

**The opinion of the Republic of Armenia on report directed to the
Compliance Committee to the Convention on Access to Information, Public Participation in
Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) by
'Ecological right' non-governmental organization (NGO)**

The applicant has disputed the protocols of the Sevan Lake Protection Expertise Commission and Environmental Impact Expertise Center in the Administrative Court and later in the other courts of the Republic of Armenia, demanding to illegitimate the positive conclusion of the Sevan Lake Protection Expertise Commission of National Science Academy of RA, submitted in session, which took place on 24.09.2014, and to invalidate number BF-76 environmental impact assessment expertise conclusion, given on 17.10.2014 by the Ministry of Nature Protection of RA.

Both the Administrative Court of the RA and the Courts of Appeal and Cassation of RA noted that the expertise conclusion is not an administrative act, therefore, it can't become a matter of dispute. Particularly, the Administrative Court of RA states that "Not all the results of the administrative bodies' activities are the administrating results (administrative acts or the actual act) and, therefore, not all of them generate legal consequences for entities. Administrative bodies during their activities can create a variety of documents or carry out physical activities, which are, however, not a result of administrative activities and do not interfere with individual's rights and freedoms. Later that actions can cause legal consequences for the person, but until they are not included in the base of administrative or any real act, can't generate legal consequences. So, such documents or activities are not subject of the independent dispute. Their legality may be subject to administrative judicial control, only in the scope of verification of legality of the final administrative act". A similar legal position was announced by the Administrative Court of Appeal of the RA.

The applicant considers such an approach is inconsistent with the requirements of the article 9 of the Aarhus convention.

The opinion of the Republic of Armenia concerning compliance of the Armenian Legislation to the Aarhus convention is following:

In pursuance of Armenia's international obligations taken under Aarhus Convention a new law on "Environment impact assessment and expertise" has been accepted on 21st of June of 2014. The Law, according to article 6 of the Aarhus convention, the public participation in the concrete types of decision-making process is carried out by means of public hearings. Moreover, the law requires from the initiator and the authorized body to take into consideration public's reasonable comments and suggestions otherwise they should provide substantial reasons.

The issues related to the implementation of the public notification and discussions are regulated under the RA government decision N 1325-N, November 19, 2014 "Defining the procedure for public notification and discussion". Public discussion and notification are carried not only within environmental impact preliminary and main assessment but also during the preliminary and main stages of the expertise. According to the article 26 of EIA Law "To ensure public awareness and participation, assessment and expertise processes should be notified and discussed". In the 48 point of the N 1325-N decision is defined that "coordinator of discussions, expertise center accept written comments and suggestions from the public according to the timeframe of this form. Coordinator of discussions with the protocol and recording provides opinions and conclusions to the expertise center within three working days".

As you know, the Environmental Impact Assessment system is used in RA. According to the legislation of RA the expertise of the environmental impact assessment is organized by the state authority. The issues concerning implementation of expertise are regulated by government decision of RA N 399-N, April 9, 2015 "Laying down the order of environmental impact assessment expertise of fundamental documents and intended activities".

The Aarhus convention does not require to carry out expertise; the main goal of the convention is to ensure public participation in the environmental decision-making processes.

The implementation of the methods is determined by the state. According to the legislation of RA, public discussions considered as an inseparable part of the process of expertise and are reflected in the conclusion of expertise. Therefore legitimacy of the conclusion of expertise, as a document which reflects the results of public participation, is important in the context of compliance with the provisions of the Aarhus convention.

