GREEN Alternative

Striving for environmental and social justice in Georgia

Green Alternative's Comments and Recommendations

On Draft Law on Environmental Impact released by the Ministry of Environment and Natural Resources Protection of Georgia on May 1, 2015 for Public Discussion

May 18, 2015

I. General remarks

1. It is unclear why "Environmental Impact" was selected as the title of the draft law, while the objective of the draft law is (or should be) protection of the environment from negative impacts. Similarly, it is unclear why "Environmental Impact Permit" was left as the title of the permit.

2. Neither the initial articles of the draft law (goals, tasks, definition of terms), nor its subsequent text explains clearly the essence and meaning of environmental impact assessment.

3. It is not legally correct for a competent authority to issue a permit as a result of making decision on the planned activity. As known, general rules of issuing licenses and permits in Georgia are defined by the Law on Licenses and Permits. This law clearly determines in what cases permits and licenses are issued. In particular, according to the law, a permit is the right to exercise an action, while a license is the right to exercise a certain activity. The law also distinguishes four types of licenses with one of them – activity license – being exactly in line with the content of the document that grants the right to exercise the activities offered by the draft law. It should be noted that the draft law mentions everywhere "an activity" rather than "an action." Therefore, it is absolutely incorrect to carry out administrative procedures for issuing a permit.

Such incompliance in the legislation has been caused by the fact that the Environmental Impact Assessment procedure and the process of making decision on planned activity have been artificially "integrated" into the rule of issuing a construction permit (construction is actually a one-time action). Current regulation is fundamentally inadmissible and incorrect that has numerously been confirmed in practice during the past years.

4. Amendments to the Law on Licenses and Permits as well as to the Law on State Support for Investments are not enclosed to the draft law that makes us think that the authors of the draft law do not intend to rectify one of the major shortcomings of current Environmental Impact Assessment system (that significantly distances Georgian legislation from relevant EU Directives). The question is about exceptions made under Article 1 of the Law on Licenses and Permits and the rule of issuing preliminary licenses and permits set by the Law on State Support for Investments.

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5. The draft law does not clarify what particular administrative procedures (public or simple rule) are needed to make decisions on permit issuance; information about the date of beginning administrative procedures and its timeframes are extremely obscure and confusing (in some cases, the date of making an announcement in a newspaper is indicated, in other cases – the date of submitting an application to the Ministry). One can guess from the content of the draft law that a decision is made through simple rule (though, as already mentioned above, it is not written openly) instead of public administrative rule that triggers discrepancy between various articles of the draft law and does not comply with the best international practice and EU Directives.

6. The draft law does not specify what happens when dealing with the case of significant technological change in an already issued permit. The draft law also does not say anything about what happens when a five-year term of permit expires (article 10) – what procedures should be pursued by an entrepreneur and a competent authority, if an activity still continues after 5 years; the possibilities of public access to information and participation at this stage of decision making are also uncertain.

7. It is unclear how certain activities, which under current legislation do not require Environmental Impact Permit and are carried out only on the basis of resource utilization license, will be carried out – will a project developer have to obtain both a permit and a license and how these procedures will be combined?

8. It is unclear, whether a developer of ongoing activities, which under current legislation do not require Environmental Impact Permit and are carried out only on the basis of resource utilization license, will be obliged to conduct environmental impact assessment (EIA) and obtain a permit.

9. The draft law says nothing about Environmental Regulations, as it is given in current legislation. It is unclear whether regulation of those activities, which do not require EIA, will be continued.

10. It is unclear why it takes the Ministry three working days to post already adopted decisions on its website, when a couple of minutes are quite enough for this technical procedure.

11. An obligation to submit 4 or 5 printed copies of documents, along with their electronic submission, is also unclear especially as all procedures are carried out at the Ministry electronically. In addition, it is also unclear that when it is really needed to have several copies of necessary documents (EIA report) to ensure public access to them, the authors of the draft law did not even remember about it.

12. The principle of dividing the activities into the first and second categories is also unclear (and therefore, absence of screening criteria in the draft law is quite clear, though inadmissible). According to the draft law, the only difference between these two categories is that the procedure of public participation during the second category activities is worse (by 10 days less) than during the first category activities. The mentioned division absolutely differs from the principle of division into categories provided in the EU Directive. The draft law has lost the key essence of division of activities subject to EIA into categories as well as the connections of this division with screening and scoping stages. The division provided in the draft law makes screening as well as any benefits received by the society, environment, entrepreneur and decision makers through introducing this stage absolutely senseless.

