

# ENVIRONMENTAL POLICY AND LAW OF ETHIOPIA: A POLICY PERSPECTIVE

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## Introduction

Man, who has acquired the power and ability to transform his environment in countless ways, has unending desire for better quality of life and materialistic comforts. The state, which claims sovereignty over its natural resources, has also been excessively exploiting and indiscriminately using natural resources at its command to meet its endless desire for development. The excessive exploitation of natural resources and their imprudent use, rather misuse, by Man and State have been posing serious threats to the fragile ecosystem. The environmental crisis is evinced by global warming; rise in the sea level; ozone depletion; acid rains; water, air and soil pollution; the extinction of numerous animal and plant species, and the loss of biodiversity.

The global community, conscious of the deteriorating ecosystem and its consequences, has been trying hard to arrest further deterioration of the environment. The hitherto convened three mega Conferences, *namely*, the UN Conference on the Human Environment (UNCHE, 1972), the UN Conference on Environment and Development (UNCED, 1992), and the World Summit on Sustainable Development (WSSD, 2002), have, *inter alia*, evolved a couple of global prescriptive and normative environmental policies and principles. These are the precautionary principle (including the environmental impact assessment), the polluter-pays principle, sustainable development, and common but differentiated responsibility. These principles have influenced environmental policies and laws of different countries, including Ethiopia.

The present paper attempts to have a 'closer look' at the environmental policy and law of Ethiopia and to highlight the nexus between the policy and the law.

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# I would like to sincerely thank Ato Muradu Abdo, former Asst. Dean of the Law Faculty, for allotting me a course on Law of Environment and thereby 'motivating' me, in my background and understanding of International Environmental Law, to have a 'closer look' at the Environmental Policy and Law of Ethiopia and for persuading me to pen it down.

I would also like to express my sincere thanks to the Officials of the Environmental Protection Authority for giving me audience for frank informal interactions and for unhesitant parting with documents and information in their armory. The dialogue and documents have immensely helped me in having further 'deeper peep' into the Environmental Policy and Law of Ethiopia and in sharpening some of my ideas.

I would like to acknowledge the efforts taken by Ato Girma Haile for making me available the Federal First Instance Court's decision in Action for Professionals' Association for the People (APAP) v Environmental Protection Authority, Civil File No. 64902/21.02.1999 (EC).

## **1. Environmental Policy of Ethiopia- A Broad Policy Perspective**

### **1.1 Environmental Policy and Environmental Law-Mutual Context**

Environmental law, ostensibly, is the juridical articulation of environmental policies and programs. However, the evolution and formulation of environmental policy of a State is a complex process. It is influenced, rather dictated, by policy-oriented approaches to other sectors correlated with the environment. Environmental policy of a State is bound to have significant correlation with the State's population policy, agricultural policy, land and natural resources use policy, development policy, industrial policy, rural and urban development policy, forest policy, mining policy, and transport policy, to name a few. Eco-interests of the political parties, national scientific advancement and development priorities, among others, also play significant roles in the formulation of environmental policy.

### **1.2 Environmental Policy of Ethiopia- A Sketch**

A broad and basic environmental policy of Ethiopia is reflected in the FDRE Constitution,<sup>1</sup> the Environmental Policy of 1997 (hereinafter the EPE).<sup>2</sup>

#### ***1.2.1 FDRE Constitution-Environmental Spirit and Policy Principles***

A set of 'fundamental rights' and 'environmental objectives' incorporated in the FDRE Constitution exhibits Ethiopia's deep concern for the environment. They also contain some basic policy-oriented principles and guidelines for environmental protection and management.

#### ***A. Fundamental rights***

The FDRE Constitution guarantees the fundamental right to live in a clean and healthy environment, the right to livelihood, and the right to sustainable development.

##### ***(1) The right to a clean and healthy environment***

The FDRE Constitution is one of the constitutions in the world that explicitly recognizes the right to live in a clean and healthy environment. Art 44(1) declares that 'all persons have the right to a clean and healthy environment'. It finds place in the Chapter dealing with 'Fundamental Rights and Freedoms' along with other precious rights of an individual, such as the right of thought and expression, the right of assembly and demonstration, the right of access to justice, and the right to property, to mention a few. Such a high place accorded to it in the Constitution exhibits the country's deep concern for the environment.

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<sup>1</sup> The Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No. 1/1995.

<sup>2</sup> Environmental Protection Authority and Ministry of Economic Development and Cooperation, *Environmental Policy* (1997).

## **(2) *The right to livelihood***

Art 44(2) of the Constitution guarantees a person, who is displaced or has lost means of his livelihood due to the implementation of State programs, the right to seek appropriate compensation from the State. It reads:

*All persons who have been displaced or whose livelihoods have been adversely affected as a result of State programmes have the right to commensurate monetary or alternative means of compensation, including relocation with adequate State assistance.*

The right to livelihood, another aspect of the right to live in a clean and healthy environment, can potentially check the Government's actions and programs that threaten to dislocate persons and thereby disrupt their right to livelihood.

## **(3) *The right to sustainable development***

Art 43(1) of the Constitution, *inter alia*, guarantees the people of Ethiopia 'the right to sustainable development' and 'the right to improved living standards'

The right to sustainable development, as globally perceived, refers to the development that meets the needs of the present generation without compromising the environmental needs of its future generations.<sup>3</sup> Art 43(4) reiterates the underlying idea of sustainable development i.e. development through rational and prudent use of the environmental resources. In pursuance of the right to sustainable development, Ethiopia, by virtue of art 43(3), is required to see to it that its international agreements and relations, concluded, established or conducted, with other states protect and ensure the right to sustainable development.

The right to improved living standards, obviously, has reference to the better quality of life in terms of environment as well as other basic needs and comforts.

Against this backdrop, it is significant to note that art 89 of the Constitution, which outlines 'economic objectives', *inter alia*, refers to the Government's duty to hold, on behalf of the People, land and other natural resources and to deploy them for the common benefit and development of the People.<sup>4</sup>

## ***B. The constitutional imperatives of the right to a clean and healthy environment and of the right to sustainable development***

The constitutional significance of arts 43 and 44 and of the fundamental rights guaranteed thereunder can be realized when one recalls the provisions of arts 13 and 105 of the Constitution. The former imposes on the Federal and the States legislative, executive and judicial organs 'the responsibility and duty to respect and enforce' the Fundamental Rights.

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<sup>3</sup> See, World Commission on Environment and Development, *Our Common Future* (1987) 43.

<sup>4</sup> Art 89(5), FDRE Constitution.

While art 105 mandates that arts 43 and 44 and the rights guaranteed thereunder, being Fundamental Rights, can be amended *only* when (i) all the State Councils, by a majority vote; (ii) the House of Peoples' Representatives, by a two-thirds majority vote, and (iii) the House of Federation, by a two-thirds majority vote, approve the proposed change(s).

### ***C. Environmental objectives***

The Constitution also enumerates a set of 'environmental objectives' and places them under the chapter dealing with 'National Policy Principles and Objectives' These objectives are placed along with the 'principles' for 'external relations' and 'national defence', and 'political, economic, social and cultural objectives' Such a constitutional treatment and status accorded to them, obviously, exhibit the prime concern of the Ethiopian Government for 'environment'. Art 92, listing these environmental objectives, reads:

1. *Government shall endeavour to ensure that all Ethiopians live in a clean and healthy environment.*
2. *The design and implementation of programmes and projects of development shall not damage or destroy the environment.*
3. *People have the right to full consultation and to the expression of views in the planning and implementation of environmental policies and projects that affect them directly.*
4. *Government and citizens shall have the duty to protect the environment.*

Art 92, thus, not only reiterates the fundamental right to live in a clean and healthy environment but also imposes a corresponding constitutional 'duty' on the Federal and the Regional Governments, along with citizens, 'to protect the environment'. In the same spirit, it expects the Governments to ensure that development projects and programs do not damage or destroy the environment. It also assures Ethiopians that they have the constitutional right to participate in the planning and implementation of environmental policies and projects that affect them directly.

These 'environmental objectives' are not merely pious or cosmetic constitutional declarations. Art 85(1) of the Constitution mandates all organs of the Federal and Regional Governments 'to be guided' by these 'objectives' in implementing the Constitution, other laws and public policies. The objectives, thus, do acquire the status of 'guiding principles' in the State Governance.

