

## **Public Participation in the Energy Sector: Namakhvani HPP Experience and Future Steps**

*The case of the Namakhvani HPP has demonstrated that the reinvigoration of the energy sector requires more transparency and greater, earlier, more informed and more active public participation.*

### **Introduction**

Despite significant improvements in legislation related to environmental protection and management of natural resources in recent years, it is evident that energy projects are met with mass opposition by local communities as well as professional circles. The most striking example of such resistance has been the lengthy and large-scale protest against Namakhvani, a HPP cascade planned in the Rioni Valley. This protest made clear that the project had been planned without appropriate public participation. There was no public consensus regarding the development of the project, either in the Rioni Valley itself or among the concerned civil and professional organizations beyond the valley.

Further, inquiries into the project have revealed numerous institutional and legislative flaws<sup>1</sup> – problems and failures that need to be addressed for the invigoration of the energy sector to become possible. The Namakhvani HPP case has created an opportunity for a salient exposure of these systemic problems and their incorporation into the political agenda. Refining the procedures related to drafting, development and assessment of energy projects and promoting the transparency of these processes through enhancing access to public information are crucial for ensuring that events similar to those that took place in relation to Namakhvani in 2019-2021 will not occur again, as well as for the creation of an equitable energy policy. Part of these reforms fall within the responsibility of individual state agencies, including the Ministry of Economy and Sustainable Development and the Ministry of Environmental Protection and Agriculture, while others require coordination between multiple government institutions.

Since after the investing company withdrew from the project, its future has been unclear. And with the end of the protest against the HPP, times has come for the reassessment and reevaluation of this two year-long process. What did we learn about the Georgian energy sector in light of the events related to the Namakhvani HPP? The necessity of what kinds of reforms was brought to the fore and who is responsible for carrying them out? This policy paper will compile and provide brief recommendations regarding the systemic challenges addressing which would assist the development of a more sustainable, equitable and democratic energy sector.

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<sup>1</sup> [Violations, Inconsistencies and Unsubstantiated Concessions: A Brief History of Namakhvani HPP Project](#). Social Justice Center, 2021

## **Enhancing Transparency and Public Participation in the Early Phases**

The Case of the Namakhvani HPP has confirmed the critical importance of public participation in the early phases of project development. By the time the local population and wider public became aware of the project, it was about to enter the construction phase. This significantly hindered the protection of their interests and their participation in the development of the project. Therefore, energy projects should get public approval at earlier stages of development, before the state takes on significant and irreversible obligations towards the investor.

## **The initiation and Development of Projects**

On 4 May 2018 the Georgian parliament passed a law on “Public-Private Partnership”. The law envisions significant coordination between the Ministry of Economy, the Ministry of Finance and the Public-Private Partnership Agency as a precondition for decisions regarding the development of energy projects. Further, it mandates the assessment of the environmental impact of such projects and public participation in the decision-making process. However, the 31 October 2018 decree No.515 by the Georgian government designated an alternative procedure for enacting decisions regarding energy projects. The alternative procedure significantly lowers requirements for coordination between the agencies and effectively grants the Ministry of Economy unilateral power to create and develop an energy project and present it to the government. Further, decree 515 provides for the possibility of an environmental impact assessment only after the company has been granted the right to develop the project. In practice, based on the offer by the company, Georgian government and the company sign a contract regarding the development of the projects which engenders rights and obligations for both parties. Among other obligations, the government obligates itself to help the company obtain an environmental resolution. As this resolution is issued by the Ministry of Environmental Protection, an institution subordinate to the government, the ministry clearly does not have an option to reject the projects and public participation in the process of environmental impact assessment often remains a mere formality.<sup>2</sup>

In order to ensure that important environmental, financial and legal considerations are taken into account during the initial stages of energy project development and that the public has full access to information on the project, the procedure outlined by Decree No. 515 should be revoked and requirements of the law of

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<sup>2</sup> [Public-Private Partnership, the Namakhvani HPP and Development of Energy Projects in Georgia](#). Social Justice Center, 2021

Georgia on Public-Private Partnership should be fulfilled (Social Justice Center is challenging decree 515 in the supreme court<sup>3</sup>).

