

ENVIRONMENTAL PERMITTING IN ETHIOPIA: NO RESTRAINT ON “UNSTOPPABLE GROWTH?”

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I. Introduction

When rapid development threatens Ethiopians’ environmental health, the people must decide whether the immediate economic benefits are worth the environmental damage. Many controversies flow from this one idea. Some optimists say that economic development “need not” harm the environment at all, or that environmental damage in fact will result from lack of development. Others ask what group of people should have the power to choose environment or development. The national legislature? The people most affected by the environmental damage? Or must we consider the perspectives of animals and plants as well, or the perspective of the earth itself, perhaps personified as “Gaia?” Still others want to know how environmental damage can be quantified so that a cost-benefit analysis is can be conducted.

All of these issues and more are crammed into the now-popular phrase “sustainable development.” First introduced in the World Commission on Environment and Development (“WCED”) report in 1987, sustainable development was defined as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”¹ The familiar definition appears also in the 1997 Environmental Policy of Ethiopia (“EPE”).² The definition has been

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1. World Commission on Environment and Development, *Our Common Future: Report of the World Commission on Environment and Development*, Introduction, ¶27, U.N. Doc. A/42/427/Annex (Aug. 4, 1987) [hereinafter WCED].

2. ENVIRONMENTAL POLICY OF ETHIOPIA, art. 2.1 (1997), available at <http://www.epa>.

criticized as being vague,³ and this is not surprising: all of the issues identified above cannot be resolved in an abstract definition. People must flesh out what sustainable development means to them through many tough decisions at the edges, at the point that development really means environmental damage. Perhaps most important is the clarity of the process by which the tough decisions are made.

This article argues that environmental permitting is one of those very important areas in environmental governance where the process of deciding between environment and development can be made clear. An environmental permit is a decision measuring an economic project against an explicit set of environmental criteria. The criteria are set in advance and form a definite lower limit of what is sustainable. If people do not like the decision on the permit, they can contest it at the relevant government agency, or in court, or politically through elections. At minimum, the people know what decision has been made.

The main thesis of this article is that international environmental ideals like “sustainable development” actually take the place of hard decisions and hide the government’s position on the right balance between environment and development. First is the question of whether “sustainable development” is used merely to please the international community. In Ethiopian environmental laws, the Amharic for “sustainable development” is actually “unstoppable growth,” or, in other words, *sustained* development.⁴ Thus, there is one meaning for English readers and another for Amharic readers, and in matters of interpretation it is the Amharic that is binding.⁵ The more important question is whether the people understand and decide upon minimum environmental standards that are more specific than the EPE’s guarantee of sustainable development or the Constitution’s rights to sustainable development⁶ and a clean and healthy environment.⁷

The grand rhetoric of international ideals is not sufficient to protect Ethiopia’s environment. The government must build on a national conversation about the needs and priorities of Ethiopian citizens. Such a

gov.et/Download/Proclamations/ENVIRONMENT%20POLICY%20OF%20ETHIOPIA.pdf [hereinafter EPE].

3. See e.g., David Hodas, *The Role of Law in Defining Sustainable Development: NEPA Reconsidered*, 3 WIDENER L. SYMP. J. 1, 3 (1998).

4. Different Amharic words are used in different legal documents for the English “sustainable development.”

5. CONSTITUTION, Art. 106 (1995) (Ethiopia).

6. *Id.* Art. 43(1).

7. *Id.* Art. 44.

conversation is only possible when the real choices between environment and development are made clear. An easy path to clarity is to give the Environmental Protection Authority (“EPA”) a straightforward permitting power, such that potentially polluting businesses cannot open or continue to operate without a permit directly from the EPA. The people may choose to have weaker environmental standards, or to give EPA some discretion to allow more pollution in cases where the economic benefits are particularly great, but at least the process would be clear. EPA would be directly accountable, rather than the current situation in which accountability is spread among the ministries, licensing agencies, EPA, and regional environmental agencies, allowing everyone to always point the finger somewhere else. Moreover, with clear permitting decisions that are publicly accessible, citizens would be more able to contribute to enforcement efforts through citizen suits.

II. Ethiopia’s Environmental Policy and Sustainable Development

Like most countries, Ethiopia adopted its current environmental laws under the influence of increased global environmental awareness that came in the wake of the Stockholm Conference in 1972, the WCED report in 1987, and the United Nations Conference on Environment and Development (“UNCED”) in 1992.⁸ The WCED and UNCED specifically called on donors to help developing countries establish the national legal infrastructure for environmental protection.⁹ Also, with the fall of many communist regimes in the early 1990s, new environmental laws became part of the international agenda for rebuilding communist countries and converting them to more capitalist economies.¹⁰

Even before the fall of Ethiopia’s communist government, the process

8. For a historical overview of international cooperation to solve environmental problem, see e.g., Nicholas A. Robinson, *Befogged Vision: International Environmental Governance a Decade After Rio*, 27 WM. & MARY ENVTL. L. & POL’Y REV. 299 (2002); Paolo Galizzi, *From Stockholm to New York, Via Rio and Johannesburg: Has the Environment Lost Its Way on the Global Agenda?* 29 FORDHAM INT’L L. J. 952 (2006).

9. WCED, *supra* note 1, at 319; UNITED NATIONS CONFERENCE ON ENVIRONMENT AND DEVELOPMENT, REPORT OF THE UNITED NATIONS CONFERENCE ON ENVIRONMENT AND DEVELOPMENT, U.N. Doc. A/Conf.151/6/Rev. 1 para 39.1(d) (1992). For more details about the role of international donors in fostering environmental laws in developing countries, see William Andreen, *Environmental Law and International Assistance: The Challenge of Strengthening Environmental Law in the Developing World*, 25 COLUM. J. ENVTL. L. 17, 22-25, 30 (2000).

10. The legal reform process in former communist countries in Eastern Europe is well documented. See UNITED NATIONS ECONOMIC COMMISSION FOR EUROPE, ENVIRONMENTAL POLICY IN TRANSITION: TEN YEARS OF UNECE ENVIRONMENTAL PERFORMANCE REVIEWS (2003).

of developing a National Conservation Strategy was begun with international help from the World Conservation Union (“IUCN”).¹¹ This process continued under the new government (of the Ethiopian Peoples’ Revolutionary Democratic Front, or EPRDF) as the Conservation Strategy of Ethiopia, culminating in a five-volume report and providing the initiative for major environmental actions like the establishment of the Environmental Protection Authority in 1995 (and reformation in 2002), the incorporation of environmental rights into the 1995 Constitution, and the passing of the sweeping cross-sector Environmental Policy of Ethiopia by the Council of Ministers in 1997.¹² Other environmental laws followed, including the Water Resources Management Proclamation in 2000 and the Environmental Pollution Control Proclamation and Environmental Impact Assessment Proclamation in 2002.

Although much of the initiative for Ethiopian environmental law came from international meetings and conversations and responded to scientific assessments of environmental health, the domestic policy situation is more complex. Ethiopia is not a passive receiver of international dictates, nor is it a micro-model of scientific debate about the environment that mirrors the international scientific debate. This can be seen in domestic laws and policies that apply sustainable development ideals. As Heinz Klug has remarked of transnational lawmaking, domestic policymakers often deploy international ideals to circumscribe the domestic policy debate, resulting in a dialectical interaction between international and local and producing “hybrid” rules.¹³

There is no question that Ethiopian environmental policy has been heavily influenced by international norms, particularly by the principle of sustainable development. The newly formed EPRDF government in 1992 sent representatives to the UNCED in Rio de Janeiro and came away energized to promote sustainable development.¹⁴ The IUCN has been encouraging sustainable development in Ethiopia and has provided funding

11. This started in 1989. See James Keeley & Ian Scoones, *Knowledge, Power and Politics: The Environmental Policy-Making Process in Ethiopia*, 38 J. OF MODERN AFRICAN STUDIES 89, 103 (2000).

