Avosetta meeting
Weighing environmental risks and socio-economic benefits in view of alternative solutions.

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Report from Norway

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Introduction

Norwegian environmental law in both the narrow and the broad sense is marked by general *substantial rules* with wide legal frames, which leave much discretion to the decision-maker. This is very much the case with sector legislation managed by state authorities in the fields of industry, petroleum, energy, and infrastructure development, and even more in land use/spatial planning and building regulation where municipal and regional authorities play a key role. There are in fact few absolute limits in environmental law, such as environmental quality rules (and those we have do not function).

This makes the balancing between objectives and values less of a legal issue and in reality a question of political priorities, at national and/or local level and case by case. In our system this also means that the courts have a very limited role in the environmental field. Broadly speaking the courts can only rule on the legality of a case and can not overrule the balancing of the executive as long as it is carried out within the frames of the relevant rule (except in extreme cases). There are no special environmental courts in Norway.

It should be added, though, that any authority deciding on a case that may have negative environmental effects, is obliged to inform itself of these effects and take them into account when a decision is made. Increasingly, sector and land use legislation have included protection of the environment and sustainable development as explicit objectives, parallel and more or less at the same level as the 'primary' development or sector objective of the act. This implies certain requirements as to the balancing, but at the end of the day, it is up to the sector authorities to decide what weight to give the environment.

On the other hand, the *procedural rules* are fairly detailed both in general public administrative law and in sector legislation. Procedures shall ensure information to the public, participation, environmental impact assessments, etc. Here, we comply with the requirements of the Århus convention, and the EIA/SEA directives also apply to Norway. Whether these procedural rules actually "help" is another matter, since the final decision anyway is left to the discretion of the relevant authorities.

Again, the Norwegian system is far from ideal from an environmental point of view. It is particularly significant that responsibility for EIAs is left to the authority that makes the final decision on the case, usually either a sector authority or a municipality ("the responsible authority"). The sector authority or municipality itself decides what to be

assessed and finally whether an EIA is satisfactory. The main argument for this is that the authority which finally decides the case should also be the one that decides what assessments are needed for making the decision. The Ministry of the Environment is consulted only if the case seems to be in conflict with "national or important regional considerations". This example of "integration" of environmental concerns into the various policy areas means that the authority often sits "on both sides of the table" – being responsible both for the development of a project in the sector and for assessing the environmental impacts of – and arguments against - the same project. There is also a major problem with lack of competence at the local level.

This system is a witness of the relative weak position of the environmental authorities, including the Ministry of the Environment, in Norway. This in turn reflects political priorities and power relations at the highest political level.

I. Balancing with non-environmental criteria.

1. *What kinds of non-environmental criteria are to be considered in particular contexts - EIA, SEA etc etc ?*

Norway's EIA/SEA rules are combined and included in the land use/spatial planning system pursuant to the Planning and Building Act..

Land use plans are required for most types of project covered by the EIA rules, and the EIA/SEA is normally included in the planning procedure. A EIA/SEA shall "assess effects on the environment and the society". This means that *all relevant social and economic effect*s are to be considered and assessed within the EIA/SEA itself. In reality, however, most of the EIA/SEAs relate mainly to the environmental effects.

So, there is wide frame for the non-environmental criteria to be considered under the EIA/SEA, including social, economic, health, and cultural effects. For example, prevention of crime and security risk are among the factors which are explicitly mentioned in the regulation. However, whether and to what extent they are all actually assessed, varies a great deal.

2. *Do only provable and factual risks and benefits count, or are public perceptions considered relevant in considering risks and benefits?*

Public perceptions may not be considered "relevant" by the developer/operator but will nevertheless be taken into account in the final decision-making.

3. *If the benefit must be one in the public interest, how is public interest defined? Give examples. What interests do not count, what do count as being in the public interest?*

In Norwegian law the concepts of "public interests" or "general considerations" ("allmenne interesser", "allmenne hensyn") are usually mentioned in an act as something

to be taken into account *in addition to* the main objective(s) of the act in question. (Some acts state explicitly that also "private interests" shall be taken into account.) It is also to be understood to include interests and considerations that primarily are taken care of and supported by other acts and other sector authorities.

The concepts are very broad and flexible, and they may vary over time. The Supreme Court has stated that "public interests are what at any time *are considered to be* public interests"[1] (sic). It has also been stated in a public report that "it is not really excluding anything". They certainly cover general environmental effects, effects on cultural heritage and culture, outdoor recreation, lifestyle, transport facilities, provision of energy, effects on local trade and industry, effects on local and national budgets and economy, tax income, employment, consumer facilities, effects on health and social services, defense and national security, and other security and contingency considerations.

It is rather a question of delimiting the concept by defining what are *not* public interests. Clearly, *private* economic interests and other personal or individual interests are not public interests.