## **Public Information**

Public participation in environmental management – whether in relation to the energy sector or any other – is impossible without access to public information. Despite legal requirements, relevant government agencies either did not provide the interested parties with numerous key documents related to the Namakhvani HPP project, or did so with a significant delay, in unreasonable timeframes.<sup>4</sup> After being denied the request for public information, Social Justice Center submitted an appeal to the court to make several Namakhvani-related documents public.<sup>5</sup> These included resolution by the Ministry of Finance, the cost-benefit analysis of the project, recommendations regarding the project by the Ministry of Justice and the contract between the investing company and the state. The Ministry of Justice initiated a process of selecting a law firm that would conduct judicial assessment of the Namakhvani HPP contract. This process, as well as numerous stages of designing and developing the project, was closed to the public. Further, Social Justice Center has been trying to obtain documents pertaining to other hydropower projects, including the Shuakhevi HPP. These efforts have proved fruitless and the matter is similarly being settled in court.

**Effective and well-informed public participation requires timely and complete disclosure of public information by the authorities.**

## **Environmental Impact Assessment**

Environmental Impact Assessment (EIA) report is a key document that evaluates the ecological and social sustainability of planned projects. However, current procedures that determine how they are devised and discussed and how the state makes decision regarding them are characterized by several significant flaws. These flaws conflict with European environmental legislation and the EU’s Environmental Impact Assessment Directive.<sup>6</sup>

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<sup>3</sup> [Obstacles to Public Participation in the Process of Energy Project Development Are Being Challenged in Court.](#) Social Justice Center, 2022

<sup>4</sup> [ნამახვანჭესის პროექტი - დოკუმენტაციის უკანონოდ დახურვა გრძელდება.](#) სოციალური სამართლიანობის ცენტრი. 2021.

<sup>5</sup> [სოციალური სამართლიანობის ცენტრი ნამახვანი ჰესის პროექტთან დაკავშირებული საჯარო ინფორმაციის მოსაპოვებლად სასამართლოს მიმართავს.](#) სოციალური სამართლიანობის ცენტრი. 2021

<sup>6</sup> [გარემოზე ზემოქმედების შეფასება - უსაფრთხო განვითარების გარანტი საქართველოში? ნანუკა ალემაშვილი.](#) სოციალური სამართლიანობის ცენტრი. 2022

The existing procedure for EIA does not ensure effective public participation and is not in accordance with the crucial precautionary principle. Based on this principle “if it is possible that a given policy or action might cause harm to the public or the environment and if there is still no scientific agreement on the issue, the policy or action in question should not be carried out.”<sup>7</sup>

### **Expert Commission**

Based on the code, in order to conduct IEA examination report, the agency forms an expert commission, which presents the report in 40 days after its formation. Factoring the report into the ultimate decision is not obligatory. However, refusing to take it into account should be substantiated.<sup>8</sup>

The code does not unequivocally obligate the expert commission to be responsible for the “completeness and high quality” of the information provided in the report.<sup>9</sup> Based on the code, this responsibility falls fully on the developer and/or their hired consultant. This clearly conflicts with EIA Directive’s aim of a proper examination conducted by a qualified body. Problems related to the transparency of the expert commission’s activities are also noteworthy. According to the code, the agency forms an expert commission “based on a separate administrative-legal deed in each individual case”. This means that the agency enjoys almost full discretion regarding the members of the expert commission. Importantly, the identities of the members of the expert commission should be disclosed proactively along with the report after the conclusion of the examination.

These considerations point to several changes that would make the expert commissions more transparent and effective. **First, the expert commission should be designated as responsible for the validity and high quality of the report and related documents. Further, pro-active disclosure of the identities of the commissions’ member and refinement of member selection criteria will increase public trust towards them. Finally, there should be a higher standard than just formal justification for not taking the commission’s report into account in cases when the ministry decides issues a positive environmental resolution despite an expert commission’s negative assessment.**

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<sup>7</sup> Ibid.

<sup>8</sup> გარემოსდაცვითი შეფასების კოდექსი (2017) მუხლი 12(2), 42(1), 43(5).

<sup>9</sup> Directive 2014/52/EU of the of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment, პრემბულა, პარა 33.

## Unreasonable Time Frames at the Screening Stage

Producing a screening report and presenting it for public discussion is a crucial part of the environmental impact assessment procedure. Whether or not the project should forego environmental impact assessment is decided at this stage. This is also when the public is first informed about the basic characteristics of the project. Public participation at this stage is ensured by law.

