

RESEARCH ARTICLE

Meaningful Public Participation in Environmental Decision-Making Process: A Comparative Study on EIA Preparation in Indonesia and the United States

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ABSTRACT

Meaningful public participation has become an essential tool for ensuring accountability and empowering the public in environmental decision making. However, in Indonesia, public participation in EIA (Environmental Impact Assessment) preparation has suffered a regression post-Job Creation Law. This research is meant to analyze public participation in EIA preparation through a comparative perspective between Indonesia and the United States, followed by reform proposals drawn from the comparative study. This research is normative, employing statutory, conceptual, and comparative approaches. The findings show that the current EIA preparation process post-Job Creation Law has diminished the role of public participation evident in the screening process, the restrictions on the stakeholders involved and the comments considered, and the replacement of the EIA Review Commission with the less representative Environmental Feasibility Assessment Team (EFAT). In comparison, the United States NEPA (the National Environmental Policy Act) and its implementing regulations require public participation from the outset of the process and require responsible agencies to respond adequately to submitted comments, subjecting them to judicial review for failure to involve the public and respond to public comments. Based on NEPA practices, reforms to Indonesia's current EIA preparation includes replacing the screening process with EA (Environmental Assessment) for more contextual determination of significant impacts, involving environmental groups and indirectly affected communities at every stage of the EIA preparation, requiring the project initiators to adequately respond to comments and to publish a ROD (Record of Decision), and allowing judicial oversight through civil and public interest causes of action to ensure accountability.

Keywords: *meaningful public participation, environmental decision-making, environmental impact assessment.*

INTRODUCTION

The Constitutional Court in Decision Number 91/PUU-XVII/2020 has introduced the concept of “meaningful participation” in lawmaking process (*Constitutional Court Decision*

Number 91/PUU-XVIII/2020, 2020; Putra & Oktaviana, 2025). The concept itself mandates a “due process” in lawmaking by vesting the public with the rights to be heard, to be considered, and to be explained (*Constitutional Court Decision Number 91/PUU-XVIII/2020*, 2020; Putra & Oktaviana, 2025). This notion of procedural justice focuses on equitable and just participation, either in lawmaking or in the day-to-day administration of the nation, to ensure that a decision making process: a) is transparent, accountable, fair, and correctible; b) is able to empower affected communities; and c) treats all parties involved with respect (Ruano-Chamorro et al., 2022; Ulibarri et al., 2022). While the concept is procedural in nature, it is considered to be an important means to achieve substantive justice and to rectify distributive injustice (Ulibarri et al., 2022).

In the field of environmental law, meaningful public participation is critical to ensure environmental accountability (Kramarz & Park, 2016). According to Paddock, meaningful public participation requires (Paddock, 2012):

1. potentially affected communities have an appropriate opportunity to participate in the decision-making process of a proposed project that will have an environmental and/or health impacts;
2. public participation can influence government agencies’ decision;
3. public concerns to be considered in government agencies’ decision-making process; and
4. government agencies’ proposing a project to solicit and facilitate meaningful participation of potentially affected stakeholders.

Meaningful public participation in environmental decision making consequently may encourage government agencies to (Paddock, 2004):

1. produce more information regarding a project’s environmental impacts;
2. provide project information based on local knowledge and expertise;
3. encourage project modifications to address environmental concerns;
4. create a consultative relationship with the public, including monitoring and reporting procedures of a project; and
5. be more careful in considering aspects of a proposed project.

Meaningful public participation, therefore, requires the government to not only involves the public in environmental decision making process, but also to ensure that the public is fully informed (Paddock, 2012). This is done to allow the public to participate effectively as “full partners” in the decision making process, thus paving the way for a fair treatment and results (Paddock, 2012).

In Indonesia, Article 65 paragraph (2) of Law Number 32 of 2009 on the Protection and the Management of Environment (hereinafter the Environmental Protection and Management Law) as amended by Law Number 6 of 2023 on the Stipulation of Government Regulation in Lieu of Law Number 2 of 2022 on Job Creation to become Law (hereinafter the Job Creation Law) stated that “[e]very person has the right to obtain environmental education, access to information, access to participation, and access to justice in the fulfillment of the rights to a good and healthy environment” (Law Number 32 of 2009 on the Protection and the Management of Environment, 2009). This guarantee of public participation, however, must be done according to Article 65 paragraph (4) of the Environmental Protection and Management Law which states that “every person has the right to participate in the protection and the management of the environment **according to laws and regulations**” (Law Number 32 of 2009

on the Protection and the Management of Environment, 2009). The term "*according to laws and regulations*" restricts the scope and exercise of the right to public participation by limiting its fulfilment to how laws and regulations govern the process of environmental decision making. After the enactment of the Job Creation Law, the scope and the role of public participation in environmental decision making process has been severely reduced to a mere tokenism, especially with regards to environmental impact assessment (hereinafter EIA) (Azhar & Mardhatillah, 2023; Muslim & Najicha, 2022; Nkrumah, 2021).