### ***D. International environmental obligations- the Fundamental Principle***

Art 9(4) of the Constitution, one of the fundamental principles of the Constitution, makes international agreements ratified by Ethiopia an integral part of its domestic law. It states that 'All international agreements ratified by Ethiopia are an integral part of the law of the land'

No other substantive step, except a Proclamation ratifying the convention, is required to make a ratified agreement an integral part of the Ethiopian law. The President of Ethiopia

has to proclaim it in the *Negarit Gazeta*<sup>5</sup> and the Judiciary, along with the Executive, has to take its judicial notice.<sup>6</sup>

### **1.3 Environmental Policy: Goal, Objectives, Key Guiding Principles, and Implementation Strategy**

The Environmental Protection Authority Establishment Proclamation No. 9/1995, which came into force on August 24, 1995, i.e. three days after the FDRE Constitution came into force, established the Environmental Protection Authority (hereinafter the Authority), *inter alia*, to prepare environmental protection policy and laws.<sup>7</sup> It accomplished its task on April 2, 1997 by completing the EPE.

In the backdrop of the environmental philosophy and spirit of the fundamental rights to live in a clean environment and to sustainable development, the EPE offers a structural and strategic policy-blueprint of the environmental governance in Ethiopia. The structural and strategic paradigm of the EPE is designed in the light of, and guided by, the well articulated 'Overall Policy Goal' and 'Specific Policy Objectives' The 'goal' and 'objectives', in turn, are premised on, and built around, the eleven 'Key Guiding Principles'<sup>8</sup>

#### ***1.3.1 Environmental Policy: the Goal, Objectives and Key Principles***

##### ***A. The overall policy goal***

The overall policy goal is two-fold, *namely*, the improvement and enhancement of the health and quality of life of Ethiopians, and promotion of sustainable development. The former gives stress on the improvement of the environment for realizing the constitutional right to a clean and healthy environment. While the latter gives, prominence to the balancing of environmental needs and interests of the present and of the future generations.

##### ***B. The specific policy objectives***

The Specific Policy Objectives of the EPE, which set comparatively more specific policy goals for the environmental law, are: (i) to ensure that essential ecological processes and life support systems are sustained, biological diversity is preserved, and renewable natural resources are used in such a way that their regenerative capabilities are maintained and that the needs of future generations are not compromised, (ii) to ensure that the benefits of exploitation of non-renewable resources are also extended to the future generation, (iii) to prevent the pollution of land, air and water in the most cost-effective way so that the cost of effective preventive intervention does not exceed the benefits; (iv) to ensure peoples' participation in the eco-management, (iv) to improve the environment of human settlements in such a manner that satisfies the physical, social, economic, and cultural

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<sup>5</sup> Art 71 (2), *ibid*.

<sup>6</sup> Art 2(3), Proclamation No. 3/1995.

<sup>7</sup> Art 6, Proclamation No. 9/1995.

<sup>8</sup> Paras 2.1-2.3, EPE.

needs of the inhabitants, and (v) to enhance public awareness and understanding about the link that exists between development and environment.

### ***C. The key guiding principles***

The 'key guiding principles' are the principles on which the 'overall policy goal' and the 'specific policy objectives' are based. These 'key guiding principles', the EPE hopes, will help the policy-makers in shaping subsequent environmental policies, strategies and programs and their implementation. These principles, according to the EPE, will also help them in ensuring consistency in the sectoral and cross-sectoral environmental policies dealt with under the EPE. Some of the pertinent 'key guiding principles' are: (i) every person has the right to live in a healthy environment, (ii) the development, use and management of renewable resources need to be based on sustainability, (iii) the use of non-renewable resources need to be minimized and where possible their use should be extended through recycling, (iv) when a compromise between short-term economic growth and long-term environmental protection is necessary, the compromise should be in favor of protection of the environment, (v) environmental protection should be made an integral part of development planning, (vi) regular and accurate assessment and monitoring of environmental conditions should be undertaken and the information relating thereto should be widely shared with the public, (vii) increased awareness and understanding of environmental and resource issues should be promoted by policy makers, government officials, and the population, (viii) a 'conservation culture' in environmental matters among all levels of society should be encouraged, and (ix) an integrated implementation of cross-sectoral and sectoral policies and strategies should be perceived as a pre-requisite for attaining objectives of the EPE.

### ***D. The sectoral and cross-sectoral policies***

The EPE also formulates a set of comprehensive sectoral and cross-sectoral environmental policies. The former signify that the environmental policy, to be comprehensive, needs certain policy-oriented approach to other inter-related sectors of the environment. While the latter signify the need to tackle, with specific goals, other related sectors, social as well as economical, to make the environmental policy more effective and holistic. As stated earlier, environmental policy of a State is influenced by a number of other related policies. The EPE, with an inimitable vision, has outlined environmental policy in terms of policy statements pertaining to varied inter-related sectors and cross-sectors<sup>9</sup> in a single document so that a goal-oriented comprehensive environmental policy of Ethiopia emerges therefrom.

A careful reading of the sectoral and cross-sectoral environmental policies reveals their stress on safeguarding the environment and emphasis on the sustainable, judicious, and eco-friendly use of the environmental resources. These policy propositions, with contextual

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<sup>9</sup> Paras 3.1-3.10 & 4.1-4.10, *ibid.* Nevertheless, Ethiopia has a couple of policy documents on specific issues. See, the National Population Policy (1993), the National Biodiversity Policy (1997), the Economic Policy (1998), the Federal Water Resource Management Policy (1998), and the Agricultural and Rural Development Policies and Strategies (2002).

variations, also propagate a blend of protective, preventive, precautionary, and conservative approaches to, and strategies for, the protection and use of the environmental resources.

Out of these, Environmental Impact Assessment (EIA), as a means of assessing in advance the adverse impacts of any developmental activity on the environment and of incorporating an appropriate measure in the development plan itself, figures more prominently in the EPE. Further, the 'Environmental Information System' asserts that the right to live in a clean and healthy environment 'carries with it the right to be informed about environmental issues'

### ***1.3.2 The Implementation Strategy***

In consonance with the constitutional spirit and in the light of its 'overall goal', the 'specific policy objectives' and the 'key guiding principles', the EPE, in its last segment, also indicates the way to implement the environmental policy. It visualizes an institutional mechanism that gives political as well as popular support to the sustainable use and effective management of natural and environmental resources at all the levels from the Federal down to the *Wereda* and community levels.

The legal instruments designing institutions and strategies for conservation, development and management of natural and environmental resources, the EPE stresses, should be in conformity with the Constitution, especially with respect to the decentralization of power; harmonization of sectoral interests, and integration of environmental planning with development planning.

With a view to avoiding conflict of interests, the EPE proposes that the task of developing and managing natural resources, as a matter of policy, should be assigned to one organization and that of environmental protection, regulation and monitoring to another. It suggests that the enforcement and administration of environmental laws and regulations should be assigned to (the Federal and Regional) courts.

### ***1.3.3 Significance of the Environmental Policy***

The environmental policies and strategies reflected in the EPE are not mere pious declarations or wishful thoughts of their author, the Authority. It seems that they have emerged after considerably intensive deliberations among members of the Authority, a multi-Ministerial statutory body. It was composed of the Minister of Agriculture, the Minister of Trade and Industry, the Minister of Health, the Minister of Mines and Energy, the Commissioner of the Science and Technology Commission, the Minister of Water Resources, and the General Manager of the Authority.<sup>10</sup> Further, it is equally significant to note that *the Conservation Strategy of Ethiopia* (CSE),<sup>11</sup> a multi-volume report, dealing extensively with the principles, guidelines and strategies for the effective management of the environment and sustainable development of the country, has played a crucial role in

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<sup>10</sup> Art 8, Proclamation No. 9/1995.

<sup>11</sup> Environmental Protection Authority and Ministry of Economic Development and Cooperation, *Conservation Strategy of Ethiopia*, vols I-V (1996).

shaping the EPE. It seems that the Authority has drawn inspiration from, and heavily relied upon, the second volume of the CSE, captioned '*National Policy on Natural Resources and the Environment*', in its formulation of the EPE.

Further, the EPE is also endorsed by the Federal Council of Ministers in April 1997 itself. The seal of approval by the Council of Ministers added further impetus, legal as well as political, to the EPE and to the environmental policy-objectives, principles, and strategy-incorporated therein.

