

Environmental transparency participation and justice

A guide to best practice in transparency, accountability
and civic engagement across the public sector

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The collaborative aims to expand the impact, scale and coordination of funding and activity in the transparency and accountability field, as well as explore applications of this work in new areas.

The views expressed in the illustrative commitments are attributable to contributing experts and not to the Transparency and Accountability Initiative. The Transparency and Accountability Initiative members do not officially endorse the open government recommendations mentioned in this publication.

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Environmental transparency, participation and justice

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Environmental transparency

People depend on a healthy environment for life and livelihoods. In order to safeguard the quality of the environment, it is essential to empower communities, individuals and civil society organisations (CSOs) to take part in decision-making. Policies that provide access to

information, opportunities for public participation and access to justice have been critical in reducing pollution, improving environmental quality and enforcing the law. Access to information motivates and empowers people to participate in an informed manner.

Initial steps

Goal

Governments commit to the timely, accessible and standardised publication of (a) environmental impact assessment (EIA) reports; (b) air and water quality data; (c) permits, approvals and licences for development projects and industrial facilities; (d) facility and project monitoring and compliance inspection reports; and (e) regular state of the environment reporting. These are the five most important classes of environmental information.

Justification

In 1992, 178 governments signed the Rio Declaration on Environment and Development. Principle 10 of the Declaration recognises that '...at the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities ... States shall facilitate and encourage public awareness and participation by making information widely available.'¹

Citizens need information relating to the environment around them to ensure their own health and well-being. Environmental information is provided to citizens through well-recognised delivery mechanisms. The five most important classes of environmental information are described above; the expected outcomes of proactively making environmental information publicly available are to (a) facilitate the identification and resolution of environmental issues and problems at the earliest possible opportunity; (b) hold government agencies, officials and companies accountable for decisions that affect the environment and natural resources; and (c) ensure that citizens are included and engaged in the decision-making processes that affect the environment. This information allows the private sector to address environmental issues earlier on and in a cost-effective manner.

Recommendations

- 1. Environmental impact assessments:* Citizens affected by proposed development projects should be provided with information about the location, scope, extent and nature of the project through the publication of EIAs in a timely manner during the planning stages and prior to project commencement. EIAs should contain predicted environmental impacts of the project and an assessment of environmentally friendly alternatives to the project.
- 2. Air and water quality data:* Air and water quality data should be made available to the public proactively. Daily air pollution information should be posted on a government website or displayed in well-known public locations. Similarly, water pollution data should be made available on government websites on a proactive basis.
- 3. Permits, approvals and licences for development projects and industrial facilities:* These documents should be published in full online in a timely manner and also made available to affected communities in written form.
- 4. Facility and project monitoring and compliance inspection reports:* Responsible and mandated government agencies should perform inspections of projects and facilities to ensure compliance and to investigate complaints. These documents, which contain valuable information for citizens on whether projects and facilities are operating in compliance with environmental laws and within the standards and conditions imposed, should be made publicly available in a timely manner. Often this information is provided to the public and the agency through pollutant release and transfer registers (PRTRs).
- 5. State of the environment reports:* The apex national environmental ministry or agency should regularly (every 2–3 years) publish a state of the environment report. Using the best available data, the report should set out the prevalent air and water quality across the country, identify environmental threats and challenges, analyse environmental indicators and trends and flag key policy changes required to protect, preserve and enhance the environment.

¹ http://www.accessinitiative.org/sites/default/files/voice_and_choice.pdf

Country examples

A large number of countries already make these five classes of environmental information available to the public, although not all of them do so on a proactive basis. Over 100 countries have laws requiring EIAs for projects and a large number of them make these available to the public. An estimated 35 countries have PRTRs, while a further 30 countries are expected to establish such registers in the next seven years. Over 85 countries have published state of the environment reports; however, many do not produce them on a regular basis. Freedom of information (FOI) laws in over 85 countries allow citizens access to environmental permits and compliance reports as well as water and air quality data, but in most countries they are not disclosed on a proactive basis.

More substantial steps

Goal

Governments commit to proactively publish (a) reasons for decisions approving/rejecting/modifying development projects after EIA procedures, and (b) reasons for decisions approving/rejecting/modifying permits/licences/approvals for industrial facilities.

Justification

The single most important factor that improves accountability for decisions affecting the environment and mitigates abuse and misuse of official authority is a legal requirement to publicly provide written reasons for the decision. When decision-makers are forced to make written reasons for decisions publicly available, it also forces them to take relevant considerations into account, to exclude irrelevant considerations and to open the reasons up to scrutiny by the public, stakeholders and other accountability mechanisms.

