

# Environmental Impact Assessment in the Mekong Region

MATERIALS AND COMMENTARY (FIRST EDITION)  
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# **This manual was produced by EarthRights International.**

EarthRights International (ERI) is a nongovernmental, nonprofit organization that combines the power of law and the power of people in defense of human rights and the environment, which we define as “earth rights.”

We specialize in fact-finding, legal actions against perpetrators of earth rights abuses, training grassroots and community leaders, and advocacy campaigns, and have offices in the Amazon, Southeast Asia, and the United States.

## Abbreviations

ABA	American Bar Association
ACEE	Appraisal Center for Environment and Engineering (China)
ADB	Asian Development Bank
ASEAN	Association of South East Asian Nations
BOI	Board of Investment (Thailand)
CGM	Complaints and Grievance Mechanism
CCC	Community Consultation Committee
CSO	Civil Society Organisation
DPRA	District, Provincial and Regional Authorities
EA	Environmental Assessment
ECC	Environmental Compliance Certificates
EHIA	Environmental and Health Impact Assessment
EIA	Environmental Impact Assessment
EIACWG	EIA Condition Working Group (Cambodia)
EIF	Environmental Impact Form (China)
EIR	EIA Report
ELC	Economic Land Concession
EMMP	Environmental Management and Monitoring Plan
EMP	Environmental Management Plan
EPNRM Law	Law on Environmental Protection and Natural Resource Management (Cambodia)
EP Act	Environmental Protection Act (China)
EPB	Environmental Protection Bureau
EPL	Environmental Protection Law (Lao PDR)
EPP	Environmental Protection Plan
ERC	Expert Review Committee (Thailand)
ESIA	Environmental and Social Impact Assessment
ESMMP	Environmental and Social Management and Monitoring Plans
ESMP	Environmental and Social Management Plan
FI	Foreign Investment
GMO	Genetically Modified Organism
GMS	Greater Mekong Subregion
IAIA	International Association for Impact Assessment
IAP2	International Association for Public Participation
ICJ	International Court of Justice
IEE	Initial Environmental Examination
IEIA	Initial Environment Impact Assessment
IESA	Initial Environmental and Social Impact Assessment
IFC	International Finance Corporation
LEP	Law on Environmental Protection (Lao PDR, Viet Nam)
MLN	Mekong Legal Network
MoE	Ministry of Environment (Cambodia)
MOECA	Ministry of Environment Conservation and Forests (Myanmar)
MONRE	Ministry of Natural Resources and Environment (Lao PDR, Viet Nam, Thailand)
MONREC	Ministry of Natural Resources and Environmental Conservation

	(Myanmar)
MRC	Mekong River Commission
NCPO	National Council for Peace and Order (Thailand)
NEB	National Environment Board (Thailand)
NEPA	National Environmental Policy Act (United States)
NEQA	National Environmental Quality Act (1992) (Thailand)
NGO	Non-Government Organisation
ONEP	Office of Natural Resources and Environmental Policy and Planning (Thailand)
PAP	Project Affected Persons
PNPCA	Procedures for Notification, Prior Consultation and Agreement
PRTR	Pollutant Release and Transfer Register
RTWG on EIA	Regional Technical Working Group on Environmental Impact Assessment
SEA	Strategic Environmental Assessment
SESO	Standard Environmental and Social Obligations (Lao PDR)
SIA	Social Impact Assessment
ToR	Terms of Reference
UN	United Nations
UN ECE	United Nations Economic Commission for Europe
UNEP	United Nations Environment Programme
USEPA	United States Environmental Protection Agency
WREA	Water Resources and Environmental Administration
WWF	World Wildlife Fund

# Table of Contents

Introduction to the First Edition.....	1
Acknowledgements .....	2
ASEAN and Environmental Impact Assessment.....	4
Sustainable Development .....	4
Human rights .....	5
What is an Environmental Impact Assessment? .....	6
Objectives of an EIA.....	6
Key Features of the Environmental Impact Assessment Process.....	8
Key Principles of an Environmental Impact Assessment.....	11
Legally established, clear and effective process.....	11
Proponent bears cost of application and assessment.....	11
Meaningful public participation at all steps of the process .....	12
Access to information by Project Affected People (PAP) and other stakeholders .....	12
All relevant information is available .....	12
Open and evidence-based decision making.....	12
Effective monitoring, compliance and enforcement.....	13
Key mechanisms for an Environmental Impact Assessment.....	13
Reliance on participatory approaches .....	13
Application of the Precautionary Principle .....	14
Intergenerational equity.....	14
Conservation of biological diversity and ecological integrity .....	14
Improved valuation, pricing and incentives .....	14
Public Participation in an Environmental Impact Assessment.....	15
Meaning of Public Participation .....	19
Environmental Impact Assessment in Practice in the Mekong.....	21
Environmental Impact Assessment in the Mekong Region .....	21
Steps in the EIA process .....	23
Step 1: Screening.....	24
Step 2: Scoping.....	24
Step 3: Preparation of the EIA .....	26
Step 4: Review and Assessment of the EIA .....	27
Step 5: Approval of the EIA Report .....	28
Step 6: Monitoring and Compliance .....	28
Kingdom of Cambodia .....	32
Introduction .....	32
Procedure for IEIA and EIA.....	38
Compliance and Enforcement .....	42
Monitoring and Compliance.....	44
The People's Republic of China .....	45
Introduction .....	45
Procedure for EIA.....	49
Public Participation .....	53
Compliance and Enforcement .....	55
Lao People's Democratic Republic .....	58
Introduction .....	58

Procedure for EIA .....	60
Preparation of an ESIA Report.....	69
Public Participation .....	71
Complaints and Grievances Mechanisms.....	74
<b>Republic of the Union of Myanmar .....</b>	<b>76</b>
Introduction .....	76
Procedure for EIA .....	81
EIA Report Preparation.....	87
Public Participation .....	89
Table of Contents for EIA Report.....	90
<b>Kingdom of Thailand .....</b>	<b>95</b>
Introduction .....	95
Procedure for EIA and EHIA .....	100
Assessment of EIA Reports .....	101
Public Participation .....	106
Recent Developments.....	107
<b>Socialist Republic of Viet Nam.....</b>	<b>109</b>
Introduction .....	109
Procedure for EIA .....	112
Compliance and Enforcement .....	116
Public Participation .....	120
Monitoring and Compliance.....	122
<b>Transboundary issues in Environmental Impact Assessment .....</b>	<b>126</b>
The Convention of Environmental Impact Assessment in a Transboundary Context (Espoo Convention) .....	128
Protocol on Strategic Environmental Assessment (the SEA Protocol).....	129
Convention on Access to Information, Public Participation in Decision- Making and Access to Justice in Environmental Matters (Aarhus Convention).....	129
Mekong River Agreement .....	131
Procedures for Notification, Prior Consultation and Agreement .....	133
Consideration of Transboundary EIA by the MRC.....	133
Greater Mekong Subregional Environment Agreement .....	135
Requirements For effective transboundary EIA systems.....	136
Concluding thoughts on the EIA in the Mekong countries .....	138
<b>Annexure 1: Outline of Project Description.....</b>	<b>140</b>
<b>Annexure 2: Legislation.....</b>	<b>142</b>
Cambodia.....	142
China .....	142
Lao PDR .....	143
Myanmar .....	143
Thailand.....	143
Viet Nam .....	144
<b>Annexure 3: Further Resources .....</b>	<b>145</b>
Screening Lists for EIA/IEE in selected Mekong Countries.....	145
Draft Regional Guidelines on Public Participation in EIA.....	145
Draft Cambodian Guidelines on Public Participation and Access to Information in EIA.....	145





## Introduction to the First Edition

EarthRights International (ERI), alongside its partners in the Mekong Legal Network (MLN), is working directly to build the capacity of communities, campaigners and lawyers to engage in Environmental Impact Assessment (EIA) processes in the Mekong region. Consequently, ERI and the MLN have collaborated to produce this original manual for EIA practitioners in the six Mekong countries which specifically targets government decision-makers, investors, lawyers and other professionals working on the implementation of EIA. The result is this unique practical guide for implementing EIA in the Mekong, which both ERI and the MLN are strategically placed to disseminate to relevant EIA stakeholders, especially project-affected communities across the region.

The *Environmental Impact Assessment in the Mekong Region* manual is the first time that anyone has sought to bring together in one volume an analysis of the EIA systems of each of the six Mekong countries, including the common themes and approaches. This was also the first project undertaken by the MLN, in collaboration with ERI. As a result, there was a lot of learning throughout the process of collaboration and collation from all involved. Whilst all of the members of the MLN are experienced lawyers, we found that there was a gap between law and practice. There was also the need to be able to communicate in a transboundary way, while acknowledging that different countries used different processes and with some different approaches to EIA.

The First Edition is the result of this period of collaboration. We have tried to ensure accuracy and completeness. However, we also recognise that there is always room for improvement. We welcome any comments, criticisms or complaints. Our aim is to provide the materials and continue the existing discussion on the value of EIA in the region and how EIA can be improved.

The work of the Mekong Partnership for the Environment, and the work of PACT, has been devoted to the role of EIA in achieving sustainable development. Through the work of PACT and many other practitioners and communities, the profile of EIA has been raised. Many discussions are occurring to improve the standard and value of EIA. In particular, the development of Regional Guidelines on Public Participation and the drafting of national guidelines on Public Participation in EIA for both Cambodia and Myanmar are all indicators of the importance of enhancing public participation in EIA.

This First Edition is aimed at practitioners, civil society, lawyers, EIA consultants and project proponents. We hope that, by understanding the legal obligations under national law, all stakeholders will work together to pursue constant improvement in the EIA process across the Mekong region.

The Editorial Team  
1 October 2016

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# ASEAN and Environmental Impact Assessment

## Sustainable Development

The Charter of the Association of Southeast Asian Nations (ASEAN), which came into force in December 2008, includes as one of its purposes:

To promote **sustainable development** so as to ensure the protection of the region's environment the **sustainability of its natural resources**, the presentation of its cultural heritage and the high quality of life of its people.<sup>1</sup>

Other purposes of ASEAN include:

- To enhance good governance and the rule of law;
- To create a single market and production base<sup>2</sup>;
- The promotion and protection of human rights and fundamental freedoms<sup>3</sup>; and
- To promote a people-oriented ASEAN.<sup>4</sup>

Article 2 of the Charter also reaffirms the Principles of ASEAN including (but not limited to) a shared commitment and collective responsibility, non-interference in the internal affairs of ASEAN Member States, respect for fundamental freedoms, the promotion and protection of human rights, the promotion of social justice and the upholding of the United Nations Charter and international law.<sup>5</sup>

In 1997, ASEAN adopted Vision 2020 for the ASEAN Community. Vision 2020 envisions a future in which the ASEAN Community is:

[C]lean and green...with fully established mechanisms for sustainable development...<sup>6</sup>

The recognition of Environmental Impact Assessment (EIA) as a basis for sustainable development in ASEAN was additionally acknowledged in the Bangkok Declaration on the ASEAN Environment (1984).<sup>7</sup> The Bangkok

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<sup>1</sup> Charter of the Association of Southeast Asian Nations (signed 20 Nov. 2007), Article 1(9), available at: <http://asean.org/wp-content/uploads/images/archive/publications/ASEAN-Charter.pdf> [hereinafter ASEAN Charter].

<sup>2</sup> ASEAN Charter, Article 1(5).

<sup>3</sup> ASEAN Charter, Article 1(7).

<sup>4</sup> ASEAN Charter, Article 1(13).

<sup>5</sup> ASEAN Charter, Article 2(2).

<sup>6</sup> ASEAN Vision 2020 (15 Dec. 1997), available at: [http://asean.org/?static\\_post=asean-vision-2020](http://asean.org/?static_post=asean-vision-2020).

<sup>7</sup> Bangkok Declaration on the ASEAN Environment (signed 29 Nov. 1984), available at: <http://environment.asean.org/bangkok-declaration-on-the-asean-environment>; Kheng Lian

Declaration sought to “strengthen the use of EIA process and extended Cost-Benefit Analysis for minimizing the adverse effects and for ensuring proper consideration of environmental values in all projects and programmes under government that are likely to produce significant environmental impact and its gradual extension to the private sector including industry.”<sup>8</sup>

The Jakarta Resolution on Sustainable Development (1987) recognised that “the sustainability of development requires that development processes and environmental management be conducted in an integral manner” and further noted that “the integration of environmental considerations into the development process requires that international and regional cooperation be further heightened and intensified.”<sup>9</sup> The Jakarta Resolution resolved that ASEAN member countries “adopt the principles of sustainable development to guide and to serve as an integrating factor in their common effort.”<sup>10</sup>

The ASEAN Declaration on Environmental Sustainability, signed in Singapore on 20 November 2007 by the heads of the ASEAN member countries, reiterates the commitment to an economically vibrant and environmentally friendly ASEAN Community so that “the present and future generation can enjoy a clean and sustainable environment.”<sup>11</sup> The Declaration includes a section on Environmental Protection and Management that refers to a number of mechanisms to promote sustainable practices.

## **Human rights**

The recent ASEAN Human Rights Declaration has a number of relevant principles that deal with property rights and the right to an adequate standard of living, including the rights to “a safe, clean and sustainable environment” and access to health care.

### **ASEAN Human Rights Declaration (2012)**

#### **Article 28:**

Every person has the right to an adequate standard of living for himself or herself and his or her family including:

(e) The right to safe drinking water and sanitation;

(f) The right to a safe, clean and sustainable environment.<sup>12</sup>

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Koh, ASEAN Environmental Law, Policy and Governance: Selected Documents, volume 1 (2009), p.657.

<sup>8</sup> Bangkok Declaration; Koh (2009), p.658.

<sup>9</sup> Jakarta Resolution on Sustainable Development, ASEAN (signed 30 Oct. 1987), available at: <http://environment.asean.org/jakarta-resolution-on-sustainable-development> [hereinafter Jakarta Resolution]; Koh (2009), p.663.

<sup>10</sup> Jakarta Resolution.

<sup>11</sup> ASEAN Declaration on Environmental Sustainability (signed 20 Nov. 2007), available at: <http://environment.asean.org/asean-declaration-on-environmental-sustainability>.

<sup>12</sup> ASEAN Human Rights Declaration (adopted 18 Nov. 2012), Article 28, available at: <http://www.mfa.go.th/asean/contents/files/other-20121217-165728-100439.pdf>.

Additionally, whilst the right to Development is recognised under the ASEAN Human Rights Declaration, it is constrained so that the right to development should be fulfilled so as to meet equitably the developmental and environmental needs of present and future generations.<sup>13</sup>

## **What is an Environmental Impact Assessment?**

### **Rio Declaration on Environment and Development (1992)**

#### **Principle 17:**

Environmental Impact Assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority.<sup>14</sup>

**Environmental Impact Assessment** can be defined as:

The process of identifying, predicting, evaluating and mitigating the biophysical, social, and other relevant effects of development proposals (and other activities) prior to decisions being taken and commitments made.

## **Objectives of an EIA**

- To ensure that environmental considerations are explicitly addressed and incorporated into the development decision making process;
- To anticipate and avoid, minimize or offset the adverse significant biophysical, social and other relevant effects of development proposals;
- To protect the productivity and capacity of natural systems and the ecological processes which maintain their functions; and
- To promote development that is sustainable and optimizes resource use and management opportunities.<sup>15</sup>

The EIA was first introduced in the United States in the early 1970s with the National Environmental Policy Act (NEPA).<sup>16</sup> Since then, the concepts and practices of the EIA have developed significantly. A 1996 Review<sup>17</sup> by the

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<sup>13</sup> ASEAN Human Rights Declaration, Article 35.

<sup>14</sup> Rio Declaration on Environment and Development, United Nations Conference on Environment and Development, Principle 17 (1992), available at: [http://www.unesco.org/education/information/nfsunesco/pdf/RIO\\_E.PDF](http://www.unesco.org/education/information/nfsunesco/pdf/RIO_E.PDF).

<sup>15</sup> More details are available at [www.iaia.org/publicdocuments/specialpublications/principles%20of%20IA\\_web.pdf](http://www.iaia.org/publicdocuments/specialpublications/principles%20of%20IA_web.pdf).

<sup>16</sup> Mandy Elliot, Environmental Impact Assessment in Australia: Theory and Practice (2014), p.103.

<sup>17</sup> Barry Sadler, International Association for Impact Assessment, Environmental Assessment in a Changing World: Evaluating Practice to Improve Performance, Final Report of the International Study of the Effectiveness of Environmental Assessment (1996), available at:

International Association for Impact Assessment (IAIA) of EIA experience worldwide suggested four necessary ingredients to the effective application of EIA:

- Appropriate timing in initiating the assessment so that the proposal is reviewed early enough to scope for development of reasonable alternatives;
- Clear, specific directions in the form of terms of reference or guidelines covering priority issues, timelines, and opportunities for information and input at key decision-making stages;
- Quality information and products fostered by compliance with procedural guidelines and use of “good practices”; and
- Receptivity of decision makers and proponents to the results of the EA, founded on good communication and accountability.

In addition to these ingredients, an effective EIA must also necessarily include the requirement for meaningful public participation.

The following definitions were adopted by the 1996 Review and are still relevant today:

**Environmental Assessment (EA)** is a systematic process of evaluating and documenting information on the potentials, capacities, and functions of natural systems and resources in order to facilitate sustainable development planning and decision making in general, and to anticipate and manage the adverse effects and consequences of proposed undertakings in particular.

**Environmental Impact Assessment (EIA)** is a process of identifying, predicting, evaluating, and mitigating the biophysical, social, and other relevant effects of proposed projects and physical activities prior to major decisions and commitments being made.

**Strategic Environmental Assessment (SEA)** is a process of prior examination and appraisal of policies, plans, and programmes and other higher level or pre-project initiatives.

**Social Impact Assessment (SIA)** is a process of estimating the social consequences that are likely to follow from specific policy and government proposals, particularly in the context of national EA requirements (Inter-organizational Committee on Guidelines and Principles (1994) (108).<sup>18</sup>

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[http://www.ceaa.gc.ca/Content/2/B/7/2B7834CA-7D9A-410B-A4ED-FF78AB625BDB/iaia8\\_e.pdf](http://www.ceaa.gc.ca/Content/2/B/7/2B7834CA-7D9A-410B-A4ED-FF78AB625BDB/iaia8_e.pdf).

<sup>18</sup> Sadler (1996), p.13.



Further, the 1996 Review proposed two substantive purposes of an EIA:

**First**, the immediate aim is to facilitate sound, integrated decision-making in which environmental considerations are explicitly included. The EA process does so by providing clear, well-organized information on the environmental effects, risks, and consequences of development options and proposals.

**Secondly**, the EA process is usually (but not universally) directed toward achieving or supporting ultimate goals of environmental protection and sustainable development. These reference or end goals are variously phrased and framed in EA laws and policies, as are the specific objectives to be met by the process.<sup>19</sup>

The EIA has developed over the past four decades into a “multi-purpose process,” with increasing emphasis given to promoting long-term, societal goals that reflect and express the ideals of sustainable development. Other elements have been identified (in addition to the above aims), including:

- Safeguarding valued ecological processes and heritage areas;
- Avoiding irreversible and unacceptable loss and deterioration of natural capital;
- Ensuring development is adjusted to the potentials and capacities of the resource base;
- Optimizing natural resource use, conservation and management opportunities;
- Protecting human health and community well-being;
- Addressing distributional concerns related to the disruption of people and traditional lifestyles;
- Improving coordination among participating agencies and actions;
- Fostering better designed and planned development projects, i.e., greener and more cost effective;
- Empowering community development and building local capacity through public participation;
- Instilling environmental values and accountabilities across a range of institutions; and
- Internalizing environmental costs and damages in industry consistent with the polluter pays principle.<sup>20</sup>

### **Key Features of the Environmental Impact Assessment Process**

Some of the key features in the modern EIA process should include:

- Screening - to determine whether or not a proposal should be subject to an EIA and, if so, at what level of detail;
- Scoping - to identify the issues and impacts that are likely to be important and to establish terms of reference for an EIA;

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<sup>19</sup> Sadler (1996), p.13.

<sup>20</sup> Sadler, (1996), p.14.

- Examination of alternatives - to establish the preferred or most environmentally sound and benign option for achieving proposal objectives;
- Impact analysis - to identify and predict the likely environmental, social and other related effects of the proposal;
- Mitigation and impact management - to establish the measures that are necessary to avoid, minimize or offset predicted adverse impacts and, where appropriate, to incorporate these into an environmental management plan (EMP) or system;
- Evaluation of significance - to determine the relative importance and acceptability of residual impacts (i.e., impacts that cannot be mitigated);
- Preparation of an environmental impact assessment statement or report (EIA Report) - to document clearly and impartially impacts of the proposal, the proposed measures for mitigation, the significance of effects, and the concerns of the interested public and the communities affected by the proposal;
- Review of the EIA Report - to determine whether the report meets its terms of reference, provides a satisfactory assessment of the proposal(s) and contains the information required for decision-making;
- Decision making - to approve or reject the proposal and to establish the terms and conditions for its implementation; and
- Follow up, Monitoring, Compliance and Enforcement - to ensure that the terms and condition of approval are met; to monitor the impacts of development and the effectiveness of mitigation measures; to strengthen future EIA applications and mitigation measures; and, where required, to undertake environmental audit and process evaluation to optimize environmental management.

## **The Right to a Clean Environment**

### **Thailand Constitutional Court's Judgment No. 32/2552 (2009)**

- **Parties:** Mr. Paiboon Kongkerd and 210 plaintiffs, referred by the Office of Administrative Court as Petitioner
- **Brief Facts:** The Plaintiffs filed a lawsuit in the Administrative Court against three local municipalities in Khonkhen, Thailand, claiming that these municipalities illegally approved resolutions to build a landfill in the Khonkhen community without the preparation of an environmental health impact assessment (EHIA), or holding a public hearing or receiving comments from health and environmental experts.
- The Khonkhen Administrative Court dismissed the case because:
- According to Environmental Act B.E. 2535 (1992), which is only one law relating to Environmental Impact Assessment, article 46 and relating decrees, this project was not required to do Environmental Impact Assessment.
- On the public hearing ground, because the rule of the office of Prime Minister on Public Consultation B.E. 2548 (2005) states that it is not compulsory to do public hearing but leaves discretion to Khonkhen governor and there is no evidence demonstrated that the governor abused of discretion, so this was not illegal.
- The Plaintiffs appealed to the Supreme Administrative Court and also requested a Supreme Administrative Court to refer the constitutional issue to the Constitutional Court to decide.
- **Legal issue:** The issue was that does article 46 of the Environmental Act B.E. 2535 (1992) contradict to article 56 of the Constitution of Thailand B.E. 2540 (1997) or article 67 of the Constitution of Thailand B.E. 2550 (2007)? Does article 46 of the Environmental Act B.E.2535 (1992) contradict article 56 of the Constitution of Thailand B.E. 2540 (1997) or article 67 of the Constitution of Thailand B.E. 2550 (2007)?
- **Judgment:** The Constitutional Court ruled that article 46 of the Environmental Act B.E. 2535 did not contradict article 56 of the Constitution of Thailand B.E. 2540 or article 67 of the Constitution of Thailand B.E. 2550. The court also set up the precedent that the right to live in a decent environment according to article 67 of the 2007 Constitution is guaranteed. It requires the relevant authorities to consider if any projects, whether they are obliged to do EIA or not, are likely to cause severe impact to natural resources and environment of the community or cause severe impact to health of people. Relevant authorities have to follow this approach if not people have right to challenge the approval to required the projects to do health and environmental impact assessment, public hearing and to get commend from health and environmental experts.

## **Key Principles of an Environmental Impact Assessment**

An effective EIA is achieved through the adoption and application of key principles, including:

- A legally established, clear and effective process;
- That the proponent bears the cost of the application and assessment process;
- Meaningful public participation at all steps of the process;
- Access to information by Project Affected People (PAP) and other stakeholders;
- That all relevant information is available;
- Open and evidence-based decision making; and
- Effective monitoring, compliance and enforcement.<sup>21</sup>

### **Legally established, clear and effective process**

The EIA process can be complicated, time-consuming and expensive. It therefore needs to be underpinned by a clear legal requirement which outlines the process to be followed. This provides certainty for all stakeholders – including the PAP, the project proponent, the EIA Consultant, government regulators (not just environmental) and other interested parties – and consistency in approach over time.

Following a legal process that is widely understood also reduces the potential for disputes to arise once a decision is ultimately made.

### **Proponent bears cost of application and assessment**

The EIA process can be a costly exercise, especially for major development proposals that involve many aspects and phases. The proper investigation and analysis of all potential impacts of a proposal requires detailed technical work. The EIA process also requires extensive public participation. The general public should not have to bear the costs of participating in, or government assessments of, EIAs. All of these costs need to be included in the overall EIA budget.

The EIA will also likely result in a range of monitoring and management duties should the project proposal proceed to implementation. The project budget needs to adequately provide for these activities.

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<sup>21</sup> Matthew Baird and Martin Cosier, Principles of Environmental Impact Assessment, Presented 17-18 Sept. 2016 in Kyauk Phyu, Rhakine State, Union of Myanmar, available at: <http://matthewbaird.com.au/wp-content/uploads/2016/10/M-Baird-ICJ-Principles-of-EIA-September-2016.pdf>.

### **Meaningful public participation at all steps of the process**

A key goal of EIAs is to reduce the risk of social conflict arising from projects by ensuring that all PAP and other stakeholders feel involved, valued and respected in the decision-making on development proposals.

To be effective in this regard, public participation must occur in a structured and planned way throughout the EIA process. Efforts to involve the public must also be genuine and meaningful, not simply tokenistic or undertaken to complete a regulatory requirement.

This public participation process must be tailored to the particular needs and circumstances of the participants.

### **Access to information by Project Affected People (PAP) and other stakeholders**

In order to effectively participate in the EIA process and make an informed decision on an EIA, all PAP and other stakeholders, including civil society and government agencies, must have appropriate access to information. This includes access to technical information, as well as information that can be understood by laypeople. Information needs to be provided in a form and language that can be used by the target audience and with sufficient time for it to be understood, considered and responded to.

### **All relevant information is available**

For an EIA to be a useful decision-support tool, it needs to be based on the best available information. This information must be relevant and available to the PAP and other stakeholders. This covers scientific information as well as local and indigenous knowledge, which can only be obtained through genuine and meaningful public participation (thus reinforcing the importance of this earlier principle).

Identifying the “best available” information involves a balance between relying on the most up-to-date and comprehensive knowledge and providing what can be feasibly (and affordably, in the context of the particular development proposal) obtained.

### **Open and evidence-based decision making**

An effective EIA process requires both the preparation of an EIA by the project proponent (and/or the EIA consultant) and the review of the EIA by the government to determine whether or not the project should proceed. This review must be conducted transparently and based on sound reasoning.

The government’s review of the EIA needs to be independent of the preparatory work and must involve an independent public participation process. The ultimate decision on whether or not to approve the EIA and the project

should be made according to the evidence contained in the EIA Report and in public submissions made to the government.

The entire review and decision-making process should be transparent, with the general public able to follow the process and access the ultimate decisions and reasoning.

### **Effective monitoring, compliance and enforcement**

The EIA process formally ends with a decision, but an approved EIA Report and its Environmental Management Plan (EMP) are critical ongoing tools for ensuring the project's impacts are addressed in the way intended when it was approved. It is vital for the overall integrity of the EIA system that governments and other external parties are able to monitor the performance of projects and ensure they comply with all commitments and duties contained in the EIA Report and EMP.

The monitoring mechanisms and findings adopted within a project must be made publicly available for all stakeholders to have confidence in both the project at hand and all future EIAs.

### **Key mechanisms for an Environmental Impact Assessment**

To achieve the overarching goal of sustainable development, an EIA should use some key analytical criteria in the assessment process. These mechanisms reflect current norms of international environmental law. Many of these mechanisms are included within the Rio Declaration on Environment and Development, adopted at the 1992 Earth Summit (the Rio Declaration).

Five primary mechanisms can be identified:

- Reliance on participatory approaches<sup>22</sup>;
- Application of the precautionary principle<sup>23</sup>;
- Application of the principle of intergenerational equity<sup>24</sup>;
- Conservation of biological diversity and ecological integrity is a primary consideration<sup>25</sup>; and
- Improved valuation, pricing and incentives.<sup>26</sup>

#### **Reliance on participatory approaches**

A central feature of an EIA is to maximise the opportunity for participation by all stakeholders. Stakeholders include other government departments, non-governmental organisations (NGOs), civil society organisations (CSOs), the

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<sup>22</sup> Rio Declaration, Principle 10.

<sup>23</sup> Rio Declaration, Principle 15.

<sup>24</sup> Rio Declaration, Principle 3.

<sup>25</sup> Rio Declaration, Principle 4.

<sup>26</sup> Rio Declaration, Principles 8, 12-13, 16.

general community (whether directly or indirectly affected), indigenous communities and the corporate sector. Best-practice EIA will provide for public participation at all stages of the assessment process, from scoping to decision-making, and will provide community participation in the compliance and monitoring phase of the development. Best-practice EIA will also provide for specific participation strategies for women<sup>27</sup> and indigenous people and their communities.<sup>28</sup>

### **Application of the Precautionary Principle**

Where there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation. In the application of the precautionary principle, public and private decisions should be guided by:

- Careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment; and
- An assessment of the risk-weighted consequences of various options.<sup>29</sup>

### **Intergenerational equity**

The principle of intergenerational equity provides that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations. This requires consideration of the impact of a proposed activity or project that takes into account any long-term impact. This could also require consideration of project closure and site decontamination.

### **Conservation of biological diversity and ecological integrity**

The starting point for the assessment of any development proposal is that conservation of biological diversity and ecological integrity should be a fundamental consideration.<sup>30</sup> This does not mean that a project cannot be approved if it will harm the environment. It merely ensures that harm and damage to the environment and society must be justified by the project. The project must evaluate various options and propose ways to avoid or reduce the potential harm. If harm is unavoidable, the project must provide appropriate compensation for the harm.

### **Improved valuation, pricing and incentives**

The use of economic tools is integral to an effective EIA. Environmental factors

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<sup>27</sup> Rio Declaration, Principle 20.

<sup>28</sup> Rio Declaration, Principle 22.

<sup>29</sup> Inter-Governmental Agreement on the Environment, signed by the Australian Government and its States and Territories and Local Government (signed 1 May 1992), available at: [www.environment.gov.au/about-us/esd/publications/intergovernmental-agreement](http://www.environment.gov.au/about-us/esd/publications/intergovernmental-agreement).

<sup>30</sup> See for example the National Environment Policy of Myanmar (1994) that makes environmental protection the primary objective in seeking development.

should be included in the valuation of assets and services, including eco-system services. This is particularly important to accurately evaluating the costs versus the benefits of projects. Additionally the EIA process should adopt the principle of “polluter pays.”<sup>31</sup> This principle is often defined to mean that those who generate pollution and waste should bear the cost of containment, avoidance or abatement.

One other economic measure is that the users of goods and services should pay prices based on the full life cycle costs of providing goods and services, including the use of natural resources and assets and the ultimate disposal of any wastes.<sup>32</sup>

### **Public Participation in an Environmental Impact Assessment**

Public participation is recognized as an integral part of the environment impact assessment process. Public participation was identified in the Rio Declaration of 1992 and has been accepted as a part of EIA since the beginnings of EIA in the 1970s.

#### **Rio Declaration on Environment and Development (1992)**

##### **Principle 10:**

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.<sup>33</sup>

Some benefits may be difficult to value, such as better decision-making or the development of greater trust in government agencies. Other benefits, such as better project design, efficient environmental management or an effective grievance process, may be difficult to measure but provide real benefits to the communities affected by development.

Also, because public participation falls into a broad spectrum of approaches and practices, choosing the most effective and relevant approach can be difficult. The International Association for Public Participation (IAP2) has developed a spectrum for public participation. We use this spectrum in the Guidelines. Good public participation will depend on how each of the steps is managed.

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<sup>31</sup> Rio Declaration, Principle 16.

<sup>32</sup> Rio Declaration, Principles 8, 13, 16.

<sup>33</sup> Rio Declaration, Principle 10.



In most cases the project proponent and the EIA consultant should develop, in consultation with the PAP and interested stakeholders, a Public Participation Plan. This Plan, also called a Stakeholder Engagement Plan, is the roadmap or guide to the involvement and consultation that will occur during the EIA process. The Public Participation Plan needs to fit the project and the local environment and community and is to be tailored to the specific project.

It must always be acknowledged that consultation is not participation. It is one part of the process. Information exchange is important and responding to the issues raised by the stakeholders is an important part of public participation.

# IAP2 Spectrum of Public Participation



Increasing Level of Public Impact

	Inform	Consult	Involve	Collaborate	Empower
Public participation goal	To provide the public with balanced and objective information to assist them in understanding the problem, alternatives, opportunities and/or solutions.	To obtain public feedback on analysis, alternatives and/or decisions.	To work directly with the public throughout the process to ensure that public concerns and aspirations are consistently understood and considered.	To partner with the public in each aspect of the decision including the development of alternatives and the identification of the preferred solution.	To place final decision-making in the hands of the public.
Promise to the public	We will keep you informed.	We will keep you informed, listen to and acknowledge concerns and aspirations, and provide feedback on how public input influenced the decision.	We will work with you to ensure that your concerns and aspirations are directly reflected in the alternatives developed and provide feedback on how public input influenced the decision.	We will look to you for advice and innovation in formulating solutions and incorporate your advice and recommendations into the decisions to the maximum extent possible.	We will implement what you decide.
Example techniques	<ul style="list-style-type: none"> <li>Fact sheets</li> <li>Web sites</li> <li>Open houses</li> </ul>	<ul style="list-style-type: none"> <li>Public comment</li> <li>Focus groups</li> <li>Surveys</li> <li>Public meetings</li> </ul>	<ul style="list-style-type: none"> <li>Workshops</li> <li>Deliberative polling</li> </ul>	<ul style="list-style-type: none"> <li>Citizen advisory committees</li> <li>Consensus-building</li> <li>Participatory decision-making</li> </ul>	<ul style="list-style-type: none"> <li>Citizen juries</li> <li>Ballots</li> <li>Delegated decision</li> </ul>

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Public participation was part of the EIA process since the passage of the US National Environmental Policy Act (NEPA), which formally established EIA in the USA in 1969.<sup>34</sup> As the international community modified and adopted the EIA, public participation remained a key feature of the process. This was recognised in Principle 10 of the 1992 Rio Declaration, which stated: “environmental issues are best handled with the participation of all concerned citizens at the relevant level.” In 1998, the UN Economic Commission for Europe (UNECE) negotiated the Convention of Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters (the Aarhus Convention). The Aarhus Convention recognised that public participation enhanced decision-making and improved the quality and implementation of decisions.

The Aarhus Convention contains a number of definitions:

**“The public”** means one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups.

**“The public concerned”** means the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.

Although Article 6 of the Aarhus Convention outlines the provisions for public participation in decisions on specific activities, there is no clear definition of what constitutes adequate public participation. Certain elements are recognised in Article 6:

- Early notification;
- Adequate;
- Timely;
- Effective;
- Nature of the proposal;
- Identity of the decision-maker;
- Procedure for public to make comments;
- Adequate time-frame for comments; and
- Whether the proposal is subject to EIA or transboundary EIA procedures.

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<sup>34</sup> Anne N. Glucker et al., Public Participation in Environmental Impact Assessment: Why, Who and How?, Environmental Impact Assessment Review volume 43 (2013), pp.104-11.