II. Specific Remarks and Recommendations by Articles

13. It is desirable to formulate subparagraph "b", paragraph 2, article 2 as follows: to provide access to information for all interested persons on all those expected consequences that may be triggered as a result of carrying out an activity or adoption of a strategic document; to ensure effective public participation in decision making in order to prevent, reduce or mitigate adverse effects on the environment as much as possible;

14. Concerning the terms given in article 3:

- "Non-technical summary" – it is desirable to formulate this definition as follows: "Non-technical summary" – a short document that provides comprehensive information (including about project implementation, its content, location, possible impacts, etc.), written in a non-technical language and easily understandable for the broad public".

- "Environmental Impact" – environmental components (air, water, land, soil, climate, landscape) should be added, like in paragraph 2 of article 4.

- It is desirable to formulate subparagraph "c.g." as follows: "Biodiversity (at the level of genes, species and ecosystems) and its components".

- "Environmental Impact Assessment (Permit) – as already mentioned above, the presented formulation fails to express the essence and importance of Environmental Impact Assessment. Moreover, the presented formulation is ambiguous and subject to interpretation, as if "the stages of public participation and consultations as well as preparation of EIA reports are rather associated with the needs than being compulsory. The proposed definition does not express the essence of EIA. It is not correct to unite "assessment" and "permit" into one term.

- "Strategic Environmental Assessment (SEA)" – the formulation presented in the draft law does not actually express the essence and importance of this tool. Moreover, its Georgian translation does not reflect its content; in our opinion, it would be relevant to use a term "Strategic Environmental Impact Assessment."

- "Planning authority" – Is only an administrative authority able to prepare SEA?

- "Expert" – the act mentioned in the definition has another title in "Transitional Provisions" (article 39).

- "Consultant" - this term is no more used in the text of the draft law. It is unclear how "consultant's" qualification and capabilities should be assessed and by whom. This paragraph needs to be either specified or removed from the text.

- "Permit seeker" – it is an ambiguous definition and requires more clarity.

- "Activity" – it is an absolutely unclear, obscure, non-systemic and totally unacceptable definition.

- "Scoping" – it is desirable to define this term as follows: "A procedure aimed to determine important issues related to possible impacts of the activity on natural and social environment, to define technical specifications of environmental impact assessment or strategic environmental assessment."

15. It should be added to article 7 (Scope Statement) that submission of non-technical summaries is compulsory even at the stage of scoping.

16. Number of the days indicated in article 8 (Discussion and Approval of Scoping Report) is not enough. Moreover, the present formulation leaves room for interpretation. So, it should be formulated not as "on the 20th (twentieth) working day" and "on the 10th (tenth) working day", but as "no earlier than 20 working days" and "no earlier than 10 working days."

In addition, it is unclear why a part of procedures ensuring public participation is implemented by the Ministry and the other part – by a permit seeker (the same remark also applies to the stage of discussing EIA report, since the same approach is used in this case too). For example, the Ministry is responsible for posting the submitted application and report on the Ministry's official website, while a public discussion is organized by a permit seeker. The Ministry receives remarks from all interested parties, while the minutes of meetings are prepared by a permit seeker. And finally, the Ministry assumes responsibility for taking or not taking the remarks into consideration.

The mentioned approach is totally incorrect and requires comprehensive revision. It is the state, rather than a project developer, who is obliged to ensure public participation in decision making. This obligation is strengthened by the Aarhus Convention and relevant EU Directives. Full or partial delegation of this function is totally unacceptable! A competent authority has to lead the entire procedure of public participation.

17. Subparagraph "d", paragraph 5, article 9 – "Full scheme of technological cycle" – this should be a part of EIA report rather than enclosed to EIA as an independent document, as provided in the next paragraph. It is unclear in subparagraph "g" what is meant under "causing the forecast of changes" and how these actions should be described. It is desirable to formulate subparagraph "j" of the same paragraph as follows: "In case of suspension of activities and/or completion of construction or other stage of activities, the ways and means of bringing the environment to its initial state."