Several studies have previously discussed the topic of public participation in environmental decision-making process. First, an article by Antoni Putra and Deka Oktaviana titled "*Quo Vadis Environmental Participation Rights: A Review of Indonesian Constitutional Court's Decision*" discusses the regulatory dynamics of public participation in environmental matters by analyzing Constitutional Court's decisions (Putra & Oktaviana, 2025). The article differs from this research in that it is comparative in nature, examining the regulatory scheme on environmental decision making in the United States and its prospects for adoption in Indonesia. Second, an article by Melisa Ayu Azhar and Siti Ruhama Mardhatillah titled "*Partisipasi Publik dalam Penyusunan Dokumen Analisis Dampak Lingkungan Pasca Berlakunya Undang-Undang/Perppu Cipta Kerja* (Public Participation in the Preparation of Environmental Impact Assessment After the Enactment of the Job Creation Law)" discusses the regulatory changes on public participation in the preparation of EIA after the enactment of the Job Creation Law (Azhar & Mardhatillah, 2023). This research differs in that it examines not only public participation regulation in environmental decision-making processes in Indonesia, but also in the United States and its prospects for adoption in Indonesia. This research is meant to analyze the current public participation regulatory scheme in environmental decision making, specifically with regard to EIA, in Indonesia and its limitations. This research also describes the environmental decision-making process in the United States as a point of comparison for the purpose of analyzing the prospects for legal transplant in Indonesia.

METHODS

This is a normative research, employing statutory, conceptual, and comparative approaches (Marzuki, 2017). Statutory approach is employed to analyze the laws and regulations governing environmental decision making process in Indonesia (Marzuki, 2017). Conceptual approach is employed to analyze the concept of meaningful public participation, especially in the context of environmental decision making process (Marzuki, 2017). Comparative approach is employed to compare the environmental decision making process regulations in Indonesia and the United States (Marzuki, 2017).

This research uses primary legal materials and secondary legal materials (Ali, 2019). Primary legal materials include laws and regulations and courts' decisions that governs environmental decision making process, specifically on EIA preparation (Ali, 2019). Secondary legal materials include books and journal articles relevant to the topic of the research (Ali, 2019). Data are collected through literature study which are then analyzed descriptively and qualitatively to answer the research questions (Soekanto, 2009).

RESULTS AND DISCUSSION

3.1 Environmental Decision-Making Process on EIA Preparation in Indonesia and its Limitation on Public Participation

The current regulatory framework on environmental decision-making process in Indonesia is based on the Environmental Protection and Management Law as amended by the Job Creation Law. One of the environmental instruments to minimize environmental damage caused by business and/or activities is EIA (Burhanuddin, 2024; Muslim & Najicha, 2022; Sisma et al., 2025). Post-Job Creation Law, several aspects of the Environmental Protection and Management Law governing EIA have been amended, severely affecting public participation, i.e. (Wongkar & Shafira, 2020): 1) the determination of whether a business or activity requires an EIA; 2) the use of the term “relevant” in public comments for EIA; 3) the stakeholders involved in the process of producing the EIA; and 4) the abolishment of the EIA Review Commission.

First, on the lack of public participation in the determination of whether a business or activity requires an EIA. In Article 22 paragraph (1), the Environmental Protection and Management Law mandates that any businesses and/or activities that have significant impacts on the environment must have an EIA (Law Number 32 of 2009 on the Protection and the Management of Environment, 2009). In determining whether there are significant impacts that might result from a business or activity, Article 22 paragraph (2) provided several criteria, i.e. (Law Number 32 of 2009 on the Protection and the Management of Environment, 2009):

- a. the magnitude of the population that will be affected by the proposed business and/or activities;*
- b. the extent of the area of impact;*
- c. the intensity and duration of the impact;*
- d. the number of other environmental components that will be affected;*
- e. the cumulative nature of the impact;*
- f. whether the impact is reversible or irreversible; and/or*
- g. other criteria in accordance with the developments in science and technology.”*

The hybrid use of conjunction and disjunction, i.e., the word “and/or,” implies that the determination on the existence of significant impacts is based on the totality of impacts from one or more of these criteria (Scalia & Garner, 2012). However, it also allows broad discretion to agencies or businesses proposing a project to pick and choose the criteria to determine whether there is significant impact (Law Number 32 of 2009 on the Protection and the Management of Environment, 2009; Scalia & Garner, 2012).

