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PERSPECTIVE

Not all conservation "policy" is created equally: When does a policy give rise to legally binding obligations?

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Abstract

In many countries, complex environmental problems such as biodiversity decline are regulated at the national level by a disparate range of laws and non-statutory policy instruments variously described by terms including plans, strategies, guidelines, statements of intent, and/or incentives. Such instruments are often grouped together by conservation policymakers and scientists under the umbrella term "policy." However, from a legal perspective, there are critical differences between these so-called policy instruments. In this paper, we focus on what we consider to be the critical difference: whether a policy instrument is binding, and therefore whether an administrative decision (e.g., about a development proposal) can be legally challenged due to noncompliance with that policy instrument. Drawing from international examples, the aim of this paper is to give conservation policymakers and scientists the guidance needed to critically differentiate between laws and nonstatutory policy, assess current or proposed policies, and determine whether a nonstatutory instrument gives rise to binding obligations, thus allowing for decisions to be challenged before a court. In doing so, we encourage conservation scientists, policymakers, activists, and practitioners to reflect critically on what is possible and not possible when nonstatutory "policy" instruments are designed and implemented.

KEYWORDS

conservation action, conservation planning, environmental law, environmental legislation, environmental planning, environmental policy, environmental regulation, EPBC, offsets, policy instrument

1 | THE MANY MEANINGS OF "POLICY" IN CONSERVATION

In 2012, the Australian Government released an Environmental Offsets Policy (Australian Government Department of Sustainability, 2012) for environmental impact assessments conducted under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act). The Offsets Policy drew on scientific best practice (Miller et al., 2015) with offsets to only be applied to compensate for biodiversity losses after avoidance and mitigation measures have been explored (known as "the mitigation hierarchy"). However, the Offsets Policy is widely regarded to have failed to deliver its intended outcomes for biodiversity (Australian National Audit Office, 2020; Evans, 2023). As noted in the decennial independent review of the EPBC Act conducted by Professor Graeme Samuel AC, "the decision-making hierarchy of 'avoid, minimize, and only then offset' is not being applied—offsets are too often used as a default measure not as a last resort" (Samuel, 2020). Samuel's suggested solution was simple: to enshrine offsets in law.

Nonadherence to the Offsets Policy is no doubt a source of frustration to those working in conservation, but the solution offered by Professor Samuel illuminates a key problem with the Offsets Policy—it is not law, it is "non-statutory," and it is intended to guide decision-making on individual development proposals rather than dictate outcomes. If the Offsets Policy had been enshrined in law, this may give rise to a binding obligation to apply the hierarchy (depending on how the obligation is phrased) and a basis on which interested parties—such as conservation scientists or groups—could challenge these decisions before a court when the law was not followed.

This example illustrates the importance in conservation of thinking about the different legal authority of the variety of regulatory tools used by governments. The language of these regulatory tools varies considerably across the globe. In common law countries including Australia, the United States, the United Kingdom, Canada, and India, binding statutory tools may take the form of Acts (primary law) passed by a Parliament or a legislature, or instruments (delegated laws) made by a government department or Ministry under the authority of a primary law. These instruments can be described in different ways, such as regulations, rules, orders, schemes, and management plans. In the European Union, binding instruments include primary law, such as the treaties, their annexes and protocols, and the EU Charter of Fundamental rights; secondary law, such as regulations, directives, and decisions passed by the European Parliament and the Council; and tertiary law, meaning delegated and implementing acts by the European Commission (European Union, 2024). Importantly, there is often a right to challenge administrative decisions made by a government entity about a development proposal where that decision was made under law or legislative instruments. For example, the *EU Habitats Directive* (92/43/EEC) has legal status and is binding on decision-makers. In a prominent early 2000s case, construction permits for a new business center near the Netherlands/Germany border were overturned by the highest Dutch administrative court as the decision did not take into account impacts on a rare wild hamster, a species protected under the Habitats Directive (Hajer, 2003).

Binding laws and legislative instruments are also supplemented by other documents that are often referred to as "policy" in some jurisdictions: for example, the Australian offsets policy mentioned above. These will be referred to here as "nonstatutory policy" as they are not made through official legislative or Parliamentary processes. Nonstatutory policy is frequently used in conservation as a relatively nimble and flexible tool that can operate separately to or in conjunction with statutory instruments and may be preferred over lengthier legislative processes (Mamouney, 2014). However, not all nonstatutory policies are created equally: a decision that does not adequately consider policy may only be challenged in court if the policy is legally binding. Some policy instruments merely provide guidance for official decision-makers, whereas others seek to place binding legal obligations upon them. For example, recovery plans in the United States have continually been found by courts to be nonbinding guidance documents, with environmental groups failing in their efforts to have decisions set aside on the basis of violation of a recovery plan (Zellmer et al., 2020). This goes to the heart of whether a "policy" instrument can in fact achieve substantive outcomes for conservation.

