

For information purposes only

Draft Bill Aligning the Environmental Appeals Act  
and other provisions to Stipulations of European and International Law  
(version: ~~1019 June~~ April 2016)

## Draft Act of the Federal Government

### Draft Bill

#### Aligning the Environmental Appeals Act and other provisions to Stipulations of European and International Law

~~[updated departmental draft of the Federal Ministry for the Environment, Nature Conservation, Building and Nuclear Safety]~~

#### A. Problem and objective

The German provisions relating to access to justice in environmental matters fail to comply in some respects with the requirements of the UNECE Aarhus Convention and with the pertinent EU directives. The draft Bill therefore aims to eliminate the existing derogations and to align the provisions to the stipulations of European and international law.

With its Decision V/9h of 2 July 2014, the fifth session of the Meeting of the Parties on the UNECE Aarhus Convention endorsed the findings of the Compliance Committee of this Convention of 20 December 2013 (ACCC/C/2008/31), according to which the transposition of Article 9 paragraphs 2 and 3 of the UNECE Aarhus Convention into German law is regarded as failing to comply with international law in two respects. The decision of the fifth session of the Meeting of the Parties requires the scope of section 1 subsection (1), sentence 1, of the Environmental Appeals Act (*Umwelt-Rechtsbehelfsgesetz – UmwRG*) to be expanded in order to make it possible to verify the application of environmental provisions by private individuals or authorities in future. Furthermore, the restriction of the standing to bring proceedings to a legal provision “serving the environment” must be removed in order to implement Decision V/9h of the fifth session of the Meeting of the Parties within the scope of Article 9 paragraph 2 of the UNECE Aarhus Convention. By contrast, within the scope of Article 9 paragraph 3 of the UNECE Aarhus Convention, this criterion, which restricts standing to bring proceedings, will be retained. A requirement to amend German law also emerges with regard to Article 9 paragraph 3 of the UNECE Aarhus Convention from the judgment of the Federal Administrative Court of 5 September 2013 (7 C 21.12) on representative actions under environmental law in the case of ambient air quality maintenance plans, as well as from the judgment of the European Court of Justice (ECJ) of 8 March 2011 in the case of *Lesoochránárske zoskupenie VLK* (Case C-240/09).

Moreover, the draft is to transpose the judgment of the ECJ (Case C-137/14) of 15 October 2015. The ECJ ruled in this judgment that the exclusion of objections of a factual nature in the court proceedings creates an obstacle which is not provided for in Article 11 of Directive 2011/92 and in Article 25 of Directive 2010/75. The corresponding provision contained in the Environmental Appeals Act is hence to be deleted. It is however planned to include as a new section 5 of the Environmental Appeals Act a provision in accordance with which objections can be excluded if their first assertion in the court proceedings is abusive or in bad faith. In its judgment, the ECJ explicitly admitted the possibility to reject such a submission.

For information purposes only

Draft Bill Aligning the Environmental Appeals Act  
and other provisions to Stipulations of European and International Law  
(version: ~~1019 June~~ April 2016)

The exclusion of objections in administrative proceedings can, by contrast, also be retained in accordance with the judgment of the ECJ. There is therefore a need to lend concrete form to the corresponding provisions in various specialist laws. The objection deadlines are additionally to be extended by a further two weeks as a general principle in order to provide the public with an adequate period for filing objections. When it comes to complex approval proceedings in which a considerable volume of documents needs to be inspected, moreover, the possibility is created to further extend the period for filing objections to match the period which is also granted to the authorities involved for their statement. This ensures that the above amendments do not extend applicable approval deadlines.

These proposed amendments to the Environmental Appeals Act will be effected by transposing the stipulations of European and international law on a 1:1 basis.

## B. Solution

Acceptance of the draft Bill

## C. Alternatives

None; the stipulations of European and international law must be transposed into national law.

## D. Budgetary expenditure not including compliance costs

No additional burdens worth mentioning can be expected to ensue for the public budgets from the amendment of the Environmental Appeals Act. The law as it stands already enables recognised environmental associations to submit appeals. The legal situation in accordance with the provisions of European and international law is now to be adopted in national law. **Insofar as the courts incur additional effort, it will be compensated for within the existing capacities of the Federation and the Länder.** The experience in German law to date with regard to representative actions under environmental law, in particular in an international comparison, does not lead one to expect the number of court actions to increase excessively (cf. on this the research project of the Federal Environment Agency entitled “*Evaluation von Gebrauch und Wirkung der Verbandsklagemöglichkeiten nach dem Umwelt-Rechtsbehelfsgesetz (UmwRG)*”, research number 3711 18 107, published in February 2014 in the series UBA-Texte 14/2014).

**Any additional needs are to be compensated for in the respective individual plans within the aegis of the Federation in financial terms and in terms of posts.** The Act also does not lead in other respects to any additional budgetary expenditure without compliance costs.

## E. Compliance costs

### E.1 Compliance costs for citizens

No additional compliance costs arise for citizens.

### E.2 Compliance costs for industry

No additional compliance costs arise for industry; no new obligations to provide information are

For information purposes only

Draft Bill Aligning the Environmental Appeals Act  
and other provisions to Stipulations of European and International Law  
(version: ~~1019 June~~ April 2016)

introduced.

The draft Bill therefore does not constitute a case for the application of the “one in, one out” rule for new legislative projects of the Federal Government (cf. on this Cabinet resolution of 25 March 2015).

### **E.3 Compliance costs for the administration**

One may anticipate minor additional compliance costs to ensue for the Federation, the *Länder* and the local authorities as a result of Articles 1, 2, 34 and 74 of the Act, but these cannot yet be specified. Any additional needs at federal level with regard to material and human resources are to be balanced out in terms of finance and established posts in the individual plans that are affected in each case.

### **F. Further costs**

As has been explained at D above, the law as it stands already enables recognised environmental associations to submit appeals. It cannot be ruled out that the new provisions might lead to legal certainty not being achieved until later in individual cases, thus indirectly causing additional expenditure when it comes to investment projects. Should industry and enterprises incur any additional costs in such individual cases, these are however unavoidable given the provisions contained in European and international law.

No impact can be expected to be exerted on individual prices and on the price level, in particular on consumer price levels.

For information purposes only

Draft Bill Aligning the Environmental Appeals Act  
and other provisions to Stipulations of European and International Law  
(version: ~~1019 June~~ April 2016)

**Draft Bill**  
**Aligning the Environmental Appeals Act and other provisions to Stipulations of European and International Law**\*

of ...

The Bundestag has adopted the present Act with the approval of the Bundesrat:

**Article 1**  
**Amendment of the Environmental Appeals Act (*Umwelt-Rechtsbehelfsgesetz*)**

The Environmental Appeals Act in the version of the promulgation of 8 April 2013 (Federal Law Gazette [*BGBL.*] I p. 753), most recently amended by ... [... Article... of an Act of ... amending ...]... (Federal Law Gazette I page ...), shall be amended as follows:

~~[N.B.: The Amending Act Transposing the Seveso III directive causes numbers 2a and 2b to be added in section 1 subsection (1), sentence 1.]~~

1. Section 1 shall be amended as follows:

a) Subsection (1) shall be amended as follows:

aa) Sentence 1 shall be amended as follows:

aaa) The words “The present Act shall apply to appeals against” shall be replaced by the words “The present Act shall apply to appeals against the following decisions:”.

bbb) The full stop at the end of number 3 shall be replaced by a semicolon.

ccc) The following numbers 4 to 6 shall be added:

“4. Decisions on the acceptance of plans and programmes within the meaning of section 2

---

\* The present Act serves to transpose Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (codification) (OJ L 26 of 28 January 2012, p. 1), to transpose Articles 3 and 4 of Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC (OJ L 156 of 25 June 2003, p. 17), to transpose Article 25 of Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) (Recast) (OJ L 334 of 17 December 2010, p. 17), as well as to transpose Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC (OJ L 41 of 14 February 2003, p. 26).

For information purposes only

Draft Bill Aligning the Environmental Appeals Act  
and other provisions to Stipulations of European and International Law  
(version: ~~1019 June~~ April 2016)

subsection (5) of the Environmental Impact Assessment Act (*Gesetz über die Umweltverträglichkeitsprüfung*) and within the meaning of the corresponding provisions of *Land* law, for which, in accordance with

- a) Annex 3 of the Environmental Impact Assessment Act, or
- b) provisions of *Land* law,

there may be an obligation to implement a strategic environmental assessment; plans and programmes shall be excluded from this the acceptance of which is decided upon by means of a formal law;

5. administrative acts or contracts under public law by means of which regulate the permissibility of projects undertakings other than those designated in numbers 1 to 2b, applying environmental provisions of Federal law, of *Land* law, or of directly-applicable legal acts of the European Union, are permitted, and
6. administrative acts regarding monitoring or supervisory measures for the implementation or performance of decisions in accordance with numbers 1 to 5 serving to bring about compliance with environmental provisions of Federal law, of *Land* law, or of directly-applicable legal acts of the European Union."

bb) Sentence 3 shall be worded as follows:

"The following shall remain unaffected

1. section 44a of the Code of Administrative Court Procedure (*Verwaltungsgerichtsordnung*),
2. section 17 subsection (4), sentences 3 to 5, of the Repository Site Selection Act (*Standortauswahlgesetz*), as well as
3. section 15 subsection (3), sentence 2, of the Transmission System Grid Expansion Acceleration Act (*Netzausbaubeschleunigungsgesetz Übertragungsnetz*), section 17a subsection (5), sentence 1, of the Energy Industry Act (*Energiewirtschaftsgesetz*), section 15 subsection (5) and section 16 subsection (3) of the Environmental Impact Assessment Act and other corresponding legal provisions."

b) The following subsection (4) shall be added:

- "(4) Environmental legal provisions within the meaning of the present Act shall be provisions which relate to the protection of people and of the environment to 1. \_\_\_\_\_ the condition of environmental components within the meaning of section 2 subsection (3) number 1 of the Environmental Information Act (*Umweltinformationsgesetz*), or 2. \_\_\_\_\_ to factors within the meaning of section 2 subsection (3) number 2 of the Environmental Information Act."

For information purposes only

Draft Bill Aligning the Environmental Appeals Act  
and other provisions to Stipulations of European and International Law  
(version: ~~1019 June~~ April 2016)

2. Section 2 shall be amended as follows:

a) Subsection (1) shall be amended as follows:

aa) The words “that protect the environment and” shall be deleted from number 1.

bb) Number 3 shall be worded as follows:

“3. was entitled to participate in a procedure under

a) section 1 subsection (1), sentence 1, numbers 1 to 2b

b) section 1 subsection (1), sentence 1, number 4, and made a statement on that matter according to the applicable statutory provisions or, contrary to the applicable statutory provisions, was not given an opportunity to make a statement.”

cc) The following sentence shall be added:

“In the case of appeals against a decision in accordance with section 1 subsection (1), sentence 1, numbers 2a to 6, or against omission of such, the association must furthermore assert a violation of environmental legal provisions.”

b) Subsections (3) to (5) shall be replaced by the following subsections (3) and (4):

“(3) If, in accordance with the legal provisions that are in place, a decision in accordance with section 1 subsection (1), sentence 1, was neither made public nor notified to the association, an objection must be lodged or an action brought within one year after the association becomes aware, or could have become aware, of the decision. Sentence 1 shall apply mutatis mutandis if, contrary to the applicable statutory provisions, a decision in accordance with section 1 subsection (1), sentence 1, has not been taken and the association becomes aware, or could have become aware, of that circumstance. ~~Section 47 subsection (2), sentence 1, of the Code of Administrative Court Procedure shall apply to zoning plans.~~

(4) Appeals in accordance with subsection (1) shall be deemed to have been reasoned insofar as

1. the decision in accordance with section 1 subsection (1), sentence 1, numbers 1 and 2, or its omission, is in breach of legal provisions which are significant to this decision, or

For information purposes only

Draft Bill Aligning the Environmental Appeals Act  
and other provisions to Stipulations of European and International Law  
(version: ~~1019 June~~ April 2016)

2. the decision in accordance with section 1 subsection (1), sentence 1, numbers 2a to 6, or its omission, is in breach of environmental legal provisions which are significant to this decision,

and the breach relates to the objectives which the association promotes in accordance with its statutes. With regard to decisions in accordance with section 1 subsection (1), sentence 1, number 1 or 4, an obligation must furthermore exist to implement an environmental assessment within the meaning of section 1 number 1 of the Environmental Impact Assessment Act.”

3. Section 3 ~~shall be amended as follows:~~

~~a)~~ ~~s~~ Subsection (1) shall be amended as follows:

~~aa)~~ A comma and the words “, in particular for proper participation in official decision-making procedures” shall be inserted in sentence 2, number 3 after the words “performance of its duties”.

~~bb)~~ The clause after the semicolon in sentence 3 shall be worded as follows:

“in particular, it shall be stated whether the association has a main emphasis on promoting the objectives of nature conservation and landscape management, as well as the geographical area to which recognition relates.”

~~c)~~ Sentence 5 shall be worded as follows:

“It shall be published on the Internet by the competent authority.”

~~dee)~~ Sentence 6 shall be rescinded.

~~b)~~ ~~Subsections (2) and (3) shall be replaced by the following subsections (2) to (4):~~

~~“(2) A domestic association with an area of activity exceeding the territory of one *Land* may apply to the following recognition:~~

~~1. nationwide recognition by the Federation, or~~

~~2. recognition in one or in several *Länder*.~~

~~(3) Recognition shall be pronounced by the Federal Environment Agency for~~

~~1. a foreign association, and~~

~~2. a domestic association which has applied for its nationwide recognition by the Federation in accordance with subsection (2) number 1.~~

For information purposes only

Draft Bill Aligning the Environmental Appeals Act  
and other provisions to Stipulations of European and International Law  
(version: ~~1019 June~~ April 2016)

~~When recognising an association in accordance with the first sentence which has a main emphasis on encouraging the objectives of nature conservation and landscape management, this recognition shall be issued in agreement with the Federal Agency for Nature Conservation. No fees shall be charged for recognition, and no expenditure refund shall be required.~~

~~(4) Recognition shall be pronounced by the authority that is competent in accordance with *Land* law for~~

~~1. a domestic association with an area of activity not exceeding the territory of one *Land*,  
and~~

~~2. a domestic association which has applied for recognition in accordance with subsection (2) number 2.”~~

4. Section 4 shall be amended as follows:

a) The title shall be worded as follows:

**“Section 4  
Procedural errors”.**

b) The words “numbers 1 and 2” in subsection (1), sentence 1, shall be replaced by the words “numbers 1 to 2b”.

c) Subsection (3) shall be replaced by the following subsections (3) to (5):

“(3) Subsections (1) to (2) shall apply to appeals by

1. persons in accordance with section 61 number 1 of the Code of Administrative Court Procedure, and by associations in accordance with section 61 number 2 of the Code of Administrative Court Procedure, as well as to
2. associations which satisfy the requirements of section 3 subsection (1) or of section 2 subsection (2).

