



RESCCUE

IMPLEMENTING THE MITIGATION HIERARCHY UNDER FIJI'S ENVIRONMENTAL MANAGEMENT LEGISLATION



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Front cover photo: The Naisoso Integrated Resort and Residential Development, Viti Levu, Fiji avoided the best mangrove habitat by relocating the marina, and then offset the residual loss of mangrove by leasing and protecting the remaining 100 acres of mangrove for conservation and traditional use purposes only. (@Google Maps)

Overview of the objectives and components of RESCCUE project:

The *Restoration of Ecosystem Services and Adaptation to Climate Change* (RESCCUE) project is a regional project implemented by the Pacific Community.

The overall goal of RESCCUE is to contribute to increasing the resilience of Pacific Island Countries and Territories (PICTs) in the context of global changes. To this end RESCCUE aims at supporting adaptation to climate change (ACC) through integrated coastal management (ICM), resorting especially to economic analysis and economic and financial mechanisms.

The RESCCUE project operates both at the regional level and in one to two pilot sites in four countries and territories: Fiji, New Caledonia, French Polynesia and Vanuatu.

RESCCUE is funded primarily by the *French Development Agency* (AFD) and the *French Global Environment Facility* (FFEM) for a duration of five years and a half (01/01/2014 to 30/06/2019).

It is structured around five components:

Component 1: Integrated coastal management – supporting ICM implementation through ICM plans, ICM committees, and management activities concerning both terrestrial and marine ecosystems, capacity building and income generating activities.

Component 2: Economic analysis – using economic analysis to support coastal management and policy decisions.

Component 3: Economic and financial mechanisms – setting up economic and financial mechanisms to generate additional and sustainable funding for ICM: review of options (payment for ecosystem services, taxes, user fees, trust funds, quota markets, offsets, labels...); feasibility studies; implementation; monitoring.

Component 4: Capitalization, communication, dissemination of project outcomes in the Pacific – going beyond pilot sites activities in order to have impacts at the regional level, by fostering experience sharing between sites, cross-sectoral expertise, and communication and dissemination of the project outcomes.

Component 5: Project management – implementing and coordinating the project, by providing technical assistance, organizing local and regional steering committees, conducting audits and evaluations (mi-term and ex-post), etc.

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Executive Summary

The Environmental Management legislation gives a clear mandate to Government for mitigation of impacts of developments and activities.

There are provisions for prevention and remedial actions at all stages of the Environmental Impact Assessment (EIA) process, but the characteristics of a mitigation hierarchy approach – sequence of mitigation actions, prioritization of avoidance actions, no net loss or net gain target – are not articulated in the legislation.

Pending the adoption of a formal policy or regulations on mitigation hierarchy, there is sufficient flexibility in the definition of terms of reference for the EIA study, report and conditions of approval in the existing legislation for the approving authority and the EIA Administrator to require that development proponents adopt a mitigation hierarchy approach.

Mitigation hierarchy policy and regulations may be developed to formally enshrine mitigation hierarchy as part of the EIA process through the functions and powers vested in the Minister for Environment and the National Environmental Council.

1. Introduction

The mitigation hierarchy and biodiversity offsets are two relatively new tools used for cost-effective reduction of impacts from development on biodiversity and ecosystem services. Globally, there are a growing number of mitigation hierarchy and offsets policies which are starting to have a wide influence on business practice in some sectors. A regional workshop was held by the RESCCUE project in Fiji in December 2016, hosted by the Pacific Community (SPC) and the Secretariat of the Pacific Regional Environmental Programme (SPREP) to consider current mitigation hierarchy and offset practices in Pacific island countries and their potential development. Based on the participants' opinions and experiences of what is feasible and desirable over the next five years, and informed by a regional review of current mitigation hierarchy policy and state of practice, a series of sub-regional provisional roadmaps were drawn up.

