

Green Alternative's Policy Briefs are short analyses on some of the challenges to country's sustainable development. They are part of the broader Green Alternative's analytical works; some complement or summarize reports, while others combine analysis from the research with consultation around a pressing issue. The purpose is to convey urgent public policy problems and promote debate on courses of action to resolve them.

This policy brief is intended for public policy makers and practitioners; it will also be useful for those groups and individuals seeking to influence the policymaking processes.

This policy brief is also available in Georgian.

Challenges of approximation of Georgian Environmental Impact Assessment (EIA) system to relevant EU requirements

Summary

This policy brief discusses a new draft regulatory act developed on initiative of the Ministry of Environment and Natural Resources Protection of Georgia, which offers a new Environmental Impact Assessment (EIA) system that is quite different from the one currently in force. The analysis shows that the EIA system provided in the draft law generally meets the relevant EU directives, but it still contains some shortcomings, which can be eradicated through consultations with the stakeholder groups.

Besides the improvement of the EIA system, the draft law also introduces new instruments: Strategic Environmental Assessment (SEA); Transboundary EIA and SEA, and the permitting procedures for the continuation of so called "ongoing activities". The latter raises special concerns because, as the authors of the policy brief claim, this mechanism has been introduced to legalize illegal activities/projects; it is biased towards non-abiding entrepreneurs and unfair towards law-abiding ones; moreover, it opens up wide opportunities for making corrupt deals.

1. Introduction

The EU-Georgia Association Agreement was signed on June 27, 2014. The agreement establishes the framework for cooperation between Georgia and the European Union. Under the agreement, Georgia undertakes to implement reforms and to progressively approximate its legislation in the relevant sectors with that of the EU (gradually, within the agreed timeframes), including in the sphere of environmental protection and sustainable development.

To ensure approximation to the EU legislation in environmental sector, the Association Agreement (Annex XXVI, "Environment") initially points out those acts, which are intended to promote environmental governance and integration of environment into other policy areas – so called 'horizontal environmental legislation'¹. Three out of five directives provided in this section are about the procedures of assessment of the effects of planned projects, plans and programs on the environment and ensuring public participation in the decision-making. Those directives are listed below:

- Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (codification);
- Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment;
- Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC.

To ensure approximation to the above mentioned acts, the Ministry of Environment and Natural Resources Protection of Georgia has developed a new draft legislative act

¹ The horizontal sector comprises environmental legislation on subjects that cut across other environmental legislation and the environmental media such as water, air or soil. In contrast to the media-related legislation, the horizontal legislation is procedural in character and provides for methods and mechanisms aimed at improving decision-making, legislative development and implementation.

– Environmental Assessment Code. A part of mechanisms proposed by the draft code (for example, Environmental Impact Assessment (EIA) and public participation in decision-making on the activities having significant environmental impacts) are already regulated by current Georgian legislation (since 1996) and therefore, in this case, current norms need to be approximated to the above mentioned EU Directives.

The second part of the issues regulated by the draft law is absolutely new to Georgian legislation; these new instruments are: Strategic Environmental Assessment (SEA) and Transboundary EIA and SEA. It should be noted that one more mechanism has been introduced by the draft law (permitting procedures granting an applicant the right to continue an “ongoing activity”) that has nothing in common with the requirements of the EU legislation. Georgian legislation includes similar mechanism since June 1, 2015 and actually, it has simply been copied in the new draft code (see critical opinions about this issue in subchapter 3.6).

The following chapters firstly briefly review the shortcomings of EIA system current in place in Georgia; later, they provide a critical review of the Draft Environmental Assessment Code (the last available version) released by the Ministry of Environment and Natural Resources Protection of Georgia for public consultation, along with Green Alternative’s recommendations.

2. Current EIA System and Shortcomings: Short Overview

As already mentioned above, the EIA instrument has existed in Georgia for almost 20 years, since 1996 and it had not undergone any dramatic changes till 2005-2006. As surprising as it may sound, the EIA system existing in 1996-2005 years was much more in line with the requirements of the European Union’s EIA directives than the EIA system, which underwent changes as a result of 2005 reforms and which is still active today. Of course, the system existing in 1996-2005 had some shortcomings, which needed to be eradicated. In addition, there were some weakly regulated aspects, which needed improvement and specification. Despite it, it can be said resolutely that in terms of general principles and approaches, the EIA system existing before the 2005-2006 reforms was much more in line with the EU requirements than the current system established as a result of these reforms. The existing shortcomings were not eradicated as a result of the deregulation and liberalization reforms implemented in 2005-2006 (which further depended in the following years); moreover, not only the EIA system did not improve, but it even worsened and further distanced from the relevant EU requirements. For example:

- The activities (according to the scale, significance and nature of environmental impact) are no more divided into four categories (the scale of environmental assessment and public participation, as well as decision-making procedures and hierarchy differed according to the categories); as a result of reforms implemented in 2005-2006, today there is only one, quite limited list of activities subject to EIA. The list does not cover the activities (i.e. EIA is no more compulsory for conducting the activities), such as extraction of mineral resources, agricultural and food, timber processing, paper, leather and textile industry, some types of infrastructure projects and other activities having significant impacts on the environment and human health.
- As a result of the reform, the activities are subject to EIA in case they are planned by private persons/companies; if projects are planned by state entities, EIA is not compulsory any more. Moreover, even in case of implementation of private projects, the legislation allows for avoiding EIA and obtaining a permit on condition that this obligation will be fulfilled sometime in the future.
- The opportunities for public to participate in decision-making were most severely affected by the reforms. Before the 2005-2006 reform, decisions on planned activities were made under public administrative procedures (it means that a permitting authority was obliged to publish, within reasonable terms before issuing a permit, an EIA report for commenting; then to hold a public discussion and make a final decision taking into account public opinions). As a result of the reform, the rule of making decisions on planned activities was changed. Until now, decisions are made through simple, rather than public administrative procedures that practically rules out opportunities for public to participate in the decision-making processes. In addition, the decision-making period has sharply decreased (from three months to 20 days).

In order to eradicate the shortcomings in the EIA system and bring it in line with the EU legislation and international requirements (including the Aarhus Convention²), donor assistance³ has been rendered to Georgia since 2002³. A series of trainings, workshops, discussions, educational tours were held with the help of donors in European countries; sector-specific EIA guidelines were developed; a new draft law was elaborated in 2005-2006 (which, unfortunately, failed to reach even the

² Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters (the Aarhus Convention); Georgia ratified the Convention in 2000. It has been in force in the country since October 30, 2001.

³ It should be noted that the very first laws regulating the EIA system, which were adopted in late 1996, were also prepared with donor assistance.

stage of inter-agency discussion). Despite all these initiatives, neither executive, nor legislative authorities made any efforts to improve the virtually destroyed and profane EIA system. Although the uselessness of this system has actually been recognized at all levels, the only argument cited as a counterbalance to the need of improving this system is that the state regulation of activities and public participation in decision-making hampers investments. Thus, “regulation” and “participation” should either be weak, or do not exist at all. It especially concerns the environmental, social and occupational safety spheres.

It can be said that ultimately, all donor efforts directed to the improvement of EIA system came across a wider problem, such as (though quite an opposite was declared formally) the absence of political will within the government to establish democratic institutions and procedures. The new political force, which came to power as a result of the 2012 parliamentary elections, promised, like the previous one, to implement democratic reforms. Thus, this is now the task of this political force to implement real reforms and establish transparency and accountability instruments in Georgia typical for democratic systems. The draft Environmental Assessment Code discussed in the present policy brief is undoubtedly a step ahead for the fulfillment of this task; however, we all, including non-governmental and donor organizations, should pay more attention and make efforts to ensure that the draft law, at least, “reaches” the Parliament, certainly in a form, which will be in line with Georgia’s commitments to the European Union and other international commitments. It can be said boldly that the Environmental Assessment Code will become a litmus test for demonstrating real wishes of the ruling political force.

3. Draft Environmental Assessment Code: some of the critical issues

In early September, the Ministry of Environment and Natural Resources Protection of Georgia released a revised version of the new draft normative act – draft Environmental Assessment Code - regulating the environmental impact assessment (EIA) system⁴. A roundtable discussion was held at the Ministry on September 23-24, 2015 to discuss the draft law. Another public discussion was planned to be held on October 12, 2015, however, it was cancelled later and no other version of the draft code has been available to the public since then. The Ministry planned to submit the draft code to the Parliament of Georgia in December 2015. But, as it seems, it failed and apparently, the draft code will be submitted to the Parliament during the 2016 spring session.

Thus, in this chapter reviews Green Alternative’s critical remarks and recommendations on the last version of the Draft Environmental Assessment Code available to the public and released in September 2015. Its major part was already presented orally at the meeting held at the Ministry of Environment on September 23-24. General agreement has been reached with the authors to take into consideration a part of them, while no agreement has been reached on the other part. Detailed written comments were also submitted by Green Alternative on the same, latest version of the draft code⁵, however, response has not been received from the ministry so far. Some of the major critical issues covered by the draft law are shortly discussed below. It is important that this issues are paid particular attention during public and parliamentary discussions.

3.1 Exemptions from EIA

The draft law (accompanying draft law amending the Law on Licenses and Permits) envisages improvement of a very important shortcoming of the current EIA system related to exemptions from EIA. In particular, unlike the current system, new norms oblige anyone to conduct EIA for a planned activity/project, no matter whether a private law entity or any ministry and government agencies plan to carry out this activity.

Undoubtedly, this amendment should be welcomed; however, the current legislation still preserves a norm, allowing to make unjustified and unsubstantiated exemptions, particularly the norm envisaged by the Law on State Support for Investments (2006), which enables any investor to launch activities based on the so called “preliminary permit” without conducting EIA and obtaining a permit on condition that the investor will meet these legal requirements in future.