Article 23 paragraph (1) of the Environmental Protection and Management Law also provides criteria regarding what type of businesses or activities require an EIA, i.e. (Law Number 32 of 2009 on the Protection and the Management of Environment, 2009):

- a. alteration of the shape of land and landscape;*
- b. exploitation of natural resources, both renewable and non-renewable;*
- c. processes and activities that have the potential to cause pollution and/or environmental damage as well as wastage and depletion of natural resources in their utilization;*
- d. processes and activities that yield results that may affect the natural environment, artificial environment, as well as social and cultural environments;*

- e. *processes and activities whose results will affect the preservation of conservation areas of natural resources and/ or the protection of cultural heritage;*
- f. *introduction of species of plants, animals, and microorganisms;*
- g. *production and use of bio and non-bio materials;*
- h. *activities that have high risks and/ or affect national defense; and/ or*
- i. *application of technology that is expected to have a significant potential impact on the environment.”*

In practice, however, the government provides a list and criteria on the type of businesses and activities that require an EIA through a ministerial regulation (Ministry of Environment and Forestry Regulation Number 4 of 2021 on the List of Businesses and/or Activities Required to Have an Environmental Impact Assessment, Environmental Management Efforts, 2021). If a business or activity is listed as requiring an EIA under the ministerial regulation, the business or activity must produce an EIS.

Agencies or businesses proposing a business or activity may be freed from the obligation to produce an EIA through a screening process (*penapisan*) (Governmental Regulation Number 22 of 2021 on the Implementation of Environmental Protection and Management, 2021). However, this process is independently done by proposing agencies or businesses, and does not require any public involvement (Governmental Regulation Number 22 of 2021 on the Implementation of Environmental Protection and Management, 2021). If a business or activity is unable to do the screening process independently, it may propose to relevant governmental agencies for a screening decision (Governmental Regulation Number 22 of 2021 on the Implementation of Environmental Protection and Management, 2021). The screening decision, however, does not involve any sort of public participation (Governmental Regulation Number 22 of 2021 on the Implementation of Environmental Protection and Management, 2021). Thus, if a business or activity is determined not to require an EIA by a screening decision, the only recourse available is for the public to challenge the screening decision in the state administrative court.

Second, regarding the use of the term “relevant” in public comments for EIA, the Job Creation Law amended the provision of Article 25 of the Environmental Protection and Management Law as seen in Table 1 (Law Number 32 of 2009 on the Protection and the Management of Environment, 2009; Law Number 6 of 2023 on the Stipulation of Law Number 2 of 2022 on Job Creation into Law, 2023).

Table 1. Comparison of the Texts of Article 25 of the Environmental Protection and Management Law and the Job Creation Law

Environmental Protection and Management Law	Job Creation Law
“The EIA document contains:	“The EIA document contains:
a. <i>an assessment of the impact of proposed business and/ or activities;</i>	a. <i>an assessment of the impact of the proposed business and/ or activities;</i>
b. <i>evaluation of activities around the proposed business and/ or activity location;</i>	b. <i>evaluation of activities around the proposed business and/ or activity location;</i>
c. community suggestions and responses <i>to the proposed business and/ or activities;</i>	c. <i>suggestions and responses from the directly affected community relevant to the proposed business and/ or activities;</i>

Environmental Protection and Management Law	Job Creation Law
d. <i>projections of the magnitude of impacts and the significance of impacts that may occur if the proposed business and/or activities are implemented;</i>	d. <i>projections of the magnitude of impacts and the significance of impacts that may occur if the proposed business and/or activities are implemented;</i>
e. <i>a holistic evaluation of the impacts that occur to determine the feasibility or unfeasibility of environmental health; and</i>	e. <i>a holistic evaluation of the impacts that occur to determine the feasibility or unfeasibility of environmental health; and</i>
f. <i>a plan for environmental management and monitoring.”</i>	f. <i>a plan for environmental management and monitoring.”</i>

Source: processed by the Author, 2025.

Based on the table, the amendment to Article 25 limits the scope of stakeholders that may comment on a proposed business and/or activity. In other words, only communities directly affected by a business and/or project are involved in the consultation process (Muslim & Najicha, 2022; Suntoro, 2021). The phrase “directly affected” also bars the participation of communities potentially and indirectly affected (Wongkar & Shafira, 2020). The term “relevant” also gives broad discretion to decide which comments are relevant and which are irrelevant (Wongkar & Shafira, 2020). This in turn could lead to outcomes that are unsustainable, disregarding communities’ interest in the process of producing the EIA and subsequently in the implementation of the proposed businesses and/or activities (Latif et al., 2019; Sisma et al., 2025).