The Fiji Team at the regional workshop comprised nine experienced personnel led by the Director Environment Mr Aminiasi Qareqare with ten members from government, NGO, consulting and CROP agency backgrounds, and with the support of the Permanent Secretary Ministry of Forest, Mr Samuela Lagitaki who delivered the opening speech. This document provides a key element identified in the provisional road map which is a legal review of the Environmental Management Act (EMA) to identify what provisions are available to enable elements of the Mitigation Hierarchy and Biodiversity Offsets approach to be incorporated in the application of the legislation.

2. Mandate for the Mitigation of Adverse Environmental Impacts of Developments and Activities in Fiji's Environmental Legislation

2.1. The Objectives And Purposes Of The Environmental Management Act, 2005 (EMA) Provide The General Mandate For The Mitigation Of Environmental Impacts

"An Act for the Protection of the Natural Resources and for the Control and Management of Developments, Waste Management and Pollution Control and for the Establishment of a National Environment Council and for Related Matters" the long title of the EMA, outlines the objectives of the Act, and gives a general mandate to Government authorities for the protection of the environment and natural resources through the mitigation of impacts of developments and activities.

EMA' statement of purposes includes 'to apply the principles of sustainable use and development of natural resources'. Sustainable development as defined in the Act means 'development that meets the needs of the present generation without compromising the ability of future generations to meet their own needs.' In the context of increasing pressures on limited resources and decreasing biodiversity, the most effective approach ensuring a minimum impact of developments and human activities is required for the conservation of natural resources, biodiversity and ecosystem services for future generations.

2.2. The System For Mitigating Adverse Environmental Impacts Of Developments And Activities

The system for mitigating adverse environmental impacts of developments and activities is established by EMA and the Act's subsidiary legislation – the Environment Management (EIA Process) Regulations 2007, and the Environment Management (Waste Disposal and Recycling) Regulations 2007 – (collectively referred to thereafter as 'the environmental management legislation' or 'the legislation').

The development approval and EIA process and waste and emissions permits provide the mandate, processes and the legal tools for mitigating anthropogenic impacts on the environment, natural resources, biodiversity and ecosystems services.

2.3. Additional Mandate for the Government to require mitigation actions

Mandate for the Government to require mitigation actions may also be derived from the multilateral environment agreements (MEAs) to ensure that commitments made at regional and international fora on environment and development are implemented. EMA establishes the National Environment Council (NEC) whose functions include ensuring that commitments made at regional and international fora on environment and development are implemented.¹ The NEC “may require” the Ministry of Environment (MoEn) *‘to implement treaties and conventions on environmental and resource management to which Fiji is a party’*.ⁱⁱⁱ¹

Fiji has ratified all major MEAs, including the Convention on Biological Diversity (CBD). Art.14 of the CBD call on its parties to *‘Introduce appropriate procedures requiring environmental impact assessment of its proposed projects that are likely to have significant adverse effects on biological diversity with a view to **avoiding or minimizing** such effects’* [emphasis added]. Fiji has committed to take action to halt the loss of biodiversity through the endorsement of the Aichi targets, and to this end to endeavor to reduce pressures on biodiversity, restore ecosystems and sustainably use biological resources, including through effective mitigation of human activities.

3. Mitigation actions in the environmental management legislation

EMA empowers the authorities to direct developers to implement preventative actions and remedial actions that characterize and form a basis for the implementation of mitigation hierarchy. The main enabling provisions for these mitigations actions are reviewed below.

3.1. Prevention Of Impacts: Avoid And Minimize

Prevention or elimination are the terms used in the environmental Legislation when referring to avoidance. Mitigate or reduce are the terms used for minimization.

Prevention/avoidance and mitigation are always mentioned in association, without specific provision for avoidance /prevention or clear indication of any hierarchy of actions. However, there is potential for introducing a requirement for development proponents to prioritize avoidance at the various stage of the EIA process, as discussed below

¹ The words “may require” are taken directly from EMA. The words are not defined in EMA and therefore its literal meaning is applied. It implies that the NEC has the power to request/direct/demand/seek/call for the Ministry of Environment to meet its obligations under various treaties or conventions on environment and resource management to which Fiji is a party to.

