

OTHER INTERNATIONAL DEVELOPMENTS

NIS

Effective Public Participation in the Preparation of Policies and Legislation*

by Svitlana Kravchenko**

Introduction

This article will demonstrate that Ukraine and some of the other Newly Independent States (NIS) have both environmental assessment and public participation in the formulation of policies, legislation and regulations. Specific examples from their legislation will illustrate this and highlight the fact that many examples of good practices are to be found in these countries.

Perhaps this will surprise some, because of the history of the East. But these countries have been working hard to create democracies, and have looked at the most modern ideas for doing so. In their view, the best democracy is a *participatory* democracy.

This article deals primarily with the legislation of Ukraine, because this is where the author's expertise lies. It also tells of the experience of Ecopravo-Lviv, or EPL (an environmental law firm representing citizens who want to participate in important decisions of their governments) in participating in strategic environmental decisions in Ukraine.

However, the legislation and practices in some other NIS countries are also mentioned, where experts are also participating in various ways, using the legislation of their countries.

The Protocol on Strategic Environmental Assessment (SEA) is an opportunity to encourage this evolution of participatory democracy in all parts of Europe, and not to undermine it.

Ukraine legislation for SEA, including public participation

Ukraine does not have special legislation on SEA and its legislation does not use this term. But its legislation on environmental assessment is broad enough to apply to strategic decisions, not only project-level decisions.

More importantly, Ukraine does have good legislative provisions declaring the right of the public to participate in such environmental decision-making.

The requirements for environmental assessment and for public participation in Ukraine come from three laws: the Law on Protection of the Natural Environment (1991), the Law on Ecological *Expertisa* (1995) and the Law on Sanitary and Epidemiological Well-being (1994).

Each of these laws provides for a process known as "*expertisa*," which is a process somewhat similar to environmental impact assessment (EIA), as it is known in the West.

Expertisa at the strategic level (legislation, regulations)

In all three of the above laws, provisions exist for *expertisa* at the strategic level, namely for legislation and "normative-technical acts".

Two articles in the 1991 Law on Protection of the Natural Environment provide that an ecological *expertisa* must be prepared for all legislation that may affect the environment. According to Article 26, a formal study must be conducted (much like an environmental impact assessment) at the time of preparation of proposed legislation. Article 27 even applies this to "normative-technical acts" (a term that means "regulations").

Article 7 of the 1995 Law on Ecological *Expertisa* also stresses that *expertisa* should be provided for draft environmental legislation and other "normative-legal acts" in order to prevent a negative influence on the environment. Article 14 provides more detailed information on this.

Similarly, Article 11 of the 1994 Law on Sanitary and Epidemiological Well-Being states that sanitary and epidemiological *expertisa* will be carried out on drafts of technical-normative acts (regulations) concerning human health and living conditions.

Public participation in *expertisa*

The laws of Ukraine also make it clear that an *expertisa* is not to be a private or merely technical exercise by experts. A state *expertisa* must allow for *public participation*. Furthermore, the public can even organize its own "public *expertisa*", which has a legal status in influencing events.

State *Expertisa*

First, according to Article 28 of the 1991 Law on Protection of the Natural Environment, public representatives

* Taken from a presentation to the UN/ECE Working Group on Strategic Environmental Assessment (SEA) in Oslo in May 2002.

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can participate in the process of an environmental *expertisa* prepared by the State. The 1994 Law on Sanitary and Epidemiological Well-Being (Article 12) likewise provides that representatives of the public can participate during the process of sanitary and epidemiological *expertisa*.

The 1995 Law on Ecological *Expertisa* is even more specific. Article 8 of this law states that the *expertisa* process must be publicized – a basic concept of transparency and accountability.

This 1995 law has detailed provisions on public participation in its Article 11.

- In order to take into account public opinion, the bodies preparing an ecological *expertisa* are to organize public hearings or open meetings.
- Public participation during the process of ecological *expertisa* can also be accomplished by mass media presentations, the submission of written proposals, opinions and recommendations, including public representatives in expert groups and commissions on ecological *expertisa*.
- Public opinion is taken into account in the preparation of the conclusion of the ecological *expertisa* and in making decisions on the further implementation of the object of *expertisa* (legislation, in the case of Ukraine).

Thus we can see that for the preparation of *expertisa* by the State, public participation is a fundamental principle, and is regulated and required in some detail.

Public expertisa

In addition to these provisions, another means of public participation is a procedure known as the “public *expertisa*”. This is provided for under both of the main laws.

