

# Participation of Stakeholders in Environmental Impact Assessment Process in Ethiopia: Law and Practice

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## Introduction

Nowadays, *environmental impact assessment* (EIA) is used as a tool by decision-makers to take environmental issues into account. In Ethiopia, too, it has been recognized since the 1990s. Thus, some decision-makers and proponents are now required to do EIA to consider the environmental impacts of their actions, whereas the duty to evaluate their EIA reports is imposed on environmental agencies. Nevertheless, for EIA to be effective, its preparation by the concerned persons and the evaluation of their reports by environmental agencies alone is not adequate. Recently, there has been a growing consensus that such efforts should involve stakeholders as well. Consequently, some legal systems have now recognized the right of stakeholders to participate in the EIA process together with the corresponding obligations of environmental agencies to ensure their participation in such process. In Ethiopia, the existing policy framework (that is, the Constitution, the EPE, the EIA Proclamation and the Guidelines) does not expressly address the issue of stakeholders' right of participation in the EIA process. This piece of writing is, therefore, an attempt to explore the extent to which stakeholders' participation in the EIA process in Ethiopia has been dealt with by the current policy framework and the extent of their participation in practice together with the problems affecting such participation. Therefore, the article is arranged in the following manner. The first part deals with EIA in general and EIA in Ethiopia (the law and theory) in particular. The second and third parts deal with stakeholders' participation in the EIA process in general and in Ethiopian in particular by considering both the law and the practice. The fifth part discusses some of the obstacles to the realization of effective stakeholders' participation in the EIA process in Ethiopian context. Moreover, it briefly considers the possible prospects that may facilitate meaningful stakeholders' participation in the EIA process in Ethiopia. The last part contains the conclusion and recommendations of the article.

## I. Environmental Impact Assessment

The use of EIA as a tool for decision-making was introduced by sec 102 of the National Environmental Policy Act (NEPA) of the USA in 1969 which mandated federal agencies to prepare and consider environmental impact statement (EIS) before undertaking any major federal action likely to have significant effect on the environment.<sup>1</sup> Since then, this

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<sup>1</sup> Robert V. Percival, *Environmental Law, Statutory Supplement and Internet Guide 2003-2004*, ASPEN Publishers, USA, 2003, p 873. For detailed discussion on the conditions attached to the obligation to

procedure has spread throughout the world and today most developed and many developing countries practice some form of EIA.<sup>2</sup> This is why it is being argued that the legal requirement of EIA is now one of the principles of environmental law with universal acceptance.<sup>3</sup> What then is EIA? It is defined as a process of anticipating or establishing the changes in physical, ecological and socio-economic components of the environment before, during and after a proposed action, as well as evaluating the impacts of all reasonable alternatives, so that undesirable effects, if any, can be eliminated or mitigated.<sup>4</sup> 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*.<sup>5</sup> Accordingly, the process of EIA becomes necessary not only for an impending development project but also for public instruments. Here, the notion *public instrument* refers to a policy, a strategy, a programme, a law or an international agreement.<sup>6</sup>

At this juncture, although EIA is necessary, there are some important issues that one has to bear in mind. Firstly, EIA does not necessarily eliminate actions that have adverse impacts on the environment.<sup>7</sup> Secondly, although EIA aims at enabling authorities to choose actions and make decisions thereon with full knowledge of their impacts on the

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undertake EIS under sec 102 of NEPA, see Steven Ferry, *Environmental Law: Examples and Explanations*, 4<sup>th</sup> Edition, Aspen Publishers, Austin, Boston, Chicago, New York, and The Netherlands, 2007, p 88-96. Of course, the use of EIA as a tool for decision is not recent as, for example, the U.S. Army Corps of Engineers had developed techniques and methodology for impact assessment as early as 1870. See D.K. Asthana and Meera Asthana, *Environment: Problems and Solutions*; S. Chanda and Company LTD, India, 1998, p 336

<sup>2</sup> Mark Lancelot Bynoe 'Citizen Participation in the Environmental Impact Assessment Process in Guyana: Reality or Fallacy?', *2/1 Law, Environment and Development Journal* (2006), p. 34, available at <http://www.lead-journal.org/content/06034.pdf>

<sup>3</sup> See John Ntambirweki, *Environmental Impact Assessment as a Tool for Industrial Planning*, included in *Industries and Enforcement of Environmental Law in Africa*, UNEP, 1997, 1997, p 75, the Rio Declaration (1992) and the Convention of Biodiversity (1992) which recognize the requirement of EIA.

<sup>4</sup> See D.K. Asthana and Meera Asthana, *supra* note 1, p 336; John Ntambirweki, *supra* note 3, p 75; H.V. Jadhav and S.H. Purohit, *Global Warming and Environmental Laws*, 1<sup>st</sup> Edition, Himalaya Publishing House, Mumbai, 2007, p 10; and Duard Barnard, *Environmental Law for All: A Practical Guide for the Business Community, The Planning Professions, Environmentalists and Lawyers*, Impact Books Inc, Pretoria, 1999, P 179.

<sup>5</sup> Article 2(3), Environmental Impact Assessment proclamation of Ethiopia, No. 299/2002 (emphasis added)

<sup>6</sup> *Id.*, Article 2(10). EIA that is done for public instruments is called *strategic environmental assessment* (SEA) or *top level EIA*.