Recommendations

1. Governments should commit to proactive publication in a timely manner of (a) reasons for decisions approving/rejecting/modifying development projects after EIA procedures, and (b) reasons for decisions approving/rejecting/modifying permits/licences/approvals for industrial facilities.

Country examples

Countries such as the USA, Australia, Canada, India and South Africa already require decision-makers to provide written reasons publicly or at the very least to affected stakeholders.

Most ambitious steps

Goal

Governments mainstream capacity building around access to information into their other environmental programmes.

Justification

Many governments have realised that developing citizen capacity for access to information is essential and requires additional investment and training, both for information requesters and providers.

Recommendations

1. Governments should provide guidelines and easily understood manuals on how and where to access environmental information to help improve the ability of citizens to access information.
2. Training and guidance materials on access to information should be provided to sub-national government officials.

Country examples

In some countries, governments have provided grants for community assistance, the establishment of training institutes for communities and training of CSOs at the community level. In Mexico, the USA and the EU, governments have made additional investments in staff capacity building and citizen training around access to information. In many countries, governments have developed guidelines and manuals in close collaboration with CSOs.

Public participation in decision-making affecting the environment

In the environmental and social context, public participation takes place largely as a part of procedures to assess and to mitigate environmental harm, such as in preparation of environmental impact assessments, permitting processes and through policy-making and planning bodies such as legislatures and zoning boards. Additionally, some countries have regularised opportunities for public participation in

the formation of regulations and rules, which has significant consequences for lives and livelihoods. Findings from current governance literature show that increasing public participation improves the legitimacy of decisions, helps build stakeholder capacity, improves implementation and improves sustainability of decisions.²

Initial steps

Goal

Governments should introduce mandatory, low-cost procedures for public comments and hearings in decision-making processes involving (a) new development projects; (b) siting and operational compliance of industrial facilities; and (c) the creation or revision of national, state, provincial or local policies, plans, laws and regulations affecting the environment.

Justification

The engagement of the public and stakeholders in environmental decision-making creates the necessary space for them to influence decisions that affect the environment and the natural resources they depend on. For participation to be fair and effective, a decision-making process should include a range of stakeholder voices. Decision-makers should listen and, to the greatest extent possible, respond to these voices. Decision-making can take many forms. At one end of the spectrum it can be direct – where stakeholders collectively make a decision, either by majority or by consensus. At the other end of the spectrum is indirect decision-making, where a third party, usually a government official, makes the decision with or without the participation of stakeholders.

Recommendations

1. Governments should introduce mandatory, low-cost procedures for public comments and hearings in decision-making processes involving all new development projects, the siting and operational compliance of industrial facilities and the creation or revision of national, state, provincial or local policies, plans, laws and regulations affecting the environment. This should apply to all levels of government. Full implementation of public participation means that each person should know about their right to participate and should have ample guidance on how, when and where to exercise this right.
2. Communication during participation should be timely, processes for input should be made known in advance and the government should seek to minimise logistical barriers. Decisions should be publicised before implementation so that aggrieved people can seek remedies and redress if they wish.³

Country examples

Many developed and developing countries have established procedures to enable the public and stakeholders to comment on EIAs of development projects and to participate in public hearings before decisions are made. Examples include the USA, Canada, Australia, India, South Africa and Brazil. These and other countries have extended these procedures to permits and EIA processes.⁴

² Ibid.

³ Ibid.

⁴ <http://www.acdi-cida.gc.ca/acdi-cida/acdi-cida.nsf/eng/REN-218131251-PH5>

More substantial steps

Goal

Governments establish and implement special procedures for reaching out to poor people, marginalised groups and tribal communities to ensure that they are included in public engagement processes covered by the above commitment on public participation.

Justification

Decisions that have significant environmental and social consequences are often made without the involvement of those whose interests are directly at stake. For poor people whose lives and livelihoods often depend on natural resources, and who are therefore most vulnerable to environmental risks, the consequences of exclusion can be especially severe. Weak access to decision-making may expose poor communities to high levels of pollution, remove them from productive land or deprive them of the everyday benefits provided by natural resources. Poor people in many countries face a daunting array of barriers to access, including low literacy levels, high costs (including the costs of corruption), exposure to risk through participation and lack of documentation of legal identity or rights to a resource that are necessary to influence decisions. Additionally, cultural norms that limit who may speak in public disproportionately exclude the poor. While voice in environmental decisions can make a significant difference in the allocation of resources and people's ability to use those resources, it also plays a role in ensuring a sense of involvement and in helping individuals gain a sense of control over their lives. These too are important aspects of poverty alleviation.⁵

Recommendations

1. Governments should specify the right of poor people, marginalised groups and tribal communities to participate in environmental consultations and should create a requirement for decision-makers to consult these groups, among other affected communities.
2. Governments should then publish the results of all public participation during environmental impact assessments.

