

To: Aarhus Convention
Compliance Committee

From: Environment-People-Law

February 27, 2013

**Statement by Environment-People-Law
for the 40th meeting of the Aarhus Convention Compliance Committee
with regard to implementation by Ukraine of the MOP decisions II/5b**

By this Statement Environment-People-Law (hereinafter – EPL) comments on the Progress report of Ukraine submitted on November 30, 2012 (hereinafter – the Report) on order to present the Aarhus Convention Compliance Committee (hereinafter – ACCC) with more complete information on the issues discussed in the Report as well as on the current legal framework for public participation in Ukraine.

The Report discusses draft laws that have been already withdrawn from the Parliament. The Report discusses in detail a draft law “*On introducing amendments into certain Laws of Ukraine on implementation of the provisions of the Convention on Environmental Impact Assessment in the Transboundary Context*” registered in the Parliament on June 21, 2012 #10651.

The Report states that the draft law #10651 fulfills MOP Decision II/5b by introducing a proper legal framework for public participation in the decision-making on activities, which may have a significant environmental impact. The proposed legal framework includes time frames for public participation; modalities of public consultation process; requirements to ensure that due account is taken of the outcome of the public participation; insures availability of information in the context of article 6 of the Aarhus Convention.

However, the Report fails to mention, that in October of 2012 a new Parliament was elected, and since the draft law #10651 submitted in June did not pass the first hearing before the first session of the new Parliament, it was automatically withdrawn pursuant to the Rules of Procedure of the Parliament. Thus, the report that the ACCC received is not current.

EIA and PP developments subsequent to the date of the Report.

The Report also mentions that in addition to the submission of the above-mentioned draft law to the Parliament the Ministry undertook some other measures. Namely, the Ministry of Ecology and Natural Resources of Ukraine (hereinafter – MENR) has revised and improved the draft law # 10651 and renamed it into a draft law «*On introducing amendments to certain laws of Ukraine on implementation of the provisions of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters*». This was done pursuant to the instructions of President of Ukraine to ensure fulfillment by Ukraine of its commitments under the Aarhus Convention issued on November 15, 2012.

The Report does not analyze a revised draft. Its text is not attached to the Report and it has not been released to the public.

This revised draft law «*On introducing amendments to certain laws of Ukraine on implementation of the provisions of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters*» was submitted on December 4th, 2012 (a few days after the Report was submitted to the Aarhus Secretary) for approval to the other ministries. Later on it was declined by most of them.

In January of 2013, the Ministry of Ecology further revised the draft law on «*On introducing amendments to certain laws of Ukraine on implementation of the provisions of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters*» again.¹ The 2nd revised draft law at the end of January was again submitted to other ministries for approval. At the date of this submission to the ACCC, EPL does not know whether this draft law will be approved. If there are further developments prior to the ACCC meeting in March 2013, EPL will provide the CC with an update.

PP developments subsequent to the date of the Report

The Report also mentions the draft law of Ukraine *On introducing the amendments to the Law of Ukraine «On Regulation of Urban Development Activities (related to public discussions of the project documentation on construction)* registered in the Parliament on September 26, 2012 #11256. This draft proposed the amendments into Article 21 of the Law of Ukraine *On Regulation of Urban Development Activities* in terms of mandatory public discussion of the project documentation on construction.

On December 12, 2012, this draft law was withdrawn for the same reason as the draft law # 10651.

Current EIA and PP legal framework in Ukraine

At the time when ACCC issued its initial findings on compliance by Ukraine with its obligations under Article 6, a soviet type of EIA was in place in Ukraine. In this type of EIA a developer itself or through a consultant developed an EIA study (OVNS) and this study was submitted to an environmental authority for review (*State Ecological Expertiza*) and issuance of a permitting decision called *Conclusion of State Ecological Expertiza*. The law prohibited to commence development, which may have a significant environmental impact, without a positive *Conclusion of State Ecological Expertiza*. The law required that public opinion is taken in due account when a *Conclusion of State Ecological Expertiza* and any further permitting decisions on the project are considered and issued. The list of activities, for which it was mandatory to go through OVNS/*State Ecological Expertiza* procedure (comparable to Aarhus Annex I), was approved by a governmental act². The legislation at that time had some provisions on public participation, but the ACCC found that the legal framework in place was not sufficient to meet AC Article 6 requirements.

During 2003-2011 MENR acknowledged that OVNS/*State Ecological Expertiza* was the permitting procedure within the meaning of Article 6 to which public participation provisions of the Convention apply in the Ukrainian context.

In June 2011, a new Law *On Urban Development Activities* abolished *State Ecological Expertiza*. The appropriate provisions requiring performance of *State Ecological Expertiza* for the projects adversely affecting the environment were struck out of the legislation. Since then MENR no longer

¹ This draft law was never made publicly available also.