12. See JONATHAN MCKEE, EUROPEAN COMMISSION, ETHIOPIA: COUNTRY ENVIRONMENTAL PROFILE 50 (2007).

13. Heinz Klug, *Hybrid(ity) Rules: Creating Local Law in a Globalized World* in GLOBAL PRESCRIPTIONS: THE PRODUCTION, EXPORTATION, AND IMPORTATION OF A NEW LEGAL ORTHODOXY (Yves Dezalay & Bryant G. Garth eds., 2002) (discussing how international ideals were brought to bear on domestic property rights in South Africa’s constitution-making process).

14. Keeley & Scoones, *supra* note 11, at 104.

and technical assistance for Ethiopia's National Conservation Strategy.¹⁵ The Environmental Policy of Ethiopia has as its overall goal "to promote sustainable social and economic development."¹⁶ The words "sustainable development" appear in many different environmental laws, including the Environmental Impact Assessment Proclamation and the Environmental Protection Organs Establishment Proclamation, as well as the Constitution, which guarantees the right to sustainable development in Article 43(1).

It is not fair to say, however, that the idea of sustainable development is imposed in a top-down manner by international bodies. In the first place, sustainable development came into popularity at the international level as a compromise between developed countries and developing countries, with developed countries generally favoring sustainability principles and developing countries generally favoring economic development. Developing country representatives to international conferences pointed out that their nation's poor are polluted by poverty, not industrial contaminants, and even accused rich Western countries of pushing an environmental agenda in order to slow their development.¹⁷ The tension between rich and poor countries over environmental protection was evident at Rio and subsequent conferences like the World Summit on Sustainable Development in 2002, and appeared again most recently at the 2009 Copenhagen Climate Conference.¹⁸ To the extent that representatives from developing countries (typically members of the political elite) truly represent developing country citizens, the idea of sustainable development must also reflect these citizens' concerns.

Sustainable development in any case is difficult for the international community to impose because it has an indefinite meaning. Many of the parties to the international compromise on sustainable development have an interest in keeping the meaning unclear so as to avoid binding environmental commitments. After Rio, international meetings on

15. *Id.*

16. EPE, *supra* note 2, art. 2.1.

17. Joao Augusto de Araujo Castro, *Environment and Development: The Case of the Developing Countries*, 26 INT'L ORD. 401 (1972).

18. See Galizzi, *supra* note 8, at 989. Notably, at the 2009 Copenhagen Climate Conference, a new subgroup of countries emerged, composed of Brazil, South Africa, India, and China. It appears that this subgroup, led perhaps by China, manipulated poorer countries into a blocking move that prevented the normal exchange between rich and poor countries—development assistance for environmental guarantees—from happening. See Joseph Curtin, *The Copenhagen Conference: How Should the EU Respond?*, INSTITUTE OF INTERNATIONAL AND EUROPEAN AFFAIRS 9 (2010). Although countries like China certainly have divergent interests from the rest of the developing country bloc, attempts to approach developing countries separately have been met by accusations from the Chinese of a "conspiracy to divide the developing world."

sustainable development have reiterated the importance of development but have diluted the sustainability aspect.¹⁹ Academics also have despaired of coming up with an agreed-upon definition for sustainable development.²⁰ Inevitably, the economic component of sustainable development is better defined than the environmental component. WCED stated that economic growth at a rate of 3 percent to 6 percent per year would be sustainable, but more vaguely that “sustainable development must not endanger the natural systems that support life on Earth.”²¹ Measurements of earth endangerment are various, contested, and generally clouded by the sweeping scope of the problem.

In Ethiopia, the Amharic words used in various laws to mean “sustainable development” are translated literally as unstoppable or continuous and ongoing growth. In other words, Ethiopians think of sustainable development as *sustained* development. The language of the Constitution makes clear that sustainable development in Ethiopia is about economic development. The Constitution has separate provisions for the “right to a clean and healthy environment”²² and the “right to improved living standards and to sustainable development,”²³ implying that sustainable development is about development and not about environmental health. It has been said of Ethiopia’s primary policy document on sustainable development, the Plan for Accelerated and Sustained Development to End Poverty (PASDEP, 2005-2010), that “[e]conomic development is the priority whilst . . . issues of environmental sustainability are relegated into the background.”²⁴

Although on a local level Ethiopians may prove to be excellent environmental stewards, there is little evidence of a pro-environmental preservationist movement. In part, this may be because rural Ethiopians do not value the “wild” environment apart from the managed environment of their farms and rural communities.²⁵ Pro-environmental sentiment comes

19. The definition of sustainable development coming out of the 2002 World Summit on Sustainable Development held in Johannesburg lacked any serious ecological commitment, and was thus a step away from the Rio definition. See Galizzi, *supra* note 8, at 991-993.

20. To put it succinctly: “Sustainable development means different things to different people.” JON M. CONRAD, *RESOURCE ECONOMICS* 166 (1999).

21. WCED, *supra* note 1, at 45.

22. CONSTITUTION, Art. 44(1) (1995).

23. *Id.* Art. 43(1).

24. MCKEE, *supra* note 12, at 7.

25. See Yohannes GebreMichael & Ann Waters-Bayer, *Trees are Our Backbone: Integrating Environment and Local Development in Tigray Region of Ethiopia*, IIED ISSUE PAPER NO. 145 at 2, 19 (2007).

from the concern for daily survival and not from the desire to preserve animals and wild places for their own sake. The problem of global warming is widely known and often invoked as an explanation for anomalous weather patterns, but many Ethiopians feel, perhaps rightly, that global warming is caused largely by actions in developed countries and that Ethiopians can do little about it.²⁶

The preservationist perspective does appear in official policy documents, but the government is more likely to follow the local nonpreservationist perspective when applying policy. The Environmental Policy contains commitments to preserve biodiversity,²⁷ support for a “conservation culture,”²⁸ and even a right of species to continue existing.²⁹ Moreover, Ethiopia has a national park system—the ideal for preservationists—that was established primarily under the emperor in the late 1960s and early 1970s in a top-down manner. However, the Ethiopian government has shown itself willing to compromise on conservation in parks in favor of economic interests. For example, the Ethiopian Investment Commission, after accidentally allocating land for a German biofuel project inside the Babilie Elephant Sanctuary, remedied the situation by changing the sanctuary boundaries.³⁰ Also, when it comes to environmental impact assessment, it is often foreign investors or foreign banks rather than the Ethiopian government insisting on impact statements from the EPA.³¹

When considering how Ethiopia uses “sustainable development,” then, it is necessary to distinguish between international and domestic audiences. Ethiopia uses the language of sustainable development to communicate to the international community its commitment to world ecological stability and, thus, to secure foreign aid. For the domestic audience, sustainable development represents the promise of a brighter future and a higher standard of living for Ethiopian citizens, and is almost synonymous with

26. Ethiopian farmers and pastoralists do their best to adapt to changing weather patterns, although they are ill-positioned to do so. See OXFAM, *THE RAIN DOESN'T COME ON TIME ANYMORE: POVERTY, VULNERABILITY, AND CLIMATE VARIABILITY IN ETHIOPIA* (April, 2010). Aside from certain changes in local forest management, Ethiopians cannot be expected to address the roots of global warming, and they see the problem as economic rather than environmental.

27. EPE, *supra* note 2, art. 2.2(a).

28. *Id.* art. 2.3(n).

29. *Id.* art. 2.3(q).

30. Yirmed Demeke & Negusu Aklilu, *Alarm Bell for Biofuel Development in Ethiopia: The Case of Babilie Elephant Sanctuary*, in *AGROFUEL DEVELOPMENT IN ETHIOPIA* (Tibebwa Heckett & Negusu Aklilu eds., 2008)

31. Interview with Environmental Protection Authority officials (June 2009).

steady economic growth. By using the term “sustainable development,” the government adds to its power and legitimacy, holding out the image of richer prospects and invoking the power of industrialized nations where the term originates. Ethiopian optimism about development is not, however, very useful in its legal applications. The very flexibility in the meaning of “sustainable development,” which is necessary in order to put the word to its various uses, makes any legal right or policy goal associated with it rather chimeric.