Third, regarding the stakeholders involved in the process of producing the EIA, the Job Creation Law amended the provision of Article 26 of the Environmental Protection and Management Law, as seen in Table 2 (Law Number 32 of 2009 on the Protection and the Management of Environment, 2009; Law Number 6 of 2023 on the Stipulation of Law Number 2 of 2022 on Job Creation into Law, 2023).

Table 2. Comparison of the Texts of Article 26 of the Environmental Protection and Management Law and the Job Creation Law

Environmental Protection and Management Law	Job Creation Law
“(1) <i>The EIA document as referred to in Article 22 is prepared by the initiator with community involvement.</i>	“(1) <i>The EIA document referred to in Article 22 is prepared by the initiator with community involvement.</i>
(2) <i>Community involvement must be carried out based on the principles of providing transparent and complete information and must be informed before the activities are carried out.</i>	(2) <i>The preparation of the EIA document is carried out by involving communities directly affected by the business and/or activity plans.</i>
(3) <i>The community referred to in paragraph (1) includes:</i> <i>a. those affected;</i> <i>b. environmental observers;</i> <i>and/or</i>	(3) <i>Further provisions regarding the process of community involvement as referred to in paragraph (2) are regulated in government regulations.”</i>

c. those who are affected by any form of decision in the EIA process.

- (4) *The community referred to in paragraph (1) may raise objections to the EIA document.”*

Source: processed by the Author, 2025.

The amendment to Article 26 basically followed the same logic as the amendment to Article 25, i.e., minimizing the scope of stakeholders involved in the process of producing an EIA. Prior to the amendment, anyone who may have interest in a proposed business and/or activity, whether it be environmental groups or communities not directly affected, is to be involved and may raise objections to the EIA document (Muslim & Najicha, 2022; Wongkar & Shafira, 2020). Coupled with the removal of the initiator's obligation to provide the public access to transparent and complete information along with the removal of the community's right to raise objections, the Job Creation Law basically reduces the substantive nature of public participation to a mere formality (Pambudhi & Ramadayanti, 2021; Tatyana & Putra, 2022).

Fourth, the abolishment of the EIA Review Commission. The Job Creation Law abolished the provision of Article 30 of the Environmental Protection and Management Law, which states that (Law Number 32 of 2009 on the Protection and the Management of Environment, 2009):

- “1. The membership of the Environmental Impact Assessment Commission as referred to in Article 29 consists of representatives from the following elements:*
- a. environmental agencies;*
 - b. related technical agencies;*
 - c. experts in the field of knowledge related to the type of business and/or activity being assessed;*
 - d. experts in the field of knowledge related to the impacts arising from a business and/or activity being assessed;*
 - e. representatives from the community that may be affected; and***
 - f. environmental organizations.***
- 2. In carrying out its duties, the Environmental Impact Assessment Commission is assisted by a technical team consisting of independent experts who conduct technical assessments and a secretariat formed for that purpose.*
- 3. Independent experts and the secretariat as referred to in paragraph (3) are appointed by the Minister, governor, or regent/ mayor in accordance with their authority.”*

In Article 24 of the Job Creation Law, the commission is replaced with an Environmental Feasibility Assessment Team (hereinafter EFAT), comprised only of the central government, local government, and certified experts, effectively excludes affected communities from reviewing the final draft of an EIA (Sisma et al., 2025). With its critical function to conduct environmental feasibility studies, the underrepresentation of affected communities and environmental organizations may pose the risk of myopic decision making by the EFAT (Wongkar & Shafira, 2020).

3.2 Environmental Decision-Making Process in the United States and its Prospect for Adoption in Indonesia

Environmental Decision-Making Process Regulation in the United States

In the United States, any federal departments or agencies that intend to take major actions must go through a review process that examines the actions' environmental, social, and economic impacts (Sutherland, 2024). This requirement is part of the mandate under the National Environmental Policy Act (hereinafter NEPA), which is the first monumental environmental statute in the United States, enacted in 1970 (Reitze Jr., 2019). NEPA, often called the “*magna carta*” of environmental law, is a procedural statute that has fundamentally altered the way the federal government conducted their decision making process (Hudson, 2023). NEPA, in essence, requires federal agencies to take a “hard look” before taking a “leap” based on the premise that a careful, transparent, and deliberative decision making process will result in a more environmentally sustainable decision (Ruple et al., 2022). A premise supported by a study conducted by Ruple and Capone, who concluded that NEPA compliance is associated with the resulting final decisions having a significantly lower environmental impact than the initially proposed projects (Ruple & Capone, 2016).

