

# Legal frameworks

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## Strategic environmental assessment of policies and plans: legislation and implementation

Ralf Buckley

*Governments can, and commonly do, adopt policies whose environmental implications completely overshadow the impacts of individual development projects as assessed by project-scale environmental impact assessment. Environmental assessment (EA) of government policies is therefore as important to sustainable development as EA of projects. One way to achieve routine policy EA is through a formal legal framework which covers: definition of a policy; screening criteria and exemptions; public advertisement, exhibition and submission; technical standards for environmental assessment; substantive criteria for weighing public environmental costs against public benefits; and provisions for third-party standing. The aims of such a framework would be to make policy EA a routine part of policy formulation.*

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**T**HE AIM OF THIS ARTICLE is to examine potential components of legal frameworks which would lead to routine strategic environmental assessment (SEA) of government policies at all scales.

Over recent decades, environmental assessment (EA) practitioners have repeatedly urged governments to extend project-scale EA to various forms of strategic EA; most importantly, EA of policies and plans (Boothroyd, 1995; Buckley, 1994a; 1998; Goodland, 1998). Few governments, however, have followed this suggestion and then only in a limited and half-hearted way. Indeed, the greatest practical application of SEA appears to be by international financial institutions such as the World Bank. The World Bank, however, has necessarily focused largely on sectoral and regional SEA, since it is not responsible for the policies of nation states.

In recent years, industry groups have consistently demanded economic impact studies of environmental legislation and international environmental agreements. State and national governments, however, can, and commonly do, still adopt economic and industry policies, budgets, and legislation, and enter into international agreements on trade, investment, defence, intellectual property, and so on with little or no formal environmental assessment, and little or no opportunity for public participation by their citizens and electorates except through informal political protest and lobbying (Boothroyd, 1995; Buckley, 1998; Marsden, 1998).

Even the most avowedly democratic of governments are notoriously shy of subjecting their actions, decisions and expenditure to public scrutiny by the citizens whose interests they are supposed to serve. After all, in most democracies, nearly half of the

citizens voted for the opposition. Even those who voted for the party in power probably did so because of a personal political philosophy or perceived personal advantage, rather than a detailed comparative analysis of competing party policies. This is rational enough, given that such policies are rarely articulated clearly, and even more rarely carried out.

Just as industries like to minimise government involvement in their activities, on the broad general principle that it might cost time or money or restrict what they can do, governments like to minimise involvement by private citizens and community groups, for precisely the same reasons. But in either case, they have to accept a certain amount of public involvement as the price of doing business, and many governments have in fact already endorsed the need for policy SEA in principle.

### Current status of policy SEA

The status of SEA in various nations of North America, Europe and the Asia–Pacific region is set out in Table 1, summarised from Sadler and Verheem (1996). Additional case studies (for instance, Kørnøv, 1998) and discussion at the SEA sessions of IAIA '98 suggest that this information was still broadly current as of 1998.

It seems that in most countries SEA has only been adopted where it can be grafted on to practices and procedures with which government agencies are

already familiar. Put bluntly, at least some government departments do not mind considering the environment in their own deliberations, but none wants to be subject to external assessment by the environment portfolio (Buckley, 1998).

To the extent that government policy may in fact change to reduce the deterioration of environmental quality, this is better than nothing, but, if it is only lip-service, it is worse than useless. The impression gained from the case study files in Sadler and Verheem (1996) is that most countries will gladly carry out a large-scale public SEA of policies which are specifically related to the environment, such as those dealing with waste management (USA, Mexico, Netherlands, UK).

Some, notably the USA, also carry out so-called program EISs (environmental impact statements), albeit largely because of court actions. However, many of these, and their equivalents in other countries, are effectively just giant project-type EAs. Instead of a single oil and gas field, for example, they may cover oil and gas development for a large region.

This has advantages in explicitly considering larger-scale alternatives and options, and better review of cumulative impacts, than can be incorporated in single-project EIA. Unless it is simply the first step in a tiered EA system, however, it may be on such a broad scale that detailed impacts at particular project sites are glossed over or ignored. If governments carry out program EISs, well and good; if they use program EISs to avoid project EISs, then not so good!