However, interested parties have only 7 working days to provide feedback on the screening report. Such a limited time frame is unreasonable and hinders the participation of interested parties in the discussion of the report. Further, it is inconsistent with the EU Directive and make active participation at the screening stage impossible.<sup>10</sup> **Therefore, extending current time frames to reasonable limits is important.**

## Conditional EIA Resolution

There are significant risks associated with the so-called “conditional” IEA resolutions. In terms of this practice, the Ministry of Environmental Protection and Agriculture issues a positive EIA resolutions, but lays down certain conditions that the developers should fulfill in the future. These conditions are generally related to further studies. Obviously, certain studies are conducted and part of the reports are obtained at different stages of project development – research needs to continue after the IEA resolution has been granted. However, this practice becomes problematic in cases where future, post-IEA research includes important component of the project, such as seismic security, geological suitability of the project’s engineering part and so forth. The IEA resolution for Namakhavani HPP is also conditional. It obligated the company to conduct 25 additional studies.<sup>11</sup> This resolution is problematic also due to the fact that the report submitted by the developer covered only one of the two dams of the HPP cascade, rendering the assessment of the cumulative environmental impact of the whole cascade impossible. Despite this, IEA report was granted a positive environmental resolution.<sup>12</sup>

Project developer is obligated to fully research the impact of planned activities on the rights of the local population, in both environmental and economic terms.<sup>13</sup> The code does provide for the possibility of granting any kind of conditional permit. **Issuing an environmental resolution in the absence of comprehensive information on the project and the obligatory expert assessment is unacceptable.**

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<sup>10</sup> [გარემოზე ზემოქმედების შეფასება – უსაფრთხო განვითარების გარანტი საქართველოში?](#) ნანუკა ალემაშვილი. სოციალური სამართლიანობის ცენტრი. 2022

<sup>11</sup> [გარემოსდაცვითი გადაწყვეტილების მიღების პროცესის შეფასება ნამახვანის ჰიდროელექტროსადგურების კასკადზე.](#) სოციალური სამართლიანობის ცენტრი. 2021

<sup>12</sup> Ibid.

<sup>13</sup> გარემოსდაცვითი შეფასების კოდექსი, მუხლი 2, ნაწილი პირველი, „გ“ ქვეპუნქტი.

Conducting key studies after EIA resolution is incompatible with the precautionary principle, which posits scientific agreement as a necessary precondition for environmental resolutions. **Neglecting the cumulative impact of different parts of a large-scale projects and partitioning EIA reports is also unacceptable.**

### **Assistance Mechanisms**

Various assistance mechanisms provided for the investors in the energy sector often become grounds for disagreement. These mechanisms include guaranteed purchase contracts, the build-own-operate model, discount prices for or outright allotments of land and other resources to the investors, low taxes, simplified processes for obtaining a permit, etc. Investor support mechanisms could generate excessive fiscal risks in the form of state obligation. Further, they could give rise to intransparent, vague and informal relations between government agencies and private entities. This can make balancing public and commercial interests harder and undermine democratic accountability.<sup>14</sup> On the backdrop of the global competition for investments, whereby the states are compelled to create ever more attractive environment for investors, surrendering public interest to incentivize investors becomes a particularly pernicious threat.<sup>15</sup>

Additional investor assistance mechanisms are planned to be introduced in 2022.<sup>16</sup> **Investor assistance mechanism in the energy sector should be evaluated in terms of their long-term socio-economic and fiscal impact. Simultaneously investor support initiatives should be subjected to public accountability.**

### **Consideration instead of Repression**

The large-scale protests against Namakhvani HPP that had spread to almost the whole country by summer 2021 were accompanied by repressive and in many cases unsubstantiated police activities. In 3 April 2021, with the resumption of preparatory works for construction in the Rioni Valley a large police force was amassed at the location. The police blocked roads leading to Namakhvani from Kutaisi and Lechkhumi. Soon after, on 11 April the police dismantled tents that the local inhabitants had set up. Along with setting up roadblocks and dismantling tents, law enforcement agencies used repressive measures such as fines and arrests. For example, on 3 April the police issued 12 participants of the protest 2, 000 GEL fines for breaking curfew. On 14 April, 6 people were arrested at a protest in the village of Gumati. These measures violated

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<sup>14</sup> [საქართველოს ენერგეტიკის განვითარების ფონდი - სახელმწიფო კომპანია დერეფულირებულ ენერგეტიკულ ბაზარზე](#). გიორგი ცინცაძე. სოციალური სამართლიანობის ცენტრი. 2022

<sup>15</sup> [რბოლა ფსკერისკენ](#). გიორგი ცინცაძე. სოციალური სამართლიანობის ცენტრი. 2021