## **2. Environmental Law of Ethiopia: A Policy-Oriented Analysis**

### **2.1 Environmental Law of Ethiopia: Legislative Framework**

In the backdrop of the environmental policy, let us now have a 'closer look' at the environmental law of Ethiopia.

Environmental laws of Ethiopia can conveniently be grouped into two broad categories based on their underlying motivational sources. *First*, the Proclamations enacted by the Parliament for giving effect to the environmental policy reflected in the FDRE Constitution and the EPE. *Second*, the Proclamations giving effect to international environmental obligations of Ethiopia.

However, at the outset we want to make it clear that in this paper we will confine ourselves to, and concentrate on, the post-FDRE Constitution Proclamations that intend to translate environmental policy of Ethiopia into the law. Therefore, Proclamations or other instruments having the force of law, or that dealt with, or had bearing on, one or the other aspect of the environment, and emanated from, or prevailed during, the erstwhile imperial regimes, the Dergue regime or the period of the Transitional Government, will not figure in the present paper. This is appreciatively done for two obvious reasons. *First*, the present writer, as mentioned in one of the opening paragraphs of the paper, is merely interested in having 'a closer look' at the existing environmental policy and law of Ethiopia. *Secondly*, the pre-FDRE Constitution legislative instruments, dealing with, or having bearing on, the environment, in the present submission, do not qualify to be labeled as 'environmental law', in the strict sense of the terms, as the connotations 'environment' and (the consequential) 'environmental law' paved their way in the arena of 'law' and thereby became amenable to legal discourse only after the UNCHE (1972). At the most, these instruments may be termed as 'incidental' environmental laws as their 'prime objective' was not the protection of the environment. Similarly, we will not undertake any analysis of the Proclamations that, by virtue of art 9(4) of the FDRE Constitution, have given effect to the international environmental obligations of Ethiopia.

In fact, the FDRE Constitution, by conferring on individuals the right to have a clean and healthy environment and on Ethiopians the right to improved living standards and to sustainable development and creating a corresponding constitutional duty on the Government to make every possible effort to ensure that Ethiopians live in a clean and healthy environment and not to, through its programmes and projects of development, destroy or damage it, and on the Ethiopians to protect the environment, has envisaged a



great role of (environmental) law in the realization of these constitutional rights and in the protection and improvement of the environment.

However, the Federal Legislature, except enacting the Proclamation No. 9/1995 establishing the EPA and assigning to it, *inter alia*, the task of formulating environmental policy, did not until 2002 show much enthusiasm in using law in the environmental governance. In the absence of sound environmental policy until 1997, the legislative inaction can understandably be appreciated. However, not a single Proclamation, dealing with environment, emanated from the Parliament between 1997 and 2002 even though the EPE was ready to translate itself into law. Only in October 2002, it, through the Environmental Protection Organs Establishment Proclamation No. 295/2002 (hereinafter the EPO Proclamation), has 're-established' the Environmental Protection Authority (hereinafter the EPA) and repealed the Proclamation No. 9/1995.

Nevertheless, the EPO Proclamation carries significance in the Ethiopian environmental law regime for two reasons. *First*, it is the first Proclamation in the series of the Proclamations that are tuned, contextually, thematically as well as operationally, to the tone of the EPE. With a view to avoiding conflict of interests between the organizations that are responsible for the environmental development and management activities, on the one hand, and the organizations responsible for the environmental protection, regulation and monitoring, on the other, as proposed in the EPE,<sup>12</sup> it, *inter alia*, re-structured the EPA. It, again in tune with the EPE, seeks to establish a 'system' that fosters coordinated but differentiated responsibilities of environmental monitoring at the Federal and Regional levels. *Secondly*, it has set in motion the EPA, an autonomous public institution of the Federal Government, headed by, and accountable to, the Prime Minister, to see that the 'environmental objectives' reflected in the FDRE Constitution and the basic principles set out in the EPE are realized.

In pursuance of the EPE, the Environmental Impact Assessment Proclamation No. 299/2002 (hereinafter the EIA Proclamation) and the Environmental Pollution Control Proclamation No. 300/2002 (hereinafter the EPC Proclamation), dealing respectively with EIA and environmental pollution control, followed in December 2002 the EPO Proclamation.

These three Proclamations, in fact, constitute the core of the Ethiopian environmental law regime. They, among other things, deal with protection of the environment, the safeguarding of human health and well-being, the prevention of pollution, the environmental standards and enforcement thereof, the enforcement mechanism, and environmental impact assessment.

## **2.2 Environmental Law of Ethiopia: Structural Paradigm**

Now, we will have a closer look at the structural framework of the environmental law that emerges from the EPC and the EIA Proclamations, the two core substantive environmental law instruments.

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<sup>12</sup> Preambulary para 1, EPO Proclamation.

Realizing the fact that some socio-economic development activities may be harmful to the environment, the EPC Proclamation, through appropriate measures and strategies, endeavors to mitigate the environmental pollution. While the EIA Proclamation, realizing that adverse impacts of a development activity on the environment can be predicted and assessed in advance and accordingly apt measures can be taken to arrest those effects or risks, provides for a mechanism of EIA.

### **2.2.1 The EPC Proclamation**

The EPC Proclamation, *inter alia*, prohibits a person from polluting or causing any other person to pollute the environment in violation of the 'environmental standards' (hereinafter ESs) to be set by the EPA. Causing environmental pollution is an offence under the Proclamation.<sup>13</sup> It authorizes the EPA or the relevant Regional Environmental Agency (hereinafter the REA) to take an apt administrative or legal measure, including the closure or relocation of an enterprise, against such a person. A polluter is required to clean up or pay the cost of cleaning up the polluted environment as determined by the EPA or the REA.<sup>14</sup>

For the purposes of preventing environmental pollution, the Proclamation mandates the EPA to formulate practicable ESs. Art 6 (1) runs:

*In consultation with competent agencies, the Authority shall formulate practicable environmental standards based on scientific and environmental principles. The sectors that require standards shall include at least the following:*

- (a) Standards for the discharge of effluents into water bodies and sewage systems.*
- (b) Air quality standards that specify the ambient air quality and give the allowable amounts of emission for both stationary and mobile air pollution sources.*
- (c) Standards for the types and amounts of substances that can be applied to the soil or be disposed of on or in it.*
- (d) Standards for noise providing for the maximum allowable noise level taking into account the settlement patterns and the availability of scientific and technological capacity in the country.*
- (e) Waste management standards specifying the levels allowed and the methods to be used in the generation, handling, storage, treatment, transport and disposal of the various types of waste.*

However, art 6(3) authorizes the EPA to prescribe different ESs for different areas for protecting the environment or rehabilitating it. Art 6(5) also empowers it to waive, for a fixed period, compliance with some requirements of specified ESs for promoting 'public

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<sup>13</sup> For details, see '4.2 Operational Strategies', *infra*.

<sup>14</sup> Art 3, EPO Proclamation.

benefit'. A Regional State, based on its specific situation, can adopt ESs stringent than that stipulated by the EPA. However, it, by virtue of art 6(4), is not permitted to adopt the standards that are less rigorous than those set by the EPA.

The Proclamation provides for the enforcement of ESs through the 'Environmental Inspectors' (EIs) to be appointed by the EPA or the relevant REA.<sup>15</sup> For effective implementation of these standards, it also imposes certain duties on individuals and creates a set of offences for their failures.<sup>16</sup>

The Proclamation does not allow a person to handle, store or dispose any hazardous waste, radioactive substance, or hazardous chemicals without having a license from the EPA or the relevant REA to this effect. A person engaged in handling of hazardous waste is required to take appropriate precaution to prevent any damage to the environment or to human health or well-being. A person engaged in the preparation, manufacturing or trading in hazardous substance or hazardous chemical is required to ensure that the chemical is registered, packed and labeled as per the applicable standards.<sup>17</sup>

By virtue of art 5 of the Proclamation, all urban administrations in the country are duty-bound to ensure that the collection, transportation, and, as appropriate, the recycling, treatment, or safe disposal of municipal waste is carried out through an integrated municipal waste management system. And the EPA, in collaboration with the relevant REA, is required to monitor and evaluate adequacy of the system and to ensure its effectiveness.

### **2.2.2 The EIA Proclamation**

The EIA Proclamation intends to ensure development without unacceptable adverse impacts on the environment. It aims to integrate environmental considerations in the development planning process so that natural resources are used in a responsible manner and thereby the environment is protected. It endeavors to ensure eco-friendly development.

