

LETTER TO EDITOR

THE DILEMMA OF ENVIRONMENTAL IMPACT ASSESSMENT IN SARAWAK, MALAYSIA

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Abstract: In the Malaysian state of Sarawak, Environmental Impact Assessment (EIA) is governed by both the State and the Federal EIA laws. This leads to ambivalence in determining the legislation under which a prescribed activity demanding an EIA falls. Even though a prescribed activity is defined by the EIA legislation, different stages of the prescribed activity eventually become prescribed activities on their own, which demand fulfillment of different EIA legislation. Unclear demarcation of EIA jurisdiction and different requirements on the scope of an EIA particularly for earthworks also stir doubts among environmental consultants. Consultation, involvement and effective communication among the State and Federal environmental authorities are crucial to minimize uncertainty resulted from co-implementation of both the EIA legislation.

Keywords: Department of Environment, law, environmental impact assessment

Introduction

Environmental impact assessment (EIA), according to the International Association for Impact Assessment is ‘the process of identifying, predicting, evaluating and mitigating the biophysical, social and other relevant effects of development proposals prior to major decisions being taken and commitment made’ (IAIA, 1999, p.2). In Malaysia, EIA is governed by Section 34A, Environmental Quality Act (EQA) 1974. The Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) 2015 was made under EQA 1974 to provide specific legislative requirements concerning EIA. The Department of Environment (DOE), as the custodian of EQA 1974, is mandated to implement the EIA processes and other requirements thereunder such as licensing (Briffett *et al.*, 2004).

Submission of EIA for prescribed activities became a legal requirement after EQ (Prescribed Activities) (Environmental Impact Assessment) Order 1987 came into force. The scope and depth of an EIA are defined by the nature and extent of the corresponding development project as well as the characteristics of the project site, which subsequently dictate the type of EIA to be submitted to the DOE (DOE, 2007). There are two types of EIA under the DOE, i.e. preliminary and detailed. The ‘EIA Procedure and Requirements in Malaysia’ published by the DOE specifies the types of project requiring detailed EIA before 2015. In 2015, the EQ (Prescribed Activities) (Environmental Impact Assessment) Order 1987 was revoked and replaced by the Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) Order 2015. All activities under First Schedule of the new Order demand Preliminary EIA

while activities under Second Schedule of the new Order demand Detailed EIA.

DOE is the sole environmental authority in all states of Malaysia except Sabah and Sarawak, where the respective state environmental authorities coexist with the DOE (Emang, 2006). In Sarawak, inclusion of environmental aspect in the colonial Natural Resources Ordinance 1949 led to the formation of the present Natural Resources and Environment Ordinance (NREO) 1993, which prompted the establishment of the state environmental agency known as the Natural Resources and Environment Board (NREB) as the custodian of the Ordinance (Emang, 2016). Sabah later enacted the state environmental legislation named the Conservation of Environment Enactment 1996 which gave rise to the Environmental Protection Department (Moduying, 2011).

In Sarawak, EIA processes are subject to both the Federal and State environmental legislation. The limits of constitutional power of both legislations are defined by the Ninth Schedule of the Federal Constitution (Mamit, 1997). The Federal EIA Order 1987 provides for exclusion of prescribed activities listed in the First Schedule of the Natural Resources and Environment (Prescribed Activities) Order 1994 (NREB, 1994). However, a clause stating such exclusion is not stipulated in the new Federal EIA Order 2015. It is replaced by a clause specifying the prescribed activities applicable to Sarawak. It is possible for the exclusion or inclusion clause in the Federal EIA Order to be overlooked by untrained eyes. In 1996, a lawsuit was made by three natives whose land was affected by the Bakun Hydroelectric Project, claiming that they were not provided a copy of the EIA report and were not fairly involved in the EIA process in accordance to the Federal EIA Order.

The case was concluded with the court ruling that the project fell under the State EIA Order instead of the Federal one and the former does not require public display and review of the EIA report (*Ketua Pengarah Jabatan Alam Sekitar & Anor V Kajing Tubek & Ors and Other Appeals* 1997).