² *List of environmentally dangerous activities* approved by the Cabinet of Ministers of Ukraine on July 27, 1995, Order # 554

performs or participates in the assessment of documentation that evaluates environmental impact of the proposed construction projects (OVNS).

The current EIA system in Ukraine looks as follows:

According to the Law of Ukraine *On Urban Development Activities*, mandatory EIA is performed when the two of the following criteria are satisfied:

- 1) A project is considered a construction project of the 4th or the 5th *class of complexity*. A project is considered to be of the 4th class, if failure of a construction alternatively endangers at least 300 people at the facility, 10000 people within a vicinity of the facility; causes damages exceeding 15000 minimal wages, or loss of a cultural heritage site of local importance, or of an infrastructure facility of regional importance. For the 5th class the above mentioned thresholds are higher.
- 2) A project of a 4th or 5th class also falls within the *List of environmentally dangerous activities* approved by the Cabinet of Ministers of Ukraine on July 27, 1995, Order # 554 (comparable with the Aarhus Annex I).

If both criteria are met, a developer itself, or a consultant prepares a chapter of the project documentation called OVNS (translated into English as Assessment of Impact on the Environment). OVNS, as before, is prepared in accordance to DBN (State Constructing Norms) A.2.2-1-2003 “Structure and Content of Environmental Impact Assessment Materials in Project Designing and Constructing of Industrial Enterprises, Buildings, and Facilities. Basic Principles of Design”.³ DBN sets some provisions on public participation during preparation of OVNS. The last step of public participation at this stage is that a developer may amend (a possibility, not an obligation) OVNS to accommodate public opinion.

At the next stage OVNS with the rest of project documentation is submitted for *Expertiza of project documentation on construction (hereinafter - Expertiza)*. *Expertiza* analyses the quality of project documentation checking whether it complies with construction, sanitary, safety, environmental and other relevant rules and standards. *Expertiza* can be performed by both private and public institutions (certified by the Ministry of Construction). MENR or any other competent authority does not participate in this process. After that, the project documentation together with *Expertiza Report* is submitted for a construction permit. The permit is issued by the State Inspectorate on Architecture and Construction within 10 days after the submission of an application for a construction permit.

The Law of Ukraine *On Urban Development Activities* as well as normative acts on the procedures for conducting *Expertiza* and issuance of the construction permit contain no provisions insuring that the results of PP during OVNS are taken in due account by a developer, or providing for any public participation at the stages of *Expertiza* or permit issuance. Therefore, it is not possible to challenge a construction permit in court based on lack of PP in decision-making procedure.

The recent amendments to the Law of Ukraine *On Urban Development Activities (November 2012)* include a new requirement which makes it mandatory for the appropriate projects to include not only documents assessing the environmental impact (OVNS), but also a report on such assessment as well as a public participation report. However, the law provides that the procedure for the assessment shall be established by the Cabinet of the Ministers of Ukraine. The law is silent with regard to that ‘public participation report’ means, at what stage what PP is taking place or what is the procedure for such

³ This DBN A.2.2-1-2003 was effective when ACCC draw its initial conclusions that Ukraine lacks a proper legal framework on public participation.

PP. No further regulations developing the provision of the Law were developed, not to say adopted by the Cabinet of Ministers yet.

There is a gap in cooperation between the MENR and the Ministry of Regional Development and Construction on Aarhus issues. The abovementioned draft laws developed by MENR and the recent amendments to the Law *On Urban Development Activities* take different approaches to address MOP decision II/5b. When MENR attempts seem to better address Article 6 requirements, it is the Ministry of Regional Development and Construction that gets its legislative initiatives adopted by the Parliament.

Conclusions

Therefore,

- 1) Due to intense pressure from the strong construction lobby in 2011 the permitting procedure (*State Ecological Expertiza*) which usually was associated with Aarhus Article 6 procedure in Ukraine was abolished, meaning that even the minimal EIA requirements reviewed by the ACC are no longer in effect;
- 2) The current EIA system (and respectively PP provisions) covers only the construction projects of a 4th and 5th class, which means that many of the activities listed by Aarhus Annex 1 may not be covered;
- 3) The current system of review of project documentation/*Expertiza* and issuance of a construction permit does not include a single provision on public participation in the corresponding decision-making;
- 4) As of the end of February 2013 not a single draft law dealing with public participation framework is registered in the Parliament.
- 5) MENR strategy to fulfil MOP decision II/5b through a draft law on EIA (draft law on EIA developed by the EU technical support project, the draft law #10651 and all of its subsequent versions) conflicts with the recent amendments to the Law of Ukraine *On Urban Development Activities* and therefore is unlikely to be successful.
- 6) The PP requirements found by the ACCC to be non-compliant have not been addressed.

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