Environmental policy in Ethiopia has many additional layers of complexity. Keeley and Scoones, for example, identify three environmental policy discourses in Ethiopia: a Green Revolution discourse, an Environmental Rehabilitation discourse, and an emergent Participatory Natural Resource Management discourse.³² Both the Green Revolution discourse and the Environmental Rehabilitation discourse originate in science. The Green Revolution is the movement of technological advances in crop productivity from industrialized countries to developing countries. Environmental Rehabilitation responds to the scientific assessment of resource degradation, particularly relating to soil fertility. Within Ethiopia, these are modern perspectives which lead to uncomfortable juxtapositions of science with traditional ways of doing things, often with urban elites championing science and blaming “backwards” traditional practices for environmental problems. In theory, Participatory Natural Resource Management is the opposite of top-down policies that originate in international discourse and elite circles in Addis Ababa and filter down. Unfortunately, however, “participation” often relates more to attempts by national officials to build up legitimacy for programs than attempts to transfer real political power to local people.

The participatory management discourse highlights one of the overarching problems addressed by this article: How can governments consciously build support for environmental policies from the ground up? Often it appears that the international community is pushing for sustainability against the will of a great many poor people who just want development. Interestingly, Agenda 21 of the UNCED’s Rio Declaration called for “local Agenda 21s” that would build local community support for

32. Keeley & Scoones, *supra* note 11, at 90. Keeley and Scoones take a less explicit interest in “sustainable development” and do not address at all the way that international buzzwords like “sustainable development” are manipulated in local contexts. Apparently, some soil scientists took issue with Keeley and Scoones for treating hard data as an element of subjective discourse and for introducing unhelpful contradictions between environmental rehabilitation and local resource management. Jan Nyssen et al., *Environmental Policy in Ethiopia: A Rejoinder to Keeley and Scoones*, 42 J. OF MODERN AFRICAN STUDIES 137 (2004).

sustainable development.³³ With some naiveté, the international community expected local governments everywhere to organize conversations with local citizens about sustainable development. Sparking local conversations, not surprisingly, has been difficult.³⁴ Ethiopian law follows the idea of “local Agenda 21s” in that it requires all regional states to have “regional conservation strategies,”³⁵ but these have not led to widespread discussions about the sustainability of development projects. It has been reported that government officials look down on rural opinions and practices with regard to the environment, indicating that the direction of discourse is often top-down.³⁶

The starting point for local debate may be empowerment of local government, but this leads directly to another question, which is how to structure local government so that it can rally local support and produce positive environmental outcomes. Local management is difficult in the context of development decisions because the scale and power of local government often does not match the scale and power of regulated private parties. Lower level government officials do not have the political standing to challenge wealthy businessmen who may have better political connections at higher levels in the government.³⁷ In addition, local governments may compete for development projects, resulting in a race to deregulate in order to attract businesses. Sadly, decentralized management may be attractive to national governments simply because it puts the responsibility for unwanted decisions onto unqualified actors, allowing the national government to avoid difficult decisions. The Ethiopian government has decentralized many environmental permitting decisions to regional governments (including the two federal cities, Addis Ababa and

33. Conference on Environment and Development, June 3-14, 1992, *Rio Declaration on Environment and Development*, Ch. 28, U.N. Doc. A/CONF.151/26 (vol. I).

34. Local Agenda 21s arguably have been more successful in some developed countries, where a discourse about sustainable development fits culturally. For one example in Australia, see Ben Boer, *Institutionalizing Ecologically Sustainable Development: The Roles of National, State, and Local Governments in Translating Grand Strategy Into Action*, 31 WILLAMETTE L. REV. 307, 329 (1995). The U.S. and Canada also have had some limited success encouraging local discourse on sustainability. See Virginia MacLaren et al., *Engaging Local Communities in Environmental Protection with Competitiveness: Community Advisory Panels in Canada and the United States*, in SUSTAINABILITY, CIVIL SOCIETY AND INTERNATIONAL GOVERNANCE 31 (John J. Kirton & Peter I. Hajnal eds., 2006).

35. Environmental Protection Organs Establishment Proc. No. 295/2002, FEDERAL NEGARIT GAZETA, art. 15 [hereinafter EPO Proc.].

36. See GebreMichael & Waters-Bayer, *supra* note 25.

37. For example, one author has noted that Tigray’s Environmental Protection, Land Administration and Use Authority “has little political leverage to enforce environmental regulations, e.g. to oblige large-scale enterprises . . . to operate in an environmentally-friendly way.” GebreMichael & Waters-Bayer, *supra* note 25, at 8.

Dire Dawa) that simply lack the resources and expertise to evaluate environmental dangers. Local districts known as *woredas* are expected to handle certain development decisions directly—and have their own budget to do so—but devote very little of their small budgets to environmental projects, and do not coordinate at all with regional governments on preventive measures like pollution control.³⁸

In the APAP case, discussed below, the EPA argued at one point that it should not be responsible for the pollution of rivers because it was merely a coordinating organ for regional environmental agencies, and that the real responsibility for environmental protection fell on the shoulders of the regional agencies. This argument shows the dangers of the decentralization of responsibility, which can become simply the diffusion of responsibility.

III. Environmental Permitting in Ethiopia

The problems with Ethiopia's permitting process get to the heart of the difficulties and contradictions in Ethiopia's overarching policy of sustainable development. Environmental permitting is where environmental policy meets practice; it cannot be effective without a real commitment by government officials and without real leverage to make hard choices between environment and development. In Ethiopia, delays in implementing environmental permitting systems are apparent in several government offices and are not explained by simple lack of resources. In the few cases where environmental permitting has been implemented, the responsible offices lack the political will or bargaining power to make clear choices in favor of the environment and deny permits on the grounds of environmental harm. Instead, what prevails is a state of confusion in which it is not clear which office has control over the environmental decisions on the permit and, therefore, which office should take responsibility for implementing the environmental policy.

Permitting is the most basic form of government control over modern industry.³⁹ The phrase “environmental permitting” is meant here in the broadest sense possible, including any type of license or permit that has at

38. MCKEE, *supra* note 12, at 56-58.

39. Most environmental laws incorporate some aspect of permitting. In the U.S., the Clean Water Act and Clean Air Act rely heavily on permitting, and the National Environmental Policy Act (and corresponding State Environmental Policy Acts), which can be invoked when a project proponent seeks any government permit, renders many permitting decisions subject to environmental impact assessment. In addition, permitting is the basis for all cap and trade programs.

least one environmental criterion. In Ethiopia, environmental permits are required for any discharge into water bodies,⁴⁰ for collection and disposal of solid or hazardous waste,⁴¹ for operating businesses that cause air or water pollution,⁴² and for starting a project or business that has environmental impacts and requires an impact statement. Permitting serves the function of registration as well as control, and provides the government with a record of potential threats to the environment and a starting point for inspections. The permitting process places the initial cost of gathering information and the burden of proof on the regulated party rather than the government, and therefore can be relatively inexpensive for the government to operate. Permits are also a great aid to government transparency, because they force public communications to and from the regulated party.

Surprisingly, the government environmental agencies in Ethiopia—the EPA and regional environmental agencies (“REAs”)—do very little of the environmental permitting. In fact, the EPA and REAs have legal authority only to issue permits for hazardous waste,⁴³ and, in practice, do not issue any permits or licenses at all. The EPA and REAs have the authority to conduct environmental impact assessments,⁴⁴ but this authority will be exercised only if a licensing authority (or a bank) refuses to go forward without EPA/REA approval. The Ministry of Water Resources has legal authority to issue permits for the discharge of waste into water resources⁴⁵ but also does not issue any such permits in practice. Instead, the Federal Investment Commission, the Ministry of Trade and Industry, and regional government bureaus⁴⁶ exercise permitting power over certain business

40. Ethiopian Water Resources Management Proc. No. 197/2000, FEDERAL NEGARIT GAZETA, art. 11(1)(d) [hereinafter WRM Proc.]; Ethiopian Water Resources Management Regulations, Council of Ministers Reg. No. 115/2005, FEDERAL NEGARIT GAZETA, art. 11(1) [hereinafter WRM Reg.].

41. Solid Waste Management Proc. No. 513/2007, FEDERAL NEGARIT GAZETA, art. 4(2); Environmental Pollution Control Proc. No. 300/2002, FEDERAL NEGARIT GAZETA, art. 4(1) [hereinafter EPC Proc.]. The Solid Waste Management Proclamation was issued in 2007, and it is not expected that urban administrations have taken steps yet to put their permitting systems in place. The administrations also have the additional responsibility of conducting environmental audits on existing disposal sites and ensuring that new sites undertake environmental impact assessment.