Subsection (1), sentence 1, number 3 shall apply **to appeals by persons and associations in accordance with sentence 1, number 1** on proviso that the rescission of a decision can only be required if the procedural error has deprived the party concerned of the possibility of participating in the decision-making process as provided for by law.

(4) Subsections (1) ~~to~~ and (2) shall apply mutatis mutandis to appeals by associations in accordance with subsection (3), sentence 1, number 2 against decisions in accordance with section 1 subsection (1), sentence 1, number 4; ~~section 46 of the Administrative Procedure Act (*Verwaltungsverfahrensgesetz*) shall apply to other procedural errors than~~



For information purposes only

Draft Bill Aligning the Environmental Appeals Act  
and other provisions to Stipulations of European and International Law  
(version: ~~1019 June~~ April 2016)

~~those designated in subsection (1) unless provided otherwise.~~ Sections 12 and 28 subsection (2) of the Regional Planning Act (*Raumordnungsgesetz*), as well as the pertinent provisions of *Land* law, shall apply insofar as the subject-matter of judicial review is land use plans in accordance with the Regional Planning Act, in derogation from sentence 1.

(5) The respective specialist legal provisions, as well as the provisions of the Administrative Procedure Act (*Verwaltungsverfahrensgesetz*), shall apply in the case of procedural errors to appeals against decisions within the meaning of section 1 subsection (1), sentence 1, numbers 3, 5 and 6.”

5. Sections 4a to 6 shall be replaced by the following sections 5 to ~~7~~8:

**“Section 5  
Conduct in the appeal proceedings that is abusive or in bad faith**

Objections lodged by If a person or an association within the meaning of section 4 subsection (3), sentence 1, ~~lodges objections~~ for the first time in the appeal proceedings, ~~these~~ shall not be taken into account if the first assertion in the appeal proceedings is abusive or in bad faith.

**Section 6**

**Period for the reasoning of actions**

A person or an association within the meaning of section 4 subsection (3), sentence 1, shall state within a period of six weeks the facts and items of evidence serving as reasoning of its action against a decision within the meaning of section 1 subsection (1), sentence 1, or its omission. Section 87b subsection (3) of the Code of Administrative Court Procedure shall apply mutatis mutandis. The period in accordance with sentence 1 may be extended by the presiding judge or by the rapporteur on request.

**Section ~~7~~6**

**Special provisions for appeals against certain decisions**

- (1) If no public notification is prescribed for decisions in accordance with section 1 subsection (1), sentence 1, number 5 or 6 in accordance with the applicable legal provisions, the competent authority shall notify the decision **with information on the appeals available** taken in the individual case by one or several individuals or associations, to be precisely designated, if this is applied for
1. by the applicant of the administrative act in accordance with section 1 subsection (1), sentence 1, number 5, or
  2. by the party to which the authority has addressed the administrative act in accordance with section 1 subsection (1), sentence 1, number 6.

For information purposes only

Draft Bill Aligning the Environmental Appeals Act  
and other provisions to Stipulations of European and International Law  
(version: ~~1019 June~~ April 2016)

The applicant shall bear the costs of notification.

- (2) The Higher Administrative Court shall decide at first instance on appeals ~~in accordance with section 1 subsection (1), sentence 1,~~ against a decision in accordance with section 1 subsection (1), sentence 1, number 4 or its omission, **even if no case exists falling under section 47 subsection (1) number 1 or 2 of the Code of Administrative Court Procedure. If an action requesting that a legal right be altered or an application for an injunction, or an application in accordance with section 47 subsection (1) of the Code of Administrative Court Procedure, is not admissible, section 47 of the Code of Administrative Court Procedure shall apply mutatis mutandis. The Higher Administrative Court shall have territorial jurisdiction in the district of which the authority which took the decision on accepting the plan or programme is domiciled with regard to plans and programmes relating to more than one of the *Länder*.**
- (3) If an association within the meaning of section 4 subsection (3), sentence 1, number 2 has had the opportunity to make a statement in proceedings in accordance with section 1 subsection (1), sentence 1, number 4, it shall be excluded from the proceedings on the appeal **in accordance with subsection (2)** with regard to all objections which it did not assert in good time in the proceedings in accordance with section 1 subsection (1), sentence 1, number 4, or which it did not assert in good time in accordance with the applicable legal provisions, but which it could have asserted. **Sentence 1 shall not apply to proceedings to draw up, amend, supplement or rescind zoning plans in accordance with section 10 of the Federal Building Code.**
- (4) **Section 73 subsection 4, sentences 3 to 6, of the Administrative Procedure Act (*Verwaltungsverfahrensgesetz*), including in cases falling under its subsection (8), shall not apply in the appeals procedure against a decision in accordance with section 1 subsection (1), sentence 1, numbers 1 to 2b.**
- (5) **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.**
- (6) Subsection (2), **sentences 1 and 3, as well as subsections (4) and (5),** shall also apply to appeals of ~~parties concerned~~**persons and associations** in accordance with section ~~614~~**4** subsection (3), sentence 1, number ~~1~~**numbers 1 and 2** of the ~~Code of Administrative Court Procedure~~.

### Section 87

#### Transitional provision

- (1) The present Act shall apply to appeals against decisions in accordance with section 1 subsection (1), sentence 1, numbers 1 and 2 which were handed down or should have been

For information purposes only

Draft Bill Aligning the Environmental Appeals Act  
and other provisions to Stipulations of European and International Law  
(version: ~~1019 June~~ April 2016)

handed down subsequent to 25 June 2005. **In derogation from sentence 1, section 6 shall only apply to those appeals specified in sentence 1 which have been collected after 28 January 2013.**

- (2) The present Act shall apply to appeals against decisions in accordance with section 1 subsection (1), sentence 1, numbers 4 to 6 which were handed down, or which should have been handed down, subsequent to 31 December 2016.
- (3) The following recognitions shall continue to apply as recognitions within the meaning of the present Act:
  1. recognitions
    - a) in accordance with section 3 of the present Act in the version of 28 February 2010,
    - b) in accordance with section 59 of the Federal Nature Conservation Act (*Bundesnaturschutzgesetz*) in the version of 28 February 2010, and
    - c) on the basis of provisions of the *Länder* within the framework of section 60 of the Federal Nature Conservation Act in the version of 28 February 2010,  
which were issued prior to 1 March 2010, as well as
  2. recognitions of the Federation and the *Länder* in accordance with section 29 of the Federal Nature Conservation Act in the version applicable until 3 April 2002.”

For information purposes only

Draft Bill Aligning the Environmental Appeals Act  
and other provisions to Stipulations of European and International Law  
(version: ~~1019 June~~ April 2016)

**Article 2**  
**Amendment of the Environmental Impact Assessment Act**  
*(Gesetz über die Umweltverträglichkeitsprüfung)*

The Environmental Impact Assessment Act in the version of the promulgation of 24 February 2010 (Federal Law Gazette I p. 94), most recently amended by ... [Article ... of an Act of ... Amending] ... (Federal Law Gazette I page ...)], shall be amended as follows:

1. Section 9 shall be amended as follows:

a) Subsection (1) shall be amended as follows:

aa) The following sentence shall be inserted after sentence 2:

“In doing so, associations that are recognised in accordance with the Environmental Appeals Act are to support the competent authority in a manner that protects the environment.”

bb) The words “subsections (4) to (7)” in sentence 4 shall be replaced by the words “subsections (5) to (7)”.

b) The following subsections (1c) to (1e) shall be inserted after subsection (1b):

“(1c) The concerned public can submit its comments in writing or for the record of the competent authority up to ~~four weeks~~ one month after the expiry of the display period. On expiry of the period for comments, all comments shall be ruled out for the proceedings on the permissibility of the project which are not based on specific titles under private law, unless the objections submitted are significant to the lawfulness of the decision. This shall be indicated in the promulgation of the display or when announcing the period for comments.

(1d) With regard to projects for which a considerable volume of documents has been submitted, the competent authority may set a longer period for comments than that stipulated in subsection (1c), sentence 1. The period for comments may not exceed the period to be set in accordance with section 73 subsection (3a), sentence 1, of the Administrative Procedure Act.

(1e) The period for comments in accordance with subsection (1c) and (1d) shall also apply to other objections.”

2. ~~The words “for the proceedings on the permissibility of the project” shall be inserted in~~ section 9a subsection (1), sentence 2, number 3 shall be amended as follows:

a) The words “for the procedure on the permissibility of the project” shall be inserted after the

For information purposes only

Draft Bill Aligning the Environmental Appeals Act  
and other provisions to Stipulations of European and International Law  
(version: ~~1019 June~~ April 2016)

word “set period”.

b) A comma and the words “, unless the objections submitted are significant for the lawfulness of the decision” shall be inserted at the end\*.

3. The following sentences shall be inserted in section 14i subsection (3) after sentence 2:

“On expiry of the period for comments, all changes shall be ruled out ~~for the proceedings for the establishment or amendment of the plan or programme~~ which are not based on specific titles under private law. This shall be pointed out in the promulgation of the interpretation, or when announcing the period for comments.”

4. Section 14l subsection (2) shall be amended as follows:

a) The words “as well as” at the end of number 2 shall be deleted.

b) The full stop at the end of number 3 shall be replaced by the words “, as well as”.

c) Following number 4 shall be added:

“4. information on appeals insofar as the acceptance of the plan or programme is not determined by law.”

5. The following sentence shall be added in section 16 subsection (4):

“Section 1 subsection (1), sentence 1, number 4 of the Environmental Appeals Act shall not be applied to a regional planning plan in accordance with number 1.5 or 1.6 of Annex 3 which shows areas for the use of wind energy or for the extraction of raw materials.”

6. The words “with the exception of section 9 subsection (1), sentence 3, subsections (1c) and (1d)” shall be inserted in section 18, sentence 2, after the word “find”.

7. The following sentence shall be added to section 19b subsection (2):

“Section 1 subsection (1), sentence 1, number 4 of the Environmental Appeals Act shall not apply to transport infrastructure planning at federal level.”

---

\* Translator’s note: The syntax of the sentence in English requires that this amendment be inserted in a different place than in the German original.

For information purposes only

Draft Bill Aligning the Environmental Appeals Act  
and other provisions to Stipulations of European and International Law  
(version: ~~1019 June~~ April 2016)

8. Section 21 subsection (6) shall be worded as follows:

“(6) The Federal Ministry of Defence and the agencies designated by it shall be responsible for tasks of enforcement and monitoring of installations which serve military purposes.”

### Article 3

#### Amendment of the Federal Immission Control Act (*Bundes-Immissionsschutzgesetz*)

The Federal Immission Control Act in the version of the promulgation of 17 May 2013 (Federal Law Gazette I p. 1274), most recently amended by ... [... Article ... of an Act Amending ... (Federal Law Gazette I page ...)], shall be amended as follows:

1. Section 10 shall be amended as follows:

a) Subsection (3) shall be amended as follows:

aa) A semicolon and the words “a period of ~~four weeks~~ one month shall apply with installations in accordance with the Industrial Emissions Directive” shall be inserted in sentence 4 after the word “inspection period”.

bb) ~~The words “the words” shall be inserted in s~~ Sentence 5 shall be worded as follows:  
“On expiry of the period for filing objections, all objections shall be ruled out for the objection procedure which are not based on special titles under private law, unless the objections submitted are significant for the lawfulness of the decision.”

b) The following subsection (3a) shall be inserted after subsection (3):

“(3a) Associations that are recognised in accordance with the Environmental Appeals Act are to support the competent authority in a manner serving environmental protection.”

2. The words “section 10 subsections (2), (3), (4), (6) and (7), sentences 2 and 3,” in section 19 subsection (2) shall be replaced by the words “section 10 subsections (2), (3), (3a), (4), (6), (7), sentences 2 and 3,”.

For information purposes only

Draft Bill Aligning the Environmental Appeals Act  
and other provisions to Stipulations of European and International Law  
(version: ~~1019 June~~ April 2016)

#### Article 4

#### Amendment of the Federal Nature Conservation Act (*Bundesnaturschutzgesetz*)

The Federal Nature Conservation Act of 29 July 2009 (Federal Law Gazette I p. 2542), most recently amended by [ ... Article ... of an Act of ... Amending ] ... (Federal Law Gazette I page ...), shall be amended as follows:

1. Section 63 shall be amended as follows:

a) Subsection (1) number 2 shall be worded as follows:

“2. prior to granting exemptions from requirements and prohibitions for the protection of marine protected areas within the meaning of section 57 subsection (2), as well as prior to the handing down of derogating decisions in accordance with section 34 subsections (3) to (5), also in conjunction with section 36, sentence 1, number 2, even if such marine areas are included in or replaced by a different decision”.

b) Subsection (2) shall be amended as follows:

aa) The following numbers 4a and 4b shall be inserted after number 4:

“4a. prior to the granting of a licence for the establishment, expansion, substantial modification or operation of a zoo in accordance with section 42 subsection (2), sentence 1,

4b. prior to the approval of an exception in accordance with section 45 subsection (7), sentence 1, by means of a statutory instrument or by a general ruling.”.

bb) The words “, as well as of derogating decisions in accordance with section 34 subsections (3) to (5), also in conjunction with section 36, sentence 1, number 2,” shall be inserted in number 5 after the words “biosphere reserves”.

2. Section 64 shall be amended as follows:

a) Subsection (1) shall be amended as follows:

aa) The words “numbers 5 to 7” in the first part of the sentence shall be replaced by the words “numbers 4a to 7”.

bb) Number 3 shall be worded as follows:

“3. was entitled to participation in accordance with section 63 subsection (1) number 2 or subsection (2) numbers 4a to 5, and the association expressed an opinion on the matter or was given no opportunity to express an opinion; this shall also apply to

For information purposes only

Draft Bill Aligning the Environmental Appeals Act  
and other provisions to Stipulations of European and International Law  
(version: ~~1019 June~~ April 2016)

participation in accordance with section 63 subsection (1) number 3 and subsection (2) number 6 where the application of the Federal Nature Conservation Act is not ruled out for such a plan licensing procedure in accordance with section 1 subsection (3) of the Environmental Appeals Act.”

- b) The words “section 1 subsection (1) sentence 4” in subsection (2) shall be replaced by the words “section 1 subsection (1), sentences 3 and 4,” and the words “section 2 subsections (3) and (4), sentence 1,” by the words “section 2 subsection (3), sentence 1, and section 5”.

### Article 5

#### Amendment of the Code of Administrative Court Procedure (*Verwaltungsgerichtsordnung*)

Section 47 subsection (2a) of the Code of Administrative Court Procedure in the version of the promulgation of 19 March 1991 (Federal Law Gazette I p. 686), most recently amended by Article 3 of the Act of 21 December 2015 (Federal Law Gazette I p. 2490), shall be rescinded.