As for procedural requirements, Article 102 paragraph (2) section c of NEPA requires that “*every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment ... [to include] a detailed [environmental impact] statement [(“EIS”)] by the responsible official*” (Poisner, 1996; Reitze Jr., 2019). According to the provision, an EIS is only required for: 1) major Federal actions; and 2) significantly affecting the quality of the human environment. Regarding the term “major Federal action”, the Council on Environmental Quality (hereinafter CEQ) defined it to include “*actions with effects that may be major and which are potentially subject to Federal control and responsibility*” (Aagaard, 2012).

The federal courts have interpreted the term “major Federal action” to be inextricably linked to the term “significantly affecting the quality of the human environment.” In *Bark v. United States Forest Service*, the United States Court of Appeals for the Ninth Circuit (hereinafter the 9th Circuit) interpreted the term “significant” to include considerations of a projects’ “context” and “intensity”, both of which are respectively defined as follows (*Bark v. United States Forest Service*, 2020):

1. **context:** “[*involves analysis*] in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality”; and
2. **intensity:** “*refers to the severity of impact*”.

The 9th Circuit subsequently held that the United States Forest Service’s decision not to produce an EIS as arbitrary and capricious for 2 (two) main reasons (*Bark v. United States Forest Service*, 2020):

1. the impacts of the project are highly controversial and highly uncertain:
 - a. **highly controversial:** “[*there is a*] ‘substantial dispute [*about*] the size, nature, or effect of the major Federal action rather than the existence of opposition to a use’”; and
 - b. **highly uncertain:** “[*there is*] conflicting evidence on the effects of ecological intervention [*that*] made a proposed project highly uncertain.”
2. the United States Forest Service failed to identify and meaningfully analyze the “*cumulative impacts of the project*” which is defined as “*the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency ... undertakes such other actions.*”

Thus, NEPA requires the completion of an EIS whenever a federal project's impacts are known to be significant in terms of their context and intensity (Ruple & Race, 2020).

While NEPA does not require public participation, the implementing CEQ regulations (40 CFR Parts 1500-1508) do require public engagement by responsible federal agencies by disclosing environmental documents, holding public hearings and meetings, and soliciting public comments (Johnson, 2023; Masinter, 2019; Poisner, 1996; Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act (40 CFR Parts 1500-1508), 2005).

First, NEPA mandates an Environmental Assessment (EA) to be produced by responsible federal agencies (Johnson, 2023). EA constitutes a brief investigation into a project's environmental impacts to determine whether there is a potential for significant environmental impact that warrants an EIS (Johnson, 2023; Outka, 2006). In the case where no significant impact is found, the responsible agency may safely declare a Finding of No Significant Impact (FONSI) (Johnson, 2023; Outka, 2006). In *Town of Cave Creek v. Federal Aviation Agency*, the United States Court of Appeals for the District of Columbia Circuit (hereinafter the DC Circuit) "arbitrary and capricious" analysis stated that the issuance of a FONSI must meet certain standards (Davis, 2006; *Town of Cave Creek v. Federal Aviation Administration*, 2003):

1. *the agency has accurately identified the relevant environmental concern;*
2. *once the agency has accurately identified the problem, it must have taken a 'hard look' at the problem in preparing the EA;*
3. *if a finding of no significant impact is made, the agency must be able to make a convincing case for its finding; and*
4. *if the agency does find an impact of true significance, preparation of an EIS can be avoided only if the agency finds that the changes or safeguards in the project sufficiently reduce the impact to a minimum.*

In *O'Reilly v. All State Fin. Co.*, the 5th Circuit held that the EA prepared by the Army Corps of Engineers (hereinafter the Corps) "*entirely failed to consider an important aspect of the problem*" and that the Corps has acted arbitrarily by (*O'Reilly v. All State Fin. Co.*, 2023):

1. not providing any response to public comments; and
2. not providing any explanation as to why it decided to issue a FONSI.

The 5th Circuit also held that the Corps failed to consider the project's cumulative impacts by not addressing the issue of the 2016 flooding in St. Tammany, raised by several public comments (*O'Reilly v. All State Fin. Co.*, 2023). The role of public comments as a form of participation, therefore, has an important role in making sure that responsible agencies did not overlook any important aspects of a project. Agencies' failure to respond to any issues raised by public comments may result in a FONSI being declared "arbitrary and capricious" if challenged in court (Akerboom & Craig, 2022).

