



Analysis of South Pacific ESIA Legislation

IUCN Environmental Law Centre

Country Brief: Marshall Islands

Legislation on EIA

Marshall Islands EIA legislation is found largely in Part IV of the 1984 National Environmental Protection Act ("NEPA"), which requires governmental decisions regarding any proposed actions "in all matters in which there is or may be an environmental impact" to include assessment of potential environmental and cultural impacts. Additionally, the Coast Conservation Act 1988 ("CCA") requires EIA for any proposed development activity in the coastal zone. The 1994 Environmental Impact Assessment Regulations ("Regulations") promulgated by the Republic of the Marshall Islands Environmental Protection Authority provide project proponents specific details for the EIA process for both NEPA and CCA.

EIA process

Under the 1994 Regulations, the EIA process screens out activities with insignificant impacts from review in an initial "Preliminary Proposal." Such a proposal is required by proponents of "each and every proposed development activity," and must contain information on the activity and any potential environmental impacts as well as alternatives to mitigate the impacts. Following a review of the proposal, the reviewing agency (i.e. NEPA or CCA, hereafter "the reviewer") makes a written determination of his or her decision to the proponent. In case the reviewer determines the project will have a significant effect on the environment, a full or partial EIA is required from the proponent. Otherwise, the proponent may continue with the activity as planned, although still subject to regulatory and permitting requirements under any relevant law. The EIA may be performed via separate phases of the activity, and a scoping process open to relevant members of the public identifies issues significant enough to be addressed in the EIA. Following completion of the scoping process, the proponent completes and submits a Draft EIA, which must include a list of alternatives to the proposed actions, a description of the affected environment and a scientific and economic analysis of potential consequences of the action. After receiving the Draft EIA, the reviewer provides for public notice and comment, including a public hearing. The reviewer then responds to the proponent, requiring either further revisions or a Final EIA, the latter of which must include the final chosen alternative, any mitigation measures and monitoring plans. The reviewer has discretion to approve or reject the Final EIA. If approved, the reviewer monitors activities and can perform audits and enforce the EIA regulations by means of fines, cease and desist orders, or entry without notice.

The CCA requires an EIA to be conducted in accordance with the 1994 EIA regulations described above for any proposed development activity on the coastal zone. For the purpose of the CCA, 'development activity' means any activity likely to alter the physical nature of the coastal zone.

Comments

The EIA Regulations are noteworthy for their broad definition of impacts likely to be significant, such as unknown risks, public health and safety, cumulative environmental impacts, and threats to rare or endangered species and their habitats. In addition, the Regulations stand out for their comprehensive post-approval phase of follow-up monitoring and enforcement.



Country Brief: Palau

Legislation on EIA

Palau EIA legislation is encompassed in the 1980 Environmental Quality Protection Act¹ (EQPA) which created the Environmental Quality Protection Board (hereafter “the Board”) and established the requirement of an Environmental Impact Statement for planned legislation and other government projects. The stated purpose of EQPA is to ensure environmental protection while promoting sustainable development. The Board functions semi-autonomously and is charged with protecting and conserving the environment of Palau. The Board promulgates regulations under eight sections, of which section (7) *Environmental Impact Statements* (EIS) has primary relevance for this report. Additionally, sections (1) *Earthmoving*, (2) *Marine and Fresh Water Quality* and (4) *Solid Waste Management* have similar aspects of environmental review in their respective permitting processes, the latter of which requires impact assessments consistent with EQPB regulations.

EIA process

Under the EQPB Regulations, the Palau EIA process begins by requiring initial Environmental Assessment (EA) reports for activities on national and state land, coastal water, wetland, or historic site, or any activity with a significant impact on the environment. Criteria for determining the ‘significance’ of a proposed action are listed, most notably including effects on social or economic welfare, public health and rare, threatened or endangered species or its habitat. On review of the EA, the Board issues a notice of determination, stating whether an applicant must proceed to contract an independent third party to conduct a comprehensive EIS report. The EIS process requires the submission first of a draft statement for review and comment, which should be revised in light of responses in the final EIS report. Applicants are to consult all relevant public and private parties, and must respond in writing to all substantive comments received. The EIS must disclose environmental impacts to the public and allow for review of the draft report by both the Board and the public. The EIS must also include alternatives to the proposed action and measures to mitigate potential impacts in the EA and draft and final EIA. The Board provides public notice of EIS reports for review and distributes the statements to selected reviewers and may hold public hearings. Following review, the Board may accept or reject the draft or final report. Later major changes to the same proposed activity require a supplemental statement. Any activity requiring an EA report requires payment of an Environmental Impact Fee of between \$100 and \$300,000 based on appraised construction costs.