<sup>7</sup> John Ntambirweki, *supra* note 3, p 75

environment,<sup>8</sup> it is sometimes undertaken not to make decisions but to serve different purposes.<sup>9</sup> For example, in some countries, EIAs were prepared and used to justify environmentally degrading activities. Moreover, officials use EIAs in an attempt to postpone the duty of making decisions. Further, officials may make decisions and order EIAs to be made to determine the validity of their decisions. Lastly, EIAs have been used to hide the truth behind reams of paper. The bulkiness of some reports has been used to impress the gullible audience. However, all these are contrary to the purpose of EIA in general and the recognition of stakeholders' participation in particular. For example, letting stakeholders' participate in the EIA process of decisions that are already made would amount to asking stakeholders to comment on these decisions instead of engaging them on their making process; a practice contrary to what has come to be known as *environmental democracy*.<sup>10</sup>

## **A. Environmental Impact Assessment in Ethiopia**

### **1. Laws**

As stated before, the legal requirement of EIA is almost universally accepted in the sense that most developed and many developing countries have adopted some form of EIA. In this sense, therefore, Ethiopia is not an exception.<sup>11</sup> Actually, its earliest commitment to undertake EIA came into being when it ratified the Convention on Biodiversity in 1994 to protect and conserve biodiversity.<sup>12</sup> A year later, the 1995 FDRE Constitution came up with provisions pertinent to EIA. For example, the Constitution requires the environment to be protected; it recognizes the right of everyone to live in clean and healthy

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<sup>8</sup> See Duard Barnard, *supra* note 4, p 179 and John Ntambirweki, *supra* note 3, p 75

<sup>9</sup> For detailed discussion on this point, Duard Barnard, *supra* note 4, p 179

<sup>10</sup> *Environmental democracy* is defined as a participatory and ecologically rational form of collective decision-making. In other words, the concept refers to a process whereby people participate in making decisions that have bearing on the environment. See generally, Michael Mason, *Environmental Democracy*, Earthscan Publications Ltd, London, 2006, p 1

<sup>11</sup> Actually, being one of the poorest countries in the world, Ethiopia is supposed to make, and is making, a number of decisions to bring about economic betterment. This in turn upgrades the importance of EIA as a tool for throwing environmental values into decision-making processes.

<sup>12</sup> 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 programmes and policies that are likely to have significant adverse impacts on biological diversity are duly taken into account.

environment; and, recognizes the right to sustainable development.<sup>13</sup> There is no doubt that EIA is vital for the full implementation of these constitutional stipulations. In 1997, Ethiopia took another step by adopting its National Environmental Policy (EPE) which recognizes, under section 4.9, the need to use EIA for the attainment of its goals.<sup>14</sup> Finally, in 2002, Ethiopia adopted the EIA Proclamation, the first piece of legislation on EIA. The Proclamation makes EIA applicable to projects and public instruments. Moreover, it imposes on all persons the duty to make prior EIA in relation to any actions (projects or public documents) for which prior EIA is required.<sup>15</sup> Further, the Proclamation strictly prohibits the commencement of any project requiring EIA before *appropriate assessment* is made. Besides, the Proclamation entrusts the power to ensure that EIA is done and evaluate same to the Federal EPA and regional environmental organs.<sup>16</sup>

Nonetheless, the EIA Proclamation has two problems, which have strong bearing on stakeholders' participation. Firstly, the EIA Proclamation is not comprehensive. Secondly, although the EIA Proclamation envisages, under article 19, the issuance of regulations for its implementation, no such regulations have been made so far. Likewise, the EPA which is authorized under article 20 of the Proclamation to issue directives to implement the Proclamation does not have a working directive so far. Of course, it issued such directives very late (in 2008). However, the directives still have two major problems. Firstly, they deal only with projects requiring EIA, not public instruments. Thus, the provisions of the EIA proclamations pertaining to public instruments cannot be enforced since at the moment no one knows which public instruments are subject to EIA and which are not. As a result, it is not possible to talk about stakeholders' participation in the EIA process of public instruments. Secondly, and more importantly, these directives which are claimed to be approved do not have force of law for two reasons. To

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<sup>13</sup> 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 43(1) recognizes peoples' right to sustainable development; and Article 44(1) recognizes everyone's right to live in clean and healthy environment.

<sup>14</sup> As stated under paragraph 2.1, the overall policy goal of the EPE is to realize the right of Ethiopians to live in clean and healthy environment and to bring about sustainable development.

<sup>15</sup> See articles 7 and 11 together with article 3 of the EIA Proclamation, *supra* note 5.

<sup>16</sup> *Id.*, articles 3 and 14

begin with, the directives have not been signed by the chairperson of the environmental council; that is, the Prime Minister. Thus, its making process is not completed. On top of that, 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*. When we come to the directives, as the law of the Federal Government, they have not been published in Negarit Gazeta. This means, no one is supposed to take judicial notice of its existence or its provisions. This can be taken to argue that the making of the directives is not yet consummated. After all, in our system law-making has five stages: initiation, discussion, approval, signature, and publication, whereas the directives are two steps short of consummation. Eventually, and legally speaking, what this means is that Ethiopia does not have a law telling us which actions (projects or public instruments) are subject to EIA and which are not. This has bearing on stakeholders' participation because proponents can refuse, legally speaking, doing EIA as there is no law, as required by the EIA Proclamation, listing projects and public instruments subject to EIA.<sup>17</sup> However, the practice shows somewhat a different scenario, as we will see later on. In any case, these and other factors have made the EIA Proclamation ineffective. In this regard, Ato Solomon Kebede, head of the EIA Department at the EPA, described the Proclamation as a skeleton without/with little flesh. According to him, although the EIA Proclamation was made years ago, it is as if it was never made because its desired outcomes are not being produced. He mentions the absence of implementing laws (particularly regulations) as a basic reason for the failure of the Proclamation to serve its purposes.<sup>18</sup>

At this juncture, one may wonder why the absence of laws implementing the EIA Proclamation is taken as a serious problem. This issue will be considered later on but for a moment we can say that some of the provisions of the Proclamation are too general and not susceptible to immediate consumption. For example, the Proclamation recognizes the

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<sup>17</sup> Articles 5 and 9 of the EIA Proclamation require the EPA to issue directives (which is a law) specifying projects and public instruments that are subject to EIA.

