

SEA in Brazil: legal-institutional challenges

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1. Introduction

To date, Strategic Environmental Assessments (SEAs) in Brazil have been carried out on a voluntary basis (SÁNCHEZ, 2008), being a relatively new and little-used instrument. Thus, there are still doubts whether SEA, if introduced specifically at the national level, can be used as a basis for government decisions – especially considering Brazil's political and institutional context, in which environmental issues are hardly incorporated into the government routine, and are seen more as an obstacle than as a priority (MALVESTIO, 2013).

In fact, in the Brazilian context, SEA has been mostly and wrongly used as a tool to assess projects with relevant environmental impacts - serving as an Environmental Impact Assessment for big scale projects - and not to evaluate government policies, plans and programs as it should be. Moreover, studies have shown that Brazilian institutions have had low compliance with the best practices indicated by the literature, as well as low learning capacity about SEA application (MALVESTIO, 2013; MONTAÑO et al., 2014; OPPERMANN, 2012; PELLIN et al., 2011; SILVA et al., 2014).

Therefore, this work aims to study a voluntary SEA applied to a government program in the Brazilian context, in order to discover (1) if SEA in Brazil can be effective in the sense of actually influencing decision-making and changing institutional culture regarding the environment; (2) which factors can influence this effectiveness; and (3) in which way the legal-institutional dimension can influence effectiveness in Brazil.

To do so, this article will present a case study of the SEA made regarding the Hydroelectric Generation Program of Minas Gerais (HGPMG), aiming at verifying its effectiveness and which factors have interfered in it. Afterwards, lessons learned from the HGPMG-SEA case will be extracted, especially concerning the legal-institutional dimension of SEA, and how it can influence SEA effectiveness. The question to be answered is whether an open rule that gives plenty of opportunity for the government to decide if, when and how to implement SEA (as in the HGPMG-SEA case) is the ideal rule for the Brazilian context.

Our hypothesis is that SEA has the potential to be used effectively in the Brazilian government decision making process and to alter the governmental view regarding the environment, despite having to overcome considerable obstacles related to policy and institutional issues. To be implemented in Brazil, it is necessary to develop more restrictive rules regarding administrative discretion, in order to create an obligatory SEA procedure by the government.

2. Case Study: Hydroelectric Generation Program of Minas Gerais, Brazil

The case study chosen to evaluate effectiveness in the Brazilian context was the SEA prepared for Hydroelectric Generation Program of Minas Gerais 2007-2027 (“HGPMG-SEA”). This is an assessment made in 2007 about hydroelectric projects to be implemented in the state of Minas Gerais² between 2007 and 2027, with a 6.000 MW increase in energy production. It is an important case in the Brazilian context, given that this SEA evaluates the implementation of hydroelectric projects – a very relevant subject in Brazil, due to the need for energy sprawl and the environmental costs of such projects – and its object is a governmental program – something rare in Brazil, where SEA object is usually an infrastructure project (OPPERMANN, 2012).

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² The state of Minas Gerais is the fourth biggest Brazilian state, with the approximate size of France. It has the second biggest population in Brazil – as large as the population of Portugal, approximately – and it has the third biggest economy of the country, focusing on third sector and mining.

However, our findings point out that the HGPMG-SEA, eight years after its elaboration, has a low level of effectiveness.

As for the first criterion used to verify effectiveness – compliance with the recommendations made by HGPMG-SEA, verified by data analysis and interviews with stakeholders – indicated that recommendations made by HGPMG-SEA to the government, such as to update SEA, to stimulate other energy sources (such as sun and wind), to improve hydroelectric projects in course and to improve power capacity in ancient power plants, were very poorly followed. Indeed, half of the recommendations were not followed and the other half ranged from "very little" to "partially" followed.

As for the second criterion – the use of HGPMG-SEA findings in environmental studies of subsequent hydroelectric projects, verified by data analysis and interviews with stakeholders –, showed that the HGPMG-SEA is practically not being used in environmental studies of hydroelectric projects, and therefore there is no compliance of these studies in relation to the HGPMG-SEA. Of nine hydroelectric power plants analyzed by this paper and implemented in Minas Gerais between 2008 and 2011, only one mentions the HGPMG-SEA report, and in a very shallow way. Furthermore, interviewees from the State government agencies admitted that HGPMG-SEA was not even consulted by the environmental agency or the energy agency in preparing its environmental and energy policies. In other words, HGPMG-SEA did not influence Minas Gerais government's decision-making.

As for the third criterion – change in the government's environmental perspective derived from the experience with SEA -, interviews with stakeholders that were working with HGPMG-SEA at the time the assessment was made, as well as stakeholders that are working in the environmental and energy sector (public and private) nowadays, stated almost unanimously that the government's vision regarding the inclusion of the environmental variable in the decision-making process has not changed with the HGPMG-SEA (although a promising moment may have occurred soon after its elaboration). The development of a learning process is non-existent in this case, and the HGPMG-SEA is a forgotten case even to the environmental agency.

