

See discussions, stats, and author profiles for this publication at: <https://www.researchgate.net/publication/334479024>

Myanmar's Nascent Environmental Governance System: Challenges and Opportunities

Article · August 2018

CITATIONS

0

READS

338

2 authors, including:



Matthew Baird

University of Southern Queensland

6 PUBLICATIONS 64 CITATIONS

[SEE PROFILE](#)

Some of the authors of this publication are also working on these related projects:



EIA and Development Approvals in ASEAN: Conditions of Approval [View project](#)

NATURAL RESOURCES & ENVIRONMENT

ABA SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES

VOLUME 33, NUMBER 2, FALL 2018



GLOBAL TRENDS

- PARKS AND CONSERVATION AREAS, ICE-FREE CITIES
- MYANMAR'S ENVIRONMENTAL GOVERNANCE, PARIS AGREEMENT AND INDIA
- LEAD PAINT, CONTAMINATED LANDS REHABILITATION
- KIGALI AMENDMENT AND CHINA; CANADIAN OIL AND GAS POLICY, MIGRATORY BIRDS



VANTAGE POINT

Concern for the earth's environment has grown and continues to expand as a global issue of considerable proportions. The following observation by Professors Yang and Percival is as true today as it was a decade ago:

Worldwide growth of public concern for the natural environment has been one of the most important developments in recent decades. Globalization has helped connect societies and their environmental fates more closely than ever before. At the same time, environmental problems increasingly transcend national borders and pose serious challenges to the health of the planet. The development of more effective environmental laws and legal systems throughout the world has thus become critical to directing economic development and growth onto a path of environmental sustainability.

Tseming Yang & Robert V. Percival, *The Emergence of Global Environmental Law*, 36 Ecology L.Q. 615, 616 (2009).

This issue of *Natural Resources & Environment* moves beyond our borders to explore legal frameworks and recent policy developments from a global perspective. The articles examine how various nations are addressing the challenges of resource scarcity, pollution, climate change, and energy development, and how trends in these areas may parallel, affect, or differ from policies in the United States.

The first article, by Emily Bergeron, recognizes that while global conservation efforts provide benefits for both humans and wildlife, such efforts also impose many—often overlooked—burdens, especially on indigenous people. Next, Daniel Spitzer describes global strategies for creating sustainable urban transport, offering examples from Europe and contrasting such policies with efforts in the United States. Laura Maher and Steve Wolfson look at global efforts to eliminate lead paint. Although the United States, like many nations, has banned lead paint for decades, more than 100 countries have yet to do so. The authors describe recent collaborative efforts and progress toward limiting lead paint worldwide. Three articles in the issue focus on global climate change: Emily Green and Phelps Turner describe Canada's efforts to meet its Paris Agreement obligation; Anupam Jha reports on India's efforts to do the same; and William Wick and Barbara Maco, with four coauthors, examine approaches for rehabilitating contaminated lands for resilience to climate change.

Shifting focus to Southeast Asia, William Schulte and Matthew Baird discuss nascent efforts in Myanmar to address environmental challenges. The issue also includes two articles looking at regulation of HFCs and the Kigali Amendment to the Montreal Protocol. Xiaopu Sun and Tad Ferris review China's efforts to manage the energy efficiency of cooling equipment and thereby help shape the future evolution of the Montreal Protocol. The second Kigali piece, by Shannon Martin Dilley, parses the various strands of the appellate decision in *Mexichem Fluor Inc. v. EPA* and explores the international implications of a U.S. failure to ratify the Kigali Amendment. Last, but by no means least, the issue's final article—a law professor, law student collaboration by Robert Percival and Garrett Kral—returns readers to a natural resource topic with a look at global trends in the protection of migratory birds. 🌳

