

MEMORANDUM ON RECOMMENDATIONS TO REVAMP THE ENVIRONMENTAL IMPACT ASSESSMENT PROCESS IN SARAWAK

Submitted by

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I.0 Introduction

Sahabat Alam Malaysia is submitting this memorandum in view of weaknesses in the environmental impact assessment process in Sarawak. Prior to this, SAM had submitted a memorandum titled “The Environmental Impact Assessment Process In Sarawak Must Be Reconsidered And Reviewed” on 9 September 2009 to express our concerns on the EIA process in Sarawak, specifically on its lack of mandatory public participation and its inadequacies in addressing particular activities such as logging operations.

Since SAM’s recommendations in the previous memorandum have yet to be fulfilled in totality, we are resubmitting an updated memorandum because it is imperative to revamp the EIA process as Sarawak’s future development plans would have substantial impacts to the environment, rights of local community, lives and the livelihood of people who depend on the natural resources in the State.

In this memorandum, we have reiterated some of our concerns and recommendations, besides suggesting improvements to the current EIA process.

1.1 Background of EIA requirement and law in Malaysia and Sarawak

In Malaysia, the Environmental Quality Act (1974) Act 127 which is a Federal Act was enacted to ensure the prevention, abatement, control of pollution and enhancement of the environment. This Act applies to the whole of Malaysia.

Among its subsidiary legislations is the Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) Order 1987. The Environmental Impact Assessment (EIA) is required for activities prescribed under the Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) Order 1987.

In Sabah, under the Environment Protection (Prescribed Activities) (Environmental Impact Assessment) Order 2005, submission of a proposal for mitigation measures report or an EIA report for approval of the Director of the Environment Protection Department is mandatory before the commencement of any of the prescribed activities listed in the First Schedule and the Second Schedule of the Order. **Public hearing is conducted for Special-EIAs, providing a two-stage opportunity for the public to submit views and comments.**

In Sarawak, in 1993 the State Legislative Assembly amended the Colonial Natural Resources Ordinance, 1949 to include “environment”, to become the present Natural Resources and Environment Ordinance, 1993. With effect from 1st February, 1994 the Natural Resources Board was cited and reconstituted as “the Natural Resources and Environment Board” (NREB).

The enactment of the Natural Resources and Environment (Prescribed Activities) Order, 1994, a subsidiary legislation to the Natural Resources and Environment Ordinance, 1993 (NREO) set forth the EIA process for certain categories of development projects to be undertaken at the state level in Sarawak.

The Sarawak EIA law, unlike its Federal counterpart, excludes mandatory public participation in the process, relegating the matter to the discretion of individual project proponents.

1.2 EIA Evaluation Procedure in Sarawak

The policy and the procedure of EIA in Sarawak are outlined in a handbook to guide an interested developer on any of the prescribed activities as listed under the Natural Resources and Environment Order, 1997. Similar to the federal procedure, there are two categories of EIA; the preliminary and the Detailed EIA. However, the procedure for the Detailed EIA report in Sarawak does not provide a mandatory requirement for any public participation. The onus to involve the public is on the initiative of the developer.

In practice, the NREB does not require the submission of a Preliminary nor a Detailed EIA. It is deemed unnecessary to categorize the EIA reports as Article 3(2) of the Natural Resources and Environment, Order 1997 requires a developer to scope the depth and coverage of the EIA report with the Controller of the NREB prior to conduct of study for the preparation of the report.

The EIA reports submitted to the NREB are evaluated by a panel of experts drawn primarily from relevant government agencies, and the recommendations from the panel are taken into consideration in the approval process by the Controller. In granting approvals to project proponents, the NREB prescribes environmental conditions and the project proponents must undertake (in writing to the Board) to comply with all the conditions. Post-EIA monitoring is carried out by the project proponents and the NREB secretariat.

