THE REGIONAL ENVIRONMENTAL CENTER FOR CENTRAL AND EASTERN EUROPE (REC) is a non-partisan, non-advocacy, not-for-profit organisation with a mission to assist in solving environmental problems in Central and Eastern Europe (CEE). The Center fulfills this mission by encouraging cooperation among non-governmental organisations, governments, businesses and other environmental stakeholders, by supporting the free exchange of information and by promoting public participation in environmental decision-making.

The REC was established in 1990 by the United States, the European Commission and Hungary. Today, the REC is legally based on a Charter signed by the governments of 27 countries and the European Commission, and on an International Agreement with the Government of Hungary. The REC has its headquarters in Szentendre, Hungary, and local offices in each of its 15 beneficiary CEE countries which are: Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Estonia, Hungary, Latvia, Lithuania, FYR Macedonia, Poland, Romania, Slovakia, Slovenia and Yugoslavia.

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Preface

Papers Presented

Seminar summarisation
Kresimir Saravanja, Deputy Minister of Urban Planning and Environment, Herzegovina-Neretva Canton
Nedjo Miseljic, Inspector in the Ministry of Urbanism, Housing-Communal Work, Civil Construction and Ecology, Republika Srpska

Definition and Purpose of Environmental Impact Assessment
Nesad Seremet, REC Country Office Director, Bosnia and Herzegovina

The Foundations of Environmental Impact Assessment: Aims, Principles and Elements of Approach
Barry Sadler, Centre for Environmental Assessment and Management, Institute of Environmental Management and Assessment, UK

Environmental Impact Assessment in the United States
The National Environmental Policy Act of 1969: Thirty Years of Experience
Orestes Anastasia, US Agency for International Development, Washington, DC

Environmental Impact Assessment in Japan
Katsunori Hirokane, National Institute for Environmental Studies, Environment Agency, Government of Japan

Developing EIA and SEA in Croatia
Nenad Mikulic, State Directorate for the Protection of Nature and the Environment, Croatia

International Support for EIA Development in Bosnia and Herzegovina
Indira Djugum, Legal Assistant for the Environment, Office of the High Representative

Business Development Application of Environmental Assessment in Bosnia
Ron Sissem, US Agency for International Development

Environmental Impact Assessment in Draft Environment Laws in the Federation of Bosnia and Herzegovina and Republika Srpska
Djordje Stefanovic, Local Project Coordinator, REC/JSF BiH EL&P Project

EIA in a Member State of the European Union: the 1997 Amendments to Dir. 85/337/EEC on EIA
David Aspinwall, UK Department of Environment, Transport and Regions

Learning from Reforms of Environmental Assessment in Countries in Transition
Aleg Cherp, University of Manchester, UK; Central European University, Hungary

The Regulation of Environmental Impact Assessment (EIA) in Hungary
Aniko Radnai, Department of Strategic Planning and Co-operation, Ministry of Environment, Hungary

Sofia EIA Initiative: Key Findings on EIA in CEE
Jiri Dusik, Nenad Mikulic, Croatian State Directorate for Environment and the REC

EIA in Countries in Transition — Hungary Main Results of a Practical EIA Research
Sandor Fulop, Environmental Management and Law Association, Budapest
Conclusions

Appendix I: Agenda

Appendix II: Participants

Appendix III: Speakers and Contributors
The Regional Environmental Center for Central and Eastern Europe (REC) has been sponsoring seminars on current issues in environmental law and policy in Bosnia and Herzegovina since 1998, through its Japan Special Fund (REC/JSF). On November 30-31, 1999, REC/JSF, with the support and cooperation of interested international organisations and the relevant ministries of environment from the two entities and also from Neretva Canton, held another in a series of seminars aimed at supporting the development of environmental law and policy in Bosnia and Herzegovina. Following a year after the first seminar, held in Jahorina, on “Framework Environmental Law Drafting in Countries in Transition,” this seminar dealt with one of the most basic innovations of environmental law and policy on a global level, with its roots in pioneering countries such as the United States, the Netherlands and Japan in the 1970s, and confirmed by Principle 17 of the Rio Declaration — that is, Environmental Impact Assessment, or EIA.

As in past seminars, we were very pleased with the level of participation and the success of our outreach to members of all communities throughout Bosnia and Herzegovina. I would especially like to thank our local hosts at the Hutovo Blato Nature Park and the local officials from the Canton Ministry of Environment, for their very warm welcome, and for providing the conditions for a fruitful and enjoyable meeting.

Following on the Jahorina seminar, the goal of the Hutovo Blato seminar was to illustrate the development of EIA on a global scale, providing Western examples, from Japan and the United States, as well as examples from other Countries in Transition. At the same time, the negative experiences of the neighbouring countries could be avoided. I would like to express my thanks to the REC Bosnia and Herzegovina office, especially Nesad Seremet, Djordje Stefanovic, Enisa Pulic, and Sunita Buljubasic, and our headquarters staff, especially Stephen Stec, Senior Legal Specialist and the manager of this project.

My predecessor, Hiro Goto, noted a year ago “the warmth, solidarity and friendship that has developed among people formerly divided, but now united in the goal of improving the living conditions of future generations living in the territory of Bosnia and Herzegovina.” With each passing day, this observation becomes less remarkable, and that is how it should be. We are happy to have contributed to the efforts of the people of Bosnia and Herzegovina to work together, putting aside differences, to achieve a safe, secure and sustainable future for their children.

Kazunobu Onogawa
Director, Japan Special Fund
Assistant Executive Director
The Regional Environmental Center for Central and Eastern Europe
1. There is a need for Bosnia and Herzegovina to build a structure for Environmental Impact Assessment (EIA).

2. As a first step, it is important to establish a set of Guidelines to fit the domestic legal system that would incorporate international EIA standards, with particular reference to the European Union, other advanced legislation such as that of the US and Japan, and the norms of the World Bank and the European Bank for Reconstruction and Development. The experience of neighbouring countries and countries in transition is especially relevant in this regard.

3. A system of training and pilot projects should be developed to use these Guidelines, based on specific pilot projects, to illustrate, among others, the following points:
   a) Methodology and procedures for environmental impact statements/assessments;
   b) Public participation in the environmental decision-making process;
   c) The legal basis and background for EIA, its implementation and follow-up; and
   d) Elements of the legal framework for EIA.

4. Strategic Environmental Assessment (SEA) of plans, programmes and policies should be promoted in the same way, through specific projects at the level of, for example, cantons and entities.

5. In parallel, efforts must be made to develop EIA legislation through normal democratic procedures.

6. We call upon the assistance of the Sofia Initiative for EIA and the REC as the best framework for implementation of our conclusions, especially points 1 through 5.

7) We recognise the need for further seminars and projects/programmes on, among others, the following subjects, and call upon JSF/REC to provide them where possible:
   a) Strengthening legal systems and institutions;
   b) Strengthening the NGO sector;
c) Improving media and communications;

d) Promoting awareness of the Aarhus Convention;

e) Establishment of Environmental Management Systems, exchange of experience on environmental auditing, certification, implementation of EMS, ISO 14000, etc.

8. We request the involvement of leading experts from neighbouring countries whose experience is especially relevant for Bosnia and Herzegovina.
Zaključi Seminara

Zajednička završna riječ g. KRESIMIRA ŠARAVANJA, Pomoćnik Ministra za urbano planiranje, Hercegovački-Neretvanski Kanton, i g. NEĐO MIŠELJIĆ, Inspektor u Ministarstvu za urbanizam, gradjevinstvo, i životnu sredinu, Republika Srpska

1. U Bosni i Hercegovini postoji potreba za izgradnjom sistema procjene uticaja na životnu sredinu.

2. Kao prvi korak, neophodno je uspostaviti Osnove za izgradnju domaćeg pravnog sistema koji bi težili poštovanju međunarodnih standarda procjene uticaja, naročito imajući u vidu standarde Evropske Zajednice, drugih razvijenih zakonodavstava, kao što su zakonodavstva SAD, Japana, te norme Svjetske Banke i Evropske banke za obnovu i razvoj. Iskustvo susjednih zemalja, te zemalja u tranziciji su naročito važna u ovom kontekstu.

3. Stalna obuka kadrova, izvođenje pilot projekata bili bi put ka razradi i unapređenju Osnova, a njihovo korištenje u konkretnim pilot projektima bi, između ostalog, ukazali na način za unapređenje sljedećeg:
   a) metodologije i procedure za procjenu uticaja/izdavanje dokumentacije;
   b) učešće javnosti u donošenju odluka u oblasti životne sredine
   c) pravne osnove i podrške procjeni uticaja, primjene pravnih propisa i njihovog unapređenja;
   d) elemenata za pravni okvir procjene uticaja.

4. Strateška procjena uticaja (SEA) u sektoru planiranja, izrade programa i određivanju politike djelovanja također treba da se promoviše na isti način, kroz konkretne projekte, na nivou, npr., kantona i entiteta.

5. paralelno s tim, mora se raditi na usvajanju zakonodavstva vezanog za procjenu uticaja, u redovnoj, demokratskoj proceduri.


7. Potvrđujemo potrebu za organizovanjem seminara i izvođenjem projekta/programa i pozivamo REC/JSF da učini maksimalan napor da nam u realizaciji istih pruži adekvatnu pomoć, a naročito ističemo sljedeće oblasti:
   a) jačanje pravnog sistema i institucija;
   b) jačanje nevladinog sektora;
   c) unapređenje medija i komuniciranja;
   d) izgradnje svijesti o Arhuskoj konvenciji;
e) uspostavljanje Sistema menadžmenta (upravljanja) životnom sredinom, razmjene iskustava u oblasti nadzora u životnoj sredini, izdavanja sertifikata, sprovodjenje EMS, standarda ISO 14000, itd.

8. Zahtijevamo i pozdravljamo uključivanje u ove tokove i srušnjaka iz susjednih zemalja, čije iskustvo može biti vrlo važno i dragocjeno za BiH.
What is EIA?

Environmental Impact Assessment (EIA) is a method which enables analysis of positive and negative consequences of a project, plan or activities. By EIA, we understand the overview, analysis and assessment of activities, whose realisation is planned with the goal of insuring acceptable environmental development.

EIA is a process for environmental assessment, that is, the assessment of the existence and size of the environmental impact that a proposed project might have. The process includes the programme of monitoring such impacts, as well as the mechanism for repeated estimation of the circumstances under which the approval for the project can be changed.

EIA is an integral part of the process of the planning of the development project, which begins to identify important environmental impacts as soon as possible. It continues during the whole planning period, while including public participation as much as possible.

What is the objective of EIA?

The EIA objective is to ensure that necessary data concerning the decision regarding the approval, rejection or change of the proposed project is obtained for the decision-makers.

GOALS:

1. To ensure that eventual effects on the environment are considered before the authorities in charge make a decision about the approval or initiation of activities that could cause perceptible effects on the environment.

2. To encourage implementation of relevant procedures, in accordance with national legislation and the decision-making process, that also enable the given goal to be achieved in all countries.

3. To encourage the creation of procedures for information exchange, reporting and consultation amongst countries in cases when the proposed activities may have cross-border environmental effects in those countries.
THE ROLE AND PLACE OF EIA:

- EIA contributes to the planning and decision-making process by paying special attention to environmental problems and insures that all potential impacts can be surveyed in a detailed and systematic way.

- EIA helps in making the appropriate decision by making insurance of the development project in the first phase, and by providing information about the potential impact that the project may have on the environment.

- EIA helps to prevent or limit the damage that the development project may inflict on the environment.

- EIA gives a variety of possibilities, which enables easier decision-making about the development programme.

THE PURPOSE OF EIA:

- Identification, estimation and assessment of important effects that the planned project may have on the environment.

- Presentation of data on impacts in the report for the authorities responsible for approving the realisation of the project, as well as for the public.

  Encouragement of authorities responsible for approving the planned projects to include ecological elements in their decision-making process.
Introduction

“Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment...”
— Rio Declaration on Environment and Development (Principle 17)

The Rio Declaration marks an international consensus on the value of environmental impact assessment (EIA) as a mechanism for identifying and addressing the environmental impacts, risks and consequences of development proposals and actions. Most European countries have enacted EIA laws. Within the European Union, member states have transposed the amended EIA Directive (97/11/EC) into national legislation and regulations. A number of accession countries are in the process of doing so. Certain transition countries and newly independent states have yet to establish or implement EIA systems. These include Bosnia and Herzegovina and other new Balkan states.

Under the Balkan reconstruction programme, active consideration is now being given to establishing an EIA system in Bosnia and Herzegovina. As a federal state with a tripartite division of powers and responsibilities, the enactment of EIA law and procedure in Bosnia and Herzegovina will present a particular challenge. However, it also should be recognised that EIA, as applied worldwide, is a relatively generic, standardised process. It has common aims, principles and elements of approach. These comprise the foundations of EIA and provide a frame of reference against which the provision for EIA in Bosnia and Herzegovina can be considered.

Background: Why Environment Matters and EIA is Important

Environmental impacts are at the core of sustainability concerns. Worldwide, the cumulative effects of human numbers and activities are estimated to be on a par with natural processes as an agent of ecological change. Global environmental change threatens to undermine the resource base and life support systems upon which human security and livelihood ultimately depend. Many of the faster-growing developing countries face serious resource and ecological constraints on
food production, water supply and the maintenance of natural habitat and biodiversity. In the Balkans, major concerns include the environmental damage that has resulted from war and conflict.

In this context, the introduction of EIA may be seen as part of the reconstruction agenda and as an instrument that can help to ensure that other activities are consistent with the principles of sustainable development. Accordingly, EIA should be instituted as an early priority, possibly through a framework law. This enactment should be followed by detailed regulations on EIA procedures and by the preparation of guidance on EIA practice. In turn, these developments should be backed by EIA training activities and institutional capacity building.

The Sofia Initiative on EIA provides an appropriate framework for this purpose (see the papers by Mikulic and Dusik in this volume). Specifically, it provides an opportunity for working exchange of EIA views and experience among Central and Eastern European (CEE) experts. A critical review of international and European Union experience with EIA is an integral part of the Sofia Initiative process. The next section provides certain introductory perspectives that may be helpful when considering the international trends and developments that may bear upon the introduction of EIA in Bosnia and Herzegovina or other Balkan countries.

EIA in Perspective

There is a massive critical literature on EIA to which hundreds of new references are added each year. Several themes stand out which are relevant to the present discussion.

1. There is a gap between the theory and practice of EIA, between what should be done and what is done. In part, this reflects real-world constraints under which the EIA process operates. These include limited time and budget to complete studies, as well as the political pressures imposed by the larger decision-making process of which EIA forms a part. Often these constraints are not even mentioned in the EIA literature; however, they should be understood and borne in mind by those responsible for introducing and strengthening EIA process and procedure.

2. EIA is applied worldwide and comparative reviews of EIA law, process and practice can be instructive. It is anticipated that attention will be focused primarily on EU developments and, possibly, on the EIA policy and procedure of the World Bank and the European Bank for Reconstruction and Development. Note, however, that some critics consider the EIA Directive to be rather pedestrian and overly procedural, out of date before it was introduced. At a minimum, the experience of other countries in transition in altering and implementing their EIA law and procedure to be consistent with the EC Directive should be scrutinised.

3. Over time, major innovations have taken place in EIA law and procedure. Undoubtedly, particular reference will be made to the EC Directive on EIA and to its recent amendment. In addition, international agreements that focus
on or refer to EIA should be consulted. Notable are the UNECE (Espoo) Convention on Trans-Boundary EIA and the Aarhus Convention on Public Participation and Access to Information. Both instruments contain important guidance on EIA process and procedure; further reference to them can be found elsewhere in this volume.

4. In recent years, the scope of EIA has broadened considerably along a number of fronts. These include:
   • the addition of social, health and other effects as part of EIA;
   • the use of extended time and space boundaries to take account of indirect and cumulative effects; and
   • the application to higher levels of decision-making or strategic environmental assessment (SEA) of policies, plans and programmes.

5. SEA is still at an early stage of process development and take-up, roughly comparable to project-level EIA in the early 1980s. To date, there are only a limited number of fully operational SEA systems. However, it is evident that SEA is becoming more widespread and the process is diversifying, in terms of the approach taken and its scope of application. Although it is accepted that countries should give first priority to establishing and operating an EIA system, there may be an advantage to incorporating SEA procedure or elements from the beginning.

6. The European Commission’s draft Directive on SEA promises to catalyse further process development and adoption. In particular, it can be expected to influence CEE countries that are in the accession process or in the receipt of EU funding and assistance. At the time of writing, the Commission’s amended proposal (COM(1999) 73) is before the European Parliament for second reading. The draft Directive applies only to certain plans and programmes and is modelled closely on EIA procedure. So possibly it may be accommodated relatively easily as part of new EIA legislation in Bosnia and Herzegovina.

Overview of Process Fundamentals

Key objectives of EIA are summarised in Box 1. The immediate aim of EIA is to facilitate sound decision-making by ensuring that environmental considerations are addressed in development proposals. The ultimate goal of EIA is to achieve a level of environmental protection that supports sustainable development. Over time, EIA has become a more broadly based planning process, characterised by multiple ends and multiple means to achieve them. The ends or objectives of EIA are variously stated in the laws and regulations established by different countries.

Typically, the provision for EIA is made in law and regulation (rather than in policy or administrative directives that were used at an earlier stage phase of process development). Many countries have enacted EIA as part of framework
environmental legislation in which the EIA process and procedure are detailed in separate regulations. Other countries have enacted EIA-specific laws and decrees that provide comprehensive and prescriptive guidance on the procedures to be followed. New EIA laws have been passed in many CEE countries and some in newly independent states (NIS). These developments are discussed elsewhere in this volume in the paper by Aleg Cherp.

Often cited as the “Magna Carta” which first introduced EIA, the US National Environmental Policy Act (NEPA, 1969) remains an influential document and is worth consulting still. Section 102 of NEPA contains the “action forcing” procedure and requirements through which EIA was intended to change the policy-making process. But NEPA is about far more than EIA; it is as much a declaration of environmental values and commitment, and its language anticipates the sustainability agenda by almost two decades (see Box 2). The aims and principles which are enshrined in NEPA and, more recently, the New Zealand Resource Management Act (1991), are far less evident in the amended EIA Directive.

In contrast, the EC Directive is much stronger on EIA procedure. The Directive is a framework law that sets out the minimum requirements and steps to be taken by member states when preparing an environmental statement (ES). When transposing the requirements into national legislation, each member state may choose to establish more comprehensive and rigorous procedures. For example, the Netherlands has established an independent EIA Commission that reviews all environmental statements prior to their submission for final approval. Certain other countries have comparable procedures for public review of major projects by an independent panel (e.g., Canada).

At a minimum, EIA procedure comprises a series of “checks and balances” to ensure compliance with law and regulations. Public involvement is a cornerstone of sound EIA procedure. Together with other checks and balances, it is also a

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### BOX 1

**EIA Objectives**

Immediate (or proximate) aims are to:

- support informed decision-making in relation to development proposals and alternatives;
- identify, mitigate and/or compensate for adverse environmental effects;
- contribute to better design and planning of projects and activities; and
- provide for the involvement of the public(s) affected by or interested in a proposed activity.

Ultimate (or long-term) aims are to:

- avoid irreversible, significant and unacceptable environmental effects;
- ensure development is adjusted to the potentials and capacities of the resource base;
- protect the assimilative and regenerative capacities of natural systems; and
- safeguard human health, community and individual well being and rights, values and interests of indigenous peoples and vulnerable minorities.
means of quality control and assurance of EIA practice. In addition, each stage of
an EIA is important to ensure that the ES is of satisfactory quality and contributes
to decision-making in the way intended. With minor variations, most countries
follow the series of steps shown in Box 3.

Typically, the EIA process begins with screening of a proposal to determine
whether or not it is subject to EIA and, if so, what level of analysis is required to
address the potential impacts. Scoping is the next and critical preliminary step, to
identify the significant adverse effects and to establish the terms of reference for a
detailed EIA, including the alternatives to be considered. The detailed phase of EIA
includes impact prediction and evaluation, identification of mitigation measures,
preparation of the environmental statement and review of its sufficiency prior to sub-
mission of the proposal for final approval. EIA follow-up activities, including moni-
toring and auditing, are often neglected; yet this phase is crucial to successful
process implementation and good environmental outcomes.

Decision-making on project disposition takes place throughout the EIA
process. The main focus tends to be on the final decision regarding the approval
(or rejection) of a proposal and the extent to which these incorporate the informa-
tion and recommendations contained in an ES. A series of interim decisions on
whether and how the proposal should proceed lead up to and “pre-qualify” formal
approval and condition setting. In many countries, this decision-making
process is tied to regulatory systems for the issuance of permits and licenses.
These arrangements tend to be jurisdiction-specific; however, in all cases, it is
important to ensure that EIA-based terms and conditions are implemented and,
where necessary, enforced through legal instruments.

BOX 2


Declaration (sec. 101):

(a) The Congress, recognizing the profound impact of man’s activity on the interrelations of
all components of the natural environment … declares that it is the continuing policy of
the Federal Government … to use all practicable means to create and maintain condi-
tions under which man and nature can exist in productive harmony …

(b) In order to carry out the policy … the Federal Government to use all practicable means
to … fulfill the responsibilities of each generation as trustee of the environment for suc-
ceeding generations … assure for all Americans safe, healthful, productive, and aestheti-
cally and culturally pleasing surroundings … attain the widest range of beneficial uses of
the environment without degradation, risk to health or safety, or other undesirable and
unintended consequences … preserve important historic, cultural, and natural aspects of
our national heritage, and maintain, wherever possible, an environment which supports
diversity, and variety of individual choice … achieve a balance between population and
resource use which will permit high standards of living and a wide sharing of life’s
amenities … and enhance the quality of renewable resources and approach the maxi-
imum attainable recycling of depletable resources.
Institutional Conditions for EIA Good Practice

The legal and institutional arrangements for EIA establish the enabling conditions for sound practice. Key pre-requisites include:

- basis in law and regulation;
- clear statement of objective(s) and principles;
- mandatory compliance and enforcement;
- comprehensive scope of application to proposals with potentially significant impacts;
- prescribed process of steps and activities;
- provision for public consultation and access to information; and
- linkage to project authorisation, permitting and condition setting.

The above components comprise an initial checklist for EIA process deve-
In addition, they can be used as criteria for auditing how current EIA processes measure up. Where these basic components are in place, they do not guarantee, in themselves, good EIA practice and effective performance. However, where they are not well established, then the EIA process is very unlikely to lead in that direction. Some also consider that provision for independent review of EIAs is a critical guarantee of sound practice, although most countries operate informal or internal processes of EIA review.

Other institutional “controls” that are considered to be important are:

- broad definition of the environment and “effects;”
- duty to avoid, mitigate or remedy adverse effects arising from an activity;
- obligation to process applications within certain timeframes;
- guidance on matters to be considered when undertaking and preparing an EIA; and
- right to appeal over process application; e.g., related to screening decisions.

Principles of EIA Good Practice and Process Implementation

Principles of EIA good practice have been issued by the International Association for Impact Assessment (IAIA) and the UK Institute of Environmental Assessment (IEA), primarily for reference and use by their members. Other EIA professionals also should find them of interest. The principles are generic and non-prescriptive. They comprise a broadly based framework of guidance on EIA best practice that is applicable to all types of proposals and consistent with the EIA process established by different countries.

As formulated by IAIA/IEA, basic principles of EIA are described in Annex 1. They should be applied as a single package, recognising that the principles included are interdependent and in some cases may conflict (e.g., rigor and efficiency). A balanced approach is critical when applying the principles to ensure that EIA practice has regard to context and the circumstances to which they are applied and also complies with the requirements and procedures of the jurisdiction concerned.

The IAIA/IEA principles are derived from those formulated by the international study of the effectiveness of environmental assessment. In addition, this study developed more detailed “operating principles” which describe how the basic principles should be applied and the results and outcomes which should be sought. The operating principles of effective EIA practice are described in Annex 2. Although there is a degree of overlap with the basic principles, when combined together the information contained in Annexes 2 and 3 should provide initial guidance on international standards for designing and implementing EIA systems.

Finally, note that the integrity of the EIA process is the master key to implementing the approach in the way intended. Operational integration calls for the technical and consultative streams of EIA to be sequenced and linked at key stages of the process, consistent with procedural measures (which are generic).
and terms of reference (which are specific to a proposal). Structural integration is achieved by relating the EIA process to the project cycle and the larger policy-making framework of which EIA forms a part.

**Other Considerations**

When introducing EIA, those responsible should have regard to the “political culture” that characterises national decision-making. The term political culture refers to the norms, assumptions and “rules of the game” which determine how decisions are made and by whom. Mostly, these are unwritten and are implicitly followed. In a federal structure where powers are shared among different jurisdictions, as in Bosnia and Herzegovina, the concern will be to clarify the realities of EIA implementation as well as have due regard to internationally agreed standards and principles of good practice.

**Endnote**

1 The full text of the Act appears on pp. 53-58 (ed.)

**Selected References**


Annex 1: Basic Principles of EIA

Environmental Impact Assessment should be:

- **Purposive** — the process should inform decision-making and result in appropriate levels of environmental protection and community well-being.

- **Rigorous** — the process should apply “best practicable” science, employing methodologies and techniques appropriate to address the problems being investigated.

- **Practical** — the process should result in information and outputs which assist with problem solving and are acceptable to and can be implemented by proponents.

- **Cost-effective** — the process should achieve the objectives of EIA within the limits of available information, time, resources and methodology.

- **Efficient** — the process should impose the minimum cost burdens in terms of time and finance on proponents and participants consistent with meeting accepted requirements and objectives of EIA.

- **Focused** — the process should concentrate on significant environmental effects and key issues; i.e., the matters that need to be taken into account in making decisions.

- **Adaptive** — the process should be adjusted to the realities, issues and circumstances of the proposals under review without compromising the integrity of the process, and be iterative, incorporating lessons learned throughout the proposal’s life cycle.

- **Participative** — the process should provide appropriate opportunities to inform and involve the interested and affected publics, and their inputs and concerns should be addressed explicitly in the documentation and decision-making.

- **Interdisciplinary** — the process should ensure that the appropriate techniques and experts in the relevant bio-physical and socio-economic disciplines are employed, including use of traditional knowledge as relevant.

- **Credible** — the process should be carried out with professionalism, rigor, fairness, objectivity, impartiality and balance, and be subject to independent checks and verification.

- **Integrated** — the process should address the interrelationships of social, economic and bio-physical aspects.

- **Transparent** — the process should have clear, easily understood requirements for EIA content; ensure public access to information; identify the factors that are to be taken into account in decision-making; and acknowledge limitations and difficulties.

- **Systematic** — the process should result in full consideration of all relevant information on the affected environment, of proposed alternatives and their impacts, and of the measures necessary to monitor and investigate residual effects.

*Source:* Sadler and Brown (1999)
Annex 2: Operating Principles for Effective EIA Practice

EIA should be applied:
- to all development projects or activities likely to cause potentially significant adverse impacts or add to actual potential foreseeable cumulative effects;
- as a primary instrument for environmental management to ensure that impacts of development are minimised, avoided or rehabilitated;
- so that the scope of review is consistent with the nature of the project or activity and commensurate with the likely issues and impacts; and
- on the basis of well defined roles, rules and responsibilities for key actors.

EIA should be undertaken:
- throughout the project cycle, beginning as early as feasible in the concept design phase;
- with clear reference to the requirements for project authorisation and follow-up, including impact management;
- consistent with the application of “best practicable” science and mitigation technology;
- in accordance with established procedures and project-specific terms of reference, including timelines; and
- to provide appropriate opportunities for public involvement of communities, groups, and parties directly affected by or with an interest in the project and/or its environmental impacts.

EIA should address, wherever necessary or appropriate:
- other related and relevant factors, including social and health risks and impacts;
- cumulative and long-term, large-scale effects;
- design, locational, and technological alternatives to the proposal being assessed; and
- sustainability considerations, including resources productivity, assimilative capacity, and biological diversity.

EIA should result in:
- accurate and appropriate information as to the nature, likely magnitude, and significance of potential effects, risks, and consequences of a proposed undertaking and alternatives;
- the preparation of an impact statement or report that presents this information in a clear, understandable, and relevant form for decision-making; and
- the EIS identifying the confidence limits that can be placed on the predictions and clarifying areas of agreement and disagreement among the parties involved in the process.
EIA should provide the basis for:

- environmentally sound decision-making in which terms and conditions are clearly specified and enforced;
- the design, planning and construction of acceptable development projects that meet environmental standards and management objectives;
- an appropriate follow-up process with requirements for monitoring, management, audit and evaluation;
- follow-up requirements that are based on the significance of potential effects, and on the uncertainties associated with prediction and mitigation; and
- learning from experience with a view to making future improvements to design of projects or the application of the EA process.

Source: Sadler, 1999
I. Introduction

Passed at a time of widespread public unrest over declining environmental quality and increasing risks to human health, the National Environmental Policy Act of 1969 (NEPA) ushered in a new era of environmental protection unlike any previously known in history. NEPA serves as a landmark in environmental law that challenged the United States government to begin for the first time to address environmental concerns comprehensively as an integral part of its operations. Since NEPA was adopted 30 years ago, the federal and state governments have made environmental protection a central concern, enacting hundreds of statutes to address issues ranging from protection of ambient and natural resources, to public disclosure requirements, to progressive economic and taxation measures that promote sustainable development. As described in the 25th Anniversary Report of the President’s Council on Environmental Quality:

[NEPA] is the foundation of modern American environmental protection. While US conservation efforts began more than 100 years ago, and continued throughout the 20th century, NEPA focused environmental concerns within a comprehensive national policy.2

The passage of NEPA inaugurated one of the first efforts in the world to institutionalise a process to assess the potential environmental consequences of development activities. NEPA has given the United States international recognition as a leader in environmental protection and management. The statute has been emulated by over 25 US States and nearly 90 countries around the world.3 In the words of Senator Henry “Scoop” Jackson, the leading proponent of the Act when it was adopted in 1969, NEPA is “the most important and far-reaching environmental and conservation measure ever enacted by Congress…”4

NEPA provides the decision-making framework for the environmental impact assessment process today known as “the NEPA process.” The process includes developing a “detailed statement” that evaluates the potential environmental impacts of a proposed project and considers project alternatives and measures to mitigate negative impacts.5 Moreover, the Act provides a basis for systematic inter-agency coordination in project development and environmental analysis, as well as broad-based public involvement throughout the assessment process. The majority of this paper will consider the NEPA process, and the lessons gained from the US experience since NEPA was adopted 30 years ago.
While NEPA is best known for its revolutionary introduction of the environmental impact assessment process to government decision-making, Congress included in the Act a broad declaration of national environmental policy to protect the environment. NEPA also established the first environmental authority in the federal government, an advisory body in the Executive Office of the President — the Council on Environmental Quality (CEQ). NEPA may likewise be credited with prompting the creation of the US Environmental Protection Agency, which was established one year after NEPA was enacted, in part to take on the rapidly growing responsibilities that were beginning to overwhelm the CEQ.

NEPA’s achievements have included meaningful progress in government and private sector consideration of environmental impacts in project planning and implementation. By requiring agencies to involve the public in the environmental assessment process, NEPA has worked like no other statute to engage the American public in government planning and decision-making. The Act has been effective enough to anticipate today’s demands for enhanced local involvement and responsibility in decision-making, sustainable development, and government accountability.

Despite these achievements, NEPA has occasionally been criticised for falling short of its goals. Some have found the Act to be inadequate in meeting the environmental protection objectives announced in Congress’s declaration of national environmental policy. Many of the goals of using NEPA to promote effective inter-agency coordination, more informed environmental decision-making and meaningful public participation have also been viewed as deficient. Moreover, despite its notable policy aims, the Act is widely seen as no more than a procedural mandate. While NEPA has indeed promoted improved consideration of environmental impacts, as well as meaningful coordination among numerous agencies, institutions, private businesses, local communities, and the public, in no place does the Act specifically require decision-makers to impose environmental restrictions on proposed projects.

Despite the criticisms, NEPA has unquestionably changed the way government does business, and has given the environment an important place in the decision-making process. Thirty years of experience in implementing (and interpreting) the Act has resulted in countless lessons to provide more effective governance and environmental protection.