Madeline June Kass
Issue Editor

NATURAL RESOURCES & ENVIRONMENT

ABA SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES

VOLUME 33, NUMBER 2, FALL 2018

FEATURES

- 3 **The Price of Global Conservation: Benefits and Burdens of Parks and Conservation Areas**
Emily Bergeron
- 8 **ICE-Free Cities: Global Strategies for Creating Sustainable Urban Transport**
Daniel A. Spitzer
- 12 **Growing Momentum Toward the Global Elimination of Lead Paint: International Collaboration and National Engagement**
Lauren Maher and Steve Wolfson
- 16 **Global Trends: Climate Change and Resilience within Contaminated Lands Rehabilitation**
William D. Wick, Barbara Maco, Lara Hansen, Paul Bardos, Eric Mielbrecht, and Tetsuo Yasutaka
- 21 **Myanmar's Nascent Environmental Governance System: Challenges and Opportunities**
William J. Schulte and Matthew H. Baird
- 26 **Paris Agreement and India: Dalliance or Serious Alliance?**
Anupam Jha
- 30 **The Kigali Amendment's and China's Critical Roles in Evolving the Montreal Protocol**
Xiaopu Sun and Tad Ferris
- 35 **Is Canada Living Up to Its Global Climate Commitments?**
Emily K. Green and Phelps Turner
- 40 **The Mexichem Decision: Uncertainty during Uncertain Times**
Shannon Martin Dilley
- 43 **Global Trends in Protection of Migratory Birds**
Robert V. Percival and Garrett S. Kral

DEPARTMENTS

VANTAGE POINT

INSIDE FRONT COVER

INSIGHTS

- Where's Macondo? Where's BAST? DOI's Offshore Rules** 50
Milo C. Mason
- Tribal Renewable Energy Service Companies, Part 3** 51
Dean B. Suagee
- Climate Change Adaptation, by Any Other Name** 53
Mary Ellen Ternes
- The WOTUS Rule Repeal** 55
Mark A. Ryan
- Latest on Clean Water Act 404(c) Veto Authority** 56
Jason D. Steiert
- Environmental Rule of Law Index: A Task Force Pilot** 58
Howard Kenison and Sarah Chamness Long

LITERARY RESOURCES 60

THE BACK PAGE 64

Issue Editor
Madeline June Kass

Assistant Issue Editors
Kristin H. Gladd, Thomas J. Grever, Frederick H. Turner, and Andrew Waite

Cover design
Amanda Fry

Department art
Mike Callaway



The views expressed in *Natural Resources & Environment* are those of the authors and do not necessarily represent the policies of the American Bar Association; the Section of Environment, Energy, and Resources; or the employers of the authors. For more information about NR&E, visit online at www.ShopABA.org. Send comments to nrecomments@americanbar.org.

NR&E EDITORIAL BOARD

Executive Editor
Gale Lea Rubrecht
 Charleston, West Virginia
gale.lea.rubrecht@gmail.com

Insights Editor
Jean Feriancek
 Holland & Hart LLP
 Denver, Colorado
jferiancek@hollandhart.com

Literary Resources Editor
JoAnne L. Dunec
 Old Republic Title Company
 San Francisco, California
jdunec@ortc.com

Interviews Editor
Milo Mason
 Annapolis, Maryland
milomason@aol.com

The Back Page Editor
Jonathan P. Scoll
 Edina, Minnesota
jonscoll@gmail.com

Perspectives Editor
Gale Lea Rubrecht

Issue Editors
David O. Bechtold
 Northwest Resource Law PLLC
 Portland, Oregon
dbechtold@nwresourceclaw.com

Douglas Crouse
 Jackson Kelly PLLC
 Charleston, West Virginia
dcrouse@jacksonkelly.com

Lisa A. Decker
 WPX Energy, Inc.
 Denver, Colorado
lisa.decker@wpxenergy.com

Jessica Duggan
 Dentons US LLP
 San Francisco, California
jessica.duggan@dentons.com

Kristin H. Gladd
 National Parks Conservation Association
 Washington, D.C.
kgladd@npca.org

Thomas J. Grever
 Shook, Hardy & Bacon LLP
 Kansas City, Missouri
tgrever@shb.com

Scott B. Grover
 Balch & Bingham LLP
 Birmingham, Alabama
sgrover@balch.com

Madeline June Kass
 Seattle University School of Law
 Seattle, Washington
kassm@seattleu.edu

Erin Flannery Keith
 U.S. Environmental Protection Agency,
 Region 1
 Norwood, MA
eflannerykeith@gmail.com

Lisa A. Kirschner
 Parsons Behle & Latimer
 Salt Lake City, Utah
lkirschner@parsonsbehle.com

