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POLICY BRIEF: Revised Guidelines on Free and Prior Informed Consent (FPIC) of 2012

NCIP Administrative Order No. 3 series of 2012 or the Revised Guidelines on Free and Prior Informed Consent (FPIC) of 2012 (hereinafter, "FPIC 2012") was issued on April 13, 2012. FPIC 2012 repeals NCIP Administrative Order No. 1 series of 2006.

What is the Right to Free, Prior and Informed Consent?
Free and Prior Informed Consent (FPIC) shall mean the consensus of all members of the Indigenous Cultural Communities/Indigenous Peoples (ICCs/IPs) to be determined in accordance with their respective customary laws and practices, free from any external manipulation, interference and coercion, and obtained after fully disclosing the intent and scope of the activity, in a language and process understandable to the community.

What is the basis of the Right to FPIC?
FPIC is the expression of the right to self determination of indigenous peoples. The Right to self-determination means that IPs have the right to freely determine their political status and freely pursue their economic, social and cultural development.

Who shall exercise the Right to FPIC?
1. All ICCs/IPs who are owners of the ancestral domain (AD);
2. In case the AD is owned by two (2) or more ICC/IP sub-groups, or under a unified claim:
a. Follow duly executed and validly existing agreement
b. Otherwise, all ICCs/IPs sub- groups, tribes shall participate in the decision-making
3. When there are two (2) or more ADs affected, the ICCs/IPs shall exercise the right to FPIC separately
4. Affected migrant IPs inside the AD may participate in the FPIC if expressly allowed by the AD owners

Is the right to FPIC exercised for each major phase of an activity?
The right to FPIC shall be exercised for each major phase of the proposed activity such as exploration, operation or development, contracting of operator, etc. unless specifically stated in the MOA.

What projects or activities require FPIC?
1. Extractive/ intrusive/ large scale projects, programs and activities
a. Exploration, development, exploitation, utilization of land, energy, mineral, forest, water, marine, air, and other natural resources requiring permits, licenses, lease, contracts, concession, or agreements from the appropriate government agencies, including feasibility studies
b. Those that may lead to the displacement and/or relocation of ICCs/IPs
c. Resettlement programs or projects by the government or any of its instrumentalities that may introduce migrants
d. Declaration and management of protected and environmentally critical areas, and other related undertakings
e. Bio-prospecting and related activities
f. Activities that would affect their spiritual and religious traditions, customs and ceremonies, including ceremonial objects, archeological exploration, diggings and excavations and access to religious and cultural sites
g. Industrial land use including the establishment of economic zones
h. Large scale agricultural and forestry management projects
i. Carbon trading and related activities
j. Large scale tourism projects
k. Establishment of temporary or permanent military facilities; conduct of military exercises, or organizing paramilitary forces
l. Issuance of land tenure instrument or resource use instrument by any government agency
m. Others analogous to the foregoing, except small-scale quarrying.

2. Non-extractive/small scale projects, programs and activities

a. Activities that are not extractive/ intrusive/ large scale

b. Feasibility studies not embraced as extractive/ intrusive/ large scale

c. Non-extractive exploitation and utilization of land, water and natural resources as defined under existing laws, rules and regulations of governing or regulating agencies, e.g. ISF, CBFM, IFMA etc.;

d. Programs/projects/activities not requiring permits from government agencies;

e. Other Small scale quarrying

f. Such other activities analogous to the foregoing

What are the areas excluded from any activity except for the exclusive purposes for which they are identified?

1. Sacred grounds and burial sites of indigenous communities;
2. Identified international and local cultural and heritage sites;
3. Critical areas identified or reserved by the ICCs/IPs for special purposes; and
4. Other areas specifically identified by ICCs/IPs in their ADSDPP.

What are the programs, projects and activities where Field-Based Investigation (FBI) or FPIC is not required?