### Article 6

#### Amendment of the Federal Building Code (*Baugesetzbuch*)

The Federal Building Code in the version of the promulgation of 23 September 2004 (Federal Law Gazette I p. 2414), most recently amended by Article 6 of the Act of 20 October 2015 (Federal Law Gazette I p. 1722), shall be amended as follows:

1. Section 3 shall be amended as follows:

- a) Subsection (2), sentence 2, clause 2 shall be worded as follows:

“it shall be indicated in so doing that comments may be submitted during the display period, and that comments which are not submitted in good time cannot be taken into consideration when resolving on the development plan.”

- b) The following subsection (3) shall be added after subsection (2):

“(3) In addition to the notice in accordance with subsection (2), sentence 2, clause 2, it shall be additionally indicated with land use plans that an association within the meaning of section 4 subsection (3), sentence 1, number 2 of the Environmental Appeals Act in appeal proceedings in accordance with section 7 subsection (2) of the Environmental Appeals Act in accordance with section 7 subsection (3), sentence 1, of the Environmental Appeals Act is ruled out with all objections which it has not asserted within the display period, or not in good time, but which it could have asserted.”



For information purposes only

Draft Bill Aligning the Environmental Appeals Act  
and other provisions to Stipulations of European and International Law  
(version: ~~1019 June~~ April 2016)

2. The words “or the notice in accordance with section 3 subsection (2), sentence 2, clause 2 (also in conjunction with section 13 subsection (2), sentence 2, and section 13a subsection (2) number 1) was missing” shall be deleted from section 214 subsection (1), sentence 1, number 2 clause 2.

## Article 7

### **Amendment of the Federal Mining Act**

The Federal Mining Act of 13 August 1980 (Federal Law Gazette Part I p. 1310), most recently amended by Article 11 of the Act of 24 May 2016 (Federal Law Gazette Part I p. 1217), shall be amended as follows:

1. The following words shall be inserted in the table of contents after the words regarding section 5:

“Section 5a Public announcement”.

2. The following section 5a shall be inserted after section 5:

#### **Section 5a**

#### **Public announcement**

- (1) Decisions which are handed down in implementation of the present Act, and to which section 1 subsection (1), sentence 1, number 1, 5 or 6 of the Environmental Appeals Act applies, may also be publicly announced by the competent authority. Provisions on the announcement of a decision by means of serving of documents, as well as other provisions on public announcement, shall remain unaffected thereby.
- (2) Public announcement shall be effected by virtue of the enacting part of the decision and the information on appeals being published in the official publication gazette of the competent authority, and furthermore in local daily newspapers which are disseminated in the area in which the decision is likely to take effect; conditions shall be indicated. Insofar as the decision is not published in full, the decision, including concomitant plans and the reasoning, shall be displayed for two weeks after the announcement with information on appeals. Once two weeks have passed after the announcement, the decision shall also be deemed to have been served on those who are entitled to appeal in accordance with the Environmental Appeals Act; this shall be indicated in the announcement. After the public announcement, the decision can be requested in writing from the associations designated in sentence 3 to whom the decision was to be announced until the end of the appeals period. The public announcement shall state where and when the decision can be inspected in accordance with sentence 2 and requested in accordance with sentence 4.”

For information purposes only

Draft Bill Aligning the Environmental Appeals Act  
and other provisions to Stipulations of European and International Law  
(version: ~~1019 June~~ April 2016)

#### **Article 8**

##### **Amendment of the General Rail Act (*Allgemeines Eisenbahngesetz*)**

The General Rail Act of 27 December 1993 (Federal Law Gazette Part I pp. 2378 and 2396; 1994 Part I p. 2439), most recently amended by Article 1 of the Act of 28 May 2015 (Federal Law Gazette Part I p. 824), shall be amended as follows:

1. The words “section 9 subsection (1), sentence 3,” in section 18a number 2 shall be replaced by the words “section 9 subsection (1), sentence 4,”.
2. The words “section 9 subsection (1), sentence 3,” in section 18d, sentence 1, shall be replaced by the words “section 9 subsection (1), sentence 4,”.

#### **Article 9**

##### **Amendment of the Federal Highways Act (*Bundesfernstraßengesetz*)**

The Federal Highways Act in the version of the announcement of 28 June 2007 (Federal Law Gazette Part I p. 1206), most recently amended by Article 466 of the Ordinance of 31 August 2015 (Federal Law Gazette Part I p. 1474), shall be amended as follows:

1. The words “section 9 subsection (1), sentence 3,” in section 17a number 2 shall be replaced by the words “section 9 subsection (1), sentence 4,”.
2. The words “section 9 subsection (1), sentence 3,” in section 17d, sentence 1, shall be replaced by the words “section 9 subsection (1), sentence 4,”.

#### **Article 10**

##### **Amendment of the Federal Waterways Act (*Bundeswasserstraßengesetz*)**

The Federal Waterways Act in the version of the announcement of 23 May 2007 (Federal Law Gazette Part I p. 962; 2008 Part I p. 1980), most recently amended by Article 17 of the Act of 24 May 2016 (Federal Law Gazette Part I p. 1217), shall be amended as follows:

1. The words “section 9 subsection (1), sentence 3,” in section 14a number 2 shall be replaced by the words “section 9 subsection (1), sentence 4,”.
2. The words “section 9 subsection (1), sentence 3,” in section 14d, sentence 1, shall be replaced by the words “section 9 subsection (1), sentence 4,”.

For information purposes only

Draft Bill Aligning the Environmental Appeals Act  
and other provisions to Stipulations of European and International Law  
(version: ~~1019 June~~ April 2016)

#### **Article 11**

##### **Amendment of the Civil Aviation Act (*Luftverkehrsgesetz*)**

The Civil Aviation Act in the version of the announcement of 10 May 2007 (Federal Law Gazette Part I p. 698), most recently amended by Article 21 of the Act of 19 February 2016 (Federal Law Gazette Part I p. 254), shall be amended as follows:

1. The words “section 9 subsection (1), sentence 3,” in section 6 subsection (7) shall be replaced by the words “section 9 subsection (1), sentence 4,”.
2. The words “section 9 subsection (1), sentence 3,” in section 10 subsection (2), sentence 1, number 3 shall be replaced by the words “section 9 subsection (1), sentence 4,”.

#### **Article 12**

##### **Amendment of the Magnetic Suspension Train Planning Act (*Magnetschwebebahnplanungsgesetz*)**

The Magnetic Suspension Train Planning Act of 23 November 1994 (Federal Law Gazette Part I p. 3486), most recently amended by Article 510 of the Ordinance of 31 August 2015 (Federal Law Gazette Part I p. 1474), shall be amended as follows:

1. The words “section 9 subsection (1), sentence 3,” in section 2 number 1 shall be replaced by the words “section 9 subsection (1), sentence 4,”.
2. The words “section 9 subsection (1), sentence 3,” in section 2c, sentence 1, shall be replaced by the words “section 9 subsection (1), sentence 4,”.

#### **Article 13**

##### **Amendment of the Energy Industry Act (*Energiewirtschaftsgesetz*)**

The Energy Industry Act of 7 July 2005 (Federal Law Gazette Part I pp. 1970 and 3621), most recently amended by Article 9 of the Act of 19 February 2016 (Federal Law Gazette Part I p. 254), shall be amended as follows:

1. The words “section 9 subsection (1), sentence 3,” in section 43a number 3 shall be replaced by the words “section 9 subsection (1), sentence 4,”.
2. The words “section 9 subsection (1), sentence 3,” in section 43d, sentence 1, shall be replaced by the words “section 9 subsection (1), sentence 4,”.

For information purposes only

Draft Bill Aligning the Environmental Appeals Act  
and other provisions to Stipulations of European and International Law  
(version: ~~1019 June~~ April 2016)

#### Article 14

#### Amendment of the Ordinance on the Licensing Procedure (*Verordnung über das Genehmigungsverfahren*)

~~In~~ Section 11a subsection (4), sentence 1, of the Ordinance on the Licensing Procedure (*Verordnung über das Genehmigungsverfahren*) in the version of the promulgation of 29 May 1992 (Federal Law Gazette I p. 1001), most recently amended by Article ~~...~~5 of the Ordinance of ~~28 April 2015...~~ (Federal Law Gazette I p. ~~670...~~), shall be amended as follows ~~the words “the words” shall be inserted after the words “period for filing objections”~~:

1. The words “for the licensing procedure” shall be inserted after the words “period for filing objections”.

2. A comma and the words “, unless the objections submitted are significant for the lawfulness of the decision” shall be inserted at the end\*.

#### Article 158

#### Amendment of the Nuclear Licensing Procedure Ordinance (*Atomrechtliche Verfahrensverordnung*)

The Nuclear Licensing Procedure Ordinance in the version of the promulgation of 3 February 1995 (Federal Law Gazette I p. 180), most recently amended by Article 4 of the Act of 9 December 2006 (Federal Law Gazette I p. 2819), shall be amended as follows:

1. ~~The words “the words” shall be inserted in s~~Section 7 subsection (1), sentence 2, shall be amended as follows: ~~after the word “admitted”~~.

a) The words “for the licensing procedure” shall be inserted after the words “shall be ruled out”.

b) A comma and the words “, unless the objections submitted are significant for the lawfulness of the decision” shall be inserted at the end\*.

2. ~~The words “the words” shall be inserted after the words “after expiration of the period for filing objections” in s~~Section 7a subsection (1), sentence 3, shall be amended as follows.

a) The words “for the licensing procedure” shall be inserted after the words “on expiry of the period for filing objections”.

\* Translator’s note: The syntax of the sentence in English requires that this amendment be inserted in a different place than in the German original.

\* Translator’s note: The syntax of the sentence in English requires that this amendment be inserted in a different place than in the German original.

For information purposes only

Draft Bill Aligning the Environmental Appeals Act  
and other provisions to Stipulations of European and International Law  
(version: ~~1019 June~~April 2016)

~~Article 9~~

b) A comma and the words “, unless the objections submitted are significant for the lawfulness of the decision” shall be inserted at the end\*.

**Article 169**

**Amendment of the Environmental Information Act (*Umweltinformationsgesetz*)**

Section 10 subsection (2), sentence 1, number 6 of the Environmental Information Act in the version of the promulgation of 27 October 2014 (Federal Law Gazette I p. 1643) shall be worded as follows:

“6. summary description and evaluation of the environmental impact in accordance with sections 11 and 12 of the Environmental Impact Assessment Act in the version of the promulgation of 24 February 2010 (Federal Law Gazette I p. 94) in the respectively applicable version, and risk evaluations with regard to environmental components in accordance with section 2 subsection (3) number 1”.

**Article 170**

**Permission to announce**

The Federal Ministry for the Environment, Nature Conservation, Building and Nuclear Safety can announce the wording of the Environmental Appeals Act and of the Federal Immission Control Act in the version valid in each case from ... [insert: date of coming into force in accordance with Article ~~181~~ of the present Act] in the Federal Law Gazette.

**Article 181**

**Coming into force**

The present Act shall come into force on the day after its promulgation.

---

\* Translator’s note: The syntax of the sentence in English requires that this amendment be inserted in a different place than in the German original.

For information purposes only

Draft Bill Aligning the Environmental Appeals Act  
and other provisions to Stipulations of European and International Law  
(version: ~~1019 June~~ ~~April~~ 2016)

## Reasoning

### A. General part

#### I. The objectives of the Act

Some of the German provisions relating to access to justice in environmental matters fail to comply with the requirements of the Convention of the United Nations Economic Commission for Europe (UNECE) on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) and of the pertinent EU directives. The draft Bill therefore aims to eliminate the existing shortcomings and to align the provisions to the stipulations of European and international law.

Firstly, Decision V/9h of the fifth session of the Meeting of the Parties on the Aarhus Convention of 2 July 2014 on Article 9 paragraphs 2 and 3 of this Convention are implemented. Furthermore, the draft takes the judgment of the ECJ (case C-137/14) of 15 October 2015 into account. All amendments are effected by virtue of the stipulations of European and international law being transposed on a 1:1 basis.

#### II. The main content of the Act

With its Decision V/9h of 2 July 2014, the fifth session of the Meeting of the Parties on the ~~UNECE~~ Aarhus Convention confirmed a previous decision of the Compliance Committee of this Convention of 20 December 2013 (ACCC-/C/2008/31) according to which the transposition of Article 9 paragraphs 2 and 3 of the Aarhus Convention in Germany is in breach of international law in two respects. One objective of the draft Bill is to create conformity between the German provisions on access to justice in environmental matters and the requirements contained in Article 9 paragraphs 2 and 3 of the ~~UNECE~~-Aarhus Convention.

In order to transpose Decision V/9h of the session of the Meeting of the Parties, within the scope of Article 9 paragraph 2 of the ~~UNECE~~-Aarhus Convention, the restriction contained in section 2 subsections (1) and (5) of the Environmental Appeals Act to a legal provision “serving the environment” is to be deleted without replacement. By contrast, within the scope of Article 9 paragraph 3 of the ~~UNECE~~-Aarhus Convention, this criterion is to be retained (cf. section 2 subsection (1), sentence 2, of the Environmental Appeals Act (new)).

A further need to effect an amendment emerges from Decision V/9h of the session of the Meeting of the Parties because of the necessity to fully transpose Article 9 paragraph 3 of the ~~UNECE~~-Aarhus Convention into German law. To this end, the scope in section 1 subsection (1), sentence 1, of the Environmental Appeals Act is to be expanded in accordance with the stipulations of the fifth session of the Meeting of the Parties of the ~~UNECE~~-Aarhus Convention to include the new numbers 4 to 6 in order to make the application of environmental provisions by private individuals and authorities verifiable in the future. The possibility of a representative action under environmental law is hence extended to cover decisions on accepting plans and programmes in which an obligation to implement a strategic environmental assessment can exist, and furthermore to include decisions on the permissibility of other projects than industrial plant and infrastructural measures within the meaning of

For information purposes only

Draft Bill Aligning the Environmental Appeals Act  
and other provisions to Stipulations of European and International Law  
(version: ~~1019 June~~ April 2016)

the Directive on the assessment of the effects of certain public and private projects on the environment and of the EU's Industrial Emissions Directive, in which provisions of environmental law apply, as well as to decisions on official monitoring or supervisory measures in accordance with provisions of environmental law.

As well as from Decision V/9h of the session of the Meeting of the Parties, a need for an amendment in order to transpose Article 9 paragraph 3 of the ~~UNECE~~ Aarhus Convention into German law also emerges from the judgment of the Federal Administrative Court of 5 September 2013 (7 C 21.12) on the representative action under environmental law under ambient air quality maintenance plans, as well as from the judgment of the European Court of Justice of 8 March 2011 in the case of *Lesoochránárske zoskupenie VLK* (Case C-240/09). This requirement for an amendment is adequately accommodated by the expansion of the scope that has been described.

