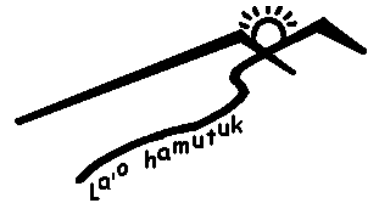


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**Submission to the
State Secretariat for Environment
Democratic Republic of Timor-Leste**

**from
La'o Hamutuk**

**regarding the
draft Basic Environmental Law**

28 February 2011

Introduction

As a civil society organization which has worked for ten years to help ensure that development in Timor-Leste benefits of our people and respects our nation's rights, including the environment, La'ó Hamutuk appreciates Secretary of State Abilio Lima's invitation to participate in this public consultation, and the extension of time to allow us to prepare this submission.

We wrote this submission with help from a number of international environmental experts who live or have lived in Timor-Leste and volunteered their expertise to support La'ó Hamutuk and the State Secretariat for Environment (SEMA) in their work to make this law as good as it can be, providing long-term benefits to our people, the nation and planet earth. We believe that the law incorporates some good and important principles, but leaves out others. It is very flexible – but leaves a lot to future legislation.

We have written this extensive, detailed submission not only to help improve the Basic Environmental Law, but also to identify and highlight some issues which can be incorporated in other statutes, and we look forward to continuing to engage with SEMA and others to develop the best laws, mechanisms and practices to achieve a sustainable future for Timor-Leste.

This submission is in three parts:

- A narrative portion, discussing some overall concepts and general ideas.
- An article-by-article commentary on the draft law.
- An annex by Chris Serjak, who wrote a separate letter with many detailed suggestions.

This narrative part discusses the following topics:

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A healthy environment is intrinsically valuable.

The general approach of this law appears to be that of resource users - seeing environmental components as something to be exploited for material gain, and the environment itself is a resource. For economic benefit, we accept some damage, and take a minimalist approach to define maximum acceptable levels of damage. A more proactive way would be to define a necessary quality of environment (including the intrinsic value of the environment and its components) and minimize damage, protect/conserves, enhance and strengthen natural systems to enable sustainable use and protect against threats like natural disasters, growing population and industry, and extreme weather.

This approach would help protect most Timorese who live within the natural environment in rural communities and towns, depending directly on the environment's resources for their lives and livelihoods, and relying on it to protect them from “natural” disasters. It also has economic benefits, increasing the attractiveness of Timor-Leste to visitors and ecotourism.

We discuss this further in our comments on Preamble paragraph 5, suggested definition of “Ecosystem Services” and other articles in the second part of this submission.

During the last fifty years, the world’s citizens and governments have become much more aware of the value of the environment and the need to protect it. Earlier this month, an Ecuadorian court fined Chevron \$15 billion for environmental devastation that their Texaco predecessor had inflicted on the Amazon rainforest and its residents between 1964 and 1992. Timor-Leste deserves a 21st-century environmental legal framework; we do not have to relive and relearn the sad experiences of other countries which did not protect their environment until recently.

Environmental involvement should be “mainstreamed.”

Protecting and preserving Timor-Leste’s environment is not the job of a single State Secretariat or Ministry, but should involve the active participation of people and institutions throughout the Government, as a corollary to the Principle of Participation defined in Article 4(e). Just as “Gender Mainstreaming” makes everyone responsible to ensure that women have equal rights and opportunities, “Environmental Mainstreaming” would encourage everyone planning projects or making decisions for the state to consider environmental implications of their actions. Every policy, law or regulation should be written with an eye to how it can impact on or protect the environment.

This will reduce the burden on SEMA and the Ministry of Economy and Development and ensure that their efforts to implement this law are not overrun or sidestepped by more powerful agencies or politicians. The main roles of SEMA would be to research and publish about environmental issues, to coordinate EIA and other processes, and to receive complaints. Mainstreaming also distributes liability – if a particular project proceeds without the required environmental licensing, the head of the agency funding or managing the project can be sanctioned, rather than having the entire burden fall on SEMA and MED. Similarly, the onus of approving environmental licenses should not fall solely on the Superior Environmental Authority (presumably the Minister of Economy and Development) as described in Articles 1(c) and 14 of Decree-Law No. 5/2011; the head of the agency proposing and managing the project (if it is to be built or funded by the state) should also have to approve the license. Either or both approvers will be responsible if the approval was issued in contradiction with the facts or the law, subject to legal action.

Our comments on articles in the draft law in the tabular part of this submission give some suggestions of how other ministries could be brought into environmental processes, and creative thinking could give many more. Perhaps the Council of Ministers should discuss this concept well before the draft Law on Environment is submitted to them, with each attendee responding to the question “How can your Ministry, Secretariat or other agency protect Timor-Leste’s environment?”

