

THE LEGISLATIVE FRAMEWORK FOR ENVIRONMENTAL IMPACT ASSESSMENT IN THE CARIBBEAN

THE LEGISLATIVE FRAMEWORK FOR ENVIRONMENTAL IMPACT ASSESSMENT IN THE CARIBBEAN

An Assessment of its Contribution to Environmental Sustainability

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For

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List of Acronyms

CARICOM	-	Caribbean Community
CEA	-	Certificate of Environmental Approval (Montserrat)
CEC	-	Certificate of Environmental Clearance (Trinidad & Tobago)
CTP	-	Chief Town Planner (Barbados)
DCA	-	Development Control Authority (St. Lucia)
DPB	-	Development & Planning Board (St. Kitts)
DPC	-	Development & Planning Corporation (Dominica)
DPP	-	Director of Physical Planning (Nevis)
DOE	-	Department of Environment (Antigua & Barbuda) (Belize)
EAB	-	Environmental Assessment Board (Guyana)
EAT	-	Environmental Appeals Tribunal (Guyana)
ECSC	-	Eastern Caribbean Supreme Court
EIA	-	Environmental Impact Assessment
EIS	-	Environmental Impact Statement (EIA Report)
EMA	-	Environmental Management Agency (Trinidad & Tobago)
EPA	-	Environmental Protection Agency (Guyana)
ESIA	-	Environmental & Social Impact Assessment
MEA	-	Multilateral Environmental Agreement
NEPA	-	National Environment & Planning Agency (Jamaica)
NIMOS	-	National Institute for Environment & Development of Suriname
NRCA	-	Natural Resource Conservation Authority (Jamaica)
OECS	-	Organization of Eastern Caribbean States
PDA	-	Planning & Development Authority (Grenada) (Montserrat)
PPDB	-	Physical Planning & Development Board (St. Vincent Grenadines)
SEA	-	Strategic Environmental Assessment
SIDS	-	Small Island Developing States
TOR	-	Terms of Reference
UK	-	United Kingdom
UNEP	-	United Nations Environmental Programme
US/USA	-	United States of America
UWI	-	University of the West Indies

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PREFACE

The IMPACT Justice Project (Improved Access to Justice in the Caribbean) is a five-year justice sector reform Canadian-funded project to which in-kind contributions are being made by the University of the West Indies (UWI), Caribbean governments and institutions. It is being implemented from within the Caribbean Law Institute, Faculty of Law, University of the West Indies (UWI), Cave Hill Campus, under a contribution agreement between the Government of Canada and the Campus. The Project commenced in March 2014.

The project's ultimate outcome is enhanced access to justice benefitting men, women, youth and businesses in the CARICOM region. This outcome is to be reached by strengthening legal frameworks; improving legal professionalism and legal services including legal education and information; and increasing knowledge and use of Alternative Dispute Resolution (ADR) mechanisms as a means of settling disputes without court intervention.

The beneficiary countries are 12 CARICOM Member States: Antigua and Barbuda; Belize; Barbados; the Commonwealth of Dominica; Grenada; Guyana; Jamaica; St. Kitts and Nevis; St. Lucia; St. Vincent and the Grenadines; Suriname; Trinidad and Tobago; and Montserrat, a British Overseas Territory which was a founding member of CARICOM and is the only non-independent territory belonging to the group.

To reach its Intermediate Outcome **1000** which is *“Increased access by CARICOM Member States to gender-equitable and environmentally sensitive regional model laws and new or amended national laws”* the Project has drafted model legislation on Arbitration, Community Mediation, Sexual Harassment, Business Names and is working on Trade Marks, OECS Judicial Pensions and Consumer Protection. It has also conducted reviews of legislation which is shared with policy makers, researchers and NGOs in the region. To date, such

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reviews have been conducted and reports prepared on Bail, Companies, Evidence, Family Law, Jury Management, Employment Law focussing on the Rights of Domestic Workers.

This study on *“The Legislative Framework for Environmental Impact Assessment in the Caribbean: An Assessment of its Contribution to Environmental Sustainability”* is the most recent of the IMPACT Justice legislation reviews.

IMPACT Justice thanks Christine Toppin-Allahar, attorney-at-law, legislative drafter and environmentalist and Fiona Pompey-Handl legal consultant, for preparing the report on its behalf. The report and a decision on follow-up will be discussed at a regional meeting of specialists in the area to be convened by the Project.

Velma Newton

Regional Project Director

IMPACT Justice

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1.0 INTRODUCTION

As defined by the United Nations Environmental Program (UNEP), EIA means, “an examination, analysis and assessment of planned activities with a view to ensuring environmentally sound and sustainable development.”¹ The *Programme of Action for Small Island Developing States* adopted at the Global Conference on Sustainable Development in Small Island Developing States (SIDS), held in Barbados in 1994, identified the need for national action to -

Develop appropriate national ... and local environmental regulations which reflect the needs and incorporate the principles of sustainability, create appropriate environmental standards and procedures, and ensure their integration into national planning instruments and development projects at an early stage in the design process, including specific legislation for appropriate environmental impact assessment for both public and private sector development.²

As the following review of the legislative framework for EIA in the beneficiary countries shows, virtually all the CARICOM countries have adopted legislation providing for EIAs to be undertaken for proposed projects in the more than two decades since the SIDS Programme of Action was adopted. Such measures are also required by several of the Multilateral Environmental Agreements (MEAs) to which CARICOM countries are parties.³ However, the approaches taken to legislating for EIA by the CARICOM countries vary and an assessment of whether the EIA processes provided for are “appropriate” for SIDS and ensure “environmentally sound and sustainable development” is merited.

The objectives of this study are therefore to –

¹ **Goals and Principles of Environmental Impact Assessment**, Adopted by decision 14/25 of the Governing Council of UNEP, 17 June 1987.

² Part X: “National Institutions and Administrative Capacity” §A(vi).

³ For example, Art.12 of the **Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region**.

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- Outline the essential elements of the EIA process
- Identify criteria for evaluating EIA legislation in Caribbean SIDS
- Evaluate the EIA processes provided for in national legislation in the 13 CARICOM beneficiary countries using those criteria
- Highlight issues which have emerged in EIA litigation in the region
- Make recommendations for new or amended national laws governing EIA in the region

It should be noted that a review of the EIA legislation in the 13 beneficiary countries in isolation of an assessment of their institutional capacity to administer their EIA legislation and a review of actual EIA practice in these countries will only provide a partial picture of the efficacy of the EIA process in the region. Notwithstanding these limitations, this study is a significant step in the achievement of the immediate and intermediate outcomes and the attainment of the overarching goal of the Justice Impact project.

2.0 THE EIA PROCESS

EIA is a systematic technique for analyzing the environmental feasibility of proposed projects.⁴ An important aspect of the EIA process is that it can contribute to better design of development projects, by means of the consideration of alternatives and the incorporation of measures to mitigate adverse environmental impacts at the planning stage. It is an important aid to decision-making on development projects which are subject to regulatory control by a competent national authority; however – as has been stressed by courts of law in several decided cases – the environmental impact of development may be only one of several considerations which a decision-maker may have to take into account.

The EIA process is illustrated in UNEP's generalized flowchart below. As this shows, the essential elements of the EIA process are –

⁴In best practice, EIA includes the assessment of socio-economic impacts as well as impacts on the natural environment, and in some countries (e.g. Suriname) it is formally referred to as Environmental and Social Impact Assessment (ESIA). As usual in this document, the term "environment" includes human beings and the expression "EIA" omc;ides spcop-economic impacts. EIA is distinguished from Strategic Environmental Assessment (SEA) of policies, plans and programmes, which is now an element of the national environmental management process in some countries.

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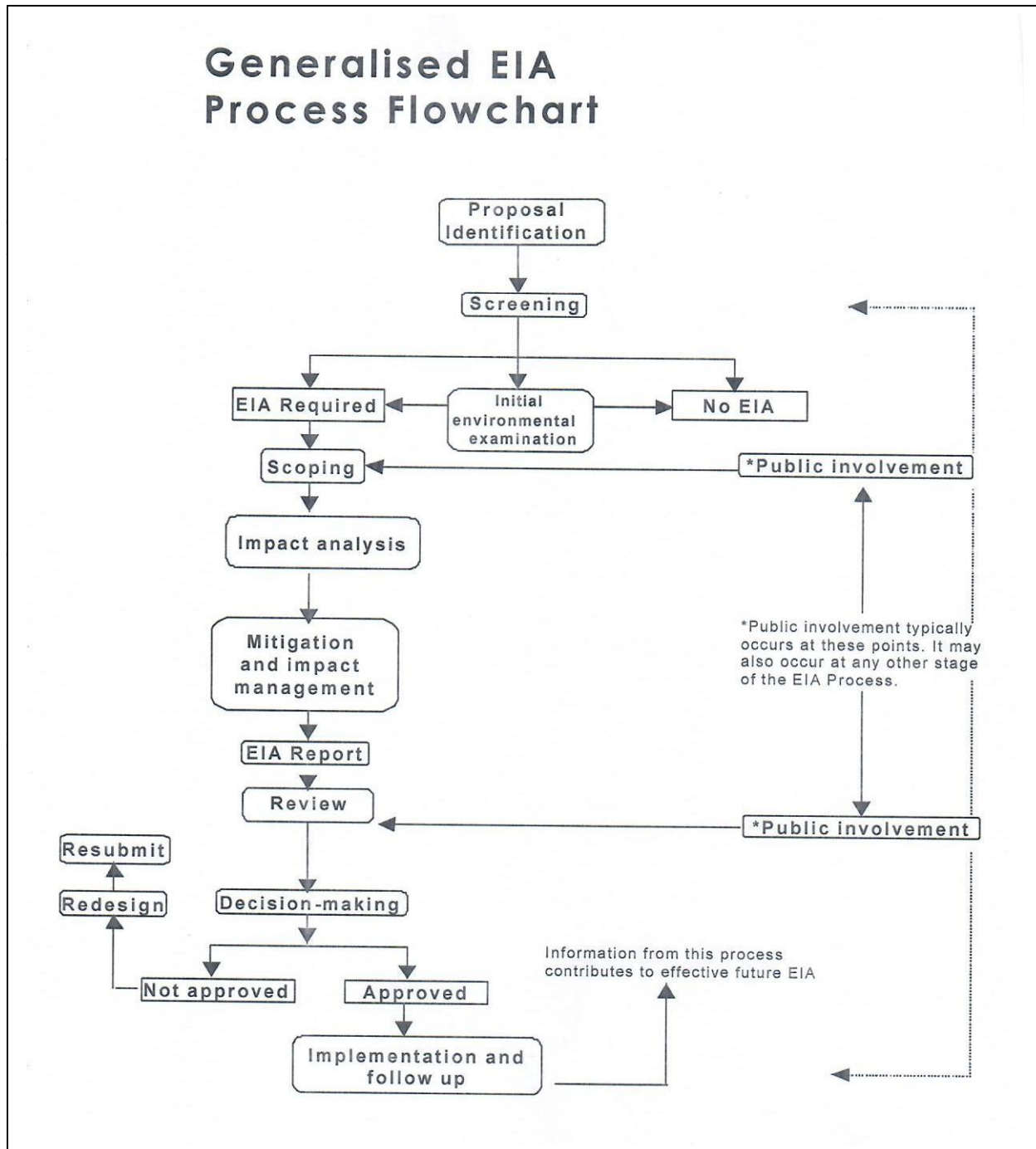
- 1) Screening
- 2) Scoping
- 3) Impact Analysis (including data gathering and reporting)
- 4) EIA Review
- 5) Public Participation
- 6) Decision-making
- 7) Implementation & Monitoring

An understanding of each of these steps is critical to the identification of criteria for the assessment of EIA legislation; hence, a brief comment on each of these elements is necessary to an understanding of the issues. In addition, the question of institutional responsibility for administration of the EIA process must be considered.