It is wholly unacceptable to apply the mechanism of issuing “preliminary” licenses and permits to the EIA system as envisaged by the Law on State Support for Investments; this mechanism makes the fundamental principles of EIA absolutely senseless and undermines the entire system. Therefore, it is essential to make an amendment to the Law on State Support for Investments that will not allow preliminary issuance of environmental permits (as it happens in case of issuing user licenses and construction permits).

⁴ Available at the website of the Ministry of Environment and Natural Resources Protection of Georgia <http://www.webcitation.org/6buFP7f2r>

⁵ Green Alternative, December 2015. *Critical review and recommendations on the Draft Environmental Assessment Code of Georgia*. Available at: <http://bit.ly/21wlwew>

3.2 EIA and environmental permitting process linkages with other licenses and permits

The draft code provides no linkages between the environmental permitting procedures and other permitting and licensing procedures necessary for commencement of the activities. Therefore, it is desirable to add a separate chapter to the draft code, which will thoroughly define these links; special attention should be paid to:

- **Links with the stages of construction permitting:** it is important to ensure that obtaining the right to land does not precede obtaining an environmental permit;
- **Procedures of issuing user licenses⁶:** it is important that EIA and environmental permit issuance procedures precede selling of user licenses at an auction;
- **Links with environmental technical regulations (generally binding rules);** It is important to clearly demonstrate this link with respect to the activities included in the both annexes of the draft code.
- **Links with the process of issuing permits on the construction of radioactive or nuclear facilities.**

3.3 Screening

It is undoubtedly progressive that the draft code formalizes a screening stage and establishes detailed screening procedures (article 6 is completely dedicated to screening). Nevertheless, there are three issues that should still be to given due consideration:

- **The draft code does not define criteria used for distributing the activities in two annexes.** It is clear that the draft code regulates the issues related to those activities, “implementation of which may have a significant impact on the environment, human life or health”; however, it is not clear what particular criteria were used for dividing these activities into two categories – what are those characteristics, which determine putting an activity into the first or the second annex?
- **Unlike other stages, the draft code does not clearly define which type of administrative proceeding (simple or public) is used by the Ministry for screening decision.** The world practice (including Georgian experience) makes it clear that at this stage the developers of difficult, large-scale projects frequently try to avoid EIA (that automatically means less public attention to the project) through breaking up the project into small, insignificant components with less environmental impacts (in scientific literature this practice is known as “salami slicing”). Thus, separate components of “the sliced” project are submitted to a competent authority in a form of separate projects for screening decisions. Of course, there is a huge probability that a competent authority will be misled (in the worst case scenario, civil servants may conclude a fraudulent deals with project developers) and an incorrect decision can be made. To prevent this, it is essential to make decision-making process at the screening stage transparent, and ensure access to information and public participation in decision-making.

Taking the above mentioned into consideration, we deem it essential **to make screening decisions through public administrative proceedings**. In other words, a screening application should become available to the public not only after the Ministry makes a decision (as given in paragraph 6 of article 6 of the draft code), but shortly after submitting the screening application to the Ministry (before the Ministry makes a decision). A screening application should be published and the public should be given relevant time for submitting opinion.

- **Taking into consideration the requirements related to biodiversity protection and climate change at an earlier, screening stage of activity planning.** The draft code provides a detailed list of screening criteria based on which it should be decided whether an EIA is required for the activities listed in Annex II. The criteria listed in paragraph 4 of article 6 are almost fully in line with the requirements of Annex 3 of the EIA Directive (Directive 2011/92/EU of the European Parliament and of the Council). It should be noted, however, that taking into account the practical experience from EIA application, as well as in response to modern challenges, important amendments were made to the Directive (including to its Annex 3) in 2014 (Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014). Reflecting these amendments in the draft code would significantly promote not only the approximation with the relevant EU Directive, but also the rectification of shortcomings proved by almost 20-year practice of using EIA instrument in Georgia and fulfillment of obligations undertaken by the state under international agreements, including: Convention on

⁶ Mining license; license for use of underground space; general license for use of oil and gas resources (special license of oil and gas exploration; special license of oil and gas extraction); general license for forest harvesting (special license for timber production; special license for hunting farm); license for fishery.

Biological Diversity, Ramsar Convention on Wetlands of International Importance, especially as Waterfowl Habitat, Bonn Convention on the Conservation of Migratory Species of Wild Animals, Bern Convention on the Conservation of European Wildlife and Natural Habitats, and Convention on Climate Change.