## Meaning of Public Participation

A recent review of public participation in EIA identified that it is not always clear what is meant by public participation or community consultation. Nor is it always clear what the “public” or the “community” means. It has also been noted that there is a significant disagreement as to the specific objectives of public participation in EIA.<sup>35</sup> This not only relates to academic debate but “is also reflected in EIA practice.”<sup>36</sup>

There is also “considerable dispute” as to the goals of public participation.<sup>37</sup> A group of academics has identified nine overarching objectives for public participation:

- Influencing decisions;
- Enhancing democratic capacity;
- Social learning;
- Empowering and emancipating marginalised individuals and groups;
- Harnessing local information and knowledge;
- Incorporating experimental and value-based knowledge;
- Testing the robustness of information from other sources;
- Generating legitimacy for decisions; and
- Resolving conflict.

In addition, there is also not always a clear understanding or agreement on who should participate: everyone interested in the project or the outcome, or only those with recognised interests. An inclusive approach may lead to greater legitimacy but given scarce resources and limited capacity, such an approach risks overburdening the EIA systems.<sup>38</sup>

In many countries, including Costa Rica and Nicaragua, the failure to take into account public comments and submissions has led people to “refrain from formal participation in an EIA and to make use of informal forms of participation instead (such as protest marches, boycotts, etc.).”<sup>39</sup>

Cheryl Wasserman of the United States Environmental Protection Agency (USEPA) notes that “meaningful public participation requires much more than simply holding public meetings or hearings or collecting public comments.”<sup>40</sup> In the US, it is more about engagement and consideration of the issues raised by

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<sup>35</sup> Glucker, et al. (2013), p.104.

<sup>36</sup> Glucker, et al. (2013), p.106.

<sup>37</sup> Glucker, et al. (2013), p.106.

<sup>38</sup> Glucker, et al. (2013), p.109.

<sup>39</sup> Glucker, et al. (2013), p.109.

<sup>40</sup> Cheryl Wasserman, United States Environmental Protection Agency, Application of Public Participation Principles in EIA: Strengthening Public Participation in Environmental Management in Indonesia, Presented 10-11 July 2012 in Jakarta, Indonesia, available at: <https://www.epa.gov/sites/production/files/2014-05/documents/application-pp-eia.pdf>; Cheryl Wasserman, United States Environmental Protection Agency, National Environmental Policy Act (NEPA) Regulations, Guidelines and Experience, 19 Nov. 2014, available at: [epa.connectsolutions.com/p6qgkt3cfqh](http://epa.connectsolutions.com/p6qgkt3cfqh).

the engagement.<sup>41</sup> At its highest, public participation allows the public to legally and peacefully influence the decision. Wasserman identifies some of the rationale behind the inclusion of public participation in an EIA:

- Relevant information;
- Better decisions;
- Builds understanding and legitimacy;
- Often results in creative solutions;
- Useful role in monitoring follow up;
- Minimizes cost and delay from unresolved conflicts; and
- Facilitates implementation.

She lists nine elements to define the public participation role in an EIA:

- Understand public participation requirements for an EIA;
- Incorporate public participation principles in an EIA;
- Identify the public and stakeholders;
- Define decision-making roles of stakeholders/public;
- Tailor and apply public participation tools;
- Respond to interests: avoid/mitigate/compensate;
- Implement environmental conflict resolution;
- Transparency and documentation; and
- Define performance in terms of success indicators.<sup>42</sup>

In addition, the USEPA has identified five consistent lessons for successful publication participation in an EIA:

- Adapt the process to meet the needs of the circumstances;
- Reach out to and understand the audience;
- Start early in the EIA process;
- Consider public consultation and involvement an ongoing process, not a one-time event; and
- Attempt to find ways to be responsive to concerns without compromising scientific integrity, law or feasibility.<sup>43</sup>

Moreover, the US and Australian experience has identified many different mechanisms to gather information and input from stakeholders. These can include any of the following:

- Public hearings;
- Public comment periods soliciting written comment letters;
- Public meetings;
- Small group meetings, focus groups or workshops;
- Advisory groups and task forces;
- News releases, newsletters with public comment forms, fact sheet, flyers;

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<sup>41</sup> Council on Environmental Quality, Executive Office of the President of the United States, A Citizens Guide to the NEPA: Having Your Voice Heard (Dec. 2007), available at: [https://ceq.doe.gov/nepa/Citizens\\_Guide\\_Deco7.pdf](https://ceq.doe.gov/nepa/Citizens_Guide_Deco7.pdf).

<sup>42</sup> Wasserman (2014).

<sup>43</sup> Wasserman (2012).

- Media – feature stories, interviews, public service announcements;
- Project/program websites;
- Information repositories or clearinghouses;
- Speakers bureaus;
- Surveys or polls;
- Mailing lists;
- Briefings by and for public officials;
- Social networking (Facebook, Twitter, etc.); and
- Visioning.<sup>44</sup>

## **Environmental Impact Assessment in Practice in the Mekong**

The EIA is employed in nearly all countries of the world. It has been suggested that 191 of the 193 member nations of the United Nations either have national legislation or have signed some form of international legal instrument that refers to the use of the EIA.<sup>45</sup> The worldwide spread of the EIA was assisted by Principle 17 of the Rio Declaration, which provides that signatory nations must employ the EIA “for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority.”<sup>46</sup>

### **Environmental Impact Assessment in the Mekong Region**

The EIA is a process used by all governments in the Mekong Region to assess the potential impacts of development proposals and to consider alternative options and management strategies as part of the decision on whether to proceed with the project.

The EIA is recognised as an important tool to assess and analyse the environmental, social, economic and other impacts of a project and develop ways to avoid, mitigate or manage these potential impacts. It is also a process used to identify and respond to key concerns by PAP and other stakeholders

The entire EIA process must be completed before any approval is given for a particular project. This is critical, given that one of the main objectives of an EIA is to ensure the negative impacts of proposals are avoided, or at least reduced or mitigated, before they arise. It is also important to meet the objective of ensuring affected citizens have the opportunity to participate in the decision-making process.

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<sup>44</sup> Wasserman (2012).

<sup>45</sup> Richard K. Morgan, Environmental Impact Assessment: The State of the Art, Impact Assessment and Project Appraisal volume 30, issue 1 (2012).

<sup>46</sup> Angus Morrison-Saunders and Francois Retief, Walking the Sustainability Assessment Talk – Progressing the Practice of Environmental Impact Assessment (EIA), Environmental Impact Assessment Review volume 36 (2012), pp.34-41.

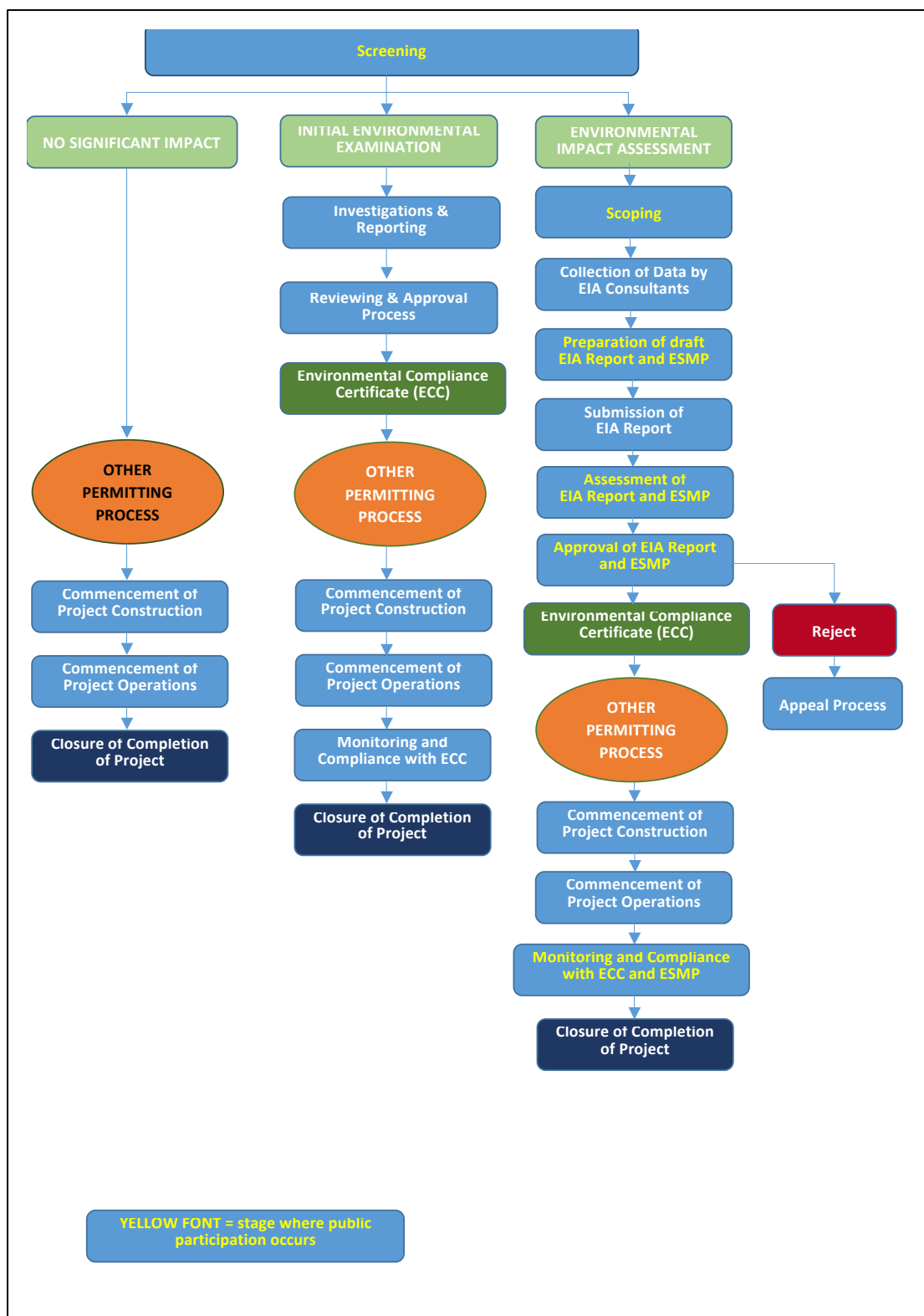


Figure 1: Overview of Environmental Assessment Process.<sup>47</sup>

<sup>47</sup> PACT, Regional Technical Working Group on Environmental Impact Assessment, Draft Guidelines on Public Participation (2015).

Each country provides for a specific Ministry or Department to be responsible for the EIA process. In all countries in the Mekong, the EIA investigation and EIA Report preparation are undertaken by an EIA consultant engaged by the project proponent. The EIA consultant will conduct the assessment and prepare the studies that form the basis for the EIA Report.

The EIA is a process that can be divided into a number of steps. Each step is part of the process. All of the steps must be followed to achieve compliance with the EIA procedures. Although each country does have its own system of EIA, there are a number of similarities.

### **Steps in the EIA process**

The EIA systems in the Mekong Region and throughout much of the world generally have most or all of the following steps:

1. Screening;
2. Scoping/defining Terms of Reference (ToR);
3. Collection of data by EIA Consultants;
4. Preparation of draft EIA Report;
5. Preparation of Environmental and Social Management Plan (ESMP);
6. Submission of EIA Report;
7. Assessment of EIA Report and ESMP;
8. Decision on whether to approve EIA Report and ESMP;
9. Issuing of Environmental Compliance Certificates (ECCs);
10. Approval of other licenses or permits;
11. Commencement of project construction;
12. Commencement of project operations;
13. Monitoring and compliance with ECC and ESMP; and
14. Closure or completion of project.

This process is depicted in the flow-chart in Figure 1. This is taken from the Regional Technical Working Group on Environmental Impact Assessment (RTWG on EIA).

In order to consider a more simplified approach to the EIA, the following steps can be identified as key parts of the EIA process:

1. Screening;
2. Scoping;
3. Conducting Environmental Impact Assessment and preparation of EIA Report and ESMP;
4. Review of EIA Report and ESMP;
5. Decision on EIA and EMP; and
6. Monitoring and compliance.

Each of these steps provides an opportunity for participation by PAP and other relevant stakeholders. These six steps are therefore used as the key focal areas for this Manual.



## Step 1: Screening

The first stage in the EIA process is the screening stage. Screening is an important part in the EIA process. It is often the first time that the project proponent will discuss the proposed project with the government and with the community. The key outcome for the screening step is a Screening Report.

Most of the screening lists in the Greater Mekong Subregion (GMS) countries combine these factors in listing projects that require an EIA to be prepared. But the screening lists can remove some of the subjective categorization of development projects. It is always important to ensure that all projects likely to have a significant environmental or societal impact are subject to an EIA and not only those referred to in the screening lists.

## Step 2: Scoping

Scoping is an important step in the EIA process. It embodies the process for determining the scope of an EIA (i.e., the data that need to be collected and analysed to assess the potential adverse impacts of a project) and producing a Terms of Reference (ToR) for preparation of an EIA Report.<sup>48</sup>

Scoping is often the first time that the project proponent will discuss the proposed project with the government and with the community. The key outcome for the Scoping Report is the preparation of the **Draft Terms of Reference** for the EIA for the proposed project. The Draft ToR will contain the key environmental and social impacts that will need to be investigated and assessed by the EIA consultant. These Draft ToR should be approved by the government in conjunction with the Scoping Report, which should articulate both the public participation efforts to date and the future public participation plan. The EIA assessment step will then gather and analyse all the impacts identified in the ToR and consider the mitigation measures, including alternatives to the project.

The Scoping step of the proposed project has the following objectives:

- Define the study area, area of influence, time boundaries, project phases and potential stakeholders;
- Start the process of understanding the applicable regulations and standards and their context for project design and completion of the EIA;
- Make a provisional identification of Environmental Impacts, focusing in particular on the environmental, social and health issues that need to be addressed in the EIA;
- Provide an indication of the depth and breadth of the EIA investigations including what baseline data and information are required, what further

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<sup>48</sup> Government of the Republic of the Union of Myanmar, Ministry of Environmental Conservation and Forestry, Environmental Impact Assessment Procedure, Article 2(gg) (2015), available at: <http://www.myanmar-responsiblebusiness.org/pdf/2015-06-Myanmar-EIA-Procedures.pdf> [hereinafter Myanmar EIA Procedures].

studies and investigations must be carried out and how such data collection, studies and investigations shall be undertaken;

- Provide an opportunity for consultants, relevant authorities, project developers and interested and affected parties to express their views and concerns regarding the proposal before an EIA proceeds;
- Enable an efficient and comprehensive assessment process that saves time, resources and costs and avoids delays; and
- Identify potentially affected communities and other stakeholders with an interest in the project.<sup>49</sup>

As part of the scoping, the project proponent shall ensure that the following public consultation and participation process is carried out:

- Disclose information about the proposed project to the public and civil society through posting on the project or project proponent's website(s) and local media, including by means of the prominent posting of legible sign boards and advertising boards at the project site which are visible to the public; and
- Arrange the required complement of consultation meetings as advised by the Ministry, with local communities, potential PAPs, local authorities, community based organizations and civil society, and provide appropriate and timely explanations in press conferences and media interviews.<sup>50</sup>

#### Checklist of PAP and Stakeholders for Scoping Step<sup>51</sup>

##### 1. Government Authorities

- National, provincial, district and local authorities;
- Authorities responsible for pollution control including water, waste, soil, noise and air pollution;
- Authorities responsible for protection of nature, cultural heritage and the landscape;
- Health and safety authorities;
- Land use control, spatial planning and zoning authorities; and
- Authorities in neighbouring countries where transboundary impacts may be an issue.

##### 2. Other Stakeholders

- Local, national and international environmental, social and development interest groups;
- Sector government departments responsible for agriculture, energy, forestry, fisheries, etc. (whose interests may be affected);
- International agencies whose interests may be affected, e.g., Mekong River Commission;
- Local employers' and business associations such as

<sup>49</sup> Myanmar EIA Procedures.

<sup>50</sup> Myanmar EIA Procedures, Article 50.

<sup>51</sup> Laos EIA Guidelines, MONRE, 2012. Box 3.3, p.26.

- Chambers of Commerce, trade associations, etc.;
- Civil Society organizations such as women's groups, youth groups, etc.;
- Employees' organisations such as trades unions;
- Groups representing users of the environment, e.g., farmers, fishermen, women using local resources for own consumption and trade, tourism operators;
- Research institutes, universities and other centres of expertise; and
- The local and national media.

### **3. PAP and the wider community**

- Landowners and residents;
- Ethnic groups in the affected area;
- Elected representatives and community figures such as religious leaders or teachers;
- Local community groups, resident groups, etc.; and
- Members of the local and wider general public.

The key issues and impacts should also be divided into the different stages of the project. These stages could include construction, operation and closure. Sometime the operation stage may include plans to enlarge or intensify the project, such as a special economic zone or a mine. The EIA consultant should outline clearly the different stages of the project and the proposed construction and operation timeline.

Some of the key issues to be explained by the EIA consultant in the meetings during the Scoping Step include:

- Project boundaries and limits;
- Key concerns (based on similar projects);
- Identification/explanation of the steps in the EIA process;
- Significant potential impacts;
- Identification of sensitive/important areas;
- Identification of alternatives;
- Identification of key environment/social issues;
- Identification of the PAP;
- Identification of the other stakeholders;
- Stakeholder engagement plan (Public Participation Plan); and
- Draft ToR.

### **Step 3: Preparation of the EIA**

Once the Scoping Report and ToR have been approved by the relevant EIA authority, or finalized by the EIA consultant, the task of gathering the information and preparing the EIA Report commences. This can take between three months and three years, depending on the type of project and the environmental and social issues that must be addressed.

Based on the information gathered, the EIA consultant will prepare the EIA Report. Once the EIA Report is drafted, the EIA consultant should arrange for a meeting (or meetings) to present the draft EIA Report to both the Ministry and the PAP and stakeholders. Following the consideration by the EIA consultant of those comments and issues raised by the PAP and stakeholders, the EIA Report should be revised. The EIA Report is then ready to be submitted to the EIA unit for review and assessment.

The EIA Report should include the key sections as required under national laws. These can be summarised as follows:

- Executive Summary;
- Context of the Project;
- Policy, Legal and Institutional Framework (including Environmental Quality Standards);
- Project Description and Alternatives to the Project;
- Description of the Environment (including social aspects);
- Impact Assessment and Mitigation Measures;
- Cumulative Impact Assessment;
- Risk Assessment;
- Public Participation Report and Comments; and
- Technical Reports.

An Environmental Management Plan (EMP) must be prepared for the project. The EMP should be presented in a separate volume annexed to the EIA Report. It should be developed for each stage in the project as required: pre-construction, construction, operation, closure, decommissioning and rehabilitation.

#### **Step 4: Review and Assessment of the EIA**

The decision on whether to approve, require amendments to, or reject outright an EIA ultimately rests with government. This is a decision that should be made independently, transparently and on the basis of complete information and scientific evidence. Accordingly, a clear review process, involving opportunities for public participation, is required.

Importantly, at this review step, the responsibility for organising public participation, with the targeted goal of PAP and stakeholder input, shifts from the proponent (and its EIA consultant) to the responsible government decision-making body (the EIA authority).

Important considerations for the EIA authority in reviewing the EIA and deciding whether or not it should be approved include (but are not limited to) the following:

- The level of public participation undertaken throughout the preparation of the EIA;
- The PAP and stakeholder views on the project proposal, including the EMP and any compensation proposed;

- Whether the proposed mitigation measures and EMP are likely to adequately address/reduce the impacts;
- The relevance and value of project commitments (i.e., those proposed social benefits in addition to the EMP measures);
- Consistency with broad sustainable development objectives;
- Consistency with the approved ToR; and
- Conditions that should be attached to an approval (in addition to the commitments in the EIA and EMP).

### **Step 5: Approval of the EIA Report**

The government makes the ultimate decision as whether to approve, require amendments to, or reject outright an EIA. This decision must be made independently, transparently and on the basis of complete information and scientific evidence.

Once a decision is made on the EIA, the public and proponent should both have access to an appeals process. For the appeals process to be effective and trusted, the decision must be publicly released along with the reasoning.

Following the approval of the EIA Report, the project will require all other approvals and permits, including any foreign investment approvals.<sup>52</sup>

### **Step 6: Monitoring and Compliance**

For projects that have an EIA approved and proceed to implementation, it is vital both for the environmental and social outcomes and for the integrity of the EIA system that the project construction, operation and eventual decommissioning comply with the EIA, ESMP and any conditions of approval.

To ensure this compliance, and to achieve the commitments in the EIA, a monitoring system is required that involves both internal monitoring by the project manager and objective monitoring by external parties. This external monitoring could be undertaken by either (or both) government bodies or community organisations.

Monitoring is a continuous activity. Monitoring will help satisfy the community that the project is being operated in accordance with the conditions of approval. It also helps to respond to issues and concerns before serious consequences occur.

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<sup>52</sup> Myanmar's new 2016 Investment Law might distinguish its processes from the other Mekong countries. Under Myanmar's 2015 EIA Procedures, EIA Reports must be approved, and an ECC issued, before the project receives relevant approvals and permits to proceed with implementation. However, the 2016 Myanmar Investment Law does not indicate whether an ECC must be issued before or after an investment permit is granted. The Government of Myanmar is expected to clarify this point through regulations in early 2017.

There also needs to be a mechanism to ensure that the community engagement that was committed to in the EIA and EMP is being undertaken during the project implementation. Should the monitoring discover a lack of compliance or breaches of conditions, mechanisms to enforce compliance need to be readily available and understood by the project proponent, as well as the PAP and other stakeholders.

## **Compliance, Monitoring and Enforcement**

Although the formal EIA process may end with an approval of a project, this is when the impacts will start to be felt by the PAP. As the project gets underway, there should be opportunities for the PAP and other stakeholders to ensure that the project fulfils all the conditions of the approval or permit and complies with the obligations and commitments made during the EIA process.

### **Prior to Construction**

The project proponent and the project builder should arrange a meeting with the PAP before the pre-construction and construction works begin on site. This meeting should provide the details of the proposed construction schedule. Details should be provided about issues like the number of trucks and construction vehicles, the number of works, the hours of construction and how long the construction period will last. The possible impact to the PAP should also be explained.

### **Construction Phase**

The project builder should also detail the proposed Public Participation Plan during the construction phase. This should provide details of any Community Consultation Committee (CCC) and any Grievance Redress Mechanism. For larger projects that will last a number of months (or years) and will have significant impacts during construction, the CCC should meet on a regular basis. The PAP should be well represented in the CCC and the PAP should be allowed to choose their representatives. CSOs should also be represented on the CCC. Additionally, the project builder should be represented, so as to allow comments and complaints to be quickly addressed.

The CCC should engage and empower the PAP and stakeholders so that problems and issues are dealt with quickly and efficiently.

### **Operational Phase**

The operational phase will last the life of the project and should have its own EMP. This EMP will include the details for the management of the environmental and social impacts of the project.

During the operational phase the project builder will be required to undertake monitoring of any pollutant produced by the operation of the project. This

could be air pollution, noise pollution, visual pollution or water pollution. The project will also produce waste. This waste could be recyclable waste, general garbage or even toxic or hazardous waste.

**Table 2: Summary of Public Participation at Key Stages in the EIA Process**

	<b>Cambodia</b>	<b>Laos PDR</b>	<b>Myanmar</b>	<b>Thailand</b>	<b>Vietnam</b>
<b>Screening</b>	Yes, in practice.	No.	No requirements to consult with PAP.	No requirement for PP.	Feasibility assessment should include some consultation.
<b>Scoping/ ToR</b>	Yes.	Yes. PAP must be involved in scoping.	Yes, clear requirements for PP.	Yes.	Not checked against EIA. There is requirement for PP.
<b>Preparation</b>	Yes.	Yes. PAP and local communities must be consulted.	ToR must provide details of PP plan to be approved by MOECAP	Yes, twice for EHIA.	Yes, but limited guidance.
<b>Assessment</b>	Yes, there is a requirement for MoE to hold PP meeting.	Yes, MONRE must consult at various levels during the assessment, including on EMP.	MOECAP must hold PP meetings and receive comments.	Expert Review Panel may hold public meeting. Required for EHIA.	No clear requirement to hold further PP meetings during assessment.
<b>Approval</b>	Not clear if approval is a public document. EIA and ECC not yet public.		ECC must be made publically available including EMP.	Approval is a public document and should include EMP.	EIA must be made available.
<b>Monitoring</b>	Yes, PAP should be involved and have GRM	Yes. Community is involved in EMP.	No requirement for community involvement.	Reports are provided to ONEP and permitting authority.	
<b>Enforcement of EIA Process by PAP</b>	No.	No.	No.	Citizens can bring proceedings in court.	No.

Requirement to comply with the EHIA obligations of the Constitution of Thailand 2550 (2007)

Central Administrative Court's judgment No.1352/2553

- **Parties:** Anti-Global Warming Association and 42 plaintiffs v The National Environmental Board and 7 defendants
- **Brief Facts:** The Constitution of Thailand 2550 (2007) came into force on 24 August 2007. The question was whether since that time the Defendants had a duty to consider whether projects or activities are likely to cause severe impact to natural resources or environment of community or to health of people or not? If they are fall under this category, to conform with Article 67 of the Constitution the Defendants would need to conduct an environmental and health impact assessment (EHIA), arranging public hearing and give environmental and health experts an opportunity to comment. The Defendants, it was claimed, had ignored this requirement for EHIA and had given at least 76 permissions for projects/activities which were likely to cause severe impact to community, using same procedures they adopted before this constitution coming into force.
- **Legal Issue:** Did the 76 permissions given to business owners after the 2007 Constitution of Thailand came into force contradict the requirements of article 67 of the 2007 Constitution?
- **Judgment:** The Central Administrative Court held that according to the 2007 Constitution, the performing of the legislative, executive and judiciary must conform with the rule of law. Furthermore, article 27 of the 2007 Constitution stated that rights and freedoms recognized by the Constitution, both explicitly and implicitly, or recognized by the Constitutional Court must be protected and be bounded directly to legislative, cabinet, judiciary, constitutional organs and administrative agencies in legislating, applying and interpreting laws. The Administrative Court was bound to protect rights, freedom of people and public interest by stopping the impact to community, quality of the environment and the health of people, which has occurred in Mah Tha Phut and surrounding areas, by enforcing relating stakeholders to conform procedures written in article 67 paragraph 2 of the Constitution.
- The Central Administrative Court revoked permissions, which were listed in the list of severe impact projects or activities by the decree of Natural Resources and Environment Ministry in 2010, given to business owners after 2007 Constitution came into force which did not conform all procedures were written in article 67 paragraph 2 of the 2007 Constitution.



# Kingdom of Cambodia

## Introduction

The legal requirements for EIAs in Cambodia are set out in the Law on Environmental Protection and Natural Resource Management (1996) (Chapter III) (EPNRM Law)<sup>53</sup> and the Sub-Decree on Environmental Impact Assessment (1999) (EIA Sub-Decree).<sup>54</sup>

### **Law on Environmental Protection and Natural Resource Management (1996)**

#### **Article 1:**

This law has an objective:

- To protect and upgrade the environment quality and public health by means of prevention, reduction and control of pollution;
- To assess the environmental impacts of all proposed projects prior to the issuance of decision by the Royal Government;
- To ensure the rational and sustainable preservation, development, management and the use of the natural resources of the Kingdom of Cambodia;
- To encourage and provide possibility to public to participate in the protection of the environment and the management of the natural resources;
- To suppress any acts which may affect to environment.<sup>55</sup>

Cambodia is currently in the process of developing a new Environmental Code. A draft EIA law, which was in the process of being finalized in 2015, will now become part of the new Environmental Code. It is expected that the Environmental Code will be submitted to the National Assembly in early 2017.<sup>56</sup>

The new Environmental Code, as with all Cambodian law, will need to comply with the national Constitution, which requires the state to protect the environment:

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<sup>53</sup> Kingdom of Cambodia, Law on Environmental Protection and Natural Resource Management, Preah Reach Kram/NS-RKM-1296/36 (enacted 18 Nov. 1996), available at: <http://www.cambodia-redd.org/wp-content/uploads/2013/05/LAW-1296-36-96-Environmental-Protection-Natural-Resources-Mgt-E.pdf> [hereinafter Cambodian EPNRM Law (1996)].

<sup>54</sup> Kingdom of Cambodia, Sub-decree on Environmental Impact Assessment Process, No. 72 ANRK.BK (issued 11 Aug. 1999), available at: [http://sithi.org/admin/upload/law/72%20on%20the%20Environmental%20Impact%20Assessment%20Process%20\(1999\).ENG.pdf](http://sithi.org/admin/upload/law/72%20on%20the%20Environmental%20Impact%20Assessment%20Process%20(1999).ENG.pdf) [hereinafter Cambodian EIA Sub-decree (1999)].

<sup>55</sup> Cambodian EPNRM Law (1996), Article 1.

<sup>56</sup> See Ros Chanveasna, Environmental Code Aims to Safeguard Natural Resources, Khmer Times (6 Apr. 2016), available at: <http://www.khmertimeskh.com/news/23704/environmental-code-aims-to-safeguard-natural-resources>.

## **Constitution of Cambodia (1993)**

### **Article 59:**

The State shall protect the environment and balance of abundant natural resources and establish a precise plan of management of land, water, air, wind, geology, ecological system, mines, energy, petrol and gas, rocks and sand, gems, forests and forestry products, wildlife, fish and aquatic resources.<sup>57</sup>

There are also a number of other Prakas<sup>58</sup> on the procedures implementing the EIA Sub-Decree (1999):

- Prakas on General Guidelines for Conducting Initial and Full Environmental Impact Assessment Reports (No.376 BRK.BST 2009)
- Prakas on Registration of Consulting Firms for Studying and Preparing Environmental and Social Impact Assessment Report (No.215 Brk MoE 2014)
- Prakas on Delegation of Authority to the Provincial Departments of Environment on Matters Related to Investment Project on Behalf of the Ministry of Environment (No. 230 BRK.BST, 29 July 2005)
- Inter-ministerial Prakas on screening on for project of all kinds of construction minerals exploitation or other minerals with the characteristic of handicraft or small exploitation (No 191, 26 April 2016)
- Decision on the composition and duties of the EIA Coordination Working Group (8 July 2015)

Under the current framework, all investment project applications and all projects proposed by the state shall have an Initial Environmental Impact Assessment (IEIA), a report of pre-feasibility study or an EIA as specified in Articles 6 and 7 of EPNRM Law.<sup>59</sup> A copy must be submitted to the Project Approval Ministry/Institution and the MoE.

## **Law on Environmental Protection and Natural Resource Management (1996)**

### **Article 6:**

An environmental impacts assessment shall be carried out on every project and activity of either private or public and shall be examined and evaluated by the Ministry of Environment before it is submitted to the Royal Government for decision. This assessment shall also be applicable for those existing activities and those which are being under process and which their environmental impacts have yet not been assessed.

<sup>57</sup> Kingdom of Cambodia, Constitution of the Kingdom of Cambodia (adopter 21 Sept. 1993), Article 59, available at: <http://www.wipo.int/edocs/lexdocs/laws/en/kh/khoogen.pdf>.

<sup>58</sup> A Prakas is a regulation promulgated by a Ministry to implement a law.

<sup>59</sup> Cambodian EPNRM Law (1996), Article 6-7.

Procedures for the environmental impact assessment shall be determined by sub-decree following a proposal of the Ministry of Environment.

Nature and size of the proposed projects as well as the existing activities and activities under process of both private and public which are subject to assessment of their environmental impacts, shall be determined by sub-decree following a proposal of the Ministry of Environment.<sup>60</sup>

**Article 7:**

Every Investment Project Application and proposed project which are submitted by the State, shall enclose with them a preliminary Environmental Impact Assessment or Environmental Impact Assessment as stated the article 6 of this law. The Ministry of Environment shall consider and make recommendations on the preliminary Environmental Impact Assessment or Environmental Impact Assessment to relevant competent bodies within a period as determined in the Law on Investment of the Kingdom of Cambodia.<sup>61</sup>

The EIA Sub-Decree was prepared by the MoE and issued by the Prime Minister of Cambodia in 1999. The objectives of the EIA Sub-Decree are set out in Article 1.

**Sub-Decree on Environmental Impact Assessment (1999)**

**Article 1:**

The main objectives of this Sub-Decree are:

- To determine an Environmental Impact Assessment (EIA) upon every private and public project or activity, and it must be reviewed by the Ministry of Environment (MoE), prior to the submission for a decision from the Royal Government;
- To determine the type and size of the proposed project(s) and activities, including existing and ongoing activities in both private and public prior to undertaking the process of EIA;
- Encourage public participation in the implementation of EIA process and take into account of their conceptual input and suggestion for re-consideration prior to the implementation of any project.<sup>62</sup>

The EIA Sub-Decree applies to all public and private projects or activities in Cambodia.<sup>63</sup> The EIA Sub-Decree identifies the specific project types covered by EIA. In total these cover four areas: industry, agriculture, tourism and infrastructure.<sup>64</sup> Under each area, there are a number of specific project types

<sup>60</sup> Cambodian EPNRM Law (1996), Article 6.

<sup>61</sup> Cambodian EPNRM Law (1996), Article 7.

<sup>62</sup> Cambodian EIA Sub-decree (1999), Article 1.

<sup>63</sup> Cambodian EIA Sub-decree (1999), Article 1.

<sup>64</sup> Cambodian EIA Sub-decree (1999), Annex.

listed. This list has been attached as an annex to the EIA Sub-Decree.<sup>65</sup> According to the list, the current screening process in Cambodia is project-based rather than by reference to significant environmental impact.<sup>66</sup>

The key difference in the Cambodian approach to screening in the EIA process (compared to the other Mekong countries) is that all projects in the screening list annexed to the Sub-Decree go through an Initial Environmental Impact Assessment (IEIA) to determine whether an EIA is required. Article 6 provides that a project owner must conduct an IEIA in accordance with the Annex.<sup>67</sup>

The project owner is then required to submit the IEIA to the MoE for assessment of the Report<sup>68</sup> or to the Provincial EIA Department if the project is to be determined at the provincial level.<sup>69</sup> The Prakas on Delegation of Power in Decision Making Representing the Ministry for the Investment Plan to Provincial/Municipal Department provides that, for projects with less than US\$2 million in investment, the responsibility for reviewing and monitoring is delegated to the provincial department of environment.<sup>70</sup> However, these departments do not have adequate capacity for effective EIA implementation.

Sub-Decree 146 on Economic Land Concessions (ELC) (2005) also requires environmental assessment of ELCs. Article 7, Clause 5 of Sub-Decree 146 states that “if the initial environmental and social impact assessment indicates a medium or high degree of adverse impact, arrange for the conduct of a full environmental and social impact assessment.”<sup>71</sup> In 2014, the Ministry of Agriculture, Forestry and Fisheries and the Ministry of Environment issued an Inter-Ministerial Prakas on Strengthening Economic Land Concession Management.<sup>72</sup> This Prakas sought to strengthen the protection for forests and protected areas. It also required companies to seek permission to clear forest products from lands subject to an existing ELC.

The EPNRM Law also includes a general provision for public participation and access to information. Article 16 of the EPNRM Law provides that the MoE shall encourage public participation in “environmental protection and natural resources management.”<sup>73</sup> Article 17 also requires the MoE to develop a sub-decree on public participation and access to information.<sup>74</sup> The MoE has

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<sup>65</sup> Cambodian EIA Sub-decree (1999), Annex.

<sup>66</sup> Cambodian EIA Sub-decree (1999), Annex.

<sup>67</sup> Cambodian EIA Sub-decree (1999), Article 6.

<sup>68</sup> Cambodian EIA Sub-decree (1999), Article 7.

<sup>69</sup> Cambodian EIA Sub-decree (1999), Article 9.

<sup>70</sup> Kingdom of Cambodia, Prakas on Delegation of Power in Decision Making Representing the Ministry for the Investment Plan to Provincial/Municipal Department, No.230 BS.KB (issued 29 July 2005), Articles 2-6, 8 [hereinafter Cambodian Prakas on Delegation (2005)].

