

The Access Initiative - Brazil



“Access to Environmental Information,
Participation and Justice in Brazil”

Executive Summary

abdl

Associação Brasileira para o Desenvolvimento de Lideranças
Brazilian Association for Leadership Development



Instituto Socioambiental
Social-Environmental Institute

São Paulo, December 2005

INTRODUCTION

This research was produced between April and November, 2005, by ABDL – Brazilian Association for Leadership Development and ISA – Social-Environmental Institute. The process was based on the methodology proposed by “TAI – The Access Initiative”.

The Access Initiative is a global coalition of public interest organizations that collaborate to improve the implementation of national commitments to ensuring access to information, participation and justice in environmental decision making. TAI is led by a global coordination formed by WRI – World Resources Institute (United States), the Environmental Management and Law Association (Hungary), Corporación Participa (Chile), Advocates Coalition for Development and Environment (Uganda) and the Thailand Environment Institute (Thailand).

Unless otherwise clearly indicated, the points of view, interpretations and results presented in this document are solely the responsibility of the Brazilian Coalition (ABDL and ISA) and not from TAI.

This project was possible due to funds obtained with the Global Opportunities Fund – UK, through the British Embassy in México. Furthermore, it also has the support of TAI and the Alliance for the Principle 10 (PP10).

Between April and November, 2005, the legal framework and access practices were analyzed in four evaluation categories: Information, Participation, Justice and Capacities. The practical analysis was based on case studies that represented several of the sub-categories described in the table below.

CASE STUDIES IN BRAZIL

Case Studies in Brazil		
CATEGORY	SUB-CATEGORY	CASES
Access to Information	Emergencies	<ul style="list-style-type: none"> • Explosion of the ship <i>Vicuña</i> in the Port of Paranaguá – State of Paraná/PR • Oil leakage in Billings dam, which supplies water to the metropolitan area of São Paulo
	Monitoring	<ul style="list-style-type: none"> • Air quality monitoring in the State of São Paulo by environmental agency CETESB • Water quality monitoring on a national level by ANA – National Water Agency
	Reports	<ul style="list-style-type: none"> • GEO Brazil Report 2002 • Sustainable Development Indicators (2004) by IBGE – Brazilian Institute of Geography and Statistics
	Industries	<ul style="list-style-type: none"> • Rionil Vinyl Products – Corporation specialized in manufacturing vinyl products – Plant in Duque de Caxias, State of Rio de Janeiro (RJ) • Braskem – manufacturer of basic petrochemical products and thermoplastic resins • Aracruz Celulose – eucalyptus cellulose productions – Plant in Barra de Riacho, State of Espírito Santo (ES). • Iguaçú Celulose – cellulose production, short and long fibers – Plant in Piraí do Sul, State of Paraná (PR).
Access to Participation	Policies	<ul style="list-style-type: none"> • National Water Resources Policy • National Energy Policy • Regional development strategy involved in transposing the São Francisco River in Northeastern Brazil
	Projects	<ul style="list-style-type: none"> • Hydro-electric power plant in Barra Grande – State of Santa Catarina • “Highway Ring” road complex, western section, concluded in 2004, serving the metropolitan region of São Paulo.
Access to Justice	Information denial	<ul style="list-style-type: none"> • Not evaluated
	Participation denial	<ul style="list-style-type: none"> • Water Resources Council for the State of Paraná
	Environmental damage	<ul style="list-style-type: none"> • Hydro-electric power plant in Barra Grande – State of Santa Catarina
Capacity Building	Government	<ul style="list-style-type: none"> • Environment Ministry • ANA – National Water Agency • CETESB – Environmental Sanitation Technology Company
	Public	<ul style="list-style-type: none"> • Environment Ministry • ANA – National Water Agency • Education Ministry (MEC) • ECOAR (NGO)

LEGAL FRAMEWORK IN BRAZIL

Evaluation of the legal framework in each category was based on the following list of consulted legislation, with specific legislation added in each evaluated category.

