

Answers to questions from the Chair and the Vice Chairs.

QUESTION 1. What is the precise legal effect of the document entitled “Materials for an inventory of the area’s vegetation and a survey of the forest pathology” (the Materials document) referred to at pages 2-3 of your communication? Does the Materials document serve as the permit that permits the destruction and/or sanitary felling of the wild apricot and apple trees? If the Materials document is not a permit, what is its legal effect, if any?

ANSWER: The legislation of the Republic of Kazakhstan prohibits destruction and/or sanitary felling of red list plants, which include wild apricot (*Armeniaca vulgaris*) and Sievers apple trees (*Malus sieversii*). Therefore, no document can be considered as a permit for the destruction and/or sanitary felling of wild apricot and apple, including the “Materials for an inventory of the area’s vegetation and a survey of the forest pathology”. The Materials document was prepared with severe violations of Article 8 of the Convention on Biological Diversity and the norms of Article 12 of the Forestry Code, paragraph 5 of Article 32-1 of the Law “On Specially Protected Natural Territories”, Article 339 of the Criminal Code, and “Sanitary Regulations in Forests”.

Purpose of a forest pathology survey is defined by the “Sanitary Regulations in Forests”, approved by the order of the Minister of Agriculture of the Republic of Kazakhstan dated on November 17, 2015 No. 18-02/1003.

“Paragraph 95. Forest Pathology Survey on the territory of the State Forest Fund, as a part of **forest pathology monitoring...**”

Based on the Forest Pathology Survey: “Based on data from surveys and forecasts of reproduction and spread of pests and diseases of the forest, an authorized body in the field of conservation, protection, use of the forest fund, forest reproduction and afforestation **prepares summary materials on the sanitary and forest pathological status of forests, and also develops long-term plans of preventive and other measures to combat pests and forest diseases on the basis of which feasibility studies (projects) are being developed for prevention and elimination of foci of pests and forest diseases,**” paragraph 88 of the Sanitary Regulations in Forests.

Kronverk LLP is not **an authorized body in the field of conservation, protection, and/or use of the forest fund**. The authors of the Materials document developed by Kronverk LLP exceeded their authority and went beyond the scope of the Forest Pathology Survey.

Legal implications. The Materials document is a part of the preliminary and project documentation. It was used to prepare an Environmental Impact Assessment and to issue a positive conclusion of the State Environmental Review (case 2 and 3 in the statement of the Ecological Society).

In addition, the Materials document was prepared in accordance with the “Rules for maintenance and protection of vegetation in the city of Almaty.” **According to paragraph 55 of the aforementioned Rules, the effect of the Rules does not extend ... to specially protected natural territories of the state level of significance, one of which is the Ile-Alatau National Park.**

The second document that was used in the preparation of the Materials document is entitled “Instructions for conducting and processing materials of inventory and forest pathology survey of vegetation in the city of Almaty” in 2006. The Instructions document is not a regulatory legal act, as evidenced by the answer of the Ministry of Justice of the Republic of Kazakhstan dated July 01, 2015 No. 09-14/000443 that the Instructions “On conducting and processing materials of inventory and forest pathology survey of vegetation in the city of Almaty” are not found in the legal informational system “Adlet” and the State Register of regulatory legal acts of the Republic of Kazakhstan.

QUESTION 2. If the Materials document does not act as a permit, is there another document through which the destruction and/or sanitary felling of the wild apricot and apple trees was permitted? If so, did you also attempt to challenge that other document in the court and what was the outcome of your challenge?

ANSWER: “Materials for an inventory of the area’s vegetation and a survey of the forest pathology” is not a permit for destruction and/or sanitary felling of the wild apricot and apple trees. In the Republic of Kazakhstan, law prohibits destruction and/or sanitary felling of the wild apricot and apple trees.

The Law of the Republic of Kazakhstan “On specially protected natural territories” only allows **withdrawal** of rare and endangered species of plants.

“Article 32-1. Red List of endangered species of the Republic of Kazakhstan.

Paragraph 5. Withdrawal of rare and endangered species of plants, their parts, or derivatives is performed on a basis of a decision of the Government of the Republic of Kazakhstan for the purpose of:

- 1) **propagation in specially created conditions;**
- 2) **scientific research;**
- 3) **selection.”**

Forest Code of the Republic of Kazakhstan.

“Article 12. Competence of the Government of the Republic of Kazakhstan in the area of protection, preservation, utilization of the forest fund, reproduction of forests and afforestation.”

Paragraph 10. The Government makes a decision about **withdrawal** of rare and endangered species of plants, their parts, or derivatives, and determines a volume of the withdrawal.”

There are links to these norms of the law in the text of our statement.

