Access to Environmental Information

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Introduction

Democratic openness in Mexico, as in so many other countries, assumes that those governed will become directly involved with public decisions. The environmental sector has not been the exception to this principle. In fact, the formal emergence of environmentalism was driven by collective demands to decision-makers. This happened, in part, as a response to a series of catastrophic events, and also in face of a political tradition based on the lack of environmental regulation for projects with serious social and environmental impacts that had not been adequately evaluated.[1] This was the context in which social organizations, making use of information about the technical and social components of projects that they perceived as threats to their health and environment, concluded that lack of knowledge about possible risks was one of the causes of costly social-environmental damages. Moreover, they determined that this inertia of the "survival of the fittest" would continue to predominate, taking its toll on natural resources and the quality of life of society at large.

In the 1970s, international principles were established that recognized the right of people to live in a decent environment and, at the same time, human beings' co-responsibility to protect and improve the environment for present and future generations. This would necessarily imply the public's participation in environmental decision-making, primarily in those decisions with a high probability of negative repercussions for those directly affected.[2]

From that moment on, various countries started to acquire a certain degree of environmental accountability to society, and set up the first mechanisms for public participation in environmental policy processes, within their legal frameworks.

In Mexico's case, the General Law for Ecological Balance and Environmental Protection (LGEEPA in Spanish) has gradually advanced, since 1988, in regulating consultation and

[1] Radioactive catastrophes in different parts of the world such as Windscale, England (in 1957), Idaho Falls, USA (in 1961) and Chernobyl, Russia (in 1986), to mention a few.

[2] The principles of the 1972 Stockholm Convention recognized the general principles that would guide different countries' efforts to achieve the over-arching goal: "We all have the right to enjoy an adequate environment." The principles include the obligation and right of society to participate in environmental decisions, given that these reflect a clear social benefit or damage, and the need to have informed participation, which implies, as a prerequisite, access to environmental information.

public participation mechanisms for diverse environmental policy processes, both for planning and management, such as the Ecological Land Use Programs, the Mexican Official Norms, and the Environmental Impact Evaluation. Corrective policy instruments have also evolved, such as the Public Complaint and the Appeals Review, and they now constitute a true back-bone for public participation in various decision-making processes, as well as in the development of laws, regulations, and programs. Each of these processes assumes that there is efficient access to environmental information, a right that was recognized and regulated by the LGEEPA itself in 1996, and which will be the subject of the following discussion.

This brief introduction shows that for issues of participation and environmental information, the right to know is one of the pillars of environmental management. In some cases this participation goes beyond simply knowing about the effects that a particular environmental decision or project could entail, in order to become part of the deliberative process that guides (or should guide) every governmental decision.

Advances

Changes made to the LGEEPA in 1996 included a special provision that created two kinds of rights to environmental information.[3] The first requires greater transparency from environmental policymakers, through the creation of the National Environmental and Natural Resources Information System, to disseminate existing registries and databases. The second involves the concrete right for people to have access to existing environmental information.

Citizens used to request information from environmental institutions through the LGEEPA, before the Federal Law for Transparency and Access to Information (LFTAIPG in Spanish) went into effect. The LGEEPA was more or less successful, although one had to follow rules, procedures and legal criteria that were very different from what requestors face today when working through the LFTAIPG.[4]

One of the LFTAIPG's main improvements over the LGEEPA, is the elimination of its intimidating requirements, such as the need to present official identification at the time

[3] Chapter II, "Derecho a Información Ambiental," Articles 159 to 159 6 Bis from the LGEEPA.
[4] Mandated institutions in the environmental sector—SEMARNAT, PROFEPA and other agencies—have fully respected the series of transparency obligations and access to information procedures imposed by the LFTAIPG, so that they have substituted the procedure and dispositions of the LGEEPA, in matters of access, with those foreseen in the LFTAIPG.

of a request (name, institution and address) and to explain in writing one's reason for requesting information.[5] The LFTAIPG also eliminated the threatening provision that stipulated that the petitioner would be, "responsible for the appropriate use of the information and must be held responsible for damages or harm that may be caused by its inappropriate use."[6] As a result of these provisions in the LGEEPA, the requestor and officials assumed that the latter had the right to deny information, if it considered the motivation for requesting access to be unjustified, or if there was the possibility that some kind of harm would be caused by the information released. Government officials retained wide discretion and had the last word about access, even though the law specified the precise criteria that should justify reserving environmental information. (It is worth noting that the LGEEPA's provisions for reserving information are very similar to the ones now in the LFTAIPG; they refer to pending judicial or administrative cases and national security issues, among others.)

