

Selected standing provisions for the public concerned in Austrian legislation

This document was prepared on request of the Compliance Committee by the communicant OEKOBUEO and accorded with the party concerned.

The following provisions regulate standing requirements for the public concerned in the framework of **permitting procedures** and in addition with regard to issues falling under the **Federal Environmental Liability Act (B-UHG)**. This list is non exhaustive and refers to the most important procedures only, but the standing concept is quite similar in most laws. This selection only refers to neighbours, NGOs, the Environmental Ombudsman, Citizens' Groups and municipalities.

According to Article 356b par 1 first sentence GewO (Industrial Code) the rules of **“procedural concentration”** the authority has to apply all federal sectoral legislation in the framework of permitting procedures falling under the **Industrial Code** (GewO). Similar provisions can be found in the **Waste Management Act** (AWG; Art 38).

NICHT ÜBERSETZTES ZITAT 356b gelöscht.

As a result members of the public concerned that have standing in permitting procedures falling under the Industrial Code have standing also with regard to other sectoral legislation applied in such procedures, even though respective sectoral legislation does not provide for explicit standing provisions. Please note that Article 356b GewO does not apply for nature protection procedures since they are under the jurisdiction of the provinces.

Case example: An investor applies for development consent for a cheese production factory. The location is close to a forest. In this case Article 356b par 1 GewO has to be applied. The authority has to apply not only GewO, but for example also forestry, noise and air quality legislation. Even though standing requirements for neighbours in forestry legislation are vague and do not exist explicitly with regard to air quality and noise respectively, neighbours are entitled to invoke respective legislation in case they are affected in the sense of Article 74 and 75 GewO (see below). The same counts for EIA and IPPC procedures with regard to NGOs and other parties to the procedure; however, standing of NGOs is not limited to “subjective rights” in EIA and IPPC procedures, but extends to all aspects of environmental protection.

Please note that the standing rights listed below, apart from environmental liability, are linked to permitting procedures and the operation of industrial installations and in most cases do not apply for acts and omissions of private persons and public authorities that contravene environmental legislation outside the framework of permitting procedures; however, § 79 GewO and § 138 WRG contain special provisions extending standing to matters of environmental protection outside permitting procedures (see below); through the rule of concentration, these standing rights apply to EIA and IPPC-procedures as well.

The general standing provision is regulated in Art 8 Administrative Procedure Code (AVG). This reads as follows:

§ 8 AVG – Administrative Procedure Act

“Persons that use the services of public authority or the authority’s activity refers to them are parties involved (right to be heard), whereas when they have a legal interest in a subject matter or a legal title they are parties (locus standi) to the procedure”.

A) Procedures relating to Article 9 par 3 of the Convention

GewO – Industrial Code: Regular procedure

Art 74 par 2 provides for the protection of *“neighbours from nuisance from smell, noise, smoke, dust, vibrations or in other ways”* as a permitting requirement.

Article 75 par 2 first sentence

“Neighbours in terms of Art 75 par 2 of the cited law are all persons, who could be harmed, inconvenienced or whose property or other rights in rem could be infringed by the construction, continuance or operation of an industrial installation.”

According to Art 75 par 4 neighbours are granted legal standing and entitled to appeal to second instance.

Art 355 par 1: Municipalities have to be heard in permitting procedures to assert public interests of their own sphere in terms of Art 74 par 2 subpar 2-5 (i.a. prevention of nuisance from smell, noise, smoke, dust, vibrations or in other ways; traffic fluidity and safety, conservation of waterbodies’ quality)

GewO – Industrial Code: Simplified procedure

Art 359b. par 1 sentence before the last sentence: *“Neighbours (§ 75 Abs. 2) do not have locus standi.”*

According to Art 359b par 1 second last sentence neighbours are not granted legal standing in simplified procedures, only the right to be heard is granted.

Remark: This provision applies for the „simplified“ procedure only. However, article 74 par 2 (obligation to protect neighbours, see above) applies for the operator, but there is no right to legally challenge the permit by neighbours in the simplified procedure.