42. Prevention of Industrial Pollution Regulation, Council of Ministers Reg. No. 159/2008, FEDERAL NEGARIT GAZETA, art. 5 [hereinafter PIP Reg.].

43. EPC Proc., *supra* note 41, art. 4.

44. Environmental Impact Assessment Proc. No. 299/2002, FEDERAL NEGARIT GAZETA, art. 3(1) [hereinafter EIA Proc.].

45. WRM Reg., *supra* note 40, art. 11(1).

46. The regional governments, including Addis Ababa City Administration and the Dire Dawa Administrative Council, have separate divisions that handle business licenses and

activities and, through this permitting power, effectively decide whether or not to apply environmental criteria.

The history of pollution standards in Ethiopia shows how reluctant the government has been to act in this area. As early as 1995, the first proclamation establishing the EPA tasked the agency to set environmental standards.⁴⁷ In 2002, the Environmental Protection Organs Establishment Proclamation (reestablishing the EPA) again gave EPA the power and duty to set environmental standards,⁴⁸ and the Environmental Pollution Control Proclamation, also in 2002, more specifically called on the EPA to set standards for water, air, soil, noise, and waste management.⁴⁹ Nonbinding ambient “guidelines” for air, surface water, groundwater, and noise have been in place at the EPA since at least 2004. Nonetheless, the Environmental Council, the governing body of the EPA, did not pass binding standards until 2008, and even then restricted their purview to effluent air and water discharges.

The Environmental Council of the EPA—which failed for six years to have any of its regular meetings—finally met and passed standards in 2008 seemingly in response to a lawsuit waged by a nongovernmental organization (“NGO”), Action Professionals for the People (“APAP”). APAP sued the federal EPA in 2006, alleging in essence that the agency should have done something to prevent pollution to the Akaki and Mojo Rivers in the area near Addis Ababa.⁵⁰ The EPA argued that APAP had standing to sue only the polluter, not the EPA, but at that time no standards existed on which APAP could base its suit. Perhaps to forestall any greater judicial probing, EPA passed the standards in time for the Supreme Court’s assessment of the case in 2009. Of course, the EPA did not state its exact motive for enacting the standards when it did.

The same delays as those at the EPA have been apparent at the Ministry of Water Resources, which was first charged with establishing water quality standards in 1995.⁵¹ The 2000 Ethiopian Water Resources Management Proclamation again called for water quality standards, and prohibited discharges of pollution into water without a permit from the

investment permits.

47. Environmental Protection Authority Establishment Proc. No. 9/1995, FEDERAL NEGARIT GAZETA, art. 6(3).

48. EPO Proc., *supra* note 35, art. 6(7).

49. EPC Proc., *supra* note 41, art. 6(1).

50. Action Professionals Association for the People v. Environmental Protection Authority, Civil File No. 64902, Federal First Instance Court (2006).

51. Definition of Powers and Duties of the Executive Organs Proc. No. 4/1995, FEDERAL NEGARIT GAZETA, art. 17(9).

Ministry.⁵² The Proclamation explicitly anticipated a set of regulations that would lay out the details of the permitting process,⁵³ but these regulations were not issued until 2005. Unfortunately, although the regulations provide some detail on how a “Waste Water Discharge Permit” would be issued, they are premised on a set of water quality standards that do not exist and, furthermore, anticipate a directive that must be issued for the implementation of the waste water provision of the regulation.⁵⁴ Neither the standards nor the directive has yet been issued. Although the Ministry today engages in professional licensing and some construction permitting for water works projects, it does not issue permits for pollution discharges.⁵⁵ The Ministry of Water Resources exhibits the same pattern of delay on environmental protection as the EPA, waiting for a proclamation, then for a regulation, and then for a directive, in order to control pollution. This process should be compared with the process to set up professional licensing at the Ministry of Water Resources, which was outlined in the same proclamation of 2000 as pollution permits but was implemented more quickly and efficiently.

Presently, only two types of pollution standards have been adopted: effluent limits on certain water pollutants for a specified list of industries, and similar limits on certain air pollutants for a specified list of industries. There are no ambient standards for overall air and water quality, despite the fact that these are required by law, although it should be noted that ambient standards would present considerable costs in urban and regional planning, administrative coordination, and air and water testing.

For the two pollution control standards that have been approved by the EPA, there remain serious problems with enforcement and implementation. The primary role for the EPA and REAs under the Environmental Pollution Control Proclamation is to monitor and inspect polluting industries.⁵⁶ It has been argued, in fact, that the proclamation goes too far and provides too little oversight of Environmental Inspectors who, in enforcing the standards, may enter any place, question anyone, and inspect and seize any materials at the Inspector’s discretion.⁵⁷ While such powers are sweeping

52. WRM Proc., *supra* note 40, art. 11(1)(d); WRM Reg., *supra* note 40, art. 11(1).

53. WRM Proc., *supra* note 40, arts. 11(1)(d), 11(2), 13(1), 14(2), 28(2), 30.

54. WRM Reg., *supra* note 40, art. 12(2); interview with official at Ministry of Water Resources (July 2009).

55. Interview with official at Ministry of Water Resources (July 2009).

56. *See* EPC Proc., *supra* note 41, art. 8(1)(a).

57. *Id.* art. 8(1). For a more detailed analysis of the problem of Inspector oversight, *see* Khushal Vibhute, *Environmental Policy and Law of Ethiopia: A Policy Perspective*, 23 J. ETHIOPIAN L. 75, 97 (2008). Vibhute worries that “[the EPC Proclamation] gives an impression that the [Environmental Inspector], in the name of seeking compliance with the

in law, they are not so sweeping in practice. Unlike a licensing power, a monitoring power is rather expensive and difficult to exercise. The EPA or REA has to go to the industry in question with its own people, conduct its own inspections and tests, and confront powerful business interests head-on in the field. The agencies simply do not have the resources or political standing to do this, and in practice they have not done it.⁵⁸ As in most countries, the degree of environmental enforcement often depends more on political will than on the requirements of the law.⁵⁹

Along with the environmental standards, the Environmental Council simultaneously adopted the Prevention of Industrial Pollution (“PIP”) regulation that explained how the standards would be applied. Subsequently, in 2008, the EPA issued a directive identifying the eight categories of factories that fall under the regulation and thus are subject to the standards.⁶⁰ The regulation gave existing factories (in one of the eight categories) a maximum of five years to comply with the standards, with the expectation that the EPA (or appropriate REA) would oversee the process of transition. Specifically, existing factories are called on to undertake an environmental audit and implement an environmental management plan.⁶¹ Meanwhile, new factories will become operational without the direct oversight or approval of the EPA. The Ministry of Trade and Industry or regional bureaus are expected to catch noncompliant factories at the time they apply for business licenses. Theoretically, in order to obtain a business license, a factory must prove that it will meet the environmental standards and must continue to do so every year when it renews its license.⁶² This provides an opportunity to check environmental compliance

[environmental standards], is free to exercise his powers even in a capricious manner with impunity.” *Id.* at 98. The only explicit restraint on Environmental Inspectors in the EPC Proclamation is that they “exercise due diligence and impartiality in the discharge of their powers and duties.” EPC Proc., *supra* note 41, art. 7(2).

58. The EPA more or less admitted its failure to control pollution of the Akaki and Mojo Rivers in the APAP suit. General problems with monitoring and inspections were confirmed by interview with EPA officials.

59. This is equally true of developed countries. For instance, amid allegations of loose environmental oversight at the U.S. EPA under the administration of former President George W. Bush, one survey found that two-thirds of the staff scientists at the EPA reported political interference with their work. *Meddling at EPA? Activists Point to Survey: Two-Thirds of 1,586 EPA Scientists Polled Cite Interference*, UCS Reports, ASSOC. PRESS, Apr. 23, 2008.

60. EPA Directive No. 008/2008, on file at the EPA. Under the regulation, the EPA may choose to take action against a factory not identified by the directive if that factory poses a risk. PIP Reg., *supra* note 42, art. 4(5).