<sup>18</sup> Interview with Ato Solomon Kebede, Head of the EIA Department of the Federal EPA, 7 and 8 September 2009

participation of the public in the EIA process. However, it does not tell us the mode, stage, and language, among others, of such participation. These are all relevant issues that could be resolved by subsidiary laws. Of course, the EPA has procedural guidelines pertaining to the EIA process.<sup>19</sup> However, there are problems with the guidelines, too. Firstly, they are not binding but set of ‘rules’ that show what should be done in the EIA process. Secondly, they have gaps in themselves. For example, they do not tell us whether stakeholders have the right to participate in the EIA or not rather than providing for the non-binding ‘obligations’ of proponents and environmental agencies to involve them in the process. Thirdly, there are no such guidelines pertaining to top level EIA (SEA). Therefore, the existence of the guidelines does not relieve the government of its need to have subsidiary law(s) to implement the EIA Proclamation thereby facilitating stakeholders’ participation in the EIA process.

## **2. Practice**

As we have seen before, however inadequate it is, Ethiopia has some kind of policy framework requiring the use of EIA as a tool for decision-making. Moreover, it has established institutional framework such as the Federal EPA to put this policy framework into effect.<sup>20</sup> Of course, the Federal EPA bears the primary responsibility of ensuring environmental protection because it is authorized to issue directives necessary for the effective implementation of the EIA Proclamation, set environmental standards against which the impact of an action on the environment should be assessed, decide on actions that require EIA, ensure that EIA is done and give, after evaluation, authorization to project owners to implement their projects if they require EIA, etc.<sup>21</sup> The question then is whether EIA is done in practice and the EPA is ensuring that it is done, when so required, in accordance with the necessary requirements such as stakeholders’ participation.

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<sup>19</sup> There have been two Procedural Guidelines so far: Environmental Impact Assessment Guideline Document issued in 2000 and Environmental Impact Assessment Procedural Guidelines Series 1 issued in 2003. According to Ato Solomon Kebede and Ato Wondosen Sintayehu, speaking as guests to the Class of LL.M and PhD Programme, At Akaki Campus, AAU, on 17 November 2009, the later Guidelines have replaced the former.

<sup>20</sup> Environmental organs refer to the Federal EPA and regional environmental agencies. The Federal EPA was established in 1995 and re-established in 2002 by virtue of article 3(1) of the Environmental Protection Organs Establishment Proclamation, Proclamation No. 295/2002, which also requires the establishment of Regional Environmental Agencies.

<sup>21</sup> See articles 3(1), 6(7), 9 and 19, EIA Proclamation, *supra* note 5.

According to Dr. Tewolde Berhan Gebre Egziabher, EIA is actually done in relation to activities requiring EIA regardless of who is undertaking it, government agencies or private actors. Besides, he indicated that the Federal EPA plays a primary role in ensuring that it is done properly before issuing a permit.<sup>22</sup> Ato Solomon Kebede, also indicated that EIA is in fact done in practice although there are projects for which EIA have not been done even if they are subject to it according to their guidelines. Yet, Ato Solomon stated that no EIA has ever been done for public instrument.<sup>23</sup> Further, Ato Abraham Hailemeleket<sup>24</sup> and Ato Wondosen Sintayehu<sup>25</sup> confirmed that EIA is done in practice at least in relation to certain projects. Moreover, they indicated that the issue of public participation is considered at evaluation stage. Therefore, one can conclude that the EIA process in Ethiopia is working at least in relation to certain projects and there is a room for ensuring stakeholders' participation in the process. All the personnel I interviewed at the EPA mentioned that EIA is done by proponents<sup>26</sup> and the EPA evaluates their reports.

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<sup>22</sup> On one occasion, I had the chance to attend a public lecture given by the Director of the Federal EPA where I was able to raise the following question: *we know that Ethiopia is undertaking different development activities. On the other hand, our EIA Proclamation requires that EIA must be done in respect of activities requiring prior EIA. So, is EIA really done in practice? If so, who ensures that it is done properly?* The Director then responded that EIA is actually done in relation to activities requiring EIA the EPA plays primary role in ensuring that it is done properly before issuing a go ahead permit with a project. Tewolde Berhan Gebre Egziabher, Director General, Ethiopian Environmental Protection Authority, Public Lecture on 7 May 2009.