According to the 2 point of the 9th article of Aarhus convention, "Each Party shall, within the framework of its national legislation, ensure that members of the public concerned (a) having a sufficient interest or, alternatively, (b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition, have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention. What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organization meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above. And the 2 point of the article 6 of Aarhus convention is defined: The public concerned shall be informed, either by public notice or individually as appropriate, early in an environmental decision-making procedure, and in an adequate, timely and effective manner, inter alia, of the proposed activity and the application on which a decision will be taken; the nature of possible decisions or the draft decision; the public authority responsible for making the decision; the envisaged procedure, including, as and when this information can be provided: the commencement of the procedure; the opportunities for the public to participate; the time and venue of any envisaged public hearing; an indication of the public authority from which relevant

information can be obtained and where the relevant information has been deposited for examination by the public; an indication of the relevant public authority or any other official body to which comments or questions can be submitted and of the time schedule for transmittal of comments or questions; and an indication of what environmental information relevant to the proposed activity is available; and the fact that the activity is subject to a national or transboundary environmental impact assessment procedure. Each Party shall ensure a proper reflection of the public participation results.

Expertise procedure is implemented by the specially created state body and for the decisions made by that body is responsible the authorized state officials. In practical the latter's decision can have foreclosing meaning for final decision made by the state body.

In particular, the expertise is implemented by EIA centre (state non-commercial organisation) created by the Government of RA. This centre gives conclusion on permissibility of intended activities or fundamental documents. In the main stage of the expertise taking into account other aspects the expertise center appreciates the productivity of participant's notification and the consideration of the opinions and discussions as well as the thoroughness of those aspects.

The positive expertise conclusions can include obligatory conditions or requirements to be implemented and for the implementations the deadlines are indicated. If the conditions and requirements are not implemented in a fixed period of time the conclusion loses its force. During the formulation of the expertise conclusions the presented ideas and conclusions of the participants' are taken into account. In case the action involved participants' ideas are not accepted the authorized body provides reasonable justifications. Expertise conclusion confirms the authorized body (Ministry of Nature Protection of RA). Without expertise positive conclusion the main document's acceptance and the implementation of the intended activity is forbidden.

In 2014 Aarhus convention comments guidebook it is mentioned, that , the second point of article 9 of Aarhus convention requires access to review of decisions, actions or inactions defined in Article 6 or in other provisions of Aarhus Convention. This entails that the court or other independent body should have the opportunity to verify the pinpointed procedures' legality

from substantive and procedural point of view. Procedural legal personality should be regulated by internal legislation taking into consideration wide access to justice issue. Litigation requirement includes any adopted decision, action or inaction in the framework of process.

Interested community can argue decisions, actions or inactivity which are in breach with substantive legislation or which break procedures laid down by Law. This provision includes variety of questions such as the case of not considering the presented suggestions in a reasonable way. For example, the subject of argument can be state body's action and inactivity which limits the public participation in hearings or essential delay of public hearings during decision making process. Argumentative procedure can also be required in case when the staff does not take necessary measures to implement the Convention, for example, does not arrange the notification of public or does not take into consideration public participation results. Subject of argument could also be the conditions of preliminary assessment decision in the framework of EIA, grant of permits, which do not correspond to technical standards, environmental requirements or environmental quality standards.

The study of Aarhus Convention and UNECE guidelines elaborated in the framework of Aarhus Convention indicates, that notwithstanding the status of expertise conclusions (whether they are administrative acts or have other legal status), they, as a document which reflects public participation results and which is fully included in the framework of Article 6 of Aarhus Convention, should be subject to review by Court or other independent and impartial body in the framework of access to justice, which is in compliance with Convention.

As for contentious issue, the Legislation of the Republic of Armenia does not define bans for judicial supervision of expertise conclusions, other matter, that the litigation process of expertise conclusion is connected with specialties of administrative legislation. In this context, it should be noted that the Aarhus Convention defines that each Party has certain degree of flexibility as to how to exercise obligations under Convention in internal legal and institutional system.