It, *inter alia*, empowers the EPA, through Directive, to determine the categories of development projects that are/are not likely to have negative impacts on the environment. The development projects that fall in the category of activities that entail adverse impacts on the environment require EIA.<sup>18</sup> A proponent, who initiates a development activity that finds place in the list of the activities that are likely to have adverse impacts on the environment, is required to get the EIA done before the proposed project is launched. For this purpose, he is obligated: (i) to identify the likely adverse impacts on the environment

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<sup>15</sup> Arts 7-9, *ibid.* For details see, '4. Implementation of Environmental Law: Institutional Framework and Operational Strategies', *infra*.

<sup>16</sup> Arts 12-17, *ibid.* For details see, '4.2.1.2 Environmental Crimes and Penal Sanctions: A Strategy for Controlling Environmental Pollution', *infra*.

<sup>17</sup> Arts 4 & 5, *ibid.*

<sup>18</sup> Art 5(1), EIA Proclamation. The EPA has identified major activities that require/not require EIA. See, Environmental Protection Authority, *Environmental Impact Assessment Procedural Guideline Series 1* (2003). For comments on EIA, see Mellese Damtie and Mesfin Bayou, *Overview of the System of Environmental Impact Assessment in Ethiopia: Gaps and Challenges* (2007).

of his project, (ii) to incorporate in the design of his project the apt means of their prevention or containment, and (iii) to get an Environmental Impact Study Report (EIS Report) prepared, at his cost, by experts.<sup>19</sup> The EIS Report is required to contain 'sufficient information' to enable the EPA or the concerned REA to determine as to whether the proposed project should or should not be allowed to proceed. An EIS Report, as a rule, is required to include in it a description of: (i) the nature of the project, including the technology and processes to be used, (ii) the content and amount of pollutants that are likely to be released during operation of the project, (iii) source and amount of energy required for its operation, (iv) likely trans-regional environmental impacts of the project, (v) characteristics and duration of all the estimated environmental impacts, (vi) measures proposed to eliminate, minimize, or mitigate the identified negative impacts, (vii) contingency plan in case of accident, and (viii) procedures designed for self-auditing and monitoring of the activity during its operation.<sup>20</sup> Then, he is required to submit the EIS Report, along with its brief summary in non-technical terms and necessary documents, to the EPA for review and necessary approval, if the proposed project is subject to licensing, execution or supervision by a Federal agency or when it is likely to produce trans-Regional impacts. Otherwise, he is required to submit it, for review and approval, to the REA where he plans to launch the project.<sup>21</sup>

The EPA or the relevant REA, before it reviews the Report, has to make it available to the public and experts and to solicit their comments. Then, it has to evaluate the Report in the light of the comments received from public and experts as well as from the communities that are likely to be affected by implementation of the project.<sup>22</sup> After review, the EPA or the relevant REA, may: (i) approve the project and issue the required authorization, (ii) approve the project and issue authorization with 'conditions' that the proponent should fulfill, or (iii) refuse implementation of the project, if it is convinced that the negative impacts cannot be satisfactorily avoided.<sup>23</sup> In case of conditional approval, the proponent is under legal obligation to fulfill the terms and conditions attached with the authorization<sup>24</sup> and the EPA or the relevant REA is to monitor and evaluate the compliance.<sup>25</sup> Failure on part of the proponent to comply with the conditions may warrant a fine in amounting between 10,000 and 20,000 Birr,<sup>26</sup> suspension or cancellation of the authorization, and the consequential suspension or cancellation of the license.<sup>27</sup>

Every licensing agency is under legal obligation, prior to issuing an investment permit or a trade or an operating license for any development project, to ensure that the EPA or the relevant REA has authorized its implementation.<sup>28</sup>

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<sup>19</sup> Art 7, *ibid*.

<sup>20</sup> Art 8, *ibid*.

<sup>21</sup> Art 14(1), *ibid*.

<sup>22</sup> See, arts 9(2) & 15, *ibid*. Also see art 6(3).

<sup>23</sup> Art 9(2), *ibid*.

<sup>24</sup> Art 7(4), *ibid*.

<sup>25</sup> Art 12(2), *ibid*.

<sup>26</sup> Art 17(4), *ibid*.

<sup>27</sup> Art 12(3), *ibid*.

<sup>28</sup> Art 3(3), *ibid*.

The Proclamation provides for incentive as well as punitive measures for ensuring EIA of development projects.

### **3. Implementation of Environmental Law: Institutional Framework and Operational Strategies**

#### **3.1 Institutional Framework**

A careful look at the EPC and the EIA Proclamations discloses that the EPA is entrusted with the task of environmental protection.

##### ***3.1.1 The EPA- the Old and the Re-structured: Change in Philosophy and Role Perception***

The prime 'objective' with which the Authority was created in 1995 was 'to ensure that all matters pertaining to the country's social and economic development activities are carried out in a manner that will protect the welfare of human beings as well as sustainably protect, develop and utilize resource bases on which they depend for survival'<sup>29</sup> It was composed of two components, the General Manager [with the Deputy General Manager] and the Environmental Protection Council (EPC). The latter was composed of: (i) an official (designated by the Government-Chairman), (ii) the Minister of Agriculture, (iii) the Minister of Trade and Industry, (iv) the Minister of Health, (v) the Minister of Mines and Energy, (vi) the Commissioner of Science and Technology, (vii) the Minister of Water Resources, and (viii) the General Manager of the Authority.<sup>30</sup> The General Manager was the Chief Executive Officer of the Authority. The EPC had twin powers, i.e., (i) to deliberate upon policy matters concerning environmental protection and to submit (to the Council of Ministers) recommendations thereon, and (ii) to evaluate and approve directives and standards issued by the Authority.<sup>31</sup>

The Authority, as a composite legal entity, was, *inter alia*, charged with the responsibility of: (i) preparing environmental protection policy and laws, and, upon approval, following up their implementation, (ii) preparing standards that help in the protection of soil, water and air as well as the biological systems they support, and following up their implementation, (iii) recommending the application of diverse encouragement and regulatory measures for the better protection of the environment, (iv) following up of the implementation of international treaties on environmental protection to which Ethiopia is a party, (v) providing instructions required for enhancing awareness of the need for environmental protection, and (vi) rendering advice and technical support to Regions on environmental protection.<sup>32</sup>

The EPO Proclamation re-structured the Authority with renewed philosophy and assigned it much more extended and varied roles to translate the constitutional rights to a clean and healthy environment and to sustainable development, and the EPE objectives, into a reality.

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<sup>29</sup> Art 5, Proclamation No. 9/1995.

<sup>30</sup> Art 8, *ibid.*

<sup>31</sup> Art 10, *ibid.*

<sup>32</sup> Art 7, *ibid.*

The EPA is created with the objective of formulating and implementing policies, strategies, laws and standards that foster socio-economic development that sustains longer and protects the environment.<sup>33</sup> It, unlike its predecessor, is accountable to the Prime Minister.<sup>34</sup>

The re-structured EPA, however, like the Authority, has two basic components with different nomenclatures, *namely*, the executive and policy-making. Director General, appointed by the Government, Heads the EPA, directs and administers its activities.<sup>35</sup> While the Environmental Council (EC) comprises of the Prime Minister (or his designee)-Chairman, members to be designated by the Federal Government, a representative designated by each National Regional State, a representative of: the Ethiopian Chamber of Commerce, the local NGOs, the Confederation of the Ethiopian Trade Unions, and the Director General of the EPA.<sup>36</sup> Responsibilities of the EC are: (i) to review proposed environmental policies, strategies and laws, and issue recommendations to the Government, (ii) to evaluate and provide appropriate advice on the implementation of the EPE, and (iii) to review and approve directives, guidelines and ESs prepared by the EPA.<sup>37</sup>

The EPA, as a composite legal institution, is entrusted with a variety of (26) powers and duties. These powers and duties can, for clarity and brevity, be grouped into seven thematic heads, *namely*, (i) formulation of environmental policies, laws and their enforcement, (ii) setting ESs and their enforcement, (iii) EIA, (iv) collection and dissemination of information about environmental matters, (v) participation in the formulation and implementation of international environmental policy, (vi) co-ordination (research on environmental protection and other activities), and (vii) advisory.<sup>38</sup>

A careful comparative look at the structural framework of the Authority and the EPA discloses that the latter moves away from the multi-Ministerial-influence in the formulation and implementation of environmental policies and laws. It gives representation to the Federal and Regional Governments, the Ethiopian Chamber of Commerce, local NGOs, and Trade Unions in the formulation of environmental policies, laws, strategies, and in the approval of directives, guidelines and ESs prepared by the EPA, and implementation of the EPE. It also reveals that it, among others, is made more responsive to the environmental policies and objectives reflected in the Constitution as well as in the EPE and to their realization. With this changed philosophy and role perception, it is assigned the overall task

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<sup>33</sup> Art 5, EPO Proclamation.

