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**Intergovernmental meeting to review and further
develop draft guidelines for the development of
national legislation on access to information, public
participation and access to justice in environmental matters**
Nairobi, 9–10 November 2009

**Draft guidelines for the development of national legislation on access
to information, public participation and access to justice in
environmental matters**

Note by the Secretariat

1. The annex to the present note contains a revised version of the draft guidelines that were before the Governing Council of the United Nations Environment Programme at its twenty-fifth session, in February 2009 (document UNEP/GC.25/INF/15/Add.2).
2. By its decision 25/11, the Governing Council took note of the guidelines and requested the Secretariat to carry out further work with a view to their adoption by the Governing Council at its next special session, in February 2010. The latest version of the guidelines, as set out in the annex, has to a large extent been produced based on the written comments received in response to the Executive Director's invitation to Governments and other stakeholders to send such comments with a view to further enhancing the guidelines' relevance and level of perfection.

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Annex

Draft guidelines for the development of national legislation on access to information, public participation and access to justice in environmental matters

The purpose of these voluntary guidelines is to provide general guidance, if so requested, to States, primarily developing countries and countries with economies in transition on promoting the effective implementation of their commitments to Principle 10 of the 1992 Rio Declaration on Environment and Development within the framework of their national legislation and processes. In doing so, the guidelines seek to assist such countries in filling possible gaps in their respective relevant national legislation, and where relevant and appropriate in subnational legal norms and regulations at the State or district levels etc., to facilitate broad access to information, public participation and access to justice in environmental matters. The guidelines should not be perceived as recommendations to amend national legislation or practice in cases where existent legislation or practice provides for broader access to information, more extensive public participation or wider access to justice in environmental matters than follows from these guidelines.

I. Access to information

Guideline 1

Any natural or legal person should have affordable, effective and timely access to environmental information held by public authorities upon request (subject to guideline 3), without having to prove a legal or other interest.

Guideline 2

Environmental information in the public domain should, among other things, include information about environmental quality, environmental impacts on health and factors that influence them, in addition to information about legislation and policy, and advice about how to obtain information.

Guideline 3

States should clearly define in law the specific grounds on which a request for environmental information can be refused. The grounds for refusal are to be interpreted narrowly to take into account the public interest served by disclosure.

II. Collection and dissemination of environmental information

Guideline 4

States should ensure that their competent public authorities regularly collect and update relevant environmental information, including information on environmental performance and compliance by operators of activities potentially affecting the environment. To that end, States should establish relevant systems to ensure an adequate flow of information about proposed and existing activities that may significantly affect the environment.

Guideline 5

States should periodically prepare and disseminate at reasonable intervals up-to-date information on the state of the environment, including information on its quality and on pressures on the environment.

Guideline 6

In the event of an imminent threat of harm to human health or the environment, States should ensure that all information that would enable the public¹ to take measures to prevent such harm is disseminated immediately.

III. Public participation

Guideline 7

States should ensure opportunities for early and effective public participation in decision-making related to the environment. To that end, members of the public concerned² should be informed of their opportunities to participate at an early stage in the decision-making process.

Guideline 8

States should, as far as possible, make efforts to seek proactively public participation in a transparent and consultative manner, including efforts to ensure that members of the public concerned are given an adequate opportunity to express their views.

Guideline 9

States should ensure that all information relevant for decision-making related to the environment is made available, in an understandable, timely and effective manner, to the public concerned.

Guideline 10

States should ensure that due account is taken of the comments of the public in the decision-making process and that the decisions are made public.

Guideline 11

States should undertake an appropriate review process whenever previously unconsidered environmentally significant issues or circumstances arise. The public should be able to participate in such a review process to the extent that circumstances permit.

Guideline 12

States should consider appropriate ways of ensuring, at an appropriate stage, public input into the preparation of legally binding rules that might have a significant effect on the environment and into the preparation of policies, plans and programmes relating to the environment.

Guideline 13

States should provide means for capacity-building, including environmental education, to promote public participation in decision-making related to the environment.