Moreover, the draft is to transpose the judgment of the ECJ (Case C-137/14) of 15 October 2015. The ECJ ruled in this judgment that the exclusion of objections of a factual nature in the court proceedings creates an obstacle which is not provided for in Article 11 of Directive 2011/92 or in Article 25 of Directive 2010/75. The corresponding provision contained in the Environmental Appeals Act is hence to be deleted. There is however provision for clarification by means of a new section 5 of the Environmental Appeals Act in accordance with which objections can be excluded if their first assertion in the court proceedings is abusive or in bad faith. In its judgment, the ECJ explicitly admitted the possibility to reject such a submission.

The exclusion of objections in administrative proceedings can, by contrast, also be retained in accordance with the judgment of the ECJ. There is therefore a need to lend concrete form to the corresponding provisions in various specialist laws. The objection deadlines are additionally to be extended by a further two weeks as a general principle in order to provide the public with an adequate period for filing objections. When it comes to complex approval proceedings in which a considerable volume of documents needs to be inspected, moreover, the possibility is created to further extend the period for filing objections to match the period which is also granted to the authorities involved for their statement. This ensures that the above amendments do not extend applicable approval deadlines.

### III. Alternatives

None; the stipulations of European and international law must be transposed into national law.

### IV. Legislative powers of the Federation

The legislative power of the Federation emerges as follows:

- Article 1 (Amendment of the Environmental Appeals Act): Article 74 paragraph 1 number 1 of the Basic Law (court procedure);
- Article 2 (Amendment of the Environmental Impact Assessment Act): Article 73 paragraph 1 numbers 1, 6, 6a, 7 and 14 of the Basic Law (defence, air transport, railways, telecommunications services and nuclear energy) and Article 74 paragraph 1 numbers 11, 17, 18, 21, 22, 23, 24, 29, 31 and 32 of the Basic Law (law relating to economic matters, agriculture and forestry, fishing, preservation of the coasts, land law, sea routes and inland

For information purposes only

Draft Bill Aligning the Environmental Appeals Act  
and other provisions to Stipulations of European and International Law  
(version: ~~1019 June~~ April 2016)

waterways used for general traffic, construction and maintenance of long-distance highways, track railways, waste management, air pollution control, nature conservation, regional planning and management of water resources);

- Article 3 (Amendment of the Federal Immission Control Act): Article 74 paragraph 1 number 24 of the Basic Law (air pollution control, noise abatement);
- Article 4 (Amendment of the Federal Nature Conservation Act): Article 74 paragraph 1 numbers 1 and 29 of the Basic Law (court procedure, nature conservation);
- Article 5 (Amendment of the Code of Administrative Court Procedure): Article 74 paragraph 1 number 1 of the Basic Law (court procedure);
- Article 6 (Amendment of the Federal Building Code): Article 74 paragraph 1 number 18 of the Basic Law (land law);
- Article 7 (Amendment of the Federal Mining Act): Article 74 paragraph 1 number 11 (law relating to economic matters)
- Article 8 (Amendment of the General Rail Act): Article 73 paragraph 1 number 6a (railways) and Article 74 paragraph 1 number 23 (track railways);
- Article 9 (Amendment of the Federal Highways Act): Article 74 paragraph 1 number 22 (construction and maintenance of long-distance highways);
- Article 10 (Amendment of the Federal Waterways Act): Article 74 paragraph 1 number 21 (sea routes and inland waterways used for general traffic);
- Article 11 (Amendment of the Civil Aviation Act): Article 73 paragraph 1 number 6 (air transport);
- Article 12 (Amendment of the Magnetic Suspension Train Planning Act): Article 73 paragraph 1 number 6a (railways) and Article 74 paragraph 1 number 23 (track railways);
- Article 13 (Amendment of the Energy Industry Act): Article 74 paragraph 1 number 11 (law relating to economic matters).

The amendments to the Ordinance on the Licensing Procedure, as well as of the Nuclear Licensing Procedure Ordinance (Articles [147](#) and [158](#)), are consequential amendments of the appropriate provisions on the exclusion of objections in the abovementioned statutory provisions.

The amendment of the Environmental Information Act in Article [169](#) relates exclusively to the provision of environmental information to the public which is available to agencies of the federal public administration. The provision is hence subject to the Federation's general legislation.

Insofar as, in Article [2](#), [7](#), [9](#) and [13](#) of the draft Bill, legislative power in accordance with Article 74 paragraph 1 numbers 11 and 22 of the Basic Law is taken up, the need arises for a provision under federal law in accordance with Article 72 paragraph 2 of the Basic Law, given that the provisions on the maintenance of legal and economic unity serve the interest of the State as a whole (cf. on this the comments from Bundestag printed paper 17/10957, page 11), [as well as Bundestag printed paper 15/1657, p. 17 and Bundestag printed paper 18/4655, p. 26](#)).

This emerges with regard to Article 7 from the fact that the provision on the public announcement of decisions on mining acts as a supplement to the procedural provisions regulated under Federal law in the Federal Mining Act and in the Administrative Procedure Act. The public announcement



For information purposes only

Draft Bill Aligning the Environmental Appeals Act  
and other provisions to Stipulations of European and International Law  
(version: ~~1019 June~~ ~~April~~ 2016)

furthermore has nationwide effect, and is significant to access to justice, and is hence to be regulated uniformly nationwide in the interest of safeguarding legal and economic unity.

## V. Compliance with the law of the European Union and with international treaties

The draft Bill serves to transpose secondary law of the EU, and is in compliance with the law of the EU, in particular with Directives 2011/92/EU, 2010/75/EU, 2003/4/EC and 2001/42/EC. The draft Bill is also in compliance with international treaties, in particular with the ~~UNECE~~-Aarhus Convention, which the Federal Republic of Germany has ratified.

## VI. Sustainability-related aspects

The draft Bill leads to improvements in terms of civil society participation and responsibility (reference to *Grundlagen der Nachhaltigkeitsstrategie, Fortschrittsbericht* page 27 I 5. (d); *Managementregel 9 "Sozialen Zusammenhalt stärken"* [Foundations of the Sustainability Strategy, Progress Report; Management rule 9 "Strengthen social cohesion"], as well as to Agenda 21, Preamble to Section III: "Strengthening the role of major groups"). The aim is to enhance the procedural rights of citizens and recognised environmental associations. The draft Bill transposes the third pillar of the ~~UNECE~~-Aarhus Convention – Access to justice in environmental matters – into national law on a broader foundation than was previously the case. Active participation by citizens and recognised environmental associations can effectively counter problems in the implementation and application of national and European environmental law. The opening of effective appeals that are available to individuals and environmental associations supplements and completes the existing participation rights in planning and licensing procedures. This particularly applies to acts, including omissions, which can damage not only individual assets, but also environmental assets of the public. Improved legal protection strengthens the enforcement of the demands of environmental law, and hence the interests of the environment as one of the major components of sustainable development.

## VII. Budgetary expenditure not including compliance costs

No additional burdens worth mentioning can be expected to ensue for the public budgets from the amendment of the Environmental Appeals Act. The law as it stands already enables recognised environmental associations to submit appeals. The legal situation in accordance with the provisions of European and international law is now to be adopted in national law. **Insofar as the courts incur additional effort, it will be compensated for within the existing capacities of the Federation and the Länder.** The experience in German law to date with regard to representative actions under environmental law, in particular in an international comparison, does not lead one to expect the number of court actions to increase excessively (cf. ~~on this~~ **on the previous law the research** project of the Federal Environment Agency entitled "*Evaluation von Gebrauch und Wirkung der Verbandsklagemöglichkeiten nach dem Umwelt-Rechtsbehelfsgesetz (UmwRG)*", research number 3711 18 107, published in February 2014 in the series UBA-Texte 14/2014), according to which a total of 58 sets of court proceedings of recognised environmental associations were identified in

For information purposes only

Draft Bill Aligning the Environmental Appeals Act  
and other provisions to Stipulations of European and International Law  
(version: ~~1019 June~~ April 2016)

accordance with the Environmental Appeals Act in the period from 15 December 2006 to 15 April 2012. This leads by way of calculation to an average of roughly twelve sets of proceedings per year). Any additional needs are to be compensated for in the respective individual plans within the aegis of the Federation in financial terms and in terms of posts. The Act ~~also~~ does not lead in other respects to any additional budgetary expenditure without compliance costs.

### VIII. Compliance costs

~~{N.B.: VIII currently only contains tendency statements, and must be finalised after the hearings at Länder and association level}~~

No additional compliance costs arise for industry as a result of the draft Bill. No new obligations to provide information are introduced (cost of bureaucracy) for industry. The draft Bill therefore does not constitute a case for the application of the “one in, one out” rule for new legislative projects of the Federal Government (cf. on this Cabinet resolution of 25 March 2015).

No additional compliance costs ultimately arise for citizens as a result of the draft Bill.

The additional compliance costs for the administration (cost of enforcement) cannot be calculated because of the only slight additional burden at federal level. The additional compliance costs are estimated to be slight at *Land* level, including the local authorities, and cannot be calculated by the *Länder*. Any additional needs at federal level with regard to material and human resources are to be balanced out in terms of finance and established posts in the individual plans that are affected in each case.

For information purposes only

Draft Bill Aligning the Environmental Appeals Act  
and other provisions to Stipulations of European and International Law  
(version: ~~1019 June~~ April 2016)

The following table contains an overview of the individual stipulations of the draft Bill leading to compliance costs:

No.	Provision	Stipulation	Addressees of the provision (citizens, industry, administration)	Change in compliance costs in 000s of €
1	section 3 subsection (1), sentence 5, of the Environmental Appeals Act	publication on the website of the recognition authority	administration	0
<del>12</del>	section 6 subsection (1) of the Environmental Appeals Act	announcement on application	administration, industry	0, 0
<del>23</del>	section 9 subsection (1c), sentence 3, of the Environmental Impact Assessment Act	additional obligation to report in the context of public notification	administration	0
<del>34</del>	section 9 subsection (1d) of the Environmental Impact Assessment Act	power of the authority to extend the period for comments	administration	0
<del>45</del>	section 14i subsection (3), sentence <del>54</del> , of the Environmental Impact Assessment Act	additional obligation to report in the context of public notification	administration	0
<del>56</del>	section 14l subsection (2) number 4 of the Environmental Impact Assessment Act	additional obligation to provide information about appeals	administration	0
<del>67</del>	section 63 subsection (1) number 2 of the Federal Nature Conservation Act	addition to the obligation of participation	administration	<del>0</del>
<del>78</del>	section 63 subsection (2) number 4a of the Federal Nature Conservation Act	addition to the obligation of participation	administration	<del>0</del>
<del>89</del>	section 63 subsection (2) number 4b of the Federal Nature Conservation Act	addition to the obligation of participation	administration	<del>0</del>
<del>109</del>	section 63 subsection (2) number 5 of the Federal Nature Conservation Act	addition to the obligation of participation	administration	<del>0</del>

For information purposes only

Draft Bill Aligning the Environmental Appeals Act  
and other provisions to Stipulations of European and International Law  
(version: ~~1019 June~~ April 2016)

11	section 5a subsection (1), sentence 1, of the Federal Mining Act	public announcement	administration	0
----	---------------------------------------------------------------------------	---------------------	----------------	---

The estimation of the compliance costs is based on the following considerations underlying the information provided by the *Länder*:

re No. 1 (section 36 subsection (1), sentence 5, of the Environmental Appeals Act):

The amendment of the provision orders the recognised environmental associations to be published on the website of the recognition authority which is responsible in the individual case. This is already in line with administrative practice at federal level and in most of the *Länder*. Setting this in the law serves to ensure transparency. If the recognition authority were to nonetheless incur any effort in enforcement in individual cases as a result of this, this is to be estimated as slight at most. Furthermore, the existing discretion arrangement on public announcement is deleted, which means that slight effort in enforcement will cease to apply in future. Because of the dependence on any recognition applications, it is also not possible to provide a numerical estimate.

Re numbers 2 and 11 (section 6 subsection (1) of the Environmental Appeals Act and section 5a subsection (1), sentence 1, of the Federal Mining Act):

The provision contained in section 6 subsection (1) of the Environmental Appeals Act ~~The provision~~ enables the competent authority, on application by a private party concerned, to announce an administrative decision of which it is the addressee. It is to be anticipated that this option will only be taken up in special cases, but not regularly. The compliance costs which this entails for the administration are furthermore to be estimated as slight since the authority must comply with a specific request and the notification itself will not give rise to any significant compliance costs. In the same way, for industry as a private party concerned, the effort involved in making the application for notification, which can be lodged informally – and which will only be made use of in exceptional cases – is to be considered as slight. The costs which this entails are minor as a rule in comparison to the other procedural costs which private parties concerned are to pay. There is no obligation to use this procedural tool. In fact, such an application opens up the possibility, if proper information on appeals is provided within the public notification, to obtain legal certainty early, and may hence save the applicants additional costs ensuing from such legal uncertainty. ~~Something similar applies with regard to the effort in enforcement incurred by the administration in respect of the provision contained in section 5a subsection (1), sentence 1, of the Federal Mining Act: Section 5a subsection (1), sentence 1, of the Federal Mining Act also only opens up a possibility (discretion), and not an obligation, for the authority to make a public announcement. Even were one to presume that regular use is made of this possibility, it does not entail any relevant additional effort for the competent authority, but rather a reduction in the effort since, in return, the need for a large number of individual announcements (frequently serving of documents) ceases to apply.~~

re Nos. 32 and 45 (section 9 subsection (1c), sentence 3, and section 14i subsection (3), sentence 54, of the Environmental Impact Assessment Act):

The public participation procedure already commences under the law as it stands with public notification by the authority in accordance with the Environmental Impact Assessment Act. The

For information purposes only

Draft Bill Aligning the Environmental Appeals Act  
and other provisions to Stipulations of European and International Law  
(version: ~~1019 June~~ April 2016)

envisioned legal amendments make a slight addendum to the text of the notification to include information on the stipulations in accordance with section 9 subsection (1c), sentences 1 and 2, in accordance with ~~and~~ section 14i subsection (~~32~~), sentence ~~53~~, of the Environmental Impact Assessment Act. ~~The~~ ise legal amendments are ~~is~~ declaratory in nature to some degree, given that only the general stipulation contained in section 74 subsection (3), sentence 4, of the Administrative Procedure Act (*VwVfG*), with the necessary restrictions as necessitated by the judgment of the ECJ of 15 October 2015, are transferred into the specialist provisions of environmental law. No additional compliance costs (enforcement costs) are created for the administration in this regard. Also in other respects, the associated compliance costs for the administration are to be estimated as slight since it will be sufficient as a rule to adjust the models and forms of the competent authorities used for public participation.

re No. 43 (section 9 subsection (1d) of the Environmental Impact Assessment Act):

Section 9 subsection (1d) of the Environmental Impact Assessment Act grants to the competent authority the power to determine in advance a longer period for the affected public to make comments. This procedural decision, which is at the discretion of the competent authority, can only be considered in cases in which, as a rule, the number of documents to be displayed is considerable and it can be time-consuming to drawing up statements (cf. re Article 2 number 1 (b)). The additional effort which this entails for the authority can hence only arise in such exceptional cases in which particularly large sets of documents need to be publicly displayed. This can only be expected to occur with major infrastructural projects. The number of cases which this entails will hence be small.

re No. 56 (section 14l subsection (2) number 4 of the Environmental Impact Assessment Act):

In accordance with the applicable section 14l of the Environmental Impact Assessment Act, the acceptance of a plan or programme requiring an SEA is to be announced publicly, after which the information in accordance with subsection (2) of this provision is to be displayed for inspection. The effect of the envisioned legal amendment is that part of this information which is to be displayed is additionally to be information on appeals if an appeal can be considered in accordance with the amended Environmental Appeals Act.

