

Incorporating climate change into the Environmental Impact Assessment System in Myanmar.¹

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Abstract

Myanmar has been recognised as being a country exceptionally vulnerable to climate change. Honduras, Myanmar and Haiti have been identified as the most affected countries in the 20-year period from 1994-2014.² The Report does note that this is primarily the result of extreme weather event, and in particular Cyclone Nargis in 2008 that killed 140,000.³ Myanmar has recently moved to adopt policies and programs to improve growth and development. The National Comprehensive Development Plan⁴ sets out the goals of accelerating inclusive growth and structural transformation enabling Myanmar to become a middle-income country by 2030. In addition at the Sustainable Development Summit on 25 September 2015, UN Member States adopted the 2030 Agenda for Sustainable Development, which includes a set of 17 SDGs to end poverty, fight inequality and injustice, and tackle climate change by 2030. Goal 13 specifically identifies the need to take urgent action on climate change.

Myanmar has, since the passage of the *Environment Conservation Law 2012*, adopted a series of laws, regulations and policies to respond to the need to promote sustainable development and to address the issue of climate change. Under the *Environment Conservation Law 2012*, the Ministry of Natural Resources Environment and Conservation (MONREC) is given the functions and power to prepare guidelines on the mitigation of and adaptation to global warming and climate change. Through the *Environmental Impact Assessment Procedure 2015* the Government of Myanmar has put in place a comprehensive environmental assessment and approvals process that allows climate change matter to be assessed as part of the process.

However there is still need to provide further guidance and technical or sectoral guidelines to ensure that climate change becomes fully integrated into the EIA assessment system in Myanmar.

Introduction

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² Global Climate Risk Index 2016, Briefing Paper, p.5
<https://germanwatch.org/en/download/13503.pdf>.

³ Global Climate Risk Index 2016, Briefing Paper, p.6

⁴ Ministry of National Planning and Economic Development. (2014). *National Comprehensive Development Plan*.

Myanmar adopted a *National Environmental Policy* in 1994. Although it does not specifically address climate change, it does focus on environmental protection and the enhancement of the quality of life for its citizens.

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

Myanmar has, since the passage of the *Environment Conservation Law 2012*, adopted a series of laws, regulations and policies to respond to the need to promote sustainable development and to address the issue of climate change. Under the *Environment Conservation Law 2012*, the Ministry of Natural Resources Environment and Conservation (MONREC) is given the functions and power to prepare guidelines on the mitigation of and adaptation to global warming and climate change.⁵ The same chapter also gives MONREC the responsibility to develop and environmental impact system and social impact system.⁶ In addition MONREC has functions under Chapter VIII to advise relevant government Ministries with respect to the urban environment.⁷

The Myanmar *Environmental Conservation Rules 2014* set out the general system for EIA in Myanmar. This was detailed in the Myanmar *Environmental Impact Assessment Procedure 2015 (EIA Procedure)* that was adopted in December 2015.⁸ At the same time the Government adopted the Myanmar *National Environmental Quality (Emissions) Guidelines 2015*. MONREC is in the process of preparing a number of Guidelines for various sectors, including mining and hydropower as well as public participation and access to information.

Myanmar's *National Climate Change Policy and National Climate Change Strategy and Action Plan 2016-2030*⁹ focuses both on mitigation and

⁵ Environment Conservation Law 2012, section 7(n)

⁶ Environment Conservation Law 2012, section 7(m)

⁷ Environment Conservation Law 2012, section 17

⁸ Tomohio Shibayama, *Environmental Impact Assessment System and its Improvement in Myanmar*, 2015.

⁹ Neither the Policy nor the Strategy have been formally adopted as of November 2017. The references in this article relate to the strategy as available from myanmarccalliance.org/en/mccsap/

adaptation, particularly relevant for Myanmar as the country is inherently exposed to severe natural weather events, which have been increasing in intensity and frequency over the last sixty years,¹⁰ However the capacity to reduce risk and adapt to climate change is limited due to lack of technical, human resources, financial and legislative processes.

