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United Nations Economic Commission for Europe
Aarhus Convention Compliance Committee
Palais des Nations
8-14 avenue de la Paix

CH-1211 Geneva 10, Switzerland

By mail: Fiona.Marshall@unece.org ; aarhus.compliance@unece.org

**Submission by the Public to the Aarhus Compliance Committee – Decision V/9h (Germany),
ACCC/C/2008/31**

Dear Members of the Committee,

Dear Ms. Marshall,

Following the complaint filed by NABU (since 2008) and ClientEarth, and in addition to the submission sent by Madame Verheyen on behalf of NABU and four other German NGOs on 8 June 2016, this submission is sent in order to inform the Compliance Committee about further changes to the German Environmental Appeals Act (*Umwelt-Rechtsbehelfsgesetz, UmwRG*). These changes were planned by the Party (Germany) after our last submission. NABU considers these changes to be an even stronger contradiction of the findings of the decision V/9h and deems that they would prevent the implementation both of Art. 9 (2) and Art. 9 (3) of the Aarhus Convention (the Convention). The new draft law effects the fundamental way of challenging acts and omissions by introducing new ways to remedy the decision of the authority, even during the court proceedings; by this, the law jeopardizes the effectiveness of the given access to justice.

Compared to the first version of the new German Environmental Appeals Act, the recent version contains – in its § 7 (5) UmwRG – a new regulation to remedy not only procedural, but also substantive, issues of a decision during court proceedings. The new text of the planned § 7 (5) UmwRG translates (from the original German) as follows:

“A violation of substantive legal provisions shall only lead to the rescission of the decision in accordance with section 1 subsection (1), sentence 1, numbers 1 to 2b or 5 if it cannot be remedied by supplementing the decision or by a supplementary procedure. Sentence 1 shall not apply within the scope of section 75 subsection (1a) of the Administrative Procedure Act.”

This change to the Environmental Appeal Act will not rectify the violation of the Convention found and adopted by Decision V/9h.

1.

Upon Art. 9 (2) of the Convention, Parties have to ensure that members of the public concerned can challenge the legality of certain decisions. The same term ('challenging') is used in Art. 9 (3) of the Aarhus Convention. Due to the planned regulation, the public concerned would be obliged not only to file a rescissory action, but also an action for obligation and performance, in order to improve and remedy an illegal decision. Otherwise, the complainant would risk seeing the action dismissed due to the new regulation foreseeing the cure of the decision.

2.

The planned regulation contradicts the principle of a fair proceeding. The public concerned would have to put much more effort into filing different types of complaints that, in the end, would only lead to the amendment of the given decision that in general remains at the end.

3.

The planned regulation contradicts the principle of a swift and timely procedure. With the ways to remedy a decision in future, there were nearly unlimited possibilities for authorities to correct illegal decisions in the proceeding as often, and with as much time, as wanted by the authorities.

4.

The planned regulation contradicts the principle of a non-prohibitively expensive procedure. In the future, members of the public would need to spend a considerable amount of money to remedy illegal decisions taken by authorities, and still without being able to succeed in their objective of overall challenging the decision.

5.

The planned regulation is even not necessary for the legal protection of the holder of an illegal permit. Such a permit holder is free to ask for a new permit that is in line with the existing law once the court has declared the old one to be illegal.

6.

The planned regulation is not necessary for the protection of legitimate expectation of the holder of an illegal permit. There is no legitimate expectation for an illegal permit. The holder of such a permit created the illegality of his permit on his own by not respecting the legal prerequisites.

7.

Due to the planned regulation, the majority of today's rescissory actions of the members of the public would no longer be filed as the objective of challenging the decision cannot be reached and, consequently, civil society supporting the members of the public would be retired.

8.

Also, the official German Advisory Council on the Environment (SRU) spoke out against the possibility to remedy an illegal decision through the planned regulation in its report No. 20 of 20th October 2016 (see para 5.4 No. 24 of the report that reads as follows in German): "*Der neue § 7 Abs. 5 UmwRG-E dehnt die Fehlerheilungsmöglichkeiten deutlich aus. Nach der neuen Regelung führt eine*

Verletzung materieller Rechtsvorschriften nunmehr auch in den Fällen nach § 1 Abs. 1 S. 1 Nr. 1 bis 2b oder 5 nur dann zur Aufhebung der Entscheidung, wenn sie nicht durch Entscheidungsergänzung oder ein ergänzendes Verfahren behoben werden kann. Auf diese Regelung sollte verzichtet werden, weil sie die Heilungsmöglichkeiten auf gebundene Entscheidungen ausdehnt“, accessible at: http://www.umweltrat.de/SharedDocs/Downloads/DE/04_Stellungnahmen/2016_2020/2016_10_Verbandsklage.pdf?__blob=publicationFile).

NABU is at the disposal of the Committee if any further clarifications should be required.

Thank you for considering the views of the public, in this case of one of Germany's leading environmental organizations, in determining compliance with Decision V/9h.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Claus Mayr', written in a cursive style.

Claus Mayr

NABU, Director of European Affairs