1 “The public” may be defined as one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups.

2 “The public concerned” may be defined as the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law should be deemed to have an interest.

IV. Access to justice

Guideline 14

States should ensure that any natural or legal person who considers that his or her request for environmental information has been unreasonably refused, inadequately answered or ignored, or in any other way not handled in accordance with applicable law, has access to a review procedure before a court of law or other independent and impartial body to challenge such a decision, act or omission by the public authority in question.

Guideline 15

States should ensure that the members of the public concerned have access to a court of law or other independent and impartial body to challenge the substantive and procedural legality of any decision, act or omission relating to public participation in decision-making in environmental matters.

Guideline 16

States should ensure that the members of the public concerned have access to a court of law or other independent and impartial body to challenge any decision, act or omission by public authorities or private actors that affects the environment or allegedly violates the substantive or procedural legal norms of the State related to the environment.

Guideline 17

States should provide a broad and inclusive interpretation of standing in proceedings concerned with environmental matters.

Guideline 18

States should provide effective procedures for timely review by courts of law or other independent and impartial bodies of issues relating to the implementation and enforcement of laws and decisions pertaining to the environment. States should ensure that proceedings are fair, open, transparent and equitable.

Guideline 19

States should ensure that the access of members of the public concerned to review procedures relating to the environment is not prohibitively expensive and that participation in such procedures does not expose the members of the public concerned to unreasonably high financial risk.

Guideline 20

States should provide a framework for prompt, adequate and effective remedies in cases relating to the environment, such as interim and final injunctive relief. States should also consider the use of compensation and restitution and other appropriate measures.

Guideline 21

States should ensure the timely and effective enforcement of decisions in environmental matters by courts of law, and by administrative and other relevant bodies.

Guideline 22

States should provide adequate information to the public about the procedures operated by courts of law and other relevant bodies in relation to environmental issues.

Guideline 23

States should promote appropriate capacity-building programmes, on a regular basis, in environmental law for judicial officers, prosecutors and other relevant stakeholders.

Guideline 24

States should encourage the development and use of alternative dispute resolution mechanisms where these are appropriate.

Commentary to the guidelines*

Commentary to guideline 1

Environmental information, such as that contained in public registers, should be available to the public for inspection free of charge or at a reasonable cost. Any person requesting information should be provided with adequate facilities for obtaining copies of such information, on payment of the costs of reproduction and dissemination, if appropriate and reasonable.

A response should be provided by public authorities to a person requesting information within a reasonable period of time. Such period should be defined under national law.

Where information is held in various forms, including written, visual, aural or electronic forms, it should be provided in the form specified by the requestor unless it is reasonable for the public authority to make it available in another form or if the information is already publicly available in another form.

There may be situations in which specific measures to facilitate access to information should be considered, for example when illiteracy is widespread or when minorities do not adequately understand the (official) language(s) used by the public authorities.

Commentary to guideline 2

To ensure the transparency of environmental information systems, the type and scope of the environmental information available and the basic terms and conditions under which it can be obtained should be specified. Registers should be established and maintained and information officers should be designated within relevant public authorities.

Commentary to guideline 3

The grounds expressed in law for refusing an information request should be clearly specified and could be limited to, but need not include, situations where disclosure of the information would adversely affect:

- (a) The confidentiality of the proceedings of public authorities;
- (b) International relations, national defence or public security;
- (c) The course of justice;
- (d) Commercial and industrial confidentiality unless the information is about emissions;
- (e) Intellectual property rights;
- (f) The confidentiality of personal data or files;
- (g) Interests of a third party that has supplied information without that party being under, or being capable of being put under, a legal obligation to do so, and where that party has not consented to the release of the material;

* The present commentary has been prepared by the secretariat in consultation with the UNEP Senior Advisors Group and is annexed to the guidelines as indicative reference material. The text of the commentary has not been negotiated by Governments.

- (h) The environment to which the information relates.

Reasons for a refusal to comply with a request for information should be stated in writing. Where only part of the information requested falls within one of the exempt categories, the remainder of the information should be separated out and supplied to the requestor. While a request for information may be refused at the time the request is made, it should be noted that the same information could be made available in the future.