The Objectives of the *National Climate Change Strategy and Action Plan* are:

- To increase the adaptive capacity of vulnerable communities and sectors so that they are resilient to the adverse impact of climate change; and
- To create and maximise use of opportunities for sectors to pursue a low carbon development pathway by ensuring development benefits to communities and all economic sectors.¹¹

The *Green Economy Policy Framework*¹² has been drafted to identify investments that can realize actions identified in the climate change strategy as well as enhancing adaptive capacity (e.g. creating new opportunities) and managing investments that might increase the impact from climate change.

The Myanmar Investment Regime

The main vehicle for foreign investment in Myanmar is the Myanmar Investment Law 2016¹³ and the Investment Rules 2017¹⁴. These replaced the Foreign Investment Law 2012 and its subordinate Foreign Investment Rules 2014.

The *Investment Law 2016* also provides for prohibited investment activities. Although none of these specifically refer to climate change, an investment that “may cause an **enormous** harmful impact to the natural environment and ecosystem” is designated a prohibited investment.¹⁵

Investments under Article 36(c)¹⁶ are required to submit an application for a permit from the Myanmar Investment Commission included those that “are likely to cause a **large** impact on the environment and the local community”. Under the Investment Rules 2017, investments that are required to conduct an EIA are considered to be investments that will cause a **large** impact on the

¹⁰ Government of Myanmar. (2015) Intended National Determined Contribution.

¹¹ *National Climate Change Strategy and Action Plan 2016-2030*

¹² Still in draft form and yet to be adopted by the Government of Myanmar.

¹³ (The Pyidaungsu Hluttaw Law No. 40/2016), The 2nd, Waning of Thadingyut, 1378 M.E. (18th October, 2016)

¹⁴ Ministry of Planning and Finance Notification No. 35 / 2017 The 3rd Waxing of Tagu, 1378 ME (30th March, 2017)

¹⁵ *Investment Law 2016*, Article 41

¹⁶ *Investment Law 2016*

environment. It is clear that the grant of an investment permit does not exempt an investor from the requirement to comply with the *EIA Procedure 2015*.¹⁷

There is no reference to climate change in the Investment Law or Investment Rules. An investment that may have an impact on the emission of greenhouse gas (GHG) or that may be impacted by climate change will only be required to seek an Investment Permit if it triggers a requirement for an EIA by the EIA Procedures Annex A.

The EIA Procedure in Myanmar

Under the *Environment Conservation Law 2012* and *Environment Conservation Rules 2014*, MONREC is given the authority to formulate the EIA system and social impact assessment system to determine if any project or activity to be undertaken by any Government department, organization or person may have a significant impact on the environment. The Ministry is provided with the power to set environmental quality standards (under s.7 (d)). Environmental quality standards are further defined and explained in Chapter VI, sections 10, 11 and 12. MONREC promulgated *Environmental Quality (Emission) Standards* in December 2015. The Environment Conservation Department (ECD) is the responsible body for the implementation of the EIA Procedure.

The *EIA Procedure* establishes the procedures for EIA and Initial Environmental Evaluation (IEE) in Myanmar (see Figure 1 below). The *EIA Procedure* provides a standard process for EIA.

- Screening
- Selection and check of the EIA expert
- Scoping
- Information disclosure and consultation
- Scoping Report and EIA Terms of Reference
- EIA Investigation
- EIA Report preparation and submission
- EIA Review process by EIA Report Review Body
- Approval of EIA Report and issuing of Environmental Compliance Certificate (ECC)
- Appeal Process (to the Minister)

Chapter 2 of the *EIA Procedure* provides that “all Projects undertaken in the Republic of the Union of Myanmar by any ministry, government department, organization, corporation, board, development committee, local government or authority, company, cooperative, institution, enterprise, firm, partnership or individual having the potential to cause Adverse Impacts, are required to