This paper gives an overview of the Act and discusses NEPA’s effectiveness over three decades and lessons for the future. Part II briefly considers NEPA’s historic Declaration of National Environmental Policy. Part III provides an overview of the roles of the CEQ and the US Environmental Protection Agency in implementing the Act, and overseeing effective compliance with its goals. Part IV includes a detailed summary of “the NEPA process,” describing requirements for project screening, scoping, environmental impact documentation, public participation, the final decision, and monitoring and evaluation. Following that discussion, Part V turns to the substantive consideration of how effective NEPA has been in meeting its objectives. Finally, Part VI will conclude with a summary of key lessons in NEPA’s 30-year experience for improving environmental impact assessment, both in the US and elsewhere.
II. Declaration of National Environmental Policy

Section 101 of NEPA contains language resembling a constitutional declaration of national environmental policy. Under that provision, Congress recognises the “profound impact” of human activity on the natural environment, and declares it a national policy of the government:

- to use *all practicable means and measures* ... to create and maintain conditions under which [people] and nature can exist in productive harmony, and fulfil the social, economic, and other requirements of present and future generations of Americans.8 (Emphasis added.)

The Act also requires the Federal government to take action to protect and enhance environmental amenities for current and future generations of the American population. As further stated by Senator Henry Jackson, Chairman of the Senate Interior and Insular Affairs Committee and a leading proponent of the Act:

What is involved is a congressional declaration that we do not intend, as a government or as a people, to initiate actions which endanger the continued existence or the health of mankind: That we will not intentionally initiate actions which do irreparable damage to the air, land and water which support life on earth.9

The Act’s Congressional Declaration of National Environmental Policy is perhaps one of the most important provisions of NEPA, yet it is also one of the least utilised. While these provisions provide broad language supporting a national environmental policy, NEPA’s goals are often regarded as essentially procedural in nature and not requiring close substantive evaluation of development proposals. As discussed in greater detail below, agencies that do meet all the procedural requirements of the Act will also inevitably fulfil the policy goals of the Act, by engaging in constructive dialogue with other bodies of government and the public that necessitates careful consideration of environmental concerns.

III. Implementing NEPA

A. ROLE OF THE COUNCIL ON ENVIRONMENTAL QUALITY

NEPA not only set out a national environmental policy for the United States, but it also established the first federal government body with a specific environmental mandate, the Council on Environmental Quality in the Executive Office of the President. As defined by the Act, the Council is to be composed of persons with specialised environmental training, experience, and credentials.10 Responsibilities of the CEQ include gathering and analysing information on environmental trends, reviewing Federal government programmes and activities pursuant to the NEPA’s policy declaration, conducting environmental studies and research, documenting changes to the natural environment, producing reports to the President on the state of the environment, and providing studies and recommendations on matters of policy and legislation to the President.11
In addition to its general role as an advisory body to the President on environmental matters, the CEQ is responsible for implementing NEPA and generally for overseeing the process of reviewing Environmental Impact Statements. When it was first established, many environmental organisations pressed the CEQ to act as a judge for all federal agency “Environmental Impact Statements” (EIS) — the principal document in the NEPA process. However, with over 70 federal agencies falling under NEPA’s authority, the small staff of the CEQ was quickly overwhelmed, and instead developed guidelines for agencies to follow in preparing impact statements. This placed the principal responsibility to comply with NEPA on the agencies, as Congress had originally intended. Also pursuant to its role as a supervisory body, the CEQ issued regulations for implementing NEPA on November 29, 1978. The regulations became effective for all Federal agencies on November 30, 1979. Since then, the CEQ has been responsible for working with agencies to develop or revise their procedures, before they are published in the Federal Register for public comment.

Since establishing its role of overseeing compliance with NEPA in the federal government, the CEQ has also had an important role in providing “Predecision Referrals” to the President (as described in section C, below). In addition, the CEQ has developed an awards programme that recognises federal agencies for outstanding application of NEPA’s requirements, based on 11 awards criteria (See Appendix D, Criteria for Federal Environmental Quality Awards). The CEQ Awards were established in 1992 in partnership with the National Association of Environmental Professionals (NAEP). Other CEQ activities have included participation in training courses and outreach programmes, hosting conferences on NEPA, working with professional organisations and academic institutions to provide training and information on NEPA, developing a guidance for agencies to comply with an Executive Order of the President to include analysis of environmental effects on minority and low-income populations (environmental justice), and establishing NEPANet, a web site containing information and documents about NEPA.

B. ROLE OF THE ENVIRONMENTAL PROTECTION AGENCY UNDER NEPA

The Environmental Protection Agency (EPA) is responsible for reviewing all Federal Environmental Impact Statements prepared under NEPA by other Federal agencies. The EPA also has a unique charge under the Clean Air Act to review certain proposed actions for legislation, action, or regulation of other Federal agencies in accordance with NEPA requirements.

Shortly after NEPA was passed, Congress recognised the CEQ’s inability to provide effective environmental review of all projects subject to NEPA requirements. At that time, Congress determined that the statute did not “assure that Federal environmental agencies will effectively participate in the decision-making process. It is essential that mission-oriented Federal agencies have access to environmental expertise in order to give adequate consideration to environmental factors.” This heightened demand for environmental expertise to meet the
requirements of NEPA was a significant consideration in the decision by Congress to establish the EPA in 1970.

In its nearly 30 years of existence, the EPA has reviewed most of the approximately 25,000 Draft and Final Environmental Impact Statements drafted under NEPA.\textsuperscript{18} Today, EPA headquarters and regional offices review about 500 EISs per year. These EISs consider a wide range of Federal government activities. Recently, EISs have most frequently addressed, for example:

- forestry and rangeland management;
- land acquisition and management;
- natural gas and oil exploration;
- mining and mineral extraction;
- national parks and recreation areas;
- application of pesticides;
- highway and road construction;
- military installations;
- watershed and wetland protection;
- wildlife and fisheries protection;
- beach erosion and storm protection;
- power transmission facilities;
- and many other activities.\textsuperscript{19}

(See Appendix C, 1994 Environmental Impact Statements Filed with the Environmental Protection Agency.) EPA also reviews proposed legislation, proposed agency regulations, the renewal of actions approved before NEPA was enacted, proposals for which no EIS is required, and proposals to develop a “segment,” that is, a discrete portion of a larger, more complex activity.\textsuperscript{20}

The EPA applies a rating system in reviewing the adequacy of EISs and the environmental impact of the proposed action. Under this rating system, the EPA may find that an EIS:

- adequately sets forth the environmental impact(s) of the alternatives (Category 1);
- does not contain sufficient information to fully assess the impacts (Category 2); or
- does not adequately assess potentially significant impacts of the action (Category 3).

With respect to review of the environmental impacts of the action, the EPA may indicate:
that it has not identified any potential environmental impact (Lack of Objections);

• that it has identified environmental impacts that should be avoided (Environmental Concerns);

• that it has identified significant environmental impact that must be avoided (Environmental Objections); or

• that it has identified adverse environmental impacts that are unsatisfactory from the standpoint of public health, welfare, or environmental quality (Environmentally Unsatisfactory).

In addition to reviewing EISs, the EPA coordinates with other Federal agencies, and develops and disseminates guidance materials and provides training courses on NEPA and Clean Air Act Section 309 compliance.\textsuperscript{21} The EPA also maintains a national EIS filing system and publishes a weekly notice listing EIS documents as they become available for review and comment.\textsuperscript{22}

**C. FEDERAL IMPLEMENTATION OF NEPA AND INTER-AGENCY COORDINATION**

As directed by the CEQ regulations, Federal agencies are required to adopt NEPA policies and procedural requirements as part of their own rules and regulations. In doing so, agencies are required to use a “systematic, interdisciplinary approach” that would integrate natural and social sciences, and environmental planning approaches in conducting environmental impact assessment.\textsuperscript{23}

Likewise, Federal agencies are required to participate in a coordinated effort with other agencies involved in a project subject to NEPA. The responsible Federal official must “consult with and obtain the comments” of any Federal agency with jurisdiction over any environmental impact being considered.\textsuperscript{24} Copies of all relevant comments must be made available to the President, the CEQ, and to the public, and are to be used in completing the review process.\textsuperscript{25} Interagency coordination is discussed with greater detail under The NEPA Process, below.

**D. PREDECISION REFERRALS TO THE CEQ**

Since 1973, the CEQ has been responsible for receiving any “predecision referrals” from a Federal agency to address interagency disagreements related to a proposed activity under NEPA review. These referrals are to be made to the CEQ after unsuccessful attempts to resolve differences with the lead agency during the NEPA process. An agency will make an environmental referral if it finds there has been a possible violation of national environmental standards or policies, based on the severity, geographic scope, duration, and availability of “environmentally preferable alternatives.”\textsuperscript{26} Under Section 309 of the Clean Air Act, the US Environmental Protection Agency is authorised to make referrals to the CEQ on an even broader range of Federal actions, not only those actions for which a Final EIS is prepared.\textsuperscript{27}
A referral must be made in writing to the CEQ after a Final EIS is made available to the public (see The NEPA Process, below). The referring agency must also provide notice of the referral to the lead agency, which must respond in writing within 25 days. During that period, other agencies and the public may also provide comment to the CEQ. Following the comment period, the CEQ may make public Findings and Recommendations on the referral, and may mediate between the disputing agencies, hold public hearings, or refer irreconcilable disputes to the President for action. The CEQ may also conclude either that the issue is not of national importance, or that insufficient information has been submitted for it to make a decision.28

IV. The NEPA Process

ENGAGING THE NEPA PROCESS: APPLICABILITY AND TIMING

Applicability of NEPA: Major Federal Actions Significantly Affecting the Quality of the Human Environment

NEPA requires Federal agencies to complete a “detailed statement” addressing all agency proposals for legislation and “other major Federal actions significantly affecting the quality of the human environment.”29 (Emphasis added.) Unlike many environmental impact assessment laws in other countries that contain lists describing specific types of activities subject to the assessment process, NEPA relies on this substantive standard. Needless to say, the phrase “significantly affecting the quality of the human environment” has been the subject of considerable judicial deliberation. The statute’s broad language has been interpreted to suggest that Congress intended NEPA to require environmental impact assessment for a wide variety of development activities. In the early cases following passage of NEPA, courts interpreted the term significantly affecting quite broadly, requiring an EIS for any projects that “may cause a significant degradation,” “could have a significant effect,” “arguably will have an adverse environmental impact,” or have a “potentially significant adverse effect.”30 The CEQ regulations define significant in terms of “context” (i.e., with respect to society as a whole, the region affected, interests, and the locality) as well as “intensity” (i.e., the severity of impact).31

Also unlike other EIA laws around the world, NEPA only applies to proposals of the Federal government, or “major Federal actions.”32 As defined in the CEQ regulations, major federal actions include all “actions with effects that may be major and which are potentially subject to Federal control and responsibility.”33 Such actions apply to new and continuing activities, including “projects and programmes entirely or partly financed, assisted, conducted, regulated, or approved by Federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals.” According to the regulations, Federal actions generally include the adoption of official policy, treaties and international agreements; formal plans for the use of agency resources; and Federal programmes. Actions may also include specific projects.34 Ultimately, the courts have determined whether government-funded projects are “major” only on a case-by-case basis.
Based on the statutory standard for applying NEPA, EISs have been required for activities such as Department of Transportation regulations increasing accessibility to mass transportation by disabled persons; housing loans of USD 3.5 million to construct affordable housing in an area without high-rise buildings in Portland, Oregon; Army Corps of Engineers’ designation of a new waste dumping site near the Atlantic coast; trapping efforts of the US Fish and Wildlife Service under endangered species programmes; and US participation in Mexican herbicide spraying of marijuana plantations. In contrast, the standard was found not to apply to a USD 3.7 million loan to construct a 272-unit apartment complex in the City of Houston; Federal funding for a landfill improvement project; enforcement action by US Fish and Wildlife of Federal requirements over baiting of migratory waterfowl; or aerial surveillance over Federal lands for detection of illegal marijuana.35

While NEPA applies to actions that are “Federal” in nature, this has not precluded the statute from addressing activities of the private sector, or state and local governments. Courts have applied NEPA more broadly, based on the premise that actions are “Federal” in nature when Federal funding or approval (e.g., a permit) is involved. In one case, a mortgage guarantee and interest grant from the Department of Housing and Urban Development could not be issued for a housing project until an EIS was filed. In that instance, the housing developer, acting as a “partner” of the Federal government, was enjoined from continuing with the project until the EIS was completed.36

With respect to policies, an EIS must be prepared when “an agency proposes to implement a specific policy, adopt a plan for a group of related actions, or to implement a specific statutory programme or executive directive.”37

Applying NEPA Early in the Planning Process

Agencies are required to engage NEPA in the planning process as early as possible, in order to ensure that environmental values receive proper attention in planning and decision-making. Likewise, early introduction of NEPA to the planning process is meant to avoid delays later on and to address potential conflicts before they arise. Specifically, each agency is required to identify environmental effects and values in sufficient detail in order to allow proper comparison among technical and economic analyses. All environmental documents prepared under NEPA should be circulated and reviewed at the same time as other planning documents.38

INITIAL STAGES OF THE NEPA PROCESS: PRE-ASSESSMENT AND DISMISSAL

Whether to Prepare an Environmental Impact Statement (EIS)

Federal agencies must establish procedures describing whether a proposal (1) normally will require an environmental impact statement, or (2) normally will not require either an EIS or an Environmental Assessment (i.e., requiring a “Categorical Exclusion”).39 Any proposals that do not fall into either category will require the preparation of an Environmental Assessment.40 In preparation of an Environmental Assessment, the agency must involve relevant environmental agencies, applicants, and the public to the extent practicable. Based on the
Environmental Assessment, the agency must make a determination whether it will continue with the preparation of an EIS. If it will be preparing an EIS, the agency must initiate steps to conduct the scoping process. If, based on the Environmental Assessment, the agency determines it will not complete an EIS, it must issue a Finding of No Significant Impact (FONSI) (see below).  

**Environmental Assessment (EA)**

An Environmental Assessment is a concise, public document that can provide sufficient evidence and analysis for determining whether to prepare an EIS or a FONSI (see below), and may be completed if a proposed project is not subject to a Categorical Exclusion. The principal purpose of an EA is to determine whether an EIS will be required, by assessing whether a federal proposal could have a significant impact. Even if no EIS is required, the EA can aid an agency in complying with other requirements of the Act.

In the event that an EIS will be required, the EA may also help facilitate the preparation of the EIS. By completing an EA, the lead agency can determine whether the expected impact would be significant before having to undergo a costly and time-consuming EIS process. The Environmental Assessment must include brief discussions on the need for the proposal, alternatives to the proposal (including a “no action” alternative), environmental impacts of the proposed action and the alternatives, and a list of agencies and persons consulted in preparation of the EA.

The role of EAs has grown considerably since NEPA was enacted. Today, EAs are the predominant means of conducting NEPA analyses. For example, the total number of EISs prepared annually has declined from about 2,000 in 1973 to 465 in 1993 and 532 in 1994. In contrast, the total number of EAs prepared annually in 1993 was 50,000. An EA typically includes specific mitigation measures to reduce adverse effects of a project below levels that would be considered “significant.” By including mitigation measures, EAs can avoid the need to conduct a full EIS.

**Finding of No Significant Impact (FONSI)**

The agency must complete a Finding of No Significant Impact if it determines that the proposed action will not have a significant effect on the human environment. The purpose of the FONSI is to explain the reasons for this determination and why an EIS will not be prepared. The FONSI must include a summary of the EA or the EA itself (as an attachment incorporated by reference), and note any other environmental documents related to it. It is not necessary for the FONSI to be detailed, but it must succinctly describe the reasons for the determination and, if relevant, which factors weighed most heavily in the decision. A FONSI must be made available to public review for 30 days before the agency makes a final determination whether to prepare an EIS only if: (1) the proposal would normally require the preparation of an EIS under agency procedures, or (2) the nature of the proposed action is unprecedented.

An increase in the preparation of FONSIs has followed in connection with the increase in EAs. “Mitigated FONSIs” provide mitigation measures as part of the finding of no significant impact.
PROCEEDING TO THE ENVIRONMENTAL IMPACT STATEMENT STAGE

Notice of Intent (NOI)

If the agency decides to prepare an EIS, then as soon as is practicable, and before the scoping process, the lead agency must publish a Notice of Intent (NOI). The NOI will serve as notice that an EIS will be prepared and considered. The NOI must describe the proposed action and possible alternatives as well as the agency's proposed scoping process including whether, when, and where any scoping meeting will take place.

Scoping Process

Scoping is the process by which a Federal agency may determine the scope of the EIS, so that preparation of the document can be effectively managed. By planning ahead, scoping can help ensure that the draft EIS will be thorough and balanced. The responsible agency and all cooperating agencies are obligated to participate in the scoping process.

The purpose of scoping is to identify public and agency concerns in the NEPA process, and to clearly define the significant environmental issues and alternatives to be examined in the EIS. By conducting scoping early in the NEPA process, problems can be identified early and properly studied, while issues of little or no significance can be ignored, saving time and resources. Scoping also helps agencies identify other Federal, state, or local government requirements that need to be addressed.

The lead agency must invite to participate in scoping all affected Federal, state, and local agencies, any affected Indian tribe, the proponent of the action, and other interested persons (including those who may oppose the proposed action). Another important function of scoping is to identify public involvement and public hearing procedures of all appropriate state and Federal agencies involved in the proposed action. Public hearings or meetings are not typically required during the scoping, but are nevertheless usually held. Ultimately the agency must determine what manner would be best to seek public input. The CEQ Guidance encourages the lead agency to notify the public of the results of the scoping process as a safeguard to ensure all issues have been identified. The lead agency is also required to document the results of the scoping in its administrative record.

The lead agency must allocate assignments in the preparation of the EIS among the lead and cooperating agencies, and identify other public environmental assessments or EISs being prepared, outside the scope of, but related to, the current scoping.

Scoping may “end” once the issues and alternatives to be addressed in the EIS have been clearly identified. Scoping is typically complete at the final stages of the Draft EIS, before the draft is officially circulated for public and agency review.
ENVIRONMENTAL IMPACT STATEMENT (EIS)

Purpose

The Environmental Impact Statement is the manifestation of the national environmental policy announced in NEPA. As described in the CEQ regulations:

The primary purpose of an environmental impact statement is to serve as an action-forcing device to insure that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal Government. It shall provide full and fair discussion of significant environmental impacts and shall inform decision-makers and the public of the reasonable alternatives which would avoid or minimise adverse impacts or enhance the quality of the human environment ... An environmental impact statement is more than a disclosure document. It shall be used by Federal officials in conjunction with other relevant material to plan actions and make decisions.61

Pursuant to the policy goals of NEPA, an EIS must ultimately serve the purpose of assessing the environmental impact of a proposed agency action, and not of justifying decisions previously made.62

Preparation and Content of the EIS

In addition to discussing the expected environmental impact of the proposed action, and alternatives to the proposed action, the EIS must describe “the relationship between local short-term uses of [the human] environment and the maintenance and enhancement of long-term productivity.”63 An EIS must also include discussion of “any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.”64

In developing a Draft EIS, the lead agency must coordinate with cooperating agencies. The Draft EIS will serve as the basis for public review and comment, and include adequate discussion of environmental conditions, environmental impacts, alternatives to the proposal, and mitigation measures. The Final EIS must include the agency’s responses to comments, as well as a discussion of any opposing views that were not adequately discussed in the Draft EIS. The lead agency will ultimately base the Record of Decision (discussed below) on the Final EIS.

The CEQ regulations assert that the EIS itself should be analytic in nature (rather than encyclopedic), concise, and no longer than absolutely necessary to comply with NEPA and the CEQ regulations. Environmental impacts must be discussed in a manner that reflects their relative significance.65

Although contractors usually draft the EIS itself, Federal agencies carry full legal responsibilities for carrying out the EIS process and ensuring NEPA’s objectives are met. An EIS should include a disclosure statement verifying that the contractor preparing the EIS does not have an interest in the outcome of the proposal. In addition to avoiding possible conflicts of interest, this requirement helps assure the public that the analysis of the EIS is objective and free of “self-serving research and analysis.” Generally speaking, any delegation of work pursuant to NEPA should be performed in as objective a manner as possible.66
When an agency makes substantial changes to a proposed action that relate to environmental considerations, or where new information is made available regarding the environmental impacts concerning the proposed activity, the agency is required to prepare a Supplemental EIS.67

**Flexibility in Preparing Multiple EISs — “Tiering”**

Tiering refers to a procedure that allows an agency to develop a broad, initial EIS and incorporate it by reference in future EISs. The CEQ regulations encourage agencies to “tier” EISs in order to eliminate duplicative research, analysis, and paperwork. This broader EIS typically addresses a national programme or policy statement. The subsequent, narrower EISs or EAs can address regional and site-specific activities, but incorporate the broader EIS without having to repeat the process of producing the same information.68

Tiering also serves the purpose of allowing agency decision-makers to focus on the specific issues related to the action in question. The subsequent EIS must also indicate where the earlier EIS is available. Depending on the project, tiering may also apply to different stages of related actions.69

**Consideration of Alternatives**

One of the most important features of NEPA is the requirement that an EIS consider the potential benefits and impacts of alternatives to the proposal, including the alternative of taking “no action.” As stated in the CEQ regulations, the requirement for alternatives “is at the heart of the environmental impact statement,” and should sharply define the issues and provide a clear basis for the choice among options by the decision-making authority and the public.70 An EIS must discuss how the alternatives “will or will not achieve NEPA’s policy objectives, and other environmental laws and policies. Likewise, agencies may not make any effort to prejudice the selection of an alternative before the final decision.71

An EIS may consider an infinite number of alternatives.72 Agencies are required to “rigorously explore and objectively evaluate all reasonable alternatives.” (Emphasis added.) These include alternatives that may fall outside the jurisdiction of the agency responsible for completing an EIS (so long as they are “reasonable”). Agencies must give detailed treatment of each alternative in order to promote more effective and meaningful comparison.73

Consideration of the “alternative of no action” is a particularly important part of the EIS process.74 The “no action” alternative is defined as one in which there is either “no change” from the current direction or intensity of the activity, or where the proposed action would not take place. In some instances, “no action” may in fact have significant environmental consequences. For example, if a permit is denied to build a railroad facility, this may lead to an increase in road congestion and local air pollution. Where “no action” by the agency would result in predictable actions by others, this should be included in the EIS analysis.75 The “no action” alternative give the agency a baseline from which to evaluate any changes to the current condition of the proposed site for each alternative and the proposed action.

In the Draft EIS, the lead agency must identify a “preferred alternative,” that is, the alternative “which the agency believes would fulfil its statutory mission and
responsibilities, giving consideration to economic, environmental, technical and other factors."

The lead agency is also responsible for identifying the Environmentally Preferable Alternative. This alternative is defined as one which would best promote the national environmental policy declared in Section 101 of NEPA. If an EIS is prepared, the Record of Decision (ROD) must include a discussion of all alternatives that were considered in the EIS, and specifically identify the Environmentally Preferable Alternative.

**Consideration of Mitigation Measures**

The EIS and the ROD must each discuss mitigation measures that could reduce the potential impacts of the proposed action or alternatives. For example, these measures include design or technological approaches that would decrease pollution emissions, minimise impacts of construction, or reduce aesthetic impacts. Mitigation measures may also address relocation assistance for local communities, possible land use controls, or other efforts to reduce environmental impacts. Mitigation measures must be developed wherever feasible in the environmental impact analysis.

In order to provide a clear assessment of potential environmental effects of the proposed activity, the EIS and ROD must also discuss the likelihood that mitigation measures will be adopted, implemented, and enforced by responsible agencies. If there is a history of non-enforcement of or opposition to such measures, the EIS or ROD must also discuss this. As with alternatives, the EIS and ROD must consider even those mitigation measures that may be outside the jurisdiction of the lead agency or cooperating agencies.

Mitigation measures should also be considered in those cases where the environmental impacts are not found to be “significant.” In such situations, the EA or FONSI should include discussion of mitigation measures or alternatives to assist agencies in planning and decision-making. As decided by the responsible agency, mitigation measures can be required in the final decision as enforceable permit conditions or adopted as part of the agency’s final decision in the same manner as they are adopted in the formal ROD.

**Consideration of Environmental Effects and Cumulative Impacts**

In order to ensure that Federal agencies provide adequate analysis of environmental impacts, the CEQ regulations describe specific kinds of impacts that should be included in an EIS. The EIS must address the environmental impacts of all alternatives, including the proposed action and the “no action” alternative. The discussion must also address “the relationship between short-term uses of [the human] environment … and any irreversible or irretrievable commitments of resources which would be involved in the proposal should it be implemented.”

More specifically, the discussion of environmental consequences must address each of the following:

1. **Direct effects and their significance;**
2. **Indirect effects and their significance;**
(c) possible conflicts between the proposed action and the objectives of Federal, regional, state, and local land use plans, policies and controls for the area concerned;

(d) environmental effects of alternatives, including the proposed action;

(e) energy requirements and conservation potential of various alternatives and mitigation measures;

(f) natural or depletable resource requirements and conservation potential of various alternatives and mitigation measures;

(g) urban quality, historic and cultural resources, and the design of the built environment, including the reuse and conservation potential of various alternatives and mitigation measures; and

(h) measures of mitigating adverse environmental impacts.  

The term “direct effects” refers to impacts that are caused by the action and occur at the same time and place. “Indirect effects” refers to impacts that are later in time or further in distance, but that are still “reasonably foreseeable.” Such effects may include impacts that cause changes to land use patterns, population density or growth rates, and air, water, ecosystems, or other natural systems. Generally speaking, “effects” can be ecological, aesthetic, historic, cultural, economic, social, or health-related.

An important consideration in the assessment process is that, in addition to “direct” and “indirect” effects, the CEQ regulations require the EIS to consider “cumulative impacts.” These include those impacts of an action which result from the incremental impacts that are added to any other “past, present, and reasonably foreseeable future actions.” By considering cumulative impacts, the EIS can assist governments and the public in considering the impact of actions that individually may appear to be minor, but that become significant when treated collectively.

**COMMENT ON THE EIS**

Agencies are required to circulate all Draft and Final EISs for review and comment to the following:

(1) all Federal agencies with jurisdiction or special expertise in environmental impacts being considered in the EIS, as well as any appropriate Federal, State, or local government authorised to develop and enforce environmental standards;

(2) the applicant; and

(3) any person, organisation, or agency requesting the entire EIS. 

Before preparing a Final EIS, and before a final decision can be made, the responsible agency must circulate the Draft EIS for comment. This agency must collect comments from all cooperating agencies and any Federal agency with jurisdiction or relevant environmental expertise, or with appropriate “environ-
mental authority. The agency must also request the comments from appropriate state and local government agencies with environmental authority, affected Indian tribes, and the applicant. Finally, the agency must take affirmative steps to request comments from the public, including those individuals or organisations that may be interested or affected by the proposed activity. Affected Federal agencies are required to provide comments on an EIS, although a Federal agency, including a cooperating agency, may satisfy this requirement by replying that it has no comment.

In addition to the requirement that the responsible agency must assess and consider all comments on the Draft EIS, the agency is required to respond to agencies, organisations, or members of the public who provided comments. Responses may address a request, for example, to modify alternatives, to consider additional alternatives, to supplement or improve the analysis in the EIS, or to make corrections to the EIS. The Final EIS must discuss the responses given to comments, and all substantive comments must be attached to the Final EIS, whether or not the agency considers the comment in the text. The responses given to the agency should normally result in substantive changes to the text, and not simply be included as an attachment.

Any person, organisation, or agency that submitted substantive comments on a Draft EIS must also receive a copy of the Final EIS.

RECORD OF DECISION (ROD)

Following completion of a Final EIS, each agency must make a final decision on the proposed activity in the form of a public Record of Decision. The ROD must include a statement of the final decision, and identify all alternatives considered in reaching the decision. The ROD must also specify the environmentally preferable alternative, based on economic and technical considerations and agency statutory missions, as well as other considerations of national policy. The ROD must explain the agency’s reasoning in selecting among alternatives, and state whether all practicable mitigation measures have been adopted to minimise environmental impacts, and if not, why not.

As a public document, the ROD must be available to the public through appropriate public notice as required in the CEQ regulations (see below). Nevertheless, there is no specific requirement that the ROD itself be published, either in the Federal Register or elsewhere.

IMPLEMENTATION AND ENFORCEMENT OF THE DECISION

In order to assure that decisions made in the EIS process are carried out, the lead agency and other appropriate consenting agencies must adopt a monitoring and enforcement programme to implement any mitigation measures described in the ROD. Pursuant to this requirement, the lead agency must take steps to implement the decisions by including appropriate conditions in grants, permits, or other approvals, and condition funding of actions on effective implementation of mitigation measures. Upon request, the lead agency must inform cooperating
agencies (and agencies commenting on the Draft EIS) on progress in carrying out mitigation measures and adopted in the ROD. The lead agency must also make all monitoring results available to the public.101

Pursuant to the requirements established under Federal administrative law, agencies are accountable for preparing Records of Decision and for implementing and enforcing the actions set out in a ROD. An agency is generally required to comply with its own decisions and regulations once they are adopted; one must therefore comply with its ROD. Thus, a ROD may be used to compel compliance with or implementation of the mitigation measures it provides.102

PUBLIC PARTICIPATION IN THE NEPA PROCESS

Public participation is a fundamental policy goal of NEPA, and has been instrumental in the success of the statute over its 30 years of existence. As described in the statute, the Federal government must provide information to all States and local governments, institutions, and the public, for “restoring, maintaining, and enhancing the quality of the environment.”103 As suggested above, the Federal government must make “diligent efforts to involve the public in preparing and implementing” the requirements under NEPA.104 This includes public involvement in scoping, commenting on the Draft EIS, participation in hearings addressing the environmental review of the proposed action, and access to information about the decision, including the final decision.

Agencies are specifically required to provide adequate public notice of hearings and meetings related to the NEPA process, and of the availability of environmental documents that may inform interested or affected persons or agencies. Where an individual action is concerned, agencies must mail notice to those who have requested it. Where an action affects national interests, notice must be published in the Federal Register and mailed to “national organisations reasonably expected to be interested in the matter.” Agencies must keep a list of these organisations. Where an action is primarily of local concern, notice may simply include publication in local newspapers (or other local media), direct mailing to owners of nearby or affected property, or direct notice to States, Indian tribes, local governments, or potentially interested community organisations (such as small business associations).105

Agencies are required to hold public hearings as appropriate and in accordance with agency procedures. Public hearings are held if a substantial environmental controversy exists concerning the proposed action or if another agency has requested a hearing.106

In addition to public notice and hearings, agencies must inform the public about EIS procedures and make available all relevant environmental information and documents resulting from the EIS process. All EISs, comments, and any other related documents must be available to the public, pursuant to the Freedom of Information Act.107 To the extent practicable, documents must be available free of charge, or at a fee that does not exceed the actual cost of reproducing copies of the documents.108
NEPA REQUIREMENTS FOR PROPOSALS FOR LEGISLATION

The NEPA process is somewhat abbreviated with respect to agency proposals for legislation, primarily for the sake of administrative efficiency. Nevertheless, agencies making legislative proposals must still meet the requirement of preparing a “detailed statement.” The NEPA process in agencies for legislation proposals is integrated with the legislative process in Congress. The CEQ regulations require agencies to include a “Legislative EIS” in recommendations or reports on legislative proposals to Congress. The Legislative EIS, likewise, is considered an integral part of the legislative proposal itself, and must be made available in time for Congressional hearings and other deliberations.109

Unlike standard procedures for preparing an EIS, preparation of a Legislative EIS does not require a scoping process, and typically can be completed in the same manner as a Draft EIS. On the other hand, a Draft EIS and Final EIS must both be completed if the Congressional Committee with jurisdiction over the proposal requires it, the proposal results from a “study process” required by statute, or legislative approval is needed for Federal or Federally assisted implementation of a project. In addition, an agency may itself voluntarily complete a Final EIS.110

The lead agency must forward all comments on the Legislative EIS, along with its own responses, to the appropriate Congressional committees considering the proposed legislation.111

V. Has NEPA Been Effective?

In January 1997, the Council on Environmental Quality issued a study on NEPA’s effectiveness since its adoption in 1969. In many respects, the study found NEPA to be a ringing success. Over three decades, NEPA has required agencies to take a “hard look” at the potential environmental impacts of their activities, it has promoted “productive harmony” among collaborating agencies, and it has given the public an unprecedented opportunity to participate in Federal government decision-making.112 NEPA has provided Federal agencies and the public an important framework for collaboration and coordination among different perspectives, experiences, and expertise on the environmental, social, and economic impacts of government decisions.113

Nevertheless, NEPA has not adequately met several important goals. One common complaint is that the NEPA process takes too long and is unnecessarily costly. Occasionally, agencies make decisions before receiving full public input, and documents are too long or technical for adequate public involvement. In some instances, both Federal agencies and the public have indicated that too little attention has been given to concerns they have raised. Training for agency officials, particularly for senior officials, was also found to be inadequate.114

Government agencies also tend to focus too heavily on the procedures for generating an EIS rather than on the “good decision-making” objectives of the Act. For instance, alternatives may not be examined adequately because of cost-saving measures taken by an agency.115 Information gathering and assessment in the EIS process has been described as “information overload.” Likewise, much environmental infor-
mation used in the EIS process has itself been inadequate or unreliable. Unfortunately, NEPA has also been used as a tool to generate litigation to stop or delay projects that do not necessarily require careful environmental scrutiny. In other cases, private companies have used the EIS requirement to prevent the enforcement of environmental regulations.

