

4. How to be an Effective Participant in the EIA process

Principle 10 of the Rio Declaration states “[e]nvironmental issues are best handled with participation of all concerned citizens”⁸⁸ and outlines three essential elements to public involvement: access to information; opportunity to participate in the decision-making process; and effective access to administrative and judicial proceedings.

These elements are often referred to collectively as “public participation.” Each participatory element strengthens environmental decision-making by facilitating information exchange and understanding, increasing transparency, and improving accountability.

People living near the site of a proposed project know best about the possible impacts of a project on the local environment or community resources, and may introduce new ideas or identify possible impacts that may not have otherwise been considered. Public participation can also forge lines of communication among communities, the project proponent, and the government, that will

continue through to project implementation or other future projects. For these reasons, it is very important to understand and use every opportunity to engage in the EIA process.

PRINCIPLE 10

Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

⁸⁸ Rio Declaration on Environment and Development, Principle 10 (1992). United Nations Environmental Programme (UNEP) Goals and Principles of Environmental Impact Assessment, Principle 7(1987). <http://www.unep.org/Documents/Multilingual/Default.asp?documentid=78&articleid=1163>

4.1 UNDERSTANDING THE REGULATORY FRAMEWORK

Public participation encompasses many different activities – from seeking information about a project, to writing comments on a draft EIA, to filing a court case challenging a decision. These opportunities will frequently be explained in different laws within a jurisdiction where a proposed mine may be located.

The first step should be to identify the laws that apply to a proposed mining project and what obligations are created on the part of the government and the project proponent by these laws. Although this Guidebook focuses on the EIA process, there may be other permitting steps that occur before, during, or after the EIA process. These permitting procedures may include additional opportunities for public participation. For example, a mining company may need to apply for pollution discharge permits, acquire water rights, seek permission to build roads, or obtain a source of electrical power for operations, any of which may be authorized in a distinct procedure separate from the EIA process.

Therefore, it is important to review the general regulatory landscape in a particular country where a mining project is being proposed. In addition to a mining law, laws governing forests, protected areas, wildlife, wetlands, cultural resources, or customary land tenure may contain requirements that apply to mining projects.

Turning back to the EIA process, laws governing the EIA process might be found within a general environmental law, sometimes known as a framework law or an umbrella law, or there may be a specific EIA law. As outlined in the following, access to information and administrative procedure laws are also important to the EIA process. Some countries' constitutions may be part of the regulatory framework if they create rights to environmental information or have other provisions that might be implicated in decisions about a proposed mine. Some EIAs may even be prepared in the absence of a law that requires one.⁸⁹

⁸⁹ See, e.g., *Save Guana Cay Reef Association Ltd. v. The Queen & Ors* (Bahamas) [2009] UKPC 44, at para. 12 (“The preparation of the EIA in this case, and its submission to The Bahamas Environment, Science and Technology Commission (BEST Commission) was in accordance with what has become the usual practice, but it is not a practice required by statute.”).

4.2 UNDERSTANDING PUBLIC PARTICIPATION RIGHTS AND OPPORTUNITIES

Public participation requirements and implementation vary widely, depending on the particular EIA system. Some laws require extensive public involvement as part of the EIA process,⁹⁰ while others make it discretionary, or are silent on the matter. There is growing recognition that the public has the right to meaningfully participate in the EIA process. Some courts have even ruled that the public must be properly consulted, even when there is no law specifically governing the process.⁹¹

The terminology used in EIA systems to describe public involvement can be confusing. Terms such as “inform,” “consult,” and “participate” may seem similar, but in fact have very different implications

for public involvement. Agencies, ministries, and project proponents may take advantage of this ambiguity to minimize or even eliminate public participation in the decision-making process.

Depending on the term used, public participation will fall in a range from passive to active.

