

ENVIRONMENTAL IMPACT ASSESSMENT IN ETHIOPIA: LAWS AND PRACTICES

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ABSTRACT

EIA is one of the means that decision-makers use to consider the impact of their actions on the environment. As a tool for decision-making, EIA emerged in 1969 in the US and it has now obtained a wide acceptance around the world. Accordingly, most countries have provided for some form of EIA to ensure environmental protection. In Ethiopia, although the relevance of EIA in decision-making was recognized in 1997 by the EPE, it was firmly established in our legal system in 2002 with the enactment of the EIA Proclamation. Ethiopia has recognized the system of EIA because in addition to contributing to environmental protection it facilitates sustainable development, fosters the implementation of the right to clean and healthy environment, brings about administrative transparency and accountability, and facilitates public participation in decision-making process. Hence, decision-makers in Ethiopia are expected to use EIA to consider the impacts of their actions on the environment. In this paper, I have examined whether the system of EIA in Ethiopia is adequate both in law and in practice. Accordingly, I have argued that the system of EIA in Ethiopia is not adequate both in law and in practice to ensure the achievement of the objectives for which EIA was recognized because, *inter alia*, (1) the laws relating to the use of EIA are inadequate, (2) the institutions that are established to ensure the effectiveness of the system of EIA are facing various problems, (3) EIA is often not used to make decisions, (4) most licensing bodies do not use ECC as a condition to issue licenses, (5) the consequences the existing laws attach to failure to comply with the legal requirement of EIA are not applied, and (6) environmental protection agencies do not carry out pre- and post EIA evaluation monitoring. Equally, I have argued that there are opportunities that, if used, can lead to improved effectiveness of the system of EIA in Ethiopia. These opportunities include

attitudinal change towards the relevance of EIA, the use of EIA as a condition to grant loans, and the recognition of environmental protection in Ethiopia's strategic plans.

DEDICATION

To Michael, my son, and my wife!

LIST OF ABBREVIATIONS

AfDB	African Development Bank
ARD	Agricultural and Rural Development
AREA	Amhara Regional Environmental Agency
BPR	Business Process Reengineering
CEQ	Council of Environmental Quality, US
CM	Council of Ministers
EA	Environmental Assessment
EC	Environmental Council
ECC	Environmental Clearance Certificate
EDB	Ethiopian Development Bank
EEPCO	Ethiopian Electric Power Corporation
EIA	Environmental Impact Assessment
EIS	Environmental Impact Study
EPA	Environmental Protection Authority
EPE	Environmental Policy of Ethiopia, 1997
EPO	Environmental Protection Organs
ERA	Ethiopian Road Authority
FDRE	Federal Democratic Republic of Ethiopia
FEPA	Federal Environmental Protection Authority
GTP	Growth and Transformation Plan
HPR	House of Peoples' Representatives
IAPs	Interested and Affected Persons

IBC	Institute of Biodiversity Conservation
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social, and Cultural Rights
ITIO	Investment, Trade and Industry Office, Amhara Regional State
NEPA	National Environmental Policy Act, 1969, US
OIC	Oromia Investment Commission
OREA	Oromia Regional Environmental Agency
PASDEP	Plan for Accelerated and Sustained Development to End Poverty
PM	Prime Minister
REA	Regional Environmental Agency
SEA	Strategic Environmental Assessment
SNNPRS	South Nations, Nationalities, and Peoples' Regional State
SREA	SNNPRS Regional Environmental Agency
TOR	Terms of Reference
TREA	Tigray Regional Environmental Agency
TRIO	Tigray Regional Investment Office, Tigray Regional State
UDHR	Universal Declaration of Human Rights
UNECA	United Nations Economic Commission for Africa
UNEP	United Nations Environmental Program
WB	World Bank

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INTRODUCTION

1. Background

While all countries desire to develop, the desire to develop is high in developing countries and very high in the least developed countries like Ethiopia. Thus, while countries generally take many measures to progress economically, developing and the least developed countries seem to turn every stone to bring about development. For instance, Ethiopia's decision to construct a series of dams over the *Gilgel Gibe* river and the plan for the *Grand Ethiopian Renaissance Dam* is a manifestation of how desperate the country is for development.¹ However, at times, some of the measures taken to bring about development are not environmentally benign unless some sort of precautionary measures are taken. For instance, it is possible to bring about 'economic development' by destroying the environment. Yet, for development to be real and meaningful, it has to be sustainable, whereas making development sustainable requires taking environmental values into account.² That is to say, in order to make development sustainable, the impacts of developmental actions on everything

¹ While the construction of *Gilgel Gibe I* and *II* were completed, the construction of *Gilgel Gibe III Hydroelectric Dam* on *Gibe River* commenced in 2009 and it is still underway. The project for the *Grand Ethiopian Renaissance Dam* on *Abbay River* (commonly known as the Blue Nile) was also launched on April 2, 2011 by Prime Minister Meles Zenawi and its construction is now underway. At the regional level, too, regional governments are taking various steps to bring about economic development. For example, the Oromia regional government has so far issued investment permits to over 14,000 investors, who have registered over 220 billion birr, to invest in various sectors such as agriculture, manufacturing, and social services like hotel and tourism, schools and hospitals. Interview with Ato Mohammed Ibrahim, Head, Oromia Environmental Protection Core Process, Oromia Land and Environmental Protection Bureau, and Ex-Commissioner of the Oromia Investment Commission, in Addis Ababa, (October 19, 2010).

² More or less, nowadays, the need to protect the environment by using different means such as environmental impact assessment seems settled. In this regard, in addition to the different legal instruments-international, regional and national-demanding environmental protection, a number of writers have been writing to show why the environment has to be protected from different perspectives. For instance, arguments for environmental protection have been put forward from anthropocentric perspective, cultural perspective (indigenous peoples' perspectives) and religious perspectives. There are also arguments that claim that the environment has to be protected for its own sake or because other beings in nature have the right to be protected and humans do not have the right to destroy them. This is an eco-centric argument. For more on these points, see generally, A COMPANION TO ENVIRONMENTAL PHILOSOPHY (DALE JAMIESON ed., 2001).

that surrounds us (that is, the biosphere, the atmosphere, the hydrosphere, and the lithosphere) should be examined.³ On the other hand, the likelihood of sustainable development will be much lower if the relevant environmental impacts are not considered.

In addition to making development sustainable, the consideration of environmental impact and values leads to the achievement of another objective. It is now well accepted that citizens have the right to live in a clean and healthy environment.⁴ Therefore, the protection of the environment or the consideration of environmental values while adopting a given course of action will serve to further everyone's right to live in a clean and healthy environment. Consequently, the protection of the environment can be justified not only from the perspective of making development sustainable but also from enforcing a human right.⁵

If environmental protection is necessary because it serves various purposes, the question then is how to protect it. On the other hand, while various measures could be adopted to protect the environment, environmental impact assessment (EIA) is one of the most important mechanisms to serve these purposes because it enables us to examine the possible impacts of a given course of action on the environment before it is adopted.⁶ Thus, it is necessary that

³ On the meaning and basic components of the environment, see P. C. MISHRA AND R.C. DAS, ENVIRONMENTAL LAW AND SOCIETY: A TEXT IN ENVIRONMENTAL STUDIES 1 (2001) and H.V. JADHAV AND S.H. PUROHIT, GLOBAL WARMING AND ENVIRONMENTAL LAWS 8, 1ST ed. (2007). Interestingly, Mishra and Das argue that considering the impact of a given action on only one element of the environment is not enough. According to them, the impact of a given action on one of the elements of the environment will affect the entire elements of the environment. In order to make this clear, they analogize the impact of an action on one of the components of the environment with a problem with one of our essential body organs such as the heart. If one's heart is affected, the whole system of our body will be disrupted. In like manner, if for example the atmosphere is affected (like ozone depletion), the other elements of the environment such as the biosphere will be affected. For more on this point, see P. C. MISHRA AND R.C. DAS, *id.*

⁴ For instance, in Ethiopia, article 44 of the FDRE Constitution guarantees this right. In Africa as a whole, article 24 of the African Charter on Human and Peoples' Right recognizes this right. One can mention provisions from other legal instruments such as the UDHR and the ICESCR as well.

⁵ In fact, one may mention different ideologies which have been put forward to justify why the environment should be protected such as for its aesthetic values or for nature's sake or as a natural duty of all of us because we do not have any better right to destroy the environment than everything in the environment. But for the purpose of this dissertation, indulgence into such discourses does seem not appropriate.

⁶ See, for example, DAVID HUNTER ET AL, INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 531, 3rd ed.(2007); LANA ROUX AND WILLEMIEN DU PLESSIS, EIA LEGISLATION AND THE IMPORTANCE OF TRANSBOUNDARY APPLICATION in LAND USE LAW FOR SUSTAINABLE DEVELOPMENT 89 (NATHALIE J. CHALIFOUR ET Al. eds., Cambridge University Press, (2006), 2007);

development agents use EIA as a tool for making decision to consider the possible impacts of their actions on the environment and to take measures to avoid or minimize such impacts. Indeed, current environmental laws recognize the importance of EIA as a tool capable of ensuring the integration of environmental values into decision-making process thereby promoting sustainable development and the enjoyment of the right to live in a clean and healthy environment.⁷ This is also true in Ethiopia where the EIA Proclamation endorses the need to use such a method by reiterating that EIA promotes sustainable development and fosters the implementation of the constitutionally guaranteed right to clean and healthy environment.⁸

Actually, because Ethiopia is one of the least developed countries and, as a result, it is taking various developmental measures, the recognition and use of EIA in the decision-making process is an indispensable mechanism for promoting sustainable development. The government of Ethiopia also seems to be cognizant of the need to protect the environment to bring about sustainable development. For instance, according to the *Plan for Accelerated and Sustained Development to End Poverty (PASDEP)*, that is, the previous five years strategic plan (2005/06-2009/10), one of the visions of Ethiopia was bringing about environmentally

MICHAEL KIDD, EIA AND THE FOUR PS: SOME OBSERVATIONS FROM SOUTH AFRICA in LAND USE LAW FOR SUSTAINABLE DEVELOPMENT 181 (NATHALIE J. CHALIFOUR ET AL. eds., Cambridge University Press, (2006), 2007); MICHAEL I. JEFFERY, ENVIRONMENTAL IMPACT ASSESSMENT: ADDRESSING THE MAJOR WEAKNESSES in LAND USE LAW FOR SUSTAINABLE DEVELOPMENT 451-452 (NATHALIE J. CHALIFOUR ET AL. eds., Cambridge University Press, (2006), 2007).

⁷ Environmental laws aim at restoring, preserving, and protecting the environment, whereas EIA is one of the principles environmental laws recognize to achieve these objectives. See STEVEN FERREY, ENVIRONMENTAL LAW: EXAMPLES AND EXPLANATIONS 1, 3rd ed., (2004); ENVIRONMENTAL LAW HANDBOOK 1, 4th ed. (Thomas F.P. Sullivan ed., 1997); Incidentally, one should know that environmental law is a public law as its primary purpose is regulating the relationships between individuals and governments (public) with regard to the environment. DUARD BARNARD, ENVIRONMENTAL LAW FOR ALL: A PRACTICAL GUIDE FOR THE BUSINESS COMMUNITY, THE PLANNING PROFESSIONS, ENVIRONMENTALISTS AND LAWYERS 14 (1999).

⁸ See paragraphs 2 and 3 of the Preamble of the EIA Proclamation No. 299/2002. Actually, because Ethiopia has had laws aiming at the protection and preservation of the environment including the EIA Proclamation, some writers argue that the country is deeply concerned about its environment. See, Khushal Vibhute, *Environmental Policy and Law of Ethiopia*, 23 Journal of Ethiopian Law 75, 76, 82-83 (2008) (discussing the environmental law and policy of Ethiopia from policy perspective).

sound development based on the 1997 Environmental Policy of Ethiopia.⁹ Moreover, in order to realize this vision, PASDEP recognized ensuring proactively the integration of environmental dictates into development.¹⁰ Therefore, it is not difficult to imagine how relevant the use of EIA would be to integrate environmental dictates into development endeavors during the time of PASDEP.¹¹ Moreover, the current five years strategic plan of Ethiopia, that is, the 2010/2011-2014/2015 *Growth and Transformation Plan (GTP)*, expressly recognizes that environmental conservation has vital contribution for sustainability of development.¹² It also states that it is necessary to formulate policies, strategies, laws and standards which foster social and economic development to enhance the welfare of humans and the safety of the environment sustainably, and to spearhead in ensuring the effectiveness of their implementation.¹³ Once again, the relevance of using EIA to achieve the objectives of the GTP is clearly discernable because EIA facilitates environmental protection which, in turn, promotes sustainable development.

At this juncture, one has to note that the importance of EIA is not something that is accepted by everyone.¹⁴ For instance, some have argued that EIA is an innovation by the developed countries, and it is intended to hamper the economic and technological development of

⁹ See Ministry of Finance and Economic Development, *Ethiopia: Building on Progress A Plan for Accelerated and Sustained Development to End Poverty (PASDEP hereinafter) 2005/06-2009/10* 189 (2006).

¹⁰ See *id.* at 190.

¹¹ Nevertheless, it should be noted that the PASDEP did not list environmental protection as one of its pillars. The eight pillars the PASDEP listed are building all-inclusive implementation capacity, a massive push to accelerate growth, creating the balance between economic development and population growth, unleashing the potentials of Ethiopia's women, strengthening the infrastructure backbone of the country, strengthening human resource development, managing risk and volatility, and, creating employment opportunities. See *id.* at 46.

¹² See Ministry of Finance and Economic Development, *The Federal Democratic Republic of Ethiopia, Growth and Transformation Plan (GTP hereinafter) 2010/11-2014/15* 77 (2010). However, the GTP does not include environmental protection in its pillars. The pillars of the GTP are sustaining faster and equitable economic growth, maintaining agriculture as a major source of economic growth, creating favorable conditions for the industry to play key role in the economy, enhancing expansion and quality of infrastructure development, enhancing expansion and quality of social development, building capacity and deepen good governance, and promote women and youth empowerment and equitable benefit. *Id.* Thus, environmental protection is not listed, at least expressly, as one of the pillars of the GTP.

¹³ See *id.*

¹⁴ When I presented my proposal to the PhD students of both Ethio-Alabama and Ethio-Warwick programs for comments on November 22, 2010, a number of arguments against the use of EIA and even government intervention in environmental protection in the presence of market regulation were raised. Although I cannot deal with all of them exhaustively, I will raise and respond to some of them in a brief manner.

developing or the least developed countries.¹⁵ This argument seems misconceived, pessimistic and unfounded. First, although EIA emerged from a developed country, the USA, developed countries are also using EIA, to a greater extent, for that matter, than other countries because of its advantages. Second, this argument is not supported by the practice in developing or the least developed countries because there are indications that some developing and the least developed countries are developing environmental laws including EIA regulations on their own initiatives.¹⁶ Further, as we will see later on, the above arguments seem to fit the whims of those who misuse EIA or use EIA for purposes other than environmental protection.

There are also people who think that EIA is unnecessary as it is a false means to measure environmental impacts because harm to the environment cannot be measured.¹⁷ There is some truth in this argument. For instance, the quantified value of the clean air or clean water we lose as a result of a given course of action may not be assessed.¹⁸ Moreover, assessing all harms to the environment by using human capacity/imagination is not possible as our knowledge of what the environment supports is limited.¹⁹ Yet, this does not mean that environmental harm cannot be measured. Some harm can be measured in monetary terms, whereas others can be measured by using other parameters such as the benefits lost or the sacrifices we are willing to accept.²⁰ Moreover, the fact that we cannot assess all the impacts

¹⁵ See, for example, MOHAMMED A. BEKHECHI AND JEAN-ROGER MERCIER, *LEGAL AND REGULATORY FRAMEWORK FOR ENVIRONMENTAL IMPACT ASSESSMENTS: A STUDY OF SELECTED COUNTRIES IN SUB-SAHARAN AFRICA* 5 (2002).

¹⁶ *Id.* at 5-6.

¹⁷ Presentation, *Supra* note 14.

¹⁸ It is argued that although very limited range of environmental values can now be assessed with some degree of confidence, the research of the past fourth decades has not provided reliable methods to measure the economic values of most of the non-pecuniary environmental assets. For more on assessing the economic values of environmental values or assets, see generally, Murray B. Rutherford et al., *Assessing Environmental Losses: Judgments of Importance and Damage Schedules*, 22 *Harvard environmental Law Review* 51, 51-52 (1998).

¹⁹ Our knowledge to know what damage is caused to the environment or its elements by a given course of action is insufficient. See *id.* at 63.

²⁰ On discussions relating to alternative methods that could be used to assess damages to the environment see *id.* at 51-52, 62-63.

a given course of action may have on the environment does not mean we have to abandon using EIA. After all, currently, assessing most environmental harms in monetary values is not feasible.²¹

Another argument against the use of EIA is the claim that nature is resilient and hence we do not need to protect it.²² Certainly, nature has the capacity to cure its wounds. Indeed, it has been said that environmental harm caused by natural or anthropogenic factors are generally rectified by nature itself.²³ After all, we do not discuss environmental problems so long as these problems are within nature's self-rectification capacity. However, many current environmental problems are such that they are beyond the capacity of the nature to deal with either due to their type or magnitude, which, in turn, makes human intervention indispensable.²⁴

There is also an argument in favor of leaving environmental protection to the market and against government intervention through devices such as EIA.²⁵ However, although market regulation may contribute to the protection of the environment, there are stronger counter arguments based on economic and moral grounds justifying government intervention in environmental protection.²⁶ For instance, government involvement in environmental regulation is justified partly on the inherent limitations of the market system and the nature of human behavior.²⁷ In other words, the market does not allocate resources to environmental protection because environmental quality is part of public goods in relation to which market

²¹ *Id.* at 51-52.

²² Presentation, *Supra* note 14.

²³ P. C. MISHRA AND R.C. DAS, *supra* note 3, at 17.

²⁴ On some of the more serious environmental challenges we are facing at the moment, see generally, DAVID HUNTER ET AL, *supra* note, at 1-10.

²⁵ For more on this point, see LAWRENCE S. ROTHENBERG, *ENVIRONMENTAL CHOICES: POLICY RESPONSES TO GREEN DEMANDS* 30-36 (2002).

²⁶ For excellent discussion on this matter, see *id.*

²⁷ MICHAEL E. KRAFT AND NORMAN J. VIG, *ENVIRONMENTAL POLICY IN FOUR DECADES: ACHIEVEMENTS AND NEW DIRECTIONS* 1-4 in *ENVIRONMENTAL POLICY: NEW DIRECTIONS FOR THE TWENTY-FIRST CENTURY* (Norman J. Vig and Michael E. Kraft eds., CQ press 7th ed. 2010).

failure exists.²⁸ Moreover, the scope and urgency of environmental problems exceed the capacity of the private market and individuals' efforts to deal with.²⁹ From a moral perspective, government must protect the environment by regulating certain behaviors such as the release of toxic substances to the environment because they are intolerable and people have the right not to be exposed to such substances.³⁰

Therefore, it seems that there is every reason to protect the environment, and EIA is one of the tools that can help us achieve this objective. In fact, as we will see in the next section, EIA is now widely accepted as a useful tool to protect the environment.

2. Literature Review

EIA is a process that enables us to see what possible adverse changes might happen to the environment if a given course of action is adopted. Thus, it enables decision-makers to pay due attention to the needs of the environment, thereby facilitating environmental protection. Of course, the use of EIA does not necessarily eliminate actions that can have adverse impacts on the environment.³¹ Yet, EIA will certainly reduce actions with adverse impacts on the environment if it is used properly.³² At this juncture, one may wonder if EIA can avoid all possible harms to the environment if it is used perfectly. First, it cannot be used perfectly. Second, assuming that it can be used perfectly, it cannot avoid all harms to the environment because we do not know everything that the environment supports.³³ In other words,

²⁸ See LAWRENCE S. ROTHENBERG, *Supra* note 25, at 30-36.

²⁹ MICHAEL E. KRAFT AND NORMAN J. VIG in Norman J. Vig and Michael E. Kraft, *Supra* note 27, at 1-4.

³⁰ For more on this point, see LAWRENCE S. ROTHENBERG, *Supra* note 25, at 30-36. In the Ethiopian context, government involvement in environmental regulation could be justified on additional grounds such as the absence of a developed market and the lack of environmental information in the hands of most consumers.

³¹ JOHN NTAMBIRWEKI, ENVIRONMENTAL IMPACT ASSESSMENT AS A TOOL FOR INDUSTRIAL PLANNING in INDUSTRIES AND ENFORCEMENT OF ENVIRONMENTAL LAW IN AFRICA 75 (UNEP, 1997).

³² On the purposes of EIA, see section 4.01 of the World Bank Operation Directives on Environmental Assessment as included in DAVID HUNTER ET AL, *Supra* note 6, at 532.

³³ This is why it is said that it is seldom possible to eliminate an adverse environmental impact altogether, but it is often feasible to reduce its intensity; this reduction is referred to as mitigation. See National Environmental

understanding some elements of the environment is right now beyond our capacity. Thus, since we cannot assess the impact of a given course of action on something we do not know, one cannot say that a perfectly working system of EIA can spare every element of the environment from harm. Yet, once again, its proper use will certainly contribute to the reduction of harm to the environment or its elements. That is why nowadays the recognition and proper use of EIA is seen as vital for environmental protection.

Historically, the use of EIA as a legal requirement prior to making decisions likely to have significant impacts on the environment originated in the USA in 1969 with the passage of the National Environmental Policy Act (NEPA).³⁴ Now, it has received universal acceptance in national legislation and international instruments.³⁵ It is even increasingly considered to be a general principle of international environmental law.³⁶ Then, one may wonder why so much importance is attached to EIA. However, the mystery is the fact that, when used properly, EIA can make available to both developers and the national authorities relevant information on the possible impact of a given course of action on the environment to enable them to make decisions with full knowledge of their impacts.³⁷

Sadly, however, EIA is sometimes done for purposes other than environmental protection. For example, in some countries, EIAs were prepared and used to justify environmentally

and Planning Agency, Natural Resources Conservation Authority, Jamaica, Guidelines for Conducting Environmental Impact Assessment 8 (1997) available at <http://www.nrca.org/business/guidelines/general/EIA-Guidelines-and-Public-presentaion-2007.pdf>, accessed on October 28, 2011.

³⁴ ROBERT V. PERCIVAL, ENVIRONMENTAL LAW, STATUTORY SUPPLEMENT AND INTERNET GUIDE 2003-2004 873 (2003) and JANE HOLDER AND MARIA LEE, ENVIRONMENTAL PROTECTION, LAW AND POLICY: TEXT AND MATERIALS 567, 2nd ed. (2007).

³⁵ JOHN NTAMBIRWEKI in UNEP, *Supra* note 31, at 75; William L. Andreen, *Environmental Law and International Assistance: The Challenge of Strengthening Environmental Law in the Developing World*, 25 COLUMBIA JOURNAL OF ENVIRONMENTAL LAW 17, 40-1 (2000).

³⁶ MOHAMMED A. BEKHECHI AND JEAN-ROGER MERCIER, *Supra* note 15, at 6. Some people even argue that the duty to assess environmental impacts has become a part of customary law because considerable states practice exists as over 150 countries have domestic EIA laws and many judicial decisions in many of these countries have also enforced the obligations to conduct EIA under these laws. DAVID HUNTER ET AL, *Supra* note 6, at 533.

³⁷ JOHN NTAMBIRWEKI in UNEP, *Supra* note 31, at 75.

degrading activities.³⁸ Moreover, some officials use EIA in an attempt to postpone the duty of making decisions.³⁹ Further, sometimes, officials make decisions and order EIA to be made to determine the validity of their decisions.⁴⁰ Likewise, EIA has been used to hide the truth behind reams of paper as the bulkiness of some reports has been used to impress a gullible audience.⁴¹ This is a misuse of EIA which is even worse than not using it because it entails waste of time, energy and resources for no good reason. Moreover, such use of EIA is contrary to a number of democratic principles. For instance, public participation in the decision-making process is a generally accepted practice. However, if decisions affecting the environment are already made and EIA is done subsequently, public participation in such EIAs does not amount to participation in decision-making; rather, it amounts to commenting on the validity of the decisions. This is clearly contrary to what is known as *environmental democracy*.⁴²

In any case, if the principle of EIA is used in an earnest manner, its contribution to the protection of the environment will be high. Such use of the principle on the other hand hinges on the accountability of public authorities. That is to say, public authorities must use EIA and ensure that it is used in the decision-making process when required.

³⁸ DUARD BARNARD, *Supra* note 7, at 179.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Eenvironmental democracy* could be defined or understood as a system where the public controls those who make decisions that affect the environment or its components. Or, alternatively, it could be defined as a participatory and ecologically rational form of collective decision-making. For more on the meaning of *environmental democracy*, see, for example, MICHAEL MASON, *ENVIRONMENTAL DEMOCRACY* 1 (2006); SUSAN HAZEN, *ENVIRONMENTAL DEMOCRACY* (1998), available at <http://www.unep.org/ourplanet/imgversn/86/hazen.html>, accessed on 13 May 2010; Giulia Parola, *Towards Environmental Democracy* 26-28 (2009) (unpublished Thesis, Faculty of Law, University of Iceland). At this juncture, it is interesting to note that not all writers believe that an *ex post facto* EIA is unnecessary. In fact, some argue that an *ex post facto* EIA should be accepted. For instance, Michael Kidd argues that since one of the fundamental purposes of EIA is to provide for mitigation measures of environmental damage caused by an activity where necessary, an *ex post facto* EIA can serve this purpose and hence, it needs to be accepted. See MICHAEL KIDD in NATHALIE J. CHALIFOUR ET AL, *Supra* note 6, at 192. However, although EIA leads to the adoption of mitigation measures, it is primarily a tool for making decision. Accordingly, an EIA that is made after a decision is already made can hardly serve this purpose.

In Ethiopia, although there were provisions dealing with the protection of the environment before and it can be argued that these provisions impliedly recognized the principle of EIA, the express recognition of EIA as a legal requirement in the decision-making process is a recent phenomenon.⁴³ In this regard, the 1997 Environmental Policy of Ethiopia (EPE) and the 2002 EIA Proclamation deserve mentioning. While the EPE recognizes EIA as one of the indispensable factors for environmental protection and sustainable development,⁴⁴ the EIA Proclamation places on all persons the duty to conduct EIA in advance in relation to certain actions.⁴⁵ Moreover, with a view to making EIA more effective, the Federal Environmental Protection Authority (FEPA) is given the duty to establish a system for conducting EIA for public and private projects.⁴⁶ That is to say, FEPA is required to identify actions (public and private) that require prior EIA. Thus, if FEPA puts this system in place and EIA is conducted in accordance with such system and its outcomes are considered when decisions are made, then EIA will make a better contribution to environmental protection in Ethiopia. Accordingly, it could be concluded that although its express recognition is a recent phenomenon, the legal requirement of EIA is now firmly established in our system of environmental law.

However, whether or not the system of EIA in Ethiopia is adequate both in law and in practice is yet to be seen. Perhaps, because it is a recent development and the area of

⁴³ Unlike the US Constitution which does not specifically empower the US Congress to enact laws to protect the environment although the Congress has been making environmental laws under the Commerce Clause claiming that environmental quality may affect interstate trade, the constitutions of Ethiopia have been providing for express stipulations in relation to environmental protection. Thus, the recognition of EIA may be inferred from these provisions. For example, both the 1987 Constitution of the Peoples' Democratic Republic of Ethiopia and the 1995 Constitution of the Federal Democratic Republic of Ethiopia have recognized the need to protect the environment. Thus, it may be argued that since environmental protection becomes effective only if EIA is conducted, then the two Constitutions impliedly recognized the principle of EIA. For example, article 92(2) of the FDRE Constitution states that *the design and implementation of programmes and projects of development shall not damage or destroy the environment*. EIA is an inbuilt requirement here because without EIA, it will not be possible to know what programmes and projects of development will damage the environment. On environmental law making power of the US Congress, see STEPHEN R. CHAPMAN, ENVIRONMENTAL LAW AND POLICY 28, 32 (1998).

⁴⁴ Environmental Policy of Ethiopia, 1997, Section 4.9.

⁴⁵ See Environmental Impact Assessment Proclamation, No. 299/2002, article 3 and 5.

⁴⁶ See Environmental Protection Organs Establishment Proclamation, No 295/2002, article 6(4).

environmental law is not widely dealt with in the law schools,⁴⁷ little research has been conducted on the EIA process in Ethiopia. Moreover, the little research that has been done so far is limited in many ways. While some of the research has been limited to a particular industry such as floriculture,⁴⁸ other research has failed to consider the practice side of EIA particularly in the regional states.⁴⁹ Further, in most cases only one aspect of EIA, project level EIA, has been considered, thereby disregarding Strategic Environmental Assessment (SEA). There is also research which generally deals with environmental law and policy in Ethiopia.⁵⁰ One work, however, is more pertinent to EIA in Ethiopia. It is *Overview of Environmental Impact Assessment in Ethiopia: Gaps and Challenges*.⁵¹ Although the work tries to deal with the issues of EIA in Ethiopia, it is not comprehensive. Likewise, on many issues, it contains scanty discussion. For instance, the work does not consider the practice of EIA in Ethiopia; it does not adequately deal with EIA at a strategic level in the country; it does not adequately analyze the legal and policy framework in Ethiopia to properly situate the system of EIA in Ethiopia, while some of the analyses seem to show misunderstanding; it does not deal with the consequences of failure to do EIA at all except mentioning few points by way of passing remark; and it also provides for little discussion on some relevant issues like public participation in the EIA process. Therefore, there is still no work based on my efforts to find them that has adopted a holistic approach to most relevant issues relating to EIA in Ethiopia and addressed them as adequately as possible. This work is an attempt to do that. It will consider the most important issues in the field of EIA and try to deal with them as adequately as possible.

⁴⁷ Recently, there is a nation-wide law curriculum which makes *environmental law* one of the courses law students should take. Probably, this will increase research activities in law schools in the field of environmental law in general and EIA in particular.

⁴⁸ Yared Berhe, *Environmental Impact Assessment: The Law and Practice at Floriculture Industry* (2007) (Unpublished LL.B thesis, Faculty of Law, Addis Ababa University).

⁴⁹ See, for example, Khushal Vibhute, *Supra* note 8, at 75-101.

⁵⁰ *Id.*

⁵¹ MELLESE DAMTIE AND MESFIN BAYOU, *OVERVIEW OF ENVIRONMENTAL IMPACT ASSESSMENT IN ETHIOPIA: GAPS AND CHALLENGES* 1-63 (2008).

3. Research Questions

The main question this paper is devoted to answering is whether or not Ethiopia has an effective system of EIA. *Effectiveness* will be examined not only in light of the existence of adequate legal regimes in the field (such as laws and policies) but also in light of their implementation on the ground. Accordingly, the paper will, among others things, attempt to answer the following questions: Has Ethiopia put in place adequate system of EIA? Is this system of EIA used in practice? What are the mechanisms that have been put in place to ensure that EIA serves its intended purposes? Are there consequences following failure to use EIA in the decision-making process, and, if so, have they ever been applied? What are the most important challenges to the effectiveness of the system of EIA in the country and how can they be overcome?

4. Objective of the research

The objective of my research has been to show clearly where the system of EIA stands in our legal system both in law and in practice with a view to filling the gaps in the existing literature in the field and making information on the subject-matter available to all interested bodies-government or individuals-for consumption.

5. Methods

In order to answer the research question, I believe that the use of variety of research methods is relevant. Hence, I have relied upon, among others things, literature review, analysis of legal instruments, interviews, field observations, and comparison, whenever possible, between the system of EIA in Ethiopia and other countries.

6. Significance of the research

The outcome of this research will be significant in many ways. For instance, as stated before, the currently available research works in the field of EIA in Ethiopia are not adequate. Thus,

this research will fill the gap in the existing literature in the field. Second, the research will be informative to the public and the government about the status of EIA in Ethiopia and what needs to be done in the future to make the system of EIA more effective. Hence, the outcome of the research may influence individual and government actions. Finally, the outcome of the research could be used by other researchers either as an input or an encouragement for further research in the field.

7. Scope of the research

As far as the consideration of legal framework is concerned, basically the laws, policies, guidelines and other documents of the federal government relating to EIA will be considered because of the predominance of federal jurisdiction over environmental protection and the lack of any such meaningful documents prepared at the regional level. With respect to the practice, this research uses interviews, case (EIA report) comments, and case studies only for certain areas. First, due to practical limitations, the use of interviews to know the situation of EIA on the ground will be limited to some selected regions where basically regional environmental protection organs and regional investment bodies are approached. Second, since the consideration of whether or not all the projects that have been implemented in selected regions from the time Ethiopia issued its EIA Proclamation until the present is practically impossible for this research to cover, only some cases will be used/cited by way of examples in the text of this research.

8. Limitation of the research

The depth and width of this research may be constrained by a number of factors including the lack of adequate literature on EIA in Ethiopia, which will lead to heavy reliance on interviews; the absence of judicial jurisprudence in relation to some of the issues it raises;

inadequate resources to carry out research on all of the relevant issues; and a lack of time given the high course load the program involves.

9. Ethical Considerations

Realizing the indispensability of ethical considerations in any research work, I will consider ethical values of the concerned community/group of people or others. Such consideration involves respecting their norms, non-disclosure of their identities and even changing their names and the dates on which information is obtained from them except for those individuals or groups who consent to the disclosure of their identities.

10. Organization of the paper

This paper is organized in such a way that the first chapter introduces readers to EIA in general. It deals with the meaning, evolution, advantages and types of EIA. Then, the second chapter discusses what the legal framework for EIA looks like in Ethiopia. The chapter deals, *inter alia*, with the development of EIA law in Ethiopia, the responsible persons to undertake EIA, the action that are subject to EIA and the role of the public in the EIA process. The third chapter analyzes the adequacy of the existing EIA legal framework in Ethiopia with a view to evaluating whether it is capable of making the system of EIA effective. The fourth chapter deals with the institutional framework that is put in place to ensure the use of EIA to achieve the objective for which EIA is recognized. Accordingly, both federal and regional organs with the responsibility to ensure the use of EIA in the decision-making processes will be discussed. In the fifth chapter, the institutions put in place to administer EIA will be evaluated. Once the available legal and institutional frameworks for the use of EIA are discussed and analyzed, the sixth chapter examines what the practice of using EIA is like at strategic and project levels. Moreover, the chapter discusses the practice of public participation in the EIA process at both levels. In chapter seven, the possible consequences of

failure to observe the requirements of the EIA Proclamation and other instruments issued thereunder will be considered together with other relevant issues. Realizing that monitoring is necessary for the effectiveness of the system of EIA, chapter eight discusses issues of monitoring EIA in Ethiopia both in law and in practice. It also considers the possible challenges to effective monitoring of EIA in the country. Chapter nine contains two parts. The first part deals with some of the most important challenges to the effectiveness of the system of EIA in Ethiopia. This includes discussions on issues ranging from inadequacies in the existing legal framework to the low level of environmental education. The second part highlights the prospects that exist to make the system of EIA in Ethiopia better in the near future. Finally, the paper will be concluded with some feasible recommendations.

CHAPTER ONE: MEANING, EMERGENCE, MERITS AND ASPECTS OF EIA

1.1 Environmental Impact Assessment (EIA)

Currently, our environment is experiencing serious problems such as climate change, loss of biodiversity, and pollution by toxic chemicals and hazardous wastes which are primarily attributable to the activities of human beings.⁵² Sadly, these problems will eventually make the environment hostile for the human race itself.⁵³ As a result, we now have environmental laws which aim at facilitating the preservation, protection and restoration of the environment.⁵⁴ In order to achieve their objectives, these laws, *inter alia*, recognize the use of different basic principles including EIA. What then is EIA and how does it help us overcome or at least reduce the environmental problems we are now facing?

EIA is understood in slightly different ways by different writers. For instance, some define it as a process of anticipating or establishing the changes in physical, ecological and socio-economic components of the environment before, during and after an impending development project so that undesirable effects, if any, can be eliminated or mitigated.⁵⁵

Others define EIA as a process by which information about the environmental effects of a project is collected and taken into account before a decision is made on whether an action

⁵² Although the problems listed are real, it has been argued that the root causes for environmental problems are consumption (life style), advancement in technology and population growth. For more discussion on this point, see DAVID HUNTER ET AL, *Supra* note 6, at 1-14 and 44-92; STEPHEN R. CHAPMAN, *Supra* note 43, at 13; G. TYLER MILLER, SUSTAINING THE EARTH 11, 7th ed. (2005); and H.V. JADHAV AND S.H. PUROHIT, *Supra* note 3, at 1.

⁵³ For example, the *Bhopal gas tragedy* (India) of 1984 due to the discharge of toxic gas and the *Chernobyl Incident* (USSR) of 1986 due to large-scale radioactive contamination alone resulted in the death of thousands of people. See P. C. MISHRA AND R.C. DAS, *Supra* note 3, at 17-18. Although it did not claim many lives as such, the danger posed by the explosion of nuclear reactors at Fukushima Nuclear Plant in Japan in 2011 can also be mentioned. The explosion caused thousands to leave their residence and stay in temporary camps.

⁵⁴ See, for example, STEVEN FERREY, ENVIRONMENTAL LAW: EXAMPLES AND EXPLANATIONS 1-5, 3rd ed., (2004); ENVIRONMENTAL LAW HANDBOOK 1, 4th ed. (Thomas F.P. Sullivan ed., 1997).

⁵⁵ See JOHN NTAMBIRWEKI in UNEP, *Supra* note 31, at 75; DUARD BARNARD, *Supra* note 7, at 179; D.K. ASTHANA AND MEERA ASTHANA, ENVIRONMENT: PROBLEMS AND SOLUTIONS 336 (1998).

should go ahead.⁵⁶ Still other writers define EIA as a procedure for assessing the environmental implications of a decision to enact legislation, to implement policies and plans, or to initiate development projects.⁵⁷ In Ethiopia, it is defined as the methodology of identifying and evaluating in advance any effect, be it positive or negative, which results from the implementation of a proposed *project* or *public instrument*.⁵⁸ *Public instruments* refer to policies, strategies, programmes, laws or international agreements.⁵⁹

According to the first two definitions, EIA is necessary to determine the possible impacts of developmental projects on the environment with a view to taking measures either to avoid or mitigate these impacts, as the case may be. On the other hand, the last two definitions provide for broader meaning of the concept as they conceive EIA as a process necessary not only for an impending development project but also for strategies or public instruments. However, all the definitions share the element that EIA is a tool that enables decision-makers to take environmental issues into account. This is why EIA is said to be a means that authorities can employ to choose actions and make decisions with full knowledge of their impacts on the environment.⁶⁰

At this juncture, it seems appropriate to briefly consider when the use of such important tool for making decisions had emerged. In this regard, some scholars have indicated that the U.S. Army Corps of Engineers had developed techniques and methodology for impact assessment as early as 1870.⁶¹ Thus, it may be said that some use of EIA began around this time. However, EIA in its present form was introduced by the National Environmental Policy Act of the USA in 1969, which mandated federal agencies to prepare environmental impact

⁵⁶ METHODS OF ENVIRONMENTAL IMPACT ASSESSMENT 3, 2nd ed. (Peter Morris and Riki Therivel eds., 2001).

⁵⁷ ENVIRONMENTAL IMPACT ASSESSMENT: THEORY AND PRACTICE 3 (Peter Wathern ed., 1988).

⁵⁸ EIA Proclamation, article 2(3). Emphasis added.

⁵⁹ See EIA Proclamation, article 2(10).

⁶⁰ DUARD BARNARD, *Supra* note 7, at 179; JOHN NTAMBIRWEKI, *Supra* note 31, at 75.

⁶¹ D.K. ASTHANA AND MEERA ASTHANA, *Supra* note 55, at 336.

statements (EISs) before undertaking any major federal action likely to have significant effect on the environment.⁶² Since then, this procedure has spread throughout the world and today most developed and many developing countries practice some form of EIA.⁶³ Therefore, it can be argued that the legal requirement of EIA is now one of the principles of environmental law with universal acceptance.⁶⁴

1.3. Merits of EIA

Although EIA in its present form is a recent development, it has gained almost universal acceptance making one wonder why it has become so important to many legal systems. The answer lies in the merits the use of EIA has. Firstly, since EIA is a study conducted to determine the possible negative and positive impacts of an action, it enables decision-makers to choose actions with full knowledge of their impacts on the environment. This means, EIA enables them to know actions that are likely to affect the environment and reject those that deserve rejection, or alternatively, formulate mechanisms for the reduction of their impacts on the environment. In this sense, therefore, EIA serves as a tool that aims at preventing and/or reducing environmental harms thereby facilitating sustainable development. Secondly, EIA helps developers avoid possible litigation by ensuring that they do not undertake obviously environmentally harmful projects. Since EIA involves public participation in

⁶² ROBERT V. PERCIVAL, *Supra* note 34, at 873.

⁶³ William L. Andreen, *Supra* note 35, at 40-42; Mark Lancelot Bynoe 'Citizen Participation in the Environmental Impact Assessment Process in Guyana: Reality or Fallacy?', *2/1 Law, Environment and Development Journal* 34 (2006) (discussing what public participation in the EIA process in Guyana is like), available at <http://www.lead-journal.org/content/06034.pdf>.

⁶⁴ See JOHN NTAMBIRWEKI in UNEP, *Supra* note 31, at 75; MOHAMMED A. BEKHECHI AND JEAN-ROGER MERCIER, *Supra* note 15, at 6; Rio Declaration of the United Nations Conference on Environment and Development, 1992 (hereinafter *Rio Declaration*); Convention on Biological Diversity, 1992 (hereinafter *Convention on Biodiversity*). According to some writer, it is the undeniable benefits of EIA that has promoted developed countries to make it a mandatory requirement and caused developing country to play catch-up. See MELLESE DAMTIE AND MESFIN BAYOU, *Supra* note 51, at 3-5.

deciding whether or not a project is desirable, positive public perception towards the project may be taken as an indication of the project's success.⁶⁵

1.4. Aspects of EIA

EIA can be used as a tool for making better environmental decisions at two levels, at the planning and project levels.⁶⁶ The EIA that is conducted at the planning level is known as strategic environmental assessment (SEA) or top level EIA, whereas the EIA that is conducted at project level is simply called environmental impact assessment or project level EIA or lower level EIA.⁶⁷ In the following sections, these two aspects of EIA will be discussed.⁶⁸

1.4.1 Strategic Environmental Assessment (SEA)

Although there is no internationally agreed upon definition of SEA, the following definition is mentioned frequently:⁶⁹

“SEA is a systematic process for evaluating the environmental consequences of proposed policy, plan or programme initiatives in order to ensure they are fully included and appropriately addressed at the earliest appropriate stage of decision-making on par with economic and social considerations.”

⁶⁵ For the discussion in this paragraph and more, see generally, NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY, HANDBOOK ON ENVIRONMENTAL LAW IN UGANDA 31, 2nd ed. Vol. 2 (2005); JOHN NTAMBIRWEKI in UNEP, *Supra* note 31, at 75-76.

⁶⁶ This is a broad category of the stages at which EIA can be used. Otherwise, different writers may provide for more specific tiers to use EIA. For example, according Modak and Biswas, EIA can be used at policy level, plan level, and programme level, all of which form part of SEA, and finally at project level as a fourth tier. See PRASAD MODAK AND ASIT K.BISWAS, CONDUCTING ENVIRONMENTAL IMPACT ASSESSMENT IN DEVELOPING COUNTRIES 209-210 (1999).

⁶⁷ See, for example, ENVIRONMENTAL ASSESSMENT IN DEVELOPING AND TRANSITIONAL COUNTRIES 1(Norman Lee and Clive George eds., 2000); PRASAD MODAK AND ASIT K.BISWAS, *Supra* note 66, at 209.

⁶⁸ For the differences between the two levels of EIA, see generally, ENVIRONMENT AND SOCIAL DEVELOPMENT DEPARTMENT, WORLD BANK, ENVIRONMENTAL IMPACT ASSESSMENT REGULATIONS AND STRATEGIC ENVIRONMENTAL ASSESSMENT REQUIREMENTS PRACTICES AND LESSONS LEARNED IN EAST AND SOUTHEAST ASIA, 5 (2006); CHARLES H. ECCLESTON, ENVIRONMENTAL IMPACT ASSESSMENT: A GUIDE TO BEST PROFESSIONAL PRACTICES 207-209 (2011).

⁶⁹ ECONOMIC COMMISSION FOR AFRICA, UNITED NATIONS, REVIEW OF THE APPLICATION OF ENVIRONMENTAL IMPACT ASSESSMENT IN SELECTED AFRICAN COUNTRIES 7 (2005). SEA is also defined as an analytical and participatory approach for mainstreaming and upstreaming environmental and social considerations in policies, plans and programs to influence decision-making and implementation processes at the strategic level. See WORLD BANK, *Supra* note 68, at 5.

According to this definition, SEA refers to a method whereby the environmental impacts of policies, plans, or programs are properly and early evaluated with a view to making the consideration of environmental values in the decision-making process as relevant as the consideration of other values such as economic and social values. This makes sense particularly when we see it in light of the principle of sustainable development because the consideration of other values while disregarding environmental values will only make development unsustainable. This is why it is said that SEA represents a proactive approach to integrating environmental considerations into higher levels of decision making.⁷⁰

As far as the evolution of SEA is concerned, it is necessary to first examine the 1969 US NEPA since it is the source of EIA in its present form. In section 102(2), NEPA requires all agencies of the Federal Government to do a detailed EIA for every recommendation or report on proposals for *legislation* and other major federal *actions* significantly affecting the quality of the human environment.⁷¹ This stipulation refers not only to project level EIA but also to strategic level EIA.⁷² For instance, it requires EIA for proposed legislation which is clearly a strategic EIA. Moreover, instead of major federal *project*, the Act uses the term major federal *action*. On the other hand, the term *action* includes both projects and strategies. According to some writers, major federal actions may include projects, programs or plans, policies (such as

⁷⁰ ECONOMIC COMMISSION FOR AFRICA, *Supra* note 69, at 7 and CHARLES H. ECCLESTON, *Supra* note 68, at 206.

⁷¹ National Environmental Policy Act, Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4321-4347 (2006)) [*NEPA* hereinafter], §102(2). *Emphasis added*.

⁷² ECCLESTON makes a distinction between *programmatic* assessment and *strategic* assessment. Accordingly, a *programmatic* assessment tends to be prepared for proposals that involve the development of a definite policy, plan, or program (PPPs). In contrast, a *strategic* assessment tends to denote a scope of analysis that is one level higher than that of a programmatic assessment. More to the point, a strategic assessment defines a high-level direction or strategy for a nation (e.g., national energy, agricultural, or water strategy). In theory, once this direction/strategy is defined, a *programmatic* assessment could then be prepared to consider a specific policy, plan, and in particular, a program for implementing the strategy defined in the SEA; the *programmatic* EIA can be tiered from the SEA. According to ECCLESTON, the United States and many other nations do not formally recognize the concept of the *strategic* EIA although they recognize *programmatic* assessment. Conversely, much of the world, including the European Union, does not formally recognize a *programmatic* EIA while they recognize *strategic* EIA. However, it should be noted that, in practice, the two concepts are similar. For more on this point, see generally, CHARLES H. ECCLESTON, *Supra* note 68, at 206-207.

rules and regulations), treaties and international agreements.⁷³ Therefore, in the US, both aspects of EIA emerged at the same time from the same source, that is, NEPA. In practice, too, SEA has been used in the US in the early 1970s.⁷⁴ However, there are many agencies which do not conduct SEA for non-project actions, that is, for policies, plans, programs and other strategies.⁷⁵

However, although the pioneering NEPA contained provisions dealing with EIA for policies, plans and programs and, hence, recognized SEA,⁷⁶ the practice elsewhere is different. In other words, the experiences of other nations show that SEA emerged late as an aspect of EIA. After all, SEA gained acceptance in most countries partly because the advantages of project level EIA gained wide acceptance; hence, attention was not paid to SEA until recently.⁷⁷ EIA laws simply focused on the assessment of the impact of individual projects rather than the impact of the plans or programs that gave rise to such projects; for example, the focus was on the construction of a hospital rather than on the government's program pertaining to such construction.⁷⁸ Such an approach clearly leads to the consideration of

⁷³ For more on this point, see STEVEN FERREY, *Supra* note 54, at 90-91 and K.S. WEINER, BASIC PURPOSES AND POLICIES OF THE NEPA REGULATIONS 68-69 in ENVIRONMENTAL POLICY AND NEPA: PAST, PRESENT, AND FUTURE (Ray Clark and Larry Canter eds., St. Lucie Press, 1997).

⁷⁴ For example, the Department of Interior (DOI) prepared a comprehensive EIS for domestic coal leasing program for coal development throughout the US. However, because the DOI did not do regional EIS, the absence of this regional EIS was challenged and the challenge reached the Supreme Court. In 1976, the Supreme Court decided the case in favour of the DOI subscribing to the DOI's argument that regional EIS was not necessary because there was no recommendation on a proposal for major federal action. In any case, the fact that the DOI did a comprehensive EIS for its coal leasing program reveals that there was some kind of SEA as early as in the 1970s in the US. For more on this point, see STEVEN FERREY, *Supra* note 54, at 106-107. Moreover, the Council on Environmental Quality (CEQ) promulgated a rule binding on all federal agencies in 1978 that required EISs for certain programs and plans. See Council on Environmental Quality Regulations, 40 C.F.R. § 1508.18 and 1508.28 (1978).

⁷⁵ K.S. WEINER in Ray Clark and Larry Canter, *Supra* note 73, at 68-69. According to *Weiner*, some of the reasons why many agencies do not do SEA include lack of ability or competence to do SEA, fear of opening up the policy-making process to the public and to litigation, belief that environmental laws enacted and patterned in part after NEPA provide for alternatives and environmental consequences to be examined from practice, difficulties in integrating the formal NEPA process with the iterative nature of planning and policy making, and lack of NEPA oversight and encouragement from the Executive Office of the President. *Id.*

⁷⁶ PRASAD MODAK AND ASIT K.BISWAS, *Supra* note 66, at 212.

⁷⁷ *Id.* at 209, 212; see also WORLD BANK, *Supra* note 68, at 5.

⁷⁸ See MAURICE SUNKIM ET.AL, SOURCE BOOK ON ENVIRONMENTAL LAW 781, 2nd ed. (2002).

environmental values at a late stage in the decision-making process.⁷⁹ As a result, scholars commenced arguing that environmental values should be considered at the earliest possible time, that is, when plans, programs and policies are considered rather than when projects based on them are put forward.⁸⁰ In the end, some legal systems started requiring SEA for certain actions; for instance, in the European Union, the first proposal for a draft directive on SEA was made in 1991 and the EU adopted the requirement of SEA for plans and programs, but not for policies.⁸¹

In Africa, too, some countries have put in place some sort of legal framework for SEA. In this regard, Ethiopia and Kenya are mentioned as countries with a legal framework for SEA in place.⁸² Moreover, Namibia's draft bill and South Africa's guidelines on SEA deserve mentioning.⁸³ Furthermore, although some African countries do not have explicit legislative requirements for SEA, their EIA laws provide for environmental assessment on programs and plans.⁸⁴ Likewise, there are countries which implicitly recognize SEA in the schedules of activities that are subject to project level EIA.⁸⁵ Hence, even if it is a late introduction, the legal requirement of SEA has been recognized in many African countries.⁸⁶

⁷⁹ See PRASAD MODAK AND ASIT K. BISWAS, *Supra* note 66, at 209.

⁸⁰ For more on the discussion in this paragraph, see generally, MAURICE SUNKIM ET.AL, *Supra* note 78, at 781.

⁸¹ For more, see *id.*

⁸² See ECONOMIC COMMISSION FOR AFRICA, *Supra* note 69, at 10 and LANA ROUX and WILLEMIEN DU PLESSIS in NATHALIE J. CHALIFOUR ET AL, *Supra* note 6, at 89.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ At this juncture, it must be noted that the development of environmental law in Sub-Saharan Africa is a direct requirement of international donor agencies rather than the outcome of a national willingness to strengthen environmental agenda. See MOHAMMED A. BEKHECHI AND JEAN-ROGER MERCIER, *Supra* note 15, at 5. For example, some writers argue that in the past, EIA was not a legal requirement in most of the African countries; instead, most EIAs were conducted when projects were funded by foreign institutions such as the World Bank, which insisted on EIAs as a requirement of funding, or where project owners were foreign companies whose code of conduct required EIA. Thus, EIAs were done due to external factors than the desire to protect the environment. See LANA ROUX and WILLEMIEN DU PLESSIS in NATHALIE J. CHALIFOUR ET AL, *Supra* note 6, at 94.

So, generally, the requirement of SEA, which is a second generation EIA in many countries, is now well established. Initially, it picked up in many developed countries in the 1990s; then, it has found its way on to the developing countries although the adoption and application of SEA in the developing countries have been very slow due to financial and human resource constraints.⁸⁷

1.4.2 Project Level EIA

In many legal systems, project level EIA is the first generation EIA. That is, when EIA emerged in many legal systems as a tool for decision-making, its use was limited to decisions pertaining to the implementation of projects.⁸⁸ This is why some of the definitions of EIA we have seen before confine the importance of EIA to developmental projects. Anyway, project or lower level EIA refers to all EIAs that are done to predict the possible environmental impacts, be it positive or negative, of specific development projects.⁸⁹ Such EIAs inject environmental values into the decision-making process for the second time. That is, first, environmental values are considered and integrated into decision-making process at strategic level. Then, since projects emanating from those strategies may also pass through project level EIA, there is a second chance to examine the possible impacts of a project on the environment. It is important to note that since SEA can be general while project level EIA is project specific, a project level EIA is actually necessary to integrate environmental values into the decision-making process of a given developmental project.⁹⁰

⁸⁷ For the discussion in this paragraph, see ECONOMIC COMMISSION FOR AFRICA, *Supra* note 69, at 9-10. Of course, SEA may face more political and institutional challenge than project level EIA even in developed nations because policy setting is a political issue. PRASAD MODAK AND ASIT K.BISWAS, *Supra* note 66, at 212.

⁸⁸ See, for example, PRASAD MODAK AND ASIT K.BISWAS, *Supra* note 66, at 212.

⁸⁹ Norman Lee and Clive George in Norman Lee and Clive George, *Supra* note 67, at 1.

⁹⁰ See, for example, WORLD BANK, *Supra* note 68, at 5; PRASAD MODAK AND ASIT K.BISWAS, *Supra* note 66, at 210-212.

1.4.3 Cost of EIA

One may wonder whether or not the use of EIA is not too costly and even more so when it is required at various stages.⁹¹ After all, undertaking EIA requires, among other things, time, experts, and resources. Thus, the fact that it is costly is obvious. On the other hand, the cost of undertaking EIA becomes a real issue because resources are scarce.⁹² However, EIA is still worth using because of its multifaceted advantages. First, the cost of EIA is lower than the cost of dealing with environmental problems that could be avoided by using EIA.⁹³ Second, and as mentioned before, the use of EIA will ensure sustainable development and facilitate the enjoyment of the right to a clean and healthy environment of citizens.⁹⁴ Therefore, the cost using EIA entails is either less than the subsequent cost of dealing with environmental problems or it is worth bearing as compared to the benefits it is capable of producing.

The other point is the fact that EIA can be done at various stages which, in turn, increases the cost of employing EIA as a tool for decision-making. For example, EIA may be done at both strategic and project levels. Moreover, strategic EIA may be done at two levels, that is, when broad policies, plans or programs are considered and when more concrete or specific programs or plans which have physical and spatial reference are considered.⁹⁵ However, the use of EIA at various levels is necessary because it is only then that we can have effective protection of the environment. For instance, the SEA that is done by a government for

⁹¹ MOHAMMED A. BEKHECHI AND JEAN-ROGER MERCIER, *Supra* note 15, at 5. EIA can be done at two levels, that is, at strategic and project levels. In the US, however, it can be done at three levels. For example, under the CEQ rules, EIA may be done for an overall program or plan; for a program or plan of lesser scope; and, for a site-specific statement or analysis. See Council on Environmental Quality Regulations, *Supra* note 74 § 1508.28.

⁹² See BIBOBRA BELLO ORUBEKE, ENVIRONMENTAL IMPACT ASSESSMENT LAW AND LAND USE: A COMPARATIVE ANALYSIS OF RECENT TRENDS IN THE NIGERIAN AND U.S. OIL AND GAS INDUSTRY in LAND USE LAW FOR SUSTAINABLE DEVELOPMENT 300 (NATHALIE J. CHALIFOUR ET AL. eds., Cambridge University Press, (2006), 2007)).

⁹³ MOHAMMED A. BEKHECHI AND JEAN-ROGER MERCIER, *Supra* note 15, at 5-6. Some argue that even if sometimes reversing environmental damage may be possible, the cost of such measure is often prohibitive. See S. SHANTHAKUMAR, INTRODUCTION TO ENVIRONMENTAL LAW 382, 2nd ed. (2007).

⁹⁴ It can also facilitate the development of sense of respect for nature/environment.

⁹⁵ See PRASAD MODAK AND ASIT K. BISWAS, *Supra* note 66, at 8-9.

strategies is general and not project specific like project level EIA. On the other hand, lower level EIA alone is not enough because the consideration of environmental values in the EIA process will be late. Therefore, it is necessary to have EIA at different stages because its costs are overshadowed by its benefits.

Finally, it must be borne in mind that the cost of EIA at the project level is not, as we will see later on, necessarily covered by governments in many countries. Instead, project proponents are required to cover these costs.⁹⁶ Moreover, governments may take various measures to reduce the cost of rendering services in EIA. For instance, as it has been happening in some countries, the number of consultants can be raised to increase competition among them with a view to bringing down the cost of EIA; or proponents may be required to employ local consultants, as opposed to international consultants, to reduce the cost of EIA whenever that is possible.⁹⁷

⁹⁶ On the other hand, proponents of projects may at the end shift their EIA costs to consumers of their goods or services because they can make their prices include EIA costs.

⁹⁷ For example, in Uganda, there is a proliferation of consultants which has resulted in a considerable lowering of EIA cost. In Ghana, to date, over 90% of EIAs undertaken have been prepared by local consultants with exceptions in the mining sector where expatriate consultants dominate. For more on this point, see generally, ECONOMIC COMMISSION FOR AFRICA, *Supra* note 69, at 32.

CHAPTER TWO: ENVIRONMENTAL IMPACT ASSESSMENT IN ETHIOPIA: THE LEGAL FRAMEWORK

2.1 Historical Development

As we have seen before, the legal requirement of EIA is now universally accepted in the sense that most developed and many developing countries have adopted some form of EIA. In this sense, Ethiopia is not an exception.⁹⁸ One of its earliest commitments to undertake EIA came into being when it ratified the Convention on Biological Diversity in 1994 to protect and conserve Biological Diversity.⁹⁹ Article 14(1)(2) of the Convention requires every contracting party to introduce appropriate procedures requiring EIA of its proposed projects that are likely to have significant adverse effects on biological diversity with a view to avoiding or minimizing such effects and, where appropriate, allow for public participation in such procedures and also introduce appropriate arrangements to ensure that the environmental consequences of its programs and policies that are likely to have significant adverse impacts on biological diversity are duly taken into account.¹⁰⁰

There are also other instruments which Ethiopia has ratified and which support the use of the system of EIA. For example, the International Covenant on Economic, Social and Cultural Rights recognizes everyone's right to the enjoyment of the highest attainable standard of physical and mental health and stipulates that this right can be realized by taking different

⁹⁸ In fact, as the previous discussion has revealed, although the express recognition of the principle of EIA is a recent phenomenon, one may argue that both the 1987 PDRE and the 1995 FDRE Constitutions have recognized EIA in as long as they required the protection of the environment and environmental protection becomes effective if EIA is recognized and used.

⁹⁹ Ethiopia signed the Convention on 10 June 1992 and ratified it on 05 April 1994. See the ratification status of the Convention on Biological Diversity.

¹⁰⁰ It is interesting to note that article 14(1)(2) of the Convention requires not only project level EIAs but also strategic EIA by demanding governments to introduce appropriate arrangements to ensure that the environmental consequences of their *programmes* and *policies* that are likely to have significant adverse impacts on biological diversity are also duly taken into account.

measures including the improvement of all aspects of environmental hygiene.¹⁰¹ Thus, it is not difficult to see how the use of EIA may contribute to the improvement of all aspects of environmental hygiene thereby facilitating the enjoyment of the highest attainable standard of physical and mental health. Moreover, the African Charter on Human and Peoples' Rights recognizes the right of all peoples to have a general satisfactory environment favorable to their development.¹⁰² On the other hand, this right could be understood as implying the use of EIA.¹⁰³ Further, although it is a soft law, Principle 17 of the 1992 Rio Declaration is also worth mentioning because it specifically requires undertaking EIA for proposed activities that are likely to have a significant adverse impact on the environment.¹⁰⁴

Despite the existence of the above instruments, the express recognition of the requirement of EIA in a domestic law in Ethiopia is a recent phenomenon.¹⁰⁵ For example, in 1997, Ethiopia adopted its first comprehensive Environmental Policy, the EPE, which expressly recognizes the need to use EIA for development programs and projects.¹⁰⁶ The policy is important, in particular, for its recognition of not only project level EIA but also SEA by indicating that EIA is necessary for developmental programs, too. However, the EPE does not provide for adequate stipulations to facilitate the use of EIA. Therefore, it was not until 2002, with the

¹⁰¹ See International Covenant on Economic, Social and Cultural Rights, General Assembly resolution 2200A (XXI) of 16 December 1966, *entry into force* 3 January 1976, article 12 (hereinafter *ICESCR*).

¹⁰² ARTICLE 24, AFRICAN [BANJUL] CHARTER ON HUMAN AND PEOPLES' RIGHTS, ADOPTED JUNE 27, 1981, OAU DOC. CAB/LEG/67/3 REV. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986 (hereinafter *ACHPR*). The Charter recognizes the right to have a general satisfactory environment as a group right than as an individual right. All the same, such recognition of the right does not in any way alter the obligation of a state to take the necessary steps to enforce article 24 of the Charter.

¹⁰³ Of course, the fact that the recognition and use EIA facilitates the enjoyment of the above right is already recognized in Ethiopia. See EIA Proclamation, No. 299/2002, the Preamble.

¹⁰⁴ See Rio Declaration on Environment and Development, 1992, Principle 17 (hereinafter *Rio Declaration*).

¹⁰⁵ The 1995 Constitution of the Federal Democratic Republic of Ethiopia (FDRE) requires the environment to be protected and also recognizes the right of everyone to live in a clean and healthy environment. For example, article 92(2) of the FDRE Constitution states that the design and implementation of programmes and projects of development shall not damage or destroy the environment. Article 92(4) of the Constitution stipulates that the government and citizens shall have the duty to protect the environment. Article 44(1) recognizes everyone's right to live in clean and healthy environment. Therefore, it could be argued that the proper implementation of these constitutional provisions largely depends on the use of EIA as a tool for decision-making whenever appropriate.

¹⁰⁶ See Environmental Policy of Ethiopia, 1997, Section 4.9.

enactment of Ethiopia's EIA Proclamation, that EIA became a legal requirement for projects and public instruments.¹⁰⁷

2.2 EIA Proclamation

At the moment, the 2002 EIA Proclamation is the most important domestic legislation Ethiopia has ever had in relation to EIA. The Proclamation conceives of EIA procedure as multifunctional. In its preamble, it declares that EIA facilitates sustainable development, fosters the implementation of the right to clean and healthy environment, brings about administrative transparency and accountability, and enables the public to participate in the planning of and decision taken on developments which may affect them and the environment. In its text, the Proclamation provides for a number of important stipulations pertaining to EIA which, if effectively put into practice, can actually facilitate sustainable development, foster the implementation of the right to clean and healthy environment, bring about administrative transparency and accountability, and enable the public to participate in the planning of and decision taken on developments which may affect them and the environment. Although most of the important stipulations of the EIA Proclamation will be dealt with in more details elsewhere in this paper, the following paragraphs will provide the highlights of some of them.

First, the Proclamation recognizes EIA as a tool applicable to both strategies and projects. As prior discussions have shown, the two generations of EIA emerged in many countries at different times. However, the use of EIA as early as possible, that is, at strategic level, is advisable than using it only at project level for limiting its use to projects will make the

¹⁰⁷ Actually, there was a *de facto* EIA in Ethiopia even before the enactment of the EIA Proclamation because a few land developers, including government owned agencies, were doing EIA and approaching FEPA to review their EIAs. See, for example, MELLESE DAMTIE AND MESFIN BAYOU, *Supra* note 51, at 1. This claim seems acceptable in particular when it is seen in light of the issuance of the 2000 EIA Procedural Guidelines of FEPA (to be seen later on) to ensure that EIA is done although there was no EIA law by then. Moreover, the previous investment law, to be seen later on, required applicants for investment permits to observe environmental protection requirements which were pushing them to use EIA under certain circumstances. Further, the fact that institutions like the World Bank started using EIA as a loan condition before 2002 could be taken as another reason why there was a *de facto* EIA in Ethiopia before the enactment of the EIA Proclamation.

consideration of environmental values in decision-making process late. Cognizant of this fact, the EIA Proclamation recognizes both aspects of EIA simultaneously. In this regard, first, article 2(3) of the Proclamation defines EIA broadly as *the methodology of identifying and evaluating in advance any effect, be it positive or negative, which results from the implementation of a proposed project or public instrument*. This definition obviously includes lower-level EIA as it states that *proposed projects* can be subject to EIA. Moreover, article 5 of the EIA Proclamation clearly requires the use of EIA at project level. Similarly, the inclusion of the expression *public instrument*, which refers to a policy, a strategy, a program, a law or an international agreement, in the definition of EIA shows the recognition of SEA in our system of environmental law. Besides, article 13 of the EIA Proclamation specifically requires the use of EIA for public instruments that are listed by FEPA as subject to EIA. Thus, for example, if Ethiopia has a plan to implement a new city master plan, the approval of the plan should be preceded by SEA provided, of course, that it is subject to EIA.¹⁰⁸ Therefore, it could be said that the fact that the EIA Proclamation was enacted late helped our system of environmental law to recognize both aspects of EIA simultaneously.

Second, articles 5 and 13 of the EIA Proclamation declare that actions that are subject to EIA should be determined by FEPA by issuing directives. Article 6(4) of the Environmental Protection Organs Establishment Proclamation also imposes on FEPA the duty to establish a system for EIA of public and private projects as well as for social and economic development policies, strategies, laws, and programmes.¹⁰⁹ This means, FEPA is under obligation, in accordance with both Proclamations, to establish the necessary system that will make the procedure of EIA work at both strategic and project levels. For example, FEPA bears, *inter*

¹⁰⁸ For the actions that FEPA has listed in its guidelines as subject to EIA, see Environmental Protection Authority, Federal Democratic Republic of Ethiopia *Environmental Impact Assessment Procedural Guideline Series 1*, November 2003 as annexed to this paper (hereinafter *FEPA Guidelines*).

¹⁰⁹ This Proclamation, which was issued in the same year but months before the EIA Proclamation, envisages the use of EIA at both strategic and project levels.

alia, the responsibility to issue directives which determine the projects and public instruments that must pass through the EIA process.¹¹⁰ Consequently, those who are required to do EIA will only be required to do EIA with respect to the actions to be determined in accordance with FEPA's instruments. If an action is not identified in FEPA's directives/guidelines as subject to EIA, then neither its approval (at strategic level) nor implementation will be subject to EIA.

In order to determine which action should be listed as subject to EIA and which should not be, FEPA must consider the possible consequences (impacts) of the action on the environment. For a project, this can be done by taking into account, as stipulated under article 4 of the EIA Proclamation, the size, location, nature, cumulative effect with other concurrent impacts or phenomena, trans-regional effect, duration, reversibility or irreversibility or other related effects of a project. If FEPA or a Regional Environmental Agency (REA)¹¹¹ faces a project that has both beneficial and detrimental effects but which, on balance, is only slightly or arguably beneficial, it should err on the side of caution.¹¹² This means, if the benefit of a project is slight or arguable when compared to its impacts, FEPA or REAs must decide that the project will have significant impact on the environment, as precaution is more important and, hence, subject it to EIA for further examination.

Third, if a project is included in the directives to be issued by FEPA under the Proclamation as a project requiring prior EIA, then its implementation can only begin under two circumstances. First, it can be implemented if appropriate EIA is done and authorization to

¹¹⁰ We will see the measures FEPA has taken in this regard later on.

¹¹¹ At this juncture, one must note that the EIA Proclamation does not give REA the power to determine which projects should be subject to EIA and which should not be. Thus, it is not clear why and how REA is here required to err on the side of caution. Perhaps, the only possible way out is if REA decides to include a project that is not subject to EIA according to FEPA's directives, REA can include such project in the list of projects subject to EIA because REA can always make more stringent requirements as provided in its establishment Proclamation (to be seen later on).

¹¹² EIA Proclamation, No.299/2002, article 4(2).

that effect is obtained from the relevant environmental protection organ. Second, it can be implemented if the relevant environmental protection organ issues authorization even if EIA is not done believing that the project will not have significant impact on the environment. In default of these two situations, the implementation of a project will be contrary to the stipulation of the EIA Proclamation.