Christine Y. LeBel
 Massachusetts Dep't of Env'tl. Protection
 Springfield, Massachusetts
cylesq@yahoo.com

Jim Murphy
 National Wildlife Federation
 Montpelier, Vermont
jmurphy@nwf.org

Patrick J. Paul
 Snell & Wilmer LLP
 Phoenix, Arizona
ppaul@swlaw.com

Andrea L. Rimer
 Troutman Sanders LLP
 Atlanta, Georgia
andrea.rimer@troutmansanders.com

J.B. Ruhl
 Vanderbilt University Law School
 Nashville, Tennessee
jb.ruhl@vanderbilt.edu

Mark A. Ryan
 Ryan & Kuehler PLLC
 Winthrop, Washington
mr@ryankuehler.com

Dean B. Suagee
 Hobbs, Straus, Dean & Walker LLP
 Washington, D.C.
dsuagee@hobbsstraus.com

Mary Ellen Ternes
 Earth & Water Law, LLC
 Oklahoma City, Oklahoma
maryellen.ternes@earthandwatergroup.com

Frederick H. Turner
 U.S. Department of Justice
 Washington, D.C.
fredturner@gmail.com

Contributing Foreign Correspondent
Andrew Waite
 Prospect Law Ltd
 London, England
ajw@prospectlaw.co.uk

American Bar Association
 Managing Editor
Jane Harper-Alport
jane.harperalport@americanbar.org

Art Director
Amanda Fry
amanda.fry@americanbar.org

Natural Resources & Environment (ISSN: 0882-3812) is published quarterly as a service to its members by the Section of Environment, Energy, and Resources of the American Bar Association, 321 North Clark Street, Chicago, Illinois 60654-7598. Periodicals postage paid at Chicago, Illinois, and additional mailing offices. Any member of the ABA may join the Section by paying its annual dues of \$75. Subscriptions are available to nonlawyers for \$80 a year (\$85 for foreign subscribers). Back issues published two years ago and earlier may be purchased from William S. Hein & Co., Inc., 1285 Main St., Buffalo, New York 14209. More current issues may be obtained for \$20 plus a \$5.95 handling charge from the ABA Service Center, 800/285-2221. Requests to reprint articles should be sent to ABA Business Operations at copyright@americanbar.org; all other correspondence and manuscripts should be sent to the *NR&E* Managing Editor at the address above. For more information, visit www.ShopABA.org. The opinions in *Natural Resources & Environment* are those of the authors and shall not be construed to represent the policies of the American Bar Association; the Section of Environment, Energy, and Resources; or the employers of the authors. POSTMASTER: Send all changes of address to *Natural Resources & Environment*, 321 North Clark Street, Chicago, Illinois 60654-7598. Copyright © 2018 American Bar Association.

Save the Date!

37th Water Law Conference

March 25-27, 2019

Grand Hyatt Denver | Denver

48th Spring Conference

March 27-29, 2019

Grand Hyatt Denver | Denver



Myanmar's Nascent Environmental Governance System: Challenges and Opportunities

William J. Schulte and Matthew H. Baird

In 2011, after nearly half a century of military rule and isolation, the Republic of the Union of Myanmar (Myanmar) began its democratic transition. In March of that year, President U Thein Sein was sworn in as the first head of the new civilian government. Daw Aung San Suu Kyi's National League for Democracy (NLD) was permitted to reengage in Myanmar politics. In nationwide elections in 2015, the NLD won 225 out of 330 seats available for election, and as a result was able to elect U Htin Kyaw as the president and appoint Daw Aung San Suu Kyi (who is constitutionally barred from becoming president) to the position of state counsellor. Const. of the Rep. of the Union of Myanmar (2008), § 59(f).

For the most part, the international response to these developments has been positive. In January 2012, the United States formally restored diplomatic relations with Myanmar and officially lifted the majority of economic sanctions against Myanmar. Many other Western nations lifted sanctions as well. In turn, in 2012 the Hluttaw (Myanmar Parliament) enacted the Foreign Investment Law as an attempt to attract foreign investment and help the country develop. The Foreign Investment Law, No. 21/2012 (2012) (Myan.). And for the most part, the strategy seems to be paying off. Myanmar has since grown its economy steadily at over 6 percent per year, and the Asian Development Bank projects that to rise above 8 percent in 2018. Asian Development Bank, *Safeguarding Myanmar's Environment* (2017).