The LFTAIPG has also had a strong positive impact through its 9th transitory article, which states that Article 17 from the Federal Administrative Procedure Law, which sets up a maximum period of three months to respond to any request, does not apply. The LFTAIPG also changes the legal approach to officials' lack of response to an information request: from an assumption that the petition is thereby denied, or the information does not exist—*negative ficta*— (LFPA, LGEEPA)—to a legal principle that assumes that the information does exist and must be released—*positive ficta*— (LFTAIPG). This places the responsibility on the federal agencies to pay for the costs of reproducing the information requested.

Limitations

The Transparency Law did not take into account the legitimate right of persons or groups to access documents that contain information of general interest, as is the case with environmental information which is sometimes part of projects that could have social and/or environmental impacts. When determining that information contained in administrative or legal files should be reserved, the LFTAIPG prevents citizens from learning about them. This applies even when it is a process or procedure that is the result of citizen's actions, such as the Popular Denunciation, which allows any person to request an investigation from the authority and a possible sanction on projects or activities that violate their environmental rights. The Transparency Law only addresses general situations, under

[5] Article 159 Bis 3 from the LGEEPA.
[6] Article 159 Bis 6 from the LGEEPA.

the assumption that people with some kind of interest in knowing about pending legal cases will be considered a "party" by the authority, according to traditional procedural rules, and that therefore they would have the right of access to the file without employing the LFTAIPG. However, environmental issues are governed differently, which is why it is possible that a group of individuals, or a lone individual, even when they have an interest in knowing the files involving apparently "unrelated" cases in which the authority does not consider them an "interested party", will be left without access to the documentation. This omission leads to the violation of rights of persons or groups affected by projects that are subject to resolution, because they will not be able to learn about the project that threatens them through the traditional procedural route, or by the transparency path.

The Federal Institute for Access to Information (IFAI in Spanish) reviewed a similar case. The requestor was denouncing a landfill that did not comply with environmental regulations, and which affected his health and that of members of his community. As a consequence of citizen actions, the authorities started an administrative process against the company. The requestor asked for access to that file, and was denied, based on the claim that, according to the Transparency Law, he did not have a legal interest because he was not part of the pending legal case, and the information was reserved for as long as the case was not resolved. The IFAI accepted this position, without taking into consideration the citizen's real interest in knowing about the issue's legal status, and to be able to contribute evidence or arguments, as warranted.

In contrast, the LGEEPA's chapter on Access to Environmental Information does recognize that those possibly affected by environmental activities or decisions are interested parties. However, it is worth reminding the reader that the Environment and Natural Resources Ministry (Semarnat in Spanish), decided to follow the LFTAIPG to the letter of the law.

Perspectives

It is necessary to exercise these rights and to use the institutional means available to defend the collective interests of communities affected by environmental impacts, by bringing the logical and legal rationales behind each case to the attention of the relevant decision-makers (both the IFAI and the judicial system).

Conclusions

The right to information is a basic precondition for society to participate effectively and efficiently in public decisions and actions, such as those involving the environment.

Exercising the right to information is necessary in three areas: knowledge of the environmental impact of human activities; effective participation in decision-making processes; and accountability.

Ignorance or uncertainty about processes, procedures, techniques used, mitigation measures and impacts associated with projects or activities can lead to mistaken decisions that have sometimes irreversible environmental repercussions. Thus, informed participation from society is fundamental, through established legal mechanisms, in order to influence public policies so as to avoid negative social and environmental impacts.

The existence of the right and legal procedures, by themselves, are not enough to generate a change in social dynamics; the governed must exercise their rights in order to learn about the system and possibilities for using information. In this sense, we argue, without fear of mistake, that the new LFTAIPG procedure is much more efficient and sets up more rigorous oversight mechanisms to able to fulfill our constitutional right to information. However, the procedure can be improved and we should make use of the instrument to set precedents that modify special circumstances that are not foreseen in the LFTAIPG.

One of the differences between the LGEEPA and the LFTAIPG is that the first law recognized that those possibly affected by environmental activities or decisions could have access to this kind of "environmental information".[7] This right granted people affected by a project or activity the possibility of having access to information related to the project. The LFTAIPG does not take into account this right of "special" access for people affected by governmental or third party projects, and who had filed charges with the Federal Environmental Protection Attorney General's Office. The situation becomes more complicated when we add the LFTAIPG's presumption in favor of reserving information about pending cases, since controversial environmental projects are often denounced by third parties.[8]

[7] According to Article 159 Bis 3 of the LGEEPA, all persons have the right of access to "Environmental Information" in power of the authorities and defines this concept as: "*[…] any information in written, visual or database form that environmental authorities have in matters of water, air, land, flora, fauna and natural resources in general, as well as activities or measures that could affect them.*"

[8] Any individual whose right is "diffuse or collective" is not recognized in relation to access to information in these kinds of special cases.