Second, in the case where an EIS is mandated, Section 102 of NEPA requires responsible agencies to produce an EIS that contains "a detailed statement" on (Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act (40 CFR Parts 1500-1508), 2005; Reitze Jr., 2019):

1. *the environmental impact of the proposed action;*
2. *any adverse environmental effects which cannot be avoided should the proposal be implemented;*
3. *alternatives to the proposed action;*

4. *the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and*
5. *any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented."*

Public participation during the preparation of an EIS is required twice (Johnson, 2023; Outka, 2006; Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act (40 CFR Parts 1500-1508), 2005):

1. after the scoping period, whereby proposing agencies identify "significant issues" addressed in the EIS, as required by Section 1501.7 of the CEQ regulations; and
2. after an EIS draft has been published, whereby proposing agencies are required to solicit and respond to public comments, as required by Section 1502.9 and Section 1503.1 of the CEQ regulations.

With regard to the scoping period, proposing agencies are required to inform the public and to hold meetings with communities likely affected by the proposed projects and any interested persons (Johnson, 2023). The scoping period is then followed by the publication of a Notice of Intent, which informs the public of agencies' intention to prepare an EIS and includes (Bennon et al., 2024; Johnson, 2023; McGrath, 2023): 1) description of the proposed project; 2) all reasonable alternatives; and 3) an outline of the scoping process.

After an EIS draft is complete, the proposing agency must publish the draft for the public to comment on and respond to the comments submitted (Johnson, 2023). In the case where the proposing agency is of the opinion that a comment is not substantive and therefore does not warrant further attention, the proposing agency must provide an explanation as required by Section 1503.4 of the CEQ regulations (Johnson, 2023; Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act (40 CFR Parts 1500-1508), 2005). The section of the CEQ regulations also requires that any public comments and the agency's response must be included in the final EIS (Johnson, 2023). In *National Resources Defense Council v. Morton*, the D.C. Circuit acknowledged the benefit of an EIS as bringing the attention of a proposed activity's environmental impacts to the public (*National Resources Defense Council v. Morton*, 1972). The transparency provided by the EIS process arguably minimizes environmental challenges, invites cooperative solutions, and produces a more informed decision (McGrath, 2023).

In *Miss. River Basin Alliance v. Westphal*, the United States Court of Appeals for the Fifth Circuit (hereinafter the 5th Circuit) provided three criteria in determining whether an EIS is adequate (Davis, 2006; *Miss. River Basin Alliance v. Westphal*, 2000):

1. *whether the agency in good faith objectively has taken a hard look at the environmental consequences of a proposed action and alternatives;*
2. *whether the EIS provides detail sufficient to allow those who did not participate in its preparation to understand and consider the pertinent environmental influences involved; and*
3. *whether the EIS explanation of alternatives is sufficient to permit a reasoned choice among different courses of action."*

These deferential criteria and standards serve as the basis for challenge by the impacted parties and as a standard of review by courts in determining the adequacy of an EIS (Bennon et al., 2024; Davis, 2006). The risks of litigation, which may delay a project in its entirety through a court injunction, indirectly force federal agencies to expand

environmental documentation to cover possible topics of litigation (Benyon et al., 2024). In the final step, Section 1505.2 of the CEQ regulations requires the proposing agency to issue a Record of Decision (hereinafter ROD) whereby the agency informs the public of the action the agency chooses to take (Johnson, 2023). The ROD requires the proposing agency to affirm that any comments received during any stage of the NEPA review processes have been considered (Johnson, 2023).

Prospects for Adoption in Indonesia

There are several public participation aspects of the NEPA processes that may be adopted in Indonesia's EIA preparation. **First**, the determination of a significant impact under the Environmental Protection and Management Law, in practice, is currently predetermined by a ministerial regulation. While the practice may speed up and simplify the determination process, it arguably runs contrary to the mandate of Article 22 paragraph (2) of the Environmental Protection and Management Law that requires the determination of significant impacts to be based on several criteria (Law Number 32 of 2009 on the Protection and the Management of Environment, 2009). The predetermination under a ministerial regulation basically did not allow for an independent determination of significant impacts by the initiator, especially considering that each similar project's impacts may be different from one another depending on the context (Emerson & Baldwin, 2019).

This screening process could be replaced by a mechanism similar to EA under NEPA. Normatively speaking, as a brief environmental document that has the main purpose of determining the existence of significant impacts, EA is arguably more consistent with the text of Article 22 paragraph (2) of the Environmental Protection and Management Law in that it allows for the independent inquiry based on the mentioned significant impacts' criteria (Cassuto & DiBenedetto, 2020; Siros et al., 2020). As compared to the current "top-down" screening process, EA allows for a bottom-up and contextual process to take place in the determination of significant impacts. Coupled with public participation through public notice and solicitation of comments, the EA preparation process allows the public to be involved early in the environmental review process, thereby ensuring accountability and transparency (Emerson & Baldwin, 2019; Foster, 2018; Hughes et al., 2024).