The fundamental difference between the Sarawak Order and the Federal Guidelines is essentially the entitlement in the Federal EQA to a copy of the EIA report by the public and the subsequent public comments to the Review Panel before an approval can be granted by the Director-General. The Sarawak Order excludes these provisions.

2.0 Weaknesses in the EIA Process in Sarawak

The amendment to the Sarawak Ordinance to include environment in the Colonial Natural Resources Ordinance has some drawbacks because of conflict between environmental protection and development objectives. As decision making about environmental concerns is internalised within a predominantly development oriented agency, the issue of transparency and accountability is a concern.

The amendment to the Sarawak Ordinance enables the Controller to review any project, irrespective of size. There are a number of State natural resource statutes, particularly those for forestry or mining which have, as one of their objectives, the mitigation and regulation of detrimental environmental impact of particular activities. However, environmental protection is a subsidiary objective of these statutes in relation to the overriding objective of facilitating the utilisation of natural resources.¹

Administering two parallel procedures for EIA in Sarawak necessitates close consultation between the Department of Environment (DOE) and the NREB to avoid duplication of authority. A drawback of the current dual EIA procedures is that a number of activities which may impact the environment fall outside their respected ambits. Not all activities which have significant environmental impacts come in the purview of the respective lists of prescribed activities for reasons of the limited scale or the type of project activity being proposed.

Following is a number of weaknesses in the EIA system in place in Sarawak.

¹ Ali Memon, "Devolution of environmental regulation: EIA in Malaysia" in UNEP EIA Training Resource Manual © Case studies from developing countries

2.1 Absence of Mandatory Public Participation in the EIA process

The process for preparing and evaluating EIA reports in Sarawak is parallel to that under the federal EQA statute with one significant departure. The scope for public participation is limited under the Sarawak state EIA process compared to the federal EIA process.

Public participation in the EIA process is extremely crucial because involvement of all concerned stakeholders in the decision-making process ensures a higher degree of transparency in the project needs assessment and approval. Public participation will also promote the strict adherence to all laws and regulations by all the concerned parties, legally binds stakeholders to promises and pledges that are made within the process and possibly other consultation outlets related to the project. It would also provide impacted people with better safeguards for negotiations on issues that may affect them.

However the Sarawak government has previously argued that the “NREB implements the EIA process in consultation with other agencies and as such it is a concerted effort of not only NREB but also other agencies as well” in response to the criticisms of the lack of public participation in its EIA process.² This is as if to imply that inter-government agency review of EIA reports is sufficient and able to replace a wider base of feedback.

2.2 Lack of information to impacted communities and other stakeholders

Without obligation to invite public participation in the EIA process, it has become very difficult for impacted peoples and civil society groups to freely obtain information on projects that can potentially generate grave environmental and social impacts.

As a result, in Sarawak, instead of the state authority and project proponents being compelled to inform, consult and negotiate with impacted communities and the public on such issues as a matter of legal and ethical duty, it is often the case that communities and public have to request for information on projects that are of concern to them. Even when information is sought, there is no guarantee that the information requested will be given.

This also implies that prior to their information request groups or individuals must have had the fortunate opportunity to have at least learnt on the development of particular projects, which can be a matter of chance. In many cases, communities are kept in the dark on development plans that may affect them.

It is essential for the public to participate during the planning and decision making process for their personal and societal interests since the proposed activities will consequently affect their lives and livelihood. However, the information dissemination process regarding a proposed project, if undertaken at all, is often done in an informal and unsystematic manner.

Sometimes the only opportunity for impacted communities to obtain early information on projects that may affect them is through oral communications from the limited visits of the representatives from the EIA consultants during their socio-economic data collection. It must be stressed that such visits cannot be considered as meaningful consultations.

The absence of mandatory public participation in the EIA process not only will result in the failure of the process to adequately address all the relevant issues surrounding a project and to take into account views, objections and alternative recommendations from impacted

² *Third Stakeholder Consultation of the Malaysia-European Commission on FLEGT and VPA – Responses to Comments/Submissions from Stakeholders*, dated February 15, 2008. Distributed during the Fourth Stakeholder Consultation Meeting in Kuala Lumpur on March 17 & 18, 2008.

communities and the public, it can in fact be used to hinder the free and transparent process of information dissemination.