However, Myanmar's rapid increase in development also brings various threats to the country's natural resources and to the health of its people. Myanmar is the largest country in mainland Southeast Asia, blessed with abundant arable land, forest cover, various mineral resources, natural gas, and both freshwater and marine resources. Indeed, much of Myanmar's economic growth is based on the exploitation of these natural resources. According to the Asian Development Bank, "[f]oreign direct investment is playing a major role by funding large oil and gas, hydropower, agriculture and mining projects," all of which tend to have major adverse environmental impacts. *Id.*

Prior to 2011, Myanmar had taken some steps to address environmental protection. In 1994, Myanmar issued its first

National Environmental Policy. Ministry of Nat. Resources and Env'tl. Conservation, Myanmar National Environmental Policy (1994). The government also issued a Forest Policy in 1995 that identified the protection of soil, water, wildlife, biodiversity, and the environment as one of six "imperatives" to which the government must give the highest priority. Ministry of Forestry, Myanmar Forest Policy (1995). Some of these ideas were later reflected in the 2008 Constitution, which placed a duty on every citizen to assist the Union in environmental conservation. Additionally, in 2009 Myanmar issued the National Sustainable Development Strategy. Ministry of Forestry, National Sustainable Development Strategy for Myanmar (2009).

Yet, since 2011, the government of Myanmar has been significantly more proactive in its efforts to update the environmental governance regime so that it strikes a better balance between economic development and environmental protection. As explained in more detail below, Myanmar adopted the Environmental Conservation Law in 2012, Environmental Conservation Rules in 2014, and an Environmental Impact Procedure in 2015. Taken together, these developments form the backbone of Myanmar's environmental governance structure. This article will provide a brief overview of these and other laws and regulations that Myanmar has established in its attempt to pursue a path to sustainable development. It also will provide some observations based on Vermont Law School's ongoing work in Myanmar to support and strengthen its environmental governance. To be sure, Myanmar has made much admirable progress in the last several years, but considerable challenges remain.

Myanmar's Environmental Legal Framework

The Constitution of Myanmar (the Constitution) is the paramount law of the country. The current constitution was adopted by referendum in 2008, but not without some controversy. Namely, the Constitution preserves military (Tatmadaw) influence over the country's affairs by reserving 25 percent of the seats in both Houses of the Assembly of the Union for appointed military officers. Const. of Myanmar, §§ 109 and 141. Any amendments to the Constitution require the approval of at least 75 percent of both Houses of the Assembly, which means that every single elected representative plus at least one military representative must support a proposed amendment. The amendment then must be put up for a referendum that can pass only with the approval of over half of all eligible voters, as opposed to half of those who actually

Mr. Schulte is the assistant director of U.S.-Asia Partnerships for Environmental Law at Vermont Law School in South Royalton, Vermont. Mr. Baird is the director of the Asian Research Institute for Environmental Law in Chiang Mai, Thailand. They may be reached at williamschulte@vermontlaw.edu and matthewhbaird@me.com.

vote. Const. of Myanmar, § 436. For this reason, it is widely viewed as one of the most difficult constitutions in the world to amend.

Despite these issues, Myanmar's constitution contains some provisions that are relevant to the country's drive toward sustainable development. For instance, section 45 states that the "Union shall protect and conserve [the] natural environment." Additionally, section 390 places a duty on all citizens to "assist the Union" in matters of environmental conservation. These provisions indicate that the Constitution's drafters felt environmental matters were of such high importance that they should be included in the paramount law of the land.

Much of the ECL deals with defining the roles and responsibilities of the Ministry of Natural Resources and Environmental Conservation, the Environmental Conservation Department, and the Environmental Conservation Committee.

To implement its duty to protect the environment, Myanmar adopted the Environmental Conservation Law (ECL) in 2012. Environmental Conservation Law, No. 9/2012 (2012). The ECL is Myanmar's first "environmental law," and it provides the overall legal framework for environmental conservation in Myanmar. The stated objectives of the ECL include, among other things, implementing the National Environmental Policy, enabling cooperation between government and nongovernment stakeholders on environmental protection activities, promoting a good and clean environment for the benefit of both present and future generations, and preventing the degradation of natural resources to enable their sustainable use. Env'tl. Conservation Law, § 3.