Despite this critical legal nuance, the term "policy" is (somewhat confusingly) used by conservation policymakers and in the conservation literature as an umbrella term, which may variously encompass different regulatory devices such as plans, strategies, guidelines, public campaigns, fiscal incentives, statements of intent, and regulations (Brodie et al., 2016; Cook & Sgrò, 2017; Rose et al., 2018; Samuel et al., 2023). Legislation is also sometimes grouped under the same umbrella as nonstatutory policy (Aggestam, 2015), although the EPBC Act Offsets Policy and the US Recovery Plan examples show us that the legal effects may be quite different. To add to the confusion, "policy" is often a term used to refer to broader governmental strategies and aspirations, such as conservation "policy issues" (e.g., see Pullin et al., 2009) and making science "policy relevant" (e.g., Rose, 2015). The lack of precision in the way we talk about "policy" in conservation—and especially when comparing legislation and other types of policy instruments—means that we are comparing apples

FIGURE 1 Four prerequisites to being able to challenge a decision made under nonstatutory policy before a court.

and oranges, without necessarily appreciating the critical differences between them.

In this paper, we focus on one critical reason why it is important to distinguish between different types of legal instruments and nonstatutory policy: because decisions made by a government agency may only be legally reviewable before a court if they have been made under a legally binding instrument. We outline the key features of legal instruments and nonstatutory policies that will determine whether a legal challenge is available. The objective of this is to encourage conservation practitioners to look critically at instruments—or proposed new instruments—to determine their legal effect and whether they will bind decision-makers.

While we have attempted to distil general principles, the specific rules underpinning rights of legal challenge vary from country to country. Further, we do not intend to present a comprehensive and technical analysis of legal rules, but rather we illustrate our perspective with examples from across the world that, when contextualized and interpreted according to a specific legal system, can be useful and insightful for conservation practitioners globally.

2 | WHEN CAN A DECISION MADE UNDER "POLICY" BE CHALLENGED UNDER LAW?

When assessing whether a failure to consider a nonstatutory policy in making a decision about a project can be challenged before a court (or another adjudicative body such as a tribunal), there are four questions to consider, as illustrated in Figure 1. Here we focus on a particular type of legal challenge called "judicial review."

Judicial review is a narrow type of review whereby a court considers whether there was an error in the decision-making process. That is, a court cannot decide whether it was a "good" decision but can only consider whether correct legal processes were followed, and a decision-maker acted within the limits of their power (Aronson et al., 2022). Judicial review of whether a government decision was made in accordance with law is available in a number of jurisdictions, including the United Kingdom, the United States, and countries in Asia, Africa, and South America (Jhaveri & Ramsden, 2021), each having its own unique set of rules articulating when judicial review is available.

For example, in Australia, judicial review is generally available where a decision is of an "administrative character" and made under an enactment, including legislation and delegated instruments that are made under the authority of primary legislation (e.g., see *Griffith University v Tang (2005) 221* CLR 99). If a court decides that legal processes were not followed, it can order that a decision be "quashed" and set aside. The decision-maker must then re-make their decision, following due legal processes. Note that there is nothing stopping the decision-maker from making substantially the same decision. For example, in *Tarkine National Coalition Incorporated v Minister for Sustainability, Environment, Water, Population and Communities* [2013] FCA 694, the Minister's decision to approve a mine was set aside as the Minister had failed to consider a mandatory conservation document. Following the judgment, the Minister re-made the decision and gave due regard to the mandatory conservation document, but once again approved the mine.

Some laws may alternatively grant a right to a broader form of review whereby a court or tribunal considers the evidence and makes the decision it considers to be substantively the best outcome with reference to relevant law, policy, and all the facts and circumstances. For example, Ontario's *Environmental Protection Act 1990* vests the Environmental Review Tribunal with the power to hear appeals about renewable energy projects (s. 142). In such an appeal, the Tribunal must consider whether the project will cause serious harm to human health, or serious and irreversible harm to plant life, animal life, or the natural environment (s. 142(2)). That is, the Tribunal considers the evidence afresh and is not simply limited to considering whether the original decision-maker followed procedure. In *Alliance to Protect Prince Edward County v. Director, Ministry of the Environment* (2013) 13-002/13-003, the Tribunal considered scientific evidence and revoked the decision of the relevant Ministry to issue a permit for a wind farm due to the potential for serious harm to the Blanding's turtle. In this broader form of review, the status of a nonstatutory policy instrument remains relevant, as the court will be bound to follow the same statutory or policy directives that the original decision-maker was bound by. In the Ontario case, the Tribunal's decision must be consistent with any policies made under the relevant legislation (s. 145.2.2). The legislation empowers the Ministry to make policies and states that any decisions made shall be consistent with these policies (s. 47.7(3)). Therefore, these policies bind both the Ministry and the Tribunal on appeal.