1. Community-solicited or initiated activities for the delivery of basic services. It shall be subjected to a validation process.
2. Projects, programs and activities undertaken by NCIP by itself or in cooperation with other government agencies and LGU Projects.
3. Foreign funded projects undertaken in cooperation with NCIP involving delivery of basic services or for the promotion of economic and sustainable development. It shall be subjected to a validation process
4. Exercise of traditional resource-use rights: gathering, hunting and such other traditional use by members of the ICC/IP of natural resources found within their ancestral domain including gathering of rattan and other forest products for family/personal consumption, subsistence and livelihood, provided, that the use shall be limited to the ICC/IPs' traditional use
5. Emergency Cases: Plans, projects or activities of the government or any civic, religious, or similar organizations within ADs in response to emergency situations involving public order, health, security or safety including military operations made in connection with hot pursuit operations, securing vital government installations, programs and projects against clear and imminent danger

What is the Certification of Precondition (CP)?

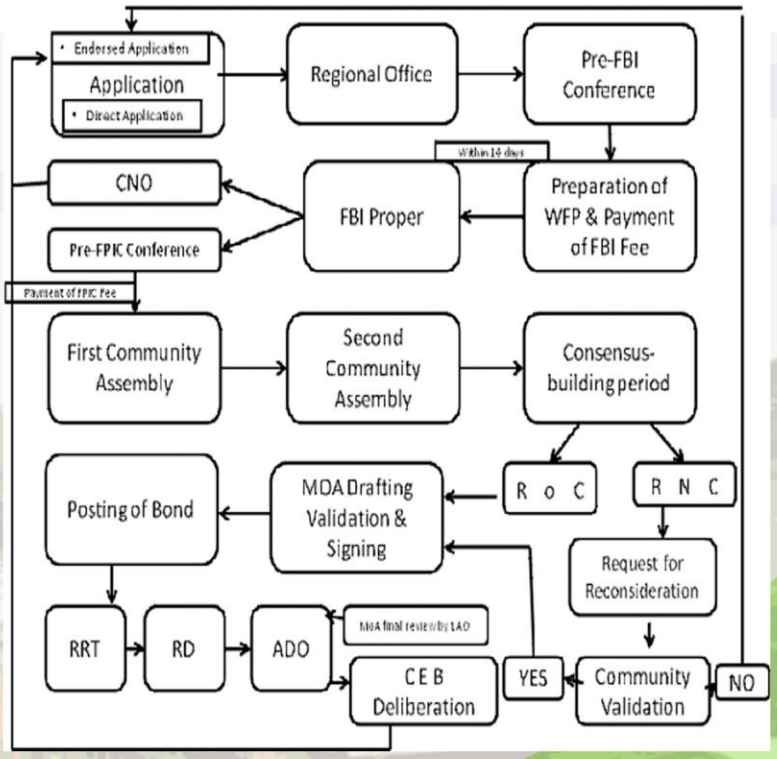
It refers to the Certificate issued by the NCIP, signed by the Chairperson, attesting to the grant of FPIC by the concerned ICCs/IPs after appropriate compliance with the FPIC 2012 requirements.

Will two (2) or more applications for CP on similar subject be simultaneously entertained?

No two (2) or more applications of similar subject shall be simultaneously entertained at any given time covering the same area while an application is being processed therein, neither shall another be given due course while a previous application is being processed.

What is the process of application for issuance of Certification of Precondition?

1. Large scale and extractive activities



What is the difference between the Pre-FBI Conference and FBI Proper?

FBI refers to the ground investigation undertaken to determine whether or not the plan, program, project or activity overlaps with, or affects, an ancestral domain, the extent of the affected area, and the ICCs/IPs whose FPIC is to be obtained.

During the **Pre-FBI Conference,** the following matters shall be discussed:

a. Orientation on the requirements of the FBI process;
b. The identity and other basic information about the applicant;
c. Detailed project profile;
d. Work and Financial Plan; and
e. Other important matters that may be agreed upon.

The **FBI proper** shall commence within ten (10) days from date of payment of the FBI fee and must be completed within ten (10) working days from actual commencement except by reason of fortuitous event or force majeure. The FBI Team shall submit its report which contains a narrative of what transpired during the ground or field investigation; findings and recommendations; and the pertinent attachments.

Should the AD be affected by the proposed project, the FPIC team shall be mobilized. Otherwise, a Certificate of Non-Overlap (CNO) shall be issued.

