POLICY BRIEF
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AN YEAR AFTER THE ENACTMENT OF THE ENVIRONMENTAL ASSESSMENT CODE: THE SHORTCOMINGS IDENTIFIED

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 work; 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.

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INTRODUCTION

On 1 June, 2017, the Parliament of Georgia adopted the Environmental Assessment Code. It has not come into effect immediately upon its adoption. The Code envisages several impact assessment tools and sets different time frames for enactment of norms related to each one. On 1 January, 2018, the norms on **Environmental Impact Assessment** (EIA) were enacted. In this policy brief two important shortcomings are explained that were identified in the practice as concerned the application of the EIA norms under the Environmental Assessment Code. **Relevant changes should urgently be introduced to the Environmental Assessment Code to address these shortcomings.**

1. PUBLIC PARTICIPATION IN CHANGING THE DECISIONS THAT HAVE BEEN MADE

One of the most important novelties introduced by the Environmental Assessment Code is that, according to the Code, it again became possible for the Georgian citizens ***to exercise the right to participate in the environmental decision-making process*** (hereinafter – participation right). Ten years ago, citizens were deprived of this opportunity, although it was contrary to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Aarhus Convention - an international treaty of Georgia; ten years ago, the lawmakers decided that an Environmental Permit to carry out activities that have a significant environmental impacts (later, such a permit was called as an "Environmental Impact Permit") was to be issued not public, but through simple administrative proceedings. Thus, the decision-making process on projects that pose significant risks to environment and human health had been closed for the public.

As noted above, the Environmental Assessment Code returned to citizens the possibility to exercise participation right and introduced the procedures. In particular, ***an Environmental Decision*** – an act that gives the right to carry out activities - is currently issued in three stages and, ***in all three stages, through public administrative proceedings***. According to the Code, it is implied that at all three stages of decision-making:

1. Before issuing its decision, the Ministry of Environmental Protection and Agriculture should make publicly available the specific information defined by law;

2. Public should be given the possibility to submit opinion to the Ministry before issuing a decision (at the first stage - in a written form only, while at the second and third stages - through public hearing as well);
3. The Ministry is obliged to consider the opinions expressed by the public and "if there are appropriate grounds", take them into account (consider) during the decision-making process;
4. Finally, the decision and its underlying reasoning should be made available to the public.

Table #1 below shows the timeframes for public participation at each stage of issuing Environmental Decision.

I. Screening decision	• Within three days after a screening application has been registered, the Ministry is obliged to make it publicly available in accordance with the procedure established by the Environmental Assessment Code. • The public has 7 days to submit opinions and comments to the Ministry. • Within 5 days after the screening procedure has been completed, the Ministry is obliged to publish a reasoned screening decision in accordance with the procedure established by the Code.
II. Scoping decision (Report)	• Within three days after a scoping application has been registered, the Ministry is obliged to make it publicly available (together with its enclosed documents) in accordance with the procedure established by the Environmental Assessment Code. • The public has 15 days to submit opinions and comments to the Ministry. • Not earlier than the 10th day and not later than the 15th day after the scoping application has been placed, the Ministry is obliged to hold a public review of the scoping report. Information on the public review shall be published not later than 10 days before the public review is held. • Public review is open and any member of the public has the right to participate in it. • Within 5 days after the scoping procedure has been completed, the Ministry is obliged to publish the scoping report and the scoping opinion in accordance with the procedure established by the Code.
III. Environmental Decision	• Within three days after an application has been registered, the Ministry is obliged to publish it (together with its enclosed documents, including the EIA report), in accordance with the procedure prescribed by the Environmental Assessment Code. • The public has 40 days to submit opinions and comments to the Ministry. • Not earlier than the 25th day and not later than the 30th day after the application has been placed, the Ministry is obliged to hold a public review of the EIA report. Information on the public review shall be published not later than 20 days prior to the public review. • Public review is open and any member of the public has the right to participate in it. • The Ministry is obliged to provide information whether the public participation procedures have been implemented and the submitted opinions and comments have been taken into account. • Within 5 days after an environmental decision has been issued, the Ministry is obliged to publish the EIA report, expert opinion, Environmental Decision and information on the results of public participation.