It should be added to subparagraph "k" of the same paragraph that in case of neglecting public opinions and conclusions submitted by the expert commission at the stage of scoping, a permit seeker shall have to substantiate the reason.

18. See our 16 remarks in connection with paragraphs 11 and 12 of article 9.

19. The term given in article 10 (issuing a permit or refusal to issue a permit) is not enough for making an informed decision; in addition, this wording is ambiguous.

20. Paragraph 2 of the same article notes that "in the process of decision making, the Ministry ensures taking into consideration argued written remarks and opinions submitted by the public." Similar wording is also used in article 8.

It is unclear what "argued" means. Who decides and how whether the remarks provided by the public are argued or not? Why is it stressed that a remark should be submitted in a written form? It has been enabling the Ministry until presently to neglect the arguments submitted during oral discussions. Such wording makes article 33 absolutely senseless. This comment also concerns subparagraph "b" of paragraph 1 of article 25 (in case of EIA).

According to the draft law, time allocated for decision making is so much insufficient that it will be impossible for the Ministry to take all the remarks submitted by interested parties into consideration. Such discrepancy between articles is caused by the fact that decisions are not made through public administrative procedures.

21. Article 11 is extremely general and needs more specification to show the connection with the procedures of issuing other permits and licenses for implementing planned activities as well as in terms of possible integration of environmental impact permits into other permits or licenses. For example, the present wording fails to clarify the connection with construction permit issuance procedure.

22. Article 14 (permit exemption) is unclear. According to the draft law, only that activity is exempted from obtaining a permit, which aims at ensuring national security and/or implementing a measure associated with urgent needs caused by emergency situation. Such activity can be carried out only by the state/administrative authority, which is already exempted from an obligation to obtain a permit (see comment 4 above). The activities included in the above listed category (national security, emergency situation) are subject to lingering bureaucratic procedures and timeframes. If the question is about national security or emergency situation, it should not take the Ministry three days to post relevant information on its website.

23. Article 15 is completely vague. It is unclear what is meant under "post-activity analysis". If it is about reporting mechanism, this mechanism is defined by the Law on Licenses and Permits.

24. Article 17 (SEA goals and tasks) – it is not clear from the draft law, whether it is compulsory and necessary to carry out Strategic Environmental Assessment (SEA) in order to launch implementation of projects in the sphere defined by article 19. It is unclear whether it has any sense to carry out SEA in energy sector, or adopt this law at all, if the state forcibly tries to launch important energy projects?

25. In paragraph 2 of the same article, social effects are limited only to health effects that is not correct.

26. It is unclear in article 18 (EIA stage) what should be investigated at the screening stage, since article 19 harshly defines those spheres, which are subject to EIA. It is required either to revise the principle of division of activities into annexes or define screening criteria. The same comment also concerns article 21 of the draft law.

Paragraph 2 of the same article notes that "the content of information to be submitted by the planning authority to the Ministry and Healthcare Ministry, its form, the rule and procedures of making decisions on EIA implementation are defined by the Minister and Healthcare Minister through a joint order." This draft law has actually determined these issues. Unfortunately, current legislation makes it clear that the law and provisions practically repeat the same contents.

27. The following sectors should be added to the list provided in article 19 – Hunting; extraction and processing of minerals. It is also unclear what is meant under the sector "industry".

28. Article 20 definitely needs explanation and substantiation. Subparagraph "a" of paragraph 1 of this article notes: "Those strategic documents, which are related to the issues of national security protection, implementation of urgent measures caused by emergency situation, or financial and/or budgetary sphere."

Generally, SEA does not apply to those issues, which are related to one-time solution or concrete issues (as a rule, frequently the only exception is the key routes of large infrastructural projects); such issues are regulated by EIA. So, it is unclear why strategic documents related to national security protection or emergency situations do not require strategic environmental assessment – for example, national strategy on combating natural disasters or national strategy on poverty reduction.

Moreover, the wording provided in subparagraph "b" of the same paragraph is unclear and needs additional explanation; it is unclear what particular documents are meant.

29. Concerning articles 22 and 23, see the above remarks related to timeframes.

30. The second sentence of article 34 ("A non-entrepreneurial (non-commercial) legal entity engaged in environmental sphere has a legal interest towards the decisions on environmental issues") must be removed, because administrative bodies may interpret it as if a citizen or a certain group of citizens cannot have a legal interest.