When is a Certificate of Non-Overlap (CNO) issued?

CNO is issued by the NCIP attesting to the fact that the area where the particular plan, program, project or activity will be done does not overlap with, or affect, any AD.

How are the Community Assemblies conducted?

First Community Assembly

It shall be conducted as soon as the proponent pays the FPIC Fee

The following matters shall be taken-up: a) Orientation on IPRA and the FPIC process; b) Validation of the FBI report and the area/s affected; c) The Census of IPs/Migrant IPs/Non-IPs; d) Identification and validation of IP Elders and Leaders; e) Determination of the Decision-making or consensus-building process/es; f) Consensus on the involvement of NGOs/CSOs; g) Validation of the members of the FPIC Team representing the community; h) Presentation of the agreed WFP; i) Option, selection and invitation of independent expert/s to conduct EIA or give their expert opinions; j) Arrangements for conflict/dispute resolution mechanisms by the chosen/elected IP Elders/Leaders; k) Date and place of Second community assembly; and l) Other matters that may be necessary and pertinent.

Second Community Assembly

It shall be held on a date and place within the AD decided upon during the first community assembly.

1. Presentation by the applicant of the plan, program, project or activity that it seeks to undertake. The presentation shall include: a) The Operation Plan and the scope and extent of the proposal; b) The cost and benefits of the proposal to the ICC/IP and their ADs; c) The perceived disadvantages or adverse effects to the community; and d) The measures adopted by the applicant to avoid or mitigate these adverse effects;
2. Sharing by an expert/s, if engaged or invited;
3. Remarks or inputs of other stakeholders, e.g. concerned NGAs, LGUs, NGO, IPO;
4. Open forum to give the ICCs/IPs the chance to ask questions and to speak out their concerns relative to the presentations and the project; and
5. Other important matters that are agreed upon during the assembly.

What is the Consensus-building period?
This is the period when the ICCs/ IPs shall proceed to consult among themselves, employing their own traditional consensus-building processes, to further understand and discern the merits/advantages and demerits/disadvantages of the proposal in order to intelligently arrive at a consensus.

This activity must **not be undertaken less than ten (10) days** from the date of the Second community assembly and must be completed within a reasonable time but not more than two (2) months thereafter.

What happens when the decision of the ICCs/IPs is favourable?
The parties shall negotiate and agree on the terms and conditions of the MOA. A validation assembly shall be convened within the AD, where the MOA provisions shall be explained to the community and after having understood the contents and implications of the MOA, the community may confirm the same. The MOA shall be signed by the authorized signatories of both parties.

The **Resolution of Consent** of the community shall also be prepared, signed and released.

Before the start of any large scale activity, the applicant shall secure a bond with a reputable bonding company with the consent of the NCIP, or deposit a cash bond with NCIP, to answer for damages, violation of terms and conditions which the ICCs/IPs may suffer and claim from on account of the said activity as may be agreed by the parties in the MOA and under other applicable laws. The kind, amount of bond to be secured or posted, and the terms and conditions thereof, shall be specified in the MOA.

What is a Memorandum of Agreement (MOA)?
When the consent of the community is obtained, the terms and conditions agreed upon shall be embodied in a MOA to be executed between and among (1) the ICC/IPs, (2) the applicant/proponent, (3) the NCIP, and (4) any other party that may be necessarily involved.