<sup>23</sup> Interview with Ato Solomon Kebede, supra note 18

<sup>24</sup> Interview with Ato Abraham Hailemeleket, EIA Expert, Federal EPA, 24 August 2009

<sup>25</sup> Interview with Ato Wondosen Sintayehu, Acting Head, Environmental Policies and Legislation Department, Federal EPA, 24 August 2009

<sup>26</sup> Although this is a common practice in many countries, some doubt the objectivity of EIS conducted by proponents and argue that such approach is flawed. The underlying reason is the fact that companies will only start the EIS/EIA process after they have formulated a specific proposal that needs government's approval. Since most companies 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 course of actions. See William L. Andreen, *Environmental Law and International Assistance: The Challenges of Strengthening Environmental Law in Developing World*, Columbia Journal of Environmental Law, V 25, No 17, 2000, p 48. Therefore, we can find places where EIA is not done by proponents but by government organs. For example, in the USA, the duty to conduct EIS is imposed on federal agencies, not proponents (unless the agencies themselves are the proponents). See sec 102 of NEPA (1969) and CEQ Regulations 1606.5 of 1999. Such position might be good because, it can be presumed, government organs are more sensitive to environmental needs than private actors and also avoid the problems professor Andreen raises. However, on the other side of the fence, one can also argue that these agencies may at times be in dilemma since they represent conflicting interests. Thus, speaking particularly from the perspective of developing or least developed countries, government organs may not be that sensitive to the environment than they are to the achievement of their primary objectives.

Now, if we know that EIA is done in practice we can consider the participation of stakeholders in the process of EIA. For the sake of convenience, we will consider such participation at two stages-when EIA is done by proponents and when it is evaluated by environmental agencies especially the Federal EPA after a brief introduction to stakeholders' participation in the EIA process.

## **II. Participation of Stakeholders in Environmental Impact Assessment Process**

### **A. Who are the EIA 'stakeholders'?**

As mentioned before, today, there is a growing consensus that timely and broad-based stakeholder involvement<sup>27</sup> in the EIA process is a vital ingredient for effective environmental assessment (EA). In fact, it is said that, experience shows that EIA that successfully involved broad range of stakeholders 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 social and environmental costs. Thus, the vitality of stakeholders' participation in the EIA process seems unquestionable. However, who are *stakeholders*? They may be defined as all the people and institutions that have an interest in the successful design, implementation and sustainability of the project including those we may be affected by a project either positively and/or negatively. Thus, *stakeholders' participation* in the process of EIA may be defined as a process whereby all those with a stake in the outcome of a project can actively participate in decisions on planning and management to share information and

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<sup>27</sup> Some people argue that terms stakeholders' 'involvement', 'consultation' and 'participation', which are used in the EIA guideline literature interchangeably, have certain differences. For example, according to Hughes, *stakeholder involvement* may be taken to encompass the full spectrum of interaction between 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 stakeholders influence decisions which affect them. Thus, it may be distinguished from *consultation* by the degree to which 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, *Environmental Impact Assessment and Stakeholder Involvement*, included in Annie Donnelly, Barry Dalal-Crayton, Ross Hughes, *A Directory of Impact Assessment Guidelines*, 2<sup>nd</sup> ed, International Institute for Environment and Development, 1998, p 22. In this writing, I will use the term *participation* to refer to the meanings Hughes gives to *participation* and *consultation*.

knowledge and to contribute to the project and its success to ultimately enhance their own interests. In this sense, the notion *stakeholders* includes, inter alia, government agencies, citizens groups, NGOs, recreational interest groups, expert groups, business affiliations and academic organizations. Some countries have adopted EIA guidelines in which they list stakeholder groups that should be considered contributors to the EIA.<sup>28</sup>

### **B. Relevance of stakeholders Participation in the EIA process**

Generally, as we have seen in the preceding section, broad-based stakeholders' involvement in the EIA process is of paramount importance. Particularly, it is believed that different types of stakeholders can contribute to the EIA process in different ways. For instance, stakeholders' participation enables the EIA process to 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 stakeholder groups, improving the understanding and 'ownership' of a project; and ensure that the magnitude and significance of impacts has been properly assessed. Moreover, it enables project proponents to better respond to different stakeholders' needs, 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. Further, placing sufficient emphasis on stakeholders' participation in the EIA process can improve the predictive quality of environmental assessments since the prediction of impacts using EIA often requires multi-year information and good quality baseline which can be obtained from stakeholders groups, 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.<sup>29</sup> Therefore, in light of the above advantages, the participation of stakeholders in the EIA process is something which any system of environmental law cannot afford to omit. Such participation is not only environmentally beneficial but also political wise as it makes decision-making participatory; a good manifestation of democratic process particularly environmental democracy.

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<sup>28</sup> For the discussion in this paragraph, see generally, Ross Hughes, Id., p 21-22

<sup>29</sup> Ibid

### **C. Constraints to Stakeholder Participation in EIA**

Despite its paramount importance, the participation of stakeholders in the EIA process is constrained by myriad of factors which 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.<sup>30</sup> For example, many stakeholders lack the time or financial resources to engage in EIA processes. Non-literate groups are marginalized from EIA by the use of written media to communicate information. Materials necessary for stakeholders' participation are lacking in local languages. 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. Elitism or patriarchal approach is another constraint as many agencies and proponents adopt '*we know better approaches*', and do not accept that stakeholders' involvement can improve the quality of development initiatives. Ambiguity of legislation and guidelines is also another important constraint to managing and encouraging more participatory environmental assessment processes. Further, achieving effective stakeholder involvement can be much more difficult for large scale projects. Finally, low level of education affects the meaningful participation of stakeholders in the EIA process. In this regard, mentioning what one villager in Bangladesh said is imperative. 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 everyday." Therefore, we can say that the innumerable benefits stakeholders' participation in the EIA process is capable of producing are countered by countless constraints.