Moreover, the principle of access to justice requires that provision be made for recourse against regulatory decisions made on the basis of the EIA process, by way of appeals against the merits of such decisions and/or their legality. Fundamental to the exercise of this right, is the right of individuals to access to information about the EIA process. Hence, both of these issues must also be considered.

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Figure 1



Source: UNEP's EIA Training Resource Manual, 2nd Ed, 2002

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2.1 Institutional Framework

Detailed consideration of the institutional aspects of EIA systems in the region is beyond the scope of this study; however, it should be noted at the outset that the institutional frameworks for administration of EIA processes in the participating countries are of two general types.

In two-thirds of the twelve Commonwealth Caribbean countries studied (Barbados and the OECS member countries), responsibility for EIAs is vested in the agency responsible for physical planning and the control of the use and development of land (which in most cases now includes the seabed within the Territorial Waters of the country). This model replicates the EIA system in the UK, where the EIA process is governed by Regulations made under the *Town and Country Planning Act*. In this system the EIA process is an adjunct of the development control process. Hence, there is only a single application and permitting process for the approval of projects which are subject to EIAs and any resulting environmental requirements are incorporated into any conditional permission granted for the carrying out of development projects.

In the other four Commonwealth Caribbean countries studied (Belize, Guyana, Jamaica and Trinidad & Tobago), responsibility for the EIA process has been conferred upon newly established environmental agencies. This model is analogous to that in the USA, where responsibility for EIAs is in the hands of the Environmental Protection Agency (USEPA) under the *National Environmental Policy Act*, and generally the adoption of this model in the Caribbean has been donor-driven. This US model of EIA administration is also proposed for Suriname under the draft Environmental Law.

In some countries (e.g. Belize, Guyana and Suriname), where the system for land use control is limited to certain geographical areas (generally the municipalities - as it is in the USA) the adoption of the US Model may be appropriate. However, its adoption in Jamaica and Trinidad & Tobago is questionable as it has contributed to a proliferation of institutions and redundant regulatory controls, resulting in conflicts of jurisdiction. In Jamaica this problem has been addressed to some degree, by the administrative merger of the two statutory authorities responsible for land use planning and EIAs respectively into the National Environment and Planning Agency (NEPA), under the *Executive Agencies Act 2000*.

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The institutional framework specifically provided for in the legislation governing EIAs in each country will be described further in Chapter 4.0.

2.2 Screening

The threshold issue for any EIA system is the determination of the cases in which EIA is, or can be, required. In some instances, the types of projects for which EIAs are required (and/or not required) are specified. In other instances, the power to require EIAs in appropriate cases is conferred on the relevant authority. A range of such cases may also be listed or the authority's discretion may be unlimited. Both devices are present in some countries, where there is a list of cases in which EIAs are mandatory but the relevant authority has the discretion to require EIAs in other cases. Additionally, sometimes the relevant authority may be empowered to dispense with the requirement for EIAs to be carried out for projects on the mandatory list.

In all cases where the relevant authority has the discretion to determine whether an EIA is required for a particular project, this discretion should be seen to have been exercised reasonably, so that project proponents have confidence that the EIA process is being administered fairly and equitably. The procedure for making this threshold decision, known as screening, involves making a preliminary assessment as to whether a project may have a significant impact on the environment such that a detailed EIA is necessary. Screening is usually carried out by reference to standard criteria (i.e. checklists) related to the type, scale and location of the proposed project, but (as shown in the UNEP flowchart) in some cases screening may involve carrying out an initial environmental evaluation (IEE), an intermediate level EIA conducted primarily by using existing information.

Generally, the public plays no role at the stage of decision-making with respect to the instances in which an EIA is required, nor is it usual for provision to be made for the project proponent to appeal against the preliminary decision of the relevant authority to require that an EIA be carried out. However, the absence of such provisions does not preclude legal challenges by the project proponent or third parties to the relevant authority's decision if it appears to be unreasonable or otherwise unlawful.

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2.3 Scoping

The cost of EIA studies is determined by the scope of the research and analytical work that has to be undertaken. In this context, the interests of project proponents, who must bear the costs of EIAs, and the relevant authorities, who want EIA studies to be as thorough as possible, differ. The procedure for the determination of the scope of works should therefore balance the interests of the relevant authorities in ensuring that EIAs address all the salient issues against those of project proponents in ensuring that the scope of EIAs is not unnecessarily broad.

Either the relevant authority or the project proponent may be responsible for the preparation of the Terms of Reference (TOR) for EIAs. If this is the responsibility of the relevant authority, the project proponent should have a say in the finalization of the scope of works to ensure that the TOR are not overly-inclusive, as generic documents are commonly utilised by the authorities. In addition, the public may be given an opportunity to comment on or participate in the process of formulating the TOR, as indicated in the UNEP EIA Process Flowchart.

2.4 Impact Analysis & Reporting

Almost invariably, the project proponent is responsible for carrying out the EIA – inclusive of data gathering and analysis - and the preparation of the EIA Report or Environmental Impact Statement (EIS).⁵ As mentioned previously, the time and cost required to carry out the required work depends upon the scope of the TOR for the EIA. In some EIA systems, the EIA preparer is given the right of access to environmental information held by public authorities, which reduces the need for original work and diminishes the costs of the EIA. However, the fact that the project proponent is responsible for carrying out the EIA and producing the EIA Report/EIS raises issues about both the competence and independence of the consultants retained by the project proponent to carry out the EIA and the essential contents and standard of the EIA report/EIS.

⁵ An exception is found in the old **National Conservation and Environmental Protection Act 1987**, No.5 of 1987, of St. Kitts and Nevis, section 25 of which provides that, for the purposes of coastal conservation, the Minister, in consultation with the Conservation Commission is responsible for undertaking EIAs in collaboration with other government departments, agencies and institutions, with respect to development activities.

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The range of issues that should be included in an EIA Report/EIS is fairly well settled. For example, these are detailed in the UNEP *Goals and Principles of Environmental Impact Assessment*,⁶ Principle 4 of which provides that an EIA report should include, at least:

- (a) A description of the proposed activity;
- (b) A description of the potentially affected environment, including specific information necessary for identifying and assessing the environmental effects of the proposed activity;
- (c) A description of practical alternatives, as appropriate;
- (d) An assessment of the likely or potential environmental impacts of the proposed activity and alternatives, including the direct, indirect, cumulative, short-term and long-term effects;
- (e) An identification and description of measures available to mitigate adverse environmental impacts of the proposed activity and alternatives, and an assessment of those measures;
- (f) An indication of gaps in knowledge and uncertainties which may be encountered in compiling the required information;
- (g) An indication of whether the environment of any other State or areas beyond national jurisdiction is likely to be affected by the proposed activity or alternatives;
- (h) A brief, non-technical summary of the information provided under the above headings.

However, there is no such general agreement concerning minimum standards with respect to the qualifications of persons engaged by the project proponent to carry out EIAs. This can give rise to concerns about the accuracy and objectivity of the EIA Report/EIS; however, these are based in part on a misunderstanding of the purposes of EIA, which is not a simple “pass/fail test” for the proposed project. As outlined above, the impact analysis and reporting stage of the EIA process involves the consideration of alternatives and the identification of mitigation measures, with the objective of reducing any predicted adverse environmental impacts of the proposed project.

⁶ Op. cit. n.1

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2.5 EIA Review

Upon submission, the EIA Report/EIS must be reviewed by or on behalf of the relevant authority as a prerequisite for decision-making on the project proponent's application for regulatory approval. Public participation is ordinarily an important aspect of the review process. There are three fundamental questions which arise with respect to this stage of the EIA process. First: by whom will the EIA review be undertaken? Secondly: what are the criteria for review? Thirdly, how should the public be allowed to participate in the review process?

The alternatives with respect to responsibility for undertaking the EIA review include internal review by the relevant authority, review by an advisory body and/or out-sourcing review of parts or all of the EIA Report/EIS to external experts, which may be necessary where the EIA is for an unusual or technically complex project. Which of these modalities is appropriate will depend primarily on the capacity of the relevant authority to undertake the EIA review internally; however, in any case, there should be transparency and accountability with respect to responsibility for undertaking the EIA review.

There may be no explicit criteria for review of the EIA Report/EIS; however, the need for clarity in this respect is underlined by the fact that challenges to the adequacy of EIA Reports have been a major feature of EIA litigation in the Caribbean. Impliedly, at a minimum, the EIA Report/EIS must be reviewed for consistency with the TOR. The review will generally go beyond this; however, the EIA Report/EIS should not be faulted for failing to cover topics which are not mentioned in the TOR. Additionally, if there has been public participation during the impact analysis stage, or the draft EIA Report/EIS has been exposed for public comment before the final stage of review, the EIA review should take into account the results of the public consultation or comments.

Another consideration that arises at this stage of the EIA process is how the administrative costs incurred for review of the EIA Report/EIS will be covered, particularly where the aspects of the review must be out-sourced to consultants. The options in this respect are for government to absorb these costs or to make provision for an element of cost-recovery by means of the imposition of administrative fees.

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2.6 Public Participation

Virtually every EIA system includes some form of public participation. This reflects Principle 10 of the 1992 *Rio Declaration on Environment and Development*, which provides *inter alia* that, “Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have ... the opportunity to participate in decision-making processes.” However, there are significant differences between EIA systems concerning when public participation should occur and the form of public participation.

As illustrated in the UNEP EIA Process Flowchart, public participation typically takes place at the stages of scoping and EIA review, but may also take place at other stages of the EIA process, (e.g. if required by the TOR for the EIA). As is recognized in the vast literature on public participation, the forms of public participation can vary from one-way information sharing, at the lowest level, through public consultation - by way of the submission of public comments or the convening of public hearings - to actual public involvement in decision-making, at the highest level.

Despite being constitutional democracies, the ex-colonial Caribbean countries studied all share a tradition of top-down government which is at odds with the modern governance philosophy that values public participation in decision-making. Hence, the adequacy of public participation in decision-making for projects that are, or should be, subject to EIA requirements is emerging as another common theme in EIA litigation in the region.

2.7 Decision-making

The role of the EIA in the decision-making process varies between regulatory systems. In the countries studied, there is a clear distinction in this respect between the systems in which the EIA process leads to a decision on an environmental permit *per se* and the systems in which the EIA is one amongst several factors to be taken into account in making a decision on whether to grant a development permit.

In the first case, the decision-maker must of necessity base the decision to grant or refuse an environmental permit, and any conditions subject to which such a permit is granted, on the outcome of the EIA process.

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In the second case, the decision-maker has at least an implied duty to take the EIA into account in decision-making, including the imposition of conditions subject to which permission is granted, but is not bound to decide the project proponent's application for regulatory approval on the basis of the predicted environmental impacts of the project. The only issue in such cases is whether the duty to take the EIA into account in decision-making is expressed, rather than implied, and whether the decision-maker must give reasons for permitting the development even though it may have adverse environmental impacts.

2.8 Implementation & Monitoring

The EIA process generally includes the identification of environmental monitoring and management measures to ensure that, after project implementation, the project proponent adheres to any conditions subject to which the project was permitted, that its environmental impacts were accurately predicted and the mitigation measures adopted have been effective. This provides the relevant authority with information necessary to take action to enforce compliance with the conditions subject to which the environmental or development permit, as the case may be, was granted. Additionally, if the power to do so has been reserved, it also allows the relevant authority to make adjustments to the permit conditions and/or mitigation measures after the conclusion of the EIA process.

2.9 Appeals

In addition to the right to public participation in environmental decision-making, Principle 10 of the Rio Declaration mandates that, "Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided". Hence, the EIA process usually provides for appeals against administrative decisions, both on their technical merits and their legality.

Ordinarily, such rights of appeal are conferred on project proponents who have applied to the relevant authority for their approval and persons who are directly affected by the decision; however, they may also be conferred on third parties who want to challenge such decisions in the public interest.

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2.10 Access to information

Rio Principle 10 connects this right of access to justice to the right of the public to access to information concerning the environment held by public authorities. In this context, it can be noted that EIA systems generally provide for public access to information concerning projects subject to EIAs; however, the type of information which is available and the ease of access to information in the public domain varies between EIA systems.