Much of the ECL deals with defining the roles and responsibilities of the Ministry of Natural Resources and Environmental Conservation (MONREC), the Environmental Conservation Department (ECD), and the Environmental Conservation Committee (ECC). In 2014, MONREC issued the Environmental Conservation Rules (the Rules), which elaborate further on the specific roles and responsibilities of each of these entities. Ministry of Env'tl. Conservation and Forestry, Env'tl. Conservation Rules, Notification No. 50/2014 (2014). (The Ministry of Natural Resources and Environmental Conservation was formerly known as the Ministry of Environmental Conservation and Forestry.) The ECC is primarily an advisory body; it is given some decision-making authorities, although its exact role in these processes can be difficult to determine on paper. For example, with regard to

establishing environmental quality standards, section 10 of the ECL states that MONREC must obtain the "approval" of both the Union Government and the ECC. However, in setting an environmental monitoring system under section 13 of the ECL, MONREC must only do so "under the guidance" of the ECC.

Section 7 of the ECL establishes most of MONREC's authorities and responsibilities. For example, section 7(o) directs MONREC to "lay down and carry out a system of environmental impact assessment," and in December 2015, MONREC issued the Environmental Impact Assessment Procedure (EIA Procedure), which is discussed in more detail below.

Section 7(d) gives MONREC the authority to "prescribe environmental quality standards," and in December 2015 MONREC promulgated Environmental Quality (Emission) Guidelines (EQG). Nat'l Env'tl. Quality (Emission) Guidelines (2015) (Myan.). Rather than developing emissions standards specific to Myanmar, the EQG consist primarily of excerpts from the International Finance Corporation's Environmental Health and Safety Guidelines. *Id.* § 3. The EQG establish general emissions standards as well as a number of industry-specific emissions standards. *Id.*, Annex 1. The EQG are intended to ensure that "pollutant concentrations do not reach or exceed ambient guidelines and standards." *Id.* § 4. Annex 1 to the EQG does contain ambient air quality standards, but there are no similar standards for water quality, noise, or odor. The EQG apply to all projects that are subject to Myanmar's EIA Procedure, and must be included in a project's Environmental Management Plan (EMP) and Environmental Compliance Certificate, which are developed as part of the EIA process. *Id.* §§ 5–6.

In addition to MONREC's section 7 authorities, section 8 of the ECL also authorizes MONREC to establish an Environmental Management Fund (EMF), and the ECD has initiated this process. Essentially, the EMF would permit the ECD and ECC to collect funds from various sources outside the normal budgeting process and expend them on environmental protection activities. Several other countries in the region have similar funds, including Laos and Vietnam. Once established, the EMF could serve as an enormous boost to the Ministry's capacity to carry out its roles and responsibilities effectively. Among other things, the establishment of the EMF will catalyze other crucial elements of Myanmar's environmental governance system. For example, section 31 of the Rules establishes the allowable sources of funding for the EMF, among which are "receipts from the Ministry by carrying out its duties related to environmental conservation."

The 2015 EIA Procedure issued by MONREC establishes a number of fees and charges to be collected by ECD under the EIA system. See Ministry of Env'tl. Conservation and Forestry, Environmental Impact Assessment Procedure (EIA Procedure), Notification No. 616/2015 (2015), §§ 18, 37, 64, 77, and 91. In addition, section 31 of the Rules allows for the EMF to be funded through "compensation from polluters for environmental impacts" as well as through payments for ecosystem services. However, neither the fee systems, the pollution compensation payments, nor the payments for ecosystem services have yet been established in Myanmar. The ECD recognizes that all of these will be significant sources of funding for the EMF and has stressed their importance in recent discussions regarding the establishment of the EMF.

Finally, in addition to defining institutional roles and responsibilities, both the ECL and the Rules contain provisions that directly regulate the activities of project proponents. For example, section 14 of the ECL requires any person “causing a point source of pollution” to “treat, emit discharge and deposit the substances which cause pollution in the environment in accord with stipulated environmental quality standards.” Relatedly, section 15 requires the installation of pollution control equipment on any facility that causes a “point source of pollution.”