An information request may also be refused if the relevant public authority does not hold the environmental information in question, the request is manifestly unreasonable or formulated in too general a manner.

Commentary to guideline 4

A relevant system to ensure an adequate flow of information about proposed and existing activities that may significantly affect the environment could, among other things, involve requiring the regular reporting of such information to the competent public authorities by such entities. In addition, such entities should be encouraged to report regularly on the environmental impact of their activities directly to the public.

Commentary to guideline 7

Public participation in decision-making processes having significant environmental implications should be facilitated by ensuring that members of the public concerned are informed in a timely and effective manner about the relevant decision-making process and the opportunities, procedures and criteria for their participation. The earlier in the decision-making process the public becomes involved, the more effective its participation can be. Public participation should therefore begin at an early stage when options are open and effective public influence can be exerted.

Public participation procedures should include reasonable time frames for the various phases, permitting sufficient time for informing the public and for the public concerned to prepare and participate effectively during the decision-making process. The timing of the opportunities to participate should be compatible with those pertaining to public access to the relevant information, so as to facilitate informed public participation.

The public concerned should be given the opportunity to consult the information necessary to participate effectively in the process. Such information could be provided through websites and, if possible, directly to members of the public concerned having requested to be so notified or having otherwise been identified as in need of direct communication. Where appropriate, the relevant authorities should give the public additional assistance and explanations.

Public participation in environmental administrative decision-making processes should be ensured, preferably by means of explicit rules governing certain procedures such as, if applicable, environmental impact assessment and the issuing of permits or licences, particularly where these may affect the environment significantly. Such rules could include the right to be heard, procedures that include the right to submit comments and propose alternatives, a reasonable time frame to comment, the right to a reasoned decision and the right of recourse to administrative or judicial proceedings to challenge failures to act and to appeal decisions. The provision of financial assistance to members of the public to enable effective participation in policy and other decisions related to the environment should also be considered.

Special efforts should be made to promote public participation in environmental policymaking and on decisions related to plans and programmes (see also guideline 12) that are of particular interest to subnational, regional and local communities.

Irrespective of the characteristics of the decision-making process in question, it should be noted that special efforts may have to be made to facilitate the effective participation of some groups and members of the public concerned. This could, for example, be the case when illiteracy is widespread or when minorities lack adequate understanding of the (official) language(s) being used in the decision-making process. It is also important to ensure involvement and participation by both men and women. Specific measures should be considered to ensure equal participation in this regard since participation could be affected by power imbalances within communities, household family relations and different time use by men and women, which could hamper effective participation.

Commentary to guideline 8

Ensuring an adequate opportunity for members of the public to express their views could, where appropriate, include taking account of literacy levels and minority languages and holding oral hearings. It could also, where relevant, include holding meetings and proceedings in a location close to the site that will be affected or the activity whose environmental impacts are under consideration or in close proximity to where the majority of the public concerned reside.

Commentary to guideline 10

To take due account of the comments of the public should be understood to mean, as a minimum, that the competent authority needs to respond to the main substantive arguments put forward in the comments. The public should be promptly informed when the decision has been taken, in accordance with appropriate procedures. The text of the decision, along with the reasons and considerations on which the decision is based, should be made public.

Commentary to guideline 14

Guideline 1 states that any natural or legal person should have affordable, effective and timely access to environmental information held by public authorities upon request. Consequently, any person whose right to access to environmental information has been denied should also have access to a review procedure to enforce the right.

Commentary to guidelines 15 and 16

The wording of guidelines 15 and 16 is without prejudice to the right of States to require additional qualifications for the members of the public concerned to have access to justice in the cases covered by these guidelines. For example, members of the public concerned may be required to have a sufficient interest or maintain the impairment of a right in a specific case, for example, article 9, paragraph 2, of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention).

Commentary to guideline 17

Giving a broad and inclusive standing in proceedings on environmental matters should include according standing to appropriate public interest and community groups. This should include non-governmental organizations promoting environmental protection and meeting any criteria that may exist in national law.