Article 30 of Ukraine’s 1991 Law on Protection of the Natural Environment states that a public environmental *expertisa* can also be prepared by an independent group of specialists. It is provided at the initiative of non-governmental organizations (NGOs) and local authorities, bearing their own costs. This “public *expertisa*” is provided independently of a State *expertisa*.

The conclusions of such a public *expertisa* have a recommendatory character – they can be accepted or rejected by the bodies that provide the State *expertisa* and who make the decisions. (Actually, in the West, as the author understands it, to “take into account” public opinion means merely to consider it, but not necessarily to accept it. In the NIS, the word *ó÷èòûâÿ*, which is often translated as to “take into account”, means to accept and follow the view of another person, so that our legislation says that a public *expertisa* *may* be *ó÷èòûâÿ*. The result, however, is the same: public opinion and the public *expertisa* must be considered, but the State can decide whether or not to agree with it.)

Article 16 of Ukraine’s 1995 Law on Ecological *Expertisa* is also about public ecological *expertisa*. This can be organized in any environmental field on the initiative of NGOs and other public groups.

Three articles in the 1995 law require public opinion

to be taken into account. Article 6 stresses that one of the main principles of ecological *expertisa* is taking into account public opinion. Article 8 stresses the importance of transparency and considering public opinion. Article 12, paragraph 3, states that the conclusions of public *expertisa* have a recommendatory character and may be adopted during the state *expertisa* and further realization of the object of *expertisa* (such as legislation).

Conclusions about SEA in Ukraine

It can be seen from this analysis that formal requirements for public participation exist in the legislation for the drafting of laws and normative acts, for commenting



Photo above shows an abandoned fishing boat in what was once the Aral Sea

Courtesy: GEO 3

on them in written form and during public hearings, and for taking into account public opinion. This is done through the process known as *expertisa*.

Ukraine practice: some examples of effective public participation

This part of the world has a long history of granting rights on paper and not respecting them in practice. So one may think, “This is all very good on paper, but probably nothing actually happens in practice.” In many cases, the author would have to agree with that judgment.

But citizen NGOs in many NIS countries – including Ukraine – are working hard to make environmental assessment and public participation a reality, both at the project level and the strategic level. Some examples of public participation in the formulation of policies in Ukraine, in the drafting of laws, and in the preparation of executive regulations, are given below.

Participation in formulation of policies in Ukraine

In order to implement Agenda 21, Ukraine decided to elaborate and adopt a policy called the Concept of Sus-

tainable Development (CSD). In this document, adopted in 2001, long-term policy goals and tasks of the State in the sphere of sustainable development, as well as measures of its implementation, were determined. The Strategy of Sustainable Development of Ukraine is "aimed at ensuring that environmental issues are fully integrated into mainstream economic and social policy", in the government's own words.

The Draft Concept of Sustainable Development of Ukraine was prepared three years ago by a group of experts. On 7 June 2001, the concept was presented in Kiev.

The text of the document was placed on the Internet and circulated among 100 NGOs. Twenty of them made comments. Some NGOs initiated round tables for discussion and sent comments and suggestions. All comments and suggestions were transferred to the group preparing the document.

Three public hearings were organized in Kiev and Lviv with the support of USAID and the UN Development Programme. Two hundred NGO representatives from all over Ukraine, including EPL, participated in national public hearings in Kiev on 24 November 2001, along with MPs and governmental officials, scientists and experts, USAID and UNDP representatives. They discussed a strategy of improvement of State environmental policy. A new composition of the Commission of Sustainable Development was formed, and representatives of the public were included.

Public participation in laws

The organization EPL and others are closely involved in the formulation of laws in Ukraine. This is one reason why the ECO Forum has taken a strong position that these efforts should be encouraged, not discouraged by adopting a Protocol that fails to support them. This has also shown, this author believes, that there is nothing to fear in allowing the public into this process, and much to be gained from this kind of democracy. Following are some examples.

1. Draft law on protection of natural environment

A few independent drafts were prepared, including mandates given to some experts and NGOs. The draft law was published and widely discussed. Public comments were taken into account, and it was adopted in 1991.

2. Law on waste

EPL sent comments on the articles on access to information and public participation of this law, and took part in a round-table organized by the Parliamentary Committee on Environmental Policy (supported by ABA CEELI; the American Bar Association, Central and East European Law Initiative) in 1998. Public opinion was taken into account.