¹⁷ *Investment Law 2016*, Article 71

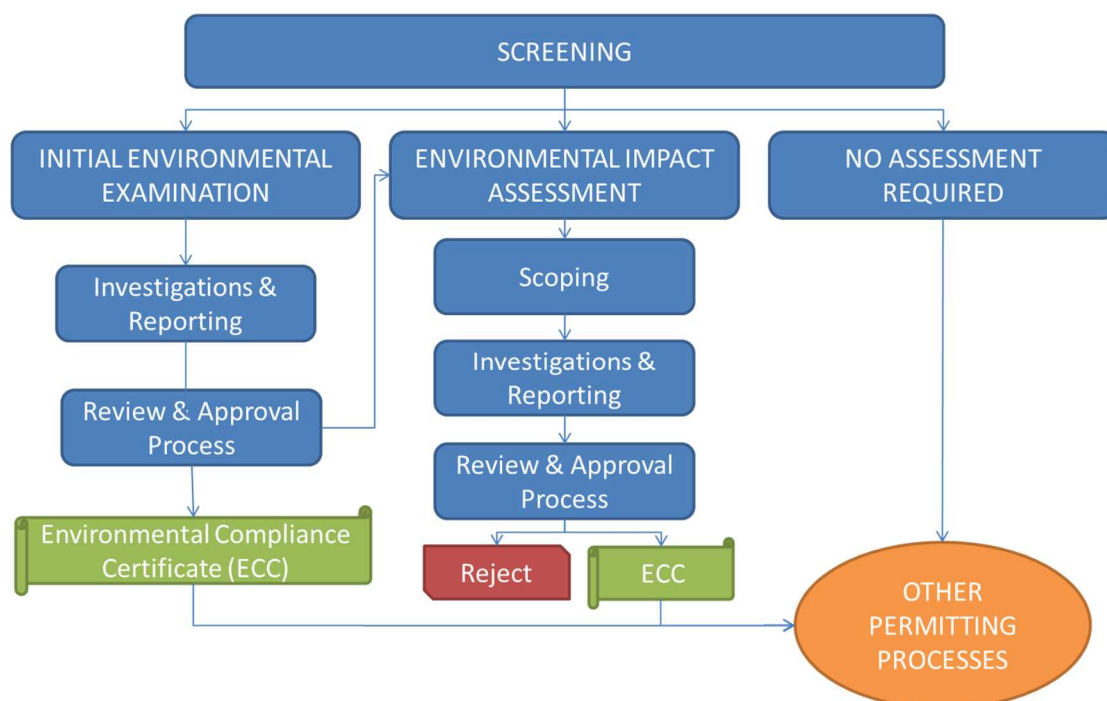
undertake IEE or EIA and to obtain an Environmental Compliance Certificate in accordance with this Procedure.”¹⁸

The *EIA Procedure* includes a screening Annexure to provide guidance for the types of listing those projects required to carry out either an EIA or IEE. However climate change is not a trigger for the EIA or IEE screening. The following analysis focuses on the EIA process that requires more detailed investigation than is required for an IEE or Environmental Management Plan.

Screening

Screening is the first step in the EIA or IEE process. The Project Proponent will submit an application to MONREC to determine the level of assessment that is required using the Annex I list of project (Article 23). Under Article 24 the Ministry will also determine whether an EMP is required for any Project (i.e. regardless of the decision on whether an IEE or EIA is required). There are exceptions to this as set out in Articles 25 to 26.

Climate change is listed as a matter for consideration in the screening determination with the reference to “national, regional and global climate change conditions.”¹⁹ (Although this is not further defined with the I). There is no specific reference to climate change in the Screening Annexure. Projects that are likely to have an impact on climate change through the emission of GHG are likely to trigger either an EIA or IEE depending on size and scale, rather than be reference to the potential GH emissions from the project.