Table 1. Applications of SEA, 1995<sup>1</sup>

| Country                | Practical application, by various mechanisms |                  |                             |                  | Legal framework for policy SEA |              |
|------------------------|--|------------------|-----------------------------|------------------|--------------------------------|--------------|
|                        | Regional scale <sup>2</sup>                  |                  | National scale <sup>2</sup> |                  | exists, unused                 | exists, used |
|                        | single sector <sup>3</sup>                   | multiple sectors | single sector               | multiple sectors |                                |              |
| USA                    | **4  | *                | ***                         | ?                | 5                              |              |
| Canada                 | *  |                  |                             | *6               |                                | *7           |
| Mexico <sup>8</sup>    |  |                  | *                           |                  |                                |              |
| Denmark                |  |                  |                             | *                | *                              | **           |
| Netherlands            | *  |                  |                             | *9               | *                              | ?            |
| UK                     |  | *                | *                           |                  |                                |              |
| Germany                | *  |                  |                             |                  |                                |              |
| Australia              | *  | *                | *                           |                  |                                |              |
| New Zealand            |  |                  |                             |                  |                                |              |
| Hong Kong              |  |                  |                             |                  |                                | *            |
| China <sup>8</sup>     | *  |                  |                             |                  |                                |              |
| Indonesia <sup>8</sup> |  | *                | *                           |                  |                                |              |

- Note: <sup>1</sup> Summarised from the 46 case study files reported in Sadler and Verheem (1996)  
<sup>2</sup> Note that states, provinces and regions in some countries are larger than some entire nations  
<sup>3</sup> Effectively, a single very large project: e.g. Arctic Ocean oil and gas development  
<sup>4</sup> \* = 1–10 cases reported, \*\* = 11–100, \*\*\* = >100  
<sup>5</sup> USNEPA used extensively for program EA but not national policy  
<sup>6</sup> SEA of federal budget commissioned by national newspaper  
<sup>7</sup> SEA of NAFTA conducted, but reached erroneous conclusion; i.e. poor technical quality  
<sup>8</sup> Carried out by World Bank  
<sup>9</sup> SEA of party policies during elections

In some ways this parallels the observation by Boothroyd (1995) that governments may use project-scale EIA as a sop to public concerns over sustainability (Buckley, 1998, page 78: although note that the publisher changed 'sop' to 'standard operating procedure', rendering the sentence as printed quite meaningless!).

The impression gained from Sadler and Verheem's (1996) compendium, therefore, and most of the comments at IAIA '98, is that governments are not going to adopt mandatory legislated policy SEA, so we had better be grateful for whatever moves they have made to expand project-scale EA upstream, on a discretionary basis. National EIA legislation in the USA and Australia, for example, has made provision for high-level policy SEA since it was first introduced, but it has not been used.

In Denmark and Hong Kong, however, it seems that all legislation and policy is already subject to mandatory SEA. These are both small countries with centralised governments. In Hong Kong, the requirement for SEA was decreed by a decision of the Governor in October 1992. All policy papers submitted to the Executive Council, the equivalent of Cabinet, must contain an SEA. In practice, in 1994 about half did so.

In Denmark, policy SEA is mandated by an Administrative Order of the Prime Minister's Office on 1 October 1993, which requires an SEA as part of all government Bills, and other proposals to Parliament, that are expected to have a significant impact of the environment. Note that this is a far broader triggering provision than simply bills and proposals related to environmental protection. For example, it would include budget documents and international trade and defence agreements. According to Sadler and Verheem (1996), in 1993–1994, only a quarter of the bills presented to Parliament actually included an SEA, but that is still more than any other country.

### Triggering: defining a policy

English, American and Australian dictionaries define a policy, in this context, as "a course of action adopted or pursued by a government". This definition, however, is too vague to be used as a legal trigger. Perhaps most importantly, many policies remain unwritten (Boothroyd, 1995); so no matter how significant they may be, they cannot readily be subject to a formal EA process. It is at the point at which policies are formalised that they can be assessed; and commonly, they are not written down as policy documents *per se*, but directly in the form of government instruments such as Bills and Budgets.

If policy EA is to be effective, it must include not only formal policy documents under that name, but also any instrument which gives effect to a policy, even if its title does not mention the term policy at all. Enabling legislation for policy EA might therefore be

called something like the Strategic Environmental Assessment (Policy and Planning Instruments) Act, the Government Instruments Environmental Assessment Act, or the Government Policy and Associated Instruments (Environmental Assessment) Act.

Either as a definition of a 'policy' for the purposes of the Act, or in an introductory section on the application of the Act, it could include a non-exclusive list of government instruments to which it applies, such as:

- government documents and instruments whose title includes the word policy;
- government documents which profess or would reasonably be interpreted to describe, set out or establish government policy on any topic or issue;
- any Bill for legislation on any issue or topic;
- any government document which establishes a Budget, or defines a government intention, authority or obligation to raise, commit or expend funds;
- any government accession to, involvement in, or endorsement of, any international agreement;
- any other documented component of government activity likely to have a significant effect on the environment.