Furthermore, it is essential to add following special provisions for biodiversity protection at the screening stage:

1. *It is prohibited to carry out the activities listed in Annex 1 of this code on a protected area of any category defined by the Georgian legislation.*
2. *It is admitted to carry out the activities listed in Annex 2 of this code only on those protected areas, where such activities do not contradict the legislation on protected areas, as well as only in case of conducting EIA and existence of positive ecological expertise conclusion.*
3. *Except of the cases defined by paragraph 2 of this article, the activities listed in Annex 2 of this code are subject to environmental impact assessment, if the screening procedure has ascertained that:*
 - (a) *An activity is planned near a protected area;*
 - (b) *An activity may have a direct impact on a protected area;*
 - (c) *An activity may have a direct and/or indirect impact on the endemic, relict and endangered species included in the Red List, protected by international conventions and agreements, their number and habitats, reproduction areas, important habitats, migration and water access ways and watering places.*

Taking the above remarks into consideration and respectively, reflecting them in the draft code will promote the improvement of EIA system, fulfillment of obligations undertaken by the country under international agreements and finally, meeting the requirements of the Biodiversity Strategy and Action Plan (BSAP) for 2014-2020 approved by the Government of Georgia in May 2014. In turn, comprehensive fulfillment of BSAP is one of the requirements of the Association Agreement between Georgia and the European Union.

3.4 List of activities listed in Annexes I and II

It is clear from the draft code that all the activities listed in Annex I of the draft code are subject to EIA; the activities listed in Annex II are subject to EIA only in case if the screening procedure identifies the need for conducting EIA.

There is no need to explain the significance of accuracy in the definition of the lists of activities. It should be noted that the activities listed in the annexes need significant improvement both in content and stylistically, as well as in terms of defining the thresholds. Although the lists provided in the annexes are mostly based on a relevant EU Directive, it is essential that the lists be in line with the local context.

As far as the list of Annex I is concerned, following recommendations are proposed:

- International practice has made it clear and international organizations (such as the World Bank, International Commission on Large Dams, World Commission on Dams and International Energy Agency) have already agreed that in case of hydro power plants, EIA is required for projects that involve the production of electricity from the gravitational flow of water into one or more turbines, with a total capacity of over 50 Megawatt and/or requiring the construction of a new dam of over 15 meters in height (in relation to the foundation), or a dam of between 5 and 15 meters in height with a reservoir of over 3 million m³. Taking the above mentioned into consideration, the activity given in paragraph 21 of Annex I needs changes.
- Activity given in subparagraph “c” of paragraph 1 of Annex II should be transferred to Annex I and be formulated as follows: “Agricultural water management projects, including irrigation and drainage projects”.
- It is recommended to add “establishment of a protected area” to Annex I and respectively, this activity should be subject to EIA.
- Following activity should be added to the list of Annex I: “Production of flour from fish and animal bones.” The question is that such activity is carried out in Georgia’s Black Sea coastal line and it (along with the environment) has adverse effects on local communities living near the enterprises (the problem is especially pressing in the town of Poti). Locals express grave concerns over the smell caused by the enterprises. Reduction of the smell caused by fish-processing enterprises as well as mitigation of impact is possible through regulating potential odor sources (changing technology, management elements) and first and foremost, selecting correct locations for such enterprises. Only a single instrument – EIA gives a possibility to discuss possible locations of enterprises. Therefore, it is important that such activity is subject to EIA.

3.5 Regulation of activities listed in Annex II

It is not clear from the draft code how the activities included in Annex II will be regulated if the screening procedure ascertains that an activity does not require EIA. Apparently, we should suppose that in this case a project developer will not be obliged to conduct any type of environmental study and obtain consent from the state (the Ministry of Environment and Natural Resources Protection) to carry out an activity. A project developer will simply have to observe the emission standards⁷ set by environmental technical regulations (generally binding rules) and other general requirements of Georgian legislation.

In our opinion, introduction of environmental technical regulations in Georgia in 2008 was not justified, because the norms of emission of harmful substances into the air and water and water uptake from surface water objects approved by environmental technical regulations are used in a unified manner, with respect to any enterprise/activity, which have significant impacts on the environment (under current legislation – with respect to those activities, which are not subject to EIA), regardless of produced products, location and used technologies, without any preliminary (environmental) investigation and receiving consent from the state (the ministry).

Regulation of the activities included in Annex II of the draft code (regulation of those activities, which are not subject to EIA as a result of screening) through environmental technical regulations is irrelevant and unacceptable (besides the reasons described above, due to extremely weak, practically non-existent enforcement system). These activities may not have such strong impact on the environment and human health, as the activities included in Annex I; however, because of the nature and scale of impact, they still require an individual rather than a unified approach.

In case of the activities included in Annex II, if the screening stage ascertains that an activity does not require EIA, a project developer should still be obliged to study potential environmental impacts (but the study should not necessarily be as large-scale and comprehensive as EIA) and outline mitigation and an environmental action plan; the Ministry of Environment and Natural Resources Protection should study these documents and make a decision on the activity (whether to issue an environmental permit or not). Certainly, the process of decision-making should be transparent and participatory; but in this case, the terms and forms of public participation may be more limited than in case of the activities included in Annex I.