In addition to concerns over the implementation of NEPA, the Act has also been criticised as being ineffective in preventing “bad” environmental decisions from being approved. In other words, many have found that NEPA does not have “teeth” to promote the true environmental policy goals of the Act, arguing that NEPA is no more than a procedural requirement. This last concern is addressed below, under Judicial Review and Agency Discretion.

CRITICAL ISSUES FOR EFFECTIVE NEPA IMPLEMENTATION

CEQ has identified a number of critical aspects of NEPA that are necessary for the Act to operate and promote national environmental policy successfully. First, agencies need to integrate NEPA goals early into their internal planning processes. They must also engage in effective interagency coordination, sharing and integrating planning responsibilities with other government agencies. Next, agencies should take steps to improve public input and information dissemination, making sure to consider the views of local communities and other public representatives during the NEPA process. As explicitly stated in the Act, the NEPA process should also use an inter-disciplinary, “place-based” approach to analyse information and values from a variety of sources. Finally, the NEPA process should not end with a final decision. Agencies should take advantage of new “adaptive management” approaches that incorporate flexible methods for monitoring and mitigation once an activity has been implemented. Combined with the procedural objectives of the Act, these strategies will help ensure that NEPA works to meet meaningful, substantive objectives to protect and enhance the quality of the human environment.

JUDICIAL REVIEW AND AGENCY DISCRETION

Perhaps the most important concern about NEPA was raised early in its history—the limited scope of judicial review over the agency decision to approve or disapprove a project following NEPA review. Although agency officials have become more accountable to the public, NEPA contains no substantive requirement to improve environmental quality or prevent environmental harm. This basic rule has been definitively voiced by the courts, starting with the landmark case of Calvert Cliffs Coordinating Committee v. Atomic Energy Commission in 1971. While the Court in Calvert Cliffs agreed that Federal agencies must use “all practical means” to pursue NEPA’s policy goals, it explained that Congress required agencies to follow the procedural provisions of Section 102 “to the fullest extent possible.” Based on this reading of the Act, the court held that agencies could use discretion in implementing NEPA’s substantive objectives. Agencies would only be scrutinised if a decision was “arbitrary or clearly gave insufficient weight to environmental values.” On the other
hand, the Court found that NEPA was inflexible with respect to the procedural requirements for completing an EIS. Thus, failure to complete a legally adequate EIS would constitute a violation of NEPA — however, agencies would not legally be required to adopt and implement the EIS.123

In 1980, the Supreme Court took this reasoning a step further in Stryker's Bay Neighbourhood Council v. Karlen124 to hold that NEPA's requirements were “essentially procedural.”125 As stated by the Court, “once an agency has made a decision subject to NEPA’s procedural requirements, the only role for a court is to insure that the agency has considered the environmental consequences ...”126 Following the Supreme Court’s ruling against close judicial scrutiny of NEPA decision-making, many lower courts have been reluctant to examine agency violations of the Act, and occasionally refuse to issue injunctions to correct such violations.127 To some extent, the practical effect of the judicial reading of NEPA has led to a policy shift within agencies towards treating the NEPA process as largely procedural, rather than making decisions based on substantive merit.

Nevertheless, Federal agencies are required to take a “hard look” at the environmental consequences of the proposed action. As stated in Vermont Yankee Nuclear Power Corp. v. Natural Resources Defence Council, the EIS process must:

1. provide enough information to the agency regarding potential environmental impacts to ensure a “fully informed and well-considered decision,” and
2. ensure that the agency will inform the public that environmental concerns have been considered.128

MEANINGFUL ANALYSIS VERSUS ADMINISTRATIVE REQUIREMENT

As discussed above, a number of agencies tend to treat the EIS process as no more than an administrative requirement, rather than as a tool to promote more effective and meaningful environmental decision-making. Without a focused, substantive purpose in conducting the NEPA process, agency efforts that often cost millions of dollars, take years to complete, and generate many tons of paper have limited value in practical terms.129 President Carter’s Executive Order requiring the CEQ to promulgate regulations also included a mandate to make the EIS process “more useful to decision-makers and the public, and to reduce paperwork and the accumulation of extraneous background data, in order to emphasise the need to focus on real environmental issues and alternatives.”130 Unfortunately, Federal agencies have found difficulty in meeting these goals. As testified by former Director of the CEQ, Kathleen McGinty, “processes that have evolved to implement NEPA have often led to delay, confusion and litigation ... That outcome fails to honour the intention of NEPA’s authors and misses the promise and opportunity NEPA truly presents.”131

Some statistics on the page length of EISs may help illustrate the extent of agencies’ emphasis on NEPA as a regulatory requirement, rather than a substantive part of agency decision-making. The CEQ regulations require Final EIS to be normally less than 150 pages in length, and up to 300 pages for proposals of “unusual scope or complexity.”132 Nevertheless, according to the EPA, in 1996 the average page length of Final EISs was 204 pages. The average length of Draft EISs...
was 198 pages. The longest Final and Draft EISs were 1,638 and 1,622 pages, respectively. If page length is any indication, these figures offer additional evidence that agencies themselves have a tendency to spend more time and effort than necessary in preparing EISs.

STRATEGIC PLANNING AND INTERAGENCY COORDINATION

NEPA has played an important role in promoting more effective strategic planning within Federal agencies, as well as better planning and coordination between agencies. However, NEPA has not been used as a strategic planning tool as extensively as the statute’s framers had originally intended. While some agencies have completely integrated NEPA into their decision-making processes, many do not fully apply the substance of NEPA’s mandate. Agencies often have difficulty coordinating because they have different timetables, requirements, and methods of involving the public.

Another leading concern is that agency and private sector planning procedures sometimes start long before the NEPA process itself begins, essentially ignoring the value of NEPA in project planning. At times, alternatives are chosen and strategic decisions are made well before the NEPA process has begun. In addition, NEPA has been applied only in rare occasions in policy or programme development processes. This generally occurs because of the mistaken belief that NEPA will require the same extensive and detailed analysis as provided for projects.

The US Department of Energy has demonstrated some leadership in integrating NEPA into its decision-making processes, particularly as the agency is undergoing transformation from secrecy to increased public disclosure and participation following the end of the Cold War. For example, the Department has used NEPA in planning to transform a nuclear weapons complex into new facilities, and in addressing nation-wide environmental cleanup requirements.

Another important step in improving agency strategic planning under NEPA has been to integrate steps in the NEPA process with other decision-making procedures. Measures by which agencies can promote integration include preventing duplicative analysis by using scoping and tiering more effectively, and meeting the requirements of NEPA and other laws concurrently, such as environmental studies, documentation, or public participation.

For example, in 1979 the Bureau of Land Management (BLM) began fully integrating the EIS process with land planning requirements under the Federal Land Policy and Management Act. Approving more than 100 joint “Resource Management Plans/EISs,” BLM has streamlined its decision-making while also managing to save over USD 30 million. In another case, the State of Florida took steps to streamline its procedures by combining NEPA requirements with reviews under the Federal Coastal Zone Management Program — largely identical procedures. By consolidating the reviews into a single process, higher quality projects have been approved, and cooperation between the Federal government and Florida has improved. For example, the State government has found it can now more effectively address proposals from petroleum companies to drill for oil off the coast.
Another important innovation in the NEPA process has been the use of a collaborative approach in developing regional planning EISs. For example, the President’s Pacific Northwest Forest Plan — a management plan for 25 million acres of Federal forests in the coastal areas of the Pacific Northwest — involved coordination of managers and planners from five Federal agencies, the States of Washington, Oregon, and California, as well as local governments and tribes. In partnership, these agencies developed a management plan, an economic assistance plan, and a strategy to improve Federal coordination to manage, monitor, and adapt to changes in the management plan. The regional planning process incorporated a number of existing EISs being developed in the region. While several earlier approaches failed judicial review, the US Court of Appeals for the Ninth Circuit found this approach adequate to meet NEPA’s statutory requirements.

PUBLIC PARTICIPATION

As stated in NEPA itself, “Congress recognises that … each person has a responsibility to contribute to the preservation and enhancement of the environment.” The Act has played a large part in increasing awareness and knowledge of environmental issues, and has given the public unprecedented opportunities to participate in Federal government decisions. Many courts have found that the process alone of generating information, disclosing that information to the public, and consulting with the public and other interested governmental bodies has been instrumental in motivating agencies to consider social, economic, and environmental factors in decision-making. Likewise, NEPA has given agencies considerable opportunity to address citizens’ concerns and build trust in local communities. As the Supreme Court stated, “the requirement that agencies prepare detailed impact statements inevitably brings[ ] pressure to bear on agencies ‘to respond to the needs of environmental quality.’”

This success, however, has varied from agency to agency, and citizens have frequently been frustrated while participating in the NEPA process. Citizens and public organisations sometimes have felt that their involvement has come too late in the process to be anything more than procedural, and that their comments and ideas are not adequately considered in EISs. The large resources available to project proponents and Federal agencies seem overwhelming to the public. On the other hand, many agency staff have expressed that the public, other Federal agencies, and states often do not provide constructive input in the early portions of the NEPA process (e.g., scoping).

As discussed above, EAs have become a leading method for meeting NEPA requirements in place of EISs. However, this has created a frequent source of conflict and litigation. Because EAs do not always require public meetings, some states, public organisations, and businesses have felt deprived of an important opportunity for involvement. Over-reliance on mitigated FONSIs, likewise, runs the risk of moving away from the spirit and intent of NEPA’s objectives to provide for a thorough consideration of environmental impacts. Like EAs, mitigated FONSIs require limited public input.

Federal agencies are now taking steps to improve public involvement in
NEPA reviews, particularly early in the process. Another approach to improving public involvement includes offering options other than public meetings, such as roundtables, workshops, and informal dialogues.\textsuperscript{150}

**INTER-DISCIPLINARY APPROACH**

NEPA requires government agencies to use a “systematic, interdisciplinary approach, which will insure the integrated use” of natural, social, and environmental disciplines.\textsuperscript{151} The integration of expertise from numerous fields and sources, and from a variety of key Federal agencies, State and local governments, and others, is a key part of NEPA’s success in supporting sound environmental decision-making.\textsuperscript{152}

In order for an inter-disciplinary approach to be successful, it requires (1) adequate environmental information, and (2) meaningful analysis. While many EISs do contain volumes of strong environmental data, many are lacking in providing adequate comparison of potential environmental impacts or alternatives. Many also fail to provide strong analysis of cumulative effects of multiple activities, largely as a result of the complexity of the analyses, both geographically and temporally.

**MITIGATION MEASURES, MONITORING AND ADAPTIVE MANAGEMENT**

The CEQ’s study of NEPA also found that better and more flexible measures should be developed to mitigate environmental impacts after the NEPA process is complete. It would be pointless to spend government resources to try to predict every possible kind of impact and to assign the perfect mitigation measure before the true effects of an activity are known. A new way to address these concerns and meet NEPA’s goals more effectively is “adaptive environmental management,” a flexible approach that grants implementing agencies the authority to update mitigation measures based on project monitoring and evaluation. According to the CEQ, adaptive management is most suitable for situations where environmental impacts will not be permanent or can be restored, or where a project may be modified after being implemented. By providing ongoing monitoring and adjusting mitigation measures, the agency can avoid environmental impacts while implementing projects earlier and at lower costs.\textsuperscript{153}

**VI. Conclusion: Key Lessons from the NEPA Experience**

With respect to NEPA’s requirement to promote informed decision-making on environmental matters, the Act has been regarded a success. It has caused agencies to reconsider, redesign, and even cancel Federal projects which otherwise would have proceeded unchallenged. It has also required public disclosure of government information, and engaged the public in previously closed processes. NEPA has also furthered inter-agency cooperation and exchange of informa-
tion. In contrast, in the past, agencies more often competed for resources and excluded others from their affairs.154

Yet there are a number of important lessons to take away from the 30-year experience of NEPA. The following is a list of key areas where NEPA’s environmental impact assessment process can be improved — considerations that can help ensure an effective and efficient environmental impact assessment (EIA) process. These issues are relevant not only in the United States, but for governments throughout the world that are seeking to improve environmental decision-making through any EIA framework.

**More Integrated Planning and Coordination**
- Improved inter-agency coordination in all stages of the NEPA process
- Increased role of NEPA in agency strategic planning
- Concurrent planning processes (combining NEPA requirements and procedures with other environmental planning procedures)
- Training of agency staff and leadership in the goals and implementation of NEPA

**Stronger Public Participation**
- Early and meaningful involvement of the public
- Public involvement in multiple stages of the process, from scoping, to analysis, to monitoring and evaluation
- More meaningful consideration of comments, responses to comments, and application of comments in the final impact assessment document
- Encouraging a sense of meaningful communication and interaction, rather than involvement that merely meets procedural requirements

**Meaningful Environmental Impact Analysis**
- Adequate consideration of alternatives and mitigation measures
- Comprehensive analysis: cumulative impacts, direct and indirect impacts
- Interdisciplinary approach
- Emphasis on meaningful analysis, comparison of alternatives, and development of mitigation measures
- De-emphasis on data collection and technical descriptions

**Effective Implementation**
- Substantive implementation of the final decision, rather than procedural statement of “preference”
• Substantive requirements in connection with permitting, mitigation obligations, monitoring, etc.

• Increased use of adaptive management (i.e., flexibility in implementing requirements through permitting or other approvals, and the ability to adjust mitigation measures based on monitoring)

There are no doubt a number of other areas in which NEPA and an EIA process can be improved. Nevertheless, these key issues are at least a meaningful starting point. Based on 30 years of experience in the Federal government, and careful study by the CEQ and the EPA, these suggestions build on an environmental decision-making framework that arguably offers the greatest promise for comprehensive environmental protection in many countries throughout the world. Whether progress can be made in these areas will depend on leadership in government and the active involvement of key stakeholders from all sectors of society.

Endnotes

The birth of NEPA and the Council on Environmental Quality (CEQ) originated from the growing public alarm that the environment was rapidly deteriorating — if not in crisis — and that few existing laws or public institutions could reverse the trend... Over the next few years, Congress held hearings and published reports on the environment in response to the public outcry that had mounted over a number of environmental emergencies throughout the 1960s. Rachel Carson’s Silent Spring raised public concerns on the effects of the pesticide DDT, the Cuyahoga River caught fire, smog in Los Angeles was severe, the Bureau of Reclamation was proposing to build a dam on the Colorado River that would flood the Grand Canyon, and Lake Erie was proclaimed dead.

Id. at 47-48.

2 CEQ Twenty-fifth Anniversary Report, 47.


5 See, e.g., CEQ Twenty-Fifth Anniversary Report, 48. As described in the report, the idea for a “detailed statement” came at a particularly contentious period in Congress, where on one occasion a hearing was held in the Interior Committee on a proposal to dam the Colorado River above the Grand Canyon. Professor Lynton K. Carthew of Indiana University, a consultant to the Committee, was instrumental in devising the “Environmental Impact Statement” requirement to institutionalise environmental analyses into agency decision-making. Prior to NEPA, agency missions were focused on projects and public works, without much consideration given to the environmental consequences of their actions. Id.

6 The National Environmental Policy Act of 1969 (hereinafter NEPA) (Pub. L. 91-190, 42 USC §4321-47, as amended), §2. As provided in the statute:

The purposes of this Act are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

Id.

7 CEQ Twenty-Fifth Anniversary Report, 47.

8 NEPA, Preamble.

9 CEQ Twenty-Fifth Anniversary Report, 48.

10 NEPA, §202.

11 NEPA, §204. See also NEPA §202.

12 CEQ Twenty-Fifth Anniversary Report, 49-50.

14 CEQ Twenty-Fifth Anniversary Report, 58.

15 CEQ Twenty-Fifth Anniversary Report, 54. Winners are selected by a committee chaired by CEQ, and including: the President of the NAEP, the National Governors’ Association, the non-governmental organisation American Rivers, and the US Environmental Protection Agency. Id.

16 CEQ Twenty-Fifth Anniversary Report, 55-58. NEPANet includes links to databases in all 50 states and offers links to all agency-specific NEPA data sets. The site is located at: http://www.whitehouse.gov/CEQ. Id.

17 Clean Air Act of 1990, Section 309.


20 Id. A segment is “a program or a reasonably expected succession of actions that could result in a cumulative negative impact on human health or welfare or the environment.”

21 EPAs Section 309 Review.


23 NEPA, §102.

24 Id.

25 Id.

26 40 CFR §1504.2.

27 40 CFR §1504.1.

28 40 CFR §1504.3. EPAs Section 309 Review. Since 1973, a total of 24 referrals have been made to the CEQ. CEQ has never made a formal referral to the President; most often, the CEQ has issued Findings and Recommendations. On one occasion, the lead agency withdrew the proposed action altogether, and in three instances the CEQ found that the issue was not a matter of national importance. EPAs Section 309 Review.

29 NEPA, §102. See also 40 CFR §1502.4.


31 40 CFR §1508.27.

32 NEPA, §102.

33 40 CFR §1508.18.

34 Id.

35 Firestone, at 31.

36 Silva v. Romney, 473 F.2d 287 (1973). See also Maryland Conservation Council v. Gilchrist, 808 F.2d 1039 (1986) (state project requiring Federal permits to construct a highway was subject to EIS).

37 40 CFR §1508.18. In addition, an EIS may be required in the adoption of official policy in the form of rules, regulations and interpretations pursuant to the Administrative Procedure Act, treaties, conventions, or other formal documents establishing governmental or agency policy which will substantially alter agency programs. Council on Environmental Quality, Forty Most Frequently Asked Questions (March 16, 1981) (hereinafter Forty FAQs), Question 24a. In all cases, the policy, plan, or program must have the potential for significantly affecting the quality of the human environment in order to require an EIS. Id. See also 40 CFR §1502.4.

38 40 CFR §1501.2.

39 40 CFR §1501.4. In developing NEPA procedures, a Categorical Exclusion must apply to those activities that the agency determines will not significantly affect the quality of the human environment. See CEQ Guidance.

40 40 CFR §1501.4. See also 40 CFR §1508.9.

41 Id. See also 40 CFR §1508.13.

42 Id.

43 See CEQ Twenty-fifth Anniversary Report, 52.

44 40 CFR §1508.9. See NEPA Sec 102(2)(E).

45 CEQ Twenty-fifth Anniversary Report, 51.

46 CEQ Study, 19-20.
47 40 CFR §1508.13. See also Forty FAQs, Question 37a.
48 Forty FAQs, Questions 37, 38.
49 CEQ Study. 19-20.
50 40 CFR §1501.7. See 40 CFR §1508.22.
51 40 CFR §1508.22.
52 See generally 40 CFR §1501.7.
54 40 CFR §1501.7(a)(3). See CEQ Guidance. See also Forty FAQs, Questions 13.
55 CEQ Guidance.
56 40 CFR §1501.7(a)(1).
57 CEQ Guidance. As described in the CEQ Guidance: “The Council on Environmental Quality (CEQ) regulations direct Federal agencies which have made a decision to prepare an environmental impact statement to engage in a public scoping process.”
58 Id.
59 40 CFR §1501.7(a)(5).
60 Id.
61 40 CFR §1502.1.
62 40 CFR §1502.2(g).
63 NEPA, §102(C)(iv). More specifically, agencies must use a format for EISs that will encourage good analysis and clear presentation of the alternatives, including the proposed action, the purpose of and need for action, the affected environment, environmental consequences.
64 NEPA, §102(C)(v).
65 40 CFR §1502.2.
66 CEQ Guidance.
67 40 CFR §1502.9.
68 40 CFR §1508.28. See also CEQ Guidance, and Forty FAQs, Question 24c.
69 40 CFR §1508.20.
71 40 CFR §1502.2.
72 Forty FAQs, Question 1b. As described in Forty FAQs:

For example, a proposal to designate wilderness areas within a National Forest could be said to involve an infinite number of alternatives from 0 to 100 percent of the forest. When there are potentially a very large number of alternatives, only a reasonable number of examples, covering the full spectrum of alternatives, must be analysed and compared in the EIS. An appropriate series of alternatives might include dedicating 0, 10, 30, 50, 70, 90, or 100 percent of the forest to wilderness. What constitutes a reasonable range of alternatives depends on the nature of the proposal and the facts in each case. Id.
74 Id.
75 Forty FAQs, Question 3.
76 Forty FAQs, Questions 4a, 5a. The agency’s “preferred alternative” need not be same as the “proposed action.”
77 Forty FAQs, Question 6.
78 40 CFR §§1502.14(f), 1502.16(h), 1508.14. See Forty FAQs, Question 19a. As provided in the CEQ regulations, “mitigation” includes: avoiding the impact altogether by not taking a certain action or parts of an action; minimising impacts by limiting the degree or magnitude of the action and its implementation; rectifying the impact by repairing, rehabilitating, or restoring the affected environment; reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action; and compensating for the impact by replacing or providing substitute resources or environments. 40 CFR §§1508.20.
79 40 CFR §1502.16, 1505.2. See Forty FAQs, Question 19b.
80 Forty FAQs, Question 19b.
81 40 CFR §§1502.16(h), 1505.2(c). See Forty FAQs, Question 19b.
Forty FAQs, Question 39.

40 CFR §1502.16. See also Forty FAQs, Question 18.

Id.

Id.

Id.

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Id.
124 100 S.Ct 497 (1980).
125 id.
126 id.
127 id. at 451.
129 CEQ Study, 7.
131 Kathleen McGinty testimony to Senate Energy and Natural Resources Committee, Subcommittee on Oversight, October 19, 1995.
132 40 CFR §1502.7.
135 CEQ Study, x.
136 id. at 11.
137 id. at 13.
138 id. at 21.
139 id. at 14.
140 id. at 21.
142 id.
143 NEPA, §101.
144 CEQ Twenty-Fifth Anniversary Report, 51.
145 CEQ Study, 17.
147 id. at 18.
148 Mitigated FONSIs are FONSIs that contain specific mitigation measures. By including these measures, agencies are often able to avoid more elaborate NEPA review.
149 CEQ Study, 19-20.
150 id.
151 NEPA, §102(A).
152 CEQ Study, 25-29. See also CEQ Twenty-fifth Anniversary Report, 52.
153 id. at 28-33.

The National Environmental Policy Act of 1969, as amended


An Act to establish a national policy for the environment, to provide for the establishment of a Council on Environmental Quality, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the “National Environmental Policy Act of 1969.”

A. Purpose
Sec. 2 [42 USC § 4321].

The purposes of this Act are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

TITLE I
CONGRESSIONAL DECLARATION OF NATIONAL ENVIRONMENTAL POLICY
Sec. 101 [42 USC § 4331].

(a) The Congress, recognising the profound impact of man’s activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanisation, industrial expansion, resource exploitation, and new and expanding technological advances and recognising further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organisations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfil the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this Act, it is the continuing responsibility of the Federal Government to use all practicable means, consist with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may –

1. fulfil the responsibilities of each generation as trustee of the environment for succeeding generations;

2. assure for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings;
3. attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
4. preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity, and variety of individual choice;
5. achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life’s amenities; and
6. enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognises that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

Sec. 102 [42 USC § 4332].

The Congress authorises and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall —

(A) utilise 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;
(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this Act, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision making along with economic and technical considerations;
(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on –
(i) the environmental impact of the proposed action,
(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
(iii) alternatives to the proposed action,
(iv) the relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity, and
(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are
authorised to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this Act; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognise the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind’s world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilise ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by title II of this Act.

Sec. 103 [42 USC § 4333].

All agencies of the Federal Government shall review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this Act and shall propose to the President not later than
July 1, 1971, such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this Act.

Sec. 104 [42 USC § 4334].
Nothing in section 102 [42 USC § 4332] or 103 [42 USC § 4333] shall in any way affect the specific statutory obligations of any Federal agency (1) to comply with criteria or standards of environmental quality, (2) to coordinate or consult with any other Federal or State agency, or (3) to act, or refrain from acting contingent upon the recommendations or certification of any other Federal or State agency.

Sec. 105 [42 USC § 4335].
The policies and goals set forth in this Act are supplementary to those set forth in existing authorisations of Federal agencies.

TITLE II
COUNCIL ON ENVIRONMENTAL QUALITY

Sec. 201 [42 USC § 4341].
The President shall transmit to the Congress annually beginning July 1, 1970, an Environmental Quality Report (hereinafter referred to as the “report”) which shall set forth (1) the status and condition of the major natural, manmade, or altered environmental classes of the Nation, including, but not limited to, the air, the aquatic, including marine, estuarine, and fresh water, and the terrestrial environment, including, but not limited to, the forest, dryland, wetland, range, urban, suburban and rural environment; (2) current and foreseeable trends in the quality, management and utilisation of such environments and the effects of those trends on the social, economic, and other requirements of the Nation; (3) the adequacy of available natural resources for fulfilling human and economic requirements of the Nation in the light of expected population pressures; (4) a review of the programs and activities (including regulatory activities) of the Federal Government, the State and local governments, and non-governmental entities or individuals with particular reference to their effect on the environment and on the conservation, development and utilisation of natural resources; and (5) a program for remedying the deficiencies of existing programs and activities, together with recommendations for legislation.

Sec. 202 [42 USC § 4342].
There is created in the Executive Office of the President a Council on Environmental Quality (hereinafter referred to as the “Council”). The Council shall be composed of three members who shall be appointed by the President to serve at his pleasure, by and with the advice and consent of the Senate. The President shall designate one of the members of the Council to serve as Chairman. Each member shall be a person who, as a result of his training, experience, and attainments, is exceptionally well qualified to analyse and interpret environmental trends and information of all kinds; to appraise programs and activities of the Federal Government in the light of the policy set forth in title I of this Act; to be conscious of and responsive to the scientific, economic, social, aesthetic, and cultural needs and interests of the Nation; and to formulate and recommend national policies to promote the improvement of the quality of the environment.
Sec. 203 [42 USC § 4343].
(a) The Council may employ such officers and employees as may be necessary to carry out its functions under this Act. In addition, the Council may employ and fix the compensation of such experts and consultants as may be necessary for the carrying out of its functions under this Act, in accordance with section 3109 of title 5, United States Code (but without regard to the last sentence thereof).
(b) Notwithstanding section 1342 of title 31, the Council may accept and employ voluntary and uncompensated services in furtherance of the purposes of the Council.

Sec. 204 [42 USC § 4344].
It shall be the duty and function of the Council –
1. to assist and advise the President in the preparation of the Environmental Quality Report required by section 201 [42 USC § 4341] of this title;
2. to gather timely and authoritative information concerning the conditions and trends in the quality of the environment both current and prospective, to analyse and interpret such information for the purpose of determining whether such conditions and trends are interfering, or are likely to interfere, with the achievement of the policy set forth in title I of this Act, and to compile and submit to the President studies relating to such conditions and trends;
3. to review and appraise the various programs and activities of the Federal Government in the light of the policy set forth in title I of this Act for the purpose of determining the extent to which such programs and activities are contributing to the achievement of such policy, and to make recommendations to the President with respect thereto;
4. to develop and recommend to the President national policies to foster and promote the improvement of environmental quality to meet the conservation, social, economic, health, and other requirements and goals of the Nation;
5. to conduct investigations, studies, surveys, research, and analyses relating to ecological systems and environmental quality;
6. to document and define changes in the natural environment, including the plant and animal systems, and to accumulate necessary data and other information for a continuing analysis of these changes or trends and an interpretation of their underlying causes;
7. to report at least once each year to the President on the state and condition of the environment; and
8. to make and furnish such studies, reports thereon, and recommendations with respect to matters of policy and legislation as the President may request.

Sec. 205 [42 USC § 4345].
In exercising its powers, functions, and duties under this Act, the Council shall
1. consult with the Citizens’ Advisory Committee on Environmental Quality established by
Executive Order No. 11472, dated May 29, 1969, and with such representatives of science, industry, agriculture, labour, conservation organisations, State and local governments and other groups, as it deems advisable; and

2. utilise, to the fullest extent possible, the services, facilities and information (including statistical information) of public and private agencies and organisations, and individuals, in order that duplication of effort and expense may be avoided, thus assuring that the Council’s activities will not unnecessarily overlap or conflict with similar activities authorised by law and performed by established agencies.

Sec. 206 [42 USC § 4346].
Members of the Council shall serve full time and the Chairman of the Council shall be compensated at the rate provided for Level II of the Executive Schedule Pay Rates [5 USC § 5313]. The other members of the Council shall be compensated at the rate provided for Level IV of the Executive Schedule Pay Rates [5 USC § 5315].

Sec. 207 [42 USC § 4346a].
The Council may accept reimbursements from any private non-profit organisation or from any department, agency, or instrumentality of the Federal Government, any State, or local government, for the reasonable travel expenses incurred by an officer or employee of the Council in connection with his attendance at any conference, seminar, or similar meeting conducted for the benefit of the Council.

Sec. 208 [42 USC § 4346b].
The Council may make expenditures in support of its international activities, including expenditures for: (1) international travel; (2) activities in implementation of international agreements; and (3) the support of international exchange programs in the United States and in foreign countries.

Sec. 209 [42 USC § 4347].
There are authorised to be appropriated to carry out the provisions of this chapter not to exceed USD 300,000 for fiscal year 1970, USD 700,000 for fiscal year 1971, and USD 1,000,000 for each fiscal year thereafter.
Appendix B: Environmental Impact Statements — Some Statistics

Figure 1: Total Environmental Impact Statements Filed Per Year

This graph illustrates the gradual decreasing trend in the number of EISs filed. As discussed in the text, this has largely resulted from a shift towards preparing Environmental Assessments (EAs) in place of EISs.

Source: US Environmental Protection Agency, Office of Federal Activities.

Figure 2: Total Environmental Impact Statements Filed for Selected Agencies

As shown here, the U.S. Forest Service, Federal Highways Administration, U.S. Army Corps of Engineers, and the Bureau of Land Management have filed the majority of EISs during the 1990s.

Source: US Environmental Protection Agency, Office of Federal Activities.

Acronyms (Note: The official acronyms for some agencies are different than those used in the graph above.)
AFS: US Forest Service • FHW: Federal Highways Administration • COE: U.S. Army Corps of Engineers • BLM: Bureau of Land Management
NPS: National Park Service • DOE: Department Of Energy • UAF: United States Air Force • FAA: Federal Aviation Administration
Figure 3: Final Environmental Impact Statement — Content and Average Page Lengths

The top graph indicates the average page distribution of an EIS. It is interesting to note that correspondence (containing comments from and responses to the public and other interested parties) is about equal in length, on average, to the text of the EIS itself. The bottom graph indicates the average attention given to specific issues in the EIS text. It is interesting to note here that, on average, nearly half of the text addresses the consequences of the proposal, and nearly one-third is dedicated to the affected environment, while only about one-sixth is dedicated to considering alternatives.

Source: US Environmental Protection Agency, Office of Federal Activities.
**APPENDIX C**

**Appendix C: 1994 Environmental Impact Statements Filed with the Environmental Protection Agency by Federal Agencies**


**1994 Environmental Impact Statements Filed with the Environmental Protection Agency by Federal Agencies**

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<td>Power Facilities: Hydroelectric</td>
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<td>Building for Federal Use</td>
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### APPENDIX C continued

1994 Environmental Impact Statements Filed with the Environmental Protection Agency by Federal Agencies (continued)

<table>
<thead>
<tr>
<th>Agency</th>
<th>Totals by Subject Matter</th>
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<td>Building for Federal Use</td>
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<td>National Aeronautics and Space Admin</td>
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<td>Space Programs</td>
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<tr>
<td><strong>Total Federal EISs</strong></td>
<td></td>
<td><strong>532</strong></td>
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</tbody>
</table>

Appendix D: Criteria for Federal Environmental Quality Awards

1. The goal of reinventing environmental regulations includes strategies for innovation, partnering, flexibility and cost reduction. How does the project/program reflect this goal and provide for these four strategies?