An alternative approach may be to see public interests as interests which are not taken care of by "the market", or not included in a cost-benefit assessment of a project which does not take social externalities of the project into account. Thus it can be seen more or less synonymous with *the concept of positive and negative externalities.* By definition, as it were, these interests have to be taken care of by special measures and instruments. In fact, this is the main purpose of including a reference to "public interests" in the legislation related to development projects.

4. If the benefit may be private what is considered legitimate: economic profit? Employment generation? Service for consumers?

Economic profit is legitimate private benefit in the balancing, also employment generation and service to consumers.

5. How is the benefit calculated? In qualitative language or in monetary terms? In what way?

When cost-benefit assessments are done properly, as it is generally done in the road sector in Norway (see below), benefits are calculated both in monetary terms and in qualitative language; in monetary terms as far as this is feasible and "make sense". It is accepted that some types of benefits cannot be described and accounted for in monetary terms only.

6. Is environmental risk calculated in cost terms in order to allow comparison with benefits? If so, how is it calculated? Is there a practice of monetarizing intangible goods?

I have no information on this, but presume that this generally is not very advanced.

[1] Norsk retstidende 1993 p. 278.

7. Are mitigation and compensation measures counted as reducing environmental risks, or do they come in at a later stage of risk management?

No information.

8. When risks and benefits are balanced is it ensured that no benefits may outweigh serious environmental damage/significant environmental pollution?

This depends on the wording and conditions in the legal text in question. There are no general environmental limits of this kind, but some new legislation has included similar criteria, which limit the possibility, or include special conditions, for certain permits. Then it of course has to be ensured that the conditions are met.

9. Who bears the burden of proving socio-economic benefits, the operator, the competent administrative body or third parties, if the benefit of the project is difficult to assess?

In principle, the operator has the burden of proving socio-economic benefits. The relevant authority can always require the necessary information from the operator until it is satisfied. It can refuse a permit if it is not satisfied with the information given.

10. Do opponents have standing in administrative proceedings and before administrative courts to argue that the non-environmental criteria were not properly applied (e.g. because the benefits of projects were overestimated)?

Clearly, the answer is yes. However, we don't have actio popularis in Norway. The general criterion in the Public Administration Act (section 28) is (sufficient) "legal interest". So, there is a certain threshold, but it is interpreted fairly widely. Relevant local interests groups and NGOs usually are seen as having legal interest. More or less the same criterion applies with regard to access to courts (we don't have administrative courts in Norway).

II. Alternatives

In practice, most of the relevant plans and projects will be covered by the EIA/SEA regulation.[2] The answers to these questions are found in this regulation. The regulation is meant to implement the EC directives.

The issue of assessment of alternatives has been controversial in Norway, and an issue of discussion between state authorities. The general rule is laid down in the regulation: "*Relevant and realistic alternatives* shall be described. The assessment program for each case must define how this is to be applied". The fact of the matter is that *assessment of alternative(s) is not common* in Norway, but rather the exception. This is at least the case with assessments of normal industrial or urban development project with private economic interests.

One important exception is the *road and highway planning* in Norway. The main rule is that several alternative lines for new roads are assessed and presented by the road authorities. The legal framework is the general land use planning system in the Planning and Building Act, and the EIA/SEA is included in the planning process. There is a well

[2] Regulation of 26 June 2009 no 855 pursuant to the Planning and Building Act of 26 June 2008 no. 71.

developed system for assessing various social costs and benefits of the different alternatives, which are presented to the political decision-making authority.

Another interesting sector in this regard is *hydro-power development*. Here we have a method for both assessing and balancing various interests, and for *comparing and weighing alternatives against each other*. Norway has innumerable rivers and waterfalls with hydro power potential. For many years rivers were developed on the basis of rather haphazard circumstances – waterfalls were identified and found suitable and profitable for development by the individual developer (the power company). The result was that many rivers were developed and destroyed which should rather have been protected.

Since the 1970s a major work has been carried out to avoid this, with two main elements: The first is what is called *"Comprehensive watercourse management plan"* ("Samlet plan for vassdrag"). Here all the most relevant rivers in Norway have been assessed with regard to on the one hand hydropower potential, including economic factors, and on the other hand environmental values and other important public interests. The objective is to develop first rivers with a maximum of hydropower potential and a minimum of environmental effects. On this basis, the rivers have been graded, and – implicitly – prioritized. This has been done by "river by river" decisions by the Parliament, based on proposals from the government. The second element of this exercise is *a national plan for watercourse protection* ("Verneplan for vassdrag"). A number of rivers have been selected for permanent protection from hydropower development and given status as "protected watercourse" in the Watercourse Act.

There is only *one court case* on this issue – unfortunately with a rather depressing outcome: the 2009 Supreme Court Case *United States Embassy*.[3] The municipality of Oslo approved a plan to build a new office complex for the US embassy in a residential area in Oslo on a site designated as a recreational park. This required an EIA, but no EIA whatsoever was carried out. Therefore, there was no formal assessment of alternatives either. There were massive protests from the residents in the area and several NGOs.