Remark: According to the decision from 03.03.2001 of the Constitutional Court jurisdiction grants legal standing to neighbours only in procedures questioning the existence of preconditions whether a simplified procedure should be conducted.

Art 79 and 79a GewO – Industrial Code: Update/Changes of permit

According to Art 79 par 1 and 79a in conjunction with Art 74 par 2 Industrial Code legal standing is granted to neighbours. They are entitled to claim their interests in terms of Art 74 par 2 (see above) and Art 75 (definition of “neighbour” and “threat to property”) as a

subjective right in the procedure. They have the right to initiate the procedure if they claim the existing permit does not sufficiently protect their interests.

AWG – Federal Waste Management Act:

Art 42: *“In the permitting procedures as to Art 37 par 1 the following parties have locus standi:*

3. neighbours,

4. the host municipality and the directly adjoining Austrian municipalities

8. the Environmental Ombudsman; the Ombudsman can invoke nature protection laws, has the right to appeal and the right to refer to the Highest Administrative Court.

9. Municipalities and water service companies with regard to water services for its citizens”

Forstgesetz – Forestry Law:

According to Art 19 par 4 Forestry Law legal standing in the sense of article 8 AVG is granted i.a. to the owner and the party holding real rights of adjoining woodland areas.

According to Art 19 par 5 the municipality in which the uprooting of a woodland area is planned, has to be heard in order to assert local public interests.

WRG – Water Act:

Protection of water supply installations (water protection areas)

According to Art 34 par 6 Water Act legal standing in terms of Art 8 Administrative Procedure Act is granted to municipalities in proceedings of installations that could affect their water supplies.

Standing in water related procedures

According to Art 102 par 1 legal standing is i.a. granted to those who shall be bound by obligations to act, endure or omit or whose rights in terms of Art 12 par 2 (rights of water use) are affected.

Additionally legal standing is granted to municipalities in proceedings according to Art 111a Water Act (projects of a certain size), in normal proceedings only to protect their water supplies.

Art 138 Water Act: Prevention procedure

According to Art 138 par 1 Water Act anybody violating the Water Act can be (public or concerned persons' interest required) forced by the water act authority at one's own expense to restore conditions in compliance with Water Act provisions (i.a. clearance of unauthorized

innovations, removal of contaminations of waterbodies and their impacts, clearance of deposits and ground pollution with appropriate measures).

According to Art 138 par 6 legal standing is granted to neighbours in cases of infringements of water use rights, property, etc

MinRoG – Mining Act

Extracting operation plans

According to Art 81 in conjunction with Art 116 par 3 legal standing in permitting proceedings of extraction operation plans is i.a. granted to neighbours, host municipalities and adjoining municipalities of planned extractions.

Neighbours are entitled to claim the prevention of nuisances from smell, noise, smoke, dust, vibrations or in other ways and infringements of their property or other rights in rem as subjective rights in the procedure.

Municipalities are entitled to claim their interests such as state of the art concerning nature protection, scientific and other matters as a subjective right in the procedure and to appeal to second instance and Administrative or Constitutional Court.

According to Article 116 neighbours have standing with regard to certain mining projects if their property would be affected and they would suffer from other nuisance. The host municipality has standing to invoke its public interests as subjective right as well as the right to appeal and refer to both the Highest Administrative and the Constitutional Court.

Permitting of mining installations

According to Art 119 par 6 Mining Act legal standing in permitting procedures of mining installations is granted to neighbours (same rights as above). Neighbours in terms of the cited provision are all persons, who could be harmed or inconvenienced or whose property or other rights in rem could be infringed by the construction or operation of a mining installation.

Federal Environmental Liability Act: B-UH:

According to Art 11 par 1 Federal Environmental Liability Act natural persons or legal persons whose rights may be affected by environmental contaminations are entitled to summon (via written complaint) the administrative body of the district where the environmental contamination in the context of this act took place, to proceed in terms of Art 6 and 7 par 2 (enumerations of rights of administrative bodies in case of environmental contaminations, such as right of access, possible proceedings to minimize contaminations) of the cited law.