3.6 A concept of “ongoing activities” and mechanism of regulation of such activities

One important part of the draft code, article 47 is completely dedicated to the issues of regulation of so-called “ongoing activities”. The draft code does not explain what “ongoing activities” mean and we think that it has been omitted deliberately because this entire part of the draft code is actually about legalization of illegal activities/projects and offers the mechanism for it (current EIA legislation already contains such unjustified mechanism since June 1, 2015⁸). This article should be completely removed from the draft code, since it is biased towards non-abiding entrepreneurs and unfair towards abiding entrepreneurs; it also creates wide opportunities for making corrupt deals. Below are the arguments to substantiate this position.

As mentioned above the draft code does not provide a definition of the term “ongoing activity”, though it defines term “a decision to continue an ongoing activity”. In particular, according to the draft law, “a decision to continue an ongoing activity” is “an order issued by the ministry, which entitles a developer of ongoing activity to continue ongoing activity”.

Paragraph 1 of article 47 of the draft code makes it possible to ascertain what is defined under “ongoing activity.” In particular, according to this paragraph, “ongoing activity” is an activity, which although, according to current legislation, is subject to EIA and requires a permit⁹, its implementation was still launched without conducting EIA and obtaining a relevant permit before June 1, 2015. It is noteworthy that such activity is considered illegal by current Georgian legislation and such violation is followed¹⁰ by an administrative and criminal liabilities.

It is interesting what can be considered in practice as “ongoing activities” and which illegally operating enterprises can fall under these norms. In our opinion:

⁷ Environmental technical regulations have approved the norms of emission of harmful substances into the air and water and water uptake from surface water objects (Decree No 17 of the Government of Georgia dated January 3, 2014 “On Approval of Environmental Technical Regulations”).

⁸ The Law of Georgia dated April 29, 2015 amending the Law of Georgia on Environmental Impact Permit. Available in Georgian at <https://matsne.gov.ge/ka/document/view/2820712>

⁹ Exact quotation from the draft code (article 47. The rule of decision making on continuation of ongoing activity): “The activities envisaged by paragraph 1 of article 4 of the Law of Georgia on Environmental Impact Permit and subject to ecological expertise (except the landfills defined by Waste Management Code), implementation of which started before June 1, 2015 and which do not have environmental impact permits, require the Ministry’s relevant decision on continuation of ongoing activities in accordance with the procedures set by this article.”

¹⁰ Implementation of activity without environmental impact permit is punished by a fine from GEL 7 000 to GEL 10 000 (Code of Administrative Offences of Georgia, article 791); implementation of activity without environmental impact permit carried out after imposing an administrative penalty on such activity is punished by a fine or corrective work up to 2 years or imprisonment up to 3 years (Criminal Code of Georgia, article 306).

- These norms will undoubtedly be used with respect to large polluters operating since the Soviet period, which had over 25 years to bring their activities in line with modern norms (adopted since the country gained its independence, in the second half of the 1990s). During past 25 years these enterprises were constantly hiding behind the terms of bringing their activities in line with legislation (which were being postponed constantly), or else were paying fines and continuing operation. This mechanism of “legalization of illegality” envisaged by the proposed draft code (which is also envisaged by current legislation for already six months) still enables similar enterprises to continue their activities forever so that to cause irreversible damage to the environment and local communities affected by their activities.
- There is no novelty for anyone that in Georgia, frequently, so called “investors”, with the support and encouragement of senior officials, launch implementation of the projects purportedly with high economic benefits for the country before obtaining relevant permits from the state agencies; they do not conduct EIA, do not obtain permits and respectively, violate the law (the latest, most obvious examples for such violations are: construction of ore leaching fields by the company RMG in Bolnisi district; construction of Dariali HPP by the company Dariali Energy in Kazbegi district). In such cases, the enforcement authorities, in the best case scenario, limit themselves by imposing an administrative penalty, while the enterprises continue illegal activities. The enforcement authorities do not even consider the possibility of closing the operating enterprises and demanding the environmental restoration to its initial state. Sometime later, “investors” will want to obtain a permit, but it is absolutely senseless to conduct EIA when the activities are ongoing, because EIA is a tool for making decisions on planned rather than on ongoing activities. Another tool – environmental audit is used to assess the impact of ongoing activity on the environment and human health. Just this is what the draft code envisages: legalization of illegally launched activity through issuing a permit on conducting ecological (environmental) audit and “making a decision on continuation of ongoing activity.”

Thus, the above mentioned definitions and the content of article 47 make it clear that:

- (a) “A decision on continuation of ongoing activity” practically is a new type of permit¹¹, which is **issued to legalize illegal activity, in order for an illegally functioning enterprise to continue functioning “legally”**.
- (b) To obtain this “permit”, a project developer has to submit to the ministry “ecological audit report” and “a plan of measures on reduction of environmental impact caused by ongoing activities”. **The timeframes of the plan are defined by the ministry for each particular case.**
- (c) “A permit” on legalization of illegal activities is issued by the Ministry of Environment and Natural Resources Protection, under the public administrative proceedings (paragraphs 4-10 of article 47), but the terms are not defined by the law (it is not clear if permit can be issues for 5, 10, 20 or more years); the terms will be defined by the ministry for each particular case. In other words, an illegally functioning enterprise will be able to continue “legal” functioning for a desirable term, as it can negotiate the term with ministry.
- (d) In case of complete and duly fulfillment of conditions set by the “permit”, a developer of ongoing activities will be authorized to apply to the ministry with the request to receive an environmental permit. In this case, a project developer should still conduct EIA and submit an EIA report to the ministry to obtain a permit. This requirement lacks a sense, because as already mentioned above, EIA is a tool that is applied for planned rather than ongoing activities.
- (e) June 1, 2017 is a deadline set for violators to legalize illegal activities (paragraph 2). It apparently means that the norms offered by the draft code for legalization of illegal activities are temporary, but to believe it would be equal to self-deception. The last 20-year practice of constant postponement of the terms because of non-fulfillment of legal requirements does not give a reason to believe that this is a temporary norm and “June 1, 2017” will not be replaced by another term, which will be more acceptable for “investors” and enforcement authorities. Similarly, we should suppose that there is a huge probability that the term of legalizing “illegal” activities – June 1, 2015 will be changed again.
- (f) It seems that the draft code does not rule out the possibility of applying administrative and criminal liability measures against violators working without permits (paragraphs 15 and 19); however, **ultimately, it is not clear when and in which case a moment will come to impose a liability.**

The mechanism proposed under article 47 can under no circumstances be considered as promoting enforcement and/or voluntary compliance. **The proposed mechanism is clearly directed to legalization of illegal activities and does not even consider the possibility for the ministry to reject continuation of illegal activities to protect environment and human health.** The mechanism has been introduced with the single goal: (1) to regulate, without suspension of activities, those Soviet-old big polluters, for whom reduction of environmental pollution, caring for human health (both employed at the enterprises and affected by these enterprises) and investing in environmental measures is simply unprofitable; and (2) to ensure that the governmental agencies have a possibility to legalize illegally operating projects imposed and “permitted” by high officials.

¹¹ It should be taken into account that according to article 1 of the framework law on licenses and permits, a new license or permit can be introduced only by this law (“... this law defines a detailed list of the types of licenses and permits...”); the law on licenses and permits does not recognize such permits or licenses (decision on continuation of ongoing activity) even today.

Instead of introduction of the above-mentioned mechanism, it is recommended that the Ministry of Environment and Natural Resources Protection makes a complete inventory of regulated community and introduces a fair and transparent system for environmental enforcement; it is essential to improve the legal framework for environmental enforcement and simultaneously, to identify specific groups (and specific facilities in each group) of the regulated community and develop specific approaches towards them. Instead of the current strategy of “closing one’s eyes” and postponing problem reaction “for better future”, it is essential to develop efficient and realistic short-term and long-term strategic plans that will promote enforcement. It requires calculation of necessary costs and reflecting them in the budgets of relevant structures. It is extremely important to unveil the plans to the public and let the public to comment on the plans.

Here, we should shortly touch upon the issue of conducting **an environmental (ecological) audit**, because this instrument is mentioned in very same article 47 and the current legislation, as already reiterated above, also contains a similar norm.

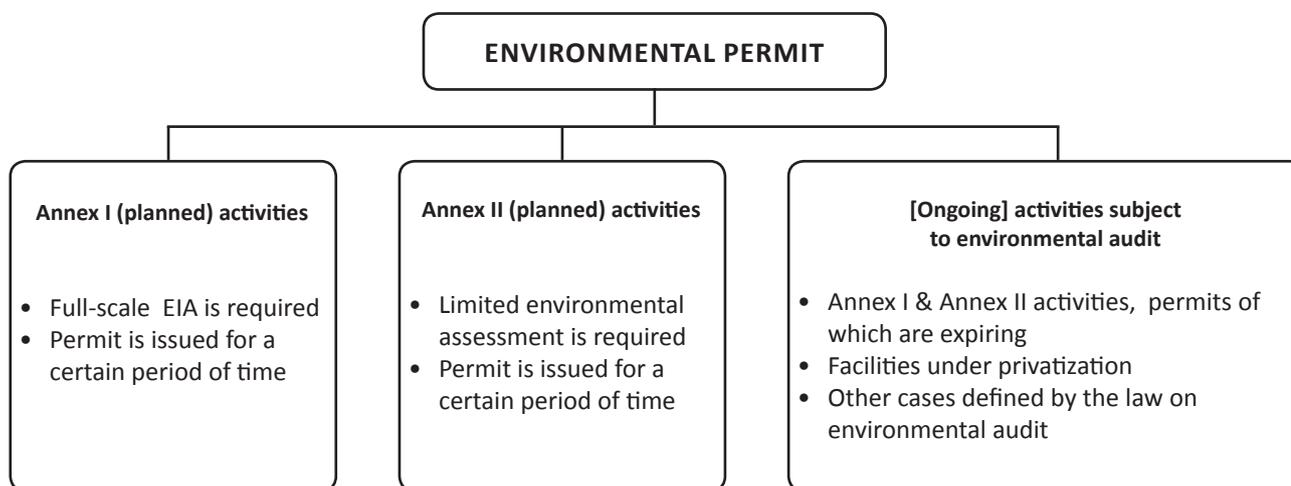
According to the draft code and current norms (article 9¹ of the Law on Environmental Impact Permit which is in force since June 1, 2015), in order to obtain “a permit” for illegal activity, a project developer is obliged to conduct “an ecological audit” and submit a report to the ministry. To fulfill the current norm, in June 2015 a by-law was adopted¹², which defined what should be assessed during conducting an ecological audit and what type of information should be included in an ecological audit report. When analyzing this by-law, it is absolutely clear that **“ecological audit” is identical to EIA and it does not meet the goal of “ecological audit” declared in the introductory provision of the law – “bringing the activities in line with environmental norms”**.