Fourth, the EIA Proclamation imposes on any licensing agency¹¹³ the obligation to ensure that an environmental permit or environmental clearance certificate (ECC) is obtained for a project subject to EIA before issuing an investment permit or a trade or an operating license for any project.¹¹⁴ Although licensing organs are required to ensure the fulfillment of conditions necessary to obtain licenses under relevant laws, the EIA Proclamation states that they must consider obtaining authorization from the relevant environmental protection organs as an additional licensing requirement provided that the action is subject to EIA. For instance, in order to issue investment permit to a foreign investor, the Ethiopia Investment Agency must ensure that the applicant meets the minimum capital requirement and other conditions recognized under investment laws unless the investor is relieved of them due to the nature of the investment he will undertake.¹¹⁵ According to the EIA Proclamation, therefore, the Agency should also consider production of ECC as an additional requirement if EIA is required for the intended investment activity.

Fifth, the Proclamation imposes the duty to do EIA on proponents. Thus, it is up to proponents, not government organs, to use experts and do EIA to produce reports. This obligation of proponents extends to revising the environmental impact study that is already submitted to the relevant environmental protection organ or even redoing EIA, if an

¹¹³ As we will see later on, licensing agencies include Investment Bureaus and Trade and Industry Bureaus.

¹¹⁴ See EIA Proclamation, No. 299/2002 article 3(3).

¹¹⁵ See, for example, Investment Proclamation, No.280/2002, article 11(4).

unforeseen fact of serious implication is realized after such submission, in order to address the implications of such unforeseen circumstance.¹¹⁶

Sixth, the Proclamation entrusts the power to ensure that EIA is done and to evaluate EIAs, in 15 working days,¹¹⁷ to environmental protection organs. Since Ethiopia is a federal state, it divides this power between FEPA and REAs.¹¹⁸ Accordingly, FEPA is responsible for the evaluation of environmental impact study reports and the monitoring of their implementation when projects are subject to licensing, execution or supervision by a federal agency or when they are likely to produce trans-regional impacts.¹¹⁹ On the other hand, REAs in every region are responsible for the evaluation and authorization of any environmental impact study reports and the monitoring of their implementation if the projects are not subject to licensing, execution and supervision by a federal agency and if they are unlikely to produce trans-regional impacts.¹²⁰ This implies that both FEPA and REA have been given the responsibility to ensure the effectiveness of the system of EIA.

Seventh, the EIA Proclamation recognizes the relevance of public participation in the EIA process and demands that the public is engaged in the process.¹²¹ As we will consider later on, public participation in the EIA process is of paramount importance for the effectiveness of the system of EIA. Hence, the public must be involved in the EIA process both when EIAs are done by proponents and when their reports are evaluated by the relevant environmental protection organs.¹²²

¹¹⁶ See EIA Proclamation, No. 299/2002, article 11.

¹¹⁷ See *id.* article 9(2).

¹¹⁸ As we will see later on, FEPA is now delegating its power to review EIAs to sectoral ministries or agencies.

¹¹⁹ EIA Proclamation, No. 299/2002, article 14(1).

¹²⁰ See *id.* articles 14 and 9.

¹²¹ See *id.* articles 6, 9 and 15.

¹²² After all, in Ethiopia public participation in the EIA process seems to be a constitutionally guaranteed right. In this sense, therefore, the EIA Proclamation could be taken as one of the laws aiming at enforcing the constitutional provision on public participation See the FDRE Constitution, article 43.

Eighth, while the Proclamation requires a proponent to fulfill the terms and conditions of authorization of its project, FEPA and REAs are given the mandate to monitor the implementation of the projects they have authorized with a view to evaluating compliance with all commitments made by and obligations imposed on the proponent during authorization.¹²³ Thus, as we will consider later on, FEPA or REAs may take measures if they find proponents not complying with their commitments or obligations.

Ninth, in order to make environmental protection more effective through the use of EIA, the Proclamation obliges environmental protection organs to provide incentives to projects (not public instruments, though) that are destined to rehabilitate a degraded environment or prevent pollution or clean up environmental pollution. The incentives include technical and financial support. However, the Proclamation makes the provision of incentives to such projects contingent upon the capacity of environmental protection organs.¹²⁴ Thus, within the limits of their capacity, FEPA and REAs are under obligation to grant incentives to the projects mentioned before.

Tenth, after providing for a number of important stipulations, the EIA Proclamation provides for the pecuniary penalty those who violate its provisions and other laws pertaining to EIA will have to face although such penalty, as we will see in subsequent chapter, applies only to proponents of private projects.¹²⁵ This appears a second assurance that the Ethiopian government is indeed committed to make the system of EIA as effective as possible by penalizing deviations not only from the provisions of the EIA Proclamation but also from other laws pertinent to EIA such as the regulations and directives to be issued under the Proclamation.

¹²³ See EIA Proclamation, No. 299/2002, articles 7(4) and 12.

¹²⁴ See *id.* article 16.

¹²⁵ See *id.* article 18.

Finally, realizing that the effective implementation of its provisions requires the issuance of implementing laws, the Proclamation authorizes the Council of Ministers and FEPA to issue regulations and directives, respectively.¹²⁶ Actually, in the absence of these subsidiary laws aiming at putting the stipulations of the EIA Proclamation into effect, the EIA Proclamation can hardly produce any of its desired result. This is so because the provisions of the Proclamation are too general to render themselves applicable without being assisted by subsidiary laws. Thus, the recognition that the necessary regulations and directives can/should be made by the Council of Ministers and FEPA is justifiable as the existence of these laws is extremely essential for the effectiveness of the Proclamation, hence, the system of EIA in the country.

Therefore, despite its late introduction, the EIA Proclamation attaches great importance to the procedure of EIA. Moreover, it contains a number of important stipulations which aim at making the system of EIA work effectively and produce its intended results. In light of these stipulations, therefore, it would not amount to exaggeration if one argues that the EIA Proclamation is a fundamental law on EIA in Ethiopia. In the subsequent chapters, we will consider what the reality in relation to EIA is like in the country vis-à-vis what is intended by the provisions of the EIA Proclamation.

2.2.1 Obligation to Undertake EIA

According *Squillace*, EIA becomes more effective when it occurs in an atmosphere of neutrality towards a particular proposed action.¹²⁷ This means, the system of EIA can be more successful and, hence, be able to produce the desired results if it is handled by a person who does not have an interest in the proposed action. After all, it may be very difficult to argue that a person who has a stake in the proposed action can be objective when he/it conducts

¹²⁶ See *id.* articles 19 and 20.

¹²⁷ Mark Squillace, *An American Perspective on Environmental Impact Assessment in Australia*, 20 Colum. J. L. 43, 71 (1995) in William L. Andreen, *Supra* note 35, at 47-49.

EIA. Moreover, if EIA is done by a neutral person, it can secure public confidence in the system of EIA and also win public support for the proposed action, whereas biased EIA leads to loss of public confidence in the system and support for the proposed action.¹²⁸ Therefore, employing a neutral person or body to handle EIA has many advantages. This being the case, then, the point worth considering is the approaches that countries have adopted to resolve this issue.

Generally, one can identify at least two approaches to the organs that are responsible for doing EIA. First, some countries have opted to give the responsibility to do EIA to government organs. For example, in the USA, the duty to conduct an environmental impact study (EIS) is imposed on federal agencies, not proponents (unless the agencies themselves are the proponents).¹²⁹ This approach may be advantageous since it can be presumed that government organs can be independent and more sensitive to environmental needs than proponents who are usually business persons.¹³⁰ A case in point is the rules of the US Council of Environmental Quality (CEQ) which prohibit the preparation of an EIA by a private party proponent or by any person who may have an interest, financial or otherwise, in the outcome of a project.¹³¹ This could be taken as an indication of the greater trust that the US puts in its government in relation to the objectivity of an EIS than in a private party proponent or its paid consultant. Moreover, *Squillace* argues that most rational persons will necessarily be greatly cynical about the impartiality of an EIS prepared by a proponent or its hired consultant.¹³²

¹²⁸ *Id.* at 101.

¹²⁹ See NEPA, *Supra* note 71, § 102, 42 U.S.C. and Council on Environmental Quality Regulations § 1606.5 (1999); William L. Andreen, *Supra* note 35, at 49.

¹³⁰ For example, William L. Andreen, *Supra* note 35, at 48.

¹³¹ *Id.* at 49.

¹³² Mark Squillace, *Supra* note 127, at 71.

However, while supporting the preparation of an EIS by an independent body, it is interesting to note that the US system allows an agency to do its own EIS when it is a proponent.¹³³ In this case, there will be a conflict of interest which can compromise the agency's independence in relation to the EIA it undertakes. However, it is argued that the conflict that an agency faces is less significant than the one that a private proponent faces because the agency lacks financial interest in the outcome of an action for which an EIS is required.¹³⁴ In other words, even if both options may be evils under such circumstances, an agency is regarded as a lesser evil. Moreover, it is argued that the problem of neutrality of an agency that does EIS for its own actions could be eased by making environmental office give technical assistance and advice to the agency during EIS.¹³⁵ Therefore, there are many good reasons to entrust the duty to conduct an EIA to government organs.

On the other side of the fence, one can also argue that mission-oriented government organs may at times be in dilemma since they have conflicting interests. On the one hand, the agencies have to ensure that their missions are accomplished by creating conducive environment such as by easing conditions for investment in their sectors. On the other hand, they have to ensure that the environment is protected by ensuring that EIA is used properly. This means, when there is a tension between the two goals, they have to strike a balance, whereas, under such circumstances, these agencies may not be less likely to do the right thing than the private proponents. In other words, the agencies may not actually be lesser evils as the above discussion has tried to portray them. Speaking particularly from the perspective of developing or the least developed countries, government organs may not be that independent or sensitive to the environment than they are to the achievement of their primary objectives such as increasing investment activities. This is exactly what the practice in Ethiopia reveals

¹³³ See William L. Andreen, *Supra* note 35, at 49.

¹³⁴ *Id.*

¹³⁵ Mark Squillace, *Supra* note 127, at 49.

as we shall see later on. Thus, although the approach that favors entrusting the responsibility to do EIA to government organs may be good for various reasons, it has also its own drawback.¹³⁶

The second approach, which is generally accepted, favors permitting proponents to do the EIA, either by themselves if they command the necessary expertise¹³⁷ or by hiring consultants,¹³⁸ and reserving the responsibility to evaluate their EIAs to government organs.¹³⁹ However, some scholars argue that this approach is flawed because proponents will only start doing EIA after they have formulated a specific proposal that needs government approval.¹⁴⁰ Since most proponents will act in their own self-interest most of the time, one can be confident that the EIS will focus primarily on what the proponent wants to do, not on, for example, alternative courses of actions.¹⁴¹ For example, it makes little sense for a proponent to choose another course of action as an alternative and analyze it from environmental perspective and then conclude that the alternative chosen is superior to the course of action previously chosen.¹⁴²

¹³⁶ This approach seems to work for developed countries. However, it is less likely to be effective as a means to facilitate the effectiveness of the system of EIA in developing and the least developed countries where government agencies' primary concern appears to be economic development and their focus on economic development at any expense could be intense and absolute.

¹³⁷ For example, in countries such as Swaziland and Namibian, environmental laws do not expressly recognize the role of consultants in the EIA process; instead, they required proponents to do EIA while tasking the competent authority to monitor compliance with the process. Thus, if proponents use consultants, the responsibility of proponents is to ensure that the EIA is properly done in accordance with the legislation and regulations because they are the once to be held liable in the end. See LANA ROUX and WILLEMIEN DU PLESSIS in NATHALIE J. CHALIFOUR ET AL, *Supra* note 6, at 98.

¹³⁸ In South Africa, a proponent is not allowed to do EIA by itself. Instead, it is required to appoint an independent consultant who will conduct an EIA on its behalf. See *id.*

¹³⁹ PRASAD MODAK AND ASIT K.BISWAS, *Supra* note 66, at 14 and William L. Andreen, *Supra* note 35, at 48. However, making proponents do EIA may also have its own problem because the consultants they use to do EIA may not prepare unbiased EIA reports. After all, consultants are business persons and it is hard to conclude that they will not be lenient when they prepare EIAs. If consultants were to be paid by the government, whosoever covers the cost, upon selection based on competition, it would be likely that they will be independent. Of course, dangers of influence from government organs are still there but it seems that this is a lesser evil.

¹⁴⁰ William L. Andreen, *Supra* note 35, at 48.

¹⁴¹ Mark Squillace, *Supra* note 127, at 75.

¹⁴² *Id.* at 89.

There is some truth in the above argument. This is so because consultants who are business persons do not want to lose clients by failing to produce EIAs which favour the implementation of their clients' proposed actions.¹⁴³ This can be the case in countries like Ethiopia where, as we will see later on, many consultants do not have much work to do as EIA is not done frequently. On the other hand, there can be an argument supporting the second approach. For instance, it could be said that private proponents can produce better EIAs because their reports could be scrutinized in particular in countries where there are public hearings on EIAs or where third persons do have the right to challenge the adequacy of EIAs.¹⁴⁴ Moreover, in many countries where the second approach is adopted to conduct EIA, proponents are required to consult with the government for some initial guidance on the content and scope of the assessment, whereas such consultation commonly results in the issuance of Terms of Reference (TOR) in which the stipulated contents of the EIA to be done are set forth.¹⁴⁵ This shows that the government still retains some role to play in the EIS. Hence, the problem of lack of neutrality may be reduced. Nevertheless, there is doubt, in many cases, about the actual usefulness of the TOR that is issued by the government.¹⁴⁶

In any case, practice shows that many countries have opted for allowing private proponents or their consultants to do EIA because of the cost implication of making government organs do EIA.¹⁴⁷ In other words, it is the second approach that is generally used, whereas countries

¹⁴³ See William L. Andreen, *Supra* note 35, at 49.

¹⁴⁴ See ALAN GILPIN, *ENVIRONMENTAL IMPACT ASSESSMENT (EIA): CUTTING EDGE FOR THE TWENTY-FIRST CENTURY* 22-23 (1995) in William L. Andreen, *Supra* note 35, at 48.

¹⁴⁵ MARCEIL YEATER AND LAL KURUKULASURIA, *ENVIRONMENTAL IMPACT ASSESSMENT LEGISLATION IN DEVELOPING COUNTRIES* in *UNEP'S NEW WAY FORWARD: ENVIRONMENTAL LAW AND SUSTAINABLE DEVELOPMENT* p 263 in William L. Andreen, *Supra* note 35, at 48 and ALAN GILPIN, *Supra* note 144, at 22-23.

¹⁴⁶ For example, it is said that many TORs resemble nothing more than a rudimentary checklist or a table of content, and even a more elaborate one could not force a reluctant proponent to assess alternatives in a fair and open manner. See Alan Gilpin, *Supra* note 144, at 22-23.

¹⁴⁷ William L. Andreen, *Supra* note 35, at 48.

have chosen it because primarily they do not need to bear the cost of doing EIA.¹⁴⁸ There is, nonetheless, an argument against this fear. It is said that a proponent of an action can be made to bear the cost that the government incurs when it prepares an EIS.¹⁴⁹ Hence, the government can entrust the mandate to do EIA to its agencies without fear of the related cost.¹⁵⁰

In Ethiopia, like in many other countries, the second approach is adopted. In this regard, the EIA Proclamation states that a proponent shall undertake EIA by using experts, identify the likely adverse impacts of his project, incorporate the means of their prevention or containment, and submit to FEPA or REA the EIS report together with the documents determined as necessary by FEPA or REA. Moreover, the Proclamation stipulates that a proponent has to bear the cost of undertaking an EIS and preparing an EIS report. Further, it states that while implementing a project, a proponent shall fulfill the terms and condition of authorization,¹⁵¹ whereas failure to do so may lead to the suspension or cancellation of a license to implement it.¹⁵²

2.2.1.1 Consultants

In some countries, environmental laws do not expressly recognize the role of consultants in the EIA process. For example, in Swaziland and Namibia, environmental laws require proponents to do EIA while tasking the competent authority to monitor compliance with the

¹⁴⁸ The UNECA provides a good discussion on the experience of some African countries such as Cameroon, Uganda, Namibia, South Africa, and Zambia in relation to who bears the cost of EIA. For instance, in Cameroon the cost of EIA is born by developers. In Zambia, sixty-nine percent of EIAs have been commissioned by government and they are usually funded by donor organizations. For more on this, see generally, ECONOMIC COMMISSION FOR AFRICA, *Supra* note 69, at 39. In Nigeria and the US, the cost is borne by the government. See BIBOBRA BELLO ORUBEBE in NATHALIE J. CHALIFOUR ET AL, *Supra* note 92, at 300.

¹⁴⁹ William L. Andreen, *Supra* note 35, at 48-49. On the experiences of some African countries in relation to who bears the cost of EIA, see generally ECONOMIC COMMISSION FOR AFRICA, *Supra* note 69, at 39.

¹⁵⁰ Alternatively, governments may retain consultants and pay them for EIA they do so that proponents play no role in the selection of consultants. However, once again, in developing and the least developed countries, there is no guarantee that governments will not exert undue influence on the consultants they retain or hire.

¹⁵¹ See EIA Proclamation, No. 299/2002, articles 7.

¹⁵² EIA Proclamation, No 299/2002, article 12(3). Here, any authorizing or licensing agency is obliged to suspend or cancel the license it may have issued in favor of a project if such suspension or stoppage is requested by FEPA or REAs.

process.¹⁵³ On the other hand, there are countries that expressly recognize the role of consultants in the EIA process and, hence, demand the preparation of EIA by the consultants. For instance, South Africa requires the appointment of an independent consultant who will conduct an EIA on behalf of a proponent.¹⁵⁴

In Ethiopia, the EIA Proclamation expressly recognizes the role of consultants (experts) in the EIA process. After imposing on proponents the duty to do EIA, the Proclamation requires them to use *experts* (consultants) that meet the requirements specified by FEPA's directives in order to conduct EIA and prepare reports thereof.¹⁵⁵ Hence, in principle, the EIA Proclamation does not allow proponents to do EIA by themselves.¹⁵⁶

At this juncture, it is interesting to note that the EIA Proclamation uses the term *experts* rather than *expert* which implies that EIA should be done and its report be prepared not by a single person but by a group of persons with the necessary expertise.¹⁵⁷ The stand of the 2003 Procedural Guidelines of FEPA¹⁵⁸ is in line with this understanding which uses the expression *consulting firm*. Moreover, the Guidelines define consulting firm as *an institution* that can command the required qualified professional working group that has demonstrated the ability to undertake environmental assessment, and meets the requirements specified under the relevant law. Thus, a proponent must use a group of experts (a consulting firm) to do EIA and prepare an EIS report to be submitted to the relevant environmental protection organs.

¹⁵³ LANA ROUX and WILLEMIEN DU PLESSIS in NATHALIE J. CHALIFOUR ET AL, *Supra* note 6, at 98. Of course, this does not mean that they cannot use consultants. However, if proponents use consultants, they must, as discussed before, ensure that these consultants do EIA properly in accordance with the EIA regulations because if they fail to do so they will be liable in the end. See *id.*

¹⁵⁴ *Id.*

¹⁵⁵ EIA Proclamation, No 299/2002, article 7(2).

¹⁵⁶ Of course, they can do so if they have the necessary experts at their disposal. This is what the practices of some proponents show, as we will see later on.

¹⁵⁷ This should not, however, be understood to mean that area experts cannot do EIA in relation to a given aspect of EIA. For instance, one expert like a zoologist may do EIA in relation to the impact of a given project on the animals living in a project site.

¹⁵⁸ I will discuss the status of FEPA Guidelines later on.

The Proclamation requires these experts to meet the requirements specified under directives issued by FEPA. This shows that FEPA is expected to issue directives providing for the necessary conditions EIA experts have to fulfill in order to do EIA for proponents. This is in line with the practice in other countries like South Africa where there are regulations for the certification and registration of consulting firms/EIA experts.¹⁵⁹ Thus, in our case, too, the required directives may, among others things, provide for the qualifications and field of qualifications of EIA experts, certification and registration by appropriate government organ as competent to do EIA in accordance with the relevant law(s), and holding renewed license. The question then is whether or not we do have consultants in Ethiopia at the moment. If the answer is in the affirmative, the issue of their certification and registration as envisaged by the EIA Proclamation remains to be seen because FEPA has not yet issued directives in accordance with which consultants will be certified and registered.

At the federal level, there are consultants who are registered and licensed to do EIA. Some of these consultants were certified and licensed by FEPA, others were certified and licensed by Ethiopian Management Institute, whereas there are still EIA consultants who were licensed by other organs like the Bureau of Trade and Industry.¹⁶⁰ In regions, too, there are licensed EIA consultants who are doing EIA for proponents. For instance, in the South Nations, Nationalities, and Peoples Regional State (SNNPRS)¹⁶¹ and Amhara Regional State¹⁶² there

¹⁵⁹ MELLESE DAMTIE AND MESFIN BAYOU, *Supra* note 51, at 13.

¹⁶⁰ Interview with Ato Solomon Kebede, Director, Environmental Standards Program Directorate, FEPA; Ex-Head of the EIA Department, FEPA, in Addis Ababa (September 7 and 8, 2009; October 22, 2010; April 12, 2011; and August 16, 2011). In the process of writing this paper, I interviewed Ato Solomon Kebede on different days and in different capacities. When I first interviewed him on September 7 and 8, 2009, he was the Head of the EIA Department of FEPA. When I interviewed him on 22 October 2010 and 12 April 2011, he was an EIA expert because the EIA Department was abolished. When I conducted my last interview with him on 16 August 2011, he was (and still is) the Director of the Environmental Standards Program Directorate of FEPA.

¹⁶¹ Interview with Ato Weldeberhan Kuma, Environmental and Case Team Coordinator, SNNPRS Land Administration, Use, and Environmental Protection Authority, in Hawassa, SNNPRS (October 07, 2010).

¹⁶² Interview with Ato Yitayal Abebe Asetih, Team Leader, Ensuring Sustainable Environmental Protection Core Process, Environmental Protection, Land Use and Administration Authority, Amhara Regional State, in Bahir Dar, Amhara (November 29, 2010).

are EIA consultants who are licensed to do EIA although the REAs of these regions did not certify and register them. It is very interesting to note that in some regions like Oromia¹⁶³ and Tigray,¹⁶⁴ REAs are not aware of the presence of consultants licensed to do EIA in their respective regions.

Therefore, it may be safely argued that although they may not be present in all our regions, there are consultants in the country who are licensed to do EIA for proponents. The next point worth considering, therefore, pertains to the manner in which those consultants obtained their licenses because they are required to be certified before they are given licenses. After all, according to the EIA Proclamation, certification and licensing of consultants must take place in accordance with the directives FEPA must issue while FEPA has not yet issued these directives. In the absence of such directives that is expected to provide for clear certification and licensing procedures, it would not be possible to certify and license consultants because no one knows what the requirements of such certification and licensing are. On the other hand, the failure of FEPA, for a decade since the duty to issue certification and licensing directives was imposed on it by the EIA Proclamation, has created a number of problems some of which are discussed below.¹⁶⁵

First, in order to be certified as a consultant and obtain license to do EIA, consultants/consulting firms must show that they have the necessary experts. However, it is not clear what type of experts firms/consultants must have in order to be certified and obtain

¹⁶³ Interview with Alemayehu Geleta, EIA expert (Water ecology expert) at Oromia Land and Environmental Protection Bureau, Environmental Protection Core Process, in Addis Ababa (October 20, 2010).

¹⁶⁴ Interview with Yirga Tadesse, EIA Expert and Acting Business Owner, EIA Team, and Hadush Berhe, Environmental Education and Awareness Expert, Tigray Regional Government environmental Protection, Land Administration and Use Agency, in Mekelle, Tigray (October 28, 2010).

¹⁶⁵ Solomon Kebede, *Supra* note 160.

licenses.¹⁶⁶ Moreover, there is no clear requirement of the minimum qualifications that an expert working for a firm/consultant must possess-diploma, first degree, second degree, etc.

Second, there are no clear obligations that consultants/firms need to assume, before they are certified and given licenses, to discharge in the course doing EIA. For example, it is not clear whether consultants should agree to engage the public in the EIA process when they do EIA and if they should also agree to declare that they lack a vested interest in a project for which they do EIA.¹⁶⁷

Third, there are no rules governing the types of consultants/consulting firms that can exist in Ethiopia. For example, can one consultant/consulting firm do all kinds of EIA for all projects-small, medium and big? Or should certain consultants/consulting firms, due to their capacity, be limited to doing EIA only for certain kinds of projects?¹⁶⁸

Fourth, it is not clear who can certify and issue license to EIA consultants. Under article 7(2), the EIA proclamation simply indicates that FEPA is responsible for issuing directives containing the requirements consultants should fulfill in order to be certified and licensed to

¹⁶⁶ For example, the EIA for the *Habasha Cement Project*, one of the biggest cement projects in Ethiopia, was done by a consultant called *JEMA International Consultancy PLC*. If we see the EIA this consultant produced for the project, we can realize that the firm actually commands some professionals to conduct EIA. For instance, during the various consultative meetings the firm held with various stakeholders in the EIA process, the firm was represented at various levels by six experts, namely, Aseffa Bekele (Engineer and Managing Director of the firm), Lelise Dembi (Sociologist), Deme Abera (Social Anthropologist), Kebede Regassa (Engineer), Dr. Seyoum Leta (geology), and Gary Fufa (Engineer). Thus, it is possible to say that the firm commands some experts to do EIA for projects. However, if the above are the only experts the firm commands, then, it cannot be taken as an appropriate firm to do a comprehensive EIA for projects like that *Habasha Cement Factory*. For instance, the firm lacks professionals in fields like psychology, hydrology, environment, politics, and law. Of course, the firm can always hire the necessary experts only for EIAs for some projects. Hence, it does not have to have permanent employees in all kinds of fields. Of course, the EIA for the *Habasha Cement* does not indicate that experts other than the ones mentioned here were involved, which, in turn, shows that the report is incomplete when it is viewed from the perspectives of other fields. The full text of the EIA report for the *Habasha Cement Share Company* (May 2010) could be obtained from the archive of OREA.

¹⁶⁷ For example, if the owners of a consulting firm are also shareholders in a project for which EIA is to be conducted, should they be allowed to do EIA for such project? They obviously have pecuniary interest in the project. Hence, it is likely that they will prepare an EIA which favors the implementation of the project.

¹⁶⁸ For example, in relation to advocacy license, article 7 of the Federal Courts Advocates Licensing and Registration Proclamation, No. 199/2000, stipulates that an advocate can obtain a federal first instance court advocacy license, or all federal courts advocacy license, or a federal court special advocacy license. These licenses give their respective holders different rights. In like manner, we can have a law providing for the types of licenses EIA consultants can obtain.

do EIA. It does not say anything in relation to who can certify and license these consultants. Thus, FEPA may indicate in its directives the possible organs that can certify and license EIA consultants. For example, in reality, FEPA has been certifying and licensing consultants/consulting firms. The Ethiopian Management Institute has also been certifying and licensing consultants/consulting firms claiming that it can issue licenses to persons engaged in developmental activities. There is nothing that prevents REAs from certifying and licensing consultants although they have not been doing so thus far. For instance, although there have been some requests for certification and license, the Tigray Regional State REA (TREA) has been declining to accept such requests because it was not sure that it could do so; in the future, however, it has a plan to certify and issue consultancy license to EIA consultants because TREA made a discussion with FEPA on the matter and realized that FEPA is now certifying some consultants although there are no guidelines or directives on the matter.¹⁶⁹ However, whoever is empowered to certify and license consultants, it is essential to have a clear procedure for this purpose. For instance, these organs which are now certifying and licensing consultants must be clear about what they have to consider to certify and license consultants. In this regard, FEPA considers, for example, whether applicants have professionals like engineer, sociologist, economist, and biologists to effectively do EIA before certifying and licensing them.¹⁷⁰

At this juncture, one may ask if a consultant/consulting firm that is licensed/certified by FEPA can do EIA for all the projects falling under the jurisdiction of both FEPA and REAs. Or alternatively, should a consultant/consulting firm obtain licenses from FEPA and REAs to do EIA for projects falling under the jurisdiction of FEPA and REAs however difficult that may be for it involves obtaining many licenses from all the concerned organs? One may also

¹⁶⁹ Yirga Tadesse and Hadush Berhe, *Supra* note 164.

¹⁷⁰ Solomon Kebede, *Supra* note 160.

wonder what the impact of a license obtained from the Ethiopian Management Institute should be. If FEPA issues the required directives, they might address these and other relevant issues.

Fifth, it is possible to use a foreign consultant/consulting firm to do EIA. However, because of the lack of procedure for certifying and licensing consultants/consulting firms, it is not clear whether or not foreign consultants/consulting firms can be legally certified and licensed to do EIA in Ethiopia. If they can be licensed, then, the conditions on which they can be licensed, the terms of the license's validity, the EIAs that they can do (for all projects or only for some of them), and the organ that can certify and license them are not clear. Of course, practice shows that there are proponents like the Ethiopian Electric Power Corporation, as we will see later on, that have been using foreign consultants to do their EIAs.

Sixth, individuals who are experts in a given area may want to be certified and given license to do EIA only in relation to their areas of expertise. For example, a zoologist may want to obtain license to do EIA only in relation to the impact of a given project on animals. However, once again, the absence of licensing/certification procedure makes this possibility unclear.

Finally, once a license is issued, it has to be renewed like any other licenses. However, the absence of licensing/certification procedures has left this issue unanswered. Related to this are the factors that have to be considered in order to renew the licenses of EIA consultants. For instance, should a consultant maintain its initial staff profile or upgrade or increase them to have its license renewed?

At this juncture, one must bear in mind that although consultants' certification and licensing directives have not been issued so far, FEPA prepared EIA Procedural Guidelines in 2003,

which are still at draft stage and which deal with some of the points raised earlier on.¹⁷¹ For instance, the draft guidelines provide for the obligations a consulting firm should discharge in order to do EIA or in the course of doing EIA on behalf of a proponent. The obligations include having expertise in environmental impact assessment and management which is commensurate with the nature of the proposed activity and legal requirements; making available an interdisciplinary team, having solid technical skills and legal know-how, and local knowledge; managing the participation of interested and affected parties in acceptable manner; having the facility to produce readable reports that are thorough and informative; declaring and ensuring at all times that it has no vested interest in the proposed activity and observe all ethical values of the calling; familiarizing itself with legal and technical requirements of all the concerned bodies, and be able to include statements from the regional environmental agencies, certificates and recommendations from the sectoral agencies; statements of local administration approval as the case maybe; and, an endorsed minutes of public consultation process by appropriate local authority as verification of the truthfulness of all information contained in the EIA as well as fairness of the process; providing additional detailed information related to the EIS report as may be requested; ensuring that interested and affected parties are provided with all means and facilities enabling them to adequately air their views and concerns; fulfilling that they are legally registered and licensed to conduct the task; being capable of presenting an authentic and complete curriculum vitae of experts to be employed for the task; and presenting a true, pragmatic, analytical, understandable, and impartial account of the proposed activity.¹⁷²

¹⁷¹ As we will see later on, these draft guidelines are being used by environmental protection organs including FEPA. On the other hand, there is no indication about when they may be finalized. In fact, some individuals in the FEPA claim, as we will see later on, that they do not need approval by the Environmental Council and, hence, they are operative.

¹⁷² See FEPA Guidelines, *Supra* note 108, Section 6.3.

The existence of these guidelines may create the impression that they can be used as substitutes for the required directives. That is, however, not the case for various reasons. First, although they are being used, as we will see later on, the guidelines are still at a draft stage because the body that was expected to approve the guidelines, that is, the Environmental Council, was not constituted at the time the guidelines were prepared and it has not approved them even after its establishment. Second, they are not comprehensive. For example, the level of education of experts consulting firms must employ is not regulated. Issues relating to area certification are not dealt with. Questions pertaining to the organ that is competent to certify and license consultants are not addressed. Terms of validity of consultant's license, the possibility of recognizing the use of foreign consultant, etc. are also left out. Third, directives are more observed than guidelines because they are law whereas guidelines are more like best practices aiming to guide decision-making.

2.2.1.2 Actions subject to EIA

EIA is important to ensure environmental protection for it serves as an early warning about the possible impacts of a given course of action so that timely measures can be taken, if need be, to deal with such impacts.¹⁷³ However, this does not mean that EIA is necessary for every action although all development actions which may have significant impact on the environment are potentially subject to EIA.¹⁷⁴ The question then is to know what criteria are used to distinguish actions which are subject to EIA and those which are not. According to UNEP's Goals and Principles of EIA, individual states are responsible to determine the criteria and procedures that should be used to identify actions that are subject to EIA. In this regard, Principle 2 states:

The criteria and procedures for determining whether an activity is likely to significantly affect the environment and is therefore subject to an EIA should be defined clearly by Legislation,

¹⁷³ PRASAD MODAK AND ASIT K.BISWAS, *Supra* note 66, at 13.

¹⁷⁴ See Norman Lee and Clive George, *Supra* note 67, at 1.

regulation, or other means, so that subject activities can be quickly and surely identified, and EIA can be applied as the activity is being planned.¹⁷⁵

Thus, states should provide for these criteria and procedures by making legislation, regulations, or other instruments. This shows that there is no universal rule for the determination of actions that are subject to EIA.¹⁷⁶ For instance, the legal instruments in Sub-Saharan African countries do provide for different activities that are subject to EIA on the basis of the type and scale of activities.¹⁷⁷

According to European Council's Directive, projects including oil refineries, power stations, installations for disposal of radioactive waste, iron and steel works, asbestos works, chemical works, motorways, ports and waste-disposal installations must be subject to EIA.¹⁷⁸ Other projects in the fields like agriculture and aquaculture; extractive industry; energy industry; production and processing of metals; mineral industry; chemical industry; food industry; textile, leather, wood and paper industry; rubber industry; infrastructure projects; projects involving tourism and leisure may be subject to EIA as well.¹⁷⁹ Moreover, certain plans and programmes which impact upon the environment are subject to SEA.¹⁸⁰ For example, plans and programmes for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning are subject to SEA.¹⁸¹

In the US, projects are classified into three categories for the purpose of EIA. The first category includes projects which are considered to have no significant impacts on the

¹⁷⁵ United Nations Environmental Programme, *Goals and Principles of Environmental Impact Assessment*, issued on January 16, 1987, Principle 2 (hereinafter *UNEP EIA Principles*).

¹⁷⁶ World Bank, *Operational Policies: Environmental Assessment* in MOHAMMED A. BEKHECHI AND JEAN-ROGER MERCIER, *LEGAL AND REGULATORY FRAMEWORK FOR ENVIRONMENTAL IMPACT ASSESSMENTS: A STUDY OF SELECTED COUNTRIES IN SUB-SAHARAN AFRICA* 14 (2002).

¹⁷⁷ MOHAMMED A. BEKHECHI AND JEAN-ROGER MERCIER, *Supra* note 15, at 14.

¹⁷⁸ See article 2 of the European Council Directives 97/11/EC on Environmental Impact Assessment; see also MAURICE SUNKIM ET.AL, *SOURCE BOOK ON ENVIRONMENTAL LAW* 778-781, 2nd ed. (2002).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

environment, either individually or cumulatively.¹⁸² Thus, they are categorically excluded from EIS. The second category includes projects that require EIS due to their size or impact.¹⁸³ The third category includes projects for which there is no certainty whether EIS is needed.¹⁸⁴ In other words, the third category consists of projects which may or may not have significant impacts on the environment but which are not known for sure. Thus, they are subject to preliminary assessment which may lead to either finding of significant impact or finding of no significant impact.¹⁸⁵

The practice in Asia also seems similar to that of the US and Europe. For instance, the Asian Development Bank categorizes projects into three parts, that is, projects which have significant environmental impacts, projects which have significant environmental impacts but of lesser degree as compared to the first, and those projects which are unlikely to have adverse impacts on the environment, whereby the first category are subject to full EIA and the second category are subject to Initial Environmental Examination, and the third are excluded from EIA.¹⁸⁶

In Ethiopia, too, the fact that there can be actions that do not require EIA and those which require EIA is recognized. However, the EIA Proclamation does not provide for a list of actions subject to EIA; nor are there any regulations which provide for such actions. For instance, the Council of Ministers is mandated to issue regulations providing for investment incentives and investment areas reserved for domestic investors to implement the provisions of the Investment Proclamation No.280/2002 which the Council did issue.¹⁸⁷ However, although the EIA Proclamation could require the Council of Ministers to issue regulations

¹⁸² For more on this point, see STEVEN FERREY, *Supra* note 54, at 85-87.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ PRASAD MODAK AND ASIT K.BISWAS, *Supra* note 66, at 5.

¹⁸⁷ See the annex to Council of Ministers Regulations No. 84/2003 on Investment Incentives and Investment Areas Reserved for Domestic Investors.

specifying actions which must pass through EIA, like the Investment Proclamation No.280/2002 which contains such stipulation, it requires FEPA to issue directives specifying actions that should be subject to EIA by taking into account the size, location, nature, cumulative effect with other concurrent impacts or phenomena, trans-regional effect, duration, reversibility or irreversibility or other related effects of the project in order to assess impacts. Further, it enjoins FEPA to err on the side of caution while determining the negative impact of a project having both beneficial and detrimental effects, but which, on balance, is only slightly or arguably beneficial.¹⁸⁸ Accordingly, FEPA issued such directives for the first time in 2008. These directives provide for some projects which are subject to full EIA.¹⁸⁹ Yet, as subsequent discussions will reveal, these directives do have various defects which make them inapplicable at the moment.

An important instrument to consider in relation to the actions that are subject to EIA and that are not is the EIA Procedural Guidelines of FEPA which are final for FEPA but not formally

¹⁸⁸ EIA Proclamation, No 299/2002, articles 4, 5(2) and 13(2).

¹⁸⁹ The projects listed by the directives are:

1. Mine explorations that is subject to federal government permit;
2. Dam and reservoir construction (dam height 15m or more, reservoir storage capacity 3 million m³ or more, or power generation capacity 10MW or more);
3. Irrigation development (irrigated area of 3000ha or more);
4. Construction of roads (Design and Standard DS1, DS2, DS3) with a traffic flow of 1000 or more;
5. Railway construction;
6. Taking fish from lakes on a commercial scale;
7. horticulture and floriculture development for export;
8. Textile factory;
9. Tannery;
10. Sugar refinery;
11. Cement factory;
12. Tyre factory with production capacity of 15,000 Kg/day or more;
13. Construction of urban and industrial waste disposal facility;
14. Paper factory;
15. Abattoir construction with slaughtering capacity of 10,000/year or more;
16. Hospital construction;
17. Basic chemicals and chemical products manufacturing factory;
18. Any project planned to be implemented in or near areas designated as protected;
19. Metallurgical factory with a daily production capacity of equal or more than 24,000 Kg;
20. Airport construction;
21. Installation for the storage of petroleum products with a capacity of 25,000 litres or more;
22. Condominium construction; and,
23. Establishment of industrial zone.

approved by the Environmental Council (EC) as required by the Environmental Protection Organs Establishment Proclamation. A year after the enactment of the EIA Proclamation, FEPA issued Environmental Impact Assessment Procedural Guidelines.¹⁹⁰ These Guidelines, which are annexed to this paper, provide for actions that are subject to EIA and those which are not. Generally, the Guidelines contain three schedules: Schedule I contains actions that require full EIA, schedule II contains actions that require preliminary EIA, and Schedule III contains actions that may not require EIA. For instance, Schedule I contains some agricultural, forestry, and fisheries activities, wildlife, tourism and recreational development, energy industry, petroleum industry, textile industry, wood, pulp and paper industries, public instruments, and all projects in environmentally sensitive areas irrespective of their nature. Schedule II contains small-scale activities and enterprises such as fish culture, bee-keeping, small animal husbandry, horticulture and floriculture. Finally, Schedule III covers projects such as social infrastructure and services (small scale educational facilities), audio visual

¹⁹⁰ FEPA Guidelines, *Supra* note 108, Annex III, Schedule of Activities. Actually, so far, FEPA has issued two Procedural Guidelines; that is, the Environmental Impact Assessment Guideline Document, issued in 2000, and the Environmental Impact Assessment Procedural Guidelines Series 1, issued in 2003. According to Ato Solomon Kebede and Ato Wondosen Sintayehu, the later Guidelines have replaced the former. Ato Solomon Kebede and Ato Wondosen Sintayehu, Speaking as guests to the Class of LL.M and PhD students, at *Akaki* Campus, AAU, in Addis Ababa (November 17, 2009). However, it must be noted that neither of them was approved by the Environmental Council. Thus, the 2000 Guidelines were replaced before they were approved and the 2003 Guidelines are still at draft stage. At this juncture, one has to note that article 13(2) of the EIA Proclamation requires FEPA to issue Guidelines, not directives, to determine the category of public instruments that should be subject to EIA. On the other hand, FEPA issued the 2003 FEPA Guidelines which contain list of some public instruments that are subject to EIA. Hence, it could be said that FEPA has discharged its duty of determining which public instrument is subject to EIA and which is not. However, the truth is that FEPA cannot discharge this duty only by issuing Guidelines specifying actions (including public instruments) that are subject to EIA. Thus, the issuance of Guidelines does not relieve FEPA of its duty to make directives. First, the controlling version (that is, the Amharic version) of the EIA Proclamation requires the issuance of directives, not Guidelines, to determine actions (projects and public instruments) that should be subject to EIA. Second, article 13(1) of the EIA Proclamation requires FEPA to issue directives, not Guidelines, in accordance with article 13(2) to determine the public instruments that should be subject to EIA. Thus, the use of *Guidelines* under article 13(2) seems an oversight. Third, since the Proclamation requires directives to list projects that are subject to EIA, there is no reason to demand a different document for the determination of public instruments that are subject to EIA. Therefore, the obligation of FEPA to issue directives determining actions that are subject to EIA is still not discharged.

production, and teaching facilities unless they are going to be implemented in environmentally sensitive areas.¹⁹¹

Therefore it could be concluded that, in Ethiopia, actions that are subject to EIA are known and EIA should be done in accordance with these Guidelines. Nevertheless, the fact that the Guidelines do have some major problems makes such a conclusion less tenable. Despite this, FEPA uses the Guidelines to require, review and decide upon EIAs although it cannot force proponents to do EIA and take measures based on them if EIA is not done.¹⁹² Moreover, some REAs such as the environmental protection organs in Oromia, SNNPRS, and Tigray are using the Guidelines as though they were approved by the EC. Of course, while some of the REAs use the Guidelines without knowing that they are still at draft stage, others use them knowing that they are at draft stage because they do not have any other option and also because FEPA itself is using them as though they were approved.¹⁹³ This means, the Guidelines are actually *de facto* operative. On the other hand, the REA in Amhara Regional State issued its own guidelines based on FEPA's Guidelines which it is using at the moment in relation to EIA. Therefore, in this paper, I will also use or quote the 2003 FEPA Guidelines as though they were approved because they are either *de facto* operative or adapted by some REAs and hence made operational. Hence, it is possible to have EIA done or a system of EIA work in Ethiopia while the possibility will be higher if licensing organs also know about the existence of these Guidelines and require those who seek licenses from them to produce ECC from the relevant environmental protection organs to issue license when EIA is required by the Guidelines.¹⁹⁴

¹⁹¹ For more on the list of activities that are subject to EIA in accordance with the guidelines, see the annex of the guidelines to this paper.

¹⁹² Solomon Kebede, *Supra* note 160.

¹⁹³ Interviews with various personnel at REAs, *Supra* notes 161, 163, and 164.

¹⁹⁴ However, the major drawbacks here are, first, neither environmental protection organs nor licensing authorities can lawfully force proponents to do EIA if they refuse to observe FEPA's EIA Guidelines because they can argue that the Guidelines are still at draft stage and hence not binding. Second, the EIA Proclamation

2.2.1.3 Stages in EIA

In Ethiopia, there are no regulations or directives which provide for definite steps in the EIA process.¹⁹⁵ However, the 2003 FEPA Procedural Guidelines state that pre-screening, screening, scoping, preliminary assessment, environmental impact study, reviewing, decision-making, and systematic EIA follow-up are the comprehensive steps in the EIA process.¹⁹⁶ In the following sections, we will consider what the Guidelines expect to be done at every stage of the EIA process from both proponents and environmental protection organs.

A. Pre-screening and Screening

Pre-screening is not normally taken as a part or a stage in the EIA process.¹⁹⁷ However, its application is recommended in recognition of its importance to enhance the overall effectiveness of the EIA System.¹⁹⁸ It is a stage where the proponent and the respective environmental or sectoral agencies establish contact and hold consultation on how best to

requires FEPA to issue directives, not guidelines, to provide for actions that are subject to EIA. Third, licensing organs are not required, as we will see in chapter six, by laws other than the EIA Proclamation to require ECC as a condition to issue license. However, as subsequent discussion will reveal, some licensing organs have been forcing applicants to observe the Guidelines in order to obtain licenses.

¹⁹⁵ Although there are differences between project level EIA and strategic level EIA, it is said that the tasks involved in strategic level EIA are similar to those in project level EIA, and, hence, many project level EIA methods can be adapted to strategic level EIA methods. For example, SEA would involve screening, scoping, prediction, consultation, public participation, mitigation of impacts, and monitoring. See PRASAD MODAK AND ASIT K.BISWAS, *Supra* note 66, at 209, 212.

¹⁹⁶ FEPA Guidelines, *Supra* note 108, Section 5.2. Of course, the last step, that is, systematic EIA follow-up is not part of EIA. It is a step after the EIA process is completed but very important for the effectiveness of EIA since it is at this stage that authorities try to ensure that the commitments made by or obligations imposed on proponents are in fact observed.

¹⁹⁷ See *id.*, Section 5.2.1. Moreover, one can mention practices which show that there are proponents (consultants) who actually adhere to this stage. For example, in the EIA report for the *Habasha* Cement Share Company, there is an indication that pre-screening consultation was held as the report states that contacts and discussions with resourceful persons were made to get insight about the existing regulatory and institutional arrangements governing cement industry in Ethiopia in general and in Oromia Regional State in particular. Thus, as the EIA Guidelines envisage, contact was established between and discussions were made by the proponents of *Habasha* Cement Factory and the concerned bodies such as FEPA and OREA officials in order to create understanding on how best to proceed with the project. See Section 1.3.2 (or p.2) of the EIA report for the *Habasha* Cement Factory, *infra* note 213.

¹⁹⁸ See FEPA Guidelines, *Supra* note 108, Section 5.2.1.

proceed with the EIA.¹⁹⁹ The undertaking of a pre-screening consultation is advisable for it saves time and fosters a mutual understanding about the requirement.²⁰⁰

On the other hand, screening is a process of determining whether or not a proposal requires EIA, and the level at which the assessment should occur.²⁰¹ In this regard, two broad approaches can be used, that is, to use a list of actions in order to determine which actions should be assessed, or to establish a procedure for the discretionary determination of which actions should be assessed.²⁰² In other words, a document containing a list of actions may be issued to help proponents identify for which actions they need to do EIA or, alternatively, the relevant authority may be given the discretion to determine, on case by case basis, which action should pass through the EIA and which should not.²⁰³

Whichever approach is adopted, an effective screening is very important because without it an unnecessarily large number of actions may be assessed and some actions with significant adverse impacts may be overlooked.²⁰⁴ This means, the purpose of the screening process is, on the one hand, to prevent unnecessary assessments of a large number of actions that will not have significant environmental impacts and, on the other hand, to ensure that actions with significant adverse environmental impact will be assessed.²⁰⁵ That is why the process of screening is said to narrow the application of EIA to those projects that may have significant

¹⁹⁹ See *id.*

²⁰⁰ See *id.*

²⁰¹ See *id.*, Section 5.2.2.

²⁰² CHRIS WOOD, *ENVIRONMENTAL IMPACT ASSESSMENT: A COMPARATIVE REVIEW* (Longman) (1995) 115-117 in LANA ROUX AND WILLEMIEN DU PLESSIS, *EIA LEGISLATION AND THE IMPORTANCE OF TRANSBOUNDARY APPLICATION* in *LAND USE LAW FOR SUSTAINABLE DEVELOPMENT* 99 (NATHALIE J. CHALIFOUR ET AL. eds., Cambridge University Press, (2006), 2007). In practice, these two approaches are not always strictly applied, but a mixture of both is used in some instances. The required information must be clear and detailed, describing actions, criteria, thresholds, and screening procedures. See *id.*

²⁰³ LANA ROUX and WILLEMIEN DU PLESSIS in NATHALIE J. CHALIFOUR ET AL, *Supra* note 6, at 99.

²⁰⁴ CHRISTOPHER WOOD, *SCREENING AND SCOOPING* in *ENVIRONMENTAL ASSESSMENT IN DEVELOPING AND TRANSITIONAL COUNTRIES* 72 (Norman Lee and Clive George eds., John Wiley and Sons Ltd., 2000).

²⁰⁵ LANA ROUX and WILLEMIEN DU PLESSIS in NATHALIE J. CHALIFOUR ET AL, *Supra* note 6, at 99.

environmental impacts.²⁰⁶ In any case, at the screening stage, a proponent initiates the process by submitting the project profile or an initial environmental examination report after undertaking an initial environmental assessment, to the relevant environmental agency.²⁰⁷ This project profile is normally called screening report or initial environmental examination report.²⁰⁸

B. Preliminary Assessment

A preliminary assessment is considered to be one of the results of the screening process.²⁰⁹ After screening, proponents will come to decide whether or not an EIA is necessary for their actions. If they conclude that EIA is necessary, they will decide the type of EIA that is necessary; preliminary EIA or full scale EIA.²¹⁰ Preliminary EIA is required for projects with limited impacts or for projects in which the need of full scale EIA is unclear or project proposals with inadequate information, whereas full scale EIA is necessary where there is sufficient ground for detailed assessment.²¹¹

C. Scoping

The scoping stage is the process of interaction. It aims at identification of boundaries of EIA studies, important issues of concerns, and significant effects and factors to be considered.²¹²

²⁰⁶ *Id.*

²⁰⁷ See FEPA Guidelines, *Supra* note 108, Section 5.2.2.

²⁰⁸ See *id.*

²⁰⁹ See *id.*

²¹⁰ See *Id.*

²¹¹ See *id.* See also LANA ROUX and WILLEMIEN DU PLESSIS in NATHALIE J. CHALIFOUR ET AL, *Supra* note 6, at 99.

²¹² In the US, CEQ Regulations provide for ten criteria which can be used to determine the significance of impact at screening and scoping stages. These criteria are:

1. Is the impact adverse or beneficial?
2. Does the action affect public health or safety?
3. Is the action located in unique geographic area?
4. Are the effects likely to be highly controversial?
5. Does the proposed action pose highly uncertain or unique or unknown risks?
6. Does the action establish a precedent for future actions with significant effects, or represent a decision in principle about future considerations?
7. Is the action related to other activities with individually insignificant but cumulatively significant impacts?

The purposes of scoping are to involve potentially affected groups, consider reasonable alternatives, evaluate concerns expressed, understand local values, determine appropriate methodologies, and establish the TOR; thus, the outcome of scoping is a scoping report or TOR for undertaking a full scale EIA.²¹³ FEPA Guidelines require scoping report to include a brief description of the project, all alternatives identified, issues raised by interested and affected persons (IAPs), and description of the public participation.²¹⁴

D. Environmental Impact Study

This could be taken as a central stage in the EIA process as it is the stage at which full scale EIA is done with a view to generating sufficient information on the possible impacts of an action.²¹⁵ In the end, the process leads to the preparation of an EIS report which will be used to determine whether or under what conditions an action should proceed.²¹⁶ Thus, this stage involves, among others things, impact prediction and analysis, consideration of alternatives,

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8. To what degree may the action affect designated or listed or protected sites?
 9. To what degree may the action adversely affect endangered or threatened species and habitats?
 10. Could the action contravene other environmental legislation? See CHRISTOPHER WOOD, SCREENING AND SCOPING in ENVIRONMENTAL ASSESSMENT IN DEVELOPING AND TRANSITIONAL COUNTRIES 72 (Norman Lee and Clive George eds., John Wiley and Sons Ltd., 2000).

²¹³ CHRISTOPHER WOOD in Norman Lee and Clive George, *Supra* note 204, at 77. For instance, the EIA report of the *Habasha Cement Factory* shows that extensive discussions and consultations with various groups of people from top to bottom level were undertaken to identify key issues that matter to them. See section 2.1.4(a) or p. 9-11, 86-108 of the EIA report of *Habasha Cement Share Company*, May 2010. It is, however, not clear that these discussions and consultations were made before the environmental impact study began as that is what scoping stage is all about. In fact, although the aim of scoping is identifying the boundaries of EIA studies, the important issues of concerns, and the significant effects and factors to be considered by involving potentially affected groups, there is no indication that such involvement did happen at the scoping stage; instead, there is an indication that these matters were determined or indentified by a consultant itself. On the other hand, a closer look at the report shows that the scoping stage was adhered to in relation to some matters. For instance, the report reveals that, among other things, matters such as alternatives sites for the project were considered, issues that might matter to the local community were also raised and evaluated, and attempts were made to understand the local community such as their religion and style of living, in a non-participatory way though. See JEMA International Consulting Pvt. Ltd. Co., *Detailed Environmental and Social Impact Assessment (ESIA) Study Report for Habasha Cement Share Company*, May 2010 (hereinafter, *Habasha Cement Factory*) at 16ff. (The report is available in the archive of OREA.)

²¹⁴ FEPA Guidelines, *Supra* note 108, Section 5.2.3.

²¹⁵ *Id.* Section 5.2.4.

²¹⁶ See *id.* The preparation of an EIA can be regarded as the step that makes the EIA process meaningful because it contains the findings related to the predicted impacts of the proposal on the environment. See CHRIS WOOD in LANA ROUX AND WILLEMIEN DU PLESSIS, *Supra* note 202, at 143.

preparation of environmental management plan such as mitigation and monitoring activities, and preparation of contingency plan.²¹⁷

E. REVIEWING

Once a full scale EIA is conducted, a proponent is supposed to submit an EIS report to the relevant reviewing authority which could be FEPA (or its delegate) or REA. The concerned organ will then review the report in order to determine the quality, adequacy, sufficiency, and relevance of the information provided in an EIA as a basis for decision making.²¹⁸ Thus, if it is believed, for example, that the EIA does not adequately address all the relevant issues, the proponent will be required to generate more information as may be guided by the reviewing organ. If, however, the report is believed to adequately address the environmental effects of a

²¹⁷ See FEPA Guidelines, *Supra* note 108, Section 5.2.4. In some ways, practice also seems to show that at least some of the things that are expected at this stage are done. For example, the EIA report for the *Habasha* Cement Share Company identifies both the positive and negative impacts of implementing the project, analyzes them and identifies the possible mitigation measures that could be adopted. Some of the positive impacts of the project, as identified in the report, include contributing to the needs of the country in the area of cement provision, generating foreign currency through cement export, contributing to transfer of technology as the proponents are planning to employ new technology in the field of cement production, creation of job opportunities, and improvement of infrastructure such as roads, schools, hospitals, and recreational centers. The adverse impacts, on the other hand, include creation of health and safety hazards such as through increased traffic to and from the projects sites, air pollution through dust and green gas emission, sound pollution, increase in wastes, causing resettlement of the people in the project sites which may affect community, family and religious values, increase in sickness and disease, increase in living standards due to job creation and increase in crime rate and use of drugs in the project sites. The study further identifies the possible mitigation measures that could be adopted to avoid or minimize the above adverse impacts. This includes installation of suitable sound suppressors and provision of ear protectors to workers to avoid or minimize sound pollution, using covered or enclosed conveyers, crushers, etc., site landscaping and vegetation to minimize pollution from dust emission, increasing energy efficiency to consume less energy or using alternative fuels like biomass to reduce emission of carbon dioxide, complying with international, national, and local occupational and safety standards to minimize occupation and safety hazards and also training people to avoid such hazards such as by using protective devices, avoiding building permanent infrastructure which will not be used after construction, provision of new amenities if local infrastructure is inadequate, and recycling, incineration and proper disposal to deal with wastes. However, the mitigation measures that were identified in the report are not adequate because they do not deal with some of the adverse impacts such as the likely increase in the living standards of the local community and the likely increase in crime rates and drug use in the local community. Of course, it would have been possible for the EIS to propose, *inter alia*, giving assistance to the local community to deal with these adverse impacts. For instance, the member of the local community may be granted priority during employment or financial aids to deal with increase in standard of life. Similarly, the law enforcement body in the local community could be granted some financial aids to build its capacity through, *inter alia*, hiring more law enforcement agents to deal with increase in crime rate and drug use. The other important element of an EIS is the identification of alternative course of actions. In the EIS for the *Habasha* cement, no alternative course of action was identified. In fact, the EIS was done on the assumption that the project will not be changed. However, there is an indication that alternatives were considered in relation to the sites for the implementation of the project. See *Habasha* Cement Factory, *Supra* note 213, at 109ff.

²¹⁸ For more on the purpose of EIA report review, see LANA ROUX and WILLEMIEN DU PLESSIS in NATHALIE J. CHALIFOUR ET AL, *Supra* note 6, at 101.

proposed action, then the reviewing organ will proceed to making decision. In the process, this organ is guided by factors such as compliance with the approved TOR, required information, the examination of alternatives, assessment of impacts, appropriateness of mitigation measures and monitoring schemes as well as implementation arrangements, the use of scientific and analytical techniques, and the extent of public involvement and reflection of IAPs' concerns.²¹⁹

F. Decision-making

This is the stage at which the fate of a given proposal is decided on. In other words, here whether a proposal is to proceed and under what conditions will be decided on. Thus, it involves requesting supplementary or new EIA report, approval or rejection of the proposed action.²²⁰ If the EIA report that is already submitted to the reviewing body does not provide adequate information on the impact of the proposed action on the environment, the proponent may be required to do supplementary EIA or new EIA depending on the degree of the inadequacy of the EIA report.²²¹ If, on the other hand, the EIA report produced by the proponent is adequate, the concerned organ will decide whether the proposed action should be adopted or rejected.²²² Thus, if the harm the implementation of the project may cause to the environment is less than the benefits, the proposed action may be adopted. Such approval may, however, be subject to different conditions. For instance, the implementation of a given action may be made subject to conditions such as performance reports by the proponent at

²¹⁹ See FEPA Guidelines, *Supra* note 108, Section 5.2.5. According to Norman Lee, the quality and effectiveness of EIS review depends, among other things, on the stage in the EIA process at which it is undertaken, the qualifications, experience and degree of independence of the reviewers, the availability of the relevant documentation for review, the resources and time provided for review, the transparency and degree of participation in the reviewing process, the status of the review findings, and the use made of these [findings] at subsequent stages of the EIA process and project cycle. NORMAN LEE, REVIEWING THE QUALITY OF ENVIRONMENTAL ASSESSMENT in ENVIRONMENTAL ASSESSMENT IN DEVELOPING AND TRANSITIONAL COUNTRIES 137-138 (Norman Lee and Clive George eds., John Wiley and Sons Ltd., 2000).

²²⁰ See FEPA Guidelines, *Supra* note 108, Section 5.2.6.

²²¹ See *id.*

²²² See *id.*

various stages in the project cycle and allowing monitoring activities by environmental protection organs.²²³ In any case, once a proposed action is approved, the proponent will be issued an environmental clearance certificate (ECC).²²⁴

On the other hand, if the EIA report reveals that the harm the implementation of the proposed action may cause to the environment will/may outweigh its benefits, the action must be rejected.²²⁵ Moreover, if there is no certainty about the benefits of the proposed action, it has to be rejected; likewise, if the proposed action is beneficial but the benefit is only slightly greater than the harm it may cause to the environment, it has to be rejected.²²⁶

G. Follow-Up

As we will see later on, follow-up²²⁷ in particular monitoring is essential for the effectiveness of the system of EIA.²²⁸ Cognizant of this fact, the FEPA Guidelines also recognize systematic follow-up as a last but relevant stage for the effectiveness of the system of EIA.²²⁹ In fact, it is said that EIA that ends at the point of decision-making produces nothing but cost.²³⁰ After all, EIA is a process rather than an isolated event, and it is part of the broader

²²³ For example, in Oromia, proponents are granted ECC on condition that they make quarterly reports to the OREA and their willingness to let OREA officials monitor their performance. See, for example, the ECCs (letters) issued to proponents of *Habasha Cement Share Company* and *CH Clinker Manufacturer PLC* issued on 22 June 2010 and 18 June 2011, respectively. The letters are annexed to this paper.

²²⁴ See FEPA Guidelines, *Supra* note 108, Section 5.2.6. Then, the ECC will be submitted to a licensing body together with other requirements to obtain a license.

²²⁵ *Id.*

²²⁶ This conclusion flows from the reading of article 4(2) of the EIA Proclamation which requires environmental protection organs to err on the side of caution with regard to projects which are slightly or arguably beneficial.

²²⁷ EIA follow-up is said to include *monitoring* (the collection of data and comparison with standards, predictions or expectations), *evaluation or auditing* (the appraisal of the conformity with standards, predictions or expectations and the environmental performance of the activity), *management* (making decisions and taking appropriate action in response to issues arising from monitoring and evaluation activities) and *communication* (informing the stakeholders about the results of EIA follow-up). ROSS MARSHALL ET.AL., 23 INTERNATIONAL PRINCIPLES FOR BEST PRACTICE EIA FOLLOW-UP, IMPACT ASSESSMENT AND PROJECT APPRAISAL 176 (2005).

²²⁸ See, for example, LANA ROUX and WILLEMIEN DU PLESSIS in NATHALIE J. CHALIFOUR ET AL, *Supra* note 6, at 102.

²²⁹ See FEPA Guidelines, *Supra* note 108, Section 5.2.7.

²³⁰ See CLIVE GEORGE, *ENVIRONMENTAL MONITORING, MANAGEMENT AND AUDITING* in *ENVIRONMENTAL ASSESSMENT IN DEVELOPING AND TRANSITIONAL COUNTRIES* 177 (Norman Lee and Clive George eds., John Wiley and Sons Ltd, 2000); see also William L. Andreen, *In Pursuit of NEPA's*

process of environmental planning and management.²³¹ Accordingly, after a decision has been taken to proceed with an action, the assessment process should continue into the implementation stage, into actual operation, and ultimately into decommissioning or the next planning or policy-making cycle.²³²

During follow-up (monitoring), the responsible organs try to, among others things, ensure that the anticipated impacts are maintained within the levels predicted, see that the unanticipated impacts are managed and/or mitigated before they become problems, realize and optimize the benefits expected, and provide information for a periodic review and alteration of impact management plan and enhance environmental protection through good practice at all stages of the project.²³³

2.2.1.4 Public Participation in the EIA Process

Recently, there has been a growing consensus that timely and broad-based public participation²³⁴ in the EIA process is a vital ingredient for effective environmental assessment (EA).²³⁵ In this regard, one can mention some international instruments which recognize the

Promise: The Role of Executive Oversight in the Implementation of Environmental Policy, 64 Indiana L. J. 205, 209 (1988-1989).

²³¹ See CLIVE GEORGE in Norman Lee and Clive George, *Supra* note 230, at 177.

²³² See *id.*

²³³ See FEPA Guidelines, *Supra* note 108, Section 5.2.7.

²³⁴ The term *public* may include individuals, experts, groups, NGOs, agencies, the general community, and other stakeholders. Thus, there can be no one “public” but several “publics” for the purpose of involvement in the EIA process. See PRASAD MODAK AND ASIT K.BISWAS, *Supra* note 66, at 170; MICHAEL I. JEFFERY in NATHALIE J. CHALIFOUR ET AL, *Supra* note 6, 453. Some writers argue that the concept *public participation* does have three elements; access to environmental information, public engagement in environmental decision-making process and access to justice. See, for example, JANE HOLDER AND MARIA LEE, *Supra* note 34, at 86-87. However, this understanding of the concept seems too broad and it equates public participation with the concept environmental democracy, which contains these three elements. Anyway, this section of the paper deals with the involvement of the public in the EIA process. Thus, issues relating to access to environmental information and access to justice may be raised and discussed incidentally elsewhere in this paper.

²³⁵ See ROSS HUGHES, ENVIRONMENTAL IMPACT ASSESSMENT AND STAKEHOLDER INVOLVEMENT in A DIRECTORY OF IMPACT ASSESSMENT GUIDELINES 22, 2nd ed. (Annie Donnelly et.al. eds., International Institute for Environment and Development, 1998); CHRIS WOOD in LANA ROUX AND WILLEMEN DU PLESSIS, *Supra* note 202, at 225. For example, according to *Holder* and *Lee*, recent decades have seen the emergence of a very widespread consensus that ‘public participation’ is a crucial element of good and democratically legitimate environmental decision-making. Consensus around public participation can be seen at every level, international, regional, national and local because, *inter alia*, ‘experts’ have no

importance of public participation. First, Principle 7 of UNEP's Goals and Principles of EIA recognizes the need to let the public comment on EIAs before decision is made.²³⁶ Second, the Rio Declaration recognizes the importance of public participation in environmental decision-making as a whole.²³⁷ Third, the Convention on Biodiversity requires member states to allow public participation in the EIA of projects that are likely to have significant adverse effects on biological diversity.²³⁸ Therefore, the recognition of public participation in these instruments can be taken as a manifestation of the widespread acceptance of the principle of public participation in environmental decision-making in general and in the EIA process in particular.

Experience also shows that EIA that successfully involved broad-based public participation²³⁹ tended to lead to more influential EA and, consequently to development and delivered more environmental and social benefits whereas, conversely, EIA that failed to be inclusive tended to have less influence over planning and implementation, and consequently resulted in higher

monopoly on judgment. Moreover, public participation in decision-making is very often put forward as a way through the tension between technical and popular input into decisions, and has become a conventional element of any discussion of 'good governance' for the environment. For more on this point, see generally JANE HOLDER AND MARIA LEE, *Supra* note 202, at 85.

²³⁶ Principle 7 states: "Before a decision is made on an activity, government agencies, members of the public, experts in relevant disciplines and interested groups should be allowed appropriate opportunity to comment on the EIA." See UNEP EIA Principles, Principle 7.

²³⁷ See Rio Declaration, *Supra* note 64, Principle 10.

²³⁸ See Convention on Biodiversity, *Supra* note 64, article 14(1)(2).

²³⁹ Some people argue that terms the 'involvement', 'consultation' and 'participation', which are used in the EIA guideline literature interchangeably, have certain differences. For example, according to Hughes, *public or stakeholder involvement* may be taken to encompass the full spectrum of interaction between the public/stakeholders and the decision-making process. As such, the term encompasses both consultation and participation. On the other hand, *participation* may be used to refer to a process by which the public/stakeholders influence decisions which affect them. Thus, it may be distinguished from *consultation* by the degree to which the public/stakeholders are allowed to influence, share or control decision-making process. Consultation implies a process with little share or control over the process by the consultees. See ROSS HUGHES in Annie Donnelly et.al., *Supra* note 235, at 22. See also RON BISSET, METHODS OF CONSULTATION AND PUBLIC PARTICIPATION in ENVIRONMENTAL ASSESSMENT IN DEVELOPING AND TRANSITIONAL COUNTRIES 150-151 (Norman Lee and Clive George eds., John Wiley and Sons Ltd, 2000).

social and environmental costs.²⁴⁰ Thus, the vitality of public participation in the EIA process seems beyond question.²⁴¹

However, the degree of public involvement in EIA varies between different countries due to different legal requirements as well as to tradition.²⁴² In many countries like Sweden or the USA, the public is supposed to have a large influence on the EIA process, whereas in countries like Thailand, the level of involvement is low.²⁴³ However, reality shows that public participation is often treated as a procedural exercise instead of a living process; as a result, the contact with public often comes far too late in the EIA process.²⁴⁴

2.2.1.4.1 Relevance of Public Participation in the EIA Process

According to some writers,²⁴⁵ broad-based public participation in the EIA process is necessary for the effectiveness of the system of EIA as the public can contribute to the EIA process in different ways.²⁴⁶ For instance, public participation enables the EIA process to

²⁴⁰ ROSS HUGHES in Annie Donnelly et.al., *Supra* note 235, at 21-22.

²⁴¹ Incidentally, it is argued that giving the term *public participation* a meaning that works for all purposes is difficult. See JANE HOLDER AND MARIA LEE, *Supra* note 34, at 86. For example, Ross Hughes defines *stakeholders' participation*, which is for her equivalent to public participation, as a process whereby all those with a stake in the outcome of an action can actively participate in decisions on planning and management to share information and knowledge and to contribute to the action and its success to ultimately enhance their own interests. ROSS HUGHES in Annie Donnelly et.al., *Supra* note 235, at 21-22. For A. Bram, *public participation* is a process whereby interested and affected persons are consulted and included in decision-making. A. BRAM, "PUBLIC PARTICIPATION PROVISIONS NEED NOT CONTRIBUTE TO ENVIRONMENTAL INJUSTICE" mentioned in MICHAEL I. JEFFERY, *Supra* note 6, at 453. According to both definitions, therefore, public participation refers to the participation of individuals, citizens' groups, government agencies, NGOs, recreational interest groups, expert groups, business affiliations and academic organizations. In fact, some countries such as the Republic of Ireland have adopted EIA Guidelines in which they list stakeholder groups that should be considered as contributors to the EIA. ROSS HUGHES in Annie Donnelly et.al., *Supra* note 235, at 21-22.

²⁴² For more on this point, see KARIN ANDERSSON, ENVIRONMENTAL IMPACT ASSESSMENT 15 (2000)

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ See, for example, ROSS HUGHES in Annie Donnelly et.al., *Supra* note 235, at 21-22; RON BISSET in Norman Lee and Clive George, *Supra* note 239, at 149-150; MOHAMMED A. BEKHECHI AND JEAN-ROGER MERCIER, *Supra* note 15, at 23; JANE HOLDER AND MARIA LEE, *Supra* note 34, at 85-97.