Second, the screening process (*penapisan*) that is currently devoid of public participation could benefit from a notice and comment mechanism. The screening process is a crucial step by which an initiator determines whether an activity and/or business requires an EIA (Amir Sup, 2020; Ciptaningrum et al., 2017). However, the absence of public participation may risk the possibilities of fraud and disingenuous independent screening by the initiator (Su et al., 2023). Moreover, in the case where the screening process is done through a screening decision by the government, there needs to be a mechanism to ensure that the process is done according to the procedure required by laws and regulations.

Just as the EA process under NEPA requires public participation, a public participation requirement in the screening process, or EA if replaced, which mandates an initiator to inform and to solicit comments from the public, needs to be embedded into the process to improve transparency and accountability (Ruple et al., 2020). As the screening process is not explicitly regulated in the Environmental Protection and Management Law and is only regulated in the law's implementing regulations, embedding public participation and replacing the screening process with EA may be done without having to amend the

law. Under the current regulations, the adoption may be done by amending (Governmental Regulation Number 22 of 2021 on the Implementation of Environmental Protection and Management, 2021; Ministry of Environment and Forestry Regulation Number 4 of 2021 on the List of Businesses and/or Activities Required to Have an Environmental Impact Assessment, Environmental Management Efforts, 2021): 1) Governmental Regulation Number 22 of 2021 on the Implementation of Environmental Protection and Management (hereinafter Government Regulation 22/2021); and 2) Ministry of Environment and Forestry Regulation Number 4 of 2021 on the List of Businesses and/or Activities Required to Have an EIA, Environmental Management Efforts, and Environmental Monitoring Efforts or a Statement of Willingness for Environmental Management and Monitoring (hereinafter Minister Regulation 4/2021).

Third, the limitation of public participation in EIA preparation to only affected communities, coupled with the removal of environmental groups and the removal of the initiator's obligation to provide complete and transparent information, basically tilted the balance highly in favor of the initiator (Zanini et al., 2023). Decision-makers, be it the initiator or the government, are more often swayed by experts' technical comments rather than the less-sophisticated general public, especially those of low-income and minority communities (Foster, 2018). Environmental groups' role in public participation, therefore, arguably becomes the balancing factor by allowing the technocratic representation of affected communities' interests (Froissart, 2019).

The inclusion of communities indirectly affected by a business and/or activity should also be restored, as environmental impacts may also affect those communities. This would force the initiator and/or the government to conduct a more holistic and comprehensive EIA preparation by considering both the direct and the indirect impacts of a business and/or activity (Aliyu et al., 2025; Kahila-Tani et al., 2016). The public comments solicited from both environmental groups and communities affected and the responses provided must be recorded similar to the ROD in NEPA process (Wilkinson, 2022). Any *ex parte* communications must also be published for the public to comment and included in the ROD to ensure transparency and accountability (Kuehn, 2018, pp. 752–771). This will provide the court with the information of whether the initiator or the government has considered and responded to every comment adequately (Brandon, 2017). Inability and inadequacy in responding to public comments could be a basis for striking down a state administrative decision resulting from the EIA preparation process (Akerboom & Craig, 2022).

The twin purposes of environmental decision making, i.e., informed decision making and informed public participation, will fail without communities' empowerment in the participation process (Burger & Wentz, 2017). This participatory process be made more accessible to the broader public by means of digital platform by improving the current environmental document information system portal (Kloppenburger et al., 2022). Hence, an amendment to the Environmental Protection and Management Law is needed to facilitate the public participation process either digitally or by in-person meetings, the inclusion of environmental groups' and indirectly affected communities' role, and disclosure of every information received by the initiators during the public comment period. Their inclusion in turn could foster legitimacy, thereby promoting the acceptability of EIAs and minimizing the threat of future litigations (Eckerd & Heidelberg, 2020; Liu et al., 2020).

Fourth, judicial oversight by the state administrative court must be provided in order to ensure that both the initiator and the government have engaged in reasonable decision making. The role of the courts in this case is twofold: 1) the traditional role of reviewing governmental and/or private action; and 2) the preventive role of indirectly incentivizing initiators and the government to consider all relevant information before taking an action. Regarding the courts' traditional role, the review process may be deferential in the sense that once an initiator or the government has complied with the procedural requirements required by laws and regulations, provided sufficient evidence for their decision, and responded to public comments adequately, the court must not second-guess the initiators' and/or the government's decision and uphold it (Siros et al., 2020). This deferential approach is commonly known in Indonesia as the *rechtmatigheid* standard of review (Winarno, 2018, p. 534). In essence, the court's role is not to replace or to supplant the conclusion made by the initiator and/or the government, only if it is supported by evidence on the record (Burger & Wentz, 2017).

