

Coping with expanded environmental regulation

David Duncan and Charunun Sathitsuksomboon of *Tilleke & Gibbins* examine Thailand's new environmental protection regulations and their impact on energy and infrastructure projects.

Last year, around the same time as Thailand's "Red Shirt" crisis, another crisis was under way. Of course, we are referring to Map Ta Phut, a thoroughly industrialised municipality which became the geographic focus of litigation over various government entities' compliance with environmental provisions in the constitution. Though the lawsuit was against government agencies and people, the resulting gridlock halted the progression of some 76 industrial projects that had already been approved pursuant to then-current procedures. Foreign and Thai companies in many countries were impacted by this impasse.

At the centre of the controversy was the Thai Constitution, enacted in 2007. Its Section 67 provides that any project or activity which may seriously affect the quality of the environment, natural resources and biological diversity ("potentially harmful") shall not be permitted, unless its impacts on the quality of the environment and on the health of the people in the communities have been studied and evaluated. Section 67 also mandates consultation with the public and interested parties, and it further requires that opinions be obtained from an independent organisation, consisting of representatives from private environmental and health organisations and from higher education institutions providing studies in the field of environment, natural resources, or health, prior to the operation of such project or activity. It goes on to guarantee that the right of a community to sue various types of government or state agencies shall be protected.

Four requirements

At issue, the constitution imposes four requirements on projects that are potentially harmful. These include the completion of environmental impact assessments (EIAs), health impact assessments (HIAs), public consultations, and independent assessments. It is on this basis that the Stop Global Warming Association and Map Ta Phut villagers brought lawsuits against several government entities, resulting in the suspension of the industrial projects.

Existing regulations

To put the Map Ta Phut debate in context, it is important to realise that environmental regulation is not new to Thailand. Indeed, many of the modern laws on this topic were enacted in 1992. Some of the most important of these are the *Enhancement and Conservation of National Environmental Quality Act 1992*, *Factory Act 1992*, *Public Health Act 1992*, *Hazardous Materials Act 1992*, and *Enhancement of Energy Conservation Act 1992*.

EIAs are the mainstay of environmental regulatory planning in many countries, and Thailand is no different. In Thailand, EIAs are required by the *Enhancement and Conservation of National Environmental Quality Act 1992* in the case of some 34 project types, including most public infrastructure projects (dams, power plants, waste plants, public transit, etc.), mining, chemical, oil and gas operations, metal works, cement production, pulp processing, and sugar processing. The requirement even extends to



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hotels/resorts, residential buildings/developments, commercial developments, and hospitals, among many others.

According to pre-existing law, all of these project types were already required to undergo EIAs. Moreover, pre-existing law already required certain HIAs to be performed within the scope of each EIA, and for EIAs to be considered by a panel of experts. Additionally, there was already a requirement for two public hearings.

New regulations

Given the extensive listing of projects subject to these requirements, one could wonder what possible projects would not already have been covered by the pre-existing law. Nevertheless, as the court cases worked their way through the system, the government worked in parallel to develop regulations implementing the constitutional provision. To this end, the National Environmental Board (NEB) established the Four Party Panel, representing public agencies, the private sector, academia, and NGOs, which was chaired by H.E. Anand Punyarachun, to develop a way of concisely determining which projects may be potentially harmful. This was a particularly serious task, given that the requirements would be far more onerous than had ever been implemented in the past.

After much investigation and deliberation, the panel recommended that some 18 project types should be subject to the additional requirements envisaged by the constitution. However, after the panel made this recommendation to the NEB, the NEB declared its intention to cut the list to 11 project types. The environmental NGOs managed to instigate significant public discourse on the matter, and many articles in the popular press seemed to overly simplify the issue as “11 versus 18”, with the former described as being bad for the environment and the latter described as being good for the environment. However, it is quite telling that so little substantive information on the categories that

were cut, and the rationale behind those decisions, actually made it to the mainstream press.

Of course, in today’s economy, capital moves across international borders far more quickly and easily than in years past. Considering this, and considering that companies typically choose to launch their new operations in locations that are welcoming, this results in some degree of competition among investment-receiving countries. Logically, more projects coming to Thailand means more jobs for Thai people, thus pushing up the median wage. Ultimately, the NEB made its decision in an attempt to balance the people’s economic needs and environmental needs, with the result that the following 11 project types were listed in the final regulations:

- Major land reclamation projects;
- Most mining operations;
- Industrial estate projects or any operations involving the use of land for industrial purposes;
- Petrochemical plants;
- Large smelting and forging operations;
- Operations involving radioactive substances;
- Most hazardous waste disposal/incineration plants;
- Airport runway extensions;
- Certain seaports;
- Certain dams and reservoirs; and
- Nuclear plants and other large power plants.