STAGES OF THE EIA PROCESS

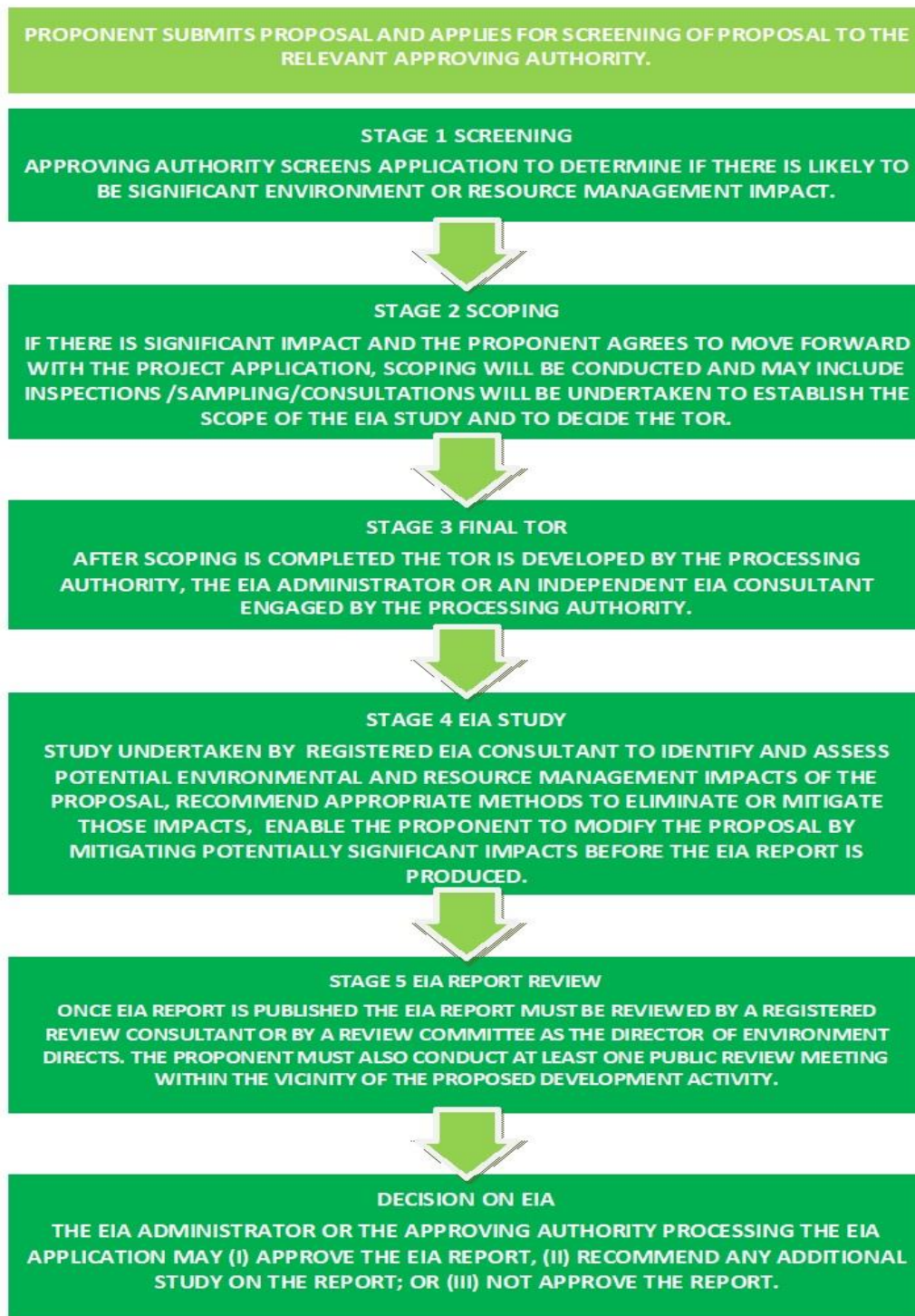


Figure 1 - Stages of the EIA Processⁱⁱⁱ

Screening of development proposals:

- Before undertaking any work that will alter the physical nature of the land, the person proposing the development (proponent) must submit an EIA screening application to the government authority that is legally authorized to approve the development proposals (“approving authority”). The screening application must contain an assessment of any environmental or

resource impact that the proposal is likely to cause, as well as an indication of how such impacts will be managed or mitigated.^{iv}

- The approving authority must then examine and determine whether the activity or undertaking is likely to cause significant environmental or resource management impact. If the approving authority determines that the proposal is likely to cause significant impact, the proposal must then be subjected to the EIA process.
- Consideration is given for a proposed development or activities likely or potential environmental or resources' impacts and how these impacts will be managed, from the earliest phase of a proposed project planning and EIA process: the screening phase. This is the best time plan for the avoidance of impacts.
- Development proposals involving activities that are likely to have more serious impacts or have impacts on vulnerable or protected ecosystems (defined in Part 1 of Schedule 2 of EMA) are to be referred by the approving authority for processing to the EIA Administrator² (the Ministry of Environment), with expertise on environmental matters^v.
- The approving authority must give consideration to a detailed list of matters when determining whether a proposed development/ activity is 'likely to cause a significant environmental impact' that will trigger the requirement for an EIA. These considerations include a broad spectrum of environmental, species and social potential impacts^{vi}. Consideration must also be given to '*whether there exist any technically or economically feasible measures that would prevent or mitigate any adverse environmental or resource management impact*'^{vii}.
- When the proponent can show that impacts will be mitigated to the point of insignificance by the conditions normally attached to an approval, an EIA will not be required^{viii}. This constitutes a strong incentive for avoidance.

Scoping of the EIA Study – Terms of Reference (TORs) of the EIA Report

- The purpose of the scoping phase is the definition of the TORs of the EIA Study and report. The TOR is developed by the processing authority which is either the EIA Administrator, or the approving authority. The processing authority may employ an independent EIA Consultant to prepare the TOR on a proposal at the authority's cost. However, the proponent may also prepare draft TORs for review and approval by the processing authority.
- The scoping phase is an opportunity to adopt a hierarchized approach to mitigation when addressing the identified potential impacts, as well as for setting a no net loss (or net gain) target, prioritizing avoidance of impacts, and for proposing biodiversity offsets in the EIA report for residual impacts.

² The Environment Impact Assessment (EIA) Administrator is a public officer mandated by EMA to (i) examine and process every development proposal that is referred to him/her by an approving authority; (ii) that may come to the attention of the unit that may have a significant environmental or resource management impact; or (iii) causes or in the opinion of the Minister is likely to cause, public concern. All development proposals that are considered to have more serious impacts and are listed in Part 1 Schedule 2 of EMA can only be approved by the EIA Administrator. The EIA Administrator has the power to conduct inspections to ensure compliance with conditions of the approved EIA.