Apart from the ECL, Myanmar also has adopted other laws with significant implications for environmental protection and sustainable development. Perhaps most notably, in 2016 Myanmar adopted a new Investment Law to replace the 2012 Foreign Investment Law, Myanmar Investment Law, No. 40/2016 (2016) (Myan.), as well as new Investment Rules in 2017. Ministry of Plan. and Fin., Myanmar Investment Rules, Notification No. 35/2017 (2017). The first stated objective of the Investment Law is “to develop responsible investment businesses which do not cause harm to the natural environment and the social environment for the interests of the Union and its citizens.” Myanmar Inv. Law, § 3(a). Section 36(c) of the Investment Law requires project proponents to obtain approval from the Myanmar Investment Commission (MIC) for projects that “are likely to cause a large impact on the environment and local community.” In turn, section 5 of the Investment Rules lays out criteria for MIC to consider in determining whether a project is likely to “cause a large impact.” Additionally, the Investment Law states that projects that “may cause an enormous impact to the natural environment and ecosystem” shall be stipulated as prohibited. Myanmar Inv. Law, § 41(e). To date, the MIC has not prohibited any projects under this provision. Finally, the Investment Law also contains several provisions directing investors to abide by Myanmar’s environmental laws. *Id.* §§ 65(g) and 71.

Taken together, the Investment Law and Rules would seem to set up a promising set of requirements regarding environmental conservation and protection. However, perhaps because it is so new, there currently appears to be a lack of clarity over the relationship between the Investment Law and the EIA Procedure, and in some ways, the current implementation of the Investment Law could be seen as interfering with the implementation of the EIA process in Myanmar. Under current practice, a project first must obtain approval from the MIC and subsequently apply to MONREC to conduct the project’s environmental impact assessment. *See, e.g.*, MIC Application Process, Directorate of Investment and Company Administration, *available at* www.dica.gov.mm/en/step-by-step/mic-application-process. Because the MIC approval pertains to a specific location of the project and to certain features of the project design and type, this approach necessarily limits the analysis of alternatives to the proposed project that the EIA procedure requires.

Environmental Impact Assessment under Myanmar Law

In emerging economies like Myanmar that do not yet have well-established environmental management systems, such as permit programs aimed at controlling pollution, the environmental impact assessment process is usually the first and best opportunity to predict, analyze, and mitigate a proposed

project’s environmental impacts. Myanmar’s EIA Procedure, which was developed with assistance from the Asian Development Bank, is fairly standard and generally meets international good practice. Asian Development Bank, New EIA Requirements to Help Safeguard Myanmar’s Environment (Jan. 14, 2016), *available at* www.adb.org/news/new-eia-requirements-help-safeguard-myanmars-environment. The major differences between EIA in Myanmar and environmental assessment under the United States’ National Environmental Policy Act (NEPA) are twofold: first, EIA in Myanmar is meant to apply to all project proposals, as opposed to “major Federal actions” under NEPA; and second, EIA investigations and reports are conducted and produced by project proponents and their consultants, rather than by government agencies under NEPA. Nevertheless, the two processes share some common features, including differing levels of assessment based on potential impact to the environment, public participation, and access to information. Despite the fact that Myanmar’s EIA Procedure is good on paper, two and a half years’ worth of experience have begun to reveal some of the ongoing challenges with the EIA Procedure in practice.

In emerging economies like Myanmar that do not yet have well-established environmental management systems, such as permit programs aimed at controlling pollution, the environmental impact assessment process is usually the first and best opportunity to predict, analyze, and mitigate a proposed project’s environmental impacts.

Screening is the first step in the EIA process. The project proponent will submit an application to MONREC to determine the level of assessment that is required, with reference to the list of project types and sizes contained in Annex 1 to the EIA Procedure. Under Myanmar’s EIA Procedure, projects with a high degree of potential environmental impact must conduct an EIA, whereas projects deemed to have a lesser degree of potential impact must conduct an Initial Environmental Evaluation (IEE). Additionally, the ECD can require the person proposing a project to put together an Environmental Management Plan (EMP), even if the project requires neither an IEE nor an EIA.

One of the challenges that the ECD is facing with regard

to the screening stage is how to deal with projects that do not fit into any of the project categories listed in the Annex. Such projects can experience considerable delays as a result, because without numeric criteria to apply at screening it can be very challenging for ECD staff to evaluate a proposal and make a judgment call on what level of assessment should be required.