In particular, according to article 3 part 1, point 2 of the RA law on "Principles of Administration and Administrative Proceedings", the administration is defined as "an activity of state bodies, which have external impact and which is concluded (finalized) by adoption of an administrative act or normative act, also actions or inactions, which causes factual consequences for persons". In this case the expertise conclusion as a result of administrative activity (administration), is not considered as an administrative or normative act. According to the part 1 of article 59 RA law on "Administration Principles and Administrative Proceedings", the

administrative act is defined as “a decision, order, injunction or other personal legal act, which has external impact, which administrative body has adopted in the sphere of public law aimed to the regulation of concrete issue and which is directed to the definition, change, elimination or recognition of rights and obligations for persons”. This means that RA legislation considers administrative act only the individual legal acts which are addressed to an individual person or persons and which are directed to the definition, change, elimination or recognition of rights and obligations. What about the factual consequences deriving from the administration, the expertise conclusion does not cause direct factual consequences for individuals. Factual consequences are derived from the decisions of state bodies by which permits or licenses are granted on the basis of expertise conclusion. Even the fact, that expertise conclusion is approved by state body, does not change its legal status (for example, in this case the mining permit is granted by the Ministry of Energy and Natural Resources, though the expertise conclusion is approved by the Minister of Nature Protection).

RA legislation ensures the judicial review of expertise conclusion in the framework of judicial review of granted permit. Assessment of expertise conclusion as a proof in court, is the mechanism through which the state ensures the review of its lawfulness. The Court, assessing the permissibility of the expertise conclusion, inspects its correspondence to the legislation both from substantive and procedural point of view.

Taking into consideration that expertise conclusion is connected with the permit (license), the litigation of expertise conclusion with final decision will be more effective.

From this point of view it is worth mentioning the ACCC / C / 2011/58 (Bulgaria) case, in which the Aarhus Convention Compliance Committee has concluded, that the fact that expertise conclusion is not subject to independent review, is not considered as a violation of paragraphs 2 and 3 of Article 9 of Aarhus Convention, and the public can make the expertise conclusion subject to assessment by means of litigation of decision adopted after project.

We would also like to address the legal status of the Sevan Lake Protection Expertise Commission (hereinafter defined as Commission) and its expertise conclusion. In fact, its legal status is significantly different from legal status of EIA expertise centre and expert conclusion defined by RA Law on EIA.

The legal status of Commission is defined by the law on “Sevan Lake”. According to article 9, the Commission is a unit acting in the structure of National Academy of Sciences of the Republic of Armenia. The mission of the unit is the independent and professional expertise of

complex and annual programs (reports), as well as the documents elaborated by state authorized bodies responsible for implementing programs or reports. The Commission consists of 9 members, who are appointed by the President of National Academy of Sciences of the Republic of Armenia. It is actually a separate unit of state body and does not hold individual responsibility.

According to article 20 of the RA Law on “Sevan Lake” "The Commission carries out preliminary and summarizing expertise and gives conclusions to complex and annual programs (reports) as well as documents elaborated by state bodies which implement programs or reports". Commission's conclusions and protocols are being sent to the President of the Republic of Armenia, National Assembly and the Government within three days. The National Assembly discusses complex and annual programs (reports) in case of presence of Commission's conclusions.

According to point 7 (“Monitoring and control of Program” chapter) of the RA law on "Approving the annual and complex programs on protection, reproduction, restoration and use of ecosystem of Sevan Lake the responsible body for the project implementation is the RA ministry of Nature Protection. The monitoring of the Program also carries out the Ministry of Nature Protection of RA. The control of annual and complex programs carries out the National Assembly of Ra. The independent and professional expertise of programs carries out the Commission, which includes representatives from interested state bodies and organizations. .

This means, that the Commission carries out independent professional study and gives its conclusion, which is not obligatory for decision-makers, and does not have foreclosing meaning and is an advisory document. Moreover, the document does not include public participation results. It is worth mentioning, that the commission gives conclusion not on permissibility of an activity, but on whether the Program is well grounded or not. The decision on permissibility adopts the responsible body (in this case the Ministry of Energy and Natural Resources) taking into account, among others, the results of the conclusion.

Nevertheless, the conclusion of the Commission can also be subject to judiciary review in the framework of litigation of the final decision of state body.

Thereby, taking into account abovementioned, we believe that RA Legislation is in compliance with Aarhus Convention requirements and obligations taken under the Convention.