Note that the trigger phrase "likely to have a significant effect on the environment", though it may seem all-encompassing, is used successfully as a trigger in Danish SEA legislation (Sadler and Verheem, 1996); and has also been quite well defined through litigation under planning and environmental assessment law in the State of New South Wales, Australia.

Governments will no doubt object to such an inclusive definition of policy, but, if a narrower definition is adopted, governments will simply circumvent the SEA legislation by labelling their policies with another name. In its common meaning, a policy is simply anything a government intends to do, so a broad definition is perfectly reasonable.

### Screening: exceptions and exemptions

Governments sometimes have to act quickly in ways which they have not previously anticipated. Individually, natural disasters, disease quarantines or defence manoeuvres may be unpredictable, but the likelihood of them occurring, and the need to respond quickly,

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**Legislation for policy SEA should contain a clause which exempts government actions from environmental assessment in case of emergency, but the government must subsequently demonstrate that an emergency did in fact exist**

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are sufficiently predictable for relevant policies to be developed well in advance.

Despite this, no government likes to have its hands tied in case of emergency, and nor should it. Hence, legislation for policy SEA should contain a clause which exempts government actions from environmental assessment in case of emergency, but provides that, if this clause is invoked, the government must subsequently (say, within 30 days) release a brief public report demonstrating that an emergency did in fact exist, or that, at the time the decision was made, the government held an actual and reasonable belief that an emergency existed, sufficient to warrant the action or decision taken.

A provision such as this is unlikely to be effective unless it contains a penalty clause. For example, it might provide third-party standing to sue, in cases in which this clause was invoked wrongly, for government funding to repair or offset any environmental damage caused by the action or decision concerned.

At first sight it might seem that there would be areas of policy which need not be subject to EA, so that a general exemption could apply. On closer consideration, however, it is hard to identify any area of policy with no environmental implications. Even an area such as intellectual property, though dealing largely with information in electronic form, also covers environmentally significant issues such as genetically modified organisms. Hence it seems preferable that all policy should be subject to EA, and that, if there are no apparent environmental implications, the policy can say so when advertised.

### Core requirement for EA

The core provision of SEA legislation, of course, would be a statutory requirement that the government undertake or commission a public SEA of any policy or associated instrument before it is adopted, implemented or acted upon. The same penalty provisions as for improper use of the exemption privilege, could apply if the government fails to carry out EA as required under this clause.

This section should provide explicitly that failure to adhere to other relevant provisions of the Act would have the same effect as failing to conduct an EA at all; that is, an inadequate or improperly conducted SEA does not count as an SEA at all. This provision would include both procedural conditions, such as notification, exhibition, timing, acceptance and response to public comment, and substantive provisions, such as those relating to the technical quality of the EA, and adequate consideration and response to public comments.

### Technical quality

Triggering SEA of policy instruments is only the first step. As in project-scale EIA, the technical quality of

impact prediction is central to the value of SEA. Technical quality includes issues such as:

scope: are all likely impacts and reasonable policy alternatives identified and examined?

scale: is the geographic scale of EA appropriate?

accuracy: are impacts predicted correctly, reliably and in sufficient detail?

uncertainty: are sources of risk and uncertainty identified and quantified?

These components have been reviewed on many occasions (for instance, Vanclay and Bronstein, 1995; Porter and Fittipaldi, 1998) and need not be reiterated here. Similarly, issues affecting technical quality of SEA, and methods available, are summarised in Sadler and Verheem (1996). Perhaps the most critical is that, for most national policies, the major impacts on the natural environment are likely to be indirect, occurring as a result of primary socio-economic effects. Greater attention to secondary effects, interactions and uncertainties, as well as cumulative impacts, is therefore needed. This is difficult, but not impossible, and it is critical to policy SEA.

### Criteria and outcome of SEA process

A requirement to conduct technically competent EA of policies, though a step forward, will have little practical effect unless SEA legislation contains a substantive provision specifying an enforceable outcome from the SEA process. For example, it could specify that the government may not adopt, implement or act upon any policy or related instrument unless and until it provides reasonable demonstration that the benefit to the nation or state concerned will outweigh the environmental costs as established by the SEA.

For this provision to be effective in practice, the legislation would need to specify how national benefit and environmental costs are to be assessed and compared. As EA practitioners are all too well aware, this is a remarkably difficult task even at the scale of individual projects, and despite advances in environmental accounting techniques.