²⁴⁶ Although public participation could be justified due to the contribution it makes to the quality of EIA and eventually to environmental protection, this is not always the case. In other words, some other reasons may justify public participation in the EIA process. For instance, in the US, public participation in the EIA is justified on the constitutional principles of representative democracy and popular sovereignty. Under the principle of popular sovereignty, a government is a creation of its citizens and it does not stand above them. This mandates government representatives to demonstrate responsiveness to the interests of individuals in order

address relevant issues including those perceived as being important by other sectoral agencies, public bodies, local communities, affected groups, and others; harness traditional knowledge which conventional approaches often overlook; improve information flow between proponents and different stakeholders, improve the understanding and ownership of a project; and ensure that the magnitude and significance of impacts have been properly assessed.²⁴⁷ Moreover, it enables project proponents to better respond to the needs of the public, helps them identify important environmental characteristics or mitigation opportunities that might be overlooked; and also improves the acceptability and quality of mitigation and monitoring processes.²⁴⁸ Further, placing sufficient emphasis on public participation in the EIA process can improve the predictive quality of environmental assessments since the prediction of impacts using EIA often requires many years' information and good quality baseline which can be obtained from the public including those in local communities, who have greater potential to access a wider information resource-base and in some cases generations of cumulative knowledge of their local environment.²⁴⁹

Therefore, in light of the above advantages, public participation in the EIA process is something which any system of environmental law cannot afford to omit.²⁵⁰ First, such participation leads to quality environmental decisions. Second, it is politically wise, too, as it

to get their support. For more on this point, see R.M. SOLOMON ET.AL., PUBLIC INVOLVEMENT UNDER NEPA: TRENDS AND OPPORTUNITIES in ENVIRONMENTAL POLICY AND NEPA: PAST, PRESENT, AND FUTURE 261 (Ray Clark and Larry Canter eds., St. Lucie Press, 1997). According to A. Gilpin, democracy is increasingly seen as a continuous and dynamic process in which governments bear the ultimate responsibility, but only with the most careful public scrutiny. This shows that public participation in decision-making process is necessary in a democratic state. See A. GILPIN, ENVIRONMENTAL IMPACT ASSESSMENT (EIA) CUTTING EDGE FOR THE TWENTY-FIRST CENTURY (Cambridge University Press) (1996) 24 mentioned in LANA ROUX AND WILLEMIEN DU PLESSIS, EIA LEGISLATION AND THE IMPORTANCE OF TRANSBOUNDARY APPLICATION in LAND USE LAW FOR SUSTAINABLE DEVELOPMENT 103 (NATHALIE J. CHALIFOUR ET AL. eds., Cambridge University Press, (2006), 2007).

²⁴⁷ ROSS HUGHES in Annie Donnelly et.al. *Supra* note 235, at 21-22; MOHAMMED A. BEKHECHI AND JEAN-ROGER MERCIER, *Supra* note 15, at 23; JANE HOLDER AND MARIA LEE, *Supra* note 34, at 96-97. See also ECONOMIC COMMISSION FOR AFRICA, *Supra* note 69, at 40-43.

²⁴⁸ ROSS HUGHES in Annie Donnelly et.al. *Supra* note 235, at 21-22.

²⁴⁹ See *id* and and RON BISSET in Norman Lee and Clive George, *Supra* note 239, at 149-150.

²⁵⁰ For example, on the recognition of public participation in the EIA process in East and South East Asia, see WORLD BANK, *Supra* note 68, at 3; in Africa, see ECONOMIC COMMISSION FOR AFRICA, *Supra* note 69, at 40-43.

makes environmental decision-making participatory, whereas participatory decision-making in the field of environment can be taken as a manifestation of democratic process, in particular, environmental democracy. It can also help proponents as well because participatory EIA has the capacity to help predict what may happen in the future. Public participation in the EIA process can also make a given course of action acceptable in the eyes of the public. This is why public participation in the EIA process is seen as indispensable.

2.2.1.4.2 Constraints to Public Participation in EIA

Despite its paramount importance, public participation in the EIA process faces various problems. According to some scholars, these problems include time and money, literacy and language, low level education, cultural differences, gender, physical remoteness, political and institutional culture of decision-making, pressure imposed by the project cycle, mistrust and elitism, ambiguity in legislation and guidelines, and project size.²⁵¹ For example, the public lack the time or financial resources to participate in EIA processes.²⁵² While non-literate people are marginalized from EIA by the use of written media to communicate information, materials necessary for public participation are also lacking in local languages.²⁵³ In many countries and regions, there is little or no culture of public participation in decision-making, whereas in some cases, public participation is perceived as a threat to authority and is viewed defensively by many government agencies and project proponents.²⁵⁴ Elitism or patriarchal approach is another constraint as many agencies and proponents adopt ‘*we know better approaches*’, and do not accept that public participation can improve the quality of

²⁵¹ See, for example, ROSS HUGHES in Annie Donnelly et.al., *Supra* note 235, at 21-26; PRASAD MODAK AND ASIT K.BISWAS, *Supra* note 66, at 166-168.

²⁵² ROSS HUGHES in Annie Donnelly et.al., *Supra* note 235, at 21-26.

²⁵³ See *id* and PRASAD MODAK AND ASIT K.BISWAS, *Supra* note 66, at 166-167. For example, in Ethiopia, EIAs are prepared in English although neither the federal government nor any of the regional governments is using English as a working language.

²⁵⁴ See ROSS HUGHES in Annie Donnelly et.al., *Supra* note 235, at 21-26 and PRASAD MODAK AND ASIT K.BISWAS, *Supra* note 66, at 168.

development initiatives.²⁵⁵ While achieving effective public participation can be much more difficult for large scale projects, ambiguity of legislation and guidelines is also another important constraint to managing and encouraging more participatory environmental assessment processes.²⁵⁶ Finally, low level of education affects the meaningful participation of the public in the EIA process.²⁵⁷ In this regard, mentioning what one villager in Bangladesh said is important. When he was asked whether he had participated in the EIA process of a major flood control and irrigation projects that would radically alter his livelihood prospects, he responded: “If I were to be consulted, what would I say? You see I’m just an ordinary man. I don’t know anything. All I know is that one has to have meals every day.”²⁵⁸

So, it could be concluded that although there are many benefits that public participation in the EIA process can produce, there are also various obstacles that need to be overcome to realize and sustain these benefits. On the other hand, everyone including proponents, decision-makers, and practitioners must rise up against these obstacles and make a concerted effort to deal with the obstacles to meaningful public participation in the EIA process in order to make public participation effective.

2.2.1.4.3 Public Participation in EIA in Ethiopia

It is now time to see whether or not Ethiopia has recognized public participation in the EIA process.²⁵⁹ Of course, based on the previous discussions, so long as the use of EIA is

²⁵⁵ See *id.*

²⁵⁶ *Id.*

²⁵⁷ See ROSS HUGHES in Annie Donnelly et.al., *Supra* note 235, at 21-26 and PRASAD MODAK AND ASIT K.BISWAS, *Supra* note 66, at 166-168.

²⁵⁸ ROSS HUGHES in Annie Donnelly et.al., *Supra* note 235, at 24-26.

²⁵⁹ Of course, if we follow the US approach, as mentioned before, we can conclude that everyone in Ethiopia has the right to participate in the EIA process because the 1995 FDRE Constitution also recognizes the principles of representative democracy and sovereignty of people (article 8). Moreover, the FDRE Constitution contains some provisions such as article 43(2) which deal with public consultation. Hence, analysis of these principles of the Constitution may lead us to a conclusion that there is in fact a right to participate in the EIA process in Ethiopia.

recognized, it seems that the recognition of public participation in the EIA process is unavoidable. However, in order to make a safe conclusion that public participation is actually recognized and to know the extent of such recognition, one has to examine the existing situation. Hence, in the next sections, we will consider the position of the existing legal framework on matters of public participation in Ethiopia.

I. International law

When Ethiopia ratified the Convention on Biodiversity in 1994, it committed itself not only to undertake EIA for projects, programs and policies but also to allow public participation when EIA is done for these actions.²⁶⁰ Therefore, although individuals may not invoke the Convention as a source of right to claim participation in the EIA process, they can still use it as a source of the government's obligation to ensure that EIA is recognized and used in a participatory manner. On the other hand, the government can discharge this obligation by putting in place legal and institutional frameworks to facilitate participatory EIA. The issue then is whether Ethiopia has created an enabling environment for the public to participate in the EIA process.²⁶¹

²⁶⁰ In the Convention, in addition to committing themselves to take the necessary steps to put the Convention into effect, the members agreed to introduce appropriate procedures requiring EIA of their proposed actions (projects and programs and policies) and allow public participation in such procedure with a view to avoiding or minimizing the likely adverse impacts of their actions on biodiversity. See Convention on Biodiversity, *Supra* note 64, article 14(1)(2).

²⁶¹ Incidentally, one has to bear in mind that if participation in the EIA process is recognized as participation in the conduct of one's own country, human rights instruments such as the African Charter on Human and Peoples' Rights and the ICCPR also recognize participation right. However, these instruments do seem to deal with political rights than civil right. Thus, they can be of some help only if participation right in the EIA process can be taken as a political right as it involves environmental governance. Yet, this argument may seem too stretched and hence less convincing. See ACHPR, *Supra* note 102, article 13(1); INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, General Assembly resolution 2200A (XXI) of 16 December 1966, *entry into force* 23 March 1976, in accordance with Article 49 (hereinafter *ICCPR*), article 25.

II. The Environmental Policy of Ethiopia (EPE)

Within the domestic framework, although the 1995 FDRE Constitution contains some provisions which may be relevant to public participation,²⁶² it is the 1997 EPE that could be taken as the first instrument to expressly recognize the importance of public participation in the EIA process. In fact, the EPE categorically declares that public participation is an integral part of the EIA process.²⁶³ However, as it is an overarching policy framework, the EPE does not deal with the details of public participation in the EIA process; nor is it expected to do so.

III. EIA Proclamation

The other instrument that is relevant to public participation in the EIA process in Ethiopia is the EIA Proclamation. Although it does not contain any express stipulation on the right of the public to participate in the EIA process, the EIA Proclamation contains some provisions which deal with public participation. The following are the relevant parts of the Proclamation.

Article 15 Public participation

1. The Authority [FEPA] and regional environmental agencies shall make any environmental impact study report accessible to the *public* and solicit comments on it.
2. The Authority [FEPA] and regional environmental agencies shall ensure that the comments made by the *public and in particular by the communities likely to be affected* by the implementation of a project are incorporated into the environmental impact study report as well as in its evaluation.²⁶⁴

Article 9 Review of Environmental Impact Study Report

1.

²⁶² For instance, article 43(2) of the FDRE Constitution stipulates that *nationals* have the right to participate in national development and, in particular, to be consulted with respect to policies and projects affecting *their community*. However, there are a few points worth emphasising here. Firstly, the Constitution deals with the right of *nationals* (citizens), not of public. Second, the right of participation the Constitution recognizes is not the right of every national (citizen) but only of those who live in the community that is likely to be affected by the course of action to be adopted. In any case, it could be concluded that, under the Constitution, public participation in the EIA process is recognized in its narrow sense as the duty of a proponent is limited to consulting only the community (its members who are nationals) that is likely to be affected by a policy or a project.

²⁶³ See Environmental Policy of Ethiopia, 1997, Section 4.9.

²⁶⁴ Emphasis added to both sub-articles.

2. The Authority [FEPA] and regional environmental agencies shall, after evaluating an environmental impact study report by taking into account any *public comments and expert opinions*, within 15 working days:²⁶⁵
 - a. approve the project without conditions and issue authorization [...]
 - b. approve the project and issue authorization with conditions [...]
 - c. refuse implementation of the project [...]

Article 6 Trans-Regional Impact Assessment

1. A proponent shall carry out the environmental impact assessment of a project that is likely to produce a trans-regional impact in consultation with the communities likely to be affected in any region.
2. ...
3. The Authority [FEPA]²⁶⁶ shall, prior to embarking on the evaluation of an environmental impact study report of a project with likely trans-regional impact, ensure that the communities likely to be affected in each region have been consulted and their views incorporated.

The above-mentioned three articles from the EIA Proclamation do have something to tell about public participation in the EIA process. First, articles 9 and 15 provide for the role of the public at EIA evaluation stage.²⁶⁷ While article 15(1) obliges FEPA and REAs to make EIAs accessible to the *public* and solicit comments on them, article 15(2) obliges these organs to ensure that the comments made by the *public and in particular by the communities likely to be affected* by the implementation of a given project are incorporated into the EIS report as well as in its evaluation.²⁶⁸ Then, article 9 obliges FEPA and REAs to take action on EIAs submitted to them, within 15 working days, after evaluating them by taking into account any *public comments and expert opinions*.

The other article, that is, article 6 imposes on proponents the duty to conduct EIA in *consultation* with the communities likely to be affected in any region. However, this duty

²⁶⁵ Emphasis added.

²⁶⁶ Regional environmental agencies are not mentioned here because the power to evaluate the EIA of a project that may have trans-regional impact is the mandate of FEPA.

²⁶⁷ This is very important because an effective system of EIA requires public participation at all stages including at evaluation stage. See LANA ROUX and WILLEMEN DU PLESSIS in NATHALIE J. CHALIFOUR ET AL, *Supra* note 6, at 98.

²⁶⁸ In this sense, one can argue that *consultation* seems similar to *participation* because the inclusion of the comments obtained through consultation shows that the public can influence decision-making.

exists only in relation to a project that is likely to produce trans-regional impacts.²⁶⁹ Besides, the duty of a proponent is limited to consulting the communities likely to be affected by this project in any region. Thus, a proponent may claim that it does not have a duty to involve broad based-public and limit its consultation to the members of the communities²⁷⁰ that are likely to be affected by the impacts of its project.²⁷¹ Thus, the scope of the Proclamation with regard to public participation in the EIA process is broad at EIA evaluation stage than at the stage where EIA is done.

However, it is still difficult to enforce the provisions of the EIA Proclamation on public participation in particular at EIA evaluation stage because there are no binding instruments (such as regulations or directives) on how the public can participate in the EIA process. For instance, it is not known how FEPA and REAs should make EIS reports accessible to the public and solicit comments on them. Should they use TV, radio, public meetings, or make copies of EIA reports available to those who need to get, read and comment on them? Moreover, it is not known for how long these organs need to solicit public comments. Yet, we know that once EIAs are submitted, article 9(2) of the EIA Proclamation obliges environmental protection organs to take action within 15 working days. Thus, there is no separate time allocated to public participation in the EIA evaluation process; instead, the Proclamation requires the 15 working days to be used for gathering comments, reviewing

²⁶⁹ Since article 43(2) of the FDRE Constitution gives, as discussed before, nationals the right to be consulted with respect to policies and projects affecting their community, this may not be a limit to participation in EIA for projects which may not have trans-regional impact.

²⁷⁰ At this juncture, a question whether the term *communities* includes communities in another country when a project is to be implemented around a boarder is not clear. Besides, there are no Guidelines adopted by FEPA to clarify this point. However, the expression *trans-regional*, which is not *trans-boundary*, seems to suggest that the communities covered are those communities in Ethiopia but which live in different regions. This line of interpretation is supported by practice as well. Because so far no community in another country has been consulted in the EIA process; nor is a proponent required to do so. However, according to some writers, the consultation of interested and affected persons during the EIA process may include consulting interested and affected parties in neighboring countries because such consultation can also produce better results for the proponent. See CHRIS WOOD in LANA ROUX AND WILLEMIEN DU PLESSIS, *Supra* note 202, at 102.

²⁷¹ Nevertheless, it must be born in mind that article 6 does not recognize the right of communities but the obligation of proponents although one may argue that the flip side of the proponent's obligation shows the right of the communities. Moreover, the article does not tell us the stage at which a proponent must consult the public; that is, scoping stage, preliminary assessment stage, EIS stage, or at all stages.

reports, and taking actions. On the other hand, it is hardly possible to say that environmental protection organs can engage the public, review EIAs, and then take action on EIAs within 15 working days.²⁷² Of course, on the other side of the fence, one finds investors, as we will see elsewhere later on, being furious for not completing the evaluation of their EIAs within few days.²⁷³

The experiences of some countries show that there is more time for public participation before actions are taken on EIAs. For instance, in Uganda, while 21 days are allowed for review by lead agencies, 28 days are allocated to public hearing where it is required.²⁷⁴ In the US, usually 45 days comment period is given with the possibility of reduction or extension as the case may be.²⁷⁵ In Guyana, the developer and the EIA consultant are required to publish a notice in a daily newspaper confirming that the EIA has been submitted to EPA and members of the public have sixty days within which to make submissions.²⁷⁶ Some countries in East and Southeast Asia also allocate more time for public participation. For instance, it is 100 days in Japan for public hearings and information display, 58 days in Hong Kong, 50 days in South Korea, and 30 days in Lao PDR.²⁷⁷

Moreover, in countries where EIA regulations do not, like the EIA Proclamation, provide for separate time for public participation, longer review period in which public participation

²⁷² The time allocated to reviewing and taking actions on EIAs is longer but different in different countries. For instance, in East and Southeast Asia, the review period is 56 days in Mongolia, 2 months in China, Vietnam, and Cambodia, 75 days in Thailand (for private funded project but no provision on public funded project), 100 days for Lao PDR, 150 days for Indonesia, 180 days in Hong Kong SAR and the Philippines (multiple projects), and 210 days in Japan. See generally, WORLD BANK, *Supra* note 68, at 3.

²⁷³ Well, because of the BPR, the number of days that FEPA takes to conclude its revision of EIA reports have now been reduced to a maximum of one week. Solomon Kebede, *Supra* note 160.

²⁷⁴ For more on this point, see generally, ECONOMIC COMMISSION FOR AFRICA, *Supra* note 69, at 39-40.

²⁷⁵ STEVEN FERREY, *Supra* note 54, at 86.

²⁷⁶ Mark Lancelot Bynoe, *Supra* note 63, at 47.

²⁷⁷ For more, see generally, WORLD BANK, *Supra* note 68, at 3.

could be accommodated is permitted. For instance, in Africa, the review period is 30 days²⁷⁸ in the Gambia, 50 days in Ghana, a minimum of 122 working days in Zambia, 68 days in Morocco, and 60 days in Egypt.²⁷⁹ In Asia, the review period is 56 days in Mongolia, two months in China, Vietnam, and Cambodia, and 75 days in Thailand (for private funded project but no provision on public funded project).²⁸⁰ In Serbia, the review period is 40 days.²⁸¹

As compared to the above periods for EIA review, the total period the EIA Proclamation allows for both public participation and reviewing EIAs is 15 working days.²⁸² Thus, since the EIA Proclamation does not allocate separate time to public participation during review process, it is up to FEPA or REAs to determine, on case by case basis, how long should be allotted to the public for comments and how long should be left to them for review and taking actions. Interestingly, and as subsequent discussions will reveal, environmental protection organs usually use the 15 working days to review and take actions on EIA reports thereby disregarding public participation altogether. Indeed, they even complain that this 15 working days period is short for effective EIA review let alone dividing it into parts to accommodate public participation.

Generally, therefore, although the EIA Proclamation contains some good stipulations in relation to public participation in the EIA process, it is still plagued with inadequacies which make the enforcement of these stipulations almost impossible. On the other hand, enforcing

²⁷⁸ Although 30 days review period in the Gambia is longer than the 15 working days review period in Ethiopia, the 30 days review period in the Gambia may not be enough to have meaningful public participation in the EIA process at review stage.

²⁷⁹ For more on this point, see generally, ECONOMIC COMMISSION FOR AFRICA, *Supra* note 69, at 39-40.

²⁸⁰ For more, see generally, *Supra* note 68, at 3.

²⁸¹ MELLESE DAMTIE AND MESFIN BAYOU, *Supra* note 51, at 16.

²⁸² The total number of days can be greater than fifteen because non-working days such as Saturdays and Sundays are not included. However, since environmental protection organs can accept comments only on working days, the presence of non-working days does not make any difference.

the inadequate stipulations of the EIA Proclamation necessitates the issuance of implementing regulations or directives which are at the moment lacking.²⁸³

IV. EIA Procedural Guidelines

FEPA has had two procedural Guidelines to facilitate the EIA process. The first Guidelines were issued in 2000. These Guidelines, recognizing that public participation (interested and affected parties (IAPs))²⁸⁴ at different stages in the EIA process is necessary, provided for public participation at the scoping, EIS, and review stages.²⁸⁵ They also dealt with the ways of involving the public in the EIA process.²⁸⁶ The 2003 FEPA Guidelines, which replaced the 2000 Guidelines, also recognize the need to have public participation in the EIA process at various stages.²⁸⁷ However, unlike its predecessor, the 2003 Guidelines are less clear on the stages at which the public can participate in the EIA process. Of course, the Guidelines stipulate that scoping should involve the public. But, with regard to the participation of the public at the other stages, the Guidelines are not clear. Nonetheless, the silence of the Guidelines does not imply the absence of proponent's duty to involve the public in the EIA process at other stages. In fact, proponents must involve the public during EIS, for instance, for two reasons.

First, the evaluating authority is expected to consider the extent of public participation in the EIS process during the review process. This forces proponents to engage the public in the EIS

²⁸³ Incidentally, one has to note that the absence of instruments specifically designed to implement the EIA Proclamation makes it difficult not only for environmental protection organs to discharge their obligation but also for proponents to discharge their duties under the Proclamation.

²⁸⁴ Both Guidelines define *interested and affected parties* as individuals or groups concerned with or affected by an activity or its consequence including local communities, work force, consumers, environmental groups and the general public. Thus, the term IAPs can be equivalent to stakeholders. See the definitional parts of both Guidelines.

²⁸⁵ See FEPA Guidelines, *Supra* note 108, Sections 3.1.3, 3.4, and 3.5.

²⁸⁶ Paragraph 3.4 of the Guidelines Document lists, among others, public meetings; telephonic surveys; exhibits, displays and "open days"; newspaper advertisements; written information; surveys, interviews and questionnaires; working with established groups; and workshops and seminars as methods of ensuring stakeholders' participation in the EIA process.

²⁸⁷ The relevant paragraphs of these Guidelines include paragraphs 5.2.3, 5.2.6, 6.3, and 6.4.

process. Second, like at the EIS stage, the Guidelines do not specifically deal with the participation of the public at EIA evaluation stage. In other words, the Guidelines do not impose clear obligation on evaluating agencies to involve the public in their evaluation process. Yet, they stipulate that the decisions of environmental protection organs on EIS reports must be *consultative* and *participatory*, an expression that can be understood as referring to consulting and engaging the public.²⁸⁸ In any case, it could be said that the 2003 Guidelines provide for public participation in the EIA process at all important stages.²⁸⁹

In conclusion, putting aside the question of its adequacy, one can say that Ethiopia has a legal framework in place to encourage and ensure public participation in the EIA process. The question then is whether such participation actually exists in practice. This issue will be dealt with in detail in Chapter Six.

²⁸⁸ Besides, since the EIA proclamation, as discussed before, requires gathering comments from the public and experts, the public can participate in the EIA process at this stage as well.

²⁸⁹ As discussed before, although the Guidelines are still at draft stage, they can be used as soft rules governing the conducts of the concerned parties such as proponents, consultants, FEPA and REAs. Moreover, although the Guidelines do not have binding force like other soft rules, environmental protection organs can make them work like laws by strictly adhering to the rules they recognize. For example, proponents may be denied ECC if they do not observe what the Guidelines stipulate such as involving the public in the EIA process. Moreover, if licensing organs also use the requirements of these Guidelines recognize as additional requirements to issue licenses/permits, the Guidelines may in fact be operative as though they were laws. Eventually, such use of the Guidelines will contribute to the betterment of the system of EIA in Ethiopia provided, of course, that the other necessary conditions are also fulfilled.

CHAPTER THREE: EVALUATION OF THE EIA LEGAL FRAMEWORK

3.1 Introduction

Although guaranteeing effective system of EIA requires more than having an adequate legal framework, it cannot be denied that providing for an adequate legal framework can be a starting point towards this goal. This is so because such legal framework creates an enabling environment to use EIA and ensure its effectiveness. In this Chapter we will examine whether the EIA legal framework Ethiopia has put in place for the use of EIA is adequate to facilitate the effectiveness of the system of EIA as a whole.

3.2 Adequacy of the Legal Framework

Since the other instruments we have seen in the previous Chapter do not specifically and in detail deal with EIA, the analysis in this section is limited to the EIA Proclamation, the 2008 FEPA Directives and the 2003 FEPA Procedural Guidelines. To begin with, although the EIA Proclamation contains specific provisions relating to EIA, the close reading of these provisions reveals that it is in fact inadequate to contribute to the effectiveness of the system of EIA in Ethiopia. On the other hand, the inadequacy in the EIA Proclamation is the result of its generality and some of the important gaps it contains. In other words, some of the provisions of the Proclamation are too general to be used without the assistance of other instruments. Similarly, there are gaps that the Proclamation contains and which must be filled by issuing subsidiary instruments if the Proclamation is to be implemented properly. The following examples explain these points more fully.

First, although the Proclamation allows public participation in the EIA process, it does not provide for how long this participation should stay other than simply requiring environmental

protection organs to take action on EIAs within fifteen working days. Second, the Proclamation does not authorize environmental protection organs to take measures against proponents of projects that are executed without passing through EIA.²⁹⁰ Third, the Proclamation does not indicate (by annexing to its text) the actions that are subject to EIA; instead, it provides that these actions should be determined by the directives to be issued by FEPA, which, in turn, shows that in the absence of these directives, no one will be required, legally speaking, to do EIA as a proponent cannot know which action is subject to EIA and which is not. Fourth, although the Proclamation states that EIA applies to public instruments as well, it does not expressly require, as it does for projects, proponents of public instruments to do EIA, in accordance with FEPA's directives/guidelines, before these instruments are approved. Likewise, the organs which approve public instruments (parliament for proclamations and international agreements, the Council of Ministers for regulations and policies, and other government agencies for programs) are under no express obligation under the EIA Proclamation to ensure that SEA is done and authorization is obtained from appropriate environmental protection organs before taking actions on proposed public instruments.

The above examples show the extent to which the provisions of the EIA Proclamation are not in themselves adequate to make the system of EIA effective. Indeed, the EIA Proclamation can be described as a skeleton with little flesh. As a result, its effective implementation necessarily requires the issuance of other more specific subsidiary instruments. On the other

²⁹⁰ Of course, with regard to projects that have passed through EIA, the Proclamation authorizes environmental protection organs to monitor their implementation and cause measures to be taken if they find that proponents are not complying with the conditions of their project's approval or with the commitments they entered into. See EIA Proclamation, No 299/2002, article 12(2). The big problem here, though, lies with the stipulations made by our investment laws. The current investment proclamations provide for limited grounds on which investment permits may be suspended or revoked by the organs that have issued them. However, these proclamations do not include failure to do EIA or doing EIA improperly in the grounds they recognize for suspension or revocation of investment permits. This means, an investment permit that is issued to a person who did not do EIA cannot be suspended; nor can it be revoked. See Investment Proclamation, Proclamation, No. 280/2002, article 16 and Investment (Amendment) Proclamation, No. 375/2003, article 3(8).

hand, cognizant of the generality of the provisions of the Proclamation and also the gaps it contains, the FDRE Parliament has authorized the Council of Ministers to issue regulations necessary for the *effective* implementation of the Proclamation.²⁹¹ However, although the inadequacies (generality and gaps) of the EIA Proclamation are obvious and it is clear that the effective implementation of the Proclamation requires regulations, a decade later, the Council of Ministers has not yet issued any regulations to implement the Proclamation.²⁹²

Moreover, the FDRE Parliament authorized FEPA to issue directives that are necessary for the *effective* implementation of the Proclamation. Unlike the Council of Ministers, however, FEPA was able to prepare EIA directives in 2008. Nonetheless, these directives cannot facilitate the effective implementation of the EIA Proclamations, as envisioned by the Parliament, because they suffer from various limitations which have made them ineffective at the moment. The first limitation of the directives pertains to their status. To begin with, in our system, law-making passes through five stages: initiation, discussion, approval, signature, and publication. When we come to the directives, they have not yet been signed by the Chairperson of the Council (who is the Country's Prime Minister) whose signature is necessary for the directives to be issued. Secondly, since directives are law, and article 2(2) of the *Federal Negarit Gazeta* Establishment Proclamation requires all laws of the federal government, that is, laws issued by the federal government, to be published in the *Federal Negarit Gazeta* (official newspaper for the publication of federal laws) so that everyone takes

²⁹¹ EIA Proclamation, No. 299/2002, article 29.

²⁹² For example, Ato Solomon Kebede, head of the EIA Department at the EPA, stating that regulations are indispensable for the effective implementation of the EIA Proclamation and that the EIA Proclamation has so far failed to achieve the objective for which it was made, mentions the absence of Council of Ministers' Regulations as a major factor for the failure. Solomon Kebede, *Supra* note 160. Actually, the indispensability of regulations for the effective implementation of the EIA Proclamation is beyond question because, being the law of the executive, their issuance shows the presence of political will to implement the Proclamation. In this regard, some writers emphasize that politics is very important for the success of a law. See Otto Kahn-Freund mentioned in PENELOPE NICHOLSON, *BORROWING COURT SYSTEMS: THE EXPERIENCE OF SOCIALIST VIETNAM* 25-27 (2007).

judicial notice thereof, the 2008 FEPA directives have not yet passed through this stage.²⁹³ Of course, in practice, directives are used as a law without publication in the *Federal Negarit Gazeta* although their publication is required. However, directives should be issued at least in the official header paper of the concerned institution to be binding/operative. FEPA's directives lack this feature as well. In other words, FEPA has not so far published the directives even in its own official header paper. In any case, what this means is that the making process of the directives is two steps short of consummation thereby making it, legally speaking, a draft. I discussed this matter with some people in the legal department of FEPA who agreed with my conclusion that the directives do not have force of law due to the lack of signature by the chairperson of the Environmental Council.²⁹⁴ Moreover, the head of the EIA department also thinks that the directives are still at a draft stage and, therefore, no action may be taken based on its provisions.²⁹⁵

The second limitation relates to the scope of application of the directives. That is, even if the directives are to be used as though they were signed by the chairperson of the Environmental Council, they are far from being comprehensive. Firstly, the preamble of the directives indicates that the directives were issued in order to implement article 5 of the EIA Proclamation which deals only with projects. This means, and in fact the content of the directives also shows, the directives do not cover public instruments that must pass through EIA although article 13 of the EIA Proclamation requires FEPA to provide for list of public instruments which are subject to EIA. This makes the directives even less comprehensive than FEPA Guidelines themselves which, as we will see below, contain some public

²⁹³ Article 2(2) of the Federal Negarit Establishment Proclamation of 1995 states that [*a*]ll Laws of the Federal Government shall be published in the Federal Negarit Gazeta. Then, under article 2(3), it adds; All Federal or Regional legislative, executive and judicial organs as well as any natural or juridical person shall take judicial notice of Laws published in the Federal Negarit Gazeta. If federal laws are not published in this newspaper, then no one is supposed to take judicial notice of their existence. See Federal Negarit Gazeta Establishment Proclamation, No. 3/1995.

²⁹⁴ Discussion with two FEPA personnel, Legal Department, FEPA, in Addis Ababa (February 24, 2010). Their names are kept anonymous in accordance with their demands.

²⁹⁵ Solomon Kebede, *Supra* note 160.

instruments which are subject to SEA. Thus, even if it is still not signed and hence operative, the omission of public instruments from the directives shows that there is low chance of using SEA in the decision-making process. On the other hand, failure to use SEA could be taken as a big blow to the effectiveness of the system of EIA since SEA is very important to ensure environmental protection.²⁹⁶ Secondly, the directives deal with projects that are subject to EIA themselves only selectively. In other words, there are projects that can be subject to EIA but which are not included in the directives. For example, while housing development projects by private investors, which are now expanding, are not subject to EIA, similar projects are made subject to EIA when they are undertaken by government organs.²⁹⁷ Similarly, big agro-industrial and resettlement projects involving many families are not included in the list of the directives.²⁹⁸ Indeed, if we compare the directives with the 2003 FEPA Guidelines on this matter, they provide for very few projects that have to pass through the EIA process.²⁹⁹

Therefore, the 2008 FEPA directives are not binding. They are, moreover, not comprehensive to make the system of EIA work well. This means, in the legal sense of the term, no proponent can be obliged to do EIA at the moment because the EIA Proclamation obliges proponents to do EIA in accordance with the directives to be issued by FEPA while such directives are not yet in place. Incidentally, one has to bear in mind that the EIA Proclamation

²⁹⁶ There is an argument that since project-based EIA tends to occur after broader social and economic policy decisions have been made and these prior policy decisions may constrain the ability of project-based EIA to ensure environmental protection, there should be an SEA for greater integration of EIA processes with top level decision-making. SEA makes decision-makers consider environmental values not only at project level but also at programmatic/strategic levels. Indeed, SEA has now emerged as an important element in domestic environmental decision-making processes. See NEIL CRAIK, *THE INTERNATIONAL LAW OF ENVIRONMENTAL IMPACT ASSESSMENT: PROCESS, SUBSTANCE AND INTEGRATION* 155-156 (2008).

²⁹⁷ Perhaps, in practice, there may not be any difference because although government owned housing development projects are said to be subject to EIA, they will not pass through EIA not only because the directives are not signed but because other government owned projects are not passing through EIA unless there is external pressure such as from the WB for EIA.

²⁹⁸ Environmental Protection Authority, Federal Democratic Republic of Ethiopia, Draft Directives, No. 2/2008.

²⁹⁹ For the projects that are listed by the directives, see the previous citation or the directives as annexed hereto.

mandates FEPA to issue two types of directives. First, FEPA is mandated to issue directives in accordance with articles 5 and 13 to deal with matters related to the determination of actions (projects and public instruments) that are subject to EIA. Second, article 20 of the Proclamation mandates FEPA to issue directives which aim at effectively implementing the whole provisions of the Proclamation. Thus, issues like the stage, duration, and modalities of public participation in the EIA process, the possible measures FEPA or REAs may take in case EIA is not done for actions subject to it, the place that should be given to the opinions of the public in the EIA process, and questions relating to certifying and licensing EIA consultants could be answered by these latter directives. Unfortunately, however, such directives do not exist even as a draft.

Another instrument worth considering here is the 2003 FEPA Guidelines themselves. As compared to all the other EIA related instruments, the Guidelines provide for better stipulations to make the system of EIA in Ethiopia effective. Nevertheless, and like the other instruments, the Guidelines do also suffer from certain limitations which affect their effectiveness. First, although their preparation ended in 2003, the Guidelines are still at a draft stage. According to the Environmental Protection Establishment Proclamation, the guidelines that FEPA prepares must be approved by the Environmental Council,³⁰⁰ and the Council has not yet approved FEPA's 2003 Guidelines.³⁰¹ This means, in legal sense, the Guidelines cannot be used by the concerned organs including FEPA and REAs. Second, even assuming that they were approved, the Guidelines lack force of law (because they are not law) like proclamations or regulations or directives. They are organizational rules that can be

³⁰⁰ See Environmental Protection Establishment Proclamation, No 295/2002, article 9(3).

³⁰¹ Solomon Kebede, *Supra* note 160. Also interview with Wondosen Sintayehu, Acting Head, Environmental Policies and Legislation Department, FEPA, in Addis Ababa (August 24, 2009). (When I first interviewed Ato Wondosen Sintayehu on September 7 and 8, 2009, he was the Acting Head, Environmental Policies and Legislation Department, FEPA.) When I conducted my last interview with him on 16 August 2011, he was (and still is) the Director of the System Preparation Program Directorate of FEPA.) The reason why the Environmental Council has so far failed to approve the Guidelines will be discussed later in detail in the part that deals with the establishment and operation of the Environmental Council.

used as rules of conduct. Hence, proponents may not be forced to obey them because they can avoid dealing with environmental protection organs so long as a law that deals with actions that are subject to EIA is not issued. Nevertheless, if the Guidelines were approved, FEPA or REAs can make them operative by refusing to issue ECC to those proponents seeking ECC from environmental protection organs until they comply with the Guidelines. Moreover, it could be argued that failure to observe the Guidelines would amount to failure to observe the EIA Proclamation as their issuance is required and mandated by the Proclamation. The danger, however, is the possibility that proponents may not come to environmental protection organs to obtain ECC unless environmental protection organs work closely and cooperatively with licensing bodies to ensure that they are not bypassed and ECC is also used, when required, as a condition to issue investment or business or other operating licenses.

The other problem concerning the Guidelines relates to their scope. That is, there are certain gaps in the Guidelines themselves. For instance, while Schedule I lists large-scale projects such as large-scale agricultural activities and large-scale conversion of forest land to other uses, both covering 500 hectares (5km²) or more, as projects which are automatically subject to full EIA, Schedule II has failed to subject medium-scale projects of similar kinds to preliminary EIA although Schedule III expressly states that such projects may not be subject to EIA if they are undertaken on small-scale basis. Of course, if a project is neither part of Schedule I nor Schedule III, it is logically part of Schedule II. For instance, while Schedule I of the Guidelines expressly stipulate that both surface and ground water fed irrigation projects covering more than 100 hectares are subject to automatic full EIA, Schedule III states that similar projects covering less than 50 hectares may not be subject to EIA

(Schedule III), whereas Schedule II is silent although it should have regulated surface and ground water fed irrigation projects covering between 50-100 hectares.³⁰²

The third limitation of the Guidelines relates to public instruments. Since the EIA Proclamation recognizes both generations of EIA, it is necessary to have guidelines which provide for list of public instruments that are and are not subject to EIA. In fact, the 2003 FEPA Guidelines contain express list of those public instruments which have to pass through SEA. Thus, matters relating to family planning, technical assistance, development strategies, urban and rural land use development plans, structural adjustment, policies and programs formulations are subject to SEA.³⁰³

There are, however, certain points which need special consideration. First, the Guidelines deal with public instruments only in Schedule I. Hence, the other two Schedules do not provide for public instruments that are subject to preliminary EIA and those that are exempt from EIA, respectively, although the EIA Proclamation foresees these possibilities as well. Second, as one can see from the list of public instruments Schedule I contains, they are too general (maybe, too vague as well) making their application difficult. For example, matters pertaining to family planning at strategic level are made subject to SEA. The question, however, is whether all issues pertaining to family matters should pass through SEA. For instance, the permission or otherwise of abortion as part of family planning, or limiting the number of children one family can have as part of family planning may have to pass through SEA. Yet, should a decision to educate the public about how to use condoms as a contraceptive mechanism be made subject to SEA? Third, the Guidelines omit some public instruments which should have been included. For example, it does not clearly deal with

³⁰² It is interesting to note that the 2000 Guidelines clearly stipulated that such projects were subject to preliminary EIA (Schedule II). Thus, it seems that the omission of such medium-scale irrigation projects from Schedule II is an oversight. This makes sense particularly if we consider the fact that the 2003 Guidelines are in many ways capitalization on the 2000 Guidelines.

³⁰³ FEPA Guidelines, *Supra* note 108, Annex III, Schedule I, No 27.

laws, treaties, and other matters, whereas the EIA Proclamation not only foresees but also mentions them as the possible public instruments that can be subject to SEA.

Therefore, although it could be said that the 2003 FEPA Guidelines are better suited to facilitate the effective use of EIA in Ethiopia, they are not free from limitations. For instance, one of the reasons FEPA gives for not taking some measures it is authorized to under the EIA Proclamation is the fact that the Guidelines are still at draft stage.³⁰⁴ Moreover, the fact that the Guidelines are organizational rules or more like best practices and also contain some gaps may have their own impacts on their effectiveness to ensure an effective system of EIA in the country. It is, however, interesting to note, as the previous discussion has revealed, that despite all its limitations the Guidelines are at least to some extent operative.

In the end, it could be concluded that in the absence of regulations and directives intending to implement its provisions and also due to some limitations in FEPA Guidelines, the EIA Proclamation remains inadequate to achieve its objectives. For instance, in the eyes of the law, it is not possible to force proponents to do EIA because there is no approved and binding instrument providing for list of actions that are subject to EIA at both strategic and project levels. Thus, if proponents do EIA, it could be due to other factors and not necessarily due to any legal obligation imposed on them.³⁰⁵ On the other hand, if the legal framework on EIA is inadequate, it is doubtful that the system of EIA in Ethiopia can be effective to produce its intended outcomes, that is, facilitating environmental protection, bringing about sustainable development, fostering the realization of environmental rights, causing administrative transparency and accountability, and fostering public participation in environmental decision-making.

³⁰⁴ Solomon Kebede, *Supra* note 160.

³⁰⁵ As we shall see later on, some proponents do EIA only when donors and/or lenders such as the Ethiopian Development Bank and the World Bank demand ECC from the relevant environmental protection organs. Of course, there are also proponents who conduct EIA out of their own initiatives such as the Water Resources Bureaus in some regions in the country.

One may wonder why adequate and more specific subsidiary laws intending to put the EIA Proclamation into effect are still lacking. The answer to the query, it seems, is the absence of the necessary political will on the side of the government to effectively implement the EIA Proclamation or use the system of EIA in practice. According to some writers, there is almost exclusive attention paid to the ‘means’, that is EIA, while the ‘end’, that is implementation of EIA to improve the quality of the environment, is not given appropriate consideration thereby rendering EIA a mechanistic process.³⁰⁶ The reality in Ethiopia stands in support of this assertion. Although the legal framework we have seen before shows the existence of political will to recognize the importance of EIA in decision-making process, the absence of adequate subsidiary laws/instruments to implement the existing legal framework shows the absence of political will to use the system of EIA in practice, whereas political backing is very important for the success of a law.³⁰⁷ In support of this conclusion, perhaps making a comparison between two peer laws, yet in different fields, may be helpful. In 2002, our current Investment Proclamation No. 280/2002 was enacted. Later on, some of its provisions were amended by Investment (Amendment) Proclamation No. 375/2003. To facilitate the implementation of the Investment Proclamation, as amended, the Council of Ministers issued Regulations No. 84/2003. To further facilitate the effectiveness of the Investment Proclamation, the Council amended these regulations by another Regulations No. 146/2008. So, the amendment of the Investment Proclamation by another Proclamation and the enactment of two regulations to enforce its stipulations show the political commitment of the

³⁰⁶ PRASAD MODAK AND ASIT K. BISWAS, *Supra* note 66, VIII.

³⁰⁷ See Otto Kahn-Freund mentioned in PENELOPE NICHOLSON, *Supra* note 292, at 25-27. Michael Kidd, emphasizing the importance of politics for the effective operation of the system of EIA, argues that political commitment can be expressed in three ways, that is, in relation to legislation, resource allocation, and decision-making. In other words, for the effectiveness of the system of EIA, the politics of legislation, the politics of resource allocation, and the politics of decision making are necessary. For more on this point, see MICHAEL KIDD in NATHALIE J. CHALIFOUR ET AL, *Supra* note 6, at 194.

government to effectively implement the Investment Proclamation.³⁰⁸ On the contrary, when we see the EIA Proclamation which was made in the same year with the Investment Proclamation, it has never been amended; nor it has ever been supported by any implementing regulations or even binding directives in spite of the fact that these laws are necessary and authorized for the effective implementation of the EIA Proclamation. This could be taken as an indication of lack of the necessary political commitment to effectively implement the EIA Proclamation as opposed to the Investment Proclamation.

On the other hand, one may still wish to inquire why the necessary political commitment for the effective implementation of the EIA Proclamation is missing. Although many factors could be raised, we will consider only two of them, that is, the perception that exists regarding the relationship between development and environmental protection and the fact that the EIA Proclamation was transplanted.

3.3 Environmental Protection vis-à-vis Development

The first reason for the absence of conducive atmosphere for the effective implementation of the EIA Proclamation is attributable to the place given to environmental protection vis-à-vis the other national interests. There is no doubt that even developed countries such as the US consider their other national interests in the course of environmental protection endeavors.³⁰⁹

For example, according to *Associated Press*, on September 2, 2011, President Obama dropped his administration's plan to tighten smog rules because of demands from congressional Republicans and some business leaders to do so despite the fact that the regulation the President decided to drop was supported by the US EPA and the unanimous

³⁰⁸ For more on this, see Investment Proclamation, No. 280/2002, Investment (Amendment) Proclamation, No.373/2003, Council of Ministers Regulations, No. 84/2003, Council of Ministers Regulations, No. 146/2008.

³⁰⁹ For example, the US NEPA requires EIA as long as it is consistent with other national interests. This means, if doing EIA is detrimental to other national interests, then NEPA can be put aside. See NEPA, *Supra* note 71, §102(2).

opinion of its independent panel of scientific advisers.³¹⁰ As a result, the President's decision was criticized by environmentalists as a decision that would give priority to business (economy) than to public health (environment).³¹¹ In similar fashion, there is nothing wrong with Ethiopia giving consideration to its other national interests such as development when issues of environmental protection are raised. In fact, admitting that Ethiopia is one of the poorest countries on earth, the effort of the FDRE government is to change this reality. For example, one of the long-term visions of Ethiopia, according to the 2010/11-2014/15 GTP, is to become a country that is extricated from poverty and a middle-income economy.³¹² Therefore, no one should wonder if the government makes development, not the environment, its area of priority.

However, the development that the government is intending to bring about must be sustainable to be meaningful, whereas using EIA is one of the factors that can make development sustainable.³¹³ After all, some argue, the overall purpose of EIA is assisting in shaping development process, not preventing development from taking place.³¹⁴ In Ethiopia, too, the legislative history of the EIA Proclamation shows that the drafters did not want, by introducing the system of EIA into the country, to make EIA an obstacle to development endeavors but to make development sustainable.³¹⁵ This means, EIA is not meant to stop developmental actions but to cause environmental values to be considered when decisions regarding these actions are made.

³¹⁰ For the whole story, see DINA CAPPIELLO and JULIE PACE, *Obama halts controversial EPA regulation*, Associated Press, 2 September 2011, available at <http://news.yahoo.com/obama-halts-controversial-epa-regulation-143731156.html>, accessed on 3 September 2011.

³¹¹ *Id.*

³¹² See GTP, *Supra* note 12, Section 2.1.

³¹³ Other methods such as cost-benefit analysis (CBA) and social impact assessment (SIA) can also be used to assess the social and economic consequences of a given development action. NORMAN LEE AND CLIVE GEORGE, in Norman Lee and Clive George, *Supra* note 67, at p. 6-7.

³¹⁴ *Id.* at 6.

³¹⁵ See discussion on the draft EIA Proclamation on 31 October 2002 by the concerned parliamentary committee and stakeholders, Archives of the HPR, Ethiopia.

Nonetheless, it is equally important to note that there is also a wrong perception that EIA hampers development.³¹⁶ Hence, those who hold this wrong perception will ignore EIA unless its use is required by some external pressure. As we will see later on, many development agents in Ethiopia such as law enforcers and proponents do seem to hold this later view. Consequently, they have failed to create conducive atmosphere for the use of EIA such as formulating the necessary EIA instruments. Likewise, they have failed to use EIA when there are chances to do so. For example, the *Gilgel Gibe III* project³¹⁷ is a big hydroelectric power project. When it is completed, the power plant will produce more than 1800 MW of hydroelectric power which will highly contribute to the satisfaction of the power needs of the country; it may even enable Ethiopia to obtain foreign currency through power export. Because this anticipated benefit is tantalizing and regardless of objections from various groups claiming that the adverse environmental impact of the project will be enormous, the implementation of the project commenced without prior EIA. Moreover, the project for the construction of the *Grand Ethiopian Renaissance Dam*, the biggest hydroelectric power dam in the history of Ethiopia, or even in Africa, for that matter, was launched on 2 April 2011. When its construction is completed and the Dam becomes operational, Ethiopia will be able to generate nearly three times the power *Gilgel Gibe III* will generate. Hence, the expected benefits from the *Renaissance Dam* could be by far more tantalizing than that of the *Gilgel Gibe III*. As a result, the *Grand Ethiopian Renaissance Dam* project was launched before a full-scale EIA was conducted in accordance with the EIA Proclamation and the 2003 FEPA Guidelines.³¹⁸ Of course, the project was preceded by a

³¹⁶ MOHAMMED A. BEKHECHI AND JEAN-ROGER MERCIER, *Supra* note 15, at 5. Of course, there is no doubt that EIA may sometimes lead to the stoppage of ‘development’ activities which can cause greater harm to the environment because their stoppage is more beneficial, at least in the long term, than their continuation.

³¹⁷ EIA was actually done for the project but as we will see later on, the manner in which it was done was wrong because the EIA was done, contrary to the requirements of the existing legal framework, after the implementation of the project commenced.

³¹⁸ Interview with Ato Alemayehu Tafesse, Head, Environmental Impact Assessment and Social Development Office, Ministry of Water and Energy, Federal Democratic Republic of Ethiopia, in Addis Ababa (July 26, 2011). Moreover, the discussion I made with some officials at FEPA, who preferred to remain anonymous, also

preliminary or an initial EIA, whereas a full-scale EIA is now underway.³¹⁹ Nonetheless, it is known that doing EIA after the implementation of a project has begun is procedurally flawed. At any rate, the above two examples show that when there is a tension, real or otherwise, between development and environment, the latter has to give way to the former although they are not mutually exclusive.

This raises doubt about the government's genuine commitment to create conducive environment for the effective use of EIA such as by issuing subsidiary instruments to effectively implement the EIA Proclamation. After all, one of the top policies of the government at the moment is encouraging investment activities, which, in turn, requires, *inter alia*, easing the requirements investors are expected to meet. Demanding strict compliance with EIA requirement is a pushing factor for investors because it is both time taking and costly. For instance, the previous Investment Proclamation required observance of environmental protection laws as one of the requirements to get investment permit.³²⁰ As a result, although there was not enabling legal environment such as EIA law, some investors were doing EIA in order to get investment permits, whereas some licensing organs were also trying to ensure that EIAs were actually done and ECCs were obtained from the relevant environmental protection organs before they issued investment permits. Nevertheless, the current Investment Proclamation which was enacted, among other things, to make the system of administration of investment in the country efficient removed this requirement.³²¹ As a

shows that there was no EIA for the Dam. In fact, Prime Minister Meles Zenawi himself indicated that environmental study was undertaken for the Dam which does not necessarily include EIA. Meles Zenawi, *Supra* note 1.

³¹⁹ Alemayehu Tafesse, *Supra* note 318.

³²⁰ Article 14(1) of the Investment Proclamation, Proclamation No. 37/1996, states:

Upon receiving an application for investment permit made in full compliance with the provisions of Article 13 of this Proclamation, and after ascertaining within 10 days that the intended investment activity would not be contravening the operational laws of the country and that, *in particular, it complies with conditions stipulated in environmental protection laws*, the appropriate investment organ shall issue an investment permit to the applicant. Emphasis added.

³²¹ See the preamble of Investment Proclamation, Proclamation No. 280/2002. Actually, nowadays, investment organs issue investment permits within hours if applicants properly fill the investment permit application form

result, investment organs such as the Ethiopian Investment Agency have now stopped requiring applicants to produce ECC as a condition to issue investment permit.³²² In fact, the Investment Proclamation No. 280/2002 obliges investment organs to take action within 10 days if applications are submitted to them in accordance with its stipulations or law issued thereunder which do not include EIA.³²³ The Investment (Amendment) Proclamation No. 375/2003 also contains the same stipulations. However, it obliges investment organs to take action on applications for investment permits within five working days provided that they are submitted to them in accordance with its stipulations or the stipulations of laws issued thereunder.³²⁴ Therefore, although Investment Proclamation 280/2002 did not repeal the requirement of ECC as stipulated in the EIA Proclamation because it is a former law,³²⁵ the Investment (Amendment) Proclamation No. 375/2003 seems to do so tacitly. This is so because article 3(7) of this later Proclamation expressly requires licensing bodies to issue permits if applicants met the requirements of the investment laws which do not include doing EIA or obtaining ECC from environmental protection organs. Accordingly, and apparently, investment organs may not be able to insist on the production of ECC to issue investment permit. FEPA also admits that investment organs are now under no legal obligation to require

in accordance with the requirements of investment laws. Then, the organs notify the concerned sectoral institutions, which have environmental units, about the licenses they have issued and request them to give the necessary aids to the person who has obtained investment permit and also to follow-up the implementation of his project in accordance with the relevant laws of the country. MELLESE DAMTIE AND MESFIN BAYOU, *Supra* note 51, at 24. The duty to notify arises from article 3(13)(8) of the Investment (Amendment) Proclamation No 375/2005 to enable the environmental units to follow-up the implementation of the authorized projects. However, the demand of the EIA Proclamation is more than just notifying the concerned government organs of the measures taken by investment organs. It actually imposes on licensing organs a clear obligation to demand from applicants ECC prior to issuing investment permit provided that the proposed action is subject to EIA.

³²² Interview with Ato Gerawork Teferra, Director, Licensing and Registration Director, Ethiopian Investment Agency, Federal Democratic Republic of Ethiopia, in Addis Ababa (July 22, 2011).

³²³ Investment Amendment Proclamation, No. 375/2003, article 3(7).

³²⁴ *Id.*

³²⁵ Even if contradictions were to exist between the two laws, the EIA Proclamation would prevail over the Investment Proclamation 280/2002 since the rule is *latter law prevails over former law*. Luckily, the two laws do not contradict because the EIA Proclamation simply adds one more requirement to the requirements the Investment Proclamation No. 280/2002 stipulates and that investors have to meet to obtain permits.

ECC to issue investment permit.³²⁶ So, the measure taken by the government in this regard by enacting the Investment (Amendment) Proclamation No. 375/2003 could be considered regressive when it is seen from the perspective of environmental protection.

There is also another regressive measure that was introduced by the Investment (Amendment) Proclamation No. 375/2003. Before the issuance of this amending Proclamation, the Commercial Registration and Business Licensing Proclamation, No.67/1997, required those who apply to get business license to produce statements on environmental protection and safety measures from the concerned government institutions.³²⁷ This requirement is relevant because it forces applicants to get statements pertaining to the environment from the relevant environmental protection organs, whereas these organs will issue the statements only if they get EIAs for projects subject to EIA. However, the Investment (Amendment) Proclamation No 375/2003 expressly repeals this requirement and relieves applicants of their duty to produce statements on environmental protection and safety measures from the concerned government institutions.³²⁸ This means, the organs that are tasked with the responsibility to issue business license cannot demand, for example, the production of ECC as a precondition to issue business licenses.

In July 2010, Ethiopia enacted a new Commercial Registration and Business licensing Proclamation which repeals the Commercial Registration and Business Licensing Proclamation, Proclamation No. 67/1997 and its implementing regulations.³²⁹ As a subsequent law, this new Proclamation could revive the requirement of the Commercial

³²⁶ Public Lecture by Ato Solomon Kebede and Ato Wondosen Sintayehu, *Supra* note 190. See also Solomon Kebede, *Supra* note 160 and Wondosen Sintayehu, *Supra* note 301.

³²⁷ See Commercial Registration and Business Licensing Proclamation, No. 67/1997, article 22(2)(a).

³²⁸ See Investment (Amendment) Proclamation, No 375/2003, article 3(13). However, the same article of the Proclamation requires the appropriate investment organ to make the investor enter into undertaking, by signing a commitment, to respect the relevant laws and directives of the land. The laws investors agree to respect may include environmental laws but it does not seem to include the EIA Proclamation which is already bypassed to obtain investment permit.

³²⁹ See Commercial Registration and Business Licensing Proclamation, No.686/2010.

Registration and Business Licensing Proclamation, Proclamation No. 67/1997, on environmental protection contrary to the stipulation in the Investment (Amendment) Proclamation, Proclamation No. 375/2003. It is, however, unfortunate that the new Commercial Registration and Business Licensing Proclamation, Proclamation No. 686/2010, has failed to make similar stipulation with its predecessor in respect of environmental protection. On the contrary, this new Proclamation compels licensing organs to effect registration and issue business licenses to applicants if they meet the requirements it sets out and which do not include EIA or ECC. This is another missed opportunity to integrate or mainstream the requirement of EIA into a sectoral law to eventually contribute to the effectiveness of the system of EIA in Ethiopia.

3.4 Transplantation of the EIA Proclamation

The other reason for the absence of necessary political commitment to fully supplement the EIA Proclamation is the fact that the Proclamation was the result of legal transplantation which was not triggered by internal needs/initiatives.³³⁰ Some officials at FEPA stated that the making of the EIA Proclamation was not motivated by internal needs; rather, it resulted from external pressure.³³¹ The officials specifically mentioned financial institutions like the WB as the ones responsible for the making of the law.³³² They indicated that these institutions started demanding EIAs as a condition for the funds they were to release for

³³⁰ In many developing countries, the use of EIA was usually demanded by development assistance agencies on project-by-project basis; thus, the development of EIA was not a response to internal demands for environmental protection as such. C. WOOD, WHAT HAS NEPA WROUGHT ABROAD in ENVIRONMENTAL POLICY AND NEPA: PAST, PRESENT, AND FUTURE 108 (Ray Clark and Larry Canter eds., St. Lucie Press, 1997). In Sub-Saharan Africa, it is said that let alone the introduction of EIA laws the development of environmental law is seen as the direct consequence of the requirements of international donor agencies rather than the outcome of national willingness to strengthen environmental agenda. MOHAMMED A. BEKHECHI AND JEAN-ROGER MERCIER, *Supra* note 15, at 5.

³³¹ Discussions with two FEPA officials, *Supra* note 294.

³³² *Id.*

government projects.³³³ As a result, the government prepared and enacted the EIA Proclamation in order to allow some kind of EIA because doing EIA may be difficult before a legal framework is put in place. For example, one must know who a responsible person is for doing EIA and who will evaluate EIAs; what the role of the public is in the EIA process; who bears the cost of doing EIA; and, who ensures that EIA is done properly. Therefore, Ethiopia had no choice but to introduce the EIA Proclamation to respond to at least some of these issues and ultimately to show to institutions like the WB that it was ready to use EIA to secure their support.³³⁴

On the other hand, it is argued that legal transplantations that are motivated by external forces such as international institutions are often understood as impositions.³³⁵ This perception, in

³³³ *Id.* This seems true because the WB, for instance, has EIA directives since 1989 which must be applied in relation to the projects it supports. MOHAMMED A. BEKHECHI AND JEAN-ROGER MERCIER, *Supra* note 15, at 9-10.

³³⁴ This claim seems tenable if one sees the reality on the ground. For instance, although our Constitution, with stipulations on the protection of the environment, was promulgated in 1995 and Environmental Protection Authority was established in 1995 with the view to ensuring environmental protection, Ethiopia did not make an EIA law, one of the most important laws to protect the environment, until 2002. In 2002, however, it enacted the EIA law. Why did it do so in 2002 when it failed to do so at least soon after the promulgation of the Constitution? Perhaps, there was no pressure from outside to have the law as stated by some FEPA officials. Moreover, it may be asked on what basis the EIA Proclamation was prepared; that is whether it was prepared on the basis of the realities existing in the country. In this regard, the drafting history of the EIA Proclamation does not expressly mention from where it was taken. However, it is clearly mentioned that the practices of different countries and *international institutions* were used to prepare a draft EIA law (see discussion on the draft EIA law on 31 October 2002 by the concerned parliamentary committee and stakeholders, Archives of the HPR, Ethiopia.). This shows that the rules in the EIA Proclamation were taken from sources alien to Ethiopia.

³³⁵ See Jeremy J. Kingsley, *Legal Transplantation: Is This What The Doctor Ordered And Are The Blood Types Compatible? The Application Of Interdisciplinary Research To Law Reform In The Developing World—A Case Study Of Corporate Governance In Indonesia*, 21 *Arizona Journal of International & Comparative Law* 493, 516 (2004). The question then is whether such laws can be effective? Generally speaking, a transplanted law may be implemented effectively, or ignored altogether, or formally observed but practically disregarded, or selectively applied. Firstly, transplanted law may be used and applied indiscriminately in the intended fashion. In this case, the law will be fully effective and it will have the desired impact. This is likely to occur when transplantation is triggered by internal needs/initiatives. Under such circumstance, transplanted laws will not remain on books; rather, they will actually be used in practice. Secondly, and on the contrary, transplanted laws may be ignored altogether, whereas this is bound to happen when external forces trigger their transplantation. Under such circumstance, the transplanted law brings about no change to the existing realities in the receiving state; hence, it will be totally ineffective. Thirdly, transplanted laws may be observed formally but be circumvented in practice, which is called “creative compliance.” For example, transplanted laws may be made in general terms leaving too much latitude for interpretation. This makes the application of the law difficult because its scope will be broad and law enforcer may not know what is included and what is not. This is also likely to happen when transplantation is not based on internal needs/initiatives. Anyway, in this case, too, the law will not be effective. Fourthly, transplanted laws may be applied only selectively. This means, while some actors/actions are regulated by the law, others are not. Hence, the law will not be made to apply to all pertinent actors/actions. As far as the impact of such law is concerned, there is no doubt that it will affect the behaviour of

turn, leads to the absence of necessary political commitment to enforce the law.³³⁶ On the other hand, if there is no political commitment, it is hardly possible to effectively implement an EIA law or use EIA as a tool for decision-making. Under such circumstance, the easiest measure a government can take to disregard the application of its imported EIA law is denying it secondary laws destined to implement its provisions, which is exactly what is happening to the EIA Proclamation. Of course, a transplanted EIA law can be enforced if the factors that caused its transplantation exist. For example, if a donor demands the use of EIA to fund a particular project, the concerned government will have to use the law to do EIA. However, if the use of EIA is limited to cases where there are external forces, the system of EIA will become a “top down” requirement that is imposed by external bodies.³³⁷

Generally, therefore, the fact that the EIA Proclamation by itself is the result of external pressure³³⁸ and the tendency of the government to give priority to development over the environment instead of trying to reconcile the two could be regarded as the major reasons for the absence of adequate political will to create conducive atmosphere for the effective implementation of the EIA Proclamation or the use of the system of EIA. Consequently, it could be concluded that even if Ethiopia has put in place a legal framework to use the

those who are subject to it. Nevertheless, such application of the law will eventually lead to ‘creative compliance’ which will make the law ineffective. This is why some writers argue that, generally, transplanted laws are quite ineffective and thus have very limited impact. see, generally, Katharina Pistor, *The Standardization of Law and Its Effect on Developing Economies*, 50 *American Journal of Comparative Law* 97, 10 (2002); Daniel Berkowitz et.al., *THE TRANSPLANT EFFECT*, 51 *American Journal of Comparative Law* 163, 2-3 (2003); Jeremy J. Kingsley, *id.* at 510-512. Coming to the EIA Proclamation, which is the most important instrument on EIA in Ethiopia, it is bound to have one of the above fates as it is a transplanted law; that is, total rejection; constructive observance; selective application; or effective application. However, as we will see later on, the Proclamation is neither totally ignored nor fully implemented. That is why we now have some kind of EIA in practice although the stipulations of the EIA Proclamation are often times ignored.

³³⁶ Of course, this does not mean that legal transplantation cannot be effective because it can be. For example, according to *Watson* successful legal borrowing could be made from a very different legal system, even from one at a much higher level of development and of a different political complexion. Alan Watson mentioned in PENELOPE NICHOLSON, *Supra* note 292, at 22. However, Watson’s argument presupposes that the borrowing is motivated by internal initiative.

³³⁷ C. WOOD in Ray Clark and Larry Canter, *Supra* note 330, at 108. The problem here is that EIA will be used only when such requirement exists although it should be used to consider the impacts of a given course of action on the environment before it is undertaken regardless of whether there are external demands for its use.

³³⁸ The fact that demands to use EIA came from external bodies is common to many countries. For example, in Latin American countries, it is said that the initial demand for EIA came formally from development aid agencies. Peter Wathern, *Supra* note 57, at 240-241.

procedure of EIA in decision-making process, the momentum was lost after the enactment of the EIA Proclamation in 2002. For instance, some of the promising steps that were taken following the enactment of the EIA Proclamation were not finalized. More serious, however, is the appearance of some regressive measures including the enactment of laws in some sectors which have eroded the chance of strengthening the implementation of the EIA Proclamation and hence the possibility to use EIA in decision-making process. Thus, the current legal framework on EIA in the country is inadequate, which, in turn, means that EIA in Ethiopia cannot fully achieve the objectives it was recognized for, that is, bringing about sustainable development,³³⁹ fostering the implementation of the right to clean and healthy environment, causing administrative transparency and accountability, and facilitating public participation in decision-making.

³³⁹ Although Ethiopia needs development, the development we have to strive to bring about must be one that is environmentally sustainable, socially acceptable, and economically feasible, whereas such development necessarily requires environmental protection.

CHAPTER FOUR: INSTITUTIONAL FRAMEWORK FOR ADMINISTERING EIA

4.1 Introduction

In order for any system of EIA to be effective, it is clear that appropriate legal framework is necessary.³⁴⁰ However, the presence of appropriate legal framework alone cannot facilitate the achievement of the objectives EIA is recognized for unless it is effectively enforced.³⁴¹ On the other hand, effective enforcement of the EIA legal framework requires, among other things, the creation of several institutions.³⁴² This is why, like an appropriate legal framework, well-functioning institutions are also important prerequisites to have an effective system of EIA.³⁴³

Cognizant of this fact, Ethiopia has issued laws that require the establishment of environmental protection organs. For instance, in 1995, Ethiopia issued Environmental Protection Authority Establishment Proclamation that formally established the FEPA.³⁴⁴ In 2002, this Proclamation was replaced by another proclamation, Environmental Protection Organs Establishment Proclamation No 295/2002, which re-established FEPA.³⁴⁵ It is interesting to note that the 1995 FEPA establishment Proclamation did not require the establishment of regional environmental protection organs. Instead, it obliged FEPA to render

³⁴⁰ See ECONOMIC COMMISSION FOR AFRICA, *Supra* note 69, at 19.

³⁴¹ *Enforcement* of EIA legal framework implies taking set of measures to achieve compliance within the regulated community. See US EPA, *Principles of Environmental Enforcement* cited in ROBER L. GLICKSMAN ET AL., *ENVIRONMENTAL PROTECTION: LAW AND POLICY* 983, 5th ed. (2007).

³⁴² William L. Andreen, *Supra* note 230, at 209.

³⁴³ See ECONOMIC COMMISSION FOR AFRICA, *Supra* note 69, at 19.

³⁴⁴ Environmental Protection Authority Establishment Proclamation, No.9/1995, article 3(1). According to article 5, the objective of the Authority shall be to ensure that all matters pertaining to the country's social and economic development activities are carried out in a manner that will protect the welfare of human beings as well as sustainably protect, develop and utilize the resource bases on which they depend for survival. See Environmental Protection Authority Establishment Proclamation, No.9/1995, article 5.

³⁴⁵ Environmental Protection Organs Establishment Proclamation, No. 295/2002, article 3(1).

advice and technical support to Regions on environmental protection.³⁴⁶ However, the 2002 Proclamation requires the establishment of Regional Environmental Agencies as well.³⁴⁷ It stipulates that every Regional state must establish an independent regional environmental agency or designate an existing agency that shall, based on the Ethiopian Environmental Policy and Conservation Strategy and to ensure public participation in the decision-making process, be responsible for coordinating the formulation, implementation, review and revision of regional conservation strategies, and, environmental monitoring, protection and regulation.³⁴⁸ This is an important addition because FEPA alone cannot ensure environmental protection unless it is assisted by other organs like regional environmental protection agencies. Accordingly, regional environmental agencies are obliged to ensure the implementation of federal environmental standards or, as may be appropriate, issue and implement their own no less stringent environmental standards.³⁴⁹

Further, the Environmental Protection Organs Establishment Proclamation requires the creation of environmental units in different sectors. This was also non-existent in the 1995 Proclamation. However, the new Proclamation makes it necessary for sectoral agencies to have environmental units which ensure the consideration of environmental values in their decision-making processes. Thus, every competent agency shall establish or designate an environmental unit that shall be responsible for coordination and follow-up so that their activities are in harmony with environmental protection requirements.³⁵⁰

Generally, therefore, the institutions that are put in place to ensure environmental protection and preservation are FEPA, REAs, and sectoral environmental units. These organs are primarily responsible for promoting environmental protection by, among other things,

³⁴⁶ Environmental Protection Authority Establishment Proclamation, No. 9/1995, article 6(8).

³⁴⁷ Environmental Protection Organs Establishment Proclamation, No. 295/2002, article 3(1).

³⁴⁸ *Id.* article 15(1).

³⁴⁹ *Id.*

³⁵⁰ *Id.* article 14.

ensuring the use of EIA when it is required. However, because other organs can also play important role in environmental protection efforts by ensuring the use of EIA, some of our environmental laws impose duties on such organs. For instance, licensing organs are required not to issue licenses unless an ECC is obtained from an appropriate environmental protection organ in relation to actions which are subject to EIA.³⁵¹ Consultants are also obliged to make sure that an EIA is done in a proper manner such as by engaging the public in the EIA process.³⁵² This chapter will consider in detail the responsibilities of these organs, that is, FEPA, REAs, environmental units, licensing agencies, and consultants.

4.2 Federal Environmental Protection Authority (FEPA)

FEPA is at the apex in the pyramid of environmental protection organs. As a result, it is tasked with the most important environmental protection responsibilities in the country. For instance, FEPA is authorized to issue directives necessary for the effective implementation of the EIA Proclamation,³⁵³ to decide on actions that must pass through EIA,³⁵⁴ and to set environmental standards against which the impact of an action on the environment should be assessed.³⁵⁵ To carry out these and other responsibilities, FEPA is organized in such a way that it has its own Environmental Council, Director General and Deputy Director General, and other necessary staff.