Comments

Despite the comprehensive nature of the EQPB regulations for EIA in Palau, it is important to note that the regulations do not require a monitoring plan or audits of the proposed activity following Final EIA approval. Additionally, Palau’s EIA may not address projects with biodiversity impacts fully, as a 2008 study found that the EQPB process is triggered only for earth-moving activities and does not address cumulative impacts.²

¹ Title 24, Palau National Code Annotated (24 PNCA)

² McIntyre, M, and Young, E. (2008). *A Review of Integrated Environmental Assessment and Cardno Planning Procedures in Pacific Island Countries*. Appendix B. Job No. 7800/90. Cardno (Qld) Pty Ltd.



Country Brief: Samoa

Legislation on EIA

The Samoa *Planning and Urban Management Act 2004* (PUMA) has been operational since 2004, during that time increasing its legislative powers to address nature conservation and national parks management as well as land planning and development. Section 42 of PUMA provides statutory authority to request an EIA, and the EIA process is provided by *Environmental Impact Assessment Guidelines 1998*, and later the *Environmental Impact Assessment Regulation 2007*.

In addition, the Water Resources Management Act 2008 requires consideration of its water resource-related provisions in any EIA under PUMA (Part VII). Similarly, the Lands, Surveys and Environment Act 1989 requires the completion of an environmental impact assessment as a prerequisite for development proposals.

EIA process

Unfortunately, neither the *Environmental Impact Assessment Guidelines 1998* nor the *Environmental Impact Assessment Regulation 2007* were available for review at the time of this report. As a result, much is unknown about the specific legal dynamics of the EIA process in Samoa.

Comments

The *Water Resources Management Act 2008* could imply the need to do EIA in the event a hydroelectricity generating project would be contemplated, and the *Lands, Surveys and Environment Act 1989* for any project on Government land. The *Water Resources Management Act 2008* includes the precautionary principle³ (Part II, s. 5) in all assessments of potential environmental impacts, which could play a role in assuring EIA reviewers in Samoa take due care in considering social and environmental impacts in water management-related decisions.

A 2008 study found the EIA process in Samoa to be successful in sharing information among parties, the public and between agencies, largely due to the participatory design of PUMA. Nonetheless, the same study found a number of obstacles for PUMA as well, the most fundamental relating to poor information in land planning and development applications, especially regarding environmental aspects. Other criticisms cite developers disregarding approval requirements, insufficient administrative funding, and a lack of human resources for strategic planning.⁴ Although PUMA refers to strategic management plans (SMP), such planning is infrequent and usually faces funding difficulties in its implementation.⁵ Similarly, SEA methods for land use planning are expected to become available once PUMA enactment that set of regulations.

³ The Precautionary Principle, as embodied in Principle 15 of the Rio Declaration, holds that "Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."

⁴ McIntyre and Young (2008). *Supra note 2*, at 10.

⁵ *Id.*



Country Brief: Tonga

Legislation on EIA:

The legislation addressing EIA in Tonga is contained in the Environmental Impact Assessment Act 2003. The Act is structured in five parts, starting with definitions of key terms in Part I and clarifying functions and powers in Part II. The third part outlines the EIA process. Part IV deals with cases of non-compliance with the previous provisions and Part V contains further miscellaneous provisions.