2. How does the agency engage in cooperative consultation with other federal, state, local agencies, and Indian tribes?

3. How is the public participation process managed?

4. How does the agency ensure editorial excellence, including readability and brevity?

5. Does the agency take an interdisciplinary approach to environmental impact analysis preparation?

6. How does the agency ensure scientific integrity of the environmental analysis?

7. How much time elapsed between the project scoping meeting and the issuance of the final environmental impact statement? For a NEPA program, what is the average length of time the agency requires to issue a final environmental impact statement?

8. What innovative approaches were used in the environmental impact analysis for the action? What innovative approaches have been institutionalized by the agency?

9. How does the action Record of Decision reflect the purposes and policies of the National Environmental Policy Act? How has the agency institutionalized the environmental values embodied in NEPA?

10. Has the agency monitored the environmental effects of the action? Does the agency have a monitoring and mitigation program for the NEPA program? How does the agency ensure that mitigation detailed in the environmental impact analysis is honoured?

11. What was the cost of the action’s environmental impact analysis? How did the action manager control the cost of the environmental impact analysis? Does the agency have cost control methods in place? What are those methods?

Mr. Hirokane presented the following slides covering the issue of EIA in Japan:

1: EIA in Japan
   (1) History
   (2) EIA in Future

2: History of EIA in Japan
   • 1972 Cabinet approved a guideline on “Environmental Conservation Measures Relating to Public Works”
   • 1974 Environment Agency prepared a new bill on EIA procedures
   • 1982 Cabinet submitted a draft bill to the Diet
   • 1983 House of Representatives (Lower House) dissolved the bill
   • 1984 Cabinet approved a guideline on the Implementation of EIA

3: History of EIA in Japan
   • 1993 Establishment of “The Basic Environment Law”
   • 1997 Enactment of the Law on EIA
   • 1999 EIA Law entered into force.

4: Background in view of establishing EIA systems in Japan
   • Negative concern for EIA
     Difficulty to reach consensus
     Delay of public works
     Negative atmosphere for EIA as a law
   • High price of land (no alternatives)
   • Dense population (NIMBY, no alternatives)
5: Comparison of new EIA with old guideline

- EIA in future
- Strategic Environmental Assessment
- Follow up and feedback
Current Status

Environmental Impact Assessment (EIA) at the project level has a long tradition in Croatia. The new by-law, based on the Law on Environmental Protection (LEP)\(^1\), replaced the “Regulations on Environmental Impact Assessment Study” of 1984, amended in 1990. The objective of EIA as laid down in the LEP, and specified in the respective by-law, is to give effect to the prevention principle by coordinating and adjusting the planned activity with the environmental carrying capacity of a given area. EIA is defined as a procedure to evaluate the environmental acceptability of a project and identify necessary environmental protection measures. EIA considers the project’s possible adverse impacts on soil, water, sea, air, forest, climate, human health, animals and plants, landscape, physical and cultural values and their interactions. It also takes into account other planned projects and their possible interactions with regard to the existing or anticipated activities in the area.

EIA AT THE PROJECT LEVEL

At the core of the EIA regulations is an obligation to assess the environmental impact of the projects listed in an annex which is an integral part of the By-law on Environmental Impact Assessment\(^2\). The List of Projects comprises, among others, electric power plants and facilities for the storage and transport of crude oil and gas.

The central piece of the EIA is the EIA study. It must include:

- a description of the project and the site, including the purpose of the project, data from the physical planning documents, and a description of the vicinity; and

- an evaluation of the project’s acceptability, including its environmental risks, along with alternative solutions, as well as proposals to protect the environment, including measures to prevent or mitigate environmentally negative effects.

The study evaluates, among other things, the meteorological, climatological, hydrological, geological, social and urban impact of each project. The EIA Evaluation Commission, appointed by the Government, assesses the study itself. The number and professional profile of its members are usually determined according to the nature of the project and the characteristics of the affected environment. But there are also two permanent commissions: one for roads and one for airports. Standing commissions are established for developments belonging to

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Developing EIA and SEA in Croatia

NENAD MIKULIC, State Directorate for the Protection of Nature and the Environment, Croatia
a specific category, which are frequent or numerous within a single programme. The members of the commissions are independent experts, as well as civil servants from the ministries or State directorates concerned.

Two official bodies are involved in informing the public of EIA studies: the coordinating body (territorially competent body within the local government in charge of environmental protection) and the enforcing body (either the executive body of the local government, or designated in the statute of the local government). An EIA study that is accepted by the EIA Evaluation Commission is forwarded to the coordinating body, which has to submit it to a public hearing, which lasts at least 15 but not more than 60 days (for details of the procedure, see Fig. 1).

The documentation to be presented at the public hearing encompasses the entire EIA study documentation as well as relevant summaries.

The public is entitled to put forward opinions, proposals and suggestions, either in writing or orally. The Commission for EIA Evaluation is obliged to explain why opinions, proposals or suggestions made by the public were not taken into consideration. There is an elaborate procedure for public participation, but in practice NGOs or citizens rarely make use of this opportunity.

If the proposed project is publicly accepted, the Commission formally draws a conclusion, at the latest 30 days after the public hearing and within six months after the Commission’s first session. The conclusion and all the documentation are then forwarded to the State Directorate for the Protection of Nature and Environment (SDPNE), which will decide whether or not to approve the planned project within 30 days after receiving the conclusion. Only in exceptional circumstances (e.g., inadequate composition of the Commission) would the SDPNE reject the Commission’s conclusions. The decision to grant or refuse permission to go ahead with the project cannot be appealed, but it is possible to initiate administrative litigation.

All other permits, e.g., for air emissions or waste, can be obtained in parallel with this procedure, the siting permit can be issued, and the project may start.

If an EIA is not necessary according to the by-law, a county may set the obligation to conduct an EIA.

On average, there are 50 EIAs at the national and around 50 EIAs at the county level each year.

### EIA AT THE STRATEGIC LEVEL

Currently, EIA procedure at the strategic level is only partially used in everyday practice. In the physical planning process, which has a long and rich tradition in Croatia, some elements of Strategic Environmental Assessment (SEA) can be found.

One such example is the “Environmental Assessment of the County of Dubrovnik-Neretva Land-Use Plan.” The case study is being prepared by a team of experts composed of marine scientists, urban planners and civil engineers that specialise in coastal work. Existing data in various development plans and programmes, scientific publications and data banks is being utilised without any additional research. In order to obtain impressions and to collect relevant infor-
FIGURE 1

EIA procedure

1. Submission of project
2. Submitted to SDEP
3. Government appoints Commission
4. Information on appointment of Commission
5. Convening of first session
6. Work of the Commission — conclude study for public hearing
7. County organises public hearing
8. Announcement of public hearing
9. Public hearing is convened
10. Beginning of public hearing
11. Public hearing
12. Documents from public hearing are returned to the Commission
13. Conclusion of the Commission
14. Everything is submitted to the SDEP
15. Decision (administrative act)
mation, a small group of experts composed of team members is visiting the coastal area. Meetings with local authorities, local residents and managers of local enterprises are being organised to allow familiarisation with local problems, needs, and development plans and requirements for the improvement of social, economic and environmental conditions.

The land use plan is not yet completed and it is expected that the plan would provide a sound background for long-term sustainable development of the county.

Another case study has been carried out in the energy sector, entitled “Environmental Impact of Various Croatian Power System Development Strategies”\(^4\). In this study, on the basis of electricity consumption forecasts and scheduled decommissioning of the existing power plants, projections of new generating capacity needed for the period 2001-30 have been made. Since the introduction of non-hydro renewable energy in Croatia is still technically and financially constrained, only fossil-fired (coal and natural gas) and nuclear power plants, together with several hydroelectric facilities, are chosen as system expansion candidates. Depending on the natural gas limitations and the decision whether to include nuclear power in the development options or not, two nuclear and two non-nuclear cases were analysed. The optimal power system expansion plan for each case has been found by means of dynamic optimisation, on the basis of plants’ annual production costs. The electricity generation mix for each case was found and corresponding emissions of SO\(_2\), NO\(_x\), particles and CO\(_2\) into the atmosphere were calculated. The study analysed how the hypothetical introduction of a CO\(_2\) tax would affect a plant’s annual costs and the capacity mix in case of the optimal solution.

In the near future Croatia intends to introduce strategic impact assessment (for plans, programmes and strategies) into physical planning as well as into other sectors of the economy.

### Problems that have been solved and the solutions adopted

The Law on Environment Protection and the By-law on Environmental Impact Assessment clearly define the procedure at the project level. Twenty years of practice and experience found its place in these legal tools. Now a list of the projects for which EIA procedure is required is attached to the By-law. This procedure must be completed before an investor applies for the site or any other permit. EIA is regulated by the specific law and because of that procedure is independent from other laws regulating construction, mining and other spatial interventions, although it is harmonised with them.

### Current Issues

EIA at the project level is a widely used and recognised instrument in the hands of the environmentalists. Nevertheless, everyday practice has shown that some modifications in the procedure would be welcome. The problems are:
• time-consuming procedure;
• wide range of the complexity of the projects that the SDPNE is in charge of;
• varying quality of EIA studies; and
• occasionally incompetent, unmotivated or even unprofessional approach of some members or entire Commissions.

In order to improve the procedure, the SDPNE has recently proposed to the Government some amendments to the Law on Environmental Protection. The changes would stipulate that:

• the SDPNE nominates the Commission instead of the Government;
• there be two lists of projects: one at the state level, that the SDPNE would be in charge of, and the other at the county level, that the local authorities would be in charge of; and
• the entire procedure be shortened so it could not last longer than four months.

At the strategic level, there is no Croatian legislation that requires the application of Strategic Environmental Assessment in the development of plans, programmes or strategies, which is still the case only in a few other Central and East European countries. Without SEA legal instruments only specific projects are being assessed. Expert knowledge and growing consciousness among civil servants in other economic sectors assure that there is ground for introducing this complex and comprehensive tool into everyday practice.

**Action plan**

Work on the National Environmental Strategy, co-funded by the World Bank, is underway. NEAP would clarify the way to improve EIA at the project level and introduce SEA into legal practice. Special attention will be paid to the SEA of plans, programmes and strategies. The following activities could be envisaged:

• close cooperation with other economic sectors on the SEA of case studies;
• strengthening environmental capacities in other economic sectors;
• leading role of the economic sector or another body that would propose plans, programmes or strategies;
• non-binding conclusions of the work on SEA;
• intensive international cooperation and exchange of experience;
• public participation (implementation of the Aarhus Convention); and
• licensing etc.
Endnotes

1 Law on Environmental Protection, “Narodne novine” No. 82/94

2 By-law on Environmental Impact Assessment, “Narodne novine” No. 34 and 37/97

3 Sofia Initiative on EIA, Strategic Environmental Assessment in Transitional Countries, the Regional Environmental Center for Central and Eastern Europe, 1998.

OHR has developed an environmental law speciality, which today forms an environmental unit consisting of three lawyers and two environmental engineers. The goals of this unit are:

- promotion of the interested parties in environmental problems;
- improvement of the acceptable measures for environmental protection;
- stimulation of discussion among interested parties;
- engagement of the more interested parties for discussion.

Current activities are primarily given over to the Inter-Entity Environmental Steering Committee and Inter-Entity Water Commission. Our role is to encourage both the Steering Committee and the Water Commission, and their leadership, through giving them support in fulfilling their mandate as key advisory bodies to the Ministries for Water and Environment.

Our goal is to keep orientation directed towards achieving results, by introducing reforms in Bosnia and Herzegovina, and to continue with promotion of Entities as a key partners.

One more important goal is the institutional strengthening of the water sector. Together with the International Community, OHR seeks to reform the water sector of Bosnia and Herzegovina, in order to promote quality of service and to prepare the water sector for a free-market economy.

Collaboration with the Natural Resources Policy Group, which consists of international donors who are actively involved in the Environmental Sector. Within this forum, OHR offers the possibility of discussion and harmonisation of strategic issues in the environmental sector, especially for the water sector.

I would like to mention the beginning of collaboration with the Sarajevo law faculty, with our basic goal in this field being communication development and involvement in decision-making. Consciousness of the environment must be raised at all levels of education. We already have made some initial contacts.

OHR wants to collaborate with the respective ministries so as to improve their structure and function, to enable the implementation of a sustainable environmental policy in Bosnia and Herzegovina.

OHR will closely collaborate with the expert team of the European Community, which will make a draft law as a framework of environmental protection, and which will include water protection law, laws about waste, and air protection. This law will include licensing, environmental impact assessment, as
well as the prevention and control of pollution.

Briefly, these are some of the environmental activities that OHR is currently undertaking. Thank you for your attention.
Zahvaljujem se na pozivu i ovom prilikom bih vas informisala o mandatu OHR-a vezano za područje okoliša u našoj zemlji. OHR je formirao jedinicu za okoliš koja je sastavljena od tri pravnika i dva inženjera za okoliš.

Ciljevi ove jedinice za okoliš u 2000. su:

- Poboljšanje učešća zainteresovanih strana za problematiku okoliša;
- Promoviranje prihvatljivih mjera za zaštitu okoliša;
- Stimuliranje diskusije među zainteresovanim stranama;
- Angažovanje što više zainteresovanih strana za diskusiju.

Sadašnje aktivnosti su prventstveno usmjereni na rad međuentitetskog Koordinacionog odbora za okoliš i međuentitetske Komisije za vode. Naša uloga je podsticanje ovog Odbora i Komisije, te njihovih rukovodstava, kroz aktivno pružanje podrške, a sve u cilju ispunjenja mandata kao ključnog savjetodavnog tijela ministarstva za vodu i okoliša za oba entitieta.

Ciljevi su zadržati orijentaciju prema cilju postizanja rezultata, uvođenjem promjena u BiH, nastaviti poboljšanje položaja entitieta kao ključnih partnera.

Još jedan važan cilj je institucionalno jačanje sektora voda. zajedno sa međunarodnom zajednicom, OHR želi reformirati strukturu sektora voda u BiH kako bi se poboljšao kvalitet usluga i kako bi se sektor voda pripremio za slobodnu tržišnu ekonomiju.

Zatim saradnja sa Grupom za strategiju prirodnih resursa, koja je sastavljena od međunarodnih donatora koji su aktivno uključeni u sektor za okoliš. Ovom forumu OHR pruža mogućnost diskusije i usklađivanja strateških pitanja u sektoru okoliša, specijalno u sektoru za vode.

Pomenula bih početak saradnje sa fakultetima gdje je osnovni cilj razvoj foruma komunikacije i učešća fakulteta na poljima okoliša. Takođe, cilj je pružiti svijest o okolišu na svim nivoima obrazovanja. Prvi kontakt smo već ostvarili.

OHR želi da sardojuje sa ministarstvima kako bi se poboljšala njihova struktura i kako bi se omogućila implemenatacija jedne održive politike okoliša u BiH.

OHR će blisko sarađivati sa timom stručnjaka koji će ispred Evropske Zajednice urediti nacrt zakona na polju okoliša, koji će se sastojati od ovkornog zakona za okoliš, zakona o zaštiti voda, zakona o otpadu, zakona o zaštiti prirode, te zakona o zaštiti zraka. U zakon će biti uključeno izdavanje dozvola, procjena uticaja na okoliš, sprečavanje i kontrola zagadenja.

Ovo su ukratko neke ad aktivnosti OHR-a oblasti okoliša. Hvala na pažnji.
Introduction

Environmental assessment (EA) is a critical tool for managing the potential effects of development on the environment and people. It is traditionally used to identify potential impacts on physical, biological, cultural, and socio-economic conditions on a scale deemed appropriate for the character and intensity of a project. In this capacity, EA serves as a tool for balancing public interest with the often narrower interests of project proponents. While EA helps protect the public interest, it can also be used by private interests, such as lending organisations, to evaluate environment-risks of projects in which investments are being contemplated.

The purpose of this paper is to briefly review how elements of EA have been used by the United States Agency for International Development’s (USAID) Business Development Program (BDP) in Bosnia and Herzegovina to protect the public interest while simultaneously reducing environment-related and lending organisation business risk. Used in this manner, EA helps promote business and economic development. To elucidate this latter point, a brief review of BDP goals is needed.

USAID Business Development Programme — Goals and Process

The BDP began operations in mid-1996 as a lending organisation. It was endowed with USD 250 million for the primary purpose of providing credit to Bosnia and Herzegovina businesses. The programme goals are to stimulate economic redevelopment, generate employment opportunities and build improved credit management capacity in the Bosnia and Herzegovina banking sector. Credit for post-war reconstruction and/or expansion of existing businesses is prioritised, with credit funds used primarily for purchase of equipment and for working capital. Repaid credit funds remain in Bosnia and Herzegovina and are made available for further on-lending. Business owners interested in obtaining credit from the BDP work through a number of Bosnian Agent Banks that service the credits. The BDP is currently responsible for analysing and approving credit requests.

The BDP began operations as an emergency lending programme. The imperative was to get people back to work as soon as feasibly possible by promoting business development. As such, emphasis was on getting credit funds into the economy as expeditiously as possible. This necessitated targeted credit review and screening needed to facilitate rapid project appraisal. Over time, the emergency lending imperative has diminished. The programme now focuses on the
sustainability of credit fund use and management.

As of January 1, 2000, the BDP had disbursed approximately 370 credits with a total value of DEM 204.6 million. The diversity of project sectors in the BDP portfolio is summarised in the table on the following page.

**ROLE OF ENVIRONMENT IN THE BDP**

USAID is mandated through laws governing US foreign assistance, to ensure that environmental concerns and values are integrated into USAID policies and programmes. As a major USAID programme, the BDP’s potential effect on the environment through its promotion of business development therefore had to be considered. This was especially true in light of the fact that Bosnia and Herzegovina lacked the capacity to control the environment and public safety effects of immediate, post-war development investments. In response to this mandate, an environmental review function was included in the structure of the BDP.

The initial role of EA within the BDP process was somewhat narrow, due to the programme’s emergency lending nature. As noted in the project document, EA was to focus only on avoidance of “immediate public health hazards that do not delay implementation of the on-lending programme”. The emergency nature was so strong that provisions were made to allow suspension of the EA function if it became an impediment to rapid credit approvals. However, over time, the emergency lending nature of the BDP was anticipated to evolve as Bosnia and Herzegovina’s development and economic conditions improved. Logically, the EA function would be expected to evolve as well by adding greater value to the business development process. By keeping the initial scope of EA limited, USAID acknowledged that the BDP may “have to assume the risk of providing loans to businesses that were unable to adhere to strict environmental standards.”

As public values for environmental protection have strengthened and a wide range of laws have been promulgated to support those values, lending organisations have responded by adopting environment-sensitive lending practices. Most

<table>
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<th><strong>BDP Credit Portfolio Summary</strong></th>
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<tr>
<td><strong>Project Sector</strong></td>
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<td>Lumber/Wood Products/Furniture</td>
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<tr>
<td>Food and Kindred Production</td>
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<td>Agricultural Livestock Production</td>
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<td>Stone/Glass/Concrete</td>
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<td>Fabricated/Other Metal Products</td>
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<td>Textiles and Apparel</td>
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<tr>
<td>Chemicals and Allied Products</td>
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<tr>
<td>Rubber and Plastic Products</td>
</tr>
<tr>
<td>Miscellaneous</td>
</tr>
</tbody>
</table>
organisations acknowledge an ethical imperative to promote a healthy, safe environment through lending practices. They have also modified lending practices to minimise financial risks that might arise from poor environmental performance of their credit customers. To implement these practices, most lending organisations have adopted environmental due diligence processes intended to uncover environmental risk associated with their business and lending decisions.

The due diligence interests of a lending organisation and the EA process have much in common. This paper is intended to briefly illustrate how the role of EA within the BDP’s lending process has evolved from its limited initial purpose into a financial risk-reduction tool that provides a valuable input to the credit analysis processes.

**EVOLUTION OF AN EA PROCESS**

An EA process typically consists of several fundamental elements:

- Summary of assessment and identification of preferred project alternative;
- purpose and need for the proposed action;
- presentation of alternative actions;
- description of the environmental setting;
- environmental impacts of each alternative;
- mitigation measures; and
- monitoring plan.

The process element of EA also provides for review, comment and approval of EAs and for public participation in several stages of the process. The initial EA process employed by BDP differed somewhat from a standard EA process, due to the context in which it was introduced. Some of these factors include:

**Bosnia and Herzegovina Context**

The BDP began operations in chaotic circumstances. Bosnia and Herzegovina was in the midst of three fundamental transitions: 1) war to post-war; 2) centrally planned economy to a market economy (necessitating privatisation); and 3) communism-oriented to democratic political structure. In a post-war, transition environment of dramatic unemployment, extremely low economic activity or growth, and social upheaval, decision-makers, the public, and private business interests do not place significant priority on environmental protection. Therefore, a practical EA approach had to be developed that achieved the basic BDP environment function mandate without constraining the primary BDP mission of extending credit as quickly and effectively as possible.

Institutions and procedures for environmental management were also in disarray. Bosnia and Herzegovina did not have adequate capacity to manage new economic development in a manner that promotes sustainable development. In fact, the Bosnia and Herzegovina constitution does not specifically address envi-
ronment protection. Similarly, neither of the two entities that comprise Bosnia and Herzegovina — the Republic of Srpska and the Federation — has formally passed legislation enabling and requiring the use of EA as a planning or environmental management tool.

Elements of EA are included in the existing urban planning and development review and permit procedures of both entities. Municipal, cantonal (only in the Federation) and/or entity-level authorities may employ a coarse form of EA. However, especially in the early phases of the BDP’s activities, the review process was not consistently applied, and local expertise and resources needed to evaluate and condition new development consistent with modern approaches to environmental management was often lacking. Consequently, the BDP could not rely on these processes to complement its basic EA function.

**BDP Credit Criteria**

A number of BDP’s lending criteria affected the scale and scope of EA. Key criteria include:

- The BDP provides credit only to companies that are in majority private ownership. This criterion is intended to facilitate the privatisation process now in progress in Bosnia and Herzegovina. Since the vast majority of larger scale projects, such as power plants and heavy manufacturing activities, remain in state majority ownership, these projects are not eligible for BDP credit.

- The BDP has relative upper and lower limits on credit amounts. Currently, the upper limit is approximately DEM 1 million. Exceptions may be considered. The limit has had the effect of reducing the size and scale of projects that apply for credit.

- The BDP has historically provided credit only in the manufacturing sector, though exceptions have been made. Public infrastructure, large-scale housing development, large-scale commercial projects, etc., do not qualify for BDP credit. This narrows the range of projects for which environmental review must be conducted and, correspondingly, the range of potential impacts identified through the EA process.

These criteria and other Bosnia and Herzegovina-specific historical macro- and micro-economic development patterns have combined to create a BDP credit portfolio rich in small and medium-size enterprises (SMEs) whose character is generally less technically complex than large-scale industrial or infrastructure development projects. Furthermore, the emphasis on quick credit analysis and disbursement frequently generated a high monthly volume of credit projects in need of rapid assessment.

Technical environmental baseline data, clear regulatory direction, environment threshold standards, etc., for evaluating environmental impacts were difficult to obtain in the early phase of the programme. Hence, constraints on the technical sophistication of the EA process were also created.

Given these factors, the initial EA process needed to be simplified to ensure
targeted and efficient project screening. A streamlined environmental review grounded in fundamental EA principles utilised in the US was designed and implemented. An environmental impact checklist was developed as a framework for identifying impacts and specifying mitigation measures. Data is generated through research, one or more visits to the project site/facility, and one or more interviews with the project proponent (generally a sole proprietor). Mitigation monitoring is underway to verify the level of borrower compliance with mitigation measures.

As in any EA process, the fundamental goal of early identification of problems is a key part of the BDP EA process. Effort is made to meet or instruct new BDP credit applicants on actions that can be taken to reduce potential impacts as early in the credit process as possible. This is especially true for projects in sectors that inherently pose significant environment risk. The goal is to minimise the number of legally binding mitigations included in the EA by resolving as many concerns as possible during the project design and planning process.

The checklist content and the form and specificity of mitigation actions have been modified over time to reflect lessons learned, improved understanding of evolving social, economic, and regulatory environment in Bosnia and Herzegovina, and greater awareness of the behaviour and priorities of borrowers. In addition, a greater array of tools has been introduced into the credit approval and disbursement process to strengthen the incentives for borrowers to conform to environment mitigation measures.

Unfortunately, out of necessity, two basic components of a standard EA process are not systematically included in the BDP EA process. The first is public participation. Public participation is designed to ensure that the full range of issues (scoping) are considered in an EIA process, provide a check on the quality of EIA findings, and ensure that decision-making processes are transparent and appropriately weigh environmental effects against social, political and economic effects. The SME scale of BDP projects, the large number of projects under BDP consideration at any one time, limited BDP environment personnel resources, the BDP goal of minimising credit review and disbursement process time, and the lack of existing processes or legacy of public involvement in decision-making in Bosnia and Herzegovina, have combined to make public participation impractical. The BDP EA process does, however, address land use compatibility in an effort to identify potential community concerns that might arise over proposed development projects.

For the same reasons noted above, a full range of project alternatives is not formally evaluated. However, when poor land use is apparent, alternative sites are recommended. All projects must demonstrate that appropriate land use permits have been obtained. In Bosnia and Herzegovina conditions, this certainly does not guarantee appropriate siting, but does provide a measure of additional review.

ROLE OF EA IN RISK ASSESSMENT FOR IMPROVED CREDIT QUALITY AND BUSINESS SUCCESS

BDP is first and foremost a lending organisation. A traditional lending organisation provides credit in the expectation of generating a profit by achieving a rate of return on money lent over a period of time and eventually recovering the cred-
it principal. Any extension of credit carries with it the risk that the principal will not be repaid due to the failure of the borrower to generate sufficient cash flow from business operations. Therefore, a lending organisation must be certain to uncover potential risks prior to extending credit. This allows the lending interest to balance risk of loss of principal and rate of return against the profit potential in extending the credit. The institution can then make an informed decision to either reject a credit request or impose conditions that require the borrower to act to minimise risk to an acceptable level.

A borrower's failure to conduct business in a legal, environmentally responsible manner can create risks and liabilities that increase business costs or reduce revenues. If this occurs, repayment of a credit can be jeopardised or the value of collateral held against repayment can be compromised. Examples of general classes of environment-related risk include:

- non-conformance with legal land use and development permitting regulations — closure or temporary constraints on business operations;
- creation of hazardous conditions for workers that result in legal actions brought by harmed employees — loss of revenue due to legal fees or payment of compensation or reduced worker productivity;
- violation of legal standards that result in stop work orders issued by authorities acting in the public interest — loss of revenues due to temporary or permanent restrictions on production or payment of fines;
- legal action brought by private or public interests adversely affected by a company's violation of environmental regulations or irresponsible business practices — loss of revenues due to legal fees or payment of compensation or temporary/permanent cessation of production;
- costs for cleanup of contamination created by the company either on or off-site;
- reduced revenue due to loss of market as a result of poor environmental performance; and
- reduced value of collateral due to contamination or property transactions made problematic until clean-up occurs.

The ability of a lending organisation to adjust its lending practices to consider the role of environmental risk in business operations may depend on the institution's access to information on the existing or potential liabilities from a borrower's business activities. Over time, it became apparent that the initial limited function of the EA process was not providing the kind of value that was possible within a lending organisation context. If the environment function was to have greater impact, it needed to be modified and recast as a tool to improve risk analysis and credit quality. The key to illustrating the risk assessment value of EA became a matter of translating environmental impacts into credit risks expressed in financial terms.
Credit decisions are based on the result of financial projections for a business. A credit analyst develops projections to determine if the difference between project revenues and costs (profit) is sufficient to service (repay) the credit. If the credit analyst fails to project current or future costs or revenue reductions resulting from failure to mitigate environmental risks, financial projections can be skewed to indicate that profit and cash flow will be sufficient to repay the credit. Certainly, the analyst must have information on significant environment risks that could cause a business to entirely fail.

Translation of environmental impacts into financial terms has been achieved by reporting to BDP credit analysts how project costs and revenues may be affected by environment risks. In many cases, monetary estimates of costs or lost revenue can be made. This information can then be communicated to credit analysts for inclusion in the financial projections. An example may help to illustrate this situation.

A potential borrower approaches BDP seeking credit for a slaughterhouse project. The EA process identifies potentially significant water quality impacts from disposal of blood and other contaminants. Failure to adequately treat wastewater can generate financial risks for the borrower, such as fines, revocation of operating permits, public actions that affect the borrower’s reputation or market, etc. A mitigation measure is written that requires the borrower to demonstrate that an adequate wastewater treatment system will be installed or that an existing system will be improved to meet treatment needs. If the cost of wastewater treatment (risk reduction) is not clearly included in the financial projections (cost side), the projections will be skewed.

In this example, the cost for wastewater treatment may not be so significant as to render the project financially unfeasible. However, it may create cash flow problems that could be problematic for timely repayment. By predicting this problem, terms of the credit can be modified to account for an environment risk reduction cost that the credit analyst otherwise may have overlooked.

In a sense, the EA process is being used as a catalyst for integrating environmental accounting concepts into the credit analysis process.

BORROWER INCENTIVES FOR REDUCING ENVIRONMENTAL RISK

Financial risk can be most effectively demonstrated to a credit analyst or borrower if the threat of increased costs or lost business revenues from legal, regulatory and enforcement and/or international standards is real. In the Bosnia and Herzegovina context, where short-term profit-making is the priority of businesspeople, the incentive is much stronger if it represents a present or short-term threat to revenues. Unfortunately, there are few existing and short-term incentives (independent of BDP credit conditions) that create environmental performance imperatives for business. Mid-term to longer-term incentives are real, but don’t often affect the decisions of business owners today. Incentive issues are briefly summarised below:

Legal Incentives

Borrowers who do have a sense of environmental awareness have often commented that, given the “Bosnian mind”, the only effective incentive for perfor-
mance rests with the threat of economic (fines or production stoppage) or criminal charges arising from enforcement of strong environmental laws. Currently, Bosnia and Herzegovina lacks a clear, comprehensive framework of environmental law based on modern approaches to environmental management. Many existing laws are taken from the former Yugoslavia. The European Commission is about to initiate a comprehensive review of environmental law in Bosnia and Herzegovina (a form of approximation) to bring this body of law closer to consistency with EU standards and to enhance the efficiency by which it can be enforced.

Regulatory Enforcement

In the two years following the war, enforcement of environmental law tended to be inconsistent and avoidable, given the right economic or political solution. Enforcement has been improving over the past year. Nevertheless, it does not yet provide significant motivation for environmental performance. Lack of resources for enforcement remains a major constraint.

Liability Incentives

Prior to the war, lawsuits could be brought against businesses (state-owned) for failure to meet environmental performance obligations. Though the penalties for violations generally were not strong, an incentive for performance did exist. In post-war conditions, the legal process is not yet mature enough to serve this function. Furthermore, in a country where the former political structure discouraged public participation or activism that might complicate implementation of state prerogatives, private legal initiatives against violators of environmental laws and regulations have not yet materialised. Imperatives for economic development and job creation could also be a disincentive for individuals or groups to initiate action against businesses that provide even a modicum of employment.

Market/Competitive Advantage Incentives

To date, the environmental performance of a company or the quality and safety of its products (i.e., environmental health and safety of inputs) has not been a major factor in domestic consumer choice. Due to continuing economic hardship, price plays the most significant role in consumer choice. Therefore, domestic market incentives for environmental performance are not strong. A number of BDP borrowers are exporting or plan to export products. These borrowers are clearly informed about market limitations that may arise out of ISO and EMAS standards for performance and/or by consumer expectations for environmental performance.