Complexities of language

Unfortunately, neither La’o Hamutuk nor our collaborators in this submission are fluent in Portuguese, and we are therefore providing this submission in English. If SEMA wishes, we can also provide a version in Tetum in a week or two. In order to prepare this submission, we translated the draft law into English, through computer translation with some subsequent corrections, which is in the left-hand column of the annexed table. We apologize if this process has introduced errors or caused us to make inappropriate comments or suggestions. In the longer term, most of the foreign companies likely to implement projects with major environmental impacts (such as in the petroleum sector), will be more familiar with English than with Portuguese or Tetum, and we encourage SEMA to follow SERN and ANP’s example in using English as a working language.

Throughout the law, we suggest using a non-gender-biased word for human being, rather than the presumably male “*homen*.” perhaps *cidadaun*, *ser humano* or *pessoa*.

In many articles, it is unclear whether a particular action is mandatory or recommended, and who has the responsibility to carry it out. Some of this may be our unfamiliarity with Portuguese sentences which lack grammatical subjects, and the ambiguity of *deve* meaning either “must” or “should.”

Public consultations

We thank the State Secretariat for the Environment (SEMA) for holding this consultation relatively early in the legislative process, before the draft law has been signed off by one or more Ministers. This will make it easier to revise the draft and incorporate information and recommendations from this initial consultation.

To our knowledge, La'ó Hamutuk and Haburas – two Dili-based NGOs – are the only ones outside the Government who have been asked for input, and we were initially given only ten days (we are grateful for the two-week extension) to comment on a highly complex, critically important law which has long-term implications for every citizen of Timor-Leste. Although the preamble of the law says there has been a public consultation in all districts, we believe that this has not taken place, and we hope that it is done in a thorough, informative, participative, transparent, linguistically-accessible and open-minded way before the draft Law is submitted to the Council of Ministers.

The consultation should go beyond district capitals and include rural communities likely to experience environmental impact. The protections and implications of this law are not abstract for people who live in those communities. In the recent past or near future, people in Hera, Betano, Mota Ikun (Liquiçá), Maubisse, Iralalauro, Gariwai, Ermera and many other villages have had projects proposed or built which would affect their communities. Many others have suffered the impact of erosion and flooding. They all have information, perspectives and the right to be included in this consultation process.

International perspectives are increasingly seeing the environment as a human rights issue, and recent conventions (including the 2007 UN Declaration on the Rights of Indigenous Peoples¹) have elaborated this right, including the right for indigenous people and communities to exercise (or withhold) free, prior, informed consent to projects which could affect them. The 1998 Aarhus “UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters”² legally applies only in Europe, but its concepts are rapidly becoming the global norm. That Convention guarantees specific rights in broad areas of access to information, public participation and access to justice. The rights enumerated in both these conventions should be respected for Timor-Leste citizens, especially in rural areas, and for members of vulnerable groups.

Over the years, La'ó Hamutuk has written more than 30 submissions on draft laws and Environmental Impact Assessments. In many of these, we have suggested ways to make public consultation more effective, including:

- Advance distribution of basic materials (including draft laws and explanations of their content, applicability and implications) in Tetum and/or Bahasa Indonesia as well as other languages, in electronic form (as well as on paper), and on the internet. La'ó Hamutuk can help with internet circulation if government websites are not flexible enough, as we are currently doing with the Aid Effectiveness survey for the Ministry of Finance.³
- Allow at least one month for comments, and more time for complex issues like this law that will benefit from outside expertise.
- Enlist local civil society organizations when appropriate, as was done in some of the consultations on land-related laws.

¹ Available at <http://www.un.org/esa/socdev/unpfii/en/drip.html>. See Articles 19, 29 and 32, among others.

² Available at <http://www.unece.org/env/pp/welcome.html>.

³ See <http://www.laohamutuk.org/econ/fragile/11OECDFragileStates.htm> for example.

- Report back to those who participated in the consultation with a list of all suggestions received, what actions were taken in response, and why (as Eni did, for example, in the Cova-1 EIS/EMP consultation).

Less than three weeks ago, Timor-Leste's Environmental Licensing Decree-Law (Decree-Law No. 5/2011 of 9 February) came into force; we only received it three days ago. This Decree-Law was enacted without any public consultation, even though its own Article 11 is about public consultation and its preamble reaffirms that "public consultation is a fundamental right enshrined in the Constitution, and also an instrument of decision-making process, which allows integration of diverse views and perceptions of the project by segments of society, creating conditions suitable for implementing the project and its integration at community and national levels."