61. PIP Reg., *supra* note 42, art. 12(2).

62. Currently, a business must renew its business license annually. *See* Commercial Registration and Business Licensing Proc. No. 67/1997, FEDERAL NEGARIT GAZETA, art.

on a regular basis.

The “competent licensing agency” for issuing a business license may be the Investment Commission, the Ministry of Trade and Industry, or a bureau of the regional government, depending on the type of project, where it is located, and whether foreign investors are involved. In any case, none of these agencies has an environmental focus. Officials at these licensing agencies are hardly aware of environmental standards and EPA directives; they have no expertise or incentive to evaluate license applications for compliance with environmental standards. Accordingly, they do not actually apply environmental standards but rather defer to the EPA in expectation of future monitoring and enforcement.

Notably, the PIP regulation requires an environmental check only in the case of “business licenses,” not investment permits.⁶³ This changes the timing of things. An investment permit is needed at the planning stages of a project; a business license is not required until the start of operations. Presumably, the factory may be designed and built to pollute in excess of the standards, and not be reviewed until it is ready to start production. This is somewhat surprising, although it is expected that an environmental impact assessment would catch such an ill-designed factory at the planning stages. If not, it is hard to imagine that a business license would be denied based on environmental problems—typically problems of design—at the point when the factory has been built and is ready to start production. The review process in practice is more a matter of course, requiring a fee and validation of appropriate documents like the investment permit (if the applicant is a foreign national). The Investment Commission, which has its own authority to issue an initial business license to an investor (although not a renewal), requires only the application, fee, and a signed statement by the investor that he or she will respect the laws and directives of the land.⁶⁴

25(2).

63. See the definition of “competent licensing agency” in PIP Reg., *supra* note 42, art. 2(1). This is in contrast to the Environmental Impact Assessment Proclamation, which requires that the licensing agency check EIA compliance before issuing “an investment permit or a trade or an operating license for any project.” EIA Proc., *supra* note 44, art. 3(3).

64. The Investment Commission’s authority to issue business licenses is based on the Investment Proclamation. See Investment (Amendment) Proc. No. 375/2003, FEDERAL NEGARIT GAZETA, art. 24(5). Notably, this provision indicates that the Investment Commission need not bother with article 22(2) of the Commercial Registration and Business Licensing Proclamation, which potentially requires, as part of an application for a business license, some type of confirmation of environmental compliance from the appropriate government organ. In place of such confirmation, the Investment Commission requires the investor to sign “an undertaking to respect the relevant laws and directives of the land.” *Id.* art. 13 (adding article 24(5) to the original Investment Proclamation). Presumably, this was included in the Investment Proclamation in order to speed up the approval process for

Although the competent licensing agency has the main responsibility to deny a business license to an applicant who does not meet pollution control standards, the EPA has a separate power under the PIP regulations to vary or cancel existing business licenses of polluting industries.⁶⁵ This is a strange provision that allows the EPA (or regional environmental authority) to intercede between the licensing authority and the license holder, and in effect makes the license holder beholden to two different government agencies for the same license. It is hard to imagine the EPA exercising its authority to vary or cancel a license if to do so would offend the business licensing authority. In addition, this provision confuses the direct line of accountability, because each of the two concerned agencies can blame the other for any failure to regulate polluting industries. Moreover, the regulation essentially places the onus of monitoring and gathering evidence about pollution on the EPA, which must have this evidence to prove that the license should be varied or cancelled. At the time of application for the license, on the other hand, it is the applicant who provides the evidence that pollution will not exceed the requisite level.

Officials at the EPA expect that environmental impact assessment (“EIA”) laws will ensure that new factories comply with environmental standards. When it comes to the issue of new factories, most people, including officials at the licensing agencies, conflate EIA and pollution control. Although it might be more efficient to fold pollution control into the EIA process—at least for new factories—it must be kept in mind that at present EIA is a separate legal requirement that is itself difficult to enforce and is not set up formally to meet an explicit set of environmental standards. Officials at the Investment Commission are not even aware of the pollution standards and are certainly not applying these standards in practice. If the EIA process is to replace pollution control for new industries, this should be stated in the law and applied more rigorously by the licensing authority.

foreign investors and increase foreign direct investment. Nonetheless, it is a rather surprising provision for its seemingly arbitrary and unequal treatment of investors. A foreign applicant for a business license who goes through the Investment Commission may face fewer application requirements than a domestic applicant for the same license who goes through the Ministry of Trade and Industry or a regional bureau. The provision also runs contrary to every other law that attempts to place responsibility on the licensing authority for environmental protection.

65. PIP Reg., *supra* note 42, arts. 6, 7.

IV. Environmental Impact Assessment and the Ethiopian Investment Commission

Most pollution comes from new entrepreneurial undertakings, and the responsibility for encouraging and coordinating entrepreneurship in Ethiopia lies with the Ethiopian Investment Commission (“EIC”). In Ethiopia from 1992 to 2009, about 71.1 percent of all capital investment was approved through the EIC.⁶⁶ This indicates how important this one office is to the trajectory of economic development in Ethiopia. The EIC deals with foreign investors or Ethiopians working in partnership with foreign investors, and issues investment licenses and other permits so that projects can proceed. Permits for domestic investors will typically be obtained from regional bureaus, or may not even be required.⁶⁷ In some cases, as for example with mining projects, the project proponent will need a specific permit from another government agency like the Ministry of Mines and Energy, and this permit will also be conditioned on the proponent satisfying EIA requirements.

The EIC boasts of a one-stop shopping philosophy such that an investor can get government approval for a project through one office, the EIC.⁶⁸ This means that EIC must undertake to coordinate with all other Ethiopian government agencies on behalf of the investor to get the project approved, for example by contacting the appropriate regional government to secure land for the project. EIC itself takes over some of the responsibilities of other agencies, for example by issuing initial business permits and construction permits. By law, EIC must respond to applications for investment licenses within five days,⁶⁹ and publications by EIC tout its ability to deliver the investment permit within four hours.⁷⁰ In the period between 1992 and 2009, the EIC gave out a total of 44,669 investment licenses in various sectors, including agriculture, hunting, and forestry (9,715); construction (3,094); manufacturing (10,748); and mining

66. EIC database, accessed June 2009.

67. The EIC has jurisdiction over foreign investors and foreign and domestic partners, as well as domestic investors who want to be eligible for certain incentives. Investment Proc. No. 280/2002, FEDERAL NEGARIT GAZETA, art. 23. Regional bureaus are responsible for investment by domestic investors in their regions, although an investment permit may or may not be required depending on regional laws. *Id.* art. 23(3). Regional bureaus also handle business licenses for projects in their regions. Commercial Registration and Business Licensing Proc. No. 67/1997, FEDERAL NEGARIT GAZETA, art. 20(1).

68. Investment Proc. No. 280/2002, FEDERAL NEGARIT GAZETA, art. 24.

69. Investment (Amendment) Proc. No. 375/2003, FEDERAL NEGARIT GAZETA, art. 14(1).

70. INVESTMENT REVIEW, May 2009, on file at EIC.

and quarrying (189).⁷¹

One of the government agencies with which EIC is supposed to coordinate is the EPA. The EIC is required by law to ensure that EIA either is done or is not mandated for the particular project before approving an investment permit.⁷² According to the language of the EIA Proclamation, a project proponent must have “authorization” from the federal EPA or REA to start a project that requires EIA, and it is incumbent upon the licensing agency to contact the EPA or REA for this authorization before issuing an investment permit or business license. For EIC, the process of consulting EPA has been awkward and ultimately unsuccessful—not surprising considering that EIC wants to process investment applications efficiently and EIA takes a great deal of time. The EIC has asserted alternatively that the EPA takes too long to verify that a project meets EIA requirements, or that the EPA always approves the project thereby making consultation a waste of time.⁷³ Interestingly, it was proposed that EPA delegate its authority to review environmental impact statements to the EIC, but the EIC, perhaps wisely, refused.