Regardless of whether environmental performance incentives do exist, they may not be immediately recognised. In the former centrally planned Yugoslavian economy, market competitiveness was just one of several factors that drove business performance and economic production decisions. In the transition to privatisation and a market economy, businesspeople in Bosnia and Herzegovina may need to be better informed of how environmental performance can affect markets.
BDP TOOLS/INCENTIVES FOR ENVIRONMENT/CREDIT RISK REDUCTION

External incentives for environmental performance that are common in western economies have largely yet to fully materialise in Bosnia and Herzegovina. If improved borrower compliance with mitigations was to be achieved, incentives would have to be created as part of the credit process. A credit review and approval process contains basic control mechanisms designed to maintain lending organisation control over the behaviour of a borrower. Their adaptation for use as environmental performance incentives is as follows:

Rejection of the Credit Application

The generation of unavoidable significant impacts/risks is grounds for rejection of a credit request. Early in the programme, rejection of a credit solely on this basis was rarely exercised. Over time, considered in combination with other financial risks, environmental impacts and their influence on business risk have become a much more visible factor in rejecting applications.

Pre-Disbursement Conditions

Mitigations for impacts and risks considered significant are now written as pre-disbursement conditions. That is, borrowers must implement specific actions before credit funds may be disbursed. Where full implementation of an action is contingent on the borrower receiving credit funds, the pre-disbursement condition is written to require the borrower to demonstrate tangible progress towards implementation (i.e. preparation of a preliminary wastewater disposal plan versus the construction of the system).

As a variation on the pre-disbursement concept, a credit may be divided into a series of disbursements or “tranches”. A portion of a credit may be disbursed in order to permit the borrower to take specific actions. Disbursement of subsequent tranches may be conditioned on the borrower implementing one or more mitigation measures. This has proven an effective approach, especially in more complex projects where mitigation implementation is tied to particular steps in project development, reconstruction or production capacity expansion.

Monitoring Programme

In mid-1998, a monitoring programme was initiated. Projects given a significant environmental rating are prioritised for monitoring. Other projects, such as start-ups in more environmental/public health-sensitive development sectors, such as resource extraction or food processing, may also be monitored. Monitoring serves two primary purposes. First, monitoring enables assessment of borrower conformance with mitigation measures. If conformance is poor and generates unacceptable risk, corrective actions can be taken. Monitoring is also conducted to generate information on the underlying causes of implementation failure or, conversely, to identify “what worked”. Through lessons learned, continual improvement of assessment activities and recommendations on overall BDP credit processes, improvements that reduce environment risk can be made.
Putting “Teeth” in the Credit Agreement

The BDP’s initial credit agreement did not specify failure to implement environmental mitigations as a condition of loan default. The agreement was subsequently modified to stipulate that failure to meet environmental obligations is now a violation of the agreement or an “event of default” that can result in application of a variety of remedies defined in the agreement. Interest penalties, accelerated repayment of outstanding credit balance, and foreclosure are the basic remedies available as incentives.

Credit Funds for Environmental Management

The concept of environmental accounting and internalising of environment-related costs is not well understood in Bosnia and Herzegovina. Early in the monitoring programme, this became a clear cause of failure to implement environmental mitigations. Borrowers simply didn’t consider such costs in their financial projections. In combination with the lack of institutional enforcement and minimal importance placed on environment protection in a difficult transition environment, mitigations that require any type of financial investment have often been marginally implemented, if acted on at all. Currently, the BDP helps borrowers identify potential environment-related costs (and the benefits of reducing environment liabilities) early in the project planning/credit application processes and encourages them to use BDP credit resources to make investments in environment risk reduction.

ADDITIONAL ACTIONS FOR IMPROVEMENT OF BUSINESS ENVIRONMENTAL PERFORMANCE

The role of environment in BDP is expanding beyond the EA risk-assessment function. Again, due to the business development nature of the programme, environment functions are targeted at improving the quality of the credit portfolio while serving public interest in environmental management. Three other general areas of environment activity include:

Input Quality and Quantity Assessment

Several of the business sectors supported by BDP are resource extraction based and/or use natural resources and living capital as direct inputs to production. Over time, a number of businesses in these sectors (i.e., quarries, gravel extraction for building materials, primary and secondary wood-processing, livestock breeding, medicinal remedies production, etc.) have not met financial projections and therefore have had difficulty meeting the terms of their credit agreements. Credit analysts often may not have sufficient familiarity with natural resource related issues to independently identify business risks for projects that rely on such resources. Inputs analysis may be needed to ensure, for example, that:

- borrower statements about the quality of inputs matches expectations of product quality and sales price (i.e. has analysis of the construction quality of limestone from a proposed quarry confirmed that it is of a sufficient quality to compete against other producers?);
a sufficient quantity and quality of natural resources at the price anticipated by the borrower is available given the distribution of such resources, limitations on resource availability given primary production capacity, need to maintain sustainable extraction of the resource and transportation costs, etc.;

- borrowers have sufficient experience and knowledge of production processes that are natural resource based (i.e. to locate quality inputs and produce a quality product with sufficient efficiency to be competitive and avoid wasting limited natural resources); and

- proposed inputs are suitable for use in Bosnian conditions. Is it wise to import livestock for milk production that may not readily adapt to Bosnian climatic conditions, feed types, etc?

Pollution Prevention

Pollution prevention (P2) concepts are now being integrated into BDP operations. While application of P2 principles can provide environmental management and protection benefits, given the BDP’s business development focus, P2 has been introduced as a tool for reducing project costs and improving revenue generation. Implementation of P2 improvements (through additional borrower investments) also serves the BDP goal of putting credit funds to productive use.

Information and Education

BDP has greater outreach potential in the SME business community than any other international development organisation in Bosnia and Herzegovina. This creates an excellent opportunity to provide Bosnian entrepreneurs with information about the role of environment in business planning and development. Environmental information is conveyed to borrowers through an introductory BDP seminar, distribution of basic environmental performance guidelines, availability of BDP environmental staff for project planning consulting, site visits, monitoring visits, etc. Borrowers generally respond favourably to receiving such information. However, as has been discussed, the extent to which borrowers actually use the information as a basis for incorporating environment factors into business planning and operations decisions remains largely an issue of creating appropriate incentives.

Conclusion

Environmental assessment has proven to be a valuable tool for facilitating environmentally sound development. As it has been applied by the BDP, EA has also proven to be flexible and applicable for identifying and managing financial risk. Its effectiveness in a lending context is dependent on converting environmental impact terms into environmental risk terms, then reporting environmental risk in terms of impacts on business costs and revenues. BDP credit analysts have readily accepted this application of EA because it improves the quality and accuracy of financial projections and business decisions. This acceptance can be contrasted with the marginal perceived value of EA within a lending programme when EA is represented primarily as a tool for protecting the environment or public interest.
Environmental Impact Assessment in Draft Environment Laws in the Federation of Bosnia and Herzegovina and Republika Srpska

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Introduction

The Constitution of Bosnia and Herzegovina defines the purviews of the Federation’s entities in environmental matters. Thanks to the influence of the international community and the readiness to compromise of domestic groups, a common method was agreed upon for the preparation of basic legal and strategic instruments in this area. The two entities of Bosnia and Herzegovina (Herzegovina-Neretva and Republika Srpska) signed a memorandum of understanding, in which they agreed to adopt common principles to be incorporated in the environmental legislation of both entities.

Environmental matters in Bosnia and Herzegovina are insufficiently and unsystematically regulated. The lack of environmental legislation has been highlighted as a major obstacle to development in this area. This conclusion is based on the following circumstances, which are common to both entities:

• Environmental matters are scattered among several documents, which treat only some specific fragments;
• Legislation passed in the early 1980s has become obsolete, given that the environment is a dynamic sector;
• Bosnia and Herzegovina has not signed any international environmental treaty since it became an independent state (1992);
• The system of environmental institutions is severely underdeveloped;
• Bosnia and Herzegovina is not included in international cooperation and information exchange on the environment; and
• Public awareness is at a very low level.

Tools for implementing environmental policy

For the purposes of this presentation, two draft environmental protection laws, prepared in both entities in 1997, will be referred to. The drafts were prepared in order to regulate the state’s role in the environmental sector, in accordance with the needs and capabilities of Bosnia and Herzegovina and its entities. Both drafts were based on existing legislation in Croatia and Yugoslavia. Without
exploring the reasons for such action, it is necessary to say that the above-men-
mentioned laws were passed in Croatia and Yugoslavia in 1991 and 1993, which
means, given the speed of development in the environmental sector, that even
these laws had become obsolete and need to be modernised in accordance with
international practice.

However, both drafts mention Environmental Impact Assessment (EIA) as one
of the tools for implementing environmental policy. The two drafts have many dif-
ferences, and the same could be said for those sections pertaining to EIA. Before
analysing EIA in the Bosnia and Herzegovina legal system, there is a need to empha-
sise some characteristics of EIA, as a tool, but also as an element of legal procedure.

Legal nature of EIA

EIA is, in fact, one part of typical administrative procedure. In order to obtain
permission for construction, extension, and reconstruction, or to make a sub-
stantial modification, the investor must obtain approval from authorised bodies.
Hence, the investor must submit a request and initiate the administrative proce-
dure. Together with the application, the investor must enclose appropriate docu-
ments, including the EIA study. (Depending on the activity, some other docu-
ments may also have to be submitted, but in the following text we will focus our
interest on the EIA study). Although the onus is on the investor to prepare and
submit an EIA study, in reality the study is prepared by professional organisa-
tions, at the request and expense of the investor. The preparation of the EIA study
can account for up to 5% of the total amount of the investment, which gives a pic-
ture of the importance of the EIA component.

The EIA study includes the following elements:

• A description of the project (installation or activity);
• A description of the site, with the emphasis on environmental features;
• The identification of the expected impact of the project on the environment
(in time for the construction and operation of the installation); and
• An assessment of identified effects and measures for amelioration of harmful
consequences (what these consequences are, their intensity and scope, as
well as measures for eliminating or mitigating these effects).

The study prepared in this manner is included among the documentation sub-
mitted to the relevant authority for examination. The authority takes into account all
aspects of the application, and makes a decision. Keeping in mind the complexity
of the procedure, and the significance of the EIA study, the authority can decide:

• To approve the application and give permission for the proposed activity;
• To reject the application; or
• To return the application to the investor and ask for changes or modifications.
In the third case, if the authority returns the application, the investor will make corrections in the study, and initiate the administrative procedure anew.

International legal documents, foremost among them the Aarhus Convention, require public participation in the process of evaluating the EIA study and in the decision-making process in the administrative procedure. It is necessary to provide opportunities for public participation from the very beginning of the process, from the moment of the preparation of the EIA study. The active participation of the public will bring mutual benefits — the range of useful ideas will be increased, while, on the other hand, public respect for the openness of the project will be enhanced. The investor can avoid potential extra costs in later stages of the project, as it is presumed that all potential consequences are thoroughly discussed. The benefit to the public is the opportunity to play an important role in creating relationships in the surrounding area.

The authority is also interested in public discussion. A well organised and conducted public debate will provide opportunities to examine the activity from different perspectives and to shed more light on the content of the procedure, and will, in addition, give the attribute “democratic” to the authority. By taking part in the decision-making process, all stakeholders will participate in implementing the decision, which will make for an easier situation, based on some sort of compromise.

This brief overview of EIA in a legal context aims to present a general picture of the role and position of EIA in the process of obtaining permission for a specific activity.

When the relevant authority issues a positive decision approving the activity, the obligation to monitor the activities set forth in the EIA study begins. The competent body has the right to act if the investor’s behaviour is not in accordance with the approved documentation, including the EIA study.

When is an EIA study needed?

Preparation of an EIA study is a very sensitive, highly demanding job that requires time, knowledge and financial means. This description assumes that some criteria should be applied to determine whether a study is needed. If a study were required in all cases, without any selective mechanism, it would present a serious obstacle to any investment. If, on the other hand, the EIA were to be limited to only a few selected cases, it would present a great danger of abuse of the environment. Hence, the question of whether to perform an EIA study is very delicate and should be very carefully examined on a case-by-case basis.

Experience gives some criteria for answering this question. Legally, criteria are set down in by-laws. Regulations in this sense exist in Croatia and Yugoslavia, upon whose legislation the entities of Bosnia and Herzegovina have based their draft laws. Criteria that we consider are:

- The physical features of installation and operation;
- The size of the activity (installation); and
- The ecological features of the area in which the activity would be conducted.
All these criteria should be considered together, taking into account their interactive and multi-disciplinary characteristics. We have to accept that identical installations with identical functions will receive different treatment, depending on their locations and the features of their surroundings. The decision on whether to carry out an EIA study involves some prior judgments, with very important consequences.

Activities in accordance with the above are classified in so-called “List A” and “List B”, part of the regulation regarding the EIA process. The Aarhus Convention includes a list of activities to which an EIA process should be applied.

EIA regulation defines which authority is authorised to make decisions, as well as the criteria determining which organisations are licensed to prepare EIA studies.

Legal status of EIA in Bosnia and Herzegovina

The Constitution of Bosnia and Herzegovina does not include provisions regarding the environment, but some of its provisions indicate a general attitude towards EIA as a universal tool linked to various activities in different sectors of life.

The Preamble to the Constitution states that “democratic institutions and fair procedures produce peaceful relationships in society…” By analysing this provision, the EIA can be defined as a fair and democratic procedure that aims to harmonise different interests. EIA is the tool which should help to balance the interests of the investor, whose goal is profit, and the citizens, who want to enjoy a healthy environment. Public participation, as a part of the EIA process, gives a strong democratic flavour.

Another statement from the Preamble with implications for EIA, is the declaration that the Constitution is “Inspired by the wish to provide general well-being and economic growth through the protection of private property and the improvement of a market economy…” The emancipation of private property and a market economy was ignored during 50 years of emphasising “social-owned property” and economy under strong state influence. An indication of well-being is not only the economy, but also the quality of the life of the citizens, which cannot be adequate without concern for the environment. A mechanism such as EIA should be put in this context, because of its goal of satisfying the interests of economic development and environmental protection. EIA is also a tool that prevents an uninhibited dash for profit with harmful effects on the general interest.

In further text, the Constitution states: “… followed by Universal Declaration on Human Rights, international treaties on civil and political rights, and also on economic, social and cultural rights…” This principle is very broadly stated, but includes provisions which provide for the realisation of the right to a healthy environment — whether within the scope of human rights, or of social-cultural rights. EIA, by its nature, facilitates the implementation of this principle.

Even if very general, provisions of the Constitution of Bosnia and Herzegovina provide a legal framework for implementation of EIA.

In addition, the Constitution, in its Article III, defines the exclusive purviews of entities in regulating environmental matters.
Constitution of Federation Bosnia and Herzegovina

The Federation of Bosnia and Herzegovina comprises ten cantons; its Constitution mainly deals with the division of powers between the Federation (entity) and cantons. Keeping in mind that environmental protection is the focus of this presentation, the following sets out the situation in this area.

EXCLUSIVE PURVIEW OF FEDERATION

- Defining economic policy, including planning and reconstruction and land use policy at the Federal level;
- Defining policy in the energy sector, including distribution among cantons and the protection of existing installations and maintenance of infrastructure.

These provisions define the purview of the Federation in areas directly linked to environmental protection, but could also be very important in determining which is the competent authority in EIA procedures.

JOINT PURVIEW OF FEDERATION AND CANTONS

- Environmental protection policy;
- Utilisation of natural resources.

EXCLUSIVE PURVIEW OF CANTONS

- Regulating utilisation of local land, including zoning;
- Regulating local energy-producing facilities.

The provisions are very general and provide wide scope for interpretation, which can create confusion, especially in cases linked to investments, and the desire of every authority to exercise control over profitable installations.

Apart from the provisions on the division of powers, the Constitution does not include provisions that could be directly linked to EIA.

Constitution of Republika Srpska

Republika Srpska is organised as a single entity (without cantons), and its Constitution is totally different from that of Bosnia and Herzegovina. The Constitution of Republika Srpska defines some specific rights, or gives frameworks for their further regulation. In accordance with the Constitution, Republika Srpska is responsible for legislative work, in accordance with the Constitutions of Bosnia and Herzegovina and Republika Srpska.

The right to a healthy environment is stated in Chapter II of the Constitution, entitled Human Rights and Freedoms. Plainly, this right is valued very highly.
Article 35 states: “man has the right to a healthy environment and everyone is obliged to, in accordance with the law, protect and improve the environment”.

CHAPTER III – ECONOMIC AND SOCIAL STRUCTURE

Article 50: “Economic and social structure is based on the equal treatment of all forms of property and free enterprise.”

Article 52: “Free enterprise can be restricted for the protection of the Republic, the environment, or the health and security of the citizens”.

The provision contained in Article 50 is a logical consequence of the political objective of building a free society, and is also set forth in the Constitution of Bosnia and Herzegovina. Article 52 allows obstacles to free enterprise; for the purposes of this presentation, the most important is that the environment is given protected status.

Taking these two provisions together, it is obvious that the Constitution provides a framework for tools that will harmonise economic growth and environmental protection. Even if it is not explicitly stated, EIA is one such tool.

An examination of the provisions of the Constitutions in Bosnia and Herzegovina can provide a picture of the general position of EIA in the legal system of Bosnia and Herzegovina and its entities. Constitutions are general acts, dealing with general definitions, but they create a framework for more precise regulation of specific areas.

There is a need for systematic environmental regulation in Bosnia and Herzegovina at the moment — entities are empowered to regulate this area, but entities have not passed adequate legislation. Both entities prepared draft environmental protection legislation in 1997, but, for various reasons, the process of adopting the legislation halted.

For the purpose of this presentation, the above-mentioned drafts will be used. The following text concentrates on EIA in the draft legislation.

Draft of Federation Bosnia and Herzegovina

Article 25 states: “The Government establishes the Council for Environmental Protection (par. 1). The Council provides opinions, suggestions and assessments in the process of harmonising economic development and environmental protection (par. 2).”

This provision orders the establishment and defines the purview of the Council, emphasising the principle of sustainable development. EIA is not mentioned specifically, but only in the context of par. 2, consistent with the notion of EIA as an instrument for harmonising economic growth in accordance with environmental protection. Representatives of NGOs are, among others, members of the Council, which creates a legal framework for public participation in the EIA process.

Chapter 5 of the draft — Implementation of protection — states as follows:

- In order to realise the principle of prevention, EIA is an obligatory tool linked to activities that could have an impact on the environment;
The federal ministry defines activities for which an EIA study must be prepared; and

An EIA study must be estimated and approved before issuing a permit for such activity.

These provisions set out the obligation to prepare an EIA study, they define the Federation (entity level) as the competent authority in defining which activities fall under the EIA regime, and they also stipulate that an EIA study is a crucial part of the administrative procedure for obtaining permits.

The draft goes further, by authorising cantons to place even tighter restrictions on activities that fall under the EIA regime. The main idea of this provision is to give the canton the opportunity to protect specific interests of the local community.

The draft also states that “An EIA study should be prepared by a public institution.” This provision can create confusion — interpreted very strictly it favours state-owned (public) institutions, in direct conflict with the constitutional principle of the equality of all forms of property. In order to avoid any kind of abuse, this provision should be modified. Instead of determining who is eligible to prepare EIA studies, it would be better to establish the conditions that an institution should satisfy if it wants to be authorised to prepare such studies. (For example, the institution should have enough experts with different professional backgrounds, and adequate technical equipment). In this way the main objective would be achieved without violating the principle of equality of all forms of property.

The federal ministry establishes a commission for evaluating the EIA study. The draft does not contain provisions regarding the members of the commission, but, following some other provisions, it is expected that NGOs should have a representative on the commission. The commission gives its opinion, but the final decision lies within the ministry’s purview.

The draft does not allow for an appeal against ministry decisions, so the ministry’s decision is final. However, it is possible to appeal such decisions in Administrative court, in accordance with the Administrative Procedures Act.

The draft states that the ministry has an obligation to “inform other states if any activity could have an impact on the environment in that state”. In so doing, the draft, at least partly, fulfils Espoo Convention obligations about informing the affected country.

Briefly, the draft establishes a legal framework for implementing the EIA mechanism, makes precise divisions between authorities in the EIA process, and provides an opportunity for detailed regulation of this matter through by-laws. Some details should be changed, but, generally, the draft is a solid foundation for the legal status of EIA.

Draft Law in Republika Srpska

Unlike the draft legislation in Bosnia and Herzegovina, the Republika Srpska draft has no systematised provisions regarding EIA, whether regarding its content or procedure. Provisions devoted to EIA take the form of principles rather than specific provisions.
Article 4 of the Republika Srpska draft states; “The Republic harmonises economic and social development with the principles of environmental protection”. This is the widely cited principle of sustainable development, and could be used as a legal base for implementing EIA mechanisms in very specific cases. The competence of the Republic (entity level) is emphasised, but, bearing in mind the simple structure of Republika Srpska (there are no cantons), this is not such a crucial issue as in the Federation.

According to Article 7, “the investor is obliged to prepare an expert’s analysis of the ecological impact that activities or installations could have on the environment, to plan and implement measures in order to provide adequate environmental protection.” In interpreting this provision, EIA could be said to be one of the most efficient mechanisms for achieving the goal. The provision does not provide for a mechanism for control or supervision, and the content of potential prevention is in the hands of the investor. Given that the investor’s aim is to make a profit, there is a legitimate concern about whether the investor will take adequate measures to provide environmental protection.

Another provision states that: “The investor is obliged to calculate the costs of environmental protection within the scope of the investment.” This provision again provides wide scope for the investor to act independently, without any control mechanism. There are no parameters establishing firm conditions that would provide an adequate level of environmental protection in specific cases.

The Republika Srpska draft has no provisions regarding the procedure for obtaining licenses and permits, such as would provide for the application of an EIA to activities that could affect the environment. The intention of this presentation is not to give directions for further legislative work, but there is a visible need for a more systematic approach to EIA matters in Republika Srpska.

Conclusions

This was an attempt to bring together all legal tools linked to EIA. It is very important that Bosnia and Herzegovina introduce EIA, especially in view of the expected reconstruction of the country in the post-war period. The economy of pre-war Bosnia and Herzegovina was centred on heavy industry, which was based on very old, environmentally unacceptable technology. In order to avoid unfortunate experiences, it would be very important to follow the EIA mechanism very strictly, which would bring very positive, long-term cost-effective results, and would provide the right of citizens to enjoy their right to a healthy environment.

The preparation of environmental legislation is underway in Bosnia and Herzegovina, and is a great opportunity to improve the situation in this area. Some positive trends should be supported and improved, but Bosnia and Herzegovina should also draw on the positive experiences of other countries, especially countries in transition.

Legislative work should be followed by a strengthening of institutions within the environmental sector, as this will be the real basis for efficient functioning in future.
Uvod

Ustavom Bosne i Hercegovine određena je zakonodavna nadležnost entiteta u oblasti životne sredine. Zahvaljujući uticaju međunarodne zajednice i spremnosti domaćih struktura na kompromis, postignut je dogovor o zajedničkoj metodologiji izrade baznih pravnih i strateških akata u ovoj oblasti. Potpisan je Memorandum o sporazumijevanju između dva BH entiteta, dogovoreno je usvajanje zajedničkih načela na kojima će počivati zakonodavstvo u oba entiteta.

Materija životne sredine u BiH je nedovoljno i nesisetsamati pravno regulisana. Nedovoljna pravna regulisanost oblasti životne sredine istaknuta je kao osnovna prepreka razvoju ove oblasti. Za ovakvu ocjenu postoji niz argumenta, identični su za oba entiteta:

- Ne postoji akt kojim je u cjelosti regulisan sektor, životne sredine (postoji niz akata kojima su obuhvaćeni tek pojedini segmenti);
- Akti koji postoje datiraju iz 80-ih, što upućuje na njihovu zastarjelost u oblasti koja pokazuje izuzetno dinamičan napredak;
- BiH nije potpisala nijednu međunarodnu konvenciju iz oblasti životne sredine od sticanja nezavisnosti (1992). Značaj međunarodno-pravnih akata donećenih u posljednjih 8 godina je ogroman, potpuno je izmjenio fiziomoni ju rada u ovoj oblasti;
- Ne postoji razvijen sistem institucija koje se bave pitanjima iz ove oblasti.
- BiH nije u dovoljnoj mjeri uključena u međunarodnu saradnju i razmjenu informacija bitnih za životnu sredinu
- Svijest građana o životnoj sredini je na vrlo niskom nivou, ali u posljednje vremenu pokazuje znake poboljšanja.

Sredstva sprovođenja politike u oblasti životne sredine

Za potrebe ove prezentacije koristimo se postojećim nacrtaima zakona o životnoj sredini/okolišu koji postoje u oba entiteta od 1997. Nacrti su u rađeni u namjeri da se stanje u ovoj oblasti dovede u red, u skladu sa potrebama i mogućnostima BiH, odnosno njenih entiteta, u ovom trenutku. Činjenica koja se mora imati u vidu je da su entiteti tekstove nacrta bazirali na postojećim zakoni-
ma u Hrvatskoj i SR Jugoslaviji. Ne ulazeći u razloge zašto je to tako, treba reći da su pomenuti zakoni urađeni 1991. odnosno 1993., što s obzirom na dinamiku u ovoj oblasti znači da su i zakoni u susjednim zemljama već zastarjeli i potrebno im je inoviranje i usaglašavanje sa postojećim trendovima u svijetu.

Bilo kako bilo, oba nacrta spominju Procjenu uticaja na životnu sredinu, kao jedno od bitnih sredstava sprovodjenja politike u oblasti životne sredine. Ako je ranije rečeno da postoje bitne razlike između dva entitietska nacrta, ova konstatacija vrlo je izražena u segmentu nacrta koji se odnose na PU. Da bi smo mogli analizirati status PU i pravni režim ovog instituta u BiH pravnom sistemu, neophodno je odrediti neke osnovne karakteristike PU kao sredstva i kao značajnog segmenta pravnog postupka.

Stećana je već slika o PU kao instrumentu koji je vrlo bitan u kontekstu finansijskog i ekonomskog statusa. U narednom tekstu navedene su osnovne značajke PU gledano iz pravnog ugla.

**Pravna priroda PU**

Procjena uticaja na životnu sredinu je, u stvari sastavni dio klasičnog upravnog postupka. Naime, da bi pribavio dozvolu za izgradnju, proširenje, pokretanje u pogon ili rekonstrukciju nekog projekta, investitor mora tražiti odobrenje nadležnih organa. Dakle, investitor mora podnijeti zahtjev za dobijanje dozvole za svoju djelatnost. Kako bi organ mogao donijeti odluku o zahtjevu, neophodno je da investitor, uz zahtjev, dostavi i studiju o PU. Sam izraz studija navodi na veliku ozbiljnost akta koji investitor mora obezbijediti. U postupku, izrada i dostavljanje studije o PU je obaveza podnosioca zahtjeva (investitora), ali u praksi ovaj akt sačinjava stručna organizacija, na zahtjev i na teret investitora. Ranije je već rečeno da je sasvim prihvatljivo da trošak izrade studije o PU učestvije sa oko 5% troškova u ukupnoj investiciji. I ovaj podatak o visini troškova koji se smatraju prihvatljivim pokazuju značaj studije o PU.

Studija o PU svakakako treba da sadrži sljedeće elemente:

- Opis projekta;
- Karakteristike lokacije koji su bitni za životnu sredinu;
- Identifikaciju očekivanih uticaja projekta na životnu sredinu (kako u vrijeme izgradnje objekta, tako i u vrijeme njegovog rada);
- Procjenu identifikovanih uticaja i utvrđivanje mjera za ublažavanje negativnog uticaja (koji su to negativni uticaji, njihov intenzitet, na koju teritoriju se odnose, mjere za eliminisanje/ublažavanje).

Ovako pripremljen dokument, studija, se prilaže uz zahtjev nadležnom organu (zavisno od propisa, mogu se zahtijevati i druga dokumenta, ali ovde ćemo se ograničiti samo na studiju o PU). Nadležni organ razmatra zahtjev i procjenu uticaja i donosi odluku o zahtjevu. Rezultat postupka može biti:

- Organ je donio pozitivnu odluku, tj odobrena je tražena aktivnost;
• Organ je donio negativnu odluku, odnosno nije odobrena tražena aktivnost (projekat);
• Organ je vratio zahtjev sa instrukcijom da se priliožena studija o PU dopuni, koriguje u određenom roku.

Ukoliko je organ vratio zahtjev na korekciju, investitior će ponoviti postupak i ponovo predati zahtjev sa dopunjenim materijalima.

Međunarodnim aktima, prije svega Arhuskom Konvencijom, predviđena je aktivna uloga javnosti u postupku ocjenjivanja studije PU i donošenju konačne odluke u cijelom upravnom postupku. Neophodno je omogućiti učešće javnosti od samog početka procesa, tj od momenta izrade studije. Sigurno je da će se aktiviranjem javnosti od samog početka rada postići obostrana korist — povećaće se obim ideja koje mogu biti zanimljive i korisne za stručnu organizaciju koja izrađuje studiju, investitior dobija time što u narod ulazi otvoreno i bez skrivenih namjera te osigurava da mu se naknadno neće pojavljivati problemi koji bi nosili dodatne zahtjeve građana (troškove). Javnost dobija time što joj se omogućava da aktivno učestvuje u kreiranju bitnih odnosa u svojoj okolini.

Organ uprave, takođe, na osnovu javne debate ima mogućnost da sagleda cijeli problem sa više aspekata i da donese pravičnu odluku iza koje stoji javnost, što svakako ostavlja pozitivan utisak i daje pravo organima vlasti da se smatraju demokratskim. Učešćem u kreiranju odluke, svi učešnici će biti spremniji i na realizaciju iste, dakle olakšće se primjena.

Ovaj prikaz postupka je dosta uprošten, ali daje sliku o tome gdje je mjesto i kakva je uloga studije o PU u postupku pribavljanja odobrenja za sprovodene aktivnosti.

Kada je projekat odobren, nadležni organ je dužan da kontroliše primjenu navoda iz studije uticaja (monitoring). Svakakako je organ ovlašten i dužan da u slučaju odstupanja od predviđenog ponašanja interveniše i da zahtjeva od investitora da svoje ponašanje uskladi sa propisanim, odnosno sa ponašanjem koje je određeno u studiji PU koja je poslužila kao osnov za izdavanje odobrenja za određenu aktivnost.

**Kada je potrebno izraditi studiju o PU**

Izrada studije o procjeni uticaja je vrlo složen stručan posao, koji podrazumijeva vrijeme i finansijska sredstva. Imajući ovo u vidu, jasno je da je pitanje obaveznosti izrade studije dosta osjetljivo. Ukoliko bi se studija zahtijevala nesektivno, za svaku investiciju, došlo bi se u situaciju da ona postane obilježnik faktora opstrukcije i realan razlog za ukupno smanjenje investiranja. S druge strane, ukoliko bi se PU odredivala previše restrikтивno, došlo bi do situacije da se izgraduju objekti koji narušavaju pravo na odgovarajuću životnu sredinu, što bi dovelo do neželjenih posljedica. Dakle, pitanje da li ili ne PU je vrlo osjetljivo i u mnogome zavisilo od svake konkretne situacije.

Praksa je dovela do postavljanja kriterija u kojim situacijama se mora, uz zahtjev za odobrenje, priložiti i studija o PU. Pravno gledano, kriteriji za
određivanje projekta koji podliježu obavezi izrade PU regulišu se podzakonskim aktima. Ovakvi akti postoje i u SR Jugoslaviji i u Republici Hrvatskoj (s obzirom da postojeći nacrti u BiH vuku korijene iz ove dvije zemlje, ova napomena treba da znači da i BiH treba računati sa donošenjem ovakvog propisa).

Kriteriji koji su bitni za određenje aktivnosti koje podliježu izradi studije o PU su sljedeći:

- Fizičke osobine projekta (objekta) i osobine procesa rada;
- Veličina projekta;
- Ekološke osobine područja u kojem se projekat izvodi.

Pri određivanju projekata koji podliježu izradi studije o PU ove kriterije treba sagledavati u njihovoj ukupnosti i uzajamnosti. Naime, u nizu slučajeva isti objekti, sa istim procesom rada, tehnologijom itd, imaće drugačiji tretman u zavisnosti od lokacije na kojoj se nalaze. U svakom slučaju kriteriji se moraju posmatrati i ocjenjivati za svaki pojedinačni slučaj.

Ipak postoje aktivnosti za koje se mora predvidjeti izrada studije, koji vežu svojim postojanjem predstavljaju potencijalni uticaj na životnu sredinu, da li s obzirom na proces koji se odvija ili zbog veličine samog objekta. Za druge aktivnosti odluka o tome da li treba ili ne studija se donosi na osnovu prethodnog uvida u stanje i na osnovu pretpostavki o eventualnom uticaju. Tada je potrebno razmotriti i uvažiti sve naprijed navedene kriterije.