While an environmental audit, first and foremost, aims to assess the compliance of enterprise’s activities with environmental legislation, resource efficiency, risk and management system, the proposed draft code (similarly in current legislation) totally distorts the essence of environmental audit, as an instrument, and the benefits of its use.

Although environmental audit is an instrument to assess ongoing (and not planned) activities, the application of this instrument in the context proposed in the draft code – legalization of illegal activities and promoting unhampered work - is totally unacceptable.

It is important to emphasize that the Framework Law on Environmental Protection adopted in 1996 envisages the need for adoption of a law on environmental audit. Articles 20 and 21 of the law contain general provisions on environmental audit, while an explanatory note of the same law mentions the law on environmental audit among the acts to be approved. Regretfully, this law has not been developed so far and we think that **along with the proposed draft code, it would be especially useful and expedient to start working on the draft law on environmental audit.**

The existence of the law on environmental audit will be necessary in case of sharing our recommendation according to which an environmental permit for the activities subject to EIA should be issued not for unlimited, but for a certain period of time, as well as another recommendation according to which the activities included in Annex 2 (which are not subject to EIA) should still be subject to limited environmental assessment and permit should be issued for these activities as well, for a certain term (see point 5 above - Regulation of activities Included in Annex II). In such case, environmental auditing will be necessary after expiring the term of environmental permit, in case of continuation of an activity. The chart below provides a possible regulation scheme in case our recommendations are taken into account.



¹² Order #201 of the Minister of Environment and Natural Resources Protection of Georgia dated June 11, 2015 on the Rules for preparing an ecological audit report and making decision on continuation of ongoing activity.

3.7 Expert commission, ensuring its independence and quality of the work conducted by the commission; ensuring the independence of decision-makers from their superiors

According to the draft code, in order “to conduct an ecological expertise”, the ministry sets up an expert commission to prepare an expertise conclusion over various documents/studies submitted to the ministry by permit seekers at different stages of permitting process. In our opinion, two important issues have not been clearly identified in the draft code; they are outlined below:

- It is not clearly specified what the goal and tasks of ecological expertise are, why it should be conducted and what it should ascertain. Paragraphs 3 and 4 of article 44 give an explanation about a possible type and content (only at one stage of the entire system) of a conclusion on EIA report rather than about the goals and tasks of expertise.
- It is not clear in the draft code **what (mechanism) ensures the independence of expert commission in the process of preparing its conclusions.** The 20-year experience makes it clear that expert conclusions, conditions of these conclusions are word for word reflected in the decisions of permit issuers. Such (legislative) system creates a huge opportunity for exerting pressure on experts (who are public servants and are not only dependent to a certain extent, but are actually subordinate to decision-makers) in the process of forming a professional opinion by the latter. There is a huge risk that experts will prepare their conclusions under real pressure and in a form acceptable for their superiors. It enables a decision-maker to lay the entire burden of decision-making on experts. The risk of such development of events is especially high when making decisions on politically important projects (and/or projects that are lobbied by powerful groups) and those generating high economic returns.

Although the law differentiates the conclusions made by experts and those made by decision-makers, the draft code does not highlight the interrelations between these documents. It is not clear whether a decision-maker uses and how it uses the conclusions prepared by experts at various stages.

In our opinion, to ensure expert independence, it would be essential if the draft code granted a recommendatory status to expert (expert commission's) conclusions and if it acknowledged that final conclusions/decisions of decision-makers (the ministry) might be different from expert conclusions. In this case, undoubtedly, substantiation and transparency (publication of all documents) of the ministry's decisions will be extremely important.

Another issue should be raised regarding independence of decision-making – this is the independence of the ministry's staff/permit issuing officials from the influence of their superiors.

There still are frequent cases in Georgia, when the state (better to say – top officials) shows interest towards the implementation of large-scale projects so that frequently the necessity of these projects and the possibilities of their implementation are not discussed in advance with relevant governmental agencies or other stakeholders. As a rule, such interest stems from possible economic or social benefits, or is determined by political considerations. There are some examples how various projects were initiated by top officials in Georgia (which reflected the interests of only certain agencies or group of people), who demanded the central and local government bodies to support these projects as much as possible. Usually, in such cases the procedure of conducting EIA and issuing a permit has a formal nature. The environmental agency lacks a possibility to outline its own position about environmental impacts and costs related to implementation of planned projects.