In the Republic of Kazakhstan, there are no regulatory legal acts that allow destruction and/or sanitary felling of the wild apricot and apple trees.

According to the Criminal Code of the Republic of Kazakhstan, destruction and/or sanitary felling of the wild apricot and apple trees is a criminal offense.

Criminal Code of the Republic of Kazakhstan.

“Article 339. Illegal operations with rare and endangered, as well as prohibited for use species of plants or animals, their parts, or derivatives.

Illegal acquisition, purchase, storage, sale, import, export, shipping, transportation, or destruction of rare and endangered species of plants or animals, their parts or derivatives, as well as plants or animals prohibited for use, their parts or derivatives, as well as destruction of their habitats -

is punished with a fine of up to three thousand monthly calculated units, or correctional labor in the same amount, or engaging in community work for up to eight hundred hours, or restriction of freedom for up to three years, or imprisonment for the same period.”

QUESTION 3. Would any person or entity be entitled to challenge the Materials document in court? If so, who?

ANSWER: The Civil Procedural Code of the Republic of Kazakhstan (hereafter referred to as “CPC”) indicates:

“Article 8. Judicial defense of rights, freedoms and legitimate interests of a person.

1. **Everyone shall have the right**, in the manner established by this Code, to apply to the court **for protection of violated or disputed rights, freedoms, or legitimate interests.**

2. State bodies within their competence, **citizens and legal entities have the right to apply to the court for protection of violated or disputed legal interests of other persons or an indefinite number of persons**, in accordance with the procedure established by this Code.”

“Materials for an inventory of the area’s vegetation and a survey of the forest pathology” **can be challenged in court**, in accordance with the paragraph 1 of Article 293 of the CPC.

“Article 293. Decisions, actions (inaction) of state bodies, local government, public associations, organizations, officials, and government workers that are subject to judicial challenge.

1. Decisions, actions (inaction) of state bodies, local government, public associations, organizations, officials, and government workers **that are subject to judicial challenge** are collective and individual decisions and actions (inaction), as a result of which:

- 1) rights and freedoms of a citizen and legal interests of a legal entity are violated;
- 2) obstacles have been created to exercise rights and freedoms of a citizen and legal interests of a legal entity;
- 3) an obligation is unlawfully imposed on a citizen or a legal entity, or they are unlawfully prosecuted.”

The **Materials document is not included in the list of regulatory legal acts that can not be challenged in court**, in accordance with the paragraph 2 of Article 293 of the CPC.

“Paragraph 2. The following regulatory legal acts cannot be challenged in court...:

- 1) laws and other regulatory legal acts, which verification for compliance with the norms of the Constitution of the Republic of Kazakhstan is within the exclusive competence of the Constitutional Council of the Republic of Kazakhstan;
- 2) legal acts of individual application, for which other laws provide for a different procedure for judicial appeal;
- 3) international treaties;
- 4) regulatory legal acts, which shall be checked for compliance with the laws in the order prescribed by the Article 30 of the present Code...”

QUESTION 4. With respect to case 1, you allege non-compliance with article 2(5) and article 9(2), (3), and (4) of the Convention. Article 9(2) concerns access to justice for decisions, acts or omissions “subject to article 6 of the Convention”. Please clarify how the Materials document is a decision subject to either article 6(1)(a) or 6(1)(b) of the Convention.

ANSWER: The Materials document is subject to article 6(1)(b), as the proposed activity will have a significant environmental impact. According to this document developed by Kronverk LLP, 226 wild apricot trees and 536 Sivers apple trees are subject to removal and sanitary felling. This is a violation of Article 8 of the Convention on Biological Diversity and the norms of Article 12 of the Forestry Code, paragraph 5 of Article 32-1 of the Law on Specially Protected Natural Territories and Article 339 of the Criminal Code.

QUESTION 5. With respect to case 3, at the time the State Environmental Review was carried out, was the Materials document a mandatory document for the purposes of that Review? If so, please provide the text of the relevant law where it makes clear that the Materials document was a mandatory requirement.

ANSWER: The Materials document is a mandatory document submitted for the State Environmental Review, in accordance with paragraph 11 of the Rules for Conducting a State Environmental Review, approved by Order No. 207-p. of June 28, 2007 of the Minister of Environmental Protection of the Republic of Kazakhstan.

“Paragraph 11. **The following items are subject to a mandatory State Environmental Review:**

- 1) preliminary and project documentation of a planned activity that has an impact on the environment, with accompanying materials of the Environmental Impact Assessment.”

The documents submitted for the State Environmental Review were accompanied by the **“Materials for an inventory of the area’s vegetation and a survey of the forest pathology”**.

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Ecological Society Green Salvation