“Inform” represents the most passive form of public involvement. To “inform” means the flow of information is generally one way, from the government or the project proponent to the public. In this case, information can even be given after a decision has been made. “Consult” or “consultation” is less passive, and means that there is an exchange of information and opinions among the public, the government, and the project proponent. In this case, citizens and other interested parties may be asked questions or given opportunities to provide their views. Depending on the EIA system, the decision-maker may be required to take these views into consideration. “Participate” is more active and means that the public has a substantive role in the EIA process, including opportunities to influence the project design and permitting decision.⁹²

Regardless of the terminology used, citizens should strive to engage as fully and effectively as possible in the EIA process.

90 Examples of EIA systems with more detailed public participation provisions include China, the European Union (through the Aarhus Convention), and the United States. See, e.g., The Provisional Measures on Public Participation in Environmental Impact Assessment, 2006 (China); Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (1998) (“Aarhus Convention”); 40 C.F.R. §§ 1502.19, 1503, 1506.6 (United States). See also the European Commission’s legislation implementing the Aarhus Convention, which is listed at <http://ec.europa.eu/environment/aarhus/#legislation>.

91 *The Northern Jamaica Conservation Association v. The Natural Resources Conservation Authority & Anor* [2006] HCV 3022 of 2005 (available at <http://www.elaw.org/node/1629>). See also *Regina v. North and East Devon Health Authority, ex parte Coughlan* [2001] QB 213, 258 (“It is common ground that, whether or not consultation of interested parties and the public is a legal requirement, if it is embarked upon it must be carried out properly. To be proper, consultation must be undertaken at a time when proposals are still at a formative state, it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of the consultation must be conscientiously taken into account when the ultimate decision is taken.”).

92 For an example of how public participation terminology is defined, see Part 1 of the Public Participation Guide published by the Canadian Environmental Assessment Agency. The guide is available online at <http://www.ceaa.gc.ca/default.asp?lang=En&n=46425CAF-1&offset=4&toc=show>

4.3 ACCESS TO INFORMATION AND EIAs

Under most systems, EIA documents must be made available for public review. There is likely to be at least one designated public place where an EIA will be made available. This might be an agency office, on the internet, or at public libraries.

Some EIA laws require that the public have access to background information or supporting documents used to prepare the EIA. If it is not clear, citizens should insist that they have the right to access these documents, especially documents

that are referenced in the EIA itself. Note that other laws, particularly access to information laws, may govern what documents the public has the rights to access.

It is not uncommon to find discrepancies between the EIA and the underlying scientific and technical documents. These discrepancies can be used to demonstrate that the statements and conclusions contained in the EIA are flawed.

4.4 THE IMPORTANCE OF PARTICIPATING AS EARLY AS POSSIBLE

Ideally, citizens should participate in an EIA process as early as possible – even at the screening stage. In many EIA systems, however, the first opportunity for public involvement is during the scoping process. At this point, it is important to ensure that significant issues are identified and alternative ways of implementing the project are considered.

As soon as an EIA process is underway for a proposed mining project, citizens need to find a way to get involved in the process, to insure that the EIA includes accurate information that adequately reflects environmental concerns and concerns of local communities.

The earlier that citizens can get involved in the process, the more likely they will be able to influence decisions about the project. It is easier to change a project while it is being designed than after studies are completed and the EIA is already drafted. Also, it is easier for the decision-maker or project proponent to dismiss or ignore public comments if they are received late in the process.

If a community learns about an ongoing EIA process and has missed the opportunity to comment during the screening or scoping phases, the community should not give up hope. Public participation is critical at all stages in the EIA process and, in some systems, it is required to have participated in the review process before one can challenge the EIA in court.

4.5 HOW TO PREPARE EFFECTIVE WRITTEN COMMENTS

In outlining the goals and principles of the EIA process, UNEP determined that “government agencies, members of the public, experts in relevant disciplines and interested groups should be allowed appropriate opportunity to comment on the EIA” before a decision is made on an activity that is likely to significantly affect the environment.