I. Environmental Council (EC)

The Environmental Protection Organs Establishment Proclamation states that FEPA shall have Environmental Council, a Director General, a Deputy Director General, and other necessary staff.³⁵⁶ In this context, it is clear that the EC was established as a body within

³⁵¹ See EIA Proclamation, No. 299/2002, article 3(3).

³⁵² See *id.* article 7(2) cumulatively with the FEPA Guidelines, *Supra* note 108, Section 6.3.

³⁵³ Environmental Protection Organs Establishment Proclamation, No.295/2002, article 19.

³⁵⁴ See EIA Proclamation, No. 299/2002, articles 5 and 13.

³⁵⁵ Environmental Protection Organs Establishment Proclamation, No.295/2002, article 6(7).

³⁵⁶ See *id.* article 7.

FEPA. In addition, the EC appears to be and has been acting as a supreme body of FEPA. At this juncture, even if one may wonder whether this supremacy was envisioned in the Proclamation, a closer look at the provisions of the Environmental Protection Organs Establishment Proclamation reveals that the EC was actually conceived of as the supreme body within FEPA. First, the composition of the EC reveals that it is the highest organ of FEPA because it is the only organ within FEPA that has the country's Prime Minister (or his delegate) as a member and its chairperson.³⁵⁷ Second, the EC is entrusted with more important tasks than the other organs of FEPA. For instance, it is given the responsibility (1) to review proposed environmental policies, strategies, and laws, and issue recommendations to the government; (2) to evaluate and provide appropriate advice, based on reports submitted to it by FEPA, on the implementation of the environmental policy of Ethiopia; and (3) to review and approve directives, guidelines and environmental standards prepared by FEPA.³⁵⁸ Third, the fact that the EC is supposed to meet only twice in a year to discharge its responsibilities, although extraordinary meetings can be held whenever deemed necessary, appears to be another indication that the EC is, unlike the other organs of FEPA, not concerned with the daily routine of environmental protection activities but only with high profile environmental matters.³⁵⁹

The EC was established in 2002 by the enactment of the Environmental Protection Organs Establishment Proclamation. Thus, one would normally expect it to discharge its duties, as indicated before, by meeting regularly twice a year or even more often. Has it been doing its job? Sadly, the EC did not meet at any point prior to 2008, a period of six years following its

³⁵⁷ According to article 8 of the Environmental Protection Establishment Proclamation, the other members of the EC are members to be designated by the Federal Government, a representative designated by each National Regional State, a representative of the Ethiopian Chamber of Commerce, a representative of local environmental non-governmental organizations, and a representative of the Confederation of Ethiopian Trade Unions, and the Director General of the FEPA. As far as the representatives of the national regional states are concerned, practice shows that the regional presidents are the ones acting as members of the Council. Solomon Kebede, *Supra* note 160.

³⁵⁸ See Environmental Protection Organs Establishment Proclamation, No 295/2002, article 9.

³⁵⁹ See *id.* article 10.

establishment. In 2008, however, the members of the EC were constituted, and the EC held its first meeting to consider some matters pertaining to its duties under the environmental laws.³⁶⁰ Since 2008, one would expect the EC to hold two regular meetings every year to perform its duties. Yet, the EC has not been meeting regularly. On the other hand, the failure to meet regularly is, according to some FEPA officials, primarily attributable to the composition of the EC which consists of the Prime Minister or his designate, members to be designated by the Federal Government, Representatives of Regional Government, representative from the Ethiopian Chamber of Commerce, and a representative of local NGOs.³⁶¹ These are persons with other huge responsibilities, which, in turn, make it difficult for them to hold regular meetings. Of course, this cannot be taken as the sole reason for the EC not to meet regularly. For instance, as subsequent discussions will show, the fact that environmental protection has not been given equal attention with other interests such as economic growth might have contributed to the failure of the EC to meet on a regular basis. Moreover, the absence of serious demands from interested groups for environmental protection might have contributed to the failure of the EC to meet regularly.³⁶²

Since the EC is not meeting regularly, it has not been able to discharge its duties properly. For instance, during its first meeting, the EC considered, among others things, the draft directive prepared by FEPA and submitted to it to determine projects that are subject to EIA. The draft directive was said to have been approved although it has not been signed by the chairperson of the EC, that is, the Prime Minister, to transform it to a law as previous discussions have revealed. Therefore, save for this directive, the EC has not considered and approved any other directive or guidelines prepared by FEPA, although it is expected to

³⁶⁰ Solomon Kebede, *Supra* note 160 and Wondosen Sintayehu, *Supra* note 301.

³⁶¹ Solomon Kebede, *Supra* note 160. See also Environmental Protection Organs Establishment Proclamation, No 295/2002, article 8.

³⁶² On how public demand can affect the adoption of environmental policy or taking environmental protection measures, see, generally, LAWRENCE S. ROTHENBERG, *Supra* note 25, at 62-69.

review them.³⁶³ Moreover, according to some FEPA officials, the EC has never heard reports from FEPA's Director General; nor has FEPA ever submitted any report to the Council.³⁶⁴ Of course, the Deputy Director General of FEPA disagrees with this claim arguing, as we will see later on, that FEPA itself is the Prime Minister's personal office and it makes reports to him like any other offices accountable to him.³⁶⁵

II. Director General and Deputy Director General

According to article 11 of the Environmental Protection Organs Establishment Proclamation, the Director General is the head of FEPA. Accordingly, his responsibilities include exercising the powers and duties entrusted to FEPA; employing and administering employees of FEPA in accordance with the federal civil service laws; preparing and, upon approval, implementing the annual work program and budget of FEPA; effecting expenditure in accordance with the approved budget and work program of FEPA; representing FEPA in all its dealings with third parties; and submitting reports on the activities of FEPA, including activities in relation to EIA, to the EC.³⁶⁶

Although the Director General is designated as the head of FEPA, the provisions of the Proclamation show that the Director General's Position is next to that of the EC. First, the Director General is supposed to submit reports to FEPA which are considered by the EC. Likewise, the Director General needs the approval of the EC for FEPA's directives, guidelines, and standards. Finally, the Director General does not occupy any special place in the constitution of the EC. For example, the Prime Minister is the chairperson of the EC.³⁶⁷

³⁶³ MELLESE DAMTIE AND MESFIN BAYOU, *Supra* note 51, at 47.

³⁶⁴ On this point, I made discussions at various times with some experts at FEPA including the directors of some directorates within FEPA. However, their names are kept anonymous because they demanded anonymity.

³⁶⁵ Interview with Ato Dessalegne Mesfin, Deputy Director General, FEPA, in Addis Ababa (August 16, 2011).

³⁶⁶ See Environmental Protection Organs Establishment Proclamation, No. 295/2002, article 11.

³⁶⁷ Incidentally, it is useful to mention that article 3(2) of its establishment Proclamation which makes FEPA accountable to the Prime Minister.

The Deputy Director General is an assistant to the Director General. Thus, he supports the Director General in discharging his duties such as in planning, organizing, directing and coordinating the activities of FEPA and by performing other activities directed by the Director General. Moreover, the Deputy Director General performs the responsibilities of the Director General in his absence.³⁶⁸ Of course, the Director General may, to the extent necessary for the efficient performance of the activities of FEPA, delegate part of his powers and duties to other officials and employees of FEPA as well.³⁶⁹

III. Other Necessary Staff and the EIA Department

These are the employees of FEPA other than the Director General and the Deputy Director General. Thus, all the professionals hired by the Director General and who are working at FEPA like as botanists, zoologists, lawyers, engineers, and biologists are part of the necessary staff. In general, they are the ones responsible for ensuring that FEPA's duties are properly discharged. Moreover, these are the employees who work in the different units within FEPA. At the moment, FEPA does have 52 active technical staff (experts), excluding the Director General, the Deputy Director General and the supporting staff, whereas 57 posts are vacant and to be filled in the years to come in order to raise the number of experts at FEPA to 109.³⁷⁰

Due to the theme of this paper, the EIA Department deserves special mentioning here. It was a department within FEPA with its own head who was accountable to the Deputy Director General. The department was entrusted with the duty to ensure that FEPA's responsibilities pertaining to the use of EIA were properly discharged. For instance, it was the unit that was preparing draft guidelines and directive on EIA and also ensuring that EIAs were evaluated

³⁶⁸ See Environmental Protection Organs Establishment Proclamation, No. 295/2002, article 12.

³⁶⁹ See *id.* article 11(3).

³⁷⁰ This information was obtained from the Human Resource Division of the Human Resource and Property Directorate of FEPA, Addis Ababa (August 18, 2011).

when they were submitted to FEPA.³⁷¹ However, due to lack of autonomy, it was claimed that the department could not do what it was supposed to do.³⁷² As a result, there was some support within FEPA for separating the EIA Department from FEPA and establishing it as a separate body.³⁷³

Rather than doing that, in 2010 and as a result of business process reengineering (BPR) undertaken by FEPA, the EIA Department was dissolved and issues pertaining to EIA were transferred to the *Environmental Units Program Directorate*.³⁷⁴ Thus, EIAs are now submitted to this Directorate, which, in turn, refers them to pertinent experts for evaluation.³⁷⁵ It is, however, debatable how well this new arrangement can effectively handle issues relating to EIA since the separate EIA Department was not in a position to do that due to lack of enough manpower (experts), adequate legal framework, lack of necessary political will, and other factors. For instance, there is no indication that there is a renewed political will to make the system of EIA more effective,³⁷⁶ the new arrangement has not resulted in increased number of EIA experts, and the inadequacies in the legal framework still linger. According to the Director of the Environmental Units Program Directorate, however, FEPA is now better suited to handle issues relating to EIA than ever before because, unlike the EIA Department, the Environmental Units Program Directorate can use any relevant expert in any of the directorates within FEPA to review and comment on EIA reports and the size of EIAs which

³⁷¹ Solomon Kebede, *Supra* note 160.

³⁷² *Id.*

³⁷³ *Id.*

³⁷⁴ Interviews with Ato Dereje Agonafir, Director, Environmental Units Program Directorate, FEPA, in Addis Ababa (16 August 2011), Solomon Kebede, *Supra* note 160, and Wondosen Sintayehu, *Supra* note 301.

³⁷⁵ Those people who are mandated to do BPR are required to come up with *whacko ideas* to redesign the way their organizations work and to bring about radical changes in this regard. Thus, the whacko idea FEPA's BPR agents identified in relation to the EIA department is merging it with another department.

³⁷⁶ Indeed, according to some officials at FEPA, the failure of FEPA to give solutions to problems which were already identified during its BPR shows the continuation of absence/little political will to protect the environment. Discussion with two FEPA officials who demanded anonymity, in Addis Ababa (August 18, 2011).

are coming to FEPA have also declined due to the delegation of EIA revision responsibility to sectoral environmental units.³⁷⁷

4.3 Regional Environmental Agencies (REAs)

As mentioned before, every regional government in the country is required to establish an independent environment agency or to designate an existing organ for this purpose. In terms of importance, the Environmental Protection Organs Establishment Proclamation seems to recognize REAs as second (subordinate) to FEPA. For instance, under article 15(3), REAs are required to prepare reports on the respective state of the environment and sustainable development of their respective Regions and submit them to FEPA. They are also prohibited from making standards which are less stringent than those set by FEPA.³⁷⁸

However, while they may stand second to FEPA, REAs (whatever their designations may be) can play important roles to protect the environment. Such importance is actually reflected in the FEPA Guidelines itself which lists a myriads of activities that REAs are expected to perform. The following excerpt from the Guidelines shows examples of responsibilities every REA is expected to discharge.

REAs are responsible for adopting and interpreting federal EIA policies and systems or requirements in line with their respective local realities; establishing a system for EIA of public and private projects, as well as social and economic development policies, strategies, laws, or programs of regional level functions; informing FEPA about malpractices that affect the sustainability of the environment regarding EIA and cooperating with FEPA in compliance investigations; administering, overseeing, and making major decisions regarding impact assessment of project subjects to licensing and execution by regional agencies, and

³⁷⁷ Dereje Agonafir, *Supra* note 374.

³⁷⁸ In federal states like Ethiopia, powers such as the power to protect the environment may be divided between central and local governments or entrusted to them concurrently. This division of power may be made expressly or tacitly. In our case, the Constitution does not seem to expressly give environmental protection power to any of the two governments. However, article 51(5) of the Constitution gives the power to enact laws for the utilization and conservation of land and other natural resources to the federal government. Article 52(2) (b), on the other hand, expressly gives regional governments the power to administer land and other natural resources in accordance with Federal laws. Thus, if the expression *conservation of land and other natural resources* under both articles is understood to mean *environmental protection*, then, the power to protect the environment belongs to both tiers of governments. Accordingly, while the federal government is supposed to make laws and policies, regional governments are expected to enforce these laws and policies. Therefore, the measure taken by the Environmental Protection Organs Establishment Proclamation to bring on board REAs is consistent with the above constitutional stipulations.

projects likely to have regional impacts. Moreover, regarding projects and activities under the jurisdictions of FEPA, REAs should write an endorsement letter verifying or confirming that the biophysical and socio-economic baseline conditions are adequately and truly described; during scoping major issues are well defined and explicitly indicated in the Terms of Reference; interested and especially the affected parties or their true representatives are provided with all means and facilities (such as notice, reasonable time, understandable language) that enable them to adequately air their views and concerns; interested and affected parties (IAPs) have agreed to and are satisfied with the terms of compensation and the appropriateness of the environmental management plan; the environmental monitoring activities are undertaken in appropriate time with the involvement of the IAPs and regular reporting is made in good faith and time to all concerned; the proponent/consultant fulfills the local and regional legal and policy requirements and obtain the necessary permits; the envisaged benefits to that communities and the regions are tangible; the monitoring plan are logical and allows the participation of relevant bodies in the region; the strategy for impact communication and reporting was understandable and appropriate at regional level stakeholders; the minutes of the consultation process reflects the true and unbiased accounts of the opinions and interests of the IAPs at the local level; establish the necessary condition for the creation of awareness on EIA; and develop the necessary incentive and disincentive system, etc.³⁷⁹

So, although the Environmental Protection Organs Establishment Proclamation is not clear on the matter,³⁸⁰ REAs are expected to, among other things, ensure the implementation of federal laws, policies and programs and localize them to meet local needs and realities, issue necessary instruments such as laws, guidelines, and programs to, *inter alia*, establish a system for EIA, ensure that EIA is done and it is done properly such as by engaging the public, monitor the activities of different actors to ensure compliance with environmental requirements, cooperate with and report to FEPA on matters of environmental protection in particular EIA, and assist FEPA while making investigations into environmentally wrong behavior. Bearing this in mind, we will now consider, first, whether REAs have been established in regional states, and, second, whether REAs have been discharging their duties properly. While the first question will be considered in detail in the following paragraphs, the second question will be considered briefly and only in relation to issuing instruments

³⁷⁹ See FEPA Guidelines, *Supra* note 108, Section 6.1.2.

³⁸⁰ The Proclamation that requires REAs establishment does not expressly require them to do these jobs; nor does it authorize FEPA to delegate these mandates to REAs.

necessary for the proper administration of EIA in their respective regions. Whether REAs have been discharging their others duties will be discussed later on elsewhere in this paper.³⁸¹

To begin with, in Oromia, environmental protection organ was first established in 1993³⁸² as the *Natural Resources Development and Environmental Protection Bureau*.³⁸³ In 1995, this Bureau was made to merge with *Agricultural Bureau*.³⁸⁴ However, in 2001, the environmental protection unit was taken out of the Agricultural Bureau and established as the *Oromia Natural Resources Development and Environmental Protection Authority*.³⁸⁵ A year later (in 2002), an independent *Environmental Protection Office* was established.³⁸⁶ In 2009, the *Environmental Protection Office* was again merged with *Land Use and Planning Office*,³⁸⁷ which was dealing with land issues in particular granting of title deed to investors, and became *Oromia Land and Environmental Protection Bureau (LEPB)*.³⁸⁸ Thus, environmental matters are now handled by the *Environmental Protection Core Process Unit* (Oromia REA or OREA hereinafter) which is one of the divisions in the LEPB.³⁸⁹

³⁸¹ For instance, in Oromia, right now, the Oromia REA is implementing federal laws, policies, and programmes pertaining to the protection of the environment in addition to performing other activities to ensure environmental protection. In the SNNPRS, issues pertaining to environmental protection are handled by SREA. Thus, SREA has the responsibility to, *inter alia*, lead and ensure the implementation of federal environmental protection laws such as the Environmental Pollution Control Proclamation, the EIA Proclamation, Waste Management Proclamation and the Proclamation relating to biodiversity conservation. In Tigray, Tigray REA has been implementing and regulating the observance of the laws, policies, programmes, etc. of the federal government, giving environmental education to increase awareness in relation to environmental protection and use of natural resources, and doing other activities.

³⁸² This shows that Oromia established a body that would deal with environmental matters in 1993 (in 1985 E.C.). This is even before the establishment of the Federal EPA in 1995 (1987 E.C).

³⁸³ Alemayehu Geleta, *Supra* note 163.

³⁸⁴ *Id.*

³⁸⁵ *Id.*

³⁸⁶ *Id.*

³⁸⁷ After the merger, the Land Use and Planning Office is referred to as *Land Use and Planning Core Process*. Thus, the Oromia Land and Environmental Protection Bureau has the Environmental Protection Core Process and Land Use and Planning Core Process.

³⁸⁸ Alemayehu Geleta, *Supra* note 163.

³⁸⁹ As far as the accountability of the Oromia LEPB is concerned, it is a member of the cabinet of the regional government. On the other hand, the cabinet is accountable to the president of the region. Thus, as a member of the cabinet, the LEPB is accountable to the president. But as the OREA is one of the limbs in the LEPB, it is accountable to the head of the Bureau. *Id* and Mohammed Ibrahim, *Supra* note 1.

At this juncture, one may wonder why the Environmental Protection Office which existed as a separate office for a fairly long time was merged with Land Use and Planning Office. It is true that environment and land are inextricably linked. Thus, by considering them as separate entities which required separate attention by separate organs, environmental protection cannot be achieved.³⁹⁰ If the environment is to be protected effectively, the two must come together.³⁹¹ For instance, in order to implement a given project, the project owner has to first get land through lease. On the other hand, the Land Use and Planning Office can require considering environmental issues as one of the lease conditions, which, in turn, involves the OREA because it has to verify that environmental issues are actually considered. Therefore, the merger of the two offices will enable them to work more cooperatively than ever before. The other reason that necessitated the merger of the two offices is the need for a better environmental protection.³⁹² In the past, investors were obtaining investment permits and title deed to lands from the Oromia Investment Commission (OIC).³⁹³ As a result, most of them were implementing their projects without doing EIA.³⁹⁴ In the end, however, it was believed that if the office dealing with the issuance of title deed to land is situated in the same bureau with environmental protection organ, the use of EIA can be ensured because title deed will not be granted unless EIA is done and ECC is obtained from OREA.³⁹⁵ Consequently, the office dealing with the issuance of title deed to land was taken out of the OIC and placed in the same bureau with the environmental protection office in the LEPB. Hence, the need to

³⁹⁰ Alemayehu Geleta, *Supra* note 163.

³⁹¹ *Id.*

³⁹² *Id.*

³⁹³ At the beginning, the Land Use and Planning Office (LUPO) was situated in the Agricultural Bureau of the Oromia Region. The Office stayed under the Bureau for long time. During this period, the LUPO did not have the mandate to issue title deed to land, whereas the OIC did have the mandate to do so. However, about four years ago, it was taken out of the Agricultural Bureau and merged with the Environmental Protection Office under a new Bureau called Oromia Land and Environmental Protection Bureau. Since then, the Land Use and Planning Office was given the mandate to issue title-deed to private investors, the power that had been enjoyed by the OIC. Accordingly, the OIC began sending investors, after concluding investment contracts with them, to the LUPO to grant them land and title deed thereto if it has the land the investors seek to invest on. Interview with Ato Mitiku Bekele, Land Use and Planning Work Performer, Land Use and Planning Core Process, Oromia Land and Environmental Protection Bureau, in Addis Ababa (August 10, 2011).

³⁹⁴ Alemayehu Geleta, *Supra* note 163.

³⁹⁵ *Id.*

narrow down the chance of avoiding doing EIA when it is required is another major factor that led to the merger of the offices dealing with environmental protection and land affairs.

Nonetheless, although the merger of OREA with Land Use and Planning Office has certain advantages, it may also have certain disadvantages. For instance, the OREA is not independent while independence is always desirable to fully achieve one's objectives. In light of contributing to the effectiveness of the system of EIA, however, the OREA is now better off even when compared to the time when it was operating as an independent environmental protection office. This is so because the current arrangement allows the OREA to work cooperatively and closely with the Land Use and Planning Office to facilitate compliance with EIA requirements by project proponents.

The South Nations, Nationalities, and Peoples Regional State (SNNPRS) also has its own environmental protection organ. This organ was first placed in Agricultural and Rural Development (ARD) Bureau.³⁹⁶ In December 2009, however, the organ was taken out of the ARD Bureau and established as an independent organ as *Land Administration, Use and Environmental Protection Authority* (LAUEPA) with the *Environmental and Biodiversity Case Team* (South REA or SREA hereinafter) dealing with environmental affairs.³⁹⁷ The main reason for establishing LAUEPA as an independent organ was the belief that it could not function well being under the ARD Bureau.³⁹⁸ Therefore, the purpose was to extricate the LAUEPA from ARD Bureau and empower it to discharge its duties in relation to protecting the environment. According to the new arrangement, LAUEPA was directly accountable to the President of the region.³⁹⁹ Before its separation from the ARD Bureau, however, its

³⁹⁶ Weldeberhan Kuma, *Supra* note 161.

³⁹⁷ *Id.*

³⁹⁸ *Id.*

³⁹⁹ *Id.*

accountability had been to the Vice Head of the ARD Bureau.⁴⁰⁰ Sadly, however, after eight months, LAUEPA was transferred back to the ARD Bureau as *Natural Resources and Environmental Protection Office*.⁴⁰¹ The reunification has come following the trend at the federal level where some offices including ministerial offices are merged with others or otherwise dissolved.⁴⁰²

In any case, once again, the initial problem of lack of independence will be a problem. Such lack of stability of the environmental protection organ in the region is creating uncertainty for the workers of the bureau in relation to what they (must) do. Some of them even mentioned that they do not want to comment on any organizational structure SREA may be given because they are scared of losing their jobs.⁴⁰³ Moreover, it shows that there is no constant perception about the functions of SREA and the importance of environmental protection. In other words, lack of attention for the environment from higher organs is reflected by this organizational structure. This may lead one to believe that REAs should be required to be established as independent environmental protection organs by federal laws such as the Environmental Protection Organs Establishment Proclamation. If this were done, the existence of REAs and their relative independence would be ensured thereby facilitating environmental protection in general and the use of EIA in particular.

In Tigray, the environmental protection organ was established in 2004 as the Tigray Regional Government Environmental Protection, Land Administration and Use Authority.⁴⁰⁴ Then it was made accountable to the president of the region.⁴⁰⁵ However, the Environmental Protection, Land Administration and Use Authority was not functional when it was

⁴⁰⁰ *Id.*

⁴⁰¹ *Id.*

⁴⁰² *Id.*

⁴⁰³ Discussion with some persons in SREA who wanted to remain anonymous, in Hawassa (October 7, 2010)

⁴⁰⁴ Yirga Tadesse and Hadush Berhe, *Supra* note 164.

⁴⁰⁵ *Id.*

accountable to the president.⁴⁰⁶ As a result, in 2005, it was changed from the Tigray Regional Government Environmental Protection, Land Administration and Use Authority to the Tigray Regional Government Environmental Protection, Land Administration and Use Agency (Tigray REA or TREA hereinafter) with its accountability also changed from the president to the region's ADR Bureau.⁴⁰⁷

However, it is clear that the change of TREA's accountability from the president to the region's ADR Bureau (or change from Authority to Agency) has had an impact on TREA's influence. The first important impact is the lower the organ it is accountable to, the lower influence it will have and the less serious attention it will receive. Thus, making TREA accountable to a lower organ decreases its visibility and effectiveness. The other impact is the fact that the ADR Bureau may interfere with the affairs of TREA. For instance, if the ADR Bureau requires TREA to issue ECC to a given investor without seriously considering his EIA, TREA will do so because it cannot resist superior order. Further, being under the region's ADR Bureau, TREA can hardly control and regulate the Bureau's environmentally damaging activities such as permission of use of certain chemicals by big agricultural projects.⁴⁰⁸

In Amhara, the environmental protection organ was established in 2000/2001 (1993 E.C.) and started working in 2001/2002 (1994 E.C.).⁴⁰⁹ It was first established as the *Environmental Protection, Study and Research Department*.⁴¹⁰ Later on, the Department was placed in the

⁴⁰⁶ *Id.*

⁴⁰⁷ *Id.*

⁴⁰⁸ Incidentally, the impact of BPR on TREA deserves mentioning. The BPR has caused both good and bad consequences. For instance, it has resulted in increased manpower for environmental protection units at both the regional and *woreda* levels. It has also introduced core processes dealing with environmental matters such as EIA review. The problem, however, is many of the things that were assumed when BPR was done are not happening now. For instance, the number of jobs a person has to perform everyday was identified but that is not being implemented. *Id.*

⁴⁰⁹ Yitayal Abebe Asetih, *Supra* note 162.

⁴¹⁰ *Id.*

region's ARD Bureau.⁴¹¹ After some time, the Department was separated from the ARD Bureau and established as an authority with the department that deals with Land Use and Administration.⁴¹² Therefore, environmental affairs are now handled by the *Environmental Protection, Land Use and Administration Authority*.⁴¹³ This authority has three units, that is, Ensuring Sustainable Environmental Protection Core Process, Land Use Core Process, and Land Administration Core Process. From the three units (processes) the one that deals with environmental matters is the Ensuring Sustainable Environmental Protection Core Process (Amhara REA or AREA hereinafter) which is accountable to the head of the authority, who, in turn, is accountable to the region's president.⁴¹⁴ In any case, the responsibility for ensuring environmental protection in general and the working of the system of EIA in particular in Amhara Regional State belongs to the AREA.

There are REAs in other regional states as well. For instance, in the Somali Regional State, the environmental protection body used to be under the region's ARD Bureau until September 2010.⁴¹⁵ After September 2010, however, this body was separated from the ARD Bureau and established as an agency with other sectors which is now called *Environmental Protection, Energy and Mining Agency*.⁴¹⁶

In the Afar Regional State, the body that is designated to deal with environmental affairs is called *Environmental Protection Department*.⁴¹⁷ Like in other regions, this Department is not independent. Instead, it is situated in the Natural Resources and Environmental Protection

⁴¹¹ *Id.*

⁴¹² *Id.*

⁴¹³ *Id.*

⁴¹⁴ *Id.*

⁴¹⁵ Telephone interview with Ato Ahmed Seid, Environmental expert, Somali Regional State Environmental Protection, Energy and Mining Agency (December 28, 2010).

⁴¹⁶ *Id.*

⁴¹⁷ Mohammed Abdulqader, EIA Expert, Afar Regional Government Natural Resources and Environmental Protection Sector (December 28, 2010).

Sector with other offices.⁴¹⁸ Thus, at the moment, environmental matters in the Afar Regional State are handled by the Environmental Protection Department of the Natural Resources and Environmental Protection Sector.

The city of Addis Ababa, because it is a self-governing city, also has its own environmental protection organ which is called the Addis Ababa City Government Environmental Protection Authority (Addis Ababa EPA hereinafter). Unlike the REAs in regional states, the Addis Ababa EPA is an independent authority which is accountable directly to the city's mayor.⁴¹⁹ Thus, some of the problems that REAs face, such as lack of autonomy and resource sharing with other offices are less serious when it comes to the Addis Ababa EPA.

In conclusion, environmental protection organs are established in the regions, including in self-governing cities, regardless of their designations and status, to ensure environmental protection. Thus, they are the ones which are primarily responsible to ensure the effectiveness of the system of EIA in relation to matters falling under their respective governments' jurisdictions. In the end, their effort, coupled with FEPA's effort in this regard, is expected to make the system of EIA work effectively and produce the desired results.

The second question relates to whether or not REAs are discharging their duties. As mentioned before, in this section we will only see whether these organs have issued the documents necessary such as EIA guidelines to carry out EIA-related jobs properly. To start with, in Oromia, the OREA has been using federal EIA instruments for the administration of EIA because it has not yet prepared its own instruments such as EIA guidelines.⁴²⁰ However, the OREA has already prepared a draft EIA Proclamation which is ready to be submitted to

⁴¹⁸ *Id.*

⁴¹⁹ Interview with Ato Getachew Belachew, EIA Officer, EPA, City Government of Addis Ababa, in Addis Ababa (February 02, 2011).

⁴²⁰ Alemayehu Geleta, *Supra* note 163.

the *Chaffe* (the regional legislative council).⁴²¹ There is also a plan to come up with guidelines on actions which are subject to EIA.⁴²² In the SNNPRS, the SREA has been using federal instruments relating to the administration of EIA.⁴²³ More importantly, there is no plan to issue its own instruments such laws, directives, guidelines, or programs pertaining to EIA.⁴²⁴ The position in Tigray is also the same as the TREA has been using federal instruments for the administration of EIA and there is no concrete plan to come up with the region's own EIA instruments.⁴²⁵ The REAs in Somali and Afar are also in the same boat.⁴²⁶

However, the situations in Amhara and Addis Ababa need separate attention. In Amhara, the AREA issued its own EIA guidelines in 2001/2002 (1994 E.C.) by contextualizing FEPA's EIA guidelines to the needs and particularities of the region.⁴²⁷ AREA amended these guidelines in 2004/2005 (1997 E.C.) which was further amended in 2006/2007 (1999 E.C.).⁴²⁸ However, the last amendment is still at the draft stage.⁴²⁹ At this juncture, it is interesting to note that the EIA guidelines issued by AREA do not need approval by higher authority.⁴³⁰ Thus, approval by AREA itself makes them applicable. In Addis Ababa, too, the Addis Ababa EPA issued its own EIA guidelines (based on FEPA guidelines) in which projects, not strategies, which are subject to EIA are identified.⁴³¹ Thus, the Addis Ababa EPA has been using these guidelines to ensure the use of EIA in relation to project that are subject to EIA before they are implemented in the city.⁴³²

⁴²¹ *Id.*

⁴²² *Id.*

⁴²³ Weldeberhan Kuma, *Supra* note 161.

⁴²⁴ *Id.*

⁴²⁵ Yirga Tadesse and Hadush Berhe, *Supra* note 164.

⁴²⁶ Ahmed Seid, *Supra* note 415 and Mohammed Abdulqader, *Supra* note 417.

⁴²⁷ Yitayal Abebe Asetih, *Supra* note 162.

⁴²⁸ *Id.*

⁴²⁹ *Id.*

⁴³⁰ *Id.*

⁴³¹ Getachew Belachew, *Supra* note 419.

⁴³² *Id.*

Therefore, although REAs can and are expected to come up with different EIA-related instruments to properly administer EIA and discharge their EIA related duties, most of them have not done that even though some of them do have plans to do so in the future.

4.4 Environmental Units/Sectoral Agencies

In addition to establishing FEPA and requiring the establishment of REAs, the Environmental Protection Organs Establishment Proclamation No. 295/2000 requires the establishment of *sectoral environmental units*, too.⁴³³ They are units in every competent sector⁴³⁴ with the responsibility to ensure that the activities of their sectors are in harmony with environmental protection requirements. Thus, they are responsible, among others things, for ensuring that EIA is done by their sectors for actions that are subject to EIA before they are executed. This shows that sectoral environmental units can also play important roles to ensure the effectiveness of EIA.

Although sectoral environmental units are also important, one cannot say that they have been established in all competent sectors. For instance, these units have been established in some federal agencies such as the Ministry of Mining, Ethiopian Road Authority, Ministry of Water and Energy, and Ethiopian Electric Power Authority. However, there are still some competent federal agencies which have not yet established such units.⁴³⁵

At the regional level, too, there are a few sectors in some regions which have established environmental units. In Tigray, for example, although most competent sectors lack such units,

⁴³³ See Environmental Protection Organs Establishment Proclamation, No. 295/2000, article 14.

⁴³⁴ The Proclamation uses the term *competent* without giving a clue as to which sector is competent and which is not. Of course, article 2(2) seems to define *competent agency* but that definition is not relevant in the context we are now considering the question. For instance, it states that *competent agency* means any federal or regional government organ entrusted by law with a responsibility related to the subject specified in the provisions where the term is used. However, the term *competent agency* seems to refer to sectors which may engage in or license actions that can have significant impact on the environment. For instance, the decision by Ethiopian Road Authority to construct a road that crosses a national park may have significant impact on the environment. Thus, the Authority has to have an environmental unit which will be responsible to ensure that these and other activities of the Authority comply with environmental protection requirements.

⁴³⁵ MELLESE DAMTIE AND MESFIN BAYOU, *Supra* note 51, at 33.

the Water Resource and Rural Road Construction Bureaus do have environmental units.⁴³⁶ Thus, these units would try to ensure that the activities of their sectors comply with environmental protection requirements by mainstreaming environmental values into their decision-making processes. Unfortunately, however, such units are unknown to the competent sectors in most regions.⁴³⁷ As a result, the decisions or policies of some competent sectors in some regions may be totally devoid of an internal voice for environmental protection.

In any case, in sectors where they are established, environmental units can ensure that EIA is done, when required, for projects related to their respective sectors. Interestingly, at the federal level, the environmental units in some ministries can even evaluate EIAs. Of course, such units started evaluating EIAs only after FEPA delegated its EIA revision power to them.⁴³⁸ Thus, proponents are now expected to submit their EIAs to the ministries themselves which will evaluate the reports through their environmental units.

At this juncture, it is relevant to consider the issue of link between FEPA and REAs, on the one hand, and sector environmental units, on the other. For instance, as far as the relationship between FEPA and REAs is concerned, the Environmental Protection Organs Establishment Proclamation expressly requires REAs to report to FEPA. However, the Proclamation does not make similar stipulation in respect of the relation between FEPA and REAs and sector environmental units. One may then wonder if such units are at all required to report to FEPA or REAs, as the case may be. However, although the Proclamation is silent on the matter, it seems logical to think that, while remaining accountable to their sectors because they are

⁴³⁶ Yirga Tadesse and Hadush Berhe, *Supra* note 164.

⁴³⁷ MELLESE DAMTIE AND MESFIN BAYOU, *Supra* note 51, at 33.

⁴³⁸ As we will consider later on, the sectors delegated to evaluate EIAs are the Ministry of Health, the Ministry of Agriculture and Rural Development, Ministry of Mines, Ministry of Water and Energy, Ministry of Trade and Industry, Ministry of Works and Urban Development and Ministry of Transportation and Communication. The names of some of these ministries have been changed as of October 2010 following the establishment of a 'new' government by the winning party, the EPRDF, in election 2010.

parts thereof, they must also report to either FEPA or REAs as they are the primary organs with the duty to ensure environmental protection. This conclusion is supported in particular by the stipulation of the 1997 EPE which requires policies to establish environmental organs that can work through coordination, whereas as the Environmental Protection Organs Establishment Proclamation is one of the policies⁴³⁹ that have been made after the formulation of the 1997 EPE.⁴⁴⁰

4.5 Licensing Agencies

*Licensing Agency*⁴⁴¹ refers to any organ of the government empowered by law to issue investment permit, trade or operating license or work permit or register business organization, as the case may be.⁴⁴² According to Business Registration and Licensing Proclamation, Proclamation No.686/2010, these organs could be the Ministry of Trade and Industry, Ethiopian Investment Agency and the appropriate regional bureau.⁴⁴³ According to the EIA Proclamation, therefore, these organs are obliged to ensure, prior to making decisions on applications for permits, that the appropriate environmental protection organs have authorized the implementation of the proposed actions if they are subject to EIA.⁴⁴⁴

At the federal level, the body that issues investment permit is the Ethiopia Investment Agency.⁴⁴⁵ However, this does not mean that the Ethiopia Investment Agency is the only organ that issues investment permits at the federal level. For instance, the Ethiopia Electric Agency, in relation to electric power generation, supply and transmission, and the Ethiopian

⁴³⁹ The term *policy* is here used to refer to any deliberate action that a government takes to achieve certain objectives.

⁴⁴⁰ See, Environmental Policy of Ethiopia, 1997, Section 5.1.

⁴⁴¹ According to article 3(3) of the EIA Proclamation, any *licensing agency* shall, prior to issuing an investment permit or a trade or an operating license for any project, ensure that the Authority or the relevant regional environmental agency has authorized its implementation.

⁴⁴² FEPA Guidelines, *Supra* note 108, Annex III.

⁴⁴³ See Business Registration and Licensing Proclamation, No.686/2010, article 2(15).

⁴⁴⁴ EIA Proclamation, No. 299/2002, article 3(3).

⁴⁴⁵ See Investment Proclamation, No 280/2002, article 23 and Investment (Amendment) Proclamation, No 375/2003, article 2, which renames the Investment Authority *Investment Commission*. However, at the moment, the Commission is called an *agency*.

Civil Aviation Authority, in relation to aviation business, can issue investment permits.⁴⁴⁶ At the regional level, the appropriate regional bureaus for the issuance of investment permit are investment bureau (commission or agency) or investment, trade and industry bureau.⁴⁴⁷ Other bureaus such as the water resource bureau can also issue investment permit. Therefore, in accordance with the EIA Proclamation, all the organs that are authorized to issue investment permits are required to ensure that EIA is done and ECC is obtained from appropriate environmental protection organs before they issue the permits.

As far as registration of business and issuance of business license are concerned, most activities are performed, at the federal level, by the Ministry of Trade and Industry.⁴⁴⁸ At the regional level, they are mainly carried out by Trade, Industry, and Transport Bureaus.⁴⁴⁹ Consequently, these organs, like the investment organs, are also required by the EIA Proclamation to ensure that EIA is done, when required, and ECC is obtained from appropriate environmental protection organs before they register business entities and issue business licenses.

Nevertheless, the fact that the obligation of licensing organs to ensure that EIA is done is not recognized by the relevant sectoral laws is a major problem. For instance, the Investment Proclamation, No. 280/2002, does not require ECC as a condition to obtain investment permit. Of course, this would not have created any problem because the EIA Proclamation, which requires ECC to issue investment permits, was enacted subsequently. However, the fact that the Investment (Amendment) Proclamation, No. 375/2003 fails to require ECC as one of the necessary conditions to get investment permit poses a real problem. In fact, the Investment (Amendment) Proclamation expressly obliges investment organs to issue

⁴⁴⁶ See Investment (Amendment) Proclamation, No 375/2003, article 3(11).

⁴⁴⁷ See, for example, Commercial Registration and Business Licensing Proclamation, No. 686/2010, article 2(18)

⁴⁴⁸ See, for example, *id.* articles 2(15) and (26), 32 and 33.

⁴⁴⁹ *Id.*

investment permits to applicants within five working days if they fulfill the requirements it lists, whereas this list does not contain ECC.⁴⁵⁰ Thus, even assuming that investment organs are willing to ensure the use of EIA, they are not mandated by the investment laws to force applicants to produce ECC from the relevant environmental protection organs.

Likewise, the position of the Business Registration and Licensing Proclamation, No. 686/2010, is the same as that of the Investment (Amendment) Proclamation. Although it contains a long list of requirements that applicants for business registration and business license must met, the list does not contain ECC.⁴⁵¹ In fact, none of the requirements this Proclamation recognizes can be stretched to include ECC. On the other hand, the Proclamation compels the appropriate registration or licensing organs to effect business registration or issue business license if the conditions it expressly recognizes are met.⁴⁵² Moreover, the Proclamation expressly prohibits the use of any law or customary practice which is inconsistent with its provision.⁴⁵³ Hence, it is not likely to legally compel licensing organs to ensure, in light of article 3(3) of the EIA Proclamation, the use of EIA, when it is required, before they issue license or register business.

In conclusion, although the House of Peoples' Representatives (HPR) could have contributed to the effectiveness of the system of EIA by inserting into the Investment (Amendment) Proclamation, No. 375/2003, and the Business Registration and Licensing Proclamation, No. 686/2010, a requirement of ECC so that any applicant for investment permit or business license or business registration could submit ECC together with the other application requirements, it failed to seize that opportunity.

⁴⁵⁰ See Investment (Amendment) Proclamation, No.375/2003, article 3(3).

⁴⁵¹ See Business Registration and Licensing Proclamation, No. 686/2010, article 32.

⁴⁵² See *id.* article 33.

⁴⁵³ See *id.* article 63(2).

In any case, due to the significant roles they can play, it could be said that licensing organs are part of the institutional framework that are meant to ensure the effectiveness of the system of EIA. However, assuming that these organs are willing to ensure the use of EIA, they can contribute to its effectiveness only if they know the actions that are subject to EIA. On the other hand, it is logical to expect environmental protection agencies to communicate to licensing organs the actions that are subject to EIA. The question then is, first, whether or not the agencies have communicated these actions to licensing organs and, second, that the licensing organs have been ensuring that proponents produce ECC from the relevant environmental protection organs before issuing licenses.⁴⁵⁴

As far as the first point is concerned, while some licensing bodies do know which actions are subject to EIA because they have the EIA guidelines, there are many others which do not know which actions are subject to EIA because they have not obtained the EIA guidelines from the environmental protection organs. Hence, it will be difficult for those licensing bodies which do not have the EIA guidelines to require the production of ECC by proponents before they issue licenses. On the other hand, for those licensing bodies which do have the EIA guidelines, demanding the production of ECC will be an easy task if there is a will to do so. This leads us to the second point, that is, whether licensing bodies have been requiring the submission of ECC by applicants before they issue license. In response to this query, we will explore the experiences (practices) of some investment organs.

At the federal level, the Ethiopia Investment Agency used to demand an ECC before it issued investment permit. However, currently, the Agency is not requiring ECC to issue investment permit because it argues, as we will see in chapter five, that its duty to do so is now removed

⁴⁵⁴ Incidentally, it seems that so long as environmental protection has a constitutional basis, licensing organ can still be held responsible for ensuring environmental protection in general and the use of EIA in particular even if the laws we have seen exclude ECC from the requirements they recognize for the issuance of permits or licenses or register businesses.

by law.⁴⁵⁵ Instead, the Ethiopia Investment Agency sends a letter to FEPA, REAs and other licensing bodies, when necessary, stating that it has issued an investment permit to a given investor with a view to enabling them to follow-up the implementation of the project in accordance with the laws of the country.⁴⁵⁶

At the regional level, the Oromia Investment Commission (OIC) states that it uses EIA as one of the conditions to issue investment permit.⁴⁵⁷ The OIC claims to know which actions are subject to EIA and which are not because it uses its own old guidelines (which preceded FEPA's guidelines themselves and which deal basically with projects involving the use of chemicals such as tannery) and FEPA's Guidelines.⁴⁵⁸ Thus, according to the OIC, first, any investor will identify the land (place) where he wants to invest after which he will be required to do EIA if his project is subject to EIA under both or either of the two guidelines.⁴⁵⁹ After an EIA is done, he is required to get ECC from the OREA. Finally, the OIC will issue investment permit to the investor if the ECC shows that he can proceed with his project.⁴⁶⁰

In SNNPRS, investment permits are issued mainly by the Trade and Industry and Investment Agency (TIIA). However, the TIIP issues investment permits only to those persons who plan to engage in big business, that is, investors whose total capital is more than five hundred thousand birr.⁴⁶¹ If a person has total capital not exceeding five hundred thousand birr, his investment will be taken either as micro or small or medium depending on the size of the

⁴⁵⁵ Gerawork Teferra, *Supra* note 322 and Ato Birhanu Hailu Lemma, Licensing and Registration Expert, Licensing and Registration Directorate, Ethiopian Investment Agency, in Addis Ababa (July 22, 2011).

⁴⁵⁶ *Id.*

⁴⁵⁷ Mohammed Ibrahim, *Supra* note 1.

⁴⁵⁸ *Id.*

⁴⁵⁹ *Id.*

⁴⁶⁰ The OIC believes that the use of EIA is necessary because some activities are environmentally degrading or polluting and the use of EIA can actually avoid or minimize such effects. For example, horticulture is a dangerous activity as it involves the use of chemicals which are hazardous to the environment and workers. By using EIA, it is possible to know how to avoid or minimize such hazardous effects of the activity. Of course, the OIC admits that there are monitoring problems to avert the dangers identified at the initial stages or during EIA. *Id.*

⁴⁶¹ Interview with Gizachew Kebede, Licensing Performer, Investment Promotion Process Team, SNNPRS Trade and Industry and Investment Agency, in Hawassa (October 7, 2010).

capital.⁴⁶² Thus, such person is not required to obtain an investment permit but another operating license regardless of the nature of the activity to be undertaken.⁴⁶³ Yet, if the investment is to be made in remote areas, an investment permit may be issued, by considering different factors, even if the total capital is below five hundred thousand birr.⁴⁶⁴ As far as persons who plan to engage in big businesses are concerned, they have to obtain investment permit before they start implementing their projects. The TIIP also issues investment permit to such persons provided that they fulfill the conditions set in the region's investment directives which were issued based on the federal investment laws.⁴⁶⁵ For example, the directives require foreign investors to meet the minimum capital requirements as set by the federal investment laws.⁴⁶⁶ Unfortunately, however, the requirement of ECC is not mainstreamed in the directives of the TIIP.⁴⁶⁷ Thus, investors can obtain an investment permit without producing an ECC from the SREA. Nevertheless, despite its absence from the TIIP directives, the TIIA claims that it sometimes demands the production of an ECC from the relevant environmental protection organ by investors who plan to engage in big projects that are likely to cause environmental pollution such as big agricultural activities or projects which are to be implemented in sensitive or protected areas.⁴⁶⁸

⁴⁶² *Id.*

⁴⁶³ *Id.*

⁴⁶⁴ *Id.* Obtaining investment permit is more important than obtaining other operating licenses because the investor gets different benefits such as incentives and investment guarantees.

⁴⁶⁵ *Id.*

⁴⁶⁶ *Id.*

⁴⁶⁷ *Id.*

⁴⁶⁸ *Id.* Unlike the Ethiopia Investment Agency which argues that its duty to require ECC is now repealed, TIIA states that it does not know whether it has any obligation to ensure the use of EIA. Similarly, it states that it does not know which actions are subject to EIA because it does not have the EIA Guidelines, whereas the SREA has not communicated to it the actions that must pass through the EIA process. In fact, TIIA indicates that there are times when its bosses do not communicate to it the laws or decisions that have pertinence to their office/jobs or that were communicated to them by others. Consequently, sometimes, they operate as though a law does not exist in a given field even if it actually exists. It is interesting to know that, TIIA actually believes in the importance of using EIA to issue investment permit. However, TIIA claims that since the investment laws or directives it uses do not mention ECC as one of the requirements investors have to meet to get investment permit, it cannot require the production of ECC as one of the requirement to issue investment permit. This shows how lack of communication between the TIIA and SREA is hurting the effectiveness of EIA in the region. SREA should have communicated to TIIP that there is a need to use ECC. On the other hand, if one wonders why effective communication is lacking between the two organs, the point boils down to misunderstanding between the two organs. While SREA's officials see TIIA's officials as their enemy, TIIA's

In Tigray, unlike the investment organs in other regions, the Tigray Regional Investment Office (TRIO) does not issue investment permits. Instead, investment permits are issued by *woredas*, while TRIO coordinates their work.⁴⁶⁹ However, although TRIO does not issue investment permits, it claims that an ECC is required, in particular after 2007/2008, for large projects to obtain an investment permit.⁴⁷⁰ This is so because the use of EIA is getting support at the regional government level.⁴⁷¹ For instance, projects which involve the use of chemicals are required to be preceded by EIA.⁴⁷² An interesting scenario in Tigray is the fact that investors need to obtain land for investment from the bureau in which TREA is situated.⁴⁷³ This being the case, the bureau will not grant access to land unless ECC is obtained after doing EIA when EIA is required.⁴⁷⁴ On the other hand, in order to facilitate the granting of access to land to investors, TRIO has to maintain smooth relationship with the bureau in particular with TREA.⁴⁷⁵ Accordingly, the two organs have currently signed a memorandum of understanding where TRIO has agreed to inform investors what they need to fulfill before appearing before TREA to obtain land for investment, whereas TREA (representing the bureau) has agreed to give speedy services to investors if they appear before it by meeting all the necessary conditions to obtain land which includes an ECC under certain circumstances.⁴⁷⁶

officials also have reciprocal feelings for SREA's officials. Generally, however, if there is a clear legal framework on the requirement of ECC for issuing investment permit, in particular, by mainstreaming it into investment laws and directives, and there is a clear understanding of the importance of EIA by TIIA officials, the use of EIA will be facilitated. *Id.*

⁴⁶⁹ Interview with Berihu Haftu, Investment Projects After Care Service, Tigray Investment Promotion Core Process, Tigray Regional Government, in Mekelle (October 28, 2010).

⁴⁷⁰ *Id.*

⁴⁷¹ *Id.*

⁴⁷² *Id.*

⁴⁷³ *Id.*

⁴⁷⁴ *Id.*

⁴⁷⁵ *Id.*

⁴⁷⁶ *Id.*

In Amhara, the principal organ that issues licenses is the *Investment, Trade and Industry Office* (ITIO), situated in the *Industry and Urban Development Bureau* of the Amhara Regional Government. According to the AREA, the ITIO does not require ECC as one of the conditions applicant for licenses have to satisfy to get license.⁴⁷⁷ The head of ITIO also confirms the claim of the AREA.⁴⁷⁸ According to him, although ECC was required in the 1990s, the ITIO is no more requiring it to issue permits because (1) AREA does not have enough experts to evaluate EIAs, (2) AREA does not follow-up the implementation of projects that have passed through EIA, and (3) EIA is time taking, whereas there is a need to shorten investment procedures to facilitate investment activities in the region.⁴⁷⁹

As far as the licensing organs in Somali and Afar are concerned, the chance of using ECC as a requirement to issue licenses is very low. This is so because, as we will see later on, while EIA is done rarely in the Somali Regional State,⁴⁸⁰ there is no such thing as EIA in Afar.⁴⁸¹

Lastly, in Addis Ababa, investment permits are issued by the Investment Agency of the Addis Ababa City Administration. According to W/ro Ayenalem W/Senbet, the Agency does not require the production of ECC to issue investment permits although it notifies the Addis Ababa EPA and the trade and industry bureau of the concerned Sub-City Administration in Addis Ababa about the permit it has issued to enable them to take the necessary actions.⁴⁸²

⁴⁷⁷ Interview with Melisachew Fantie, EIA Report Review, Auditing and Monitoring Expert, Ensuring Sustainable Environmental Protection Process, Amhara Regional State Environmental Protection, Land Use and Administration Authority, in Bahir Dar (November 29, 2010).

⁴⁷⁸ Interview with Ato Aynalem Belete Adem, Leader, Investment Promotion Team, Industry and Urban Development Bureau, Amhara Regional State, in Bahir Dar (November 29, 2010).

⁴⁷⁹ *Id.*

⁴⁸⁰ Ahmed Seid, *Supra* note 415.

⁴⁸¹ Mohammed Abdulqader, *Supra* note 417.

⁴⁸² Interview with W/ro Ayenalem W/Senbet, Information and Plan Preparation Officer, Investment Agency, Addis Ababa City Administration, in Addis Ababa (October 11, 2011).

Therefore, the practice in Addis Ababa in relation to the use of EIA as a condition for the issuance of investment permit is not different from the practice elsewhere.⁴⁸³

In conclusion, there is no uniformity among the practices of investment organs with regard to the use of ECC. While some of them require the submission of ECC together with the other investment requirements for actions that are subject to EIA, others require only under certain circumstances. There are also licensing bodies which do not require the submission of ECC at all.

4.6 Delegated Sectors

Article 6(24) of the Environmental Protection Organs Establishment Proclamation mandates and requires FEPA to delegate part of its responsibilities to other organs. It states, “The Authority [FEPA] shall have the powers and duties to delegate some of its powers and duties, as it may be deemed appropriate, to other agencies.”⁴⁸⁴ On the other hand, FEPA is given the power to review EIAs of projects that are subject to federal licensing, execution or supervision or projects that are likely to entail inter-regional impacts.⁴⁸⁵ Thus, it could be said that FEPA can delegate any of its powers, which it deems necessary, including the power to

⁴⁸³ In Addis Ababa, business registration and licensing is primarily effected by trade and industry bureau of the various sub-cities. In order to enable the bureaus to require ECC before they register businesses and issue licenses thereof, the Addis Ababa EPA has given them all a list of activities which are subject to EIA. Accordingly, the bureaus now require applicants for licenses to produce ECC from the Addis Ababa EPA if the activities they plan to engage in are included in the list. Getachew Belachew, *Supra* note 419. This claim seems true. For example, according to W/ro Ayesha Abdu, the Trade and Industry Bureau of the *Gulele Sub-City Administration* has a list of activities that require EIA. Accordingly, the Bureau does not register or license any business until EIA is done and a permit is obtained from the Addis Ababa EPA. Interview with W/ro Ayesha Abdu, Trade Registration and License Core Process Leader, Trade and Industry Bureau, Gulele Sub-City, Addis Ababa City Administration, in Addis Ababa (October 11, 2011). Ato Zekarias Kifle also confirmed that the Trade and Industry Bureau of the Gulele Sub-City Administration requires ECC for some projects such as industrial projects in accordance with the list it has received from the Addis Ababa EPA. Interview with Ato Zekarias Kifle, Environmental Awareness and Pollution Inspection Officer, Gulele Sub-City, Addis Ababa City Administration, in Addis Ababa (October 11, 2011). Similarly, Ato Mehdin Temam stated that the Trade and Industry Bureau of the *Arada Sub-City Administration* requires ECC for projects that are subject to EIA in accordance with the list of the Addis Ababa EPA. Interview with Ato Mehdin Temam, Watershed Development and Biodiversity Conservation Officer, Arada Sub-City, Addis Ababa City Administration, in Addis Ababa (October 11, 2011). Therefore, it could be concluded that, at the moment, the trade and industry bureaus of the different sub-cities in Addis Ababa require ECC in order to register and license business activities that are subject to EIA.

⁴⁸⁴ See Environmental Protection Organs Establishment Proclamation, No. 295/2002, article 6(24).

⁴⁸⁵ See *id.* article 6(5).

review EIAs. As a result, some sectors like the ex-Ministry of Mining and Energy (now Ministry of Mines) were raising questions about why FEPA could not delegate to them its power to review EIAs pertaining to their sectors.⁴⁸⁶ In the end, on one of the Council of Ministers' Meetings, the highest executive meeting, it was agreed that FEPA had to delegate such power to sector agencies.⁴⁸⁷ Consequently, FEPA has so far delegated its power to review EIAs to some ministries such as the Ministry of Mines, Ministry of Agriculture and Rural Development, Ministry of Health, Ministry of Trade and Industry and Ministry of Water and Energy. Thus, these ministries are expected to review the EIAs of activities taking place in their respective sectors.

The letter of delegation to the above ministries shows that FEPA has delegated its power to review and take action on EIAs to these ministries in order to fast track the process of evaluating and taking immediate actions on EIS reports.⁴⁸⁸ This means, as far as projects pertaining to their scopes of operation are concerned, proponents are now expected to submit their EIS reports to these Ministries, not to FEPA. Of course, as we will see later on, some of the delegated sectors did not accept their delegation claiming that they could not evaluate EIAs. As a result, they have been transferring the EIAs that are submitted to them to FEPA for evaluation and further actions.

⁴⁸⁶ Solomon Kebede, *Supra* note 160.

⁴⁸⁷ This was the 73rd regular meeting of the FDRE Council of Ministers held on November 3, 2008.

⁴⁸⁸ However, some personnel at FEPA (who wanted to remain anonymous) indicated that such delegation was advised by the Prime Minister on one of the Council of Ministers' Meetings when some Ministries raised the issue. Indeed, it seems that this claim is true because in the letter of delegation FEPA sent to the delegated Ministries, it is mentioned that the delegation was agreed upon during the 73rd Session of the Council of Ministers on 15 October 2008. In the original Amharic language, the letter reads as: የኢትዮጵያ ፌዴራላዊ ዲሞክራሲያዊ ሪፐብሊክ መንግሥት የሚኒስትሮች ምክር ቤት ህዳር 5 ቀን 2001 ዓመተ ምህረት ባካሄደው 73^ኛ መደበኛ ስብሰባው የኢንዱስትሪ ብክለትን ለመከላከል በቀረበው ደንብ ላይ መወያየቱ ይታወሳል። በዚህም ውይይቱ በልማት ፕሮጀክቶች ላይ የሚቀርቡ የአካባቢ ተፅዕኖ ግምገማ የጥናት ሰነዶችን መርምሮ የማረጋገጠ አሰራር በተቀላጠፈ ሁኔታ እንዲፈፀም ለማስቻል የአካባቢ ጥበቃ ባለሥልጣን በልማት ፕሮጀክቶች ላይ የሚቀርቡ የአካባቢ ተፅዕኖ ግምገማ የጥናት ሰነዶችን መርምሮ የማረጋገጥ ሃላፊነቱን ለሥራ ፈቃድ ሰጪ አካላት በውክልና እንዲሰጥ ከስምምነት መድረሱ ይታወሳል። the bold part of the delegation letter says; Accordingly, in order to speed up make the process of evaluating EIS reports of developmental projects, it was agreed that FEPA should delegate its responsibility to evaluate the EIS reports of developmental projects to the sector ministries.

At this juncture, it is necessary to note that FEPA has now decided not to make EIA review its principal job.⁴⁸⁹ Instead, it has decided to delegate its EIA review power to sectoral environmental units.⁴⁹⁰ Consequently, its primary objective at the moment is building the capacity of these units to make them capable of reviewing EIAs.⁴⁹¹ Hence, FEPA will be reviewing EIAs only until the relevant sectoral environmental units are established and their capacity is built to takeover EIA review responsibility.

In any case, the delegated organs, which are few in number at the moment,⁴⁹² can also be taken as the other institutions, though based on FEPA's mandates, which are in place to ensure the effectiveness of the system of EIA in Ethiopia. To the extent possible, therefore, they can ensure that EIA is done properly and evaluate EIS reports in accordance with the existing legal framework through their environmental units to ensure that the needs of the environment are considered before they approve projects to proceed. Indeed, if the delegated sectors can be serious and impartial about the use of EIA (which is discussed in the next chapter), they can be more effective in ensuring its effectiveness than the other organs because proponents cannot bypass them as they are the ones granting permits for operations pertaining to their sectors.

⁴⁸⁹ Dereje Agonafir, *Supra* note 374.

⁴⁹⁰ *Id.*

⁴⁹¹ *Id.*

⁴⁹² According to Ato Dereje Anogafir, there are five ministries which have been delegated and accepted the delegation to review EIAs so far. *Id.*

CHAPTER FIVE: EVALUATION OF THE INSTITUTIONAL FRAMEWORK FOR ADMINISTERING THE EIA PROCESS

5.1 Introduction

As the preceding chapter demonstrated, different institutions are entrusted with the duty to, in one way or another, ensure the effectiveness of the EIA system in Ethiopia. These organs include FEPA, REAs, sector environmental units, licensing organs, and the delegated ministries. However, these institutions are in many ways inadequate to ensure the effectiveness of the EIA system. While factors like the lack of adequate manpower and the absence of political will adversely affect most of them, there are other factors which are unique to some institutions. In this chapter, we will consider the factors that have been affecting and will affect the efforts of these institutions to ensure the effective working of the system of EIA in Ethiopia.

5.2 Federal Environmental Protection Authority (FEPA)

In Ethiopia, FEPA has been entrusted with the primary responsibility for ensuring environmental protection in general and effective EIA in particular. For instance, it is FEPA that is given the power to issue standards and guidelines to effectively implement the EIA Proclamation. Yet, FEPA has only prepared drafts of these documents; none have been approved by the EC. FEPA, in other words, has arguably failed to discharge its responsibilities for EIA, whereas the major reason for this is the defective organizational structure of FEPA. For instance, article 7 of the Environmental Protection Organs Establishment Proclamation clearly states that FEPA shall have the EC, Director General and Deputy Director General, and other necessary staff. This shows that the EC is part of FEPA.

In practice, too, the EC considers itself as the governing council of FEPA.⁴⁹³ This seems right in particular if we consider the composition of the EC which consists of the Prime Minister, the highest executive organ in the country, as its member and chairperson. On the other hand, the EC has not been discharging its duties under the Environmental Protection Organs Establishment Proclamation because it is not, as we will see below, meeting regularly.⁴⁹⁴ Therefore, if the EC is regarded as part of FEPA and it has thus far failed to approve the draft documents prepared by FEPA, it will be FEPA that should receive the blame for failing to discharge EIA related responsibilities.

On the other side of the fence, one can find arguments in favor of the EC being a separate environmental protection organ. For instance, it could be argued that the EC, which consists of high-ranking officials including the Prime Minister, should not be part of FEPA; instead, the EC was intended to stand over FEPA to hold it politically accountable and to have political oversight.⁴⁹⁵ This argument can be supported by some stipulations in the Environmental Protection Organs Establishment Proclamation. First, article 2(4) of the Proclamation states that environmental protection organs include FEPA, the *Environmental Council*, the Sectoral Units and Regional Environmental Agencies.⁴⁹⁶ Second, article 9 of the Proclamation requires FEPA to submit reports to the EC and stipulates that the draft directives, guidelines and environmental standards FEPA prepares must be submitted to the EC for revision and approval.⁴⁹⁷ Thus, under both articles, the EC is portrayed as a separate

⁴⁹³ In practice, the EC considers itself as part of FEPA but with superior authority. Dessalegne Mesfin, *Supra* note 365; Solomon Kebede, *Supra* note 160.

⁴⁹⁴ As we will see later on, the Deputy Director General of FEPA argues that the EC does not need to meet twice in a year and in fact the requirement in the Environmental Protection Organs Establishment Proclamation No 295/2002 for two EC's meeting per year shows a defect in the drafting process of the proclamation. Dessalegne Mesfin, *Supra* note 365.

⁴⁹⁵ This is one of the comments I received on the draft of this dissertation from my supervisor, Professor William Andreen. However, the Environmental Protection Organs Establishment Proclamation contains provisions supporting arguments for and against the EC being part of FEPA. More important, though, is how the EC is acting at the moment, which is considering itself as part of FEPA.

⁴⁹⁶ Emphasis added.

⁴⁹⁷ See the Environmental Protection Organs Establishment Proclamation, No.295/2002, article 9(2) & (3).

environmental protection organ. If the EC is regarded as a separate environmental protection organ, then, the failure to approve the documents FEPA prepared is attributable to the EC, not to FEPA.

In any case, the fact that the Environmental Protection Organs Establishment Proclamation is not clear on the status of the EC creates dual problems, that is, it makes FEPA ineffective so long as the EC is not effectively discharging its duties and it also creates confusion as to whom to hold accountable for not discharging EIA related duties.

5.2.1 Ineffectiveness of the Environmental Council (EC)

Although the EC was legally established in 2002, it has not been fully operational. This has had a serious negative impact on how the other institutions with EIA responsibility operate. For instance, while subsidiary instruments are indispensable for the effective implementation of the EIA Proclamation, the EC is given the responsibility to approve these instruments. The only exception is for regulations which must be approved by the Council of Ministers. Thus, in the absence of the EC's approval, all subsidiary instruments which FEPA may prepare for the implementation of the EIA Proclamation will not be legally binding. In this regard, one can mention the draft standards and EIA Procedural Guidelines which FEPA has prepared but have not been approved by the EC.

One may wonder why the EC is not yet fully functional despite the fact that it was established a decade ago. First, although the EC was established in 2002, it was actually constituted for the first time in 2008.⁴⁹⁸ In other words, the members of the EC, except for the PM and the Director General of FEPA, were identified in 2008. Thus, for almost six years following its establishment, FEPA could not, legally speaking, do matters relating to EIA because the organ that was supposed to exist to approve FEPA's working instruments was not there. This

⁴⁹⁸ Solomon Kebede, *Supra* note 160

is why, for example, the EIA Procedural Guidelines FEPA prepared in 2003, a year after the establishment of the EC, was not approved before 2008. As a matter of fact, the guidelines are still at draft stage.⁴⁹⁹ Second, according to the Environmental Protection Organs Establishment Proclamation, the EC is required to meet twice in a year. Thus, starting from its establishment in 2002 up to now, the EC must have met at least 18 times. However, the EC could not meet before 2008 because its members were not constituted. After 2008, however, one would normally expect two regular meetings every year. Nonetheless, the EC has so far met only twice.⁵⁰⁰ This means, the EC is not meeting regularly as it is required to by the Proclamation. That is why the EC has not approved, *inter alia*, the draft pollution standards prepared by FEPA and the draft amendment to the EIA Proclamation prepared by some NGOs and submitted to FEPA.⁵⁰¹ So, if the EC does not meet twice per year to discharge its duties, then, it is not functional. On the other hand, an examination of why the EC was not constituted before 2008 so as to enable FEPA to discharge its duties properly and is not meeting regularly after 2008 reveals lack of political commitment, that is, environmental protection not being given equal attention with other interests as we will see later on, as a major reason. Of course, one can blame the current structure of the EC as well.⁵⁰²

⁴⁹⁹ At this juncture, one has to note that the Deputy Director General of FEPA argues that guidelines do not require the approval of the EC to be operative. In this regard, he mentions the Amharic version of article 9(3) of the Environmental Protection Organs Establishment Proclamation No 295/2002 which uses two words **ደረጃዎች** (standards) and **መመሪያዎች** (directives or guidelines). According to him, the term **መመሪያዎች** was used to refer to directives, not guidelines. Hence, FEPA's guidelines can be operative without the approval of the EC. Dessalegne Mesfin, *Supra* note 365. However, this argument does not seem right for two reasons. First, the equivalent Amharic version for both directives and guidelines is **መመሪያዎች** and that is why the corresponding English version of article 9(3) uses both terms, that is, *directives* and *guidelines*. Second, the guidelines that FEPA prepared in relation to EIA in 2000 and 2003 are referred to as draft guidelines. If the approval of the EC was not required, there would be no reason for FEPA to call these two guidelines draft guidelines.

⁵⁰⁰ Solomon Kebede, *Supra* note 160.

⁵⁰¹ Draft amendments to the EIA Proclamation should go to the House of Peoples' Representatives (HPRs) at the end. However, the EC is expected to approve it before it is submitted to the Council of Ministers after which any bill reaches the HPRs. However, according to Ato Wondosen Sintayehu, no measure has been taken on such draft thus far. Wondosen Sintayehu, *Supra* note 301.

⁵⁰² For instance, the representatives of the regional governments are the regional presidents themselves. Thus, even assuming that they have political willingness, these presidents could hardly meet regularly and twice per year due to their busy schedules. Solomon Kebede, *Supra* note 160.

It is interesting to mention at this point that, according to the Deputy Director General of FEPA, the requirement in the Environmental Protection Organs Establishment Proclamation No 295/2002 for two EC's meetings per year shows a defect in the drafting process of the proclamation. The Deputy Director General, who was personally involved in the drafting of the proclamation, states that the drafters thought the EC would have more jobs to do. However, as subsequent experience has shown, there are no jobs which require the EC to meet twice in a year. As a result, he argues, the meeting of the EC should have been made contingent upon the existence of jobs to do and that is what is happening at the moment. In other words, the EC is not meeting twice per year because it has nothing to do by holding two regular meetings every year.⁵⁰³

However, the reason given by the Deputy Director General of FEPA to justify why the EC is not meeting twice in a year does not hold water. First, although the EC may not have many jobs to do, it has to at least receive reports from FEPA and review it to advise the government on the implementation of the environmental policy of Ethiopia. This, in turn, requires at least one meeting per year. Second, the fact that there are draft documents that have been prepared by FEPA and which are waiting for the EC's approval reveals that there are actually jobs the EC can do if it meets regularly. Thus, the EC is not meeting regularly not because there are no jobs which demand its regular meeting but it is not functional.

Issues of competence and impartiality of the members of the EC, furthermore, may also contribute to the EC's non-functionality. For instance, if we look at the composition of the EC, its members are the Prime Minister or his designate as a chairperson, members to be designated by the Federal Government,⁵⁰⁴ a representative designated by each National

⁵⁰³ Dessalegne Mesfin, *Supra* note 365.

⁵⁰⁴ The Proclamation is not clear on how many members of the EC can be delegated by the federal government.

Regional State, a representative of the Ethiopian Chamber of Commerce, a representative of local environmental nongovernmental organizations, and a representative of the Confederation of Ethiopian Trade Unions, and the Director General of FEPA.⁵⁰⁵ The current members of the EC include the PM, regional presidents, representatives from the Confederation of Ethiopian Trade Unions and Ethiopian Chamber of Commerce (one from each) and the Forum for Environment (as a representative of local environmental NGOs).⁵⁰⁶ At first glance, the composition of the EC seems good. In fact, the presence of the PM and regional presidents as members of the EC seems to give weight to the EC and increase its effectiveness. However, in reality, such composition has its limitations.⁵⁰⁷

First, looking at the members of the EC, it is not difficult to observe that most of them are development-oriented. Thus, if conflict is to arise between environment and development, they would expectedly strike the balance in favor of 'development'. In fact, this may be one of the causes for the EC's failure to approve those EIA related instruments prepared by FEPA. Second, the current composition of the EC brings about duplication of efforts. For instance, if FEPA prepares a draft law and submits it to the EC for approval, the members of the EC will consider the draft. Then, the draft will be submitted to the CM for approval before it gets to the House of Peoples' Representatives (HPR). Finally, the HPR will consider the draft for possible action. However, some of the members of the EC are the members of

⁵⁰⁵ The Director General of FEPA is mentioned at last as a member of the EC. Does this mean that he/she is less important than the other members of the EC? However, there is no clear indication that the order in which the members of the EC are mentioned shows their importance.