We hope that Article 11 of Decree-Law No. 5/2011 does not reflect SEMA's view of a proper public consultation, as it is poorly designed and is about *socialization* (disseminating information), rather than *consultation* (asking for input and using it to improve decision-making). If we had been asked about this decree-law before it was enacted, we would have suggested that it incorporate these essential elements for public consultation on environmentally sensitive projects and decisions:

- Decision-makers should use the consultation process as a source of information and perspectives to enable them to make decisions which are better for the nation and the community.
- Special efforts must be made to obtain wide participation from local communities which may be impacted by a project or law, especially vulnerable and remote populations.
- Stakeholders, civil society organizations, the public and especially local communities must be informed that the consultation is happening and invited to participate. Media and other means can be used to let people know about the consultation.
- Comprehensive, accessible, unbiased information (including project proposals and draft laws) must be provided prior to the consultation in languages people can understand.
- Participants must be allowed sufficient time (at least 30 days) to analyze and comment on that information.
- Consultation must be completed, and its results incorporated, before laws are approved or projects are allowed to proceed.
- The laws should be clear whether the Government or project proponent is responsible for each step of this process; this has been confusing in past EIA consultation processes.

Before enacting this Basic Environment Law, it would have better to develop a fundamental national environment policy through extensive, nation-wide public consultation, as was done on the Concept Paper for the Petroleum Fund Law in 2004. Without such a policy, the principles underlying this law (to the extent that they exist) do not represent broad-based Timorese wishes and desires. Without buy-in from a wide range of citizens, it will be difficult to achieve ownership, compliance, awareness and cooperation. See our comments on Article 5(a).

The current lengthy process to enact land-related laws illustrates some of the obstacles of legislating without an underlying policy framework, and several of the civil society submissions to that process may help the proponents of this law avoid them, as well as providing insights into environmental aspects of land management.

Environmental Licensing Decree-Law

Had there been a public consultation prior to enactment the Environmental Licensing Decree-Law, we would have pointed out some basic weaknesses in addition to those discussed above under public consultation, and perhaps this law can be revised. This list is not comprehensive as many other parts of that decree-law need revision, but some of these are also applicable to the Basic Environment Law under discussion:

- The sanctions are so small as to be meaningless for a large company – all they can lose is what they gained, so it's a no-lose gamble to profitably destroy the environment.
- There is no obligation or sanction on state agencies or officials for violating this law (such as the Ministry of Infrastructure proceeding with projects without going through any EIA process), or the Minister of Economy and Development ("Superior Environmental Authority") ordering the issuance of a license to a project with is clearly environmentally unacceptable.
- There is no provision allowing a potentially impacted community or person to ask a court to issue an injunction to delay or stop a project from proceeding with an inadequate EIA or without undergoing such a process. (A citizen brought such a case to the Provedor in 2009 on the heavy oil power plants, but no action was taken.)
- The Law fails to acknowledge the potential for significant environmental impacts from the cumulative effects of small individual activities. For example, although construction of a single high-voltage transmission tower may have little impact, the construction of thousands of towers over hundreds of kilometers has a massively significant environmental impact. Individual environmental impacts must not be viewed in isolation; but, must rather account for previous, concurrent, and future development actions at various spatial scales.
- The Evaluation Committee (Article 10.2) which recommends the requirements and issuance of a license should be independent, and include representatives from several sectors, not only the state, who have good knowledge about environmental, economic and socio-cultural issues in Timor-Leste.
- Article 3.1, which specifies which projects require a license, should also be based on degree of environmental protection required, quality of the environmental assets themselves, existing laws/zoning/planning, cultural considerations, etc. (Annexes I and II to this Decree-Law were not published in the *Jornal da Republica*, so we do not know if they address this issue.) It is normal to altogether prohibit a project which impacts on a valuable asset both under law or otherwise, such as Tara Bandu areas or community needs.

Complementary legislation

We are concerned that the proposed Basic Law on Environment omits many details which will be specified in other Decree-Laws or other regulations enacted by a Ministry or the Council or Ministers in a closed process. This is explicitly stated in Article 64, but is referred to in many articles.