2.3 Flaws in identifying land under Native Customary Rights (NCR) claims

Land conflicts between local communities and project proponents will continue due to lack of proper procedures to incorporate a higher quality of participation from affected communities during the EIA study. Most of the time, community consultations often consist of superficial interview sessions conducted during the data gathering stage of an impact assessment study.

In some cases, local communities are unaware of the proposed project at the time the EIA consultants approach them. Only when the communities' opinions about the proposed project are needed, will the EIA consultants briefly explain the project to the communities.

Besides this, local communities are not consulted or requested to give their official consent to draft maps of their territorial boundaries or shown copies of the final version of those maps.³ This is indeed a serious concern, given that the Sarawak State Government's interpretation on NCR has been shown to be in direct conflict with its indigenous communities'.

While the State maintains that NCR rights are limited only to cultivated farms (*temuda*), the people's own customs assert that the rights extend to their communal higher forests (*pulau galau*). The latter's interpretation has in fact been supported by several judicial decisions.⁴

2.4 Poor quality maps and overlapping land use categories

Several EIA reports have been found to contain overlaps between large licence areas and other land-use categories. It appears that the EIA consultants are left to identify these overlaps and recommend appropriate measures to address such overlaps. A poor assessment has major consequences for the people living in the project areas.

It is presumed that many maps found in the EIA, especially those that provide land-use information is obtained largely from the Sarawak State Government. If this presumption is true, then the manner in which the state identifies the size, shape and location of logging, oil palm and tree plantation license areas and other land-use categories is in serious need of improvement in terms of its accuracy and transparency.

2.5 Inadequacy in surveys

When there is absence of public involvement in the EIA process, both the project proponent and the state authorities are effectively shielded from constructive public views and criticisms. A lower standard of reporting may result in poor impact predictions and mitigation measures,

³ Friends of the Earth (2008) Malaysian Palm Oil - Green Gold or Green Wash? A Commentary on the Sustainability Claims of Malaysia's Palm Oil Lobby, with a Special Focus on the State of Sarawak. October. Amsterdam.

⁴ Please see decisions on *Borneo Pulp Plantation & Ors v. Nor Nyawai & Ors*, High Court, Kuching (2001), Court of Appeal, 2004 and *Superintendent of Lands & Surveys, Miri Division & Anor v. Madelli Salleh*, Federal Court, 2007.

inadequate baseline data and may even contain glaring mistakes, inaccuracies and deliberate false information.

Communities are often not aware of the mitigation measures recommended for their safety in the EIA as they were never involved in the discussion in the first place. Hence, they would not even know whether these safety measures were enforced at all.

SAM has received information that survey forms that are used during socio-economic study for the EIA are filled using pencils and subsequently respondents are asked to sign using pens. This gives room for the information on the forms to be altered if needed.

In the past, socio-cultural aspects are not fully addressed in preparation of an EIA. Most often a community's social and cultural institutions and beliefs are set aside. Lack of comprehensive study on the history of a particular settlement may also arise in extinguishment of the communities' rights.

Social impacts include changes in people's way of life, their culture, community, political systems, environment, health and wellbeing, their personal and property rights and their fears and aspirations. There has been a call for Social Impact Assessment to be made mandatory so that impacts of developmental interventions on the human environment are also assessed.

2.6 Lack of neutrality on the part of consultants

There is a tendency for the consultants to take on the position of the state and the project proponent, with one study actually reporting "like it or not, change is the modern way forward" on the subject of the concerns voiced by impacted communities.⁵

The lack of neutrality on the part of the EIA consultants is because they are not independently chosen. The EIA consultants are appointed directly by the project proponent. Since the pool of EIA consultants in Sarawak is limited, the tendency for the consultants to be partial to the project proponents or the State is high. Hence the EIA report may be biased and information given to communities potentially skewed.