Two systems

With these new regulations, two systems of regulation are now in place. When considering a major project, it will be necessary for investors to check two different lists, to determine which approval procedure, if any, will apply. Of course, there is significant overlap between the two lists; in cases of overlap, it will be necessary to follow the new regulations. Following the new regulations requires significant time – approximately one year in total, which is about seven months longer than the normal process. Of course, timelines may vary from project to project.

In addition to EIAs, the new process requires more extensive HIAs, more intensive public hearings (at least three times), and independent assessments. The E/HIA process will require approximately 50 days for public scoping and 50 days for public review. After submission, the documents are subject to review by the Office of Natural Resources and Environmental Planning and Policy (ONEP) and a panel of experts, for 75 days. If approved, the matter

then travels on for public consultation (50 days) and independent assessment (60 days), though the two can occur simultaneously. There is then a phase where all the results are considered by the relevant authority (15 days). If the relevant authority approves, it then goes through “normal” licensing processes, before final issuance.

To put this in context, however, one must also consider the many other environmental protection laws that also exist, not least of which are the *Factory Act* and the *Hazardous Substances Act*, which impose heavy compliance burdens. Of course, many economically-minded people have expressed concern that, in considering locations for opening new factories, companies will look elsewhere, so that they need not trouble themselves with the expensive compliance rigmarole. In the meantime, there are several old projects which, by virtue of already being in existence, are grandfathered and thus continue to emit significant pollution. Moreover, there is concern that companies with existing projects will not expand or invest in new technologies, because such actions may trigger additional environmental compliance requirements. In this regard, there is some concern that the new regulations, while hailed as groundbreaking by the environmental NGO community, may actually function to make the environment overall worse off and, of even greater concern for everyone, result in fewer jobs for those who need them.

Reducing the expense of environmental regulatory compliance

There is no question that expansive environmental regulations are expensive for business. However, there are several methods by which to mitigate this impact.

One of the simplest ways is to locate one’s project in an industrial estate. Locating in an industrial estate can simplify construction and planning, because infrastructure is already installed and ready to support factories and other industrial facilities. This can reduce construction expenses, and simplify permitting processes. Moreover, foreign companies can own land in industrial estate areas, and work permits are more easily granted for the foreign technicians and experts projects need. In addition, when locating a project in an Export Processing Zone, additional tax-based incentives and privileges are granted.

Thailand’s Board of Investment (BOI) also offers significant incentives to promoted companies, whether or not they are located in industrial estates. One of the most important categories of these is tax-based incentives. These

include import duty reduction/exemption on machinery and raw or essential materials; corporate income tax exemption for three to eight years; double deduction from taxable income of transportation, electricity, and water costs; tax exemption for dividends paid out of the exempted profits during the tax exemption period; and tax exemption for fees for goodwill, copyright, or other rights received from a promoted activity. The resulting tax savings make Thailand an attractive place to invest.

Several non-tax incentives are also offered, including permission for foreign-majority owned companies to own land; permission for foreign-majority owned companies to engage in industries and services normally reserved for Thai nationals; and visa and work permit facilitation.

Of course, promoted industries may change from time to time, as the BOI continually tweaks its programs to best serve Thailand. In 2010, considerable focus was placed on sustainable and green development priorities, promoting activities such as energy conservation, alternative energy utilisation, and reduction of environmental impact; measures to promote production efficiency by manufacturing technology upgrades; and environmental solutions. These measures serve to incentivize new “green” industries, as well as to encourage existing operations to become more “green”.

Conclusion

Though many will find the new requirements burdensome, there is a plus side, as well. Those in compliance with the law can benefit in terms of building a good image, both internationally and locally, and this is of increasing importance as consumers pay greater attention to companies’ CSR (corporate social responsibility) projects. Moreover, factory operators can benefit from having good relationships with the communities in which they are located, when locals perceive their attention to the environment and health of the community. Though there is no question that environmental regulation is expensive, Thailand has put measures in place to mitigate the negative impact, and to make it welcoming for industry. Those who are considering projects in Thailand should consult counsel, both to make sure they comply with all environmental requirements, and also to make sure that they pursue all the incentives available.

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