

**To: Aarhus Convention Compliance Committee
From: Ecological Society Green Salvation
City of Almaty, Republic of Kazakhstan.**

March 9, 2012.

Dear chairman, dear members of the Committee!

According to the decision IV/9c adopted on July 1, 2011, by the Fourth Meeting of the Parties of the Aarhus Convention, Kazakhstan as a party of the Convention will need to have “thoroughly examined, with appropriate involvement of the public, the relevant environmental and procedural legislation, as well as the relevant case law, to identify whether it sufficiently provides judicial and other review authorities with the possibility to provide adequate and effective remedies in the course of judicial review.” By January 1, 2012, results of this work are to be submitted to the Secretariat of the Aarhus Convention.

Ecological Society Green Salvation (hereinafter - ES) considers it necessary to let the Committee know that the above mentioned activities were not carried out properly and did not bring any positive changes.

I

In 2011, before the Fourth Meeting of the Parties of the Convention, the ES publicly expressed its position on the above mentioned issues and appealed to the Ministry of Environmental Protection (hereinafter - MEP), due to the fact that the Meeting of the Parties recognized the failure of the Republic of Kazakhstan to comply with the Aarhus Convention already twice. But the opinion of the organization has been ignored by the Ministry.

In the national report on compliance with the Aarhus Convention by Kazakhstan, the MEP partially acknowledged that there were barriers to compliance with the Convention. But no real actions to eliminate those barriers were taken. As a result, on July 1, 2011, on the Fourth Meeting of the Parties, it was again acknowledged that Kazakhstan failed to comply with the Convention.

The ES believes that the main reason for the failure is the internal social and economic policy which led to destruction of the environmental protection system in the country. This was reflected in negligent performance of environmental protection agencies, systematic inaction of local authorities, and actual lack of public access to justice. The state authorities only provide the appearance of implementation of the Convention. In these circumstances, public and non-profit organizations face difficulties when trying to utilize their constitutional rights and responsibilities to protect the environment and the rights granted by the Aarhus Convention.

For example, representatives of the public of the city of Almaty continually send inquiries and information about the environmental situation in the city and region to various state agencies, constantly report violations of the law and demand to take action. The ES by itself sent more than 100 letters in 2011. However, only in a few cases effective measures were taken. For other inquiries, the authorized and local organs of the government did not provide complete and accurate information. Over the last two years, 3 out of 5 court decisions in favor of the ES were not executed. And only one of them was partially reimbursed for the legal costs. Only 1 out of 5 lawsuits about public authorities' inaction was accepted for consideration without a lengthy appealing process.

II

On September 15, 2011, after adoption of the decision IV/9c, the ES sent a petition to the Minister of Environmental Protection in an attempt to facilitate implementation of the decision. The petition informed about law violations committed by governmental authorities and serious deficiencies of the legislation being an obstacle for implementation of the Aarhus Convention¹.

Reply to the ES contained information which only partially covered the questions we had raised. Most of the provided information is incomplete or inaccurate. The questions regarding the shortcomings of the environmental legislation were not covered by the MEP at all (see Attachment 1).

The most unfortunate thing is that the Ministry did not take any measures to stop the law violations.

For example, in the summer and autumn of 2011, the environmental situation in the area of the KSMK-3 (the city of Almaty) deteriorated due to expansion of Bokeykhanova street. The construction was carried out with gross violations of the environmental, health, and constructional norms, which caused the public discontent and lead to mass protests. The MEP knew about it and about clear discrimination against the citizens based on their place of residence, but did not take any actions. 27 people addressed to the ES asking to protect their rights and interests in court. The residents are subjected to discrimination as a result of the **inaction** of the local authorities with the connivance of the territorial division of the Ministry of Environmental Protection (Balkhash-Alakol Department of Ecology).

Their attention was not even drawn by the fact that the Aarhus Convention Compliance Committee took the decision in 2006 specifically based on an appeal from the residents of Bokeykhanova street who live close to the KSMK-3. This decision was a basis for the unimplemented decision III/6c dated on June 11-13, 2008, and decision IV/9c dated on July 1, 2011, adopted by the Meetings of the Parties of the Convention. In other words, since 2006 till the present moment, no real efforts were undertaken by Kazakhstan under the decision III/6c, in order to assure compliance with the Aarhus Convention.

Thus, even after adoption of the decision IV/9c, when Kazakhstan as a Party of the Convention was required to consider public opinion regarding a possibility of providing adequate and effective measures of legal defense in courts, the governmental authorities did not take any actions.