This law interacts with several laws which are already in force, including:

- Petroleum Act and model PSC for both JPDA and TLEA (Article 25)
- Local authorities (already enacted) (Article 10)
- Environmental Licensing (just enacted) (Article 15)

However, most details of the concepts discussed in this law are left to other legislation, including:

- Sanctions for violations (Articles 12.5, 55)
- Security deposit (Article 16)
- Rules for use of renewable resources (Article 18)
- Regulating marine and coastal activities (Article 24)
- Mining, sand and gravel, and other nonrenewable resources. (Articles 25-26).
- Pollution (Article 29)
- Solid Waste management (Article 35)
- Hazardous waste (Article 38)
- Environment Fund (Article 41)
- Supervision and enforcement (Article 49)

In addition to many policies, standards and rules mentioned in the law, we suggest another which would make it effective: a law implementing Timor-Leste's participation in global climate change conventions.

We hope that all these laws will be enacted soon, as the passage of this Base Law for Environment creates a legal hodgepodge, where some UNTAET and Indonesian laws are still in force, while Timor-Leste laws apply to some aspects of environmental regulation. This law could list the laws which remain in force, providing more legal certainty for citizens, regulators, policy-makers and project proponents.

Some of the recently-passed environmental laws have been in process for nearly a decade (for example, a draft Environmental Impact Assessment Legislation Law was circulated for discussion in March 2003). We are not optimistic that the many laws needed create an effective environmental protection and management legal regime will be in force before the many large, environmentally-intrusive projects envisioned in the National Strategic Development Plan are constructed.

Nevertheless, we do not encourage hasty enactment of the legislation which will form part of Timor-Leste's environmental legal framework. The weaknesses of the new Environmental Licensing Decree-Law demonstrate the dangers of bypassing public consultation and Parliamentary debate.

Climate Change

Although climate change caused by the emission of greenhouse gases (GHG) affects the great majority of our people, it has been omitted from this draft law.

Timor-Leste has signed and is implementing the UNFCCC and Kyoto Protocol. Although our GHG emissions are low (as a "non-Annex I country") or exported (to the Bayu-Undan LNG plant in Darwin), this will change when heavy oil power generation starts, the PEDN is implemented, the Tasi Mane petroleum corridor is built, and an LNG plant for Greater Sunrise comes on-line. However, as a signatory to the Protocol, Timor-Leste is committed to mitigation actions.

Global legal and technical mechanisms and standards relating to GHG emissions are in flux, and this article needs to ensure that Timor-Leste fulfills its legal and global responsibilities, as well as doing whatever is required to receive adaptation funding. Our claim for benefits will be stronger if our Basic Environmental Law recognizes this issue and tries to keep our emissions as low as practicable.

The people must act if the regulators fail to.

Even with the environmental mainstreaming suggested above, there will be times when an environmentally damaging project has so much money or political backing that it may go ahead even if it should clearly be disallowed under this Basic Environmental Law.

One way to reduce the likelihood of this situation, and to strengthen the rights of Timor-Leste's people, is to implement a mechanism where the courts can stop a project even if it has been licensed. Citizens, communities or classes who have been or will be affected by an activity should have standing to bring such a case to court, and judges should be empowered to issue temporary or permanent injunctions based on legal and scientific evidence, which can direct officials or project promoters to take certain actions or face criminal sanctions.

In addition to transparency and information already required by this law, the government should be required to give reasons for its decisions, demonstrating that its decisions are consistent with the goals of the legislation, so that a citizen or a judge can decide if they are valid. If a government entity takes an action that is arguably contrary to the statute, civil society, individuals and community groups should be able to challenge that in court and have the court compel the government to comply with the legislation.

These concepts of accountability and citizen responsibility are alluded to in Articles 6.4, 50, 56.1 and 58 of this law, but the need to be prescribed in enough detail that they can actually be used. Explicit provision must be made to enable citizens, communities or affected classes to challenge decisions by the government that do not comply with the basic law in court, including the relief described in Article 53 and preventive court orders.

We have discussed this in more detail in our comments on the individual articles in Chapter IX.

Petroleum activities are more dangerous on shore than at sea.

Timor-Leste has been through several EIA processes, including consultations and hearings, for off-shore seismic exploration and test wells in our exclusive maritime area (TLEA). Although La'o Hamutuk participated in most of those processes, we were surprised to hear them cited as model Environmental Assessment processes in a recent seminar. They are only good in comparison with the lack of assessment or consultation for virtually all other environmentally-sensitive projects, such as the heavy oil power plants, thousands of high-voltage transmission towers, large construction and road projects, chemical agriculture and other activities.

The Petroleum industry has caused catastrophic environmental disasters, and during the past 12 months the world's newspapers have headlined Deepwater Horizon, the Ecuadorian Amazon rainforest and global climate change. Timor-Leste so far has experienced only a small taste of this industry, as all activities have been far out at sea. When onshore activities begin, as is planned for the Tasi Mane project and the onshore LNG plant, the impact on human life, local communities and people's livelihoods, as well as on complex land and coastal ecosystems, will be much greater. We hope that they will receive much more attention.