Compliance costs for the administration that are entailed by providing information on appeals are to be estimated as slight since, with regard to the information on appeals which is also to be displayed, it will be sufficient as a rule to use model information on appeals from the competent authority.

re Nos. ~~6-7, 8,~~ and 109 (section 63 subsection (1) number 2 and subsection (2) numbers 4, 4a and 5 of the Federal Nature Conservation Act):

Section 63 subsection (1) number 2 and subsection (2) numbers 4, 4a and 5 of the Federal Nature Conservation Act expand the rights of participation of recognised nature conservation associations (specifically, the opportunity to make a statement and to inspect relevant expert reports). This can lead to a slight additional effort on the part of the administration (in cases coming under section 63 subsection (1) number 2 of the Federal Nature Conservation Act for federal level, otherwise for the *Länder*), because for instance documents need to be made available and any statements examined. This is solely an effort that is expended as warranted because such rights of participation are only to be

For information purposes only

Draft Bill Aligning the Environmental Appeals Act  
and other provisions to Stipulations of European and International Law  
(version: ~~1019 June~~ April 2016)

opened up if corresponding decision-making proceedings are initiated which are listed in section 63 of the Federal Nature Conservation Act.

The changes to the case constellations of section 63 subsection (1) number 2 and of section 63 subsection (2) number 5 of the Federal Nature Conservation Act only adjust the Federal Nature Conservation Act to the law as it stands because, in accordance with the case-law of the Federal Administrative Court (see judgment of 10 April 2013 – 4 C 3.12), derogation decisions under nature conservation law in accordance with section 34 subsections (3) to (5) of the Federal Nature Conservation Act have already been deemed to be equivalent to exemptions under the law on nature conservation within the meaning of this provision, and this is accordingly complied with in administrative practice.

With regard to the new case constellations of section 63 subsection (2) numbers 4a and 4b of the Federal Nature Conservation Act, no additional effort for the administration can be ascertained, and would at most be estimated as slight for the following reasons: Section 63 subsection (2) number 4a of the Federal Nature Conservation Act links to section 42 subsection (2), sentence 1, of the Federal Nature Conservation Act. To this end, the database of the Federal Statistical Office states a number of 110 cases per year. On the basis of this number of cases, no additional effort for the administration is measurable, and would at most be estimated as slight because some of the information obtained via the participation would otherwise also have to be obtained and evaluated via the authorities' official investigations in the decision-making procedure. This may on the contrary actually lead to a reduction in the burden on the administration in individual cases.

Section 63 subsection (2) number 4b of the Federal Nature Conservation Act links to section 45 subsection (7), sentence 1, of the Federal Nature Conservation Act. In this regard, the database of the Federal Statistical Office states a number of 3,720 cases per year. On the basis of this number of cases, no additional effort for the administration is measurable, and would at most be estimated as slight, because some of the information obtained via the participation would otherwise also have to be obtained and evaluated via the authorities' official investigations in the decision-making procedure. This may on the contrary actually lead to a reduction in the burden on the administration in individual cases.

#### **IX. Further costs**

As stated at item VII, the law as it stands already largely enables recognised environmental associations to lodge appeals. It cannot be ruled out that the new provisions might lead to legal certainty not being achieved until later in individual cases, thus indirectly causing additional expenditure when it comes to investment projects. Should industry and enterprises incur any additional costs in such individual cases, these are however unavoidable given the provisions contained in European and international law.

No impact can be expected to be exerted on individual prices and on the price level, in particular on consumer price levels.

For information purposes only

Draft Bill Aligning the Environmental Appeals Act  
and other provisions to Stipulations of European and International Law  
(version: ~~1019 June~~ ~~April~~ 2016)

**X. Legal and administrative simplification**

The legal situation in accordance with the stipulations of European and international law is now to be adopted in national law by means of the draft Bill.

**XI. Gender-specific impact**

The draft Bill has no equality-specific impact.

**XII. Demography check**

The project is not expected to have any demographic effects, including on developments in births, the age structure, immigration, the regional spread of the population or the relationship between the generations.

**XIII. Temporal application; sunset clause**

The Act cannot have a sunset clause given its goal of transposing mandatory stipulations of the law of the European Union and of international law into German law. Time-limited application would therefore be counter to the objective of the Act.

**B. Regarding the individual provisions**

**re Article 1 (Amendment of the Environmental Appeals Act)**

**re number 1 (section 1)**

re (a) aa)

The editorial addition to the introduction of sentence 1 makes it clear that the term “decision” in the context of the Environmental Appeals Act is to be understood as an umbrella term regarding various types of decision which, because of the connection with specialist law, fall within the individual categories of the catalogue, for instance also licences, planning approval, etc. This umbrella term “decision”, which is already used in the applicable law, is stipulated by the ~~UNECE~~-Aarhus Convention.

The addenda made in section 1 subsection (1), sentence 1, numbers 4 to 6 serve to transpose Article 9 paragraph 3 of the ~~UNECE~~-Aarhus Convention. By adopting Decision V/9h of 2 July 2014, the fifth session of the Meeting of the Parties on the ~~UNECE~~-Aarhus Convention endorsed the decision of the Compliance Committee of this Convention, according to which, amongst other things, the transposition of Article 9 paragraph 3 of the ~~UNECE~~-Aarhus Convention in Germany is in breach of international law and of the Convention. The 5th session of the Meeting of the Parties hence recommended in 2 (b) of Decision V/9h taking the necessary legislative, regulatory and administrative measures and practical arrangements to ensure that Criteria for the standing of NGOs promoting environmental protection, including standing with respect to sectoral environmental laws, to challenge

For information purposes only

Draft Bill Aligning the Environmental Appeals Act  
and other provisions to Stipulations of European and International Law  
(version: ~~1019 June~~ April 2016)

acts or omissions by private persons or public authorities which contravene national law relating to the environment under Article 9 paragraph 3 of the Convention are revised, in addition to any existing criteria for NGO standing in the Environmental Appeals Act, the Federal Nature Conservation Act and the Environmental Damage Act.

This ascertainment of the illegality of the applicable German law in terms of international law requires the federal legislature to act, this being the only way to create a legal situation which is in conformity with international law. In addition to the principle of the openness of the Basic Law (*Grundgesetz*) towards international law, there is also a need for such action on the basis of the international law principle of “*pacta sunt servanda*”. The contractual obligations of the Federal Republic of Germany under the ~~UNECE~~-Aarhus Convention have been detailed by Decision V/9h of the fifth session of the Meeting of the Parties, which is binding on Germany. In addition, the ~~UNECE~~-Aarhus Convention also constitutes applicable Union law for all Member States of the European Union, with the consequence that an additional mandatory transposition obligation also emerges from European law.

The draft Bill hence aims amongst other things to implement the requirement to transpose Article 9 paragraph 3 of the ~~UNECE~~-Aarhus Convention into German law in full. Article 9 of the ~~UNECE~~ Aarhus Convention contains stipulations for access to justice. Its paragraph 1 regulates access to justice in relation to access to environmental information in accordance with Article 4 of the Convention. Article 9 paragraph 2 of the ~~UNECE~~-Aarhus Convention standardises access to justice with regard to certain projects and installations for which public participation is prescribed in accordance with Article 6 in conjunction with Annex I of the Convention. Article 9 paragraph 3 of the ~~UNECE~~-Aarhus Convention, finally, contains stipulations for access to justice in other respects, that is over and above subsections (1) and (2). This provision reads as follows:

Article 9 – Access to justice

[...]

(3) In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

In its constant line of rulings, the Compliance Committee of the Aarhus Convention favours a broad interpretation of the scope of Article 9 paragraph 3 of the Aarhus Convention. Solely the question of whether the application of environmental provisions is necessary is pertinent to the detailing of the scope. In accordance with the line of rulings of the Compliance Committee, domestic environmental legal provisions are not restricted to legal provisions in which the term “environment” occurs in the title or in the heading. The sole decisive factor is whether the legal provision in question relates to the environment in any way. Paragraph 3 thus also covers acts and omissions that may contravene provisions on, amongst other things, city planning, environmental taxes, the law on chemicals or waste, exploitation of natural resources or pollution from ships, regardless of whether the provisions in question are found in planning laws, taxation laws or maritime laws (cf. on this: The Aarhus



For information purposes only

Draft Bill Aligning the Environmental Appeals Act  
and other provisions to Stipulations of European and International Law  
(version: ~~1019 June~~ April 2016)

Convention – An Implementation Guide, Second Edition 2014, page 197 referring to cases ACCC/C/2005/11 (Belgium) and ACCC/C/2011/58 (Bulgaria)).

In accordance with the constant line of rulings of the Compliance Committee, the introduction of a popular action is however not necessary. It is though sufficient – as a minimum requirement – for it to be possible in a signatory State for the application of environmental provisions by private individuals or authorities to be reviewed by courts. Consequently, the fifth session of the Meeting of the Parties only requires an amendment of the national provisions on the environmental representative action. An amendment of the national system of appeals for individuals is by contrast not necessary, and is hence also not proposed by the Federal Government.

The Compliance Committee stated as follows in the concrete proceedings against Germany: Unlike article 9, paragraphs 1 and 2, article 9, paragraph 3, of the Convention applies to a broad range of acts or omissions and also confers greater discretion on Parties when implementing it. Yet, the criteria for standing, if any, laid down in national law according to this provision should always be consistent with the objective of the Convention to ensure wide access to justice. The Parties are not obliged to establish a system of popular action (*actio popularis*) in their national laws to the effect that anyone can challenge any decision, act or omission relating to the environment. On the other hand, the Parties may not take the clause “where they meet the criteria, if any, laid down in its national law” as an excuse for introducing or maintaining such strict criteria that they effectively bar all or almost all members of the public, including environmental NGOs, from challenging acts or omissions that contravene national law relating to the environment. Access to such procedures should be the presumption, not the exception, as article 9, paragraph 3, should be read in conjunction with articles 1 and 3 of the Convention and in the light of the purpose reflected in the preamble, that “effective judicial mechanisms should be accessible to the public, including organizations, so that its legitimate interests are protected and the law is enforced” (findings on communication ACCC/C/2005/11 concerning Belgium, paragraphs 34–36, on communication ACCC/C/2006/18 concerning Denmark, para. 29-30, and on communication ACCC/C/20058/48 concerning Austria, paragraphs 68-70). (cf. ACCC/C/2008/32, No. 92).

There is therefore a need to modify the scope of the Environmental Appeals Act. These amendments grant special legal standing to recognised environmental associations. The addenda in section 1 subsection (1), sentence 1, numbers 4 to 6 expand the former scope for appeals to be made by recognised environmental associations as follows:

The new number 4 covers plans and programmes with regard to which an obligation may be incumbent to implement a strategic environmental assessment.

In editorial terms, it has been moulded on the wording of number 1 of the sentence. In the same way as when it comes to the obligation to carry out an EIA (cf. Bundestag printed paper [*BT-Drs.*] 16/2495 of 4 September 2006, page 11), the new number 4 is based on whether a requirement to carry out an SEA can exist for the plan or the programme. This may be based on the fact that, in accordance with the statutory stipulations, a mandatory strategic environmental assessment is to be carried out for the concrete plan or the concrete programme, or on the fact of the plan or the programme requiring a strategic environmental assessment in accordance with the result of a preliminary examination of the individual case. When it comes to such examinations, it therefore needs to be primarily scrutinised

For information purposes only

Draft Bill Aligning the Environmental Appeals Act  
and other provisions to Stipulations of European and International Law  
(version: ~~1019 June~~~~April~~ 2016)

within the framework of the reasonedness of the appeal whether an SEA was carried out or should have been carried out. If an SEA was required, but no SEA was carried out, the appeal may be well-founded. If it was stated within the framework of a preliminary examination of the individual case that an SEA was not required, and if this result is confirmed in the review on appeal, no further examination of the appeal is required. Number 4 applies in federal law exclusively to plans and programmes which are listed in Annex 3 of the Environmental Impact Assessment Act (*UVPG*). In accordance with section 2 subsection (5) of the Environmental Impact Assessment Act, this includes amendments to these plans and programmes.

There is a need to consider that the requirement to carry out an SEA is contingent as a rule on the plan or programme establishing a framework for subsequent approval decisions. Section 14b subsection (3) of the Environmental Impact Assessment Act defines this as follows: “Plans and programmes shall be considered to provide the framework for decisions regarding the approval of projects if they contain assertions of relevance to subsequent approval decisions, particularly regarding the necessity, size, location, nature or operating conditions of projects or the utilisation of resources.” The official reasoning states the following in this regard: “Subsection (3) lends concrete shape to the characteristic of establishing the framework for the plans and programmes designated in both subsections (1) and (2), and in section 14d. The provision contains an exemplary list of specific plan and programme contents which indicate the setting of a framework. A framework for the decision on the approval of projects can also be defined by “negative plans”. These are understood to include plans and programmes which, for precisely-defined territories, rule out the realisation of specific projects by prescribing a specific utilisation for the territories in question, or by banning specific utilisations. This kind of “negative planning” can lead in particular to displacement and relocation effects which have a major impact on protected assets within the meaning of section 2 subsection (1) of the present Act.” (cf. Bundestag printed paper 15/3441 of 29 June 2004, pp. 29 et seq.).

The legislature has ~~stipulated~~ ~~presumed~~ that such an establishment of frameworks ~~always~~ exists ~~as a rule~~ for plans and programmes in accordance with Annex 3 number 1 of the Environmental Impact Assessment Act; it needs to be verified in each individual case for plans and programmes in accordance with Annex 3 number 2 of the Environmental Impact Assessment Act. A plan does not absolutely need to contain mandatory stipulations for later projects here. It is in fact sufficient for the ascertainment of the plan in the subsequent approval of a project to need to be taken into consideration in a discretionary decision or when applying discretionary provisions or empowerments to make an assessment. This is also the case for instance if a plan which is as such non-binding has the effect that the lawfulness of individual decisions on approval depends amongst other things on proper coordination that is free of arbitrariness. At the same time, also only plans and programmes which are binding at national level can establish a framework for future projects if they are to be taken into account by being binding in the approval field, via a requirement of weighing up or indirectly via Article 3 paragraph 1 of the Basic Law in the approval of the project. There is therefore no need for a direct external legal impact in other respects (cf. on the above Landmann/Rohmer: *Umweltrecht*, section 14b of the Environmental Impact Assessment Act, 77th supplement August 2015, No. 44).