Laws governing the EIA process will likely specify a period of time for the public to review a draft EIA and submit written comments. If the law does not specify, the agency or ministry may issue a notice indicating the date when comments are due. If an EIA is particularly long or involves complex issues, consider seeking an extension of time to file written comments.⁹³

⁹³ United Nations Environment Programme (UNEP), *Goals and Principles of Environmental Impact Assessment*, Principle 7 (1987).

Rather than making generalized statements about how the project will affect you, your community, or the surrounding environment, your comments will be more effective if they specify provisions of domestic laws and regulations that the EIA or proposed project violate. If your constitution guarantees access to clean water or guarantees a right to live in a healthy environment, it is recommended that these legal rights be highlighted in your written comments if they are likely to be affected by a proposed mining project.

Submitting written comments is important for demonstrating, in later stages, that you participated in the EIA review. If you decide to appeal the approval of an EIA for a particular mine project, your case will be stronger if your written comments cover all the issues you may later want to raise in court.

4.6 HOW TO PARTICIPATE EFFECTIVELY AT PUBLIC HEARINGS

Before participating in a public hearing, it is important to consider the target audience. Are you only trying to inform the decision-makers or are you also trying to engage the public and the media? Most participants in public hearings are trying to address both audiences. Therefore, while your written comments may have tied most of your concerns to the legal duties of the agencies involved, your oral testimony at a public hearing should highlight impacts that will affect the community at large and explain why others should share your concerns.

If there are issues of particular importance, consider putting these on paper in a simple, bulleted form and handing them out at the beginning of the hearing. This will encourage others to address your points as well.

Before a hearing, it is a good idea to find respected experts, such as medical doctors or toxicologists, who understand the likely impact of a proposed project and are willing to testify at the hearing. It is also a good idea to make sure that members of the local community who may be affected by the project are there, in large numbers, to testify about their concerns.

At some public hearings it is a good idea to get on the agenda for the hearing as early as possible. If the media is covering the event, they may not stay for the whole hearing and may be influenced by what takes place early on. It is also important to alert the media, to make sure they cover the hearing.

4.7 CHALLENGING ADVERSE DECISIONS MADE DURING THE EIA PROCESS

The opportunity to seek administrative or judicial review of substantive and procedural outcomes of the EIA process is an important measure for maintaining fairness and transparency. The prospect of having an independent arbiter review a decision imposes an element of accountability on the decision-maker. The availability of administrative and judicial review also enables citizens to enforce their participatory rights and right to access environmental information.

4.7.1 Administrative review

For parties who disagree with a decision made during the EIA process, or if the process itself was flawed, the next step will often be to seek administrative review of the decision. In general, this means that the decision will be reviewed by a higher-level official within the agency or ministry that made the decision, or by an administrative court. In many jurisdictions, courts of law will not accept a petition for judicial review if a party has not sought administrative relief first.

Administrative appeals can be useful because they tend to be less expensive and quicker than judicial proceedings and provide an opportunity to refine arguments that may be made later in a court of law. Agency officials or administrative courts may be more familiar with the subject matter and issues of law. But administrative appeals can be equally

frustrating if there is corruption or delay due to improper outside influence or a backlog of cases.

Many jurisdictions guarantee citizens the right to administratively appeal a decision made by a public authority. There are three basic principles of administrative law that guide decision-making:

1. The decision-maker must take into account all relevant considerations and may not be influenced by outside information or demonstrate bias;
2. Discretionary powers must be exercised within the bounds of the legislation that grants the authority (e.g., a decision cannot be ultra vires); and
3. People affected by an administrative decision are entitled to procedural fairness.

If one or more of these principles is violated, there may be grounds to seek administrative review of the decision. It is very important to be aware of appeal deadlines, which are usually much shorter than civil statutes of limitation. The EIA law or a general administrative procedure law will set out these deadlines, stating that an appeal or petition must be filed within a certain number of days of the decision being made.