<sup>34</sup> Art 3(2), *ibid*.

<sup>35</sup> Arts 7(2) & 11(1), *ibid*.

<sup>36</sup> Art 8, *ibid*. The first EC is constituted only on September 21, 2007. It consists of : (i) the Deputy Prime Minister, Chairman, (ii) the State Minister, Ministry of Agricultural and Rural Development, (iii) the State Minister, Ministry of Mines and Energy, (iv) the State Minister, Ministry of Water Resources, (v) the State Minister, Ministry of Public Works and Urban Development, (vi) the State Minister, Ministry of Trade and Industries, (vii) the Mayor, Addis Ababa City Administration, (viii) the Mayor, Dire Dawa City Administration, (ix) the Head, National Regional States (all) (x) the President, Ethiopian Chamber of Commerce, (xi) the President, Forum for Environment, (xii) the President, Confederation of Ethiopian Trade Unions, and (xiii) the Director General, EPA.

<sup>37</sup> Art 9, *ibid*.

<sup>38</sup> Art 6, *ibid*.

of eco-management. To accomplish its task in a better way, the EPA is armed with the hitherto unknown multifarious powers (like setting ESs and their compliance, power to seek entry into any premise, and inspect anything while enforcing the ESs), equipped with a variety of strategies (like establishing a system for EIA, carrying cost-benefit analysis of development projects), and entrusted with certain duties (like liaising with competent agencies for environmental protection, carrying studies for combating desertification and mitigating the effects of draught on the environment and taking corrective measures).

### ***3.1.2 Sectoral Units and Regional Environmental Agencies- A New Co-ordination Institutional Strategy***

The EPO Proclamation has brought in another significant change in the environmental monitoring system. It mandates every Ministerial and Government Unit of the Federal and Regional Governments to establish (or designate an existing one) an environmental unit and to charge it with the responsibility of ensuring that activities of the Ministerial or Government Unit are compatible with and carried out in accordance with the environmental laws in vogue.<sup>39</sup>

It also mandates the Regional States, and the Addis Ababa and the Dire Dawa Administrations to establish (or designate the existing one) an independent environmental agency in the region. Such an institution is required to be premised on the EPE and the CSE and to incorporate a decision making process that allows public participation. And the REA be charged with the responsibility of: (i) coordinating the formulation, implementation, review and revision of the regional conservation strategies, (ii) monitoring, protecting and regulating the environment of the region, and (iii) ensuring the implementation of the Federal ESs, or of the region's own if they are not less stringent than that of the Federal ones.<sup>40</sup> The REA is also required to prepare periodic reports on the status of environment and of sustainable development in the region and to submit them to the EPA.<sup>41</sup>

## **3.2 Operational Strategies**

In pursuance of its objective, the EPO Proclamation has conferred more than two dozens 'powers and duties' on the EPA. However, subsequently, within less than two months, two of these powers and duties, *namely*, 'setting of ESs and their compliance' and the 'establishing a system of EIA', probably perceiving them as the most crucial strategies for accomplishing the environmental objectives reflected in the Constitution and the EPE, received legislative attention. The EPC Proclamation and the EIA Proclamation respectively govern these two.

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<sup>39</sup> Art 14, *ibid*.

<sup>40</sup> Art 15(1) & (2), read with art 2(8), *ibid*.

<sup>41</sup> Art 15(3), *ibid*. However, it is not clear as to whether these reports are subject to review by the EPA.

### **3.2.1 Environmental Pollution Control: Strategy and Scheme**

The EPC Proclamation, as mentioned earlier, mandates the EPA to lay down ESs for different sectors of the environment. Discharge of effluents in the given environment in excess of the stipulated standards amounts to 'pollution'. It categorically prohibits a person from polluting the environment. Art 3(1) states that 'No person shall pollute or cause any other person to pollute the environment by violating the relevant environmental standard'. It makes an act of pollution, and acts related thereto, an offence.

#### **A. Environmental standards: Norms and compliance with them**

After taking into account the environmental standards prevalent in some of the developing Asian and African countries, like Bangladesh, Pakistan, India, Jamaica, China, Thailand, Uganda, Nigeria, Zambia, and Kenya, and looking into the relevant information obtained from the UNEP, United Nations Industrial Development Organization (UNIDO), the European Union, and the United States' Environmental Protection Agency, the EPA has prepared a set of ESs to be introduced throughout Ethiopia.<sup>42</sup> However, a REA, taking into consideration peculiar ecological conditions in the region, can have its own standards provided they are not lesser stringent than that prescribed by the EPA.

However, these standards are merely provisional in nature and are not in operation as they are still awaiting the requisite statutory approval of the EC.

The EPA or the concerned REA is mandated to ensure 'compliance' of the ESs through EIs appointed by it.<sup>43</sup> With a view to ensuring effective compliance with these standards, an EI is empowered:

1. *To seek entry into any land or premise at any time (which seems appropriate to him) even without a court order or prior notice, if he thinks that such a notice is likely to be prejudicial to the efficient performance of his statutory duty.*
2. *To question any person alone or in the presence of witness.*
3. *To check, copy or extract of any paper, file or a document, which, in his opinion, is related to pollution.*
4. *To take samples, in the presence of the proprietor or his representative, of any material and to carry out or cause to be carried out tests thereof for determining whether or not it causes harm to the environment or to life.*
5. *To take photographs, measure, draw, or examine any commodity, process or facility for ensuring compliance of the Proclamation and/or any other relevant law.*
6. *To seize any equipment or any other object that is believed to have been used in the commission of an offence under the Proclamation and/or any other relevant law.*

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<sup>42</sup> See, Environmental Protection Authority, *Provisional Standards for Industrial Pollution Control in Ethiopia* (2007).

<sup>43</sup> Art 7(1), EPC Proclamation.



7. *To specify a person the matter constituting contravention of the Proclamation and/or of any other relevant law, and to specify the measures that he needs to take to remedy the contravention within the stipulated period.*
8. *To suggest corrective measures to be taken immediately, including cessation of the activity, when he suspects that an activity may cause damage to the environment.*<sup>44</sup>

With a view to ensuring unreserved compliance with the ESs, the Proclamation also mandates a person, natural as well as juridical, not to hinder or obstruct an EI in the execution of his duty.

The EPA or the relevant REA is empowered to take any administrative or legal measure, including the closure or relocation of an enterprise, if it, in its opinion, poses a risk to human health or to the environment.

### ***B. Environmental crimes: A strategy for controlling environmental pollution***

One of the prominent strategies employed for combating environmental pollution is the creation of environmental crimes and subjecting their perpetrators to severe punitive sanctions. The EPC and the EIA Proclamations have resorted to this strategy.

The EPC Proclamation has created a set of offences relating to: (i) pollution, (ii) environmental inspectors, (iii) records, and (iv) wastes and hazardous materials.

By virtue of art 3(1) of the EPC Proclamation, as mentioned earlier, no person is allowed to pollute or to cause any other person to pollute the environment. And art 16 of the Proclamation makes an act of discharging pollutants in the environment in violation of the stipulated ESs an offence. The offence is punishable by a fine of not less than 1,000 Birr and not more than 5,000 Birr or an imprisonment for a term between one year and ten years, or both. And if the polluter happens to be a juridical person, its liability further escalates. It is punishable by a fine amounting between 5,000 and 25,000 Birr *and* imprisonment of the officer in charge for a term between five and ten years or by a fine between 5,000 and 10,000 Birr or both.

The Criminal Code of 2004 (hereinafter the CC),<sup>45</sup> however, stipulates more severe punishment for causing pollution. It provides for a fine of upto 10,000 Birr or rigorous imprisonment for a term of up to five years for discharging, in contravention of the relevant law, pollutants into the environment. If the pollution results in serious consequences on the health or life of persons or on the environment, the term of rigorous imprisonment extends up to ten years.<sup>46</sup> The CC also provides for rigorous imprisonment for a term of upto fifteen years if a person intentionally poisons a well, cistern, spring, water hole, river or lake.<sup>47</sup>

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<sup>44</sup> Art 8, *ibid*.