~~The fact of establishing a framework for a plan or programme in this manner is significant amongst other things when affecting an attribution to a suitable appeal in accordance with the Code of Administrative Court Procedure.~~

Additionally, section 14f subsection (3) of the Environmental Impact Assessment Act also needs to be taken into account, in accordance with which, in the case of a multi-stage planning and licensing

For information purposes only

Draft Bill Aligning the Environmental Appeals Act  
and other provisions to Stipulations of European and International Law  
(version: ~~1019 June~~ April 2016)

process, it is important when determining the assessment framework to avoid multiple assessments by determining the stages of this process at which certain environmental impacts are to be examined as a matter of priority. This multi-stage procedure is intended to simplify verification on the following levels. With the following plans and programmes, as well as in the following licensing procedure, the environmental assessment is to be restricted to additional or other considerable environmental impacts, as well as to necessary updates. Information on this establishment should furthermore be provided in the proceedings for public participation so that the public is aware of the object of the review on which it can make a statement. When it comes to any appeal procedure against the plan or programme which has been accepted, the object of the review of the environmental assessment which has been ascertained on this level will also be a primary connecting point to a review.

Amongst other things, **section 1 subsection (1), sentence 1, number 4 of the Environmental Appeals Act** also covers development plans (land use plans and zoning plans) which are subject to an obligation to implement a strategic environmental assessment. The Compliance Committee found on this in the proceedings ACCC/C/2011/11 (Belgium) that “town planning permits and area plans” fall under Article 9 paragraph 3 of the ~~UNECE~~-Aarhus Convention which do not already fall under Article 9 subsection (2) of the ~~UNECE~~-Aarhus Convention because of the approval of a specific project. The Compliance Committee found in the proceedings ACCC/C/2010/50 (Czech Republic) that ~~land use plans~~ “(land-use planning” and “-urban and land-planning”) fall under Article 9 paragraph 3 of the Aarhus Convention. The Compliance Committee found in the proceedings ACCC/C/2011/58 (Bulgaria) that general and detailed spatial plans fall within in the scope of Article 9 paragraph 3 of the ~~UNECE~~-Aarhus Convention.

The need to provide for appeals with regard to decisions on plans and programmes already emerges from the wording of the ~~UNECE~~-Aarhus Convention. The following is explicitly set out in Article 9 paragraph 2 of the Convention: “and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention”. Article 9 paragraph 2 of the ~~UNECE~~-Aarhus Convention hence regulates an option to subject both Article 6 and other provisions of the Convention – such as Article 7 – not to the regime of Article 9 paragraph 3 of the Convention, but to the stricter regime of Article 9 paragraph 2 of the ~~UNECE~~-Aarhus Convention. The Federal Government specifically wishes not to make use of this. It however follows from this passage that Article 7 of the Convention at least falls under the legal protection in accordance with Article 9 paragraph 3 of the Convention (see also: The Aarhus Convention – An Implementation Guide, Second Edition 2014, page 193).

~~The new number 4 now also grants a possibility to lodge appeals for recognised environmental associations against decisions on the acceptance or rejection of such plans and programmes.~~

As a consequence of the selection decision that has been described, in accordance with the amended section 2 of the Environmental Appeals Act, only a breach of environmental legal provisions is to be reviewed when it comes to plans and programmes. Given this restriction, for instance, the assertion of an obligation to draft can only be considered with environmental plans and programmes the goals of which are environmental protection, for instance ambient air quality maintenance plans where an SEA is required in accordance with section 47 subsection (1) of the Federal Immission Control Act. With regard to other plans and programmes, only the proper application of the environmental legal provisions can be reviewed.

For information purposes only

Draft Bill Aligning the Environmental Appeals Act  
and other provisions to Stipulations of European and International Law  
(version: ~~1019 June~~ April 2016)

At the same time, the new number 4 accommodates the judgment of the Federal Administrative Court of 5 September 2013 (7 C 21.12) on the representative action under environmental law in case of ambient air quality maintenance plans.

~~As has been stated, in the view of the Compliance Committee, direct access to justice is a precondition in the cases covered by Article 9 paragraph 3 of the UNECE Aarhus Convention, and may not be impeded or prevented by the inadmissible completion of the characteristic of the criteria that have been provided for in domestic law. The Aarhus Convention does not provide for an empowerment to only impliedly carry out such reviews within the framework of the review of a subsequent approval decision. In the same way, this is likely to be counter to the principle of effectiveness under European law.~~

The wording “decision on the acceptance of a plan or programme” corresponds to the terminology of the Environmental Impact Assessment Act (cf. section 141 of the Environmental Impact Assessment Act).

The new number 4 is not applied with regard to a plan or programme the acceptance of which is decided on in the shape of a formal act. This presumption can apply in federal law with regard to numbers 1.1, 1.10, 1.15 and 1.16 of Annex 3 to the Environmental Impact Assessment Act.

The legal possibility to make provision for such an exception emerges from the interplay between Article 9 paragraph 3 and Article 2 number 2 of the ~~UNECE~~-Aarhus Convention: Article 9 paragraph 3 of the ~~UNECE~~-Aarhus Convention targets amongst other things authorities of the signatory State. These national authorities are defined by Article 2 number 2 of the ~~UNECE~~-Aarhus Convention. In accordance with sentence 2 of this definition, amongst other things bodies and facilities which act in a legislative capacity are excepted from this (cf. on this also the parallel transposition of the term in section 2 subsection (1) number 1 (a) of the Environmental Information Act of the Federation, as well as the Opinion of Advocate General Jääskinen of 8 May 2014, Cases C-404/12 P and C-405/12 before the European Court of Justice (ECJ)). It should be pointed out here that statutes in this sense are only parliamentary statutes (cf. on this inter alia the judgment of the ECJ of 18 July 2013, Case C-515/11); this does not cover statutes in accordance with the Federal Building Code or those legal provisions which can supplant statutes in city states (special arrangement contained in section 246 subsection (2), sentence 1, of the Federal Building Code).

~~In other respects, the legal form of the respective decision regarding the acceptance of a plan or programme, or its omission, is vital. Reference is made to the statements regarding section 7 subsection (2) of the Environmental Appeals Act with regard to the question of which court appeal in accordance with the Code of Administrative Court Procedure is relevant to the review of statutes in accordance with section 47 of the Code of Administrative Court Procedure is the relevant appeal for statutes which are issued in accordance with the provisions of the Federal Building Code, as well as for statutory instruments on the basis of section 246 subsection (2) of the Federal Building Code (cf. number 1.8. of Annex 3 to the Environmental Impact Assessment Act). Because plans and programmes in accordance with section 1 subsection (1), section in accordance with section 1 subsection (1) sentence 1 number 4 of the Environmental Appeals Act have different contents and manifestations, no abstract attribution is possible in many cases as to whether or not a plan or programme category can be subjected to a review of statutes; this can only be ascertained on the basis~~

For information purposes only

Draft Bill Aligning the Environmental Appeals Act  
and other provisions to Stipulations of European and International Law  
(version: ~~1019 June~~ April 2016)

~~of the individual case (for instance, land use plans are not subject to a review of statutes as a rule unless they contain findings within the meaning of section 35 subsection (3) sentence 1, number 4 of the Environmental Appeals Act 3, of the Federal Building Code).~~

~~An admissible appeal for cases of the omission of a plan or programme will as a rule be the general application for an injunction (cf. on this the judgment of the Federal Administrative Court of 5 September 2013 (7 C 21.12)).~~

~~The action for a declaratory judgment in accordance with section 43 of the Code of Administrative Court Procedure can be considered as a supplement for plans and programmes which have been accepted and which do not fall under the review of statutes in accordance with section 47 of the Code of Administrative Court Procedure. In accordance with what has been said above, these plans and programmes demonstrate the establishment of a framework under the law on SEAs for subsequent decisions on approval which have an external impact that is also limited in this regard. It is not a matter in this context of the dogmatic attribution of the respective plan or programme in other respects. A determinable legal relationship also exists with the recognised environmental association which might lodge the appeal in this sense if the recognised environmental association is among the concerned public that is to be involved within the SEA proceedings. The recognised environmental association receives an entitlement via the amended Environmental Appeals Act to have the compatibility of a plan or programme that has been accepted reviewed as to the proper application of environmental legal provisions. This particularly includes the proper implementation of the strategic environmental assessment.~~

~~A direct "inter omnes" impact within the meaning of section 47 subsection (5) of the Code of Administrative Court Procedure can only be considered with regard to those plans and programmes for which the review of statutes that is provided for in section 47 of the Code of Administrative Court Procedure constitutes the relevant appeal. When it comes to all other appeals, the (negative) decision of a court will nonetheless have to be respected by the competent authority in question, which is bound by the law. Added to this is section 1 subsection (14), of the Environmental Appeals Act, which also provides for a prohibition of a second appeal with the expanded scope of the Environmental Appeals Act. If, accordingly, a decision is (re)issued within the meaning of section 1 subsection (1) of the Environmental Appeals Act on the basis of a decision that is handed down in contentious administrative court proceedings in accordance with this decision, then no appeal in accordance with the Environmental Appeals Act is accordingly initiated.~~

The new number 5 covers decisions on approval for other projects which do not already fall under numbers 1, 2, 2a or 2b as industrial plant or infrastructural activities.

Accordingly, this ~~primarily exclusively~~ covers decisions in the shape of an administrative act, by means of which a project is licensed or permitted. ~~Acts which do not constitute administrative acts are not considered as decisions within the meaning of the provision.~~ Equally, the case constellation of omission is always directed towards the issuance of such an administrative act. ~~It also covers public-law contracts in accordance with section 54 of the Administrative Procedure Act (VwVfG) which give rise to the permissibility of a project in place of an administrative act. Acts without the quality of an administrative act do not constitute a decision within the meaning of the provision.~~

The definition of the project is orientated towards the definition contained in section 2 subsection (2) of the Environmental Impact Assessment Act, but without referring to Annex 1 of the Environmental Impact Assessment Act. It is hence possible to cover the establishment and operation of technical

For information purposes only

Draft Bill Aligning the Environmental Appeals Act  
and other provisions to Stipulations of European and International Law  
(version: ~~1019 June~~ April 2016)

equipment, the construction of another installation or the implementation of another activity which encroaches on nature and on the landscape, as well as their alteration or expansion in each case.

Equally, special manifestations of approval decisions under specialist law are covered in the shape of an administrative act, such as partial licences or preliminary notices. It is solely material for the delimitation in each case whether environmental provisions of federal or of *Land* law are to be applied to the decision on approval is relevant to the delimitation.

Reference is made to the new section 1 subsection (4) of the Environmental Appeals Act on the specific details of the term “environmental provisions” in the terminology of Article 9 paragraph 3 of the ~~UNECE~~-Aarhus Convention. Accordingly, the elements of the definition of “environmental information” that is contained in section 2 subsection (3) of the Environmental Information Act are relevant, which constitutes a 1:1 transposition not only of the EU’s Environmental Information Directive, but also of the underlying definition of the ~~UNECE~~-Aarhus Convention. Furthermore, the line of rulings of the Compliance Committee of the Convention can be used for further reviews (cf. on this the above comments on the Compliance Committee’s line of rulings).

Finally, number 5 provides that “environmental legal provisions” are those of Federal law, of *Land* law and of the directly-applicable law of the European Union. It covers all legal acts of the European Union which do not require any act of transposition under Federal or *Land* law in order to be applicable. These are EU regulations in accordance with Article 288 paragraph 2 TFEU. By contrast, directives in the case of their comprehensive transposition in German law, and the further acts named in Article 288 paragraph 1 TFEU, do not fall under number 5. In individual cases, the case-law of the ECJ on the erroneous transposition of directives, or the failure to transpose them, and the concomitant direct effect of directives, are to be complied with.

The new number 6 is intended to implement the stipulation of Decision V/9h, as well as of Article 9 paragraph 3 of the ~~UNECE~~-Aarhus Convention, in accordance with which a judicial review must also be facilitated when environmental provisions are applied by authorities or private individuals. Since, in accordance with the outcome of the compliance proceedings which have been carried out against Germany, direct appeals under civil law against private individuals are insufficient for the transposition of this stipulation of Article 9 paragraph 3 of the ~~UNECE~~-Aarhus Convention in conformity with international law, an administrative court appeal must be ~~furthermore~~ made available. In accordance with the traditional understanding of German administrative law, which is to be retained, only appeals against an authority can hence be considered here which are to be carried out for monitoring, or for another supervisory activity, so that a state can be safeguarded, or where necessary brought about, which is in conformity with environmental law.

It is unnecessary to explicitly mention private individuals in the wording of the Act because official monitoring and supervisory measures always constitute state encroachments on the relationship with citizens and legal entities and take place within the framework of administrative proceedings within the meaning of section 9 of the Administrative Procedure Act. Parties which are concerned by these official monitoring and supervisory measures can therefore be natural or legal entities within the meaning of section 11 of the Administrative Procedure Act.

~~What was said re number 5 and section 1 subsection (4) of the Environmental Appeals Act applies regarding the term “environmental provisions”.~~

For information purposes only

Draft Bill Aligning the Environmental Appeals Act  
and other provisions to Stipulations of European and International Law  
(version: ~~1019 June~~ ~~April~~ 2016)

For reasons of determinedness, the wording of the new number 6 connects to the term “administrative act” within the meaning of section 35 of the Administrative Procedure Act. Accordingly, the subject-matter of the appeal must always be an act or omission on the part of the authority in the shape of an administrative act, and hence have an external impact. Measures taken within authorities (such as instructions within the framework of execution by the *Länder* on federal commission) are hence not covered by the new number 6.

In content terms, the new number 6 refers to monitoring and supervisory measures which serve the purpose of implementing environmental legal provisions in the transposition or implementation of decisions within the meaning of section 1 subsection (1), sentence 1, numbers 1 to 5 of the Environmental Appeals Act.

This covers provisions of Federal and *Land* law, as well as of the directly-applicable law of the European Union (cf. on this the comments at number 5).

The comments made regarding number 5 and section 1 subsection (4) of the Environmental Appeals Act apply to the term “environmental legal provisions”.