⁵⁰⁶ Solomon Kebede, *Supra* note 160. There are some issues that can be raised in relation to the constitution of the EC. First, the representation in the EC is not inclusive. For instance, the Proclamation does not recognize the representation of the public and women as special groups of persons. Second, the *Forum For Environment* (FFE) was chosen as a representative of local environmental NGOs. However, according to my discussion with FEPA, it is actually not clear how the FFE was picked. Perhaps, it was picked because it has more proximity to the media than the other local environmental NGOs. Third, the establishment Proclamation does not provide for the terms for which members of the EC serve. This means that, once a person becomes a member of the EC, he/it will remain a member forever as long as the EC exists. However, the limitation on the terms of the members can be provided by the CM regulations. Sadly, and unusually, however, the establishment Proclamation has not authorized the CM to issue regulations to enforce its provisions.

⁵⁰⁷ On the possible problems the current composition of the EC may entail, extensive discussion was made with Ato Solomon Kebede. *Id.*

the CM and the HPR at the same time. This means, they will consider the same document three times. Third, it could be argued that the composition of the EC is meant to serve as political expression. However, in order to ensure political expression of the concerned entities, there are a number of things that can be done. For instance, FEPA can be granted a reasonable autonomy with the necessary budget to do its job while making it accountable to either the HPR or a board that is comprised of representatives from all interested organs such as the federal government, regional governments, trade unions, the public, NGOs, and the business communities. After all, as the EC is not functional, it is not possible to argue that the political representation purpose is being served. Moreover, the non-functionality of the EC is hurting the effectiveness of environmental protection laws.

With regard to the issue of impartiality and competence of the EC's members, the following points can be made. First, the composition of the EC may suggest that its members cannot be impartial. For instance, it may be difficult to think that development-oriented regional presidents can support strong environmental regulations such as approval of directives and guidelines pertaining to EIA. Second, looking at the current composition of the EC, the EC does not seem competent to consider and approve the documents FEPA prepares, such as EIA guidelines and directives. For instance, although the PM and the regional presidents are not expected to be expert in the field of environment, they are expected to have environmental advisors in their offices to make decisions involving the environment. However, both the PM and the regional presidents do not have environmental advisors at the moment.⁵⁰⁸ As a result, a body that is neither composed of experts in the field of environment nor supported by such experts can hardly be regarded as competent to handle environmental matters. Thus, the lack of impartiality and competence are additional defects in the EC's composition, which contribute to its non-functionality.

⁵⁰⁸ *Id.*

5.2.2 Accountability of FEPA to the Prime Minister (PM)

Another problem that may be raised in relation to FEPA relates to its accountability to the PM. The proclamation that established FEPA states that it is accountable to the PM. However, if we consider the EC as part of FEPA because there are provisions in the Environmental Protection Organs Establishment Proclamation that support this argument and also the EC treats itself as part of FEPA, then making FEPA accountable to the PM does not seem right because the PM is already part of FEPA as the chairperson of the EC, the highest organ within FEPA.⁵⁰⁹ Second, FEPA's establishment Proclamation is not clear on what it means when it makes FEPA accountable to the PM. Naturally, a body that is accountable to another is expected to report to the superior. In this case, if FEPA is accountable to the PM, it must report to the PM, whereas the establishment Proclamation does not make any such requirement. The stand of FEPA officials in this regard is, however, contradictory. That is, while some⁵¹⁰ argue that FEPA is not reporting to the PM and the PM is also not asking for such report, others⁵¹¹ argue that FEPA is actually reporting to the PM.⁵¹²

On the other hand, it is normal to think that if FEPA is made accountable to the PM, the PM must have an environmental advisor. Nonetheless, as stated before, the PM does not have environmental advisor at the moment.⁵¹³ This may be taken as an implication that the

⁵⁰⁹ It should be noted here that what is wrong is not making FEPA accountable to the PM. After all, FEPA is an executive organ and, according to article 72(1) of the 1995 FDRE Constitution, the highest executive powers of the Federal Government are vested in the Prime Minister and in the Council of Ministers. However, the problem lies in making FEPA accountable to the PM in two capacities, that is, as a chairperson of the EC, the highest organ of FEPA, and as the PM, the highest executive organ.

⁵¹⁰ For example, Solomon Kebede, *Supra* note 160.

⁵¹¹ For example, Dessalegne Mesfin, *Supra* note 365.

⁵¹² Of course, in order to make FEPA more independent and to enable it to do its jobs freely and effectively, its accountability could be made to the HPR while maintaining functional relationship between the EC as an advisor to the Office of the PM. Alternatively, while maintaining the accountability of FEPA to the PM, the EC can be taken out of FEPA's structure and it can be made a body that advises the PM on environmental matters than acting as a supreme organ of FEPA. Still another alternative is giving FEPA the status of a ministry so that it can be a member of the Council of Ministers and hence accountable to the PM and the Council Ministers.

⁵¹³ Solomon Kebede, *Supra* note 160.

environment is not given the attention it needs.⁵¹⁴ Of course, it can be argued that FEPA, which is accountable to the PM, was established as an advisory body to the PM. Indeed, according to the Deputy Director General of FEPA, the PM does not need an environmental advisor because “FEPA itself is his office, accountable to him in person, and hence his advisor.”⁵¹⁵ However, there are two problems that are associated with this argument. First, the Environmental Protection Organs Establishment Proclamation No 295/2002 does not establish FEPA as an advisory body to the PM. Instead, article 3(1) of the Proclamation clearly states that FEPA is established as an autonomous public institution of the Federal Government. This means, the HPR established FEPA as an independent executive organ of the federal government, not as part of the Office of the PM. However, as an executive organ, FEPA was made accountable to the PM like any other agencies. Second, even assuming that FEPA was established as an advisory body to the PM, one may still question if FEPA was in fact advising the PM because, as some officials state, it has not been reporting to the PM.

Therefore, the fact that there is no clarity on what is meant by the accountability of FEPA to the PM and the absence of environmental advisor to the PM makes the PM unable to play the roles he can and should play in relation to environmental protection in general and the effectiveness of EIA in particular. On the other hand, there is some claim that the EC was established to act as an advisory body to the PM. Perhaps, making the EC an advisory body to the PM would be a good arrangement because it is not unusual to have such body in the executive office. For instance, in the US, NEPA creates a Council on Environmental Quality (CEQ) in the Executive Office of the President to oversee the implementation of NEPA.⁵¹⁶

⁵¹⁴ It is true that nowadays planting trees is what is usually talked about but that is conservation and environmental protection cannot be achieved solely through conservation measures. In order to effectively protect the environment, what is needed is bringing about environmentally sustainable development. Thus, planting trees which is conservation measure alone is not enough.

⁵¹⁵ Dessalegne Mesfin, *Supra* note 365.

⁵¹⁶ William L. Andreen, *Supra* note 35, at 40.

Thus, one could take the CEQ as an advisory body to the President on matters like the EIA.⁵¹⁷ In our case, however, there is nothing in the establishment proclamation of the EC that clearly shows that the EC is established as an advisory body to the PM. Instead, the Proclamation establishes the EC, arguably, as part of FEPA which is an autonomous public institution of the Federal Government.

5.2.3 From the EIA Department to the Environmental Program Unit Directorate

Before 2010, FEPA had an EIA department which was relatively independent. Activities pertaining to EIA were performed by this department. For instance, it was the EIA department that reviewed EIAs and prepared draft instruments relating to EIA. Of course, some individuals in the EIA department were of the opinion that the system of EIA would have been more effective if the EIA department was separated from FEPA and established as an independent body.⁵¹⁸ This opinion emanated from the reluctance of FEPA, perhaps due to some external factors, to be fully committed to the use of EIA and the effective implementation of the EIA Proclamation. What happened, however, was completely opposite. As of 2010, FEPA has been implementing what is known as the BPR which led to the abolition of the EIA department and transferred matters pertaining to EIA to the *Environmental Units Program Directorate*. After all, as a matter of policy, the BPR of FEPA advocated delegating the power to review EIAs to sector agencies so that they could review EIAs through their environmental units. Accordingly, FEPA's principal objective in relation to EIA at the moment is building the capacity of sectoral environmental units so that they will become capable of accepting the delegation for and doing the job of reviewing EIAs. Hence,

⁵¹⁷ However, the EC and the CEQ may have significant differences such as in their composition. For example, the CEQ is headed by three Presidential appointees, one of them serves as the President's environmental advisor. Comment received from Professor Andreen, one of my advisors. In our case, however, no provision in the Environmental Protection Organs Establishment Proclamation shows the EC or any of its members are intended to advise the PM

⁵¹⁸ Solomon Kebede, *Supra* note 160.

FEPA's intention is to remain the reviewer of EIS reports only until these units gain the capacity to takeover EIA review responsibility. Once the delegation is completed, FEPA intends to regulate the delegated units through monitoring. In this regard, it has established the so-called *Environmental Monitoring Directorate* which will receive reports from the delegates and review them in order to take corrective measures, if need be.⁵¹⁹

Dissolving the EIA department and giving EIA related jobs to the Environmental Units Program Directorate, which is working on the delegation of EIA review responsibility, shows a change in perception that either EIA is not important or that activities pertaining to EIA including the review of EIS reports can be effectively undertaken by sectoral environmental units. Certainly, since the EIA Proclamation itself declares that EIA is very important and it has multiple functions,⁵²⁰ the second reason seems to have guided the BPR agents of FEPA to support and adopt the delegation of EIA review to sectoral environmental units. According to the Director of the Environmental Units Program Directorate of FEPA, the delegation was necessitated by two factors.⁵²¹ First, FEPA has felt that sector environmental units can review EIAs more effectively and efficiently than FEPA because FEPA lacks adequate time, experts, and resources to effectively and efficiently review them. Second, FEPA has decided to delegate its EIA review power to sectors because it wanted to enable them to discharge their constitutional duty of protecting the environment.⁵²² Whatever the reason may have been, there are problems related to the delegation which are dealt with in the next section.

⁵¹⁹ The information in this paragraph was obtained from Ato Dereje Agonafir, *Supra* note 374 and Solomon Kebede, *Supra* note 160.

⁵²⁰ See EIA Proclamation, No 299/2002, Preamble.

⁵²¹ Dereje Agonafir, *Supra* note 374.

⁵²² According to article 92 of the FDRE Constitution, sectors are obliged not to undertake environmentally destructive or damaging activities. Thus, if they are delegated to review EIAs, they will be able to discharge this duty under the Constitution. *Id.* This argument is, however, flawed. Of course, article 92(2) of the Constitution states that *the design and implementation of programmes and projects of development shall not damage or destroy the environment.* However, sectors can still discharge their environmental duties by not designing programs or implementing projects which are environmentally damaging or destructive. Thus, it is wrong to assume that it is only the delegation of EIA review power to sectors that can enable them to discharge their environmental duties under the Constitution. For instance, sectors can do EIA for the strategies they design to

5.2.4 Problems of Delegation

As mentioned before, FEPA has delegated its power to evaluate EIAs to some ministries. At first glance, the delegation appears a wise thing to do because, among other things, it reduces the burden to FEPA of evaluating EIS reports, and also allows proponents to get speedier actions on their EIAs. However, a closer investigation reveals that the delegation has created some problems.

First, EIA review power is one of the most important powers that FEPA has to ensure the consideration of the environment in the decision-making process. By using this power, FEPA can demand the inclusion of what is left out and even reject proposed actions. Thus, although the delegation of powers is normal for any government organ, an organ should not delegate the most important part of its power. If it does so, then, the delegation will be contrary to its *raison d'être*, which is exactly the situation FEPA is facing.

Second, the establishment of sectoral environmental units is required by the Environmental Protection Organs Establishment Proclamation in order to inject the consideration of environmental values into the decision-making processes of their respective agencies. Thus, they are not meant to evaluate the EIAs of their own agencies or of proponents seeking permits from their agencies. But under the delegation policy, the units are upgraded to regulators which the Proclamation does not envisage.⁵²³

Third, the BPR delegation policy assumes that sectoral environmental units can handle EIA review tasks. However, their ability to effectively review EIAs is questionable because

know the possible impacts of such strategies on the environment. Likewise, they can do EIA for the projects they intend to implement in order to take precautionary measures to protect the environment. Further, they can follow-up the implementation of actions they have authorized to ensure that proponents are observing environmental requirements.

⁵²³ At this juncture, one may question how and why those who worked on the BPR of FEPA supported the delegation of regulatory responsibilities of FEPA to the sector agencies which are the regulated bodies. How is asking a criminal to punish himself different from asking a sectoral agency to evaluate and reject, if need be, its own EIA or the EIAs of the projects it supports?

reviewing EIA requires experts with multidisciplinary knowledge. After all, the EIA department itself was complaining about the lack of adequate skills to effectively review EIAs. That being the case, it is not clear how the delegation policy was thought to make things better in this regard. To a reasonable person, the delegation policy will, therefore, only make the situation worse.⁵²⁴

Fourth, the delegation policy wrongly assumes that the sectoral environmental units can be impartial. These units are placed in different developmental sectors such as ministries. As part of these sectors, they are accountable to the heads of these agencies. Under such circumstances, it is difficult to assume that they will be able to discharge their responsibilities free of influence. For instance, in one of my interviews, a licensing official told me that he is not ready to halt any development effort just to protect monkeys from disease.⁵²⁵ Moreover, the units also share, to some extent, the biases of their sector; in short, they are a part of a mission-oriented agency and share that mission, a fact which may in turn make them less serious about EIA evaluations.⁵²⁶

Fifth, although some of the delegated ministries gladly accepted their delegation because they were pushing for it, others objected to their delegation as soon as they received delegation

⁵²⁴ In the opinion of the Director of the Environmental Program Units Directorate, problem of capacity may not arise because one of the principal objectives of FEPA at the moment is building the capacity of sectoral environmental units so that they can effectively evaluate EIAs. Dereje Agonafir, *Supra* note 374. However, this is a wrong approach because FEPA's principal objectives, according to article 5 of the Environmental Protection Organs Establishment Proclamation, are to formulate policies, strategies, laws and standards, which foster social and economic development in a manner that enhance the welfare of humans and the safety of the environment sustainably, and to spearhead in ensuring the effectiveness of the process of their implementation. Thus, building the capacity of sectoral environmental units is not one of the principal objectives of FEPA. Logically, it is up to the concerned sectors themselves to build the capacity of their environmental units.

⁵²⁵ According to the official, there was a proposal made by a certain foreign investor to build a hotel using straw in some forest area (a park actually) in *Debank* in the Amhara Regional State as a lodging site. The region's REA argued that allowing the building of the hotel in the area is not good because there are monkeys there and they will be infected by disease by eating the waste materials produced by the hotel. However, the owner of the project was allowed to proceed with his project and build the hotel because the licensing office believed that he could create job opportunities for many persons and also contribute to the development of the region. According to him, if we do not allow such persons to do their jobs, we will starve people for the sake of protecting monkeys from disease and that is not acceptable. Aynalem Belete Adem, *Supra* note 478.

⁵²⁶ For example, Alemayehu Tafesse states that he may be biased in favour of supporting development projects while evaluating the EIAs falling under the jurisdiction (because of the delegation) of his Ministry. Alemayehu Tafesse, *Supra* note 318.

letters stating, among other things, that they lacked the capability to undertake EIA evaluation. Hence, while the ministries which objected have continued referring EIAs to FEPA for evaluation, those ministries which accepted the delegation are now reviewing EIS reports and granting licenses to proponents. These later ministries are also making reports to FEPA on what they have done in relation to EIA review although it is not clear what FEPA can do if it finds something wrong with the way these sectors have handled EIA evaluations such as omitting public participation from the process of evaluation.⁵²⁷

Surprisingly, there are times when those sectors which have accepted their delegations refer EIAs for evaluation to FEPA. Currently, donors have realized that the review of EIAs by the sectors themselves is a defective approach.⁵²⁸ Hence, they have started refusing to accept the EIAs reviewed by the sectors; instead, they are demanding that EIAs to be evaluated by FEPA.⁵²⁹ This donor policy is forcing these sectors to seek the review of EIAs by FEPA.⁵³⁰ This practice has led to inconsistent approaches within the same sector. The sectoral office reviews EIAs when donors are not involved while sending EIS reports to FEPA for evaluation when donors are involved in the financing/aid of projects. The job of evaluating EIS reports must be consolidated in FEPA rather than scattered around the government if the system of EIA is to be effective.⁵³¹

Sixth, the EIS review power that FEPA has delegated does not extend to reviewing the EIS reports for public instruments. The delegation letters clearly stated that the delegations are limited to EIS for developmental projects, not public instruments. Thus, if these Ministries want to initiate public instruments which are subject to EIA, the EIAs they prepare for such instruments must be submitted to FEPA. However, since no directive has specified the public

⁵²⁷ Solomon Kebede, *Supra* note 160.

⁵²⁸ *Id.*

⁵²⁹ *Id.*

⁵³⁰ *Id.*

⁵³¹ *Id.*

instruments that are subject to EIA, the Ministries may not have to do EIA in the first place. All the same, FEPA can still claim that FEPA guidelines should be observed and, hence, SEA must be done. If that happens, the power to review and take action on EIAs for public instruments is still with FEPA.

In conclusion, the delegated ministries are now reviewing the EIAs for development projects pertaining to their areas of operation. For instance, the Ministry of Mines evaluates the EIAs of those who want to engage in mining business. However, concerns are being expressed in relation to the delegation of FEPA's responsibility to review EIAs. These concerns pertain, *inter alia*, to the relationship between the delegated bodies and FEPA, their capability to discharge the responsibilities entrusted to them, conflicts of interests, and the legality of the delegation. For instance, as previously discussed, the relationship between FEPA and the delegated ministries (their environmental units) is not clear. Are they accountable to FEPA on matters of EIA? Are they supposed to make reports to FEPA on the measures they take in relation to EIA? What if they commit serious mistakes in the course of evaluating EIS reports? Can FEPA stop an authorized project whose implementation is underway? Moreover, as the previous discussion revealed, the delegated ministries may not have the necessary expertise to undertake the task of EIA review. Likewise, the delegation of the responsibility to evaluate EIA raises the issue of conflicts of interests as the primary objectives of the delegated ministries are not environmental protection but promoting development. For example, the primary goal of the Ministry of Agriculture is to promote agricultural activities in the country. The delegation, therefore, essentially gives the Ministry the power to regulate itself. Can the regulated body regulate itself? For instance, assuming that a mega-agricultural project is to be implemented in a given area where there are natural forests hosting numerous wild animals (rich in biodiversity), will the Ministry of Agriculture be independent while evaluating the EIS report of such project? In this case, the existence of

conflict of interests is clear. Finally, there is a concern pertaining to the legality of the delegation. FEPA is given the power to delegate some of its powers to other organs by the Environmental Protection Organs Establishment Proclamation.⁵³² Thus, FEPA can delegate part of its powers to other organs, but only through the exercise of its discretion. However, these delegations resulted from a decision made at a Council of Ministers' Meeting. In other words, it was the Council of Ministers' that caused the delegation of FEPA's power to review EIAs to ministries. This is not in line with the law for two reasons; first, it implies that FEPA did not make the delegation voluntarily, and, second, the Council of Ministries cannot delegate powers given to another organ by the HPR.

5.3 REAs' Problems

The Environmental Protection Organs Establishment Proclamation requires every Regional State to establish a REA or designate an existing organ to perform activities relating to environmental protection. As a result, REAs like the OREA, SREA, TREA, AREA, Somali REA, Afar REA, and Addis Ababa EPA have been established. However, for a number of reasons, most of these REAs cannot be effective in discharging their EIA related duties.

First, except in Addis Ababa, the REAs have not been established as independent organs. Instead, they have been placed in other sectoral institutions such as the ARD bureau or the Land and Environmental Protection Bureau as in Oromia or the Environmental Protection, Land Administration and Use Agency as in Tigray. The placement of REAs in other sectoral institutions means that the heads of REAs will have to compromise in case the two organs have competing interests. For instance, in land and environmental protection bureau or an environmental protection, land administration and use agency, the land use office may work to facilitate access to land by easing access requirements including environmental

⁵³² See Environmental Protection Organs Establishment Proclamation, No. 295/2002, article 6(24).

requirements at least under certain circumstances while the environmental office focuses on ensuring the observance of environmental requirements. Moreover, the heads of the sectoral institutions in which REAs are situated may not understand the importance of environmental protection which will lead to paying less attention to what REAs do or should do. This is exactly what the heads of REAs in regions like Tigray and SNNPRS mention as among the major problems affecting their effectiveness in relation to ensuring the use of EIA. Furthermore, the issue of resource sharing is also important because the extent of resources available to REAs matters for what they can do. For instance, according to some REAs, they have not been able to hire enough experts, and hence do not, because their host institutions do not put enough resources at their disposal as they have to accommodate the needs of the other offices under them, too.⁵³³

The other major problem which REAs have been facing, other than the Addis Ababa EPA, is continual fluctuation in their organizational structures. In short, they have been undergoing constant reorganizations. For instance, in the SNNPRS, SREA was first established as part of the ARD Bureau. In December 2009, it was severed from the ARD Bureau and made part of the newly established Land Administration, Use and Environmental Protection Authority (LAUEPA). Eight months later, however, it was decided that SREA (or LAUEPA as a whole) had to be reunited with the ARD Bureau. In Oromia, OREA was first established in 1993 as the Natural Resources Development and Environmental Protection Bureau. In 1995, it was made part of the ARD Bureau and then, in 2001, it became the Natural Resources Development and Environmental Protection Authority. In 2002, it was established as an independent Environmental Protection Office. Finally, in 2009, the Office was united with another Office under the name Oromia Land and Environmental Protection Bureau. Similar

⁵³³The information in this paragraph was obtained from Alemayehu Geleta, *Supra* note 163; Yirga Tadesse and Hadush Berhe, *Supra* note 164; and Yitayal Abebe Ashotih, *Supra* note 162.

reorganizations have taken place in other regions as well. This continual lack of stability in the organizational structure of the REAs may make REAs' officials less confident in performing their duties.⁵³⁴ Of course, this could have been avoided if the Environmental Protection Organs Establishment Proclamation had established or required the establishment of REAs as independent environmental protection organs like the FEPA, instead of permitting regional states to designate existing organs to perform these duties.

5.4 Absence of Sectoral Environmental Units

Sectoral environmental units are also important for mainstreaming environmental values into sectoral decision-making process. This is why the Environmental Protection Organs Establishment Proclamation required every competent agency to establish or designate an environmental unit that would be responsible for coordination and follow-up of the agency's activities to ensure that they were in harmony with the requirements of the environmental laws. Therefore, it would be safe to conclude that the sectoral environmental units can contribute to the effectiveness of the system of EIA in the country. However, only some of the federal and regional sectors have thus far created such environmental units. This, in turn, makes it difficult to mainstream environmental values into sectors' decision-making processes.

5.5 Licensing Agencies

The EIA Proclamation recognized that it was important to reform the activities of the licensing organs. Consequently, the proclamation directs the licensing agencies not to issue permits to any person for any project that is subject to EIA before an ECC is produced from the relevant environmental organs. Nevertheless, while some licensing bodies require ECC, there are also licensing bodies which do not require ECC or require it only rarely. Some of

⁵³⁴ For instance, one EIA expert in the SREA told me that although he was commenting on the structure of the SREA any time it was changed, it would no longer do so because he is worried about his employment security.

the licensing bodies which do not require ECC argue that they are relieved of their duty to do so under the EIA Proclamation by subsequent laws particularly the Investment (Amendment) Proclamation No 375/2003. It is true that the Investment (Amendment) Proclamation No 375/2003 does not mention an ECC as a condition to obtain investment permit. Similarly, the Business Registration and Licensing Proclamation No. 686/2010 which regulates the registration and licensing of businesses does not require the production of an ECC to register business or issue business license. To the contrary, both laws oblige the concerned government organs to issue permit or license or register business if the conditions they recognized are met, whereas these conditions do not include ECC.⁵³⁵

At this juncture, it is interesting to note that some officials at the Ethiopia Investment Agency argue that the requirement of EIA and ECC for the issuance of investment permit at the Agency level is inappropriate. For instance, according the Director of the Licensing and Registration Directorate of the Ethiopia Investment Agency,⁵³⁶ some investors may not know, at the time they make applications for permits, the sites of their investments although they know the region(s) they will invest in. Thus, it will be inappropriate to require them to do EIA before they identify their investment sites. Moreover, those investors who have known where they want to invest may have to compete with other investors to win the site they want for their investment. That being the case, it will not be proper to require all investors who compete for the same plot of land to do EIA to get a permit.⁵³⁷ As a result, the Director maintains that it should be the organs that grant access to land, working together with environmental protection organs, which should require the preparation of EIA, not the

⁵³⁵ This could be taken as a big blow to the system of EIA because proponents can avoid doing EIA to get permits or licenses or to register their businesses. Contrary to this, however, some organs which register businesses and issue business licenses require the production of ECC for some activities from the relevant environmental protection organs. A good case in point is the practice of the trade and industry bureaus of the different sub-cities in Addis Ababa. See the previous discussion on licensing agency in chapter four.

⁵³⁶ Gerawork Teferra, *Supra* note 322.

⁵³⁷ However, we know that the agency gives permits only if a person who has won the competition is known. Thus, the agency will not issue permits to all competitors or potential investors in a given area. That being the case, it is in fact possible to demand ECC from the winner to get a permit if there is a will to do so.

Ethiopia Investment Agency, whereas the Agency issues investment permit on the assumption that investors will observe the laws of the country including environmental laws.

On the other hand, some experts at the Licensing and Registration Directorate of the Ethiopia Investment Agency may not agree with part of the claims of the Director. For example, according to Ato Birhanu Hailu, applicants for investment permits must first identify the locations of their investments to obtain investment permits.⁵³⁸ This is in line with the requirement in the investment permit application form prepared by the Ethiopia Investment Agency. For instance, according to Section 2.4 of the Investment Permit Application Form of the Ethiopia Investment Agency, applicants must identify *project locations* which include identifying the region, zone and *woreda* for the intended investments.⁵³⁹ Thus, it is possible to require applicants to do EIA and produce ECC from the relevant environmental protection agencies before investment permit is issued. In fact, the Form itself expressly requires applicants to describe the *potential impacts* of proposed investments on the *environment* and the *mitigation measures* that will be adopted, which, in turn, implies that EIA could be done.⁵⁴⁰

However, the experts, like the Director, maintain that the Ethiopia Investment Agency does not and should not have a duty to ensure the preparation of EIA as a condition to issue investment permit. Instead, they argue that environmental protection agencies and land planning and administration organs should ensure the use of EIA before investors commence implementing their projects.

⁵³⁸ Birhanu Hailu Lemma *Supra* note 455.

⁵³⁹ This Form can be freely obtained from the Ethiopian Investment Agency. *Emphasis added.*

⁵⁴⁰ See Federal Investment Agency, FDRE, Investment Permit Application Form, Section 2.14. This also implies that applicants for investment permits actually know the sites of their intended investments. *Emphasis added.*

5.6 Cross-Cutting Problems

In the previous sections, we have seen problems which are more or less peculiar to certain environmental protection organs. In this section, I will briefly address some problems which appear to be cross-cutting. These problems include the lack of adequate manpower, poor linkage between FEPA and REAs, on the one hand, and between environmental protection organs and licensing organs, on the other, and the absence of adequate political commitment.

5.6.1 Inadequate Staffing

Environment protection agencies must handle matters relating to EIA in a manner that ensures professional integrity.⁵⁴¹ Hence, environment protection agencies require a staff that has adequate expertise. For example, professional staff with knowledge in the fields of geology, forestry, wildlife, anthropology, chemistry, engineering, economics, agricultural science, and social science is necessary.⁵⁴² Our environmental protection organs-the FEPA, the REAs, and the Sectoral Environmental Units-however, are badly understaffed. For instance, there are REAs where there are only one or two employees to review all EIAs. In FEPA, too, the problem of inadequate staff is manifest. There is nothing different about the sectoral environmental units. For example, following the delegation of EIA review responsibility by FEPA to some ministries, some delegated ministries objected to the delegation claiming that they did not have the necessary manpower to handle the matter. If the organs dealing with EIA are not adequately staffed, then it is difficult to think that they can ensure, through report evaluation, that EIA is done properly and that all the relevant issues have been considered. This problem becomes worse in particular when it is seen in light of the very limited public participation in the EIA process we have and which may

⁵⁴¹ For example, CEQ Regulation 1502.24 requires agencies to insure the professional integrity, including scientific integrity, of the decisions and analysis in the EIS. See Council on Environmental Quality Regulations *Supra* note 74 § 1502.24.

⁵⁴² ROMAN SIVAKUMER, *Supra* note 461, at 186.

somewhat ease the problem of lack of manpower by letting these organs take advantage of the expertise outside their offices.

5.6.2 Poor Linkage

5.6.2.1 Relationship between FEPA and Other Environmental Protection Organs

The other cross-cutting problem which environmental agencies, particularly FEPA and the REAs, have been facing is poor communication with one another and the other relevant bodies. Environmental protection through EIA requires coordination and cooperation. For instance, FEPA can provide the REAs with scientific and technical support in order to help them build their capacity. REAs can also report to FEPA on their environmental performances. Further, REAs can refer the EIAs of trans-regional projects to FEPA because reviewing such EIAs falls under the jurisdiction of FEPA.

However, FEPA claims that although the Environmental Protection Organs Establishment Proclamation requires REAs to report to FEPA on their environmental performance and the EIA Proclamation demands referral of EIA to FEPA if a project can have trans-regional impact, REAs have not been reporting to FEPA so far.⁵⁴³ In fact, they have never referred EIAs on trans-regional projects to FEPA.⁵⁴⁴

REAs also admit that the link they have with FEPA is very weak. According to them, it is true that FEPA invites them to participate on workshops and trainings and also sends them some documents pertaining to EIA.⁵⁴⁵ However, the overall relationship between them is very poor.⁵⁴⁶ For instance, they mention the failure of FEPA to invite them on EIA evaluation of

⁵⁴³ Solomon Kebede, *Supra* note 160.

⁵⁴⁴ *Id.*

⁵⁴⁵ Alemayehu Geleta, *Supra* note 160; Weldeberhan Kuma, *Supra* note 161; Yirga Tadesse and Hadush Berhe, *Supra* note 164; Yitayal Abebe Ashetih, *Supra* note 162.

⁵⁴⁶ *Id.*

projects requiring federal licenses but affecting their regions.⁵⁴⁷ Moreover, they clearly indicate that they do not report to FEPA.⁵⁴⁸ On the other hand, some REAs such as SREA indicate that there should be reform with regard to their relationship with FEPA because, they think, the existence of poor communication between REAs and FEPA has been contributing to their weakness.⁵⁴⁹ The most surprising scenario, however, is that of the Addis Ababa EPA and FEPA. The two organs share the same compound and the same building. Accordingly, one would expect them to have a strong working relationship. Nevertheless, the relationship between FEPA and the Addis Ababa EPA is as weak as the relationship between FEPA and REAs.⁵⁵⁰

At this juncture, it is important to note that the Environmental Protection Organs Establishment Proclamation leaves many gaps that have contributed to the weak relationship between FEPA and REAs. For instance, the Proclamation does not clearly state the kinds of activities for which REAs have to report to FEPA. Moreover, the Proclamation is not clear on what FEPA can do if REAs do not report. Can FEPA take measures for failure to report and would such measures be compatible with our federal arrangement? Therefore, to dispel the confusions FEPA and REAs establishment Proclamation creates, a law that can implement the Proclamation has to be issued by the CM. However, the CM cannot make such law because unusually the Proclamation does not authorize it to do so. Thus, the only chance is to amend the Proclamation itself and resolve some of these issues while giving the mandate to issue implementing regulations to the CM.⁵⁵¹

⁵⁴⁷ *Id.*

⁵⁴⁸ *Id.*

⁵⁴⁹ Weldeberhan Kuma, *Supra* note 161; Yirga Tadesse and Hadush Berhe, *Supra* note 164.

⁵⁵⁰ Getachew Belachew, *Supra* note 419.

⁵⁵¹ Actually, in order to deal with the gaps in the link between the FEPA and REAs, the representatives of both sides had a meeting some time ago and they all agreed that some sort of MOU is necessary between them. Yet, the agreement on the necessity of MOU has not so far led to the reaching of MOU. Perhaps, FEPA, which should have played a central role in bringing them all together, has not played its part. Solomon Kebede, *Supra* note 160.

The relationship between FEPA and REAs, on the one hand, and the sectoral environmental units, on the other, is also very poor. First, these units do not exist in many federal sectors or in the regions. Second, the ones that exist do not have links with either FEPA or REAs. Of course, the delegation policy of FEPA is now contributing to the establishment links between some sectors' environmental units and FEPA. Moreover, the REAs in some regions where there are sectoral environmental units are trying to establish links with such units. For instance, in Tigray, TREA has signed agreements with the Water Resource Bureau, Urban Development Bureau, and Rural Road Construction Bureau to work together.⁵⁵² Accordingly, TREA expects these bureaus to do EIAs for their projects and submit the reports thereof to TREA for evaluation or to be at least involved in the preparation of EIAs for their projects.⁵⁵³ However, despite these facts, the relationship between FEPA and REAs, on the one hand, and the sectoral environmental units, on the other, is still far below what is expected.

5.6.2.2 Relationship between Environmental Protection Organs and Licensing Organs

As far as the relationship between environmental protection organs and licensing organs is concerned, the following points can be made. At the federal level, the main body that issues investment permit is the Ethiopia Investment Agency. The relationship between this organ and FEPA is now very poor. In the past, the Agency was trying to ensure the use of EIA because the investment laws demanded it. Hence, there was a relationship between FEPA and the Ethiopia Investment Agency since the agency was waiting for an ECC to be produced from FEPA. However, since the new investment laws do not, unlike in the past, require observing the requirements of environmental protection laws to obtain investment permit, the

⁵⁵² Yirga Tadesse and Hadush Berhe, *Supra* note 164.

⁵⁵³ *Id.*

link between the two organs has become very poor.⁵⁵⁴ Therefore, the only relationship that exists between FEPA and the Ethiopia Investment Agency at the moment is that the Agency sends letters to the former after issuing investment permits to enable FEPA to make its own follow-up.

At the regional level, the relationship between licensing bodies and the REAs is better, at least in some respects, than the relationship between FEPA and the Ethiopia Investment Agency. For example, in Oromia, in the past, the OIC sometimes sent letters to OREA to notify it about the investment permits it had issued to investors.⁵⁵⁵ However, the situation is now different. Since the Land Use and Planning Office issues title deed to land and it is placed in the same bureau with the OREA, it is compulsory for the OIC to keep a smooth relationship with the Bureau; and hence, with the OREA.⁵⁵⁶ On the other hand, the unit that deals with issuance of title deed to land in the bureau requires investors to produce ECC from the OREA to get title deed.⁵⁵⁷ Therefore, it is said that, nowadays, the relationship between the OIC and OREA and OREA and the unit that issues title deeds to land is smooth.⁵⁵⁸

In SNNPRS, SREA states that there has not been any relationship between the region's investment agency and SREA.⁵⁵⁹ This means that the two offices do not communicate. As a result, SREA does not know how many projects in the region are underway without EIA in spite of the fact that they are required to pass through the EIA process.⁵⁶⁰ Moreover, the

⁵⁵⁴ Surprisingly, these investment laws do not even recognize the use of EIA as one of the factors entitling an investor to incentives. Moreover, our laws on land lease do not require doing EIA before someone is granted lease.

⁵⁵⁵ Alemayehu Geleta, *Supra* note 163.

⁵⁵⁶ *Id.* Also Mitiku Bekele, *Supra* note 393.

⁵⁵⁷ Mitiku Bekele, *Supra* note 393.

⁵⁵⁸ Alemayehu Geleta, *Supra* note 163; Mitiku Bekele, *Supra* note 393.

⁵⁵⁹ Weldeberhan Kuma, *Supra* note 161.

⁵⁶⁰ *Id.*

region's investment agency does not let SREA know, at least through letters, about the projects for which it has issued permits.⁵⁶¹

In Tigray, TREA states that there was no link between TREA and the licensing authority in the past.⁵⁶² Indeed, let alone licensing authority, there was almost no communication between TREA and the unit dealing with land administration and use which is found in the same agency with TREA.⁵⁶³ Nonetheless, the situation has now improved.⁵⁶⁴ There were discussion fora where the two considered the relevance of EIA and even agreed that the licensing authority should demand the production of an ECC from TREA or other appropriate organ (*woreda*) before issuing investment permit.⁵⁶⁵ In particular, licensing organs have accepted after explanation was given by TREA that they have a duty to demand ECC before issuing investment permit for certain projects.⁵⁶⁶

In Amhara, there is actually no meaningful relationship between AREA and the licensing body in the region.⁵⁶⁷ For instance, communication exists between the two only when the region's licensing body thinks that EIA may be necessary for certain projects because they could have bad environmental consequences.⁵⁶⁸ In that case, it sends proponents to AREA to do EIA and have their EIAs evaluated to get ECC before they obtain license.⁵⁶⁹

In Addis Ababa, the relationship between the Addis Ababa EPA and the licensing organ, the Trade and Industry Bureau, is much better. In this regard, the Addis Ababa EPA gave the

⁵⁶¹ *Id.*

⁵⁶² Yirga Tadesse and Hadush Berhe, *Supra* note 164.

⁵⁶³ *Id.*

⁵⁶⁴ *Id.*

⁵⁶⁵ *Id.*

⁵⁶⁶ *Id.*

⁵⁶⁷ Yitayal Abebe Ashotih, *Supra* note 162; Melisachew Fantie, *Supra* note 477.

⁵⁶⁸ *Id.*

⁵⁶⁹ *Id.*

bureau a list of projects which are automatically subject to EIA.⁵⁷⁰ Thus, the licensing body requires ECC from the Addis Ababa EPA when these projects are to be undertaken.⁵⁷¹ Moreover, there are environmental units in every sub-city in Addis Ababa to ensure that the environment is considered before decisions are made.⁵⁷² For example, in the *Gulele* Sub-City of the Addis Ababa City Administration, there is an environmental unit that is called *Watershed Development and Biodiversity Conservation Office*. In the *Arada* Sub-City of the Addis Ababa City Administration, there is an environmental unit that is called *Environmental Awareness and Pollution Inspection Office*. Of course, the nomenclatures of these units do not exactly express what they do. Their primary job is to give advice to the decision-makers in their respective sub-cities before decisions such as issuance of licenses are made.⁵⁷³ As far as the relationship between these units, on the one hand, and the Addis Ababa EPA, on the other hand, is concerned it is characterized as very good.⁵⁷⁴

In conclusion, although some improvements are being seen in particular in some regions and in Addis Ababa, the link between licensing bodies and environmental protection organs is not good. This, in turn, can have a negative impact on the effectiveness of the system of EIA because the EIA process requires coordination between the environmental protection organs and licensing bodies.

5.6.3 Lack of Adequate Political Will

It is true that the establishment of environmental agencies was a manifestation of some political will to protect the environment. However, more is required if the EIA process is going to be effective. These agencies must, *inter alia*, have some autonomy and stability;

⁵⁷⁰ According to Ato Getachew Belachew, the number of these projects is one hundred. Getachew Belachew, *Supra* note 419.

⁵⁷¹ *Id.*

⁵⁷² See also *Id.*

⁵⁷³ Zekarias Kifle, *Supra* note 483; Mehdiin Temam, *Supra* note 483.

⁵⁷⁴ *Id.* See also Getachew Belachew, *Supra* note 419.

they must have the power to issue the documents, like EIA directives, that are necessary to enable them to do their jobs; and they need to be empowered to do whatever is necessary to achieve their objectives such as giving them an express mandate to take measures and to require other sectors to execute their decisions or comply with their requests such a decision to suspend the implementation of projects if EIA was not done. These are very important measures for the effectiveness of the system of EIA. However, they are almost missing at the federal and the regional levels, which, in turn, demonstrate the lack of adequate political support for an effective EIA system in Ethiopia.

CHAPTER SIX: ENVIRONMENTAL IMPACT ASSESSMENT IN PRACTICE

6.1 Introduction

The discussion in the preceding chapters has shown that Ethiopia has created the legal and institutional framework, however inadequate it may be, for the use of EIA as a decision-making tool. The ultimate question, however, is whether the EIA process is actually functioning in Ethiopia. This Chapter, therefore, is devoted to the consideration of how the practice of EIA in the country works based on information obtained from the environment protection organs, licensing bodies, some stakeholders, and some proponents. To that end, I will first examine the use of EIA at the top (strategic) level. Then, I will focus on the use of EIA at the project level by proponents for both public and private projects. Finally, I will address some issues pertaining to public participation in the EIA process.

6.2 Strategic Environmental Assessment (SEA)

As stated in chapter one, SEA is made before strategies are adopted in order to consider their possible impacts on the environment. Thus, it could be said that conducting SEA represents the first step towards mainstreaming environmental values into decision-making process. In Ethiopia, the EIA Proclamation recognizes this important aspect of EIA. Moreover, it imposes on FEPA the duty to determine (by issuing directives) which public instruments should be subject to SEA and which may not be.⁵⁷⁵ Nonetheless, a decade after this obligation was imposed, FEPA still has not yet issued directives which determine the public instruments that should be subject to SEA. However, the 2003 FEPA Procedural Guidelines set forth a list of some public instruments that are subject to (full) EIA. For example, family

⁵⁷⁵ EIA Proclamation, Article 13 (1)(2).

planning, technical assistance, development strategies, urban and rural land use development plans such as master plans, structural adjustment, and policy and program formulation are among the public instruments that should be preceded by SEA, according to the Guidelines, before their endorsement.⁵⁷⁶ Thus, it may be logical to expect SEA to be done for these actions.

However, the practice at the federal level shows that there has never been a SEA conducted for any of the public instruments listed in the FEPA's Guidelines.⁵⁷⁷ At the regional level, too, SEA is not done for public instruments. For instance, the REAs in Oromia,⁵⁷⁸ SNNPRS,⁵⁷⁹ Tigray,⁵⁸⁰ Afar,⁵⁸¹ Somali,⁵⁸² and Addis Ababa⁵⁸³ have indicated that there has never been any SEA done in their respective jurisdictions for public instruments.⁵⁸⁴ At this juncture, it should be noted that some reasons could be given for the absence of SEA for strategies. First, unlike for public and private projects, those organs which approve public instruments are not under any obligation to require ECC. For instance, although environmental protection organs are authorized to review EIAs for public instruments and issue an ECC, the organs that approve public instruments are not put under an obligation to require the production of an ECC before they approve these instruments. According to FEPA, the absence of a binding directive that provides for a list of public instruments subject to SEA

⁵⁷⁶ FEPA Guidelines, *Supra* note 108, Schedule I.

⁵⁷⁷ Solomon Kebede, *Supra* note 160.

⁵⁷⁸ Mohammed Ibrahim, *Supra* note 1; Alemayehu Geleta, *Supra* note 163.

⁵⁷⁹ Weldeberhan Kuma, *Supra* note 161.

⁵⁸⁰ Yirga Tadesse and Hadush Berhe, *Supra* note 164.

⁵⁸¹ Mohammed Abdulqader, *Supra* note 417.

⁵⁸² Ahmed Seid, *Supra* note 415.

⁵⁸³ Getachew Belachew, *Supra* note 419.

⁵⁸⁴ In Amhara, so far, there has been only one SEA. It was done around 2004 for a strategy called Swedish International Development Agency (SIDA) Amhara Project. The SIDA had a strategy for projects in Amhara region and it wanted SEA to be conducted before any project could proceed on the basis of the strategy. At that moment, the region's environmental protection organ was not in a position to conduct SEA; it had no expertise, no guidelines, etc. As a result, SIDA itself hired consultants who conducted the SEA. In the process, the AREA officials got involved to acquire experience. Since then, no SEA has been conducted in the region. Indeed, the AREA itself does not have guidelines for SEA; nor does it have the capacity to evaluate its reports. Yitayal Abebe Ashteh, *Supra* note 162.

is an additional reason for the absence of SEA in practice.⁵⁸⁵ Truly, the existence of a binding directive which provides for a list of public instruments that should be subject to SEA can lead to the use of SEA in practice because, unlike guidelines which are non-binding, directive is a law.⁵⁸⁶

6.3 EIA at Project Level

Project level EIA is a second and lower limb of EIA that is done to know the possible impacts of a given project on the environment. As far as projects that are subject to federal licensing are concerned, Tewolde Berhan Gebre Egziabher, the Director General of FEPA, stated that they have been passing through EIA regardless of whether the government or the private sector undertakes them.⁵⁸⁷ Interviews with other FEPA personnel show, with some reservation though, that EIA is actually being done at the project level.⁵⁸⁸ Further, interviews with some federal level sectors also show that they actually use EIA for their projects. For instance, the Ethiopian Road Authority (ERA) stated that it has been doing EIA for its projects which require EIA according to its own guidelines and submitting the reports thereof to FEPA for review.⁵⁸⁹ Likewise, the Ethiopian Electric Power Corporation (EEPCO) also stated that it has been doing EIA for projects which are subject to EIA according to its

⁵⁸⁵ Solomon Kebede, *Supra* note 160.

⁵⁸⁶ Note that the public instruments that are subject to SEA can also be provided by a Council of Ministers Regulation which is a higher law. More importantly, although both are laws, in practice, a regulation tends to be more effective than a directive because it is made by a higher body.

⁵⁸⁷ Tewolde Berhan Gebre Egziabher, Director General, Ethiopian Environmental Protection Authority, Public Lecture at Addis Ababa University Akaki Campus (May 7, 2009). When the Director speaks of projects that are subject to EIA, he seems to refer to the projects that are listed in the 2003 FEPA Draft Guidelines since there is no finally approved instrument made by FEPA so far providing for the list of projects that must pass through the EIA process.

⁵⁸⁸ Solomon Kebede, *Supra* note 160; Wondosen Sintayehu, *Supra* note 301; Dereje Agonafir, *Supra* note 374.

⁵⁸⁹ Interview with Ato Silesh Degefa, Senior EIA Expert, Environmental and Social Management Team, Ethiopian Road Authority (April 1, 2011). According to Ato Silesh, the guidelines of the Authority were prepared by modifying the guidelines of FEPA and the WB. The claim of the Ethiopian Road Authority is correct because it actually conducts EIAs and discloses the executive summary of same. For the purpose of disclosure, it uses newspaper such as *Addis Zemen* and *The Ethiopian Herald*, Ethiopian News Agency, and its web address. For more, visit ERA's website at www.era.gov.et.

funders' guidelines⁵⁹⁰ and submitting its reports for review initially to FEPA and after delegation to the Ministry of Mining and Energy for revision (now to Ministry of Water and Energy).⁵⁹¹ Hereafter, EEPKO may have to submit its EIAs to Ministry of Water and Energy for review because the energy sector is severed, as of September 2010, from the Ministry of Mining and Energy and merged with the Ex-Ministry of Water Resources. Another sector that has been using EIA is the Ministry of Mines (which was Ministry of Mining and Energy up to September 2010). According to the Ministry, EIA is used for its projects and so far about sixteen EIAs were conducted; eight in energy sector (up to September 2010), seven in mining sector and one in petroleum sector.⁵⁹² Finally, the Ministry of Water and Energy indicated that it has been using EIA for its projects such as big irrigation and drainage projects.⁵⁹³

Therefore, putting for the moment the issue of its adequacy aside, it could be concluded that there are proponents who do project level EIA to know the possible impacts of their projects on the environment before they implement them. It is important to note that this has been happening even if all the necessary preconditions for an effective system of EIA have not yet been set forth.⁵⁹⁴ What is more, there are even times when failure to do a proper EIA may entail consequences by treating such failure as contravening the EIA Proclamation and other instruments issued thereunder.

⁵⁹⁰ The funders of EEPKO include the WB and the African Development Bank. Thus, it has been using the EIA guidelines of these institutions. Interview with Ato Yohannes Yosef and W/o Fikre Kebede, Experts, Power System Planning, Ethiopian Electric Power Corporation (April 1, 2011).

⁵⁹¹ *Id.*

⁵⁹² Interview with Ato Seyoum Zenebe, Environmental and Community Development Unit Process Owner, Ministry of Mines (April 1, 2011).

⁵⁹³ Interview with Ato Teferra Arega, Environmentalist, Watershed Administration Directorate, Ministry of Water and Energy (1 April 2011).

⁵⁹⁴ After all, as mentioned before, there was EIA for some projects even before the EIA Proclamation was made. Thus, even in the absence of the necessary legal framework, we can always find some willing proponents who do EIA because EIA helps proponents, too.

For example, in one case, a certain foreign investor wanted to establish a plant to produce bio-fuel in *Babille*, a protected forest area in eastern part of Ethiopia which is known for its rich biodiversity especially elephants.⁵⁹⁵ In accordance with the FEPA Guidelines, the implementation of this project was subject to prior EIA. The investor also wanted to do an EIA before he commenced implementing his project. As a result, he approached the Ethiopian Institute of Biodiversity Conservation (IBC) to assist him with the matter. However, the IBC informed him that the area was already studied and no development activity could be undertaken in it except for the good of the area itself. But, ignoring the advice of the IBC, the investor went ahead and conducted an EIA and submitted its report to FEPA for evaluation and approval. FEPA then looked at the report and ordered him to make some changes before it could approve the EIA. However, the investor never reappeared before FEPA with the required changes to his EIA. Instead, he commenced implementing his project which resulted in the removal of thousands of hectares of forests. When this fact was discovered, a dispute erupted between environmental groups such as the IBC, FEPA, Ethiopian Wildlife Development and Conservation Authority, and NGOs like Forum for Environment, on the one hand, and the investor, on the other. The dispute was serious and it went all the way long to the Office of the Prime Minister for resolution. After a year and half, it was resolved in favor of the environmental groups leading to the stoppage of the project.⁵⁹⁶

Nevertheless, although there are EIAs in practice, one cannot conclude that EIA is done for all or even most projects which are subject to EIA. For example, unlike the Director General

⁵⁹⁵ According to Ato Yeneneh, the elephants are now protected. Of course, sometimes conflicts arise between the elephants and the surrounding people because the elephants devour their crops during harvest. This has been leading to some sporadic measures by the surrounding people. However, there are no large scale measures that are being taken so as to threaten the existence of the elephants. Telephone Interview with Ato Yeneneh Teka, Director, Wildlife Development and Protection Directorate, Wildlife Development and Protection Authority (October 6, 2011).

⁵⁹⁶ The information in this paragraph was obtained from Ato Solomon Kebede, *Supra* note 160; Ato Fanuel Kebede, Senior Wildlife Expert, Ethiopian Wildlife Development and Protection Authority, in Addis Ababa (August 31, 2009); and some people at the IBC who demanded anonymity, in Addis Ababa (September 1, 2009).

of FEPA who stated that EIA is done for projects that are subject thereto, other FEPA personnel stated that there are certain projects which are subject to EIA according to FEPA Guidelines which do not pass through the EIA process before their implementation commences.⁵⁹⁷ In fact, according to one FEPA official, the EIA Proclamation is disregarded more often than it is respected.⁵⁹⁸ Hence, unsurprisingly, there could be many projects that are subject to EIA but which are implemented without compliance with the EIA requirements.

In fact, most federal government projects do not pass through EIA unless some kind of external funding is involved.⁵⁹⁹ Interestingly, if external aid is required after the commencement of the implementation of a project and the donor is likely to demand EIA, an EIA will be done for the project even after its implementation has begun.⁶⁰⁰ As one can imagine, EIA in this case is done not to know the possible impact of the project on the environment but to satisfy the demands of the possible donor/funder. The following story is a good case in point.⁶⁰¹

Gilgel Gibe III is a large hydroelectric power generation project in Ethiopia. It is expected to produce more than 1800 MW upon its completion in 2013. When the program leading to the project was formulated, no SEA was performed although FEPA Guidelines require it.⁶⁰² Similarly, the commencement of the implementation of the project was not preceded by a project level EIA. All of this happened because the designers of the program and its implementers thought that the project would be fully sponsored by the Ethiopian

⁵⁹⁷ Solomon Kebede, 160; Interview with Ato Abraham Hailemelekot, EIA Expert, FEPA, in Addis Ababa (August 24, 2009); Wondosen Sintayehu, *Supra* note 301.

⁵⁹⁸ Solomon Kebede, *Supra* note 160.

⁵⁹⁹ *Id.* For example, the implementation of the Borkena Dam Construction began before EIA was done although it was stopped soon due to siltation problem. Solomon Kebede, Public Lecture *Supra* note 190.

⁶⁰⁰ Solomon Kebede, *Supra* note 160.

⁶⁰¹ The story was told by Tewolde Berhan Gebre Egziabher, *Supra* note 587.

⁶⁰² According to No. 27 of Annex I of FEPA Guidelines, policies and programs are subject to SEA.

government.⁶⁰³ Unfortunately, however, in the course of implementing the project, the government faced a financial shortage which forced it to look for external funding in particular from the WB. The WB agreed to fund the project but it required the production of an ECC from FEPA as a precondition. Thinking that it would not be realized, the government then rushed into doing a post-implementation EIA, which is contrary to the spirit of the EIA Proclamation. Then, the EIA was done and its report was submitted to FEPA for evaluation and approval. Unfortunately, a little bird told the WB that EIA was not done for the project prior to the commencement of its implementation. The WB then withdrew its plan to fund the project.⁶⁰⁴

The implementation of the project for the *Grand Ethiopian Renaissance Dam* also started before a full-scale EIA was conducted.⁶⁰⁵ Indeed, at the moment, a full-scale EIA is being done for the project side-by-side with its implementation although one may wonder what purpose such an EIA will eventually serve.⁶⁰⁶

Moreover, there are many private projects which have not been subjected to an EIA before their implementation commenced, although they were required to pass through EIA according to FEPA's Guidelines. For instance, almost all floriculture projects have not received such scrutiny.⁶⁰⁷ As the floriculture industry is now expanding in Ethiopia, the failure to subject them to EIA will mean a big blow to the effectiveness of the system of EIA.

Likewise, the implementation of other projects such as the Awash River (*Kesem* and

⁶⁰³ Of course, government sponsored projects should pass through the EIA if they are subject to EIA even when they are not sponsored by donors or lenders. However, as we will see later on, the practice is different.

⁶⁰⁴ However, the African Development Bank (AfDB) agreed to fund the *Gilgel Gibe III* Project. Of course, the AfDB stepped in, though after the WB withdrew its plan, after EIA was done for the project. The executive summary of the EIA for the *Gilgel Gibe III* Project was posted on the AfDB's website on 08 July 2008 and is available at <http://www.afdb.org/en/documents/ethiopia/> (accessed on 10 August 2011).

⁶⁰⁵ Perhaps, this is the case because the construction of the Dam is intended to be one hundred percent funded by Ethiopians themselves.

⁶⁰⁶ Alemayehu Geleta, *Supra* note 163. According to Ato Alemayehu, the EIA may lead to the identification of further mitigation measures, among other things. Of course, such EIA can also be used to rationalize the decision to build the dam.

⁶⁰⁷ MELLESE DAMTIE AND MESFIN BAYOU, *Supra* note 51, at 5.

Tendaho) project, which is under construction/operation, was not preceded by EIA although an EIA was done after its implementation began.⁶⁰⁸ Furthermore, a study conducted by FEPA has revealed that some coffee and tea plantation projects were implemented by removing forests in areas like *Sheka zone*, South West of Ethiopia and one of the few places where remnants of virgin forest exists in the country, without prior EIA.⁶⁰⁹

What these examples reveal is the fact that there are many projects that are subject to federal licensing which do not pass through the EIA process even though they are required to. This saps the strength and effectiveness of the EIA system in Ethiopia. In particular, the non-performance of EIA for government projects could be taken as a major blow to our system of EIA on the ground because, in Ethiopia, many major developmental projects such as dams are carried out by government organs, that is, they are government projects.

Another important factor that has to be mentioned here is the fact that the Ethiopian Investment Agency does not require an ECC before issuing an investment permit. The Agency requires only the fulfillment of the requirements expressly stated in the investment laws. On the other hand, although the EIA Proclamation obliges it to require ECC as well, it does not do so for the reasons discussed before. As a result, in the absence of demand for ECC by the Ethiopian Investment Agency, those proponents who seek permit from the Agency will have no incentive to do EIA and approach FEPA for ECC.

In the end, it could be said, at the federal level, that although there are times when EIA is done at project level, the practice is limited. First, EIA is used for projects selectively as, under normal circumstances, government projects are not subject to EIA while some private actors are required to do EIA for their projects. Second, there are times when the EIA

⁶⁰⁸ Solomon Kebede, *Supra* note 160.

⁶⁰⁹ MELLESE DAMTIE AND MESFIN BAYOU, *Supra* note 51, at 5.

Proclamation is totally disregarded. Third, the Ethiopian Investment Agency and other licensing bodies do not demand ECC as a requirement to issue license. This situation has led some writers to conclude that the practice of EIA in Ethiopia is still at infant stage.⁶¹⁰

The practice in the regions is not any different from what we have seen at the federal level. For instance, in the Oromia region, there have not been any EIAs conducted for public projects.⁶¹¹ After all, since the regional government does not need a permit to get land from the Land Use and Planning Office, it is not possible for OREA to ensure that public projects pass through EIA. In relation to private projects, however, OREA has been trying to ensure the use of EIA before their implementation begins.⁶¹² Of courses, in the past, most investors were not conducting EIAs because they were obtaining both investment permits and deeds from the OIC.⁶¹³ This means, there was no reason for them to do EIA and go to OREA for ECC when they could proceed with their projects. However, currently, after the Land Use and Planning Office was merged with OREA under one bureau, investors have been doing EIA because the Land Use and Planning Office requires the production of ECC from its neighbor, OREA, before it grants title deed to land.⁶¹⁴ Of course, this does not mean that every private project that is supposed to pass through EIA actually passes through EIA because there are still some private projects which are escaping EIA even if they are limited in number.⁶¹⁵ For example, in the region, cement production has been rapidly expanding. Accordingly, since the enactment of the EIA Proclamation in 2002 and the issuance of the 2003 FEPA's Procedural Guidelines, licenses have been issued for the establishment of about

⁶¹⁰ See, for example, *id.* at 1.

⁶¹¹ Mohammed Ibrahim, *Supra* note 1; Alemayehu Geleta, *Supra* note 163.

⁶¹² *Id.*

⁶¹³ *Id.*

⁶¹⁴ *Id.*

⁶¹⁵ *Id.* Moreover, I made discussion with Ato Mitiku on the subject-matter and he agrees with the points mentioned in this paragraph. Mitiku Bekele, *Supra* note 393.

40 cement factories.⁶¹⁶ Some of these factories are currently operational, while others are under construction or their construction is about to begin. Were these licenses issued before EIAs were performed? Both the OREA and the OIC confirm, however, that most of them were not preceded by EIA.⁶¹⁷

In the SNNPRS, there have been very few projects for which EIAs were done.⁶¹⁸ Indeed, the only projects for which EIAs were so far done are those for which either donations or loans were required because donors or lenders like the WB and the Ethiopian Development Bank (EDB) have been requiring the production of ECC.⁶¹⁹ This means, in the region, EIA is done for projects, both government and private, only when there is external pressure. Consequently, the situation of EIA on the ground in the region is described as very poor.⁶²⁰ According to SREA, lack of sufficient autonomy to do its jobs and proponents' lack of understanding about EIA have greatly contributed to the existence of poor EIA record in the region.⁶²¹ For instance, SREA indicates that the only purpose for which proponents do EIA when they do so is to get ECC from SREA.⁶²² As a result, they demand the issuance of ECC on the spot because they see EIA serving only a mere formality requirement and nothing more.⁶²³

⁶¹⁶ Mohammed Ibrahim, *Supra* note 1; Alemayehu Geleta, *Supra* note 163.

⁶¹⁷ *Id.* For instance, according to the list of Cement factories in Oromia Regional State that I obtained from the OIC, Cement Tiles Production Factory (2003), Zena Woldegebriel Melese Cement (2003), C.G.C. Overseas Construction Ethiopia (2006), East Cement PLC (2006), Abyssinia Cement PLC (2007), Chemu Industrial PLC (2007), Gulfmeera General Business Development PLC (2008), Ethio-Cement PLC (2008), Lafarge Cement Ethiopia PLC (2008), Osho Venture (Ethiopian Branch) (2008), P & F General business PLC (2008), Famu Industrial PLC (2008), Hua Yi Cement PLC (2008), Amhaf Cement Industries PLC (2009), C.H. Clinker Manufacturer PLC (2009), and Rao Lirui (2009) are some of the cement factories for which EIAs were done before investment permits were issued

⁶¹⁸ Weldeberhan Kuma, *Supra* note 161.

⁶¹⁹ *Id.*

⁶²⁰ *Id.*

⁶²¹ *Id.*

⁶²² *Id.*

⁶²³ *Id.*

In the Tigray region, almost all projects of the regional government have not been subjected to EIA analysis unless donors or lenders require it.⁶²⁴ Indeed, it is even difficult for TREA to ensure the use of EIA in relation to government projects that are not subject to donors or lenders funding because the regional government does not need permit to get access to land to implement its projects. Of courses, there are certain sectors which do EIA partly because they are conscious about the relevance of EIA and partly due to an understanding reached between TREA and them in relation to the use of EIA.⁶²⁵ For instance, because they are aware of the importance of EIA and also they reached an agreement with TREA on the matter, the Water Resource Bureau and Rural Road Construction Bureau of the regional government usually do EIAs for their projects and request TREA for its comments on their EIAs.⁶²⁶ On the other hand, although private projects were not passing through EIA, they are currently being forced to pass through EIA due to the following three reasons. First, the office that gives private proponents title deed to land, that is, Land Administration and Use Office, is now situated in the same agency with TREA.⁶²⁷ Hence, the Office often demands the production of ECC from TREA before it grants title deed to land.⁶²⁸ However, this does not mean that the use of EIA is now as effective as it is expected to be. Actually, there are times when the Office grants title deed to land even if ECC is not produced.⁶²⁹ Similarly, TREA itself tries to ensure the use of EIA for private projects only if these projects are big such as big agricultural projects which are limited in number thereby implying the existence of limited EIA even for private projects.⁶³⁰ Second, TREA and TRIO reached an understanding that, in relation to big projects, EIA is necessary and TRIO is required by the

⁶²⁴ Yirga Tadesse and Hadush Berhe, *Supra* note 164.

⁶²⁵ *Id.*

⁶²⁶ *Id.*

⁶²⁷ *Id.*

⁶²⁸ *Id.*

⁶²⁹ *Id.*

⁶³⁰ *Id.* Although it is not exactly clear what TREA means by *big projects*, it is necessarily a project that involves more than 100,000 birr because, as we will see later on, TREA evaluates the EIAs of projects which involve more than 100,000 birr, whereas EIAs for projects involving lesser amount are evaluated at the *woreda* level.

EIA Proclamation to demand ECC before it issues license to proponents.⁶³¹ As a result, TRIO has been demanding the submission of ECC together with the other requirements to issue license to proponents.⁶³² However, although things were moving smoothly at the beginning, the relationship between the two organs is now becoming rough.⁶³³ Third, the intervention of some donors and lenders is also causing some proponents to use EIA.⁶³⁴ For instance, for private projects to be implemented in Tigray, the EDB does not make a loan unless an ECC is obtained from TREA and produced together with other loan requirements.⁶³⁵ Interestingly, even when a project is not subject to EIA, the EDB requires a certificate indicating that the project is exempt from EIA.⁶³⁶

In the Amhara region, nearly all projects of the regional government have failed to pass through EIA unless they are subject to funding by donors such as the WB that require EIA.⁶³⁷ As far as private projects are concerned, however, there are some sorts of EIAs because there are proponents who conduct EIA.⁶³⁸ Those proponents who do not want to do EIA regularly go directly to licensing organ and obtain license as they are not required to produce ECC from AREA by the licensing organs.⁶³⁹ However, there are times when these licensing organs request AREA to give its comments on proposed project.⁶⁴⁰ In this case, AREA demands the production of EIA to give its comments.⁶⁴¹ In this way, AREA is trying to ensure the use of EIA to the extent possible. Moreover, AREA is now monitoring the implementation of projects in the region.⁶⁴² Thus, it can hold those proponents which begin implementing their

⁶³¹ *Id.*

⁶³² *Id.*

⁶³³ *Id.*

⁶³⁴ *Id.*

⁶³⁵ *Id.*

⁶³⁶ *Id.*

⁶³⁷ Yitayal Abebe Ashot, *Supra* note 162; Melisachew Fantie, *Supra* note 477.

⁶³⁸ *Id.*

⁶³⁹ *Id.*

⁶⁴⁰ *Id.*

⁶⁴¹ *Id.*

⁶⁴² *Id.*

projects without doing EIA accountable if something goes wrong.⁶⁴³ This could be taken as another mechanism of ensuring the use of EIA. However, as compared to the practice in the other regions, the record of EIA seems better in Amhara. For instance, in 2002 E.C. (2009/2010 G.C.), the region's investment body issued license to about 700 proponents on average out of which 250 proponents did EIA and submitted their EIAs to AREA for review.⁶⁴⁴

In the Somali region, like in other regions, government projects that are subject to EIA do not usually pass through EIA.⁶⁴⁵ Moreover, EIAs often were not done for private projects because the Somali REA did not have EIA experts to either implement the process or evaluate EIAs. Currently, however, there is some form of EIA because some proponents have started doing EIA.⁶⁴⁶ Yet, the record of EIA in the region is still very poor as most proponents do not do EIA and submit it to the Somali REA for evaluation.⁶⁴⁷ Moreover, the licensing body in the region does not require proponents to submit an ECC together with the other requirements to issue license.⁶⁴⁸ Thus, there is less motivation for proponents to do EIA and obtain an ECC from the Somali REA. At this point, it is interesting to note, according to the Somali REA, that some proponents who do EIAs for their projects, in particular large projects, do not submit their reports to the Somali REA.⁶⁴⁹ Instead, they submit their reports to FEPA claiming that the Somali REA does not have the capacity to evaluate their EIAs.⁶⁵⁰ Although the Somali REA admits that it does not have enough experts to evaluate EIAs, it

⁶⁴³ This means, if nothing goes wrong, AREA cannot take any measure against proponents merely because they did not do EIA for their projects as required by the existing legal framework.

⁶⁴⁴ Yitayal Abebe Ashotih, *Supra* note 162. Of course, it could be said that out of the remaining 450 projects, some of them were not subject to EIA while others were subject to EIA but did not pass through EIA.

⁶⁴⁵ Ahmed Seid, *Supra* note 415.

⁶⁴⁶ *Id.*

⁶⁴⁷ *Id.*

⁶⁴⁸ *Id.*

⁶⁴⁹ *Id.*

⁶⁵⁰ *Id.*

claims that it has been evaluating such reports by requesting assistance, when necessary, of experts from other government offices in the region.⁶⁵¹

In the Afar region, the situation of government projects is the same as it is in the other regions, that is, they do not pass through EIA.⁶⁵² Moreover, there is no EIA done for private projects that are subject to the regional government's licensing power.⁶⁵³ It is important to mention here that the Afar REA tries to justify the absence of EIA for projects by claiming that the projects that have been implemented in the region so far were not thought to have any significant impact on the environment.⁶⁵⁴ On the other hand, such claim may be difficult to sustain because, at times, it is only after doing EIA that one can conclude whether a project can have significant impact on the environment.⁶⁵⁵

Finally, in Addis Ababa, the record of EIAs produced at the project level was very poor before 2006 as the Addis Ababa EPA was not ready to ensure the use of EIA for projects to be implemented in the City because it did not have, *inter alia*, enough EIA experts and an EIA department.⁶⁵⁶ Since 2006, however, the Addis Ababa EPA established an EIA department and also hired more EIA experts.⁶⁵⁷ As a result, the record of project level EIA has been improving since then.⁶⁵⁸ That is, projects that are subject to EIA are now passing through EIA. Nevertheless, this does not mean that EIA is undertaken in Addis Ababa on full scale. In fact, there are certain problems which hamper the use of EIA on full scale and hence its effectiveness.⁶⁵⁹ First, most government projects do not pass through the EIA process unless external funding is involved, and the funders require an ECC as a precondition for

⁶⁵¹ *Id.*

⁶⁵² Mohammed Abdulqader, *Supra* note 417.

⁶⁵³ *Id.*

⁶⁵⁴ *Id.*

⁶⁵⁵ Of course, FEPA's Guidelines could be used to identify which actions are subject to EIA and which are not although knowing the impact of an action on the environment requires doing EIA.

⁶⁵⁶ Getachew Belachew, *Supra* note 419.