<sup>45</sup> Proclamation No. 414/2004. It has revised and repealed the Penal Code of the Empire of Ethiopia, 1957.

<sup>46</sup> Art 519, *ibid*.

<sup>47</sup> Art 517(2), *ibid*.

Under the EPC Proclamation, the EIs are, *inter alia*, authorized to seek entry into any premises, to inspect documents, to question a person, to take samples and to carry their tests, and to seize any instrument. It also creates corresponding obligation on the persons concerned to render the requisite assistance to him. Art 13 makes (i) any act of a person that hinders or obstructs an EI in the execution of his duty, (ii) a failure of a person to comply with lawful orders of an EI, (iii) a refusal to an EI to seek entry into any land or premise, (iv) an act of hindering an EI from getting access to records, (v) an act of preventing an EI from checking, copying or extracting any paper, file or any other document, and (vi) withholding, misleading or giving wrong information to an EI, an offence. Such a person, if happens to be a natural person, is punished by a fine of not less than 3,000 Birr and not more than 10,000 Birr. If it happens to be a juridical person, its liability extends to a fine of not less than 10,000 Birr and not more than 20,000 Birr and an imprisonment (of the officer in charge) for a term between one year and two years or a fine amounting between 5,000 and 10,000 Birr or both.

If a person, who, by virtue of the Proclamation or any regulation, is required to keep records fails to do so or alters records, he is punishable by a fine of not less than 10,000 Birr and not more than 20,000 Birr.<sup>48</sup>

A person who fails to manage any hazardous waste or another substance according to the relevant laws, mislabels or fails to label or in any way withholds information about any hazardous waste or other material or attempts to take part or takes part or attempts to aid or aids in the illegal traffic of any hazardous waste or other material is punishable by a fine of not less than 20,000 Birr and not more than 50,000 Birr. If the person happens to be a juridical person, it is punishable by a fine of not less than 50,000 Birr and not more than 100,000 Birr and the officer in charge to an imprisonment for a term between five and ten years, or a fine of not less than 5,000 Birr and not more than 10,000 Birr or both.<sup>49</sup>

In addition to these specified penal sanctions, the Proclamation contains two additional punitive clauses. Art 12, which is a sort of residuary penal provision, deals with the punishment for the acts that amount to offences under the Proclamation or any other law in force but no punishment is provided therefor either in the Proclamation or the Penal Code of 1957. It provides for a fine of not less than 5,000 Birr and not more than 10,000 Birr or an imprisonment for a term up to one year or both, if the offender happens to be a natural person. And if the perpetrator happens to be a juridical person, the punishment provided for is a fine of not less than 10,000 Birr and not more than 20,000 Birr. However, if the juridical person happened to be in charge and had knowledge about the commission of the offence but failed in his duty to avert it, he would be ordered to pay a fine of not less than 5,000 Birr and not more than 10,000 Birr or to undergo an imprisonment for a term up to two years or to bear both. However, art 12(3) makes the punishment prescribed under the Proclamation inapplicable if the punishment provided for the offence by the Penal Code (now CC) is more severe.

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<sup>48</sup> Art 14, EPC Proclamation.

<sup>49</sup> Art 15, *ibid*.

Art 17 of the Proclamation, *inter alia*, empowers the trial court, in its discretion, to order confiscation of ‘any thing used in the commission of the offence in favor of the State or to dispose it of in any other way’ and to order the offender to bear the cost of cleaning up and disposing of the substance, chemical or equipment.

The EIA Proclamation also creates a set of environmental crimes for ensuring EIA. Without prejudice to the relevant provisions of the Penal Code (now CC), it provides for criminal liability for operating a development activity without obtaining the requisite authorization from the EPA or the relevant REA,<sup>50</sup> making a false presentation in the EIS Report, failing to keep the required records, and failing to fulfill conditions attached with the authorization. The first two offences are made punishable by a fine ranging in between 50,000 Birr and 100,000 Birr, while the latter two are made punishable by a fine of not less than 10,000 Birr and not more than 20,000 Birr. It also provides for an additional fine of not less than 5,000 Birr and not more than 10,000 Birr for a Manager if he failed to exercise his due diligence.

The CC also labels certain acts contrary to EIA as offences. It provides for simple imprisonment for a term of up to one year for a person who implements a development project requiring EIA without obtaining the requisite authorization or makes a false statement concerning EIA.<sup>51</sup>

### ***C. Restoration of damage to the environment: A strategy of the eco-management***

The EPC and the EIA Proclamations, in addition to the penal sanctions mentioned here before, also provide for restoration of the damage to the environment.

Art 17(c) of the EPC Proclamation empowers a trial court, in its discretion, to order the person convicted under the Proclamation or Regulations issued thereunder to ‘restore to the state in which the environment was prior to the infliction of the damage, and when such restoration is not possible to pay appropriate compensation’. Similarly, art 18(5) of the EIA Proclamation allows a trial court, before which a person is prosecuted for committing an offence under the Proclamation and/or Regulations or Directives issued thereunder, in its discretion, to, in addition to the penalty imposed, order the convicted person ‘to restore or in any other way compensate for the damage inflicted’

Art 3(4) of the EPC Proclamation, incorporating the ‘polluter-pays principle’, and also empowers the EPA and the REA to ask a polluter to clean up or to pay the cost of cleaning up the polluted environment.

### ***D. Incentives: A strategy for preventing environmental pollution***

The EPC Proclamation allows the EPA to exempt any new imported equipment for controlling pollution from customs duty. The Council of Ministers is expected to issue a

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<sup>50</sup> Art 18(2), EIA Proclamation. It seems that the Printers have inadvertently omitted some material part from the provision.

<sup>51</sup> Art 521, the CC.

Regulation providing incentives for the existing undertakings.<sup>52</sup> However, it has yet to issue such a Regulation. Nevertheless, a Draft Regulation prepared in 2005 by the EPA,<sup>53</sup> for consideration of the Council of Ministers, *inter alia*, indicates the following incentives. Art 10 says:

*10. Incentives:*

1. *An industrial enterprise that installs equipment to avoid the generation or to recycle pollutants may be entitled to a 30 percent depreciation allowance on such equipment.*
2. *An industrial enterprise that installs equipment to minimize the generation of pollutants at least by 50 percent shall be granted a 15 percent depreciation allowance on the equipment.*
3. *Any equipment or spare-parts thereof destined to treat a pollutant shall be exempted from all taxes.*
4. *The incentive rights granted under these Regulations shall not limit the enjoyment of other rights provided for under other laws.*

Similarly, the EIA Proclamation mandates the EPA and the REA to, within the means available, 'support implementation of a project destined to rehabilitate a degraded environment' It enables the EPA, within its capacity, to provide any environmental rehabilitation, pollution prevention, or clean up project with financial and technical support to cover additional costs.<sup>54</sup>

***E. Public interest litigation: An innovative strategy of the environmental pollution control***

Art 3 of the EPC Proclamation empowers the EPA and the relevant REA to 'take any administrative or legal measure', penal and/or civil, against a polluter. Nevertheless, art 11 of the EPC Proclamation grants 'standing' to a private individual for initiating action 'against any person' who is allegedly causing or is likely to cause damage to the environment. It reads:

*11. Right to standing*

- 1) *Any person shall have, without the need to show any vested interest, the right to lodge a complaint at the Authority or the relevant regional environmental agency against any person allegedly causing actual or potential damage to the environment.*
- 2) *When the Authority or regional environmental agency fails to give a decision within thirty days or when the person who has lodged the complaint is dissatisfied with the decision, he may institute a court*

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<sup>52</sup> Art 10, EPC Proclamation.

<sup>53</sup> The Industrial Pollution Prevention and Control Regulation (2005).

<sup>54</sup> Art 16(2), EIA Proclamation.