Petroleum regulation here has been complicated by overlapping jurisdictions between DNMA, ANP and SERN, and by pressures to maximize short-term state revenues and company profits from petroleum activities. The separate regimes for the Joint Petroleum Development Area (JPDA) and TLEA and the unresolved maritime boundary make offshore regulation more complicated. Although most of the activities regulated under this Basic Law for Environment do not have these complexities, their proximity to communities and potential impact on local livelihoods and environmental services brings a new set of problems.

Three years ago, La'o Hamutuk published a report *Sunrise LNG in Timor-Leste: Dreams, Realities and Challenges*.⁴ Some of the report's environmental recommendations have been partially implemented, and others apply to the law currently under discussion:

"An LNG Project will introduce many new environmental problems. The project could double Timor-Leste's carbon dioxide emissions to the atmosphere and will generate significant amounts of polluting materials, such as hydrogen sulfide, oils, garbage, sanitary water, and other waste. Timor-Leste currently has insufficient laws or capacity to regulate, monitor and control waste generation and pollution of this scale, and many important steps need to be taken:

- The Government should revise the Law on Environmental Impact Assessment and, related to this, develop proper guidelines for conduct of an EIA for an industrial project. An EIA should include a detailed Environment Management Plan spelling out pollution management and mitigation, disaster management plans, and detailed mechanisms for minimizing negative cultural and social impacts. To enable proper evaluation of a submitted EIA, the Government should establish a joint coordination mechanism among ministries and departments, increase capacity of these departments, and include recognized expertise from national and international non-governmental organizations. The

⁴ La'o Hamutuk's book is available online or from our office in English or Bahasa Indonesia. The environment chapter is <http://www.laohamutuk.org/Oil/LNG/chap6.htm> and our recommendations are at <http://www.laohamutuk.org/Oil/LNG/chap9.htm>.

Environmental Impact Assessment process should include informed local consultation and consent, as well as the opportunity for civil society organizations and local community leaders to give input to and modify the Management Plan.

- A Pollution Control Law should specify limits to pollutants, including CO₂ and other greenhouse gases, chemicals which affect sea, ground water and soil quality, as well as issues like flaring and noise pollution. The law needs to be detailed on requirements for waste disposal and treatment of various types of waste, so that regulatory and monitoring bodies can enforce it, and public and private waste disposal and treatment facilities can be developed.
- A base law on the environment, incorporating pollution control and environmental impact assessment laws should also define conditions for decommissioning of projects and constructions when their operational period has ended, to ensure that Timor-Leste is not left with toxic materials or dangerous structures after the company leaves. Plans on decommissioning should be part of the contract and the EIA, although they could be written to enable Timor-Leste to revise its decommissioning requirements during the course of the project.
- Each law developed should spell out or refer to sanctions and/or penalties which are severe enough to compel compliance. Contractual agreements should stipulate that the operating companies obey these laws. It is therefore necessary that laws and regulations are in place before the onset of the project, and that Timor-Leste has the personnel and the mechanisms necessary to identify violations and expeditiously enforce the law.”

Conclusion

This draft Basic Law on Environment is based on the premise that sanctions and threats of sanctions will deter destructive practices, while encouraging those which conserve and protect the environment. However, it does not incorporate a strategic overview of the whole system. Many emergencies can be prevented, or at least ameliorated, by good land policy and planning, but the draft law seems more interested in monitoring such emergencies after the event and finding out who can be blamed so compensation can be obtained under the “polluter pays” principle. In the real world, the penalty often is cheaper than the value of the environmental degradation, or in many cases the pollute’ cannot be held to account. This is the situation in Indonesia, which has some great policies but bad outcomes, and should not be repeated in Timor-Leste.

La’o Hamutuk appreciates policy-makers’ time and effort to consider the many ideas and recommendations in this submission. If anything is unclear, or if you would like more information or to explore any issues in more depth, we are happy to meet or to try to answer questions. We will post this submission on our website,⁵ and would appreciate copies of submissions from others so that we can also publish them (as was done in earlier public consultations), as well as any responses or subsequent drafts. We look forward to continuing our involvement in the process of developing Timor-Leste’s legal framework to protect our environment, and are confident that the wisdom, integrity, skills, professionalism, impartiality and efficiency of the drafters and decision-makers will produce a law that truly protects our environment and the interests of our citizens.

Thank you.



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⁵ We have already posted the draft law at <http://www.laohamutuk.org/Agri/EnvLaw/11EnvBasicLaw.htm>, and will add to this page as more documents and information becomes available.