Despite these technical difficulties, a substantive action provision of this type is still critical to SEA legislation for several reasons. First, without such a provision, government can simply conduct policy EA and then ignore its implications completely, as happened, for example, with some of the forestry EISs in New South Wales, Australia (Buckley, 1994b) and is arguably happening at present in Australia's Regional Forest Assessment process. Secondly, a requirement to compare national benefits and environmental costs at least forces the government to be explicit about what it anticipates those benefits will be, and to which sectors of the electorate they might accrue.

Thirdly, even though benefits and costs will rarely be comparable in the same metric, such as money, this requirement will at least set out clearly what is to be

compared against what, and what uncertainties there are on each side of the comparison. Fourthly, since the outcome of such a comparison depends on the different values ascribed to various economic, social and environmental goods and services by different sectors of the electorate, the comparison will render these values explicit in a political context.

What is a government policy, if not political? Hence it is not unreasonable that the political nature of policy formulation be rendered more explicit through the SEA process. Of course, if a government dislikes the outcome of SEA legislation established during its own term or its predecessors', it can simply legislate anew to amend, override or abolish it. However, this also has political implications. Whilst this provision of the legislation would be very weak from a legal standpoint, therefore, it would be important from a political one.

### **Public advertisement, exhibition and comment**

The principle procedural requirements of SEA legislation should be directed towards adequate public information and participation. Drawing on corresponding provisions in project-scale EIA legislation, this could include:

- a requirement to advertise all new policies or associated instruments as soon as they are first formally documented either in draft or final form;
- a requirement to exhibit copies in publicly accessible places, and make copies available, for instance by mail, from one or more central advertised locations or distribution centres;
- publication, advertisement, exhibition and distribution of a government SEA of the proposed policy or instrument at the same places, though not necessarily the same time, as the policy or instrument itself;
- invitation for written public comment, to be received within a defined time period of the exhibition of the draft SEA (note that this period should commence when the SEA, not the policy, is first exhibited);
- a requirement for the government to compile and

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## **Government must prepare and publish a final SEA including public comment, government response to such comments, and an assessment of environmental costs against anticipated national or state benefits, before the policy can be adopted or acted upon**

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publish the public comments, either in full or in an accurate, truthful and non-misleading summary; a requirement for the government to consider all public comments seriously and with appropriate weight, properly assess their accuracy and significance, and incorporate them with appropriate weight into a final SEA for the policy, which is to be used in balancing environmental costs and national or state benefits; opportunity for judicial review of procedural components such as application of the terms 'seriously' and 'appropriate' above.

### **Timing**

As with any EA process, the time allocated for each stage is an important factor, with the aim being to expedite the overall process as far as possible whilst still allowing time for public participation and an expert assessment of likely impacts. As with project-scale EA, a 30- or preferably 60-day period for public comment, from the date on which all relevant information is available to the public, seems to be the minimum for an effective process.

Predicting the likely environmental impact of government policy, however, even at a significantly lower level of detail than for a single development project, will typically be a substantially more complex task than for project-scale EA, because of large-scale indirect and second-order environmental impacts associated with first-order economic and social effects. Hence the time taken by the technical assessment process must allow for the likelihood that relatively complicated predictive models will need to be developed.

On the other hand, policy SEA will rarely be expected to collect new baseline data, but only to use whatever is already available. Hence, the common requirement of project-scale EA for at least one entire year's biological, water quality and meteorological baseline data, will generally not apply for policy SEA.

Since most individual development projects are put forward by private-sector proponents, project-scale EIA legislation generally provides set time periods not only for public comment, but also for government actions associated with assessment and development approval procedures. For policy SEA, a slightly different set of time limits will be relevant. The legislation needs to contain a requirement that the government prepare and publish a final SEA which includes the public comment, the government response to such comments, and an assessment of environmental costs against anticipated national or state benefits, before the policy can be adopted or acted upon.

In practical terms it does not matter how long this takes. There are, however, two possible reasons for prescribing a maximum time limit on this stage of the process, albeit a relatively lax one. The first is that, if a government puts forward a policy which is highly

unpopular on environmental grounds, opposition parties and community groups may wish to see it formally rejected under the SEA legislation, rather than quietly abandoned.

The second is that, if a government puts forward a policy which has considerable benefits from an environmental perspective, but which is opposed by, for instance, a particular industry sector or political party, it may be equally important that the final SEA which demonstrates the environmental advantages of the policy should be distributed widely, despite possible pressures to quash it. Note that these considerations apply only to policies formally issued for public review.