In some cases, comprehensive information is available to the public free of charge, including access to electronic copies of EIA Reports via the internet, but in others only basic information that is recorded by the relevant agency in registers open to the public is available, and there may be a fee payable for taking copies of such information. In such cases, both the transparency of the EIA system and right of the public to access to justice are compromised.

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3.0 CRITERIA FOR EVALUATING EIA SYSTEMS

Based on the foregoing outline of the essential elements of the EIA process, the following research questions with respect to all those aspects of EIA systems have been formulated, as a basis for evaluating the EIA legislation in the participating countries.

CRITERIA	CONSIDERATIONS
1. Legal & Institutional Framework	
Are there robust statutory provisions for EIAs?	<ul style="list-style-type: none"> ▪ <i>Does the package of legislation make provisions with respect to all the elements of the EIA process, including appeals?</i> ▪ <i>Does the EIA process involve the consideration of socio-economic and gender impacts as well as impacts on the natural environment?</i> ▪ <i>Does the EIA legislation make provision for social impact assessment inclusive of gender analysis?</i> ▪ <i>Is there an institution to which responsibility for implementing and enforcing the law on the EIA process is assigned?</i> ▪ <i>Has the statute been implemented by subsidiary legislation on EIAs?</i> ▪ <i>To what extent does the EIA system depend upon published policy documents rather than legislation?</i>
2. Screening	
Is the screening process transparent?	<ul style="list-style-type: none"> ▪ <i>Are there cases in which EIA is mandatory?</i> ▪ <i>If there is a discretionary power to require EIAs (or to dispense with EIAs for projects on the mandatory list), is the screening process transparent?</i> ▪ <i>Are the screening criteria set out in or under Rules/Regulations or in published policy documents (e.g. EIA Guidelines)?</i> ▪ <i>Is there any mechanism for public participation in the screening process?</i>
3. Scoping	

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Is the scoping process clear and balanced?	<ul style="list-style-type: none"> ▪ <i>Who prepares the TOR for the EIA?</i> ▪ <i>If the relevant authority prepares the TOR, does the project proponent have any opportunity to object to the TOR before they are finalized?</i> ▪ <i>Is there any mechanism for public participation in the scoping process?</i>
4. Impact Analysis & Reporting	
Are there minimum standards for carrying out EIAs and EIA report/EIS preparation?	<ul style="list-style-type: none"> ▪ <i>Are there any requirements with respect to the type of persons who may carry out EIAs?</i> ▪ <i>Does the EIA preparer have any right of access to environmental information held by public authorities?</i> ▪ <i>Are the minimum contents of the EIA Report/EIS specified?</i>
5. EIA Review	
Is the EIA review process transparent?	<ul style="list-style-type: none"> ▪ <i>Who is responsible for the EIA review?</i> ▪ <i>Are the criteria for review specified?</i> ▪ <i>Is there public participation in the EIA review process?</i>
6. Public Participation	
Are the provisions for public participation in the EIA process adequate?	<ul style="list-style-type: none"> ▪ <i>At what stage/s of the EIA process is provision made for public participation?</i> ▪ <i>Is the level of public participation provided for at each stage appropriate?</i>
7. Decision-Making	
Does the decision-maker have to take the EIA into account in decision-making?	<ul style="list-style-type: none"> ▪ <i>Is the duty of the decision-maker to take the EIA into account in decision-making expressed or implied?</i> ▪ <i>Does the decision-maker have to give reasons for the decision, including any conditions subject to which regulatory approval is granted?</i>
8. Implementation & Monitoring	

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Is provision made with respect to implementation and monitoring measures after the grant of regulatory approval?	<ul style="list-style-type: none"> ▪ <i>Is an environmental management plan required as a follow-up to the EIA?</i> ▪ <i>Does the relevant authority have to implement monitoring measures based on the EIA?</i> ▪ <i>Are there provisions to ensure that mitigation measures, inclusive of measures to mitigate gender impacts, are implemented.</i>
9. Appeals	
Is there adequate provision for appeals against decisions made in the course of the EIA process and/or as an outcome of the EIA process on their technical merits or legality?	<ul style="list-style-type: none"> ▪ <i>On whom are rights of appeal (if any) conferred?</i> ▪ <i>Is the right of appeal limited to the applicant (project proponent)?</i> ▪ <i>Do other persons whose property or other rights may be directly affected have a right of appeal?</i> ▪ <i>Do third parties have a right to appeal such decisions in the public interest?</i>
10. Access to information	
Does the public have the right to access to information concerning proposed projects which are subject to EIA requirements?	<ul style="list-style-type: none"> ▪ <i>What is the type of information that is available (is it comprehensive or limited)?</i> ▪ <i>What is the level of difficulty/ease of access to such information by the public?</i> ▪ <i>Can the public take copies of such information?</i> ▪ <i>Is there any charge payable for access to/copies of such information?</i>

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4.0 EVALUATION OF NATIONAL EIA LEGISLATION

4.1 Antigua and Barbuda

The responsibility for the EIA process is vested largely in the Development Control Authority (DCA) in Antigua and Barbuda. The DCA was established under s.5 of the *Physical Planning Act, 2003*, (No. 6 of 2003), to carry out the functions of the Act.

Section 17 states that persons shall not commence or carry out any development of land, except in accordance with a development permit. Section 23(1) provides for an EIA to be carried out for an application for a development permit for any development set out in the Third Schedule. Under s. 23(2), the DCA also has the authority to request an EIA for any other development not listed in the Third Schedule if the proposed development would be likely to have significant effects on the environment.

If the DCA determines that an EIA is required, they must send a written notice to that effect within 60 days setting out the TOR for the preparation of an EIS and the period within which the EIS must be submitted (s.23(4)). Section 23(6) provides that after an applicant has been notified, the DCA and any other public agency or department, may make any information that may be relevant to the preparation of the EIS available to the applicant. Section 23(7) states unequivocally that the DCA cannot grant a development permit unless the EIA has been taken into account. The DCA must also inform other Government agencies and departments that a notice requiring an EIA was sent to the applicant and such agencies and departments shall not grant any licence, permit, approval, consent or other document of authorization unless it has been notified that the notice has been complied with and that the DCA has issued a development permit (s.23(8)).

Under s.23(10), the Minister has the authority to create a register of approved persons with the qualifications, skills, knowledge and experience as may be prescribed by regulations, to carry out EIAs. EIAs may also be required for parts of the country which have been declared to be an environmental protection area (s.54(3)(f)).

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Under s.69, persons whose interest in land may be affected by a decision of the DCA may appeal to the Tribunal. No provision is made, however, for third parties to appeal directly to the Tribunal. Section 77(1) states that the TCP shall maintain a register of all planning and other decisions including applications for development permits and decisions on applications and any conditions attached to development permits. Copies of any entry in the register shall be provided to persons upon payment of the prescribed fee (s.77(2)).

Under s. 81(2)(g), the Minister has the power to develop regulations for, *inter alia*, EIA procedures and EISs; however, no such EIA regulations have been made under the Act since it came into force in 2003.

A more recent law, the *Environmental Protection and Management Act, 2015* (No. 11 of 2015) seeks to ensure, *inter alia*, that decisions pertaining to the environment are made in an integrated manner, in which the Department of Environment (DOE), in collaboration with appropriate authorities, non-governmental organizations and other persons, determines priorities and facilitates coordination among governmental entities to effectively harmonize activities (s.4(1)(b)).

While the Act contains some general provisions addressing EIAs, it does not clearly define the role and responsibilities of the DOE in the EIA process. For example, s.3(e) states that the purposes of the Act shall be achieved by means, *inter alia*, of EIA. Further, s.23 provides that the draft National Environmental Policy Framework shall provide the basis for screening and evaluating development approvals affecting all activities under the EIA process established under this Act and the *Physical Planning Act*. Additionally, s.38 provides for SEAs to be completed by a Ministry, government department or statutory body if a proposed policy, plan, programme or alteration may have a significant negative impact on the environment.

The Act creates a natural resource inventory which is to be presented on an information storage and retrieval system to facilitate consultation on resource use priorities during the EIA process (s.76(2)(b)). The DOE shall also set up an environmental registry with all documents produced, collected or submitted with respect to EIAs (s.76(2)(b)). Section 109

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addresses the power to develop regulations under the Act; however, there is no specific reference to EIA regulations.

Comments

EIA regulations under the *Physical Planning Act* should be developed in order to address any inconsistencies or overlap with the *Environmental Protection and Management Act*.

4.2 Barbados

Only brief provision is made for EIAs in the relevant law in Barbados, namely the *Town and Country Planning Act*, Cap.240.⁷ Section 17(1) of the Act provides that, if requested by the Chief Town Planner (CTP), an EIA with respect to the proposed development may have to be submitted in support of an application for planning permission. Further, s.17(2) provides that the CTP must require an EIA for proposed developments part or all of which are to occur in the Coastal Zone Management Area; however, this provision is inoperative as there is no Coastal Zone Management Plan within the meaning of the *Coastal Zone Management Act* in force.

The Minister responsible for planning is empowered by s.79 to make Regulations with respect *inter alia* to the making of applications for planning permission, including the fees payable in respect of such applications, and generally for the purposes of the Act; however, the existing *Town and Country Planning Regulations 1972*, which pre-date the 1998 amendments to the parent Act, do not contain any provisions with respect to the EIA process. Hence, there are no existing legal requirements with respect to any steps in the EIA process including the core elements of screening, scoping, EIA preparation and review.

In the absence of EIA Regulations, the existing EIA practice in Barbados is based on the provisions of two published policy documents, the *Applicant's Handbook and Guide to Town Planning* (2nd Edition, 2007) and the *Physical Development Plan* (Amended 2003). Both documents contain lists of the classes of proposed developments for which EIAs

⁷ As amended by the *Coastal Zone Management Act*, Act No.39 of 1998 (now Cap.394).

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will be required by the CTP, but in addition state that the CTP may require EIAs in other cases if in his opinion the proposed development may have a significant effect on the environment.

The *Handbook* also sets out guidelines for the preparation of TOR for the EIA to be submitted to the CTP for approval prior to carrying out the EIA, including the minimum scope of the TOR. It also outlines the minimum contents for the EIA Report which must be submitted in multiple hard copies for referral to other governmental agencies which comprise “the Environmental Review Committee” as well as being made available for review by the public for at least 28 days before a public meeting is held. It specifies that adequate publicity must be given to the date and time of the meeting and the applicant must submit a report on the public meeting to the CTP within 14 days after the date of the meeting.

The CTP is ordinarily responsible for decision-making with respect to applications for planning permission and is bound by s.16(1) in making such decisions to have regard to the development plan, in so far as it is relevant, and to any other “material considerations”, which would include the EIA if required. Further, the CTP may grant such permission subject to conditions, which would include conditions based on the outcome of the EIA process. Pursuant to Regulation 7 of the existing *Town and Country Planning Regulations 1972*, the period within which the CTP must determine applications, after the receipt of all the necessary information (including the EIA where required), is two (2) months. However, s.20(3) of the Act provides that the CTP’s decision is not invalidated by reason of it having been issued after the expiry of the two-month period and in practice this deadline is never met.

Section 18 of the Act provides for certain classes of applications to be referred to the Minister for decision-making and vests the Minister with all the duties and powers conferred on the CTP by s.16 with respect to the determination of such applications. The two classes of applications to be referred to the Minister for decision-making under this section, as specified in directions published in the *Official Gazette*, are applications for the change of use of agricultural land and coastal development. The applicant or the CTP may request a hearing by a person appointed by the Minister before the determination of such an application; however, such hearings are not open to third parties and the findings and recommendations of the person conducting the hearing are not disclosed to the

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applicant or the public. There is no statutory deadline for decision-making by the Minister.