2.1 | Is the instrument made pursuant to legislation?

It is common for legislation to outline a framework for decision-making, which is then supplemented by a power for the relevant government agency to create various other binding instruments enshrining more specific legal commands and/or guidance. These might be called regulations, rules, plans, manuals, or delegated laws depending on the jurisdiction. Legislation may also require decision-makers to consider aspects of these instruments in making prescribed decisions.

Land-use planning commonly uses this model, including in the United States, New Zealand, and the Netherlands (Berke & Godschalk, 2009). For example, in the United Kingdom, legislations including the *Town and Country Planning Act 1990* (UK) and associated regulations articulate a broad legislative framework for planning and then provide for the creation of local plans that set out more detail regarding where development can occur. The Ontario legislation discussed above is another example of this model, with the *Environmental Protection Act 1990* vesting the relevant Ministry with power to make policies, which are binding on decision-makers (s. 47.7(3)).

In contrast, some types of government policy lack a direct link to legislation, and it may not be clear whether a decision-maker is bound to follow it. Sharpe (2017) suggests that in these instances, "the question of whether relevant policy is a mandatory relevant consideration [for official decision-makers]…need be determined on a statute-by-statute basis by reference to the subject-matter, scope and purpose of the statute" (p. 110).

A useful example is the Australian case of *Jacob v Save Beeliar Wetlands (Inc)* [2015] WASC 482; (2016) 50 WAR 313. The Western Australia Environmental Protection Authority (EPA) recommended approval of a highway extension despite significant potential impacts on the Beeliar Wetlands, which were proposed to be addressed through offsets. The Save Beeliar Wetlands group challenged the approval decision, pointing to several EPA policies (a position statement, a guidance statement, and a bulletin) that expressed a view that offsets should not be used where impacts are significant. At first instance, the Supreme Court declared the decision was invalid as it had been made without due consideration of these policies. However, the Court of Appeal overturned this decision, finding that these policy documents were not a mandatory relevant consideration, as they were not made through processes provided for by legislation. Consequently, the EPA was not bound to follow the policy and could (lawfully) approve the extension of the highway (see discussion in Sharpe [2017]).

This illustrates that, while a policy document might purport to deliver good conservation outcomes, its utility may be severely compromised where there is no right to legally challenge decisions based upon a failure to properly consider the policy.

2.2 | If so—Does the instrument intend to place obligations on decision-makers?

Even where a "policy" instrument is made under legislation, not all instruments place binding obligations on decision-makers, and some instruments merely provide guidance to frame and inform administrative decision-making. Where a policy has been developed under the authority of legislation, it will still be necessary to examine the legislative context to determine whether the policy is intended to be binding (Sharp, 2017).

A useful example of an instrument that is intended to merely guide decision-makers is recovery plans made under the United States' *Endangered Species Act 1973*. Under this Act, the Secretary "shall develop and implement [recovery plans] for the conservation and survival of endangered species" (16 USC § 1533(f)). In the case

of *Fund for Animals v Rice*, 85 F.3d 535 (11th Cir. 1996), an environmental group challenged the construction of a landfill in an area that had been deemed critical habitat for the endangered Florida panther and was therefore argued to be inconsistent with its recovery plan. However, the group was unsuccessful as the Court observed that the plan was for guidance purposes only. Despite having its foundations in legislation, recovery plans allow the relevant government agency to exercise discretion.

Furthermore, while some "policy" instruments stipulate legal processes to be followed, or considerations to be applied, when assessing specific projects, others provide strategic guidance to governments. For example, in Fiji, the *Environmental Management Act 2005* requires the National Environmental Council to formulate a National Environment Strategy (cl 24). The current strategy is the *National Biodiversity Strategy and Action Plan for Fiji 2020–2025*, which sets out strategic actions for the national government to take to protect biodiversity: for example, conducting a gap analysis as to where additional protected areas are needed (Department of Environment, Government of Fiji, 2020).

High-level strategic guidance can help with setting a clear vision for conservation planning and is therefore not without utility—for example, there have been calls for the United States to adopt a national biodiversity strategy to promote consistency in law and policy-making (Gerber et al., 2023). However, this type of high-level guidance document may not give rise to legally binding obligations.

2.3 | Does a nonstatutory policy mandate or encourage outcomes?

Instruments involving decisions made at the individual project level may also have different legal effects. Some policy instruments may impose legally enforceable obligations on decision-makers and project proponents, while others might simply direct and steer them (by providing nonlegally binding recommendations or incentives). For example, in Queensland, Australia, State Code 11 requires that development must avoid marine plant flowering, fish spawning, and fish migration periods (PO6) (Queensland Government, 2022. This makes it clear to potential proponents that a particular type of activity is considered unacceptable and, therefore, forces them to consider alternatives in order to obtain development consent. It also provides a clear direction for decision-makers.