Aktivnosti se, u skladu sa naprijed navedenim klasifikuju u tzv. “listu A” i “listu B”. Liste A i B su sastavni dio odluke kojom se precizira postupak vezan za izradu i ocjenu PU. Kao jedan od dobrih putokaza kako odrediti aktivnosti za koje se treba primjenjivati režim izrade PU je spisak aktivnosti naveden u Arhuskoj konvenciji.

Ovom odlukom se određuju i organi koji odlučuju (stvarana i mjesna nadležnost), te utvrđuju kriteriji o stručnoj organizaciji koja ima pravo (licencu) za izradu studija.

Kratak osvrt na red radnji koje predstoje u postupku izrade i ocjene studije o PU je bio neophodan da bi se stvorila jasna slika o tome što je, kakva je uloga i koliko je bitna PU u sistemu pravne zaštite životne sredine.

**Pravne pretpostavke i status PU u B&H**

**USTAV B&H**

Ustav B&H nema odredbi o životnoj sredini, ali iz nekih drugih odredbi mogu se izvući zaključci o odnosu prema PU, kao univerzalnom sredstvu koje zadire u više sfera djelovanja.

Naime Ustav u preambuli navodi da “uvjereni da demokratske insistucije vlasti i pravični postupci najbolje stvaraju miroljubive odnose u pluralističkom društvu”. Rukovodeći se ovim navodima, PU možemo svrstati u pravedan i pravičan postupak u kojem se uskladjuju interesi koji na prvi pogled izgledaju nepomirljivi. Naime, PU upravo treba da stoji kao balans između potrebe investi-
tiora za sticanjem što većeg profita i željom građana da uživaju blagodeti zdrave, netaknute životne sredine. Demokratičnost ovog procesa je ostvariva kroz implementaciju učešća javnosti te kroz stručan i savjestan rad organa uprave, koji u krajoj liniji donose odluku o odobrenju aktivnosti.

“Želeci da podstakne opšte blagostanje i ekonomski rast putem zaštite privatnog vlasništva i unapređenja tržišne privrede” je takođe princip iz preambule Ustava, koji može da se dovede u vezu sa PU. Naime, potpuna emancipacija privatnog vlasništva i tržišnog privredovanja u BiH treba da nastupi nakon dugog perioda življenja i rada u uslovima protezanog položaja društvene svojine i diktnaranog tržišta. Takođe, treba imati u vidu da pokazatelji blagostanja i ekonomskog rasta nisu samo visoki društveni proizvod, visoka stopa privrednog rasta, nego i osim niza drugih odrednica, i kvalitet životne sredine u kojoj žive građani. Mehanizam kao što je PU treba staviti u ovaj kontekst, jer upravo ostvaruje dobitnu kombinaciju i za investitora i za građane, naime podvlači važnost zaštite životne sredine u kontekstu potrebe za ekonomskim razvojem. Takođe, sprječava eventualnu nekontrolisanu trku privatnog kapitala za svojim uvećanjem na štetu opšteg interesa.

Ustav BiH, u svojoj preambuli još navodi i sljedeće: “nadahnuti univerzalnom deklaracijom o pravima čovjeka, međunarodnim pakтовima o građanskim i političkim pravima, odnosno o ekonomskim, socijalnim i kulturnim pravima”. U ovom iako postavljenom formulacijom Ustav je predstavio i pravo na život u adekvatnoj životnoj sredini (možemo ga tretirati u okviru osnovnih prava čovjeka, ili kao pravo koje postoji u kontekstu ekonomskih, socijalnih i kulturnih prava) kao jedno od svojih izvora. Svakako da PU, koje je sredstvo za zaštitu, očuvanje i unapređenje životne sredine postoji kao jedno od potencijalnih mogućnosti za realizaciju naprijed pomenutog principa.

Mada su odredbe Ustava dosta uopštena, postoji prostor u njihovom tumačenju da sePU ocijeni i primjeni kao mehanizam koji je u kontekstu ispunjenja ustavnih načela, odnosno da u Ustavu postoji osnovi za donošenje odredbi o PU.


2. Ustav Federacije Bosne i Hercegovine

Ono što je rečeno za ustav BiH u smislu razgranjenja odnosa različitih nivoa vlasti, može se reći i za ustav Federacije. Naime Federacija je složena organizaciono-teritorijalna jedinica, i ustav se uglavnom bavi pitanjima razgranjenja nadležnosti između Federacije (entiteta) i kantona/županija, u skladu sa okvirom koji je dat Ustavom BiH. Ustavom Federacije određene su sljedeće nadležnosti (radi se o nadležnostima koje su bitne za temu o kojoj govorimo):
ISKLJUČIVA NADLEŽNOST FEDRACIJE:

- Utvrđivanje ekonomske politike, uključujući planiranje i obnovu i politiku korištenja zemljišta na federalnom nivou
- Utvrđivanje energetske politike, uključujući raspodjelu između kantona i osiguranje i održavanje potrebne infrastrukture

Ovim odredbama je određena nadležnost Federacije u oblastima koje su u uskoj vezi sa zaštitom životne sredine i koje su jako bitne kada se govori i razmišlja o eventualnim investicijama koje mogu od investitora zahtijevati izradu studije o PU. Ne ulaze dublje u analizu samog sadržaja što to može biti predmet investicije i kako će se raditi i što će sadržavati eventualna studija o PU, ove odredbe su značajne za određivanje stvarne nadležnosti kod eventualnih postupaka. Naime, saglasno ovim odredbama ustava, za eventualno rješavanje zahtjeva i PU, biće nadležni entitetski (federalni organi uprave, odnosno organi koje odredi akt na federalnom nivou).

ZAJEDNIČKA NADLEŽNOST FEDERACIJE I KANTONA/ŽUPANIJA

Ustav Federacije predviđa i zajedničku nadležnost, odnosno oblasti u kojima Federacija i Kantoni/Županije nose zajedničku odgovornost za realizaciju prava svojih građana. U ovu grupu aktivnosti, između ostalog spadaju i:

- Politika zaštite životne sredine;
- Korištenje prirodnih bogatstava.

ISKLJUČIVA NADLEŽNOST KANTONA/ŽUPANIJA:

Ustav Federacije, potom, određuje sljedeće oblasti, kao isključivu nadležnost Kantona:

- Donošenje propisa o korištenju lokalnog zemljišta, uključujući zoniranje;
- Donošenje propisa o lokalnim postrojenjima za proizvodnju energije i osiguranje njihove dostupnosti.

S obzirom da sve naprived navedene odredbe ostavljaju dosta prostora za tumačenje, u vrlo osjetljivoj oblasti, biće neophodno konkretizovati nadležnosti u aktima kojima će se detaljnije govoriti o ovim pitanjima. Činjenica da životna sredina zadire u mnoge oblasti života koje su regulisane specijalnim zakonima (prostorno planiranje, vode, šume), nameće još veću obavezu vrlo osjetljivog pristupa i usklađivanja propisa na istom nivou, a posebno kada postoje situacije koje mogu proizvesti konflikt nadležnosti između različitih nivoa vlasti (entitet – kanton).

PU je posebno dizajniran mehanizam, koji jednu aktivnost/projekat posmatra iz više uglova, na vrlo precizan način, ponekad vrlo detaljan, tako da je velika vjerovatnoća da će se dešavati situacije preklapanja nadležnosti kod rješavanja postupaka o procjeni uticaja. Ovo je veliki izazov, koji u praksi može dovesti do
nemogućih situacija”, tako da je vrlo realno i neophodno vrlo precizno definisati kriterije koji će omogućiti razgraničenje nadležnosti u svim situacijama.

Osim odredbi o razgraničenju nadležnosti, ustav Federacije nema odredbi koje bi određivale ili mogle imati uticaj na samu materiju životne sredine, odnosno mehanizma PU.

**Ustav Republike Srpske**

Bitna razlika, gledano iz aspekta organizacione strukture i pravnog sistema, između dva entiteta je ta što je RS organizovana kao jedinstven entitet (bez kantona), a Federacija, kako je napravljeno rečeno, je klasična složena zajednica. Zahvaljujući jednostavnosti strukture, RS ima potpuno drugačiji ustav, koncipiran tako da pohišće određuje sadržaj prava (normalno na vrlo uopšten način), jer nema potrebe da odvaja prostor za definisanje nadležnosti, pošto nema nižih jedinica koje imaju zakonodavnu vlast. U RS, zakonodavnu vlast ima isključivo Republika (entitet), u skladu sa Ustavom BiH i Ustavom RS.

Ustav RS je podijeljen u tematske odjeljke. O pravu na zdravu životnu sredinu govori se u odjeljku II — Ljudska prava i slobode. Samim svrstavanjem prava na životnu sredinu u ovaj odjeljak napravljen je veliki iskarak u korist ovog prava, jer se svrstava u rang osnovnih ljudskih prava i osnovnih sloboda.


Svako je u skladu sa zakonom, dužan da u okviru svojih mogućnosti štiti i unapređuje životnu okolinu.”

Odredba je dosta uopštena, ali s obzirom da je to ustavna odredba, daje osnovo da se očekuje da će oblast životne sredine uživati dužnu pažnju i da će biti regulisana na način koji će omogućavati da građani RS dobiju adekvatnu pravnu podlogu i zaštitu prava na zdravu životnu sredinu.

**U ODJELJU III – EKONOMSKO I SOCIJALNO UREĐENJE, USTAV RS NAVODI SLJEDEĆE:**

Čl. 50.: “Ekonomsko i socijalno uređenje se zasniva na ravnopravnosti svih oblika svojine i slobodnom privređivanju…”

Član 52.: “Slobodno preduzetništvo se može zakonom ograničiti radi zaštite interesa Republike, čovjekove okoline, zdravlja i bezbjednosti ljudi”.

Odredba iz člana 50. je logična posljedica opredjeljenja na zasnivanje odnosa na bazi slobodnog tržišta, uz jednak pravni tretman svih oblika svojine, što je navedeno i u principima Ustava BiH. Ipak, odredba člana 52. je odredba koja dozvoljava ograničenje slobodnog preduzetništava u određenim situacijama, a za potrebe ove prezentacije, posebno je bitno što su interesi životne sredine navedeni kao osnov za primjenu ograničenja.

Mogućnost ograničenja slobodnog preduzetništva je osjetljivo pitanje jer direktno se dovodi do ljudskih prava i ustavnih temelja zemlje. Sigurno da će se u konkretnim situacijama, kada bude potreba da se odredba člana 52. primjeni, doći do konflikta i moraće se iznalaziti rješenje koje će ponuditi stručan odgovor na pitanje da li postoji konflikt prava na slobodno preduzetništvo i članom 52.
zaštićenih prava. Ako se koncentrišemo na pitanje životne sredine, PU bi bio taj indikator u kojoj mjeri treba ograničiti pravo na slobodno preduzetništvo. Osnovna funkcija PU kao mehanizma i jest usklađivanje interesu investitora da ostvari što veći profit (kojem je zaštita životne sredine u pojedinim slučajevima i na kraću rok smeta) i građana koji imaju pravo da žive u adekvatnoj životnoj sredini. Jednom riječju, odredbom člana 52., mada nije direktno spomenuta, PU dobija pravo građanstva u pravnom uređenju RS.

Isticanjem odredbi ustava BiH i oba entiteta, te njihovim vrlo kratkim i usmjerenim tumačenjem, trebala se stvoriti slika o postojanju ustavnog utemeljenosti PU u pravnom sistemu u BiH i entitetima. Kako je rečeno, ustav je najviši akt, koji definiše osnovne odnose u državi i društvu. Preciznije pravno određenje pojedinih oblasti, uređuje se zakonom, a ako postoji potreba i osnov i podzakonskim aktima. U BiH postoji potreba uređenja životne sredine. Trenutna situacija je ta da entiteti imaju nadležnost u ovoj oblasti, ali nijedan entitet nema zakon o zaštiti životne sredine. Pojedine odredbe koje dotiču ovaj segment mogu se pronaći u nekim drugim aktima, ali sve te odredbe su nesisitematizovane i nisu uskladene jedna sa drugom.

Entiteti su još 1997 izradili nacrte zakona, koji u svojim tekstovima imaju odredbe koje se direktno ili indirektno odnose na PU. S obzirom da su tekstovi još u formi nacrta i za očekivati je da će oni biti unapređeni do usvajanja zakona, u ovom momentu, nacrt Federacije je mnogo sistematičnije i preciznije regulisao pravni okvir i proceduru vezani za PU.

**Nacrt zakona Federacije Bosne i Hercegovine**

U članu 25. Ovog nacrta navedeno je da: “Vlada ustanovljava Savjet za zaštitu okoliša” (stav 1.). “Savjet daje mišljenje, prijedloge i procjene o procesu usaglašavanja pitanja ekonomskog razvoja i zaštite okoliša” (stav 2.). Odredba definiše ustanovljavanje Savjeta, te određuje nadležnosti Savjeta, bazirajući funkciju upravo na realizaciji osnovnog principa, održivog razvoja. Zakon ovdje ne spominje izričito PU, ali čitav kontekst stava 2. upućuje da bi jedan od najvažnijih operativnih mehanizama bio upravo davanje mišljenja o PU, kao i o usaglašavanju interesa investitora (ekonomskog razvoja) i zaštite prava građana. Sastav Savjeta će uključivati i predstavnike NVO, čime će se ostvariti i formalnopravni okvir za učešće javnosti u procesu ocjenjivanja studije o PU.

Nacrt Federacije poseban odjeljak posvećuje zaštiti okoliša (odjeljak 5. – Provodenje zaštite). U ovom odjeljku percizirano je, između ostalog, i sljedeće:

- Postoji obaveza pređržavanja i procjene uticaja na okoliš, kao konkretna realizacija principa prevencije;
- Federalno ministarstvo određuje aktivnosti koje podliježu izradi studije o procjeni uticaja;
- Studija o procjeni uticaja se dostavlja na razmatranje nadležnom organu u toku postupka, svakako prije izdavanja odobrenja za izvođenje predmetne aktivnosti.
Ovim odredbama vrlo precizno je određena obaveznost izrade studije o PU, precizno je utvrđeno da je Federacija (entitiet) nedržavna da odredi aktivnosti koje potpadaju pod ovaj režim, te je određeno da studija predstavlja bitan sastavni dio zahtjeva i postupka za odobrenje, odnosno investitor mora podnijeti studiju o PU ukoliko želi da mu se predmetna aktivnost odobri.

Zakon ide i dalje, određujući da ministarstva na nivou kantona/županija mogu donijeti posebne odluke o aktivnostima koje podliježu izradi studije PU, čak i ako te aktivnosti nisu navedene u odluci Federacije. Ovim je data mogućnost Kantonima da pomoću kriterija za dobijanje odobrenja za pojedine aktivnosti. Sigurno da se ovom odredbom niti specifični interesi kantona, koji zavisno od svojih sopstvenih interesa, mogu još restriktivnije odrediti aktivnosti koje su, s obzirom na lokalne prilike, u krugu aktivnosti koje potpadaju pod režim izrade studije o PU.

Za samu izradu studije, Nacrt predviđa da “studiju izrađuje javna institucija.” Ova odredba može unijeti zabunu, jer ako se striktno tumači, može se doći do zaključka da pravo da izrađuje studiju ima samo javni sektor (državne organizacije), što je proteženje javnih institucija (institucija koje su bazirane na javnom — državnom kapitalu), odnosno u direktnoj suprotnosti ustavnog načela da su svi oblici svojine jednaki u tržišnoj utakmicici. Da ne bi došlo do zabune, bilo bi dobro ovu odredbu izmijeniti, bar utoliko da državni organi postavljaju kriterije (stručna osposobljenost kadrova, dovoljan broj stručnjaka različitih profila, određen nivo tehničkih kapaciteta itd) koje institucije treba da zadovolje da bi ušle u krug potencijalnih institucija koje imaju pravo da izrađuju studiju. Ovim bi se postigla zaštita u smislu da ne bi bilo protivustavne opstrukcije, a istovremeno bi se izbjegla mogućnost da studiju izrađuju institucije koje objektivno nemaju mogućnosti da kvalitetno urade posao.

Federalno ministarstvo određuje Komisiju za ocjenu studije. Nacrt ne određuje sastav ove Komisije, ali činjenica je da bi članovi morali biti vrhunski stručnjaci, kako i predstavnici NVO, čime bi se postigla i stručnost, ali i učešće javnosti u ovom postupku, što je vrlo ozbiljan trend i zahtjev, kojem se u međunarodnom kontekstu daje velika važnost. Komisija daje mišljenje o studiji, a konačnu odluku po zahtjevu donosi ministarstvo.

Nacrt Federacije, osim navedenog, određuje i dužnost ministarstva da “o aktivnosti informiše drugu zemlju ukoliko bi aktivnost mogla da ima uticaj na tu zemlju”. Ovim je Nacrt Federacije, bar djelomično, ispuni zahtjev iz Espoo Konvencije (Konvencija o procjeni uticaja u međunarodnom kontekstu), prema kojoj je investitor dužan da obavjesti javnost druge zemlje o aktivnostima koje mogu imati uticaj na tu zemlju.

Što se tiče proceduralnih odredbi, Nacrt navodi da protiv odluke ministarstva (odluka u upravnom postupku) nije dozvoljena žalba, dakle odluka je konačna u upravnom postupku, ali je dozvoljena mogućnost pokretanja upravnog spora pred nadležnim sudom.

Nacrt Federacije je jasno postavio pravni okvir za uvođenje studije o PU u proces izdavanja odobrenja aktivnosti koje mogu uticati na životnu sredinu, postavio je dosta jasne parametre za razgraničenje nadležnosti, ostavio mogućnost za bolje preciziranje podzakonskim aktima. Takođe, s proceduralne strane, postoji dosta
dobra i logična osnova po kojoj je svakom budućem investitoru jasno kako da pokrene i vodi postupak za odobrenje svoje aktivnosti.

Svakako da postoji potreba dodatnog usavršavanja ovih odredbi, pojedini detalji treba da budu izmijenjeni, ali s obzirom na postojanje dobrog okvira to ne bi trebao biti težak posao.

**Nacrt zakona u Republici Srpskoj**

Za razliku od Nacrta Federacije, nacrt RS nema sistematisovane odredbe o PU, kako iz aspekta sadržaja, tako ni iz aspekta procedure. Odredbe koje se odnose, ili se mogu odnositi na PU su više u formi načela, nego u formi preciznih obavezujućih normi.

Član 4. Nacrta određuje da "Republika usklađuje svoj privredni i društveni razvoji s ciljevima i principima zaštite životne sredine." Ovo je vrlo široko postavljena odredba kojom se određuje prihvatanje principa održivog razvoja, te se može iskoristiti kao zakonski osnov za određivanje obaveze izrade studije o PU u pojedinim slučajevima. Naglašena je nadležnost Republike (entiteta), ali s obzirom na ukupno ustrojstvo RS, podjela nadležnosti nije toliko bitan segment kao u Federaciji (entiteti – kanton).

Nacrt u članu 7. kaže: "Investitor je dužan da izvrši stručnu analizu ekoloških uticaja objekata i poduhvata na životnu sredinu, da planira i sprovede mjere kojima se sprječava ugrožavanje životne sredine." U tumačnju ove odredbe može se, kao jedan od mehanizama za realizaciju planiranja i sprečavanja ugrožavanja uzeti u obzir i studija o PU, ali dosta široka formulacija ostavlja dosta nedoumica, a glavni akter prevencije je investitor. Nije proedvifen postupak koji obavezuje investitora da na određen način postupa, nego je investitoru data mogućnost da sam izabere način i sredstvo sprovođenja mjera zaštite životne sredine u svakom konkretnom slučaju. S obzirom na osnovnu intenciju investitora da uveća profit (smanji troškove), ostaje dosta prostora za manipulisanje, što bi dovelo do komplikovanih situacija u praksi.

Sljedeća odredba koja se odnosi na PU je da su "Preduzeća i drugi privredni subjekti u sklopu svog poslovanja dužni da obezbeđe ugrađivanje unutarnjih mjera zaštite životne sredine u okviru investicionih i proizvodnih troškova," ponovo dosta uopštena odredba, koja postavlja određene finansijske obaveze pred investitora, ali opet sa dosta mogućnosti elastičnog tumačenja i primjene u praksi. Nisu navedeni parametri o uslovima pod kojim bi investitor trebao planirati troškove, niti je jasno koliki to iznos treba da bude, na šta da se odnosi i kada je obavezno i kako treba odvajati ova sredstva i kako ih trošiti.

Nacrt RS nema odredbi koje bi upućivalo na postupak dobijanja odobrenja za aktivnost, a koje bi upućivalo na izradu studije o PU, što je još jedna manjkavost nacrta u RS. Mada ova prezentacija nema za cilj određivanje budućih aktivnosti, neophodno je pristupiti dopuni teksta nacrta koji bi se odnosio na PU.

**DJORDJE STEFANOVIĆ**
Završne naznake

Naprijed ponuđeni tekst je pokušaj da se na jednom mjestu što više kaže o PU u pravnom sistemu u Bosni i Hercegovini. Vrlo je važno da se PU uvede u pravni sistem i u život u BiH, jer nakon godina destrukcija, očekuje se značajan nivo aktivnosti na obnovi zemlje, što svakako podrazumijeva i privredni rast, izgradnju, rekonstrukciju i ponovno puštanje u rad postojećih proizvodnih pogona. Iskustvo govori da je privreda BiH za svoju osnovu imala industriju koja je bila veliki zagadač. Da se ne bi ponavljala stara negativna iskustva, bilo bi jako dobro da se institutu PU posveti dužna pažnja. U cjelokupnom kontekstu dešavanja u BiH, preko dosljedne i racionalne primjene PU, ostvarili bi se značajni rezultati, kako u korist privrede, tako i u korist prava građana na život u adekvatnoj životnoj sredini.

Izrada tekstova zakona o životnoj sredini je aktuelan proces u BiH, dosta stvari je otvoreno i postoji mogućnost da se u ovoj fazi stvari mijenjaju. Neka pozitivna iskustva i trendovi postoje, treba ih podržati, a svakako treba i naprijed i usvajati i pozitivna iskustva drugih, te plasirati vlastite ideje na osnovu opšteprihvaćenih principa.

Uporedo sa razvojem legislative, neophodno je raditi na stalnom institucionalnom jačanju sektora životne sredine, na jačanju kadrovnih i tehničkih potencijala koji će biti u mogućnosti da obezbijede prosperitetnu budućnost, a da istovremeno očuvaju životnu sredinu.
This paper explains the background to Directive 85/337/EC, as amended, and its implementation in the UK.

**ORIGINS OF THE DIRECTIVE**

The European Commission formally announced its intention of making proposals on EIA in its second action programme on the environment of 1977. This acknowledged that the inspiration for a Directive came not from Member States’ land use planning procedures or their procedures for authorising industrial plant, but from the US National Environmental Policy Act 1969 (NEPA). The Commission had already asked for a consultants’ report on Environmental Impact Assessment (EIA), and between 1977 and 1980 it produced 20 internal drafts before formally proposing a Directive in 1980.

Although the Commission’s proposal was very different from the NEPA requirements, it did borrow the idea of the preparation of an environmental statement by the developer. The original proposal was effectively for two assessments, the first forming part of the published information provided by the developer, the second prepared and made public by the competent authority. The latter was subsequently dropped.

**UK Concerns**

Although the UK fully supported the principle of EIA, and environmental issues had long been taken into account by UK competent authorities when considering applications for development consent, initially we were not persuaded of the need for the Directive or for legislation in this area. Among the concerns were:

- the difficulty in defining which projects should be subject to EIA;
- the likelihood of disputes and litigation about aspects to be covered in an EIA; and
- delays arising from the need to carry out additional consultation.

The UK was not alone in having reservations about the early EIA Directive. Denmark, for instance, expressed a concern about proposals adopted by its national Parliament, as a result of which the exception now at Article 1.5 (proposals adopted by acts of national legislation) was introduced. While recognising
the need for the exception, the UK Parliament also recognised the benefits and requirements of the Directive. It agreed to amend its own Parliamentary Standing Orders (of procedure) so that proposals subject to approval by an Act of National Legislation would also be subject to EIA.

**DIRECTIVE 85/337: REQUIREMENTS**

The Directive was formally adopted on June 27, 1985. Its main requirement is that, before consent is given for certain development projects, an assessment must be made of the effects they may have on the environment, so that whoever gives consent is aware of the consequences. To enable the assessment to be made the developer has to supply information, and the public and certain authorities have to be consulted.

Significantly, the requirement is only a procedural one: that an assessment is carried out. There is no obligation on Member States to refuse consent if projects are assessed as being damaging to the environment.

The projects to which the Directive applies are listed in either Annex 1 or Annex 2. Projects in Annex 1 are subject to EIA in every case. Until the Directive was amended in 1997 there were nine types of project in this Annex, including oil refineries, large thermal power stations, nuclear power stations and reactors, iron and steel works, installations for extracting and processing asbestos and installations for the incineration, treatment or landfill of hazardous waste: in other words, projects which by their nature are clearly likely to have significant environmental effects.

Annex 2 covers a large number of projects brigaded under 12 generic headings, such as agriculture, extractive industry, energy industry, food industry, chemical industry and infrastructure projects. Annex 2 projects are subject to EIA if Member States consider them likely to have significant effects on the environment by virtue of their nature, size or location.

The Directive (as slightly amended by the 1997 Directive) requires the direct and indirect effects on the following four factors to be covered in the EIA:

- human beings, fauna and flora;
- soil, water, air, climate and the landscape;
- material assets and the cultural heritage; and
- the interaction between the above.

The developer must supply, in the form of an Environmental Statement, at the very least a description of the proposed project with information on the site, design and size; a description of the “measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects” — commonly called mitigation measures; the data required to identify and assess the main effects the project is likely to have on the environment; and a non-technical summary of all this information. The aim should be to provide as systematic and objective an account as possible of the significant environmental effects to which the project
is likely to give rise. The non-technical summary is designed to help non-experts to understand the findings.

Directive 85/337 left the detailed arrangements for public consultation to be decided by individual Member States. However, it did require:

- any request for development consent and the information supplied by the developer in the environmental statement to be made public;
- authorities with specific environmental responsibilities likely to be concerned by a particular project to be given an opportunity to express their opinion; and
- where a project is likely to have effects in another Member State, the developer’s information to be forwarded to that State and to serve as a basis for any consultations between the two States.

AMENDING DIRECTIVE 97/11/EC


The amending Directive considerably extended its scope in terms of projects covered. The types of project in Annex 1 — for which EIA is mandatory in every case — was increased from nine to 21. Most of these were previously solely in Annex 2. For example, all “dams and other installations designed to hold water or store it on a long-term basis” had been in Annex 2 to Directive 85/337, but such projects where the new amount of water exceeds 10 million cubic metres are now in Annex 1, while those below that capacity remain in Annex 2. Similarly, installations for the intensive rearing of poultry or pigs, formerly in Annex 2, are moved to Annex 1 if they have more than 85,000 places for broilers and 60,000 for hens, 3,000 places for production pigs and 900 for sows. A number of completely new projects have been added to Annex 2. These include wind farms, permanent camp and caravan sites, and theme parks.

The new Directive also introduced some important procedural changes:

- developers may ask the competent authority for formal advice on the scope of information to be covered in the environmental statement;
- the competent authority must make public its decision as to whether assessment is needed or not — called a screening opinion;
- the environmental statement must include an outline of the main alternatives studied by the developer and an indication of the main reasons for the developer’s choice; and
• the competent authority must make public its decision whether or not to give consent and its reasons.

The Directive also introduced selection criteria which must be taken into account in making the determination. The criteria are listed under these three headings:

• characteristics of projects (e.g. size, use of natural resources, pollution and nuisances);

• location of projects (e.g. existing land use, regenerative capacity, whether in a densely populated area); and

• characteristics of potential impact (e.g. duration, frequency and reversibility).

UK APPROACH TO IMPLEMENTATION

As is probably the case with most other Member States, the UK has incorporated the requirements of the Directive into an existing consent regime. We have a well-established planning system, which originates from legislation introduced in 1947. The operational framework is set nationally in law and policy. Policies are set primarily by the central government, but are progressively more refined at local levels. Implementation of the law and policy is mainly a matter for local government, with the central government (the Secretary of State) as the final authority. At the core of the system is the development plan, which sets out the longer term land use policies and land allocations for a particular area. Development plans are prepared by local planning authorities on the basis of national and regional planning policy, and are the basis for deciding planning applications to the local planning authority, which is the “competent authority” for the purposes of the Directive. The system ensures that local needs and interests are taken into account at the planning stage. To avoid having to devote too much time and expense in producing detailed plans for a project which might be refused planning permission, developers normally submit “outline plans” for approval, sufficient to give the local planning authority an idea of the type and scale of development proposed, but leaving the details (“reserved matters”) until later in the process for approval.

The EIA provisions in the Directive have been incorporated into this system as far as possible. The requirements of the regulations must be fully met at the outline application stage. This means that, when an outline planning application is made, the local planning authority must satisfy itself that it has sufficient information available on the environmental effects of the proposal to enable it to determine whether or not planning permission should be granted in principle.

Most of the projects — about 75 percent — listed in the Directive are covered by the planning regime described above, and separate implementing regulations have been introduced for England and Wales, Scotland, and Northern Ireland. Where the EIA procedure reveals that a project will have an adverse impact on the environment, it does not, of course, follow that planning permission must be
refused. It remains the task of the local planning authority to judge each planning application on its merits within the context of the development plan, taking account of all material considerations, including the environmental impacts.

A number of projects in the Directive (the other 25 percent or so) are not covered by these arrangements and are subject to different consent regimes. This involves some 25 separate pieces of legislation, for which eight Government Departments are responsible. Construction of motorways is an example of such a project. It requires approval by central, not local, government. When the Regulations were drawn up it was thought unsatisfactory for a scheme which might cover a number of separate local planning authorities to depend on separate authorisations from each authority. But extensive consultation between central and local government is, of course, necessary. Other examples of projects subject to separate consent regimes outside the planning system are gas pipelines, afforestation, land drainage works, railways, inland waterways, ports and harbours, and nuclear power stations.

METHOD OF IMPLEMENTATION

The method of implementation has been to use the wording of the Directive as far as possible. Thus, the schedules in our EIA planning regulations precisely mirror the Annexes in the Directive. The basic provision of the regulations prohibits a local planning authority from granting planning permission for an Annex 1 development or an Annex 2 development that is likely to have significant effects on the environment, unless the EIA procedures have been followed. The main features of the procedures are:

**Screening**

Screening is simply working out whether or not an EIA is required. With an Annex 1 project there is little difficulty other than to identify it as such. For Annex 2 development the local planning authority must consider every planning application to see whether an EIA is required, using the selection criteria described in paragraph 16, above. Developers may ask the local planning authority for a screening opinion before they put in a planning application. If the authority fails to give an opinion within three weeks, or gives an opinion with which the developer disagrees, the developer may appeal to the Secretary of State for a screening direction. Once the Secretary of State has given his view, the application is still before the planning authority. Only the question of EIA is decided by the Secretary of State.

**Thresholds and criteria**

Article 4 of the Directive allows for screening of Annex 2 projects to be done either by a case-by-case examination or by use of thresholds, or a combination of the two. The UK has set thresholds and criteria for nearly all Annex 2 projects. Most of these are by area. For example, developments relating to some industries (food, textile, leather, wood, paper and rubber) need only be considered for EIA if the area of new floorspace exceeds 1,000 square metres. Similarly, proposals for
permanent camp sites or caravan sites (under the Tourism and Leisure generic category) need only be considered for EIA if the area of the development exceeds one hectare. There are other criteria, for example, an installation for hydroelectric energy production is considered only if it is designed to produce more than 0.5 megawatts. In some cases there are alternative combinations of criteria; for example, for gas pipeline installations that the area of the work exceeds one hectare or that the installation has a design operating pressure exceeding seven-bar gauge.

These thresholds and criteria enable small developments which could not possibly have significant effects on the environment to be excluded, but have been set fairly low to ensure that nothing with a possibly significant effect could slip through the net. They do not apply where a proposed development is to be located wholly or partly in what we call a “sensitive area”. The regulations define precisely what sensitive areas are, but they include Areas of Outstanding Natural Beauty, National Parks, scheduled monuments and European sites for the purposes of the Habitats Directive. Any proposed development within one of these areas must therefore be considered for the need for EIA whether or not it exceeds the relevant threshold or criterion.