2.7 Logging and the EIA Process

Section 11 A(1) of the NREO states that the Board may require any person undertaking prescribed activities to submit to the Board a report from such expert or authority and in such form as may be approved by the Board, on the impact of such activities on the natural resources and environment and any other particulars or information as may be required by the Board. In terms of logging, the following sub-sections may apply:

- 11A(1)(b) clearing of forest areas for the establishment of agricultural estates or plantation;
- 11A(1)(c) – the carrying out of logging operations in forest areas which have been previously been logged or in respect whereof coupes have been previously been declared to have been closed by the Director of Forests under the provisions of the Forests Ordinance; and

⁵ PSS Resources (1997) *Preliminary Report on Environmental Impact Assessment for the Proposed Development of Rinwood Pelita Oil Palm Plantation at Long Tabeng, Tinjar, Miri Division, Sarawak*. March. Kuching.

- 11A(1)(g) – activities which may cause pollution of inland waters of the state or endanger marine or aquatic life, organism or plants in inland waters, or pollution of the air, or erosion of the banks of any rivers, watershed or the foreshores and fisheries.

Under the First Schedule of the Natural Resources and Environment (Prescribed Activities) Order 1994, it is stated that logging activity will require an EIA if it falls into:

- 2. (i) Extraction or felling of timber from any area exceeding 500 hectares which have previously been logged or in respect of which coupes have previously been declared to have been closed by the Director of Forests under the provisions of the Forest Ordinance (Cap. 126 (1958 Ed.)).-
- 2. (ii) Extraction or felling of any timber within any area declared to be a water catchment area under section 8 of the Water Ordinance, 1994 (Cap. 13).

The legal requirement of EIA for logging in Sarawak is fairly narrow, citing mandatory EIA only if one, the size of the proposed area is above 500 hectares and if the area has been previously logged over and two, if the area falls under gazetted catchment areas.

Our first criticism is on the way it perversely puts limitation to the law by categorising forests into logged-over areas and virgin areas, something which is not found in the Federal EIA law. It is even preposterous to demand an EIA for the logging of secondary forests but not untouched pristine forests.

Besides, it is a well-known strategy practised by project proponents from a host of commercial development schemes to break up project area into package sizes less than 500 hectares to avoid having to conduct an EIA. Licence holders also obviously have the option of packaging logging coupes into blocks of less than 500 hectares each and operate them under different subsidiary companies.

In 2009, the Sarawak Ministry of Environment and Public Health had in fact divulged its discovery that some giant timber companies had by-passed the EIA requirements by splitting their projects into very small packages, during the government's investigations on the mass fish deaths in Sarawak inland rivers earlier that year.

"These companies split their projects into small packages in order to escape the EIA. For example, some companies with licence to open 10,000 hectares of land had split their project into small ones measuring 499 hectares each... By doing this, they escape the need to carry out EIA. This happened in the upstream of Bakun. That is why these projects had caused excessive siltation and killed a lot of fish. These fish were washed down by the rivers during the floods."⁶

3.0 Recommendations

Taking into account of all the above, SAM would like to make the following recommendations to both the Federal and the Sarawak State Governments:

3.1 Environmental governance

- The Federal Constitution should be amended to ensure that the country is governed by a single environmental legislation. This will require 'environment' to be included under the Federal list

⁶ *The Star* Logging, land clearing caused mass fish deaths in S'wak. February 20, 2009.