At present, EIC no longer consults the EPA for authorization and argues that the new Investment Proclamation, by omitting any reference to EIA, somehow overrides the requirement in the EIA Proclamation to get EPA authorization before issuing an investment permit.⁷⁴ More troubling, the EIC has asserted repeatedly that it is the EPA’s responsibility to check for EIA compliance in the field after the investment permit has been approved. It is hard to understand this argument. The project may commence once the investment permit is issued, and the EIC itself may issue construction permits. Once construction starts, it is too late to do EIA. EIA only works if it is part of project planning. Because the EIC is

71. EIC database, accessed July 2009.

72. EIA Proc., *supra* note 44, art. 3(3).

73. Interview with EIC officials (June 2009).

74. The original Investment Proclamation specifically required undertaking EIA before issuing an investment permit. Investment Proc. No. 37/1996, FEDERAL NEGARIT GAZETA, art. 14(1). The new Investment Proclamation (No. 280/2002) repealed the earlier proclamation and omitted any reference to EIA. The Investment (Amendment) Proclamation (No. 373/2003) also did not add the EIA requirement. Nonetheless, the new proclamations do not relieve the EIC’s duty as stated in the EIA Proclamation to check for EIA, because, although the proclamation latest in time prevails, provisions of previous proclamations should be repealed or superseded by something more than mere implication. The EIC’s argument, though spurious, seems to provide enough doubt to buffer the EIC from pressure to observe the EIA Proclamation. Calls have been made to amend the Investment Proclamation so that it, too, includes a provision requiring the EIC to check with EPA before issuing a permit. Unfortunately, no legal requirement can make the EIA process proceed quickly, so it is unlikely that EIA can be reconciled with the expedited service requirements that form the backbone of investment policy in Ethiopia.

involved so much in approving and coordinating investments, its failure to check for environmental compliance has the potential to lead to some egregious results. For example, the EIC accidentally allowed a German company to start a biofuel project on land that was located inside a wildlife sanctuary.⁷⁵

Another notorious example of EIC's lack of environmental concern comes from the floriculture industry. Fertilizers and pesticides that are used to boost floriculture production are potentially harmful to human health and widely recognized as sources of pollution to soil, aquatic resources, and the atmosphere.⁷⁶ Despite this fact, EIC has given permits to at least 251 investors in this sector without checking for environmental impacts.⁷⁷ Additional investment licenses have been given out by regional investment bureaus (without checking for environmental impacts), including the Oromia Investment Bureau, which has given out approximately 3,491 hectares of land to the sector.⁷⁸

As with pollution standards, environmental impact assessment suffers from a lack of clear implementing guidelines. The EIA Proclamation anticipated two directives to guide EIA: A directive explaining which projects are subject to EIA,⁷⁹ and guidelines explaining how an Environmental Impact Study Report ("EISR") should be prepared and evaluated.⁸⁰ Although the EIA Proclamation was issued in 2002, it was not until 2008, at the first meeting of the Environmental Council of the EPA, that the Council approved a directive stating which industries are subject to EIA requirements.⁸¹ This is a major step forward, but it remains to be implemented through the Investment Commission and EPA. Regrettably, there are still no legal standards for what the EISR must contain. This is hard to understand, given that the EPA has had a comprehensive set of nonbinding draft guidelines for EISRs in almost every major industrial category since 2004.

75. See Demeke & Aklilu, *supra* note 30.

76. Mulugeta Getu, *Ethiopian Floriculture and Its Impact on the Environment: Regulation, Supervision and Compliance*, 3 MIZAN L. REV. 240, 243 (2009).

77. *Id.*

78. *Id.*

79. EIA Proc., *supra* note 44, art. 5(1).

80. *Id.* art. 8(3).

81. Environmental Protection Authority [EPA], A Directive Issued to Determine Projects Subject to Environmental Impact Assessment, Dir. No. 1/2008, on file at the EPA.

V. Environmental Controls at the Regional Level

Regional environmental authorities review EISRs from projects in their regions that do not have trans-regional effects and do not require federal permits or federal supervision.⁸² Unfortunately, the regional governments are even less prepared than the federal EPA to review EISRs with strict scrutiny, or to challenge government development projects or well-connected businessmen. Some regional governments have adopted regional EIA regulations based on the federal law, although in general the regional governments lag behind the federal government in implementing environmental policies. The Oromia regional government was reviewing its first draft EIA regulation in 2009. In 2006, the Addis Ababa city government enacted an EIA regulation very similar to the federal EIA Proclamation but, like the federal proclamation, the city regulation awaits directives that are necessary for proper implementation and proper review of EISRs.⁸³

Unlike the EIA Proclamation, the Environmental Pollution Control Proclamation does not explain the exact separation of duties between the federal EPA and the regional environmental authorities. Instead, it merely states that the regional government may adopt stricter environmental standards than the federal standards.⁸⁴ Even a project with cross-regional impact or a federal license requirement would have to meet the local standards of the region in which it is located. In such cases, the EPA and regional environmental authority probably would have overlapping responsibilities of inspection and enforcement, with the more stringent standards forming the baseline for both federal and regional agencies.⁸⁵ Decentralization is favored by the federal EPA, so it is unlikely that jurisdictional disputes would arise. The greater problem here is that the regional governments do not have the resources or the political clout to stand up to larger industrial operations. Also, without clearly defined roles for federal and regional authorities, the line of accountability to those authorities is confused.

Some regional governments have adopted their own pollution control

82. EIA Proc., *supra* note 44, art. 14(1).

83. Addis Ababa City Government Environmental Impact Assessment Regulations No. 21/2006.

84. EPC Proc., *supra* note 41, art. 6(4).

85. As an example of overlapping authority, the Addis Ababa pollution control regulation requests that applicants for pollution control permits bring their federal investment permit when they apply. Such an applicant would end up with both a federal and a regional permit.

regulations, but the regional governments usually lag behind the federal government here as well. For example, the Oromia regional government in 2009 was still reviewing the first draft of its pollution control regulation, modeled substantially on the federal law. The Addis Ababa city government first enacted pollution control regulations in 2007. The Addis Ababa regulations, once implemented, will be a major advance over the federal law, setting up a separate environmental pollution control permitting system and providing detailed rules that explain application and review procedures for these permits.⁸⁶ Unlike the federal EPA, which has direct control only over hazardous waste permits, the Addis Ababa EPA issues environmental permits itself and can force polluting industries to provide information about pollution at the time of permit application. In addition, the regulations provide that, in case the applicable environmental standards are not yet in place, the Addis Ababa environmental agency will use “environmental standards issued by the concerned international organizations.”⁸⁷ Despite such rigorous laws, it is expected that regional governments will have greater difficulty with implementation due to lack of funds, lack of expertise, small numbers of employees, and inability to challenge better-connected businessmen and the bigger agencies of the federal government.

VI. Citizen Suits to Enforce Pollution Limits

The alternative to government enforcement of standards is citizen enforcement of standards. The Environmental Pollution Control (“EPC”) Proclamation authorizes citizens to appeal directly to the courts to enforce environmental standards against polluting industries without having to show a “vested interest.”⁸⁸ Any citizen of Ethiopia, then, may bring a suit against a polluting industry. The idea is that the citizen steps into the shoes of the EPA to enforce the standards. Damages may include, in addition to the fines paid to the government and imprisonment, the full cost of restoring the environment “to the state in which the environment was prior to the infliction of the damage.”⁸⁹ If this is not possible, then the industry pays compensation to the victims of the pollution.⁹⁰ There is no explicit provision for compensating the citizen initiating the suit, who incurs the

86. See Addis Ababa City Government Environmental Pollution Control Regulations No. 25/2007.

87. *Id.* art. 5(2).

88. EPC Proc., *supra* note 41, art. 11.

89. *Id.* art. 17.

90. *Id.*

costs of litigation and pollution studies. This is a shortcoming of the law because it might prevent poor people from coming forward. Notably the APAP case, discussed below, was funded by APAP, an NGO with considerable resources and professional expertise. In any case, citizen enforcement has the potential to be very effective but remains deeply problematic for other reasons.