**Indicative criteria**

Above these *de minimis* thresholds, we have included “indicative” ones in our published advice to local planning authorities. These are intended as guidelines only. They indicate the point or threshold at which EIA is more likely to be required, and are therefore set higher than the statutory thresholds. For example, the applicable threshold in our regulations for “intensive fish farming” is that the installation resulting from the development is designed to produce more than 10 tonnes of dead weight fish per year; under that weight the planning authority does not have to consider whether EIA is necessary. As a guideline to planning authorities, however, we have advised that developments designed to produce more than 100 tonnes of dead weight fish per year will be more likely to require EIA. In the example in paragraph 23, above, for hydroelectric energy production we advise that EIA is more likely to be required for new developments which have more than 5 megawatts of generating capacity, as opposed to the 0.5 megawatts threshold in the regulations.

It should be emphasised again that these are guidelines only, and authorities must screen for EIA any proposals that exceed the statutory thresholds. Where the judgement is that it will have a significant effect, then EIA must be carried out. The Regulations do not grant discretion to waive the requirement for EIA. This approach is one that has found favour with the European Court of Justice and also the EC. It avoids the sole use of thresholds that, while simple to understand and uniform in application, may not always offer the flexibility to take account of different environmental conditions and receptors. There is also a danger that setting thresholds may be “illegal” in that, if inappropriately set, they may serve to exclude whole categories of project from the need for EIA. But this approach is not without cost. It requires skilled and competent professional people to carry out the analysis. It can lead to challenges alleging unreasonable or inconsistent decisions and it may be more time-consuming. But it operates well within the UK’s established procedures.
“Significance”: Secretary of State advice

The advice the UK government gives to its planning authorities in the light of the selection criteria is that, generally, EIA will be needed for Annex 2 projects in three main types of case:

- major developments of more than local importance;
- developments proposed for particularly environmentally sensitive or vulnerable locations; and
- developments with unusually complex and potentially hazardous environmental effects.

Publicity and Consultation

Under the planning system there are well-established procedures relating to publicity for planning applications, through site notices and local newspapers. When an Environmental Statement is submitted with an application, the local planning authority must also publicise where the Statement may be inspected free of charge (typically the authority’s own offices or a public library) and where copies may be obtained (there may be a charge for copies to cover printing and copying costs). If the Environmental Statement is submitted after the planning application, this obligation falls to the developer rather than the planning authority. Copies of the Statement must also be sent to the Secretary of State.

The regulations also require “consultation bodies” to be sent a copy of the environmental statement and planning application. The consultation bodies include English Nature, the Countryside Commission and the Environment Agency, together with other bodies prescribed in associated legislation according to the type of development concerned. This requirement to consult supplements 1992 regulations that require public bodies to make environmental information available to any person who requests it.

Scoping

Scoping is about agreeing on the main effects the proposed development will have on the environment and the issues to be addressed in the Environmental Statement. It is the responsibility of the developer to define the scope of the assessment. There is no requirement for the developer to consult with the planning authority, or others, about the scope of the assessment, but we recommend that he does. As mentioned above, before submitting a planning application, the developer is now able to ask the planning authority to give a formal scoping opinion on information to be supplied in the Statement. Where he does so, the authority is required to give a response within five weeks. The developer may request a screening and scoping opinion at the same time.

If the planning authority is asked to give a scoping opinion, it must consult the statutory consultation bodies and the developer within those five weeks. If the authority fails to give a scoping opinion within five weeks, the developer can ask the Secretary of State for his view (scoping direction). A scoping opinion, or a direc-
tion from the Secretary of State, is intended to avoid further areas of investigation being identified at a late stage, and is not binding on either the planning authority or the developer. The regulations provide for the authority or the Secretary of State to require further information if the Environmental Statement is considered inadequate, and a developer who ignores a scoping opinion or direction is more likely to be subject to calls for further information. However, further information may still be sought even after a scoping opinion or direction has been given.

Environmental Statement

In the UK the developer is responsible for preparing the Environmental Statement and for meeting all the associated costs. He may choose to engage consultants for some or all of this work. In our guidance material we encourage developers to discuss at an early stage the preparation of the Statement with the local planning authority and with statutory consultees and other bodies, where appropriate. We also recommend the use of specialists to carry out the assessment.

The Environmental Statement is clearly central to the whole EIA process, and the UK has prepared guidance on preparing the Statement. This includes advice on the following: the need to adopt a systematic approach; defining the brief; determining content (scoping); establishing a programme and timetable; assembling a project team; establishing environmental trends; initial consultations; establishing significant environmental issues; defining requirements for baseline studies; considering alternatives (need/demand); describing resources and receptors; examining pathways; predicting the nature of impacts and magnitude of effect; selecting prediction methods; dealing with uncertainty; proposals for mitigation; assembling the Statement; the structure and content of the Statement; the need for a method statement; the non-technical summary; reporting on the impacts; evaluation of the impacts; and proposals for mitigation. The guidance was issued in 1995 and was well received.

Evaluation of Environmental Statement

Unlike some countries, (e.g., the Netherlands) where there is an independent review body or where the national Government reviews the information provided in the Environmental Statement, in the UK the responsibility for evaluating the environmental information falls to the competent authority that will make the decision on whether development consent is to be given. That is not an easy task, and may involve having to consider detailed technical and scientific information across different disciplines.

Most applications are considered by professionally trained staff employed within the competent authority, who have detailed knowledge of their local areas and environment. But the competent authority is also required to consult with the statutory consultation bodies. There is also the opportunity to consult with local amenity groups concerned with conservation, where there is much local knowledge and expertise. The authority can also seek other outside help — from consultants or from independent bodies, such as the Institute for Environmental Assessment.
Summary

PERCEIVED BENEFITS OF EIA

In spite of our original reservations, it would be wrong to suggest that we still harbour concerns about the Directive. There have been some difficulties. The wording of the Directive is not always precise, and in some cases it allows for differing interpretations of whether a proposed development is within the scope of the Directive. There is no doubt, too, that the Directive has offered those opposed to particular developments an opportunity to challenge a decision on the grounds that EIA has not been carried out, or that it has not been carried out adequately. In the UK, the EIA Directive has possibly given rise to more complaints to the EC about failure to apply the Directive than has any other single piece of EC legislation. The challenges are mainly made on procedural grounds arising from failure to comply with the process, rather than from a deliberate attempt to ignore the environmental effects. But such complaints are decreasing. And as competent authorities become more used to making and recording screening decisions, procedural complaints should further decline.

We consider that the benefits of EIA outweigh any of the difficulties. If properly carried out, EIA can be helpful to all concerned with major projects. For developers, the preparation of an environmental statement in parallel with project design provides a useful framework within which environmental considerations and design development can interact. Analysis of environmental considerations may indicate ways in which a project can be modified to anticipate possible adverse effects. This can make the formal planning approval stages smoother. In many cases, what the requirements do in practice is bring forward to an earlier stage in a project’s development work which would in any case have to be undertaken later.

For planning authorities and other public bodies with environmental responsibilities, EIA provides a basis for better decision-making. It should mean that the implications of a new project are more thoroughly analysed before a planning application is made, and that more comprehensive information is provided with the application. To that extent, quicker decisions may also be possible.

Access to the Environmental Statement — and particularly the summary in non-technical language — should help the general public to understand the implications of and become involved in proposals of concern to them. Before EIA the public’s interest was often expressed as concern about the possibility of unknown or unforeseen effects. The consultation requirements ensure greater transparency by providing the opportunity for a wider contribution to the decision-making process. You may be certain that many of our NGOs are very active in making known their views of certain proposed developments.

EIA ACTIVITY IN THE UK AND FUTURE DEVELOPMENTS

To put the EIA requirements in context, it may be helpful to include some idea of the level of EIA activity in the UK over the past 10 years. There are some 500,000 planning applications to local planning authorities each year. Since the EIA Directive was introduced in 1988 it is estimated there have been almost 3,500
Environmental Statements. In the last few years the number has been declining slightly, but, given the changes in the categories of projects subject to EIA, we anticipate that the number will rise again.

There is little doubt that the quality of some of the earlier Environmental Statements could have been much improved and, even though research has shown an improvement in the quality of EIA in the UK, it is likely that up-to-date research would find there is still room for improvement. This is inevitable as the levels of both expertise and expectation increase. We are committed to keeping our threshold levels — both de minimis and the indicative thresholds and criteria — under review to ensure that the levels set do not allow damage to the environment. We intend to commission research shortly to review the present levels.
During the previous decade, most of the former socialist countries, or “countries in transition,” (CITs) have introduced or reformed Environmental Assessment (EA) procedures as a regulatory tool that would halt the environmental deterioration incurred by centrally planned economies and facilitate the transition to more democratic societies (see Table 3). What have been the effects of and lessons learned from these developments?

The present paper summarises the results of the author’s three-year research project (see Table 1), which analysed the evolution of EA systems in transitional countries, their effects and constraints, and opportunities for their future development. The main body of the paper discusses the policy implications of this study, and, more specifically, the rationale for reforming EA systems in CITs, approaches to such reforms, and their common outcomes. The Appendices cover EA legislation in CITs and guide the reader to other sources of information on the topic.

**Why are EA Systems Reformed?**

**PROTOTYPE EA PROCEDURES IN SOCIALIST COUNTRIES**

Prototype EA procedures for evaluating the environmental impacts of planned economic developments existed in many socialist countries since the 1970s. These included planning, design and construction rules and standards, which comprised not only ‘physical’ environmental standards, but also procedures for conducting site investigations and obtaining relevant permits. Sector- or media-specific envi-

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**TABLE 1**

<table>
<thead>
<tr>
<th>Stage</th>
<th>Key tasks</th>
<th>Focus</th>
<th>Main research methods</th>
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<tbody>
<tr>
<td>1</td>
<td>Reviewing current formal provisions for EA</td>
<td>25 countries in transition</td>
<td>Mail survey (38 questions, 44 respondents)</td>
</tr>
<tr>
<td>2</td>
<td>Analysing the history of EA systems</td>
<td>Six CITs: Belarus, Hungary, Kazakhstan, Lithuania, Russia and Slovakia</td>
<td>Field visits, interviews with 38 respondents, review of statistics and documentation</td>
</tr>
<tr>
<td>3</td>
<td>Analysing the evolution of EA practice</td>
<td>One CIT: Belarus</td>
<td>Independent review of more than 200 individual EA records using a specifically designed original methodology</td>
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</table>
Environmental permits were introduced already in the 1960s. Finally, some proposed activities underwent special expert reviews, or ‘expertizas’, which could address environmental issues; but these reviews primarily ensured compliance with technical, economic and other rules, conformity to higher level plans, and horizontal co-ordination between different government bodies. In the USSR, ‘expertizas’ seemed to be more routinely used than in Central Europe. A more proactive approach to environmental planning was represented, for example, by spatial planning in Czechoslovakia, which was considered a “prerequisite for harmony of … environmental … and human aspects in a territory” (EBRD (1994), p.xi). Similarly, the Soviet system of environmental planning incorporated so-called TerKSOPs (“Territorial Integrated Schemes of Nature Protection”). These were frequently elaborated alongside spatial plans to address environmental issues at a more strategic level.

### THE RATIONALE AND GOALS FOR REFORMING EA SYSTEMS

By the late 1980s and early 1990s, many deficiencies of the “socialist environmental appraisals” became evident. In particular, it was clear that they failed to mitigate environmental impacts of socialist economies and to function in market economies and democratic decision-making systems. The socialist environmental assessments were “internal” government procedures, since all their participants represented the state. This often encouraged closed, non-transparent, and informal processes with no independent procedural checks, no clearly defined responsibilities of participants, and a high degree of discretion of officials in charge. Decisions based on such appraisals relied excessively on technical criteria (i.e. sector- and media-specific norms and standards), rather than on views of affected parties. Interdisciplinary evaluations, as well as the consideration of cumulative, synergistic, and indirect impacts, were seldom conducted. The prototype EA procedures were not necessarily applied to activities from diverse sectors and stages of planning with potential environmental impacts. Typically, they were used for project-level developments in particular sectors or of exceptional scale and complexity. Socialist environmental appraisals were also not capable of challenging the overall economic supremacy of socialist planning because strategic decisions were rarely subject to EA and decisions based on EA were not publicly accountable.

### The goals of reforming EA systems in countries in transition

- to expand the coverage of EA procedures so that they address all environmentally significant activities at both the project and strategic levels;
- to address, in an integrated manner, all environmental impacts, not just those regulated by sector- and media-specific standards;
- to ensure that EA findings are used in decision-making and that environmental considerations are not subordinated to economic ones;
- to make EA procedures fully independent of the developers, more transparent and accountable; and
- to meet the external requirements imposed on EA systems by EU EA Directives and the Espoo Convention.
The reforms of socialist environmental appraisals were initiated in response to the recognition of these deficiencies. They were also undertaken in order to meet external demands of harmonising the EA legislation with such international norms as the European Union EA Directives (85/337 and 97/11) and the Espoo Convention on EIA in a Transboundary Context.

**Approaches to EA Systems Reform**

**RELATING TO THE EXISTING SITUATION: TWO TYPES OF EA SYSTEMS REFORM**

A successful reform of an EA system starts with a thorough evaluation of the existing procedures, institutions and capacities. Many CITs have failed to introduce efficient EA procedures because they did not take the existing situation into account and started to design a new system “in a vacuum.” However, attempts to conserve socialist EA procedures, which are gradually becoming irrelevant under new economic and political conditions, have been similarly unproductive. CITs have approached this dilemma in different ways.

Most of the Central and Eastern European and Baltic countries have radically replaced their pre-reform EA provisions with ones approximating the EU EA Directives. On the other hand, most of the Newly Independent States (NIS) of the former Soviet Union have gradually been reforming EA procedures inherited from the USSR. Both the gradual and the radical approach to EA system reform have certain advantages and disadvantages, as summarised in Table 2.

The optimal approach to the EA reform seems to depend upon specific social and economic circumstances as summarised in the last section of the paper.

**DESIGNING AN EA SYSTEM REFORM**

A reform (either gradual or radical) of the EA system in a country in transition is likely to have goals similar to the ones outlined in Box 1. The following components of EA systems have usually been reformed in order to meet these goals:

<table>
<thead>
<tr>
<th><strong>TABLE 2</strong></th>
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<tr>
<td><strong>Advantages and disadvantages of radical and gradual EA system reform</strong></td>
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<tr>
<td><strong>Gradual reform</strong></td>
</tr>
<tr>
<td><strong>Advantages</strong></td>
</tr>
<tr>
<td>Familiar</td>
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<tr>
<td>Politically and economically easier</td>
</tr>
<tr>
<td><strong>Disadvantages</strong></td>
</tr>
<tr>
<td>Old deficiencies may remain</td>
</tr>
<tr>
<td>May become irrelevant with dismantling of the old political and economic regimes</td>
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</table>
• the area of application of EA procedures;
• the rights and responsibilities of participants in the EA process;
• the nature of EA studies and EA documentation; and
• the links of EA findings to decision-making.

The area of application of EA procedures (screening system)

The area of EA application should be defined in such a way that all environmentally significant activities undergo environmental assessment. About 10 CITs (mostly from the NIS) have approached this problem by requiring some form of EA for all activities, independent of their size and nature. This usually results in 100-500 EAs per year per one million of population. Such a form of screening saves resources necessary for preliminary assessment and ensures that all significant activities are covered. At the same time, it imposes a significant burden on both regulatory authorities and developers and results in poor average quality and effectiveness of EAs.

Another widely adopted approach is to require EA not for all, but rather only for certain types of activities, specified in the so-called screening lists. In particular, the Espoo Convention and the EU EA Directives provide such lists of activities on which about two-thirds of the CITs base their screening systems. However, the following considerations need to be taken into account while adopting internationally accepted screening lists.

• The lists contained in Annex I of the EU EA Directives and Annex I of the Espoo Convention cover only very large and complex developments. Those CITs that only require mandatory EA for these types of development often end up with none or just a few EA cases (mostly for internationally funded major projects) and with many significant domestic developments avoiding EA.

• The list provided by Annex II of the EU EA Directive is very broad and contains few specific thresholds. CITs that require mandatory EA for all types of developments listed in Annex II risk “overloading” their systems with smaller projects. As a result, an unacceptable burden is imposed on developers and regulatory agencies and the quality and effectiveness of individual EA procedures suffer.

• Neither of the above-mentioned lists explicitly deals with the issue of reconstructing or expanding existing activities. Nevertheless, such developments constitute the bulk of environmentally significant activities in many CITs. A consistent EA system should clearly indicate which of the reconstruction/expansion activities require EA.

• The EU EA Directives and the Espoo Convention only address project-level developments. At the same time, it is especially important for CITs to have a well-defined screening system for EA of strategic activities (such as policies, plans and programmes) (SEA).
In other words, both the EU and the Espoo Convention screening lists reflect political compromise among the Western European (or UNECE) countries and may not necessarily correspond to specific domestic environmental priorities and capacities. Additionally, no screening list can take account of specific circumstances of a particular development and of the views of affected parties. Consequently, most CITs use other screening methods in addition to screening lists.

Most countries give their competent authorities discretion to initiate EA for activities not included in screening lists. Such arrangements result in between 0.2 and 100 (more often 10-50) EAs per year per one million of population. This approach is still quite unsophisticated and inexpensive and results in a more manageable number of EAs. However, in practice, authorities rarely exercise this discretion, and some or all of the above-mentioned deficiencies of screening lists may be manifested.

Finally in the minority of countries (3-4 CITs), screening lists are supplemented by preliminary assessments, which result in decisions on the need for a full EA. In such systems, 1-10 full EAs per one million of population are conducted. Ideally, this approach can address all significant activities, taking into account local circumstances and the views of affected parties. In practice, preliminary assessments impose additional costs and are often said to duplicate the main procedures. The capacity for undertaking these preliminary assessments may be inadequate and the pressures to skip the full EA may prove overriding. Thus, the practical effect of preliminary assessments in the absence of necessary preconditions may be minimal.

In reforming screening provisions, consideration should be given to the scope of other pollution prevention mechanisms (such as emission and discharge permits), which EA should complement, rather than duplicate, and of the existing institutional capacity to implement screening.

In some CITs, there are few major new developments, and planning and pollution controls for minor developments (including the reconstruction of existing activities) are not functioning properly. In such a situation, a universal EA procedure may apply to activities of smaller environmental significance, but, at the same time, strategic EA may also promote a more environmentally friendly context for such developments. However, when sector- and media-specific environmental permits start to function, when major new developments can be expected, and when there emerges sufficient local capacity to undertake more sophisticated screening procedures, the EA process may be diversified, or its scope may be narrowed.

The roles of participants in the EA process

As mentioned above, the EA systems in CITs are undergoing an evolution from closed and informal procedures only involving state agencies to multi-participant, transparent, formal and accountable processes. This presumes a transformation of the roles of all participants in the EA system, i.e. environmental and other authorities, developers, experts and consultants, the public, NGOs and affected parties. In designing an effective EA system it is useful to consider the roles of these participants at all stages of the EA process (i.e., screening, scoping, EA study, EIS review, decision-making, post-project analysis, etc.).
In many CITs, especially in more politically and economically conservative regimes, EA procedures are still traditionally dominated by state environmental authorities. In more dynamically reforming countries, responsibilities for various stages of EA are devolving to proponents and independent experts and consultants. This broadly corresponds to the “polluter pays principle” and helps to off-load extra responsibilities from the government. However, virtually all CITs face a special challenge in defining and enforcing the rights of the public in the EA process. The recently adopted Aarhus Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters provides a minimal standard for public participation in decisions regarding specific activities (Article 6). According to this Convention, the public should be adequately defined (as involving all interested social groups, not just the local population); it should be notified in a timely fashion about the start of the EA process; it should be given full access to EA documents; public meetings or hearings should be organised prior to authorisation of all activities requiring EA; the final decision should be published and the right to appeal against it as well as against procedural irregularities should be provided.

In reality, very few CITs approach this standard. Reasonable public participation provisions exist and function in at least in some cases in four or five CITs. In an additional five to eight CITs, public participation provisions have significant deficiencies or do not function in practice. In the remaining 15-20 CITs (many of them signatories and some even parties to the Aarhus Convention) public participation provisions are virtually absent.

**Conducting EA studies and documenting their findings**

The usefulness of EA studies significantly depends upon the way their scope is defined, their findings are documented, and their quality is controlled.

A procedure for defining the scope of EA studies (i.e. the geographic area, impacts and alternatives to be studied, the groups to be consulted, the timeline, etc.) is called *scoping*. Formal mandatory scoping procedures, which involve the developer, the competent authorities and the affected parties, are required in six to eight CITs. In several more CITs, scoping is not legally required, but is reported in practice. There is no evidence of legal requirements for, or practice of, scoping in the remaining 10-15 CITs.

Though many countries impose quite extensive requirements on the EA studies, stipulating comprehensive inter-disciplinary evaluation of all impacts and alternatives, such provisions are rarely implemented in practice. Several recent reviews of day-to-day EA activities discovered that in the majority of cases EA studies are limited to media-specific analysis of selected legally regulated impacts of the main (preferred) alternative. It seems that the situation may be improved through making EA requirements more realistic, improving screening and scoping systems (see above), establishing better quality control procedures, and strengthening the capacity for undertaking interdisciplinary EA studies.

The Environmental Impact Statement (EIS) is the main outcome of the EA process. If EISs are used by decision-makers and affected parties the EA system may be considered successful. Approximately 10 out of 28 CITs explicitly require the production of EISs as separate documents, often accompanied by a non-tech-
nical summary. The other CITs stipulate including EA findings in the main project documentation. In the latter case, the use of EA results by affected parties may be complicated because (a) these results are not consolidated and not well presented, and (b) the access to the project documentation may be limited due to its commercial or other confidentiality (whereas, public access to a stand-alone EIS is much easier to secure). Additionally, many CITs reflect EA findings in other documents, such as Environmental Declarations (a short analogue of an EIS), Conclusions of State Environmental Expert Review (‘expertizas’), etc.

**Reviewing EA findings and using them in decision-making**

The absolute majority of CITs have systems for reviewing the quality of EA materials. In most NISs, this is carried out within the framework of the State Environmental Expert Review (SER), which combines the function of quality control and decision-making. In Central and Eastern European countries, the quality of EISs is reviewed in similar procedures, either by competent authorities or by independent experts, and the outcomes of these reviews are normally directly tied to decision-making.

The decision-making based on EA findings is normally the responsibility of Environment Ministries or their regional branches in most CITs. The advantage of this arrangement is that environmental authorities, better than others, can take the environmental implications of proposed developments into account. On the other hand, these bodies have neither the competence nor the mandate to consider the socio-economic implications of planned activities. Thus, a true balance between economic and environmental considerations, as required by the sustainable development approach, cannot be reached under such an arrangement.

On the other hand, in a very small number of CITs the decisions based on EA findings are made not by environmental but rather by local planning authorities (much in the same way as in the UK and some other Western countries). While, in theory, such an approach provides for a more balanced account of economic, social and environmental factors, in practice the latter are often ignored. It seems that passing the responsibility for decision-making to non-environmental authorities can only be effective when the capacity of such authorities is sufficiently developed, the decision-making system is fully publicly accountable, and local politicians are not fully overwhelmed by social and economic priorities.

**REFORMING THE REGULATORY SYSTEM**

A vision of the principal elements (discussed above) of a new or reformed EA system should be transformed into precise legal and regulatory arrangements. Very often transitional countries discover that their own capacities may be not sufficient for doing this and they decide to involve external advisors in the process of developing (amending) EA laws and regulations. This was, for example, the case in Slovakia, Latvia and Lithuania, where Western consultants advised on the development of new EA systems within a framework of special “projects”.

In addition to international advisors, competent and interested domestic actors should be involved in the process of setting up a national EA system. EA provisions are often drafted not only by officials, but also by consultancy firms
(as, e.g., in Hungary), often selected by open tender. Most of the successful EA systems were also discussed publicly at earlier stages of their development and involved “trial runs” (when draft provisions were applied to selected developments to see how they work in reality).

CAPACITY BUILDING AND IMPLEMENTATION

However, introducing comprehensive, clear, consistent and realistic EA legislation is only the first step towards the development of a working EA system. Many CITs have very advanced EA laws but mediocre (if any) practice. The ultimate success of an EA system depends upon the capacity of participants in national EA procedures. Thus, any EA system should feature capacity-strengthening measures, which normally include:

• **training**
  This includes general education for students, training for officials, highly specialised courses for EA professionals, workshops for NGOs and decision-makers and other types of training activity specifically addressing carefully identified training needs of the country.

• **publications and information services**
  Well-developed EA systems are supported by a number of guidelines covering various stages of the EA process, EA of various types of activity or other EA-related topics. For example, in Slovakia, more than 25 EA guidelines have been either commissioned by the Environment Ministry or produced by independent organisations since 1994, when the EA Act entered into force. In addition to national guidelines, EA information services (libraries or Internet sites) may provide access to registries of past EISs, international documents, textbooks and other EA materials.

• **research**
  Any country which is planning the introduction of or has recently introduced an EA system has many research needs in the area of EA. In particular, effective and practicable methodologies and procedures need to be identified, the quality of EA process and documentation constantly verified and the effects of EA application evaluated. Research findings can be used in guidelines, other information services and for training.

• **networking**
  For effective capacity building all resources of a country are best utilised within networks that involve EA practitioners, researchers, educators and other participants. Networks are promoted through conferences, publicly available contact lists, professional associations and periodicals.

Training, information services and research are often provided by specialised organisations called EA (EIA) Centres. Several of those function in transitional countries with effective EA systems (e.g. in Slovakia). EA Centres may be separate organisations, affiliated to universities, academia or NGOs, but they are normally expected to maintain a sufficient degree of independence⁵.
Conclusions

Though most socialist countries had prototype EA procedures for at least two decades prior to the start of political and economic reform at the end of the 1980s, these procedures could only function in the context of socialist economies and one-party political systems. They also failed to meet environmental challenges associated with centrally planned economic development and eventually needed reforming. The reforms of EA systems were typically aimed at enhancing their environmental effectiveness, making EA procedures more transparent and participatory and meeting external obligations arising from the agenda of EU accession or conformity to international conventions.

CITs have chosen either a gradual or a radical approach to reforming EA systems. These approaches have their own advantages and disadvantages. In order to optimise the environmental, economic and democratic effects of EA, its reform should be “in gear” with the political and economic transition and should correspond to the specific needs of the country. Where a “socialist” system is replaced with “advanced” EA provisions in the absence of necessary institutional preconditions (summarised in Box 2), where “advanced” EA provisions are introduced without building the capacity to a similarly “advanced” level, EA does not function in practice, environmental impacts may worsen, and democracy may suffer. Where, on the other hand, EA reform lags behind reforms in other areas, the outdated appraisal system fails to address environmental challenges associated with the process of transition. Moreover, the obsolete EA may become an obstacle to democracy, a market economy, and integration into international institutions.

The key areas of the EA system reform in countries in transition have been the area of application of EA procedures, the rights and responsibilities of its participants (developers, authorities, experts and the public), the nature of EA studies and the usage of EA results in decision-making.

- **The area of application of EA procedures**
  EA should address developments important for the environment of the country, or from the point of view of its international obligations, or which cause public concern. In reforming screening provisions, consideration should be given to the scope of other pollution prevention mechanisms (such as emission and discharge permits), which EA should complement, rather than duplicate, and of the existing institutional capacity to implement screening.

- **The rights and responsibilities of EA participants**
  The definition of the responsibilities of participants in EA procedures should take account of their nature and match their capacities. Traditional state-controlled developers and design institutions might be able to implement pre-reform design rules and standards but may lack the capacity for implementing state-of-the-art EA requirements. The same is true of nascent domestic small and medium-sized businesses. Thus, imposing comprehensive EA requirements should go hand-in-hand with capacity-strengthening measures. The Western EA procedure based on the polluter pays principle may not work in an unreformed economy.
The rights of the public and other affected parties should match the level of the development of civil society. As the process of transition progresses, the reform of EA should take account of gradually diversifying interests of public groups and NGOs. Even when the public interest in environmental matters is apparently lacking, inadequately designed PP provisions might result in costly delays, provided some developments are opposed by strong NGOs. At the same time, NGOs can act as very powerful actors in enforcing EA provisions, provided they have such an opportunity. Finally, there will always be some proportion of the public interested in proposed developments not for environmental, but for social and economic reasons. In the absence of other participatory mechanisms, EA can be a crucial instrument of local democracy.

- **Reforming the nature of EA studies**
  Reforming the nature of EA studies towards the systematic and integrated evaluation of direct and indirect impacts should match the capacity of existing experts to undertake such assessments. A mechanism for an “expert review” may assist in pooling the available expertise for checking the adequacy of some complex EA studies. At the same time, extensive capacity-building measures might be necessary. Introducing advanced EA requirements beyond simply following the standard design rules makes sense when there are major and non-standard (for example, internationally promoted) new developments undergoing EA. On the other hand, the capacity of competent authorities should be sufficient to ensure the quality of interdisciplinary analysis, rather than simply compiling sectoral standpoints.

- **Linking EA to decision-making**
  Linking EA to decision-making may be particularly challenging. Decision-making by environmental authorities might disregard important social and economic benefits of proposed developments or, what is worse, take them into account informally and implicitly. However, decision-making can only be passed to non-environmental authorities when they are fully publicly accountable and not overwhelmed by urgent social and economic priorities.

Finally, an effective EA reform always presumes extensive capacity-strengthening measures such as training, information services, research and networking. Many of these measures may be undertaken within the frameworks of specialised EA Centres.
Sources of information

Printed sources

There is a very extensive body of core literature on EA, with several publications issued each year. Extensive bibliographies can be found on the Internet (try, for example, http://ntl.ids.ac.uk/cgi-bin/dbtcgi.exe). To begin with, one can review Canter (1996) on methodology, Thérivel and Partidario (1996) on SEA, and Sadler (1996) on values, principles and approaches. Comparative studies of different systems in developed countries can be found in Wood (1995) and in developing and transitional countries in Lee and George (2000).

The literature on EA in CITs is not so extensive. A description of the historical evolution of the SER system in the USSR may be found in Cherp and Lee (1997) and a discussion of the distinction between SER and EA in Stec (1996). One of the most comprehensive reviews of legislation in individual CITs is presented in Bellinger, Lee et al. (forthcoming). Especially instructive is the description of the system in Slovakia by Kozova and George (forthcoming). Case studies on EA practice in CITs are discussed in Lee (1998), Mikulic, Dusik et al. (1998), Thérivel (1997), Holm-Hansen (1995), etc. More information on SEA can be found in the report of the Sofia Initiative by Mikulic, Dusik et al. (1998) and in Cherp (1999).

All of the above-referred information is in English. Some publications in Russian include general manuals (Cherp, Khotuleva et al. (2000)) and guidelines on particular topics, mostly related to the Russian system (e.g. ICES (1996)).

Electronic sources

There are many Internet sites specifically devoted to EA. Large collections of links may be found on the Network for EA in CITs at <http://www.personal.ceu.hu/departs/envsci/eianetwork/links.htm> and on the Web site of the Manchester EIA Centre at <http://www.art.man.ac.uk/eia/link.htm>. Both of these sites also provide a large amount of original information on EIA and SEA, including several databases and some texts of actual legislation. The Network for Environmental Assessment in Countries in Transition also provides an opportunity to join an electronic discussion group where different questions can be asked of a wide circle of participants from different CITs.


Texts of international conventions related to EA (Espoo and Aarhus) and related information may be obtained through the UNECE sites at <http://www.unece.org/>.

Additionally, the texts of these conventions, EU Directives, and the EA legislation of most of the CITs can be obtained directly from the author (oc@europe.com). Another important document, the EIS Quality Review Package (Lee, Colley et al. (1999)) can be ordered from the EIA Centre or its extracts can be obtained in electronic form from the author.
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<td><strong>THE BALTIC STATES</strong></td>
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<td>Turkmenistan</td>
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<td>Government Resolution No.121 on EIA (not currently in force)</td>
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Notes: The “first national EA legislation” is highlighted in bold. The criteria for selecting it were the following: (a) it should be issued after 1989; (b) it should be national, rather than inherited from the parent state; (c) it should specifically address EA (rather than, e.g., be an EP act). The sources of information were the mail survey and levels 2 and 3 of the study, unless indicated otherwise.