Typical Appeal Points

- Failure to disclose certain adverse environmental impacts
- Lack of or inadequate opportunities for public participation
- Omissions in the required content of the EIA (e.g., inadequate range of alternatives, lack of mitigation measures, failure to evaluate cumulative impacts)
- Improper or lack of adequate notice of availability of EIA for public review

Administrative review, as the name implies, typically involves a review of the documents that were gathered or prepared during the EIA process (also called a “record”) to determine whether the decision was proper. Usually, there is no opportunity to introduce new information and a party will be limited to providing a statement of reasons supporting the appeal. Because the scope of review is limited, administrative appeals will be most successful if they point to errors or flaws in the EIA process or to specific examples where the EIA does not satisfy the content requirements set forth in applicable law.

4.7.2 Judicial review

If the decision-maker acts improperly or if the decision does not meet substantive requirements of the EIA law, then the decision may be reviewed by a court, provided that the jurisdiction permits judicial review. Although Principle 10 of the Rio Declaration and other international laws recognize a citizen’s right to access effective judicial proceedings and to obtain redress and remedy in environmental matters, not all countries acknowledge this right and have insulated ministerial decisions from judicial review.

Even when judicial review is available, courts are generally not permitted to exercise *de novo* review of an administrative decision. Rather, the court will look to see whether the EIA process was followed correctly and, in some cases, whether the decision meets substantive requirements in the EIA law. The court’s authority and permitted grounds for review will be described by a statute – such as an administrative procedure, civil procedure, or judicial review act. Some jurisdictions have specialized courts to review administrative decisions. It is important to understand the bounds of the court’s discretion and what issues it may review so that the claims may be properly stated. A court case will not be successful, or may even be dismissed, if a party raises issues that the court does not have authority to review.

Judicial review may be complicated by certain legal and practical limitations, such as the high

cost of obtaining legal representation and expert witnesses, the possibility of costs being awarded against an unsuccessful petitioner, and standing requirements that severely restrict the scope of possible plaintiffs. Some jurisdictions have enacted provisions to reduce costs for public interest cases or have softened standing requirements, but litigation is still expensive. Even if a party is able to get through the courthouse door to challenge the approval of a mining project, judges are often reluctant to overturn or even scrutinize administrative decisions, particularly when a dispute centers on technical issues that are within an agency or ministry’s realm of expertise.⁹⁴ Despite these obstacles, judicial review can be a very effective tool.⁹⁵

In early 2010, an administrative judge in the U.S. Department of Interior overturned a controversial surface coal mining permit issued in the state of Arizona because the agency overseeing the mining project, the Office of Surface Mining (OSM), failed to prepare a supplemental environmental impact statement (EIS) after the mining company changed the project. A coalition of tribal and environmental groups challenged the permit. The administrative law judge concluded: “As a result [of the OSM not preparing a supplemental EIS], the Final EIS did not consider a reasonable range of alternatives to the new proposed action, described the wrong environmental baseline, and did not achieve the informed decision-making and meaningful public

94 See, e.g., *Otadan v. Rio Tuba Nickel Mining Corp.*, G.R. No. 161436 (2004) (Philippines) (<http://sc.judiciary.gov.ph/resolutions/2nd/2004/2Jun/161436.htm>) (“This Court has consistently held that the courts will not interfere in matters which are addressed to the sound discretion of the government agency entrusted with the regulation of activities coming under the special and technical training and knowledge of such agency.”).

95 In April 2010, Bulgaria’s Supreme Administrative Court revoked a permit for a proposed metals processing facility in Chelopech because: (1) there was a two and one-half year delay between the public hearings on the EIA and the date the EIA resolution was issued; (2) the affected communities were incorrectly identified by the Environment Ministry; and (3) the proposed technology was deemed not to be based on best available techniques for an industrial scale operation. See “Bulgarian Court blocks Dundee Precious Chelopech plant,” Reuters, April 16, 2010 (<http://www.reuters.com/article/idUSSGE63F0H120100416>).

comment required by [the National Environmental Policy Act].”⁹⁶

4.7.2.1 Standing to sue

One significant hurdle that potential environmental litigants may face is establishing “standing” (or *locus standi*) to bring a case before a court. Standing means that a party has a sufficient legal interest in the outcome of a case or may suffer impairment of a legal right. An interest in protecting the environment or in having public authorities comply with the law is viewed in some jurisdictions as insufficient to establish standing to sue.