¹⁸ *EIA Procedure* Article 2, pursuant to Section 21 of the *Environment Conservation Law 2012* and Articles 52, 53 and 55 of the *Environment Conservation Rules 2014*

¹⁹ *EIA Procedure* Article 28(n)

Figure 1: Developed by Cosier and Baird (2015)

Scoping

All EIA projects must undergo scoping²⁰. Following the screening determination that an EIA is required, the Project Proponent and its EIA Consultant must develop a draft Terms of Reference (ToR) for the EIA for the Proposed Project. Scoping requires both an initial study of the proposed project and the possible environmental and social constraints as well as beginning the process of public consultation with Project Affected People and other stakeholders.

The draft ToR for the EIA must be submitted for approval by the ECD. The Scoping Report must be prepared in accordance with any guidelines issued by the Ministry and shall include draft ToR.²¹

MONREC has 15 days to review the Scoping Report and ToR and either approved the ToR for the EIA or require further amendments to the Scoping Report and or ToR for the EIA.²²

The Scoping Phase and the ToR for the EIA is the opportunity for ECD to ensure that climate change considerations are included within the investigation of the project by the EIA Consultant. Under the EIA Procedure prior to approving the EIA Report, the EIA Report Review Body²³ must determine that the EIA Report complies with the requirements contained in the ToR for the EIA approved by the ECD.²⁴

EIA Report Preparation

Once the Scoping Report and ToR have been approved by MONREC, the Project Proponent is then able to commence the EIA investigation and the preparation of the EIA and the EMP. The EIA investigation shall consider all biological, physical, social, economic, health, cultural and visual components of the study area, together with all pertinent legal matters relating to the environment, people and communities (including land use, resources use, and ownership of and rights to land and other resources) that may be affected by the Project during all Project phases including pre-construction, construction, operation, decommissioning, closure, and post-closure, and shall identify and assess all Adverse Impacts, risks, Cumulative Impacts and Residual Impacts for environment, social and, if relevant, health that potentially could arise from the Project.²⁵

²⁰ EIA Procedure Article 47. Scoping and ToR are not required for IEE type projects.

²¹ EIA Procedure Article 51, to date no guidelines has been issued by the Ministry.

²² EIA Procedure Article 54

²³ EIA Procedure Article

²⁴ EIA Procedure Article 16 (c)(ii) requires that the EIA Report comply with the Scoping Report and the ToR for the EIA.

²⁵ EIA Procedure Article 56

EIA investigation must include an assessment of alternatives²⁶ and must be in accordance with the approved ToR²⁷. The EIA is to be comprehensive as indicated in Articles 56 and 57. It must also address the relevant national and international standards. Myanmar adopted National Environmental Quality (Emission) Standards in 2015. These must be addressed in accordance with the EIA Procedure 2015.

There is also a clear requirement for the EIA Report to address the issue of climate change²⁸ including the potential impacts on climate change such as greenhouse gas emissions and loss of carbon sinks or stocks; and identification of impacts of climate change on the Project based on available climate change predictions from designated national authorities or international scientific research bodies.

Review and Approval of EIA Report.

Once the EIA report is prepared and submitted, there is a need for disclosure of the EIA Report and the EMP.²⁹ The EIA Report must also comply with the table of contents in Article 63. The EIA Report review body is also given specific responsibilities under the EIA Procedure 2015.³⁰ The EIA Report Review Body is composed of 36 members from different Ministries. These are divided into a number of working groups dealing with different sectors.

MONREC may arrange public consultation meetings³¹ and the EIA Review Report Body will examine the EIA Report, and EMP and either recommend the Project be approved, amended or rejected. The Minister makes the final decision. If approved, MONREC will then issue an ECC for the Project.

The Project Proponent is liable for monitoring and compliance with the EIA, EMP and ECC. There is no requirement for the Project Proponent to establish any community consultative committee or grievance mechanism for PAP.