3. EIA law (or law on ecological expertisa)

EPL has been involved in drafting a new EIA/*Expertisa* law because of one of its court cases using the law to stop an environmentally dangerous activity, which revealed some gaps in existing law. EPL was invited to participate

in an EIA demonstration project (US Environmental Protection Agency (EPA), UNDP and Ministry of Environment), based on Ukrainian legislation and Western practice. Several public hearings were organized on a model basis, providing the public with detailed documents and a forum for speaking frankly and directly about their concerns. After the practical stage EPL was involved in making changes in different laws: on Protection of Natural Environment, Law on *Expertisa* and Law on Local Self-government. Drafts of changes were prepared which were discussed in a round table and sent to Parliament.

4. Draft law of Ukraine on amendments of legislation in connection with the ratification of the Aarhus Convention

EPL participated in the expert group drafting the law. The draft was placed on the Internet, and EPL sent its comments. The draft was widely discussed in public fora. It passed through a first reading in Verkhovna Rada (Parliament). It was not adopted, despite expectations by the current Verkhovna Rada before national elections. It has been submitted to the newly elected Parliament for a second reading.

5. Draft GMO law

This law was published and discussed during Parliamentary hearings organized by the Green Party. There were two drafts. One, prepared by experts from Monsanto Corporation, was criticized by the public (EPL participated) and was rejected. An EPL expert was then invited to participate in the governmental drafting group for the second draft. EPL organized two round tables for the discussion of the draft with the public. The second draft was submitted to the Parliament by the Commission on Environmental Policy.

6. Law on environmentally favourable economic activity

Ecopravo-Kiev leads the working group on preparation of a draft law on environmental business. A round table was organized to discuss the draft. Public representatives gave their proposals to the draft during the round table. They were taken into account. This law is in the Verkhovna Rada now, but has not yet been adopted.

Participation in regulations (subsidiary legislation)

Decree of the Cabinet of Ministers of Ukraine on rules to provide ecological information

This public participation process may be of particular interest. The government decided to put its draft Decree on the Internet in order to invite public comments. EPL sent comments, some of which were incorporated into the draft. It was sent by the Cabinet of Ministers to regional administrations to discuss with the public. EPL participated in the public hearing in Lviv.

This year, the Ministry, together with NGO representatives from the public Council of the Ministry, have been finalizing NGOs' comments on this draft. After they have been finalized, the draft will be circulated by the Ministry for second approval by all relevant ministries and will then be submitted to the Cabinet of Ministers.

This Council of the Ministry is a special mechanism

for public participation to provide NGOs with direct contact with the Ministry on an ongoing basis.

Public participation in policies and legislation in some other NIS

Several countries of the NIS, in addition to Ukraine, have both good legislation and good practices regarding environmental assessment and public participation in the creation and adoption of policies, laws and executive regulations. Some examples are given below.

A. Laws

Georgia

In the Republic of Georgia, the Law on Environmental Protection, the Law on Normative Acts and the Regulations of Parliament provide for public participation at the legislative level.

Article 6(f) of the Law on Environmental Protection states, "a citizen is entitled to take part in the decision-making process and in the examination of this decision in the scope of environmental protection."

According to the Law on Normative Acts, public agencies have the right to order a draft law to be prepared by governmental or non-governmental organizations or by a group of experts.

According to Article 32 of this law, if there is any independent professional conclusion about a draft law, it must be presented to the Parliament together with this draft law.

In accordance with one Regulation of the Parliament of Georgia, draft laws must be published.

Under Article 47 of the Regulations of the Parliament of Georgia, Parliament is entitled to consider draft laws or law proposals submitted by persons who have no legislative initiative (from NGOs or citizens, for example) if they are prepared as required by legislation.

Moldova

The Government of Moldova recently adopted a Regulation on Public Participation in Preparation and Making Decisions Related to the Environment. The aim is to implement provisions of the Law on Ecological *Expertisa* and Environmental Impact Assessment and the Aarhus Convention. This appears to be a significant step towards transparency.

Russia

The Law on Environmental *Expertisa* provides that all legal and non-legal acts and regulations adopted by State agencies which may have a negative effect on the

environment are subject to *expertisa*. Polluter Pays (PP) provisions are included.

B. Good practices

Belarus

Sixteen NGOs have initiated the creation of a Public Committee on Assessment of National Strategy on Sustainable Development. The resolution of the meeting about necessary changes was sent to the relevant Ministries, local governments and international organizations.