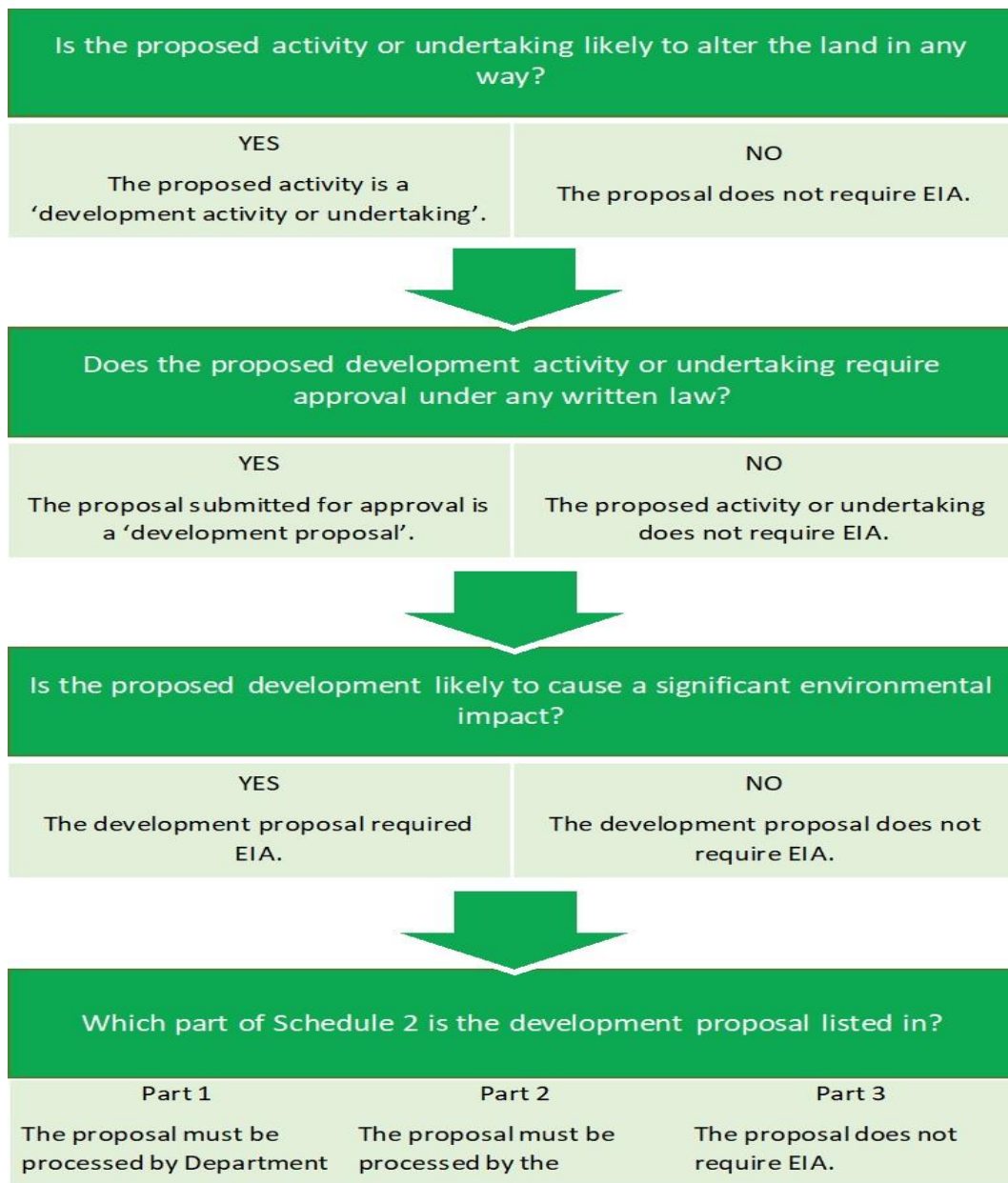


Figure 2 – Screening Process^{ix}

- The processing authority must inspect the proposed site^x, identify all features that may be and may take samples^{xi}, to identify potential environmental and resource issues that may pose the proposed development, and that will provide baseline data for measuring future impacts.
- Public scoping meetings may be held, that may inter alia 'clarify the nature of impacts or provide a better estimate of the magnitude of impacts'; and 'provide additional environmental information to project planners'^{xii}. For major proposed development, other line ministries, the private sector, non-governmental organizations, public authorities and other interested persons may be invited to assist in the preparation of the TORs^{xiii}. Additional consultation meetings may be held for the finalization of the TORs. In the context of mitigation hierarchy which principles include transparency and public participation, these consultations with stakeholders at the early stage of the development approval process may provide important additional information on biodiversity and culturally important or vulnerable sites, and constitute an incentive for the proponent to adopt most effective avoidance and minimization actions to be included in the TOR of the EIA study and report.