First, as the Supreme Court decided in the APAP case, citizens do not have standing to sue the EPA and can only proceed against the polluting industry directly. Action Professionals for the People (“APAP”) sued the EPA in 2006, alleging that EPA’s own studies, as well as other independent studies, demonstrated conclusively that the Akaki and Mojo Rivers were being severely polluted by industrial waste from various factories as well as by untreated waste from the city of Addis Ababa.⁹¹ The EPA’s response, in essence, was that because pollution standards had not yet been adopted, it was impossible to say that pollution had occurred. This argument was awkward for EPA, considering that it was the EPA’s failure to enact standards in the first place that had prevented APAP from suing the offending industries directly. The legal point on which EPA eventually succeeded was that APAP did not have standing to sue the EPA. This point was not entirely clear from the EPC Proclamation, which says merely that, if a person files a complaint with EPA about a polluter and is not satisfied with EPA’s response, that person can then “institute a court case.”⁹² Against whom? The Supreme Court decided that a citizen suit can only proceed against the polluter. In fact, this is probably the right decision from the standpoint of the legislature’s intent. The citizen suit provision in the EPC Proclamation waives the “vested interest” requirement initially for the purpose of facilitating citizen *complaints* to the EPA against polluters. Considering the current political environment and the shortage of government funds, it is unlikely that the legislature intended to open the door to litigation against EPA. In the end, APAP achieved a victory of sorts when the EPA finally enacted pollution standards. As will be seen, however, this does not mean that industries along the Akaki and Mojo Rivers will be forced to immediately comply with the standards.

91. Action Professionals Association for the People v. Environmental Protection Authority, Civil File No. 64902, Federal First Instance Court (2006). For a brief summary of the case, see Vibhute, *supra* note 57, at 95. Wondwossen Sintayehu of the EPA also produced a summary of the case at the pleading stage. WONDWOSSEN SINTAYEHU, ENVTL. PROT. AUTH., ACTION PROFESSIONALS’ ASSOCIATION FOR THE PEOPLE VS. ENVIRONMENTAL PROTECTION AUTHORITY: REPORT ON THE PUBLIC INTEREST LITIGATION CASE INSTITUTED AT THE FEDERAL FIRST INSTANCE COURT OF ETHIOPIA, *available at* www2.unitar.org/cwm/publications/cw/tw/tw10/written/gov/Ethiopia_Wondwossen_Sintayehu.pdf.

92. EPC Proc., *supra* note 41, art. 11(2).

If citizens cannot use the courts to compel EPA to take action, EPA will have complete discretion over whether to set pollution standards and whether to monitor the emissions of industries. When EPA delays and does not pass standards, or does not take enforcement actions on a case-by-case basis for particularly bad offences, or fails to conduct adequate inspections, then citizens have no recourse but to complain to the EPA and, if dissatisfied, appeal only up to the level of the head of the EPA, from which there apparently is no further appeal.⁹³ The solution to this problem is political: Citizens can still mobilize pressure on the national government, or, perhaps more appropriately in this case, on regional governments. Underlying these issues is a more pertinent issue: The EPA and the REAs are underfunded, and their activities can be curtailed through subtle pressures exerted by wealthy industries and investors.

With regard to the standards that have been passed, which presumably should afford citizens an opportunity to sue industries directly, there are yet many problems. To be effective at enforcement, citizens need to be informed about the standards. Under Ethiopian administrative law, “standards” are a species of “directive” and are not required to be published in the federal *Negarit Gazeta*, so they are not readily available to the public. Unless citizens go to the EPA and request specific information, they will not have the appropriate environmental standards in hand. This is not a problem for sophisticated actors like APAP operating out of Addis Ababa, but it is a problem for the average citizen.

Additional concerns have been raised that citizens need information about the activities of a particular factory in order to support a claim that a standard has been violated.⁹⁴ The standards are not ambient standards, which set acceptable amounts of pollution in air and water bodies, but rather are effluent standards that set limits on the amount of certain pollutants generated by a particular factory. Thus, it is not enough to show that a particular water body is polluted or that air in a particular area is polluted. Rather, citizens involved in a suit would have to test the effluent discharges of a particular factory. Typically, the amount of discharge is information to which only the factory and Environmental Inspectors have access. To solve this problem, the government could give citizens a right to EPA’s records or a right to get information directly from the polluting industry. To some degree, citizens already may access those records at the EPA that have been made public. This access is limited in practice, however, and in any case citizens cannot force the EPA to gather the

93. PIP Reg., *supra* note 42, art. 10(3).

94. *See* Vibhute, *supra* note 57, at 96.

necessary information and make it public, nor can they sue the EPA for failure to enforce the standards against a particular industry. A better solution is to give citizens direct access to information about the factory, either through court orders stemming from citizen suit litigation or through a public reporting process.

Interestingly, the Environmental Council deleted a provision of the Prevention of Industrial Pollution (“PIP”) Regulation that would have allowed “anybody” to get information about pollution directly from the concerned factory. It was decided that this information is the factory’s property, and that information including the environmental management plan, the report for the implementation of the PIP Regulation, and the information gathered through periodic supervisions and checkups would be available to the public at the EPA. The worry was that, if the public had a right to information, “expenses will be incurred by the information provider [and] unexpected outcomes might occur.”⁹⁵ This avoids the more important issue, which is why are not all reports submitted by the factory made as public as possible? The EPA could require factories to publish information about their pollution levels in a newspaper (or simply include all of this information on the permit itself and post the permit in a public place). The expenses of publishing this information are minimal. Under the PIP Regulation, every factory must submit an annual report relating to how it is meeting the pollution standards, but this report goes directly to the EPA rather than to the general public.⁹⁶

Citizen enforcement against industry is the ultimate type of government decentralization, at least of executive powers. Every citizen is a policeman. In the end, it would be numerous local and federal courts that would decide the matter of liability. This is an inviting scenario, and cost-effective for the government. Clearly, however, many administrative reforms are needed before citizen suits will work properly. Citizens need to have a public forum where pollution standards and EPA reports on polluting industries are accessible. One solution already mentioned is to change the directive so that EPA and REAs issue environmental permits. The permit itself could state the applicable pollution standards, and regular permit renewals would give EPA the opportunity to gather information from the industry without incurring all of the expenses of an on-site inspection. The industry would be required to report its pollution as part of the permit application. In addition, if EPA received many citizen complaints about one industry, the agency would be in a position to drag

95. Environmental Council First Ordinary Meeting Minutes (April 23, 2008).

96. PIP Reg., *supra* note 42, art. 11(2).

out the permitting process and collect more information. Once public, the information would provide the basis for a citizen suit.

VII. What Ethiopia's Permitting Process Says About Ethiopian Views of Sustainability

Perhaps the main question raised by Ethiopia's permitting process is, why is the Ethiopian government so eager to pass strong environmental policies and initiating laws and yet so reluctant to pass implementing laws and pollution standards? A variety of different actors in the Ethiopian government are ready to cooperate with foreign donors who want to contribute money toward stronger environmental policies. This includes government officials from members of the previous communist regime to the current workers at the EPA and Ministry of Water Resources. However, these same actors uniformly resist making strong decisions to implement environmental policies to stop environmental harms. This is not only true of the EPA and the Ministry of Water Resources, but also of the regional governments that have considerable discretion in implementing federal environmental policy at the regional level. Because this delaying pattern is so consistent, it is not likely that the problem is with a few lazy or corrupt government workers or a few powerful individuals with feelings of insidious anti-environmentalism.

It is instructive to compare environmental permitting with the permitting system being set up to regulate nongovernmental organizations ("NGOs") under the Charities and Societies Proclamation.⁹⁷ The Charities and Societies Proclamation was issued in 2009, and already the Charities and Societies Agency has been formed. Licensing of NGOs ("re-registration") has also commenced—by the end of 2009, 1,200 local and foreign NGOs had been licensed. In 2009, the same year the proclamation was issued, a draft directive was already under consideration. This shows what the government can accomplish in a short time if the political will is present.

Arguments about the difficulties of enforcing environmental laws are not entirely convincing. First, enforcement is not held up by lack of training or expertise. Environmental standards can be copied from other countries, and have been copied. Since 2004, the EPA has had its own set of nonbinding environmental quality standards and nonbinding EIA guidelines ready for adoption into law. These have not been adopted. Several studies have been done of pollution in the area around Addis

97. Charities and Societies Proc. No. 621/2009, FEDERAL NEGARIT GAZETA.

Ababa, particularly of pollution in the Akaki and Mojo Rivers, and it is apparent that the scientific expertise for these kinds of studies is available.