Possible affected rights in terms of par 1 are protection of life and health of human beings, water use rights, property and other rights in rem.

Environmental Ombudsmen in terms of Art 2 par 4 EIA Act (see below) and environmental organisations in terms of Art 19 par 1, 6 7 EIA Act (see below) are also entitled to summon administrative bodies in case of environmental contaminations (same procedure as above).

According to Art 12 legal standing in proceedings in terms of Art 6 and 7 par 2 of the cited law (decontamination proceedings) is granted to persons and organisations who filed a complaint (as above) and persons listed in Art 11 par 1 (see above) of the cited law who declared in writing their remainder of legal standing within a respite of two weeks after the announcement of a proceeding.

According to Art 13 all parties in the procedure are entitled to appeal to second instance, access to the administrative court is only granted to the Minister of Environment.

Tiroler Naturschutzgesetz – Tyrolean Nature Protection Act:

According to Art 36 par 8 Tyrolean Nature Protection Act the Environmental Ombudsman is granted legal standing in terms of Art 8 Administrative Procedure Act in all procedures subject to the cited law except from administrative criminal proceedings. In proceedings he is supposed to consider other public interests (also economic aspects).

Remark: He is entitled to appeal to second instance if possible, but no access to Administrative Court.

According to Art 43 par 4 of the cited law municipalities who are affected by a project are granted legal standing in terms of Art 8 Administrative Procedure Act to assert interests of their own sphere.

Salzburger Naturschutzgesetz – Nature Protection Act of Salzburg:

According to Art 47 par 4 Salzburg Nature Protection Act affected municipalities are granted the right to be heard in the procedure.

According to Art 55 par 5 of the nature protection act standing in terms of Art 8 Administrative Procedure Act is granted to the Environmental Ombudsman except from proceedings listed in par 2 (i.a. proceedings in which the Env. Ombudsman abandoned his right of legal standing or missed a respite)

According to Art 8 par 4 Salzburger Landesumweltanwaltschaftsgesetz the Environmental Ombudsman of Salzburg is entitled to appeal to second instance and the Administrative Court.

Remark: There are seven other nature protection laws of the seven other Austrian provinces.

B) Procedures relating to Article 9 par 2 of the Convention

a) EIA procedures: EIA-act (UVP-G)

Locus standi, right of participation and right of appeal (Article 19):

“(1) The following parties shall have locus standi:

1. neighbours: neighbours shall be persons who might be threatened or disturbed or whose rights in rem might be harmed at home or abroad by the construction, operation or existence of the project as well as the owners of facilities in which persons stay temporarily on a regular basis with regard to the protection of such persons; neighbours shall not be persons who stay temporarily in the vicinity of the project and do not have rights in rem; with regard to neighbours abroad, the principle of reciprocity shall apply to states not parties to the Agreement on the European Economic Area;

2. the parties stipulated by the applicable administrative provisions unless they already have locus standi according to number 1;

3. the ombudsman for the environment according to paragraph 3;

4. the water management planning body to protect the interests of water management according to Article 55 (4) of the WRG 1959;

5. municipalities according to paragraph 3;

6. citizens' groups according to paragraph 4, except in the simplified procedure (paragraph 2); and

7. environmental organisations recognised under paragraph 7.

(2) Citizens' groups according to paragraph 4 may participate in the simplified procedure as parties involved with the right to inspect the files.

(3) The ombudsman for the environment, the host municipality and the directly adjoining Austrian municipalities which may be affected by significant effects of the project on the environment shall have locus standi in the development consent procedure and in the procedure according to Article 20. They shall be entitled to claim the observance of legal provisions that serve to protect the environment or the public interests in their competence as a subjective right in the procedure and to complain to the Administrative Court.