As regards public access to information, s.17(3) of the Act provides that the CTP must keep a register with respect to applications for planning permission, including information as to the manner in which such applications have been dealt with, and s.17(4) provides that the register shall be available for inspection by the public at all reasonable hours. Further particulars of the information to be recorded in the register are prescribed in Regulation 10(1) of the *Town and Country Planning Regulations, 1972*. This provides that the information in the register must include the name and address of the applicant, the date of the application and “brief particulars” of the proposed development, as well as the date and effect of the decision made by the CTP and/or, if applicable, the decision made by the Minister under s.18 or s.19. No provision is made for taking copies of the information on the register. A fee is set by the *Town and Country Planning (Fees) Regulations 1970* for certified copies of plans, decisions and application forms; however, CTP is not in the practice of issuing copies of such documents to third persons without the consent of the applicant.

As regards rights of appeal, s.19 of the Act provides that an applicant may appeal to the Minister to review a decision made by the CTP on any application. As is the case under s.18, the applicant or the CTP may request a hearing by a person appointed by the Minister before the determination of such appeal, but such hearings are closed to third parties and the findings and recommendations of the person conducting the hearing are not disclosed to the applicant or the public. There is no right of appeal against decisions of the Minister on application referred to him for determination under s.18, which are stated to be final. Further, s.69 provides that decisions made by the Minister under s.18 and 19 cannot be questioned in any legal proceedings whatsoever, except as provided for by s.72. This section allows for any “person aggrieved” by such a decision to challenge it in court on the grounds of *ultra vires*, but the expression “person aggrieved” is not defined in the Act and is open to narrow interpretation by the court.

In addition, an application to the court for relief against any administrative act or omission may be made, by any person whose interests are adversely affected thereby or any other person if justifiable in the public interest, by way of an application for judicial review under the *Administrative Justice Act*, Cap.109B. The grounds on which such an

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application may be made include breach of the principles of natural justice and s.16(1)(b) of the Act specifies that the law relating to natural justice applies to decisions made by the Minister responsible for planning under s.19 of the *Town and Country Planning Act*, but this does not restrict their application in any other case.

Comments

The legislative provisions for EIAs in Barbados can only be described as woefully inadequate, lacking in transparency and accountability at every level. The provisions in the parent Act that enable the CTP to require applicants to carry out EIAs are lacking in detail and, in the absence of EIA Regulations, the entire EIA practice relies on statements in policy documents. The legal provisions for public access to information about proposed developments requiring EIAs are inadequate and the provisions for merit appeals against administrative decisions do not satisfy basic principles of natural justice. The opportunity for third parties to challenge such decisions on legal grounds under the EIA legislation is also very limited. In order to strengthen the system it will be necessary for the parent Act (which dates from 1965) to be modernized and for EIA Regulations to be made under the Act.

4.3 Belize

The *Environmental Protection Act, 2000*, Chap. 328, was first enacted in 1992 and revised in 2000. Section 3 of the Act establishes the Department of Environment (DOE) while s.4 sets out the powers, duties and functions of the department including the examination and evaluation and carrying out of EIAs and risk analyses. The DOE also has the authority to make suitable recommendations to mitigate against harmful effects of any proposed action on the environment.

The EIA process is addressed in Part V of the Act. Section 20(1) provides that any person who wants to undertake any project, programme or activity which may significantly affect the environment shall cause an EIA to be carried out by a suitably qualified person. Section 20(3) states that measures to be taken by the developer to mitigate any adverse environmental effects and a statement of reasonable alternative sites and reasons for their rejection should be included in the EIA. Further, a developer is required to consult with

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the public and other interested bodies or organizations (s.20(4)). The Act also authorizes the DOE to develop its own EIA and to synthesise the views of the public and interested bodies (s.20(6)). Decisions by the DOE to approve an EIA may be subject to conditions which are reasonably required for environmental purposes.

Under s.21, the Minister has the power to make regulations prescribing the types of projects, programmes or activities for which an EIA is required and prescribing the procedures, contents, guidelines and other matters relevant to such an assessment.

Section 58 provides that the DOE may issue a cessation order to any person who fails to carry out an EIA as required under the Act or regulations. If the person fails to take such steps as he considers appropriate to cease the activity, he will be liable to a fine and/or imprisonment.

The *Environmental Protection (Amendment) Act, 2009*, amended the 2000 Act and provides for, *inter alia*, greater environmental control and management of the petroleum industry and the creation of an environmental management fund. Section 8 repeals and replaces s. 20(7) of the original Act and states that a decision by the DOE to approve an EIA may be subject to the signing of an Environmental Compliance Plan and the payment of an environmental monitoring fee, the posting of guarantees or performance bonds and such other environmental conditions as may be reasonably required for environmental purposes. Section 9 imposes a penalty on any person who fails to carry out an EIA, or abide by conditions imposed by the DOE or who fails to execute an Environmental Compliance Plan.

Section 3 of the *Environmental Impact Assessment Regulations, 2003*, provides that the criteria and procedures under the Regulations should be used to determine whether an activity is likely to significantly affect the environment and, therefore, is subject to an EIA. Before embarking on a proposed project or activity, persons, agencies and institutions must apply to the DOE for a determination whether such project or activity would require an EIA. Section 5 specifies the minimum content to be included in an EIA, e.g. a description of the proposed activities; a description of the potentially affected environment, including specific information necessary to identify and assess the

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environmental effect of the proposed activities; and an identification and description of measures available to mitigate the adverse environmental impacts of proposed activity or activities.

Section 6 provides that if the DOE determines that there is a need for an EIA on a project, the EIA process shall include a screening of the project; a review by the National Environmental Appraisal Committee; and the design and implementation of a follow-up program. Sections 7 to 9 provide for the screening and categories of projects. Section 7 provides that all undertakings, projects or activities specified in Schedule I shall require an EIA and Section 8 states that the DOE has the discretionary authority to determine whether any of the undertakings specified in Schedule II would require an EIA. Section 9 lists the projects that will not require an EIA.

While carrying out an EIA, the developer must consult with the public within or adjacent to the geographical area of the proposed undertaking. The DOE can also request written comments from interested persons concerning the environmental impact of the undertaking and shall determine the procedure for public contact and involvement (s.18). Section 19 lists the items that should be included in an EIA report including the policy, legal and administrative framework, a mitigation plan, presentation of all reasonable alternatives, a monitoring plan and a report on public hearings, if any.

Section 20 provides that after a person has submitted the EIA, a notice must be published in two newspapers for two weeks. The DOE, on the recommendation of the National Environmental Appraisal Committee (NEAC), may require a public hearing (s.24). Section 25 provides for the appointment of the NEAC, whose functions include the review of all EIAs; advising the DOE of the adequacy or otherwise of an EIA ; and advising the DOE of circumstances where a public hearing is necessary. Section 27 provides for an appeal process and s.28 deals with offenses and penalties. The developer has 30 days within which to appeal to the Minister who may appoint a Tribunal to hear and determine the appeal.

The Environmental Impact Assessment (Amendment) Regulations, 2007 amends the 1995 principal regulations. Several definitions that were omitted from the principal Act and

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Regulations are now included, for example, “Environmental Compliance Plan”, “Environmental Impact Assessment”, “Public Hearing” and “Suitably Qualified Person”.

Comments:

Generally speaking, the laws and regulations in Belize governing the EIA process are quite comprehensive especially in comparison to some of the other countries in the region. However, there are some weak spots in the legislation. For example, there is no public participation in the scoping process or review of the TOR.

4.4 Dominica

In Dominica the EIA process is an adjunct of the development control process under the *Physical Planning Act*, No.5 of 2002. The Development and Planning Corporation (DPC) established by the *Development and Planning Corporation Act, 1972*, is deemed in s.4 to be the Authority responsible for the administration of the Act. Under s.23 of the Act, unless the DPC decides otherwise, an EIA is mandatory for proposed developments of the types listed in the Second Schedule; however, the DPC may require an EIA in any other case, where it is of the opinion that significant environmental harm could result from the development. Additionally, the DPC is barred by s.18(3) from entertaining applications for outline approval for any of the 19 matters set out in the Second Schedule.⁸

The criteria for screening applications to determine if an EIA is required are set out in s.23(3), but provision is made for additional criteria to be specified in the regulations. The DPC is responsible for notifying the applicant within 30 days that an EIA is required, settling the TOR for the EIA and setting a deadline for submission of the EIA report. In every case when it requires that an EIA be undertaken, the DPC must notify every agency or department of government which is responsible for granting any license, permit, approval or other documentary authorization in connection with the proposed project; however, these agencies are not expressly prohibited from granting their authorization for the project pending the EIA.

⁸ The Second Schedule was amended by s.63 of the *Geothermal Resources Development Act*, Act No.12 of 2016, to add geothermal resource development projects within the meaning of that Act as class 19.

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Under s.23(4), the project proponent must submit to the DPC an EIS in such form and containing such information as may be prescribed and s.23(8) empowers the Minister to make regulations prescribing the qualifications, knowledge, skills and experience to be possessed by persons carrying out EIAs and for the registration of such persons who are approved to prepare EISs for Dominica. In addition, s.88(2)(g) provides that the Minister may make regulations for the procedures for EIAs and the form of EISs. No such regulations have yet been made; hence, with the exception of matters for which specific provision is made in the Act (e.g. the screening process), the EIA process is governed primarily by EIA Guidelines.

Section 75 of the Act provides that the applicant, or any person other than the applicant whose interest in land may be affected by a decision of the DPC, may appeal against a refusal to grant development permission or the conditions subject to which permission is granted. Appeals lie to the Appeals Committee appointed by the Minister pursuant to s.74, which may deal with such appeals by way of written representations or public inquiries, and the procedure for public inquiries is set out in s.76 of the Act. The implication of this is that third parties have no right of appeal against the approval of projects which are subject to EIAs or, unless they have property interests which are affected by the decision, even against the conditions subject to which approval is granted for such projects. Hence, any such challenge, and any challenge by third parties to the DPC's decision in the public interest, would have to be made in the courts of law by way of Judicial Review proceedings.

Comments

The legislation governing EIAs in Dominica is exceptional in that the criteria for screening proposed projects to decide whether an EIA should be required are specified in the parent Act; hence, although there has been a failure to make Regulations under s.23(8) and s.88(2)(g) to specify the qualifications required for registration as an EIA consultant in Dominica, the procedures for EIAs and the content of EISs, there is some transparency with respect to the threshold issue of if an EIA will be required. Although, in contrast to the older planning legislation in Barbados, persons other than the applicant whose property rights are directly affected have a limited right of appeal concerning the conditions subject to which approval is granted for projects that are subject to EIAs, there is no right of appeal against the approval of such projects *per se*. Hence, the EIA legislation

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in Dominica is in need of strengthening by the promulgation of EIA regulations as provided for by the parent Act.

4.5 Grenada

In Grenada, the EIA process is an adjunct of the development control process under the *Physical Planning and Development Control Act*, No.23 of 2016 (which replaced previous legislation of the same name, Cap.241A, enacted in 2002). The Act is administered by the Planning and Development Authority (PDA) established by s.5 of the Act.

Section 22 of the Act provides for EIAs. This section empowers the PDA to require an EIA to be carried out with respect to any application for permission to develop land, including an application for approval in principle, if the proposed development could significantly affect the environment. The types of projects for which EIA is ordinarily mandatory are listed in the Third Schedule to the Act, but the PDA may “for good cause” dispense with the requirement that an EIA be carried out for such projects. The PDA also has the discretion to require EIAs with respect to projects not specified on the list as the last item on the list is, “any other projects identified by the Authority”.

The PDA is expressly prohibited from granting permission for any development which is subject to EIAs unless it has taken the EIA report into account. All the details of the EIA process (including the screening and scoping processes, the qualifications of persons conducting EIAs, the minimum contents of EIA Reports, the procedures for public participation in the EIA process, the criteria and procedures for review of the EIA Report, the establishment of an EIA Committee, and the consideration by the PDA of applications for which EIAs are required) are relegated to Regulations to be made by the Minister. No such Regulations have yet been made.