<sup>71</sup> Kingdom of Cambodia, Sub-decree on Economic Land Concessions, No. 146 ANK/BK (issued 27 Dec. 2005), Article 7.

<sup>72</sup> Kingdom of Cambodia, Inter-Ministerial Prakas on Strengthening Economic Land Concession Management, No. 206 MoE (issued 9 May 2014).

<sup>73</sup> Cambodian EPNRM Law (1996), Article 16.

<sup>74</sup> Cambodian EPNRM Law (1996), Article 17.

developed a Prakas on preparing an EIA report, which includes more detailed requirements on public participation.<sup>75</sup>

**Environmental Protection and Natural Resource Management Law (1996)**

**CHAPTER VII: PUBLIC PARTICIPATION AND ACCESS TO INFORMATION**

**Article 16:**

The Ministry of Environment shall, following proposals of the public, provide information on its activities, and shall encourage participation of the public in the environmental protection and natural resource management.<sup>76</sup>

**Article 17:**

Procedure for participation of the public and access to information pertaining to the environmental protection and management of the natural resources, shall be determined by a Sub-Decree following a proposal of the Ministry of Environment.<sup>77</sup>

**Article 18:**

Information related to environmental protection and natural resource management shall be mutually disseminated between the Ministry of Environment and other ministries.<sup>78</sup>

With respect to public participation, public involvement is “encourage[d]” in the EIA Sub-Decree but no concrete requirements are stipulated.<sup>79</sup> Additionally, the Sub-Decree contains no requirements for consideration of alternatives or information disclosure.<sup>80</sup> These have been further outlined in the relevant Prakas. The existing Prakas provide for NGOs to be represented at multi-stakeholder meetings to review the EIA and IEE lodged with the Ministry or the Provincial Department of Environment.<sup>81</sup>

Article 20 of the Law on Mineral Resources Management and Exploitation authorizes the Minister to release information on environmental and social issues to the public.<sup>82</sup>

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<sup>75</sup> Kingdom of Cambodia, Prakas on General Guidelines for Initial and Final Environmental Impact Assessment Reports, No. 376 BRK.BST (issued 2009) [hereinafter Cambodian EIA Guidelines Prakas (2009)].

<sup>76</sup> Cambodian EPNRM Law (1996), Article 16.

<sup>77</sup> Cambodian EPNRM Law (1996), Article 17.

<sup>78</sup> Cambodian EPNRM Law (1996), Article 18.

<sup>79</sup> Cambodian EIA Sub-decree (1999), Article 1.

<sup>80</sup> See Cambodian EIA Sub-decree (1999).

<sup>81</sup> Cambodian EIA Prakas (2009).

<sup>82</sup> Kingdom of Cambodia, Law on Mineral Resources Management and Exploitation, Preah Reach Kram NS/RKM/0701/09 (enacted 13 July 2001), Article 20, available at: [http://www.cambodiainvestment.gov.kh/law-on-mineral-resource-management-and-exploitation\\_010713.html](http://www.cambodiainvestment.gov.kh/law-on-mineral-resource-management-and-exploitation_010713.html).

The Law on Forestry (2002) requires details of an EIA to be made available for public comment and requires public participation in “any government decision” that might impact forests.<sup>83</sup>

### **Law on Forestry (2002)**

#### **Article 4:**

This law shall be implemented to ensure public participation in any government decision that has the potential for heavy impact on concerned general citizens, livelihoods of local communities and forest resources of the Kingdom of Cambodia.

Consistent with the Cambodian code of forest management and the Environmental Protection and Natural Resources Law, an Environmental and Social Impact Assessment shall be prepared for any major forest ecosystem related activity that may cause adverse impact on society and environment. Document of the Environmental and Social Impact Assessment shall be made available for public comment.

Any final decisions by the Royal Government on major forest ecosystems related activities must consider the recommendations of the final Environmental and Social Impact Assessment. The Royal Government can publicly notice any final decisions under this article.<sup>84</sup>

Public participation is also required under other provisions of the Law on Forestry (2002):

### **Law on Forestry (2002)**

#### **Article 6:**

The Forestry Administration shall perform its duties in a manner consistent with principles of transparency, thereby ensuring the right of the public to participate in decisions regarding the management, sustainable use and conservation of the forests.<sup>85</sup>

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<sup>83</sup> Kingdom of Cambodia, Law on Forestry, Preah Reach Kram NS/RKM/0802/016 (adopted 31 Aug. 2002), Article 4, available at: [http://www.cambodiainvestment.gov.kh/law-on-forestry\\_020930.html](http://www.cambodiainvestment.gov.kh/law-on-forestry_020930.html) [hereinafter Cambodian Forestry Law (2002)].

Article 4.

<sup>84</sup> Cambodian Forestry Law (2002), Article 4.

<sup>85</sup> Cambodian Forestry Law (2002), Article 6.

Prakas (Declaration) on General Guidelines for Conducting Initial and Full Environmental Impact Assessment Reports states:

**Prakas on General Guidelines for Conducting Initial and Full Environmental Impact Assessment Reports (2009)**

**Article 11:**

Review comments at multi-stakeholder meeting chaired by the Minister of Ministry of Environment with representation from relevant government ministries/ agencies, local authorities, non-governmental organizations, and other stakeholders concerned with the investment project (within 5 working days).<sup>86</sup>

The same Prakas states:

**Prakas on General Guidelines for Conducting Initial and Full Environmental Impact Assessment Reports (2009)**

**Article 12:**

Review Comments at multi-stakeholder meeting chaired by the Director of provincial Department of Environment with representation from relevant provincial departments/agencies, local authorities, non-governmental organizations, and other stakeholders concerned with the investment project (within 5 working days).<sup>87</sup>

The MoE is currently developing a Prakas on public participation in EIA. The draft of this Prakas and attached Guidelines were released for public comment in July 2016. The Prakas and Guidelines are due to be finalised by the end of 2016.

## **Fees and charges**

The Joint Prakas (Declaration) on Public Service Charge of the Ministry of Environment<sup>88</sup> provides for a list of Public Service Charges. It provides for Service Charge, Duration of Service Providing and validity according to the types of Public Service as stipulated in the Annex.

## **Procedure for IEIA and EIA**

Cambodia adopts the following steps in the IEIA/EIA process:

1. Project screening;

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<sup>86</sup> Cambodian EIA Guidelines Prakas (2009), Article 11.

<sup>87</sup> Cambodian EIA Guidelines Prakas (2009), Article 12.

<sup>88</sup> Joint Prakas on Public Service Charge of the Ministry of Environment, No. 999, (issued 28 Dec. 2012).

2. Project scoping;
3. Preparation of the EIA Report and EMP;
4. Reviewing and assessment of EIA report;
5. Approval or Refusal of EIA Report;
6. Construction, operation; and
7. Project monitoring, compliance and enforcement.<sup>89</sup>

Under the Sub-Decree on EIA, the project owner submits the IEIA to the MoE for screening consideration.<sup>90</sup> The MoE will determine whether the project will require an EIA or if the IEIA is sufficient. The MoE must also determine if a project requires an EIA within 30 days.

The MoE is to review and provide recommendations on the IEIA or the EIA to the competent organization.<sup>91</sup> If the MoE does not respond to the findings and recommendations within a 30-day period, the Project Approval Ministry/Institution will assume that the revised IEIA or EIA report has complied with the criteria of this Sub-Decree.<sup>92</sup>

### **Sub-Decree on Environmental Impact Assessment (1999)**

#### **Article 18:**

If the Ministry of Environment fails to respond its findings and recommendations as described in Article 15 and 17, the Project Approval Ministry/Institution will assume that the revised IEIA or EIA report has complied with the criteria of this Sub-Decree.<sup>93</sup>

The EIA Sub-Decree provides for 30 days as the timing for the processing an EIA and responding to the project proponent and relevant ministry.<sup>94</sup> The project owner must acknowledge the findings and recommendations of its IEIA/EIA Report(s) that have been approved by the MoE, before it can proceed with project implementation.<sup>95</sup>

The MoE has developed a Prakas to assist in the preparation of IEIA and EIA and also for the establishment of the process for reviewing and commenting on EIA Reports.

### **Preparation of EIA/IEIA Report**

The Prakas on General Guidelines for Conducting Initial and Full Environmental Impact Assessment Report (2009) provides general guidelines on the

<sup>89</sup> See generally, Cambodian EIA Sub-decree (1999).

<sup>90</sup> Cambodian EIA Sub-decree (1999), Articles 6-7.

<sup>91</sup> Cambodian EIA Sub-decree (1999), Article 15.

<sup>92</sup> Cambodian EIA Sub-decree (1999), Article 18.

<sup>93</sup> Cambodian EIA Sub-decree (1999), Article 18.

<sup>94</sup> Cambodian EIA Sub-decree (1999), Article 17.

<sup>95</sup> Cambodian EIA Sub-decree (1999), Article 20.



development of IEIAs and full EIAs.<sup>96</sup> The Prakas also includes a general guideline on the content of an IEIA or EIA Report and a checklist for scoping adverse impacts and mitigation measures. The Prakas also provides some definitions for the EIA process.

Under the 2005 Prakas on delegation, approval for project of less than US\$2 million has been delegated to the Provincial Departments of the Environment.<sup>97</sup> The EIA process is similar irrespective of whether a project is assessed at national level or at sub-national level.

One of the key features of the EIA system in Cambodia is that the screening list identifies all projects that are required to carry out IEIA. Once the project proponent has conducted the screening process, the Ministry will determine whether an EIA is required or whether the IEIA will be sufficient.

The EIA Department of the MoE (or the relevant provincial department) will also be required to carry out a site visit, with includes the opportunity for public comment within the screening process.

**Article 7:**

The Department of Environmental Impact Assessment Monitoring and Review or concerned Provincial Departments of Environment shall make visit to and comment on the project site as stated in Article 2 and 3 above whether an IEIA or full EIA report is needed.

**Article 9:**

The Department of Environmental Impact Assessment Monitoring and Review or concerned Provincial Departments of Environment shall review and comment on the IEIA or full EIA report following the general guidelines.

## **Assessment of IEIA/EIA Report**

Under the 2009 Prakas, once an IEIA or EIA is submitted to the Ministry it must be assessed within 30 days. Within this timeframe, there is a requirement for a site visit and consultation with PAP and other stakeholders.

The MoE has established a review process for IEIA/EIA Reports. This a two-stage review process. First, by the EIA Coordination Working Group (EIACWG), which has the MoE providing initial assessments. This is followed by an inter-Ministerial Review process. The Decision on the Composition and Duty Revision of the EIA Condition Working Group (EIACWG) (2015) established the EIACWG for the review and consideration of IEIA and EIA Reports for investment projects.<sup>98</sup>

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<sup>96</sup> Cambodian EIA Guidelines Prakas (2009), Article 1.

<sup>97</sup> Cambodian Prakas on Delegation (2005).

<sup>98</sup> Kingdom of Cambodia, Decision on the Composition and Duty Revision of the EIA Condition Working Group, No. 013 (issued 2015) [hereinafter Cambodian Decision on EIACWG (2015)].

## **Decision on the Composition and Duty Revision of EIA Condition Working Group No. 013 (2015)**

### **Article 2:**

EIACWG has duties as follows:

- Examine and decide on EIACWG internal regulation;
- Examine and comment on reports of Environmental and Social Impact Assessment (ESIA) of proposed project and other existing and processing private or public development activities by depending on the result from examination and initial comment from Department of EIA;
- Decide on report of Initial Environmental and Social Impact Assessment (IESA);
- Report to the Minister of the Ministry of Environment on result of the meeting of giving comment on reports of Environmental and Social Impact Assessment.<sup>99</sup>

### **Article 3:**

Department of EIA is the Secretariat of EIACWG and has duties as follow:

- Prepare internal regulation of EIACWG;
- Coordinate and provide administrative and technical protections in accordance with regulations in force;
- Prepare meeting minutes of EIACWG of both the internal ministerial and Inter-Ministerial Skills;
- Prepare meeting reports of EIACWG of both the internal ministerial and Inter-Ministerial Skills for the Minister of the Ministry of Environment to examine and decide in compliance with the administrative procedure;
- Prepare inter-ministerial leadership level meeting led by the Minister of the Ministry of Environment to examine and decide on reports of Environmental and Social Impact Assessment (ESIA) and this meeting shall comprise of Director, Deputy Director of EIACWG, Skilled Officials and Ministerial leadership level, relevant Institutions, Municipal/Provincial Governors or Deputy Governors and Municipal/ Provincial Department of Environment;
- Prepare comment letter on report of ESIA for project owners to modify.<sup>100</sup>

This TWG is the body responsible for the assessment and consideration of the IEIA or EIA reports. The EIACWG is able to ask for written opinions on IEIA or EIA Reports from other experts including national and international NGOs, university professors or research institutes (Article 4).

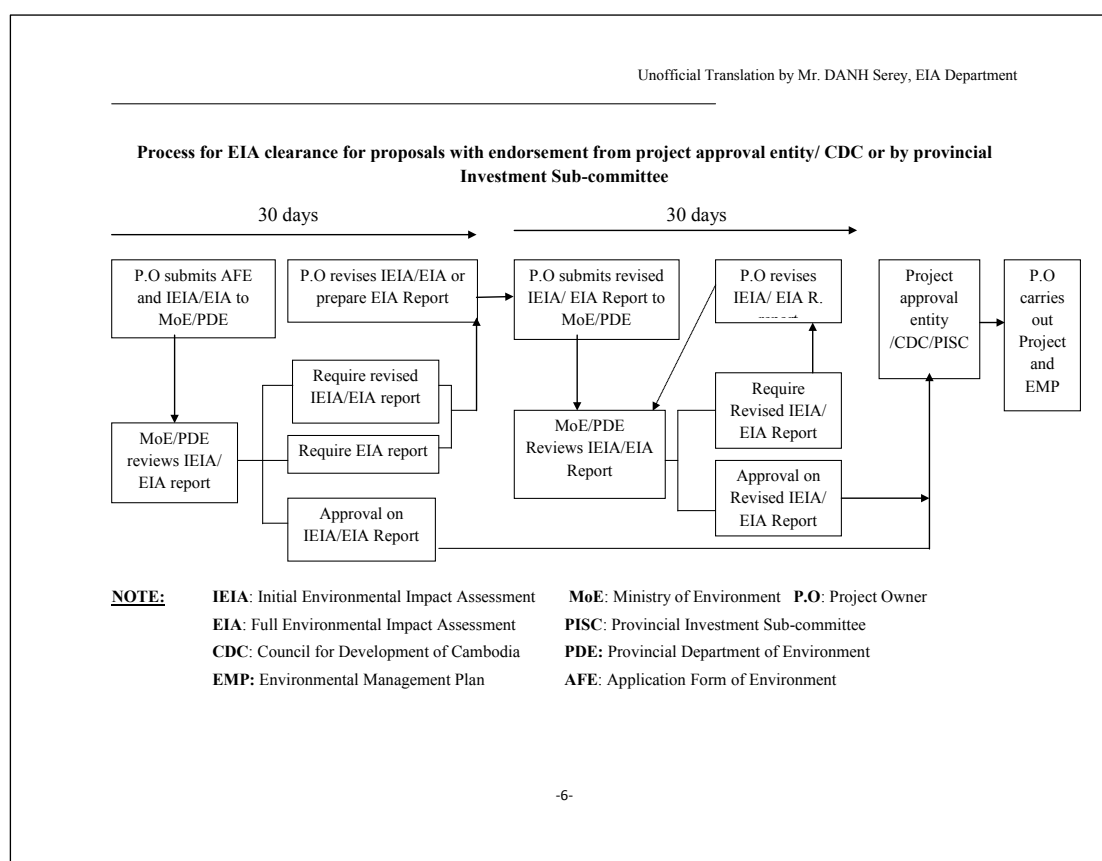
Following this technical review, there is a further multi-stakeholder meeting that includes other Ministries and relevant stakeholders, during which the recommendations will be considered. Following this meeting, there will be the

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<sup>99</sup> Cambodian Decision on EIACWG (2015), Article 2.

<sup>100</sup> Cambodian Decision on EIACWG (2015), Article 3.

final recommendation to the Minister of Environment whether to approve or reject the IEIA or EIA. There will be an EIA Approval Certificate that will be issued together with any conditions imposed on the project.



Flow chart for EIA Process from Prakas on General Guidelines (2009)

## Compliance and Enforcement

### Penalties for breach of the EIA process

Both the EPNRM Law and the Sub-Decree on EIA provide for the imposition of penalties for the failure to comply with the environmental protection laws of Cambodia. The EPNRM Law enables the MoE to issue a written order to require corrective action for any behaviour that is in breach of the law. In addition, the MoE could also issue an order to stop any activities until the offence is corrected and may order the clean up of pollution.<sup>101</sup>

It is unclear if any such orders have been issued. The MoE is not required to maintain a register of any orders or a list of any complaints that have been brought to the attention of the MoE.

<sup>101</sup> Cambodian EPNRM Law (1996), Articles 20-25.

## **Law on Environmental Protection and Natural Resource Management (1996)**

### **CHAPTER IX: PENALTIES**

#### **Article 20:**

Any person who violates the rule of the Ministry of Environment as stated in the article 14 of this law, this Ministry shall issue a written order requiring such person to:

- Correct his/he/its offending activities immediately or within a specified period; or
- Stop his/her/its activities, until the offence is corrected; or
- Clean up immediately the pollution.<sup>102</sup>

The Sub-Decree on EIA specifies penalties for the failure to comply with the provision of the Sub-Decree.

## **Sub-Decree on Environmental Impact Assessment (1999)**

### **CHAPTER 7: PENALTIES**

#### **Article 29:**

A Project Owner/Responsible Person, who fails to submit their EIA report or provides false information or misconduct the EMP, as described in their EIA report, or violates any provisions in this Sub-Decree, will be an offence under Cambodian law, as stated in Article 20/21/22/23 and 25 of Chapter 5 of the Law on Environmental Protection and Natural Resources Management.<sup>103</sup>

#### **Article 30:**

The MoE duly has a responsibility to compile a report and complaint against any Project Owner/Responsible Person who has been offended or breached any articles described in this Sub-Decree.<sup>104</sup>

#### **Article 31:**

Any environment official, who has neglected, lacked vigilance or breached the MoE's regulations, or conspires with perpetrator or assists this activity, must be subject to administrative offense or face prosecution before the court of law.<sup>105</sup>

It is not clear if any enforcement action has ever been commenced under the EPNRM Law or the EIA Sub-Decree. As note above, there is no requirement for the MoE to maintain a register of enforcement actions taken or orders issued.

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<sup>102</sup> Cambodian EPNRM Law (1996), Article 20.

<sup>103</sup> Cambodian EIA Sub-decree (1999), Article 29.

<sup>104</sup> Cambodian EIA Sub-decree (1999), Article 30.

<sup>105</sup> Cambodian EIA Sub-decree (1999), Article 31.

## Monitoring and Compliance

The responsibility for follow-up and compliance and enforcement is also shared under the Prakas depending on which body approved the project.

### **Article 14:**

The Department of Environmental Impact Assessment Monitoring and Review or provincial Department of Environment shall be responsible for follow-up, monitoring and taking appropriate measures to ensure compliance by the project owner of the Environmental Management Plan (EMP) during project construction, operation and closure as stated in the IEIA or EIA report approved by the Ministry of Environment or provincial Department of Environment.

Additional provisions for monitoring, record keeping and inspections are also found in the EPNRM Law.

## **Law on Environmental Protection and Natural Resource Management (1996)**

### **CHAPTER VI: MONITORING, RECORD KEEPING, AND INSPECTION**

#### **Article 14:**

The Ministry of Environment shall collaborate with the concerned ministries to require the owners or responsible of the factories, pollution sources, industrial zones or those zones which have natural resource development activities to: - install or use of monitoring equipment, - provide samples; - prepare or keep files and submit records and reports for examination.<sup>106</sup>

#### **Article 15:**

In order to carry out its duty and take responsibility on the National Protected Areas, the Ministry of Environment, in collaboration with the concerned ministries, may enter to inspect on site in the areas, premises, buildings, or any means of transportation or place, etc...in case when it is found out by the Ministry of Environment that these sources cause affects to quality of the environment. Inspectors of the Ministry of Environment and officials of concerned ministries which are collaborating, shall present their identity cards and mission orders, before conducting an inspection. During the inspection, when found out that there is any criminal offence, the inspectors shall report it immediately to the competent institution to take action according to the law.<sup>107</sup>

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<sup>106</sup> Cambodian EPNRM Law (1996), Article 14.

<sup>107</sup> Cambodian EPNRM Law (1996), Article 15.

# The People's Republic of China

## Introduction

The EIA system in China is based on the Environmental Impact Assessment Law (2002) (EIA Law). EIA was first introduced in China in the late 1970s.<sup>108</sup> The EIA Law was most recently revised in 2016.<sup>109</sup> The most significant amendment removed the requirement that EIA approval needed to be granted prior to the project proponent applying for other approvals. There is still a requirement that all EIA assessments and approvals are required prior to the construction of the project. There is some concern that such a parallel process will diminish the importance of EIA.<sup>110</sup>

- Environmental Protection Act (1989, revised in 2014)
- Environmental Impact Assessment Law (2002, revised in 2016)
- Regulation on Environmental Impact Assessment of Planning (2009) (Order of the State Council No. 559)
- Measures on Open Environmental Information for Trial Implementation (2007) (Order of the State Environmental Protection Administration No. 35)
- Interim Measures for Public Participation in Environmental Impact Assessment (Huan Fa [2006] No. 28)

The Constitution includes an obligation to protect the environment.

### **Constitution of the People's Republic of China (1982, revised 2004)**

#### **Article 26:**

The State protects and improves the environment in which people live and the ecological environment. It prevents and controls pollution and other public hazards.

The State organizes and encourages afforestation and the protection of forests.<sup>111</sup>

<sup>108</sup> Environmental Impact Assessment in China, Edited Tan Zhu and Kin-Che Lam, Research Center for Strategic Environmental Assessment, Nankai University, China and Centre of Strategic Environmental Assessment for China, The Chinese University of Hong Kong, 2009, p.1

<sup>109</sup> People's Republic of China, Environmental Impact Assessment Law of the People's Republic of China (initially adopted 28 Oct. 2002; revised 2016), 2002 version available at: [http://api.commissiomer.nl/docs/os/sea/legislation/china\\_s\\_ea\\_legislation\\_o3.pdf](http://api.commissiomer.nl/docs/os/sea/legislation/china_s_ea_legislation_o3.pdf) [hereinafter Chinese EIA Law (2002, revised 2016)].

<sup>110</sup> Zhang Chun, Has China's impact assessment law lost its teeth?, China Dialogue, 20 July 2016, <https://www.chinadialogue.net/blog/9122-Has-China-s-impact-assessment-law-lost-its-teeth-/en>.

<sup>111</sup> People's Republic of China, Constitution of the People's Republic of China (promulgated 4 Dec. 1982, revised 2004), Article 26, available at: [http://www.npc.gov.cn/englishnpc/Constitution/node\\_2825.htm](http://www.npc.gov.cn/englishnpc/Constitution/node_2825.htm).

The Appraisal Center for Environment and Engineering (ACEE) was established in 1992 under the authority of the State Environmental Protection Authority. It has a number of key responsibilities including the technical review of EIA documents, training of EIA staff, research on policies relating to EIA and investigation of construction projects with potential environmental impacts.

The Environmental Protection Act (1989) (EP Act) was significantly revised in 2014.<sup>112</sup> In particular, the 2014 amendments strengthened the role of EIA in environmental protection.

### **Environmental Protection Act (1989, revised 2014)**

#### **Article 19:**

Compilation of draft development plans and construction of projects with environmental impacts shall be subject to environmental impact assessment in accordance with the law.

Development plans without environmental impact assessment developed in accordance with the law are prohibited to be implemented. Construction projects without environmental impact assessment developed in accordance with the law shall not commence to construct.<sup>113</sup>

#### **Article 41:**

Installations for the prevention and control of pollution at a construction project must be designed, built and commissioned together with the principal part of the project. Installations of the pollution prevention and control facility shall comply with the requirements of the approved environmental impact assessment report, and shall not be dismantled or left idle without authorization.<sup>114</sup>

This principle, also known as the “Three Synchronizations” (or “Three Simultaneities”), requires that “pollution prevention and control facilities shall be designed, built and put to use simultaneously with design, construction and inauguration of a construction project.”<sup>115</sup>

The EP Act also requires companies to taken measures to reduce pollution and emissions and to establish pollutants inventories and staff responsibilities for pollution control, including the keeping of records.<sup>116</sup>

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<sup>112</sup> People’s Republic of China, Environmental Protection Law of the People’s Republic of China (adopted 26 Dec. 1989, revised 2014), available at: <http://www.china.org.cn/english/environment/34356.htm> [hereinafter Chinese EP Act (1989, revised 2014)].

<sup>113</sup> Chinese EP Act (1989, revised 2014), Article 19.

<sup>114</sup> Chinese EP Act (1989, revised 2014), Article 41.

<sup>115</sup> The People’s Republic of China’s Environmental Impact Assessment Framework, Key Laws, Regulations, Standards and Guidelines, American Friends Service Committee, 2014.

<sup>116</sup> Chinese EP Act (1989, revised 2014), Article 42.

Recent amendments also provide for the adoption of a “total emission control system for key pollutants.”<sup>117</sup> If the total key pollutants exceed the relevant quota or control EIA, approvals for new constructions may be suspended.

**Environmental Protection Act (1989, revised 2014)**

**Article 44:**

For regions that fail to fulfill the total emission control quota or achieve the environmental quality targets assigned by the State, environmental departments at or above provincial level governments shall suspend the EIA approval for their new construction projects that may cause increase of the total key pollutants emission in the region.<sup>118</sup>

In addition, the 2014 amendments also make clear provision for construction projects that commence without the necessary EIA approvals. This is a significant change from the previous law.

**Environmental Protection Act (1989, revised 2014)**

**Article 61:**

For construction projects that proceed to commence the construction of the projects prior to submitting EIA reports or having such reports approved, competent government departments with environmental protection supervision responsibility shall order them to stop the construction, impose fine penalty, and may require restoration of the construction sites.<sup>119</sup>

Other laws provide specific requirements for EIA in the event of particular triggers, such as impact on wildlife and ecological areas.

**Law of the People's Republic of China on the Protection of Wildlife (1988, revised 2004, amended 2016)**

**Article 13:**

The people's government at the county level and above shall, when drawing up plans relating to exploitation and utilisation, give due consideration to the protection of wildlife and their habitats; shall analyse, calculate and evaluate all potential impacts that implementation of these plans may have on protection and wildlife and their habitats; and shall avoid or reduce adverse impacts that could result from the implementation of these plans.

Construction projects that are not permitted by construction laws and regulations shall be prohibited in nature reserves. The selection of sites and

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<sup>117</sup> Chinese EP Act (1989, revised 2014), Article 44.

<sup>118</sup> Chinese EP Act (1989, revised 2014), Article 44.

<sup>119</sup> Chinese EP Act (1989, revised 2014), Article 61.



routes for construction projects such as airports, railways, roads, irrigation and hydroelectricity projects, cofferdams and land reclamation shall avoid nature reserve and other protected areas and wildlife migration routes. If they cannot be avoided, infrastructure to allow for wildlife migration shall be constructed, such as tunnels and fish passes, to eliminate or reduce adverse impacts on wildlife.<sup>120</sup>

When the departments that examine and approve environmental impact assessment documents are examining and approving environmental impact assessment documents relating to construction projects that may impact upon nature reserves or other protected areas or wildlife migration routes, they shall seek the opinion of wildlife protection departments under the State Council if wildlife under special national protection may be affected, and shall seek the opinion of wildlife protection departments under the governments of provinces, autonomous regions or municipalities if wildlife under special local protection may be affected.

**Article 14:**

Departments of wildlife protection at various levels shall keep watch on and monitor the impact of the environment on wildlife. When the environmental impact causes harm to wildlife, the department of wildlife protection shall conduct an investigation and deal with the matter jointly with the departments concerned.<sup>121</sup>

**Law of the People's Republic of China on the Prevention and Control of Atmospheric Pollution (1995, amended 2000, revised 2015)**

**CHAPTER III: SUPERVISIONS AND ADMINISTRATION OF AIR POLLUTION PREVENTION AND CONTROL**

**Article 18:**

Enterprises, institutions and other producers and operators shall make an environmental impact assessment, following the law, when constructing a project that can affect the atmospheric environment, and publish its assessment documents. Units that discharge pollutants into the atmosphere shall meet air pollutants emission standards, and comply with key atmospheric pollutant total amount control requirements.<sup>122</sup>

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<sup>120</sup> People's Republic of China, Law of the People's Republic of China on the Protection of Wildlife (adopted 8 Nov. 1988, most recently revised 2 July 2016), Article 13, available at: <http://chinalawtranslate.com/2016wildlifeprotection/?lang=en> [hereinafter Chinese Wildlife Protection Law (1988, revised 2016)].

<sup>121</sup> Chinese Wildlife Protection Law (1988, revised 2016), Article 14.

<sup>122</sup> People's Republic of China, Law of the People's Republic of China on the Prevention and Control of Atmospheric Pollution (adopted 29 Aug. 1995, most recently revised 29 Aug. 2015), Article 18, available at: <http://www.china.org.cn/english/environment/34422.htm> [hereinafter Chinese PCAP Law (1995, revised 2015)].

**Article 19:**

Enterprises, institutions and operational entities with centralized heating facilities, and those that discharge industrial waste gases, or toxic and hazardous air pollutants as stipulated in Article 78 as well as other entities pursuant to pollution administrative permit system according to law, shall apply for a pollutant discharge permit. The State Council shall determine the application process and concrete implementation procedures.<sup>123</sup>

**Procedure for EIA**

The Law on Environmental Impact Assessment (2002) (EIA Law) outlines the mandatory requirements for construction projects and plans to undertake environmental impact.<sup>124</sup> EIA is required to be integrated into the construction of the project.

**Law on Environmental Impact Assessment (2002, revised 2016)****Article 4:**

The appraisals of the environmental impacts shall be objective, open and impartial, and shall take the impacts imposed upon the various environmental factors and the corresponding ecosystem by the programs or construction project after they are carried out so as to provide a scientific basis for decision-making.<sup>125</sup>

Chapter III of the EIA Law sets out the procedures for the EIA with respect to projects.<sup>126</sup> The construction unit is to prepare the relevant environmental impact form depending on the estimate level of potential environmental impact of the construction project.

**Law on Environmental Impact Assessment (2002, revised 2016)****Article 16:**

The state shall execute classified administration on EIAs for construction projects according to different degrees of environmental impacts of the construction projects.

The construction unit shall prepare an EIA report, environmental impact form (hereafter termed EIFs) or fill in environmental impact registration table (hereafter generally called EIA document) in accordance with the following stipulations:

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<sup>123</sup> Chinese PCAP Law (1995, revised 2015), Article 19.

<sup>124</sup> Chinese EIA Law (2002, revised 2016).

<sup>125</sup> Chinese EIA Law (2002, revised 2016), Article 4.

<sup>126</sup> Chinese EIA Law (2002, revised 2016), Chapter III.

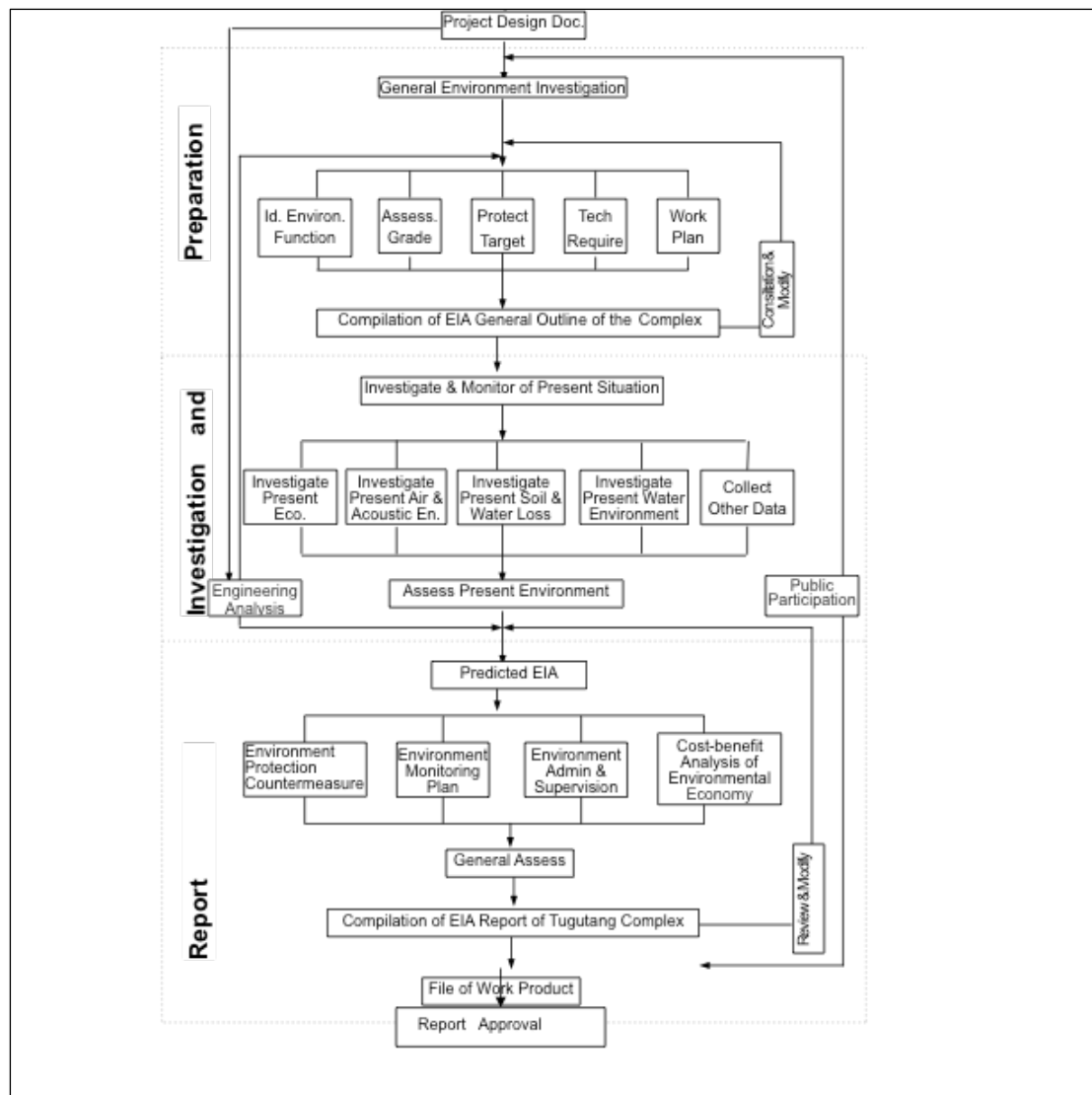
- (1) Preparing an EIA report for construction projects possibly with significant environmental impacts, to perform a comprehensive assessment for the environmental impacts;
- (2) Preparing EIF for construction projects possibly with slight environmental impacts, to perform analysis or specific assessment for the environmental impacts; and
- (3) Filling in environmental impact registration table for construction projects possibly with very small environmental impacts and not needing an EIA.<sup>127</sup>

There are three categories of potential environmental impact:

- **Category A (Major):** projects which are likely to cause a range of significant adverse environmental impacts need to produce a full EIA and submit a full EIA report (EIR). An EIA outline may be prepared by the consultant and submitted to the approval authority prior to preparation of a full EIA but is not mandatory;
- **Category B (Light):** projects which are likely cause to a limited number of significant adverse environmental impacts, they need to conduct a limited EIA and submit a limited Environmental Impact Form (EIF);
- **Category C (De minimis):** projects not expected to cause significant adverse environmental impacts do not require EIA, but still should fill in an Environmental Impact Registration Form. Proponents in this category fill in an Environmental Impact.