In many jurisdictions, associations or NGOs formed for the protection of collective interests of the public (such as protecting the environment) are not deemed to have sufficient legal interest because the group’s members cannot assert individual claims. This concept is generally called “associational standing.” In such jurisdictions, individuals who have a direct legal interest at stake must file the case and bear the risks and costs.

On the other hand, certain countries (particularly in Latin America) have open standing rules that allow judicial review of government action at the behest of any member of the public. These cases are known as “*acciones populares*.”⁹⁷

Similarly, India has very broad standing requirements and a robust system that encourages public interest litigation to protect environmental rights.⁹⁸

4.7.2.2 Scope of judicial review

As mentioned previously, most jurisdictions follow general principles of administrative law and do not allow a court to substitute its own decision for that of an administrator or minister. Instead, the court will evaluate the “reasonableness” of the agency or ministry’s decision and whether all of the relevant information was considered before the decision was made. Courts will also review the EIA process to make sure that required steps, such as proper notice or public participation, have been met.

96 In re *Black Mesa Complex Permit Revision*, DV 2009-4-PR (Jan. 5, 2010), at p. 36.]

97 An example is Article 88 of the Constitution of the Republic of Colombia, which states: “The law will regulate *acciones populares* for the protection of collective rights and interests related to property, space, security and public safety, administrative ethics, the environment, free economic competition and issues of similar nature defined therein. It will also regulate the actions originating in damage to a plural number of persons, without prejudice to the relevant individual stocks. Also, it will determine the cases of strict liability for damage caused to the collective rights and interests.”

98 *S.P. Gupta vs. Union of India*, AIR 1982 SC 149, at para. 19A (“It is for this reason that in public interest litigation -- litigation undertaken for the purpose of redressing public injury, enforcing public duty, protecting social, collective, ‘diffused’ rights and interests or vindicating public interest, any citizen who is acting bona fide and who has sufficient interest has to be accorded standing.”); *State of Uttaranchal v. Balwant Singh Chauhan & Ors* [2010] INSC 54 (describing history of public interest litigation in India and relaxed standing requirements).

4.8 ENFORCING PROMISES, COMMITMENTS AND CONDITIONS RELATED TO THE PROJECT

In some legal systems, the EIA itself is an enforceable document and citizens can bring a court case to enforce an EIA.

4.8.1 Promises contained in the EIA

As described in earlier sections, an EIA for a mine is likely to include mitigation plans and perhaps plans for restoring the area after the mine closes. The EIA may include specific commitments to use certain technologies to protect groundwater from contamination or restrict the hours of operation to maintain the livability of the area near the mine. If the mine violates commitments made in the EIA, citizens in some countries will be able to challenge those violations in court.

4.8.2 Conditions contained in the grant of environmental clearance

In some countries, the environmental clearance that is based on the information provided in the EIA is an enforceable document. The environmental clearance will generally include conditions on which the mine was approved. In many jurisdictions, these conditions are enforceable in court.

GENERAL TIPS FOR EFFECTIVE PARTICIPATION IN THE EIA PROCESS

- Identify the ministries or agencies that have decision-making authority over the proposed project.
- Identify the key individuals who will be responsible for the decisions that concern you.
- Collaborate and join forces with organizations or groups that share a similar interest in the issues that concern you.
- Monitor local newspapers for official announcements or articles about a proposed project and opportunities to submit comments or attend hearings.
- Participate at every possible opportunity provided by the government or project proponent, whether by submitting written comments or attending a public hearing.