<sup>16</sup> ენერგეტიკაში PPA მექანიზმის დაბრუნებას ვაპირებთ - პრემიერი. bm.ge. 22 ივნისი. 2022

the fundamental right of assembly and manifestation, while the police roadblock significantly curtailed freedom of movement in the Rioni Valley.<sup>17</sup>

Along with violating fundamental constitutional rights of citizens, the police measures hindered the facilitation of a dialogue and agreement-based process for settling the dispute. **The Ministry of Internal Affairs should abstain from repressive measure at the sites of the protests, to enable the citizens to voice their positions safely and with their fundamental rights protected.**

### **Supervision System**

Projects as large as the planned Namakhvani HPP Cascade entail significant risks during their construction and operation. Even if a project's environmental impact is fully researched and assessed, a well-organized, transparent and effective system of supervision is still necessary to ensure that the development proceeds safely and in accordance with the law.

The case of the Namakhvani HPP has demonstrated that the current practices of environmental and technical supervision have significant flaws. The study of conducted environmental inspections has revealed that fines often do not act as effective instruments for improving conditions on the ground. Also problematic is the fact that the results of the environmental inspection that was conducted simultaneously with mediation, have not yet been disclosed to organizations that participated in the mediation. **Problems related to the completeness, accuracy and accessibility of protocols of inspection are noteworthy.<sup>18</sup> In light of previous incidents and the case of the Namakhvani HPP, the function and practices of Technical and Construction Supervision Agency should be researched and evaluated.<sup>19</sup>**

### **Judiciary System**

The Namakhvani HPP case has revealed one more significant systemic problem which significantly aggravates the rights situation of the local populations of energy project development areas and does not allow professional groups to facilitate legal discussions on various issues. Namely, the lack of transparency and effectiveness of the judiciary. The construction permit the Namakhvani HPP, the environmental resolution, government approval of the project, as well as the establishment of illegal roadblock in the Rioni Valley should have become matters of legal dispute. Several organizations, including the Social Justice

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<sup>17</sup> [საპოლიციო ღონისძიებების შეფასება ნამახვანის პროტესტის დროს](#). სოციალური სამართლიანობის ცენტრი. 2021.

<sup>18</sup> [ნამახვანი ჰესის მედიაციის პროცესი - ანგარიში](#). სოციალური სამართლიანობის ცენტრი. 2022.

<sup>19</sup> [ვინ და როგორ გასცემს დიდი ინფრასტრუქტურული პროექტების აშენების ნებართვებს?](#) მანანა ლოლბერიძე. Ifact.ge. 2022.

Center have submitted relevant appeals. However, due to the drawn-out processes, the court did not figure as the space where the disagreements could have been settled legally.

### **Changes in the Wrong Direction**

Events related to the Namakhvani HPP have brought the country's environmental and economic management systems to the fore. Journalists, researchers and legal experts have revealed numerous problems related to lack of transparency, participation and competence in the decision-making process. It is now very important that these revelations become a basic for public deliberations and relevant processes of reform.

However, 2022 saw a slew of legislative and institutional changes which, rather than addressing the deficiencies revealed by the processes related to the Namakhvani HPP and using this experience to revamp the system, aggravate the situation in several different aspects. After these changes responsibility for EIA resolutions fell on the National Environmental Agency. This substitution was introduced without proper discussion and substantiation, and new regulation of EIA procedure entails numerous risks, including possible conflict of interest.<sup>20</sup> Changes were also made in the law on Public-Private Partnership. They have diminished standards of transparency during the project drafting and development stages.<sup>21</sup>

Instead of potentially dangerous changes made behind closed doors and without proper substantiation, the energy sector needs systemic reinvigoration – more transparency, more active and earlier participation of the public and strategies that prioritize public interest. Concerns voiced at the protests against the Namakhvani HPP should be raised not only after, but during decision-making. Local populations and interested parties should have the possibility to obtain information on projects that are important for them, participate in the management of natural resources, inquire about the benefits and dangers of projects and receive qualified responses. Changes recommended in this policy document can assist the establishment of such a process.

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<sup>20</sup> [მწვანე ალტერნატივას პოზიცია და შენიშვნები გარემოსდაცვითი მმართველობის სფეროში დაგეგმილი რესტრუქტურის ინიციატივის შესახებ. 2022](#)

<sup>21</sup> [საჯარო და კერძო თანამშრომლობა, ნამახვანჰესი და ენერჯეტიკული პროექტების განვითარება საქართველოში. გიორგი ცინცაძე. სოციალური სამართლიანობის ცენტრი. 2022](#)