A more compelling explanation is the lack of government funds to support the personnel and infrastructure for environmental regulation over the long term. Adopting strong environmental policies is cheap and easy, especially if a foreign donor is contributing money for studies and policy development. On the other hand, maintaining a complex regulatory infrastructure staffed by experts is difficult and expensive.

Lack of funds is only a partial explanation, however, because it cannot account for the federal government's apparent reluctance to allow citizens to enforce environmental standards on their own through the courts.⁹⁸ Citizen enforcement is considerably less expensive than enforcement by regulatory agencies. If the regulatory agency does nothing but enact the standards, the citizens can at least bring suits against the worst offenders. Although lawsuits present some cost to the courts, the government could recoup these costs with fines and penalties, and, after the first few cases, the mere threat of litigation should be enough to keep offending industries in line without having to litigate every infraction.

Lack of funds also does not entirely explain the government's reluctance to implement EIA laws, as the expense of an environmental impact study report is borne by the project proponents.⁹⁹ Once project proponents learn that they must prepare a report, they hire an environmental consultant to do the technical work. It would be relatively easy to require that such consultants be licensed by the government,¹⁰⁰ and revocation of the license and criminal fines could be imposed on consultants for watering down reports or accepting bribes from proponents.¹⁰¹ The remaining expense to the government is for experts at the EPA who must review the reports. Although this expense cannot be avoided, it is considerably less than the expense of preparing the report, and requires only cross-checking rather than detailed investigative work.

The obvious explanation for the government's inaction on pollution is that the government is fearful of stifling economic development. This is a

98. Citizen suits may seem like a modern legislative innovation, but in fact very similar lawsuits were used under the common law of England and the U.S. before industrialization to control isolated cases of pollution. Citizens could sue for nuisance when pollution crossed onto their property and disturbed their use and enjoyment of their land.

99. EIA Proc., *supra* note 44, art. 7(3).

100. In fact, the EIA Proclamation hints that the EPA will issue standards for EIA consultants. *See id.* art. 7(2).

101. It is already a criminal offense to make misrepresentations in an environmental impact study report. *Id.* art. 18(2).

fear both of losing central control of economic planning and of scaring off investment by increasing the cost of business. These are fears shared by many citizens. In the first place, decentralized management of economic issues (citizen enforcement of pollution standards is a type of decentralized economic management) is a threat to the structure of any modernizing economy. Karl Polanyi has argued convincingly that economic development appears to be organic and from the ground up, but in fact is dependent on centralized coordination and the repression of various local and individual interests.¹⁰² It is dangerous from the perspective of government to create enforceable environmental rights, for example the right to be free from a specific amount of pollution, because rights are by their nature decentralized. The right could be asserted by one person against everyone else, even though everyone else has agreed to waive that environmental right in exchange for the economic benefits of polluting. The threat is not of a grassroots environmental movement, but rather of a small group of Ethiopian environmentalists holding hostage popular development plans by strictly imposing environmental standards.

The fear of scaring off investment comes from the perceived threat that other competing political jurisdictions will attract businesses more than Ethiopia. Competition among jurisdictions produces the well-known regulatory race to the bottom, in which jurisdictions reduce legal regulation of business more and more in order to become the most attractive suitor to business ventures. The race to the bottom is the inevitable effect of allowing expansive markets at a level higher than the scale of government. If a company can enter Ethiopia, employ Ethiopians, and generate revenues to be spent in Ethiopia, this gives the company a kind of power to negotiate terms with Ethiopia. Some companies can and do demand less environmental regulation.¹⁰³ Similarly, much like an international company vis-à-vis the national government, a national company may demand terms from local governments in exchange for jobs and growth brought to the locality.¹⁰⁴ The victims of pollution may agree to pollution as part of an unbalanced exchange, in which they receive some kind of employment or minor financial compensation. Alternatively, depending on the integrity of the local government, a national company may be allowed to pollute because the victims of this pollution are a small and politically

102. KARL POLANYI, *THE GREAT TRANSFORMATION* (1944).

103. On the other hand, some international companies may end up polluting less because of the demands placed on them by their international consumers. This is an effect that has nothing to do with environmental law (although EIA may play a small role) and everything to do with access to information and reports by the international press.

104. Harvey Molotch, *The City as a Growth Machine*, 82 *AMERICAN JOURNAL OF SOCIOLOGY* 309 (1976).

inconsequential group.

Discussions about sustainability in Ethiopia may be a superficial proxy for deeper concerns about resource distribution. That is, while it appears that people are talking about how to prevent pollution, they are in fact thinking about how the people who receive the benefits from economic development do not share these benefits with the people who suffer the environmental harms of economic development. If resource distribution is the popular concern in Ethiopia, then the government is right to focus on international aid concessions and redistribution of wealth within the country rather than on environmental laws that aspire to overall environmental health as measured by science. The permitting process could be changed to fit the Ethiopian context, for example by focusing on discreet payments from polluting industries—a kind of anticipatory tax on pollution. When businesses apply for permits, the government could assess likely pollution and increase the permit fee based on likely environmental harm and economic damage to local residents.

VIII. Conclusions and Further Considerations

Environmental laws in Ethiopia are meant to protect the productive capacity of the land. They include guarantees of an individual's right to access land, and they make promises to control the threats to natural resources from modern factories and from development. This is not just subterfuge. The Ethiopian government wants to protect the country's resources, but in a context in which economic development is an absolute imperative. The only available model for economic development, whether it comes from the U.S. or China, is to continue nationalization and internationalization of markets and preempt any calls for total redistribution of wealth with promises of general social protections like pollution prevention. It is perhaps assumed that, after development is well underway, the government will then have the time and resources to go back and make good on its promises of environmental health. To some extent this may be a real possibility, but at the same time it is prudent to confront the real environmental costs of development, the real distribution of these costs, and the real contradiction between meaningful local control and the imperatives of a nationalizing and internationalizing economy.

Real environmental protection may require a different kind of economy, and certainly will require environmental controls at the same scale as markets. Often it is assumed that the scale problem can be solved only by expanding environmental regulation to the international level, but an equally plausible solution is to reduce the scope and impact of markets

to national or local levels, or in other words to re-socialize markets. Along similar lines, real environmental protection requires decision-makers who recognize the environment (or distribution of environmental harms) as a problem. At present, important decision-makers in government are connected directly to industry or focused myopically on business and development. It is vague economic indicators, often short term, that weigh heavily on the minds of decision-makers everywhere, and not so much the indicators of environmental health. To change this, government decision-makers must be isolated from industrial elites in a purposeful manner.

How will local discussions about sustainability within Ethiopia help improve Ethiopia's natural environment? How will meaningful local discussions be achieved? Local discussions should not be held in the strait jacket of objective scientific discourse on "sustainability," but instead should focus attention on the real concerns of Ethiopian citizens, like resource distribution, that are the only hope for motivated political action on environmental issues. Scientific problem-solving is crucial to dealing with the world's environmental problems, but it does not substitute for political motivation. Neither is environmental science value-neutral. If science is controlled by urban elites, it may be used simply to further elite interests.

Many of the current environmental laws ought to be reformed, not because they are objectively bad laws, but because they pacify the citizenry with language invoking the power of science and the international community and offer vast promises that cannot be fulfilled. These reforms, though they may be initiated by elites in Addis Ababa, can at least serve to expose administrative decisions to greater (and wider) public scrutiny going forward. Some general suggestions from this article include (1) empowering the EPA and REAs to issue environmental permits; (2) providing a secure source of funding and stronger political standing for the EPA (for example, earmarked funds from foreign donors who want to contribute to global sustainability); (3) setting up definite links between the EPA and REAs so that EPA can assist REAs with expert advice and injection of funds when needed, and so that their respective responsibilities are clear; (4) making EPA and REAs the center for all environmental decision making, thus cleaning up the line of accountability so that citizens know which agency is responsible for which decision; (5) making EPA and REAs a place for public discussion and dissemination of information about pollution and other environmental risks; and (6) placing a positive duty on the EPA to provide information about polluters to citizens interested in citizen suits.

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