As for the preventive role of the courts, it is based on the logic that the threat of litigation may force the initiator and/or the government to do "litigation proofing" by providing more information and public consultation engagements in the produced environmental documents (Bennon & Wilson, 2023; Liscow, 2025). Hence, a clear statutory authorization that allows both civil litigation by communities affected and public interest litigation by environmental groups to challenge the EIA preparation process, especially after the Job Creation Law removed the provision that allows environmental licenses to be annulled through the state administrative courts (Law Number 32 of 2009 on the Protection and the Management of Environment, 2009; Law Number 6 of 2023 on the Stipulation of Law Number 2 of 2022 on Job Creation into Law, 2023; Zhuang & Wolf, 2021). Without broad access to justice and to complete and timely information, public participation cannot be meaningful (Sánchez et al., 2024). Community empowerment in the decision making process coupled with legal access to justice is therefore essential in ensuring that rights are respected and guaranteeing meaningful public participation (Sánchez et al., 2024).

These reform proposals to the EIA preparation process in Indonesia may be seen in Figure 1.

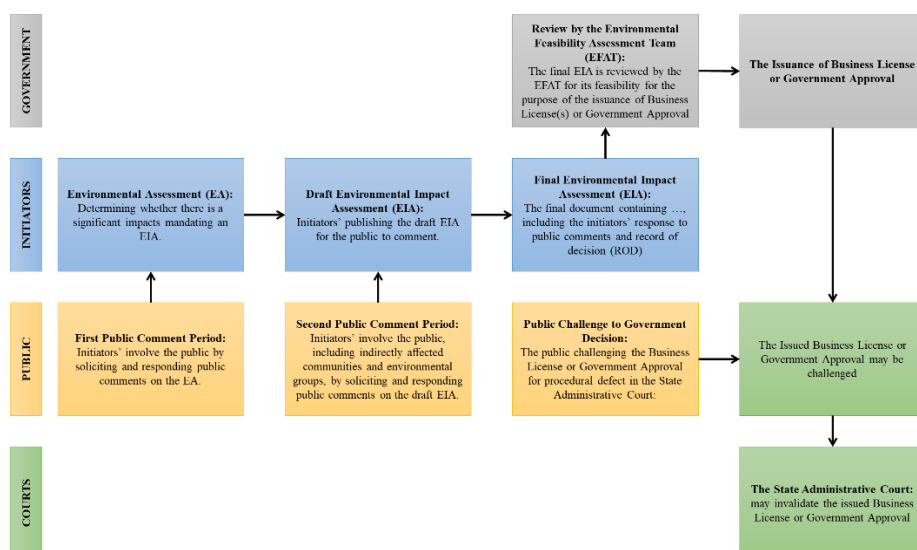


Figure 1. Reform Proposals for the EIA Preparation Process in Indonesia
Source: processed by the Authors, 2025.

The stages of the process include: 1) screening by EA; 2) EIA drafting period; 3) final EIA feasibility review by EFAT; 4) issuance of business license or government approval; and 5) judicial review by the state administrative court. However, these processes must provide legal certainty, and thus, a timeline is required to balance environmental interests with those of the business or activity initiators.

CONCLUSION

The enactment of the Job Creation Law has severely diminished the role of public participation in the EIA preparation process. Under the current regulatory settings, meaningful public participation is a utopia caused by procedural constraints and exclusion of indirectly affected communities and environmental groups. Indonesia could learn from how NEPA governs environmental decision-making in the United States, especially how it embedded public participation and judicial oversight from the preparation of EA and/or EIS to its finalization in ROD. NEPA and its implementing regulations are arguably better equipped in accommodating public participation and promoting more responsive and proactive government agencies. Coupled with judicial oversight, NEPA ensures that agencies really did their homework in doing a hard look before taking any action that may have significant impacts on the environment.

Indonesia could start by reforming the significant impacts determination process by replacing the current screening process with a process similar to EA under NEPA to better accommodate the contextual differences between proposed projects. Broadening and empowering public participation during the preparation of EA and EIA could also bolster informed decision-making while at the same time ensuring accountability and transparency. Reinstatement of judicial oversight on the process complements the public participation by providing access to justice that allows the public to challenge decisions resulting from the EIA preparation process. These reforms serve as the pillar in realizing meaningful public participation in environmental decision-making in Indonesia.

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