The above-mentioned scheme of public participation proposed by the Environmental Assessment Code might be considered to be very progressive (and even exemplary for many countries of the world), if not one circumstance: the Environmental Assessment Code envisages the possibility of making changes to the decision at all three stages, however, not through public but simple administrative proceedings. In other words, this means that the decision made with public participation can be changed at any time without notifying public about proposed changes. The public will be able to learn about the decision only after it has already been made.

Such an approach, apart from that it casts a shadow on the most important efforts to establish democratic procedures, also contradicts the legislation of Georgia. Procedures for changing decisions that have been issued are described below - as envisaged by the Environmental Assessment Code; in the end, the legal norms under the

Georgian legislation are provided which are contradicted by the procedures established by the Environmental Assessment Code.

Paragraphs 7-11 of Article 5 of the Environmental Assessment Code refer to the possibility of changing Environmental Decision (at screening, scoping and final stages). It appears from these paragraphs that there are three options to make changes to the decisions; furthermore, in two cases - the Ministry and in the third case - the project (activity) developer have the right to initiate changes. All these three options are described in the table #2 below.

Table #2: Terms for introduction of changes to the decisions on activity, as stipulated under the Environmental Assessment Code.

Party authorized to initiate changes to the decisions	Type of decision that can be changed (Screening, Scoping, Environmental Decision)	Possible reasons for change	Type of administrative proceedings and procedures
I. Paragraph 7 of Article 5 of the Environmental Assessment Code			
Ministry of Environmental Protection and Agriculture	As per Code: an enabling administrative-legal act. Considering the content of the Article, this may only be an Environmental Decision – a final decision made at the third stage.	As a result of an inspection performed by the competent authority, it was established that: (a) the condition at the location of the activity does not comply with the conditions described in the EIA report; and/or (b) The EIA report failed to comprehensively assess the adverse effects of the activity on environmental media[1].	- The Code does not define a type of administrative proceedings; thus, a simple administrative proceeding is applied[2]. - The Code does not define any procedural requirements, or an obligation to issue a sub-law defining detailed rules.
II. Paragraph 11 of Article 5 of the Environmental Assessment Code			
Ministry of Environmental Protection and Agriculture	As per Code: an Environmental Decision or an enabling administrative-legal act issued in the area of EIA. Thus, changes can be made in all three types decision - screening decision, scoping report and Environmental Decision; as we as to the decision on exemption from EIA.	- Based on the decision, the project developer was obliged to additionally study parts of environmental media; and - Based on the study results, the Ministry has established that there is a need to make changes to the conditions of the decision.	- The Code defines the procedure: simple administrative proceedings - The Code does not define any procedural requirements or an obligation to issue a sub-law that would detail rules on this issue.

[1] The same requirements apply to the cases where an activity is exempt from the EIA: reasons for a change may be: (a) inconsistency of existing conditions at the location of the activity with the documentation on exemption from the EIA; and/or (b) documentation on the exemption from the EIA failed to assess comprehensively the adverse effects on the environmental media.

[2] According to Paragraph 2 of Article 72 of the General Administrative Code of Georgia, "unless the application of other types of administrative proceedings is provided for by law, an administrative body shall prepare an individual administrative act under procedures for simple administrative proceedings".

Party authorized to initiate changes to the decisions	Type of decision that can be changed (Screening, Scoping, Environmental Decision)	Possible reasons for change	Type of administrative proceedings and procedures
III. Paragraphs 8-11 of Article 5 of the Environmental Assessment Code			
Project developer	Environmental Decision	Project developer has to show that: - The fulfillment of terms and conditions under the environmental decision could not prevent or reduce the environmental impact; and/or - Changing the terms and conditions with other terms and conditions are necessary and effective in order to prevent or reduce the environmental impact.	- The Code does not define a type of administrative proceedings; thus, a procedure for simple administrative proceedings is applied. - The Code defines several general procedural requirements: - In order to discuss the issue, the Minister establishes an expert commission; - The commission presents recommendations to the Minister; - The Minister presents "a respective issue" to the Government of Georgia; - In case of the Government's consent, the Minister issues a decision to change the Environmental Decision.

As it is clear from the table above:

- On the initiative of the Ministry, it may be possible to change decisions made at all three stages; on the initiative of the project developer only the third stage, final decision - Environmental Decision - can be changed.
- Moreover, in case initiative to change the decision comes from the Ministry, the decision-making process is entirely concentrated within this authority, whereas the Government of Georgia becomes involved in the decision-making process when the changes are initiated by the project developer; though the final decision rests with the Minister, but only with the consent of the Government.
- When a process is initiated by the project developer, the Environmental Assessment Code requires an opinion (recommendation) of the expert commission concerning the changes, prior to the decisions of the Government and Minister. If it is initiated by the Ministry, the law-makers, for some reason or other, has regarded that an opinion of the expert commission is not required.
- In none of the cases detailed procedural requirements, or an obligation to issue a sub-law to regulate this issue, have been established.
- In all three cases a decision-making process is not transparent.