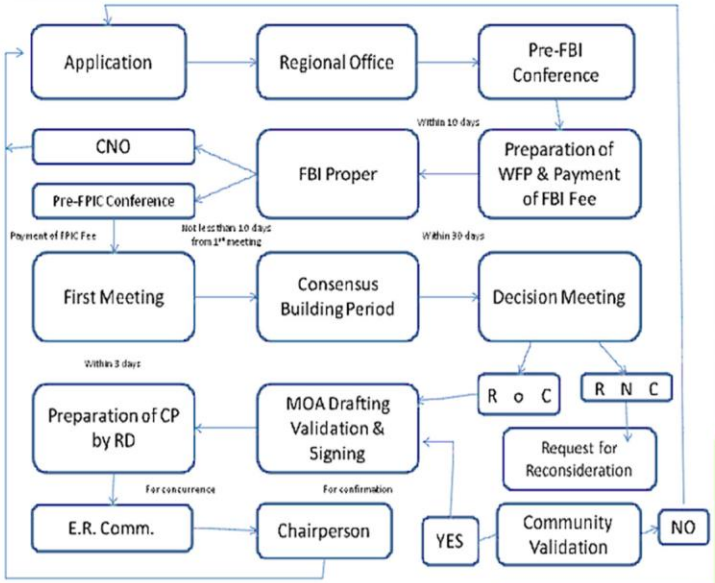
Is the FPIC transferable?
The FPIC for a particular proposal shall not be transferable except in cases of merger, reorganization, transfer of rights, acquisition by another entity, or joint venture, to any other party, and the same is provided in the MOA.

How are royalties and similar benefits to IPs managed?
The MOA shall include detailed benefit-sharing provisions (i.e. not less than 1% royalty under the Mining Act). Royalties shall not only be treated as economic benefits due ICCs/IPs but a social justice measure.

Only the duly organized, NCIP registered, IPO of the concerned ICCs/IPs shall be authorized to receive and manage the royalties. The royalties may be released : a) directly to the account of the IPO of the ICCs/IPs duly established for the purpose, or b) to a Trustee Bank agreed upon which shall be responsible for releases to the IPO account. In both cases, no release shall be made by the company to the IPO, or the trustee bank to the IPO, without the concurrence of the Commissioner from the Region and the Chairperson of NCIP duly secured by the IPO.

What happens when the decision of the ICCs/IPs is not favourable?
If the consensus is not favorable, the Resolution of Non-consent shall be prepared, signed and released.

2. Non-extractive/small scale projects, programs and activities



How are the Meetings and Consensus building conducted?

First Meeting
The applicant will be given sufficient time to present and clarify its proposal. The presentation must include the operation plan, the scope and extent of the activity, the cost and benefits to the ICC/IP and their ancestral domains, perceived disadvantages or adverse effects to the community, and measures adopted by the applicant to avoid or mitigate these.

Consensus Building
It must start not less than ten (10) days from the first meeting and completed not more than Thirty (30) days thereafter.

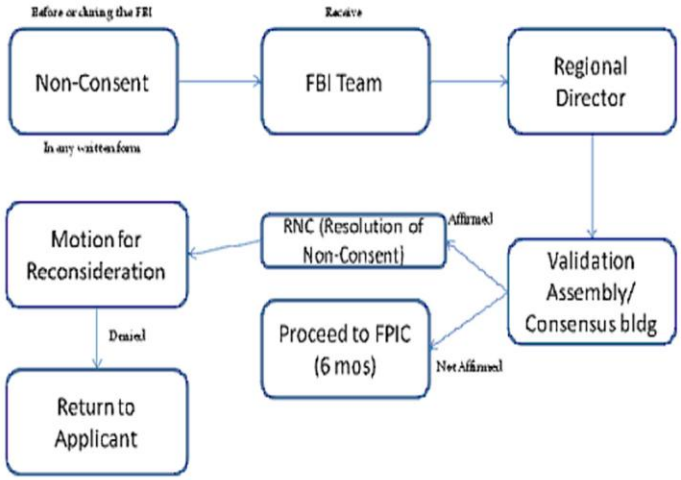
The council of elders/leaders shall consult with their constituency in accordance with their customary mechanisms.

Decision Meeting
If the decision/consensus is favorable, the FPIC Team shall convene the Decision meeting, with notice to the concerned parties. During this meeting, the council of elders/leaders will formally proclaim their decision and the parties shall proceed to negotiate and finalize the terms and conditions of the MOA and thereafter consummate the same.

What happens when the consensus of the ICCs/IPs is against the project?

The leaders/elders shall issue a resolution of non-consent.
However, if it is favorable, the Regional Director shall within three (3) days, from receipt of the resolution, prepare and sign the CP and transmit the same, including the FPIC Report, to the concerned commissioner for concurrence, copy furnished ADO. Once concurred, the same shall be endorsed to the Chairperson for confirmation.