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<sup>30</sup> For detailed discussion on how these and other factors affecting the effective involvement of stakeholders in the EIA process, see Id, p 24-26

### III. Participation of stakeholders in Environmental Impact Assessment in Ethiopia

#### A. Policy Framework

##### 1. FDRE Constitution

The first place to look for the right of stakeholders to participate on matters affecting their interests is the supreme law of the land, a Constitution. In this regard, article 43(2) of the FDRE Constitution, which is the most pertinent provision to the issue at hand, 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*.<sup>31</sup> There are few points worth emphasising here. Firstly, the Constitution deals with the right of *nationals*, not of stakeholders like people on the other side of a boarder (foreigners), citizen groups, NGOs or agencies. Thus, while all stakeholders are not granted the right to be consulted by the Constitution, the fact that nationals can be stakeholders in relation to matters affecting their community is clear. Thus, we can say that nationals, as stakeholders, have the right to engage in the EIA processes of policies or projects. Secondly, this right of nationals exists only in relation to policies and projects affecting *their community*. Some countries provide for the duty of a proponent to consult not only the community likely to be affected but others including members of the public, interested bodies and organizations with the mechanisms for consultation including scoping meetings, structured interviews, key informant interviews and written submissions.<sup>32</sup> For example, in USA, agencies undertaking EIS are supposed to involve the public or those persons and agencies who may be *interested* or *affected* by a given action.<sup>33</sup> Under our Constitution, however, the duty of a proponent pertains only to the community likely to be affected, not to any interested party. Thus, article 43(1) of the Constitution is too narrow to serve as a basis for claiming stakeholders' participation in the EIA process in general but that of nationals whose communities are likely to be affected by policies and projects.

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<sup>31</sup> Emphases added

<sup>32</sup> Section 11(9) of the EPA law of the Guyana, See Mark Lancelot Bynoe, *supra* note 2, p 44

<sup>33</sup> See Sec 1506.6 of the 1999 CEQ Regulations on Public Involvement. Emphasis added. The Regulations also provide for ways of involving the public like NEPA-related hearings, public meetings, mailing information to those who request it, etc.

## **2. Environmental Policy of Ethiopia (EPE)**

The 1997 EPE simply states that public consultation is an integral part of the EIA process. Accordingly, unless one interprets the term *public* to include all stakeholders, the Policy does not expressly recognize the right of stakeholders to participate in the EIA process.

## **3. EIA Proclamation**

The other appropriate place to look for the right of stakeholders to participate in the EIA process is the EIA Proclamation. First of all, it should be noted that whether this Proclamation recognizes the right of nationals to be consulted with respect to policies and projects affecting their community or not, it should be read *into* it because that right is constitutionally guaranteed. Thus, the effort here is to look for something more with respect to the right of stakeholders to participate in the EIA process. In this regard, although the Proclamation does not contain any express stipulation, there are certain provisions which deal with public participation.

### **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 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.

### **Article 9 Review of Environmental Impact Study Report**

1. ....
2. The Authority 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: ( Emphasis added)
  - 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 15 Public participation**

1. The Authority and regional environmental agencies shall make any environmental impact study report accessible to the *public* and solicit comments on it.
2. The Authority 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.

The above-mentioned three articles from the EIA Proclamation do have something to tell about the participation of stakeholders in the EIA process. First, 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 exists only in relation to a project that is likely to produce trans-regional impacts. Besides, the duty of a proponent is limited to consultation of communities likely to be affected by this project in any region. Thus, a proponent may claim that it does not have the duty to involve stakeholders other than those belonging to the concerned communities. With regard to these communities, the Federal EPA is obliged to ensure that they have been consulted and their views incorporated prior to embarking on the evaluation of EIA report.<sup>34</sup> Therefore, we can now say that proponents do have the obligation to engage, through consultation, the communities that are likely to be affected by their projects when they do EIA. Nevertheless, it must be born in mind that article 6 does not recognize the right of these 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 the proponent must consult the public; that is, at the preliminary assessment or preparation of the study, or both.

The other two articles, article 9 and article 15, provide for the role of 'stakeholders' at EIA report evaluation stage. Article 15(1) obliges the Federal EPA and regional environmental agencies to make EIA report accessible to the *public* and solicit comments

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<sup>34</sup> At this juncture, a question whether the term *communities* includes communities in another country where a project is to be implemented around a boarder is not clear. Moreover, there are no guidelines adopted by the Federal EPA to clarify this point. But, as practice shows, the term is used to refer only to local communities, not those in another country.

on it. Then, 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 project are incorporated into the EIS report as well as in its evaluation.<sup>35</sup> Finally, article 9 obliges the Federal EPA and regional environmental agencies to take action on EIA reports, within 15 working days, after evaluating them by taking into account any *public comments and expert opinions*.

An interesting scenario here is the fact that, unlike article 6, articles 9 and 15 use the term *public*, not *communities likely to be affected*. Nevertheless, the EPA, according to Ato Solomon, has not yet come up with any legal or technical definition of the term *public*.<sup>36</sup> As a result, we do not know whether the term includes all stakeholders or only the people who may have special interest in EIA. However, the closer look at the provisions of the Proclamation conveys the message that the term *public* under these provisions refers to something more than the communities that are likely to be affected by a course of action. For example, while article 15(1) obliges the Federal EPA and regional environmental agencies to make EIA reports accessible to the public, article 15(2) obliges them to ensure the incorporation of the comments of the public *particularly* that of the communities likely to be affected. The term *particularly* shows that the *communities likely to be affected* are just one of the examples of what the term *public* intends to include. For example, article 9(2) makes the consideration *expert* opinions necessary for the evaluation of EIA reports. Thus, the term *public* under article 15(1) may be taken to include experts as part of stakeholders. Moreover, it is possible to get support from the existing literature in the field that the term *public* consists of not only the communities likely to be affected but also other stakeholders. For example, some writers define *public involvement* in the EIA process as *a process through which the views of all interested parties are integrated into project decision-making*.<sup>37</sup> From this definition, we can understand that the term *public* includes all interested parties or stakeholders.