Basic Legislation Consulted
Constitution of the Federative Republic of Brazil of 1988
Federal Law nr. 9784/99 – Establishes a legal framework on administrative processes for citizens to clearly understand their rights with regard to Public Administration
Federal Law nr. 6.938/81 – National Environmental Policy Bill
Federal Law nr. 10.650/03 – Environmental Information Access Bill
Federal Law nr. 9.433/97 – Institutes the National Water Resource Policy and creates the National Water Resource Management System
Federal Decree nr. 5.376/05 – Deals with the National Civil Defense System (SINDEC) and the National Council for Civil Defense.
Federal Decree nr. 4.871/03 – Deals with the institution of Area Plans to combat oil pollution in waters under national jurisdiction and other matters.
Federal Decree nr. 5.098/04 – Deals with the creation of the National Plan for Prevention of and Swift Response to Environmental Emergencies involving Dangerous Chemical Products - P2R2.
Federal Law nr. 9.966/00 – Deals with the prevention, control and monitoring of pollution caused by oil leakage and other harmful or dangerous substances in waters under national jurisdiction.
<i>Aarhus Convention</i> – on “Access to Information, Public Participation in Decision-Making Processes and Access to Justice in Environmental Affairs”.

METHODOLOGY

The research methodology involved primary and secondary data mapping, directed interviews, requests for information by emails and letters.

For each case study and for the legal framework analysis, a specific set of indicators was applied, evaluating different aspects of each subcategory.

The results of each indicator were integrated in a qualitative evaluation grid, which allowed between 3 to 5 selection options (varying in accordance with the degree of satisfaction of the evaluated aspect). Following is an example of the grid for obligations related to disclosing information on environmental emergencies.

Results were later grouped by an average transformation of data into values between 0 and 100, according to the focus of analysis (e.g., by case study, subcategory, category and country).

In all, the research covered 171 indicators in the four categories.

INFORMATION/EMERGENCIAS 1a – Mandate to disseminate information about environmental and health impacts to the public during an emergency * PRIORITY INDICATOR Category: Information Subcategory: Information about environmental emergencies Topic: Mandate or legal requirement to collect and disseminate information.		
Research: Requirements to disseminate information about environmental and health impacts during an emergency help ensure that responsible agencies alert the public so that citizens may protect themselves and avoid risks. Consult: Laws, governmental decrees, ministerial decrees, and public and internal official guidelines on emergencies. General environmental laws could also include relevant rules.		
Researcher information Researcher:		
Sources of information Documents: Title / Source; Issuing; Issuance date; Chapters / Articles		
Values	Evaluation	Justification
Not applicable/not assessed		
(i) There is no mandate that a government agency or responsible party disseminate information about environmental emergencies and accidents.		
(ii) There is a mandate that a government agency or responsible party disseminate information about environmental emergencies and accidents, but mandate has vague or broad exceptions or restrictions.		
(iii) There is a clear mandate (incl. means of dissemination) that a government agency or responsible party disseminate information about environmental emergencies and accidents, and mandate has clearly defined exceptions.		

OBJETIVES OF THE ASSESSMENT CATEGORIES

Information: this category evaluates legal obligations and practices on preparing, making available, disclosing, systematizing and organizing environmental information. This evaluation comprised response deadlines for requests from regular citizens, deadline fulfillments and the conditions in which information was publicized, quality of information made available, ease of access through different media, frequency of reports etc. The idea was to obtain an outline of the rights, eases and difficulties faced by regular citizens when needing to obtain information in a situation of environmental emergency, accessing monitoring reports on environmental quality or learning about environmental performance and emissions from a given industrial plant.

Participation: this category evaluates the legal guarantees and instruments that support citizen participation in decisions on environmental policy and in preparing and implementing infrastructure projects. This evaluation comprised efforts to broaden debates with affected populations on the part of governments and businesses, communication efforts on policy intentions and basic documents for preliminary discussions, quality of “official” participation spaces and information made available to support the process, documents and products and their public availability, among other factors. Overall, this category evaluated the conditions, eases and difficulties faced by regular citizens when they wish to take part in decision-making processes related to the environment.

Justice: this category evaluates the quality and efficiency of national legal institutions and the legal system in cases where lawsuits were filed due to denial of any of the access rights covered in this research (access to environmental information and participation, and one case of environmental damage). The analysis appraised the aspects of court impartiality, process conduction, legal possibilities of filing the lawsuit and of appeal, quality of the outcome, involvement of interested parties in the lawsuit, among others. This category evaluated the

eases and difficulties faced by regular citizens who feel one or more of their rights have been harmed and are seeking judicial remedies.