What is the process when the community rejects the activity before or during the FBI?



What is a Regional Review Team (RRT) Review?
The Regional Review Team (RRT) shall review the FPIC report and the MOA. Should the review report be favorable, and the Regional Director finds nothing wrong with the same, he shall endorse the record of the FPIC Process undertaken, together with his recommendation/s to the Ancestral Domains Office (ADO) for appropriate action, otherwise he may direct appropriate action by the RRT or the FPIC Team before he makes his endorsement to the ADO.

What involves the Exercise of Priority Rights (EPR)?
EPR refers to the declaration by an ICC/IP community to exercise their priority right over a particular natural resource for development, harvesting, extraction or exploitation. The declaration shall include an EPR Plan.

What are the issues and concerns regarding FPIC 2012?
The FPIC 2012 includes provisions that are considered "progressive" as compared to its predecessor – FPIC Guidelines of 2006, to wit:

- ✔exercise of the right to FPIC for each major phase of the proposed activity
- ✔excluded areas from any activity include sacred grounds and burial sites, cultural and heritage sites, critical areas and others
- ✔include two (2) IP elders/leaders in the FBI Team
  convene a validation assembly and explain the MOA provisions to the community in a language that they speak and understand

- ✔ convene a validation assembly and explain the MOA provisions to the community in a language that they speak and understand
- ✔ provides management of royalties and recognizes that royalties shall not only be treated as economic benefits due ICCs/IPs but a social justice measure

However, the FPIC 2012 does not correct the previous conditionalities and limitations of the FPIC Guidelines of 2006:

1. The exercise of free, prior and informed consent is restricted by time, manner and method imposed by the NCIP. The FPIC must conform to the step by step procedure laid down by the Guidelines, form (i.e. in writing and signed), and deadlines (i.e. for large scale: not > 2months; for small scale: not > 30 days). This imposition is inconsistent with the customary laws and traditions of the indigenous peoples, despite the recognition of the Guidelines on the primacy of customary law and decision-making processes of the IPs.

2. The indigenous communities are placed on the defensive. Whenever the decision of the community is not favorable, they are made to defend their actions. Despite clear rejection of the proposed activity, the proponent is given infinite opportunity for reconsideration and reapplication for FPIC.

3. The FPIC remains to be transferable in cases of merger, reorganization, transfer of rights, acquisition by another entity, or joint venture, to any other party. It is not transferable only when provided in the MOA.

4. The NCIP retains its function as "facilitator" of projects, programs and activities. There should be emphasis that when the terms and conditions of the MOA are negotiated, the proponent and the ICCs/IPs are not of equal bargaining positions. The indigenous communities therefore require the skills and techniques of a negotiator to ensure that the interest of the community is protected. NCIP is not a mere third party to the MOA. It has the mandate to protect and promote the interest and well-being of the ICCs/IPs. The NCIP should represent the IPs and actively advance the communities' interests in order to obtain the best "deal" possible.

5. The FPIC 2012 does not provide in the MOA the minimum responsibilities of the applicant and the IP community, and the remedies and/or penalties for non-compliance or violation of the terms and conditions which includes applicability of customary laws and imposition of sanction/s. This opens the provisions on responsibilities, remedies and penalties for non-compliance to be subject to negotiation between the parties.

6. Blanket exclusions to the requirement of obtaining FPIC should be removed. This includes provisions on emergency cases and projects, programs and activities undertaken by NCIP by itself or in cooperation with other government agencies and LGU Projects. Projects by NCIP and LGU projects that are covered by the exclusion should be particularly described such as limiting these projects to those involving delivery of basic services. Similarly, particular scenarios that fall under "hot pursuit operations, securing vital government installations, programs and projects against clear and imminent danger" should be clearly defined.

7. The exercise of priority rights by ICC/IP community is further muddled by imposition of conditions and processes that are incompatible with traditional customs and traditions.

Disclaimer: Unless otherwise stated, this Policy Brief is based on present laws and polices (FPIC Guidelines 2012) and is not the policy proposal of LRC-KsK/FoE Philippines.

References:
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