It follows, therefore, that the HGPMG-SEA was not sufficiently effective, neither regarding the influence of its findings and its recommendations in the government decision-making, nor regarding change of its institutional culture.

As for the factors that influenced this framework, based on the findings above and in the interviews, it was possible to note that the problems that have occurred in HGPMG-SEA are much related to the lack of compliance with the best practices defined by literature³. In fact, (i) HGPMG-SEA was not worked within the government as a process, but as a study, which was paralyzed in time; (ii) tiering was not done between the SEA and the environmental impact assessments of projects; (iii) SEA has not entered as an official instrument in the government planning system; (iv) there was insufficient training of employees responsible for SEA implementation; (v) SEA elaboration process did not generate learning and the intended change in governmental vision; (vi) public participation was not encouraged either during or after the process; and (vii) in the end, there was no monitoring of the study outcomes.

The result of all this is the ineffectiveness of the SEA process in inserting the environmental variable in decision making and in producing change in government mentality, caused mostly by lack of political will to dedicate time and resources to implement SEA and lack of institutional knowledge to do so.

About this conclusion, it is important to emphasize that there was no law in Minas Gerais obliging the elaboration or the use of SEA in state planning. Therefore, it could be that the absence of this rule was the cause of non-compliance of SEA best practices, which generated the ineffectiveness of the instrument. This hypothesis will be analyzed next.

³ For the purposes of this paper, there is not enough space for a broad literature review. Nevertheless, the review of best practices was made in this author's Master thesis, and includes many papers, books and other prestigious academic works. This paper includes only the conclusions.

3. Legal-institutional dimension and its connection with effectiveness

The literature of Environmental Science, Law and Political Science is not unanimous regarding the ideal degree of openness that the rule must have for an effective performance of public administration: should law be made by open standards (vague concepts in the law and wide administration freedom), or closed rules (detailed norms and little administration freedom)?

First, it should be emphasized that the option to create open standards, leaving greater discretion for the government, has shown to be quite risky, especially in the Brazilian context. Indeed, despite some studies defending public administration as generally "neutral" and "efficient" (HUBER; SHIPAN, 2002), the same cannot be stated for the Brazilian government. On the contrary, studies have shown that the federal environmental agency suffers from political influence when it needs to apply the law (FEDERAL COURT OF AUDITORS, 2009). The fact is that, if the standards are open, there will be a great chance of government non-compliance with the legislation purposes.

Moreover, the need for administrative control in the environmental area is even greater when considering the low capacity (resources and techniques) of Brazilian environmental agencies in implementing standards. Indeed, the learning process that could be provided by experimentation on open standards does not occur in practice, with a low learning ability by Brazilian environmental agencies that was already pointed out by the literature (MONTAÑO et al., 2014).

The issue of closed rules, however, does not seem to be the ideal solution to ensure effectiveness in the Brazilian context. That is, legal certainty and predictability – that in theory are the results of closed rules – are lacking in Brazilian Environmental Law, since the number of environmental standards is excessive; the consequence is the shortage of effectiveness of these standards, which are knowingly not applied satisfactorily (BRAGA, 2010). Moreover, the lack of institutional capability is also a problem when applying closed rules, when the institutions do not have enough training or structure to correctly use the legal tools at their disposal.

For all the above, it is understood that, in the Brazilian context, a standard establishing procedural control should be considered, to create the obligation to carry out a formal SEA process in which, in the end, the choices made in the planning of PPPs should be grounded on the findings of the SEA. That is, the actual implementation of SEA findings in planning would not be obligatory, but if it is decided that the findings will not be implemented, this decision should be justified in a solid and valid manner. Thus, at least, the public administration will be releasing clearer information, relating the PPPs with the SEAs and subjecting its decisions to an intra or extraprocedural control, avoiding negative political influence by promoting transparency, and capacitating the administration by inserting SEA in the planning system in an obligatory manner.

4. Final remarks

Of all that was discussed and evaluated throughout this study, the hypothesis shown in the introduction was confirmed, with some additions.

First, the case study findings do not necessarily apply to any SEA already held or to be held in Brazil, and other studies may raise other hypotheses to explain low effectiveness or even demonstrate that the legal-institutional dimension is not an important variable.

Second, the legal-institutional dimension shall not be considered the only relevant variable for SEA effectiveness, although it could be a relevant factor according to this study, and there is very little attention in the literature on the subject.

Third and finally, there is obviously the need for political will to implement legislation; therefore, the creation of an SEA standard in Brazil is quite difficult, because that would imply greater government transparency, hindering the influence of private interests in government decisions, something that politicians are not comfortable to approve.

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