Alternatively, an instrument may simply encourage a party to do something that furthers a government's overarching agenda. For example, private protected areas have emerged globally as an important biodiversity conservation tool (Ivanova & Cook, 2020), but the uptake of these measures on private land is difficult to mandate and instead may be encouraged through various financial incentives (Retief et al., 2022).

2.4 | Is a policy instrument current?

Finally, even if a nonstatutory policy instrument appears to be binding, it must be ascertained whether a policy is current. It can be easy to assess the currency of legislation, as it is often compiled in central databases where amendments are documented and traceable. In contrast, policy documents may be posted on government websites, and outdated policy documents may not be removed. It has been noted that it can be difficult to "discover what [policies have] been made under a particular power; and once found it is difficult or impossible to verify whether one has found the latest text of a particular document" (Greenberg, 2015).

Some instruments may be subject to review requirements at specified intervals, either imposed by legislation or outlined in the instrument itself. For example, in the United States, s. 4(c) of the *Endangered Species Act* requires that recovery plans for listed threatened species are reviewed every 5 years. However, a review found that nearly 25% of species lack final recovery plans and over half of plans are more than 20 years old (Malcom & Li, 2018) with many federal courts unwilling to force preparation or updating of such plans (Cheever, 2001). Therefore, even if these recovery plans were to impose binding obligations, it may be difficult to determine whether one does in fact apply to a decision.

3 | NOT ALL "POLICY" IS CREATED EQUALLY: THE LEGAL AUTHORITY OF A NONSTATUTORY POLICY IMPACTS ON WHETHER IT CAN ACHIEVE CONSERVATION OUTCOMES

The objective of this paper is to give conservation practitioners the guidance necessary to look critically at a "policy" instrument and understand its legal meaning and effects, as well as its ability to translate into outcomes for conservation in practice in one key respect—that is, whether it is legally binding, and whether conservation decisions can therefore be challenged before a court. From a legal perspective, instruments enshrining "policy" are not created equally, and we have analyzed a sample set of instruments that may be referred to under the broad umbrella of "policy" to identify the different features that distinguish these instruments (and their contents) in legal consequence and effect. Once these features are

familiar to someone working in conservation, they can be used to identify the legal characteristics of policy instruments. This, in turn, is a necessary precursor to evaluating whether a particular policy instrument (or set of policy instruments), either proposed or current, might be desirable or undesirable according to a set of more normative evaluation criteria.

In identifying these features of legal and nonstatutory policy instruments, we are not asserting that one type of instrument is inherently superior to the other. Indeed, there are sound reasons to include nonstatutory policy into the regulatory mix for addressing conservation issues: legislation may need to pass through a lengthy Parliamentary process and receive majority support before it comes into effect, whereas nonstatutory policy can often be made and amended quickly and administratively by a government agency (Gunningham et al., 1998; Weeks & Pearson, 2018). When a regulator chooses between legislative and nonstatutory options, they must, among other considerations, consider the pros and cons of providing greater legal flexibility (nonstatutory policy) or greater legal certainty (legislation) to the issue being regulated (Frohlich et al., 2022).

Nor are we asserting that the legally binding nature of a law or nonstatutory policy is the only important factor to consider when assessing the normative value of conservation laws and nonstatutory policies. Other features such as the robustness of the science underpinning the law or policy, the presence of effective monitoring and evaluation regimes, and the availability of legal sanctions for noncompliance are also critical to achieving outcomes for biodiversity.

Instead, we have sought to ensure that anyone dealing with these nonstatutory policies—whether governments, decision-makers, proponents, activists, or other interested parties—is equipped to consider the legal meaning and effect of a current or proposed policy instrument and to assess whether a decision made by a government agency can be challenged before a court. However, we acknowledge that this paper has only been able to provide a brief overview of key legal principles and examples, and analysis of the legal effect of individual policy instruments should be carefully done on a case-by-case basis.

To return to the example we started with: the current Australian EPBC Act Offsets Policy contains no legal obligation for decision-makers to follow it and apply the mitigation hierarchy. Critically, as of mid-2024, the Federal government is in the midst of a reform process. This process has included a proposal to enshrine the mitigation hierarchy as a mandatory consideration in development decision-making (Australian Government Department of Climate Change, Energy, the Environment and Water, 2023). If this proposed reform were to become law, it would mean that decisions can be challenged before a court if the mitigation hierarchy is not followed—a potentially very useful tool to fight biodiversity decline. As the law reform process continues to unfold, it is likely there will be opportunities for members of the public, including the conservation community, to make submissions on the proposal. With a better understanding of the significance of this proposed change from a legal perspective, the conservation community can make better informed submissions and ideally influence the trajectory of future biodiversity decline.

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