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<sup>127</sup> Chinese EIA Law (2002, revised 2016), Article 16.



The above chart is a simplified system of EIA in China (ADB, 2011).<sup>128</sup>

The content of the starting document shall be the following:

- Briefing on the proposed projects, including location, investment, project features, etc.;
- Environmental baseline of the project location and surrounding area;
- Potential environmental impacts brought about the project in study;
- Measures for preventing and mitigating the adverse environmental impacts; and
- Environmental management plan involving pollution control facilities and investments.<sup>129</sup>

The EIA documentation is subject to public consultation and consideration and

<sup>128</sup> Asian Development Bank, *Environmental Impact Assessment: People's Republic of China: Hunan Xiangjiang Inland Waterway Project*, Project Number: 43031 (July 2011), p.3, available at: <https://www.adb.org/sites/default/files/project-document/74202/43031-013-prc-eia.pdf>.

<sup>129</sup> Chinese EIA Law (2002, revised 2016), Article 17.

is then submitted to the relevant EBP (at a local, city or provincial level) for assessment and review. If approved, it can be subject to relevant conditions including requirements to comply with relevant EMP and emission guidelines.

In addition, China has extensive Environmental Quality Standards for air, water and soil. The construction project must comply with these standards.

Under the Provisions of the State Environmental Protection Administration on the Examination and Approval Procedure of EIA on Construction Projects (2005),<sup>130</sup> the approval of a construction project may only occur if the construction project complies with the relevant laws, regulations and standards.

**Provisions of the State Environmental Protection Administration on the Examination and Approval Procedure of EIA on Construction Projects (2005)**

**Chapter 4. Approval**

**Article 14:**

Regarding the construction project which complies with the conditions listed in Article 12 of these Provisions and is passed after examination, the SEPA shall make a decision to approve it, and shall notify the construction unit in writing.

Regarding the construction project which does not comply with the above-said conditions, the SEPA shall make a disapproval decision, and notify the construction unit in writing with the reasons thereof stated.<sup>131</sup>

The EIA system in China is subject to a number of laws relating to the classification of projects and technical guidelines for specific sectors.

- Classification Catalogue of Construction Projects Environmental Impact Assessment (2015 Revision);
- Measures for the Administration of Construction Projects Environmental Impact Assessment (2015 Revision)-Annex 1 to 6; and
- Technical guidelines for environmental impact assessment -General programme, HJ 2.1-2011, Chapter 8 (issues in 1993, revised in 2011) by Ministry of Environmental Protection.

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<sup>130</sup> People's Republic of China, Provisions of the State Environmental Protection Administration on the Examination and Approval Procedure of EIA on Construction Projects (promulgated 23 Nov. 2005) [hereinafter Chinese Provisions on EIA on Construction Projects (2005)].

<sup>131</sup> Chinese Provisions on EIA on Construction Projects (2005), Article 14.

## Public Participation

Public participation is required under the EIA Law:

### **Law on Environmental Impact Assessment (2002, revised 2016)**

#### **Article 21:**

Except for those that are confidential as the state stipulates, for the construction projects that have potential significant environmental impacts and shall prepare EIA reports, the construction units shall hold expert meetings and public hearings or in other forms to solicit comments and suggestions of relevant units, experts and the public, before submitting the EIA reports for approval.

The EIA reports submitted by construction units for approval shall specify a description on having adopted or not adopted the comments and suggestions of relevant units, experts and the public.<sup>132</sup>

It was only in 2015 that the full versions of EIA were available for download on the relevant website of the local or provincial Environmental Protection Bureau. Prior to 2015, only the executive summary was available for public inspection. The new procedure for public access to EIA is more in accord with the provisions of the EP Act.<sup>133</sup>

### **Environmental Protection Act (1989, revised 2014)**

#### **Article 56:**

The project owner of a construction project for which an environmental impact report should be prepared pursuant to the law shall explain relevant situations to the potentially-affected public when preparing the environmental impact report, and solicit public opinions.

The competent department that is responsible for the examination and approval of environmental impact assessment documents for the construction project shall make public the full text of environmental impact reports of the construction project upon receipt thereof with exception of commercial secrets and confidential circumstances as specified by the State.

In the case of a construction project failing to solicit sufficient public comments, they shall request the project to fulfill the task.<sup>134</sup>

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<sup>132</sup> Chinese EIA Law (2002, revised 2016), Article 21.

<sup>133</sup> Chinese EP Act (1989, revised 2014), Chapter V: Information Disclosure and Public Participation, Articles 53, 56.

<sup>134</sup> Chinese EP Act (1989, revised 2014), Article 56.

Under the Interim Measures for Public Participation in Environmental Impact Assessment (2006),<sup>135</sup> the agency conducting the EIA is required to solicit input from affected communities and other relevant organizations.

**Interim Measures for Public Participation in Environmental Impact Assessment (2006)**

**Article 3:**

These Measures shall apply to the solicitation of public opinions conducted by competent administrative departments of environmental protection in the examination and approval or reexamination of environmental impact reports of construction projects.<sup>136</sup>

**Article 4:**

The State encourages public participation in EIA activities. The principle of openness, equality, extensiveness and convenience shall be put into practice throughout public participation activities.<sup>137</sup>

The EIA Report is also required to include details of the submissions received during the EIA investigation process. This period of public solicitation is to be available for a minimum of 10 days.<sup>138</sup>

**Interim Measures for Public Participation in Environmental Impact Assessment (2006)**

**Article 17:**

Construction entities or EIA agencies entrusted thereby shall pay serious attention to opinions of the public, and attach an explanation of the reasons why certain public opinions are adopted or not adopted in the environmental impact report.<sup>139</sup>

It is clearly the aim of the Interim Measures for Public Participation, reinforced by Article 21 of the EIA Law, that there is to be an assessment and analysis of the comments received from the public. These comments are then meant to be addressed by the EIA agency.<sup>140</sup> Conflicting submissions and comments are meant to be addressed.

The Interim Measures for Public Participation also provide for a minimum

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<sup>135</sup> People's Republic of China, Interim Measures for Public Participation in Environmental Impact Assessment (adopted 22 Feb. 2006) [hereinafter Chinese Interim Measures for EIA Public Participation (2006)].

<sup>136</sup> Chinese Interim Measures for EIA Public Participation (2006), Article 3.

<sup>137</sup> Chinese Interim Measures for EIA Public Participation (2006), Article 4.

<sup>138</sup> Chinese Interim Measures for EIA Public Participation (2006), Article 12.

<sup>139</sup> Chinese Interim Measures for EIA Public Participation (2006), Article 17.

<sup>140</sup> See Chinese EIA Law (2002, revised 2016), Article 21; Chinese Interim Measures for EIA Public Participation (2006).

period of seven days notice prior to the holding of meetings or other activities to obtain information and data from the public. However, the opportunity to participate is also limited in accordance with Article 25.<sup>141</sup> Organisations and individuals appearing as Observers are not allowed to speak or comment at these meetings, but may submit written requests and comments.

### **Interim Measures for Public Participation in Environmental Impact Assessment (2006)**

#### **Article 25:**

Citizens, legal persons or other organizations that wish to participate in a hearing shall file an application in accordance with the requirements and methods specified in the public announcement of the hearing, and at the same time, present the key points of their own opinions.

Hearing Organizers shall select representatives to participate in the hearing among all applicants in accordance with the provisions of Article 15 of these Measures, and notify the representatives so selected five (5) days prior to the hearing.<sup>142</sup>

The limitations on the public hearing process in EIA in China has been the subject of some adverse comment and the process is undergoing changes in the manner and substance.<sup>143</sup>

### **Compliance and Enforcement**

There are seven articles in EIA Law to regulate the legal liabilities of illegal and unlawful acts during the implement of EIA,<sup>144</sup> including:

- The legal liability of the institution compiling the plan<sup>145</sup>;
- The legal liability of the institution reviewing and approving the plan<sup>146</sup>;
- The legal liability of the construction entities<sup>147</sup>;
- The legal liability of the institution reviewing and approving the construction project<sup>148</sup>;
- The legal liability of the institution performing Project EIA<sup>149</sup>;
- The legal liability for illegal charging of fees by the departments responsible for the preliminary examination, inspection, and examination and approval of the EIA documents<sup>150</sup>;

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<sup>141</sup> Chinese Interim Measures for EIA Public Participation (2006), Article 25.

<sup>142</sup> Chinese Interim Measures for EIA Public Participation (2006), Article 25.

<sup>143</sup> See for example, "Weaknesses of Public Participation in the EIA Process in China", a report prepared by the Chinese Academy for Environmental Planning (CAEP) and revised by the European Academy (EURAC), June 2013.

<sup>144</sup> Tan Zhu and Kin-Che Lam, 2009, p.28.

<sup>145</sup> Chinese EIA Law (2002, revised 2016), Article 29.

<sup>146</sup> Chinese EIA Law (2002, revised 2016), Article 30.

<sup>147</sup> Chinese EIA Law (2002, revised 2016), Article 31.

<sup>148</sup> Chinese EIA Law (2002, revised 2016), Article 32.

<sup>149</sup> Chinese EIA Law (2002, revised 2016), Article 33.

<sup>150</sup> Chinese EIA Law (2002, revised 2016), Article 34.



- The legal liability of the administrative departments of environmental protection illegally approving Project EIA.<sup>151</sup>

The Provision on the Graded Examinations and Approval of Environmental Impact Assessment Documents of Construction Projects (2009) provides that different levels of Environmental Protection Bureaus (EPBs) will be responsible for examining and approving EIA Reports.<sup>152</sup>

### **Provision on the Graded Examinations and Approval of Environmental Impact Assessment Documents of Construction Projects (2009)**

#### **Article 5:**

The competent department of environmental protection under the State Council is responsible for approving the EIA documents of the following construction projects:

- (1) Construction projects of nuclear facilities or confidential projects;
- (2) Trans-province, autonomous region, or municipal city construction projects;
- (3) Construction projects subject to examination and approval by the State Council or by the relevant department authorized by the State Council. The relevant department of the State Council should record the construction project with special character that may cause significant impact on environment.<sup>153</sup>

#### **Article 8:**

The limits of power for examination and approval of the EIA documents of construction projects other than the ones specified in Article 5, should give the advices on rating approval by the people's governments of provinces according to the Article 4 and following principles and then submit to people's government and report to the ministry of environmental protection.

- (1) The EIA documents of projects related to the smelting of non-ferrous metal, mining, steel processing, calcium carbide, ferroalloy, coke, waste incineration, power generation and pulp and others causing heavy pollution should be approved by provincial competent administrative department of environmental protection.
- (2) The EIA documents of projects related to chemical industry, papermaking, electroplating, printing and dyeing, brewing, monosodium glutamate, citric acid, enzymes, yeast and others

<sup>151</sup> Chinese EIA Law (2002, revised 2016), Article 35.

<sup>152</sup> People's Republic of China, Provision on the Graded Examinations and Approval of Environmental Impact Assessment Documents of Construction Projects (enacted 1 Mar. 2009) [hereinafter Chinese Provision on the Graded Examinations and Approval of EIA Documents (2009)].

<sup>153</sup> Chinese Provision on the Graded Examinations and Approval of EIA Documents (2009), Article 5.

causing heavy pollution should be approved by provincial and the city level competent administrative department of environmental protection.

(3) The management of rating approval of EIA documents of project regulated by other laws or regulations should implement in accordance with the relevant provisions.<sup>154</sup>

**Article 9:**

Where the relevant competent administrative departments for environment protection disagree with each other over the conclusions of EIA of the construction project that may cause adverse environmental impacts on trans-administrative regions, the EIA documents should be submitted for examination and approval to their common competent administrative department for environment protection at the next higher level.<sup>155</sup>

The same provision also provides that if an EPB exceeds its authority and approves a project, the decision to approve the project to may be cancelled by the higher authority EPB or the approving officer may be subject to a fine or demotion.<sup>156</sup>

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<sup>154</sup> Chinese Provision on the Graded Examinations and Approval of EIA Documents (2009), Article 8.

<sup>155</sup> Chinese Provision on the Graded Examinations and Approval of EIA Documents (2009), Article 9.

<sup>156</sup> Chinese Provision on the Graded Examinations and Approval of EIA Documents (2009), Article 10.

# Lao People's Democratic Republic

## Introduction

The Environmental Protection Law (1999) (EPL 1999) established a framework for management of environmental resources with the objective of conserving and facilitating the sustainable use of natural resources. This was amended by the Environmental Protection Law (2012) (EPL 2012).<sup>157</sup>

The Environmental and Social Impact Assessment (ESIA) Department within the Ministry of Natural Resources and Environment (MONRE) is responsible for overseeing the implementation of the EIA process. MONRE issues environmental compliance certificates (ECCs) for projects that have successfully completed the EIA process and coordinates with line agencies (DPRAs) to carry out follow-up (compliance) monitoring and evaluation. Project proponents are required to submit regular monitoring reports to MONRE based on their Environmental Management and Monitoring Plans (EMMPs).<sup>158</sup>

- Law on Environmental Protection (Amended) No.29/NA (2012)
- Ministerial Instruction on the Process of Environmental Impact Assessment of the Investment Projects and Activities No /MONRE (17 December 2013)
- Ministerial Instruction on the Process of Initial Environmental Examination of the Investment Projects and Activities No 8029/MONRE (17 December 2013)
- Process of Environmental and Social Impact Assessment of the Investment Projects and Activities No 8030/MONRE (17 December 2013)

### **The Constitution of Lao PDR (2003)**

#### **Article 19:**

All organisations and citizens must protect the environment and natural resources: land, underground, forests, fauna, water sources and atmosphere.<sup>159</sup>

Under the EPL 2012, there is an obligation to protect the environment.<sup>160</sup> The EPL 2012 also includes the requirement to conduct EIA<sup>161</sup> and IEE.<sup>162</sup>

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<sup>157</sup> Lao People's Democratic Republic, Environmental Protection Law, No. 29/NA (adopted 18 Dec. 2012), available at: <http://www.laolandissues.org/wp-content/uploads/2012/03/Environmental-Protection-Law-2013English.pdf> [hereinafter Lao PDR EP Law (2012)].

<sup>158</sup> Sengdeuane Wayakone and Inoue Makoto, Evaluation of the Environmental Impacts Assessment (EIA) System in Lao PDR, Journal of Environmental Protection volume 3 (2012), p. 1658.

<sup>159</sup> Lao People's Democratic Republic, Constitution of the Lao People's Democratic Republic, No. 25/NA (adopted 6 May 2003), Article 19, available at: <http://www.refworld.org/docid/3ae6b5221a.html>.

There have been a number of changes in the environmental assessment regime in Lao PDR over the past decade. The first EIA regulation was issued in 2000 and upgraded to the Lao PDR Decree of Environmental Impact Assessment (2010) (EIA Decree 2010).<sup>163</sup> It prescribes the thematic issues to be covered and the outputs expected at the different stages of the EIA process (pre-construction, construction, operation and closure stages), and it addresses two categories of investment projects requiring environmental and social assessments:

- **Category 1:** Investment projects, which are small or create fewer impacts on the environment and society, and require initial environmental examinations (IEEs); and
- **Category 2:** Large investment projects which are complicated or create substantial impacts on the environment and society, and require EIAs.

In December 2013, MONRE issued two Ministerial Instructions to implement the provisions of Articles 21 and 22 of the Law on Environmental Protection (Amended) No.29/NA 2012. These were the Process of Environmental and Social Impact Assessment of the Investment Projects and Activities No. 8030/MONRE, Ministry of Natural Resources and Environment, 17 December 2013 (Ministerial Instruction on ESIA 2013) and the Ministerial Instruction on the Process of Initial Environmental Examination of the Investment Projects and Activities No 8029/MONRE, Ministry of Natural Resources and Environment, 17 December 2013. These Decrees maintain the distinction between the IEE and EIA process but separate the processes.

The Ministerial Agreement on the Endorsement and Promulgation of List of Investment Projects and Activities Requiring for Conducting the Initial Environmental Examination or Environmental and Social Impact Assessment 2013 lists the types and sizes of projects that are in Category 1 and Category 2. As an example, hydropower projects over 15 MW require an ESIA. Additionally, an ESIA is required for all projects that include resettlement and compensation (irrespective of type and size) in accordance with the Prime Minister's Decree on Compensation and Resettlement of People Affected by Development Projects No. 192/PM or if the planned project is located in a Socially or Environmentally Valuable Area such as a National Protected Area or National Protection Forest.

The Lao PDR Environmental Impact Assessment Guidelines (2012) (EIA Guidelines 2012)<sup>164</sup> contain detailed provisions for the preparation of EIA reports in Lao PDR. The Guidelines run to some 140 pages. The EIA Guidelines 2012 were developed by the Ministry of Natural Resources and Environment (MONRE) of the Lao PDR in consultation with line ministry agencies, provincial

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<sup>160</sup> Laotian EP Law (2012), Articles 3, 7.

<sup>161</sup> Laotian EP Law (2012), Articles 17, 22.

<sup>162</sup> Laotian EP Law (2012), Article 21.

<sup>163</sup> Lao People's Democratic Republic, Decree of Environmental Impact Assessment, No. 112/PM (issued 16 Feb. 2010).

<sup>164</sup> October 2012.

governments, project developers and EIA consultants and with technical assistance from a team of experts from the international consulting company Grontmij and the Finnish Environment Institute (SYKE).<sup>165</sup> The EIA Guidelines 2012 were based on practical experience in preparing and reviewing EIAs in the Lao PDR as well as in other developing and industrialized countries. These Guidelines were updated and revised in October 2015. The ESIA Guidelines 2015 are currently in draft form.

The EIA Guidelines 2012 were in line with the Lao PDR EIA Decree 2010 for Category 2 projects (i.e., those identified as having significant potential impacts [Article 2]), with recent Guidelines issued under the Decree and with other legislation and Guidelines in the Lao PDR. The EIA Guidelines are also broadly in accordance with MONRE Instruction on ESIA 2013 (MONRE ESIA 2013).

The Draft Lao PDR Environmental Impact Assessment Guideline 2015 (Draft EIA Guideline 2015)<sup>166</sup> contains detailed provisions for the preparation of EIA reports in Lao PDR.

## **Procedure for EIA**

The EPL 2012 made some amendments to the provision of EIA in Laos and amended a number of definitions.

### **Environmental Protection Law (2012)**

#### **Article 2. Environment (revised):**

Environment means any organic and inorganic features existing naturally or created by mankind and surrounding such as people, animals, plants and others and the positive and negative interaction and impacts on livelihood, production, existence and expansion of mankind and nature.

Environment consists of social and natural environment.<sup>167</sup>

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<sup>165</sup> EIA Guidelines 2012, Preface.

<sup>166</sup> October 2012.

<sup>167</sup> Laotian EP Law (2012), Article 2.

Part II of the EPL 2012 inserted new provisions concerning impact on environment.

### **Environmental Protection Law (2012)**

#### **PART II: IMPACT ON ENVIRONMENT**

##### **Article 10. Impact on Social Environment (new):**

An impact on social environment is an adverse impact on human life and health, properties and livelihoods, including shelters of people, and on cultural and historical heritages.<sup>168</sup>

##### **Article 11. Impact on Natural Environment (new):**

An impact on natural environment is an adverse impact on natural ecological fundamentals, natural resources, biodiversity, arable land, water sources, climate change and natural heritages.<sup>169</sup>

Under Article 17, IEE and EIA were inserted into a new category of environmental prevention tasks.<sup>170</sup> In this Chapter were also inserted provisions relating to Strategic Environmental Assessment,<sup>171</sup> Initial Environmental Examination,<sup>172</sup> Environmental Impact Assessment<sup>173</sup> and the Use of Clean Technology.<sup>174</sup>

### **Environmental Protection Law (2012)**

#### **Article 21. Initial Environmental Examination (new):**

IEE is a data examination, exploration and analysis to anticipate possible minor environmental impacts, while identifying appropriate methods and measures to prevent, avoid or mitigate environmental impacts from investment projects or activities including considerations of climate change.

IEE shall promote participations by organizations, local concerned authorities and people, who directly or indirectly affected by the sector's plan or program.

Process of conducting IEE on investment projects and activities shall comply with the specific regulations.<sup>175</sup>

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<sup>168</sup> Laotian EP Law (2012), Article 10.

<sup>169</sup> Laotian EP Law (2012), Article 11.

<sup>170</sup> Laotian EP Law (2012), Article 17.

<sup>171</sup> Laotian EP Law (2012), Article 19.

<sup>172</sup> Laotian EP Law (2012), Article 21.

<sup>173</sup> Laotian EP Law (2012), Article 22.

<sup>174</sup> Laotian EP Law (2012), Article 24.

<sup>175</sup> Laotian EP Law (2012), Article 21.

**Article 22. Environmental Impact Assessment (revised):**

EIA shall be a process of addressing an issue in order to anticipate impacts that may affect the environment, society and nature, derived from investment projects or activities, along with considerations related to climate change in Lao PDR, and development of reports. Apart from reporting, there shall be development of Environmental Social Management and Monitoring Plans.

Both the report and the plan shall be approved by MONRE prior to functioning investment projects and activities.

The process of assessing impacts from the investment project and the activity on the environment, society and nature, shall comply with the specific regulations.<sup>176</sup>

A new provision was also inserted with respect to public participation.

**Environmental Protection Law (2012)****Article 48. Public Participation (new):**

An integrated spatial plan, strategic environmental assessment, environmental action plan, social and natural environmental impact assessment, environmental management and monitoring plan, pollution control and others, shall be developed with participations by organizations, local authorities and people, who are directly or indirectly affected by investment projects or activities.<sup>177</sup>

Articles 2.14 and 2.15, MONRE ESIA 2013, provide details of public participation in EIA.

The Draft EIA Guidelines 2015 identify that normal project planning cycle which runs parallel to the EIA process will generally include the following phases:

- Pre-Feasibility;
- Feasibility;
- Design and procurement;
- Pre-construction;
- Construction or survey-exploration;
- Operation; and
- Decommissioning, closure and post-closure.

Lao PDR adopts the following steps in the EIA Process:

1. Project screening;
2. Project scoping;
3. Preparation of the ESIA Report and ESMMP;
4. Reviewing and assessment of ESIA Report;

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<sup>176</sup> Laotian EP Law (2012), Article 22.

<sup>177</sup> Laotian EP Law (2012), Article 48.

5. Approval or Refusal of ESIA Report and ESMMP;
6. Construction and operation and management; and
7. Project monitoring, compliance and enforcement.

During each of these phases, the project proponent is required to undertake investigation and consultation activities to minimize the environmental and social impacts of a project.

The ESIA system in Lao PDR combines the function of ESIA as a decision-making tool with its function as an environmental and social licensing or permitting instrument.

As a decision-making tool, the ESIA system helps MONRE to make a decision as to whether an ESIA and ESMMP for a proposed project or activity should be:

- Approved on the basis of the potential environmental impacts and their mitigation measures presented in the ESIA Report; or
- Substantially revised and resubmitted for renewed review and approval; or
- Rejected in case the results from the ESIA studies and the review of ESIA and ESMMP Report show that the project or activity is likely to cause substantial, unavoidable and un-remedied social or environmental impacts; or such in case where the project and activity is not consistent with the National Environmental Policy or Strategic Plan of the Natural Resources and Environment.

As a permitting instrument, the ESIA system gives MONRE the powers to:

- Issue Environmental Compliance Certificates (ECCs) approving the ESIA and the ESMMP reports. An ECC is mandatory for obtaining an investment license to construct and operate a project or activity, which is listed in the Ministerial Decision No. 8056/MONRE under Group 2 Projects and Activities;
- Enforce compliance with the conditions specified in the Environmental Compliance Certificate; and
- Sanction non-compliances including imposing fines and suspending and revoking the Environmental Compliance Certificate.<sup>178</sup>

The Draft EIA Guidelines 2015 provide a detailed overview of EIA process:

EIA is a legal requirement for all projects that may have a significant adverse impact on the environment and/or society. EIA is therefore a regulatory tool to identify and minimize adverse environmental and social impacts, and to ensure that proper management and mitigation measures are implemented.

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<sup>178</sup> ESIA Guideline, Volume 1, June 2015 (Draft), MONRE, Laos PDR.



An EIA should consider the environmental issues in all project phases, including design and procurement, pre-construction, construction, operation, decommissioning, closure, and post-closure. The EIA helps the project developer to prepare a project in consideration of its consequences on the environment without threatening its technical and economic feasibility.

An EIA should consider all biological, physical, social, economic, health cultural and visual components of the environment that could be affected by a project. It offers the possibility of analyzing and defining the relations and interactions between the factors having an influence on the ecosystems, resources and quality of life of the population and communities.<sup>179</sup>

The Draft EIA Guidelines 2015 contain detailed definitions to assist in the implementation of EIA:

**Best Practices** mean practices to which the project developer will commit, which are not yet required by applicable laws, but are nonetheless are recognized by a consensus of relevant stakeholders, including government, industry, labor, financial institutions and academia as being practices which have been adopted by leading, reputable companies of international standing and which, when carried out by the project developer, can be expected to further to reduce the adverse impacts arising from the project and activities related thereto.

The Definitions also include references to public participation:

**Involvement** means the process of consulting and disseminating information on an investment project to gather comments from people or groups who are likely to be affected by, gain benefits from, or have an interest in the project. The comments are to be used as references in preparing and deliberating on an initial environmental examination (IEE), environmental impact assessment (EIA) report, or environmental and social management and monitoring plan (ESMMP). Involvement can take the form of meetings with stakeholders at all levels, or with those who are likely to be affected by the investment project during all phases of the project.

**Project Affected People** means a natural person, legal entity, or organization that is directly or indirectly affected, or likely to be affected, by the investment project. The people may be affected by legal expropriation of land or real estate, changes of land category, and impacts on the ecological and environmental systems in their settlement areas.

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<sup>179</sup> Draft EIA Guidelines 2015, p.83.

**Stakeholders** are defined as persons, groups or communities external to the core operations of a project who may be affected by the project or have an interest in it. This may include individuals, businesses, communities, or local government (IFC, 2012).

One of the key issues in the MONRE ESIA 2013 is the focus on scoping and screening. Project scoping and screening are not defined in the MONRE ESIA 2013.

**Project Screening** means study and analysis of data contained in a proposed investment project to determine whether the project requires initial environmental examination (IEE), or environmental impact assessment (EIA).

**Scoping** means the process of determining the scope of the environmental impact assessment (EIA), i.e., the data that need to be collected and analyzed to assess the impacts of the investment project on the environment. The primary objective of the scoping process is to produce a terms of reference (TOR) for preparation of an environmental impact assessment report.

The Draft EIA Guidelines 2015 identify the main responsibilities of the project developer. These are to:

- Send an investment application form to MONRE to enable MONRE to determine the scale of the project;
- Prepare a Scoping Report and ToR for the EIA;
- Prepare the EIA Report, Environmental and Social Management and Monitoring Plan (ESMMP), and development plans;
- Conduct public consultation meetings during preparation of the EIA;
- Incorporate mitigation measures in the design and procurement documents;
- Improve the ESMMP frequently, and implement the mitigation measures during the pre-construction, construction, operation and decommissioning, closure and post-closure phases; and
- Carry out monitoring and auditing activities as stipulated in the ESMMP.<sup>180</sup>

Chapter 2.1 of the Draft EIA Guidelines 2015 outlines the EIA process. The EIA process requires completion of a Screening and Scoping Report and ToR for EIA activities prior to preparation of the EIA Report. For the project screening, the project developer shall submit an investment application to MONRE. The project developer shall utilize the list of projects subject to EIA, in addition to considering the significance of the potential impacts of the project. MONRE will make a decision based on the information provided by the project developer as to whether the proposed project will have to undertake an IEE or an EIA.

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<sup>180</sup> Draft EIA Guidelines 2015, p.23.

During the project scoping, the project developer will prepare a Scoping Report and detailed terms of reference for preparation of the EIA.<sup>181</sup> Chapter 3 of the Draft EIA Guidelines 2015 provides guidance on how to prepare the Scoping Report and the ToR. MONRE will revise, comment on and approve the Scoping Report and ToR before the project developer begins preparing the EIA. Preparation of the EIA Report, ESMMP and development plans will require consultations with the local authorities and affected people.

The Draft EIA Guidelines 2015 describe this consultation process. Figure 3<sup>182</sup> indicates the most important steps to undertake during preparation of the EIA, especially with regard to public consultation. MONRE will conduct an administrative and technical review of the EIA Report, ESMMP and development plans. The project developer will be required to revise the EIA Report, ESMMP and development plans to comply with the consolidated comments provided by MONRE and those of the Panel of Experts.

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<sup>181</sup> MI Part II, Screening and Scoping.

<sup>182</sup> Draft EIA Guidelines 2015, p.15

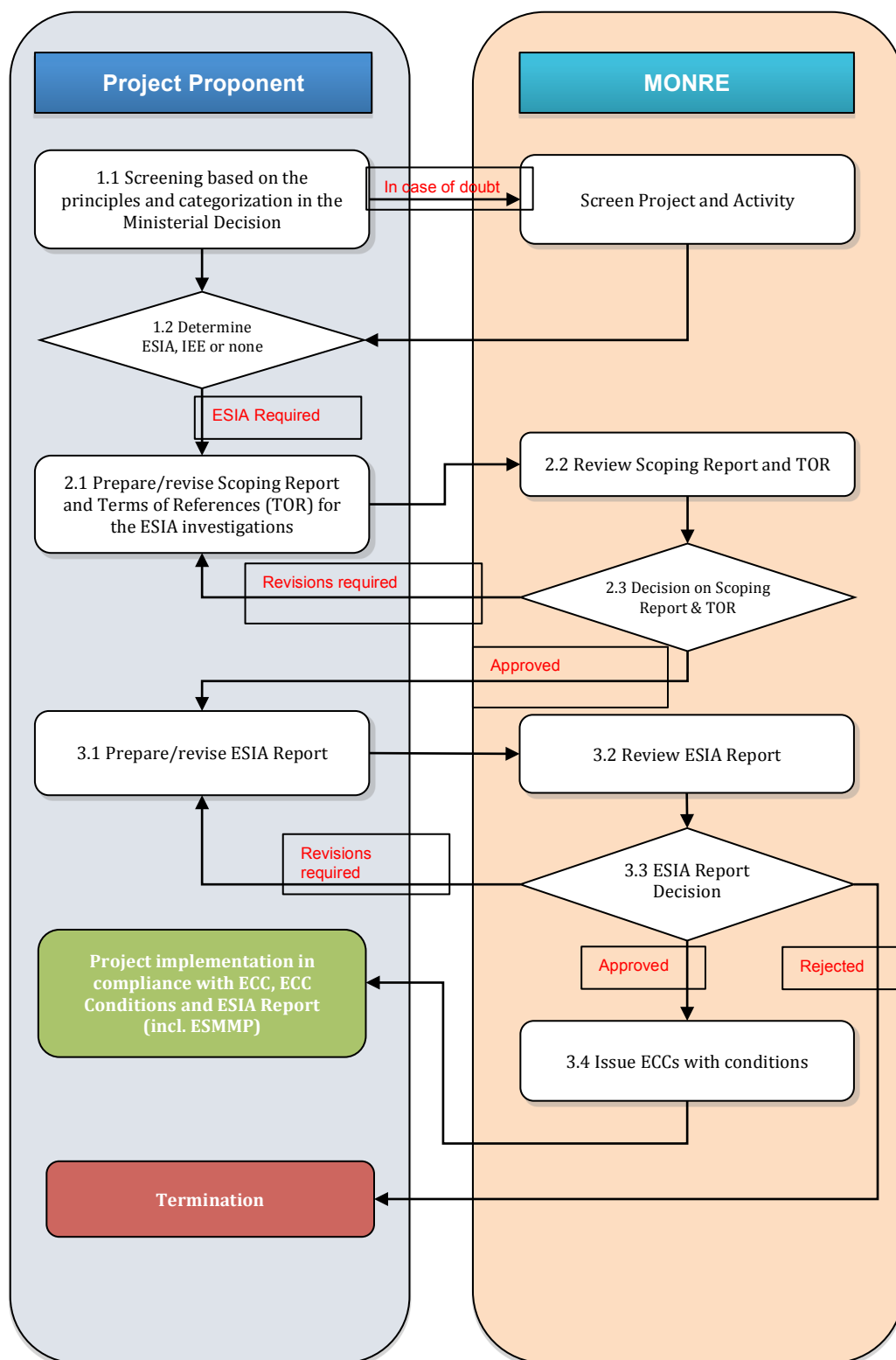


Figure 3: the ESIA process in more detailed, but only for the phases during project development until issuance of the ECC for the ESIA and the ESMMP<sup>183</sup>

<sup>183</sup> Draft ESIA Procedure 2015, p.15.

## Screening

The screening is conducted according to the MONRE Guidelines on Screening (2013).

## Scoping

Scoping is the first phase in carrying out EIA studies.<sup>184</sup> The project developer is responsible for preparing the Scoping Report and Terms of Reference (ToR) and for preparing the EIA study. When completed, these documents shall be sent to MONRE for comments and approval within 15 days under Article 2.4 of the MONRE ESIA 2013.

Scoping is a fundamental phase in the EIA process,<sup>185</sup> which:

- Defines the study area, area of influence, time boundaries, project phases, and potential stakeholders;
- Starts the process of understanding the applicable regulations and standards, and their context for project design and completion of the EIA;
- Makes a provisional identification of impacts, which provides focus on the environmental and social issues that need to be addressed in subsequent EIA studies;
- Provides an indication of what baseline data and information are required, and how to obtain it;
- Provides an opportunity for consultants, relevant authorities, project developers, interested and affected parties to express their views and concerns regarding the proposal before an EIA proceeds;
- Enables an efficient assessment process that saves time, resources, costs and delays; and
- Identifies potentially affected communities and other stakeholders with an interest in the project.

During scoping, the likely key environmental impacts and risks of the project are identified in a preliminary manner. The scoping phase establishes the framework of activities and impacts that require further investigation during the EIA study. One of the main reasons for scoping is to limit further investigation to those issues that are most important for decision-making and efficient, sustainable project execution.

According to the Draft EIA Guidelines 2015, the Scoping Report should include the following main sections. A proposed table of contents for the Scoping Report is presented in Table 3 of the Guidelines.

- Executive Summary;
- Context of the Project;
- Overview of the Policy, Legal and Institutional Framework

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<sup>184</sup> MI 2013, Article 2.3.

<sup>185</sup> EIA Guidelines 2015, p.24.

- Project Description and Alternatives;
- Description of the Environment;
- Key Potential Environmental Impacts and Mitigation Measures;
- Public Consultation and Disclosure; and
- Conclusions and Recommendations.

Following scoping, MONRE will review the Scoping Report and approve and Terms of Reference.<sup>186</sup>

## **Preparation of an ESIA Report**

The project proponent is then required to prepare an ESIA Report, including an Environmental and Social Management and Monitoring Plan (ESMMP). The ESIA Report will be reviewed by MONRE in conjunction with other line agencies. MONRE is required to hold consultation meeting with relevant stakeholders including PAP and provide comments to the project proponent. This may require further assessment if resettlement is required.<sup>187</sup>

The ESMMP has to be prepared in Lao language and is subject to review and approval prior to the issuance of the ECC by MONRE. The ECC is the document that formally approves the ESIA Report and the ESMMP. MONRE is able to suspend the ECC should the project proponent not comply with the ECC or the ESMMP.