One of the stated objectives of the Environmental Conservation Law is to enable cooperation with international organizations, nongovernmental organizations, and individuals involved in environmental conservation matters.

Annex 1 notwithstanding, section 26 of the EIA Procedure authorizes the Ministry to determine whether “special circumstances” exist that would require a project to undergo a different level of review than that provided for in Annex 1. Additionally, section 25 lays out a number of specific circumstances under which a project will be required to conduct a full EIA, regardless of project type or size. This includes projects that may impact areas such as forest conservation areas, wildlife sanctuaries, protected cultural heritage areas, and mangrove swamps, among others.

Once the screening step is complete, some projects will require only an IEE or an EMP. However, projects that are deemed to require an EIA must undergo the next step in the process, which is scoping. Scoping is essentially designed to define the study area (both geographically and temporally), identify impacted communities and other interested stakeholders, make an initial identification of potential environmental impacts, determine the depth and breadth of the subsequent EIA investigation, and frame the EIA investigation to make it as efficient as possible. Ideally, the scoping study should also identify what baseline data and other information will be required for the full EIA investigation, as well as how much of that data is currently available and what further studies will need to be completed in order to obtain data and information. Currently, this step poses a challenge in Myanmar, where reliable baseline data for a given subject matter often does not exist, there are often no generally accepted methodologies for obtaining such data, and conducting investigations to obtain primary data can be prohibitively expensive for project proponents.

Myanmar’s EIA Procedure also requires project proponents to conduct a public participation process during the scoping stage. Once these processes are complete, the project proponent is required to complete a Scoping Report and a Terms of Reference (ToR) for the EIA Report and submit these to the ECD for approval. The ECD can approve these documents with or without conditions, or it can require the project

proponent to revise the Scoping Report and/or ToR.

Following approval, the project proponent commences the EIA investigation and the preparation of the EIA and the EMP, which must be performed in accordance with the approved ToR. The EIA Procedure also requires the project proponent to conduct public participation and information disclosure during this stage. Section 63 of the EIA Procedure provides a detailed table of contents for an EIA report, which should include, among other things, a thorough description of the surrounding environment, an analysis of alternatives to the proposed project, a cumulative impacts assessment, and a full description of the public consultation processes employed during the EIA investigation. Because the EIA Procedure is so new and many of the EIA consultants preparing reports are still building their expertise, compliance with these requirements seems to vary considerably.

Upon completion of the EIA Report, the project proponent will submit the report to the ECD. The EIA Procedure requires the ECD to arrange for public consultations and information disclosure, but due in large part to capacity limitations, this has not yet happened. After its own review, the ECD submits the EIA Report to the EIA Report Review Body, which was formed under section 58 of the Rules. The EIA Report Review Body meets regularly in Myanmar’s capital, Nay Pyi Taw, and provides observations and recommendations to the ECD on EIA Reports under review, although it does not appear to have any decision-making authority, either in practice or according to the EIA Procedure. If the EIA Report is approved, MONREC then issues an Environmental Compliance Certificate for the project. This certificate is a document with legal effect that is intended to contain all the requirements and standards that apply to the project, including but not limited to emissions and effluent standards, waste management, and monitoring and reporting requirements.

Progress on the development and issuance of the certificates has been very slow. In January 2018, the ECD issued the first Environmental Compliance Certificate, which does not appear to have yet been made public. Thompson Chau, *Ministry Issues First ECC but Online Database Urged*, Myanmar Times, Feb. 5, 2018. As of June 2018, fewer than 10 certificates had been approved and issued by ECD. Although some Environmental Compliance Certificates have been made public by the project proponents or consultants themselves, the lack of technological capacity and support at the ECD has prevented it from disclosing these documents online in a consistent manner. See, e.g., Ministry of Nat. Resources and Env’tl. Conservation, Env’tl. Conservation Dep’t, Compliance Certificate for A-6 Offshore Drilling Exploration Project, available at www.woodside.com.au/Working-Sustainably/Consultation%20Activities/Myanmar%20A-6%20Environmental%20Compliance%20Certificate-%20February%202018.pdf.