31. Paragraph 2 of article 35 notes the following: "Proceeding from the planned activity or a peculiarity of strategic document, the Ministry has the right to invite a subject from a foreign country (natural or legal entity) or a person without nationality as a member of expert commission." It is an obscure wording. If a person "without Georgian citizenship" is meant, he/she should be a national of another country.

A paragraph should be added here, according to which when setting up the commission, the Ministry has to prevent conflict of interests.

32. Article 36 (Functions, Rights and Duties of Expert Commission) - Is it correct to call the expert commission's conclusion "Ecological Expertise Conclusion?" It actually goes beyond ecological limits.

33. Article 39 should be supplemented by a number of bylaws, as well as by amendments to current laws.

34. Paragraph 1 of article 40 notes the following: "The activities subject to ecological expertise envisaged by paragraph 1 of article 4 of the Law of Georgia on Environmental Permits (except of landfills defined by Waste Management Code), the implementation of which started before June 1, 2015 and which do not have Environmental Impact Permits, need relevant decision by the Ministry about continuation of ongoing activities in line with the procedures set by this article."

It is unclear which procedures are meant and why June 1, 2015 was set as a deadline?

35. Article 41 (Legal acts becoming invalid after the law enters into force) should be supplemented by a number of acts, including Order of the Minister of Energy on the construction of over 100 hydropower plants. Otherwise, EIA will lose its sense.

36. The formulation of article 42 (Enactment of the Law) arouses doubts that the Government/the Parliament plans to adopt the law, but postpone its enactment for a certain period of time. It is not clear, whether enactment of only article 38 has any sense.

37. Annex I of the list of activities subject to EIA contains the following activities:

> e.z) Carrying out the works on pumping out or artificial filling of underground waters, where annual amount of water to be pumped out or filled constitutes or exceeds 10 million sq/m;
>
> e.t) Water transfers between river basins, when water is conveyed from one river basin to another to avoid water shortage and when the amount of transferred water exceeds 100 million square meters per year;
>
> z.a) Extraction of oil and/or natural gas, when the volume of extraction in case of oil exceeds 500 sq/m a day, and in case of natural gas – 100 000 cubic meters a day;
>
> z.b) Open-pit mining of mineral resources (except sand and gravel), when the surface of extraction site exceeds 10 hectares;

z.d) Peat extraction, when the surface of extraction site exceeds 50 hectares.

It should be explained how the presented limits (amount, area) were determined and how much it corresponds to Georgia's reality. The analysis of past years shows that 10 hectares is a huge area for Georgia and EIA should be carried out with respect to the activities conducted on much smaller areas.

38. The list of activities of Annex II offers the following wording: "Processing of mineral resources (construction, including processing of inert materials, is not subject to EIA)". It is unclear, for example, why alabaster and cement production should not be subject to EIA, also, why energy projects, such as solar stations, biofuel production and so on, are not subject to EIA.

According to current legislation, creation of protected areas and forest farms is not subject to EIA. To compensate this, the procedure of their approval has been developed, which also contains the issues of public participation and is somehow similar to EIA process. It is essential to discuss the inclusion of these activities into the present draft law.

There are some activities that may have significant adverse effects on the environment if carried out in the area adjacent to protected areas. Thus, this issue also needs to be discussed.

III. Remarks Related to the Explanatory Note

39. The explanatory note of the draft law has been composed very irresponsibly and incorrectly. Neither it serves to inform the public, nor does it explain legislators the reason, goal and essence of adopting the draft law and fails to justify the need and importance of its adoption.

40. The reason for adopting the draft law has been formulated incorrectly in terms of its content as well as from political point of view. It is regretful that the Ministry does not want to acknowledge the shortcomings of current legislation that has numerously been shown in various state policy documents, analytical assessments of local or international experts, including in the assessment documents prepared in frames of the ongoing program of the United Nations Economic Commission for Europe (UNECE) – "Greening Economies in the Eastern Neighbourhood (EaP GREEN) – the present draft law has been prepared just in frames of this program. Instead of citing the rectification of shortcomings as the reason behind adopting the draft law, the explanatory note reads: "The reason for adopting the draft law is Georgia's willingness to fulfill its commitment under the Association Agreement with the European Union and other international agreements on improvement of Georgia's environmental legislation and its approximation to the EU Directives; to care for the environment and to prevent, mitigate or avoid harmful effects on the environment."