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<sup>35</sup> 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.

<sup>36</sup> Interview with Ato Solomon Kebede, *supra* note 18

<sup>37</sup> *Public Involvement: Guidelines for Natural Resource Development Projects*, by Environment and Sustainable Development Division (ESDD), UNESCAP, 1997, p 4. This material is available online.

Therefore, unlike at the preparation stage, though less clear, we can conclude that the EIA Proclamation recognizes the participation of stakeholders in the EIA process at EIA report evaluation stage. However, this still is problematic to enforce because there are no binding instruments (such as regulations or directives) on how stakeholders or the public, in its broad sense, can participate on EIA through commenting on EIA reports. For instance, it is not known how the Federal EPA and regional environmental agencies should make EIA 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 want to comment on them? Moreover, it is not known for how long these organs need to solicit comments on EIA reports. Yet, we know that once submitted, environmental organs must take action on EIA reports within 15 working days. This period is extremely short and it makes stakeholders participation at this stage extremely difficult. For example, 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 its EPA and members of the public have sixty days within which to make submissions.<sup>38</sup> In the US, usually 45-days comment period is given with the possibility of reduction or extension as the case may be.<sup>39</sup> Hence, even if the EIA Proclamation is somewhat broader than the Constitution in relation to the issue of stakeholders' participation in the EIA process, it is still plagued with inadequacies, something that could be rectified through subsidiary laws.<sup>40</sup>

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<sup>38</sup> Section 11(9) of the EPA of the Guyana, See Mark Lancelot Bynoe, *supra* note 2, p 47

<sup>39</sup> Steven Ferry, *supra* note 1, p 86

<sup>40</sup> At this juncture, one may be tempted to conclude that the lack of subsidiary laws issued by the Council of Ministers and/or the Federal EPA for the effective implementation of the EIA Proclamation shows the absence of political commitment on the side of the government to implement the EIA law to the fullest extent possible. To clarify this point more, considering the implementation of a peer law in the field of investment (means to development, the concept normally associated with environment) seems in line. In 2002, Investment Proclamation No. 280/2002 was made. This Proclamation was amended by Proclamation No.373/2003. To facilitate the implementation of the Investment Proclamation, the Council of Ministers issued Regulations No. 84/2003 which was amended by Regulation No. 146/2008. Now, the frequent enactment of laws in the field of investment implies that the government is paying attention to investment and its commitment to see to it that everything goes well in this field. However, when we see the EIA Proclamation which was made in the same year (2002) with the Investment Proclamation, it has never been amended; nor it has ever been supported by implementing regulations. The absence of instruments specifically designed to implement the EIA Proclamation makes it difficult for the Proclamation to produce the 'desired' result. It also makes things complicated for environmental organs and even proponents to discharge their duties under the Proclamation.

#### 4. EIA Guidelines

The Federal EPA has had two procedural guidelines to facilitate the effective use of EIA. The first of such guidelines was issued in 2000. These guidelines, recognizing that the participation of stakeholders (interested and affected parties (IAPs))<sup>41</sup> at different stages in the EIA process is necessary, provide for the participation of stakeholders at the scoping, EIA performance, and review stages.<sup>42</sup> They also deal with the ways of involving stakeholders in the EIA process.<sup>43</sup> In 2003, the EPA issued the EIA Procedural Guidelines Series 1 of 2003 replacing the 2000 guidelines.<sup>44</sup> Like its predecessor, these guidelines also recognize that the participation of stakeholders (IAPs) in the EIA process at various stages is necessary. However, unlike the 2000 guidelines, the 2003 guidelines are less clear on the stages at which stakeholders can participate in the EIA process. Of course, the guidelines stipulate that scoping should involve stakeholders. But, with regard to the participation of stakeholders at the other stages, we need to rely on interpretation. For example, when EIA is done, proponents should involve stakeholders even if the guidelines do not expressly require this for two reasons. First, the evaluating authority is supposed to consider the extent of stakeholders' participation in the EIA process for approval. This forces proponents to engage stakeholders in the EIA process. Moreover, since the EIA proclamation requires consultation at least for the communities concerned, then we can read this element into the guidelines. The other lack of clarity in the latter guidelines pertains to the review/evaluation stage. They do not impose duty on evaluating agencies to involve stakeholders in their evaluation process. Yet, it stipulates that its decisions should be *consultative* and *participatory*, an expression that is likely to be understood as referring to consulting and participating stakeholders. Moreover, since the

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<sup>41</sup> 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, customers, environmental interested groups and the general public. Thus, the term IAPs can be equivalent to stakeholders. See the definitional parts of both guidelines.

<sup>42</sup> See Federal Democratic Republic of Ethiopia Environmental Protection Authority Environmental Impact Assessment Procedural Guidelines Document, Addis Ababa, May 2000, Paragraphs 3.1.3, 3.4, and 3.5

<sup>43</sup> 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.