In addition, or perhaps as an alternative, it may be valuable to prescribe a maximum time limit from the date when the initial SEA is first published, to the date on which a policy or associated instrument which relies on that SEA is finally adopted or implemented. This corresponds to sunset clauses in project-scale development approval legislation, and is intended to prevent policy being adopted on the basis of obsolete data, or in the face of social change.

## Standing

As with any legislation which imposes responsibilities on a government in power, policy SEA law needs a mechanism for the electorate to hold the government to its promises and deadlines. The simplest and most effective approach will generally be a broad provision, in the legislation itself, explicitly granting standing to any third party in the jurisdiction concerned, to apply to a relevant court for an appropriate injunction.

It would also be valuable for the legislation to contain an explicit mechanism under which a government decision to adopt a policy pursuant to this legislation could be appealed against on its merits, rather than merely through administrative appeals, tribunals or similar procedural approaches. Concerns are sometimes expressed that allowing appeals on merit rather than purely on legal procedure, may lead the judiciary to assume the functions of the legislature. In practice, however, this seems preferable to the closure of appeal avenues through more restrictive judicial review requirements.

## Funding

An explicit funding mechanism will generally not be required within the policy SEA legislation, because the legislation will force government agencies responsible for policy development to allocate funding for SEA as part of their normal budget process. Similarly, in jurisdictions which have established an Environmental Defender's Office or equivalent organisation, and/or provide government financial assistance to community groups undertaking public interest litigation or making submissions in

project-scale EA, these functions and activities can simply be extended to policy SEA.

## Conclusions

Governments, industries and multilateral organisations world-wide claim to endorse sustainable development. One of the key tenets in sustainable development is that environmental, social and economic considerations must be integrated in every decision and action. Strategic environmental assessment is one step in this direction. It is a very small and weak step, however, unless all development plans, policies and decisions are subject to SEA, not only those initiated by the environment portfolio.

A good litmus test of policy SEA, for example, would be to ask whether it would be triggered by a nation's accession to an international trade agreement. If it would, could it accurately predict the likely outcome? If it could would the government's decision be influenced by the result.

The main components of a legal framework for policy EA could include:

- definition of a policy, and screening criteria to determine which, if any, are exempt from EA;
- formal requirement that governments exhibit all proposed policies for public comment before adopting them, for a defined time period;
- formal requirement to advertise new policies and display them in publicly accessible places;
- provision for exemptions in cases of urgency, with defined criteria;
- formal requirement that an EA prepared or commissioned by the government agency concerned be exhibited with each proposed policy;
- standards for the technical quality of impact predictions;
- formal requirement for government to consider public submissions in relation to likely environmental impacts of proposed policies;
- formal requirement that governments may only adopt a particular policy if expected national benefits demonstrably outweigh likely environmental costs;
- formal requirement that governments must withdraw or modify a policy if public submissions demonstrate the likelihood of significant environmental impacts not considered in the government EA of the proposed policy;
- general third-party standing to enforce all the above in the courts.

A legal framework of this kind would force government agencies to budget for policy EA as part of policy formulation. Public submissions would be funded by the individuals or agencies making the submission. Provisions for financial assistance, if any, which apply for project-scale EA in any jurisdiction could also apply for policy EA.

Based on experience to date, the view within the EA profession seems to be that governments are generally averse to adopting comprehensive new approaches to policy SEA, and in fact have only carried out SEA when it fits smoothly into existing procedures with which politicians and bureaucrats are already comfortable. These approaches, though a useful starting point for SEA, would generally fail the acid test outlined above. The time is surely right for signatory nations to Agenda 21 to adopt broad legislation for policy SEA, or to activate and apply legislation which already exists.

The legislative approach outlined above is essentially an extension of project EA upstream to policy EA. It has sometimes been argued that SEA should be more flexible and less prescriptive, as one of its principal aims is to encourage consideration of environmental factors at an early stage in planning and policy formulation. For some types of SEA this may be true. For policy EA, however, the basic requirement is to predict the environmental impacts of a set of human activities and actions, just as in project EA. Triggering, technical quality and outcomes are all as important in policy as in project EA; so are screening, scoping and public participation.

In addition, just as project EA encourages project proponents to incorporate environmental considerations from early stages of project planning, because

proponents know that their proposals will be subject to environmental assessment at a later stage, so formal policy EA will encourage policy-makers to incorporate environmental considerations at an early stage of policy formulation, for precisely the same reason.

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