Capacity building: this category is based on the idea that it is not enough to have quality information available, worthy participation spaces and efficient justice in environmental matters. For these factors to translate into good environmental governance, well-prepared people are needed to make good use of these systems. Hence, this category evaluates governmental efforts to build the capacity of their agents, so that these are better able to offer access to information, participation and justice, and, on the other hand, instruments (such as courses, educational material, funds etc.) provided by the government or other social actors, so that society as a whole are better able to demand access to information, participation and justice.

RESULTS

ACCESS TO INFORMATION

Analyses on access to and quality of environmental information in the studied cases revealed a reasonably high average of evaluation values, with exceptions related to information on the environmental performance of industrial plants.

The legal framework contains strong guarantees to producing and accessing environmental information; in almost all cases, legislation laws sets forth the responsibilities, deadlines and content of information to be produced and made available. The key general laws are the National Environmental Policy Bill and the Environmental Information Access Bill.

In the practice of this access, however, despite the favorable final results, there were some key difficulties that must be highlighted.

In the case of emergencies, information was usually spread out in several entities involved in containment and reparation, and there was little regular monitoring of environmental conditions after the more critical period. On the positive side, the government's environmental entities and the media were quite open and available to cooperate with information collection, which generally did not occur with the businesses involved.

Water quality monitoring still lacks consistency and broadness of scope in aggregating data that is currently dispersed, collected with different methodologies and only in a few states of the country. Because this is a more recent initiative, it would be prudent to keep track, over the next few years, of the performance of both the National Water Agency and the National Water Resources Secretariat in the Environmental Ministry, for it appears that these bodies intend to make the system accessible, integrated and complete.

Air quality monitoring was one of the positive highlights of the entire investigation, presenting current, relevant and available information and qualified and motivated personnel to see to the public's demands. The environmental agency in charge, CETESB, can be considered an example to be followed by other agencies and regions in Brazil for this type of monitoring.

In the studies on the current state of the environment in the country, although the evaluated reports presented adequate quality of information, there is no law that requires them to be regularly prepared, and their distribution is still below expectations. In addition, such reports are not generally used as an explicit reference in preparing environmental or sectoral policies.

There is no legal framework that requires companies to surrender information on the environmental performance of their plants directly to the public. But industrial legislation requires potentially polluting companies to deliver periodic reports to the environmental monitoring entities. At the very least, the Environmental Information Access Bill and other specific laws do ensure access to information in the hands of public environmental organs, but neither these organs nor companies voluntarily surrender the relevant information requested throughout the investigation, demonstrating that there are still cultural lacunas and distortions on the concept of "secrecy" of industrial information.

ACCESS TO PARTICIPATION

In this category, both the legal framework and practices are in an intermediary stage of quality and accessibility. Although there has been recent progress in institutionalizing participation in policies and projects over the last decades, such as the basin committees and the advisory and deliberative sector councils, such changes have not yet translated into a practice by governmental agents and other actors responsible for policies and projects of stimulating effective participation; more often, the procedures and consultations established in law are merely fulfilled in order to advance without hindrance.

The positive side, both in the legal framework and the practice, is that there are now legal guarantees that prevent any constraint to freedom of association, participation and the formal existence of spaces where these can occur – as opposed to prior times when there was no democracy in Brazil.

This does not mean, however, that participation is occurring well — of the several possible forms and levels of participation, even the most elementary one, which is making relevant information timely available to interested parties, has been inadequate, as it is frequently manipulated by those in charge of advancing the project or policy, especially in procedures for public works' licensing and grand-scale environmental policy implementation. This fact was observed, to a greater or lesser degree, in the case studies for the western section of the "Highway Ring" road complex and the São Francisco River integration project.

The National Water Resources Plan is an example of how participatory processes can be participatory and effective in incorporating collaborations from several sectors and actors. Throughout the entire process of elaborating the plan, there were open consultations, with information made available through several media, with references to the inclusions of the contributions of different actors, as well as a clear schedule of the process as a whole.

Another frequently identified element regarding participation in environmental policies and projects is that participation occurs only in advanced stages of the decision-making process, with no genuine efforts on the part of the government or investing sectors to involve the population in the initial strategic decision-making stages. This element was observed in all of the case studies, with the exception of the National Water Resources Plan. The negative highlight occurred in the National Energy Policy, which has not carried out its long-term planning in a participatory manner and is not open enough in its consultations to actors potentially affected by the policies and programs, allowing nearly exclusively representatives from the government and large companies in the sector, in addition to not allotting even a single place for a civil society representative in the National Energy Policy Board (CNPE).