The process involves the following interconnected activities:

- Description, mapping and analysis of the project components and their location, activities, installations, production processes and use of materials and resources;
- Identification, mapping and analysis of emissions, extraction of resources and other potential disturbances and risks including their characteristics and their likely spatial distribution, temporal aspects, amounts and hazards;
- Identification, mapping and characterization of the receiving natural and social environment, including environmental, social, cultural, economic assets; the state of such assets, and other existing and planned economic activities;
- Identification, analysis and synthesis of project related impacts and risks on the surrounding natural and social environment including determination of the significance of the impacts and risks;
- Identification and characterization of legal and contractual requirements and other provisions related to i) the identified emissions, resources use and other potential disturbances; and ii) the identified receiving natural and social environment; and
- Determination and design of appropriate mitigation measures to ensure that the impacts and risks are mitigated in the following order of priority:

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<sup>186</sup> MI 2013, Article 2.4.

<sup>187</sup> MI Article 2.8.

prevented, minimized, rehabilitated or compensated; and in any case to ensure compliance with all applicable legal and contractual requirements.<sup>188</sup>

## Access to information

The EPL 2012 also includes a broad provision regarding access to information:

### **Environmental Protection Law (2012)**

#### **Article 47. Environmental Information Services (new):**

The natural resources and environmental sector shall develop the environmental information management and services to ensure the public information provision based on regulations.

Persons, legal entities and organizations shall be able to access environmental information.<sup>189</sup>

In addition, Articles 16 and 20 of the Law on Media (2008) allow Lao people the right of access to information about matters that are happening within the country.

Article 2.20 of the MONRE ESIA (2013) provides details of the information that is required to be disclosed to the public, including the ESIA Report, the EMMP, the ESMMP and EIA budget and any other information required to be disclosed by MONRE. This is to be in Lao and local language. There is a provision that allows information to be withheld by MONRE upon request by the project proponent. There is no provision that the information be provided in English.

The EIA Decree requires that the project proponent make suitable information available to stakeholders in a language and format that is understandable to them to facilitate meaningful consultation with groups affected by the project, civil society organizations and NGOs active in the project area. The EIA Guidelines still require the project proponent to provide stakeholders sufficient time to review and understand the project and its issues to enable them to participate effectively during consultation. For the public consultation meetings, the project information provided to the people affected by the projects and the stakeholders should include the Scoping Report and the presentation materials. This information is to be provided in both Lao and in English.<sup>190</sup> There is no equivalent article in the MONRE ESIA (2013).

According to the EIA Guidelines 2015, disclosure of information is an important part of the project proponent's engagement process during the construction,

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<sup>188</sup> Draft EIA Guidelines 2015, p.31.

<sup>189</sup> Laotian EP Law (2012), Article 47.

<sup>190</sup> EIA Guidelines 2015.

operation and decommissioning, closure and post-closure phases. At the start of the construction phase, the project developer should prepare and distribute informational materials about the construction activities. Information disclosure should focus on the local and district levels.

The EIA Guidelines 2015 provide that all informational material shall be provided in the Lao language and written in nontechnical terms to make it easy to understand by the population.<sup>191</sup>

Under the EIA Guidelines 2015, the public consultation continues throughout the EIA preparation phase. The project proponent must undertake a process of consultation during the EIA study involving the affected communities and the project stakeholders. Consultations should take place on a continuous basis starting as early as possible in the EIA process.<sup>192</sup>

Articles 12 and 13 of the Lao PDR Decree on Compensation and Resettlement of People Affected by Development Projects<sup>193</sup> describe additional requirements when the project involves resettlement and compensation. The Public Involvement Guidelines (WREA, 2011) provide information on the dissemination, participation and consultation activities to be carried out during the EIA process.<sup>194</sup>

The overall public participation process in the EIA Guidelines 2015 is quite comprehensive. It starts at the scoping phase and continues to the operation and decommissioning phase. The actual scope of public participation in the MONRE ESIA 2013 and the EIA Decree 2010 is more limited.

## **Public Participation**

Public involvement of PAP and other stakeholders is required under Article 48 of the EPL 2012<sup>195</sup> and is outlined in MONRE ESIA 2013 Articles 2.14 and 2.15. These provisions are fairly limited to receiving information about the project and participate in consultation meetings. Whilst the project proponent is required under MONRE ESIA 2013 Article 2.18 to provide information to MONRE, Article 2.20 details the information to be made available to PAP and other stakeholders by the project proponent. This includes:

- Information about the project proponent;
- The social and environmental impacts of the project;
- The ESIA Reports;
- Mitigation measures proposed;
- The proposed budget for ESMMP; and
- Any breaches of the obligations of the project proponent.

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<sup>191</sup> EIA Guidelines 2015, p.56.

<sup>192</sup> EIA Guidelines 2015, p.56, Table 15.

<sup>193</sup> No. 192/PM, 7 July 2005.

<sup>194</sup> EIA Guidelines 2015.

<sup>195</sup> Laotian EP Law (2012), Article 48.



With respect to public consultation in an EIA, Article 2.5 of the MONRE ESIA 2013 and Chapter 3.8 Public Consultation and Disclosure detail the information required to be included in the EIA Report.<sup>196</sup> Involving the public in preparation of the EIA is fundamental to increasing the understanding and acceptance of the project, to understanding how the project may affect their living conditions, as well as to identifying impacts and issues that are not immediately obvious to the EIA preparation team.

In the Lao PDR, the project developer shall undertake a process of consultation during the EIA study involving the affected communities and the project stakeholders.<sup>197</sup> According to the Draft EIA Guidelines 2015, consultation shall be conducted in coordination with local authorities on a continuous basis starting as early in the EIA process as possible.

The Draft EIA Guidelines 2015 identifies the following contents should be included in the “Public Consultation and Disclosure” section of any draft EIA report.

**Table 3: Key Content of Public Consultation and Disclosure**

HEADING	KEY CONTENTS
Methodology	
Stakeholders	Table with updated list and presentation of the stakeholder (based on the stakeholder analysis conducted during the Scoping Phase)
Consultation and disclosure activities	Tables and schedules indicating timing, duration, location, and participants in consultation activities at village/district, district/provincial and provincial/central levels Tables with list of disclosure materials, timing, methods of disclosure and target groups including disclosure of the minutes of the consultation meetings
Results	Issues and recommendations identified by the stakeholders Prioritization and ranking of issues raised Final outcome of resolutions to issues raised including the project proponent’s responses and feedback from the stakeholders whether they are satisfied with the responses
Consultation details	Detailed proceedings / minutes for each consultation activity with complete list of participants (however respecting requests for anonymity) for each consultation activity and confirmation from the chair persons and stakeholder representatives that the comments and recommendations of the stakeholders have been duly recorded

In the Draft EIA Guidelines 2015, public consultation is recognized as an important responsibility of the project proponent and is as a crucial step toward building understanding and acceptance of the project by the stakeholders.

<sup>196</sup> EIA Guideline 2015, p.58, Table 15.

<sup>197</sup> MI Article 2.12.

Public consultation provides the proponent with feedback and information about “valued environmental components” of the communities affected by the project.

It can be seen from Figure 2.2 that in Lao PDR public consultation is seen as a spectrum of participation and as part of the continuum of the EIA procedure.

The consultation process is an ongoing activity that will take place throughout the project implementation cycle. The Scoping Report should define the future consultation process in terms of:

- Objectives of consultations during preparation of the EIA Report;
- The participants to be involved in future consultations; and
- Information disclosure.

The public participation process under the ideal situation can be broken down into four key sequential phases, each of which is a prerequisite for the next:

1. Information gathering: collection of baseline data from the public to feed into the description of the environment and impact prediction;
2. Information dissemination: stakeholders are informed about the project;
3. Consultation: stakeholders are given the opportunity to voice their views about the project; and
4. Participation: an extension of consultation, where stakeholders become joint partners in the design and implementation of projects (mitigation measures, community development activities, etc.) and take part in decision-making.

Whilst the project proponent is clearly responsible for community consultation during the scoping phase, during preparation and review of the EIA report and the ESMMP, MONRE, the local administration, the responsible agencies and the project proponent shall organize consultation meetings at the village, district and provincial levels. These consultation meetings provide a forum for the people affected by the project and other stakeholders to share their opinions and provide their comments on the report and plans, from the first drafts through the final drafts.

The community consultation process will continue throughout the construction, operation and decommissioning, closure and post-closure phases. The ESMMP Report should define the future consultation process in terms of:

- Objectives of the consultation for each project phase;
- Consultation committee(s);
- Complaint and grievance mechanisms; and
- Disclosure.

MONRE ESIA 2013 Article 2.14 provides that the people affected by the project and other stakeholders should participate in discussions on implementation of the environmental and social activities, as well as the ESMMP of the investment project. Article 7 (7) of the EIA Decree provided that people affected by the project and other stakeholders have the right and duty to make a written

proposal to solve the environmental and social problems caused by the investment project to the local administrations at each level, or directly to MONRE if the problems have not yet been solved. This part was not included in the MONRE ESIA 2013.

## **Obligations of Project Proponent**

Under the EPL 2012, the project proponent is responsible for any environmental damage caused by the project.<sup>198</sup> In addition, Article 58 requires the provision of financial guarantees “to restore, remove pollutants and clean the environment affected by its operations, from commencement till completion.”<sup>199</sup>

### **Environmental Protection Law (2012)**

#### **Article 55. Responsibilities in Environmental Rehabilitation (new):**

Persons, legal entities or organization implementing investment projects or activities, which create environmental and social impacts, shall correct, improve, rehabilitate and remunerate damages within the affected areas.<sup>200</sup>

In Lao PDR, private investment projects in the natural resources sector including hydropower projects, mining projects and agriculture and forestry projects are required to enter into a concession agreement with the Government of Lao PDR. The concession agreement for such projects may contain specific environmental and social obligations complementary and in addition to the statutory requirements. In particular, for the hydropower sector, MONRE has developed Standard Environmental and Social Obligations (SESO), which form the basis for the project specific environmental and social obligations in the concession agreement for the project. The SESO form a standard and contain standard terms and conditions that in principle are non-negotiable, but the SESO also identify the areas or issues where the environmental and social obligations have to be custom made to fit the project specific design, installations, layout, location and surrounding social and environmental situation.<sup>201</sup>

## **Complaints and Grievances Mechanisms**

The EPL 2012 inserted a new Part IX to deal with dispute settlements. The EPL 2012 established a hierarchy:

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<sup>198</sup> Laotian EP Law (2012), Article 55.

<sup>199</sup> Laotian EP Law (2012), Article 58.

<sup>200</sup> Laotian EP Law (2012), Article 55.

<sup>201</sup> ESIA Guidelines 2015 (draft), p.16.

## **Environmental Protection Law (2012)**

### **PART IX: DISPUTE SETTLEMENT**

#### **Article 71. Forms of Dispute Settlement (new):**

Settlement of environmental disputes shall be one of these forms:

- (1) Conciliation of conflicting parties;
- (2) Mediation;
- (3) Administrative settlement;
- (4) Settlement by the Economic Dispute Resolution Office;
- (5) Lawsuits via people's courts;
- (6) Settlement of Internationally Characterized Disputes.<sup>202</sup>

It is recommended that the project proponent establish a complaints and grievances mechanism (CGM) related to environmental and social issues arising during the construction, operation and decommissioning, closure and post-closure phases. It is suggested that this CGM be managed by the project developer with involvement of local authorities.

The introduction of a grievance mechanism is an important step to allow an ongoing involvement of the community in the resolution of disputes.

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<sup>202</sup> Laotian EP Law (2012), Article 71.

# Republic of the Union of Myanmar

## Introduction

The Ministry of Natural Resources and Environment Conservation (MONREC), formerly known as MOECFA, is the Ministry with the authority and responsibility for the implementation of EIA. Under the Environmental Conservation Law 2012 (ECL 2012)<sup>203</sup> and Environmental Conservation Rules 2014, the Ministry developed the Environmental Impact Assessment Procedure (2015).

The Constitution of Myanmar contains specific references to the obligation to protect the environment. The Union is the owner of the natural resources and whilst the Constitution allows for creation of laws to extract and utilize these natural resources, this is qualified by the obligation under Section 45 to protect and conserve the natural environment.

Every citizen has the duty to assist the Union in environmental conservation and the protection of cultural heritage. These duties are not qualified.

### Constitution of Myanmar (2007)

#### Article 37:

The Union:

- (a) Is the ultimate owner of all lands and all natural resources above and below the ground, above and beneath the water and in the atmosphere in the Union;
- (b) Shall enact necessary law to supervise extraction and utilization of State owned natural resources by economic forces;
- (c) Shall permit citizens right of private property, right of inheritance, right of private initiative and patent in accord with the law.<sup>204</sup>

#### Article 45:

The Union shall protect and conserve natural environment.<sup>205</sup>

#### Article 390:

Every citizen has the duty to assist the Union in carrying out the following matters:

- (a) Preservation and safeguarding of cultural heritage;

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<sup>203</sup> Republic of the Union of Myanmar, The Environmental Conservation Law, The Pyidaungsu Hluttaw Law No. 9/2012 (enacted 30 Mar. 2012), available at: <http://www.altsean.org/Docs/Laws/Environmental%20Conservation%20Law.pdf> [hereinafter Burmese ECL (2012)].

<sup>204</sup> Republic of the Union of Myanmar, Constitution of the Republic of the Union of Myanmar (adopted 29 May 2008), Article 37 [hereinafter Burmese Constitution (2008)].

<sup>205</sup> Burmese Constitution (2008), Article 45.

- (b) Environmental conservation;
- (c) Striving for development of human resources;
- (d) Protection and preservation of public property.<sup>206</sup>

The Environment Conservation Department of the Ministry of Natural Resources and Environmental Conservation (MONREC) was formed in 2012. The ECL 2012 provides the legal basis for implementing a range of enhanced environmental management measures.

- Environment Conservation Law 2012
- Environment Conservation Rules 2014
- Environmental Impact Assessment Procedure 2015

One of the objectives of the ECL 2012 is to enable the implementation of the Myanmar National Environment Policy, which was adopted in 1994. The policy states:

#### **Myanmar National Environment Policy (1994)**

The wealth of the nation is its people, its cultural heritage, its environment and its natural resources. The objective of Myanmar's environmental policy is aimed at achieving harmony and balance between these through the integration of environmental considerations into the development process to enhance the quality of the life of all its citizens. Every nation has the sovereign right to utilize its natural resources in accordance with its environmental policies; but great care must be taken not to exceed its jurisdiction or infringe upon the interests of other nations. It is the responsibility of the State and every citizen to preserve its natural resources in the interests of present and future generations. Environmental protection should always be the primary objective in seeking development.

Myanmar recently enacted the 2016 Myanmar Investment Law, which implements the government's approach to both foreign and domestic investment. It includes the objective of developing businesses which do not cause harm to the environment. Section 41 specifically prohibits businesses which may affect traditional cultures and customs, affect public health or cause damage to the natural environment and ecosystem. Investors have a wide range of duties, including using international best standards so as not to cause damage, pollution or loss to the natural and social environment. Section 36 provides that businesses that are designated by the Myanmar Investment Commission (MIC) to be strategic for Myanmar, capital intensive investments or have a large potential impact for the environment and the local community must submit a proposal to the MIC. It is not clear whether this proposal must include an EIA report (as was required by the previous rules) or if a permit must

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<sup>206</sup> Burmese Constitution (2008), Article 390.

be acquired before an EIA is undertaken. The government is expected to release implementing rules which may clarify this point.

The ECL 2012 provides the overview on environmental protection in Myanmar. The objectives of the ECL 2012 include:

### **Environment Conservation Law (2012)**

#### **Section 3:**

The objectives of this Law are as follows:

- (a) To implement the Myanmar National Environment Policy;
- (c) To promote a good and clean environment...for the benefit of both present and future generations;
- (e) To manage prevention of degradation of natural resources and to enable the sustainable use.<sup>207</sup>

The ECL 2012 also requires business or activities causing pollution to limit pollution discharges to environmental quality standards and to install pollution control equipment to control and limit pollution.

### **Environment Conservation Law (2012)**

#### **Section 14:**

A person causing a point source of pollution shall treat, emit, discharge and deposit the substances which cause pollution in the environment in accord with stipulated environmental quality standards.<sup>208</sup>

#### **Section 15:**

The owner or occupier of any business, material or place which causes a point source of pollution shall install or use an on-site facility or controlling equipment in order to monitor, control, manage, reduce or eliminate environmental pollution. If it is impracticable, it shall be arranged to dispose the wastes in accord with environmentally sound methods.<sup>209</sup>

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<sup>207</sup> Burmese ECL (2012), Section 3.

<sup>208</sup> Burmese ECL (2012), Section 14.

<sup>209</sup> Burmese ECL (2012), Section 15.

In addition, the Environmental Conservation Rules 2014 provide a clear prohibition on the carrying out of certain activities and damage to the environment.

### **Environmental Conservation Rules (2014)**

#### **CHAPTER (XIII): PROHIBITONS**

##### **Article 69:**

(a) Any person shall not emit, cause to emit, dispose, cause to dispose, pile and cause to pile, by any means, the pollutants and the hazardous waste or hazardous material stipulated by notification under the Law and any of these rules at any place which may affect the public directly or indirectly.

(b) Any person shall not carry out to damage the ecosystem and the natural environment which is changing due to such system, except for carrying out with the permission of the Ministry for the interest of the people.

Under the ECL 2012, MONREC is given the authority to formulate the EIA system and social impact assessment system to determine if any project or activity to be undertaken by any government department, organization or person may have a significant impact on the environment.<sup>210</sup>

In addition, the Ministry is provided with the power to set environmental quality standards.<sup>211</sup> Environmental quality standards are further defined and explained in Chapter VI, Sections 10, 11 and 12.<sup>212</sup>

### **Definitions of EIA Terms**

The EC Law, EC Rules and EIA Procedure define a number of terms for EIA in Myanmar. The EC Law defines environment and ecosystem:

**Environment** means the physical factors of the surroundings of human beings, including land, water, atmosphere, climate, sound, odour, taste; the biological factors of animals and plants; and historical, cultural, social and aesthetic factors<sup>213</sup>;

**Ecosystem** means the natural system of existing living and non-living substances and plants in equilibrium and the natural environment which have been evolving due to the system.<sup>214</sup>

<sup>210</sup> Burmese ECL (2012), Section 7(m).

<sup>211</sup> Burmese ECL (2012), Section 7(d).

<sup>212</sup> Burmese ECL (2012), Sections 10-12.

<sup>213</sup> Burmese ECL (2012), Section 2(a).

<sup>214</sup> Burmese ECL (2012), Section 2(m).



The EC Rules provide further definitions for EIA, IEE and EMP:

**Environmental Impact Assessment** means the process of systematic study whether or not there are potentials or impact processes that may cause on the physical, human, biological and socioeconomic environment which is required as part of the decision making process on the proposed project, business, service or activity;

**Third person or organization** means any other person or organization except a person or an organization that implements the project, business or activity or a person or an organization that scrutinizes and allows it;

**Initial Environmental Examination** means the initial process which studies whether or not potential impacts of a project or business or activity is significant, whether or not it is necessary to carry out environmental impact assessment and whether or not it is necessary to prepare and submit other stipulated documents;

**Environmental Management Plan** means a project document prepared in accord with the requirements, guidance of the Ministry to refrain from, protect, mitigate and monitor adverse impacts caused by designing, construction, implementation, operation, maintenance, termination, closure of a project or business or activity; or after its closure, or by any other cause. Such plan includes manners to manage, work programmes to implement, work programmes to monitor the change of environmental situation and environmental conservation and protection, measures for environmental emergency, to refrain from, protect and mitigate environmental impacts caused by a project or business or activity or caused by any part of a project or business or activity.

The EIA Procedure (2015) also defines key terms that are used in the EIA and IEE process:

**Project Affected Person or PAP** means a natural person, legal entity, or organization that is, or is likely to be, directly or indirectly affected by a Project or a proposed Project, including without limitation effects in the nature of legal expropriation of land or real property, changes of land category, and impacts on the ecological and environmental systems in the settlement areas of such person, entity or organization.

**Adverse Impact** means any adverse environmental, social, socio-economic, health, cultural, occupational safety or health, and community health and safety effect suffered or borne by any entity, natural person, ecosystem, or natural resource, including, but not limited to, the environment, flora and fauna, where such effect is attributable in any degree or extent to, or arises in any manner from, any action or omission on the part of the Project Proponent, or from the design, development, construction, implementation,

maintenance, operation, or decommissioning of the Project or any activities related thereto.

**Environmental Impact** means the probable effects or consequence on the natural and built environment, and people and communities of a proposed Project or businesses or activities or undertaking. Impacts can be direct or indirect, cumulative, and positive or adverse or both. For purposes of this Procedure, Environmental Impacts include occupational, social, cultural, socio-economical, public and community health, and safety issues. Moreover, social impacts include Involuntary Resettlement and relating to Indigenous People.

**Cumulative Impact** in relation to a project means the impact or impacts of a Project that in itself or themselves may not be significant but may become significant when added to the existing and potential impacts eventuating from similar or diverse Projects or undertakings in the same geographic area or region.

## Procedure for EIA

The EC Rules establish a framework for EIA in Chapter XI. MONREC is to determine which projects, businesses or activities are required carry out an EIA.<sup>215</sup> The EC Rules allow for a two-tiered system of IEE or EIA.<sup>216</sup>

EIAs or IEEs are to be carried out by qualified and registered third-party consultants.<sup>217</sup> Proposed projects must include an Environmental Management Plan (EMP) that is to be submitted together with the IEE or EIA. These are to be submitted prior to the project being approved<sup>218</sup> and are to be assessed by MONREC.

The EC Rules also make provision for an EIA Report Review Body with experts from relevant government departments and other government organizations.<sup>219</sup> MONREC may approve the EIA or EMP following review of the proposed project by the EIA Report Review Body.<sup>220</sup> The EC Rules do not make any specific reference to public participation or community consultation.

The EIA Procedure 2015 provides the detail of the proposed EIA system in Myanmar. Although there were some community workshops to inform civil society and the private sector on the Draft EIA Procedure, there was no formal public consultation process on the Procedure.

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<sup>215</sup> EP Rules, Article 52.

<sup>216</sup> Article 53.

<sup>217</sup> Article 56.

<sup>218</sup> Article 52.

<sup>219</sup> Article 58.

<sup>220</sup> Article 61.

Chapter 2 of the EIA Procedure 2015 provides that:

“[A]ll Projects undertaken in the Republic of the Union of Myanmar by any ministry, government department, organization, corporation, board, development committee, local government or authority, company, cooperative, institution, enterprise, firm, partnership or individual **having the potential to cause significant Adverse Impacts**, are required to undertake IEE or EIA and to obtain an Environmental Compliance Certificate in accordance with this Procedure.”

The EIA Procedure 2015 includes a screening Annex to provide guidance for the types of listing those projects required to carry out either an EIA or IEE.

The EIA Procedure 2015 provides a standard process for EIA.

1. Screening;
2. Selection and check of the EIA expert;
3. Scoping;
  - a. Information disclosure and consultation;
  - b. Scoping Report and EIA Terms of Reference; and
  - c. Revision/approval/conditions within 15 days.
4. EIA Investigation;
5. EIA Report;
6. EIA Review process;
7. ECC Issuing; and
8. Appeal process.

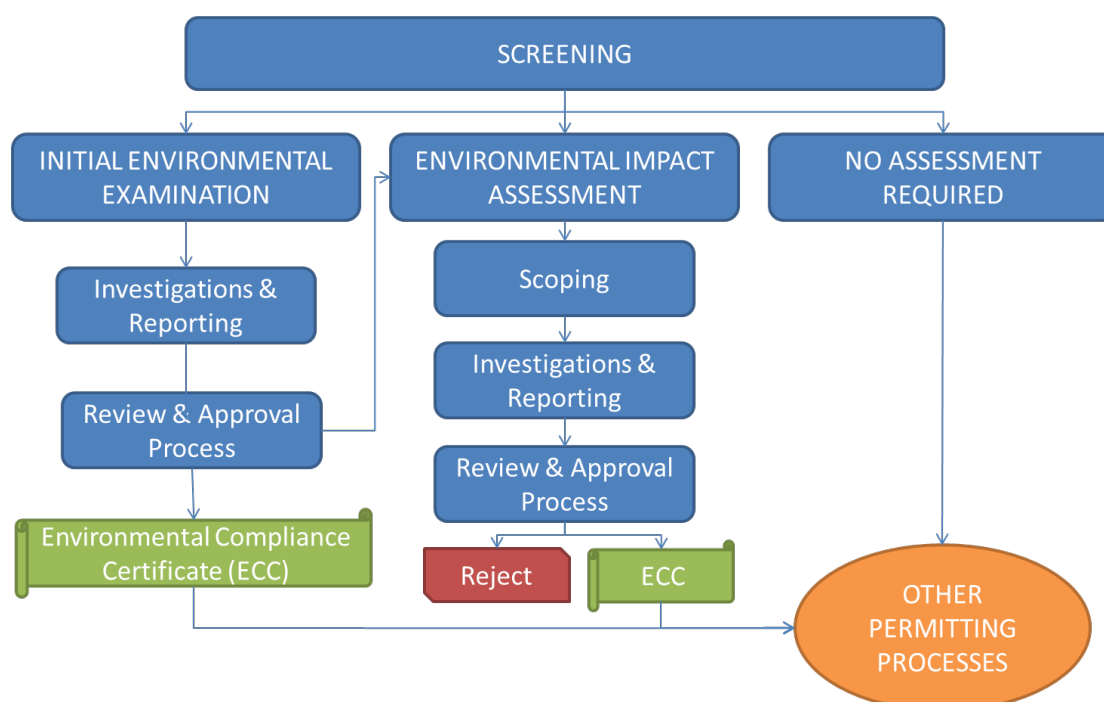


Figure 5: Developed by Cosier and Baird (2015)

Section 15 of the EIA Procedure 2015 establishes that MONREC is the exclusive authority for the IEE and EIA process in Myanmar:

### **Environmental Impact Assessment Procedure (2015)**

#### **Section 15:**

The Ministry has the power and exclusive authority to:

- (a) Define Project screening criteria;
- (b) Approve technical guidelines for IEE and EIA;
- (c) Review and approve IEE Reports;
- (d) Provide guidelines for and approve the ToR of EIA;
- (e) Review and approve EIA Reports;
- (f) Review and approve EMP, Construction Phase EMP and Operational Phase EMP;
- (g) Determine and impose Environmental Impact related conditions which will be applicable to any approval of an IEE, EIA or EMP;
- (h) Monitor and enforce compliance with the conditions set forth in an ECC and monitor and enforce the implementation of EMP, including any amendments thereof occasioned once the detailed design of the proposed Project has been finalized or by or on account of experience during implementation of the Project;
- (i) Require any Project to update its EMP and to submit such updated EMP to the Ministry for review and approval according to a schedule defined by the Ministry;
- (j) Identify and notify the registration conditions and/or procedures for a Third Person or Organization who wishes to undertake IEE or EIA; and
- (k) Perform other duties and functions relating to IEE and EIA as stipulated by the Union Government.

The EIA Report Review Body is also given specific responsibilities under the EIA Procedure 2015:

### **Environmental Impact Assessment Procedure (2015)**

#### **Section 16:**

The EIA Report Review Body shall have the following responsibilities:

- (a) When requested by the Ministry, to review the EIA of any Project.
- (b) Within the timeframe prescribed by the Ministry, to prepare an EIA Review report in regard to an EIA Report.

(c) In each case, prescribe the scope and content of the EIA Review report. Such scope and content may include, among other things, assessments of the following questions:

- Does the EIA Report comply with this Procedure?
- Does the EIA Report comply with the Scoping Report and the ToR for the EIA?
- Does the EIA Report comply with explicit guidelines, standards, timing and criteria for review?
- Does the EIA Report recognize and consider the views of stakeholders?
- Is the EIA Report complete? Does it contain sufficient, suitable and reliable information?
- Have all applicable environmental and social requirements been adequately identified, addressed, referred to and fully complied with in the preparation and content of the EIA Report?
- Have all foreseeable Adverse Impacts been identified and addressed in the preparation and content of the EIA Report?
- Is it likely that the measures to prevent, mitigate or minimize Adverse Impacts of the Project specified in the EIA Report will ensure that the environmental requirements will be fully complied with?
- Are the measures to prevent or minimize pollution from the Project effective and based on BAT and Good Practice?
- Are there any measures or procedures which are non-compliant, or which risk leading to non-compliance, with environmental and social requirements?
- Can the Project as described and presented in the EIA Report be constructed and operated without causing unacceptable Adverse Impacts?

(d) The EIA Review report shall identify any defects in the EIA investigations or in the EIA Report and shall give recommendations as to which further studies, investigations, consultations or assessments the Project Proponent must undertake and report.

(e) The EIA Review report shall, where relevant, give recommendations on conditions of the ECC.

(f) If requested by the Committee or the Ministry, the EIA Report Review Body shall present its findings at a meeting.

The EIA Procedure 2015 further provides that EIA consultants must be registered with MONREC. No EIA or IEE may be conducted unless the consultant or firm is registered. MONREC has established a temporary system for registration of EIA experts.

### **Screening**

Screening is the first step in the EIA or IEE process. The project proponent will submit an application to MONREC to determine the level of assessment that is

required using the Annex I list of projects (Article 23). Under Article 24, the Ministry will also determine whether an EMP is required for any project (i.e., regardless of the decision on whether an IEE or EIA is required). There are exceptions to this as set out in Articles 25 and 26:

**Article 25:**

An EIA is required in all cases where the Project will be located in or will have foreseeable adverse effects on any legally protected national, regional or state area, including without limitation: (i) a forest conservation area (including biodiversity reserved area); (ii) a public forest; (iii) a park (including marine parks); (iv) a mangrove swamp; (v) any other sensitive coastal area; (vi) a wildlife sanctuary; (vii) a scientific reserve; (viii) a nature reserve; (ix) a geophysically significant reserve; (x) any other nature reserve nominated by the Minister; (xi) a protected cultural heritage area; and (xii) a protected archeological area or area of historical significance.

**Article 26:**

Notwithstanding any categorization set forth in Annex A 'Categorization of Economic Activities for Assessment Purposes', the Ministry reserves the right to change the type of the Project as necessary, if the Ministry determines that special circumstances so warrant to require a Project that would otherwise be required to complete and submit an IEE or an EIA or to exempt a Project from completing any IEE or EIA assessment.

Article 27 provides that MONREC can consider project proposals that are submitted separately as a single project for the purposes of screening. This allows for the potential impacts of projects that are connected – for whatever reason – to be assessed concurrently.

**Article 27:**

For purposes of Screening, the Ministry may at its discretion elect to treat Projects that are logically or economically linked, or which have the same or related proponents, or which are sequential in time, as a single Project. Components of basic infrastructure (such as an access road, transmission tower or waste disposal facility) that are required for a larger Project (such as a mine or a power plant) shall be considered to be part of that larger Project. In such circumstances, the Ministry may determine whether an IEE or an EIA will be required for the Projects that are treated as a single Project.

The determination of the screening step must be made within 15 days from receiving the project application.

## Scoping

All EIA projects must undergo scoping (Article 47). Following the screening determination that an EIA is required, the project proponent and its EIA consultant must develop a draft ToR for the EIA for the proposed project.

Scoping requires both an initial study of the proposed project and the possible environmental and social constraints as well as beginning the process of public consultation with PAP and other stakeholders.

Scoping is designed to:

- Define the study area, area of influence, time boundaries, project phases, and potential stakeholders;
- Start the process of understanding the applicable regulations and standards, and their context for project design and completion of the EIA;
- Make a provisional identification of Environmental Impacts, focusing in particular on the environmental, social and health issues that need to be addressed in subsequent EIA studies;
- Provide an indication of the depth and breadth of the subsequent EIA investigations including what baseline data and information are required, what further studies and investigations must be carried out, and how such data collection, studies and investigations shall be undertaken;
- Provide an opportunity for consultants, relevant authorities, project developers, and interested and affected parties to express their views and concerns regarding the proposal before an EIA proceeds;
- Enable an efficient and comprehensive assessment process that saves time, resources, and costs and avoids delays; and
- Identify potentially affected communities and other stakeholders with an interest in the project. (Article 49).

In Myanmar, public participation is mandatory at the scoping stage to both release relevant information and consult interested stakeholders.

### **Article 50:**

As part of the Scoping, the Project Proponent shall ensure that the following public consultation and participation process is carried out:

(a) Disclose information about the proposed Project to the public and civil society through posting on the Project or Project Proponent's website(s) and local media, including by means of the prominent posting of legible sign boards and advertising boards at the Project site which are visible to the public; and

(b) Arrange the required complement of consultation meetings as advised by the Ministry, with local communities, potential PAPs, local authorities, community based organizations, and civil society, and

provide appropriate and timely explanations in press conferences and media interviews.

The Scoping Report must be prepared in accordance with any guidelines issued by the Ministry and shall include draft ToR for the EIA Report in accordance with Article 51.

MONREC has 15 days to review the Scoping Report and ToR and either approve the ToR or require further amendments to the Scoping Report and/or ToR.

### **EIA Report Preparation**

Once the Scoping Report and ToR have been approved by MONREC, the project proponent is then able to commence the EIA investigation and the preparation of the EIA and the EMP. This must include an assessment of alternatives (Article 48) and must be in accordance with the approved ToR (Article 55). The EIA is to be comprehensive, as indicated in Articles 56 and 57. It must also address the relevant national and international standards. Myanmar adopted National Environmental Quality Standards in 2015, which an EIA must address, in accordance with the EIA Procedure 2015.

#### **Article 56:**

The EIA investigation shall consider all biological, physical, social, economic, health, cultural and visual components of the study area, together with all pertinent legal matters relating to the environment, people and communities (including land use, resources use, and ownership of and rights to land and other resources) that may be affected by the Project during all Project phases including pre-construction, construction, operation, decommissioning, closure, and post-closure, and shall identify and assess all Adverse Impacts, risks, Cumulative Impacts and Residual Impacts for environment, social and, if relevant, health that potentially could arise from the Project.

Public participation and consultation with PAP and stakeholders forms an integral part of the EIA process in Myanmar.

#### **Article 61:**

As part of the EIA investigations, the Project Proponent shall undertake the following consultation process:

- (a) Timely disclosure of all relevant information about the proposed Project and its likely Adverse Impacts to the public and civil society through local and national media, the website(s) of the Project or Project Proponent, at public places such as libraries and community halls, and on sign boards at the Project site visible to the public, and provide appropriate and timely explanations in press conferences and



media interviews; arrange consultation meetings at national, regional, state, Nay Pyi Taw Union Territory and local levels, with PAPs, authorities, community based organizations and civil society;

(b) Consultations with concerned government organizations including the Ministry, the concerned sector ministry, regional government authorities and others; and

(c) Field visits for the Ministry and concerned government organizations.

The EIA Procedure 2015 provides a detailed table of contents for an EIA Report, which further outlines the topics and issues to be addressed in the EIA (Article 63 – see the Table at the end of this Chapter).

Once the EIA Report is prepared and submitted, there is a need for disclosure of the EIA Report and the EMP.

**Article 64:**

After completing all investigations and public consultation and participation processes required for EIA Type Projects, the Project Proponent shall submit the EIA Report to the Department in both digital form and complete paper copies, together with the required service fee as prescribed by the Department.

**Article 65:**

Not later than fifteen (15) days after submission of the EIA Report to the Department, the Project Proponent shall disclose the EIA Report to civil society, PAPs, local communities and other concerned stakeholders: (i) by means of national media (i.e. newspapers); (ii) the website(s) of the Project or Project Proponent; (iii) at public meeting places (e.g. libraries, community halls); and (iv) at the offices of the Project Proponent.

**Article 66:**

Upon receipt of the EIA Report, the Department will make the EIA Report publicly available.

The EIA Report must also comply with the table of contents in Article 63 (see the Table at the end of this Chapter).

MONREC will arrange public consultation meetings and the EIA Review Report Body will examine the EIA Report and EMP and either recommend the project be approved, amended or rejected. The Minister makes the final decision. If approved, MONREC will then issue an ECC for the project.