*case within sixty days from the date the decision was given or the deadline for decision has elapsed.*

The phraseology of art 11 does not make it clear as to whether a private individual has 'standing' in initiating criminal as well as civil action against an actual or a potential polluter. Some of the terms (like 'vested interests' and 'complaint') used in the article give indication that he has 'standing' in initiating only a civil action, while others (like 'instituting a court case' and 'damage to the environment', which under the Proclamation can be done only by violating the ESs and thereby committing an offence thereunder) rule out such a restriction. Further, from the wordings of art 11(2) it becomes difficult to ascertain the underlying legislative intent. The provision does not make it crystal clear as to whether the EPA or the REA can/cannot be made a party to the 'court case', along with, or in exclusion of, the alleged polluter. It leaves scope for two possible interpretations. A complainant may argue that it will be difficult/impossible for him to know the 'reasons' and 'factors' that prompted the EPA or the REA for not taking a 'decision' or taking a 'decision' that is neither sound nor appealing unless the former is made a party to the case. And it [the EPA or the REA] should be made accountable for failing in its statutory obligation (of controlling environmental pollution). While the EPA or the REA may oppose such a move on the ground that art 11 gives the complainant the 'right to standing' to initiate an action against a 'person' who is causing or is likely to cause 'damage to the environment' and not against a supervisory body, like it. Both the arguments seem to be equally appealing and fitting into the legislative intent reflected in art 11(2).<sup>55</sup> This sort of ambivalence should be done away with by the Legislature.

Nevertheless, art 11, in the backdrop of art 33 of the Civil Procedure Code of 1965, which lays down a general principle that 'no person' can be a plaintiff in a civil action 'unless he has vested interest in the subject-matter of the suit', carves out an exception. It allows 'any person', even having 'no vested interest', to initiate civil proceedings against a person who is causing or is likely to cause damage to the environment. The phrases 'any person' and 'without the need to show any vested interest' used in art 11 are of wide amplitude. They

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<sup>55</sup> Recently, in *Action for Professionals' Association for the People (APAP) v Environmental Protection Authority* (Civil File No. 64902, Federal First Instance Court, October 31, 2006 [21.02.1999 (EC)] (Unpublished), the first case instituted under art 11 of the EPC Proclamation, these viewpoints were agitated before the Federal First Instance Court. The APAP, a social organization, after lodging a complaint on December 8, 2005 with the EPA about pollution of Akaki and Modjo rivers caused due to discharge of industrial effluents contrary to the EPC Proclamation and urging it to take immediate steps to combat it. The EPA, on December 26, 2005, responding the complaint, pleaded that the environmental standards are still in the draft form and are awaiting the EC's approval and therefore they cannot be relied upon for deciding whether the rivers are polluted or not. It also asserted that it has taken 'all the necessary measures' to combat the pollution. The APAP, being dissatisfied, on March 16, 2006 approached the Federal First Instance Court for seeking apt relief. It made the EPA a defendant. In its petition, APAP, *inter alia*, urged the court: (i) to compel the EPA to take administrative and legal measures to stop the alleged pollution, (ii) to direct the EPA to clean both the allegedly polluted rivers, and (iii) to institute inspectors to ensure that the EPA takes the necessary measures. The court, on 31.10.2006 [21.02.1999 (EC)], ruled that art 11(2) does not permit APAP to sue the EPA. The present writer is told that the Court's ruling is challenged in the Federal High Court and it has decided to hear it. If the appeal is admitted, the issue may probably resurface before the High Court.

enable environmentalists, public-spirited individuals, NGOs or organizations, to invoke art 11 in their fight against environmental degradation.

It enables a private individual to make the EPA and the REA more responsive to the environmental protection and to make them to act with vigor to discipline actual and potential polluters. It gives an opportunity to environmentalists, in the public interest, to attract attention of the EPA and the REA to the environmental pollution when their EIs, advertently or inadvertently, turn blind eyes to anti-environmental activities or deliberately become inactive in discharging their statutory obligations.

However, it is pertinent to note a few pragmatic facts that diminish the practical utility of art 11. When a private individual/an organization intends to institute or institutes a court case against a person for causing or likely to cause damage to the environment, it may not be easy for him/it to collect all the required information to substantiate his/its assertion in the court. He/it does not have any authority to receive information from the polluter or from the EPA or the relevant REA. By virtue of art 19 of the EPC Proclamation, a person engaged in an activity pertaining to any of the provisions of the Proclamation (or any other related law) is obliged to provide information to the EPA or the relevant REA, and only the EPA has access to all environmental information. He/it also does not have any legal authority to seek entry into the premises where alleged anti-environmental activities are being carried out, to take sample of the effluents therefrom, or to inspect documents or equipments. If he/it ventures to do so, he/it takes risk of being prosecuted for unlawful trespass. All these powers, as mentioned earlier, vest with the EIs. Therefore, all the required information can be accessed by, and is available to, the EPA or the relevant REA. In the absence of such information, a complainant is bound to loose his case. Thus, art 11 practically turns out to be non-existent. However, with a view to overcoming the difficulty and to making the 'standing' of a private individual more effective, environmental laws of most of the countries, recognizing *locus standii* of private individuals in environmental matters, have, through law, made it obligatory for the pollution control authorities to make available, on demand, all the relevant information available with them to the individual intending to institute a case against a polluter.<sup>56</sup> Similar provision, with requisite modifications, may advisably be incorporated in the EPC Proclamation.

### **3.3 Grievance Redressal Mechanism**

#### ***3.3.1 Redress of Grievance under the EPC Proclamation***

The EPC Proclamation, as mentioned earlier, empowers the EPA to formulate ESs and to ensure compliance to them through the EIs, who are armed with vast powers.

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<sup>56</sup> For example, in India the Water (Prevention and Control of Pollution) Act, 1974 and the Air (Prevention and Control of Pollution) Act, 1981 oblige the Pollution Control Boards to disclose relevant internal reports and information to a person seeking to prosecute a polluter. However, a Pollution Control Board is allowed to withhold any report if it considers that disclosure would be against 'the public interest'. While in some jurisdictions, individuals are conferred with the right to information, which can be invoked to obtain the requisite information from the environmental protection agencies.

A look at these powers convinces one that EIs need to be armed with these powers for effective compliance of the standards even though some of the powers are drastic. Exercise of most of the powers, obviously in the quest for controlling pollution, is left entirely to the subjective satisfaction of the concerned EI. He is allowed to invoke them when he apprehends that the ESs have been violated or are likely to be violated. Some of the powers, if exercised capriciously or on unfounded apprehensions, may even go against the spirit of some of the cherished rights, constitutional or statutory, of an individual. The Proclamation merely expects an EI to 'discharge' his powers 'with due diligence and impartiality'<sup>57</sup> Nevertheless, exercise of these powers in a capricious manner or on some unfounded apprehensions cannot be ruled out. The Proclamation does not hint at any substantive or procedural restrictions on the EI. He is left entirely to his conscience and sense of impartiality when he decides to invoke and exercise his powers.

However, the Proclamation provides for a right to appeal to the 'Head' of the EPA [i.e. the Director General] or of the concerned REA by a person dissatisfied with any of the measures taken by the EI. Such an appeal has to be made within ten days from the date on which the EI has taken the measure. And if the 'Head' has not given any decision on the appeal or has given a decision with which the person is not satisfied, he may, within thirty days from the date on which the decision was given or the deadline for such a decision has elapsed,<sup>58</sup> institute a case in a Federal Court of First Instance or a designated regional court, as the case may be.

However, in the absence of self-evident malafide actions of the EI, it would be difficult for the aggrieved person to either convince the Head of the EPA (or of the REA) that the EI did not exercise his powers 'with due diligence and impartiality', the phrase pregnant with legal imprecision and of wide amplitude.

The Proclamation is silent about the way and the manner in which the 'Head' is expected to handle the grievance at his hand. It seems that there is neither a Directive nor a Regulation on the subject. Such a legal instrument, in the opinion of the present writer, is necessary for, *at least*, two reasons: (i) it will streamline the decision-making process at the EPA and the REA, and (ii) it will help to eliminate the apprehended departmental bias from the decision-making process. An aggrieved person might apprehend that the institutional bias might go in favor of the EI, an appointee of the 'Head'. It is one of the settled principles in administrative law that justice should not only be done but also should be seen to have been done. Such an instrument, therefore, will do away with the apprehension and thereby will boost his confidence (and that of others) in the decision-making process at the EPA and the REA levels. It will also ultimately relieve the EPA and the REA from unwarranted court proceedings.

Further, proving a case by an aggrieved person against the EI before the court, for the reasons mentioned here before, is not an easy task. However, if he has been able to make

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<sup>57</sup> Art 7(2), EPC Proclamation.