(4) Comments according to Article 9 (5) may be supported by entering one's name, address, date of birth and dated signature on a list of signatures. The list of signatures shall be submitted at the same time as the comment. If a comment is supported by 200 persons or more who have the right to vote in municipal elections in the host municipality or in a directly adjoining municipality at the time of expressing their support, this group of persons (citizens' group) shall have locus standi in the development consent procedure for the project and in the procedure according to Article 20 or shall be considered to be a party involved (paragraph 2). Citizens' groups having locus standi shall be entitled to claim the observance of environmental provisions as a subjective right in the procedure and to complain to the Administrative Court or the Constitutional Court.

(5) The representative of the citizens' group shall be the person designated as such in the list of signatures or, if such designation is lacking, the person ranking first in the list of signatures. The representative shall also be the person entitled to receive service according to Article 9 (1) Zustellgesetz (Service of Documents Act, BGBl No. 200/1982). If the representative resigns, the person ranking next on the list of signatures shall be considered to

be the representative of the citizens' group. The representative may be replaced by another person by means of a written statement to the authority. Such a statement shall be signed by the majority of the members of the citizens' group.

(6) An environmental organisation is an association or a foundation:

1. whose primary objective is the protection of the environment according to the association's statutes or the foundation's charter,

2. that is non-profit oriented under the terms of Articles 35 and 36 Bundesabgabenordnung—BAO (Federal Fiscal Code), BGBl. No. 194/1961, and

3. that has been in existence and has pursued the objective identified in number 1 for at least three years before submitting the application pursuant to paragraph 7.

(7) (Constitutional provision) In agreement with the Federal Minister for Economic Affairs and Labour, the Federal Minister of Agriculture and Forestry, Environment and Water Management shall decide upon request by administrative order whether an environmental organisation meets the criteria of paragraph 6 and in which Laender the environmental organisation is entitled to exercise the rights related to locus standi. Complaints against the decision may also be filed with the Constitutional Court.

(8) The request pursuant to paragraph 7 shall be supported by suitable documents that prove that the criteria of paragraph 6 are met and that indicate the Land/Laender covered by the activities of the environmental organisation. The rights related to locus standi can be exercised in procedures on projects to be implemented in this Land/in these Laender or in directly neighbouring Laender. The Federal Minister of Agriculture and Forestry, Environment and Water Management shall publish a list of the environmental organisations recognised by administrative order pursuant to paragraph 7 on the Internet site of the Federal Ministry of Agriculture and Forestry, Environment and Water Management. This list shall specify the Laender in which the environmental organisations are entitled to exercise rights related to locus standi.

(9) An environmental organisation recognised pursuant to paragraph 7 shall forthwith inform the Federal Minister of Agriculture and Forestry, Environment and Water Management if any of the criteria defined in paragraph 6 is no longer met. Upon request of the Federal Minister of Agriculture and Forestry, Environment and Water Management, the environmental organisation shall submit suitable documents proving that the criteria defined in paragraph 6 continue to be met. If the Federal Minister of Agriculture and Forestry, Environment and Water Management learns that a recognised environmental organisation no longer meets one of the criteria of paragraph 6, this fact shall be declared by way of administrative order in agreement with the Federal Minister for Economic Affairs and Labour. The list pursuant to paragraph 8 shall be amended accordingly.

(10) An environmental organisation recognised pursuant to paragraph 7 shall have locus standi and be entitled to claim the observance of environmental provisions in the procedure insofar as it has filed written complaints during the period for public inspection according to Article 9 (1). It shall also be entitled to complain to the Administrative Court.

(11) An environmental organisation from a foreign state may exercise the rights under paragraph 10 if this state has been notified pursuant to Article 10 (1) no. 1, if the effects impact that part of the environment in the foreign state whose protection is pursued by the environmental organisation and if the environmental organisation could participate in an environmental impact assessment procedure and a development consent procedure if the project was implemented in this foreign state.

Remark: This legal position applies for all projects but infrastructure projects. For the latter legislation slightly differs, but this is not relevant in this context. See for further details the accorded input of Austria from February 2011.