Commentary to guideline 18

It should be ensured that the obligations of courts of law and other bodies charged with resolving environmental issues are properly defined and that they are adequately resourced and staffed to perform the obligations required of them.

Commentary to guideline 19

The establishment of appropriate assistance mechanisms to remove or reduce financial barriers to access to justice should be considered to facilitate access to review procedures relating to the environment. Such mechanisms may include the timely provision of financial and legal aid to poor litigants. Other mechanisms, such as waivers and cost-recovery mechanisms, may also be appropriate.

The risk of the losing party being compelled to cover the (litigation) costs of the winning party in the review procedure may be an example of a situation in which the public concerned is exposed to an unreasonably high financial risk. Nevertheless, an award of (reasonable) costs against a losing party may also be regarded as a normal risk of litigation and may serve as a check on unmeritorious matters being brought forward.

Commentary to guideline 20

The ultimate objective of any review by courts of law or other independent or impartial bodies is to obtain a remedy for a transgression of law. It should be ensured that remedies are adequate and effective. Adequacy requires the remedy to compensate fully past damage, prevent future damage and may require it to provide for restoration. The requirement that the remedies should be effective means that they should be capable of efficient enforcement.

In environmental cases, remedies such as compensation and restitution are often insufficient to reverse the situation to *ex ante* given the irreversible impacts of many environmentally hazardous acts and activities. Provisional measures, such as injunctive relief, are therefore important remedies to avoid irreversible damage. When initial or additional damage may still happen and the violation is continuing, or where prior damage can be reversed or mitigated, courts and other review bodies may issue an order to stop or to undertake certain action. This order is called an “injunction” and the remedy achieved by it is thus injunctive relief. An injunction can be final (permanent) or interim (temporary). An interim injunction is granted to restrain activity, or to require a person to undertake some act temporarily until a final decision can be made.

Restitution is a remedy by which a defendant can be ordered to give up his or her gains from an unlawful activity to the claimant. Restitution should be contrasted with compensation, which is an order to the defendant to compensate the claimant for his or her loss. It could thus be in the interest of the claimant to seek restitution if the profit that the defendant has made as a result of unlawful behaviour, i.e., by transgression of laws relating to the environment, is greater than the loss suffered by the claimant.

Other appropriate measures could include civil penalties.

Commentary to guideline 21

It should be ensured that the laws relating to enforcement of decisions in environmental matters are adequate and sufficiently effective to remedy any harm caused to the environment, to provide full compensation for such harm and to protect the environment from suffering similar harm in the future.

Commentary to guideline 22

Education on participation in environmental decision-making and on the environmental rights of individuals and public interest groups should be actively promoted. Such education should, among other things, explain to the public concerned how they can use the legal system to protect their rights to access to information and public participation.

Commentary to guideline 24

Alternative dispute resolution refers to any means of settling disputes outside the judicial or administrative process. It includes, among other things, negotiations, arbitration, conciliation and mediation. Its use should be encouraged as a potentially swift and relatively inexpensive means of resolving disputes. In the sphere of environment one potential benefit associated with the use of such mechanisms is the possibility to arrive at broadly accepted and thereby potentially long-lasting solutions to disputes. It is primarily mediation, but also arbitration, that has been used in the environmental field. In mediation, there is a third party, a mediator, who facilitates the resolution process (but may also in some cases, as in a conciliation procedure, provide advice on the content or possible resolution of the dispute) but does not impose a resolution on the parties. In arbitration, participation is typically voluntary, and there is a third party, such as a private judge, who imposes a resolution. A prerequisite for mediation to be successful is that national law must allow sufficient margin for negotiations to develop a win-win solution for all involved. The potential role of alternative dispute resolution can thus vary according to the nature of the decision-making process, the issues at stake and the margin for alternative dispute resolution that national law permits, among other things.

Where appropriate, the relevance and use of traditional, community-level alternative dispute resolution mechanisms and processes should be considered.