⁶⁵⁷ *Id.*

⁶⁵⁸ *Id.*

⁶⁵⁹ *Id.*

financing the project.⁶⁶⁰ Second, there are times when orders come from above, sometimes including from the City's mayor, to grant an ECC to certain proponents because speedy service is required.⁶⁶¹ For instance, the Addis Ababa EPA is required to issue an ECC immediately to proponents of projects relating to road construction and water works.⁶⁶² Therefore, the lack of cooperation from the city government's bodies either by not doing an EIA for their projects or by making superiors give orders for the immediate issuance of an ECC is a major obstacle to the improving record of EIA in the City. Despite this problem, there is a prospect for further improvement of the situation. This is because, as a result of BPR, the various organs of the city government have agreed to work together on matters of common concern.⁶⁶³ In this regard, the Addis Ababa EPA, Investment Bureau, Trade and Industry Bureau, and Land Use and Administration Bureaus have agreed to work together.⁶⁶⁴ Accordingly, as of July 2010, private proponents must do EIA, if their projects are subject to EIA, in order obtain business license or to get their businesses registered.⁶⁶⁵ In the absence of an ECC, the concerned licensing body will not issue business license; nor will it register a business.⁶⁶⁶ The problem though is the depth of the EIAs that are submitted to the Addis Ababa EPA.⁶⁶⁷

In conclusion, as the discussion in relation to the practice of EIA at the federal level, in six regions and in Addis Ababa have shown, there is no SEA for public instruments despite the recognition of the use of SEA in the EIA Proclamation and the provision of some public instruments which have to pass through SEA in FEPA's Guidelines. Moreover, almost all

⁶⁶⁰ *Id.*

⁶⁶¹ *Id.*

⁶⁶² *Id.* It is necessary to note that such orders are still being given and they are expected to be given in the future in relation to similar projects. *Id.*

⁶⁶³ *Id.*

⁶⁶⁴ *Id.* This is why, as we have seen before, we currently have environmental units to advise decision-makers in sub-cities in the Addis Ababa City.

⁶⁶⁵ *Id.*

⁶⁶⁶ *Id.*

⁶⁶⁷ *Id.*

government projects that are subject to EIA do not pass through EIA unless there is external pressure to do so, and in many such instances, the EIA process is initiated after the crucial decisions have been made. Further, the record of EIA in relation to private projects is also poor in many regions because, among other things, licensing organs do not require an ECC for the issuance of a license.

6.4. Who Does EIA in Practice

In order to study the complete ecosystem of the project site, a comprehensive EIA is required.⁶⁶⁸ A comprehensive EIA requires a qualified multidisciplinary staff.⁶⁶⁹ For instance, CEQ Regulation requires an EIS to be prepared using an interdisciplinary approach which will ensure the integrated use of the natural and social sciences and the environmental design arts.⁶⁷⁰ Hence, trained specialists in fields like geology, forestry, wildlife, anthropology, sociology, chemistry, engineering, economics, environmental science, agricultural science and social science may be required to conduct a comprehensive EIA.⁶⁷¹ Cognizant of this fact, the EIA Proclamation and FEPA Guidelines demand that an EIA be done by experts/consultants.

The practice at the federal level shows that EIAs are, in fact, performed by consultants/experts. For instance, leaving the issue of competence aside, FEPA confirms that the EIAs it has been receiving so far are done by experts.⁶⁷² Similarly, some sectors which we will see later on such as ERA and EEPSCO also state that they employ experts to conduct EIA for their projects.

⁶⁶⁸ ROMAN SIVAKUMER, *Supra* note 461, at 186.

⁶⁶⁹ PRASAD MODAK AND ASIT K.BISWAS, *Supra* note 66, at 51.

⁶⁷⁰ In the US, an EIS must be prepared using an interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts. The disciplines of the preparers should also be relevant to the scope and issues identified in the scoping process. See Council on Environmental Quality Regulations § 1502.6 (1970, as amended in 1977).

⁶⁷¹ ROMAN SIVAKUMER, *Supra* note 461, at 186; PRASAD MODAK AND ASIT K.BISWAS, *Supra* note 66, at 51.

⁶⁷² Solomon Kebede, *Supra* note 160.

In regions as well, there are indications that EIAs are done by consultants. For instance, in SNNPRS, SREA states that the limited EIAs that were done were conducted by consultants operating in the region.⁶⁷³ Moreover, SREA indicates that the consultants operating in the region are relatively better staffed to do EIA.⁶⁷⁴ Nonetheless, according to SREA, these consultants do not usually find enough jobs because most projects that are implemented in the region do not pass through EIA.⁶⁷⁵

On the other hand, there are regions where the REAs do not know who actually performs the EIA work, although they sometimes receive EIAs and evaluate them. For instance, in Oromia, it has been said that the OREA is not serious about who does EIA, that is, it does not question who prepares the EIAs submitted to it for evaluation but simply evaluates them.⁶⁷⁶

What matters to OREA is the existence of the necessary information as required by the checklists it gives to proponents to do EIA.⁶⁷⁷ However, during evaluation, OREA states that it is very serious.⁶⁷⁸ For instance, it considers, among other things, the impact of a proposed project on the physical environment, biological environment, socio-economic impact, identification of mitigation measures, public participation in the EIA process, and the investor's environmental management plan.⁶⁷⁹ If one of these or the other important elements is missing, then, OREA does not approve the EIAs submitted to it and hence issue ECC.⁶⁸⁰

Instead, it requires the element that is left out to be considered again.⁶⁸¹

⁶⁷³ Weldeberhan Kuma, *Supra* note 161. This shows that, if things do not get better, these consultants may cease to exist because they cannot continue paying their experts, however limited they may be, while EIA is rarely done. This will, in turn, lead to further problem because, although very limited, there will be EIAs for certain projects and these EIAs need to be done by qualified consultants.

⁶⁷⁴ *Id.*

⁶⁷⁵ *Id.*

⁶⁷⁶ Alemayehu Geleta, *Supra* note 163.

⁶⁷⁷ *Id.*

⁶⁷⁸ *Id.*

⁶⁷⁹ *Id.*

⁶⁸⁰ *Id.*

⁶⁸¹ *Id.*

The approach of the OREA of not being serious about who does EIA and its allegation that it is (and can be) serious during the evaluation of EIS reports does not seem convincing. This is so because it is difficult to imagine how OREA can actually be serious about report evaluation if it is not serious about who prepares them. The problem is the EIAs OREA receives for evaluation may not be prepared by qualified experts, whereas EIAs that are not prepared by qualified experts cannot be scientifically or technically valid.⁶⁸² Thus, if OREA actually wants to be serious about evaluation of EIA, it has to first consider who prepares it. That is, it has to ensure that EIA was prepared using experts with relevant and multidisciplinary knowledge. On the other hand, if such approach is not used, OREA must reject any EIA however beautiful it may be.⁶⁸³

In the Tigray region, EIAs for federal projects which pass through EIA and which are to be implemented in the region are done by consultants coming from Addis Ababa.⁶⁸⁴ Moreover, some sectors of the regional government such as the Water Resource Bureau use their own experts to do EIA and invite experts from other offices including from the TREA to help them with their expertise.⁶⁸⁵ However, with regard to the EIAs of other projects which are submitted to it, however limited they may be, TREA does not know who actually prepares

⁶⁸²For example, as indicated in the previous chapter, CEQ Regulation requires agencies to insure the professional integrity, including scientific integrity, of the decisions and analysis in the EIS. They shall also identify any methodologies used and shall make explicit reference by footnote to the scientific and other sources relied upon for conclusions in the statement. See Council on Environmental Quality Regulations, *Supra* note 670, §1502.24.

⁶⁸³ Another problem relates to the manpower of OREA. According to the information I obtained from the personnel I interviewed at the OREA, for the purpose of EIA evaluation, OREA currently has three to four experts. So, in light of the multidisciplinary issues involved in EIA, three to four experts are not enough to effectively evaluate EIA. Moreover, there is not public participation at EIA evaluation stage. Therefore, generally, it is difficult to buy the argument that the OREA is and can be serious about EIA evaluation while it does not ensure who does EIA, it lacks adequate manpower to do the job, and it does not engage stakeholders in the process of EIA evaluation.

⁶⁸⁴ Yirga Tadesse and Hadush Berhe, *Supra* note 164. As we have seen before, there is no process for the certification and licensing of consultants in the region although there is a plan to do so. Hence, those consultants who have been doing EIAs in the region were certified and licensed in other places mainly in Addis Ababa.

⁶⁸⁵ *Id.* At this juncture, one may raise the issue of independence of these experts. It seems that they will consider only issues their bureau wants to them to consider than considering the overall impact of the project for which they do EIA. However, although this is a valid concern, such practice is better than making someone who is not an expert in the field do EIA. Moreover, the invitation of experts from other organs including from TREA may reduce the tendency to be biased.

them except hoping that the EIAs are prepared by experts or by proponents themselves but assisted by some experts.⁶⁸⁶ As a result, TREA considers EIAs which, if any, are submitted to it without trying to ascertain who prepared them.

The above fact raises a serious concern about how TREA can ensure the proper use of EIA in the region if it does not identify who prepares EIAs before it embarks on evaluation. The danger that is involved is the possibility that at least some of the few EIAs submitted to the TREA for evaluation may lack professional integrity. That is, TREA may sometimes end up evaluating EIAs which lack scientific or technical validity as the preparers may not be experts with relevant and multidisciplinary knowledge. Of course, some measures could be taken to overcome or at least minimize the chances of receiving and evaluating EIAs which lack professional integrity. For instance, in the US, EIAs are required to list the names, together with their qualifications (expertise, experience, professional discipline), of the persons who were primarily responsible for preparing the EIS or significant background papers, including basic components of the statement.⁶⁸⁷ Such requirement can lead consultants to use more experts with relevant qualifications. However, our environmental protection agencies may not use this requirement because the requirement is expressly recognized in neither the EIA Proclamation nor the FEPA Guidelines.⁶⁸⁸ On the other hand, one may think of the inclusion of such requirement in the EIA TOR that proponents receive from environmental protection agencies.⁶⁸⁹

⁶⁸⁶ *Id.*

⁶⁸⁷ See Council on Environmental Quality Regulations, *Supra* note 670, §1502.17. Where possible the persons who are responsible for a particular analysis, including analysis to background papers, should also be identified. *Id.*

⁶⁸⁸ Of course, the Guidelines require that the consultant that will be appointed to prepare an EIA on behalf of a proponent to be able to present an authentic complete CV of experts to be employed for the task. FEPA Procedural Guidelines, 2003, Section 6.3. However, this is different from requiring the inclusion of the list of experts that have actually participated in the preparation of an EIA. A consultant can present an authentic CV of some experts but it may not actually use them for the work.

⁶⁸⁹ For example, in order to ensure that EIA is done by relevant experts, the Addis Ababa EPA requires the attachment of the consultant's resume and license to be annexed to EIAs. For example, the EIA report of Craft Consulting PLC in relation to its Quarry Development Project in Addis Ababa was prepared by Ato Yirdaw

It is interesting to note that the TREA itself admits the possibility of receiving and evaluating EIAs which lack professional integrity. As a result, it has started taking some measures such as requesting proponents to use consultants to prepare EIAs if they can or experts in the field of their operation if they cannot use consultants.⁶⁹⁰ For instance, the TREA has been requesting proponents to use experts in the field of agriculture to do EIA for agricultural projects.⁶⁹¹ Of course, this approach by itself is flawed because agricultural projects require knowledge other than in the field of agriculture. In any case, beyond making such requests, TREA believes that it cannot force proponents (which are few in number) to use experts/consultants because there is no legal framework such as directives authorizing it to force them to do so.⁶⁹²

Incidentally, the above assertion of TREA that it cannot force proponents to use experts does not appear consistent with article 7(2) of the EIA Proclamation, which states:

A proponent shall ensure that the environmental impact of his project is conducted and the environmental impact study report prepared by experts that meet the requirements specified under any directive issued by the Authority [FEPA].

In light of this stipulation, although the type, number, experience and other issues relating to the experts that should be involved in conducting EIA and preparing reports are still not settled due to lack of FEPA's directives to that effect, it is crystal clear that proponents must use experts with pertinent knowledge (otherwise, such experts cannot be taken as experts for the projects of proponents) for conducting EIAs. Thus, any failure to use pertinent experts to do EIA will be contrary to this vivid stipulation of the EIA Proclamation. On the contrary, proponents' actions cannot be taken as contrary to this stipulation of the EIA Proclamation if

Regass whose CV and license are annexed to the EIA report of the project. See *Report Document on EIA on Quarry Development Submitted to the Addis Ababa EPA by Craft Consulting PLC*, November 2010 (available at the Addis Ababa EPA, EIA Unit). Although this method may not necessarily avoid the problem, it can identify who actually did or claims to have done the EIA that is submitted to the Addis Ababa EPA.

⁶⁹⁰ Yirga Tadesse and Hadush Berhe, *Supra* note 164.

⁶⁹¹ *Id.*

⁶⁹² *Id.* Moreover, the TREA has never rejected any EIS report submitted to it due to procedural or substantive problems.

they choose, for instance, diploma holders or experts with only one year experience to conduct EIA because such are details left to the non-existing FEPA directives. Therefore, by invoking this stipulation of the EIA Proclamation, TREA can indeed require proponents to use *experts*, not even *an expert*, to do EIAs.

In Amhara, the AREA states that there are some consultants who were licensed by the region's justice bureau and who are now doing EIA for projects subject to EIA.⁶⁹³ According to it, although these consultants can do EIAs for some projects, they cannot do so for all projects because they lack the necessary expertise to do EIA for some projects.⁶⁹⁴ All the same, they have been doing EIAs for all kinds of projects and for all proponents approaching them and preparing EIS reports that AREA has been considering for evaluation thus far.⁶⁹⁵ On its part, AREA accepts and evaluates EIAs only if such reports bear the seals of EIA consultants with a view to ensuring that only consultants are doing EIAs in the region.⁶⁹⁶

In Addis Ababa, at the moment, EIAs are done by consultants.⁶⁹⁷ On its part, the Addis Ababa EPA has been taking various measures to ensure that EIAs are prepared by consultants. For example, it has posted the list and addresses of EIA consultants on the door of its EIA unit to enable proponents to choose appropriate consultants for their projects.⁶⁹⁸ Similarly, it has been requiring the attachment, to EIS report, of the resume of the consultant who has prepared a given EIS report.⁶⁹⁹ However, the Addis Ababa EPA admits that although EIAs are prepared by licensed consultants, many of them are one-man EIA teams.⁷⁰⁰ Hence, the EIAs these consultants prepare cannot be scientifically or technically

⁶⁹³ Yitayal Abebe Ashot, *Supra* note 162.

⁶⁹⁴ *Id.*

⁶⁹⁵ *Id.*

⁶⁹⁶ *Id.*

⁶⁹⁷ Getachew Belachew, *Supra* note 419.

⁶⁹⁸ Anyone can find the list and addresses of some EIA consultants on the door of the EIA Unit of the Addis Ababa EPA

⁶⁹⁹ Getachew Belachew, *Supra* note 419.

⁷⁰⁰ *Id.*

valid. Moreover, some EIA consultants do not have fixed offices.⁷⁰¹ As a result, some proponents could not find them, for example, to request to make modifications to their EIS reports in accordance with the comments of the Addis Ababa EPA.⁷⁰² Thus, these circumstances could hamper the preparation of genuine and proper EIAs although there is an attempt to ensure that only experts could prepare EIAs.

Finally, it is necessary to briefly discuss the experiences of some federal sectoral offices which act as both proponents of projects and evaluators of EIS reports. For example, the Ministry of Mines evaluates, because it is delegated to do so, EIS reports done by proponents in the field of mining and petroleum provided that the EIAs are done by experts.⁷⁰³ The Ethiopian Road Authority (ERA) also hires consultants who command the necessary experts to do EIA for its road construction projects and then provides them with TOR at the beginning and sometimes monitors them when they do EIA.⁷⁰⁴ Moreover, there are times when ERA does EIA by itself using its owning experts, whereas this usually happens when its projects are to be funded by donors and donors request quick EIA and ECC.⁷⁰⁵ The practice of the Ethiopian Electric Power Corporation (EEPCO) is similar to that of ERA. While EEPCO hires consultants, domestic or international, to do EIAs for its large scale projects, it prepares EIAs using its own experts if the project is a medium scale one.⁷⁰⁶

In conclusion, the EIA Proclamation requires an EIA to be done by experts so that the impact of a given action on the environment is properly assessed. Experience also shows that this has been the case under certain circumstances. However, this requirement is not always fully met due to various reasons including the consultants' lack of necessary expertise, the

⁷⁰¹ *Id.*

⁷⁰² *Id.*

⁷⁰³ Seyoum Zenebe, *Supra* note 592.

⁷⁰⁴ Silesh Degefa, *Supra* note 589.

⁷⁰⁵ *Id.*

⁷⁰⁶ Yohannes Yosef and W/o Fikrte Kebede, *Supra* note 590.

operation of one-man EIA teams, and some REAs' failure to ensure that the EIS reports submitted to them are prepared by experts before they embark on report review.

6.5 Evaluation of EIAs

The evaluation/review phase of the EIA process also demands the involvement of experts with multidisciplinary knowledge. In fact, it is said that the relevant authority that is in charge of reviewing EIAs must have qualified multidisciplinary staff at its disposal to ensure that the EIAs are evaluated adequately and professionally.⁷⁰⁷ Thus, if an authority can command such experts, it will be in a position to assess whether the proposed project is environmentally sound. With this in mind, let us now turn our attention to the reality in Ethiopia and see whether evaluation of EIAs has been carried out by a team of experts with multidisciplinary knowledge. However, it should be noted that we will consider only issues relating to the review of EIAs for projects as we have had no EIAs for strategies so far.

To start with, the experience of FEPA in relation to EIA review is mixed. Before the implementation of the BPR, the abolition of the EIA department, and the delegation of EIA evaluation mandate to sectors, EIAs were evaluated by FEPA using various experts including at times experts working for NGOs and government organs.⁷⁰⁸ Thus, the chance of making EIAs evaluated by people with relevant expertise was high. Currently, however, as the EIA department does not exist and part of FEPA's EIA review mandate has been delegated to other agencies, FEPA has only a few experts (in biology, law and crop science) to review EIAs.⁷⁰⁹ Therefore, the situation at FEPA at the moment is not suitable to have good review of EIS reports. In other words, no one can dare say that the few experts that are at the disposal of FEPA can provide adequate and professional review of EIAs to correctly identify what the possible impact of a proposed project will be on the environment.

⁷⁰⁷ MOHAMMED A. BEKHECHI AND JEAN-ROGER MERCIER, *Supra* note 15, at 35.

⁷⁰⁸ Solomon Kebede, *Supra* note 160.

⁷⁰⁹ *Id.*

The situation of EIA evaluation in many of our regions is similar to, if not worse than, the current trend at FEPA. That is, EIAs are not usually evaluated by a team consisting of experts with multidisciplinary knowledge.

In Oromia, OREA has EIA experts (not more than four) in chemistry, agriculture, and water ecology.⁷¹⁰ These experts are responsible for evaluating EIAs submitted to OREA.⁷¹¹ Moreover, they do review EIAs often acting separately.⁷¹² That is, the common practice in OREA is that one expert evaluates one EIA and then decides whether ECC should be issued and on what conditions, if any. Of course, there are also times, though not common, when these experts work as a team to evaluate a given EIA.⁷¹³ Another point worth mentioning is the fact that the process of evaluation at OREA is not participatory, that is, there is no public participation at this stage.⁷¹⁴

In SNNPRS, although the situation now is getting better than what it used to be, generally, SREA is understaffed to effectively review EIAs.⁷¹⁵ Moreover, although EIA is expected to be evaluated by a team of experts, it is evaluated by a single person who is given the responsibility to do so.⁷¹⁶ That is, SREA gives an EIA to one person it thinks fit to review the report at hand and comment on the possible action to be taken. This is done because SREA believes that reviewing EIA in group takes time, whereas proponents demand the issuance of ECC in a very short period.⁷¹⁷ Besides, the fact that the EIA Proclamation does not give adequate time for serious consideration of EIAs has led SREA to use only one person for

⁷¹⁰ Alemayehu Geleta, *Supra* note 160.

⁷¹¹ *Id.*

⁷¹² *Id.*

⁷¹³ *Id.*

⁷¹⁴ *Id.*

⁷¹⁵ Weldeberhan Kuma, *Supra* note 161.

⁷¹⁶ *Id.*

⁷¹⁷ *Id.*

report evaluation.⁷¹⁸ At any rate, this single person is required to decide on the fate of an EIA. Of course, he is required to take factors such as project type, size, location, and engagement of the public in the EIA process at some stage to reach his conclusion.⁷¹⁹ In the end, if he suggests that the EIA should be approved and ECC be issued, that will be done. If, on the contrary, he suggests the consideration of some more issues or its rejection, the recommended action will be taken. So far, there has been only one proposed project that has been rejected based on the EIA submitted to SREA because the proponent wanted to use a protected area.⁷²⁰ All the other EIAs submitted to SREA hitherto have been accepted and ECCs were issued to their proponents although some of the proponents were required to make some changes to their EIAs before they were given ECC.⁷²¹

In Amhara, AREA has adopted a generalist approach.⁷²² Thus, AREA expects its experts to have a general knowledge of the issues involved in EIAs and be able to review them accordingly.⁷²³ Hence, when EIA is submitted to AREA, the leader of the EIA team gives the report to anyone with less work burden (not even the relative pertinence of their knowledge to the proposed project) to review and give comments on the possible actions that needs to be taken.⁷²⁴ Therefore, like in Oromia and SNNPRS, EIAs in Amhara are evaluated by a single person. Of course, there are times when the experts at AREA exchange reports or even hold group discussions, although not required of them, to help one another and produce better review result.⁷²⁵ After comments are made on EIAs through such cooperative work, the

⁷¹⁸ *Id.*

⁷¹⁹ *Id.*

⁷²⁰ Here, the project proposal indicated that the proponent wanted to, among other things, breed cattle and give showering service. The project was to be implemented in *Cheleleqa* wetland-sensitive and protected area. The proponent did EIA and submitted its report to SREA for evaluation. After evaluation, SREA found that the project had to be rejected. *Id.*

⁷²¹ *Id.*

⁷²² Melisachew Fantie, *Supra* note 477.

⁷²³ *Id.*

⁷²⁴ *Id.*

⁷²⁵ *Id.*

comments will be communicated to the team leader in the name of the responsible expert.⁷²⁶

As far as public participation at this stage is concerned, the practice in Amhara is not different from the practice elsewhere, that is, it is not participatory.⁷²⁷

In Tigray, EIAs for projects involving less than 100,000 birr are evaluated at the *woreda* level where there is only one EIA expert to consider all issues involved in EIA evaluation and to issue ECC.⁷²⁸ However, if the project for which EIA is done involves more than 100,000 birr, the EIA is evaluated at the regional level.⁷²⁹ Thus, it will be TREA that can approve reports for such projects and issue ECC or recommend changes thereto or rejects them. Nonetheless, the practice in the region demonstrates that TREA has not so far rejected any project based on EIAs or even recommended modifications to the EIAs submitted to it.⁷³⁰ This means that all the EIAs that TREA has reviewed thus far have been approved and all proponents that have approached TREA have obtained an ECC. As far as the experts involved are concerned, TREA uses a team comprising of three experts in agriculture or related field to review and take appropriate actions on EIAs.⁷³¹ According to TREA, these experts can handle issues arising out of EIA review because the big projects for which EIAs have been submitted to it so far are agricultural projects.⁷³² Besides, TREA admits that it has not yet started full-scale EIA review due to lack of sufficient manpower for the job.⁷³³ Finally, like in Oromia, SNNPRS, and Amhara, the public does not participate in the EIA review process at TREA.⁷³⁴

The issue of EIA review in the Somali region does not seem relevant. This is so because, as we have seen before, there is virtually no EIA done in the region. Moreover, the Somali REA

⁷²⁶ *Id.*

⁷²⁷ *Id.*

⁷²⁸ Yirga Tadesse and Hadush Berhe, *Supra* note 164.

⁷²⁹ *Id.*

⁷³⁰ *Id.*

⁷³¹ *Id.*

⁷³² *Id.* It is clearly difficult to buy this argument because agricultural projects can involve issues going beyond agriculture such as legal, social, ecological and economical.

⁷³³ *Id.*

⁷³⁴ *Id.*

also believes that projects implemented in the region so far have not required EIA because they did not have a significant impact on the environment. Of course, this argument is difficult to accept as we have seen previously.⁷³⁵

In Afar, the Afar REA does not have adequate staff to properly review EIAs.⁷³⁶ Thus, when proponents submit EIAs to it, it seeks that assistance of experts from other offices in the region to review them.⁷³⁷ Moreover, the Afar REA does not involve the public in its EIA review process.⁷³⁸

In Addis Ababa, the Addis Ababa EPA has six experts to handle EIA review.⁷³⁹ Accordingly, reports that are submitted to the Addis Ababa EPA are reviewed by at least three experts with pertinent knowledge to proposed projects.⁷⁴⁰ However, the Addis Ababa EPA admits that there are still factors affecting its effectiveness in relation to reviewing EIAs.⁷⁴¹ For instance, the existing experts are not enough as, for instance, there are no experts in fields like engineering.⁷⁴² Moreover, the existing experts lack experience in reviewing EIAs because they have never been given formal training in this regard.⁷⁴³ They are individuals who were gathered from different institutions where they were doing jobs not related to EIA.⁷⁴⁴ Further, as the time within which the review of EIA must be completed is short, which is 15 working days, the Addis Ababa EPA has not been engaging stakeholders in its EIA review process.⁷⁴⁵

⁷³⁵ See the discussion on the practice of EIA in the Somali Regional State.

⁷³⁶ Mohammed Abdulqader, *Supra* note 417.

⁷³⁷ *Id.*

⁷³⁸ *Id.*

⁷³⁹ Getachew Belachew, *Supra* note 419.

⁷⁴⁰ *Id.*

⁷⁴¹ *Id.*

⁷⁴² *Id.*

⁷⁴³ *Id.*

⁷⁴⁴ *Id.*

⁷⁴⁵ *Id.* In fact, it is doubtful if this time is enough even to review EIAs let alone dividing it into parts to accommodate public participation.

In conclusion, because there are EIAs, however limited they may be, environmental protection organs have been reviewing them. However, the review processes of these organs are marred by various defects. For instance, many environmental protection organs such as OREA, SREA, and AREA assign a single person to review EIAs although it is never possible to provide real and quality review by using one expert.⁷⁴⁶ Similarly, the review process of environmental protection organs is not participatory. Although this issue will be discussed in the next section, environmental protection organs do not engage the public in their review process thereby forfeiting the contribution the public could make to the quality of EIA evaluation. On the other hand, the failure of environmental protection organs to engage the public in EIA review process is attributable to, among other things, the paradox in the EIA Proclamation. That is, while the Proclamation requires environmental protection organs to engage the public in EIA review process, it does not allow them sufficient time to do so.⁷⁴⁷

6.6 Implementation of Public Participation in the EIA Process

As we have seen, Ethiopia has put in place a legal framework that recognizes the importance of public participation in the EIA process. However, there has never been any public participation in the country at the strategic EIA level because strategic environmental assessment for public instrument is lacking in Ethiopia.⁷⁴⁸ On the other hand, project level EIAs are done even though they are not as numerous as the law would require. Accordingly, it is possible to discuss the actual implementation of public participation processes at this

⁷⁴⁶ Among other things, the fact that most of the environmental protection organs are understaffed and the need to provide speedy service to proponents make these organs use one person to review EIAs. On the other hand, this method is inherently defective because the reviewer will comment on the report only from the perspective of his profession and leave issues involving other professions intact. It is also clearly contrary to what the EIA Proclamation envisages when it recognizes the use of EIA and mandates environmental protection organs to evaluate such reports.

⁷⁴⁷ The Proclamation allows less than 15 working days to review EIAs. However, public participation may require months, not just weeks. This is true in particular when the public to be consulted is found in remote area, there is language barrier, and the concerned public is not literate.

⁷⁴⁸ If no SEA has ever been done so far although it is a decade since the EIA Proclamation was enacted, one may be tempted to assert that SEA in our case is more of an aspiration than a real commitment to implement.

stage.⁷⁴⁹ I will address project level public participation both when an EIA is done by proponents and when that report is evaluated by the environmental protection organs or their delegates.

6.6.1. Public Participation When an EIA is Drafted

Proponents are required to involve the public, in particular, the communities that are likely to be affected by the implementation of their projects when they conduct EIA thereof.⁷⁵⁰ In practice, however, public participation in the EIA of projects is quite limited. For instance, at the federal level, most projects of the federal government do not pass through EIA unless some kind of external funding exists and the funders demand EIA to be done. Similarly, many private projects which are subject to EIA and which require federal licensing do not pass through EIA because licensing bodies do not demand an ECC before issuing a license. Further, and in relation to private projects, there are times when a single person sits in office and ticks in EIA checklists obtained from the relevant government body and prepares a fictitious EIA which is as good as having no EIA. Finally, there are times when public participation is deliberately avoided.⁷⁵¹ Accordingly, the public participation process has thus far been minimum, a fact that renders the public's right to participate in the EIA process illusory. According to some people, the absence of binding and detailed instruments

⁷⁴⁹ Actually, most public participation in the EIA process probably occurs at the project level. For example, in Hungary, the level at which most public participation in environmental decision-making occurs is the project level, although environmental organizations do also have the legal right to participate in the development of environmental policies, laws, and regulations. See Alexios Antypas, *A NEW AGE FOR ENVIRONMENTAL DEMOCRACY: THE AARHUS CONVENTION IN HUNGARY*, 6 *Env. Liability* 199, 202-203 (2003)

⁷⁵⁰ See the discussion in chapter two on the legal framework in relation to public participation in Ethiopia.

⁷⁵¹ Solomon Kebede, *Supra* note 160. Moreover, according to Ato Solomon, while some government organs often involve the public in the EIA process, some consultants for private projects choose to forge the names, comments, signatures, and the other necessary information of false participants in the EIA process and also to draft minutes of their discussions with the public. Of course, in order to ensure real public participation in particular the community likely to be affected by a project in the EIA process, FEPA has been trying to take measures such as requiring proponents to videotape the public (community) during participation (consultation).

pertaining to public participation in the EIA process is to blame for the limited level of public participation.⁷⁵²

The practice in relation to projects that are subject to regional licensing is not different. For example, according to one FEPA official, public participation in the EIA process in the regions is nearly non-existent due to factors such as the failure by REAs to ensure that public participation takes place in the EIA process.⁷⁵³ The officials of many REAs also admit that they have not been trying to ensure public participation when EIAs are prepared.

For instance, in SNNPRS, public participation when EIA is conducted is not an issue. First, most projects that are implemented in the region do not pass through the EIA process.⁷⁵⁴ Second, consultants deliberately avoid engaging the public in the EIA process.⁷⁵⁵ Third, the SREA itself has not been trying to ensure the use of EIA because it lacks autonomy and capacity to do so.⁷⁵⁶

In Tigray, too, public participation is often not an issue.⁷⁵⁷ For instance, EIAs are usually conducted in the region only for large projects and not for all projects that require an EIA under FEPA's Guidelines.⁷⁵⁸ On the other hand, the absence of EIA for projects which require an EIA limits the chance of public participation. Moreover, and to make things worse, most consultants who do EIAs for big projects do not engage the public in the

⁷⁵² *Id.* For example, at EIA preparation stage, CEQ Regulation imposes various duties on lead agencies to effectively involve the public in the EIA Process. See CEQ Regulations sec. 1506.6. In our case, although FEPA Guidelines contain similar stipulations, they are not binding.

⁷⁵³ Solomon Kebede, *Supra* note 160.

⁷⁵⁴ Weldeberhan Kuma, *Supra* note 161.

⁷⁵⁵ *Id.*

⁷⁵⁶ *Id.*

⁷⁵⁷ However, in the future, TREA has a plan to ensure that the public in particular the community to be affected by a given project is consulted when EIA is done. For the moment, however, if the *woredas* say the public was engaged as they are closer to the public, then TREA has no option but to believe them even if it knows that the allegation is not genuine. Yirga Tadesse and Hadush Berhe, *Supra* note 164.

⁷⁵⁸ *Id.*

process.⁷⁵⁹ Of course, there are proponents, although they are few, which try to engage the public when they do EIA for their projects.⁷⁶⁰ For instance, the regional Bureau of Water Resource usually tries to engage the public in particular the community that is likely to be affected by the implementation of its projects when it does EIA.⁷⁶¹

The situation in the Somali and Afar regions is even worse. For example, in the Somali region, virtually no EIAs are performed.⁷⁶² In Afar, although EIAs are done for a few projects, the reports may be considered and approved even if the process was not participatory.⁷⁶³

In Oromia, Amhara, and Addis Ababa, however, some sort of public participation is, in fact, sought by the REAs when an EIA is done. The process, however, is not entirely satisfactory.

In Oromia, OREA has been trying to ensure that EIAs are conducted in a participatory manner.⁷⁶⁴ It has started requiring proponents of private projects to engage the public when they draft an EIA, and it considers public participation as one of the conditions necessary to approve EIAs.⁷⁶⁵ As a result, OREA has refused to approve EIAs because consultants failed to seek comment from the communities that were likely to be affected and failed to include their comments in the final EIA.⁷⁶⁶ In such cases, OREA has been recommending the inclusion of the public comments in the EIA.⁷⁶⁷ However, OREA admits that, due to a lack of monitoring when EIAs are done, proponents may produce reports which lack professional

⁷⁵⁹ *Id.*

⁷⁶⁰ *Id.*

⁷⁶¹ *Id.*

⁷⁶² See the previous discussion on the practice of EIA in Somali Region.

⁷⁶³ Mohammed Abdulqader, *Supra* note 417.

⁷⁶⁴ Alemayehu Geleta, *Supra* note 163.

⁷⁶⁵ *Id.*

⁷⁶⁶ *Id.*

⁷⁶⁷ *Id.*

integrity⁷⁶⁸ with regard to public participation.⁷⁶⁹ Yet, it can always investigate into the truth of allegations made in relation to public participation if there are doubts.⁷⁷⁰ Indeed, there were times when OREA carried out such investigations and actually found out that claims of public participation in the EIA process were false and then ordered proponents to genuinely engage the public to have their EIAs reviewed.⁷⁷¹ Generally, therefore, although there are some problems, OREA has been taking steps to ensure that there is genuine public participation and that the public's comments are included in the final EIA.

In Amhara, AREA states that no EIA is approved if it is not shown that there was consultation in particular with the community that is likely to be affected by the implementation of a proposed project.⁷⁷² Indeed, this is one of the minimum requirements AREA demands to take action on EIAs.⁷⁷³ In order to ensure that there is genuine public consultation, most AREA experts that are entrusted with the task of evaluating EIAs usually go to projects sites and try to find out whether there was public consultation.⁷⁷⁴ As a result, there were times when these experts discovered that the names and minutes of public consultation included in EIAs were false and the concerned proponents were made to hold real public consultation before they could obtain ECC.⁷⁷⁵ Moreover, in addition to sending out experts to projects sites, AREA tries to ensure the presence of genuine public consultation by requiring the minutes of public consultation included in EIAs to bear the seal of the concerned *kebele* administration and the signature of the *kebele* chairperson.⁷⁷⁶ Usually, false

⁷⁶⁸ The lack of professional integrity may be manifested by falsifying minutes of public participation (consultation) when EIA is drafted.

⁷⁶⁹ Alemayehu Geleta, *Supra* note 163.

⁷⁷⁰ *Id.*

⁷⁷¹ *Id.*

⁷⁷² Yitayal Abebe Asetih, *Supra* note 162; Melisachew Fantie, *Supra* note 477.

⁷⁷³ *Id.*

⁷⁷⁴ *Id.*

⁷⁷⁵ *Id.*

⁷⁷⁶ *Id.*

minutes do have neither the seal of *kebele* administration nor the signature of *kebele* chairperson.⁷⁷⁷

The Addis Ababa EPA requires proponents to engage the public, in particular the concerned community, when an EIA is done.⁷⁷⁸ Moreover, the Addis Ababa EPA does not approve EIAs which are prepared without involving the public.⁷⁷⁹ Where that is the case, it requires that the proponents go back and consult the public on the proposed project before it takes action.⁷⁸⁰ On the other hand, to ensure the truth of claims of public participation by proponents, the Addis Ababa EPA sometimes sends experts to the concerned community to have informal discussions with them about their participation.⁷⁸¹ Moreover, it also requires proponents to annex the photos of the people it claims were involved in the EIA process.⁷⁸² However, the Addis Ababa EPA admits that both methods have their limitations. First, it cannot always send experts to talk to the concerned community.⁷⁸³ Second, proponents can attach photos of people who gather for other social purposes.⁷⁸⁴ As a result, the Addis Ababa EPA is now planning to hold discussions with consultants to raise their awareness in relation to the need to engage the public in the EIA process, the consequences of failure to do so, and other relevant issues.⁷⁸⁵

Finally, according to some proponents, the public is also to blame for limited participation. For example, ERA indicates that when it does EIA by using its own experts, it tries its best to consult the concerned community but the turnout is generally very small.⁷⁸⁶ Moreover, when it does EIA by hiring consultants, the summary of the EIA is published in newspapers such as

⁷⁷⁷ *Id.*

⁷⁷⁸ Getachew Belachew, *Supra* note 419.

⁷⁷⁹ *Id.*

⁷⁸⁰ *Id.*

⁷⁸¹ *Id.*

⁷⁸² *Id.*

⁷⁸³ *Id.*

⁷⁸⁴ *Id.*

⁷⁸⁵ *Id.*

⁷⁸⁶ Silesh Degefa, *Supra* note 589.

Addis Zemen and *The Ethiopian Herald*, posted online, and communicated to the public through TV and radio before the EIA is submitted to FEPA for approval.⁷⁸⁷ Yet, ERA does not usually receive comments from the public on the report.⁷⁸⁸ According to Ato Silesh, this has been happening because, among other things, (1) the means of disclosure ERA uses, that is, Newspapers (*Addis Zemen* and *The Ethiopian Herald*), TV and radio, are not easily accessible to the community that is likely to be affected, (2) the urban public is usually indifferent about the impact of the proposed projects; and (3) the community that is likely to be affected by the implementation of the proposed projects is not sufficiently aware of the relevance of participation and the impact of failure to participate in the EIA process.⁷⁸⁹

The record of public participation in the Ethiopian EIA process is poor. First, there are places where there is limited or no EIA thereby making public participation nearly non-existent. Second, some REAs do not use involving the public in the EIA process as a condition to review EIAs, which, in turn, allows proponents to disregard the public when they do EIA. Third, some consultants prepare false EIA reports. Fourth, some REAs do not try to ensure that proponents engage the public when they do EIA such as through some kinds of discussions with the concerned public. Fifth, those REAs which have been trying to ensure the presence of genuine public participation in the EIA process have been facing various problems such as shortage of time to take some necessary measures. Finally, the fact that the public also does not demand participation or actively participate in EIA could be taken as another factor contributing to the existence of limited public participation when EIA is

⁷⁸⁷ The executive summary of the EIAs of ERA can be obtained from ERA's website at www.era.gov.et; See also *id.*

⁷⁸⁸ *Id.*

⁷⁸⁹ Telephone interview with Ato Silesh Degefa, Senior EIA Expert, Environmental and Social Management Team, Ethiopian Road Authority (October 6, 2011). Interestingly, language has not been a cause for the existence of limited public comments on the EIAs of ERA because ERA uses local language to communicate its EIAs to the concerned community through their *kebele* administrations. In other words, the EIAs that are sent to the concerned community are written in their local languages. The problem, however, is that those people, who are not literate, cannot comment on the EIAs that are communicated to them in a written form. *Id.*

conducted. Therefore, the cumulative effect of these and other factors have made the record of public participation in EIA when EIA is done poor.

6.6.2. Public Participation When EIAs are Reviewed

The second stage at which public participation in the EIA process can occur is when EIAs are reviewed by the environmental protection organs (or their delegates). In this regard, the environmental protection organs are obliged to make the EIAs accessible to the public and to solicit comments thereon. The question then is whether these organs have been engaging the public in their EIA review process.

At the federal level, FEPA was engaging some stakeholders such as NGOs and government agencies in its EIA evaluation process.⁷⁹⁰ Some government organs which may have interests in the EIAs of different projects also confirmed that FEPA was inviting them to comment on EIAs under certain circumstance.⁷⁹¹ Moreover, some NGOs also admitted that FEPA was engaging them in EIA evaluation process when they demanded it although it was not giving them adequate time to seriously consider and give well founded comments on the reports.⁷⁹² Therefore, it could be said that there was some form of stakeholders' participation when EIAs were reviewed by FEPA. However, such participation was limited in various ways.

First, although there is no question that REAs should be asked to comment on EIAs involving projects that would be implemented in their regions, FEPA was not involving them as

⁷⁹⁰ Solomon Kebede, Public Lecture, *Supra* note 190.

⁷⁹¹ Interview with Ato Yeneneh Teka, Director, Wildlife Development and Protection Directorate, Wildlife Development and Protection Authority, in Addis Ababa (August 31, 2009); Fanuel Kebede, *Supra* note 596; interview with two individuals at the Ethiopian Institute of Biodiversity Conservation and who demanded anonymity, in Addis Ababa (September 1, 2009). The two agencies are highly interested in having EIAs done and properly evaluated because development activities not preceded by proper EIA will affect the accomplishment of their missions.

⁷⁹² For example, interview with Ato Befekadu Refera, *Melca Mahiber*, Programme Coordinator, in Addis Ababa (June 9, 2010). This NGO was established in 2005 to work on culture and environmental conservation in Ethiopia.

stakeholders.⁷⁹³ Second, FEPA was not making EIAs accessible to the public and involving the broad-based public such as experts in the evaluation process of EIAs.⁷⁹⁴ In fact, the participation of stakeholders in the evaluation process of EIAs was limited to some sectors and NGOs.⁷⁹⁵ On the other hand, such limited participation is contrary to the FEPA's Guidelines which allow broad-based public participation such as involvement of community representatives and various experts by requiring environmental protection organs to engage *all interested and affected parties* at report review stage.⁷⁹⁶ Third, there were times when FEPA was deliberately omitting sending out EIAs to stakeholders like government agencies because it thought that they would not give prompt comments, whereas FEPA had to take action on EIAs within 15 working days.⁷⁹⁷ Indeed, it is hardly possible to expect FEPA to solicit public comments on EIAs before it takes action because the 15 working days deadline is too short to allow such practice. Therefore, although there was some sort of public participation at FEPA during EIA review, the participation is below expectation.

More interesting, though, is the current development in relation to public participation at FEPA when EIAs are reviewed. Since the commencement of the implementation of the BPR and the abolition of the EIA department, FEPA has stopped making its report review participatory.⁷⁹⁸ This means that public participation at FEPA has now moved from bad to worse because we do not even have the limited public participation we used to have.

The situation at the regional level is not any different from, if not worse than, what we have seen at the federal level. For instance, even if their REAs recognize that public participation during EIA review is necessary because it can, among other things, fill the gaps that are

⁷⁹³ See, generally, the interviews made with various REAs' officials as discussed in various parts of this paper.

⁷⁹⁴ Solomon Kebede, *Supra* note 160.

⁷⁹⁵ *Id.*

⁷⁹⁶ See FEPA Guidelines, Section 6.4.

⁷⁹⁷ Solomon Kebede, *Supra* note 160.

⁷⁹⁸ *Id.*

created by lack of adequate manpower to evaluate reports, EIA reviews in Oromia,⁷⁹⁹ SNNPRS,⁸⁰⁰ Tigray,⁸⁰¹ Amhara,⁸⁰² and Afar⁸⁰³ have not been participatory. It is interesting to see that even the relatively better performing Addis Ababa EPA does not review EIAs in a participatory manner.⁸⁰⁴ On the other hand, the failure to involve the public at this stage is contrary to the EIA Proclamation.⁸⁰⁵ More importantly, according to article 43(2) of the FDRE Constitution, citizens have the right to participate in national development and, in particular, to be consulted with respect to policies and projects affecting their community. Therefore, failure by environmental agencies to engage the public in particular the community that is likely to be affected by the implementation of the proposed projects appears to a violation this constitutional right.⁸⁰⁶

One may wonder why public participation is omitted when EIAs are evaluated. The first real problem is lack of adequate time to involve the public. The EIA Proclamation requires public participation during EIA review process. Ironically, however, it allows only 15 working days to review reports, solicit public comments, and take actions. This is practically impossible. Moreover, some environmental protection organs mention other factors which have made the review of their EIAs non-participatory. For instance OREA,⁸⁰⁷ TREA,⁸⁰⁸ and the Addis Ababa

⁷⁹⁹ Alemayehu Geleta, *Supra* note 163.

⁸⁰⁰ Weldeberhan Kuma, *Supra* note 161.

⁸⁰¹ Yirga Tadesse and Hadush Berhe, *Supra* note 164. In Tigray, as the previous discussion has shown, EIA evaluation takes place at two places-at the *woreda* and regional level. At *woreda* level, it is only one person that evaluates an EIA. At the regional level, although one person used to evaluate EIAs, there are now three persons for the job. At both levels, EIA review is not participatory.

⁸⁰² Yitayal Abebe Asetih, *Supra* note 162; Melisachew Fantie, *Supra* note 477.

⁸⁰³ Mohammed Abdulqader, *Supra* note 417.

⁸⁰⁴ Getachew Belachew, *Supra* note 419.

⁸⁰⁵ On the contrary, one may wonder if the EIA Proclamation is not self-defeating because it does not allow sufficient amount of time to involve the public in the review process of EIAs.

⁸⁰⁶ Once again, it is difficult to say that environmental agencies have violated the constitutional right of citizens or the community that is likely to be affected by the implementation of projects because the EIA Proclamation allows only 15 working days for both review and public involvement, whereas this period is not enough even for proper review of reports.

⁸⁰⁷ Alemayehu Geleta, *Supra* note 163.

⁸⁰⁸ Weldeberhan Kuma, *Supra* note 161.

EPA⁸⁰⁹ cite the absence of adequate manpower, the need to give speedy service to intolerant investors who demand an ECC on the spot, and lack of independence which sometimes leads superiors to give direct orders to such organs to issue ECC soon or to admonish the personnel at these organs for not doing their jobs properly as some of the reasons why they do not review EIAs in a participatory manner.

Therefore, although FEPA was allowing some kind of public engagement in EIA review process in the past, it has now abandoned it. Moreover, the other environmental protection organs have not been allowing public participation during EIA review process. Hence, when this is coupled with very limited public participation when EIAs are done by proponents, the possibility of having effective public participation becomes nil. In the end, the problem of public participation does have a negative ramification for the effectiveness of the whole system of EIA in the country because effective public participation in the EIA process at all levels is indispensable for the system's effectiveness.

⁸⁰⁹ Getachew Belachew, *Supra* note 419.

CHAPTER SEVEN: CONSEQUENCES OF FAILURE TO UNDERTAKE EIA

7.1 Introduction

The EIA Proclamation put proponents under different obligations. Hence, failure by proponents to discharge these obligations may entail consequences.⁸¹⁰ In this Chapter, we will discuss the possible measures that can be taken against those who fail to discharge their duties under the existing legal framework together with other related issues.

7.2 Criminal Liability

There is a general trend that a person who violates provisions of environmental law may be considered criminal and, hence, subjected to criminal sanctions.⁸¹¹ For instance, in Tanzania, the 2004 Environmental Management Act uses criminal sanctions to deter failures to prepare

⁸¹⁰ In the absence of consequences that follow non-compliance with environmental regulations, the entities that are regulated may not have motivation to use environmental protection methods which could be costly. Thus, measures should be taken in response to violations of environmental regulations to deter further violations even if compliance with such regulations may be costly. See, for example, ROBER L. GLICKSMAN ET AL., *Supra* note 341, at 1007-1008.

⁸¹¹ ORLA JOYCE, ENVIRONMENTAL LIABILITY included in ENVIRONMENTAL LAW 231 (Anne-Marie Mooney Cotte ed., Cavendish Publishing Limited, 2004) and JOEL A. MINTZ ET.AL., ENVIRONMENTAL ENFORCEMENT: CASES AND MATERIALS 211 (2007). For example, in the USA, although it may not be used for NEPA because private proponents do not prepare EIAs, many environmental laws recognize the use of criminal law to enforce their stipulations, whereas over the past two decades federal and state environmental officials have increasingly relied on the criminal provisions of these laws to secure compliance therewith. In this regard, all federal pollution control and hazardous waste statutes and many wildlife and other natural resource laws recognize the use of criminal law to enforce their stipulations. See generally JOEL A. MINTZ ET.AL., *id.* See also ROBER L. GLICKSMAN ET AL., *Supra* note 341, at 1019-1021. However, there are arguments that employing criminal law to enforce provisions of environmental law is difficult. This is so because environmental wrong usually involves a lower level of intent than many other crimes. (This is a comment from Professor William Andreen, my advisor.) However absurd it may appear, there is also an argument that says, unlike other criminal activities, environmental wrongs not only cause costs to the society but also bring about significant social benefits. See, generally, ENVIRONMENTAL LAW IN DEVELOPMENT: LESSONS FROM THE INDONESIAN EXPERIENCE 188 (Michael Faure and Nicole Niessen eds., Edward Elgar, 2006). On the possible legal and policy questions, such as degree of negligence that is needed, the use of criminal sanctions may raise, see ROBER L. GLICKSMAN ET AL., *id.* at 1019-1020. However, such benefit cannot be tenable.

EIAs as required by law or fraudulently making false statements in EIAs.⁸¹² In South Korea, the 1997 EIA Act subjects violations of its provisions such as preparing false EIAs to criminal sanctions.⁸¹³ Therefore, criminal liability could be one of the consequences that failure to comply with EIA requirements entails.

The position in Ethiopia is also the same as violation of environmental legislation usually gives rise to criminal liability. For example, a person who fails to do EIA when he is required to do so or who does it but in a manner contrary to the necessary stipulations commits a wrongful act which constitutes a crime. In this regard, article 18 of the EIA Proclamation states:

Article 18: Offences and Penalties

- 1) Without prejudice to the provisions of the Penal Code,⁸¹⁴ any person who violates the provision of this Proclamation or of any other relevant law or directive commits an offence and shall be liable accordingly.
- 2) Any person who, without obtaining authorization from the Authority or the relevant regional environmental agency, [implements a project on which an environmental impact assessment is required by law] or makes false presentations in an environmental impact assessment study report commits an offence and shall be liable to a fine of not less than fifty thousand birr and not more than one hundred thousand Birr.
- 3) Any person commits an offence if he fails to keep records or to fulfill conditions of authorization issued pursuant to this Proclamation and shall be liable to a fine of not less than ten thousand Birr and not more than twenty thousand Birr.
- 4) When a juridical person commits an offence, in addition to whatever penalty it may be meted with, the manager who failed to exercise all due diligence shall be liable to a fine of not less than five thousand Birr and not more than ten thousand Birr.
- 5) The court before which a person is prosecuted for an offence under this Proclamation or regulations or directives emanating from it, may, in addition to any penalty it may impose, order the convicted person to restore or in any other way compensate for the damage inflicted.

Article 18 of the EIA Proclamation, therefore, subjects a person who fails to do EIA or violates the EIA Proclamation or other relevant law or directive pertaining to EIA to a

⁸¹² See ENVIRONMENTAL MANAGEMENT ACT of Tanzania, 2004, Section 184 in *Law, Environment and Development Journal*, 3 Volume 3, 48 (2007), available at <http://www.lead-journal.org/content/07290.pdf> (hereinafter *Law, Environment and Development*).

⁸¹³ WORLD BANK, *Supra* note 68, at 43.

⁸¹⁴ By *Penal Code*, the EIA Proclamation refers to the 1957 Penal Code of the Empire of Ethiopia because the present Criminal Code did not exist when the EIA Proclamation was enacted. On the other hand, the Penal Code did not criminalize failure to observe the requirements of EIA because it was enacted more than a decade earlier than the emergence of the system of EIA itself. Yet, the Penal Code criminalizes acts such as contamination of water and pastureland. Thus, when the EIA Proclamation leaves the application of the provisions of the Penal Code intact, it seems to refer to environmental crimes other than crimes involving EIA as crimes involving EIA were not included in the Penal Code. Penal Code of the Empire of Ethiopia, 1957, articles 503ff.

criminal sanction. Then, it provides for the penalty such a person has to serve. Accordingly, a person who performs an act contrary to EIA, that is, a person who fails to obtain authorization from FEPA or the relevant REA for his action or makes false presentations in an EIA study report will be liable to a fine of not less than fifty thousand birr and not more than one hundred thousand Birr. For example, proponents who produce false EIAs or who forge false minutes with the public together with their signatures face these fines. Moreover, a person who obtains authorization from the relevant environmental protection organ but fails to fulfill the conditions of such authorization while putting his action into effect will be liable to a fine of not less than ten thousand Birr and not more than twenty thousand Birr. Finally, if the crime is committed by a juridical person, the Proclamation subjects its manager, in addition to the penalty the juridical person has to serve, to a fine of not less than five thousand Birr and not more than ten thousand Birr provided that he failed to exercise all due diligence.⁸¹⁵

There are some important points worth emphasizing here. First, these criminal measures do not apply to proponents of public instruments who fail to respect the EIA Proclamation or any law issued thereunder. This is so because public instruments are initiated by government organs and government organs are not criminally responsible. In this regard, the Criminal Code of Ethiopia clearly exempts state organs from criminal liability.⁸¹⁶ Similarly, if government organs are proponents of projects and they violate the EIA Proclamation or any other law issued thereunder, they cannot be held liable under article 18 of the EIA Proclamation. Therefore, one can conclude that the criminal remedy article 18 of the Proclamation provides applies only to proponents of private projects.

⁸¹⁵ EIA Proclamation, Article 18(4). Under the US environmental statutes, the responsible corporate officials could be sentenced to prison for crimes committed by juridical persons. (Comment received from Professor Andreen, one of my advisors.)

⁸¹⁶ Article 34(1) of the Criminal Code excludes the administrative bodies of the State from the realm of juridical persons that can be held criminally liable.

Second, the EIA Proclamation also deals with juridical persons. A juridical person is an artificial person created by law. Hence, the criminal liability of juridical persons is always in a sense vicarious because it is necessarily incurred through the acts of their members.⁸¹⁷ This means, juridical persons can be held criminally responsible and their responsibility is premised upon the theory of agency as it is the act of their employees that is imputed to them.⁸¹⁸ Cognizant of this fact, the EIA Proclamation recognizes the liability of juridical persons who violate EIA laws.

As far as the penalties are concerned, article 18 of the EIA Proclamation does not make any distinction between natural persons and juridical persons. Both are subject to the same penalty if they commit offences related to EIA; that is 50,000-100,000 birr or 5,000-20,000 birr depending on the type of crime they commit. However, the Criminal Code makes a very important stipulation in this regard. Article 3 of the Code states that the provisions in the Code will not affect the stipulations made in regulations and special laws of a criminal nature provided that the general principles embodied in the Code are applicable to those regulations and laws unless they contain different general principles. This means, the other stipulations such as extent of penalties they make should remain intact. However, if these regulations or special laws do not have their own general principles, the general principles in the Criminal Code will be applicable to enforce their provisions.

Coming to the EIA Proclamation, although the Criminal Code criminalizes acts contrary to EIA under article 521, article 18 of the EIA Proclamation applies by virtue of article 3 of the Code. However, since the EIA Proclamation contains no general principles governing

⁸¹⁷ SMITH AND HOGAN, CRIMINAL LAW: CASES AND MATERIALS 275, 7th ed. (1999).

⁸¹⁸ STEPHEN A. SALTSBURG ET. AL., CRIMINAL LAW: CASES AND MATERIALS 254 (1994). It is generally accepted that legal persons can incur liabilities, both civil and criminal, and they can cause harms that can constitute crimes. See SMITH AND HOGAN, *Supra* note 817, at 275. For instance, transnational corporations can pollute the environment in the course of doing business thereby endangering the health, person or lives of many individuals.

penalties, the general principles of the Criminal Code relating to penalties apply in conjunction with the stipulations of article 18 of the EIA Proclamation. One of such general principles is recognized under article 90(4) of the Code. This article provides that where only fine is provided as a penalty for a given crime and the criminal is a juridical person, then, the fine should be made five fold. This stipulation seems justifiable since juridical persons can be financially more potent than natural persons and hence subjecting them to the same fine with natural persons may not serve the purpose of punishment such as deterrence. Accordingly, if a juridical person commits a crime involving EIA, the extent of the fine it is subject to will be 250,000-500,000 birr or 50,000-100,000 depending on the type of crime it has committed. That is, a juridical person will be fined 250,000-500,000 birr if it fails to obtain an ECC from FEPA or the relevant REA before it implements its project or if it makes false presentations in an EIA study report. It will be fined 50,000-100,000 birr if its crime relates to failure to keep records or to fulfill conditions of authorization issued pursuant to the EIA Proclamation.⁸¹⁹

At this juncture, it is important to note that the Criminal Code attaches a severe penalty to crimes involving EIA. In this regard, article 521 states:

Whoever, without obtaining authorization from the competent authority, implements a project on which an environmental impact assessment is required by law or makes false statements concerning such assessment is punishable with simple imprisonment not exceeding one year.⁸²⁰

⁸¹⁹ For a detailed discussion on the criminal responsibility of juridical persons in Ethiopia, see generally Dejene Girma Janka, *Essay on the Criminal Responsibility of Juridical Persons in Ethiopia* (discussing the position of the criminal law of Ethiopia on the criminal responsibility of juridical persons), 2 Jimma University Journal of Law 83, 83-113(2009). At this juncture, it is important to note that some countries may regard crimes relating to EIA as serious and provide for severe penalties. For example, the 2004 Environmental Management Act of Tanzania treats failure to prepare an EIA as required by law or fraudulently making false statements in EIAs and submitting such statements to the concerned government organ as a crime which may entail fine not exceeding ten million shillings and imprisonment for a term of two to seven years. See *Law, Environment and Development*, *Supra* note 812. In light of this, the criminal liability our laws provide for crimes involving EIA may be taken as lenient.

⁸²⁰ Criminal Code, article 521.

This stipulation of the Criminal Code is the same as the stipulation of article 18(2) of the EIA Proclamation. The question then is which of the two laws will apply in case the crimes they define are committed. Arguments favoring the application of both laws can be forwarded.

The first argument could be article 18 of the EIA Proclamation governs crimes involving EIA, whereas the provisions of the Criminal Code are meant to supplement the EIA Proclamation. This is so because article 3 of the Criminal Code states that its provisions will not affect the stipulations made in regulations and special laws of a criminal nature. On the other hand, the EIA Proclamation is a special law and article 18 is of a criminal nature. Accordingly, article 18(2) of the EIA Proclamation seems to override article 521 of the Criminal Code.⁸²¹

The other argument is article 521 of the Criminal Code applies to crimes involving EIA and article 18 of the EIA Proclamation can be used to fill the gaps in the Criminal Code. Two possible reasons can be mentioned here. First, the Criminal Code is a subsequent law as it came into force on the 9th of May 2005. Hence, it prevails over the stipulations of the EIA Proclamation on similar subject-matter. Of course, article 3 of the Criminal Code allows the application of the stipulations made in regulations and special laws of a criminal nature. However, the regulations and special laws the Code envisages are those that are made after the Criminal Code was enacted, whereas the EIA Proclamation was made in 2002. Second, article 521 of the Criminal Code and article 18(2) of the EIA Proclamation deal exactly with the same crimes, that is, implementing projects that are subject to EIA without obtaining ECC and making false statements in EIAs. However, both laws attach different penalties to these crimes. Hence, it could be said that the HPR would not have attached a different penalty to these crimes in the Criminal Code if it did not want the Criminal Code to govern them.

⁸²¹ We cannot use article 521 of the Criminal Code because its contents are exactly the same as that of article 18(2) of the EIA Proclamation.

Accordingly, a person who implements a project that requires EIA without obtaining authorization from the competent authority or makes false statements in an EIA may be sentenced to simple imprisonment not exceeding one year in accordance with article 521 of the Criminal Code.

At any rate, whichever argument is accepted, the fact of the matter is that failure to observe EIA requirements calls for the application of criminal law. Accordingly, we can employ criminal remedies to enforce the provisions of the EIA Proclamation or laws issued thereunder. At this juncture, it is necessary to bear in mind that the Criminal Code provides for an even harsher penalty if a crime involving EIA causes harm. For example, article 519 of the Criminal Code stipulates that a proponent who fails to do an EIA is liable to rigorous imprisonment of up to ten years if the failure causes serious consequences to the health or life of a person or to the environment.⁸²² If such a crime is committed by a juridical person, the imprisonment will be converted to a fine in accordance with article 90(3) of the Criminal Code.

Sadly, although both the Criminal Code and the EIA Proclamation recognize criminal remedies for EIA infractions, practice shows that such remedies have never been used. For instance, FEPA has not so far referred any cases to the public prosecutor.⁸²³ Similarly, the REAs in different regions such as in Amhara,⁸²⁴ Oromia,⁸²⁵ Tigray,⁸²⁶ and SNNPRS⁸²⁷ have not referred any such cases. Therefore, at the moment, the criminal provisions recognized by the EIA Proclamation and the Criminal Code in relation to wrongful conduct involving EIA are not operative. They only have symbolic value.

⁸²² For the crimes committed by spreading disease and polluting the environment, see generally, Criminal Code, FDRE, 2004, articles 514-534.

⁸²³ Solomon Kebede, *Supra* note 160.

⁸²⁴ Yitayal Abebe Asetih, *Supra* note 162.

⁸²⁵ Alemayehu Geleta, *Supra* note 163.

⁸²⁶ Yirga Tadesse and Hadush Berhe, *Supra* note 164.

⁸²⁷ Weldeberhan Kuma, *Supra* note 161.

7.3 Civil liability

One of the first liabilities that a person may face for a behavior contravening environmental regulations is civil liability such as payment of damage, injunction, restitution, and remediation.⁸²⁸ Different countries also recognize the use of civil liabilities as remedies or consequences for the failure to comply with environmental regulations. For instance, in Tanzania, the failure to obey environmental regulations may entail, among other things, injunction, compensation and restoration orders.⁸²⁹ In the USA, environmental laws such as the Clean Air Act,⁸³⁰ the Clean Water Act,⁸³¹ and the Resource Conservation and Recovery Act⁸³² permit the use of civil remedies such as monetary penalties and injunctive orders. In many European countries, too, various kinds of civil liabilities are recognized and are used for environmental violations.⁸³³ Therefore, it could be said that the recognition and use of different civil liabilities is seen in many countries as one of the tools to enforce environmental regulations including regulations pertaining to the use of EIA.

Does the EIA Proclamation provide for civil enforcement of its provisions or its implementing regulations? Unfortunately, the Proclamation does not clearly provide for civil

⁸²⁸ *Damage*, as one of the civil remedies, refers to financial remedy that aims at granting a plaintiff monetary compensation for the harm he has sustained with a view to restoring him to the position he was in prior to the occurrence of the harm. Although not all harms to the environment can be assessed in monetary terms such as loss of eco-services, it is said that where harm has already occurred, indemnities or compensatory damages may be awarded to the injured party to compensate for the full losses suffered to the environment and the services it provides as well as the expenses that have been incurred due to the environmental harm. Moreover, it is possible to claim damage for future harm if it is proved, not just feared, that a party is exposed to risk/hazard such as toxin as a result of environmental wrong. The other civil remedy for environmental wrong-doing is *injunction*. It is said that, in environmental context, injunction is an extremely effective remedy because it leads to prevention of imminent environmental wrong-doings from happening. *Restitution* and *remediation* are also other civil remedies. Actually, in many legal systems, restitution is the preferred remedy if it is possible for the injury to be wiped out and the situation restored to its pre-injury state. In environmental cases, courts often order environmental harm to be cleaned up or the damaged ecosystem be returned to a healthy state. For more discussions on civil remedies for environmental wrong-doings, see generally, MARK WILDE, *CIVIL LIABILITY FOR ENVIRONMENTAL DAMAGE: A COMPARATIVE ANALYSIS OF LAW AND POLICY IN EUROPE AND THE UNITED STATES* 273-289 (2002); DINAH SHELTON AND ALEXANDRE KISS, *JUDICIAL HANDBOOK ON ENVIRONMENTAL LAW* 54-56 (2005).

⁸²⁹ Environmental Management Act of Tanzania (2004), Section 226 (hereinafter *Tanzania EMA*).

⁸³⁰ STEVEN FERREY, *Supra* note 7, at 226-228.

⁸³¹ William L. Andreen, *Water Quality Today-Has the Clean Water Act Been A Success?* 55 *Alabama Law Review* 3, 549-551 (2004).

⁸³² STEVEN FERREY, *Supra* note 7, at 344-348.

⁸³³ See MARK WILDE, *Supra* note 828, at 273-289.

relief for a failure to draft an EIA or for doing it improperly. However, the Proclamation provides that the approval of EIA or the granting of an ECC by FEPA or REAs does not exonerate a proponent from liability for damages unless it is caused by the victim or a third party for whom the proponent is not responsible.⁸³⁴ This means that failure to do EIA or doing it improperly by itself does not entail civil liability.⁸³⁵ However, if the failure to do EIA or doing it in a manner contrary to the existing regulations causes damage to any person, then the proponent will be civilly liable. For example, if damage that could have been avoided by undertaking (proper) EIA is caused in the course of implementing a project, the proponent will be liable for the damage. The only defense against such liability is the fault of the victim or if the author of the damage is a third party for whom the proponent is not responsible.⁸³⁶ Moreover, a person who is convicted for committing EIA related offence may be required to restore the damaged environment or compensate for the damage inflicted.⁸³⁷ For example, a court may require such person to clean up the polluted environment or bear the cost of cleaning up.

⁸³⁴ EIA Proclamation, article 3(4) and (5).

⁸³⁵ The other laws also take the same stand. See, for example, the Pollution Control Proclamation No 300/2002 which prohibits, under article 3, any person from polluting or causing another person to pollute the environment and then authorizes environmental organs to take administrative and other legal measures against such person *if pollution occurs*.

⁸³⁶ As far as the ways of holding a proponent liable for the damage he is responsible is concerned, the 1960 Civil Code of Ethiopia provides for a framework. In this regard, first, it states that irrespective of any undertaking on his part, a person shall be liable for the damage he causes to another by an offence (Article 2027(1)). Second, the Code states that a person shall be liable where a third party for whom he is answerable in law incurs a liability arising out of an offence or resulting from the law (Article 2027(3)). This stipulation establishes the notion of vicarious liability. Third, the Code stipulates that a person can commit fault (offence) either intentionally or by negligence, or it may consist of acting or not acting (Article 2029). Thus, lack of intention with regard to the offence that has been committed does not exonerate a person from liability and a person can commit a fault either by doing what is prohibited or by failing to do what is required of him. Finally, the Code clearly provides that a person who infringes any specific and explicit provision of a law, decree or administrative regulation commits an offence (Article 2035). In this regard, the EIA Proclamation clearly provides for the use of EIA with regard to certain projects or public instruments. Thus, anyone who fails to use EIA in accordance with the requirements of FEPA (directive or guidelines) violates a law within the meaning of the Civil Code. Hence, he can be held liable for committing an offence if damage happens or is certain to happen (because article 2092 of the Civil Code stipulates that any future damage which is certain to occur shall be made good without waiting for it to materialize). See the Civil Code of the Empire of Ethiopia, 1960.

⁸³⁷ See EIA Proclamation, article 18(5).

The Environmental Protection Organs Establishment Proclamation, however, directs FEPA to take measures which are necessary to carry out the duties entrusted to it.⁸³⁸ Thus, FEPA could apply to a court to get, *inter alia*, injunctive order against the implementation of any project if it wants to ensure environmental protection. More interestingly, even under the EIA Proclamation, FEPA or REAs can bring civil actions against proponents who cause harm to the environment while implementing their projects, despite the fact that they authorized the implementation of such project.

However, the practice on the ground shows that civil liabilities are not applied to those deserving them. No civil cases have ever been brought against proponents who fail to do EIAs or do inadequate EIAs. FEPA cites the absence of adequate and enabling legal environment as a major reason for its failure to do so.⁸³⁹ Moreover, the REAs also indicate that they are not taking measures leading to the imposition of civil liabilities even if there are grounds to do so. For instance, OREA,⁸⁴⁰ SREA,⁸⁴¹ TREA,⁸⁴² AREA,⁸⁴³ and the Addis Ababa EPA⁸⁴⁴ state that they have not yet taken any action to cause proponents to face civil liabilities due to different reasons such as the need to refrain from bothering investors and lack of independence. Therefore, although actions may be taken against proponents who fail to do EIA or those who do EIA but improperly with the intent to make them face civil liabilities to eventually secure compliance with EIA regulations, environmental protection organs are not taking measures entailing such liabilities.

Although some legal systems, like the US, recognize citizen suits against government agencies for failure to perform mandatory duties, such suits are not recognized in Ethiopia.

⁸³⁸ Environmental Protection Organs Establishment Proclamation, Proclamation No.295/2002, article 6(26).

⁸³⁹ Solomon Kebede, *Supra* note 160.

⁸⁴⁰ Alemayehu Geleta, *Supra* note 163.

⁸⁴¹ Weldeberhan Kuma, *Supra* note 161.

⁸⁴² Yirga Tadesse and Ato Hadush Berhe, *Supra* note 164.

⁸⁴³ Yitayal Abebe Ashot, *Supra* note 162.

⁸⁴⁴ Getachew Belachew, *Supra* note 419.

This is consistent with the old Ethiopian proverb that says *you cannot sue the government as you cannot till the sky*. In any case, the non-recognition of suits against environmental protection organs for not discharging their duties under EIA regulations largely contributes to the absence of civil action for civil liabilities against proponents because taking civil actions against proponents is in many ways contingent upon these organs doing their jobs such as issuing directives and standards.