<sup>58</sup> Art 9, *ibid*. However, art 9(1) does not stipulate any deadline for the Head of the EPA or of the REA for giving his decision. Therefore, a combined reading of art 9(1) & (2), in this context, exhibits some legislative ambivalence.

out his case, the Proclamation is silent about the ‘relief’ he is entitled to as well as the kind of ‘liability’ that can be imposed on the erred EI. It gives an impression that the EI, in the name of seeking compliance with the ESs, is free to exercise his powers even in a capricious manner with impunity. If the impression is correct, it, in the present submission, deserves serious attention of the policy-makers. An appropriate inbuilt mechanism within the administration of the EPA and the REA is, therefore, needed. Such a move will not only boost confidence of the aggrieved persons in the grievance redressal mechanism designed at the EPA, the REA and the judicial levels but will also desist the EIs from exercising their powers on flimsy grounds.

### ***3.3.2 Redress of Grievance under the EIA Proclamation***

The EIA Proclamation empowers the EPA or the relevant REA, after evaluating an EIS Report, to approve, refuse or allow with certain conditions the implementation of a development project, and in the latter case to monitor their compliance. It also provides a grievance procedure for a person who is dissatisfied with certain decisions of the EPA or the relevant REA. Art 17 says:

#### *17. Grievance Procedures*

- 1) Any person dissatisfied with the authorization or monitoring or any decision of the Authority or the relevant regional environmental agency regarding the project may submit a grievance notice to the head of the Authority or the relevant regional environmental agency, as may be appropriate.*
- 2) The decision of the head of the Authority or relevant regional environmental agency shall, as provided under Sub Article (1) above, be issued within 30 days following the receipt of the grievance.*

The provision is self-explanatory. It enables a dissatisfied proponent to seek redress from the Director General of the EPA or the Head of the relevant REA. They are obligated to give their decision within thirty days from the receipt of the grievance notice.

For appreciating the nature and ambit of the grievance procedure, it is, however, necessary to note two facts. *First*, the EPA or the relevant REA, after evaluating the EIS Report, is empowered to approve, approve with conditions, or refuse an authorization for the proponent’s project and to monitor the implementation of an authorized project and to ensure the compliance of the conditions attached with the authorization. *Secondly*, the Proclamation, unlike the EPC Proclamation, does not provide for any judicial remedy to a proponent who is dissatisfied with any decision, including decision about the authorization or monitoring thereof, of the EPA or the REA.

The absence of a provision in the Proclamation for seeking judicial redress against any decision of the Director General of the EPA or of the Head of the REA leaves scope for two conflicting views.



One may argue that the Proclamation excludes judicial review of decisions of the 'Head' of the EPA and of the REA as it gives finality to the decisions. This view gets support from the fact that the EPC Proclamation contains in it an explicit provision enabling a person dissatisfied with the decision of the Director General of the EPA or of the Head of the REA to seek judicial remedy. The absence of a similar provision in the EIA Proclamation exhibits the legislative intent of keeping these decisions away from judicial scrutiny. Further, one may even seek support from art 3, read with art 9, of the EPC Proclamation, which excludes judicial review of certain decisions of the EPA and of the REA pertaining to the control of pollution. The EPC Proclamation does not allow a polluter to seek judicial review of: (i) any of administrative or legal measures taken against him by the EPA or the REA, (ii) its order to install a sound technology for reducing or avoiding generation of waste and to employ methods of recycling of waste, (iii) its order to clean up or to pay the cost of cleaning up of the polluted environment, and (iv) order to close or relocate his enterprise if it is posing threat to the human health or to the environment. The exclusion of judicial review of decisions of the EPA and of the REA under the EIA Proclamation is, therefore, in tune with the legislative policy of keeping decisions of the EPA and of the REA beyond judicial purview.

One, however, may take a position that the absence of explicit provision for judicial redress against the decisions of the Director General and of the Head of the REA in the EIA Proclamation does not give finality to the decisions of the EPA or of the REA. Such an argument finds its base in, and seeks support from, art 37 of the FDRE Constitution. It says that 'everyone has the right to bring a justiciable matter to, and to obtain a decision or judgment by, a court of law or any other competent body with judicial power' In no way, he may argue, can the EIA Proclamation take away the constitutional right of access to justice. A dissatisfied proponent, he may assert, therefore, cannot be precluded from seeking judicial redress.

Both the views seem to be equally sound and convincing. We will have to wait until a test case reaches to a court of law to know the judicial interpretation of art 17. However, the present writer is inclined to prefer the second view for the simple reason that an ordinary legislative instrument cannot vitiate a constitutional right.

## **Conclusions**

The FDRE Constitution guarantees the fundamental right to have a clean and healthy environment, the right to improved living standards and the right to sustainable development. It also includes in it a set of well-articulated 'environmental objectives' and accords them the status of 'guiding principles' in the state governance.

Immediately after the Constitution came into force, Ethiopia, in 1995, established the Authority and assigned it, *inter alia*, the task of formulating Environmental Policy. It accomplished its task in 1997 by formulating a comprehensive EPE. The EPE is premised on, and is built around, the fundamental rights to live in a healthy environment and to sustainable development, and the environmental conservation strategy. It also offers a set of sound baseline principles for implementing the policy. The EPE is indeed in tune with the international environmental policy and principles.

In pursuance of the EPE and the environmental spirit reflected in the FDRE Constitution, the Federal Parliament, in 2002, restructured the EPA and armed it with a new set of powers and duties. It also enacted other two core Proclamations for carrying out EIA and controlling environmental pollution.

However, none of the two Proclamations is yet in operation. There are no environmental standards to seek compliance for or no EIA norms to apply. In the absence of these standards and norms, these anti-pollution Proclamations are still dormant in the statute book. The EPA has prepared comprehensive ESs, EIA guidelines, and a few draft Directives for effective environmental governance but they do not have legal force as they have yet to receive the requisite approval of the EC. The EC, for the first time, was constituted in September 2007. It has yet to convene its first meeting. Hopefully, these environmental standards and guidelines will become operative very soon as the EC is set to meet in the near future. It is hoped that EPA thereafter will start functioning with vigor to combat the environmental pollution and to make every possible effort to see that very soon the constitutional right of Ethiopians to live in a clean and healthy environment and the right to sustainable development and to improved living standards become a reality.

However, in the meantime, it would be apt to pay due attention to some of the gray areas, structural as well as operational, spotted in this paper to make the Ethiopian environmental law regime more effective. There is a need to create some appropriate inbuilt-mechanism to ensure that the EIs, who are armed with vast powers, do not exercise their powers in a capricious manner and thereby put legitimate interests and rights of the persons at stake with impunity. Similarly, the right to standing under the EPC Proclamation and the mechanism for grievance redress designed under the EPC and EIA Proclamations, for the reasons highlighted in the paper, deserve serious re-look.

The essence of the EPO, the EPC, and the EIA Proclamations may be clustered, with appropriate thematic segments, in a single Proclamation. The suggestion, if acted upon, will lead to a couple of advantages for the enforcing authorities as well as for the persons concerned. A combined reading of the three Proclamations reveals that a couple of articles are reproduced in more than one Proclamation.<sup>59</sup> Such a repetition can, without losing context, be avoided in the suggested unified Proclamation. Some of the articles, when read in the context of other Proclamations, sound inapt as they are, with elaboration, dealt under some other Proclamations.<sup>60</sup> Such provisions can be appropriately modified in the proposed new Proclamation.

Lastly, in the opinion of the present writer, it is high time to undertake a decade's review of the achievements of the EPE to see how many of the policy-propositions, and the sectoral and cross-sectoral environmental policies enumerated in the EPE are/are not given

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<sup>59</sup> For example, arts 2(1), 2(3), 2(6), 2(8), 2(12) of the EPO Proclamation are repeated in the EIA Proclamation and the EPC Proclamation.

<sup>60</sup> For example, arts 6(4) & 6(5) of the EPO Proclamation become obsolete in the light of the EIA Proclamation. Similarly, arts 6(7), 6(10) & 6(15) of the EPO Proclamation, in the light of the EPC Proclamation, warrant apt modifications.

legislative effect to and reasons therefor. Such an evaluation will reveal the extent to which environmental policies have been translated into the law. It will also stimulate and initiate legislative processes for translating the hitherto untouched/partially touched policy statements into legislative propositions.