Transferring Article 9 paragraph 3 of the ~~UNECE~~-Aarhus Convention in terms of a general clause in the list contained in section 1 subsection (1), sentence 1, of the Environmental Appeals Act does not constitute an alternative to the approach pursued in the provisions contained in the new numbers 4 to 6 since this would entail further difficulties in terms of delimitation. Above all, for the newly-provided section 2 subsection (1), sentence 2, of the Environmental Appeals Act, it is necessary to be able to clearly delimitate which items of the subject-matter of section 1 subsection (1), sentence 1, of the Environmental Appeals Act serve the purposes of transposing Article 9 paragraph 2 of the ~~UNECE~~ Aarhus Convention, and which serve those of transposing Article 9 paragraph 3 of the ~~UNECE~~-Aarhus Convention.

re a) bb)

Section 1 subsection (1), sentence 3, is re-structured. An additional reference is included to the special arrangements contained in section 15 subsection (3), sentence 2, of the Transmission System Grid Expansion Acceleration Act, of section 17a subsection (5), sentence 1, of the Energy Industry Act and those contained in section 17 subsection (4), sentences 3 to 5, of the Repository Site Selection Act for access to justice in terms of environmental law. The former reference to section 44a of the Code of Administrative Court Procedure, as well as to section 15 subsection (5) and section 16 subsection (3) of the Environmental Impact Assessment Act, is retained. In addition to the two last-mentioned provisions, a reference to other corresponding legal provisions on the incidental review is included. This addendum ensures that these special arrangements are also encompassed within the scope of the amended Environmental Appeals Act. In addition to section 15 subsection (5) and section 16 subsection (3) of the Environmental Impact Assessment Act, the corresponding legal provisions include the provisions contained in section 16 subsection (4), sentence 2, and of section 19b subsection (2), sentence 2, of the Environmental Impact Assessment Act, as introduced by the present Act. The corresponding provisions for an Act on the Development and Promotion of Wind Energy at

For information purposes only

Draft Bill Aligning the Environmental Appeals Act  
and other provisions to Stipulations of European and International Law  
(version: ~~1019 June~~ ~~April~~ 2016)

Sea (*Gesetz zur Entwicklung und Förderung der Windenergie auf See*), which the Federal Government is currently drawing up, will be included in the text of the statute as an additional number as soon as is possible in terms of legislative technique, subsequent to coming into force.

It is not envisioned to amend section 1 subsection (3) of the Environmental Appeals Act. The consequence is hence that any appeals in accordance with section 64 subsection (1) of the Federal Nature Conservation Act beyond what is contained in the provision contained in section 1 subsection (3) of the Environmental Appeals Act remain unaffected, and appeals in accordance with this provision can be lodged independently.

re b)

Subsection (4) lends concrete shape to the term “environmental legal provisions”, to which significance attaches in accordance with section 1 subsection (1), sentence 1, numbers 5 and 6, and in accordance with section 2 subsection (1), sentence 2, of the Environmental Appeals Act, in accordance with the stipulation contained in Article 2 paragraph 2 of the Aarhus Convention, compliance with which is mandatory, and the national manifestation in section 2 subsection (3) numbers 1 and 2 of the Environmental Information Act.

**re number 2 (section 2)**

re a)

The amendment in number 1 of the former section 2 subsection (1), sentence 1, serves to transpose Article 9 paragraph 2 of the ~~UNECE~~-Aarhus Convention. The Compliance Committee of the ~~UNECE~~ Aarhus Convention found on 20 December 2013 with regard to the Environmental Appeals Act that the criterion of a legal provision “serving the environment” is in breach of Article 9 paragraph 2 of the ~~UNECE~~-Aarhus Convention. In concrete terms, the Compliance Committee states: “Therefore, review procedures according to article 9, paragraph 2, of the Convention should not be restricted to alleged violations of national law “serving the environment”, “relating to the environment” or “promoting the protection of the environment”, as there is no legal basis for such limitation in the Convention.” (cf. Case ACCC/C/2008/31, No. 78). A final resolution and endorsement of this finding took place at the fifth session of the Meeting of the Parties on the ~~UNECE~~-Aarhus Convention that was held in Maastricht from 29 June to 2 July 2014. This criterion must therefore be removed from the scope of Article 9 paragraph 2 of the ~~UNECE~~-Aarhus Convention. The precondition that the tasks habitually carried out by the association in terms of its statutes must be affected by the alleged breach is upheld – in compliance with the ~~UNECE~~-Aarhus Convention. As a result, the amendment will hence not lead to each and every breach of the law being subject to an objection.

Number 3 of the former section 2 subsection (1), sentence 1, is to be adjusted on the basis of the decision of the ECJ of 15 October 2015 on exclusion. In accordance with this decision, the admissibility of an appeal (action or objection) of a recognised environmental association cannot be made to depend on whether the latter has participated in the previous initial proceedings. The



For information purposes only

Draft Bill Aligning the Environmental Appeals Act  
and other provisions to Stipulations of European and International Law  
(version: ~~1019 June~~ April 2016)

precondition for the admissibility of an appeal can by contrast still be that the association was entitled to take part in the initial proceedings. By contrast, in accordance with number 3 (b), the law on exclusion is continued for plans and programmes requiring an SEA.

The addition of the new sentence 2 in section 2 subsection (1) makes it clear that, with regard to appeals against decisions in accordance with section 1 subsection (1) numbers 2a to 6, in concurrence with the requirements of Article 9 paragraph 3 of the UNECE Aarhus Convention, only potential breaches of environmental legal provisions can be complained of and reviewed. Unlike in the scope of Article 9 paragraph 2 of the UNECE Aarhus Convention, in accordance with the explicit wording of Article 9 paragraph 3 of the UNECE Aarhus Convention, this is admissible for decisions which fall within the scope of Article 9 paragraph 3 of the UNECE Aarhus Convention. Reference is made to section 1 subsection (4) of the Environmental Appeals Act with regard to the environmental legal provisions.

re b)

Sentences 1 to 3 of subsection (3) contain the largely unchanged wording of the provision formerly contained in subsection (4). **Sentence 3 of the applicable provision can be dispensed with because of the new section 7 subsection (2) of the Environmental Appeals Act.**

The former content of the provision contained in subsection (3) had to be removed because of the decision of the ECJ of 15 October 2015 on exclusion. Hence, in the scope of section 1 subsection (1), sentence 1, numbers 1 to 2b of the Environmental Appeals Act, the general arrangement on exclusion of section 73 subsection (4), sentences 3 ~~to~~ and 6, of the Administrative Procedure Act also does not apply. (cf. section 7 subsection (4) of the Environmental Appeals Act).

The deletion from subsection (4) (former section 2 subsection (5) of the Environmental Appeals Act, old version) number 1, as well as the insertion of a new number 2, serve to transpose Article 9 paragraph 2 of the ~~UNECE~~-Aarhus Convention. cf. in this regard the reasoning re a). The new wording of sentence 2 is needed in order to also enable the principle that was previously enshrined in section 1 subsection (1), sentence 1, number 1 of the Environmental Appeals Act, in accordance with which – in the framework of the appeal – the question of an EIS being required is to be reviewed first and foremost, to also cover appeals relating to decisions in accordance with section 1 subsection (1), sentence 1, number 4 of the Environmental Appeals Act, where the question must be reviewed of whether an SEA is required (cf. on this reasoning re Article 1 number 1 a). In the interest of simplification, the provision now takes as a definitional basis the obligation to implement an environmental assessment. In accordance with section 1 number 1 of the Environmental Impact Assessment Act, “environmental assessment” is the umbrella term for EIS and SEA.

**re number 3 (section 3)**

The addendum to subsection (1), sentence 1, number 3 serves to explain the element “proper performance of its duties”. Under the law as it stands, it is already examined in the recognition proceedings whether the applying association is able to carry out the tasks involved in recognition. The addendum makes this explicitly clear. “official decision-making procedures” within the meaning

For information purposes only

Draft Bill Aligning the Environmental Appeals Act  
and other provisions to Stipulations of European and International Law  
(version: ~~1019 June~~ April 2016)

of this provision are decision-making proceedings in accordance with section 1 subsection (1), sentence 1, as well as – where a recognition is to take place as a nature conservation association – decision-making proceedings in accordance with section 64 of the Federal Nature Conservation Act.

The amendment that is contained in sentence 3, clause 2 serves the purpose of clarification. Already under the law as it stands, the local connection of an association's range of activities is stated in recognition practice as a rule if the association does not receive nationwide recognition. Where an association is recognised by *Land* authorities, it happens that the recognition is only granted for a specific region since, in accordance with its statutes and actual activities, the association has also only been operating in this region. In such cases, there is an empowerment to lodge an action in accordance with section 2 subsection (1) number 2 only with regard to projects which are to be implemented in this specific region, or which may have an impact on this region. The amendment in sentence 3 makes this practice clear once more.

~~The re-wording of subsections (2) to (4) is to remedy difficulties encountered in practice with regard to possible recognition. In accordance with the existing provision, associations which are active beyond the territory of a *Land* only need to apply for nationwide recognition; recognition in one *Land* is however not possible. This also applies to associations which are active in two *Länder* (such as in the border area). In accordance with subsection (2), in future those associations are to be able to select, when it comes to potential recognition, whether they apply for nationwide recognition, or whether they wish to also be recognised in one or several *Länder*. Associations which are active in the border area between two *Länder* can hence be recognised in both *Länder* in future if they do not aspire to nationwide recognition. Parallel recognition by the Federation and the *Land* is ruled out, by contrast. Subsections (3) and (4) regulate competence for recognition; they have been structured in an application friendly manner.~~

The new wording in sentence 5 should be regarded in connection with the new provision contained in section 7 subsection (1) of the Environmental Appeals Act. The public announcement previously provided for in sentence 5 was at the discretion of the authority. So that the developer can however make effective use of the possibility provided for in section 7 subsection (1), there is a need for it to have an overview of the recognised associations. The recognition authority is hence obliged in future to make all recognitions accessible on the Internet. In practice, this information is already provided via the Internet by the recognition authorities of the Federation and of most of the *Länder*. Because it is obligatory to publish the recognitions on the Internet, the optional public announcement previously provided for is no longer necessary.

**Re number 4 (section 4)**

re a)

The amended title serves the purpose of clarification.

re b)

For information purposes only

Draft Bill Aligning the Environmental Appeals Act  
and other provisions to Stipulations of European and International Law  
(version: ~~1019 June~~ April 2016)

Subsection (1) is adapted to the scope of the Environmental Appeals Act, which is amended by the transposition of the Seveso III directive because the breach of a comparably weighty procedural provision can also be considered for decisions in accordance with section 1 subsection (1), sentence 1, numbers 2a and 2b of the Environmental Appeals Act.

re c)

The former subsection (3) is replaced by the new subsections (3) to (5).

re subsection (3):

The new subsection (3) regulates the personal scope of section 4. The provision determines which individuals and associations can take up the rights in accordance with subsections (1) to (2). In content terms, it takes over the content of the provisions of the former subsection (3). It is however made clearer in the presentation that section 4 applies to individuals and associations in accordance with section 61 numbers 1 and 2 of the Code of Administrative Court Procedure, and to recognised associations in accordance with section 3 subsection (1), as well as to those in accordance with section 2 subsection (2). Sentence 2, which was newly introduced through the Act Amending the Environmental Appeals Act in order to transpose the judgment of the European Court of Justice of 7 November 2013 in the Case C-72/12, was retained without amendment.

re subsection (4):

Also when it comes to decisions in accordance with section 1 subsection (1), sentence 1, number 4, there is a need to make a distinction between absolute and relative procedural errors (re the definitions cf. Bundestag printed paper 18/5927, p. 9). Subsection (5) hence ensures that the provisions regarding ~~absolute~~ procedural errors in accordance with subsections (1) ~~to~~ and (2) also apply to plans and programmes. Section 46 of the Administrative Procedure Act ~~therefore~~ applies to relative procedural errors unless more specific legal provisions of the Federation or the *Länder* contain other provisions. Sections 12 and 28 subsection (2) of the Regional Planning Act, as well as sections 214 and 215 of the Federal Building Code, are for instance regarded as other provisions within the meaning of this provision.

re subsection (5):

Subsection (5) clarifies that section 4 of the Environmental Appeals Act does not make any provision regarding the legal consequences of procedural errors when it comes to decisions in accordance with section 1 subsection (1) numbers 3, 5 and 6. Subsections (1) to (4) do not apply in this regard. Rather, the respectively relevant provisions of specialist law apply to procedural errors in these areas, as do the provisions contained in the Administrative Procedure Acts of the Federation or of the *Länder*.

For information purposes only

Draft Bill Aligning the Environmental Appeals Act  
and other provisions to Stipulations of European and International Law  
(version: ~~1019 June~~ April 2016)

**re number 5 (sections 5 to ~~87~~)**

re section 5:

The ECJ ruled in its judgment of 15 October 2015 (Case C-137/14) that the exclusion of factual objections in the court proceedings creates an obstacle which is not provided for in Article 11 of Directive 2011/92/EU and Article 25 of Directive 2010/75/EU. At the same time, in number 81 of the judgment, the ECJ explicitly admitted the possibility to lay down specific procedural rules for ensuring the efficiency of the legal proceedings. The ECJ gives as examples here the inadmissibility of an argument that is submitted abusively or in bad faith. These provisional possibilities are to be taken up through the new section 5.

In accordance with section 5, a plaintiff who had the opportunity to make a statement in the administrative procedure is excluded from lodging objections the first assertion of which in the appeal proceedings is abusive or in bad faith. The court is to make this finding in the individual case in each instance. A first assertion can for instance be abusive or in bad faith if the appellant declares in administrative proceedings, or has made it clear by other means, that there are no such objections. When it comes to appeals by recognised environmental associations, conduct in the proceedings that is abusive or in bad faith may apply for instance if the first assertion of specific objections in the appeal proceedings which were already known to the association in the approval proceedings runs counter to the protective concerns and environmental interests of which the association understands itself to be the champion, and the association therefore acts in a manner that is “unreasonable”, measured by the objectives of its statutes or of its role as a “quasi administrative aid with no decision-making powers (*Verwaltungshelfer*)” (cf. in this regard Federal Administrative Court, judgment of 1 April 2015, 4 C 6.14, number 25).

~~The general exclusion arrangement contained in section 73 subsection (4), sentences 3 and 6, of the Administrative Procedure Act therefore also does not apply within the scope of the Environmental Appeals Act to individuals in accordance with section 4 subsection (3), sentence 1, number 1 of the Environmental Appeals Act, and to associations in accordance with section 4 subsection (3), sentence 1, number 2 of the Environmental Appeals Act.~~

Re section 6:

Section 6 contains the previous section 4a subsection (1). The need remains in practice for the period for the reasoning of actions provided therein to accelerate court proceedings. It is also to be possible to make use of this acceleration potential in future in the expanded scope of the Environmental Appeals Act.