The project proponent is liable for monitoring and compliance with the EIA,

EMP and ECC. There is no requirement for the project proponent to establish any community consultative committee or grievance mechanism for PAP.

## Public Participation

### **Article 13:**

The Project Proponent shall:

- (a) Arrange for appropriate public consultation through all phases of the IEE and EIA process as required by Articles 34, 50, and 61; and
- (b) Disclose to the public in a timely manner all relevant Project-related information in accordance with this Procedure except that which may relate to National Security concerns as informed by the Ministry.

Under the EIA Procedure 2015, the project proponent for an EIA-type project shall implement public consultation processes at both the scoping and investigation steps.

Consultation and information disclosure about the project is required at the scoping stage. During scoping, the proponent must ensure that the public participation does the following (Article 50):

- (a) Disclose information about the proposed Project to the public and civil society through posting on the Project or Project Proponent's website(s) and local media, including by means of the prominent posting of legible sign boards and advertising boards at the Project site which are visible to the public; and
- (b) Arrange the required complement of consultation meetings as advised by the Ministry, with local communities, potential PAPs, local authorities, community based organizations, and civil society, and provide appropriate and timely explanations in press conferences and media interviews.

During the EIA preparation phase, which occurs after the ToR have been finalised with MONREC, the project proponent or EIA consultant must undertake information disclosure and public participation. Under the EIA Procedure 2015, the EIA shall "consider the views, concerns, and perceptions of stakeholders, communities and individuals that could be affected by the Project or who otherwise have an interest in the Project" (Article 60).

Article 61 requires that, as part of the EIA investigation, the project proponent shall undertake the following consultation process:

- (a) Timely disclosure of all relevant information about the proposed Project and its likely Adverse Impacts to the public and civil society through local and national media, the website of the Project Proponent, at public places such as libraries and community halls and sign boards at the Project site visible to the public;
- (b) Arrange consultation meetings at national, state and local level with PAPs, authorities, community based organizations, and civil society;
- (c) Consultations with concerned government organizations including MOECAP, the concerned sector ministry, regional government authorities, and others; and
- (d) Field visits for the MOECAP and concerned government organizations.<sup>221</sup>

Public concerns should also be taken into account in assessing impacts, designing mitigation measures and selecting monitoring parameters. The EIA Report must include a section on the public consultation process, including the results of public consultations and negotiations with the affected populations on environmental and social issues.

A special feature of the EIA Procedure 2015 is the provision for an administrative Appeal Process. This is applicable for both the project proponent and those potentially adversely affected by the project.

The EIA Procedure 2015 does not make any provision for a community consultative committee or grievance committee to be established. Public participation and community involvement in the operation phase and in monitoring and enforcement of the EMP is likewise not specified.

## **Table of Contents for EIA Report**

### **1.0 Executive Summary**

### **2.0 Introduction**

- 2.1 Presentation of the Project Proponent
- 2.2 Presentation of the Environmental and Social Experts
- 2.3 Presentation of the Health Experts for Projects with Health Impacts

### **3.0 Policy, Legal and Institutional Framework**

- 3.1 Corporate Environmental and Social Policies (if applicable)
- 3.2 Policy and Legal Framework, including existing applicable laws and rules, International Conventions, Treaties and Agreements, and national and international standards and guidelines
- 3.3 Contractual and other Commitments
- 3.4 Institutional Framework

<sup>221</sup> None of the details are clarified in the draft EIA Procedure 2015. This will need to be subject to further guidelines.

- 3.5 Project's Environmental and Social Standards
- 3.6 Health Standards for Projects with Health Impacts
- 4.0 Project Description and Alternative Selection**
  - 4.1 Project Background
  - 4.2 Project Location, overview map and site layout maps
  - 4.3 Project Development and Implementation Time Schedules
  - 4.4 Description of the project size, installations, technology, infrastructure, production processes, use of materials and resources and generation of waste, emissions and disturbances, including the devices and measures to control emissions and disturbances, all together with overview maps and site layout maps and design drawings for each Project phase (pre-construction, construction, operation, decommissioning, closure and post-closure)
  - 4.5 Description of the selected Alternative(s) by Project phase (pre-construction, construction, operation, decommissioning, closure and post-closure)
  - 4.6 Comparison and Selection of the preferred Alternatives
- 5.0 Description of the Surrounding Environment**
  - 5.1 Setting the Study Limits
  - 5.2 Methodology and Objectives
  - 5.3 Public Administration and Planning: Identification and summary of the main relevant elements in socio-economic development plans, spatial plans, and sector plans at Union Government, State or Region, City and Township levels
  - 5.4 Legally protected national, regional or state areas, including without limitation: (i) forest conservation areas (including biodiversity reserved areas); (ii) public forests; (iii) parks (including marine parks); (iv) mangrove swamps; (v) any other sensitive coastal areas; (vi) wildlife sanctuaries; (vii) scientific reserves; (viii) nature reserves; (ix) geophysically significant reserves; (x) any other nature reserve nominated by the Minister; (xi) protected cultural heritage areas; and (xii) protected archeological areas or areas of historical significance.
  - 5.5 Physical Components: Description with data and maps of (i) topography; (ii) water resources; (iii) geology and soils, hydrology/hydrogeology; (iv) environmental quality; (v) climate; (vi) vegetation cover; and (vii) natural hazards including earthquakes, tsunamis, extreme weather events, flooding, drought, wildfires and others
  - 5.6 Biological Components: Descriptions and maps on fauna and flora including abundance, spatial distribution of rare, endangered and vulnerable species, and species of economic and health/nutritional values, and maps and description of valued or sensitive environmental areas and habitats
  - 5.7 Infrastructure and Services: Location and size or capacity of

- transport infrastructure, public utilities and services
- 5.8 Socio-Economic Components: Income and livelihoods, living conditions and access to public services and natural resources, land use maps, population distribution maps, maps and charts of other socio-economic indicators such as poverty, employment and education
- 5.9 Public Health Components: Mortality and morbidity, occurrence of diseases, accidents and injuries, and social health determinants
- 5.10 Cultural Components: Description and maps of cultural, historical, and religious sites, structures and objects, and objects with high aesthetic value; description of traditional knowledge and beliefs, and cultural practices
- 5.11 Visual Components including where applicable landscape, city scape and sea scape using three dimensional models

## **6.o Impact and Risk Assessment and Mitigation Measures**

- 6.1 Impact and Risk Assessment Methodology
- 6.2 Impact and Risk Identification, Assessment and Mitigation. For each Project phase (pre-construction, construction, operation, decommissioning, closure, and post-closure):
  - 6.2.1 Identification and assessment of potential Environmental Impacts including (i) physical, biological, social, socio-economic, health, cultural, and visual impacts; (ii) potential impacts on climate change such as greenhouse gas emissions and loss of carbon sinks or stocks; and (iii) identification of impacts of climate change on the Project based on available climate change predictions from designated national authorities or international scientific research bodies
  - 6.2.2 Identification and assessment of the likelihood and severity of natural and industrial hazards relevant to the Project
  - 6.2.3 The design, layout, functioning, management and implementation of appropriate impact and risk mitigation measures
  - 6.2.4 Characterization and assessment of any Residual Impacts and risks and comparison with applicable regulations, standards and guidelines
  - 6.2.5 Comprehensive monitoring plan
- 6.3 Relevant maps, aerial photos, satellite images in proper scale clearly indicating the location of sources of Adverse Impacts, the spatial and temporal distribution of such impacts and with reference to the Description of the Surrounding Environment, the components that are likely to be impacted and the nature of the impacts.

## **7.0 Cumulative Impact Assessment**

- 7.1 Methodology and Approach
- 7.2 Cumulative Impact Assessment
  - 7.2.1 Brief description and map of relevant existing and future private and public projects and developments
  - 7.2.2 Identification and assessment of the potential cumulative impacts on the components in the surrounding environment and the Project's contribution to such impacts
  - 7.2.3 Determination of the leverage and influence that the Project may have over the significant and project related cumulative impacts
  - 7.2.4 Description of measures to mitigate the Project's contribution to the cumulative impacts

## **8.0 Environmental Management Plan**

- 8.1 Project Description by Project phase (pre-construction, construction, operation, decommissioning, closure and post-closure)
- 8.2 Project's Environmental, Socio-economic and, where relevant, Health Policies and Commitments, legal requirements and institutional arrangements
- 8.3 Summary of Impacts and Mitigation Measures
- 8.4 Overall budget for implementation of the EMP
- 8.5 Management and Monitoring Sub-Plans by Project phase (pre-construction, construction, operation, decommissioning, closure and post-closure); the Management and Monitoring Sub-Plans shall address and satisfy all relevant environmental and social management and monitoring issues such as but not limited to noise, vibrations, waste, hazardous waste, wastewater and storm water, air quality, odor, chemicals, water quality, erosion and sedimentation, biodiversity, occupational and community health and safety, cultural heritage, employment and training, and emergency response
- 8.6 Content of each Sub-Plan
  - 8.6.1 Objectives
  - 8.6.2 Legal Requirements
  - 8.6.3 Overview maps and site layout maps, images, aerial photos, satellite images
  - 8.6.4 Implementation Schedule
  - 8.6.5 Management Actions
  - 8.6.6 Monitoring Plans
  - 8.6.7 Projected Budgets and Responsibilities

## **9.0 Public Consultation and Disclosure**

- 9.1 Methodology and Approach
- 9.2 Summary of consultations and activities undertaken
- 9.3 Results of Consultations

9.4 Further ongoing Consultations  
9.5 Disclosure

# Kingdom of Thailand

## Introduction

The first mandatory provisions for EIA in Thailand were issued in 1975. By Section 46 of the Enhancement and Conservation of National Environmental Quality Act 2535 (1992) (NEQA 1992), The Ministry of Natural Resources and Environment (MONRE), with the approval of the National Environment Board (NEB), has the power to specify the type and size of projects or activities requiring an EIA.

- National Environmental Quality Act 2535 (1992)
- Notification on EIA 2555 (2012) MONRE
- Notification of the Ministry of Natural Resources and Environment on measures and procedures of EHIA B.E. 2552 (2009)
- Decree of EHIA 2553 (2010)

The Constitution of the Kingdom of Thailand, B.E. 2550 (2007) contains legal principles on environmental rights, such as assembly rights of a local community to protect the sustainable use of natural resources and biodiversity,<sup>222</sup> rights of access into public information owned by the state,<sup>223</sup> public hearing rights in environmental management<sup>224</sup> and standing to sue state and an administrative agency responsible for environmental protection.<sup>225</sup> The Constitution also regulates the rights and duties of people, a group of people, and private organizations in environmental protection.<sup>226</sup>

Under Article 67, any projects and activities which may cause severe adverse impacts to the community with respect to environmental quality, natural resources and health are required to prepare Environmental and Health Impact Assessment (EHIA).<sup>227</sup> The types of projects and activities which are required to prepare EHIA are issued in the Ministerial Notification of MONRE. Article 87 sets out the directing principles for environmental policy.<sup>228</sup>

### **Constitution of the Kingdom of Thailand (2007)**

#### **Article 56:**

A person shall have the right to know and have access to public data or information in possession of a Government agency, a State agency, a State

<sup>222</sup> Kingdom of Thailand, Constitution of the Kingdom of Thailand (adopted 2007), Article 66, available at: [https://www.unodc.org/tldb/pdf/Thailand\\_const\\_2007.pdf](https://www.unodc.org/tldb/pdf/Thailand_const_2007.pdf) [hereinafter Thai Constitution (2007)].

<sup>223</sup> Thai Constitution (2007), Article 56.

<sup>224</sup> Thai Constitution (2007), Article 57.

<sup>225</sup> Thai Constitution (2007), Article 60.

<sup>226</sup> The 2007 Constitution was abrogated on 22 May 2014.

<sup>227</sup> Thai Constitution (2007), Article 67.

<sup>228</sup> Thai Constitution (2007), Article 87.



enterprise or a local government organisation, unless the disclosure of such data or information shall affect the security of the State, public safety or interests of other persons which shall be protected or purport to be personal data, as provided by law.<sup>229</sup>

**Article 57:**

A person shall have the right to receive data, explanations and reasons from a Government agency, a State agency, a State enterprise or a local government organisation prior to the approval or the operation of any project or activity which may affect the quality of the environment, health and sanitary conditions, the quality of life or any other material interest concerning such person or a local community and shall have the right to express his or her opinions to agencies concerned, for assisting further consideration of such matters.<sup>230</sup>

In planning social, economic, political and cultural development, or in undertaking expropriation, town and country planning, zoning and making bylaws likely to have impacts on essential interests of the public, the State shall cause to be held comprehensive public hearings prior thereto.

**Article 58:**

A person shall have the right to participate in the decision-making process of State officials in the performance of administrative functions which affect or may affect his or her rights and liberties.<sup>231</sup>

**Article 66:**

Persons so assembling as to be a community, a local community or a traditional community shall have the right to conserve or restore their customs, local knowledge, good arts and culture of their community and of the nation and participate in the management, maintenance, preservation and exploitation of natural resources, the environment and the biological diversity in a balanced and sustainable fashion.<sup>232</sup>

**Article 67:**

The right of a person to give to the State and communities participation in the conservation, preservation and exploitation of natural resources and biological diversities and in the protection, promotion and preservation of the quality of the environment for regular and continued livelihood in the environment which is not hazardous to his or her health and sanitary condition, welfare or quality of life, shall be protected as appropriate.<sup>233</sup>

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<sup>229</sup> Thai Constitution (2007), Article 56.

<sup>230</sup> Thai Constitution (2007), Article 57.

<sup>231</sup> Thai Constitution (2007), Article 58.

<sup>232</sup> Thai Constitution (2007), Article 66.

<sup>233</sup> Thai Constitution (2007), Article 67.

Any project or activity which may seriously affect the community with respect to the quality of the environment, natural resources and health shall not be permitted, unless, prior to the operation thereof, its impacts on the quality of the environment and on public health have been studied and assessed and a public hearing process has been conducted for consulting the public as well as interested persons and there have been obtained opinions of an independent organisation, consisting of representatives from private organisations in the field of the environment and health and from higher education institutions providing studies in the field of the environment, natural resources or health.

The right of a community to bring a lawsuit against a Government agency, a State agency, a State enterprise, a local government organisation or other State authority which is a juristic person for the performance of duties under this provision shall be protected.

**Article 85:**

The State shall implement the land, natural resources, and environment policy as follows:

- (1) To set the principles of land use nationwide and to keep in mind the conformity to the natural environment be it land, water, ways of life of local community and the effective preservation and maintenance of natural resources, and to set standards on sustainable land use which allow people in the area affected by the implementation of that land use principles to participate in decision making process;
- (2) To distribute the ownership of land equitably and take action to allow farmers have ownership or right on agricultural land throughout by land reform or other methods and to provide water sources to the farmer for their sufficient and proper use to suit their agriculture;
- (3) To provide effective town planning develop, and carry out the town planning with efficiency and effectiveness for the sake of the sustainable preservation of natural resources;
- (4) To provide the plan to manage water resources and other natural resources systematically for public interest, including to allow people to participate in preservation, maintenance and exploitation of natural resources and biological diversity in a well-balanced manner; and
- (5) To support, maintain and protect the equality of environment under a sustainable development, as well as to control and eliminate pollution which affect to people's health, well-being, and quality of life of the people by allowing the people, local communities, and administrative organization to participate in formulating of the operation plan.<sup>234</sup>

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<sup>234</sup> Thai Constitution (2007), Article 85.

Part 4 of NEQA 1992 establishes the EIA system for Thailand. The assessment procedure established under Part 4 depends on whether or not a project requires Cabinet approval.

### **National Environmental Quality Act (1992)**

#### **Section 46:**

For the purpose of environmental quality promotion and conservation, the Minister shall, with the approval of the National Environment Board, have the power to specify, by notification published in the Government Gazette types and sizes of projects or activities, likely to have environmental impact, of any government agency, state enterprise or private person, which are required to prepare reports on environmental assessment for submission to seek approval in accordance with section 47, section 48 and section 49.<sup>235</sup>

Under Section 47, in the case of a project or activity that is required to prepare an EIA and which requires the approval of the Cabinet, the EIA Report is lodged with MONRE and then submitted to the NEB for its review and comments. The Report is then submitted to the Cabinet for consideration. A project that does not require approval from the Cabinet is covered under Section 48.

### **National Environmental Quality Act (1992)**

#### **Section 48:**

In case the project or activity which is required by section 46 to prepare the environmental impact assessment report is the project or activity which is required by law to obtain permission prior to construction or operation, the person applying for the permission shall have the duty to file the environmental impact assessment report with the permitting authority under such law and with the Office of Environmental Policy and Planning simultaneously. The report to be filed as aforesaid may be made in the form of an initial environmental examination (I.E.E.) in accordance with the rules and procedures determined by the Minister pursuant to section 46, second paragraph.

The official who is legally authorized to grant permission shall withhold the granting of permission for the project or activity referred to in the first paragraph until having been notified by the Office of Environmental Policy and Planning of the result of consideration pertaining to the review of the environmental impact assessment report in accordance with section 49.

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<sup>235</sup> Kingdom of Thailand, The Enhancement and Conservation of National Environmental Quality Act, B.E. 2535 (adopted 29 Mar. 1992), Section 46, available at: [http://www.pcd.go.th/info\\_serv/en\\_reg\\_envi.html](http://www.pcd.go.th/info_serv/en_reg_envi.html) [hereinafter Thai NEQA (1992)].

The Office of Environmental Policy and Planning shall examine the environmental impact assessment report and related documents filed therewith. If it is found that the report as filed is not correctly made in accordance with the rules and procedures specified by virtue of section 46, second paragraph, or the accompanied documents and data are incomplete, the Office of Environmental Policy and Planning shall notify the person applying for permission who files the report within fifteen days from the date of receiving such report.

In case the Office of Environmental Policy and Planning finds that the environmental impact assessment report together with related documents as filed is duly made and completed with the data as required, or has been duly amended or modified in accordance with the foregoing third paragraph, it shall review and make preliminary comments on the report within thirty days from the date of receiving such report in order that the report together with the preliminary comments shall be referred to the committee of experts for further consideration.

The appointment of the committee of experts according to the foregoing fourth paragraph shall be in accordance with the rules and procedures determined by the National Environment Board. The committee shall be composed of expert members who are qualified or specialized in various fields of related disciplines and the authority legally competent to grant permission for the given project or activity under review, or its representative, shall be included in its membership.<sup>236</sup>

The Office of National Resources and Environmental Policy and Planning (ONEP) is the main agency responsible for the administration of the Thai EIA system, including the development of EIA system and EIA review process. ONEP is responsible for reviewing and making proposals on types and sizes of projects or activities for which EIA is required as well as rules and regulations for the preparation of EIA reports to the National Environment Board (NEB) for approval, the development of guidelines for the preparation of EIA reports for various types of projects or activities, and the registration of EIA consulting firms.

There are currently 35 types of projects that require an EIA and 11 types of projects that require an EHIA.

Other lines agencies grant the permission for construction or operation of the projects or activities after they have been notified by ONEP of the result of EIA approval. Permitting agencies shall stipulate the conditions of permission, including all mitigation measures and comments of the Expert Review Committee (ERC) included in the approved EIA.

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<sup>236</sup> Thai NEQA (1992), Section 48.

ONEP also acts as the Secretariat for the ERCs that are responsible for the review and assessment of EIAs and EIA. There are 15 ERCs currently established.<sup>237</sup>

EIA Reports are submitted to ONEP for a preliminary review. ONEP has 15 days for this review. Any incomplete EIAs are referred back to the EIA consultant to make amendments. Once the EIA is resubmitted, ONEP then has 15 days for a preliminary assessment of the documentation. Following this step, the EIA must be referred to an ERC for assessment. The ERC has 45 days to review the EIA. If approved, the EIA is then sent to other permitting agencies, which will grant the appropriate permits subject to the recommendations of the ERC.

Projects that require Cabinet approval are referred by ONEP, together with all comments, to the National Environmental Board, before referral to Cabinet.

For monitoring, reports must be submitted to ONEP and the permitting body twice per year. These are placed on the ONEP website and are publically available

The disclosure of information is governed by the Official Information Act (1997).<sup>238</sup> Persons requesting information are entitled to be provided with the EIA Report, the EHIA Report and the assessments of the Report, any comments, the EMP and monitoring report. It is not clear if all this information is provided during the process when it becomes available or after the conclusion of the process, when the project has been approved.<sup>239</sup>

## **Procedure for EIA and EHIA**

The EIA procedure in Thailand adheres to the following process with the main differences in the process occurring after the EIA Report is submitted to ONEP.

1. Screening;
2. Scoping and development of ToR;
3. Preparation of EIA – by EIA Consultant;
4. Submission of EIA Report to ONEP;
5. Assessment of EIA – by ERC;
6. Assessment of HIA – by ERC;
7. Approval by MONRE or Cabinet;
8. Referral to other line agencies for permits; and
9. Monitoring and compliance.

NEQA 1992 does not have any provisions on public participation and information disclosure with respect to EIA.<sup>240</sup> Section 6 provides rights for participation and access to information in general matters of environmental

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<sup>237</sup> IGES, 2016, p.71.

<sup>238</sup> Kingdom of Thailand, Official Information Act, B.E. 2540 (adopted 2 Sept. 1997), available at: <http://www.oic.go.th/content/act/act2540eng.pdf>.

<sup>239</sup> IGES, 2014, p.73.

<sup>240</sup> See Thai NEQA (1992).

conservation.<sup>241</sup> The primary basis for public participation in Thailand has been by reliance on the Constitutional provisions.

The 2007 Guidelines prepared by MONRE provide that a project is required to hold public participation at least twice. This will occur at the start of the preparation of the EIA Report for the public to review the ToR of the project and the scope of the study, and during the preparation of the draft EIA Report, including the proposed prevention and mitigation measures. In the case of a project requiring an EHIA, the Guidelines require four public meetings.

A project has to disclose information at the office of local authorities, project site and communities, in accordance with the Prime Minister's Office Rule on Public Hearing (2005) and consist of at least the following information:

- Rationale and objectives of the project;
- Main points of the project;
- Project proponent;
- Project site;
- Products and outcomes of the project, including positive benefits that each stakeholder group will receive from the project;
- Negative impacts that might happen to the people living or working in area and neighbouring areas of the project site and general public including prevention, mitigation and remediation measures; and
- The estimated project cost.

Five steps and corresponding tasks of the EIA process are established and public participation is included, although not clearly defined.

1. Screening comprises of initiation of the project, site evaluation and local authorities involvement;
2. Scoping comprises of site selection, scope of EIA and public and stakeholders' involvement;
3. Report preparation comprises of consultant selection, draft report preparation and data acquisition/public input/opinion;
4. EIA review comprises of final report preparation, EIA expert panel review for private project submitted to permitting authority, for government project submitted to National Environmental Board and to the Cabinet; and
5. Monitoring comprises of project owner submitted report, follow-up by permitting authority and monitoring by a third-party.

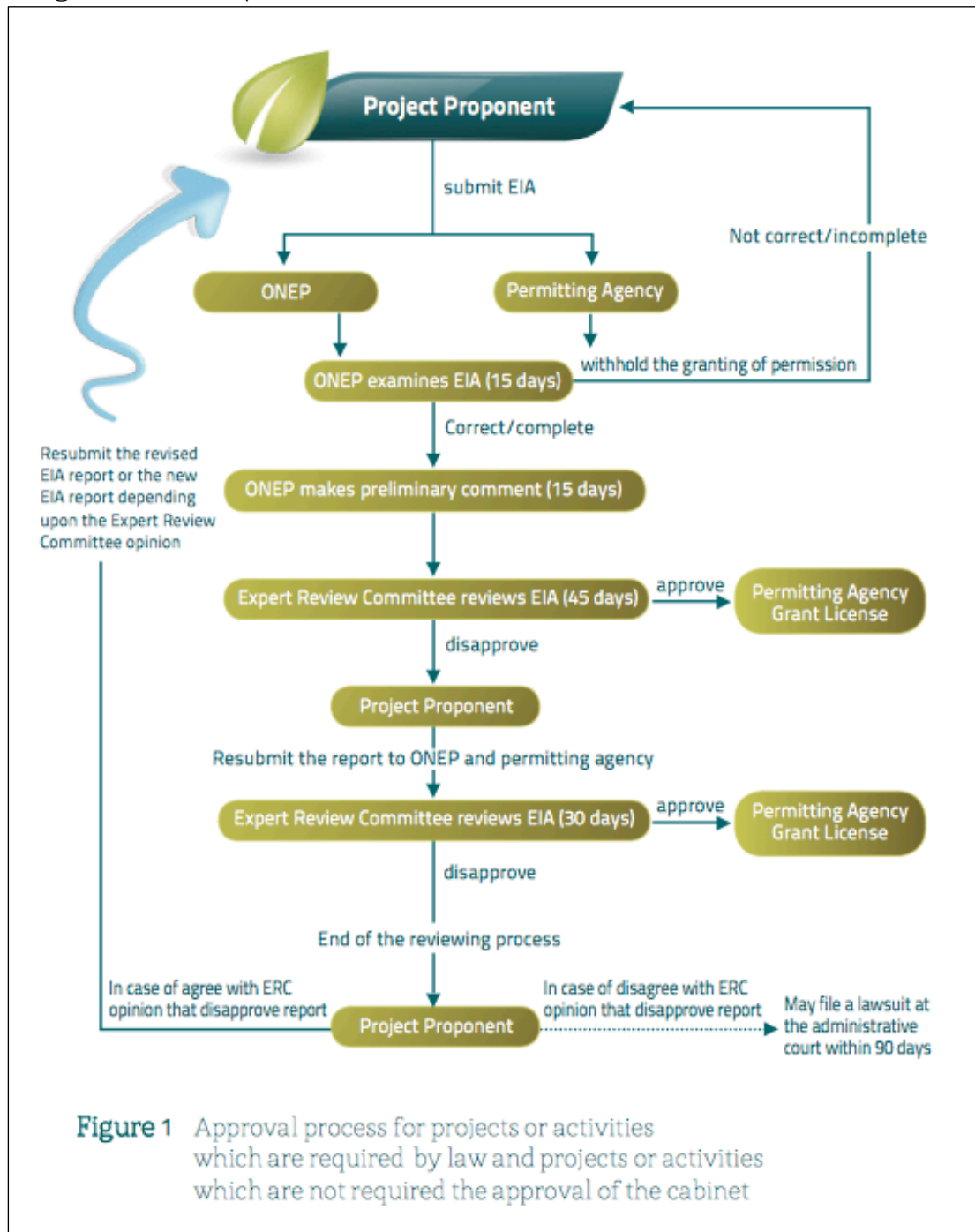
### **Assessment of EIA Reports**

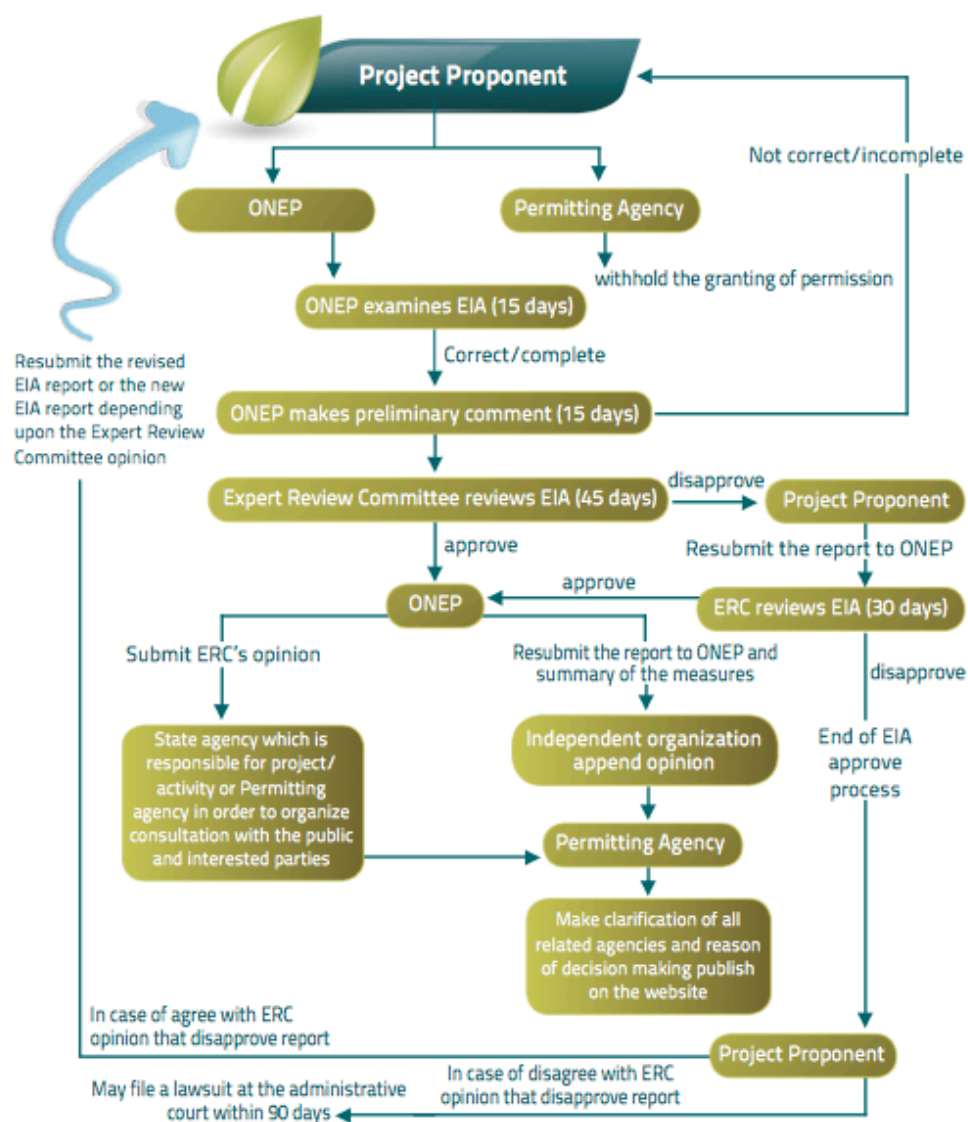
Figures 1 and 3 below show the procedures for the assessment of projects that do not require the approval of the Cabinet once they have been submitted to ONEP. The additional steps for those projects that may have a significant impact on human health. This is a specific feature of the Thai EHIA process. In all other jurisdictions the requirements for health impact assessment falls under

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<sup>241</sup> Thai NEQA (1992), Section 6.

the general EIA requirement.





**Figure 3** Approval process for projects or activities which may seriously affect community which respect to Environment, Natural Resources and Health and are required permission by law and projects or activities which are not required the approval of the cabinet



Guidelines for preparation of the EIA Report for a project or activity which may seriously affect a community with respect to quality of environment, natural resources and health were issued by ONEP (2008).

The EIA must also include:

- Summary report containing description, location and alternative location and operational method of the project or activity report on impact which may significantly affect the environment, protection and remedy thereof and investigation and examination of environmental impact and conclusion; and
- The main report contains introduction, location of the project or activity, description, existing environmental conditions and evaluation of the alternatives, measure for protection and remedy of environmental impact and compensation and summarizing table.

**Table. Guideline for preparing the environmental impact assessment (EIA) report**

**1. Main element**

**1.1 Executive summary comprises the main following issues:**

- 1.1.1 Type and size of the project including all related activities
- 1.1.2 Site of the project showing photos and map of the site showing environmental surroundings which may be affected from the project. Scale of map shall be 1: 50,000 or as appropriate.
- 1.1.3 Alternative options of the project site and the project implementation methodology (reasons and justifications)
- 1.1.4 Report describing important impact to environment, mitigation and monitoring measure in compliance with a Sor Por 1 Form attached with this Notification.

**1.2 Main report comprises the important following issues:**

- 1.2.1 Introduction: introducing background, objective and justification of the project, including objective, scope and methodology of the EIA report.
- 1.2.2 Site of the project: presenting photo and map of the site showing environmental surroundings which may be affected from the project. Scale of map shall be 1: 50,000 or as appropriate.
- 1.2.3 Project detail: describing a clear detail on overview of the project such as type and size of the project, project implementation methodology, or related activities, as well as layout of land utilization of the project showing in appropriate scale and direction.
- 1.2.4 Present environmental condition: describing detail and photos of natural resources and environment in both physical and biological aspects by classifying to capacity of rehabilitation and non-rehabilitation; human use value;

quality of life value; as well as describing current problems around the site together with showing photos of surrounding area; and utilization of land around the site and other areas that may be affected from the project in short term and long term.

1.2.5 Evaluation of alternative option for implementing the project and evaluation of impact may cause by the project.

(1) Alternative option for implementing the project: the EIA report shall describe alternative option, which may be an option for the project site or the project implementation methodology. Every proposed option shall be in line with objective and shall describe reasons addressing to the project's goal and necessity either the project exists or non-exists. Mitigation measure shall be proposed in each option. The most suitable option and justification of the project shall be identified.

(2) Evaluation of environmental impact: evaluation of environmental impact, both direct and indirect to natural resources and environment and to all values mentioned in 1.2.4, which is classified to rehabilitation and non-rehabilitation, caused by the project shall be conducted. Impact that maybe caused by each proposed option shall also be evaluated and compared.

1.2.6 Mitigation and compensation measure: detail of mitigation measure causing by 1.2.5 and compensation measure in case of unavoidable damages shall be described.

1.2.7 Monitoring measure: environmental monitoring plan, which is technically and practically suitable for the project, shall be proposed. This monitoring plan will be used for the project's post monitoring and evaluation.

1.2.8 Table summarizing important impact to environment and mitigation measure EIA report shall be conducted on the basis of public participation, social environmental impact assessment, and health impact assessment.

The review process under the EIA Procedures is carried out by an Expert Review Committee. Other than that including private projects and activities, the EIA report has to be reviewed and approved by the Expert Review Committee (ERC) appointed under the NEB prior to obtaining the permit for construction or operation from a legally authorized permitting agency. The ONEP of MONRE is charge of EIA, coordinating with permitting agencies and the Secretariat of the committee of experts.

The Thailand Board of Investment produced an Investment Guide on Environmental Regulation in 2014 (BOI 2014) provides details on the types of projects required EIA and EHIA including the content of the relevant reports

and the processes followed by ONEP. However it does not refer to any details on public participation.

## **Public Participation**

It is a requirement that all stakeholders must have a chance to participate in the EIA or EHIA process. Twenty groups of stakeholders were identified as follows:

- Local communities which would be impacted;
- Project owners;
- Expert panels at the central government;
- Local expert panels;
- Regional and/or Provincial natural resources;
- Monitoring agencies;
- Local authority for natural resources;
- Local administrative offices;
- Independent environmental organizations;
- Educational institutions;
- Civil Society organizations;
- Media;
- National Environmental Board;
- ONEP;
- EIA consultants;
- Concerned citizens;
- General public;
- Regional government offices;
- Permitting authorities; and
- The Cabinet.