7.4 Administrative Measures

Environmental law recognizes not only criminal and civil enforcement but also administrative enforcement of its provisions. Administrative enforcement refers to a variety of enforcement mechanisms that environmental agencies are authorized to use to secure compliance with environmental regulations on their own and without the authorization of the court or other institutions.⁸⁴⁵ This shows that administrative organs can play important role in the implementation of environmental regulations in general and EIA regulations in particular.

On the other hand, while administrative organs can use various methods of enforcing environmental regulations such as issuing supplementary instruments or setting standards, the application of administrative measures to ensure observance of environmental regulations could be taken as one of such methods. In fact, it is argued that administrative measures are fundamental enforcement tools.⁸⁴⁶ For instance, in the US, about ninety percent of the measures EPA takes to enforce environmental statutes are administrative in nature such as notices of violation, administrative compliance order, emergency orders, and administrative penalties.⁸⁴⁷ Thus, for example, any environmental legislation that deals with EIA must recognize the use of some kinds of administrative measures for failure to observe EIA related regulations.

⁸⁴⁵ JOEL A. MINTZ ET.AL., *Supra* note 811, at 79.

⁸⁴⁶ *Id.*

⁸⁴⁷ *Id.*

The EIA Proclamation does not expressly deal with administrative measures. However, reading the provisions of the EIA Proclamation and the Environmental Protection Organs Establishment Proclamation between the lines reveals that FEPA and REAs can take certain administrative measures. I will discuss some of these measures below.

7.4.1 Orders Requiring Modifications to or New EIA

First, if fictitious EIAs are produced FEPA or the REAs can order proponents to do real EIAs simply because they cannot evaluate hypothetical EIAs. The EIA Proclamation requires them to evaluate EIAs that are genuine.⁸⁴⁸ Besides, if a proponent does EIA but fails to use qualified experts, FEPA or REAs can (should) order a new EIA to be done because the EIA that is submitted to them lacks professional integrity. As a result, it cannot be taken as a correct prediction (assessment) of the possible impacts of a project on the environment.⁸⁴⁹

On the other hand, if EIAs are done by using qualified experts but such EIAs fail to live up to the requirements of the EIA procedures such as involving the public in its process, FEPA or REAs can order proponents to consider the elements that were left out and correct their EIAs accordingly.⁸⁵⁰ However, it should be noted that while some proponents may accept such recommendations, others may not although their projects cannot go forward legally until the recommendations are accepted and their EIAs are approved by FEPA or REAs. In this regard, it is necessary to recall *Babile* case where the proponent was ordered to consider some more issues before possible action could be taken on his EIA but who did not reappear before

⁸⁴⁸ See, for example, the spirit of article 9 of the EIA Proclamation.

⁸⁴⁹ For instance, AREA considers the existence of consulting firm's seal on the report to ensure that the report was prepared by experts and to review same while it refrains from taking further action thereon if it is not prepared by experts. Melisachew Fantie, *Supra* note 477.

⁸⁵⁰ Refer to the previous discussions in relation to the practice of public participation in practice. In the US, if new information or new circumstance arises after EIS is done, the concerned agency may be required to prepare a supplemental EIS. See STEVEN FERREY, *Supra* note 7, at 115-116.

FEPA with the recommended amendment to his EIA although he started implementing his project only to have it stopped eventually.

7.4.2 Other Administrative Orders

Environmental protection organs may be authorized to monitor the implementation of projects and to take appropriate administrative measures such suspension, relocation, and closure if they find something wrong.⁸⁵¹ For instance, they may be authorized to order the suspension or stoppage of projects that did not pass through EIA although they are subject to EIA. This mandate is relevant in Ethiopia in particular because numerous projects are being implemented without EIA although they had to pass through EIA.

The experiences of other countries show that environmental protection organs can take such measures. For example, in Tanzania, the National Environmental Management Council can issue a preventive order if a person is conducting or will conduct an activity that may cause adverse effects to the environment or public health.⁸⁵² Failure to do an EIA can thus trigger administrative enforcement if it is believed that the intended project may have adverse effect on the environment or public health. Moreover, the National Environmental Management Council can issue orders if there are activities that are causing or are likely to cause adverse effect to the environment or public health with a view to avoiding, remedying or mitigating these effects, where the concerned person may be required, among other things, to stop or control the activity, remedy the adverse effect caused by the activity, or prevent the reoccurrence of the effect.⁸⁵³ The Council can also order the preparation and implementation of an environmental management plan.

⁸⁵¹ See EIA Proclamation, article 12; Environmental Pollution Control Proclamation, article 3(4) and (5).

⁸⁵² See *Law, Environment and Development*, *Supra* note 812.

⁸⁵³ See *id.*

In the US, too, various administrative measures can be taken to enforce environmental regulations. For instance, although the text of NEPA does not refer to it, the 1978 CEQ regulations authorize requiring a supplemental EIS when there is, for example, a significant modification in the proposed project.⁸⁵⁴ The Clean Air Act, moreover, authorizes the EPA to abate an activity that is presenting an imminent and substantial endangerment to public health or welfare, or the environment through an emergency order provided that it has consulted with state and local authorities to ensure the accuracy of the information it bases its order on, and it is not practicable to ensure prompt protection of public health or welfare or the environment through judicial process.⁸⁵⁵

In Ethiopia, almost all environmental statutes recognize some kinds of administrative remedies, including the suspension or revocation of permits, confiscation of tools employed while violating environmental regulations, requiring cleaning up or paying for cleaning-up operation, and restoration of the injured environment.⁸⁵⁶ On its part, the EIA Proclamation requires environmental protection organs to monitor the implementation of an authorized project in order to evaluate compliance with all commitments made by and obligations imposed on the proponent during authorization.⁸⁵⁷ It also authorizes them to order any proponent who is found not complying with his commitments or the obligations imposed on him to take rectification measures, or to request the suspension or cancellation of

⁸⁵⁴ See William L. Andreen, *Supra* note 230, at 248. The other administrative measures that the US EPA could take include making referrals to the CEQ or bringing a problem to the attention of action agencies so that rectification measures could be taken. See *id.* at 237-242.

⁸⁵⁵ JOEL A. MINTZ ET.AL., *Supra* note 811, at 93-94.

⁸⁵⁶ For instance, in accordance with the Environmental Pollution Control Proclamation, FEPA can require the installation of sound technology to remediate environmental wrong-doings, order the cleaning-up of polluted environment or the payment for such operation, or seek the closure or relocation of an enterprise that is causing environmental problem (Article 3(2), Environmental Pollution Control Proclamation No 300/2003). The Water Resource Management Proclamation also allows the revocation or suspension of permits of persons infringing its provisions or regulations issued thereunder (Article 17, Water Resources Management Proclamation No 197/2000). The other laws also provide for different types of administrative measures that are pertinent to their objectives. See, for example, Public Health Proclamation No. 200/2000 (Article 7), Animal Disease Control Proclamation No. 267/2002(Article 8), Development, Conservation and Utilization of Wildlife Proclamation No. 541/2007 (Article 16(2)(3)), and Solid Waste Management Proclamation No. 513/2007 (Article 14(4)).

⁸⁵⁷ See EIA Proclamation, article 12

authorizations or permits to engage in activities causing environmental problems while requiring the authorizing or permitting authorities to comply with such requests.⁸⁵⁸

Therefore, FEPA and the REAs can supervise whether proponents are operating in accordance with their commitments and the obligations they are subject to and make them take relevant measures to observe their commitments or discharge their obligations. In the end, if FEPA and REAs believe that the suspension or stoppage of a given activity is necessary, they can approach licensing bodies and request them to suspend or stop the activity. This mandate seems very important because it enables environmental protection organs to identify activities that are posing or causing problems to the environment and move the relevant government organs to take timely and appropriate measures.

However, the EIA Proclamation permits FEPA and the REAs to take the above measures only in relation to projects that have passed through EIA. On the other hand, we have seen that most projects are actually implemented without EIA even though they are subject to EIA. Hence, these organs cannot exercise the mandates discussed above in relation to proponents who are implementing their projects without EIA because they have not made any commitment to environmental protection organs; nor are they subject to any obligations imposed by these organs. Of course, it could be argued that FEPA and REAs can, and must, take such measures in relation to activities that have not passed through EIA because the failure to do so will discourage using EIA by willing proponents. Another point worth noting is the fact that even in relation to projects that have passed through EIA, the EIA Proclamation does not authorize FEPA and REAs to directly take suspension or stoppage measures. Instead, it authorizes them to request licensing bodies to take such measures. Thus, the effectiveness of these measures is contingent upon licensing bodies' willingness to

⁸⁵⁸ See *id.* articles 12 and 21

discharge their duties under the EIA Proclamation. Of course, article 21 of the EIA Proclamation imposes a duty on any person to cooperate in the implementation of its provision. Thus, it appears that licensing bodies have a duty to suspend or stop a project in accordance with the requests of environmental protection organs. However, it is equally necessary to bear in mind that the Investment Proclamation 280/2002, Investment (Amendment) Proclamation 375/2003, and the Business Registration and Licensing Proclamation 686/2010 do not expressly recognize the suspension or stoppage of projects due to the failure to comply with EIA requirements.⁸⁵⁹

However, the Business Registration and Licensing Proclamation, Proclamation 686/2010 contains few provisions which are pertinent to environmental protection. First, it allows the suspension of a license if environmental standards are not maintained, and the suspension lasts until the problem identified is rectified.⁸⁶⁰ Thus, those organs which issue business licenses can suspend such licenses if the holders fail to observe requirements of environmental standards. Moreover, the Proclamation prohibits the renewal of a suspended license until the cause for the suspension is rectified.⁸⁶¹ Second, the Proclamation recognizes the cancellation of a business license on various grounds. For instance, if a licensee fails to maintain environmental standards twice or if he fails to comply with the written notification of licensing organs to rectify problems relating to maintaining environmental standards within a fixed period, his license can be revoked.⁸⁶² The application of these measures could, therefore, have a strong deterrent effect on license holders. As a result, one may argue that

⁸⁵⁹ See Investment Proclamation, Proclamation No.280/2002, article 16(1, 2, and 7); Investment (Amendment) proclamation, Proclamation No. 373/2003; Business Registration and Licensing Proclamation, Proclamation 686/2010, articles 37 and 39.

⁸⁶⁰ See Business Registration and Licensing Proclamation, Proclamation 686/2010, article 37(1)(a).

⁸⁶¹ See *id.* article 37(4).

⁸⁶² See *id.* article 39(1)(c)(d) cumulatively with article 37(2)(3).

the remedies the Business Registration and Licensing Proclamation, Proclamation 686/2010 provides for failure to comply with environmental standards amount to real penalties.⁸⁶³

On the other hand, although the Business Registration and Licensing Proclamation 686/2010 contains few provisions pertaining to environmental protection, these provisions cannot ensure the effective implementation of the EIA process.⁸⁶⁴ This is so because the suspension or revocation of a license in accordance with the Proclamation comes into picture only after the implementation of a project has commenced, whereas EIA is necessary before such implementation has begun. Therefore, although the Business Registration and Licensing Proclamation 686/2010 seems to be one step ahead of the investment proclamations to ensure the effectiveness of the system of EIA in Ethiopia, it actually has not.

It is also interesting to note that the Environmental Pollution Control Proclamation, which was issued subsequent to the EIA Proclamation, seems to go one step beyond the EIA Proclamation in mandating environmental protection organs to take some administrative action. According to this Proclamation, FEPA and REAs are required to take any necessary measure including the issuance of orders to clean up, pay for clean up, close, or relocate an activity in order to prevent harm if an activity poses a risk to human health or to the

⁸⁶³In practice, however, these measures may not be applied strictly. For instance, as we will see below, there was a time in Oromia Region when the operation of a certain cement factory was suspended for failure to comply with authorization condition; that is, taking dust containment measures. Of course, this measure was taken before the enactment of the present Proclamation. On the other hand, there were times when events justifying these measures occurred in other areas but no such measures were taken. For instance, according to Ato Abera Aychilum and Ato Mehdin Temam, although some business activities in the Arada Sub-City of the Addis Ababa City Administration failed to observe some environmental standards, the trade and industry bureau of the sub-city did not take any of the two administrative measures. Interviews with Ato Abera Aychilum, Trade Registration and License Core Process Coordinator, Trade and Industry Bureau, Arada Sub-City, Addis Ababa City Administration, in Addis Ababa (October 11, 2011) and Ato Mehdin Temam, *Supra* note 483. Similarly, W/ro Ayesha Abdu stated that the trade and industry bureau of the Gulele Sub-City of the Addis Ababa City Administration has never taken either suspension or revocation measures so far for failure to observe environmental standards. Ayesha Abdu, *Supra* note 483.

⁸⁶⁴The Business Registration and Licensing Proclamation, Proclamation 686/2010, becomes relevant only if we consider doing EIA as one of the environmental protection standards which is not the case.

environment.⁸⁶⁵ So, if a risk is posed, the environmental protection organs do not have to refer a matter to another government agency; instead, they can enforce directly.

However, the Environmental Pollution Control Proclamation, like the Business Registration and Licensing Proclamation, Proclamation 686/2010, does not go far enough because, enforcement is limited to situations posing risk to human health or to the environment. The mere fact that an EIA was not done for a project would not authorize any enforcement under this Proclamation unless the resulting activity posed some threat to health or the environment. So, in relation to such projects, what these agencies can do is request, in accordance with the stipulations of the EIA Proclamation, licensing bodies to suspend the activities until a proper EIA is done or stop them, as the case may be, whereas these authorizing or permitting bodies are obliged to accept and enforce such requests.

The fear here, though, is although the EIA Proclamation requires licensing bodies to comply with the request of an environmental protection agency they may not do so in practice. For instance, in addition to failing to demand an ECC, licensing bodies may not be willing to suspend activities environmental protection organs want them to suspend until EIA is done and proper measures are taken to protect the environment. This is so because the sectoral laws we have in place such as the investment proclamations do not authorize them to take such measures on the basis of a failure to do an EIA, or requests made by environmental protection organs, for that matter. This makes it indispensable for the environmental protection organs to have the power to take all necessary measures by themselves to achieve their objectives.

⁸⁶⁵ See Environmental Pollution Control Proclamation No 300/2002, article 3. Nonetheless, in order to enable environmental protection organs to discharge this duty, law enforcement bodies need to work cooperatively with them. For instance, licensing bodies must cooperate and enforce the orders of these organs for, in default of such cooperation, these organs can hardly discharge their duties of taking the necessary measures to prevent harms to human health or to the environment.

Of course, one may argue that there are loopholes that would permit the environmental protection agencies to take administrative measures such as suspension or closure without turning to the licensing bodies. First, one of the objectives of FEPA is ensuring the effectiveness of policies, strategies, laws and standards that are formulated with a view to advancing environmental protection.⁸⁶⁶ In addition, FEPA is authorized to carry out any activity that is necessary for the achievement of its objectives.⁸⁶⁷ Therefore, it is possible to conclude that FEPA has the authority to order the suspension or stoppage of a project that is being implemented contrary to the requirements of the EIA process. If FEPA cannot take such action, it will be difficult for it to ensure the effectiveness of policies, laws, strategies and standards that are formulated for environmental protection. Similarly, the REAs are mandated to ensure environmental protection in their respective regions,⁸⁶⁸ whereas ensuring environmental protection includes following-up the implementation of projects and ordering their suspension or stoppage, if need be. Therefore, both FEPA and REAs can construe their broad mandates and claim the power to take the above-mentioned administrative measures without the authorization of the licensing agencies. Of course, both FEPA and REAs may need to (should) notify licensing organs the measures they have taken and the reasons thereof. Interestingly, however, none of the personnel interviewed both at FEPA and REAs indicated that they could take suspension or stoppage orders by themselves while they were unanimous in expressing their lack of such power.⁸⁶⁹

At any rate, whatever measures the environmental protection agencies can take or request to be taken, cooperation between these agencies and the licensing bodies is of paramount importance. In the absence of such cooperation, the environmental protection agencies can

⁸⁶⁶ See Environmental Protection Establishment Proclamation No 295/2002, article 5.

⁸⁶⁷ See *id.* article 6(26).

⁸⁶⁸ See *id.* article 15.

⁸⁶⁹ Solomon Kebede, *Supra* note 160; Alemayehu Geleta, *Supra* note 163; Weldeberhan Kuma, *Supra* note 161; Yirga Tadesse and Hadush Berhe, *Supra* note 164; Yitayal Abebe Ashetih, *Supra* note 162; Getachew Belachew, *Supra* note 419.

hardly achieve their objectives which need taking appropriate measures. This is so because these agencies are not, at the moment, using the independent enforcement authority they have under the Environmental Protection Organs Establishment Proclamation. Thankfully, practice shows that the licensing organs may sometimes be willing to cooperate with the environmental protection agencies. For example, in Tigray, a licensing body ordered the relocation of an alcohol factory in *Mekelle* which was causing problems to the people living around the facility at the request of TREA.⁸⁷⁰ Of course, TREA could have taken the measure itself according to Article 3 of the Environmental Pollution Control Proclamation. In Oromia, there was a time when the OIC ordered the suspension of some projects due to failure to discharge their duties relating to environmental protection; a case in point is the suspension of *Mojjo* Cement Factory due to the owner's failure to take dust containment measures as agreed upon during the issuance of license thereof.⁸⁷¹ In Amhara, the region's licensing body forced, at the request of AREA and other actors, the factory called *Debre Birhan Tannery* to upgrade its technology.⁸⁷² Here, too, AREA could have taken this measure by itself because Article 3 of the Environmental Pollution Control Proclamation authorizes it to do so.

Environmental protection organs, therefore, should build upon these examples and request the licensing bodies to take appropriate measures when there is a need to do so.⁸⁷³ This

⁸⁷⁰ The factory is called *Desta* Alcohol Factory and it was established in the town of *Mekelle* around 2001. When it was established, the Factory was outside the town. However, as the town grew bigger, the factory was engulfed. Then, the people living around the factory started complaining because it was producing sludge which had an unbearably bad odour. As a result, TREA was requesting the region's licensing organ to order the relocation of the factory which was finally accepted. Yirga Tadesse and Hadush Berhe, *Supra* note 164.

⁸⁷¹ The cement factory called *Mojjo* Cement Factory was established in *Mojjo* (a place about 75 Kms to the east of Addis Ababa). When the owner was granted his license, he was informed that he needed to plant trees in the compound of the factory to contain the dust that the factory would produce. However, the proponent failed to do so although the factory started and continued operating. As a result, the OIC suspended the factory until the owner took the said measure and caused its reopening. Mohammed Ibrahim, *Supra* note 1.

⁸⁷² The *Debre Birhan Tannery* factory was discharging wastes that caused damages to the animals (sheep and goats in particular) of the surrounding communities and the environment which caused different actors including AREA to complain about these consequences and request the region's licensing body to take measures. The licensing body accepted the request and finally forced the factory to upgrade its technology to avoid the consequences or at least minimize them. Ayinalem Belete Adem, *Supra* note 478.

⁸⁷³ At times, environmental protection organs may need to mobilize the other actors to support their cases because licensing bodies pay serious attention to their request if it has such support. All the examples mentioned

includes requests to compel proponents to do EIAs in appropriate instances. Thus, it is up to the environmental protection agencies to direct their requests to the concerned licensing bodies whenever they believe that administrative measures such as suspension and stoppage are necessary. Of course, as we have seen before, under certain circumstances licensing bodies are arguably obliged to accept the requests of environmental protection organs in favour of suspension or stoppage of projects.

When we come to actual practice, the only administrative measure FEPA has so far taken is *advisory* because it does not believe that it has the authority to take other compulsory administrative measures such as suspension or the stoppage of projects; nor does it think that the existing legal framework is adequate to enable it to take such measures to ensure the effectiveness of the system of EIA.⁸⁷⁴ On the other hand, there are only some proponents who have been accepting the advice of FEPA due to various reasons such as fear of donors' admonishment while others have ignored such advice.⁸⁷⁵

The situation at the regional level is not any different. For instance, in Oromia, OREA has been following up the activities of project owners and advising them to take some corrective measures to prevent environmental harms from ensuing instead of ordering the suspension or stoppage of projects even if the projects are causing harm to the environment.⁸⁷⁶ In the SNNPRS, the only measure SREA has taken so far is raising the awareness of proponents about the relevance of EIA with the hope that they may use EIA for their projects; no other administrative measure has ever been taken because, after all, SREA monitors neither the performance of EIA nor the implementation of projects.⁸⁷⁷ In Tigray, too, TREA has not

in the three regions, that is, Tigray, Oromia, and Amhara, reveal that there was public pressure as well behind the requests that made the licensing bodies to take the measures they did take.

⁸⁷⁴ Solomon Kebede, *Supra* note 160.

⁸⁷⁵ *Id.*

⁸⁷⁶ Alemayehu Geleta, *Supra* note 163.

⁸⁷⁷ Weldeberhan Kuma, *Supra* note 161.

taken administrative measures against any EIA-related wrong conducts because it does not monitor the performance of EIA or the implementation of projects.⁸⁷⁸

7.5 Standing

In order to bring an action, a person must have a standing.⁸⁷⁹ A person is said to have a *standing* if he can make legal claim or seek judicial enforcement of a duty or a right.⁸⁸⁰ Thus, in a criminal case, it is, in principle, the public prosecutor that has standing because it is up to the public prosecutor to institute a case against a person who fails to do an EIA or does it contrary to the law. Thus, the responsibility of individuals here is to report to law enforcement agencies about the existence of conduct contrary to environmental impact assessment law. In this regard, the Criminal Procedure Code of Ethiopia states that any person has the right to report to the police or the public prosecutor the commission of a crime, whether or not he has witnessed its commission, with a view to criminal proceedings being instituted.⁸⁸¹ Thus, there is no individual standing to bring a criminal charge against a person who fails to do an EIA or does it improperly because criminal matters are public matters.⁸⁸²

With regard to administrative measures, article 11(1) of the Environmental Pollution Control Proclamation makes the following stipulations on the right to standing:

⁸⁷⁸ Yirga Tadesse and Hadush Berhe, *Supra* note 164.

⁸⁷⁹ Thomas F.P. Sullivan, *Supra* note 54, at 25.

⁸⁸⁰ See BLACK'S LAW DICTIONARY 4400 (Bryan A. Garner, ed., 8th ed., 2004).

⁸⁸¹ Criminal Procedure Code of Ethiopia, 1961, articles 11(1) and 16(1).

⁸⁸² There is, however, one exception. If the crime committed is punishable upon individual complaint only and the public prosecutor refuses to institute a proceeding against the alleged criminal, he is obliged to authorize in writing the appropriate person to conduct a private investigation. Criminal Procedure Code of the Empire of Ethiopia, 1961, articles 44 and 47. Hence, if the failure to comply with the EIA requirement amounts to a crime that is punishable only upon complaint, the complainant can conduct a private proceeding provided that he has complained to the public prosecutor and the prosecutor has turned down the complaint. However, neither the EIA Proclamation nor the Criminal Code recognizes crimes involving EIA as crimes that are punishable upon complaint. Consequently, private individuals do not have standing to institute criminal proceeding against those who commit crimes involving EIA.

Any person shall have, without the need to show any vested interest, the right to lodge a complaint at the Authority or the relevant regional environmental agency against any person allegedly causing actual or potential damage to the environment.⁸⁸³

Since the failure to perform an EIA may lead to possible environmental damage because, among others things, mitigation measures may not be adopted beforehand, anyone, even if he is not the likely victim, can approach the relevant environmental protection agency to seek an administrative remedy. For instance, NGOs can lodge complaints with FEPA seeking an order requiring a proponent to do EIA if he has started implementing his project without doing EIA. Of course, this presupposes that the environmental protection agencies can force proponents to do an EIA even though these agencies do not believe that they can do so.

With regard to a judicial challenge to administrative action or inaction, Article 11(2) of the Environmental Pollution Control Proclamation authorizes anyone to institute a court case within sixty days if the relevant environmental protection agency fails to give a decision on request to take administrative measure(s) within thirty days, or if he is dissatisfied with the decision of such organ. The court is empowered to issue necessary orders, including injunctive relief, when appropriate. Therefore, there is no standing requirement when a case goes to court after exhausting the available administrative remedy with the relevant environmental protection agency.

However, if a person wants to go to a court to sue a proponent that has failed to do an appropriate EIA, then he will have to show that he has a vested interest (standing) in the case. This is so because the Civil Procedure Code of Ethiopia stipulates that no one may be a plaintiff unless he has a vested interest in the subject matter of the suit.⁸⁸⁴ Hence, individuals

⁸⁸³ Environmental Pollution Control Proclamation, Proclamation No. 300/2002, article 11(1).

⁸⁸⁴ Civil Procedure Code of Ethiopia, 1965, article 33(2).

may, for example, claim before a court that the establishment of a factory near their residence without an appropriate EIA will cause them problems such as noise pollution.⁸⁸⁵

In conclusion, while it is the public prosecutor that can cause criminal measures to be taken for failure to comply with environmental requirements including failure to use of EIA, anyone may approach environmental protection agencies for administrative measures. On the other hand, it is only a person who has a vested interest that can take a case involving failure to comply with EIA requirements directly to a court and seek judicial remedy.⁸⁸⁶

⁸⁸⁵ The reliefs they can seek from the court may include forcing the proponent to do EIA before the factory becomes operational in order to take appropriate mitigation measure or ceasing the implementation of the project at the selected site.

⁸⁸⁶ For example, a person who may be affected by the conduct of a person who fails to comply with the EIA law may go directly to court to seek judicial remedy. After all, this is his constitutionally guaranteed right as article 37(1) of the FDRE Constitution gives everyone the right to bring a justiciable matter to, and to obtain a decision or judgement by, a court of law or any other competent body with judicial power.

CHAPTER EIGHT: MONITORING ENVIRONMENTAL IMPACT ASSESSMENT IN ETHIOPIA

8.1 Introduction

Monitoring could be understood as the day-to-day management task of collecting and reviewing information that reveals how an operation is proceeding and what aspects of it, if any, need correcting.⁸⁸⁷ In other words, monitoring is a process whereby the concerned body gathers information and analyzes it in order to know how a given action is proceeding and to take remedial measures, if need be.⁸⁸⁸ For example, environmental protection agencies can collect information in respect of how EIS is done or how authorized projects are implemented, analyze the information, and then make appropriate recommendations for corrections, if necessary.⁸⁸⁹

It should be noted that monitoring is a continuous process⁸⁹⁰ which should exist throughout an action's life cycle.⁸⁹¹ That is to say, the competent authority must check how a given

⁸⁸⁷ See, for example, INTERNATIONAL FEDERATION OF RED CROSS AND RED CRESCENT SOCIETIES, HANDBOOK FOR MONITORING AND EVALUATION 4-7, 1st ed. (2002)(hereinafter *Red Cross and Red Crescent Societies*); COADY INTERNATIONAL INSTITUTE, PARTICIPATORY MONITORING AND EVALUATION: A MANUAL FOR VILLAGE ORGANIZERS 7(available online, accessed on 2 June 2010); INTERNAL OVERSIGHT SERVICE, UNESCO, EVALUATION HANDBOOK 5 (2007) (hereinafter *UNESCO*).

⁸⁸⁸ In environmental law, monitoring, in its broader sense, can embrace all relevant checks of activities, impacts, and environmental parameters, to ensure that they are in accordance with plans, predictions and approval conditions. See CLIVE GEORGE in Norman Lee and Clive George, *Supra* note 230, at 178.

⁸⁸⁹ This is why monitoring is regarded as a tool that enables us to learn from past experiences and to improve future actions. See WORLD BANK, MONITORING AND EVALUATION: SOME TOOLS, METHODS & APPROACHES 5 (2004) (hereinafter *WB M&E*).

⁸⁹⁰ The essence of *monitoring* is that it is a periodic oversight of the operation of a given action in order to know how it is proceeding towards its target so that timely measure can be taken to correct deficiencies, if any. UNICEF, GUIDE FOR MONITORING AND EVALUATION 3 (available online, accessed on 2 June 2010) (hereinafter *UNICEF*). At this juncture, one has to know that the concept *evaluation* is highly related to monitoring. They are complementary tools of management. However, evaluation is different from monitoring in many ways. For instance, it is episodic while monitoring is periodic, evaluation is done based on the information gathered through monitoring although additional information can be used, evaluation is done in order to determine the relevance and fulfillment of objectives, as well as efficiency, effectiveness, impact (overall Goal) and sustainability; evaluation is a rigorous and independent assessment of either completed or ongoing activities

action is proceeding on a periodic basis in relation to all the relevant stages in the action's life cycle.⁸⁹² This may mean, in relation to EIA, periodic checking of how proponents do EIA, implement their projects, and operate their undertakings in order to know whether or not they are complying with environmental rules and/or the approval conditions of their projects. Therefore, in respect of EIA, we may consider monitoring at two stages; pre-evaluation and post evaluation.⁸⁹³

Pre-evaluation monitoring could be a job of supervising proponents or their consultants at work to know how they are preparing EIA with a view to ensuring the preparation of a proper EIA. Monitoring at this stage is of particular importance in Ethiopia because, as the discussion in the previous chapters has revealed, many consultants/proponents do not seem to care about the environment, or they produce EIAs which lack professional integrity, or they do not follow the proper procedures. On the other hand, monitoring EIA when it is done can minimize some of these problems. For example, monitored proponents may use relevant interdisciplinary team to prepare EIAs; they can identify proper alternatives to the actions they propose; they can provide for reasonable mitigation measures in their EIAs; and they can engage the public in the EIA process.

At this juncture, it is interesting to note that the laws of some countries allow interaction between authorities and proponents when an EIA is prepared. For example, the

to determine the extent to which they are achieving the stated objectives and contributing to decision making; etc. For more on evaluation and other related concepts such as review, inspection, investigation and audit, see generally, UNESCO, *Supra* note 887, at 5; International Federation of Red Cross and Red Crescent Societies, *Supra* note 887, at 6; UNICEF, *Supra* note 889, at 3; UNDP, HANDBOOK ON PLANNING, MONITORING AND EVALUATING FOR DEVELOPMENT RESULTS 8 (2009) (hereinafter *UNDP*); Coady International Institute, *Supra* note 887, at 8.

⁸⁹¹ Coady International Institute, *Supra* note 887, at 8.

⁸⁹² For example, monitoring is necessary during all the principal stages in the life cycle of a given development project such as design, implementation and operation. See CLIVE GEORGE in Norman Lee and Clive George, *Supra* note 230, at 178. Although EIA is a check on design, an EIA that wants to be effective must include provisions for further checks during later stages of the cycle. *Id.*

⁸⁹³ Monitoring may exist at evaluation stage as well because the reviewing body can examine the extent to which compliance was made with EIA regulations during EIS. However, we will categorize monitoring in relation to EIA into two for the sake of convenience of discussions in this Chapter.

Environmental Conservation Act of South Africa provides for a dialogue between proponents and a relevant authority throughout the EIA process until the final EIA is reviewed.⁸⁹⁴ This requirement gives the relevant South African authority the chance/mandate to check how an EIA is being prepared so that early remedial measures can be taken if deemed necessary. Hence, the interaction or dialogue that is provided for in the Act allows pre-evaluation monitoring to facilitate the preparation of proper EIA. Once the final EIA is prepared and submitted, the relevant authority will have a second chance to monitor the manner in which the EIA was prepared during the review process.⁸⁹⁵

On the other hand, monitoring can also take place after the implementation of a given action is authorized. That is to say, it may be necessary to have post-evaluation monitoring, which could be understood as an activity that aims at obtaining information with regard to how proponents are proceeding with authorized projects to make the system of EIA effective.⁸⁹⁶ After all, the EIA that ends at decision-making stage produces nothing but cost.⁸⁹⁷ Or, as some put it, the EIA process that is limited to producing EIS report will become a paperwork production process having little substantive effect.⁸⁹⁸ Therefore, post-evaluation monitoring is necessary during which the monitor can examine whether authorized actions are implemented in accordance with the obligations imposed on and/or commitments made by

⁸⁹⁴ See *Environmental Conservation Act of the Republic of South Africa, 1989*, cited in MOHAMMED A. BEKHECHI AND JEAN-ROGER MERCIER, *Supra* note 15, at 35.

⁸⁹⁵ This is why it is said that EIA review can be taken as a monitoring job to improve the quality of project management. See *id.*

⁸⁹⁶ It is said that post-evaluation monitoring can ensure that an action is implemented as described in the assessment and that its impacts are not greater than those predicted in the assessment. CLIVE GEORGE in Norman Lee and Clive George, *Supra* note 230, at 178. ECONOMIC COMMISSION FOR AFRICA, *Supra* note 69, at 46.

⁸⁹⁷ CLIVE GEORGE in Norman Lee and Clive George, *Supra* note 230, at 177. After all, effective EIA is a process rather than an isolated event, and it is itself part of the broader process of environmental planning and management. If the implementation of an authorized action is not monitored, the environmental management plan that may have been included in EIA report will not be more than good intention for proponents may not use them. *Id.* at 177-180.

⁸⁹⁸ William L. Andreen, *Supra* note 230, at 209. According to Professor Andreen, an agency that has prepared an EIA document may not use it in the course of making subsequent decisions; instead, it can do whatever it wants unless some kind of supervision/checking exists to ensure that the EIA documents is in fact used to make decisions. See *id.*, at 210.

proponents when their actions are authorized so that corrective measures are taken, if necessary.⁸⁹⁹ Experience also shows that monitoring after EIS reports are reviewed is necessary. For instance, in Africa, countries like Uganda, Ghana, and Tunisia authorize and require post-review monitoring although, in most African countries, post-review follow-up is more often neglected and grossly ineffective due to capacity and resource constraints.⁹⁰⁰

In any case, in order to facilitate the effectiveness of the EIA system, it is necessary to monitor proponents when they prepare an EIA and when they implement their projects.⁹⁰¹ The primary aim of this chapter is to examine whether such monitoring exists in Ethiopia. Accordingly, we will discuss the agencies that are responsible for monitoring the EIA process, the existing law on monitoring, and the actual practice.

8.2 Monitoring EIA in Ethiopia

The Environmental Protection Establishment Proclamation establishes FEPA and requires every regional states and competent sectors to establish REAs and sectoral environmental units, respectively. Then, it provides for a list of responsibilities that these environmental agencies are expected to discharge.⁹⁰² As we will see below, these responsibilities include environmental monitoring.

First, the Proclamation establishes FEPA to, *inter alia*, formulate policies, strategies, laws and standards which foster social and economic development in a manner that will enhance the welfare of humans and the safety of the environment, and to spearhead in ensuring the

⁸⁹⁹ Of course, it is said that many environmental laws including the US NEPA lack a systematic process for ensuring that the final decision, including any adopted mitigation measures, is properly implemented. CHARLES H. ECCLESTON, *Supra* note 68, at 236.

⁹⁰⁰ See ECONOMIC COMMISSION FOR AFRICA, *Supra* note 69, at 46-47.

⁹⁰¹ This means, overall, there can be monitoring at three stages, that is, when EIA is done, when EIA is reviewed, and when authorized action is implemented.

⁹⁰² See Environmental Protection Establishment Proclamation No 295/2002, articles 3, 6, 14, and 15. The Preamble of the Proclamation states that assigning environmental monitoring responsibility to different [environmental] organs is instrumental for the sustainable use of environmental resources. See *id.* Paragraph 1, Preamble.

effectiveness of the process of their implementation.⁹⁰³ This is a broad objective which can include making EIA-related instruments and monitoring their implementation to ensure the effectiveness of the EIA system. Hence, FEPA can monitor the extent to which its EIA-related instruments such as the 2003 EIA Procedural Guidelines are used by proponents when they prepare EIA. Moreover, the Proclamation mandates and requires FEPA to carry out any activity that is necessary to achieve its objectives.⁹⁰⁴ This is another broad mandate/duty that FEPA can exercise/discharge to facilitate the effectiveness of the system of EIA. For instance, this mandate/duty could be used to monitor proponents when they do EIA and when they implement their authorized projects.

Second, the Environmental Protection Organs Establishment Proclamation requires every regional government to establish an independent regional environmental agency or designate an existing agency which shall be responsible, among others things, for environmental monitoring based on federal environmental standards or their own environmental standard which cannot be less stringent.⁹⁰⁵ Thus, in regions where REAs have been established, they must be given the mandate to perform environmental monitoring, whereas environmental monitoring may include monitoring when EIA is done and when authorized projects are implemented.⁹⁰⁶ As a result, it could be concluded that REAs can monitor the EIA process of actions falling under their jurisdictions and the implementation of such actions.

Third, the Environmental Protection Organs Establishment Proclamation requires every competent agency to establish or designate an environmental unit which should be responsible to, among other things, follow-up the activities of their respective agencies to

⁹⁰³ *Id.* article 5.

⁹⁰⁴ *Id.* article 6(26).

⁹⁰⁵ *Id.* article 15(1)&(2).

⁹⁰⁶ According to the Proclamation, *environmental monitoring* is used to refer to follow-up activities on the conditions of the environment with a view to taking measures when something goes wrong.

ensure that their activities are in harmony with environmental protection requirements.⁹⁰⁷

This also shows that wherever they are established, sectoral environmental units must have the power to monitor (follow-up) how the activities of their respective agencies are carried out.⁹⁰⁸ Accordingly, if their agencies do EIAs, the sectoral environmental units can monitor the EIA preparation process. They can also monitor how the projects are implemented.

Therefore, the Environmental Protection Organs Establishment Proclamation requires environmental protection agencies to perform environmental monitoring activities which include monitoring when an EIA is done and when authorized actions are implemented. Consequently, these organs can use this Proclamation to undertake both pre-evaluation and post-evaluation monitoring activities.

The EIA Proclamation also contains stipulations that are relevant to monitoring by the environmental protection agencies. First, the EIA Proclamation requires proponents to implement their projects by fulfilling the terms and conditions of their authorization.⁹⁰⁹ Then, it provides that FEPA or REAs should monitor the implementation of authorized projects in order to evaluate compliance with all commitments made by and obligations imposed on proponents during authorization.⁹¹⁰ Hence, if proponents fail to implement their projects in accordance with the terms and conditions attached to the authorization of their projects and FEPA or REA discovers this fact, the later may order them to undertake specified remedial measures, or, alternatively, decide that their licenses must be suspended or cancelled. On the other hand, licensing agencies are obliged to accept FEPA or REA's request to suspend or cancel the licenses of certain proponents.⁹¹¹

⁹⁰⁷ See Environmental Protection Establishment Proclamation No 295/2002, article 14.

⁹⁰⁸ It is said that EIA follow-up by the regulatory authority is normally done through monitoring, auditing and evaluation. See ECONOMIC COMMISSION FOR AFRICA, *Supra* note 69, at 46.

⁹⁰⁹ EIA Proclamation, article 7(4).

⁹¹⁰ *Id.* article 12(1).

⁹¹¹ *Id.* articles 12(2) and (3) and 21.

Although the EIA Proclamation is clear on the issue of monitoring, there are some important points that are worth discussing. First, the Proclamation does not mandate that FEPA or REA to monitor the preparation of an EIA.⁹¹² Thus, the EIA Proclamation only recognizes post-evaluation monitoring. Second, the Proclamation does not authorize FEPA or REA to monitor the implementation of projects that are subject to EIA but which are implemented without producing an EIA. The power to monitor under the EIA Proclamation is limited to those projects that are authorized. This is probably why the environmental protection agencies claim that they lack the power to monitor the implementation of projects that have not passed through the EIA process.⁹¹³ On the other hand, this omission may have a significant impact on the success of the system of EIA in Ethiopia because, as the discussion in chapter 6 revealed, many projects that are subject to EIA do not pass through EIA. Third, the Proclamation does not provide for stipulations pertaining to the monitoring of SEA. Forth, the EIA Proclamation does impose on sectoral environmental units the obligation it imposes on FEPA and REAs in relation to monitoring.

In any case, the use of the two proclamations⁹¹⁴ discussed above indicates that environmental protection organs in particular FEPA and REAs can undertake monitoring activities when proponents prepare EIA and when projects authorized after EIA are implemented. This being

⁹¹² Under article 8(3), the EIA Proclamation obliges the FEPA to issue Guidelines that determine the elements necessary to prepare as well as evaluate an environmental impact study report. Thus, one may say that although FEPA is not clearly given the power to monitor the EIA process on the ground, it is given this power indirectly in so long as it can issue Guidelines on what has to be included/done in the EIA process. However, this argument seems difficult to accept because proponents may not do their EIA in accordance with FEPA Guidelines or they may produce reports which lack professional integrity.

⁹¹³ Solomon Kebede, *Supra* note 160.

⁹¹⁴ In addition to the two proclamations, FEPA Guidelines also seem to allow FEPA and REAs to undertake monitoring activities before and after review of EIA reports. For example, the Guidelines require FEPA and REAs to ensure that views, concerns, and position of interested and affected parties are taken into account *during assessment*, reviewing, *auditing* and at all stages of decision making (*emphasis added*). One of the ways in which these organs can discharge this duty is by monitoring how EIA is done when it is done and when supervising the implementation of authorized actions.

said, we will now see the practice on the ground by briefly considering the experiences of some environmental protection organs.

8.3 Monitoring EIA in Practice

At the federal level, FEPA does not monitor the preparation of EIA.⁹¹⁵ However, there have been times when it has followed up on the implementation of certain projects and advised their owners to take corrective measures.⁹¹⁶ Equally, there were times when project owners denied FEPA officials entry into their project areas for monitoring purpose.⁹¹⁷ What is more important, however, is the fact that some officials at FEPA believe that the agency does not have the power to monitor the implementation of projects, against an owners' will.⁹¹⁸ But this assumption is wrong as the previous discussion has revealed. In any case, while FEPA does not undertake pre-evaluation monitoring, it has undertaken some limited post-evaluation monitoring.

In Oromia, OREA has not been monitoring the EIA process when EIA is done.⁹¹⁹ However, there has been monitoring of ways in which a few projects have been implemented and those efforts have resulted in a few advisory measures.⁹²⁰ However, pre-review monitoring is unknown to the OREA.⁹²¹

⁹¹⁵ Solomon Kebede, *Supra* note 160.

⁹¹⁶ *Id.*

⁹¹⁷ *Id.*

⁹¹⁸ See *Id.* Also Wondosen Sintayehu, *Supra* note 301. At this juncture, one may wonder why FEPA officials feel that they do not have monitoring power when the law is very clear as to FEPA's power to monitor. In fact, their beliefs do not seem to be based on rules.

⁹¹⁹ Alemayehu Geleta, *Supra* note 163.

⁹²⁰ *Id.*

⁹²¹ For example, it is said that investors do not take the mitigation measures they have identified in their EIAs after they have started implementing their projects because that increases their costs. In fact, investors think that EIA is necessary only for OREA and hence their obligations also end with the production of EIS reports. This means, investors do not think that EIA is good for them as well and also their obligation in relation to EIA goes beyond EIS report preparation and continues to exist even during project implementation such as implementing what is identified in EIAs and the conditions attached to the approval of their EIAs. *Id.*

In Tigray, although there is a plan to monitor when EIAs are done to ensure that they are done properly, TEPA has so far not been monitoring the preparation of EIAs.⁹²² However, TEPA has been monitoring some old and operational factories and pushing them to introduce environmental management systems.⁹²³

In Amhara, like the other regions, AREA does not monitor the preparation of EIAs.⁹²⁴ However, unlike the practice in the other regions, it often sends experts to project sites to observe the area, talk to the concerned community, and verify the information contained in EIAs before it makes a decision on EIAs.⁹²⁵ As far as post-evaluation monitoring is concerned, the practice in Amhara is similar to that of Oromia where it is occasionally undertaken.⁹²⁶

In the SNNPRS, SREA does not monitor the preparation of EIAs.⁹²⁷ However, unlike Oromia, Amhara and FEPA where some post-evaluation monitoring exists, SREA does not monitor the implementation of projects to ensure the observance of conditions it attaches to the issuance of ECCs.⁹²⁸ This implies that the practice of monitoring EIA at both stages is non-existent in the SNNPRS.

Therefore, despite the presence of a legal framework enabling environmental protection agencies to undertake both pre-and post-evaluation monitoring, environmental protection

⁹²² Yirga Tadesse and Hadush Berhe, *Supra* note 164.

⁹²³ As a result, trainings were given to them by FEPA and TREA and the project owners have agreed to introduce environmental management system to become clean projects. They have also been given five years grace period (federal standard) to introduce environmental management system and become clean either by changing the way they operate or by introducing new technologies. Of course, the intended result is not happening at the speed expected initially but it is moving in the right truck. In any case, TREA has been following up the progress of the said projects at every phase (in year 1, year 2, etc.) than waiting for the expiry of the five years time and planning to see the old and environmentally damaging ones becoming clean. *Id.*

⁹²⁴ Yitayal Abebe Ashot, *Supra* note 162.

⁹²⁵ Of course, there was time when such practice was stopped in order to encourage investors. However, the practice has now resumed because AREA believes that it cannot take appropriate measure on EIAs without such verification. *Id.*

⁹²⁶ *Id.*

⁹²⁷ Weldeberhan Kuma, *Supra* note 161.

⁹²⁸ *Id.*

agencies have thus far failed to conduct pre-evaluation monitoring. Under such circumstance, proponents or their hired consultants may not conduct EIA properly. For instance, proponents may not use experts to prepare EIS; they may ignore public participation; appropriate mitigation measures may not be included in the EIA; reasonable alternatives to the proposed action may not be identified; or, wrong information may be included in the final EIA.⁹²⁹ On the other hand, although pre-evaluation monitoring may not eliminate all these problems, it will certainly reduce them if it is undertaken.

Moreover, the implementation of projects which are subject to EIA and which have or have not passed through the EIA process is also not monitored. This means that even those proponents that have done EIAs and obtained ECCs can do just anything they want by disregarding the conditions attached to the approval of their projects. The absence of monitoring at this stage indeed reduces the procedure of EIA to a mere formality requirement with no actual impact.⁹³⁰ According to some scholars, if oversight is limited to the review stage, the proponents can do just about anything they choose.⁹³¹ This is exactly what one of the licensing officials interviewed has said. He said that proponents are usually not required to produce ECCs from environmental protection agencies as a condition to obtain permits because the EIA produces nothing, just consumes money and time, since the agency that issues the ECC does not monitor the implementation of the project.⁹³²

⁹²⁹ This does not mean that authorities can approve EIAs if all these elements are missing but they can do so if one or some of them are lacking.

⁹³⁰ Fortunately, on 02 February 2011, while I was interviewing Ato Getachew Belachew, EIA Officer at the Addis EPA, a certain proponent came to the EIA Unit of the Addis Ababa EPA and demanded the issuance of ECC on the spot claiming that delaying the issuance of the ECC would add no value to his project or to what the Addis Ababa EPA would do. This shows that at least some proponents think that EIA is meant to serve only a procedural, not substantive, purpose.

⁹³¹ William L. Andreen, *Supra* note 230, at 46.

⁹³² Ayinalem Belete Adem, *Supra* note 478.

8.4 Factors Weakening Monitoring of EIA

Generally speaking, although monitoring is crucial for the effectiveness of EIA, it does not take place as it ought to be in many countries. While the system of monitoring is weak in Uganda, Tunisia, Ghana, Zambia and South Africa, it is virtually non-existent in Cameroon.⁹³³ There are a number of factors that have contributed to the weakness or absence of monitoring in these countries. For instance, in Uganda, developers take advantage of the weak enforcement capacity of its National Environmental Management Act and omit some of the critical recommendations of the EIA permit; in Tunisia due to human resource constraints, monitoring is not done on a systematic basis; in Ghana, effective follow-up is hindered by the lack of adequate resources; in Zambia, the lack of staff at the regional level is the main reason for not implementing post-assessment environmental audits; in Cameroon, the EIA administrative authority is not involved in the follow-up and evaluation of the effectiveness of measures taken to mitigate impacts, or in environmental monitoring in general, due to acute shortage of human and material resources and absence of evaluation strategy.⁹³⁴ Lack of adequate staff and resources, the absence of appropriate monitoring strategies, the failure of legislative authority for EIA monitoring are, therefore, some of the major factors making monitoring weak or non-existent. Although there are legal bases to rely on to undertake monitoring at both stages, the existence of weak monitoring practice in Ethiopia can also be ascribed to most of the above-mentioned reasons. For example, as the discussion in Chapter Five has revealed, environmental protection organs lack capacity, adequate manpower, and independence to effectively carry out their duties.⁹³⁵

⁹³³ For more, see generally, ECONOMIC COMMISSION FOR AFRICA, *Supra* note 69, at 47-48.

⁹³⁴ See *id.*

⁹³⁵ Of course, the officials of some environmental protection organs such as FEPA believe that they lack the power to monitor although this belief does not seem justified in light of the discussions made before.

CHAPTER NINE: CHALLENGES TO AND PROSPECTS FOR EFFECTIVE SYSTEM OF EIA

9.1 Introduction

Although the Ethiopian EIA system is working to some extent, both the law and the practice are inadequate. Nevertheless, there are some glimmers of hope. Thus, there are both challenges to and prospect for the effectiveness of the system of EIA in Ethiopia. In the first part of this chapter, some of the factors which could be taken as major challenges to the effectiveness of the system of EIA in Ethiopia will be considered. The discussion of the challenges that were addressed elsewhere in this paper will be succinct. In the second part of the chapter, some factors that may contribute to the improvement of the effectiveness of the EIA system in Ethiopia will be explored.

9.2 Challenges to the Effectiveness of the System of EIA in Ethiopia

9.2.1 Inadequate Laws

One of the major challenges to the effectiveness of the EIA system in Ethiopia is the inadequacy of the existing legal framework. As the discussion in chapter three revealed, the EIA legal framework is inadequate because of the lack of binding subsidiary laws, that is, regulations and directives, that are necessary to implement the general stipulations of the EIA Proclamation.⁹³⁶ Without these subsidiary laws, the EIA Proclamation can hardly produce any of its intended results as most of its provisions are too general to be applied without further administrative refinement.

⁹³⁶ FEPA itself sees the absence of binding subsidiary laws such as regulations and directives as a major blow to the effectiveness of the system of EIA in the country because there are various issues that have not yet been resolved by the existing laws. Solomon Kebede, *Supra* note 160; Wondosen Sintayehu, *Supra* note 301.

Moreover, it is necessary to bear in mind that the inadequacy of the EIA legal framework goes beyond the EIA Proclamation and extends to other sectoral laws. Although the laws in these other fields could contribute to the effectiveness of the system of EIA by providing relevant stipulations, they do not do so. For example, Ethiopia's investment law, land law, fishery law, wildlife law, water law, mining law, and genetic resource law do not expressly require the use of EIA before engaging in the activities they regulate.⁹³⁷ Of course, the express requirement of EIA in these sectoral laws might not be necessary if the stipulations in the EIA Proclamation were not being dented by subsequent laws.⁹³⁸ For instance, the EIA Proclamation requires licensing agencies to demand EIA when it is necessary and obliges them to cooperate in the implementation of its provisions.⁹³⁹ However, some Proclamations that were made after the EIA Proclamation was enacted have relieved some licensing agencies of their duty to demand EIA.

9.2.2 Lack of Independence and Capacity

Environmental protection agencies are expected to be independent in relation to their activities.⁹⁴⁰ This is, however, not the case as the practice shows. As a result, these agencies, particularly REAs, do what they are told to do by their superiors because they do not want to be condemned by them as anti-development agents.⁹⁴¹ This implies that environmental protection agencies may sometimes rubberstamp EIAs and issue ECCs without seriously

⁹³⁷ For discussions on these laws, see MELLESE DAMTIE AND MESFIN BAYOU, *Supra* note 51, at 22-30.

⁹³⁸ See the previous discussion on these proclamations. For example, in the US, NEPA requires all agencies of the Federal Government to utilize, to the fullest extent possible, a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision-making which may have an impact on man's environment. NEPA, Sec.102 (42 USC § 4332).

⁹³⁹ EIA Proclamation, articles 3(3) and 21

⁹⁴⁰ For example, as the discussion in Chapter four has revealed, regional governments are supposed to establish independent environmental agencies or designate existing organ to do jobs related to environmental protection.

⁹⁴¹ Solomon Kebede, *Supra* note 160. The fact that some government officials still call advocates of EIA anti-development agents shows the existence mistaken understanding that EIA is an obstacle to development efforts although the ultimate effect of EIA is the opposite; viz, making development sustainable.

examining the reports. As the previous discussion has indicated, this problem is worse in the regions.⁹⁴²

In order to ensure the effectiveness of the system of EIA, the institutions that are created for this purpose must have the necessary capacity. For example, in order to review EIAs adequately and effectively monitor the implementation of authorized projects, environmental protection organs must have the necessary human and material resources. The reality in Ethiopia is, nonetheless, different. All environmental protection organs including FEPA suffer from lack of capacity, in particular, adequate staff.⁹⁴³ That is, the capacity of these organs is not commensurate with what they are expected to do. This is why, for instance, EIAs are reviewed by only one person. In fact, the problem of capacity is common throughout Africa.⁹⁴⁴

9.2.3 Low-Level Political Commitment

In order to make the system of EIA effective, it is necessary to have adequate political commitment. On the other hand, such political commitment can be expressed by establishing adequate EIA legal framework and implementing same effectively. When we look at the practice in Ethiopia in light of these factors, the political commitment in Ethiopia can be regarded as inadequate. First, the existing legal framework is not adequate because there is no willingness to make it so. Second, at the implementation stage, there is no serious intention to use or implement the EIA procedure. According to one official at FEPA, the government's theoretical commitment to protecting the environment is commendable.⁹⁴⁵ Practice, however,

⁹⁴² For example, according to OREA, when investors are required to modify their EIAs because of failure to consider some important elements such as public participation, they will do so but at the same time they complain to bosses who, in turn, admonish the OREA for not doing its jobs properly and causing investors to run around. This, in turn, has been discouraging OREA from being serious about its evaluation of EIAs. Alemayehu Geleta, *Supra* note 163.

⁹⁴³ Solomon Kebede, *Supra* note 160; Wondosen Sintayehu, *Supra* note 301.

⁹⁴⁴ See ECONOMIC COMMISSION FOR AFRICA, *Supra* note 69, at 30.

⁹⁴⁵ Interview with one of the top FEPA officials who preferred to remain anonymous on 24 August 2009. For example, in the SNNPRS, one of the factors that have made the system of EIA ineffective is the absence of

is another thing, and it is that actual lack of commitment which makes it difficult for FEPA to do many of the things it wants to do to protect and conserve the environment.⁹⁴⁶

9.2.4 Urge for Fast Economic Development

Ethiopia is one of the poorest countries in the world. Thus, the government's focus upon development is intense, and this focus sometimes leads it to disregard other interests. That is to say, when environmental and development needs appear at odds, the economic interest of the country likely leads to striking the balance in favor of development. This is actually what one can understand from the discussions made previously in relation to government projects. Moreover, this is what makes the commitment of the government towards environmental protection low. For example, if we look at the *Plan for Accelerated and Sustained Development to End Poverty (PASDEP)* and the *Growth and Transformation Plan (GTP)*, the previous and the current five year strategic plans of Ethiopia, respectively, neither of them mentions environmental protection as one of their pillars. Instead, both of them provide for economic and social development related pillars.⁹⁴⁷

Incidentally, it is necessary to bear in mind that even in most developed countries environmental protection may be given a secondary emphasis. For instance, it is said that environmental protection receives a secondary emphasis in the eyes of the US public as compared to other national goals such as economic prosperity and educational quality.⁹⁴⁸

In general, inadequate EIA laws, lack of independence and capacity, low-level political commitment, and the urge for fast economic development are some of the major challenges

attention to the use of the procedure from higher bodies. If superior will is lacking, it is hardly possible to do any meaningful jobs to ensure environmental protection in particular by using EIA. Weldeberhan Kuma, *Supra* note 161.

⁹⁴⁶ *Id.*

⁹⁴⁷ See the pillars of both plans as mentioned before. Of course, both plans recognize the need to protect the environment because such protection facilitates, as a means to an end, the achievement of their objectives. See PASDEP, *Supra* note 9, at 189-190; GTP, *Supra* note 12, at 77.

⁹⁴⁸ LAWRENCE S. ROTHENBERG, *Supra* note 25, at 63.

that have made the system of EIA in Ethiopia ineffective. If the system of EIA is to be effective, these challenges must be overcome. Of course, overcoming some of these challenges may be demanding although some of them could be overcome with relative ease. For example, although both are related, it is less demanding to make the EIA legal framework adequate than deciding to use EIA in practice.

9.3 Prospects for the Effectiveness System of EIA in Ethiopia

On the other side of the fence, there are signs that the system of EIA in Ethiopia may improve in the future. Thus, there is no reason to be pessimistic about it. In this regard, one may mention attitudinal change, increased awareness, the increased role of NGOs, the use of EIAs as a condition precedent to loans, and the recognition of the need to protect the environment in the GTP as some possible glimmers of hope.⁹⁴⁹

9.3.1 Attitudinal Change

Currently, attitudes towards environmental protection seem to be changing. As environmental problems are becoming more serious, governments have begun paying more attention to the environment. The Ethiopian government is no exception. For instance, on his Ethiopian Television interview on 14 May 2011, the Prime Minister of the FDRE said that the necessary environmental studies⁹⁵⁰ were done for the *Grand Ethiopian Renaissance Dam* that Ethiopia is building on the *Abbay* River (the Blue Nile).⁹⁵¹ This could be taken as an indication of change in perception that the environment must be considered before actions are taken. Likewise, some government officials have now begun appreciating the advantages of

⁹⁴⁹ On how these factors may contribute to the improvement of the system of EIA in Ethiopia, Solomon Kebede, *Supra* note 160.

⁹⁵⁰ Of course, the Prime Minister did not use the term environmental impact assessment (የአካባቢ ተፅዕኖ ግምገማ); rather, he used the term environmental study (የአካባቢ ጥናት) although one may doubt if this is equivalent to EIA. However, the context in which he was using the term *environmental study* indicated that he was referring to EIA. However, as the previous discussions have shown, this EIA is an initial EIA, not a full-scale EIA which is at the moment in the process of preparation.

⁹⁵¹ A response given by the FDRE Prime Minister to a question by a journalist interviewing him about the Dam on Ethiopian Television Programme on 14 May 2011.

EIA and are favoring its use.⁹⁵² Similarly, some project owners including government organs are doing EIA and submitting their EIAs to environmental protection organs for evaluation.⁹⁵³ Further, sectoral agencies that have not established environmental units are now establishing these units, whereas those which already established them are strengthening their capacity.⁹⁵⁴ For example, in the Ministry of Water and Energy, a unit called the *Environmental Impact Assessment and Social Development Office* was established in April 2011.⁹⁵⁵ Therefore, changing attitudes is one of the hopes for a more effective EIA system in Ethiopia.

9.3.2 Increased Awareness

According to Ato Solomon,⁹⁵⁶ while environmental awareness in Ethiopia is low, it is very low in relation to EIA. The public, decision-makers, and proponents do not have adequate knowledge about the importance of EIA. This, in turn, has made the use of EIA difficult. However, nowadays, one can speak of increasing environmental education in the country. This is true, in particular, due to the existence of different NGOs such as the Sustainable Land Use Forum (SLUF), *Lem Ethiopia*, the Institute of Sustainable Development, and *Melca Mahiber* all of which are, in one way or another, working in this area. For example, if we look at how the following NGO undertakes environmental education, we will understand how NGOs are trying to raise environmental awareness. *Melca Mahiber* was established in 2005 for culture and biodiversity conservation. Within its mission, it has a program called *segni*⁹⁵⁷

⁹⁵² Solomon Kebede, *Supra* note 160.

⁹⁵³ MELLESE DAMTIE AND MESFIN BAYOU, *Supra* note 51, at 37.

⁹⁵⁴ *Id.* at 38.

⁹⁵⁵ Alemayehu Tafesse, *Supra* note 318.

⁹⁵⁶ Solomon Kebede, *Supra* note 160.

⁹⁵⁷ *Segni* is a word in Afan Oromo which means *seed*. In its environmental education endeavors, *Melca Mahiber* sows few seeds which will grow and yield abundant produce. The sites are *Bale* and *Sebata*, two places in Oromia. It works as follows. *Melca Mahiber* chooses 18-24 students at a time from the schools in these two places (*Bale* and *Sebata*) based on their leadership quality (like as leaders in clubs or groups). Then four elders will be chosen from the community based on their traditional knowledge (proverbs, tales, stories, poems, culture, etc.) and knowledge like knowing the names, uses, values, etc. of plants. Next, the students will be taken to a camp in forest where they are totally isolated from the rest of the world (they cannot use mobile

which focuses on environmental education. Basically, *Melca Mahiber* trains students who will serve as trainers for other students by taking 18-24 students from schools in *Bale* and *Sebeta*, two places in Oromia, based on their leadership qualities such as club leaders. The students will receive training from 4 elders with traditional and biodiversity knowledge. Upon the completion of this work, the students will return to their schools and try to raise the awareness of their fellow students, and even authorities, local communities and other stakeholders. By doing so, the trainees have been able to create sense of environmentalism in the members of their schools, communities, authorities, and others. On the other hand, raising environmental awareness will empower the public to claim environmental protection and making meaningful participation in environmental decision-making including in the EIA process.⁹⁵⁸

phone, they cannot watch TV, they cannot listen to radio, etc.). Then, the elders start teaching them. First, they teach them what to do and what not to do. For example, they will be told not to throw waste in forest and they should use only one path in the forest in order not to destroy plants by using different paths. The next step is trekking where students are made to move around in forest with elders. The elders will tell them the names, uses, values and other important things about plants. For example, they will tell them which plant has medicinal value (which part of it-root, or stem, or leaf), which plant has spiritual value, which plant is used for building, etc. At this point, the students are not allowed to use pen, pencil, exercise books, or any stationery materials to take notes. They are supposed to listen and memorize what they hear. The next step is tracking. Here, first, the students are given some time to stay alone in forest and think about what they heard from elders. Then, they will gather together and make their reflections. If someone misses or adds something during reflection, others will correct him/her. After tracking, environmental games follow. Here, the students are made to play games involving the environment. For instance, their eyes will be veiled and then they will be asked to identify which plant is which simply by smelling. They will also be made to make deep listening to plants to hear the movement of water up and down. Once environmental games are over, the students will get back to their camp. Now, cultural education begins with dinner. They are made to eat their dinner around campfire. After the end of the dinner, they will be told tales, stories, proverbs, etc. together with their moral values. This lasts up to 11:00 pm. The next step is night watch where every student is made to be on the lookout for an hour. During this time, the students will listen to lots of things in the forest, they start getting rid of their fear of nature, etc. The next step involves spending a night in forest. Every student will be made to spend a night in a forest alone to enable them to create communication with nature and to get rid of their fears. Finally, the students and the elders will be evaluated on their performances. Once evaluation is over, the students will be made to commit themselves to disseminate their knowledge to their community in their schools like by establishing clubs, preparing dramas, writing poems or prose involving the environment and culture, etc. Now, all the above steps are taken with a view to creating sense of environmentalism in the students. Once the students develop such feelings, they will be able to teach about the environment when they get back to their schools. In fact, they have done so hitherto and *Melca Mehiber* thinks that the students have excelled its expectations as they are even going to farmers (beyond their schools) and teaching them about the environment on gatherings. As a result, they have changed many people. That is why *Melca Mehiber* calls its program on education *segni*. It sows few seeds, the seeds grow, and the yield will be far more than the seeds. See Befekadu Refera, *Supra* note 792.

⁹⁵⁸ See *id.*

Another interesting job in the field of environmental education by *Melca Mahiber* pertains to law enforcement agencies. It was stated that law enforcement agencies at lower level such police officers do not have knowledge on environmental laws; nor do they have the copy of environmental laws. Thus, *Melca Mahiber*, realizing that this is one of the factors contributing to failure to protect the environment, trained paralegals to work with these agents. Likewise, it distributed some laws on the environment for their use.⁹⁵⁹

The Sustainable Land Use Forum (SLUF) provides another good example. SLUF was established in 1995 as an umbrella organization. Its job is not doing activities related to the environment at the grassroots level but assisting other NGOs that are working in the field of environment. Thus, initially, it had eight member NGOs, whereas this number has now increased to 21 (three international NGOs and 18 local NGOs). NGOs become members of SLUF on competitive basis. Once they become the members of SLUF, SLUF gives them money so that they can carry out environmental protection related activities. Moreover, SLUF builds the capacity of its member NGOs and their partners, like government organs/officials working with them, through training, studies, information exchange, advocacy, and networking. In addition, SLUF organizes workshops where stakeholders are invited to participate to create opportunities for sharing experiences, information, and skill transfer. Sometimes, mass media is also used for this purpose. Further, SLUF works in collaboration with schools' environmental clubs with a view to encouraging environmental education. Finally, SLUF trains some employees of its member NGOs who will, in turn, train their colleagues.⁹⁶⁰

Although its primary purpose is not environmental education, SLUF certainly performs work that can contribute to environmental awareness raising. These activities include its work with

⁹⁵⁹ *Id.*

⁹⁶⁰ The information in this paragraph was obtained through interview from Ato Debebla Dinka Guda, Sustainable Land Use Forum, Programme Coordinator, in Addis Ababa (June 10, 2010).

schools' environmental clubs, the workshops it arranges to transmit environmental knowledge and skill, and its use of the mass media.

These two NGOs indicate that there are activities that are being performed to raise environmental awareness. If they succeed in raising public awareness, they may cause the public to demand the enactment of laws that are necessary to make the system of EIA adequate and also demand the enforcement of EIA related laws effectively.⁹⁶¹ Similarly, they may be more likely to participate in environmental decision-making, including the administration of EIA.

9.3.3 Increasing Role of NGOs

First, as the discussion in the preceding section shows, NGOs play important role in environmental protection through awareness creation. Moreover, NGOs go beyond creating environmental awareness. For example, if we look at what SLUF does, it tries to build the capacity of NGOs and some government officials that work in the field environment. Moreover, there are NGOs that are trying to make the system of EIA in the country more effective. *Melca Mehiber*, for example, published a study showing the ineffectiveness of the EIA system and then prepared a draft amendment to the EIA Proclamation and submitted it to FEPA.⁹⁶²

9.3.4 EIA as A Condition for Loans/Donations

The relevance of financial institutions in ensuring the use of EIA should not be overlooked. In this regard, donor financial institutions such as the WB are requiring the use of EIA. For instance, as the previous discussion on *Gilgel Gibe III* case revealed, the WB withdrew its

⁹⁶¹ On how the public may influence environmental law-making, see generally, STEPHEN R. CHAPMAN, *Supra* note 43, at 28-32.

⁹⁶² However, the draft amendment to the EIA Proclamation is still with FEPA, and it has not been submitted to the Council of Ministers. *Melca Mehiber*, furthermore, taught law to law enforcement and distributed legal documents. Befekadu Refera, *Supra* note 792.

promise to the Ethiopian government to fund the project for reasons associated with EIA. Moreover, in 1992, the African Development Bank released its Environmental Assessment Guidelines in relation to public sector projects.⁹⁶³ Thus, the Bank now requires EIA for public projects that are subject to EIA as a funding condition. For instance, the *Bedele-Metu* Road Upgrading Project in Ethiopia will be funded by the AfDB. Accordingly, the ERA has conducted an EIA for the project and submitted the report of the assessment to the AfDB (the executive summary of the EIA is available on the website of the AfDB).⁹⁶⁴ Such measures by donors or funding institutions are likely to increase the use of EIA in Ethiopia because the country, being poor, needs the assistance of these institutions.⁹⁶⁵

However, to ensure the effectiveness of the EIA system, the measures taken by donors and international and regional financial institutions should be complemented by local financial institutions. In Ethiopia, there are many financial institutions. However, so far, it is only the Ethiopian Development Bank that has decided to require the use of EIAs as a precondition for loans.⁹⁶⁶ Of course, other local financial institutions have also shown an inclination to use EIA as one of the requirements for loans, but they claim that the requirement must first be recognized by the government through legislative measures.⁹⁶⁷

Therefore, the fact that the above financial institutions demand EIA for the loans they grant is another hope for a more effective system of EIA in Ethiopia. In fact, as the previous discussion has revealed, it is due to the requirements of these financial institutions that some REAs had the chance to review EIAs.

⁹⁶³ AFRICAN DEVELOPMENT BANK, ENVIRONMENTAL AND SOCIAL ASSESSMENT PROCEDURES FOR AFRICAN DEVELOPMENT BANK'S PUBLIC SECTOR OPERATIONS 1(2001).

⁹⁶⁴ The Executive Summary of the EIA report for *Bedele-Metu* Road Upgrading Project was posted on the website of the AfDB on 21 June 2011 and it is available at <http://www.afdb.org/en/documents/6/> (accessed on 10 August 2011).

⁹⁶⁵ For instance, the AfDB is associated with a number of development projects in Ethiopia including the *Gilgel Gibe III* Electric Power Project. To get more about which projects the AfDB is related to in Ethiopia, visit the bank's website at <http://www.afdb.org/en/documents/ethiopia/>.

⁹⁶⁶ Solomon Kebede, *Supra* note 160.

⁹⁶⁷ MELLESE DAMTIE AND MESFIN BAYOU, *Supra* note 51, at 38.