The project proponent is entitled, under s.22(5), to information that is relevant to the EIA which is in the possession of the Physical Planning Unit or any other public agency, except confidential information, on payment of a reasonable cost. Pursuant to s.22(6) the DPA must notify all governmental agencies which are responsible for issuing licenses, permits, approvals, consents or other documentary authorization in connection with the

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proposed development that an EIA is required for the project, and such agencies are prohibited from granting their own authorization until they have been advised by the DPA that the EIA has been carried out and permission has been granted for the development.

Subsection 22(7) provides that it is a summary offence to contravene the provisions of section 22 or any Regulations made under the section, punishable by a fine of \$20,000 or 3 years imprisonment or both. Besides the addition of provisions for an EIA Committee to be established by the EIA Regulations, the addition of this offence to the section is the only change to the law related to EIAs in Grenada made as a result of the repeal and replacement of the 2002 legislation.

A right to appeal to the Appeals Tribunal established under Part VIII of the Act against the decision of the PDA is conferred by s.59 on any applicant or any other person whose interest in land may be affected by the decision. However, this is limited to appeals against refusal of a development permit or any conditions subject to which a development permit is granted. This implies that there is no right of appeal under the Act against the approval *per se* of a development which is subject to EIA, even by a person other than the applicant whose property rights may be affected by the development. Hence, any such challenge, and any challenge by third parties to the PDA's decision in the public interest, would have to be made in the courts of law by way of Judicial Review proceedings.

There is no specific right to information about the EIA process. Under s.69 of the Act, the DPA is required to maintain a Register containing information concerning applications for permission to develop land (including information as to the name and address of the applicant, the date of the application, the nature of the development, the decision on the application and any subsequent appeal against the decision or modification of the permission, and any enforcement action taken with respect to the development). Particulars concerning EIAs are not expressly required to be recorded. Entries must be made in the Register within 7 days and the public has the right of access to the information on the register free of charge and to take copies of such information on payment of the prescribed fee.

Comments

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The provisions of the operative section of the planning legislation governing EIAs in Grenada are quite adequate; however, as is the case elsewhere in the OECS sub-region, the efficacy of these provisions has been undermined by the failure to implement the parent Act by making the necessary EIA Regulations. In 2001 draft EIA Regulations were prepared together with the former Act and subsequently there was another consultancy to prepare EIA Regulations to implement that Act; however, no such Regulations have yet been made. The other major weakness, which is common to all the other countries where the EIA process is an adjunct of the development control process under planning legislation, is that the public's rights to information about EIAs and to appeal with respect to decisions about projects subject to EIAs are very inadequate.

4.6 Guyana

The EIA process in Guyana is governed by the *Environmental Protection Act*, No. 11 of 1996. Section 3 of the Act establishes the Environmental Protection Agency (EPA) and s.5 states that any person or authority dealing with the environment under any other written law must defer to the authority.

Under s.4(1), one of the functions of the EPA is to ensure that any developmental activity which may cause an adverse effect on the natural environment be assessed before such activity is commenced and that such adverse effect be taken in account in deciding whether or not such activity should be authorised. Section 4(2)(b) provides that, in the exercise of its functions, the EPA has discretionary power to request, examine, review, evaluate and approve or reject EIAs and make suitable recommendations for the mitigation of adverse effects of any proposed activity on the environment.

Section 4(3)(e) requires that the EPA compile a list of approved persons with the qualifications and experience to undertake EIAs and to maintain a public register of all EIAs carried out.

Part IV of the Act deals specifically with EIAs. Section 11(1) provides that a developer of any project listed in the Fourth Schedule or any other project which may significantly affect the environment must apply to the EPA for an environmental permit. Section 16

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provides that the Minister may make regulations establishing criteria and thresholds to determine which projects have significant effects on the environment, but no such screening regulations have yet been made.

Section 17(1) provides that the EPA may require an EIA for an activity which does not by itself significantly affect the environment, but may together with other activities carried on in any place have a cumulative environmental impact.⁹ The EPA may also exempt projects from carrying out an EIA. Section 11(3)(a) provides that any person who may be affected by an exempted project, may lodge an appeal within thirty days with the Environmental Assessment Board (EAB) established under s.18 to conduct public hearings into all appeals.

Section 11(4) provides that EIAs shall be carried out by an independent and suitably qualified person approved by the EPA. Section 11(5) lists the information to be included in the EIA report. Section 11(6) requires the developer to publish a notice of the project in at least one daily newspaper and members of the public have 28 days from the publication of the notice to make written submissions to the EPA. Under s.11 (8), the EPA shall set the terms and scope of the EIA with the person carrying out the EIA. The developer and EIA preparer shall, during the course of the EIA, consult the public and provide copies of information obtained for the EIA. The EIA and EIS shall be public documents and made available for the duration of the project and five years thereafter for inspection. Expenses of the EIA are borne by the developer.

The EPA shall submit the EIA and the EIS to the EAB for consideration and recommendation as to whether or not they are acceptable. Section 28 provides that any person who is not satisfied with the decision of the EPA or the EAB may appeal against that decision. Section 51 establishes an Environmental Appeals Tribunal (EAT) which is equivalent to a superior court of record and has jurisdiction to hear and determine appeals against, *inter alia*, the refusal or requirement of an environmental permit.

⁹ It should be noted that s.17(2) provides that the EPA may require any public authority to carry out a SEA of any policy, programme or plan that may significantly affect the environment. Under s.17(3), such an SEA is to be carried out in accordance with the prescribed EIA procedure, in so far as is applicable.

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Section 3 of the *Environmental Protection (Authorisations) Regulations, 2000*, provides that the EPA may, upon the evaluation of an application for an environmental authorisation require the applicant to furnish any document, information or EIA pursuant to section 11 of the Act.

The *Environmental Protection Amendment Act 2005* made some minor changes to the parent Act including decreasing the amount of time for persons to appeal under section 11(3)(a) from 60 days from the date of publication of the EPA's decision to 30 days.

Comments:

Although the EIA provisions in Guyana's legislation are quite comprehensive – at least in comparison to some of the other countries in the region – they still need to be supplemented by comprehensive EIA regulations. The EPA has developed several EIA Guidelines for the natural resource sectors but some of these guidelines are skeletal and in need of updating. More importantly, the information contained in the guidelines is not legally binding.

4.7 Jamaica

Section 3 of the *Natural Resources Conservation Authority Act, 1991*, established the National Resources Conservation Authority (NRCA) to, *inter alia*, take such steps as are necessary for the effective management of the physical environment of Jamaica so as to ensure the conservation protection and proper use of its natural resources. In 2001, the NRCA merged with the Town Planning Development (TPD) and the Land Development and Utilization Commission (LDUC) to form the National Environment and Planning Agency (NEPA) under the *Executive Agencies Act 2000*. Hence, NEPA also has responsibility for administration of the *Town and Country Planning Act* and the *Land Development and Utilization Act*.

Under s.9(3) of the NRCA Act, persons who propose to undertake any enterprise, construction or development of a prescribed description or category in a prescribed must obtain a permit from NEPA before commencing such activity. The Minister may, on the recommendation of NEPA, prescribe the areas in Jamaica, and the description or category

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of enterprise, construction or development to which the provisions of this section applies. The original *Natural Resources (Prescribed Areas) (Prohibition of Categories of Enterprise, Construction and Development) Order, 1996*, declared the whole of Jamaica as the prescribed area and listed the classes of projects requiring NRCA permits.

The principal order has been twice amended by the *Natural Resources (Prescribed Areas) (Prohibition of Categories of Enterprises, Construction and Development) Amendment Order, 2003*, and the *Natural Resources (Prescribed Areas) (Prohibition of Categories of Enterprises, Construction and Development) (Amendment) Order, 2015*. By virtue of the most recent amendments, persons are now required to obtain permits for categories of existing enterprises, construction and development that were previously exempted under the original 1996 order.

Under section 10 of the NRCA Act, NEPA has the power to request EIAs from persons applying for permits. Section 10(1)(b) provides that NEPA may by written notice require an applicant for a permit to submit an EIA where it is of the opinion that the activities are having or are likely to have an adverse effect on the environment. Section 10(3) further provides that NEPA must inform other Government agencies or departments with responsibility for the environment that a notice has been issued and such agencies or departments shall not grant any licences, permits, approvals, or consents until the applicant complies with the notice. Section 10(4) provides that any person who is not applying for a permit and refuses or fails to submit an EIA is guilty of a summary offence.

Section 9(5) of the Act provides that in considering an application, the Authority must consult with any Government agency or department exercising functions with the environment and have regard to all material considerations and the effect which it will or is likely to have on the environment generally and in particular on any natural resources in the area concerned.

Comments:

The NRCA Act was enacted in 1991 and needs to be completely overhauled. It contains only one section on the EIA process and is quite inadequate. In order to supplement the legislation, NEPA developed *Guidelines for Conducting Environmental Impact Assessments* in 1997. The Guidelines also should be updated since the last revision was in 2007. Although the Guidelines are very detailed and are published on the NEPA

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website,¹⁰ they are not legally binding and should not be used as a substitute for EIA Regulations.

4.8 Montserrat

In Montserrat the EIA process is primarily an adjunct of the development control process under the *Physical Planning Act*, Cap.8:03, administered by the Planning and Development Authority (PDA) established by s.3 of the Act. In s.18, very brief provision is made for EIAs. Sub-section 18(1) provides that, unless the PDA decides otherwise, an application for development permission for the 16 classes of proposed projects listed in the Third Schedule must be accompanied by an EIA, and s.18(2) provides that an EIA must include the matters specified in the Fourth Schedule. Additionally, provision is made by s.64(a)(vi) for the making of regulations respecting the “scope and content and process of considering” EIAs, but – despite the fact that Physical Planning Regulations and Fees Regulations were made in 1996 and 2002 respectively - no such EIA Regulations have yet been made.

A right of appeal against the decision to grant or refuse development permission for any proposed project, including ones subject to EIA, is conferred by s.20 upon any person aggrieved by the decision of the PDA. Such appeal must be made within 60 days to the Physical Planning and Environmental (Appeals) Tribunal¹¹ appointed by the Governor General under s.56. Such appeals are to be determined by the Tribunal based on oral representations made by the parties, but an appeal lies to the Court of Appeal against any decision of the Tribunal under s.59. Provision is made by s.63 for public access to information recorded in the register maintained by the PDA; however, the information to be recorded in the register does not include specific information concerning EIAs.

Further provisions concerning EIAs in Montserrat have been made by the *Conservation and Environmental Management Act*, No.17 of 2014. Section 18 of the Act introduces a new regulatory requirement for project proponents to obtain a Certificate of Environmental Approval (CEA) from the Director of Environment before commencing any of the 10 activities listed in Schedule 1 to the Act. In addition, the Director may require

¹⁰ Accessible at: http://nepa.gov.jm/new/services_products/applications/eias/development_guidelines.php

¹¹ The name of the Tribunal was amended in 2014 by Schedule 5 to the *Conservation and Environmental Management Act*.

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a CEA for any existing activity in a buffer zone that may have significant adversely effects on a protected area. A CEA may be granted subject to such terms and conditions as the Director sees fit, including undertaking mitigation measures, or the Director may refuse to grant a CEA giving reasons for that decision. The Director has a duty under s.19 to monitor the activity to ensure that it is carried out in compliance with the conditions in the CEA and is consistent with the description and information provided in the application.

Section 21 provides that the issue of a CEA does not affect requirements under any other laws for regulatory approval before the listed activity can proceed; however, where a CEA is required, no other regulatory authority may grant documentary authorization for the commencement of the activity until the CEA has been issued. Most (but not all) of the activities listed in Schedule 1 would require permission from the PDA under Cap.8:03. The implication of this is that, where a CEA is required for an activity that constitutes development requiring permission under Cap.8:03, the CEA must be obtained before that permission is granted; however, there is no requirement for an EIA to be carried out before a CEA is granted, even if an EIA is ordinarily mandatory under Cap.8:03, s.18(1).