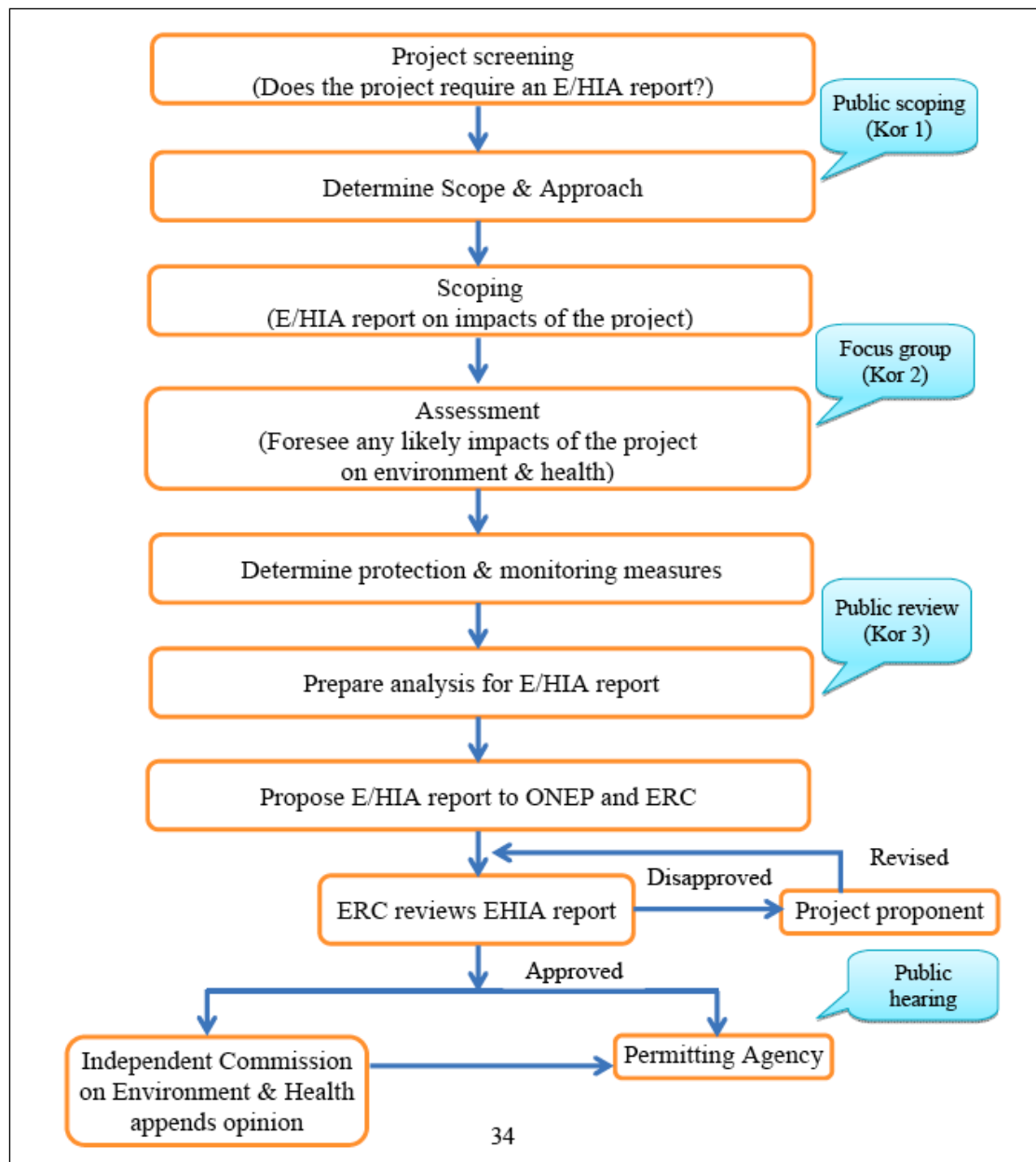
The level of participation is divided into four levels for each type of stakeholder and at various steps in the EIA process (depending on the nature of the projects and public participation needs). The four levels are:

1. Informed/public disclosure;
2. Consulted/public hearing;
3. Involved in making decision/public committee; and
4. Voted/public consensus.<sup>242</sup>

During the EHIA process for those projects that may have a significant impact of human health a four stage public participation process is adopted. The following table highlights the four “kor” or consultations required. These consultations are not necessarily public consultations and could include small stakeholder or expert meetings.

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<sup>242</sup> Pantumsinchai (2003).



## Recent Developments

The National Council for Peace and Order (NCPO) has been pursuing a decentralization agenda. The review process by an ERC can now be delegated to the provincial level. It is not clear from the process how the review process will be carried out at the provincial level. It is not clear if the provincial level review committees will need to be certified by ONEP and how the licensing and further approval process will undertaken.

Thailand's EIA system is currently being reviewed as part of the reform agenda of the government. In 2016, the National Council for Peace and Order also passed Order No. 9/2016, which amended Section 47, paragraph 4 of the NEQA. It is now possible for projects related to transportation, irrigation, public

rescue and protection, hospital and residential development to enter into construction contracts prior to the approval of an EIA.

The NCPO also used the emergency power to promulgate Orders 3/2016 and 4/2016. These orders allowed certain projects, such as Special Economic Zones, to avoid the planning law of Thailand. MONRE has amended the regulations that only power projects from 10 MW for biomass would require an EIA. If the power project was based on waste or garbage, then no EIA is required.

## Socialist Republic of Viet Nam

### Introduction

The Law of Environmental Protection was introduced in 1994 and was then updated with the Law on Environmental Protection (2005). In June 2014, the National Assembly passed the Law on Environmental Protection (2014) (LEP 2014),<sup>243</sup> which updated and replaced the Law on Environment Protection 2005.

- Law on Environmental Protection (2014)
- Decree on the Implementation of the LEP 2014 No 19/2015/ND-CP
- Decree on Environmental Protection, Strategic Environmental Assessment, Environmental Impact Assessment and Environmental Protection Plans No. 18/2015/ND-CP
- Circular on Environmental Protection, Strategic Environmental Assessment, Environmental Impact Assessment and Environmental Protection Plans No. 27/2015/TT-BTNMT
- Circular providing guidance on SEA Appraisal, EIA Appraisal in the Ministry of Agriculture and Rural Development No 09/2014/TT-BTNMT
- Decision of the regulation on the condition and provision of services of appraising EIA Reports No 19/2007/QD-BTNNT

The Ministry of Natural Resources and Environment (MONRE) was established in 2002 to manage Viet Nam's natural resources and environment.<sup>244</sup> The National Environmental Administration of MONRE helps to manage national environmental protection activities throughout Viet Nam and there are Departments of Natural Resources and Environment for the provinces and the five cities under central government administration.<sup>245</sup>

The Constitution of Viet Nam outlines the major elements of Viet Nam's government structure and responsibilities. Relevant to the issues of public participation in EIAs are Articles 2 and 14, which deal with human rights and citizens' rights. Article 30 also provides for a right to lodge complaints with competent agencies, organizations or persons for the illegal acts of agencies, organizations or individuals.

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<sup>243</sup> Socialist Republic of Viet Nam, Law on Environmental Protection, Số: 55/2014/QH13 (adopted 23 June 2014), available at: <https://luatminhkhue.vn/en/law/law-no-55-2014-qh13-dated-june-23--2014-of-the-national-assembly-on-environmental-protection.aspx> [hereinafter Vietnamese LEP (2014)].

<sup>244</sup> ABA (2014) p.812.

<sup>245</sup> ABA (2014), p.812.

## **Constitution of Viet Nam (2013)**

### **Article 43:**

Everyone has the right to live in a clean environment and has the obligation to protect the environment.

### **Article 53:**

Land, water resources, mineral resources, resources in the sea and airspace, other natural resources, and property managed or invested in by the State are public property, owned by all the people, and represented and uniformly managed by the State.

### **Article 63:**

(1) The State shall adopt environmental protection policies; manage and use natural resources in an efficient and sustainable manner; conserve nature and biodiversity; and take the initiative in preventing and controlling natural disasters and responding to climate change.

(2) The State shall encourage all activities for environmental protection and the development and use of new energy and renewable energy.

(3) Organisations and individuals that cause environmental pollution, natural resource exhaustion or biodiversity depletion shall be strictly punished and shall rectify and compensate for damage.

The LEP 2014 defines EIA:

Environmental impact assessment means analysis and forecast of impacts on the environment to be exerted by specific investment projects so as to work out measures to protect the environment when such projects are implemented.<sup>246</sup>

Article 3 of LEP 2014 outlines the requirements for SEA, EIA and EPP in Viet Nam for designated projects.<sup>247</sup> Article 19 provides that owners of projects must prepare EIAs.<sup>248</sup> These must be submitted to the competent state agencies for approval and must be formulated at the same time at the feasibility study reports of the projects. The principal contents of an EIA are outlined in Article 22.<sup>249</sup>

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<sup>246</sup> Vietnamese LEP (2014), Article 3.

<sup>247</sup> Vietnamese LEP (2014), Article 3.

<sup>248</sup> Vietnamese LEP (2014), Article 19.

<sup>249</sup> Vietnamese LEP (2014), Article 22.

## **Law on Environmental Protection (2014)**

### **Article 18. Objects subject to environmental impact assessment:**

(1) The following objects are subject to environmental impact assessment:

- (a) Projects falling under the competence of the National Assembly, Government or Prime Minister to decide on investment policy;
- (b) Projects using land of nature reserves, national parks, historical and cultural relic sites, world heritages, biosphere reserves or beautiful landscapes which have been ranked;
- (c) Projects likely to exert adverse environmental impacts.

(2) The Government shall promulgate a list of projects mentioned at Points b and c, Clause 1 of this Article.<sup>250</sup>

### **Article 19. Environmental impact assessment:**

(1) Owners of projects specified in Clause 1, Article 18 of this Law shall conduct environmental impact assessment or hire consultancy organizations to do so and take responsibility before law for results of environmental impact assessment.

(2) Environmental impact assessment shall be conducted in the stage of project preparation.

(3) Results of environmental impact assessment shall be expressed in the form of environmental impact assessment report.

(4) Expenses for the elaboration and appraisal of environmental impact assessment reports shall be paid from by investment capital sources by project owners.<sup>251</sup>

Consultation during the EIA process is required under LEP 2014, but only refers to communities that are directly affected by the project.<sup>252</sup> However, the procedures can be confusing as the role of MONRE is not clear when it comes to scoping, screening and preparation of the EIA Report.

Under Article 21(1) of LEP 2014, project owners are required to consult with “regulatory agencies, organizations and communities that are directly affected by the project.”<sup>253</sup> The result of the consultation is then to be included in the EIA Report.<sup>254</sup>

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<sup>250</sup> Vietnamese LEP (2014), Article 18.

<sup>251</sup> Vietnamese LEP (2014), Article 19.

<sup>252</sup> Vietnamese LEP (2014), Article 21.

<sup>253</sup> Vietnamese LEP (2014), Article 21(1).

<sup>254</sup> Vietnamese LEP (2014), Article 22(8).



## **Law on Environmental Protection (2014)**

### **Article 21. Consultation in the course of environmental impact assessment:**

(1) Consultation in the course of environmental impact assessment aims to finalize environmental impact assessment reports, minimize adverse impacts on the environment and human beings and ensure sustainable development of projects.

(2) Project owners shall consult agencies, organizations and communities that are directly impacted by projects.

(3) Projects for which consultation is not required include:

(a) Projects conformable with the planning of concentrated production, business or service zones which have had their environmental impact assessment reports approved for the stage of infrastructure construction investment;

(b) Projects on the list of state secrets.<sup>255</sup>

The LEP 2014 imposes an obligation on the project owner to carry out an EIA and to take “statutory responsibility for the conclusive result after carrying out such assessment.”

### **Procedure for EIA**

The LEP 2014 requires EIAs to be prepared at the time of the project’s feasibility study. One important aspect of the EIA process in Viet Nam is that MONRE is not formally involved in the screening and scoping steps and does not approve the ToR for the EIA. The first time that MONRE may become aware of a proposed development project is when the EIA is submitted to it under Article 23.<sup>256</sup> Viet Nam has the most comprehensive process for SEA in any of the ASEAN countries.

The Decree on Environmental Protection, Strategic Environmental Assessment, Environmental Impact Assessment and Environmental Protection Plans No. 18/2015/ND-CP (Decree 18/2015) and Appendixes I and II provide the list of projects requiring an SEA or EIA. This replaced a number of decrees relating to the previous regime on EIA. In addition MONRE has issued 22 EIA Technical Guidelines for various sectors.<sup>257</sup>

With regard to large infrastructure development, in particular hydropower, mining and economic land concessions, all of these would in theory be covered

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<sup>255</sup> Vietnamese LEP (2014), Article 21.

<sup>256</sup> Vietnamese LEP (2014), Article 23.

<sup>257</sup> IGES (2016), p.74.

by the requirement to conduct an SEA. In addition, an EIA would be required for projects falling into the following categories:

- Projects in which investment is decided by the National Assembly or Prime Minister;
- Hydropower project with a capacity of more than 1 MW;
- Oil and gas projects;
- Mineral exploitation with a annual volume of more than 50,000 m<sup>3</sup>; and
- Projects involving relocation and resettlement of more the 300 houses.

Economic land concessions are not specifically listed in Appendix II, but projects that change the use of forest areas or areas under two rice crops per year with an area of 10 – 50 ha (depending on type of forest) will require an EIA. Investment projects not requiring an EIA require an Environmental Protection Plan (EPP).<sup>258</sup>

The contents of the EIA Report are outlined in Article 22 of LEP 2014.

### **Law on Environmental Protection (2014)**

#### **Article 22. Principal contents of an environmental impact assessment report:**

- (1) Origin of the project, project owner and agency competent to approve the project; method of environmental impact assessment.
- (2) Assessment of selected technologies, work items and activities of the project which may exert adverse impacts on the environment.
- (3) Assessment of the status of the natural environment and socio-economic conditions of the locality in which the project is to be implemented, and of neighboring areas, and explanation about the suitability of the selected project implementation location.
- (4) Assessment and forecast of waste sources and impacts of the project on the environment and community health.
- (5) Assessment and forecast of and determination of measures to manage risks of the project to the environment and community health.
- (6) Waste treatment solutions.
- (7) Measures to mitigate impacts on the environment and community health.
- (8) Consultation results.
- (9) Environmental management and surveillance program.

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<sup>258</sup> LEP 2014, Article 29.

(10) Estimated costs of construction of environmental protection facilities and implementation of measures to mitigate environmental impacts.

(11) Plan on implementation of environmental protection measures.<sup>259</sup>

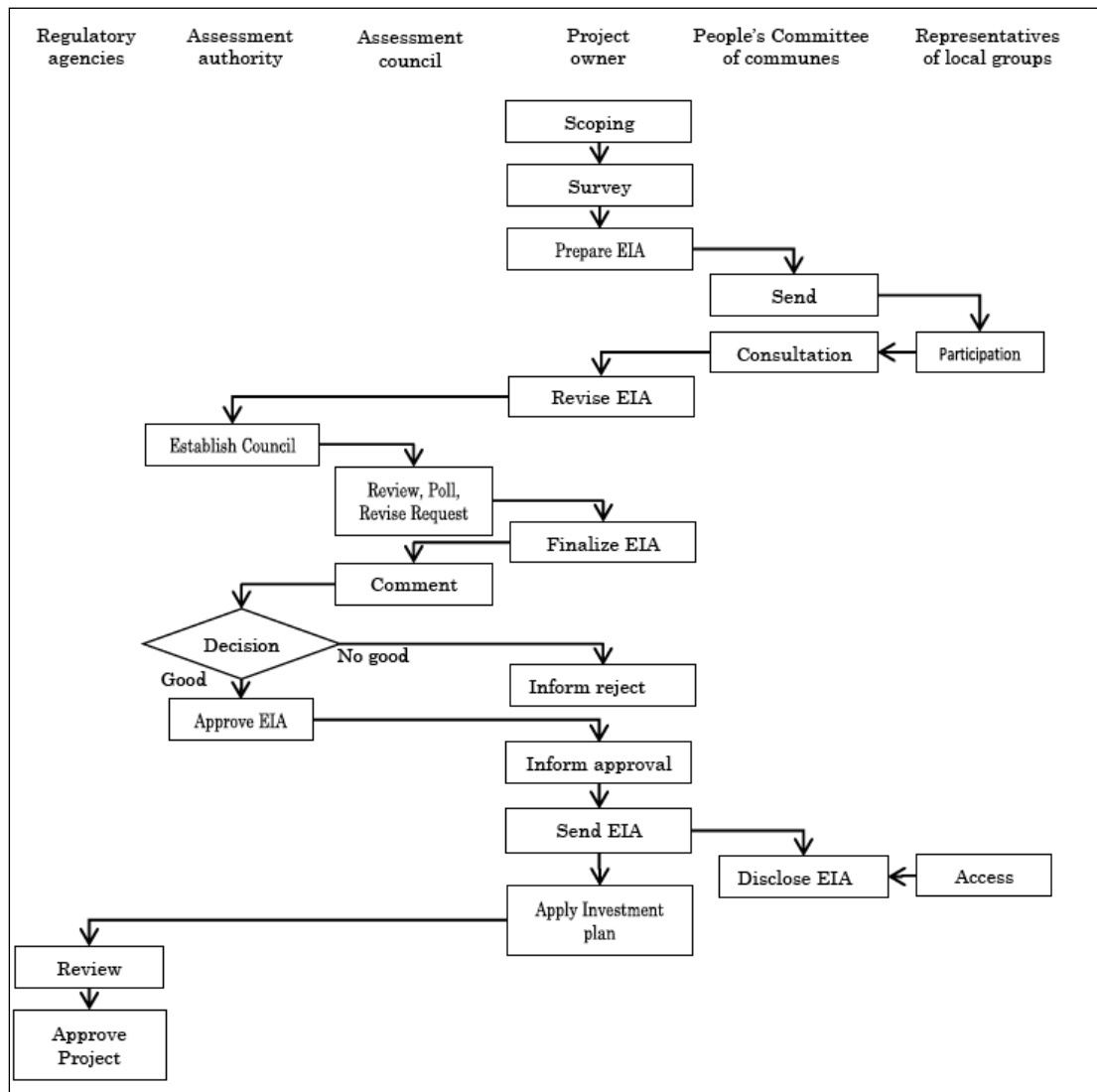


Figure: EIA Procedure in Viet Nam (IGES (2014), p.77)

Once the EIA is submitted to MONRE, it is assessed by either MONRE or the relevant provincial-level committee, subject to certain exceptions. Article 25 of LEP 2014 provides that the assessment of the EIA must be undertaken within 20 days of any final modification of the EIA.<sup>260</sup> This allows for comments to be referred back to the EIA consultant and for the EIA Report to be amended by the project proponent.

<sup>259</sup> Vietnamese LEP (2014), Article 22.

<sup>260</sup> Vietnamese LEP (2014), Article 25.

Article 23 of the LEP 2014 lists the projects for which MONRE has the authority to determine the EIA Report. This is further clarified by Article 14 of Decree 18/2015. Appendix II of Decree 18/2015 provides the list of projects and activities that are subject to EIA. Appendix III of Decree 18/2015 lists the projects for which MONRE is the EIA approval authority. Other investment projects are assessed and approved by the relevant Ministry, the Ministry of National Defense and the Ministry of Public Security (for national defense projects) and all other projects are assessed and approved by the provincial People's Committee.

Article 25 of LEP 2014 makes clear that other investments licenses and construction and operation permits may be granted only after EIA Reports have been approved.<sup>261</sup> Article 27 of LEP 2014 sets out the responsibilities of the project proponent to implement the environmental protection requirements in the EIA Report.<sup>262</sup>

### **Law on Environmental Protection (2014)**

#### **Article 25. Approval of environmental impact assessment reports:**

(1) Within 20 days after receiving an environmental impact assessment report which has been modified at the request of the appraising agency, the head of the appraising agency shall approve such report. In case of refusal to approve the report, he/she shall send a written reply to the project owner, clearly stating the reason.

(2) Decisions on approval of environmental impact assessment reports serve as a basis for competent authorities to:

- (a) Decide on investment in projects specified in Article 18 of this Law in case these projects are subject to investment decision in accordance with law;
- (b) Grant or modify licenses for mineral exploration or exploitation for mineral exploration and exploitation projects;
- (c) Approve exploration and field development plans for oil and gas exploration and exploitation projects;
- (d) Grant or modify construction permits for projects having construction work items subject to construction licensing;
- (dd) Grant investment certificates for projects other than those specified at Points a, b, c and d of this Clause.<sup>263</sup>

<sup>261</sup> Vietnamese LEP (2014), Article 25.

<sup>262</sup> Vietnamese LEP (2014), Article 27.

<sup>263</sup> Vietnamese LEP (2014), Article 25.

Previously, projects were allowed to commence operation only after the local commune had been informed of the approval and the contents of the EIA, the local population community had been publically informed on the environmental protection solutions and pollution discharge limits and that the EIA Report and conditions and the environmental protection measures have been fully implemented.<sup>264</sup> This has been removed from the requirements under LEP 2014.

The EIA approving authorities are also required to notify the Commune and People's Committees of the EIA approval and the content of the approval. There is no specific requirement that these documents, or the EIA documents themselves are public documents. There is also a requirement that certain projects not requiring SEA or EIA are required to make written environment protection commitments.<sup>265</sup>

## **Compliance and Enforcement**

Project proponents are required to comply with the terms of the EIA Approval and also any other conditions imposed by other licensing Ministries. Project proponents are also required to provide information to the communities in accordance with the provision of the LEP 2014, the Decree 18/2015 and other laws.

### **Article 26. Responsibilities of project owners after environmental impact assessment reports are approved:**

(1) To fulfill requirements of decisions on approval of environmental impact assessment reports.

These responsibilities are further detailed in Articles 12 and 16 of Decree 18/2015. The EIA consultant takes "legal responsibility for the EIA results." The project proponent also has other detailed obligations listed in Article 16.

### **Decree on Environmental Protection, Strategic Environmental Assessment, Environmental Impact Assessment and Environmental Protection Plans No. 18/2015/ND-CP (2015)**

#### **Article 12. Implementation of EIA:**

(3) The advisory organization in charge of EIA shall take responsibility to the project owner and take legal responsibility for the EIA results and information or figures in the EIA report.

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<sup>264</sup> LEP 2005 Article 23.1

<sup>265</sup> LEP 2014, Articles 29 and 33.

**Article 16. Responsibility of project owners pertaining to the approved EIA reports:**

(1) Adjust the investment project to ensure measures or environment protection works based on the approval for EIA report where necessary.

(2) Make a plan for management of environment of project on the basis of program for management and observation of environment suggested in the EIA report and posted at the premises of the People's Committee of the commune where the consultation is taken place when implementing EIA according to guidance of the Ministry of Natural Resources and Environment.

(3) Strictly satisfy requirements prescribed in Article 26 and Article 27 of the Law on Environment protection.

(4) Send plans for testing operation of waste treatment works serving the operation phase (every phase or the entire project) before conducting the testing operation to organizations where the consultation is taken place or EIA report-approving authority (hereinafter referred to as approving authority) for at least ten (10) working days. The testing operation shall last up to 06 months; the extension of testing operation period must be approved by the approving authority.

(5) File, approve and implement the plan for hydroelectric reservoir cleaning before filling if the project has construction work of storage ponds or reservoirs; the reservoirs shall be filled after the approving authority carries out an inspection and grant a written approval.

(6) With regard to cases prescribed in column 4 Appendix II of this Decree, the project owner must send a report on results of environment protection works serving the operation phase on the basis of approved EIA report and approval for amendment (if any) sent to the approving authority for verification and confirmation of finished project before putting the project into official operation. With regard to project of investment having multiple phases, the results of environment protection works serving the operation phase shall be reported according to every phase of the project.

(7) Send a report on amendments and only implement amendments related to scope, scale, capacity, production technology, environment protection works and measures of projects after receiving the written approval issued by the approving authority.

The projects listed in Column 4 of Appendix II of the Decree mainly relate to those projects that would be likely to have detailed EMPs and pollution control works. These need to be verified before the operation of the project can commence.

Environmental management issues have to be addressed in EIA Reports and

the project proponent is required to prepare an Environmental Management and Monitoring Program (EMMP). This EMMP is required to document the elements of an environmental management plan including budget for environmental management activities and requirements for institutional arrangements.

The LEP 2014 provides that projects and activities required to undertake an EIA shall report their environmental information to environmental management agencies. Articles 130 and 131 require certain environmental information to be made public, including EIA Reports, SEA Reports and EPPs. However it is not clear if the draft EIAs and supporting information including EMPs are to be made available prior to approval of the project.

### **Law on Environmental Protection (2014)**

#### **Article 128. Environmental information:**

(1) Environmental information includes data on environmental components, impacts on the environment, environmental protection policies and laws, and environmental protection activities.

(2) Environmental database means a collection of environmental information which is developed, updated and maintained to meet requirements on information access and use for environmental protection and public interests.<sup>266</sup>

#### **Article 130. Publicization and provision of environmental information:**

(1) Organizations and individuals that manage industrial parks, export processing zones, hi-tech parks, industrial complexes or production, business and service establishments obliged to make environmental impact assessment reports shall report environmental information under their management to environmental management agencies under provincial-level People's Committees.<sup>267</sup>

#### **Article 131. Publicization of environmental information:**

- (1) Environmental information to be publicized includes:
- (a) Strategic environmental assessment reports, environmental impact assessment reports and environmental protection plans;
  - (b) Information on waste-generating sources, wastes and waste treatment;
  - (c) Seriously or particularly seriously polluted or degraded areas, and areas prone to environmental incidents;

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<sup>266</sup> Vietnamese LEP (2014), Article 128.

<sup>267</sup> Vietnamese LEP (2014), Article 130.

(d) Environmental reports;

(dd) Environmental protection inspection and examination results.

The information prescribed in this Clause but on the list of state secrets shall not be publicized.

(2) The forms of publicization must ensure convenience for information recipients.

(3) Agencies publicizing environmental information shall take responsibility before law for the accuracy of such information.<sup>268</sup>

Decree 19/2015 also requires the following provision of environmental information to the community.

**Decree on the Implementation of the LEP 2014 No 19/2015/ND-CP (2015)**

**Article 51. Providing environmental information for the residential community:**

(1) The environmental information is provided at least once a year periodically, including:

(a) Legal normative document on environment;

(b) Report on the reality of national and local environment; specialized environmental reports made and publicized by the state management authorities on natural resources and environment;

(c) List of facilities causing severe environmental pollution, areas with severely polluted or degraded environment, areas prone to environmental incidents made and publicized by the state management authorities on natural resources and environment;

(d) List and information on waste sources and types of waste prone to cause harm to human health and environment prepared and publicized by the state management authorities on natural resources and environment;

(dd) Publications and printed matters on environmental themes and environmental communication materials and relevant issues;

(e) Result of inspection, examination and handling of violation of the services, business and production facilities in the residential area;

(g) Environmental protection activities of the services, business and

<sup>268</sup> Vietnamese LEP (2014), Article 131



production facilities in the residential area;

(h) License related to the extraction, use and protection of natural resources and environment of the services, business and production facilities in the residential area.

## Public Participation

Previously, Article 20.8 of LEP 2005, required the opinions of the commune/ward or townships People's Committee and representatives of the "population communities" in the project location, including opinions against the project location or environmental protection and mitigation measures to be included in the EIA. However under LEP 2014, consultation is now only required with "agencies, organizations and communities that are directly impacted by projects."<sup>269</sup>

### Law on Environmental Protection (2014)

#### **Article 21. Consultation in the course of environmental impact assessment:**

(1) Consultation in the course of environmental impact assessment aims to finalize environmental impact assessment reports, minimize adverse impacts on the environment and human beings and ensure sustainable development of projects.

(2) Project owners shall consult agencies, organizations and communities that are directly impacted by projects.

(3) Projects for which consultation is not required include:

(a) Projects conformable with the planning of concentrated production, business or service zones which have had their environmental impact assessment reports approved for the stage of infrastructure construction investment;

(b) Projects on the list of state secrets.<sup>270</sup>

Article 12 of Decree 18/2015 provides that the written opinions of those consulted must be "sufficiently and honestly" included in the meeting minutes. However there is no express requirement for the minutes to be attached to the EIA report.

Article 12 of Decree 18/2015 also outlines the procedures for consultation whereby consultation is to occur with communities that are under the direct

<sup>269</sup> Vietnamese LEP (2014), Article 21.

<sup>270</sup> Vietnamese LEP (2014), Article 21.

impact of the project in the form of a “community meeting co-chaired by the project owner and the People’s Committee of the commune.” There are no legislative provisions regarding the enforcement of these obligations, and specifically, there is no statutory mechanism to ensure the accurate disclosure of the environmental impacts of a project (during the community meeting) to the consulted parties. It is also not clear what information is required at this meeting.

**Decree on Environmental Protection, Strategic Environmental Assessment, Environmental Impact Assessment and Environmental Protection Plans No. 18/2015/ND-CP (2015)**

**Article 12. Implementation of EIA:**

(4) The project owner shall consult with the People’s Committee of communes, wards and towns (hereinafter referred to as communes) where the project is carried out, with organizations or community under the direct impact of the project; research and receive objective opinions and reasonable requests of relevant entities in order to minimize the negative effects of the project on the natural environment, biodiversity and community health.

(5) The People’s Committee of the commune where the project is carried out and the organizations under direct impact of the project shall be consulted according to procedures below:

(a) The project owner shall send EIA reports to the People’s Committee of the commune where the project is carried out and organizations under the direct impact of the project together with the written requests for opinions.

(b) Within 15 working days, from the date on which the EIA reports are received, the People’s Committee of the commune and organizations under the direct impact of the project shall send their responses if they do not approve the project.

(6) The consultation with the community under the direct impact of the project shall be carried out in the form of community meeting co-chaired by project owner and the People’s Committee of the commune where the project is carried out together with the participation of representatives of Vietnamese Fatherland Front of communes, socio-political organizations, socio-professional organizations, neighborhoods, villages convened by the People’s Committee of the commune. All opinions of delegates attending the meeting must be sufficiently and honestly stated in the meeting minutes.

(7) The Ministry of Natural Resources and Environment shall provide guidance on forms of application for EIA report assessment; formulation and issuance of EIA technical guidance.

Circular 27/2015 also provides some details on the form of the consultation with the affected commune.

**Circular on Environmental Protection, Strategic Environmental Assessment, Environmental Impact Assessment and Environmental Protection Plans No. 27/2015/TT-BTNMT (2015)**

**Article 7. Consultation during the implementation of EIA:**

- (1) The project owner must carry out the consultation as prescribed in Clauses 4, 5 and 6 Article 12 of Decree No. 18/2015/NĐ-CP.
- (2) The request for consultation sent by the project owner shall use the form prescribed in Appendix 2.4 of this Circular.
- (3) The feedback on request for consultation sent by the consulted agency shall use the form prescribed in Appendix 2.5 of this Circular.
- (4) The meeting minutes of consultation with the community under the direct impact of the project shall use the form prescribed in Appendix 2.6 of this Circular.
- (5) During the consultation process, the project owner must ensure that the request for consultation enclosed with the EIA report shall be sent to the consulted agency.
- (6) Deadline for the feedback of the consulted agency is within 15 working days, from the date on which the request for consultation is sent.
- (7) If the project is carried out in at least 02 communes, the project owner may hold the meeting of consultation with the community under direct impact of the project in each commune or inter-commune.

**Monitoring and Compliance**

LEP 2014 places a strong emphasis on self-monitoring and reporting with regard to EIA compliance. It is the assumed responsibility of the project owner to “comply with the requests specified in the approval of their environmental impact assessment.”

Decree 18/2015 requires that environment protection works must be reviewed and approved prior to operation. This is further detailed in Articles 10, 12 and 13 of Circular 27/2015. There are no details the Decree or Circular 27/2015 that would require regular inspections or reporting.

**Article 17. Inspection and confirmation of environment protection works serving the operation phase of projects:**

(1) The inspection of environment protection works serving the operation phase of a project shall be carried out by an Inspectorate which is established by the Head of the approving authority or by their authorized agency.

The LEP 2014 also allows for the owners of industrial parks to assess and approved the EIA Report for projects within the industrial park. Article 11 of Circular 27/2015 provides that the Provincial People's Committee may authorise the management board of an industrial park to assess and approve the EIA report in certain circumstances.

**Circular on Environmental Protection, Strategic Environmental Assessment, Environmental Impact Assessment and Environmental Protection Plans No. 27/2015/TT-BTNMT (2015)**

**Article 11. Authorizing the management board of the industrial parks to assess and approve the EIA report:**

(1) The People's Committee of the province may authorize the management board of the industrial parks to assess and approve the EIA report if the management board of the industrial parks has an office of environment management and at least 05 employees specialized in environment protection on the payroll.

(2) The authorization prescribed in Clause 1 of this Article is only applicable to projects under competence in assessment and approval for the EIA report of the People's Committee of the province which are invested to industrial parks having EIA reports of infrastructure construction projects approved, having concentrated waste treatment works constructed and having environment protection works certified by the competent agency as prescribed.

There is still the requirement for MONRE to approve this delegation, and it is subject to reporting requirements under Article 11, Clause 5.

Although not specifically referred to in the EP Law 2015 and the related Decree and Circular, the community has a right of supervision for investment projects. This supervision is contained in the relevant circulars from the Prime Minister's Office. There are three instruments that may assist the communities in the monitoring and compliance of projects subject to EMPs.

- The Prime Minister's Decision No. 80/2005/QĐ-TTg promulgating the Regulation on Investment Supervision by the Community (just Vietnamese version)
- Joint Circular No. 04/2006/ TTLT-BKHĐT-UBTUMTTQVN-BTC detailing Decision No. 80/2005/QĐ-TTg (just Vietnamese version);

- The Minister's Decree No. 84/2015/ND-CP on supervision, assessment of investment
- The Ordinance No. 34/2007/PL-UBTVQH11 on exercising of democracy in communes, wards and townships

The basic contents of Decision 80/2005/QĐ-TTg and Joint Circular 04/2006 allows for those projects to be “supervised” by the community. This defined in the Decision 80/2005.<sup>271</sup>

(1) Defining investment supervision by the community

Investment supervision by the community is voluntary activities of the residents within the commune, ward, or town (hereinafter referred to as commune) meant to monitor, inspect the adherence to regulations on investment management of relevant entities during the investment process; discover and request competent authorities to deal with violations of regulations on investment (except for classified projects of the State as prescribed by law).

(2) Scope of investment supervision by the community:

(a) Programmes and projects (hereinafter referred to as investment projects) funded by state budget and not related to national secrets influences community;

(b) Investment projects funded by budget and energy of community or other budgets directly fund for community;

(c) Investment projects funded by other budgets.

The Joint Circular No. 04/2006 also states that all of investment projects in a commune must be supervised by the community.<sup>272</sup>

**Joint Circular No. 04/2006/ TTLT-BKHĐT-UBTUMTTQVN-BTC detailing Decision No. 80/2005/QĐ-TTg (2006)**

**(3) Subjects of investment supervision by the community:**

(3.1) Contents of public supervision of public investment programs/projects, PPP projects; investment projects using loan capital guaranteed by the government, loan capital secured with state-owned property, land use right, capital from administration development fund, capital for development of state-owned enterprises.

(a) Monitoring, inspection of conformity of the decision on investment policies, investment decision with socio-economic development planning, land use planning, relevant planning, and

<sup>271</sup> Article 1 and 2, Decision No. 80/2005/QĐ-TTg.

<sup>272</sup> Article 50. Decree No. 84/2015/ND-CP.

investment plans within the communes as prescribed by law;

(b) Monitoring and inspecting the investor's adherence to regulations on: land boundaries and land use; detailed site plan, architectural and construction plan; environmental protection, land clearance, compensation, and relocation plan; investment plan and progress;

(c) Discovery of acts that infringe upon public interests; negative impacts of the project to the living environment of the community during the investment stage or operation of the project;

(d) Discovery of act of wastefulness that causes loss of capital and property of the project;

(e) Transparency during the investment process.

(3.2) Contents of public supervision of investment in projects funded by other sources of capital shall comply with Point a, Point b, Point c, and Point dd Clause 1 of this Article.

(3.3) Contents of public supervision of investment in programmes/projects having contributions of the public, projects funded by commune budget or direct sponsorship for communes:

(a) The contents as mentioned above;

(b) Monitoring, inspection of adherence to technical regulations and processes, norms and categories of supplies; monitoring and inspection of acceptance result and financial statement of the project.