- During the preparation of the TORs the processing authority (or the EIA consultant) must consider whether
 - an environment management plan should be a condition of approval of the proposal; and
 - an environmental bond should be taken from the proponent^{xiv3}
- The processing authority, when finalizing the TORs, may depart from the TORs proposed in the EIA processing application to the extent the processing authority considers appropriate^{xv}. This may be used to require a mitigation hierarchy approach.

The EIA Study and Report

- The EIA study must be arranged by the proponent and prepared by a registered consultant, based on the approved TOR. The strongest reference to mitigation hierarchy in the Environmental Management legislation is found in provisions of the EIA Process Regulations describing the purpose of the EIA study, when stating that the purpose of the EIA study on a proposal includes:
 - “(a) to identify and assess the potential environmental and resource management impacts of the proposal;
 - (b) to recommend **appropriate methods to eliminate or mitigate those impacts;** (emphasis added)
 - (c) to enable the proponent **to modify the proposal by mitigating potentially significant impacts before an EIA report is produced.**”^{xvi} (emphasis added)
- The EIA report must be a comprehensive report, based on the EIA study and address all requirements set in the TORs, identify the potential impacts of the proposal on the surrounding environment, and suggest possible mitigation measures to address any identified adverse impact.
- The mandatory contents of the EIA report are detailed in EIA Regulation 25. It includes:
 - a **statement of the various alternatives** that have been considered for the activity or undertaking that are reasonably foreseeable a technically and economically appropriate, including the option of taking no action, and an outline of the reasons for choosing the proposed action;
 - a description of the possible environmental and resource management impacts of the activity or undertaking, including any pollution or waste that may be generated, and impacts occurring during construction, operation, decommissioning, and abandonment phases of the activity or undertaking;
 - a statement of the mitigation action proposed in respect of any adverse impacts identified;
- If required by the TORs, an Environmental Management Plan (EMP) must be prepared, and must:
 - (a) describe in respect of the proposal the **environmental protection**

³ An environmental bond is an amount of money that is estimated against the cost of restoration, improvement or remediation work on any area, compensation for loss or damage to property or income or preventative or remedial action. An environmental bond is determined through the process of the EIA study or can be ordered by a court of law. According to the EMA (EIA regulations), the TOR for any EIA study must consider whether an environmental bond should be taken from the proponent and if so the nature and amount of the bond. An environmental bond must be given by or on behalf of the proponent if the EIA Report recommends it or the EIA Administrator considers the taking of bond necessary according to the requirements referred to above. The EMA establishes an Environmental Trust Fund into which any environmental bond is paid into before the development activity can proceed. The bond is retained in the Trust until the activity to which it relates ceases or the development is abandoned or decommissioned of the undertaking has been completed. The bond may be returned in whole or in part, or the indemnity, insurance or guarantee cancelled or varied depending on the requirements for restoration, compensation etc.,

measures that will be put in place by the proponent if approval is given for the proposal;

(b) include an **environmental monitoring and surveillance** program of action;

(c) provide for an environmental monitoring committee to be appointed by the proponent to verify that the environmental protection plan is being fulfilled and adverse impacts of the proposal documented^{xvii}.

Review and Approval of the EIA Report

- The EIA Administrator, when or if approving the report, may attach **conditions** to the approval, or recommend additional studies^{xviii}. This is a last opportunity for ensuring that adequate preventative and remedial actions are taken and that the mitigation hierarchy approach, that would have been integrated in the TOR, is implemented.
- Additional studies may include further options for strengthening avoidance actions (including temporal avoidance), and request the study of biodiversity offsets towards a no net loss (or net gain) outcome.