<sup>44</sup> See Federal Democratic Republic of Ethiopia Environmental Protection Authority Environmental Impact Assessment Procedural Guidelines Series 1, Addis Ababa, November 2003. The relevant paragraphs of these guidelines include paragraphs 5.2.3, 5.2.6, 6.3, and 6.4.

EIA proclamation requires gathering comments from the public and experts, stakeholders (may not be all of them, though) can participate in the EIA process at this stage as well. In any case, the guidelines we have in place provide for stakeholders' participation in the EIA process. However, two points ought to be borne in mind at this juncture. Firstly, the guidelines do not make stakeholders' participation necessary at every state of EIA although they clearly state that their participation at various stages is relevant. Secondly, these guidelines do not have the status of law. This means, they can only be taken as soft rules governing the conducts of concerned parties such as proponents, consultants, and the EPA. However, the EPA can give these guidelines force of law either by changing them to directive or by denying proponents environmental clearance if they do not follow the principles/rules set out in the guidelines like the ones relating to stakeholders' participation.

## **B. Practice**

As we tried to see before, EIA is done in Ethiopia at least in relation to certain projects. Moreover, we have considered that the involvement of stakeholders in the EIA process is indispensable for its effectiveness. Further, we have also considered that, although they do not make exactly the same stipulations, the Constitution, EPE, EIA Proclamation, and the guidelines create policy frameworks for stakeholders' participation in the EIA process in Ethiopia. Therefore, we will now see whether such participation has been taking place in practice, too.

### **1. At performance stage**

Although proponents should involve stakeholders particularly the communities that are likely to be affected when they do EIA, according to Ato Solomon, it is extremely difficult to conclude that such participation exists in practice. In this regard, he mentioned the absence of binding instrument pertaining to stakeholders' participation in the EIA. For example, issues on how proponents should communicate with stakeholders, for how long, at what stage, what language to use, etc could be resolved in a binding instrument (directive or regulations) specifically dealing with stakeholders' participation.<sup>45</sup>

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<sup>45</sup> Although the existing guidelines deal with some of these issues, they don't deal with them comprehensively. Moreover, they are not binding.

Moreover, he indicated that many EIA reports are fictitious on the participation of the concerned communities. For instance, he indicated that there have been instances where comments, names, signatures, etc of supposed communities were forged. At times, he stated that EIA is done by a single person who sits in his/her office and ticks in a checklist table. In this case, there is no way, let alone for stakeholders in general, even for the communities likely to be affected, to participate in such EIA process, if there is an EIA process after all! Further, Ato Solomon indicated that regional environmental agencies do not ensure the participation of the public (stakeholders) in the EIA process for various reasons such as lack of independence and fear not to be treated as anti-development agents. As far as the participation of the communities that will be affected by the implementation of public instruments is concerned, that has never happened before since no EIA has ever been done for such instruments because the EPA has not yet indicated which public instrument is subject to EIA and which is not.<sup>46</sup>

## **2. At evaluation stage**

As stated before, the EIA Proclamation obliges the EPA and regional environmental agencies to make EIA reports accessible to the public and solicit comments thereon. However, the EPA has not yet clarified what this term *public* includes. But as we have tried to see before, the sane interpretation of the Proclamation on this point conveys the message that all stakeholders-communities likely to be affected, experts, NGOs, agencies, etc-are included. The practice also shows that the EPA is involving entities like NGOs and agencies which may have stakes in a given EIA. In this regard, Ato Solomon said that EIA reports are sent out to stakeholders including NGOs.<sup>47</sup> Moreover, I have interviewed officials from two government agencies which are very much interested in participating in the evaluation of EIA reports. These agencies are the Ethiopian Institute of Biodiversity Conservation (IBC) and the Ethiopian Wildlife Development and Conservation Authority (EWDPA). The two agencies are highly interested in having EIAs done because development activities not preceded by proper EIA will jeopardized

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<sup>46</sup> Interview with Ato Solomon Kebede, supra note 18.

<sup>47</sup> Public Lecture, Ato Solomon Kebede and Ato Wondosen Sintayehu, at Akaki Campus, AAU, 17 November 2009

the accomplishment of their missions. Accordingly Ato Yeneheh Teka<sup>48</sup> said that sometimes the EPA sends EIA reports to EWDCPA for comments and this usually happens when the areas where proposed projects are to be implemented concern EWDCPA. Moreover, Ato Fanuel Kebede<sup>49</sup> stated that EWDCPA sometimes gets that chance to participate on the evaluation of EIA reports and this happens usually when the EPA seeks its comments on EIA reports thinking that the interest of EWDCPA is at stake. In this regard, the EPA thinks that EIA evaluation should involve EWDCPA when a project is to be implemented in protected areas such as wildlife sanctuaries, parks, and reserves. Moreover, some IBC personnel<sup>50</sup> believe that the IBC is a stakeholder in the EIA process of projects that are likely to affect biodiversity. Thus, they argue that the IBC should take part in the evaluation of EIA reports of such projects. Fortunately, the EPA sometimes sends to the IBC some EIA reports for comments before it acts upon them. However, they have indicated that often times the EPA marginalizes the IBC thinking that it would comment on EIA reports negatively.

Therefore, we now know that EIA at evaluation stage is to some extent participatory because at least some agencies and NGOs are taking part in the process. However, according to Ato Solomon, there are still problems as far as engaging broad-based stakeholders in the EIA process at this stage is concerned.