III

Position of Kazakhstan as a party of the Convention stays unclear. The National Report prepared to the Fourth Meeting by the MEP points out some shortcomings of legislation, such as: "The right of the public participation in the law-making process in the RK is declaratively proclaimed by the legislation... In practice, many aspects of public participation in the law-making process in Kazakhstan are not represented in the legislation today... As a result, very often the public **does not have a real opportunity to participate in the law-making process**, except for some individual cases."² **"All necessary parameters of effective public participation in decision-making process on specific types of planned economic activity should be elaborated more clearly** by by-laws based on recommendations received from non-profit organizations."³ We can fully agree with this conclusion of the authors.

Requirements stated in the decision IV/9c must be implemented by a Party of the Convention. The current situation deserves the closest attention of the parliament, government, organs of justice. On September 8, 2011, the Decree No.238 of the Minister of Environmental Protection established an inter-department working group for implementation of the Aarhus Convention⁴. But the meeting of the working group was held only on December 2, 2011, i.e. 29 days before the deadline stated in the decision IV/9c. The meeting united representatives of the Supreme Court, mayor's office of the city of Astana, Committee of Information and Archives of the Ministry of Communication and Information of the RK, Committee of the State Control over Emergencies and Industrial Safety of the Ministry of Emergency Response of the RK, Committee of Geology and Natural Resources Regulation of the Ministry of Industry and New Technologies of the RK, Forestry and Game Committee of the Ministry of Agriculture (MA) of the RK, Committee for Water Resources of the MA of the RK, Committee of Fishery of the MA of the RK, Committee of the State Sanitary and Epidemiological Control of the Ministry of Public Health of the RK, Committee of Science of the RK, and OSCE Center in Kazakhstan.

Members of the working group were assigned “within the limits of their competence, to study the legislation of the Republic of Kazakhstan and examples of its application in the context of compliance with the Aarhus Convention, and present the information to the MEP by **February 2, 2012**”⁵, and also consider and present comments and suggestions to the developed analysis⁶.

On December 13, 2011, the MEP in collaboration with the OSCE Center conducted a round table with participation of the public representatives discussing the results of implementation of the Aarhus Convention by Kazakhstan.⁷ The participants of the rounds table decided to “agree with the conclusions made based on the results of implementation of the decision IV/9c of the Parties of the Aarhus Convention about compliance of the environmental and civil procedural legislation of the Republic of Kazakhstan with the requirements of the Aarhus Convention in the part of access to environmental information, public participation in decision-making process, and access to justice in the questions related to the environment.”⁸ Such conclusion contradicts even a mild self-criticism of the MEP expressed at in the Second National Report. Besides, it brings a question: if the MEP admits that the legislation of the Republic of Kazakhstan only proclaims the right on public participation in the decision-making process, then based on which normative legal documents did the discussion with the public on “environmental and procedural legislation and corresponding legal precedents” take place?

The discussion procedure in a form of a round table offered by the MEP, in our opinion, does not correspond to the requirements stated in the decision IV/9c. It is known that recommendations expressed during such round tables in the Republic of Kazakhstan do not have a juridical power, and are normally, simply ignored. In a situation like this, when a country lacks of normative documents regulating public participation, this discussion process would require development of a special procedure for accountability of public participation. Besides, the process of discussion with the public cannot be limited only by conducting of a round table.

Beside the MEP, the discussion of the legislation with the public should involve specially authorized state authorities in the area of environmental protection, representatives of the committees of the parliament, General Prosecutor’s Office and Supreme Court. The process should engage public at large, and it is obligatory that the parties concerned, based on whose appeals the decisions of the Meetings of the Parties of the Conventions were made, were present, but they were not even notified about the planned activities.

The websites of the parliament, Supreme Court, General Prosecutor’s Office, and other official sources do not have any information that after the Forth Meeting of the Parties of the Aarhus Convention they undertook steps towards implementation of the decision IV/9c.

New numerous (82!) amendments to the Environmental Code of the Republic of Kazakhstan adopted by the parliament on December 3, 2011, did not eliminate the obstacles which impeded implementation of the Aarhus Convention. The only amendment used as a reference by the authors of the “Report on the undertaken measures for implementation of the decision IV/9c”⁹, practically did not change the situation.

The website of the Supreme Court published statistical data which absolutely lacks of information about lawsuits related to environmental protection filed by non-governmental organizations and physical persons¹⁰.

The MEP did not cancel its normative decisions which interfere with implementation of the Aarhus Convention, in particular, the “Rules on conducting public hearings”. This document fully contradicts to the principles of the Convention. The ES tried to cancel the normative act by appealing to a court, but the appeal was not accepted even after addressing to the Supreme Court. At the same time, the round table participants recommended the MEP “to make changes”¹¹ to the document which acts since 2007.

The documents presented by the MEP for the discussion of the public and the working group did not fully illustrate all deficiencies of the legislation impeding implementation of the Aarhus Convention. They create an impression of being prepared in a hurry. For example, it is doubt that the “Analysis of court decisions for the period 2008-2011 on disputes related to access to

environmental information, public participation in a decision-making process, and access to justice in the questions related to the environment” can be called an analysis at all.