Section 20 provides for an EIA to be required in connection with the issuance, revocation or amendment of a CEA, where false, inaccurate or misleading information was given on a application for a CEA or where the Director is satisfied that an activity poses an environmental threat which could not have been reasonably foreseen when the CEA was issued. In these circumstances, the PDA may, on the recommendation of the Director, require the holder of a CEA to carry out an EIA in accordance with s.18 of the *Physical Planning Act*.

A person who the Director requires to obtain a CEA may appeal against the decision to the Tribunal. Additionally, if a CEA is refused, or granted subject to conditions, or revoked, suspended or amended by the Director, the applicant or holder, as the case may be, may also appeal to the Tribunal against the decision. There are no provisions for appeals by third parties with respect to the grant of CEAs, but s.70(3) provides that the proceedings of the Tribunal must be open to the public except where the Tribunal, for good cause, otherwise directs.

Comments

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The principal EIA legislation in Montserrat is exceptional in that the minimum contents of EIAs are set out in a Schedule to the Act; however, it can be noted, by comparison with the checklist in the UNEP guidelines reproduced in Chapter 2.4 above, that the checklist of items to be included in the EIA in Schedule 4 does not include either the consideration of alternatives or the identification of gaps in knowledge or uncertainties in the information on which the EIA is based.

In so far as some activities that do not constitute development requiring permission under the *Physical Planning Act* may have adverse environmental impacts (e.g. the storage, transport and disposal of soil; timber cultivation and logging; and animal husbandry, all listed in the *Conservation and Environmental Management Act* Schedule 1), the introduction of a requirement for a CEA before such activities can be undertaken is justifiable. It is also noteworthy that an effort has been made to harmonize the requirements for an EIA to be undertaken under the *Conservation and Environmental Management Act* with the pre-existing provisions for EIAs to be required under the *Physical Planning Act*. However, as EIAs are not expressly required under the *Conservation and Environmental Management Act* before the grant of CEAs in the first instance, but are only required if there is an unforeseen change in circumstances after the grant of a CEA, or if it turns out that the CEA has been obtained wrongfully, the intended role of EIAs in the scheme of the 2014 Act is unclear.

Hence, there is a clear need for strengthening, clarification and harmonization of the existing EIA legislation in Montserrat.

4.9 St. Kitts and Nevis

In St. Kitts and Nevis, as in the other OECS Countries, the EIA process is primarily an adjunct of the development control process under the land use planning legislation;¹² however, St. Kitts and Nevis is a federation. It is unique amongst federal states in that the federal government is also the local government of St. Kitts, whilst specific constitutional provisions are made for the internal self-government of Nevis. Hence, the federal Parliament may not ordinarily make laws having effect in Nevis with respect to any

¹² As mentioned in n.5 *supra*, provision is made for EIAs to be carried out in connection with coastal conservation in the 1987 NCEPA; however, a similar provision was not included in the draft *National Conservation and Environmental Management Bill 2017*, which is intended to repeal and replace the NCEPA.

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matters specified in Schedule 5 to the Constitution, over which Article 103 confers the exclusive power to make laws for Nevis on the Nevis Island Legislature. These include land, buildings and the environment. Hence, the EIA legislation for St. Kitts and Nevis must be reviewed separately.

4.9.1 St. Kitts

In St. Kitts, EIAs are provided for by the *Development Control and Physical Planning Act*, Cap.20:07, which is administered by the Development and Planning Board (DPB) established by s.5 of the Act. Section 26 makes provisions for EIAs. Unless the DPB determines otherwise, an EIA is mandatory for the 18 types of projects listed in the Third Schedule. In addition, the DPB may require an EIA to be carried out for other projects that are likely to have significant adverse environmental impacts. The criteria for screening applications to determine whether an EIA should be required are set out in s.26(3).

Within 30 days of receiving the application for development permission, the DPB must give notice to the project proponent that an EIA is required, setting out the TOR for the EIA and specifying the time within which it must be submitted. The EIS submitted must contain such information as is prescribed. Section 26(7) provides that the Minister may make Regulations with respect to the qualifications, skills, knowledge and experience of persons preparing EISs and for their registration. Additionally, s.86(2)(d) provides for the making of Regulations with respect to the procedures for EIAs and the form of EISs, but no such EIA Regulations have been made.

Section 72 provides that the applicant, or the owner or occupier of the land, or any person whose interests in land may be affected by a decision of the PDB, may appeal to the Appeals Tribunal established by s.71, against the refusal of approval or any conditions subject to which approval was granted. Section 73 provides that Tribunal may conduct a “Public Examination” in connection with any such appeal if, “the public interest requires that all persons (including the appellant) who may have a view to express in relation to the matter ... should have an opportunity of having their views taken into account, of submitting evidence and of examining witnesses called by others.” However, no provision is made for information concerning EIAs to be recorded in the register to be maintained by the PDB pursuant to s.82 of the Act.

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Comments

The inclusion of screening criteria in the Act and the provisions for public hearings of appeals are the strong points of the EIA provisions in St. Kitts. However, these strengths are undermined by the failure to make EIA Regulations to implement the Act, including (but not limited to) the matters that the Act specifies are to be prescribed by regulations, namely the minimum contents of EISs and the registration of EIA consultants. The most significant area of weakness is the lack of provisions for public participation in the EIA process, which is not compensated for by the provisions for public hearings of appeals as the public's right to information is very limited, persons whose property interests are not affected do not have a right of appeal and, in any event, there is no right of appeal against the approval of projects which are subject to EIAs.

4.9.2 Nevis

In Nevis, EIAs are provided for by the *Physical Planning and Development Control Ordinance*, No.1 of 2005. Section 20 provides that the Director of Physical Planning (DPP) may require an EIA in respect of any application for the development of land, including an application for approval in principle, if the development could have significant environmental impacts. Unless the DPP decides otherwise, an EIA is mandatory for the 18 kinds of development projects listed in the Second Schedule to the Ordinance. The DPP has an express duty to take the EIA Report into account in determining the application.

Sub-section 20(4) provides for the Minister to make EIA Regulations with respect to screening; scoping; the contents of the EIA report; the level of expertise that EIA consultants are required to have; the procedures for public participation in the EIA process and public scrutiny of the EIA Report; and decision-making, including the criteria and procedure for review of the EIA Report. No such regulations have yet been made; however, the DPP has issued guidelines for the conduct of EIAs.

Provision is made by s.20(5) for the DPP to notify all governmental organisations when an EIA is required for a project. Every such agency must share any information in its possession which is relevant to the EIA with the project proponent and provide copies thereof on payment of the cost of copying. This does not include confidential or copyright

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protected information. Under s.20(6) the DPP must also notify all other regulatory agencies that an EIA is required and under s.20(7) such agencies are prohibited from issuing any documentary authorization in connection with matters affecting the development until after the EIA process has been carried out and permission has been granted for the development under the Act.

A right of appeal against the decision of the DPP to an Appeals Tribunal established pursuant to s.7 is conferred on the applicant by s.29; hence, third parties would have to resort to judicial review proceedings to challenge decisions made in or based on the EIA process. The matters to be recorded in the register to which the public has access under s.47 do not specifically include particulars about EIAs; however, by a recent decision of the Eastern Caribbean Supreme Court (ECSC),¹³ the right of public access to information about applications for development approval in Nevis has been interpreted to include the right of access to information submitted in the application, which would include the EIA.

Comments

The legal regime for EIAs in Nevis suffers from the same deficiencies that are common to other OECS countries, the failure to make regulations governing the EIA process and the appellate provisions of the Ordinance are designed to deal with the decision made on the application for development permission, and not the EIA process *per se*.

4.10 St. Lucia

In St. Lucia, EIAs are governed by the *Physical Planning and Development Act*, Cap.5:12, which is administered by the Development Control Authority (DCA) established by former legislation, which is continued in existence by s.61 of the Act. Section 22 provides that the DCA may require an EIA to be carried out with respect to any application for permission for a development project, including an application for approval in principle, if the proposed development could significantly affect the environment. Unless the DCA decides otherwise, EIAs are mandatory for the 18 types of projects listed in Schedule 4.

¹³ *Anne Hendricks Bass v Director of Physical Planning*, Suit No.NEVHC2016/0059; Judgment of Williams J. 25th Jan 2017; upheld in *Director of Physical Planning v Anne Hendricks Bass*, SKBHCVP2017/002, Judgment of the Court of Appeal, 15th Jun 2017.

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Section 22(3) provides that the DCA may not grant permission for a development project which is subject to EIA requirements, unless the EIS has first been taken into account.

Provision is made by s.22(4) for the Minister in consultation with the DCA to make EIA Regulations governing screening, scoping, the minimum contents of EISs, the expertise of persons carrying out EIAs, the procedures for public participation in the EIA process and public scrutiny of the EIS, and criteria and procedures for the review of the EIS. No such EIA Regulations have yet been made.

Under s.22(5) public agencies are bound to share with the project proponent any information in their possession that is relevant to the EIA, except confidential information, and provide copies such information at cost. Additionally, all governmental agencies are prohibited by s.22(6) from granting any documentary authorization related to the proposed project until after the project proponent has complied with EIA requirements and the DCA has granted its permission for the development.

A right to appeal against decisions of the DCA with respect to the refusal or grant of permission subject to conditions is conferred on the applicant by s.26. Such appeals are heard and determined by the Appeals Tribunal established by s.8. An appeal lies to the High Court against a decision of the Appeals Tribunal on a point of law, but not on any matter of fact or on the merits of the decision made by the DCA or the Tribunal. Registers recording particulars of every application made to the DCA, which are open to the public, are provided for by s.47; however, the particulars required to be recorded do not include information with respect to EIAs.

Comments

As is the case in every other OECS countries, the legal regime for EIAs in St. Lucia is undermined by the failure to make the EIA Regulations provided for by the Act. Additionally, the provisions for appeals with respect to decisions of the DCA are very inadequate, as a right of appeal is conferred only on project proponents, and the public's right to information concerning proposed developments appears to be limited to the particulars recorded in the public register.

4.11 St. Vincent and the Grenadines

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In St. Vincent and the Grenadines, the EIA process is governed by the *Town and Country Planning Act*, Cap.334. This legislation is unique in the OECS sub-region as it pre-dates the OECS Model Physical Planning Act prepared in the mid-1990s.

Responsibility for the administration of the legislation is conferred on the Physical Planning and Development Board (PPDB) established by s.3 of the Act. Section 29 makes provision for EIAs. It empowers the PPDB to require submission of an EIA where anyone proposes to undertake a prescribed category of enterprise, construction or development in a prescribed area, or where it is of the opinion that an existing enterprise, construction or development in a prescribed area is likely to cause pollution or have an adverse effect on the environment. Regulations may be made under s.36 in relation to the categories of enterprises, construction or development for which EIAs are required and the preparation, content and consideration of EIAs or EISs. No such regulations have been made to date.

Sub-section 29(3) provides that it is a summary offence to refuse or fail to submit an EIA that is required by the PPDB and s.29(4) prohibits the grant of any licence, permit, approval or consent under any law in respect of the enterprise, construction or development, unless the EIA has been carried out and the PPDB has given its approval for it to proceed. Additionally, s.17 provides that, in dealing with an application for the grant of permission for development, the PPDB must give primary consideration to an approved EIS as well as any approved national, regional or local area plans, as far as it is practicable to do so.

As regards appeals, s.27 provides that any person who is aggrieved by a decision of the PPDB made under s.17 or any of the other provisions of the Act (e.g. s.29) may appeal to the Minister against the decision. Such appeals are heard and determined by an Appeals Tribunal appointed by the Minister.

Comments

The EIA provisions of the legislation in St. Vincent and the Grenadines are very brief and, in the absence of EIA Regulations specifying the categories of projects for which EIAs are required and detailing the requirements for the preparation, content and review of EIA reports, the legal regime for EIAs is weak and inoperative. However, the exceptional features of the legislation are the provisions for requiring EIAs of existing developments

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and the provisions for appeal which could facilitate third party appeals against decisions with respect to EIAs *per se*.