Country examples

The USA has enacted Executive Order 12898 (1994) Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations.⁶ The Government of Chile has prepared new EIA regulations that would make special provisions for reaching out to poor people in project decision-making. South Africa and South Korea also have some provisions on special procedures for the participation of poor and minority communities.

Most ambitious steps

Goal

Governments commit to publish responses to general categories of public comment for permitting, planning and regulatory decisions.

Justification

The single most important factor that improves accountability for decisions that affect the environment and mitigates abuse and misuse of official authority is a legal requirement to publicly provide written reasons for the decision. When decision-makers are forced to make written reasons for decisions publicly available, it also forces them to take relevant considerations into account, to exclude irrelevant considerations and to open the reasons up to scrutiny by the public, stakeholders and other accountability mechanisms, especially when these comments correspond to the major categories of stakeholder input and comment.

Recommendation

1. Along with issuance of each major final permitting, planning and regulatory decision, governments should publish a summary of major categories of objections, comments and proposed alterations to the permit, plan or regulation.

Country examples

This practice is carried out by the USA as a best practice in environmental impact assessment. Other countries, such as the Netherlands, keep public records of citizen input in strategic environmental assessment for ecosystems and a reviewing panel must document a response to major concerns.

⁵ http://www.accessinitiative.org/sites/default/files/A_Seat_at_the_Table_FINAL2010.pdf

⁶ <http://www.archives.gov/federal-register/executive-orders/pdf/12898.pdf>

Access to justice for the environment

Access to information, meaningful participation, the redress of environmental harms and the enforcement of law are guaranteed through 'access to justice'. Access to justice is the right to redress and remedy and ensures accountability and the rule of law. Redress and remedy can be provided by

several different institutions, including the judicial branch of government, special administrative forums in the executive branches of government, extra-governmental dispute resolution mechanisms and even traditional forms of mediation.⁷

Initial steps

Goal

This commitment requires governments to ensure that citizens and persons whose environmental transparency and inclusiveness rights are violated or who suffer environmental harm have independent and impartial institutions and mechanisms for obtaining relief and redress for their grievances.

Justification

Broadly speaking, access to justice serves four principal purposes in the context of environmental decision-making. First, it strengthens freedom of information, allowing civil society to press governments for information they are otherwise denied. Second, access to justice allows citizens the means to ensure that they participate meaningfully and are appropriately included in decision-making on environmental matters. Access to justice also levels the playing field by empowering groups to enforce environmental laws that may not otherwise be enforced. Access to justice increases the public's ability to seek redress and remedy for environmental harm and allows the public to hold officials accountable for carrying out proper procedures in environmental decision-making and enforcement.

Recommendations

In opening both regular and specialised courts for environmental decisions, a number of 'institutional design' choices must be made. These will have strong consequences for the performance of the court. When establishing these courts, governments should consider:

1. Whether to establish a judicial court or administrative tribunal and at what level of independence;
2. What substantive laws, policies and principles the court or tribunal will have jurisdiction over;
3. Whether the court or tribunal should be a first-instance, intermediate appellate, and/or supreme (final review)-level institution and whether it should have civil, criminal or administrative authority, or a combination of these;

4. What territory should be covered by the court or tribunal, from a town to a city to a state or province to an entire nation;
5. Whether the jurisdiction will make the workload appropriate or too low or too high;
6. Providing broad standing, meaning what qualifications will be required of parties to bring an action in the court or tribunal or otherwise participate in a case;
7. What it costs for parties to bring cases and prosecute them to final decision, and taking steps to reduce those costs;
8. How the court or tribunal will manage to get adequate, unbiased input on the increasingly complex scientific/technical issues in environmental cases;
9. Establishing alternative dispute resolutions (ADRs) which can often be a cheaper, faster and better way to resolve environmental conflicts, and how these might be incorporated into the procedure;
10. Qualifications, training, tenure and salary for decision-makers to ensure the quality of the court's or tribunal's decisions;
11. What process mechanisms will permit the court or tribunal to move cases through the decision-making process more efficiently and effectively and less expensively; and
12. What powers will be needed to make the court's or tribunal's decisions effective, from mediated agreements to injunctions to criminal fines and incarceration, and all the creative alternatives in between.⁸

Country examples

Some of the best examples of administrative and judicial institutions established for providing access to justice on environmental matters come from Australia and New Zealand. The Land and Environment Court of New South Wales, Australia is one such example.

⁷ http://www.accessinitiative.org/sites/default/files/voice_and_choice.pdf

⁸ http://www.accessinitiative.org/sites/default/files/Greening Justice Final_31399_WRI.pdf

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