In all three cases, as already mentioned above, **the decision is made through simple administrative proceedings that contradicts the requirements of the Georgian legislation;** in particular:

- **The Aarhus Convention**

  In accordance with Paragraph 10 of Article 6 of the Convention[3], in case of making changes to the decision on the activity (changing the terms and conditions), the decision-making authority shall be guided by the same approaches that was applied for issuing the decision (i.e. paragraphs 2-9 of Article 6) and shall ensure early and effective public participation in the decision-making process.

- **The General Administrative Code**

  According to Paragraph 2 of Article 63 of the General Administrative Code, a change to an administrative act shall be only made in the same manner that was applied for issuing the act[4]. Thus, it is possible to change the act issued through public administrative proceedings only through public administrative proceedings.

Recommendation: It is necessary to define detailed rules in the Environmental Assessment Code for making changes to the decisions that have been issued, including the rights and obligation of all parties (the Ministry, the Government, a project developer, public) involved in issuing such decisions, the information to be provided for making such decisions and other details.

The detailed rules of public participation should be defined (at least with the same level of detail, as it is currently defined in the case of screening, scoping and final decision-making procedures).

In order to ensure public participation in making changes to the decisions that have been issued, it might not be necessary to hold a public hearing (however, it should not be excluded either). In such a case, it might be relevant to submit opinions in writing (as it is at the screening stage; competent authority could publish a draft of the proposed decision, define time-frame for submitting comments, receive comments, publish the final decision and justification).

2. Activities regulated by the Environmental Assessment Code: Annexes I and II to the Code

The EIA-related norms apply to the activities defined by the Environmental Assessment Code. The Code has two annexes: for the activities listed in **Annex I** the EIA is mandatory; activities listed in **Annex II** require the EIA only if the Ministry decides to do so (based on the screening decision issued by the Ministry). If the Ministry decides **that the activity does not need the EIA, project developer is not obliged to conduct any, even a small-scale study of the potential results of their activities**. The project developer is simply obliged to comply with generally binding environmental norms defined by the legislation (rules, standards, technical regulations).

The grouping of activities are also envisaged in **two guiding documents for Georgia** in the area of the EIA: the Aarhus Convention and the 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[5] (hereinafter - the EU Directive):

- **The Aarhus Convention** has an annex, which lists activities that may have significant adverse effects on the environment. The Convention requires ensuring public participation in making decisions concerning these activities, in accordance with the requirements of the Convention.

[3] Paragraph 10 of Article 6 of the Aarhus Convention: "Each Party shall ensure that, when a public authority reconsiders or updates the operating conditions for an activity referred to in paragraph 1, the provisions of paragraphs 2 to 9 of this article are applied mutatis mutandis, and where appropriate".

[4] Paragraph 2 of Article 63 of the General Administrative Code: "A change or amendment to an administrative act shall be made in the same manner as determined for drafting and issuing the act".

[5] 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

- **The EU directive**, similar to the Environmental Assessment Code, has two annexes of activities: Annex I (similar to the Code) lists the activities that require EIA; in case of the activities listed in Annex II, the EU Directive leaves upon the discretion of the Member States to determine whether the EIA is required or not. Member States can make determination through:
  - a case-by-case examination);
  - Setting threshold or criteria; or
  - Apply a combined approach – use both approaches. Georgia, in the process of approximation of legislation with the EU Directive (when elaborating the Code) has selected the third one – a combined approach.

  Furthermore, the EU Directive sets criteria (the so-called screening criteria) which are mandatory to use during decision-making based on any approach.

Activity that, in our opinion, should be regulated in a different manner than envisaged by the Environmental Assessment Code, is described below; this is the mining of minerals.

Mining is included in both annexes of the Code, in particular:

- **Annex I (requires the EIA)** – open-cast mining of minerals where the surface of the mining site exceeds 25 hectares; peat extraction where the surface of the site exceeds 150 hectares.
- **Annex II** – open-cast mining of solid minerals or peat extraction (except for sand and gravel) where the surface of the site excides 10 hectares.