4.12 Suriname

Currently there is no EIA legislation in force in Suriname. Provisions for requiring EIAs for projects which are subject to decisions by competent national authorities have been made in the draft Environmental Law (Milieu Wet) of 2002. The enactment of this framework law is on the current legislative agenda of the National Assembly and there is an on-going project to draft EIA regulations to implement the Law when it is enacted.

Pending enactment of the Environmental Law, a voluntary system of Environmental and Social Impact Assessment (ESIA) administered by the National Institute for Environment and Development of Suriname (NIMOS), based on published ESIA Guidelines, has been in effect in Suriname. It is proposed that NIMOS will be converted into the Authority responsible for administering the Environmental Law when it comes into force.

4.13 Trinidad and Tobago

The EIA process in Trinidad and Tobago is administered by the Environmental Management Authority (EMA). Section 6 of the *Environmental Management Act, 2000*, established the EMA as a body corporate governed by a Board of Directors.

Section 35(1) provides that for the purpose of determining the environmental impact of a new or significantly modified construction, process, works or other activity, the Minister may designate a list of activities requiring a Certificate of Environmental Clearance (CEC) from the EMA. Further, section 35(4) provides that applications which require the preparation of an EIA must be submitted for public comment before the CEC can be issued by the EMA. The EMA is required to publish a notice of the proposed action in the *Official Gazette* and at least one daily newspaper (s.28(1)(a)). Written public comments are received at least 30 days from the date of notice in the Gazette and the EMA may hold a public hearing if there is sufficient public interest (s.28(3)).

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Sections 36 and 37 provide for mitigation measures and monitoring the performance of the activity after the CEC is issued by the EMA. Section 38(3) provides that if an EIA is required for an activity at any location, no other entity shall grant any permit, licence, or other documentary authorisation until a CEC has been issued by the EMA. The grant of the CEC signifies approval of the designated activity solely in terms of the environmental impact.

In 2001, the EMA made three sets of subordinate legislation on EIAs: the *Certificate of Environmental Clearance (Designated Activities) Order*; the *Certificate of Environmental Clearance Rules*, made under Section 35(1); and the *Certificate of Environmental Clearance (Fees and Charges) Regulations*, made under s.96.

The *Certificate of Environmental Clearance (Designated Activities) Order, 2001* contains a list of 44 designated activities for which a CEC is required. This list lacks coherence.

Rule 4(1)(d) of the *Certificate of Environmental Clearance Rules, 2001*, provides that an applicant for a CEC must be notified within 10 working days if an EIA is required in compliance with a Terms of Reference (TOR). Rule 5(1) provides that if an EIA is required, the EMA has 21 days to consult the applicant on the proposed TOR and prepare the TOR. Rule 5(2) further provides that the applicant shall conduct consultations with relevant agencies, NGOs and other members of the public on the draft TOR before requesting amendments to the draft TOR. Under Rule 7, the issuance of a CEC shall include the mitigation measures that the applicant must undertake and a reminder to the applicant of his right of appeal to the Environmental Commission, the special court established by the Act. The standards for the preparation of EIAs required under section 35(4) of the EMA Act are set out in Rule 10, but the Rules are silent with respect to the EIA review process.

The *Certificate of Environmental Clearance (Fees and Charges) Regulations, 2001* lists the fees and charges payable to the EMA for the processing of EIAs. The Regulations provide for full cost recovery, on proof of expenditure, at the top end of the scale of charges.

Comments:

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The EIA process in Trinidad and Tobago seems to be fairly comprehensive and well-developed. However, there are a number of shortcomings in the legislation. For example, it is at the discretion of the Minister which activities should be on the “designated activities” list and in the discretion of the EMA for which projects involving designated activities an EIA is required; neither the screening criteria nor the mechanism for the review of the EIA Report are set out in the CEC Rules. Hence, whilst commendable provisions are made for public participation in the EIA process, it is not fully transparent.

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5.0 ISSUES EMERGING IN EIA LITIGATION

The majority of the environmental law cases which have been determined by courts in the Anglophone Caribbean countries to date are concerned with EIA legislation and practice. Most of these cases have emerged from two jurisdictions, Belize and Trinidad & Tobago; however, there are a number of important decisions on aspects of EIA law and practice that have been decided by courts in other Caribbean countries, including some jurisdictions that are not included in this study, such as The Bahamas and the British Virgin Islands. They are nevertheless of interest, especially as these higher courts in these jurisdictions (e.g. The Eastern Caribbean Court of Appeal and the Privy Council) are shared by some of the countries covered by this review.

The jurisprudence cannot be discussed in detail in this report; however, the key issues that have emerged in the jurisprudence to date can be summarized as follows:

- The threshold question of standing to sue
- The requirement for EIAs
- The standard to be attained by EIA Reports/EISs
- The adequacy of public access to information & consultation/participation
- The issue of bias in/predetermination of decision-making
- The weight to be attached to EIAs in decision-making

As explained elsewhere, challenging citizens' standing to sue was a successful strategy employed by governments in the region in the early years of environmental litigation in the Caribbean.¹⁴ In later cases, the courts had cause to compliment governmental authorities for not raising the issue of standing in cases brought by NGOs challenging administrative decisions made after EIAs had been carried out.¹⁵ However, there has been a resurgence of this type of preliminary objection in more recent cases,¹⁶ but such a preliminary objection, both with respect to the applicant's standing to sue as a "person

¹⁴ Anderson, Winston, "*Locus Standi* in Commonwealth Environmental Law: Caribbean Perspectives" (1994) Vol.4.2 *Caribbean Law Review* 379

¹⁵ For example, *Fishermen & Friends of the Sea v Environmental Management Authority & BPTT*, (2005) 66 WIR 357, P.C.

¹⁶ For example, *Save Guana Cay Reef Association Ltd & Others v The Queen & Others* (2009) UKPC 44, 17 November 2009 (The Bahamas), where an individual with property rights in the affected area had to be added as an applicant for judicial review before the case could be litigated.

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aggrieved” under the *Town and Country Planning Act* and as a person whose interests were adversely affected under the *Administrative Justice Act*, with respect to the grant of planning permission for a 15 storey hotel within the UNECSO world heritage site in Barbados without first requiring an EIA, was firmly dismissed by the Barbados High Court in the most recent case of *David Commissiong v Frundel Stuart, Minister responsible for Town and Country Planning & Vision Developments Inc.*¹⁷

As regards the requirement for EIAs *per se*, the Jamaican case of *Delapenha Funeral Home Limited v Minister of Local Government and Environment*,¹⁸ which concerned the risk of groundwater contamination from development of a cemetery, is of interest. In this case the developer’s environmental permit was suspended and an EIA was required under the NRCA as a result of community concerns, despite the fact that the Water Resources Authority had carried out two detailed investigations and advised that it had no objection to the proposal. On the question as to whether, in this context, the decision to require an EIA in response to public pressure was irrational, the trial judge held that EIA is a “term of art” and the fact that NEPA was in possession of environmental information and advice from other agencies was not a substitute for carrying out an EIA.

With reference to the standard to be attained by EIA Reports/EISs, the decision of the Privy Council in *Belize Alliance of Conservation Non-Governmental Organizations v Department of Environment and Belize Electricity Co.*,¹⁹ the first EIA case from the Caribbean to reach the highest court in the hierarchy, has been followed in several other cases.²⁰ The test as stated by the court in that case is that, “Provided an environmental impact statement is comprehensive in its treatment of the subject matter, objective in its approach and meets the requirement that it alerts the decision maker and members of the public ... to the effect of the activity on the environment and the consequences to the community inherent in the carrying out or not carrying out of the activity, it meets the standards imposed by the regulations.”

¹⁷ High Court Action CV426 of 2017 (Barbados), Judgment of Richards J., 20th December 2017

¹⁸ Claim No.2007 HCV 01554 (Jamaica), Judgment of Mangatal J. 13th June 2008

¹⁹ (2004) 64 WIR 68, PC

²⁰ E.g. *Belize Tourism Industry Association v National Environmental Appraisal Committee, Department of the Environment & Belize Island Holdings Limited*, Claim No.223 of 2014 (Belize), Judgment of Abel J. 13th January 2016; *Anne Hendricks Bass v Director of Physical Planning, Development Advisory Committee & Caribbean Development Consultant Ltd*, Claim No. NEVHCV 2016/0014 (EC SC, St. Kitts & Nevis), Judgment of Ramdhani J. 15 May 2017

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Much of the case law is concerned with the adequacy of public access to information and public consultation/participation in the EIA process. This issue has been comprehensively reviewed elsewhere;²¹ however, certain principles that have emerged from the jurisprudence should be mentioned. The first of these is that, “Public consultation and involvement in decisions on environmental issues are matters of high importance in a democracy”;²² however, “there is no requirement for an on-going public debate”.²³ Another fundamental principle is that, regardless of whether public consultation is required by law or is voluntarily embarked upon as a matter of administrative practice, public consultation must meet the common law standard; hence, all the relevant information – including all the EIA documents - must be released to the persons to be consulted, including both other governmental agencies and the public.²⁴ This principle has been bolstered by the decisions of the Eastern Caribbean Supreme Court on the right of public access to plans and other information submitted in support of applications recorded in the planning register.²⁵

Another issue which has arisen in several cases, although it is not expressly pursued in some of them, is whether applications for developments subject to EIAs have been decided objectively. In virtually every Caribbean country the government is actively seeking and offering incentives to encourage foreign investment. The question which follows logically is whether administrative decisions to approve such projects have been biased or pre-determined. The courts have held that the fact that the government has entered into an agreement or memorandum of understanding with an investor which

²¹ Anderson, Justice Winston, “Ensuring Environmental Access Rights in the Caribbean: Analysis of Selected Case Law”, CCJ Academy of Law & ECLAC; Available: <http://repositorio.cepal.org/handle/11362/42519>

²² **Fishermen & Friends of the Sea v Environmental Management Authority & BPTT** (2005) 66 WIR 357, P.C.; however, the Privy Council’s statement in that case is difficult to reconcile with their subsequent decision in the Bahamian case of **Save Guana Cay Reef Association Ltd & Others v The Queen & Others** (2009) UKPC 44, 17 November 2009.

²³ **Fishermen & Friends of the Sea v Environmental Management Authority & Atlantic LNG**, HCA Cv.2148 of 2003 (Trinidad & Tobago), Judgment of Stollmeyer J.

²⁴ **Northern Jamaica Conservation Association & Others v Natural Resources Conservation Authority & National Environment & Planning Agency**, Claim No.HCV 3022 of 2005 (Jamaica) Judgment of Sykes J. 16 May 2006; **Belize Tourism Industry Association v National Environmental Appraisal Committee, Department of the Environment & Belize Island Holdings Limited**, op. cit.; **The Proprietors Strata Plan #108 & Another v The Governor of the Turks & Caicos Islands & Others**, Civil Appeal, Judgment of the Court of Appeal, March 2017.

²⁵ **Anne Hendricks Bass v Director of Physical Planning**, Suit No.NEVHC2016/0059; Judgment of Williams J. 25th Jan 2017; upheld in **Director of Physical Planning v Anne Hendricks Bass**, SKBHCVP2017/002, Judgment of the Court of Appeal, 15th Jun 2017.

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provides that the government will facilitate obtaining all necessary regulatory approvals for such projects, prior to the outcome of the EIA process, does not prove bias if all the usual regulatory approvals are in fact required and such approval is granted subject to conditions which reflect the findings and recommendations coming out of the EIA process.²⁶

Finally, there is the issue of what weight the EIA should be given in the decision-making process with respect to development projects. The legal principle with respect to this was settled in the earliest Caribbean case to reach the highest court, namely the BACONGO case from Belize.²⁷ The issue in this case was whether it was competent for the government to approve the construction of a hydro-electric dam which would result in appreciable negative environmental impacts in the interest of reducing national energy reliance on imports from Mexico. As the Privy Council stated, “That is a decision which the government is entitled to make. Belize is a sovereign state. It has a constitution which safeguards democracy and human rights. But the question of whether or not the dam should be built raises no issue of human rights. It is a matter of national policy which a democratically elected government can decide.” It remains to be seen whether this dictum will hold true for Caribbean countries in which the constitution safeguards environmental rights.