Public Participation and Information Disclosure

As a sign of modern Myanmar’s commitment to strengthen the inclusion of the public in governing and decision-making processes, one of the stated objectives of the Environmental Conservation Law is to enable cooperation with international organizations, nongovernmental organizations, and individuals involved in environmental conservation matters. Env’tl. Conservation Law, § 3(h). The EIA Procedure gives effect to these

goals by requiring project proponents to conduct public participation processes and disclose project-related information at various stages in the EIA process.

However, some challenges remain. With regard to information disclosure during the IEE and EIA report investigation stages, the EIA Procedure itself does not specify what information must be disclosed to the public, other than “project related information.” As a result, the type and amount of information that is actually shared with the public (as well as the method for dissemination) varies widely across projects. During the EIA Report review stage, the EIA Procedure requires both the ECD and the project proponent to release the EIA Report itself to the public for review. EIA Procedure, §§ 65–66. But this does not yet occur on a regular basis in Myanmar.

As for public consultation meetings, the EIA Procedure states that for IEEs and for the scoping stage of EIAs, the project proponent must consult with the ECD to determine the required number and location of meetings. For public consultation during the EIA Report investigation stage, the project proponent must hold meetings “at national, regional, state, Nay Pyi Taw Union Territory and local levels. . .” *Id.* § 50. However, the exact meaning of this provision is somewhat unclear, and in practice public consultation events at the EIA Report investigation stage have only occurred in locations in close proximity to the project site.

Further, under the EIA Procedure, the EIA shall “consider the views, concerns, and perceptions of stakeholders, communities and individuals that could be affected by the Project or who otherwise have an interest in the Project.” *Id.* § 60. The EIA Report must include a section on the public consultation process, including the results of public consultations and negotiations with the affected populations regarding the environmental and social issues. *Id.* § 63. The methods employed for conducting public consultations seem to vary widely, and as of yet there is no standard practice for demonstrating how the public’s views and concerns have been considered and either rejected or incorporated into the EIA Report.

In an attempt to address some of these issues regarding public participation and information disclosure, in 2017, representatives from Vermont Law School assisted the ECD in convening a technical working group and hosting a series of public consultations to produce a Draft Guideline on Public Participation in the Environmental Impact Assessment Process. The project resulted from discussions with senior ECD officials on the need to strengthen public participation by providing practical guidance for project proponents, EIA consultants, and stakeholders.

The Draft Guideline on Public Participation in the Environmental Impact Assessment Process, *available at*

Although MONREC has made increasing public participation in decision-making a priority, it has struggled to release environmental information in a consistent manner and meaningfully involve the public.

www.vermontlaw.edu/academics/centers-and-programs/us-asia/myanmar-eia-public-participation-guidelines, seeks to provide detailed guidance on the minimum requirements for public participation in EIA processes for the benefit of all stakeholders involved, including local communities affected by the project. Significantly, the draft guideline emphasizes ensuring that opportunities are provided for involvement by indigenous and ethnic minority groups that will be impacted by a project.

Observations and Conclusions

Overall, Myanmar has made great strides to build a strong environmental legal framework since opening up to the outside world in 2011. However, as with most emerging economies, myriad challenges remain. For example, Myanmar has yet to establish nationwide ambient air or water quality monitoring networks, which limits its ability to measure and limit ambient pollutant levels. Additionally, while the ECL gives MONREC the authority to establish pollutant fees and a system for payments for ecosystem services, capacity limitations have hampered MONREC’s ability to do so. Similarly, although MONREC has made increasing public participation in decision-making a priority, it has struggled to release environmental information in a consistent manner and meaningfully involve the public. As Myanmar continues to develop at a rapid pace, the next several years will be crucial in determining whether or not it will be able to meet these challenges and avoid some of the adverse environmental consequences that come with prioritizing economic growth over environmental protection. 🌳

COMING NEXT IN NR&E

Winter 2019: Forests

Spring 2019: Filling the Gap

**If we were logical, the future would be bleak, indeed.
But we are more than logical. We are human beings, and we
have faith, and we have hope, and we can work.**

—Jacques-Yves Cousteau

The future depends on what we do in the present.

—Mahatma Gandhi

**The ultimate test of man's conscience may be his willingness
to sacrifice something today for future generations whose
words of thanks will not be heard.**

—Gaylord Nelson