## Transboundary issues in Environmental Impact Assessment

There is no single, unified body of international law or treaty governing EIA.<sup>273</sup> Principle 17 of the Rio Declaration<sup>274</sup> was a clear international statement on the importance of EIA (as a national instrument) as a way to assess the potential impacts of those projects that are likely to have a significant impact on the environment. Although most domestic EIA laws rely on the principles outlined in the Rio Declaration to assess impacts, it has been recognised that there are gaps between these laws and the practice of environmental impact assessment.

Project proposals with potential transboundary impacts have some unique assessment and public participation issues.<sup>275</sup> The way that project proponents engage stakeholders in neighbouring countries will require the involvement of the national governments, as well as a range of diplomatic and legal considerations.<sup>276</sup>

There is recognition under international law that countries have an obligation to “undertake an environmental impact assessment where there is a risk that the proposed [project] may have a significant adverse impact in a transboundary context, in particular, on a shared resource.”<sup>277</sup> In the International Court of Justice (ICJ) decision in a case between Argentina and Uruguay, the ICJ recognised EIAs as practice which has become part of general international law in regards to large-scale industrial developments on shared international watercourses with the potential for transboundary pollution is a very significant outcome.<sup>278</sup> This is despite the fact that there was no obligation for an EIA in the Statute yet both Parties agreed it was necessary.<sup>279</sup> It could be said that a general obligation exists to conduct EIAs in such circumstances, but that their scope and content is not defined.<sup>280</sup> There is also no specification within this duty to conduct public participation with affected populations.<sup>281</sup>

ASEAN has already tried to address activities, such as pollution, haze, trade in endangered species and natural disasters that are likely to have a

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<sup>273</sup> Charles M. Kersten, Note, Rethinking Transboundary Impact Assessment, Yale Journal of International Law volume 34 (2009), p.178.

<sup>274</sup> All members of ASEAN except Brunei are signatories to the Rio Declaration.

<sup>275</sup> The list of activities likely to have transboundary impacts, for which notification is required under the Espoo Convention is defined in Articles 2 and 3 and Appendix I List of activities. [http://www.unece.org/env/eia/about/eia\\_text.html#appendix1](http://www.unece.org/env/eia/about/eia_text.html#appendix1).

<sup>276</sup> Mairi Dupar and Nathan Badenoch World Resources Initiative, Environment, Livelihoods, and Local Institutions: Decentralization in Mainland Southeast Asia (2002), available at: [http://pdf.wri.org/decentralization\\_msea.pdf](http://pdf.wri.org/decentralization_msea.pdf).

<sup>277</sup> Pulp Mills Case (Provisional Measures)(Argentina v. Uruguay) ICJ Reports 2006, p.204

<sup>278</sup> See unpublished paper by Remy Kinna, and McIntyre (2011) and McIntyre (2010).

<sup>279</sup> Pulp Mills on the River Uruguay (Argentina v Uruguay) ICJ Advisory Opinion (Order of 20 April, 2010) I.C.J. Reports 2010, at Par 203 & 204.

<sup>280</sup> Pulp Mills on the River Uruguay (Argentina v Uruguay) ICJ Advisory Opinion (Order of 20 April, 2010) I.C.J. Reports 2010, at Par 205.

<sup>281</sup> Pulp Mills on the River Uruguay (Argentina v Uruguay) ICJ Advisory Opinion (Order of 20 April, 2010) I.C.J. Reports 2010, at Par 204.

transboundary impact. However, there exist activities and projects that whilst being confined to only one country may have an impact beyond that country's borders. This could include hydropower projects, coal-fired power stations, nuclear developments and industrial or resource exploitation projects. These are the projects or activities that may have a transboundary impact that should be properly assessed prior to approval.

In the Mekong Region, there are various agreements and mechanisms for considering transboundary environmental issues, but no agreement for transboundary EIA yet exists. As such, there is no regional framework for EIAs for proposed projects that have transboundary impacts. The Mekong River Commission (MRC) has extensive experience in water management matters that have transboundary impacts. In 2002 the MRC developed a draft framework for Transboundary EIA that remains the most comprehensive proposal in the region to date.

The UN Convention on the Protection and Use of Transboundary Watercourses and International Lakes calls on member states to pass legislation that will apply EIA to treaty waters.<sup>282</sup> The UN Convention on the Law of the Non-Navigational Uses of International Watercourses only provides for notification concerning planned measures with possible adverse effects. Such information may include the results of any EIA.<sup>283</sup> Whilst there is an obligation within this Convention to "protect and preserve the ecosystems of the international watercourses," there is no requirement to conduct transboundary environmental assessment.<sup>284</sup>

The UN Economic Commission for Europe (UN ECE) has been at the forefront of developing mechanisms that both support and enhance the role of domestic EIA law, as well as examining ways that EIA can assist in the regional context. The three most internationally recognised instruments relating to environmental assessment are the following:

- The Convention of Environmental Impact Assessment in a Transboundary Context (Espoo Convention)
- The Protocol on Strategic Environmental Assessment (the SEA Protocol)
- The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention)

Each of these international instruments draws from the existing international environmental laws norms. Each of these instruments reflects the procedural nature of EIA.

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<sup>282</sup> Kersten (2009), p.180.

<sup>283</sup> Article 12. Viet Nam is the only ASEAN Member State that is a signatory to this Convention.

<sup>284</sup> Article 20.



The Economic Commission for Europe has adopted a Guidance on Public Participation in Environmental Impact Assessment in a Transboundary Context (the ECE Guidance) to support the two key European intergovernmental agreements on EIA and public participation – the 1991 Convention on Environmental Impact Assessment in a Transboundary Context (the Espoo Convention) and the 1998 Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the Aarhus Convention).<sup>285</sup>

### **The Convention of Environmental Impact Assessment in a Transboundary Context (Espoo Convention)**

As a consequence of the adoption of EIA in most member states in Europe, in 1987 a Group of Experts from the UN Economic Commission for Europe (UN ECE) elaborated on EIA in a transboundary context. The Convention was negotiated from 1988 to 1990 and the Convention was opened for ratification from 3 September 1991. The Convention entered into force on 10 September 1997. At present there are 44 parties to the Espoo Convention, including the EU, USA and the Russian Federation.

The Espoo Convention is a preventative mechanism to avoid, reduce and mitigate significant environmental impacts intended to help make development sustainable by promoting international cooperation in assessing the likely impact of a proposed activity on the environment. It applies, in particular, to activities that could impact the environment in other countries.<sup>286</sup>

It is important to note that the Espoo Convention is a process-oriented convention. Under the Espoo Convention the Parties shall take “all appropriate and effective measures to prevent, reduce and control significant adverse transboundary environmental impact from proposed activities.”<sup>287</sup>

The requirements under the Espoo Convention extend to an obligation to require project level EIA, notify potentially affected countries, provide access to information to potentially affected parties and allow comments and be informed on the final decision with respect to the project.<sup>288</sup> The Espoo Convention provides a list of activities in Appendix I that are covered by the Convention and a minimum list of information that should be included in the EIA in Appendix II.

The Espoo Convention is important as it is based on international environmental law norms and provides access to information and the right to

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<sup>285</sup> UNECE (2006) Guidance on Public Participation in Environmental Impact Assessment in a Transboundary Context, ECE/MP.EIA/7.

<sup>286</sup> Vesna Kolar Planinšič (2016), Ministry of the Environment and Spatial Planning of the Republic of Slovenia. Various presentations to the RTWG on EIA.

<sup>287</sup> Espoo Convention, Article 2.

<sup>288</sup> These are contained in Articles 3 to 6 of the Espoo Convention.

participate and be informed of potential adverse impacts from activities having a transboundary impact.

### **Protocol on Strategic Environmental Assessment (the SEA Protocol)**

In addition to the Convention on EIA in a Transboundary Context, the Parties negotiated the SEA Protocol. This SEA Protocol entered into effect on 11 July 2010. The SEA covers the environmental assessment of policies or programmes by member governments which are likely to have significant environmental, including health, effects.<sup>289</sup>

Under the SEA Protocol, Strategic Environmental Assessment is defined to mean:

The evaluation of the likely environmental, including health effects, which comprises the determination of the scope of an environmental report and its preparation, the carrying out of public participation and consultations, and the taking into account of the environmental report and the results of the public participation and consultations in a plan or programme.<sup>290</sup>

The SEA Protocol requires the preparation of a SEA for plans and policies within their jurisdiction. Public participation and consultation are required by the member Parties.<sup>291</sup> The SEA Protocol refers to “early, timely and effective opportunities for public participation.” It also requires that the public, including relevant NGOs, be provided with the necessary information to allow them to comment “within a reasonable time frame.”

There is also a requirement from transboundary consultation, if it is likely that the implementation of the plan or policy will have a transboundary impact.<sup>292</sup>

### **Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention)**

One of the most important elements of EIA is the need for effective public participation. In order to achieve effective public participation, there is a need for the community to have access to the information prepared by the project proponent and by government concerning the project and its potential impact. Principle 10 of the Rio Declaration reflects these fundamental requirements.

The Aarhus Convention was concluded as part of the UN ECE “Environment for

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<sup>289</sup> SEA Protocol, Article 4.

<sup>290</sup> SEA Protocol, Article 2.

<sup>291</sup> SEA Protocol, Article 8.

<sup>292</sup> SEA Protocol, Article 10.

Europe” process and entered into force on 30 October 2001.<sup>293</sup> It has been recognised as having global significance for the promotion of environmental governance.<sup>294</sup>

The Aarhus Convention contains three main pillars:

- The rights of the public to access information about the environment and development;
- The requirement for public participation in environmental assessment of specific development projects;<sup>295</sup> and
- The rights for the public’s access to courts and tribunals for justice in environmental matters.<sup>296</sup>

As of 7 January 2014, there were 46 Parties to the Convention, 33 Parties to the Protocol on Pollutant Release and Transfer Registers (PRTRs) and 27 Parties to the amendment on public participation in decisions on the deliberate release into the environment and placing on the market of genetically modified organisms (GMOs).<sup>297</sup>

The Preamble of the Convention referred to Principle 1 of the Stockholm Declaration on the Human Environment and Principle 10 of the Rio Declaration on Environment and Development. Principle 10 states:

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

The Aarhus Convention recognised that the engagement of the public is vital for creating an environmentally sustainable future. This recognition has been continued with the Meeting of the Parties to the Aarhus Convention. One of the strengths of the Aarhus Convention is the ability of the parties to continue with negotiations to cover additional matters under the Aarhus Convention.

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<sup>293</sup> <http://www.unece.org/env/pp/welcome.html>

<http://europa.eu.int/comm/environment/aarhus>.

<sup>294</sup> Donna Craig and Michael Jeffrey, Non-lawyers and Legal Regimes: Public Participation for Ecologically Sustainable Development, in *The Future of International Environmental Law* (David Leary and Balakrishna Pisupati, editors) (2010), p.105.

<sup>295</sup> These matters are listed in Annex 1 of the Aarhus Convention. These matters also include any activity not specifically covered in the Annex, where public participation is provided for under an environmental impact assessment procedure in accordance with national legislation.

<sup>296</sup> Aarhus Convention, Articles 4-9.

<sup>297</sup> Detailed information about ratification of the Aarhus Convention is available at <http://www.unece.org/env/pp/ratification.html>.

This includes a Protocol to enhance public access to information through the establishment of coherent, integrated, nationwide pollutant release and transfer registers (PRTRs).

Additionally the United Nations Environment Programme (UNEP) Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters reflect the Aarhus principles at the global level.<sup>298</sup> It can be considered that the core principles of the Aarhus Convention reflect a norm of customary international environmental law and are foundation pillars for better environmental governance and the achievement of sustainable development.<sup>299</sup>

## **Mekong River Agreement**

The 1995 Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin (the Mekong Agreement), requires member countries to provide notification and have prior consultations to discuss transboundary impacts for water projects in the Mekong Region that may have an impact on neighbouring countries, before any commitment is made to proceed.<sup>300</sup>

The Mekong Agreement was signed in Chiang Mai, Thailand on 5 April 1995. The UN had established the Mekong Committee in 1959, but the Mekong Agreement reflected the decision by Cambodia, Lao PDR, Thailand and Viet Nam to establish a regional framework for cooperation along the Mekong Basin.

From the outset the Mekong Agreement was focussed on sustainable development, utilization, conservation and management of the Mekong Basin.<sup>301</sup>

### **Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin (1995)**

#### **Article 3. Protection of the Environment and Ecological Balance:**

To protect the environment, natural resources, aquatic life and conditions, and ecological balance of the Mekong River Basin from pollution or other harmful effects resulting from any development plans and uses of water and related resources in the Basin.

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<sup>298</sup> Detailed information on the history of the Aarhus Convention is available at <http://www.unece.org/fileadmin/DAM/env/pp/welcome.html>. Chisinau Declaration As adopted on 1 July 2011.

<sup>299</sup> Craig and Jeffrey (2010), p.123.

<sup>300</sup> Mekong River Commission, Transboundary EIA, <http://www.mrcmekong.org/about-mrc/programmes/environment-programme/transboundary-eia>.

<sup>301</sup> Preamble, Mekong Agreement.

**Article 4. Sovereign Equality and Territorial Integrity:**

To cooperate on the basis of sovereign equality and territorial integrity in the utilization and protection of the water resources of the Mekong River Basin.

The key to the successes (and failures) of the Mekong Agreement has been the need for all parties to act cooperatively in matters that impinge on the right of each member state to utilize the Mekong River resources. Additionally the Mekong Agreement implicitly recognizes that there are many actions that will have a transboundary impact, not least hydropower, but also shipping, irrigation and fishing.

The Mekong Agreement established the Mekong River Commission (MRC), which includes the Council, the Joint Committee and the Secretariat.<sup>302</sup> Since that time, the work of the MRC has expanded to include significant programmes to assess and research on activities along the Mekong Basin. The MRC in 2011 adopted the Integrated Water and Related Resources Management-based Basin Development Strategy and its 2011-2015 Strategic Plan.

A key feature of the Mekong Agreement from a transboundary EIA perspective is the requirement for prior consultation. Prior consultation is defined in the Mekong Agreement:

**Prior consultation:** Timely notification plus additional data and information to the Joint Committee as provided in the Rules for Water Utilization and Inter-Basin Diversion under Article 26, that would allow the other member riparians to discuss and evaluate the impact of the Proposed use upon their uses of water and any other affects, which is the basis for arriving at an agreement. Prior consultation is neither a right to veto the use nor unilateral right to use water by any riparian without taking into account other riparians' rights.<sup>303</sup>

It must be recognised that the MRC has, over the past 20 years, contributed greatly to the study of the Mekong River Basin. Many of its projects examine the impact of development and existing uses on the Mekong Basin. Recently, the work of the MRC has been dominated by discussion of the expansion of hydropower developments both on the main stream Mekong River and its tributaries.

The success (and failure) of the MRC is that it has adopted a cooperative approach based on promoting consensus and cooperation over confrontation. The MRC is also heavily reliant of foreign donors. It has been suggested that this reliance has created a "sense of alienation of the MRC to its member states."<sup>304</sup>

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<sup>302</sup> Chapter IV.

<sup>303</sup> The Mekong Agreement, Chapter 2

<sup>304</sup> Only One Mekong, p.961.

## **Procedures for Notification, Prior Consultation and Agreement**

One of the key features of the Mekong Agreement, as mentioned above, is the requirement of prior consultation. This was further enhanced by the Procedures for Notification, Prior Consultation and Agreement (PNPCA) that were adopted in 2003.

The PNPCA were adopted to promote better understanding and cooperation among the MRC member countries. The guiding principles of the PNPCA are:

- Sovereign equality and territorial integrity;
- Equitable and reasonable utilization;
- Respect for rights and legitimate interests;
- Good faith; and
- Transparency.<sup>305</sup>

The aim of PNPCA, similar in substance to the notification requirements under the Espoo Convention, was to provide other member countries with prior notification of development that would likely have a transboundary impact. The PNPCA also allows the impacted party an opportunity to consider the information contained in the notification and to request further information or clarification. The time for prior consultation is set at six months with the possibility of extension.<sup>306</sup> Approval is considered on a case-by-case basis.<sup>307</sup>

There is a role for both the MRC and the MRC Joint Committee to assist in the transmittal process and also to assist with the consultation process.<sup>308</sup> The PNPCA process makes good use of the existing institutional arrangements, including the National Mekong Committees established under the Mekong Agreement.

The value of the PNPCA process cannot be underestimated, even if it only applies for a limited range of projects and has been the subject of criticism.<sup>309</sup> What is clear from the PNPCA and the Mekong Agreement is that member countries have agreed to allow prior notification and prior consultation for activities and projects that may have transboundary impacts. It also recognised that a secretariat body was necessary to assist in the process of notification and consultation.

## **Consideration of Transboundary EIA by the MRC**

Attempts have been made by the MRC to advance the idea of a transboundary EIA framework. In 1998, the MRC agreed to formulate and adopt a system for

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<sup>305</sup> PNPCA, Article 3.

<sup>306</sup> See PNPCA, Article 5.5

<sup>307</sup> PNPCA, Article 6.

<sup>308</sup> PNPCA, Article 5.3.3

<sup>309</sup> PNPCA, Article 4.

environmental assessment in a transboundary context.<sup>310</sup> Following a report prepared by Environmental Resources Management in April 2002, a guideline report was presented to the MRC.<sup>311</sup> The ERM Report consisted of a Background Report and a Proposed System Report.

The Proposed System Report noted that the policy documents were “not intended to supersede or replace existing EIA requirements in each country” but were proposed as a complementary framework applicable to those projects that had the potential to cause transboundary impacts.<sup>312</sup>

The Proposed System Report was broken into three parts:

- A sub-system for SEA;
- A Policy of EIA in a Transboundary Context for the MRC; and
- A sub-system for EIA.

The Proposed System also had a number of elements:

- Proposed Policy on EIA in a transboundary context;
- Guidelines on SEA;
- Guidelines on Cumulative Impact Assessment;
- Guidelines on Public Participation in Environmental Assessment;
- Environmental Impact Statement Review Criteria;
- Sector Guidelines; and
- Training Program to support the implementation of the EIA/SEA System.

As King noted, since the presentation of these comprehensive reports to the MRC in 2002 little action has been taken. In 2007, the Thai National Mekong Committee raised a number of concerns with the EIA framework.<sup>313</sup> In 2009, the Environmental Law Institute conducted a further review<sup>314</sup> and assessed the EIA/SEA Proposed Framework in the context of global best practice and provided a revised draft framework.<sup>315</sup> The MRC remained committed to the implementation of a transboundary EIA framework in the 2006-2010 Strategic Plan and the 2011 – 2015 Strategic Plan. However since the 2009 review by the Environmental Law Institute, there has been no advancement on the adoption of the Framework.

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<sup>310</sup> P. King, Transboundary EIA and Climate Change in the Greater Mekong Subregion (GMS), presented at the Stimson Centre Conference, Finding Solution to Equitable Hydropower Development Planning in the Lower Mekong Basin, Chiang Rai, 2014

<sup>311</sup> Environmental Resources Management, Development of an EIA/SEA System for the Lower Mekong Basin, April 2002 (ERM Report)

<sup>312</sup> Environmental Resources Management, Development of an EIA/SEA System for the Lower Mekong Basin Proposed System, April 2002 (the Proposed System Report).

<sup>313</sup> King, p.2.

<sup>314</sup> Establishing a Transboundary Environmental Impact Assessment Framework for the Mekong River Basin, an Assessment of the Draft Mekong River Commission TbEIA Framework, Environmental Law Institute, April 2009.

<sup>315</sup> King, p.1.

## Greater Mekong Subregional Environment Agreement

There was an attempt to develop a GMS Environment Agreement as a regional response to climate change in 2009. In January 2009, the World Wildlife Fund (WWF) commissioned a background study reviewing the legislative framework in the GMS, including regional and multi-lateral agreements and the domestic legislative arrangements of the GMS countries. This report noted that the GMS was unusual in not having a sub-regional environmental agreement.

The main focus of the discussion was on the use of a regional agreement to promote adaptation to climate change. Although a discussion meeting was held in Bangkok on 22 July 2009, there was no further follow-up or development of the idea for a regional climate change adaptation agreement. Over the past five years, governments have been developing country responses to climate change, rather than a regional approach.

There were likely to be a number of reasons, as identified by Peter King, as to the failures to develop any regional environmental agreement for the GMS.<sup>316</sup> However it may also be that the key reason no environmental agreement was advanced was due to the lack of political will in the face of global economic uncertainty. Without political will, any regional environmental agreement will not be advanced. Other reasons may also be that any regional environmental agreement in the GMS will clearly be directed at the use of rivers, such as the Mekong and Salween, and the development of hydropower, which are inherently hotly contested political issues, both within and between countries.

In the Mekong Region (and the broader ASEAN region) the potential for adverse environmental impacts is also recognised, especially in relation to water resources development, transport of dangerous goods, biodiversity loss and transboundary haze. The Greater Mekong Subregion Core Environment Programme and Biodiversity Conservation Corridor Initiative (CEP-BCI) specifically address concerns over the likely transboundary effects of infrastructure development in the region.<sup>317</sup> Other cross-border institutional developments include a Greater Mekong Railway Association, Regional Power Coordination Centre and Mekong Tourism Coordination Office, among others.<sup>318</sup>

The Greater Mekong Subregion Cross-Border Transport Facilitation Agreement (1999) has a specific section on transport of dangerous goods.<sup>319</sup> These are defined as “those substances and articles, which may affect the

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<sup>316</sup> Presentation by Dr. Peter King, July 2009.

<sup>317</sup> The CEP-BCI is Administered by ADB and overseen by the environment ministries of the six countries that form the Greater Mekong Subregion Working Group on Environment - <http://www.adb.org/countries/gms/sector-activities/environment>.

<sup>318</sup> Comments from Dr Peter King.

<sup>319</sup> More details on the Greater Mekong Subregion Cross-Border Transport Facilitation Agreement are available at <http://www.gms-cbta.org/uploads/resources/15/attachment> and at ADB\_TF\_CBTA\_Full\_Text\_gms-cbta-instruments-history.pdf.



interest of environment, health, safety, and national security.” If the Contracting Parties permit on a case-by-case basis the cross-border movement of Dangerous Goods as defined above, they should require the full application of the measures under United Nations Recommendations on the Transport of Dangerous Goods/Model Regulations (UN Model Regulations) and/or the European Agreement Concerning the International Carriage of Dangerous Goods by Road.

### **Requirements For effective transboundary EIA systems**

Some of the requirements for effective transboundary environmental impact assessment include:

- The establishment of effective national EIA procedures;
- The designation of a focal point in the national country to be responsible for any communications between the host country and the impacted country or countries;
- The opportunity for equivalent public participation in EIA for both the public of the impacted country and the public of host country;
- Notification to the focal point of the impacted country as early as possible with the relevant information;
- Joint responsibility to provide for public participation in the areas likely to be affected by the proposed project;
- Joint responsibility for the distribution of the EIA documentation and for the submission and transmittal of comments to the focal point of the host country;
- A requirement that the host country take into account the submissions from the impacted country in reaching the decision about the project or activity;
- Providing a copy of the decision of the host country and any environmental management plans or approval conditions; and
- A mechanism to pay for the Transboundary EIA process.

The ECE Guidance identifies a number of key best practices that have relevance to the Mekong region countries:

- Financial support may be needed to: translate the EIA documentation into the language(s) of the affected country; translate the public comments and recommendations back into the language of the country of the project proposal; disseminate EIA materials (including booklets, brochures) within the neighbouring country; pay for information distributed through newspapers, radio, TV, e-mail or Internet; and organize public consultation meetings;
- Neighbouring countries should be notified of project proposals with potential transboundary impacts as early as possible, and receive such notification no later than the general public in the country of the project proposal;
- All countries potentially affected by a project proposal – both the host and neighbouring countries – should be jointly responsible in

disseminating information about the EIA and collecting feedback from PAP and stakeholders for consideration in the decision-making process; and

- All comments received on transboundary EIAs from any stakeholder in any potentially affected country should be considered in making a decision on the EIA, and that final decision should be published in neighbouring countries.

Public participation as a centrepiece of transboundary EIA promotes the transparency and legitimacy of decision-making processes in projects with transboundary effects. Transboundary EIAs conducted without adequate public participation may address state-to-state concerns, but completely miss important local issues and valuable local or indigenous knowledge. Effective feedback mechanisms can ensure that best efforts to address local concerns in neighbouring countries have been built into environmental mitigation and monitoring plans (EMMPs) and thus avoid future conflicts during construction and operational phases of the project.

The ECE Guidance demonstrates that, despite the need to consider unique procedural issues in establishing transboundary EIA arrangements, the majority of the concepts and recommended approaches outlined in these Guidelines will be applicable to project proposals with transboundary impacts. In other words, the same public participation principles and approaches should apply within both the host and neighbouring countries, although the institutional mechanisms may differ.

## Concluding thoughts on the EIA in the Mekong countries

Much has been written on the EIA in the various countries of the Mekong. Much of the analysis has focused on comparisons between lower Mekong countries and China or Japan or Korea. This is the first analysis that has compared the six countries to each other. From the legislation and regulation review that formed the basis of this Manual and the *Mekong EIA Briefing: Environmental Impact Assessment Comparative Analysis In Lower Mekong Countries*,<sup>320</sup> it can be observed that there are a number of similarities in the EIA Procedures adopted by the Mekong countries. There are also a number of significant differences. The most important differences can be found in the way that the relevant EIA Unit assesses the EIA Report and how the final determination of the project is made. Regional cooperation is increasing and regional sharing of good practice can promote better EIA practice.

The monitoring, compliance and enforcement stage of the EIA process generally remains weak. Whilst the focus is on the preparation and review of the EIA leading to the determination of the project (approval or rejection), there is little attention on the enforcement and compliance with the EMP. Less effort is made on ensuring that the conditions of approval are complied with and that all the project commitments are completed by the project proponent.

Four features are in common to all national EIA systems. The first is that all countries have a screening list for projects. The second is that all countries have a tiered approach to the EIA. The third is that all countries do provide for access to information. Fourth, all countries provide for the opportunity for public participation at most steps in the EIA process.

### Screening lists

All countries have adopted a screening list for projects. The EIA is designed to ensure that all projects that are “likely to have a significant impact on the environment”<sup>321</sup> are required to conduct an EIA. These lists differ between countries. Usually it determines whether an IEE or EIA is to be undertaken, or if no assessment is required. In Thailand the screening process will also identify if a specific health impact assessment is required.

### Tiered Approach to the EIA

The screening lists also provide for levels of assessment from no assessment to IEE or EIA. In addition, some countries provide for some form of environmental assessment instead of the no-assessment option (Cambodia and Viet Nam). In

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<sup>320</sup> Available online at the following website:

[http://www.pactworld.org/sites/default/files/local-updates-files/MPE\\_Mekong\\_EIA\\_Briefing\\_Final.pdf](http://www.pactworld.org/sites/default/files/local-updates-files/MPE_Mekong_EIA_Briefing_Final.pdf).

<sup>321</sup> This phrase has been the subject of considerable debates and discussion. The aim of EIA is to ensure that these impacts are identified, assessed and mitigated.

some countries, if the IEE reveals likelihood that the project will cause a significant impact on the environment, then the EIA Unit may require a full EIA.

### **Access to Information**

All countries allow project affected people (PAP) to have access to information. Thailand, for example, goes further to allow broad access to information. However, in some countries it is not always clear what information must be provided and at which stage of the process. Myanmar is quite clear that certain documents must be publically available within specific time frames. However, some EIA procedures are not clear in legislation and regulations about access to information and the minimum information that must be provided.

### **Public Participation**

All countries provide the opportunity for public participation at most steps in the EIA process. However, often this is a promise that is not fulfilled. One of the greatest challenges now being addressed is how to promote and enhance public participation and stakeholder engagement in the region to enhance project development and implementation.

## Annexure 1: Outline of Project Description<sup>322</sup>

Brief Presentation	Guidance Notes
1. Sector and subsector	E.g., Energy production, Hydropower
2. Size	Size can be expressed in terms of area (or length if it is a road or other linear project), production, category/type, number of employees, project investment
3. Location	Overview map typically scale 1:200,000 or 1:20,000 depending on type of project. The map should include main natural features, like water bodies, forest, etc. existing infrastructure (roads, bridges, etc.) and human settlements in the proximities of the project. In case of an urban development, sensitive areas (schools, temples, markets, sites or monuments of cultural importance, commercial areas, etc.) should be clearly indicated.
4. Project components	<ul style="list-style-type: none"> <li>• Main production facilities</li> <li>• Internal infrastructure</li> <li>• Ancillary infrastructure and facilities</li> </ul>
5. Overall time schedule	Present a diagram with the planned timing of: <ul style="list-style-type: none"> <li>• Studies (incl. the EIA study)</li> <li>• Permitting/licensing</li> <li>• Concession agreements</li> <li>• Detailed design, contracting</li> <li>• Pre-construction activities</li> <li>• Construction activities</li> <li>• Operations</li> <li>• Decommissioning/closure/post closure</li> </ul>
6. Project Organization	Organization chart, management, roles and responsibilities, etc.
Pre-construction and Construction Phases	
7. Activity schedules	Diagram with the main components and their respective main construction activities and related mitigation measures
8. Location of project components	Site map (1:50,000 or 1:10,000) with location of project components such as roads, camps, mine, processing plant, storage areas, tailing dam, reservoir, power house, transmission line, bridges, etc.
9. Project Characteristics	Description of each of the main characteristics of the project: <ul style="list-style-type: none"> <li>• Materials (amounts, types, sources)</li> <li>• Equipment, machinery</li> </ul>

<sup>322</sup> Laos EIA Guidelines, MONRE, 2012.

	<ul style="list-style-type: none"> <li>• Conceptual design drawings List the alternatives considered and assessed. Only consider realistic and reasonably feasible alternatives</li> </ul>
10. Labour	<ul style="list-style-type: none"> <li>• Expected workforce, if possible short description of workforce per job type)</li> <li>• Expected origin of workforce</li> <li>• Type and location of worker accommodation</li> <li>• Health and Safety commitments</li> </ul>
<b>Operational Phase</b>	
11. Overview of operations	<p>Brief description of project components including production processes and technologies, facilities and infrastructure.</p> <p>Visual presentation of the completed project (e.g. a freehand drawing, layout)</p> <p>Presentation of production data:</p> <ul style="list-style-type: none"> <li>• Input materials (amounts/year, types, qualities and characteristics, sources)</li> <li>• Water and energy consumption and sources</li> <li>• Outputs: products (amounts, characteristics) by-products, waste and other emissions)</li> </ul>
12. Operations schedule	Time diagram presenting the main components and the main operations/processes and their respective mitigation measures
13. Site layout maps	Site layout maps (1:20,000 or better scale) showing the location of the main operational components
14. Components	<p>Description of each component:</p> <ul style="list-style-type: none"> <li>• Facilities, technology, processes with simplified flow diagram</li> <li>• Location and visual presentation</li> <li>• Conceptual design drawings</li> <li>• Flow diagram: materials, water, energy, waste and other emissions</li> <li>• Materials handling, storage</li> <li>• Waste and wastewater management</li> <li>• Transport (means, timing, loads, routes)</li> </ul>
15. Labour	<p>Expected workforce (if possible workforce per job type) and origin of workforce</p> <p>Type and location of worker accommodation</p> <p>Health and Safety commitments</p>
<b>Decommissioning / Closure / Post Closure Phase</b>	
16. Overview	Closure Plan Requirements (Strategy, Policy, Main Objectives, time schedule, budgets, etc.)

## **Annexure 2: Legislation**

### **Cambodia**

- Environmental Protection and Natural Resource Management (1996)
- Sub-Decree on Environmental Impact Assessment (1999)
- Prakas on Guidelines for Conducting EIA Report (49 MoE, March 2000)
- Prakas on General Guidelines for Conducting Initial and Full Environmental Impact Assessment Reports (No.376 BRK.BST, 2009)
- Prakas on Registration of Consulting Firms for Studying and Preparing Environmental and Social Impact Assessment Report (No.215 Brk MoE, 2014)
- Prakas on Delegation of Authority to the Provincial Departments of Environment on Matters Related to Investment Project on Behalf of the Ministry of Environment (No. 230 BRK.BST, 29 July 2005)
- Inter-ministerial Prakas on Screening on EIA for Mining and Small-scale Mining (No. 191, 26 April 2016)
- Joint Prakas (Declaration) on Public Service Charge of the Ministry of Environment (No. 999, 28 Dec. 2012)
- Decree 146 on Economic Land Concessions (2005)

### **China**

- Environmental Protection Act (1989, revised 2014)
- Law of the People's Republic of China on the Protection of Wildlife (1988, revised 2004, amended 2016)
- Law of the People's Republic of China on the Prevention and Control of Atmospheric Pollution (1995, amended 2000, revised 2015)
- Law on Environmental Impact Assessment (2002, revised 2016)
- Provisions of the State Environmental Protection Administration on the Examination and Approval Procedure of EIA on Construction Projects (2005)
- Provision on the Graded Examinations and Approval of Environmental Impact Assessment Documents of Construction Projects (2009)
- Interim Measures for Public Participation in Environmental Impact Assessment (2006)
- Classification Catalogue of Construction Projects Environmental Impact Assessment (2015 Revision)

- Measures for the Administration of Construction Projects Environmental Impact Assessment (2015 Revision)—Annex 1 to 6
- Technical Guidelines for Environmental Impact Assessment—General Programme, HJ 2.1-2011, Chapter 8, by Ministry of Environmental Protection (issued in 1993, revised in 2011)

## **Lao PDR**

- Law on Environmental Protection (Amended) No.29/NA (2012)
- Law on Media (2008)
- Decree on EIA (2010)
- Ministerial Instruction on the Process of Environmental Impact Assessment of the Investment Projects and Activities No. /MONRE (17 December 2013)
- Ministerial Instruction on the Process of Initial Environmental Examination of the Investment Projects and Activities No. 8029/MONRE (17 December 2013)
- Process of Environmental and Social Impact Assessment of the Investment Projects and Activities No 8030/MONRE (17 December 2013)

## **Myanmar**

- Constitution of Myanmar (2007)
- Myanmar National Environment Policy (1994)
- Environment Conservation Law (2012)
- Environment Conservation Rules (2014)
- Environmental Impact Assessment Procedures (2015)
- Investment Law (2016)

## **Thailand**

- Constitution of Kingdom of Thailand BE 2550 (2007)
- National Environmental Quality Act 2535 (1992)
- Prime Minister Office Rule on Public Hearing (2005)



- Notification on EIA 2555, MONRE (2012)
- Notification of the Ministry of Natural Resources and Environment on measures and procedures of EHIA B.E. 2552 (2009)
- ONEP's Notification on the Timeline Following Notification of the Ministry of Natural Resources and Environment on EHIA 2553 (2010)

## **Viet Nam**

- Law on Environmental Protection (2014)
- Decree on the implementation of the LEP 2014 No 19/2015/ND-CP (2015)
- Decree on Environmental Protection, Strategic Environmental Assessment, Environmental Impact Assessment and Environmental Protection Plans No. 18/2015/ND-CP (2015)
- Circular on Environmental Protection, Strategic Environmental Assessment, Environmental Impact Assessment and Environmental Protection Plans No. 27/2015/TT-BTNMT (2015)
- Circular providing guidance on SEA Appraisal, EIA Appraisal in the Ministry of Agriculture and Rural Development No 09/2014/TT-BTNMT (2014)
- Decision of the regulation on the condition and provision of services of appraising EIA Reports No 19/2007/QD-BTNNT (2007)

## **Annexure 3: Further Resources**

### **Screening Lists for EIA/IEE in selected Mekong Countries**

- These are available online at the following website:  
<https://www.earthrights.org/publications>.

### **Draft Regional Guidelines on Public Participation in EIA**

- These are available online at the following website:  
<http://eia.mekongcitizen.org>.

### **Draft Cambodian Guidelines on Public Participation and Access to Information in EIA**

- These are still being drafted and are not yet available online.



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