The Ministry should realize that bringing Georgia's legislation in compliance with the EU Directives is not the goal, but the means to ensure sustainable development, protection of natural environment and cultural heritage, sustainable utilization of resources, harmonious development of various economic sectors; to promote attraction of investments from international financial institutions and other donors. The formulations provided in the explanatory note can easily be used by the opponents of Georgia's western integration to prove that EU approximation is a process imposed on us and does not correspond to the interests of our country.

It should also be noted that due to the current EIA legislation a lot of decisions were made, which were unfair and caused harmful effects to the environment and human health. Urgent revision and abolition of this legislation was perceived by well-informed public as an act of "restoration of justice."

Below, we offer to formulate the reason for adopting the draft law as follows:

"The reason for adopting the draft law is its discrepancy with the sustainable development principles, as well as with Georgia's commitments undertaken under international multilateral agreements. The present legislation fails to ensure human rights protection established by paragraphs 3, 4 and 5 of article 37 of the Constitution of Georgia; poses a threat to human health and welfare, natural environment and cultural heritage. Imperfect EIA system increases the cost of infrastructural projects and complicates attraction of investments, including the possibilities of financing from international financial institutions; hampers harmonious development of various sectors (tourism, agriculture, energy, nature protection); strengthens the cumulative impact of projects on natural and social environment."

41. "Paragraph a.g of the explanatory note (Key Essence of the Draft Law) is absolutely unclear and is beyond any criticism. It is obvious that the text has been copied from the document that was written for other purposes. Copying such unformatted text with such content in the document officially disseminated for public discussion cannot be discussed as the best expression of respect to interested parties. It should be noted that the Ministry had used the same text in the letter sent to Green Alternative, where it tried to disagree with the opinion expressed by our organization in one of its studies concerning the shortcomings in current EIA legislation.

42. In subparagraph "b.a." of part "b" of the explanatory note (Financial Justification of the Draft Law) the authors of the bill note that "adoption of the draft law does not require additional expenses from the Georgian state budget."

Low quality of ecological expertise is a huge shortcoming of the existing practice. Frequently, people involved in expertise are not familiar or have superficial knowledge about the project and protect area; they lack opportunities to carry out field research and do not participate in public discussion. It is unclear how the Ministry plans to improve this situation without additional expenses.

43. Subparagraph "b.e." reads while discussing the anticipated financial consequences of the draft law that "adoption of the draft law will not trigger aggravation of financial consequences for those persons, who fall under the project influence."

Actually, adoption of EIA legislation based on sustainable development principles will significantly improve financial consequences for those persons, who fall under the project influence, including as a result of technical specifications during scoping process, etc. Good EIA process/practice ensures that an interested party and permit issuing agency find the best, safe and financially profitable way for project implementation. Explanation of such elementary truth is important in the explanatory note for both the legislators and the interested public, including for potential project developers and investors.

44. Subparagraph "c.a" notes that "the draft law complies with the EU Directives, particularly 2001/42/EC, 2011/92/EU, including Directive 2014/52/EU."

This assertion is disputable. To better demonstrate the compliance (to both the authors and the readers), it is possible to prepare a simple table, where EU requirements will be listed in one column, and relevant provisions envisaged by the draft law in the second column along with describing the compliance/incompliance status.

45. Subparagraph “c.c” notes that “the draft law does not contradict to Georgia’s bilateral and multilateral agreements and treaties. In addition, the draft law envisages the principles established by the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.”

Instead of the above mentioned wording, in our opinion, it will be better to note that adoption of the draft law will help eradicate existing discrepancies, on the one hand, in current EIA legislation, and on the other hand, with respect to Georgia’s bilateral and multilateral treaties and agreements, including the Aarhus Convention.

46. Subparagraph “d.a” notes: “International and local experts, Caucasus Environmental NGO Network (CENN) participated in the development of the draft law.”

It is unclear what “international and local experts” means. The names of these experts and organizations should be specified. It is also unclear why only one non-governmental organization participated in the development of the draft law. Does it refer to the draft law prepared in frames of one of this organization’s projects in 2006, which might be used in the process of working over the present draft law?

47. Subparagraph “d.b” notes that “an assessment by an organization (institution) and/or an expert participating in the development of the draft law is attached”; however, no such assessment is attached actually.