1. It is based on lawsuits of the Ecological Society Green Salvation and a lawsuit of the Public association “Zaman” which proves that, firstly, the documentation database for the analysis was insufficient, and secondly, the judicial statistics in the Republic of Kazakhstan has a low quality. Thus, the presented data is insufficient for a full picture of access to justice in the country.

2. The author either did not familiarize him/herself with the legal cases, or only superficially read through. Therefore, the author only lists the names of the lawsuits.

3. The conclusions are very vague and significantly yield even to the conclusions made by the MEP in the Second National Report on compliance with the Aarhus Convention.

The “Analysis of the environmental and civil procedural legislation of the Republic of Kazakhstan on compliance with the requirements of the Aarhus Convention in the part of access to the environmental information, justice, and public participation in decision-making process” is more persuasive.

The author indicates a number of important shortcomings of the CPC, which in fact, create obstacles to access to justice, which is confirmed by the experience of NGOs, including our organization. The document contains interesting, from our point of view, suggestions of improvements of the procedural legislation with an account of a specificity of environmental cases.

But a question arises: could these materials be considered to be documents prepared by a Party of the Convention, in accordance with the decision IV/9c? Or they should be counted as documents prepared by a private party by an order of the MEP? We believe that such analysis should have been made by specialists of the Supreme Court, because the topic here, first of all, is access to justice.

IV

Concluding the above stated, we would like to emphasize that the MEP did not implement in the full extent the powers assigned to it in order to facilitate international collaboration in the environmental protection sector, including implementation of international treaties. Moreover, all actions of Kazakhstan, as a Party of the Convention, almost exclusively were reduced to the activities of the MEP and Supreme Court which mostly conducts educational events. But these events do not change the current situation and do not facilitate realization of the public rights. It should be specially noted that as for the moment, the decisions II/5a and III/6c are still not implemented. It seems that the governmental authorities are trying to shift the responsibility for implementation of the Aarhus Convention to the Aarhus Centers. All information about implementation of the Aarhus Convention by Kazakhstan is transferred from the website of the MEP to the website of the Aarhus Center of the Republic of Kazakhstan.

The process of discussion of the environmental and procedural legislation conducted in accordance with the decision IV/9c was held in parallel with widespread violations of human rights on favorable environmental which are well known to the public authorities.

Therefore, the ES believes that Kazakhstan as a Party of the Convention did not undertake real steps to provide “adequate and effective means of legal protection during a trial process”, in order to realize the right of public representatives to access to justice.

Based on the above stated, the Ecological Society Green Salvation calls the Committee to carefully analyze the information provided by governmental authorities and give an objective evaluation to the actions of Kazakhstan as a Party of Convention and assist with introduction into action of the warning given in accordance with the decision IV/9c.

¹ Petition to the Minister of the Environmental Protection dated on September 15, 2011.

http://www.greensalvation.org/index.php?page=letter_Ministr_Orhus2011.

² Second National Report on implementation of the Aarhus Convention, p.40; <http://www.eco.gov.kz/sotrudnichestvo/index.php>.

³ Same as above, p.34.

⁴ Report on the measures undertaken to implement the decision IV/9c. Kazakhstan's compliance with the responsibilities under the Aarhus Convention; p.3; http://aarhus.kz/index.php?option=com_content&task=view&id=448. The report is published on the website of the Aarhus Center of the Republic of Kazakhstan. No such information is shown on the website of the MEP.

⁵ Same as above, p.3.

⁶ "Analysis of court decisions for the period 2008-2011 on disputes related to access to environmental information, public participation in a decision-making process, and access to justice in the questions related to the environment" and "Analysis of the environmental and civil procedural legislation of the Republic of Kazakhstan on compliance with the requirements of the Aarhus Convention in the part of access to the environmental information, justice, and public participation in decision-making process". Both analyses are prepared by Svetalana Kovlyagina, chairman of the Public observatory commission of monitoring of compliance of human rights in penitentiary institutions of Pavlodar oblast, chairman of the open fund "Committee of human rights monitoring", Kazakhstan.

⁷ Report on the measures undertaken to implement the decision IV/9c, p.4; http://aarhus.kz/index.php?option=com_content&task=view&id=448.

⁸ Same as above, p.4-5.

⁹ Same as above, p.8.

¹⁰ Statistics for 12 months of the 2010 and 9 months of the 2011. The lawsuits related to environmental protection. See the website of the Supreme Court: http://supcourt.kz/rus/mezhdunarodnoe_sotrudnichestvo/real_pok/statistika/.

¹¹ Report on the measures undertaken to implement the decision IV/9c, p.5.