4. Remediation of impacts: Restore and Offset

In the mitigation hierarchy, remedial actions are to play as little role as possible (taking the upper part of a mitigation actions pyramid). The environmental management legislation has a range of provisions relating to restoration and remediation, but falls short of clearly envisage biodiversity offsets. There is however some scope for interpreting some provisions to enable biodiversity offsets becoming part of a mitigation strategy.

4.1. Restore

- Restoration, remediation or rehabilitation actions are best when planned at the early stage of the EIA process. The EIA study must consider all phases of project planning, including decommissioning, and the conditions attached to a development approval may *'specify any procedures for cessation of operations and rehabilitation of land'*^{xix}
The approving authority or the Ministry of Environment, as EIA Administrator, may also require the proponent, as a condition of approval, to deposit in the Environmental Trust Fund an 'environmental cash bond', *'as a security to cover the probable cost of preventing or mitigating any environmental damage to the area and its surroundings.'*^{xx} The environmental bond may also be used for preventative action^{xxi}.
- The Environmental legislation also provides for restoration/remediation actions in case of pollution incident. Failure to obtain a permit under the Waste Management and Pollution Control provisions of EMA, or breach of permit conditions, attract penalty notices and remediation notice. Failure to comply may result into a court action and court orders for restoration, including improvement or remediation work, and severe penalties.^{xxii}
Further, if a person fails to comply with a court order made relating to restoration, improvement or remedial action of an area, the Ministry of Environment may undertake the restoration, improvement or remediation of the area, and the cost shall become a debt recoverable in the court (including using the security for costs deposited in the Fund)^{xxiii}.

4.2. Offset

The concept of Offset is widely known in the context of mitigation of climate change emissions, with the mechanisms set up for carbon offsets such as the Clean Development Mechanism (CDM). In the mitigation hierarchy, biodiversity offsets are to be used only to neutralize residual impacts when all other mitigation actions have been exercised, and achieve no net loss (or net gain) .

The literature distinguishes two types of offsets:

- Restoration offsets, which involve creating or restoring habitat outside of the project impact area (*For example, by planting mangroves into an already degraded ecosystem outside the development impact area*), and
- Protection/Averted Loss offsets which involve preventing future damage (that is predicted to occur) by taking better care of the current situation. For example, by improving fisheries management to reduce future impacts on threatened fish species.”^{xxiv}

There is no specific reference to biodiversity offset in the environmental management legislation. There is however some scope for introducing biodiversity offset as part of the EIA process.

- The duties of the approving authority in the EIA process include taking into account ‘*whether there exist any technically or economically feasible measures that would prevent or mitigate any adverse environmental or resource management impact*’^{xxv}. Noting the broad mandate given to define the TORs for an EIA study, nothing in the legislation seems to preclude the inclusion of biodiversity offset as part of the mitigation actions envisaged either by the proponent (or his consultant) as part of the EIA process application proposed TORs, or by the processing authority when finalizing the TORs.^{xxvi} The EIA study and report would then have to integrate the offset of residual impacts.
- Considering that the cumulative impacts of a development proposal is one of the considerations in the determination of significant impact, offsets would be warranted in a location outside the development impact area, that would alleviate the additional impact caused by the proposed development on a given ecosystem (such as mangroves, with mangrove replanting offsets).
- The EMA makes provision for ‘*Debt for Nature Swaps*’, defined as “*any debt incurred by a facility on conservation of nature initiatives, that includes compensation to land and resource owners for giving away the right of use of a piece of land and the natural resources for conservation purposes*”. Although the EIA Process Regulations do not elaborate on this mechanism, further consideration should be given to explore the option to interpret the debt for nature swaps mechanism by proponents for the purpose of biodiversity offset.
- The use of biodiversity offsets may also be made possible through the adoption of the mitigation hierarchy approach, as discussed below.

5. Options For Introducing Mitigation Hierarchy In The EIA Process

The Environmental legislation provides a clear mandate to Government for the prevention and remediation of environmental impacts but it does not reflect a mitigation hierarchy approach in the EIA process. There is no sequence or clear prioritization of mitigation actions. However, subject to political will, there is some scope in the legislation for the introduction of a mitigation hierarchy approach in the EIA process, either informally, or formally, as highlighted below.