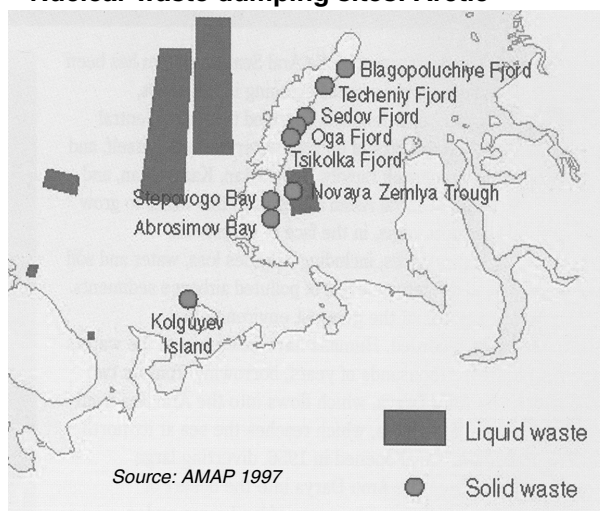
Ecopravo-Belarus participated in the preparation of the draft of the new edition of the Law on Environmental Protection. They sent 30 comments, all of which were taken into account by the Ministry of the Environment, which is responsible for preparing of the draft.

Georgia

The environmental committee of the Parliament of Georgia is now inviting NGOs to hearings on draft laws.

The Ministry of Environment is using NGOs' assistance in the process of preparation of its normative acts (regulations). NGOs are always welcome to submit comments on draft laws and normative acts of the Minister of Environment. From time to time, the Ministry of Environment (or some other environmental agencies) or some environmental NGOs organize hearings on drafts of environmental normative acts or environmental policy.

Nuclear waste dumping sites: Arctic



Map shows dumping sites for solid and liquid radioactive wastes in Arctic areas of the Russian Federation
Courtesy: GEO 3

Moldova

The Parliament of Moldova organized a two-day public hearing on Water Policy at the end of April 2002 (although there is currently no regulation in place on public hearings). Five NGOs were

invited to participate, along with scientists and experts. A declaration and official resolution were adopted after hearings by the parliamentary session. Both documents will be published in the official journal after editing.

The President of Moldova stated that he plans to initiate legislative steps to amend the Law on Local Public Administration (1998), the Law on Parliamentary Rules (1995) and the Law on Elaboration of Legal Acts (2002) to introduce procedures of public participation in decision making, as well as enabling the general public to access draft laws, for example, by placing them on the Internet.

The President returned to the Parliament the Law on Biosafety for re-voting with his comments. He suggested that one NGO representative (with consultative status) be included in the Parliamentary Commission on Biosafety to redraft the law. This Commission will decide on permissions concerning the use of genetically modified

(GM) organisms in the country. The Commission adopted the President's proposal.

Russia

The public can prepare comments and expert conclusions at the request of a governmental body (related to the Committee of State Duma), and can participate in parliamentary hearings, working groups and scientific-consultative councils.

Armenia

The Environmental Public Advocacy Centre (an NGO) organized public hearings on the following draft laws: Water Code, Code on Mineral Resources and Law on Waste. Representatives from the relevant ministries, experts, academics and the public were invited to the hearings. Suggestions and comments were sent to the Ministry of the Environment and the State Committee of Water Economy responsible for the preparation of the draft.

Two months later, a second public hearing was held, this time organized by the government. Public comments were taken into account in both senses of the term, Western and NIS (in the West, this means that comments are considered, whereas in the NIS it means that comments are included or accepted in the draft). All proposals were accepted or an explanation was given where they were not. The draft was sent to Parliament. Parliamentary hearings were expected to be in mid-May 2002. The Environ-

mental Public Advocacy Centre (EPAC) is preparing a strategy of lobbying comments that were not included.

USAID's Programme of Water Management is helping the State Committee on Water Resources in its preparation of the Water Code. This Programme created a special group for Strategic Environmental Assessment of the Water Code.

Uzbekistan

The Draft Law on Waste was published and widely discussed with the public. The NGO Armon participated in drafting, sent 30 comments, and organized a round table for discussion. Parliament (Oliy Majlis) passed it in July 2002. Some of the public comments were included in the law.

Conclusions

From the examples given of legislation and practice, one can see that the hunger for democracy of the people of the NIS region is being satisfied in notable ways. Those involved are bringing the modern tools of environmental assessment and public participation to the strategic level.

Will there be a SEA Protocol that supports these progressive laws and practices, or one that suggests that international standards are less than what is already there? Will the Protocol help these States to move forward, or allow the progress already made to be lost?