Despite demarcation of the Federal and State jurisdictions in EIA processes, the requirements are not often clear-cut and occasionally, separate EIAs addressing similar aspects of a prescribed activity need to be conducted to meet the Federal and State EIA requirements, respectively (Memon, 2000; Briffett et al., 2004). This is also echoed by a memorandum of Sahabat Alam Malaysia (2014) stating the need for the DOE and the NREB to work closely in avoiding duplication of authority. While the importance of public participation and streamlining of

the EIA processes in Sarawak have been highlighted, very limited studies have been carried out to address these two issues, which has led to the inception of this article to preliminarily examine the potential of harmonizing the State and Federal EIA processes in Sarawak.

The Federal and State Environmental Legislation

The DOE and the NREB, as the Federal and State environmental authorities, define their prescribed activities in the EQ (Prescribed Activities) (Environmental Impact Assessment) Order 2015 and the Natural Resources and Environment (Prescribed Activities) Order 1994 respectively. Examination of both Orders shows similar prescribed activities as shown in Table 1.

Table 1: Comparison of Prescribed Activities under the DOE and the NREB

Natural Resources and Environment (Prescribed Activities) Order 1994	Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) Order 2015
Authority: NREB	Authority: DOE
<ul style="list-style-type: none"> • Agriculture development 	<ul style="list-style-type: none"> • Agriculture
<ul style="list-style-type: none"> • Logging 	<ul style="list-style-type: none"> • Forestry
<ul style="list-style-type: none"> • Development of commercial, industrial and housing estates 	<ul style="list-style-type: none"> • Housing • Industrial estate development • Land reclamation
<ul style="list-style-type: none"> • Activities which may pollute inland water or affect sources of water supply 	<ul style="list-style-type: none"> • Construction of dam • Water supply • Drainage and irrigation • Dredging • Mining* • Fisheries
<ul style="list-style-type: none"> • Fisheries and activities which may endanger marine or aquatic life, plants in inland waters or erosion of river banks 	
<ul style="list-style-type: none"> • Extraction and removal of rock materials and mining 	<ul style="list-style-type: none"> • Mining* • Petroleum • Quarries
<ul style="list-style-type: none"> • Facilities for disposal and treatment of waste 	<ul style="list-style-type: none"> • Waste treatment and disposal
<ul style="list-style-type: none"> • Any other activities which may damage or have an adverse impact on the quality of environment or natural resources of the State 	<ul style="list-style-type: none"> • Infrastructure • Ports • Aerodrome • Power generation and transmission • Railways • Transportation • Resort and recreational development • Development in coastal and hill areas • Development in coastal area, national park and state park • Development in slope area • Industry • Radioactive materials and radioactive waste

*Mining can fall under two different classes of prescribed activities under the Natural Resources and Environment (Prescribed Activities) Order 1994

There is an apparent difference between the prescribed activities under both Orders. The State EIA Order adopts an inclusive approach with a list of broadly defined prescribed activities while the Federal EIA Order has a more specific approach with specific prescribed activities (DOE, 2007; NREB, 1995). A direct matching between the prescribed activities

defined by both Orders is not straightforward. While the Federal EIA Order explicitly requires preliminary EIA for different mining activities, the State EIA Order parks mining and sand extraction under the category of 'activities which may pollute inland water or affect sources of water supply' which also includes water supply, irrigation schemes and aquaculture

development (NREB, 1994). Unlike the Federal EIA Order, the State EIA Order does not specify its requirement on ore processing but this can probably be matched to the all-inclusive prescribed activity spelling “the clearing of vegetation on any land or the breaking up of any land for any purpose of an area exceeding 50 hectares” (NREB, 1994).

In view of this, the inclusive approach of NREB’s prescribed activities requires higher degree of interpretative effort by the EIA consultants (Mamit, 1997). In addition, the State EIA Order does not have explicit requirement of petroleum exploration and development, which confers the DOE the direct jurisdiction over such activities off the coast of Sarawak.

The Dilemma of Environmental Consultants in Sarawak

Interviews with the EIA consultants of an environmental firm were carried out to better understand the challenges they faced with the co-existence of both the State and Federal EIA laws. The respondents consisted of three senior EIA consultants and two consultants at managerial positions.