## **I. Problems and Prospects**

### **A. Problems**

Ethiopia is a country with a very long way to go to bring about development. This requires making countless decisions and undertaking numerous projects. However, such measures must not be counterproductive. In this regard, EIA helps in avoiding their counter-productivity, whereas effective EIA requires the meaningful participation of stakeholders in the process. Nevertheless, such participation is countered by many constraints, some of which are highlighted below.

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<sup>48</sup> Interview with Ato Yeneheh Teka, Director, Wildlife Development and Protection Authority, 31 August 2009

<sup>49</sup> Interview with Ato Fanuel Kebede, Senior Wildlife Expert, Ethiopian Wildlife Development and Protection Authority, 31 August 2009

<sup>50</sup> Interview with some people at the IBC, who demanded anonymity, on 1 September 2009

### **1. Lack of Subsidiary Laws**

As stated repeatedly, due to lack of *binding* subsidiary laws, the provisions of the Constitution and the EIA Proclamation relating to ‘stakeholders’ participation in the EIA process could not effectively be implemented. The EPA by itself sees the absence of such laws as a major blow to the system of effective EIA in the country.

### **2. Level of Education**

This applies to the public in particular. Large part of our public is not aware of what EIA is worth. Moreover, we do not know whether we can claim participation in the EIA process. Thus, the public is not making, firstly, claims, and secondly, meaningful participation in the EIA process thereby denying our system of EIA the benefit of stakeholders’ participation.

### **3. Mistrust**

It was claimed by some stakeholders that the EPA does not trust some stakeholders. Firstly, it thinks that they are predisposed; they are going to say no to the EIA reports. For example, IBC and EWDC think that EPA does not trust them. Secondly, according to Ato Solomon, the EPA does not think that stakeholders will give their comments on EIA reports timely which leads the EPA to prefer deciding on such matters without sending them to stakeholders. These factors will eventually have a negative impact on the EIA because it will widen the gap between the EPA and stakeholders rather than bridging it.

### **4. Lack of independence and wrong perception about the relationship between EIA and Development**

Regional environmental authorities are expected to ensure that EIA is done and it is done in accordance with all the procedural requirements. Thus, they have to check whether there was stakeholders’ participation in the process or not before they approve of EIA reports. However, according to Ato Solomon, there are two problems here. Firstly, these authorities are not independent. Thus, they have to do what their bosses expect them to do, which is approving EIA reports. Secondly, they fear that if they say no to EIA reports, they will be treated as *anti-development agent*. This shows that there is a mistaken

understanding that EIA is an obstacle to development endeavours although the ultimate effect of EIA is the opposite; viz, making development sustainable.

### **5. Non-publication of EIA reports for comments**

It was also said that EIA reports are not published. This is basically so because there are no guidelines on how to making them public. The EPA is supposed to gather the comments of the public and experts. However, there is nothing said in the law as to how to do this.

### **B .Prospects**

Although the system of EIA in Ethiopia is plagued by constraint, there is no reason to be absolutely pessimistic about it. A look at what is happening shows that there are glimmers of hope that things may get better. According to Ato Solomon, the following prospects can be mentioned as signs of hopes. Firstly, sectoral agencies' attitudes towards EIA are changing as they have started appreciating the purpose of EIA. Secondly, civic societies are taking EIA seriously. For example, they participate in the evaluation of EIA. Moreover, NGOs such as *Melkea Mehiber* have, after showing through study that EIA in Ethiopia is not effective so far, prepared a draft amendment to the EIA Proclamation and submitted it to the EPA with the view to avoiding the inadequacies in the Proclamation. Thirdly, the public is gaining awareness about the environment in general and EIA in particular. Fourthly, some local financial institutions have shown interest to use EIA as a requirement for the relation they establish with investors.<sup>51</sup> Therefore, if these and other prospects come true, without any doubt, Ethiopia will have a better system of EIA.

### **Conclusion and recommendations**

As we have tried to see, although there is no express provision on the right of stakeholders (in its broader sense) to participate in the EIA process, the FDRE Constitution, the EIA Proclamation, the EPE and the Guidelines provide for some possibilities for them to participate in such process. As a result, stakeholders are participating in the EIA process in practice. However, such participation is limited due to

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<sup>51</sup> Interview with Ato Solomon Kebede, supra note 18 and Public Lecture by Ato Solomon Kebede et al, supra note 50

problems such as the absence of laws implementing the EIA Proclamation. For example, there has not been law which lists actions which are subject to EIA and which are not. Moreover, no EIA has ever been done in relation to public instruments. Further, the role of stakeholders in the EIA process is not clearly spelt out. All these could be done in implementing laws such as regulations and directives.

To have effective stakeholders' participation in the EIA process in the country, the following recommendations should be taken into account. Firstly, subordinate laws such as Regulations and Directives spelling out the rights and duties of stakeholders, the methods of their participation and the corresponding obligations of proponents and environment agencies to ensure their participation at various stages should be made. Secondly, the EPA should revise its guidelines so as to clearly provide for the right of stakeholders to participate in the EIA process at every stage. Besides, it must make these guidelines mandatory code of conduct either by changing them to directives or by invariably using them to grant environmental clearance. Third, the EPA proclamation should be amended so as to create conducive environment for stakeholders' participation. For instance, article 9 of the Proclamation which requires the EPA to take action on EIA reports within 15 days should be amended as this is a very short time to engage stakeholders on EIA evaluation. Fourthly, the EPA should have a real commitment to engage stakeholders in practice as well. Finally, NOGs should raise stakeholders' awareness so that they can make meaningful participation in and contribution to the EIA process.