EIA-screening procedure

Art 3 par 7 EIA-act

“(7) Upon request by the project applicant, by a co-operating authority or by the ombudsman for the environment, the authority shall state whether an environmental impact assessment needs to be performed for a project pursuant to this Federal Act and which criterion of Annex 1 or Article 3a (1) to (3) applies to the project. This statement may also be made ex officio. The project applicant shall submit to the authority documents that are sufficient for identifying the project and for assessing its environmental impacts. The decision shall be taken in the first and second instances by administrative order within six weeks each. The project applicant, the cooperating authorities, the ombudsman for the environment and the host municipality shall have locus standi. Before the decision is taken, the water management planning body shall be heard. The essential substance of the decisions, including the main reasons for them, shall be published or made accessible to the public in a suitable 17/08/2010 way by the authority. The host municipality may file a complaint against the decision taken with the Administrative Court. The ombudsman for the environment and the co-operating authorities are exempted from the obligation to reimburse cash expenses.”

Remark: The EIA-act refers in some other provisions to the procedure of Article 3 par 7 has to be applied. This counts for example for extensions, changes or the assessment of cumulative effects. See for further details the accorded input of Austria from February 2011.

b) IPPC procedures

I. FEDERAL LAW

GewO – Industrial Code:

According to Art 356b par 7 Industrial Code approved Environmental Organisations in terms of Art 19 par 7 EIA-Act are granted legal standing in permitting procedures of installations or substantial modifications (in terms of Art 81a subpar 1: modifications that could affect human beings or the environment in a significant harmful way) of installations listed in Annex 3 of the cited law in case they object in written form within a respite in terms of Art 356a par 2

subpar 1 (at least six weeks). They are entitled to claim the abidance by the laws concerning environmental protection and appeal against the decision.

AWG – Federal Waste Act:

According to Art 42 par 1 subpar 13 approved environmental organisations in terms of Art 19 par 7 EIA-Act are granted legal standing in permitting procedures of IPPC-installations in case they object in written form within a respite in terms of Art 40 (at least six weeks). They are entitled to claim the abidance by the laws concerning environmental protection and appeal against the decision.

MinRoG - Mininglaw:

According to Art 121 par 11 Mining Law approved Environmental Organisations in terms of Art 19 par 7 EIA-Act are granted legal standing in permitting procedures of installations or substantial modifications (in terms of Art 121a subpar 1: modifications that could affect human beings or the environment in a significant harmful way) of installations listed in Annex 3 of the Industrial Code in case they object in written form within a respite in term of Art 121d par 2 subpar 1 (at least six weeks). They are entitled to claim the abidance by the laws concerning environmental protection and appeal against the decision.

II. PROVINCIAL LAW

There are also IPPC provisions of the nine Austrian provinces. They differ in detail, but are to a large extent similar to the federal laws. For example the province of Salzburg:

According to Art 5 par 1 Environmental Protection and Information Act of Salzburg legal standing is granted to natural persons or corporate bodies, who claim legal interests in the procedure, the host municipality and adjoining municipalities and their environment which may be affected by a project in a significant harmful way, approved environmental organisations in terms of Art 19 par 7 EIA-Act, if entitled to claim rights in Salzburg and the Environmental Ombudsman.

Municipalities, Organisations and the Environmental Ombudsman of Salzburg are entitled to claim the abidance by the laws concerning environmental protection or public interests (municipalities) as a subjective right in the procedure. Furthermore they are entitled to appeal to second instance and the Administrative Court.

Remark on Annex 1 to this document:

Annex 1 to this document provides an overview of most standing rights listed above in a table.

- Please note that most procedures such as mining and forestry law are constantly applied in the framework of Article 356b GewO or the Waste Management Act (see above), but not nature protection procedures that are in jurisdiction of the provinces.
- Please note that the project applicant and the operator respectively are a party to all procedures, but this is not shown in the table.