The question before the Supreme Court was whether the decision was legal and valid without an EIA. The Court found that the EIA should have been carried out, but – surprisingly – that this omission could not make the decision invalid. The US embassy and the Oslo Municipality had, informally, worked together over several years to find a suitable site, and a number of alternative sites had been considered in this process. The one that was finally chosen was "the only realistic possibility". Therefore an EIA of alternatives would not have given a different result. Consequently, according to Norwegian administrative law, the decision was valid. This may appear as a serious blow to the principle of alternative EIAs in Norwegian law, but the case is – hopefully - quite unique. (The decision has been severely criticized by my colleague Inge Lorange Backer and myself.[4])

a) What is the scope of alternatives that must be tested?
Only those the operator would legally be able to perform? Only those which it would be practicable to ask the operator to perform? Or even those other persons including the state would be more suited to perform?

The basic criterion is whether an alternative is "relevant and realistic".

[3] Norsk retstidene 2009 p. 661
[4] See Inge Lorange Backer and Hans Chr. Bugge: Forsømt konsekvensutredning av altenativer, in Lov ogrett, vol. 49,3, 2010 p. 115-127.

The “responsible authority” has a fairly wide discretion with regard to what is seen as “relevant and realistic”. The operator may definitely be required to assess alternatives which he is not interested in or motivated for, and even when others are better suited to carry out the work and the practical assessment has to be carried out by others.

b) Only those voluntarily considered by the operator, or those required by objective criteria?
Also other alternatives than those considered by the operator may be required, but there are no “objective criteria” for when and how this should be required and carried out – except “relevant and realistic”.

c) Is there a difference made between alternatives within a project (e.g. different routes for a planned road) and alternative projects (e.g. high speed train vs. regional airport)? If so, how is “project” defined?
So far, this type of alternative projects in the meaning alternative solutions to a problem have apparently not been required in practice. It would, however, be possible if such alternatives are regarded as “relevant and realistic”. – (A problem in this connection, however, is that the system is based on sector responsibility. The authority responsible for air transport and airports are not necessarily interested in assessing whether a high speed train might be a better solution to the transport needs.)

Otherwise, there is one rule of a certain interest here. If a regional or municipal master plan has properly assessed and decided on the *placement* of a project - *where* to develop it - for example an infrastructure project (typically a road), it is not necessary to carry out assessments of *alternative placements* in the further process (regulation art. 9 (6)).

d) Are projects defined as those meeting the operator’s narrow objective, or also those which would serve a broader goal?
It could also be alternative projects serving a broader goal than the operator’s narrow objective.

e) Only those which are not more costly than the project proposed by the operator?
There is no limitation in this sense.

f) Must the zero alternative be considered?
The regulation requires that the operator must explain the purpose and reason for the project and in this connection also describe the consequences if it is not carried out. This may be seen as a ‘soft’ EIA of the zero alternative. However, the application of this rule seems to be quite flexible in practice.

2. Must the environmental effects of the alternatives proposed be as thoroughly checked as that of the proposed project?
Apparently, the operator is usually *not* required to carry out an equally thorough EIA of alternatives as of the operator’s own project (if required at all) – at least not in a first stage. If one or two of the alternatives seem to be favourable and *real* alternatives, a full EIA will be required at that stage.

Here again, *the road sector* is special. In general, the road authorities carry out *equally thorough* EIAs for the various alternatives they assess when a new road is to be built.

3. Do opponents have standing in administrative proceedings and before administrative courts to argue that certain alternatives were not (adequately) considered?
Yes, see the Supreme Court case *United States Embassy* above.

4. What reasons have been raised to challenge the fair balancing of alternatives?
No known example of this.

III General questions

What is your overall assessment of experiences with balancing environmental risks with socio-economic benefits in relation to alternatives?
In Norway, the system in the *hydro power sector* is quite interesting. Also, *the road sector* does a serious effort and generally a good job in assessing and presenting environmental problems and various socio-economic costs and benefits in the planning of major new roads. The political decision-making body gets a fair and balanced picture of costs and benefits, and the final decision is based on a political balancing of different objectives. Typically, for example, local interests and authorities prefer alternatives with long tunnels to avoid nuisance in residential areas and protect natural values. This is weighed against increased costs and safety considerations.

Outside the road sector the picture is quite mixed in Norway, and experience limited since alternative assessments are not often carried out. Bluntly speaking, some sector authorities tend to give priority to their own sector objectives more or less regardless of negative effects on other values and interests. The relevant act provides them with the necessary discretionary power. One case in point may be wind power development. Nevertheless, local protests and very serious effects on landscape and nature have been decisive factors when some wind mill projects have been turned down by the political decision making authority.

2. Would you suggest another way of how to structure the risk-benefit calculus?
The cases of hydro power and road planning in Norway represent methods of assessing, presenting and balancing risks and benefits in connection with alternatives which seem to be quite serious and advanced.

Of course, the fundamental problem of putting a price on environmental values remains and is difficult to solve. The bottom line is that “money talks” and so do political priorities.