In our view, **the thresholds (25 hectares - in Annex I, and 10 hectares - in Annex II) defined by the Environmental Assessment Code are excessively high and fail to provide adequate protection to the environment, human life and health and, thus, should be changed.** To ground this position further, it is enough to recall the incident that took place only a few weeks ago in Adjara.

The case relates to the mining works in Chinkadzeebi village of Keda municipality. The company "Struijk Group Georgia" and its contractor companies carried out mining works for Porphyritic Andesite on the territory area of 1,68 hectare adjacent to the village[6], that was needed for Batumi coastal protection project[7]. As it has been reported by local media[8], on October 31, 2018, a six-year-old child died as a result of explosive works by a company contractor. The child was playing in a yard about 300 meters away from the explosion site when the stone pitched after explosion hit him; due to the inflicted damage, he died on the spot.

As it turns out, the company has obtained the mining right in April 2018 (by the Decree #753 of the Government of Georgia dated April 10, 2018); i.e. when the provisions of the Environmental Assessment Code related to the EIA have already been enacted (effective as of January 1, 2018). **It is natural that the requirements of the Code could not be extended to this activity, as the thresholds set by its Annexes are much higher**: the company was not required to conduct an EIA because the planned activity did not fall within the activities regulated under Annex I; Nor was the company required to apply to the Ministry of Environmental Protection and Agriculture even to discuss the issue whether the planned activity could pose a threat to the environment, human life, health and property – as the planned activity did not fall within the activities regulated under Annex II. **If appropriate thresholds were established for activities under Annexes to the Environmental Assessment Code, most probably it would seem very likely that a death of a child, at least, could have been prevented,** say nothing of avoiding other negative consequences of

[6] The project is implemented by the Dutch company Struijk Group (registered in Georgia: "Struijk Group Georgia") in the framework of the Sustainable Urban Transport Investment Program, Tranche 2, financed by the Asian Development Bank, commissioned by the Municipal Development Fund of Georgia.

[7] See Order #753 dated April 10, 2018, of the Government of Georgia on Exemption of Struijk Group Georgia Ltd. from obtaining a licence to extract minerals. In addition to Chinkadzeebi village of Keda municipality, based on the same Decree of the Government, the company was granted the right to extract Porphyritic Andesite on the territory area of 2.57 hectare near Maglakoni village of Khelvachauri municipality.

[8] Manana Kveliashvili, 31 October, 2018. "*A six-year-old boy was playing in the yard when died due to an explosion at the mine*" Batumelebi.

mining[9]. Only through passing the stages defined by the Environmental Assessment Code it would have been possible to identify potential threats, discuss alternative options and select the best, safe solutions.

Recommendation: It is necessary to periodically review the activities included in the Annexes to the Environmental Assessment Code.

In the case of mining, today the threshold set by Annex I to the Code replicates the thresholds set by the Aarhus Convention and Annex I to the EU Directive (in both cases, the threshold is 25 hectares). In Georgia, in order to set the thresholds, the area of the country, characteristics of natural environment, specifics of spatial development, and many other circumstances that differentiate Georgia from other countries should be taken into account.

In our view, it is necessary, based on consultation with stakeholders, **to revise the threshold of 25 hectares defined by Annex I to the Environmental Assessment Code. In addition, Annex 2 to the Code should not define thresholds at all, as provided in Annex II to the EU Directive.**

It is also important to note the wording provided in Annex II to the EU Directive for mining activities which is: "Quarries, open-cast mining and peat extraction (projects not included in Annex I)".

The Environmental Assessment Code, except that it is defines the threshold for an open-cast mining which is very high (10 hectares), completely omits the word "quarries" mentioned in Annex II of the EU Directive – quarries for construction aggregate (includes mining of sand and gravel). Furthermore, according to Annex II of the Code, the requirements of the Code do not apply to the extraction of sand and gravel ("*open-cast mining of solid minerals or peat extraction (except for sand and gravel) where the surface of the site excides 10 hectares"*). Thus, **it is necessary to eradicate this inconsistency between the EU Directive and the Environmental Assessment Code – quarries, including mining of sand and gravel, should be regulated by Annex II of the Environmental Assessment Code.**

[9] See Additionally: Batumelebi, 1 July 2015. "*Exploded rock for construction in the sea*", Batumelebi.

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