9.3.5 Recognition of Environmental Protection in the GTP

Ethiopia has recently begun implementing its five-year (2010/2011-2014/2015) Growth and Transformation Plan (GTP).⁹⁶⁸ The Plan expressly recognizes that development should be environmentally sustainable.⁹⁶⁹ Moreover, it also states that it is necessary to formulate policies, strategies, laws and standards which foster social and economic development to enhance the welfare of humans and the *safety of the environment sustainably*, and to spearhead in ensuring the effectiveness of their implementation.⁹⁷⁰ Therefore, the GTP presents some opportunities to protect the environment in general and to use EIA in regard to development endeavors in particular. First, it declares that there is a need to formulate policies, strategies, laws and standards which can contribute to environmental protection. This creates an opportunity to push for policies, strategies, laws and standards in the field of environment so that the inadequacies in the existing EIA legal framework are remedied. Second, the GTP recognizes the need to ensure the effective implementation of environmental policies, strategies, laws and standards. This is another opportunity to seize to push for an effective implementation of EIA related instruments. Thus, the weight that the GTP has attached to environmental protection, which can be facilitated through the proper use of EIA, is another prospect for better protection of the environment in general and a more effective EIA system in particular.⁹⁷¹

⁹⁶⁸ Ethiopia's long-term vision is to become a country where democratic rule, good-governance and social justice reigns, upon the involvement and free will of its peoples; and once extricating itself from poverty and becomes a middle-income economy. The GTP is thus directed towards achieving Ethiopia's long term vision. In this regard, the major objectives set out in the GTP are maintaining at least an average real GDP growth rate of 11% and meet the Millennium Development goals, expanding and ensuring the qualities of education and health services thereby achieving the MDGs in the social sectors, establishing favorable conditions for sustainable state building through the creation of stable democratic and developmental state, and ensuring growth sustainability by realizing all the above objectives within stable macroeconomic framework. See GTP, *Supra* note 12, at 7 (or Sections 2.1 and 2.2).

⁹⁶⁹ See *id.* at 77

⁹⁷⁰ See *id.* Emphasis added.

⁹⁷¹ Nonetheless, it could be argued that it is not necessary to invest too much trust in the words of the GTP. This is so because our past experience does not seem to justify such investment. For instance, according to the *Plan for Accelerated and Sustained Development to End Poverty (PASDEP)*, the previous five years strategic plan (2005/06-2009/10, Ethiopia recognized the need to protect the environment based on the 1997 Environmental Policy of Ethiopia. Moreover, the PASDEP recognized ensuring proactively the integration of environmental

Therefore, although there are many factors that are competing to make the system of EIA in Ethiopia ineffective, there are also several factors which present opportunities to exploit to make it effective.⁹⁷² Consequently, it is up to all of us to seize the opportunities and stand up against the challenges in order to make the system of EIA in Ethiopia effective. When this is done, the system of EIA will be able to produce the desired results in which we are all interested.

dictates in development. Therefore, the protection of the environment in general and the use of EIA in particular could be facilitated based on the PASDEP. Despite these stipulations in the PASDEP, however, there has been no significant/meaningful step taken to use EIA to bring about environmentally sound development during the time of PASDEP. For more on the stipulations of PASDEP, see PASDEP, *Supra* note 9, at 46, 189-190

⁹⁷² In addition to the factors that have been mentioned and discussed as prospects, one may add the changes in the structural arrangements that are taking place in some regions such as merging the Land Use and Planning Office with REAs in the same bureau and the agreements that some REAs are making with licensing bodies to facilitate the effective implementation of the EIA in Ethiopia as other prospects.

CONCLUSION AND RECOMMENDATIONS

Conclusion

In this paper, an attempt has been made to show that environment protection is necessary because, among other things, it (1) leads to sustainable development and (2) facilitates the enjoyment of the right to clean and healthy environment. As a result, governments have been taking various steps to ensure effective environmental protection. One way in which governments have done this is by recognizing and using the system of EIA in decision-making process. EIA is a tool that decision-makers can use at both strategic and project levels to determine the possible impacts of a course of action on the environment. This tool emerged as far back as 1969 in the USA and it is now widely accepted around the world.

At the international level, Ethiopia committed itself to using EIA when it ratified the CBD in 1994. Within the domestic framework, the express recognition of EIA as a requirement in the decision-making process emerged with the adoption of the 1997 Environmental Policy of Ethiopia. Then, in 2002, the EIA Proclamation firmly established the legal requirement of EIA in the decision-making process by providing for more detailed stipulations pertaining to the use of EIA. For instance, the Proclamation deals, among other things, with the duties of proponents, the types of EIA that should be undertaken, the responsibilities of environmental protection agencies and licensing bodies, and the role of the public in the EIA process. The 2003 FEPA Procedural Guidelines and the 2008 FEPA Directives were also issued to shore up the system of EIA in the country. Moreover, Ethiopia has put in place different institutions including FEPA and the REAs and tasked them with EIA related duties in order to ensure the

effectiveness of the system of EIA. In this way, Ethiopia has developed both legal and institutional frameworks for the use of EIA in the decision-making process.

Nonetheless, both the legal and institutional frameworks that have been developed in Ethiopia have remained inadequate to ensure the full effectiveness of the EIA system. For instance, the EIA Proclamation, the fundamental EIA law of Ethiopia, is full of inadequacies and gaps, and no binding subsidiary laws have been made to rectify these problems despite the fact that the Proclamation authorizes the issuance of such secondary laws. To make things worse, some subsequent laws have introduced regressive measures which militate against the effectiveness of the system of EIA in Ethiopia. Likewise, the various institutions that are in place to ensure the effectiveness of the system of EIA are not capable of discharging their duties because they face various problems including lack of capacity (adequate manpower and other resources), lack of adequate autonomy, the existence of problematic organizational structures, the abolition of EIA units from their organization as is the case with the FEPA, fluctuations in the organizational structure of some REAs, the absence of sectoral environmental units in most cases, and poor linkage among environmental protection agencies and with other relevant organs. The practice of delegating EIA review responsibility by FEPA to sectoral agencies also weakens FEPA because it deprives FEPA of one of its most important regulatory powers. In the final analysis, and whatever the motive behind may be, the absence of adequate political commitment to support the effective implementation of the system of EIA in Ethiopia is to blame for the inadequacy in the existing EIA legal and institutional frameworks.

Moreover, although the existing legal framework does not create a conducive atmosphere for the use of EIA in the decision-making process, some EIAs are conducted in practice. All the same, the practice of EIA in Ethiopia is far from being adequate. For instance, while no SEAs

have been done for public instruments, there are limited project level EIAs on the ground. In this regard, while most government projects do not pass through EIA, despite the fact that they are subject to EIA under the FEPA Guidelines, many private projects also bypass the requirement of EIA. On the other hand, many projects, government and private, pass through the EIA process because, among other things, various funding institutions such as the WB, the AfDB, and the EDB, demand an ECC as a requisite funding condition. However, the EIAs in Ethiopia are characterized by lack professional integrity, limited public participation, and a one-man approach to their review. To add insult to injury, many licensing bodies refuse to require an ECC as a prerequisite to licensing. Environmental protection agencies have also failed to effectively discharge their EIA related duties such as taking measures for failure to observe EIA requirements and conducting pre-and post-EIA monitoring. A myriad of factors, therefore, have contributed to the failure to use EIA in an effective manner.

In the end, when the inadequacies in the EIA legal and institutional frameworks are coupled with the problems of implementation, one can only conclude that the system of EIA in Ethiopia has largely been a failure. Despite this, there are glimmers of hope that the situation may improve. For instance, attitudes, especially at the top level, seem to be changing, and public awareness about environmental protection is growing. NGOs have been taking measures to contribute to environmental protection; some financial institutions have been demanding the use of EIA as a condition precedent to the making of loans; and the GTP recognizes the need to protect the environment to bring about sustainable development. Thus, if these circumstances continue to exist and the opportunities they present are exploited, the situation of the system of EIA in Ethiopia could be improved both in law and in practice.

Recommendations

The preamble of the EIA Proclamation states that EIA promotes sustainable development, fosters the implementation of the right to clean and healthy environment guaranteed by the FDRE Constitution, brings about administrative transparency and accountability, and facilitates public participation in decision-making processes. However, if the system of EIA Ethiopia has put in place is to attain these lofty goals, there is absolutely no question that it needs to be improved. Improving the system of EIA in Ethiopia both in law and in practice requires at the very least taking the following steps.

First, the fundamental problem our system of EIA has been facing is lack of adequate political commitment, which, in turn, is primarily the result of the need to give priority to development activities. Of course, the fact that some laws and institutions dealing with EIA have been put in place both at the federal and the regional levels show the presence of some political commitment to use EIA. Nonetheless, the existing situation reveals that this political commitment falls short of what is needed to make the system of EIA effective. Consequently, the effectiveness of the EIA system in Ethiopia necessarily demands the existence of adequate political commitment by all concerned authorities at three levels of government: the legislative level, the resource allocation level, and the decision-making level.

At the legislative level, the concerned authorities must act to make the existing EIA legal regimes adequate. In this regard, the amendment of two laws in particular is necessary. First, the EIA Proclamation must be amended because there are defects which cannot be remedied without amending it. For instance, the extension of the time within which EIAs should be reviewed, imposing the duty to require an ECC on the authorities that approve public

instruments, granting express power to environmental protection agencies to monitor the implementation of projects and take appropriate measures, if need be, and recognizing the right to standing of everyone to take action against any person including environmental protection agencies for failing to discharge their EIA related duties require the amendment of the Proclamation. Moreover, the removal of the regressive measures that have been introduced by subsequent proclamations require the amendment of the EIA Proclamation.

The other law that needs amendment is the Environmental Protection Organs Establishment Proclamation 295/2002. The amendment to this Proclamation should contain two revisions. First, the Proclamation should establish the EC as a separate body which advises the PM on environmental matters and also supervises FEPA. If this is done, FEPA will be able to issue some subsidiary instruments such as directives and guidelines and implement same to make the system of EIA effective in Ethiopia. Second, the Proclamation must authorize the Council of Ministers' to issue regulations to implement its provisions so that the Council can clarify some vague issues like the relationship between FEPA and the REAs, on the one hand, and between the sectoral environmental units and FEPA and the REAs, on the other.

But changing the legislation is not enough. The bodies which are given authority to issue subsidiary law must have the commitment to do so. Hence, regulations and directives should be issued, for instance, to deal with the details relating to public participation in the EIA process, procedures concerning the certification, licensing, and operation of consultants, and the actions, particularly public instruments, that should be subject to EIA.

At the resource allocation level, both the federal and regional governments should allocate adequate resources to environmental protection agencies so that they can ensure the effective implementation of the EIA system. For instance, one of the reasons why FEPA has been delegating its EIA review responsibility to sectoral agencies is the lack of adequate resources.

Similarly, the lack of adequate manpower to handle EIA-related matters such as reviewing and monitoring is one of the cross-cutting problems of environmental protection agencies. However, putting adequate resources at the disposal of environmental protection agencies can help solve this problem by providing environmental protection agencies with the ability to hire the necessary expertise.

Finally, at the decision-making level, both the federal and regional governments must use EIA. As we have seen before, one of the salient features of the system of EIA in Ethiopia is that most government actions (all public instruments and most government projects) are not subject to EIA. However, realizing that EIA is not meant to stop development actions but merely to inject environmental values into the decision-making process in order to help ensure sustainable development, authorities should subject their public instruments and projects to EIA, even when there is no external pressure to do so, in accordance with the available EIA legal framework.

Second, the delegation by FEPA of its EIA review responsibility to sectoral agency should be abandoned. Such delegations are inappropriate. First, FEPA should not delegate its regulatory responsibility to the regulated organs. Second, the environmental units of the delegated sectors cannot be entirely impartial when they review EIAs. Third, the problems that are claimed to have triggered the delegation can be solved by empowering FEPA itself. For instance, one articulated reason for the delegations is the lack of adequate resources at FEPA to review all the EIAs it receives, which, in turn, hinders the delivery of speedy service to proponents. However, this problem can be solved if adequate resources are put at the disposal of FEPA. Similarly, FEPA could be granted more autonomy to independently handle all EIA-related matters. After all, at the federal level, it is FEPA that is evaluating most of the EIAs that are done at the moment.

Third, environmental protection agencies must (1) effectively discharge their duties under EIA-related laws and (2) also read the existing laws meticulously and assert their authority based on these laws to ensure the effective enforcement of the system of EIA in Ethiopia. For example, environmental protection agencies should, among other things, enter into agreements with different sectors such as the land use and administration offices and licensing bodies to ensure the use of EIA; ascertain that EIA is done by experts before embarking on report evaluation; abandon using a one expert review system; try to engage the public, to the extent possible, in the EIA review process; undertake monitoring activities when EIA is prepared and authorized projects are implemented; take appropriate measures based on the existing laws when that is necessary; and take steps to raise the awareness of proponents about their duties under the EIA Proclamation and the relevance of EIA to their projects.

Fourth, some financial institutions such as the WB, the AfDB, and the EDB have been using EIA as a condition for granting loan or funding for development actions. This is commendable. Accordingly, they should continue requiring EIA for the assistance they provide. More importantly, however, the other aid organizations, financial or otherwise, should follow in the footsteps of these financial institutions. In particular, the financial institutions in Ethiopia should follow the lead of the EDB and demand EIAs as a precondition for the loans they grant because EIA ensures the sustainability of the projects they support.

Fifth, the existing NGOs in the field of environmental protection should continue doing, or even step up, what they are doing at the moment. For instance, they should work extensively on raising the awareness of the public and proponents in relation to the relevance of EIA; lobby the environmental protection agencies to strengthen their efforts to ensure the effectiveness of the system of EIA; lobby the licensing bodies to use EIA as a licensing

condition; advocate the amendment of the EIA Proclamation and other relevant laws; and urge the issuance of subsidiary laws for the effective implementation of the EIA Proclamation. Such efforts will someday produce the desired results.

Finally, as we have seen before, the GTP of Ethiopia presents some opportunities for protecting the environment, in general, and improving the use of the EIA system, in particular, over the next five years. Hence, everyone, in particular the environmental protection agencies, should seize upon these opportunities and ensure the effectiveness of the system of EIA in Ethiopia. Moreover, all relevant authorities must strive to convert the words of the GTP on environmental protection into action. Stakeholders such as environmental NGOs should also exploit the opportunities presented by the GTP to lobby the relevant authorities to take measures that aim at making the system of EIA effective in Ethiopia. At this juncture, one may wonder what impact the Charities and Societies Proclamation No. 621/2009 will have on the operation of NGOs in the field of environment. First, the Proclamation recognizes institutions that are established for environmental protection or improvement as charitable organizations.⁹⁷³ Then, the Proclamation excludes non-Ethiopian charities and societies from engaging in (1) the advancement of human and democratic rights; (2) the promotion of equality of nations, nationalities and peoples and that of gender and religion; (3) the promotion of the rights of disabled persons and children; (4) the promotion of conflict resolution or reconciliation; and (5) the promotion of the efficiency of the justice and law enforcement services.⁹⁷⁴ Luckily, engaging in environmental protection or improvement is not an activity that is exclusively reserved for Ethiopian charities and societies.⁹⁷⁵ Therefore, any charities and societies (NGOs) working in the field of environment can seize this opportunity and try to influence decision-making in any way

⁹⁷³ See Charities and Societies Proclamation, Proclamation No. 621/2009, article 14 (1)(2)(b)

⁹⁷⁴ *Id.* article 14 (2) (j-n)

⁹⁷⁵ *Id.* article 14 (2) (b)

proper to advance the cause of the environment in general and the effectiveness of the system of EIA in particular.⁹⁷⁶

In general, therefore, Ethiopia has recognized the importance of EIA in decision-making process. As a result, it has put in place both legal and institutional frameworks to make the EIA system effective. Practice also shows that EIA is being used in decision-making processes both at the federal and at the regional levels. However, Ethiopia's EIA legal and institutional frameworks have thus far remained inadequate to ensure the effectiveness of the EIA system. Similarly, the practice of EIA in Ethiopia is very limited. Besides, for a number of reasons, environmental protection agencies have not been trying their level best to ensure the effectiveness of the system of EIA in Ethiopia. Consequently, it is very difficult to imagine the achievement of the objectives of the EIA Proclamation if the *status quo* continues. On the other hand, there are many opportunities that could be seized and exploited to improve the EIA system in Ethiopia.

⁹⁷⁶ Of course, non-Ethiopian NGOs cannot use a human right approach to promote environmental protection or improvement because non-Ethiopian NGOs using a human right approach may be taken as an NGO that is advancing human and democratic rights which is reserved to Ethiopian NGOs.

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APPENDIXES

Appendix I: FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA ENVIRONMENTAL PROTECTION AUTHORITY



ENVIRONMENTAL IMPACT ASSESSMENT PROCEDURAL GUIDELINE Series 1

November, 2003
ADDIS ABABA

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1. Definitions of terms

Terms in Use

Alternative

A possible course of action that might be adopted in lieu of the proposal or activity or in terms of site, design, input, process, including the "no action" alternative.

Audit

The process through which how well compliance with policy objectives and regulatory requirements is met and the fidelity of the implementation of conditions attached to an approved environmental impact assessment report is examined.

Competent Agency

Any federal or regional government organ entrusted by law with a responsibility related to Environmental Impact Assessment.

Cost-Benefit Analysis

Objective, careful, and explicit analyses of the costs and benefits of a proposed action. Such an analysis should also determine social discount rates for both costs and benefits.

Cumulative Impact

An impact that may in itself not be significant but the combination of one or more impacts that can have a greater effect than the sum of the individual impacts.

Environment

The physical, biological, social, economic, cultural, historical and political factors that surround human beings. It includes both the natural and built environments. It also includes human health and welfare.

Environmental Assessment

The methodology of identifying and evaluating in advance, any impact positive or negative, which results from the implementation of a proposed action.

Environmental Impact Assessment Report

A report containing sufficient information to enable the Environmental Agency to determine whether and under what conditions a proposed action should proceed.

Environmental Management Plan

An action plan that addresses the how, when, who, where and what of the environmental mitigation measure aimed at optimizing benefits and avoiding or mitigating adverse potential impacts of proposed operation or activity. It encompasses mitigation, monitoring, rehabilitation and contingency plans.

Environmental Management System

Is the means of ensuring effective implementation of an environmental management plan or procedures and compliance with environmental policy objectives and targets.

Environmental policy of an organization

A statement by the organisation of its intentions and principles in relation to its overall environmental performance that provides a framework for action and for the setting of its environmental objectives and targets

Environmental Protection Organs

Refers to The Authority, the Council, the Sectoral and Regional environmental agencies.

Impact

Any change to the environment or its component that may affect human health or safety, biophysical conditions, or cultural heritage, other physical structure with positive or negative consequences.

Integrated Environmental and Development Management

A code of practice for ensuring that environmental considerations are fully integrated into all stages of the development process in order to achieve a desirable balance between conservation and development and promote environmentally sustainable use of resources.

Interested and Affected Parties

Individuals or groups concerned with or affected by an activity and its consequences. These include local communities, work force, customers, or consumers, environmental interested groups and the general public.

Licensing agency

Any organ of government empowered by law to issue an investment permit, trade or operating license or work permit or register business organization as a case may be.

Mitigations

Measures taken to reduce or rectify undesirable impacts of a particular activities when an environmental evaluation process deems the impact is adversely significant.

Monitoring

The repetitive and continuing observations, measurements and evaluation of changes that relate to the proposed activity. It can help to follow changes over a period of time to assess the efficiency of control measures.

Project

Any activity enlisted in the Annex here in and includes any new development activity, major expansion or alteration of any existing undertaking, or any resumption of work that has been discontinued.

Proponent/ Developer

Any organ of government, if in the public sector or any person if in the private sector that initiate a project or a public instrument.

Public instrument

Means a policy, a plan, a strategy, a program, a law or an international agreement.

Rehabilitation

Restoration of an environmental component, social service or system that has been affected by an activity to more or less its former states.

Regional Environmental agency

Any regional government organ entrusted by that Region, with a responsibility of the protection or regulation of the environment and natural resources.

Reviewing

The determination of whether or not the environmental impact study report meets the approved Terms of Reference and provides satisfactory information and analysis that is required for decision-making.

Scoping

The identification and “narrowing down” of potential major environmental impacts based on which a detail impact assessment will be conducted.

Screening

The process that decides whether or not a project requires assessment, and the level of assessment that may be required.

Strategic Environmental Assessment

The assessment used to identify the potential impacts of the proposed public instruments and the design of their containment.

2. ENVIRONMENTAL IMPACT ASSESSMENT - AN OVERVIEW

In the past the environment failed to feature in holistic manner in the development endeavors of the country, since project evaluation and decision-making mechanisms were unwarrantedly made to focus on short-term technical feasibility and economic benefits.

For this reason, past development practices fell short of anticipating, eliminating or mitigating potential environmental problems early in the planning process.

This state of play resulted, among others, in situation where the country is plagued with seriously degraded environment. Further development along this line has to be cut short, as efforts in reversing the damage to the environment at a later time is usually costly or even irreversible.

In order to ensure sustainable development, it is essential to integrate environmental concerns into development activities, programs, policies, etc. Environmental Impact Assessment as one of environmental management tools facilitates the inclusion of principles of sustainable development aspiration well in advance.

The EA procedural guideline series aim at in particular towards:

- ensuring the implementation of the EPE and compliance of EA related legal and technical requirements,
- providing a consistent and good practice approach to EA administration in Ethiopia,
- assisting proponents and consultants in carrying out their environmental assessment related tasks,
- assisting Interested and Affected Parties, especially communities in realizing their environmental rights and roles,
- assisting Environmental Protection Organs, Competent and Licensing agencies in discharging their roles and responsibilities, and
- establishing partnership and networking among and between key stakeholders in EA administration.

This document is the first series of the procedural guideline and contains legal and policy elements, core values, guiding principles, basic requirements and schedules of activities.

3. Legal and policy context

The concept of sustainable development and environmental rights are enshrined in article 43,44 and 92 of the Constitution of FDRE.

In Article 43: The Right To Development, where peoples' right to:

- improved living standards and to sustainable development,
- participate in national development and, in particular, to be consulted with respect to policies and projects affecting their community, and
- the enhancement of their capacities for development and to meet their basic needs, are boldly recognized.

Similarly, in article 44: Environmental Rights, all persons are entitled to:

- live in a clean and healthy environment,
- Compensation, including relocation with adequate state assistance.

Moreover, in article 92: Environmental objectives it is declared that,

- government shall ensure that all Ethiopians live in a clean and healthy environment,
- programs and projects design shall not damage or destroy the environment,
- peoples have the right to full consultation and expression of views, and
- government and citizens have the duty to protect the environment.

"Environmental Protection organs Establishment proclamation (proc.no.295/2002)" has stipulated the need to establish a system that enables to foster coordinated but differentiated responsibilities among environmental protection agencies at federal and regional levels. The proclamation has also required the establishment of Sectoral and Regional Environmental, Units and Agencies, respectively. This shows that institutionalizing and mainstreaming environmental concerns has a legal foundation.

The Environmental Impact Assessment Proclamation (Proc. no. 299/2002) has made EA to be a mandatory legal prerequisite for the implementation of major development projects, programs and plans. This proclamation is a proactive tool and a backbone to harmonizing and integrating environmental, economic, cultural, and social considerations into a decision making process in a manner that promotes sustainable development.

The "**Environmental Pollution Control Proclamation (Proc. no. 300/2002)**" is promulgated with a view to eliminate or, when not possible to mitigate pollution as an undesirable consequence of social and economic development activities. This proclamation is one of the basic legal documents, which need to be observed as corresponding to effective EA administration.

The **Environmental Policy of Ethiopia (EPE, 1997)**, provides a number of guiding principles that indicate and require a strong adherence to sustainable development. In particular EA policies of EPE includes, among other things, the need to ensure that EA:

- considers impacts on human and natural environments,
- provides for an early consideration of environmental impacts in projects and programs design,
- recognizes public consultation,
- includes mitigation plans and contingency plans,
- provides for auditing and monitoring,
- is a legally binding requirement,
- is institutionalize, etc

4. EA Objectives and Principles

4.1. Objectives

The primary purpose of EA is to ensure that impacts of projects, policy and programs, etc are adequately and appropriately considered and mitigation measures for adverse significant impacts incorporated when decisions are taken.

Consequently, an EA serves to bring about:

- administrative transparency and accountability,
- popular participation in planning and decision taking on development that may affect the communities and their environment, and
- sustainable development.

4.2. Principles and values

4.2.1. CORE VALUES OF EA

Core values of EA are:

- ❖ **Sustainability** ----- the EA process should result in sustainable development by establishing long-term environmental safe guards.
- ❖ **Integrity** ----- the EA process will confirm to agreed and established requirements.
- ❖ **Utility** -----the EA process will provide balanced, credible information for decision making.
- ❖ **Equity**----- that EA ensures fairness in the distribution costs or benefits.

4.2.2. GUIDING PRINCIPLES OF EA

The basic principles that underlie the objective are: -

- ❖ **Early application**--- proactive consideration and integration of environmental concerns at the earliest stages of the conceptualization of the projects, programs or policies.
- ❖ **Participation** --- appropriate and timely access and opportunity to the process for all interested and affected parties.
- ❖ **Issues based** - the focus of an EA is on the resolution of major issues of significant impacts.
- ❖ **Consider alternatives** - all feasible options to a project, policies, programs or its components like site, processes, products, raw materials etc. including the “no go” option should be considered.
- ❖ **Accountability** - refers to answerability of a proponent, consultant and environmental agencies for their respective roles and responsibilities.
- ❖ **Flexibility**--the assessment process should be able to adapt to deal efficiently with changing circumstances and decision making situation.
- ❖ **Credibility**- assessments and reviews are undertaken with professionalism and objectivity.
- ❖ **Time and Cost-effectiveness**- the assessment process, its outcomes and decision taking will ensure environmental protection at the least cost and within reasonable time to society and developer alike.
- ❖ **Transparency**- all assessment decisions, and their basis, should be open and accessible to the public.
- ❖ **Supportive**- the review and decision making process should enhance and support sustainable development and environmentally friendly investment efforts.
- ❖ **Conservation based**- the EA process should strive to promote conservation based development. Integrating conservation elements in the development planning that extend beyond conventional impact fixation approach can do this.
- ❖ **Practicality**--- the information and outputs provided by the assessment process are readily usable in the decision -making and planning,

4.2.3. OPERATING PRINCIPLES

EA is undertaken to:

- ❖ modify and improve design,
- ❖ ensure efficient resource use,
- ❖ enhance social aspects,
- ❖ identify measures for monitoring and managing impacts,
- ❖ promote sustainable productivity within the natural and social system capacity,
- ❖ meet environmental requirements and make continuing improvement in environmental performance,
- ❖ provide accurate and appropriate information for sound decision,

4.2.4. BENEFITS OF EA INCLUDES:

- ❖ more environmentally sustainable design,
- ❖ better compliance with standards,
- ❖ saving in capital and operating costs,
- ❖ reduced time and costs for approval,
- ❖ avoids later plan adaptations,
- ❖ reduces health costs,
- ❖ increased project acceptance,

5. Environmental Impact Assessment Process and Requirements

5.1. GENERAL DESCRIPTION AND PERMIT REQUIREMENTS

An environmental impact assessment is used to predict and manage the environmental effects which a proposed development activity may entail and to decide on the permission, modification or conditions of management or termination of the project and thus to help bring about the intended development with out unacceptable adverse impacts.

1. What is Environmental Impact?

Environmental impact refers to any change to the environment or to its components that may affect human health or safety, flora, fauna, soil, air, water, climate, natural or cultural heritage, other physical structures, social, economic or cultural conditions.

2. Who should undertake an environmental impact assessment?

The proponent is responsible for undertaking an environmental impact assessment (EIA) and for submitting the study report (EIS).

3. Which projects require EIA?

Those projects, listed in the guidelines prepared by EPA, that are likely to entail significant adverse environmental impacts require EIA.

4. To Whom Shall the EIS Be Submitted?

When the project is federal or trans-regional, its EIS shall be submitted to the Federal EPA. Otherwise, it shall be submitted to the appropriate regional office.

5. When should an EIA be carried out?

Undertaking an EIA should begin at the time when the project site selection commences.

6. What shall be the content of an EIS?

- a) An EIS shall contain sufficient information to enable the determination of whether and under what conditions the project shall proceed.
- b) as a minimum, a description of:
 - (i) the nature of the project, including the technology and processes to be used and their physical impacts;
 - (ii) the content and amount of pollutants that will be released during implementation as well as during operation;
 - (iii) source and amount of energy required for operation;
 - (iv) characteristics and duration of all the estimated direct or indirect, positive or negative impacts on living things and the physical environment;
 - (v) measures proposed to eliminate, minimize, or mitigate negative impacts;
 - (vi) a contingency plan in case of accidents; and
 - (vii) procedures of internal monitoring and auditing during implementation and operation.

7. When should an EIS be submitted?

The EIS must be submitted before commencing any construction or any other implementation of the project.

8. How can a proponent speed-up the authorization process?

A proponent shall, in electronic and hard copies, submit a brief statement that summarizes the EIS in non-technical terms as well as indicate the completeness and accuracy of the information given. Annexes attached to the study report shall include:

- (a) site plan of the project,
- (b) a description of the participation process and comments of interested and affected stakeholders, especially local communities, and
- (c) testimony of concerned local authorities on the involvement of stakeholders, as well as on the correctness of the information to the extent they can, and
- (a) detailed technical information.

9. What is expected from Licensing Agencies?

Any licensing agency shall, prior to issuing a trade or an operating license for any project, ensure that an EIS of the project has been approved.

10. What is expected from the public?

- (a) to submit comments on proposed project,
- (b) to actively engage in ensuring the sustainability of the proposed development.

5.2. Comprehensive description of the EA Process

The various stages involve in the EA include the following:

5.2.1 PRE-SCREENING CONSULTATION

Pre-screening is not normally taken as a part of a stage in the EA process. However, its application is recommended in recognition of its importance to enhance the overall effectiveness of the EA System.

Pre-screening is a stage where the proponent and the respective environmental or sectoral agencies establish contact and hold consultation on how best to proceed with the EA.

The undertaking of a pre-screening consultation is advisable for it saves time and fosters a mutual understanding about the requirement.

5.2.2 SCREENING

Screening is the processes of determining whether or not a proposal requires EA and the level at which the assessment should occur.

At this stage a proponent initiates the process by submitting the project profile or an initial environmental examination report after undertaking an initial environmental assessment, to the relevant environmental agency.

This project profile is normally called **screening report** or Initial Environmental Examination report, that may describe,

- ♣ the proposed activities and its potential impacts,
- ♣ characteristics of the location (sensitivity of the area),
- ♣ size (small, medium and large scale),
- ♣ degree of public interest,
- ♣ institutional requirement, Environmental enhancement and monitoring considerations,

The outcome of screening could be one of the following:

- *No EA required*
- *Preliminary Assessment (PA)* – preliminary assessment is applied to:
 - ◆ Projects with limited impacts,
 - ◆ Projects in which the need of EA is unclear, and
 - ◆ Proposals with inadequate information
- *Full scale EA* – when there is sufficient ground for detail assessment.

5.2.3.SCOPING

The scoping stage is the process of interaction. It aims at identification of:

- boundaries of EA studies,
- important issues of concerns,
- significant effects and factors to be considered,

The purposes of scoping are to:

- involve potentially affected groups,
- consider reasonable alternatives,
- evaluate concerns expressed,
- understand local values,
- determine appropriate methodologies,
- establish the terms of reference,

The outcome of scoping is a scoping report or Terms of Reference for undertaking full scale EA. Both of them require passing through reviewing process.

Scoping report should include as a minimum:

- a brief description of the project,
- all alternatives identified,
- issues raised by IAPs
- description of the public participation,

Outline of a Term of Reference:

- ♣ background to the proposal,
- ♣ setting the context of the problem,
- ♣ consideration of alternatives,
- ♣ institutional and public involvement,
- ♣ required information regarding project and location, etc.,
- ♣ analysis of impacts,
- ♣ mitigation and monitoring, and
- ♣ conclusions and recommendations,

5.2.4 ENVIRONMENTAL IMPACT STUDY

Purpose of EA

The purpose of undertaking Environmental Impact Study is to generate sufficient information on significant impacts that enable the preparation of an Environmental Impact Study report, which will be used to determine whether or under what conditions a project should proceed.

Environmental Impact Study Involves:

- Impact Prediction
- Impact analysis
- Consideration of alternatives
- preparation of management plan (mitigation, monitoring activities)
- preparation of contingency plan

Assessing impacts characteristics should:

- ♣ be carried out with well defined values of significance,
- ♣ compare all feasible alternatives,
- ♣ document the values and beliefs on which judgments are based, and
- ♣ based on acceptable methodology, research and experimental findings.

Impact significance criteria include:

- ❖ ecological importance,
- ❖ social importance,
- ❖ environmental standards,
- ❖ statistical significance,

- ❖ experimental findings, etc

Design Of Mitigation Measures:

Mitigation seeks to:

- ❖ find better ways of doing things,
- ❖ minimize or eliminate negative impacts,
- ❖ enhance benefits, and
- ❖ protect public and individual rights to compensation,

Mitigation options:

- ❖ alternative ways of meeting the needs,
- ❖ changes in planning and design,
- ❖ improving monitoring and management,
- ❖ monetary compensations,
- ❖ performance bond,
- ❖ replacing, relocating, rehabilitating, etc.

Impact management plan should:

- ❖ state policy and standards,
- ❖ indicate environmental effects, the issue and activity required to address it,
- ❖ define responsibilities, provide a schedule of tasks,
- ❖ include a system of reporting,
- ❖ include a system for monitoring and auditing,
- ❖ indicate resources required for completion and where relevant actual costs, including training and equipment needs,
- ❖ describe the proposed mitigation measures,
- ❖ contain a contingency plan, etc.

5.2.5 REVIEWING

The purpose of review is to examine and determine whether the EIA-report is an adequate assessment of the environmental effects and of sufficient relevance and quality for decision-making.

Five hard copies and an electronic copy should be submitted to the relevant reviewing authority or agency as the case may be.

Reviewing conducted at various stages in the EA processes.

This include reviewing of:

- ❖ screening report;
- ❖ scoping report;

- ❖ Terms of Reference (TOR)
- ❖ Environmental impact assessment report, and
- ❖ Performance (monitoring or audit) reports at different stages in the project cycle.

Reviewing may include considerations of the adequacy of:

- ❖ compliance with the "approved TOR",
- ❖ required information,
- ❖ the examination of alternatives, assessment of impacts, appropriateness of mitigation measures and monitoring schemes as well as implementation arrangements,
- ❖ the use of scientific and analytical techniques,
- ❖ the extent of public involvement and reflection of IAPs concerns, and
- ❖ presentation of the information to decision makers at Regional, Sectoral, and Local levels.

NB. Reviewing will be made based on reviewing guidelines prepared by EPA. For detail information and requirements consult this guideline.

5.2.6. DECISION MAKING

EIA is an ongoing process of review, negotiations and incremental decision-making at various levels of the project cycle, about whether or not the proposal is to proceed, and under what conditions. Decision-making should be consultative, participatory and influence others to behave responsibly and sustainably.

It should also acknowledge and implement mandates and responsibility.

The guiding principles of approval procedure are, that:

- full scale assessment is required where the project is known to have significant adverse environmental impacts,
- preliminary EA is required where the project may have environmental impacts,
- EA is not necessary where the project is unlikely to cause significant environmental impacts,
- there is a need to adhere to precautionary principle. When determining the impacts of a project if both beneficial and detrimental effects are on balance, only slightly or arguably beneficial, it should be decided as it is likely to entail a negative significant impact,
- all projects contravening government policies or other legal obligations should be rejected from the outset.
- decisions are to be made in a step wise manner upon a successful implementation of environmental requirements based on stages in EA process and corresponding stages in the project cycle,

Possible decisions include:

- ❖ request for supplementary, or new EA report;
- ❖ approval of the EA report or performance reports at various stages in the project cycle;
- ❖ approval of the implementation of the proposal with or without conditions;
- ❖ approval subject to ongoing investigation;
- ❖ rejection;

Important considerations of decision making :

- ❖ a summary of evaluation is made available to the public;
- ❖ reasons for decision and conditions of approval are made public;
- ❖ there is the right of appeal against decision;
- ❖ approval can be reversed or permit can be revoked on the advent of changing circumstances,
- ❖ approval of a proposal cannot immune the proponent from being accountable of the occurrence of adverse significant impacts in the course of the implementation of the project, and

Approval of an EIA report is only mark a simple agreement to the proposal. The culmination of the approval procedure will be the issuance of an Environmental Clearance Certificate upon the satisfactory trial operation phase.

5.2.7. A SYSTEMATIC EA FOLLOW-UPS

Systemic follow-ups activities are needed:

- ♣ to ensure that the anticipated impacts are maintained within the levels predicted,
- ♣ to see that the unanticipated impacts are managed and or mitigated before they become problems,
- ♣ to realize and optimize the benefits expected, and
- ♣ to provide information for a periodic review and alteration of impact management plan and enhance environmental protection through good practice at all stages of the project.

It is therefore necessary that:

- Environmental Management System, including internal monitoring schemes established,
- External audit conducted,
- Mechanism for regular risk communication designed, etc.

6. Roles and responsibilities

The multitude of division of functions and variability of responsibilities inherent in the EA process calls for the clear definition and spell out of roles and tasks of different stakeholders.

Therefore, defining the roles and responsibilities of each party would enable to harmonize the various interests and foster cooperation in a manner that averts duplication of efforts and promote efficiency.

Potentially, EA involves all members of society. For convenience and, above all in recognition of the common but differentiated roles each may manifest, the different actors are categorized in to the following five major groups:

6.1. Environmental Agency

An Environmental Agency is either EPA or Regional Environmental Body that are mandated by a proclamation provided for the establishment of Environmental protection organs (proc. no.295/2002) and Environmental Impact Assessment proclamation (proc.no.299/2002) and other relevant laws to oversee and facilitate the implementation or administration of EA.

In general, An Environmental Agency has responsibility to make sure that:

- the necessary system that contains procedural and technical guidelines is prepared and implemented,
- the public, especially affected communities are given meaningful opportunity in the EA process,
- views, concerns and position of IAPs are taken into account during assessment, reviewing ,auditing and at all stages of decision making,
- All processes in EA administration is made in transparent, participatory and accountable manner,
- the proponent's right to appeal and understanding of the process is respected at all times,
- incentives structures are prepared to incite and encourage environmentally friendly practices,
- EA audits are conducted at various stages in EA process and at the corresponding levels in the project cycle and a step wise approval is done.
- liaison with relevant licensing agencies is maintained.
- activities' schedules are continuously updated,
- appeals and grievance are entertained and decisions are communicated in good time,
- proponents are provided with advice that help them best comply with EA requirements,
- decisions are made without unnecessary delay and within the time frame stipulated in the relevant laws and in a manner that improve effectiveness and efficiency,
- appropriate support is made available to build capacity and create awareness on EA, etc.

6.1.1. EPA AS A FEDERAL ENVIRONMENTAL AGENCY IS RESPONSIBLE FOR:

- the establishment of a required system for EA of public and private sector projects, as well as social and economic development policies, strategies, laws, and programs of federal level functions;
- reviewing and pass decisions and follow-up its implementations of Environmental Impact Study Reports of projects, as well as social and economic development programs or plans where they are,
 - subjects to federal licensing, execution or supervision,
 - Proposed activities subjects to execution by a federal agency,
 - likely to entail inter or transregional, and international impacts
- notifying its decision to the concerned licensing agency at or before the time specified in the appropriate law or directives,
- auditing and regulating the implementation of the conditions attached to the decision,
- provide advice and technical support to the regional environmental agencies, sectoral institutions and the proponents,
- making its decisions and the EA report available to the public,
- resolving all complaints and grievances in good faith and at the appropriate time,
- develop incentive or disincentive structures required for compliance of RA requirements,
- pave the way and involve in EA awareness creation, etc.

6.1.2 REGIONAL ENVIRONMENTAL AGENCIES:

In the Environmental Impact Assessment Process the regional environmental agencies or their equivalent Competent Authority are responsible to:

- ❖ adopt and interpret federal level EA policies and systems or requirements in line with their respective local realities,
- ❖ establish a system for EA of public and private projects, as well as social and economic development policies, strategies, laws, or programs of regional level functions;
- ❖ inform EPA about malpractices that affect the sustainability of the environment regarding EA and cooperate with EPA in compliant investigations,
- ❖ administer, oversee, and pass major decisions regarding impact assessment of:
 - project subjects to licensing by regional agency
 - project subjects to execution by a regional agency
 - project likely to have regional impacts

Regarding projects and activities under the jurisdictions of federal EPA, regional agencies should write an endorsement letter verifying or confirming that:

- the biophysical and socio-economic baseline conditions are adequately and truly described,
 - during scoping major issues are well defined and explicitly indicated in the Term of Reference (TOR),
 - interested and especially the affected parties or their true representatives are provided with all means and facilities (e.g. notice, assembly holes, reasonable time, understandable language) that enable them to adequately air their views and concerns,
 - IAPs have agreed to and satisfied with the terms of compensations and the appropriateness of the EMP,
 - the environmental monitoring activities are undertaken in appropriate time with the involvement of the IAPs and regular reporting is made in good faith and time to all concerned,
 - the proponent/consultant fulfill the local and regional legal and policy requirements and obtain the necessary permits,
 - the envisaged benefits to that communities and the regions are tangible,
 - the monitoring plan are logical and allows the participation of relevant bodies in the region,
 - the strategy for impact communication and reporting was understandable and appropriate at regional level stakeholders,
 - the minutes of the consultation process reflects the true and unbiased accounts of the opinions and interests of the IAPs at the local level.
- establish the necessary condition for the creation of awareness on EA,
 - develop the necessary incentive and disincentive system, etc.

6.2 Proponent

A proponent is any person that initiates a project, policy or program, that is, if in the public sector an organ of government, and the private sector an investor.

A proponent is required to:

- proactively integrate an environmental concerns into its social and economic development project, program, policy, plan or strategic initiative as per the requirements of relevant environmental laws and directives,
- ensure that positive effects are optimized and strive to promote conservation based development and work with objectives of continuous improvement,
- initiate the EA process and create the necessary ground for undertaking EA,
- appoint an eligible independent consulting firm who shall seek to undertake EA ,
- cover all expense associated with the Environmental Impact Assessment. This may include the costs of :
 - ❖ undertaking EA,
 - ❖ public participation process,

- ❖ reviewing EIA report as the need arise,
 - ❖ preparation and implementation of EMP, that include both mitigation and monitoring measures and the associated institutional and human resources,
 - ❖ closure plan as the case may be,
 - ❖ Environmental Management System,
 - ❖ contingency plan,
 - ❖ reporting, environmental education,etc.
- submit to EPA or the relevant regional environmental agency an EIA report together with the necessary documents requested both in an electronic and hard copies,
 - observe the terms and conditions of authorization and work in partnership and cooperation with all responsible and interested parties,
 - provide the necessary reports for stepwise decisions required for approval of the proposal,
 - involve all interested and affected parties, and to that effect take all reasonable and practical measures to notify the latter in good time,
 - establish environmental units to monitor the environmental performance of the project in a proactive manner to ensure sustainable development,
 - consult relevant government institutions as the case may be,
 - report on a regular bases about its environmental performance,
 - establish database and network with all concerned parties, and respect local values and interests,
 - develop standardize environmental management system
 - be familiar with the pertinent EA related stipulations, etc.

6.3. A Consulting firm

A consulting firm is an institution that can command the required qualified professional working group that has demonstrated the ability to undertake the EA, and meets the requirements specified under the relevant law.

The firm that will be appointed to work on behalf of a proponent is expected to:

- have the expertise in environmental impact assessment and management commensurate with the nature of the proposed activity and legal requirements,
- make available an interdisciplinary team, having solid technical skills and legal know-how, and local knowledge,
- manage the participation of interested and affected parties in acceptable manner,
- have the facility to produce readable reports that are thorough and informative,
- declare and ensure at all times that has no vested interest in the proposed activity and observe all ethical values of the calling,

- familiar itself with legal and technical requirements of all the concerned bodies, and be able to include :
 - statements from the regional environmental agencies,
 - certificates and recommendations from the sectoral agencies,
 - statements of local administration approval as the case maybe, and
 - an endorsed minutes of public consultation process by appropriate local authority, as the verification of the truthfulness of all information contained in the EIA-report as well as fairness of the process,
- provide additional detailed information related to the environmental impact study report as may be requested,
- ensure that Interested and Affected Parties are provided with all means and facilities (e.g. notice, assembly holes, reasonable time, understandable language, fair representation, etc.) enabling them to adequately air their views and concerns,
- fulfill that they are legally registered and licensed to conduct the task,
- capable of presenting an authentic complete CV of experts to be employed for the task,
- present a true, pragmatic, analytical, understandable, and impartial account of the proposed activity, etc.

6.4. Interested and Affected Parties (IAPs)

Interested and Affected Parties are individuals or groups concerned with or affected by the proposed activity or its consequences. These may include local communities, the work force, customers and consumers, environmental interested groups and the general public.

Interested and Affected Parties are expected to:

- provide comments at various stages of EA with reasonable time frame,
- work in partnership with Environmental Agencies and proponents,
- act and lobby in good faith, knowledge, reason and in a cooperative manner and use all means and facilities to ensure fairness in EA administration,
- follow and monitor changes and inform the environmental and sectoral agencies and local administration the occurrence of adverse incidence or any other grievance in the course of implementation of a project or public instruments,
- advocate and uphold the principle and values of environmentally sustainable development, etc.

6.5. Licensing Agency

Licensing Agency is any organ of government empowered by law to issue an investment permit, trade or operating license or work permit or register business organization as a case may be.

Licensing agencies are required to:

- ensure that prior to issuing their respective licenses and permits, have legal duty to require proponents to submit authorization, a letter of approval or Environmental Clearance Certificate awarded by the appropriate Environmental Agency,
- ensure that environmental performance criteria are included in their respective sectoral incentive or disincentive structure,
- ensure that renewal or additional permits issuance should also considers integration of environmental concerns,
- to seek advice or opinion from the appropriate environmental agency, etc.

7. List of Annexes

*Annex I. Environmentally Sensitive areas and ecosystems**

Areas prone to natural disasters (geological hazards, floods rain storms, earthquakes, landslides, volcanic activity, etc.).

2. Wetlands: -
(flood plains, swamps, lakes, rivers etc.) water bodies characterized by one or any combination of the following conditions.
 - (a) Tapped for domestic purposes; brick making
 - (b) Within the controlled and /or protected areas;
 - (c) Which support wildlife and fishery activities
 - (d) Used for irrigation agriculture, livestock grazing
3. Mangrove swamps characterized by one or any combination of the following conditions;
 - (a) With primary pristine and dense growth;
 - (b) Adjoining mouth of major river systems;
 - (c) Near or adjacent to traditional fishing grounds;
 - (d) Which act as natural buffers against shore erosion strong winds and storm floods
4. Areas susceptible to erosion e.g.
 - (a) hilly areas with critical slopes
 - (b) Unprotected or bare lands
5. Areas of importance to threatened cultural groups
6. Areas with rare/endangered/or threatened plants and animals.
7. Areas of unique socio-cultural history archaeological, or scientific importance and areas with potential tourist value
8. Polluted area.
9. Areas subject to desertification and bush fires.
10. Coastal areas and Marine ecosystems:-
 - Coral reef

- Islands
- Lagoons and estuaries
- Continental shelves
- Beach fronts etc.
- Intertidal zones

11. Areas declared as:

National parks, Watershed reserves, forest reserves, wildlife reserves and sanctuaries, sacred areas, wildlife corridors, hot - spring areas

12. Mountainous, water catchments and recharge areas of aquifers.

13. Areas classified as prime agricultural lands or range lands

14. Green belts or public open spaces in urban areas

15. Burial sites and graves

16. Near Air ports

*The above list to be reviewed periodically.

Annex II. Aspects of Potential Environmental Impacts

The potential adverse impacts of concern during the screening process are as follows:

- ◆ **Socio-economic impacts:** falling living standards, particularly of the poor, could risk the start of a vicious circle that could produce further environmental degradation. Living and working conditions may deteriorate as a result of such processes as resettlement, cultural shock, risk to health and safety, the intrusion on sight, sound and smell, etc. Impacts on men and women may be very different, impacts will also vary between social groups, especially where rights to land and other natural resources are differentiated. In-migration related to project development could cause important social changes.
- ◆ **Degradation of land and aquatic environments:** major changes in land-use, deforestation, watershed degradation, loss of biodiversity, soil erosion, dry land degradation and overgrazing, salinization, water logging and land-based pollution are all impacts of concern.
- ◆ **Water Pollution:** pollution of water courses, aquifers, water bodies and coasts can result from uncontrolled wastewater/sewage discharge from human settlements, industrial effluent, agricultural chemicals, etc.
- ◆ **Air pollution:** pollution of the air may be caused by urban traffic, pollutants may be odour, smell, dust, sulphurdioxide, oxides of nitrogen, ammonia or even storage of volatile liquids, routine industrial emission, upset industrial conditions, etc.
- ◆ **Noise and/or vibration:** noise and vibration will be caused by any rotating or reciprocating machinery, but will also be associated with blasting, excavating equipment, road traffic, entertainment, etc

- ◆ **Damage to wildlife and habitat:** impacts that affect biodiversity, ecosystems, rare or endangered species or flora/fauna having economic or scientific importance.
- ◆ **Alterations to ecological processes:** e.g. energy transfer bio-accumulation, etc.
- ◆ **Effects on cultural, religious, historic, archaeological and scientific resources:** including the effects of in-migrants or tourists
- ◆ **Climate, especially the hydrological cycle.**
- ◆ **Impacts on human health.**

Annex III. SCHEDULE OF ACTIVITIES:

SCHEDULE I. LIST OF PROJECTS THAT REQUIRE FULL EA

1. AGRICULTURE

- water management projects for agriculture (drainage, irrigation)
- large scale mono- culture (cash and food crops)
- Pest control projects
- Fertilizer and nutrient management
- Land development schemes covering an area of 500 hectares or more to bring forest land into agricultural production
- Agricultural programmes necessitating the resettlement of 100 families or more.
- Development of agricultural estates covering an area of 500 hectares or more
- Construction of dams, man-made lakes, and artificial enlargement of lakes with surface areas of 200 hectares or more.
- Drainage of wetlands wildlife habitat or of virgin forest covering an area of 100 meters or more.
- Introduction of new breed, species of crops, seeds or animals
- Surface water fed irrigation projects covering more than 100 hectares
- Ground water fed irrigation projects more than 100 hectares
- River diversions and water transfers between catchments

2. Livestock and Range management

- Large Scale livestock movement
- Introduction of new breeds of livestock
- Introduction of improved forage species
- Large scale open range rearing of cattle, horses, sheep etc
- Large scale livestock production in Urban area
- Large scale slaughter house construction
- Ectoparasite management (cattle dips, area treatment)
- Intensive livestock rearing units

3. Forestry activities

- Timber logging and processing
- Forest plantation and afforestation and introduction of new species
- selective removal of single commercial tree species
- pest management

- Conversion of hill forest land to other land use
 - Logging or conversion of forest land to other land use within the catchments area of reservoirs used for municipal water supply, irrigation or hydropower generation or in areas adjacent to parks
 - Logging with special emphasis for endangered tree species
 - Large scale afforestation/reforestation, mono-culture forest plantation projects which use exotic tree species
 - Conversion of forest areas which have a paramount importance of biodiversity conservation to other land use
 - Resettlement programs in natural forest and woodland areas.
4. Fisheries activities
- Medium to large scale fisheries
 - Artificial fisheries (Aqua-culture for fish, algae, crustaceans shrimps, lobster or crabs).
 - Introduction of new species in water bodies commercial fisheries
5. Wildlife
- introduction of new species
 - wildlife catching and trading
 - hunting
 - wildlife ranching and farming
 - zoo and sanctuaries
6. Tourism and Recreational Development
- Construction of resort facilities or hotels along the shorelines of lakes, river, islands and oceans
 - Hill top resort or hotel development
 - Development of tourism or recreational facilities in protected and adjacent areas (national parks, marine parks, forestry reserves etc) on islands and in surrounding waters
 - Hunting and capturing
 - camping activities, walk ways and trails etc.
 - sporting and race tracks/sites
 - Tour operations
7. Energy Industry
- Production and distribution of electricity, gas, steam and hot water
 - Storage of natural gas
 - Construction of off shore pipelines in excess of 50 km in length
 - High power transmission line
 - Construction of combined cycle power station
 - Thermal power development (i.e. coal, nuclear)
 - Hydro-electric power
 - Bio-mass power development
 - Wind -mills power development
 - Solar (i.e. Impact due to pollution during manufacture of solar devices, acid battery spillage and improper disposal of batteries)
 - Nuclear energy

8. Petroleum Industry.

- Oil and gas fields exploration and development, including Construction of offshore and onshore pipelines
- Construction of oil and gas separation, processing, handling and storage facilities.
- Construction of oil refineries
- Construction of product deposits for the storage of petrol, gas, diesel, tar and other products within commercial, industrial or residential areas.
- Transportation of petroleum products

9. Food and beverage industries

- manufacture of vegetable and animal oils and fats
- oil refinery and ginneries
- processing and conserving of meat
- manufacture of dairy products
- brewing distilling and malting
- fish meal factories
- slaughter - houses
- soft drinks
- tobacco processing
- canned fruits, and sources
- sugar factories
- other agro-processing industries

10. Textile in industry

- cotton and Synthetic fibres
- dye for cloth
- ginneries

11. Leather Industry

- tanning
- tanneries
- dressing factories
- other cloth factories

12. Wood, Pulp and Paper Industries

- manufacturing of veneer and plywood
- manufacturing of fiber board and of particle - board
- manufacturing of Pulp, Paper, sand-board cellulose – mills

13. Building and Civil Engineering Industries.

- industrial and housing Estate
- major urban projects (multi-storey building, motor terminals, markets etc)
- tourist installation
- construction and expansion/upgrading of roads, harbours, ship yards, fishing harbours, air fields(having an air strips of 2,500m or long) and ports, railways and pipelines
- river drainage and flood control works.
- hydro - electric and irrigation dams

- reservoir
 - storage of scrap metal.
 - military installations
 - construction and expansion of fishing harbours
 - developments on beach fronts
14. Chemical industries
- manufacture, transportation, use and storage of pesticide or other hazardous and or toxic chemicals
 - production of pharmaceutical products
 - storage facilities for petroleum, petrochemical and other chemical products (i.e. filling stations)
 - production of paints, vanishes, etc.
15. Extractive industry
- extraction of petroleum
 - extraction and purification of natural gas
 - other deep drilling - bore-holes and wells
 - mining
 - quarrying
 - coal mining
 - sand dredging.
16. Minerals extraction and processing
- Metallic minerals such as Iron, Lead, Copper, Nickel
 - Industrial minerals such as kaolin, diatomite,
 - Construction Minerals
 - Mineral Water
 - Thermal Water
 - Extraction of salts from brines.
17. Non-metallic industries (Products)
- manufacture of cement, asbestos, glass, glass-fibre, glass-wool
 - processing of rubber
 - plastic industry
 - lime manufacturing, tiles, ceramics
18. Metal and Engineering industries.
- manufacture and assembly of motor - vehicles
 - manufacture of other means of transport (trailers, motor-cycles, motor-vehicle bicycles-cycles)
 - body - building
 - boiler - making and manufacture of reservoirs, tanks and other sheet containers
 - foundry and Forging
 - manufacture of non - ferrous products
 - iron and steel
 - electroplating

19. Waste treatment and disposal

(a) *Toxic and Hazardous waste*

- construction of Incineration plants
- construction of recovery plant (off-site)
- construction of waste water treatment plant (off-site)
- construction of secure landfills facility
- construction of storage facility (off - site)
- collection and transportation of waste.
- installation for the disposal of industrial waste

(b) *Municipal Solid Waste*

- construction of incineration plant
- construction of composting plant
- construction of recovery/re-cycling plant
- construction of Municipal Solid Waste landfill facility
- construction of waste depots.
- collection and transportation

(c) *Municipal Sewage*

- construction of waste water treatment plant
- construction of marine out fall
- night soil collection transport and treatment.
- construction of sewage system

20 . Water Supply

- canalization of water courses
- diversion of normal flow of water
- water transfers scheme
- abstraction or utilization of ground and surface water for bulk supply
- water treatment plants
- Construction of dams, impounding reservoirs with a surface area of 100 hectares
- Ground water development for industrial, agricultural or urban water supply of greater than 4000 m³ /day
- Drainage Plans in towns close to water bodies

21. Transport

- Major urban roads
- Rural road programmes
- Rail infrastructure and railways
- Trans-regional and International high way
- Upgrading or rehabilitation of major rural roads
- Airports with basic runway

22. Health projects

- vector control projects (malaria, bilharzias, trypanosomes etc)

23. Land Reclamation and land development

- rehabilitation of degraded lands
 - dredging of bars, greyones, dykes, estuaries etc.
 - spoil disposal.
24. Resettlement/relocation of people and animals
- resettlement plan
 - establishment of refugee camps
25. Multi-sectoral Projects
- Agro-forestry
 - ◆ dispersed field - tree inter-cropping
 - ◆ alley cropping
 - ◆ living fences and other linear planting
 - ◆ windbreak/shelterbelts
 - ◆ taungya system
 - Integrated conservation and development programmes e.g. protected areas.
 - Integrated Pest Management (e.g. IPM)
 - Diverse construction - public health facilities schools, storage building, tree
 - Nurseries, facilities for ecotourism and field research in protected areas, enclosed latrines, small enterprises, logging mills, manufacturing furniture carpentry shop, access road, well digging, camps, dams, reservoirs.
 - River basin development and watershed management projects
 - Food aid, humanitarian relief
26. Trade: Importation and Exportation of the following
- hazardous Chemicals/Waste
 - plastics
 - petroleum products
 - vehicles
 - used materials
 - wildlife and wildlife products
 - pharmaceuticals
 - food
 - beverages
 - GMOs and GMOs based products
27. Public instruments
- decisions to change designated status
 - family planning
 - technical assistance
 - development strategies
 - urban and rural land use development plans eg master plans,
 - structural adjustment,
 - national budget
 - Policies and Programmes formulations, etc.
28. All projects in environmentally sensitive areas should be treated as equivalent to Schedule 1 activities irrespective of the nature of the project.

SCHEDULE. 2. LIST OF PROJECTS THAT REQUIRE A PRELIMINARY ENVIRONMENTAL IMPACT STUDY.

A List of Small - Scale Activities and Enterprises

- Fish culture
- Bee-keeping
- Small animal husbandry and urban livestock keeping
- Horticulture and floriculture
- Wildlife catching and trading
- Production of tourist handicrafts
- Charcoal production
- Fuel wood harvesting
- Wooden furniture and implement making
- Basket and other weaving
- Nuts and seeds for oil processing
- Bark for tanning processing
- Brewing and distilleries
- Bio-gas plants
- Bird catching and trading
- Hunting
- Wildlife ranching
- Zoo, and sanctuaries
- Tie and dye making
- Brick making
- Beach sailing
- Sea weed Farming
- Salt pans
- graves and cemeteries
- Urban Livestock Keeping
- Urban agriculture.
- Fish landing stations.
- Wood carving and sculpture
- Hospitals and dispensaries, Schools, Community centre and Social halls, play grounds
- Wood works e.g. boat building
- Market places (livestock and commodities).
- Technical assistance
- Rain water harvesting
- Garages
- Carpentry
- Black smith.
- Tile manufacturing
- Kaolin manufacturing
- Vector control projects e.g. Malaria, Bilharzia, trypanosomes
- Livestock stock routes
- Fire belts.
- Tobacco curing kilns

- Sugar refineries
- Tanneries
- Pulp plant
- Oil refineries and ginneries
- artisanal and small scale mining
- Rural road
- Research having the potential to affect ecosystems functions, use, or the health and welfare of the society.
- Rural water supply and sanitation
- Land drainage (small scale)
- Sewerage system

SCHEDULE 3. LISTS OF PROJECTS THAT MAY NOT REQUIRE ENVIRONMENTAL IMPACT ASSESSMENT

1. Social infrastructure and services
 - Educational facilities (small scale)
 - Audio visual production
 - Teaching facilities and equipment
 - Training
 - Medical centre (small scale)
 - Medical supplies and equipment
 - Nutrition
 - Family planning

2. Economic infrastructure and services
 - Telecommunication
 - Research, small scale

3. Production Sector
 - Irrigation
 - Surface water fed irrigation projects covering less than 50 hectares
 - Ground water fed irrigation projects covering less than 50 hectares

 - Agriculture
 - All small scale agricultural activities

 - Forestry
 - Protected forest reserves (small scale)
 - Productive forest reserves (small scale)
 - Livestock
 - Rearing of cattle (<50 heads); pigs (<100 heads), or poultry (<500 heads)
 - Livestock fattening projects (small scale)
 - Bees keeping projects (small scale)

 - Fisheries
 - Rearing of cattle (<50 heads); pigs (<100 heads), or poultry (<500 heads)
 - Artesian fisheries (small scale)

- Industry
 - Agro industrial (small scale)
 - Other small scale industries having no impact to the environment
- Trade
 - All small scale trades except trade in endangered species and hazardous materials
- Financial assistance
 - Programme assistance
 - Non-project or special country support
 - Food aid not involving GMOs based food
- Emergency Operations
 - Assistance to refugee returned and displaced person

4. All projects involved in environmental enhancement programs

Appendix II: DRAFT FEPA DIRECTIVES, 2008

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DIRECTIVE NO. 1/ 2008

A DIRECTIVE ISSUED TO DETERMINE PROJECTS SUBJECT TO
ENVIRONMENTAL IMPACT ASSESSMENT

WHEREAS, Article 5 of the Environmental Impact Assessment Proclamation No. 299/ 2002: provides for the determination of categories of projects requiring environmental impact assessment;

NOW, THEREFORE, this directive is issued in accordance with Article 9(3) of the Environmental Protection Organs Establishment Proclamation No. 295/2002.

1. Designation

This directive may be cited as the "Directive No. 2/ 2008 issued to determine the Categories of projects subject to the Environmental Impact Assessment Proclamation No. 299/ 2002 "

2. List of Types of Project Requiring Environmental Impact Assessment

The Environmental Impact Assessment Proclamation No. 299/ 2002 shall be applied to the types of project listed under these directives.

3. Regional Directive

Any Regional Environmental Agency may issue another directives based on this directive.

4. Effective Date

This Directive shall enter into force as of the date signed by the Chairperson of the Council. *has it been signed?*

Done at Addis Ababa, this ---- day of ----- 2008.

Chairperson of the Environmental Council

→ Actions Subject to SEA - No!

Project Types Subject to Environmental Impact Assessment for projects!	
1.	Mine Exploration that is subject to Federal Government Permit - Petroleum included? (ditto pros)
2.	Dam and Reservoir Construction <ul style="list-style-type: none"> • Dam height 15 meter or more, or • Reservoir storage capacity 3 million m³ or more, or • Power generation capacity 10 MW or more. → many pros, esp. 9 x 10? cumulative?
3.	Irrigation Development <ul style="list-style-type: none"> • Irrigated area of 3000 ha or more big!
4.	<ul style="list-style-type: none"> • Construction of Roads (Design Standard DS1, DS2 and DS3) with a traffic flow of 1000 or more • Railway Construction
5.	Taking Fish from Lakes on a commercial Scale
6.	Horticulture and Floriculture Development for export - National mkt?
7.	Textile Factory
8.	Tannery - Fursing?
9.	Sugar Refinery
10.	Cement Factory
11.	Tyre Factory with Production Capacity of 15 000 Kg/day or more
12.	Construction of urban and industrial waste disposal facility
13.	Paper Factory
14.	Abattoir Construction with Slaughtering Capacity of 10 000/Year or more
15.	Hospital Construction
16.	Basic Chemicals and Chemical Products Manufacturing Factory (Nuclear? (exp.?)
17.	(Any project planned to be implemented in or near areas designated as protected.
18.	Metallurgical Factory with a Daily Production Capacity of Equal or More Than 24 000 Kilogram.
19.	Airport Construction
20.	Installation for the Storage of Petroleum Products with a Capacity of 25,000 Liters or more.
21.	Establishment of Industrial Zone - This is not a project but Strategy - So SEA? inserted.
22.	Condominium construction - Real estate estimate? incl. is cens.?

A
 4.
 This
 (un)wished (out)come of process
 = Lustris

23 - Hotels, motels, resorts... on lakes...
 24 - big plantations (Alu...) Rice...
 - A310 - industry
 25 - Universities + ...? - Re Settlement?

Appendix III: ECC FOR TWO CEMENT FACTORIES BY OREA



BULCHIINSA MOOTUMA NAANNOO CROMIYAATTI
BIIRRO LAFAA FI EECUMSA NAANNOO
ቢሮ ስፔሻል ደብዳቤ ማኅተም
የዕቅድ ጥበቃ ጉዳይ ቢሮ
የዕቅድ ጥበቃ ጉዳይ ቢሮ

Ref. No. *BLEM/21/759/9/13*
Date *22-0-2010*

To: Habesha Cement Share Company
Addis Ababa
THE OROMIA REGIONAL GOVERNMENT
BUREAU OF LAND AND ENVIRONMENTAL PROTECTION

Subject: Environmental Clearance for Habesha Cement Manufacturing Plant

The land and Environmental Protection Bureau (LEPB) of the Oromia National Regional State has evaluated the environmental impact statement report of the **Habesha Cement Company on Cement Manufacturing Plant Project**, in accordance with the Environmental Impact Assessment Proclamation No 299/2002 and the requirements provided under the relevant guidelines. The evaluation has disclosed that the report is prepared on the basis of a life-cycle approach; and that

- Measure taken to ensure effective and meaningful consultation are sufficient,
- Methods and instruments used to collect and prepare baseline information are adequate,
- Methods and objectivity of criteria to identify or predicate impacts are appropriate,
- The impact analysis and means of containment envisaged under the report are all-inclusive, and
- The environmental management plan (EMP) is presented in a monitorable, reportable, and verifiable manner.

Therefore, the Oromia LEPB, after evaluating the impact study report, has approved implementation of the **Habesha Cement Company on Cement Manufacturing Plant Project** on the basis of the following preconditions:

- The Oromia LEPB, will monitor implementation of the project in order to evaluate compliance with all the particulars mentioned under the EMP and ensure the taking of measures by the proponent to undertake any corrective measures as deemed appropriate,
- The OLEPB will require the proponent to address any unforeseen fact of serious implication that is realized after the issuance; and the proponent will be objected accordingly, and,
- The proponent will submit quarterly reports to Oromia LEPB in connection with its performance.

With best Regard



Ahmed Hussein Dakiye
O. Rep., Environmental Protection Core Process

- C.C.
- Oromia Investment Commission
 - Oromia Special Zone Surrounding Finfinne
Finfinne
 - Wolmera Ana Land and environmental protection Office
Holeta
 - Bureau Head
 - Land Use Planning Core Process
 - Environmental Protection Core Process
OLEPB

Received
16/1/2010
Mekonnen
Hurman

Appendix IV: FEPA's Unsigned Letter of Delegation to Some Ministries

1. Delegation letter to the delegated sectors

ለማዕድንና ኢነርጂ ሚኒስቴር

ለንግድና ኢንዱስትሪ ሚኒስቴር

ለግብርናና ገጠር ልማት ሚኒስቴር

ለውሃ ሃብት ልማት ሚኒስቴር

ለትራንስፖርትና መገናኛ ሚኒስቴር

ለጤና ጥበቃ ሚኒስቴር

አዲስ አበባ

የኢትዮጵያ ፌዴራላዊ ዲሞክራሲያዊ ሪፑብሊክ መንግሥት የሚኒስትሮች ምክር ቤት ህዳር 5 ቀን 2001 ዓመተ ምህረት ባካሄደው 73^ኛ መደበኛ ስብሰባው የኢንዱስትሪ ብክለትን ለመከላከል በቀረበው ደንብ ላይ መወያየቱ ይታወሳል። በዚህም ውይይቱ በልማት ፕሮጀክቶች ላይ የሚቀርቡ የአካባቢ ተፅዕኖ ግምገማ የጥናት ሰነዶችን መርምሮ የማረጋገጠ አሰራር በተቀላጠፈ ሁኔታ እንዲፈጸም ለማስቻል የአካባቢ ጥበቃ ባለሥልጣን በልማት ፕሮጀክቶች ላይ የሚቀርቡ የአካባቢ ተፅዕኖ ግምገማ የጥናት ሰነዶችን መርምሮ የማረጋገጥ ሃላፊነቱን ለሥራ ፈቃድ ሰጪ አካላት በውክልና እንዲሰጥ ከስምምነት መድረሱ ይታወሳል።

የተደረሰበትን ስምምነት ለመተግበር እንዲያስችል የውክልና መነሻ ሰነድ አዘጋጅተን ለአስተያየቶችህ ልክንሳችሁ እንደነበረ ይታወሳል። በቀረቡልን አስተያየቶች መሰረትም ከዚህ ደብዳቤ ጋር የተያያዘውን የውክልና ረቂቅ ሰነድ አዘጋጅተናል። በሰነዱ ከተስማማችሁ በስልክ ቁጥር 0116464607 እንዳላወቃችሁን ውክልናውን ለመፈረም የምንችል መሆናችንን እንገልጻለን። ሰነዱ እንዲከለስ ከፈለጋችሁ ደግሞ የሚያስፈልገውን ለውጥ እንድታላውቁንና ተወያይተን በጋራ እንድንስማማበት ጥሪያችንን እናቀርባለን።

ከሠላምታ ጋር

ግልባጭ:

- በኢትዮጵያ ፌዴራላዊ ዲሞክራሲያዊ ሪፑብሊክ ለጠቅላይ ሚኒስትር ጽ/ቤት አዲስ አበባ

አባሪ:

- የውክልና ረቂቅ ሰነድ