*Source: Raznatovic and Markovic (forthcoming).
**Source: Sevic (forthcoming)
***Source: UNEP-GRID Arendal and Azerbaijan (1999)
Endnotes

1 The current paper covers 28 countries in transition: Albania, Armenia, Azerbaijan, Belarus, Bulgaria, Croatia, Czech Republic, Estonia, Georgia, Hungary, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, FYR Macedonia, Moldova, Mongolia, Poland, Romania, Russia, Slovakia, Slovenia, Tajikistan, Turkmenistan, Ukraine, Uzbekistan and Yugoslavia

2 The term ‘Environmental Assessment’ (EA) is used here to designate both project-level Environmental Impact Assessment (EIA) and Strategic Environmental Assessment (SEA) of policies, plans and programmes.

3 Several CITs, mostly in the Balkans, the Caucasus and Central Asia, affected by regional tensions and/or by special economic hardship, have so far not been able to develop functioning EA systems.

4 In reality environmental authorities often do consider social and economic parameters of developments, but not explicitly, often in response to informal pressures from more powerful economic ministries. This does not improve the transparency and accountability of EA procedures.

5 More information on establishing and operating an EIA Centre is provided in Ecoline’s and University of Manchester EIA Centre’s recently published leaflet How to Organise an EA Centre.

References


The Regulation of Environmental Impact Assessment (EIA) in Hungary

ANIKO RADNAI, Department of Strategic Planning and Co-operation, Ministry of Environment, Hungary

Objectives and regulation methods

One of the important instruments of modern environmental protection is the Environmental Impact Assessment (EIA). Its chief characteristic is the system-oriented approach; the forecast of changes in the environment likely to occur as a consequence of an activity is made by taking interdependent impact processes as a whole into consideration. From the procedural point of view, one of its main characteristics is that the decision-making process integrates both this complex environmental information, and information requested by the public, as well as consideration of comments from the public.

A comprehensive regulation of EIA corresponding to these features came into force in Hungary in 1993. The main part of the regulation currently in force (since 1995) consists of sections of the Environmental Protection Act referring directly or indirectly to EIA, along with the government decree on impact assessment elaborated for their implementation.

In the field of international regulation, the most important agreement is the UNECE Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention) to which Hungary has been a party since October 1997. The effective implementation of the obligations included in the Espoo Convention requires the amendment of national regulation, which has been completed.

Other regulations include provisions relating to the EIA that determine the connection between environmental licensing and other licensing procedures, as well as introducing the content elements and methodological approach of impact assessment into the decision-making levels preceding the licensing procedures. Of the latter, the most important is the introduction of environmental, social and economic impact assessment into regional planning. A separate government decree deals with the environmental, social and economic impact assessment of power stations.

THE PROCEDURE DETERMINED BY THE ENVIRONMENTAL PROTECTION ACT AND THE GOVERNMENT DECREES ON ENVIRONMENTAL IMPACT ASSESSMENT

On the one hand, the Environmental Protection Act devotes a separate chapter to provisions referring only to impact assessment, and, on the other hand, it defines viewpoints about environmental protection as a whole, which play important roles in the impact assessment, such as emphasising prevention, defining the environment as a complex unit (entity) as well as involving the different “unofficial”
parties, such as the public and NGOs, in the preparation of a decision.

The sphere of activities subject to EIA is laid down in Appendix 1 of the Government Decree. An environmental license must be obtained to begin activities listed in the Appendix, and in some specified cases also to abandon them. For some activities the impact assessment obligation only exists if it is justified by the extraordinary sensitivity of the site. These activities can be found on the list of activities to be carried out in nature conservation areas and health resorts.

An environmental license must also be obtained when significant change in an activity included on the list is planned. The definition of significant change is laid down in the Decree in the form of conditions, starting from the principle that such permanent and large changes should be considered significant as cause new or surplus release or greater exploitation of the environmental elements above determined threshold values, or if the capacity increases above the threshold value.

Taking the logic of the planning and decision-making processes into consideration as the main rule, the environmental licensing procedure established by the Act and the Decree consists of two phases, preparatory and detailed assessment, which are built on one another. This provides a purposeful, flexible and economical procedure both for the authorities and the initiators of the activity.

The starting point for both phases is the submission of environmental protection documentation (a preliminary environmental study followed by a detailed environmental impact study) which has to contain information — sufficient in content and detail to achieve the objective of the given phase — about the expected changes in the environment as a consequence of the planned activity.

The objective of the preparatory phase is to identify the sphere and significance of the expected impact and, based on this, to determine the content of the detailed study. However, it can be seen that there is no need for the second phase if in the course of the preparatory phase satisfactory information has already become available on which to make a well-founded decision. The two basic cases are as follows:

- it is obvious that the activity cannot be started on the planned site and/or in the planned way due to disqualifying environmental reasons; or
- the effects can be clearly foreseen and are well known; their exploration does not need further assessment; avoidance or reduction of potential damage to an acceptable level is known and can be achieved with accepted solutions.

On the presumption that such cases occur, the regulations usually allow the decision-making authorities to consider whether to require a detailed assessment or not by giving general evaluation standpoints. However, in a specified sphere which corresponds to the activities determined in Annex I to an earlier EC Directive on impact assessment the full procedure must be implemented in every case.

The objective of the detailed assessment phase is the evaluation of how the state of the environment and, as a consequence of this, the state of health, and the social and economic conditions of people living in the affected area may change, considering the assessment conducted on the basis of guidelines and viewpoints determined in the preparatory phase.
In both phases of the procedure the potentially affected people are informed and their opinions are sought, but the methods of doing this and determining who is affected differ.

The public is involved in the preparatory phase of the impact assessment, with the view that it is practical to draw those likely to be affected into the process as soon as possible, so that the assessment in the second phase can take into account their observations, which are important from an environmental point of view, and so that the applicant can be informed of the reaction to the plan in due time. This established method is simpler than holding a public hearing in the detailed phase, as that is confined to informing and seeking opinions in writing only.

Since at the beginning of the impact assessment the actual extent of affected areas is unknown, in the preparatory phase the determination of the effect is based on the assumption that residents living on the site and in neighbouring settlements could be affected. For this reason the Decree makes it obligatory to inform them and seek their opinions, although the published preliminary study is open to the general public and anyone can express an opinion on it.

In the detailed assessment phase the determination of the effect takes place on the basis of the completed delimitation of affected areas. In this phase not only the geographical extent of the area but also the nature and degree of the effect are clarified. In addition to informing the public through the local governments of the affected area, information on the public hearing must also be published in a local or national daily newspaper.

When determining the requirements of the content of the impact assessment, the regulation follows the reasoning set out below. In the course of the assessment a cause-effect system has to be explored in which the causes are the appearance of the impact-producing factors of the planned activity, and the effects are the changes that can be expected in the state of the environment and in the situation of the people as a consequence of impact processes generated by the impact-producing factors.

These factors — which can be produced in any phase of the activity, such as establishment (including construction), operation or abandonment, or which may be generated by a potential accident or failure — are the following:

- emission of substances or energy into the environment (discharge, release); or
- consumption of natural resources and change of land use (utilisation/exploitation of the environment).

Annex 3 of the Decree describes the rules for determining affected areas, providing a method for the delimitation of areas where changes may occur in the state of the environmental elements and/or systems. When determining these rules, the main intention was to give general standpoints that can be enforced in EIA, emphasising the following aspects:

- an affected area is the area where the state of the environmental elements/systems may change and an affected person/object is one which is in this area and is sensitive to the given change;
the determination of the affected area is an iterative process, which is closely connected to each phase of the impact assessment process. When starting the determination a wider area should be considered, where change in the environmental state does not necessarily occur; and

there are several kinds of affected areas, depending on different impact-producing factors, and the strength of an impact can differ within an affected area.

The relationship between the environmental license and licenses issued by other authorities referring to the activity was defined by the Environmental Protection Act quite loosely, stating that “The use of the environment may be commenced or continued when an environmental license issued by the inspectorate is no longer subject to appeal — prior to other licenses related to the activity or as a precondition thereto — in the case of activities subject to environmental impact assessment.”

The last phase of the licensing procedure is the issue of a building license. By this time, the impact assessment process and the environmental licensing procedure should be completed. The Decree therefore includes the amendment of other licensing procedures, stipulating that the environmental license shall be enclosed with the application for a building license. The appropriate provisions have also been included in new or amended sectoral regulations issued after the Decree came into force.

The EIA affects all areas of environmental protection and nature conservation, therefore, due to the divided scope of competence among authorities, it is necessary to involve other authorities in the environmental licensing procedure along with the regional environmental authorities of the Ministry of the Environment. When defining this sphere in Annex 2 of the Decree, the starting point was the idea that, in addition to the two authorities designated in the Environmental Protection Act as special authorities to be involved in each environmental licensing procedure (namely competent authorities on specific issues of nature and landscape protection, and of environmental health), every actually concerned authority should be involved in the procedure, in case questions arise concerning other specific environmental or nature protection issues.

TASKS FOR THE HARMONISATION OF EIA REGULATION

The EC Directive on environmental impact assessment was amended in 1997. In order for this Directive to be incorporated into Hungarian legislation, the relevant regulation should be amended prior to Hungary’s accession to the European Union.

The most important elements of the amendment are as follows:

- Provisions for the publication of the decisions of authorities.
- In the case of probable cross-border effects, the involvement of the affected country in the procedure.

This basically coincides with the amendments necessitated by the ratification of the Espoo Convention. The new provisions needed to implement the Espoo
Convention have been incorporated into Hungarian EIA regulation. The amendment was approved by the government in November, 1999.

- Extension of the list of activities subject to obligatory conduct of an EIA and of activities subject to assessment depending on the individual examination.

As this will significantly enlarge the Hungarian list, continuous preparatory work is taking place to develop a properly defined list of projects to be subject to the EIA procedure, including determination of threshold values and other selection criteria.

The EIA legislation will be in harmony with the Directive by the end of 2001.

Endnotes

1 Government Decree 86/1993 (VI.4.) on the provisional regulation of environmental impact assessment of certain activities.
2 Act LIII of 1995 on the general rules for the protection of the environment.
4 Act XXI of 1996 on regional development and regional planning.
5 Government Decree 73/1996. (V.22.) on the public information, public hearing and expert committee procedures necessary for the licensing of the establishment and putting into operation of power stations which have a significant effect on the natural, social and economic environment.
Public Participation in EIA in CEE

The Sofia Initiative on Environmental Impact Assessment (EIA) undertook a joint comparative study with the REC project on Promoting Progress in Public Participation, which concluded that current EIA systems in the Central and Eastern Europe (CEE) region are predominantly modelled after the EU directive on environmental assessment of certain projects (85/337/EEC). This, however, brings about certain uniform procedural features that, unfortunately, do not favour thorough public participation in EIA.

- **Screening** in the CEE is usually based on the formally pre-defined screening lists (usually annexes to the EIA laws and regulations) that formally list those activities that are subject to EIA. Although some EIA systems do provide opportunities for undertaking screening through initial environmental evaluation (Slovakia, Hungary) there is extremely limited public participation in this process — the public is usually only notified about the results of screening without usually having the right to appeal against the screening decision.

- None of the 15 national EIA systems in the CEE region provide adequate opportunities for **public scoping** of the EIA documents. A form of formalised scoping is applied in Hungary, Lithuania, Romania and Slovakia, but these do not allow proper public participation.

- **Formal expert review and public review** in most CEE countries complies with the relevant requirements of the EU directive (with the exceptions of Latvia and FYR Montenegro). The actual quality of the civic review is largely predetermed by the quality of public notification of the beginning of the review phase. Public participation in this stage of assessment is especially limited by the lack of effective forms of public notification. Given the limited extent of public financial support for NGO activities in CEE (in the absence of well-developed taxation laws), NGOs only seldom have sufficient resources to undertake a thorough review of the EIA documents. This also has an indirect effect on the quality and extent of NGO participation in the EIA reviews.

- EIA systems in CEE tend to partially provide opportunities for a thorough **legal review** of the quality of the EIA documents. In some countries (Bulgaria, Croatia, Hungary, Romania, Slovakia, Slovenia) the EIA process results in an administrative decision that can be appealed. But in other countries the EIA
process is conceived as merely a decision support process, whose findings cannot be formally questioned in court. In such systems, the quality of the EIA-related operations deteriorates. Overall findings in this regard point out the need for further elaboration of the “access to justice” components in the EIA systems throughout the CEE region.

• Post-EIA monitoring is designed mainly to provide a remedy for potential mistakes made in the EIA process. Most of the EIA systems require preparation of post-EIA monitoring plans as a part of the EIA documents, yet there is quite limited application of these requirements. However, the EIA laws in Bulgaria and Romania that enable state authorities to limit the permit resulting from the EIA process to a certain period of time (e.g. five years) provide a novel concept to be followed world-wide.

CONCLUDING REMARKS:

The weakest aspect of the EIA-related public participation is the almost region-wide absence of scoping, which can be attributed in particular to inadequate scoping requirements in the EU directives (85/337 and 97/11). The general absence of public scoping leads to the inefficiency of public participation programmes in EIA and is regarded as the weakest point of the EIA systems in the CEE region. A positive feature of the current situation is the fact that this weakness is being properly recognised and that provisions for public scoping are incorporated in the development of new EIA laws in the region.

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TABLE 1

<table>
<thead>
<tr>
<th>Countries</th>
<th>EIA Law</th>
<th>EIA in Other Law</th>
<th>EIA of Programme, Plans and Policies</th>
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EIA Quality Assurance through Accreditation of EIA Experts in CEE and NIS

Environmental Impact Assessment in its present form was introduced to the CEE region only recently. Having realised that the markets that ensure the proper work of EIA consultants have not yet been fully developed, many CEE countries are experimenting with various means of accreditation of EIA experts. Even though the system of EIA accreditation is widely discussed on a national level throughout the CEE region, there has been little effort to facilitate regional exchange of experience on this topic.

The Sofia Initiative on EIA, at its Second Regional EIA Workshop (September 1996, Szentendre), arrived at a widely supported consensus that application of EIA accreditation can easily become counter-productive. The procedure may easily turn into a bureaucratic and symbolic element of the EIA system. Accreditation of EIA experts alone, therefore, cannot ensure adequate quality of EIA documents. This quality control can be properly exercised only through an EIA process that is transparent and accountable to all its participants (i.e. use of scoping, full public participation and independent EIA quality review). In light of these findings, the Sofia Initiative on EIA recommends that the following issues be tackled:

- The focus should be on practices and methods used in CEE and newly independent states (NIS), with particular reference to:
  - scoping (procedures and approaches used, scoping the EIS);
  - public review of the EIS (citizens’ right to obtain information, right to participate and right to appeal);
  - expert EIS review (independence of the review body and basic criteria used in EIS review); and
  - post-decision monitoring in EIA (procedures and institutions);
- Regional and national capacity-building programmes be required in support of the issues mentioned above, with the highest priority to be given to national and regional training on scoping practices.

Use of Social Impact Assessment within EIA Systems in CEE and NIS

Social Impact Assessment (SIA), a systematic analysis of the social, economic and cultural impacts of the proposed development interventions, is increasingly becoming a standard part of EIA practice world-wide. This development of EIA systems can be attributed to the growing demand for full and effective public participation in EIA. Much EIA-related legislation in the CEE and NIS countries directly or indirectly requires the assessment of social and cultural impacts, yet these legal provisions are often not adequately reflected in the actual EIA practice. This fact may be primarily attributed to the lack of practical methodological SIA know-
how among EIA consultants in the CEE and NIS.

The findings of the Sofia Initiative on EIA indicate that:

- social impacts within EIA are usually addressed through:
  - assessment of direct social impacts caused by the development (e.g. division of a community by road, direct aesthetic effects, etc.);
  - risk assessment and assessment of health impacts; and
  - direct local economic impacts (decrease of value of local property, etc.);
- there is no uniform approach to assessment of social impacts within EIA;
- identification of social impacts should be improved by better scoping and public review of the EIS; and
- assessment of social impacts should be properly reviewed through public review of the EIS.

With respect to SIA, the Sofia Initiative on EIA endorses the need for improved scoping and public participation to better identify social impacts.

The presentation by Dusik and Mikulic also made the following points:

**SEA has the following benefits:**

- promotes integration of environment into development policy-making;
- promotes public participation;
- provides for consideration of a larger range of alternatives than is normally possible in EIA project;
- takes account of cumulative effects and global change; and
- strengthens project EIA by:
  - prior identification of impacts and information requirements;
  - clearance of strategic issues and concerns; and
  - reducing time and effort to conduct EIA reviews.

CEE countries should undertake **pilot SEAs** that are based on indigenous practical experiences and the following principles:

- The agency proposing the programme, plan, or policy should undertake the assessment. There should be a clear relationship between the SEA and the decision-making process.
- The SEA evaluates alternatives of the policy.
- There is early public participation.
• The SEA considers environmental and human health impacts as well as socio-economic implications.

• SEA findings should be clearly documented.

• Findings of SEA should be independently reviewed.

Preparation of **Regional Development Plans, Environmental Action Plans and Environmental Health Action Plans** provides incentives for development of national SEA systems:

• SEA is the main means for integration of environmental concerns into national development policies (especially energy, transport, agriculture, forestry, tourism, etc.).

• SEA is clearly relevant for integration of environmental concerns into regional and local development plans (i.e. land-use plans, urban development plans, regional development plans for PHARE II, etc.)

• Introduction of SEA relates to implementation of Article 7 of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.
Description of the research project

At the commission of Hungary’s Environment Ministry, the Environmental Management and Law Association (EMLA) undertook a large, practical Environmental Impact Assessment (EIA) research project in 1997-98. The research encompassed 50 EIA files from the environmental inspectorates, which represents roughly 10 percent of all the EIA cases in Hungary started since 1993, the year the first Hungarian EIA regulation entered into force.

In addition to the data obtained from files, we arranged discussions at the inspectorates with lawyers and other experts charged with EIA cases. The structure and substance of these discussions were given by the first draft of the research report, while the comments collected were built into the final version of the report.

Main Conclusions

A) A PRACTICAL EIA DEFINITION

As a result of our research, we have defined EIA as a planning tool for large, environmentally significant projects based on continuous interaction between authorities, the developer and other participants of the project. The result of this process is a compound system of conditions for the fulfilment of the project. However, the major changes in technology and location of the project must be parts of the alternatives, involving the zero option, also

B) PARTICIPANTS’ ATTITUDES

For developers, EIA means a significant loss in time and money, and, as we will see, there is a chance that the planned development will suffer significant changes or fail during the process. No wonder that their main objective is to avoid EIA or perform it only formally. However, amongst the developers there are a few who consider EIA a tool for developing environmentally sound projects that helps them to avoid future environmental liability.

Since the Environmental Impact Study (EIS) is prepared by experts who are contracted by the developer, we could not find any cases in which the EIS itself was critical of the planned project.

Municipalities, environmental NGOs and local communities showed the motivation and ability to become involved in EIA processes. Their primary aim is to avoid environmental risks in their immediate vicinity, but, in the majority of the cases, they are willing to accept compromises.
C) EIA AS A TOOL IN HANDS OF THE ENVIRONMENTAL AUTHORITIES

EIA is by far the most important administrative legal instrument of the environmental inspectorates, who have few other meaningful, effective tools with which to protect the environment. The environmental authorities rank low in the informal hierarchy of the system of Hungarian administrative bodies, but EIA can help them to gain greater appreciation and resources. Unfortunately, there are still sporadic cases in which other administrative bodies — such as road construction or mining offices — simply overlook the fact that certain projects have to undergo an EIA process and issue their permits without it.

Practical Problems

A) WHO IS THE CLIENT?

In practice it is not yet fixed who can act in the procedural position of the client on the project side. The owner, the planner, the expert firm which prepared the EIS, the future operator and even the construction company, all could play this role in the cases that we examined. There is no serious objection against any of them, except maybe the expert group, because their procedural position as a client might create a conflict of interest with other positions that they might hold as experts.

A related question is whether there is a legal succession in the position of the permittee. Again, the Hungarian practice is not uniform. Sometimes the authorities insist on starting a new EIA process for the new owner, sometimes they are satisfied with a simple announcement of the change in the position. In our opinion, the permit addresses objective and subjective conditions, the latter ones naturally bound to the person of the permittee. Out of this, we think that the new owner of a facility which had an EIA permit will have to apply for a new permit. Naturally, this permitting process will be much simpler and the authority can restrict it to the examination of the personal features of the project.

B) THE TIMING OF THE EIA PROCESS

More than half (53 percent) of the cases examined finished within 90 days, the time required by law. Another 33 percent took only slightly more time, while in 23 percent of the cases the time needed was six months to one year, not counting the time needed for legal remedies (which occurred only rarely).

Another, even more important time-related question is the time at which other (construction type) permits are obtained in relation to the EIA decision. Since the completion of the EIA process is a prerequisite for starting the construction permit process, there are only sporadic cases in which the construction permit is issued prior to the EIA permit. However, there are cases in which the construction permit authorities began their procedures before the EIA permit was obtained, which was illegal, even if they did not finish their procedure before the EIA procedure ended.
C) SCREENING, SCOPING

There is no screening and no real scoping process built into the Hungarian EIA system. However, developers still want to know which of their projects are subject to EIA and which are not, and, if a project has to undergo an EIA, how wide the scope of it should be. Hungarian EIA practice has developed three kinds of informal screening-scoping methods. The first and most impersonal is written correspondence between the environmental authority and the developer. Some inspectorates have developed a so-called scoping questionnaire, which can also act as a guide for the developer.

The second method is informal personal discussion between the developer and the inspectorate — this is more flexible, but lacks any guarantee of a fair and balanced process.

In some respects these shortcomings are eliminated in the third methodology, in which the developer and the authority meet within the framework of a broader discussion, together with other authorities, municipalities and sometimes the representatives of the interested public.

Remembering the general traits of EIA, and the attitudes of investors, it is easy to understand that the main aim of the developer is not always to get information about the EIA practice and the considerations of the authorities and other participants, but, on the contrary, to convince them informally that the only correct way of carrying out the project is in the way that the developer originally planned.

D) THE LEGAL BASIS OF THE RESPONSIBILITY OF THE EXPERTS

We found two cases in which experts working for the developer wilfully distorted data. Although there was sufficient legal ground, in neither case was there any administrative, professional or criminal punishment. The legal problem is that in a procedural sense they are not experts. However, a legal decision to fine the client could indirectly influence the behaviour of the EIS experts. Failing that, the professional chambers of the experts could take action against them, if the authorities initiated them. Finally, as a last resort, criminal sanctions could deter those who infringe the basic professional and ethical rules of the EIA process.

De lege ferenda, separation of the EIS experts from the investor would be the most promising solution to this problematic situation.

E) CO-AUTHORITIES

Under Hungarian EIA regulations, the environmental inspectorate, as the main decision-making authority, has to consider the opinion of several other authorities — such as those overseeing water management, forestry, plant and animal protection, public health — before making its decision. If any of the authorities express a definitely negative opinion, the inspectorate must deny the permit. However, a positive opinion from the co-authorities does not bind the main authority.

In Hungarian EIA practice there is a big problem in harmonising the opinions of the main authority with those of the co-authorities, in order to reach a final deci-
tion that does not contain conditions that cancel out one another. The solution, at least in part, can be found in the general traits of EIA, as stated in the conclusions set out above. The spirit of “continuous interaction” dictates that the authorities’ opinion changes and develops throughout the entire EIA process. The main authority has to organise this continuous interaction in a way that brings the different official opinions closer to one another and to an optimum environmental effect.

F) PUBLIC PARTICIPATION

The research has shown that the methods through which the authorities inform the public of planned projects and the EIA process are not effective enough. A small notice on a municipality placard cannot attract the attention of all concerned people. If they are not aware of the EIA process, then they may want to become involved in other processes in later phases of the development, such as the construction permit process or even civil litigation, leading to unnecessary legal arguments that might cause harm and delay to all participants.

For these reasons, some authorities and municipalities use new ways of informing the public, such as local TV channels, local journals, or posters in large libraries, post offices or other public places.

The information about the project itself usually includes the type of project planned, its technology, location, size and environmental effects, a list of whose interests and what kinds of needs are served by the project (e.g., a waste dump site), planned environmental protection measures, etc.

A good, but not general, practice is that the environmental authority circulates public opinions and comments amongst the co-authorities and sends them to the developer. Such process is in harmony with the continuous interaction element of the concept of EIA.

A key issue in public participation is the due consideration of the comments by the decision-making authority. Due consideration can be said to have happened when the authority has considered the facts stated in the comments, made a professional and legal analysis and included these in the written reasoning of its decision. The practice, we found, barely gives such due consideration to public participation.

G) THE DECISION

The research revealed an interesting problem: the majority of officers at environmental inspectorates are convinced that there are significant shortcomings in the legal basis of their decision. This subjective evaluation is mirrored in the decisions. They very seldom refer to substantial environmental regulations, but simply try to convince the clients that the conditions they have prescribed are professionally well-founded.

The conditions in the decision show a very colourful picture. These are the main types:

- **Monitoring conditions** Where and what kind of monitoring is needed, how it should be performed, and when (how frequently) the data should be sent to the authorities. There are also prescriptions for determining the zero status.
• **Waste management conditions** The decisions specify the most desirable waste management methods and naturally form a mandatory part of the decision.

• **Open conditions** Frequently the authority determines only the final environmental results that the investor has to achieve, but there is no detailed description of the methods, technology, activities, etc. through which the developer should achieve such results.

• **Reinstating conditions** In some cases the conditions in the decision simply repeat the EIS. In such cases the aim of the authority is clear: to give legal force to the environmental performance that the developer undertook.

• **Experimental operations as conditions** In other cases, the authority prescribes that several experiments be conducted, especially experimental operations of some parts of the planned project, or of the facilities. Such conditions, however, are open to criticism: if the fulfilment of all environmental requirements is ambiguous, then the denial of the permit or further approval processes might be needed, but not a positive permit.

**Endnotes**

1. Four of the examined cases ended with negative decisions, and in three cases (6 percent) this decision turned out to be final.

2. In half of the cases we found significant public participation through municipalities, NGOs or private individuals.

3. This is why we found some signs of informal screening-scoping processes in 90 percent of cases.

4. In one case water consumption data was artificially diminished to reach the allowable amount; in another case the soil erosion pictures were taken from a special angle so that the problem seemed much smaller than in reality. In a third case — not among the 50 we examined — we learned that the expert had changed official maps to show a situation in which the actual effects of a hazardous waste facility did not reach a large city.

5. The 1999 amendment of the Hungarian governmental decree on EIA contains exactly the three elements whose necessity was revealed by the practical research.
1. There is a need for Bosnia and Herzegovina to build a structure for Environmental Impact Assessment.

2. As a first step, it is important to establish a set of Guidelines to fit the domestic legal system, that would incorporate international EIA standards, with particular reference to the European Union, as well as other advanced legislation such as that of the US and Japan, and to the World Bank and the European Bank for Reconstruction and Development. The experience of neighbouring countries and countries in transition is especially relevant in this regard.

3. A series of training programmes and pilot projects should be developed to use these Guidelines, based on specific pilot projects, to illustrate, among others, the following points:
   a) Methodology and procedures for environmental impact statements/assessments;
   b) Participation of the public in environmental decision-making;
   c) The legal basis and background for EIA, its implementation and follow-up; and
   d) Elements of the legal framework for EIA.

4. Strategic Environmental Assessment (SEA) of plans, programmes and policies should also be promoted in the same way, through specific projects on the level of, for example, cantons and entities.

5. In parallel, efforts must be made to develop EIA legislation through normal democratic procedures.

6. We call upon the assistance of the Sofia Initiative for EIA and the REC as the best framework for implementation of our conclusions, especially points 1 through 5.

7. We recognise the need for further seminars and projects/programmes on, among others, the following subjects, and call upon JSF/REC to provide them where possible:
   a) Strengthening legal systems and institutions
   b) Strengthening the NGO sector
   c) Improving media and communications
   d) Awareness of the Aarhus Convention
e) Establishment of Environmental Management Systems, exchange of experiences on environmental auditing, certification, implementation of EMS, ISO 14000, etc.

f) Establishment of eco-business relations (markets for environmental services).

8. We request the involvement of leading experts from neighbouring countries whose experience is especially relevant for Bosnia and Herzegovina.
November 26, 1999

08:30  Coffee, Tea

09:00  Welcoming Remarks

  Hiro Goto, Japan Special Fund for the Regional Environmental Center for Central and Eastern Europe (REC)
  Kresimir Saravanja, Ministry of the Environment, Herzegovina-Neretva Canton, Bosnia and Herzegovina
  Nedjo Miljusic, Ministry of the Environment, Republika Srpska
  Chairman: Stephen Stec, REC, Leiden University

09:30  Introduction of Participants

  “Definition and Purpose of Environmental Impact Assessment (EIA)”
  Nesad Seremet, REC Country Office Director, Bosnia and Herzegovina

10:00  Keynote Address

  “Fundamental Principles of EIA (UNEP EIA Training Resource Manual)”
  Barry Sadler, Co-Director, Institute of Environmental Management and Assessment, UK

11:00  The Global Foundations of EIA

  “The US National Environmental Policy Act”
  Orestes Anastasia, policy advisor, USAID EIC/PADCO
  “EIA in Japan”
  Katsunori Hirokane, Ministry of Environment, Japan

11:45  Coffee Break

12:00  The Global Foundations of EIA (continued)

  “The Sofia Initiative on EIA and the Espoo Convention, and their Foundation in International Environmental Law”
  Nenad Mikulic, State Directorate for Environment and Nature Protection, Croatia

12:30  Discussion

13:00  Lunch

14:30  Report on Progress of EIA Law Drafting and Practice in Bosnia and Herzegovina
“International Support for EIA Development in Bosnia and Herzegovina”
*Indira Djugum, Office of the High Representative*

“Experience with EIA in Bosnia and Herzegovina”
*Ron Sissem, USAID*

“EIA in Draft Environmental Laws in Bosnia and Herzegovina at the Entity and Canton Levels”
*Djordje Stefanovic, REC*

15:00 EC Directive Related to EIA and Practice in EU Member States
“EIA in a Member State of the European Union, The 1997 Amendments to Dir. 85/337/EEC on EIA”
*David Aspinwall, UK Department of Environment, Transport and Regions*

15:30 Discussion

16:00 Coffee Break

16:30 Panel Discussion: EIA in Countries in Transition (CITs)
*Oleg Cherp, Ph.D. candidate, Manchester University*
*Orestes Anastasia, policy advisor, USAID EIC/PADCO*
*Aniko Radnai, EIA Division, Ministry of Physical Planning and Environment, Hungary*
*Jiri Dusik, Project Manager for Sofia EIA Initiative, REC*
*Sandor Fulop, President, Environmental Law Association of Central Eastern Europe and Newly Independent States*

18:00 Break

Evening Programme

**November 27, 1999**

09:00 Coffee, Tea

09:30 Continuation of Panel on EIA in CITs

10:30 Coffee Break

11:00 “Strategic Environmental Assessment (SEA)”
*Barry Sadler, Co-Director, Institute of Environmental Management and Assessment*

“SEA on the Verge of International Consciousness: Czech Republic, EC, Espoo, Aarhus”
*Jiri Dusik, Project Manager for Sofia EIA Initiative, REC*

12:00 Conclusion of Seminar

12:30 Lunch

14:00 Optional – Excursion to Hutovo Blato
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THE REGIONAL ENVIRONMENTAL CENTER FOR CENTRAL AND EASTERN EUROPE (REC) is a non-partisan, non-advocacy, not-for-profit organisation with a mission to assist in solving environmental problems in Central and Eastern Europe (CEE). The Center fulfills this mission by encouraging cooperation among non-governmental organisations, governments, businesses and other environmental stakeholders, by supporting the free exchange of information and by promoting public participation in environmental decision-making.

The REC was established in 1990 by the United States, the European Commission and Hungary. Today, the REC is legally based on a Charter signed by the governments of 27 countries and the European Commission, and on an International Agreement with the Government of Hungary. The REC has its headquarters in Szentendre, Hungary, and local offices in each of its 15 beneficiary CEE countries which are: Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Estonia, Hungary, Latvia, Lithuania, FYR Macedonia, Poland, Romania, Slovakia, Slovenia and Yugoslavia.

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