The Ministry may then approved or reject the EIA Report. If the EIA Report is approved this may be with conditions attached to the ECC.³² The Ministry may prescribe conditions to be attached to the ECC. Such conditions can address³³ issues such as project insurance (against climate related impacts), financial guarantees, the use of energy and management of all adverse

²⁶ EIA Procedure Article 48

²⁷ EIA Procedure Article 55

²⁸ EIA Procedure Article 62

²⁹ There are significant requirements contained in the EIA Procedure for public participation and disclosure of information. See for example Articles 34, 50, and 61

³⁰ EIA Procedure Article 16

³¹ None of these details are clarified in the draft EIA Procedure 2015. This will need to be subject to further guidelines.

³² EIA Procedure Article 70

³³ EIA Procedure Article 91

environmental impacts, which could include GHG emissions and the impact of climate change on the project itself.

Monitoring and enforcement

The Project Proponent is required to commence the implementation of the project strictly in accordance with the conditions attached to the ECC, including the EMP.³⁴

The Project Proponent bears full legal and financial responsibility for all of the Project Proponent's actions and omissions and those of its contractors, subcontractors, officers, employees, agents, representatives, and consultants employed, hired, or authorized by the Project acting for or on behalf of the Project, in carrying out work on the Project.³⁵

In addition, the *EIA Procedure 2015* places a heavy reliance on self-reporting. The proponent is to conduct self-monitoring during all stages of the project in accordance with applicable laws, the EIA Rules, the *EIA Procedure 2015*, standards, the ECC and the EMP, and that the proponent is to notify MONREC of any breaches of its obligations³⁶. Within 10 days of a monitoring report being completed, it is required to be made publically available on the Project's website, at public meeting places and Project offices, and any person is able to request a digital copy of the report.³⁷ The reporting requirements are enforceable conditions of the ECC and the EMP.

MONREC also has the right to conduct monitoring and inspections of a project and activities to determine compliance as well as prevent violations³⁸. Proponents are required to grant MONREC full and immediate access in an event of an emergency or where MONREC believes there has been a violation.³⁹ If non-compliance is found upon inspection, MONREC may require the Proponent to undertake remedial measures or impose penalties⁴⁰. Such penalties can include suspension of the project.⁴¹ All the costs of inspection borne by MONREC are to be paid by the Project Proponent.⁴²

Conclusions

The overall EIA procedure provides many opportunities to integrate climate change considerations into the overall assessment of major projects in Myanmar. This could be at the scoping stage, when the ECD must review and

³⁴ EIA Procedure Articles 87 and 103

³⁵ EIA Procedure Article 102

³⁶ EIA Procedure Articles 106, 107, and 108

³⁷ EIA Procedure Article 110

³⁸ EIA Procedure Article 115

³⁹ EIA Procedure Article 108

⁴⁰ EIA Procedure Article 113

⁴¹ EIA Procedure Article 114

⁴² EIA Procedure Article 115

approve the ToR for the EIA and also through the requirements for public consultation and consideration of the concerns from the Project Affected People and other Stakeholders (including civil society and other Ministries). However, the lack of a final policy framework and strategy is likely to limit the effectiveness of the EIA system. Without an adopted Government policy to integrate climate change consideration into major projects, such as thermal power plants, hydropower developments, transport infrastructure, urban developments, it is difficult to see how ECD would be able to include these consideration into specific project determinations.

The general requirements under the EIA Procedure could be enhance through sectoral guidelines that address the issues of climate change for each sector. Alternatively, MONREC could issue specific guidelines to assist the ECD and the EIA Report Review Body into addressing the assessment of climate change issues within the EAI review, assessment and approval stage. This could also provide guidance on the possible conditions that could be attached to the ECC. Once the Myanmar Government adopts the *National Climate Change Policy* and *National Climate Change Strategy and Action Plan 2016-2030* there will be added impetus to ensure that climate change considerations are more fully defined and integrated within the EIA Procedure.