EIA process:

Under the Environmental Impact Assessment Act 2003, “major projects” shall be supported by an EIA (par. 6). The project types listed in the schedule at the end of the Act qualify as such major projects. According to the schedule, “energy generating stations” always require an EIA. The Minister of Environment determines whether a project is a major project and requires an EIA within 30 days after receipt of an application for a project (par.11). If the Minister decides that a project requires an EIA, the project is referred to the Environmental Assessment Committee, composed of five members from different Departments and the private sector (pars. 12 and 13). The Environmental Assessment Committee reviews the application and recommends to the determining authority, i.e. any authority which is responsible for issuing of a license or approval before any development activity proceeds, conditions for attachment to the proposed project and means for their implementation (par.14). Applications for major projects cannot proceed without approval under the Environmental Impact Assessment Act (par.16).

Comments:

The list of criteria, which the Minister uses to determine whether a project requires an EIA, contains specific references to biodiversity-related issues. Impacts on ecosystems, especially ecosystems supporting habitats or rare, threatened or endangered species, landscapes, or the introduction of alien species are to be considered. (par. 8a, b and e).

The EIA process can be further refined and guided by Regulations, which the Minister of Environment is empowered to make with the consent of Cabinet. At the time of writing there is no information on such regulations.

In 2005, a draft Environment Management Bill was presented, which may become law in the near future. It could become relevant to EIA in Tonga, as one of the objectives of the bill is to facilitate assessments of environmental impacts.



Country Brief: Tuvalu

Legislation on EIA

To date, Tuvalu has not enacted express legislation for environmental management. However, the draft *Environmental Protection Act 2007* (EPA 2007) is undergoing revision, with a first reading in November 2007 and a second reading to occur soon.⁶ Part V of the draft EPA 2007 draft text references environmental impact assessment. Additionally, the *Marine Resources Act 2006* cites the need to conduct EIA before undertaking fish processing or aquaculture facilities and in the broader scope of conserving fisheries resources. Similarly, the *Television License Regulations 2005*⁷ requires preliminary EIA from proponents of projects to build or operate television broadcasting services.

EIA process

As described above, express environmental law providing for EIA has not yet been passed in final form in Tuvalu, nor have regulations been promulgated providing the detailed guidance for EIA. Two sections provide a statutory basis for EIA in the current draft version of EPA 2007, which gives authority to the Director of the Department of the Environment to monitor activities “likely to have, or are having an environmental impact in any area of land or sea within the jurisdiction of Tuvalu.” Furthermore, the Act provides for enabling regulations to be promulgated to guide the EIA process and enforce its related procedures, including the creation of an EIA Taskforce. Notably, the Act also allows regulations to recognize assessments performed in other countries.

According to a 2008 report, the current process in fact has been managed by an EIA Taskforce based within the Department of Environment, consisting of representatives from various government agencies and community groups.⁸ The Taskforce assesses likely project impacts via questionnaires and decides actions based on its findings.

Comments

The Tuvalu EIA process has been criticized due to the fact environmental decision-makers are hampered by a lack of authority to request further studies and withhold approval.⁹ In addition, as a small, isolated country with largely only small-scale projects, what projects that are proposed may be seen as favourable to the country in terms of economic and social benefits. As a result, potential social and economic benefits might outweigh insufficient knowledge of possible long-term environmental impacts, a potential concern for relatively untested renewable energy projects.¹⁰ Given the lack of guiding regulations or reference criteria in Tuvalu, plus the fact the Department of Environment has only two full-time staff responsible for administering and occasionally implementing EIAs, experts allege that the process is often inadequate if performed at all.¹¹

⁶ McIntyre and Young (2008). *Supra* note 2, Appendix B.

⁷ This regulation serves to implement the *Telecommunications Corporation Act 1993*.

⁸ McIntyre and Young (2008). *supra* note 2, at 14.

⁹ *Id.* at 13.

¹⁰ *Id.*

¹¹ *Id.* at 19



Country overview: Vanuatu

Legislation on EIA:

The Environmental Management and Conservation Act of 2003 (EMC Act), covering a range of environmental issues, also contains the relevant legislation on environmental impact assessment (EIA) for Vanuatu in Part 3.