ACCESS TO JUSTICE

In Brazil, there are good legal grounds for judicial defense in cases of environmental damage or when access to environmental information has been denied, but regarding participation, cases depend on interpretations or adaptations of different legal instruments in order to defend citizens or organizations that feel their participation rights have been harmed.

Although no specific lawsuit was found regarding denial to accessing environmental information, the legislation that protects citizens in such cases are quite complete, despite being concentrated on information for which environmental organs are responsible, and not the entire public administration system.

In practical terms, no difficulties or barriers were found to file lawsuits or within the procedure of such lawsuits.

In case of denial of participation, the lawsuit was not tried, because there were important political implications for the State of Paraná government. The result, after great influence from the media and public opinion, is that the issue (participation in the state water resources council) was complied with, but without a legal obligation to do so.

In the case of the Hydro-electric plant in Barra Grande, although the lawsuit was supported by ample information, with evidence of fraud that should have annulled the prior licensing procedure, and the judges were indeed in a situation where they could impartially rule (which did not occur in the case of participation denial), the courts' decision, with exception of the first lower court ruling, were always opposed to interrupting the works and filling the dam.

A seriously grave fact was that the agreement between the parties was also signed by Ibama – the Brazilian Institute for Environment and Renewable Natural Resources – which, despite the promised compensations, corroborated the illegal destruction of millions of hectares of threatened forestland with endemic species.

The rulings on the Barra Grande lawsuit was greatly influenced by companies and economic sectors interested in concluding the dam, which could rely on a team of lawyers that was received several times by the judges.

In both cases, the delay in the higher courts' rulings hindered the subject matter of the lawsuits, which were either settled out-of-court or entirely lost through the forest destruction, and this factor impairs the adequate implementation of the double jurisdiction degree that is in force today in Brazil.

CAPACITY BUILDING

Although the Constitution of Brazil broadly ensures freedom of association and the rights of citizens to a balanced and clean environment, the incentives required for association initiatives to translate into an instrument of participatory democracy and environmental management in Brazil are still very insufficient for the needs of the country.

Fiscal and financial incentives for management of NGOs, associations and social movements are rare or insufficient, and the red tape involved in fundraising and accounting for funds often renders activities unfeasible. In addition, there is currently a political environment that questions the honesty and relevance of certain types of third-sector organizations, which hinders the legitimacy of these organizations before the public.

Some governmental organs, which are still the exception, have implemented divisions or departments in charge of organizing and delivering information and guidance to the public with regard to requests for information and participation, but even in these cases, this effort has not been supported by internal capacity-building initiatives for employees (with rare exceptions, as in CETESB) and differentiated internal administrative practices.

Capacity-building for the public to be better able to demand information and participation finds its main strengths in the environmental education programs developed by federal government organs and other levels of administration for several national sectors and groups, with special emphasis on teachers, multiplying agents and students in grade school and high-school. But there are still relevant lacunas as to disseminating knowledge on the rights and paths for citizens to participate in and have access to environmental information, leading to an effective "environmental citizenship". One example is the poor knowledge that individuals and organizations have of the Environmental Information Access Bill.

Even the environmental education programs and the government's environmental funds have not treated capacity-building for "environmental citizenship" as an ongoing process, but as a gathering of specific actions that are not necessarily integrated and planned. The National Environment Fund (FNMA) has supported several forms of participatory management (management of conservation units, preparing business plans, strengthening networks etc.), but this support is impaired due to the conditions of the calls for proposals and the discontinuity and lack of resources.

SUMMARY OF ASSESSMENT RESULTS

Access to Information			
	Quality	Accessibility	Average
General legal framework supporting access to information	83		
Information about environmental emergencies	81	65	73
Information from regular monitoring	82	80	81
State of the environment reports	84	67	76
Facility level information	47	55	51
Access to Participation			
General legal framework supporting participation in decision-making affecting the environment	67		
Participation in national or sub-national decision-making on policies, strategies, plans, programs or legislation	65	66	65
Participation in project-level decision-making	53	46	50
Access to Justice			
Access to justice in case of information rights being denied	Not evaluated		
Access to justice in case of participation rights being denied	48		
Access to justice in case of environmental damage	63		
Capacity Building			
General legal framework supporting capacity building	77		
Efforts of the government to build its own capacity to provide information, utilize public participation and ensure justice	67		
Government efforts to build the capacity of the public to exercise the access principles	68		