²⁶ *Save Guana Cay Reef Association Ltd & Others v The Queen & Others* (P.C. Bahamas 2009) Op cit; *Virgin Islands Environmental Council v Attorney General & Quorum Island BVI Ltd*, Claim No.BVIHCV2007/0815, (BVI) Judgment of Hariprashad-Charles J. 21 Sept 2009; over-ruled on a different point in *Quorum Island BVI Ltd v Virgin Islands Environmental Council & Minister of Planning*, HCVAP 2009/021, Judgment of the EC Court of Appeal, 12 August 2011

²⁷ *Belize Alliance of Conservation Non-Governmental Organizations v Department of Environment and Belize Electricity Co.* Op cit n.19

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6.0 CONCLUSIONS & RECOMMENDATIONS

With the exception of Suriname, all the Caribbean countries covered by this study have legislation in force which provides for EIAs to be carried out prior to the authorisation of development projects which could have significant adverse environmental impacts. This is undoubtedly a valuable contributor to furthering environmental sustainability of development in the region; however, the quality and effectiveness of the existing legislation within the region varies markedly and, as illustrated in Figure 2, the Comparative Evaluation, there is room for improvement in the legal framework for EIAs in all the countries.

There is a great deal of similarity with respect to the provisions governing EIAs between the countries in which EIAs are required under the laws relating to land use planning and development control, with the exception of Barbados and St. Vincent & the Grenadines. This is explained by the fact that the enactment of the relevant legislation in all the countries, except Barbados and St. Vincent & the Grenadines, followed the preparation of the OECS Model Physical Planning Act in the mid-1990s and all the laws in force are based upon or influenced by that Model Act. However, despite the “family resemblance” between the legislation in most of the OECS countries, there are significant variations between them.

They all contain Schedules listing the types of projects for which EIAs are ordinarily mandatory, but provide that the relevant authority may dispense with the requirement for EIAs in such cases, and also that it may require EIAs to be carried out in other unlisted cases in which it appears that the project may have significant environmental impacts. Only in the cases of Dominica and St. Kitts are the screening criteria for identifying the projects for which EIA should be required specified in the Act and only in the case of Montserrat are the minimum contents of the EIA report/EIS specified in a Schedule to the Act. In every other jurisdiction the particulars regarding these issues, like all the other elements of the EIA process, are relegated to regulations to be made under the Act. Hence, what these countries all have in common is that the law regarding EIAs depends almost entirely upon the making of EIA Regulations to implement the provisions of the parent Acts – and this has not been done in any jurisdiction.

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The *Town and Country Planning Act* in St. Vincent & the Grenadines, which was enacted in 1992, is *sui generis*, and the efficacy of its EIA provisions depends to an even greater extent than in the other OECS countries on the making of EIA Regulations, but such regulations have not been made in the quarter-century since the Act came into force. Although it is philosophically akin to English planning legislation, parts of the Act – including the EIA provisions – are quite original and, in the case of s.29(3) which makes the refusal or failure to submit an EIA a summary offence punishable by a severe fine, perplexing. It should be obvious that such a measure is quite unnecessary as the relevant authority has the power to refuse the application for permission to carry out the project if the EIA is not submitted. However, in 2016 the relevant legislation in Grenada was amended following suit to insert just such a superfluous offence amongst the EIA provisions.

In the case of Barbados, the *Town and Country Planning Act*, enacted in 1965 and amended several times since then, was amended in 1998 to make passing reference to EIAs amongst the provisions empowering the CTP to require further information in support of applications for planning permission. There is absolutely no “flesh on the bones” of this provision and it is not supplemented by any subsidiary legislation dealing with the EIA process. Consequently, the EIA process in Barbados is totally lacking in transparency and EIA practice is entirely dependent on policy documents. The unavoidable conclusion is that the legislation in Barbados governing the EIA process represents the worst-case scenario in the Caribbean.

A feature that is common to all the countries where the EIA process is an adjunct of the development control process under the land use planning legislation is that the provision of the Acts concerning public access to information and rights with respect to administrative appeals against decisions of the relevant authorities all focus on the application for regulatory approval *per se*, and do not expressly mention information about the EIA process or decisions made in the course of that process. However, the recent decision of the Eastern Caribbean Supreme Court in the first *Anne Hendricks Bass* case has lifted the veil under which key information related to proposed projects in the records of development control authorities – including information about EIAs – could be concealed.

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Additionally, in some countries rights of appeal are conferred on any “person aggrieved” by the decision of the relevant authority, a term which is being given an increasingly wider interpretation by the courts in the UK, but this is the exception rather than the rule. Hence, the principle means of challenging the adequacy of the EIA process and decisions made as an outcome of the process remains by way of judicial review proceedings in the law courts.

Three of the four non-OECS countries in this study – Belize, Guyana and Trinidad & Tobago – have all enacted comprehensive general environmental legislation providing for the EIA process. Each of these Acts is unique; hence, it cannot be said that there is a Caribbean model of EIA practice which they represent.

Both Belize and Trinidad & Tobago have gone a step further and made EIA Regulations to supplement the parent Acts. Comparatively speaking, these two countries have more robust EIA legal and administrative systems in place; however, the laws could still benefit from some revision and updating to address some of the current gaps and weaknesses. For example, in the case of Belize, no provision has been made for third parties to request administrative review of an EIA. Likewise, in Trinidad and Tobago, citizens cannot file an appeal with the Environmental Commission²⁸ Guyana’s environmental legislation governing EIAs is also quite comprehensive but it is undermined by a weak institutional structure and a lack of EIA Regulations.

Jamaica’s NRCA Act is one of the oldest environmental laws in the region but unlike Belize, Guyana and Trinidad and Tobago, the EIA provisions are woefully inadequate. There are no EIA regulations; instead, NEPA relies heavily on guidelines which, while detailed, are a poor substitute for EIA Regulations.

Based on the foregoing conclusions, the following recommendations with respect to improving EIA legislation in the Caribbean can be made:

1. The highest priority is for EIA Regulations to be made to implement the enabling legislation in all the countries in the region, including Guyana and Jamaica, as well as Barbados and the OECS countries.

²⁸ Consequently, all the decided and pending EIA cases from Trinidad & Tobago have been filed and determined under the **Judicial Review Act, 2000**, which provides for litigants to sue in the public interest.

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2. In the case of the OECS countries where (with the exception of St. Vincent and the Grenadines) the legislation respecting EIAs is similar and there is a treaty commitment to harmonization, this process could be expedited by the preparation of Model OECS EIA Regulations and their customisation for the individual countries.
3. In Barbados, where the 50 years old land use planning legislation is in urgent need of comprehensive revision, adequate enabling provisions for EIAs should be incorporated into the revised parent Act and EIA regulations made to implement those provisions.
4. The draft Suriname Environmental Law, enactment of which has been pending since 2002, should be enacted as soon as practicable and the EIA provisions of that Law implemented through EIA Regulations.
5. Even in the countries with the best packages of EIA laws, namely Belize and Trinidad & Tobago, the relevant Acts and Regulations are capable of improvement and should be reviewed and revised as necessary.
6. All the countries in the region should seek to provide more access to information on EIA legislation, projects requiring EIAs, EIA reports, etc. to citizens and prospective developers. Updated laws, regulations, guidelines, etc. should be uploaded on official websites and updated on a regular basis.

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FIGURE 2: COMPARATIVE EVALUATION

CRITERIA	ANU	BDS	BZE	DOM	GDA	GUY	JCA	MON	SKT	NEV	SLU	SVG	SUR	TN T
1 Are there robust statutory provisions for EIAs?	NO REGS	NO	YES	NO REGS	NO REGS	NO REGS	NO	NO REGS	NO REGS	NO REGS	NO REGS	NO	NO	YES
2 Is the screening process transparent?	YES	NO	YES	YES	NO	YES	NO	NO	YES	NO	NO	NO	NA	NO
3 Is the scoping process clear and balanced?	NO	NO	NO	NO	NO	YES	NO	NO	NO	NO	NO	NO	NA	YES
4 Are there minimum standards for carrying out EIAs and EIA report/EIS preparation?	NO	NO	YES	NO	NO	YES	NO	YES	NO	NO	NO	NO	NA	YES
5 Is the EIA review process transparent?	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NA	NO
6 Are the provisions for public participation in the EIA process adequate?	NO	NO	NO	NO	NO	YES	NO	NO	NO	NO	NO	NO	NA	YES
7 Does the decision-maker have to take the EIA into account in decision-making?	IMPLIED	IMPLIED	EXPRESSED	IMPLIED	EXPRESSED	EXPRESSED	EXPRESSED	IMPLIED	IMPLIED	EXPRESSED	EXPRESSED	EXPRESSED	NA	YES
8 Is provision made with respect to implementation and monitoring measures after the grant of regulatory approval?	NO	NO	YES	NO	NO	YES	NO	NO	NO	NO	NO	NO	NA	YES
9 Is there adequate provision for appeals against decisions on their technical merits or legality?	NO	NO	YES	NO	NO	YES	NO	NO	NO	NO	NO	NO	NA	YES
10 Does the public have access to information concerning proposed projects which are subject to EIAs?	LIMITED	LIMITED	LIMITED	LIMITED	LIMITED	YES	LIMITED	LIMITED	LIMITED	YES BY COURT ORDER	LIMITED	LIMITED	NA	YES

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LIST OF LEGISLATION

Antigua & Barbuda

- Physical Planning Act, 2003 (No. 6 of 2003)
- Environmental Protection and Management Act, 2015 (No. 11 of 2015)

Barbados

- Town and Country Planning Act, Cap.240
- Town and Country Planning (Fees) Regulations 1970
- Town and Country Planning Regulations 1972
- Coastal Zone Management Act, Cap.394
- Administrative Justice Act, Cap.109B

Belize

- Environmental Protection Act, 2000, Cap. 328
- Environmental Protection (Amendment) Act, 2009
- Environmental Impact Assessment Regulations, 2003
- Environmental Impact Assessment (Amendment) Regulations, 2007

Dominica

- Physical Planning Act, No.5 of 2002
- Development and Planning Corporation Act, 1972
- Geothermal Resources Development Act, Act No.12 of 2016

Grenada

- Physical Planning and Development Control Act, No.23 of 2016
- Physical Planning and Development Control Act, Cap.241A (Repealed)

Guyana

- Environmental Protection Act, No. 11 of 1996
- Environmental Protection (Authorisations) Regulations, 2000
- Environmental Protection Amendment Act, 2005

Jamaica

- Natural Resources Conservation Authority Act, 1991

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- Natural Resources (Prescribed Areas) (Prohibition of Categories of Enterprise, Construction and Development) Order, 1996
- Executive Agencies Act, 2000
- Natural Resources (Prescribed Areas) (Prohibition of Categories of Enterprises, Construction and Development) Amendment Order, Order, 2003
- Natural Resources (Prescribed Areas) (Prohibition of Categories of Enterprise, Construction and Development) (Amendment) Order, 2015

Montserrat

- Physical Planning Act, Cap.8:03
- Conservation and Environmental Management Act, No.17 of 2014

St. Kitts & Nevis

- National Conservation and Environmental Protection Act 1987, No.5 of 1987
- Development Control and Physical Planning Act, Cap.20:07
- (Nevis) Physical Planning and Development Control Ordinance, No.1 of 2005

St. Lucia

- Physical Planning and Development Act, Cap.5:12,

St. Vincent & the Grenadines

- Town and Country Planning Act, Cap.334

Suriname

- Draft Environmental Law (Milieu Wet) 2002

Trinidad & Tobago

- Environmental Management Act, 2000
- Certificate of Environmental Clearance Rules, 2001
- Certificate of Environmental Clearance (Designated Activities) Order, 2001
- Certificate of Environmental Clearance (Fees and Charges) Regulations, 2001
- Judicial Review Act, 2000

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