A senior EIA consultant expressed that it is unclear if earthwork activities for development of industrial area nearby or within environmentally sensitive areas are regulated by the DOE or the NREB. The State EIA Order requires EIA for development of industrial estates housing medium to heavy industries (NREB, 1994). The Federal EIA Order also requires PEIA for industrial estate development under Item 17 of its First Schedule and DEIA for development in environmentally sensitive area under Item 12 of its Second Schedule. The Federal legislation does not impose implementation of Items 17 and 12 in Sarawak due to overlapping EIA requirements but explicitly requires EIA for industrial activities. However, it is difficult to separate industrial activities from their associated earthworks. There had been cases of industrial activities, as reflected by another senior consultant, where the EIA for earthworks was submitted to the NREB and the EIA for construction and operation was submitted to the DOE. DOE had later, in a few instances of its review panel meeting commented that EIA submitted to the agency should also include earthworks and was unaware that an EIA for earthworks had been submitted to the State environmental agency.

One of the managers interviewed affirmed that the DOE had, in numerous instances of its feedback, required inclusion of earthworks in the EIA of industrial activities and port development, particularly the erosion and sediment control plans (ESCPs). The reason is ESCPs are not warranted by the NREB but they are mandatory in EIA reports submitted to the DOE (DOE, 2007; DOE, 2011). Another manager mentioned that it is a common practice to submit the EIA for earthworks to the NREB first for approval, in

fast-tracked EIA for industrial activities. The reason is that the earthworks can then proceed in parallel with the design and procurement of the industrial activities. Nonetheless, the DOE would require the gap to be addressed when EIA for construction and operation of the industrial development is submitted subsequently. The senior consultant with auditing experience recalled environmental auditing of projects with approved EIAs under the DOE would call for ESCPs of earthworks. As the EIA for earthworks had been submitted to the NREB without ESCPs, this could lead to non-compliance and the clients did not relish the idea of having to conduct ESCPs to meet the audit requirement due to cost implications and the preconception that they had already fulfilled the State environmental requirement.

The manager also highlighted an area of potential confusion in aerodrome development. Prior to the implementation of the EQ (Prescribed Activities) (EIA) Order 2015, construction of airports with airstrips less than 2.5km was under the governance of the NREB, as long as the airports did not fall in the area of national parks. Currently, extension and construction of aerodromes with runway 1km and above or within environmentally sensitive areas are regulated by the DOE. The managers highlighted that this creates repercussion on clients’ budgeting as the EIA costing could be significantly different due to the differences in scopes and technical coverage required by the DOE and the NREB. The DOE requires DEIA for construction of an airport with runway 1km and above which is usually more comprehensive and extensive than the EIA otherwise required by the NREB prior to 2015 (NREB, 1995; DOE, 2007).

Recommendations

A few areas of apparent discord between the State and Federal environmental requirements are noted, particularly concerning earthworks for activities requiring DEIA under the DOE’s jurisdiction where information related to the EIAs of earthworks already submitted to the NREB is not effectively conveyed. To mitigate this, the information can be explicitly written in the DEIA reports submitted to the DOE and made known by a well-informed NREB representative in the review panel meeting. Having said that, involvement of both agencies in the review of one another’s EIA reports is crucial. Similarly, both agencies should be involved in scoping exercises where doubts concerning jurisdiction of EIA are encountered.

Disparity in the requirements for ESCPs can be minimized by making ESCPs a standard requirement of both environmental agencies for earthworks, though this will probably increase the cost of an EIA report submitted to the NREB. It is suggested that a project-based approach to EIA’s custody instead of a stage-based approach could simplify the

administrative process. For example, if a project falls under the jurisdiction of the DOE, then the DOE will oversee all stages of the project from site clearing to operations and decommissioning. While it is possible to streamline EIA administration and requirements in Sarawak, the challenges lie in the willingness of both the NREB and the DOE to work in close consultation. Though not directly related to this article, it is deemed crucial that the State EIA Order is reviewed to incorporate public participation. As such, regional studies on EIA processes can focus on developing a public participation model for Sarawak.

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