EIA process:

The EIA process can be triggered by any application for a project proposal or development activity submitted to a Ministry, Department, Government Agency, local government or municipal council, if the project is not exempted from an EIA as a family residence, traditional or custom structure or emergency action (section 13 and 14). The mentioned authorities undertake a preliminary EIA and determine whether the proposed project is likely to cause any environmental, social or custom impact, the significance of the impact and whether proposed mitigation measures are sufficient. If the preliminary EIA foresees either significant impacts or not sufficient mitigation measures, the authority refers the project application within 10 days after the determination to the Director of the department responsible for the environment. The Director will within 21 days after receipt of the application decide, whether an EIA is required and inform the project proponent. In case the Director decides that an EIA is necessary, he develops terms of reference for the EIA, which may include consultation requirements. He also determines, whether and in which form the project proponent has to give public notice about the project. The public notice can invite written submissions.

After receipt of the EIA report, the Director can require further information from the project proponent. Within 30 days after the Director received the report and all material, the Director reviews the report and makes a recommendation to the Minister responsible for the Environment. The Minister considers the Director's advice and within 21 days after receipt approves the application with or without conditions, refers it back to the Director for further assessment or rejects the application. Successful applicants need to notify the relevant local authority to finalize procedures for obtaining final planning permission. Where the Director determines that no EIA is required, the relevant authority is notified and may process the application without any further reference to the EMC Act.

Comments:

The criteria for triggering an EIA include explicit references to biodiversity related issues, like impacts on protected, rare, threatened or endangered species, its habitat or nesting grounds or the introduction of foreign organisms and species. Regarding energy projects, e.g. for geothermal energy projects a license is required by the Geothermal Energy Act (Part 4) and therefore the requirement of an EIA under the EMC Act has to be assessed. The EMC Act requires authorities of different levels to conduct a preliminary EIA and links them to the Department responsible for the Environment on the national level. However, the Act fails to link environmental management, strategic planning and other land/resource use planning and therefore fails to provide for strategic environmental planning. A possibility would be a reform of the 1986 Physical Planning Act.

Evaluation of Pacific Island EIA Legal Frameworks

A wide range in EIA legal frameworks can be found among the six countries assessed. At one end are found countries such as Tuvalu lacking implementing regulations for their EIA process and only brief legislative provisions describing the basis for EIA. Samoa has a similarly brief legislative basis for EIA, but appears to be in the final stages of passing EIA regulations. Given the lack of detailed EIA regulations in Tuvalu (and possibly Samoa), despite its reported implementation of EIAs, it would appear that much depends on political context beyond written law. Tonga has a strong beginning to its EIA legal framework given its listing of both discretionary criteria and types of projects that automatically require an EIA. However, the act can be seen as relevant only to scoping and screening, and should be followed by more detailed regulations defining the complete requirements of the EIA itself (not available at the time of writing).

Among countries with regulatory provisions on EIA, Palau has some of the most comprehensive regulations. The Palau EIS process is similar to that of the United States, from which it inherited legislation during colonisation, and the level of detail and institutional procedures may not be the best fit for the country as a result.¹² The Marshall Islands has a similarly comprehensive set of EIA regulations, and includes subsequent monitoring, mitigation reporting, auditing, and penalties and enforcement in case of non-compliance following approval of a final EIA. Finally, Vanuatu

Recent developments in biodiversity-related EIA planning as exemplified in the Convention on Biodiversity Voluntary Guidelines are not availing among the regulations examined. For example, none of the regulations require review by biodiversity experts or biodiversity mapping. However, the Marshall Islands, Palau, Tonga, and Vanuatu all include specific regard for endangered and rare species and their habitat to varying degrees. Of particular note, Tonga requires consideration of impacts on ecosystems, and the Marshall Islands includes cumulative impacts and unknown risks.

Other options in the EIA regulations examined could be relevant to biodiversity as well. With regard to ensuring options for reviewers and minimizing environmental impacts, the Marshall Islands, Vanuatu, Palau all require examination of alternatives and mitigation measures, whereas Samoa, Tuvalu and Tonga have not provided regulations addressing such aspects yet. Furthermore, Samoa includes the precautionary principle for EIA decisions on water-related projects. Strategic planning, as exemplified by use of Strategic Environmental Assessment, was not found in the regulations examined, with just Samoa potentially enacting strategic planning regulations in coming years.

¹² McIntyre and Young (2008). *Supra note 2*, Appendix B.