In addition, frequently, making a decision on the implementation of projects goes beyond the competence of one particular agency – when upon making a final decision it becomes necessary not only to take environmental considerations into account, but also to give due consideration to political, social and economic aspects related to the projects. Therefore, it will be useful to impose a different rule of decision-making on some activities regulated by environmental permits. In particular, in case of some activities/projects (after an activity passes through an ecological expertise procedure envisaged by the law (an expertise conclusion is made) and the ministry also makes a decision), the Government of Georgia or Prime Minister may grant development consent. In this case, the amount of investments may be used as one of the criteria (along with other criteria) for selecting the activities; it means that if, for example, in case of a particular project, an apparent volume of investment exceeds a certain established threshold, development consent on the implementation of this activity should be granted by the Government of Georgia or the Prime Minister.

Such amendment to the rule of decision making will be useful in many aspects: (a) It will help take political, economic and social aspects into account when making a final decision; (b) a burden of decision making on implementation of the project will lie not on a particular ministry, but on the Government/Prime Minister; (c) in a long-term perspective, such

amendment may promote the improvement of the existing system of planning and the eradication of a faulty practice, when initially a decision is made on implementation of the project and only afterwards it is assessed what particular benefits (or environmental and social impacts) it may bring to the country.

3.8 Public participation

Considering the fact that current legislation in fact provides no opportunities for public participation in the decision-making process (including on the activities having significant adverse impacts on the environment), **the mechanism of public participation provided by the draft code is undoubtedly a step ahead in terms of improving the EIA system and meeting the requirements of the Aarhus Convention and relevant EU directives. It is especially welcomed that an obligation to ensure public participation was returned to the state/state entity and that public access to information and decision-making processes is ensured at various stages of EIA system.** Although there are many positive changes introduced by the draft law, there are still several issues that should be considered to ensure that public is duly informed and public is effectively involved in the decision-making processes. Those issues are outlined below:

Although the draft code envisages public participation at the scoping stage and the EIA report reviewing stage, we are deeply confident that involvement at the screening stage will make the entire EIA process much more effective and efficient. Arguments about this issue are provided above in paragraph 3.

According to the draft code, to ensure public access to information and participation in the decision-making, an applicant is required to submit a non-technical summary along with EIA report; there is a similar norm related to non-technical summary of SEA report. Regretfully, the draft code does not explain anywhere how non-technical summaries should be used to inform the public. Thus, it is essential to include the obligations related to dissemination of non-technical summaries in the draft code.

3.9 Involuntary resettlement

According to the draft code, when conducting EIA, it is important to study and respectively to reflect in the report the impact of a planned activity on the population. This requirement is also included in the current legislation. In practice, because of this requirement, EIA reports contain information on who will be subject to involuntary physical or economic resettlement as a result of project implementation. As a rule, this information is very short and general. Moreover, **EIA reports do not contain any mechanisms for the reduction or mitigation of these effects on the population, as well as the mechanisms and obligations of compensation. Ultimately, the issue of involuntary resettlement is completely ignored both by the permitting and the enforcement agencies.**

Green Alternative has thoroughly studied the issues related to regulation of involuntary resettlement caused by development projects. The results of this study, as well as detailed recommendations are provided in Green Alternative's publication "Development Induced Involuntary Resettlement: Modern Approaches and Georgia's Challenges¹³". We will also note that stemming from the urgency of the issue, it is essential to dedicate a separate chapter (or articles) of the draft code to the issue of involuntary resettlement caused by planned activities.

3.10 Strategic Environmental Assessment

As already mentioned in the introductory part of the present policy brief, the draft law introduces a new instrument in Georgian legislation – Strategic Environmental Assessment (SEA). This initiative will undoubtedly be welcomed. In addition, it should be taken into consideration that Georgian legislation does not grant any status to strategic documents (for example, plans, programs, strategies) and therefore, to ensure comprehensive enactment of this part of the draft law, it is essential to define the role and place of strategic documents in the system of planning the country's development, including in budgetary planning.

¹³ Green Alternative, 2012. *Development induced involuntary resettlement in Georgia*. Available at: <http://greenalt.org/wp-content/uploads/2013/12/Development-induced-involuntary-resettlement-in-Georgia.pdf>



The policy brief was prepared under Green Alternative's project "The challenges of European integration - for better Environmental Governance". The project is implemented with the financial support of Open Society Georgia Foundation

The views expressed in this policy brief reflect Green Alternative's position and should not be taken to represent those of Open Society Georgia Foundation or the European Union.



© Green Alternative, 2016

27/29 Paliashvili St.
0179 Tbilisi, Georgia
Tel: (995 32) 229 27 73
Fax: (995 32) 222 38 74
greenalt@greenalt.org
www.greenalt.org