5.1. Informal Implementation Of Mitigation Hierarchy

- The main benefit of an informal approach is that it could be implemented without the delays that would unavoidably be associated with the development of prescriptive mitigation hierarchy policy or regulations. It would also establish a practice in the implementation of mitigation hierarchy that would prepare for, and facilitate the development and implementation of any future policy or regulatory change.
- The approving authority and the EIA Administrator are given by law broad discretion in the definition of the terms of reference for the EIA study and report, as detailed above that could be used for requiring from development proponents a mitigation hierarchy approach. This

informal shift towards mitigation hierarchy may either be left to the discretion of the processing authority, or could be partly formalized at the administrative and operational level through the development by the Ministry of Environment of Mitigation Hierarchy Standard Operating Procedures.

- Development proponents may also be encouraged to adopt a mitigation hierarchy approach for developments, in particular, proponents of larger developments financed by international financial institutions such as the International Finance Corporation (IFC), the European Investment Bank (EIB), the European Bank for Reconstruction and Development (EBRD), and the Asian Development Bank (ADB). These financial institutions are increasingly imposing performance standards on lenders and require them to adopt a mitigation hierarchy that complies with the performance standard (such as the IFC PS6).

5.2. Prescriptive Implementation Of Mitigation Hierarchy

- Enshrining mitigation hierarchy in environmental management policy and/or legislation has the benefit of ensuring consistency and perennity in its implementation. The following provisions could be used to this effect.
- The Minister’s power to make regulations ‘*to establish guidelines, standards and procedures for the conservation, protection or rehabilitation of any land, river or marine area*’^{xxvii}, after consulting the relevant Minister responsible for Fijian Affairs, land, mineral resources, agriculture, fisheries, or forestry, could also be used for introducing mitigation hierarchy in the EIA process.
- The National Environment Council (NEC) is a high level body with a significant influence on environmental and natural resource management policies. The NEC’s functions include ‘*to make resolutions on public and private sector efforts on environmental issues*’^{xxviii}. Such resolutions may be made for the purpose of supporting the adoption of a mitigation hierarchy approach in the development approval process.
- The functions of the NEC also include ensuring that commitments made at regional and international fora on environment and development are implemented.^{xxix} Mitigation hierarchy may, for example, be included as one of the strategies of the NBSAP implementation framework endorsed by the NEC.

END NOTES

- i EMA, s.8(1)(f)
- ii EMA s.11(j)
- iii Environmental Law Association
- iv EIA Process Regulations, r.4(3)
- v EMA, s.2
- vi EMA, S.2
- vii EMA, s. 27(2)(c)
- viii EIA Process Regulations, r.6(3)(f)
- ix Environmental Law Association Fact Sheet No. 1 (2015)
- x EIA Process Regulations, r.13
- xi EIA Process Regulations, r.6(2)(c)
- xii EIA Process Regulations, r. 18(1)
- xiii EMA, s.19(4)
- xiv EIA Process Regulations, r.21(1)

xv	EIA Process Regulations, r.19(3)
xvi	EIA Process Regulations, r.22
xvii	EIA Process Regulations, r.26(1)
xviii	EMA, s.31(1)
xix	EIA Process Regulations, r.31(3)(g)
xx	EMA, s.31(2)
xxi	EIA Process Regulations, r. 32
xxii	EMA, Part V, Waste Management and Pollution Control.
xxiii	EMA, s.47 (5)
xxiv	TBC Guidance Note - Strengthening the Mitigation Hierarchy in Pacific Island Countries and Territories
xxv	EMA, s.27(2)
xxvi	EIA Process Regulations, r.19(3)
xxvii	EMA, s.61(3)
xxviii	EMA, s.8 (1)(e)
xxix	EMA, s.8 (1)(f)