- The Federal and Sarawak State Government must make more concerted efforts to ensure that development plans and environmental governance in Sarawak incorporate a higher level of transparency and accountability as well promote greater public access to information.
- **Strategic Environmental Assessment (SEA) should be conducted to be used as a planning tool and in decision making to ensure that environmental and sustainability aspects are considered effectively in policy, programme and project levels.**

3.2 Mandatory public participation

- The EIA process in Sarawak must follow the exact standards and procedures as those established at the Federal level. The Sarawak State Government must amend its environmental law to ensure that public participation in the EIA process is made mandatory and not subject to the project proponents' discretion. This is in line with the content of its legislative counterpart at the Federal level as well as with all internationally accepted principles and practices on impact assessment of development projects.
- The EIA study must be done with the knowledge of communities that would be affected by the project, with proper notification and objectives of the study disclosed to the communities.
- The affected community within the project impact site must be provided a copy of the EIA and conditions of approval to monitor compliance to conditions and mitigation measures that were approved.

3.3 Scoping of EIA and prescribed activities

- EIA regulations or guidelines should have threshold requirements so that they are part and parcel of one project to prevent breaking up of projects to avoid conduct of EIAs.
- The project alternatives, including no project option, shall be identified and their suitability can be examined on the basis of the information on the project, area and social issues and in consultation with the wider stakeholders.
- The scope of the EIA study must have minimum requirements, particularly in indigenous or vulnerable communities, especially so in the Social Impact Assessment (SIA) and Socio-economic Impact Assessment (SEIA).
- Impacts on the surrounding areas of affected customary land must be included in the assessment.
- The Sarawak EIA law pertaining to logging operations must be amended in order to make the EIA process mandatory for all logging operations in virgin forests and in areas under 500 hectares.

3.4 Quality of assessment

- The Sarawak EIA process must pay more attention to the plight of impacted communities. Engagement with impacted communities in order to seek out their views on the project

must incorporate large and encompassing samples and the Free, Prior and Informed Consent process in ascertaining their traditional territorial boundaries and NCR claims. All these must be documented and reported with greater detail and precision.

- Information given to communities by the EIA consultancy's field/survey officers must be accurate and the field officers/surveyors must remain neutral.
- Design of the questionnaire should be given emphasis when surveys are undertaken during the EIA process. The skills of researchers/surveyors conducting the assessment and interviews must be very high.
- The SIA/SEIA must include socio-cultural aspect of the communities.
- Report of consultations with the communities should be made accessible.
- An independent study must be conducted on the impacts to communities who have to be resettled due to the project.

3.5 Improve quality of EIAs

- **To ensure independence of EIA consultants and subsequently the neutrality of the EIA report, the NREB should appoint registered consultants to conduct the EIA. Selection of the consultants would be from a pool of permanent specialist and individual EIA consultants registered with the Board. The project proponent should bear all fees, costs, incidentals to the conduct and submission of the EIA report. The payment should be deposited with the Board for disbursement to the EIA consultants.**
- The Sarawak EIA process must pay vigorous attention on technical areas such as the production of maps that are of acceptable professional quality and providing meaningful recommendations on mitigation measures.
- Assessment must be supported by accurate data and information and impacts must be anticipated with greater precision.
- Recommendations to avoid, mitigate, minimise negative consequences must be clear and practical procedures proposed.
- The Sarawak State Government must strictly monitor the quality of consultancy companies offering and engaging in EIA services and their EIA reports.
- EIA consultancy companies must display neutrality, no conflict of interest and adhere to strict code of ethics.

4.0 Conclusion

The EIA process must be used as a planning tool as well as an opportunity to solicit greater public participation in evaluating development plans and projects. In addition, the EIA process must be utilised to facilitate informed decision-making and follow up to help ensure that all opportunities for avoiding, minimizing, preventing, eliminating, reducing, restoring, and/or compensating for adverse environmental and socioeconomic impacts and enhancing the environment are pursued.

In the light of the planning of more large-scale development projects in Sarawak, a strategic environmental assessment needs to be done to assess whether the planned projects are necessary or justified, given the adverse impacts.

It is also imperative that Sarawak's EIA process is greatly improved and be technically equipped to ensure a disciplined and neutral impact assessment process is undertaken. Hence, we hope the recommendations for improvement of the EIA process submitted by SAM is seriously considered and implemented.

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