~~Im Übrigen soll~~In other respects, the ~~The~~ former section 4a (stipulations concerning the application of the Code of Administrative Court Procedure) is to be rescinded. Subsections (2) and (3) have ~~This provision has~~ not led in practice to simplifying and facilitating appeal proceedings under environmental law, but has rather tended to create uncertainty. Subsection (~~2~~) of this former provision does not contain any acceleration potential worth mentioning vis-à-vis the general provisions of the Code of Administrative Court Procedure, and is hence dispensable. Moreover, it ~~The same applies to subsection (2) of the former section 4a, which~~ only takes on a clarifying function. The modification of the standard for review in proceedings in accordance with section 80 subsection (5) of

For information purposes only

Draft Bill Aligning the Environmental Appeals Act  
and other provisions to Stipulations of European and International Law  
(version: ~~1019 June~~ April 2016)

the Code of Administrative Court Procedure that is provided for in subsection (3) has come up against considerable criticism in the judiciary and in the literature. It leads to complicated delimitation issues in legal application which tend to make injunctive relief difficult to obtain. There are also reservations [against these provisions](#) under European law. The European Commission expressed doubts in ongoing pilot proceedings against Germany (EU pilot 5908/13/ENVI) as to whether [the provisions are section 4a is](#) compatible with Union law and with the case-law of the Court of Justice on access to justice in environmental matters.

re section 76:

The new subsection (1) permits an administrative act to be announced in individual cases. Accordingly, addressees of administrative acts within the meaning of section 13 subsection (1) numbers 1 and 2 of the Administrative Procedure Act can apply for a decision to be announced within the meaning of section 1 subsection (1), sentence 1, number 5 or 6 of the Environmental Appeals Act if public promulgation is not already prescribed by other legal provisions. The running of the period for lodging an appeal is triggered by the announcement of an administrative act, and thus the provision of proper information on appeals vis-à-vis a person or a recognised environmental association entitled to lodge an appeal. This affords earlier legal certainty to the addressee of an administrative act which would be favourable for him/her in the majority of cases as to whether this decision will stand or whether it will be reviewed. Since the addressee of the administrative act has this announcement carried out and it is in his/her interest, he/she must also meet the costs associated with the act as part of the costs of administrative proceedings in other respects.

Such approval proceedings under environmental law (within the meaning of section 1 subsection (1), sentence 1, number 5 of the Environmental Appeals Act) and supervisory and monitoring activities under environmental law (within the meaning of section 1 subsection (1), sentence 1, number 6 of the Environmental Appeals Act) are, as a rule, not an administrative relationship which exists exclusively between the applicant and the authority, or between the addressee of the administrative act and the authority. Rather, such cases with an environmental connection virtually always involve a number of concerned third parties. The administrative acts referred to particularly do not require the prior implementation of public participation proceedings. Hence, the announcement on application can also help ensure that the potentially concerned third parties can become aware at all of the administrative decision that has been taken. Without the possibility of an individual announcement on application, the concerned third parties would otherwise only be able to learn via the implementation of the administrative decision that such an administrative decision has been taken at all; this might take place at a much later date.

The persons or associations vis-à-vis whom the decision is to be announced are to be stated by the applicant [of the announcement](#). In doing so, the competent authority is to support it within the framework of its obligation to advise, such as by referring to topical publications on recognised associations.

Similar to in cases falling under section 47 of the Code of Administrative Court Procedure, in accordance with subsection (2), [sentence 1](#), jurisdiction at first instance for appeals of recognised environmental associations in accordance with the Environmental Appeals Act in relation to plans and

For information purposes only

Draft Bill Aligning the Environmental Appeals Act  
and other provisions to Stipulations of European and International Law  
(version: ~~1019 June~~ April 2016)

programmes on the basis of the fundamental comparability of the planning decisions is to be allocated to the Higher Administrative Courts at first instance.

Subsection (2), sentence 2, provides that, in cases falling under section 1 subsection (1), sentence 1, number 4 of the Environmental Appeals Act in which neither an action requesting that a legal right be altered (*Gestaltungsklage*), nor an application for an injunction (*Leistungsklage*), nor a review of statutes (*Normenkontrolle*) in accordance with section 47 of the Code of Administrative Court Procedure is admissible, section 47 of the Code of Administrative Court Procedure applies *mutatis mutandis* on a subsidiary basis. The previous law is therefore continued as a matter of principle, in accordance with which, in cases where no plan or programme exists, the general application for an injunction is admissible as a rule (cf. on this the judgment of the Federal Administrative Court of 5 September 2013 (7 C 21.12)).

The previous law only continues to also apply to statutes which are handed down in accordance with the provisions contained in the Federal Building Code, as well as to legal instruments on the basis of section 246 subsection (2) of the Federal Building Code (cf. number 1.8. of Annex 3 to the Environmental Impact Assessment Act); the relevant appeal here is a review of statutes in accordance with section 47 of the Code of Administrative Court Procedure. Even where an action for a review of statutes is admissible against presentations in land use plans in analogy to section 47 subsection (1) number 1 of the Code of Administrative Court Procedure (cf. Federal Administrative Court, judgment of 26 April 2007 – 4 CN 3.06, judgment of 31 January 2013 – 4 CN 1.12), the previous case-law is nonetheless retained. In accordance with the case-law of the Federal Administrative Court, it can only be ascertained here on the basis of the individual case whether a review of statutes is permissible: For instance, land use plans as a rule are not subject to a review of statutes unless they contain statements within the meaning of section 35 subsection (3), sentence 3, of the Federal Building Code (see in other aspects on this also the judgment of the Federal Administrative Court of 16 April 2015 (4 CN 6.14)).

The provision orders in future for all other cases that the provisions on the review of statutes in accordance with section 47 of the Code of Administrative Court Procedure are to apply *mutatis mutandis*.

The recognised environmental association receives through the amended Environmental Appeals Act the entitlement to have the compatibility of a plan or programme that has been accepted reviewed with regard to the proper application of environmental legal provisions. This particularly includes the proper implementation of the strategic environmental assessment.

Sentence 3 creates a provision on the territorial jurisdiction of the Higher Administrative Court for the special case of a plan or programme relating to more than one of the *Länder*.

Subsection (3) leads to a exclusion arrangement in proceedings in accordance with section 1 subsection (1), sentence 1, number 4, subsection (4) that is analogous to the former section 2 subsection (3) of the Environmental Appeals Act. The decision of the ECJ of 15 October 2015 was handed down on the basis of the EIS and IPPC directives (now the Industrial Emissions Directive), and only relates to the exclusion arrangements in these legal fields. The proceedings in accordance with section 1 subsection (1), sentence 1, number 4 are however based on other legal foundations, and are hence not covered by the decision of the Court of Justice. Sentence 2 makes an exception from this for zoning plans. Where zoning plans are under an obligation to carry out an EIA, they are also subject to the judgment of the ECJ of 15 October 2015. The review as to whether a zoning plan requiring an

For information purposes only

Draft Bill Aligning the Environmental Appeals Act  
and other provisions to Stipulations of European and International Law  
(version: ~~1019 June~~ April 2016)

SEA is, at the same time, subject to an obligation to carry out an EIA is difficult to carry out in practice. This was also why the “environmental assessment”, which meets the requirements of both the EIA and the SEA Directives, was introduced with the Act adapting the Federal Building Code to EU Directives of 2004 in development planning, as a standard procedure, thus dispensing with the obligation to carry out an EIA or an SEA. Section 7 subsection (3) of the Environmental Appeals Act therefore does not apply to these plans; by contrast, section 5 of the Environmental Appeals Act is also applicable in such cases.

Subsection (4) ~~serves to clarify~~ clarifies ~~that section 6 subsection (2) applies~~ that the general exclusion arrangement contained in section 73 subsection (4), sentences 3 to 6, of the Administrative Procedure Act is not applied within the scope of section 1 subsection (1), sentence 1, numbers 1 to 2b of the Environmental Appeals Act. In accordance with subsection (5), this applies to persons in accordance with section 4 subsection (3), sentence 1, number 1 of the Environmental Appeals Act and to associations in accordance with section 4 subsection (3), sentence 1, number 2 of the Environmental Appeals Act. This explicit provision contained in the text of the Act is needed in order to implement the judgment of the ECJ of 15 October 2015 (Case C-137/14) completely and in a manner that is in conformity with European law. The provision refers to all procedures in section 1 subsection (1), sentence 1, of the Environmental Appeals Act which serve to transpose the Directive on the assessment of the effects of certain public and private projects on the environment and the EU's Industrial Emissions Directive, or which transpose directives the provisions of which on access to justice explicitly refer to the corresponding provisions of the Directive on the assessment of the effects on the environment of certain public and private projects or of the EU's Industrial Emissions Directive, and therefore are also covered by the judgment of the ECJ. It ensures that, where exclusion is also ruled out for objections which, in accordance with section 9 subsection (1), sentence 1, of the Code of Administrative Court Procedure, relate not to environmental impact, but to other aspects of the project. This is imperatively concluded from the judgment of the ECJ of 15 October 2015 (Case C-137/14, No. 76). What is more, however, this is also a consequence of Article 9 paragraph 2 of the Aarhus Convention: Decision V/9h of the fifth session of the Meeting of the Parties on the Aarhus Convention found amongst other things that, within the scope of Article 9 paragraph 2 of the Aarhus Convention, for appeals by recognised environmental associations, a restriction of the standing to file an appeal to the violation of legal provisions serving the environment, that is of environmental legal provisions, is not permissible. This is taken into account by the amendments to section 2 subsection (1) number 1 and to subsection (4) number 1 of the Environmental Appeals Act. The provision is not to be applied within the scope of section 1 subsection (1) numbers 3 to 6; this means that the old law remains applicable in this regard. The latter also applies in cases in which a court reaches the conclusion in proceedings against a decision in accordance with section 1 subsection (1), sentence 1, number 1 of the Environmental Appeals Act that for the project forming the subject-matter of the dispute, no EIS is required, in contrast to the view held by the plaintiff, cf. section 2 subsection (4), sentence 2, of the Environmental Appeals Act. If the court instead presumes that the appeal is, rather, targeted against a decision in accordance with section 1 subsection (1), sentence 1, number 5 of the Environmental Appeals Act, the provisions on exclusion apply in the further review.

What is more, section 6 subsection (4) also provides an appropriate clarification for section 73 subsection (8) of the Administrative Procedure Act, where this provision also refers to section 73 subsection (4), sentences 3 to 6, of the Administrative Procedure Act.

For information purposes only

Draft Bill Aligning the Environmental Appeals Act  
and other provisions to Stipulations of European and International Law  
(version: ~~1019 June~~ April 2016)

Subsection (5) expands the possibility which already exists in the applicable law on plan licensing to remedy substantive errors in licensing decisions in accordance with section 1 subsection (1), sentence 1, numbers 1 to 2b and number 5 of the Environmental Appeals Act which can be reviewed within the scope of the Environmental Appeals Act. There are plans for a parallel arrangement to the tried-and-tested tool of section 75 subsection (1a), sentence 2, of the Administrative Procedure Act in the form of which the provision took on as a result of the established case-law of the Federal Administrative Court. Subsection (5) links into this with no reservations.

The scope of the provision is limited to decisions in accordance with section 1 subsection (1), sentence 1, numbers 1 to 2b as well as number 5 since there is no need for such an arrangement in the other cases falling under section 1 subsection (1), sentence 1, of the Environmental Appeals Act. This provision hence covers amongst other things licences under the law on immissions or permits and licences under water law. The fundamental concept of planning safeguards and the remedying of errors by a supplementary procedure applies not only to the plan approval, but in equal measure to the licensing procedures mentioned as an example above. In accordance with the applicable German law, the respective specialist law determines which form of licensing decision is prescribed for a project. Regardless of the size and complexity of the project, this can be a plan approval, a licence or another form of approval. It can therefore not be concluded from the form that is prescribed by law that a plan approval procedure is in each case only needed for major projects, or that a licence is needed only for smaller projects. The opposite is very frequently the case in enforcement reality. The case constellations which are covered by section 75 subsection (1a), sentence 2, of the Administrative Procedure Act, on the one hand, and by subsection (5), on the other, are quite comparable.

Linking closely to section 75 subsection (1a), sentence 2, of the Administrative Procedure Act, subsection (5) provides that, in the case of a substantive breach of legal provisions, the decision on the permissibility of a project is not rescinded if the substantive breach can be remedied by adding to the decision or in a supplementary procedure. In the event of the supplement to the decision, a judgment for an enforcement action is handed down aiming to supplement the decision to include the provision that was previously missing (cf. Federal Administrative Court, Order of 19 May 2005, 4 VR 2000/05, No. 35; Cologne Administrative Court, judgment of 26 August 2008, 14 K 4484/06, No. 19). In the event of the supplementary procedure, the court (only) finds on the unlawfulness of the decision, with the consequence that it cannot be enforced until the shortcoming has been remedied (cf. only Federal Administrative Court, judgment of 16 October 2008, 4 C 5/07, No. 73; “It is herewith found that the plan approval resolution of the authority ... of ... in the current version is unlawful, and hence not enforceable.” – Example from an operative part of a ruling within the case-law of Düsseldorf Administrative Court, judgment of 25 May 2011, 3 K 1599/07). As a result of the wording, which is borrowed from section 75 subsection (1a), sentence 2, of the Administrative Procedure Act, it is possible in practice for the comprehensive “remedy case-law” of the Federal Administrative Court to be transferred to subsection (5), in particular since the constant line of rulings also applied section 75 subsection (1a), sentence 2, of the Administrative Procedure Act to other substantive errors than errors in weighing up (cf. only Federal Administrative Court, judgment of 1 April 2004, 4 C 2/03, No. 28 and the many references in Bonk/Neumann, in: Stelkens/Bonk/Sachs, *Verwaltungsverfahrensgesetz*, 8th ed.2014, Nos. 37-38). Breaches of imperative law the remedying of which is not at the disposal of the plan approval authority itself, but which is contingent on the intervention of another administrative body in external proceedings, can also be overcome (cf. Federal Administrative Court, loc. cit.).



For information purposes only

Draft Bill Aligning the Environmental Appeals Act  
and other provisions to Stipulations of European and International Law  
(version: ~~1019 June~~ April 2016)

Where it relates to a procedural error, section 4 of the Environmental Appeals Act takes priority in terms of its scope.

The provision contained in subsection (5) does not facilitate the remedying of all and any breaches of substantive legal provisions, any more than does section 75 subsection (1a), sentence 2, of the Administrative Procedure Act. A remedy is only possible if the concrete possibility to remedy the error in supplementary proceedings exists once the unlawfulness and lack of enforceability exists, or by adding to the decision. This is contingent, on the one hand, on the breach not being of such a nature and gravity that it places the project in question as a whole from the outset; the identity of the project may not be challenged. Furthermore, there must be a concrete possibility that the shortcoming can be remedied in the foreseeable future. If it is established at the time of the court decision that the shortcoming cannot be considered in the foreseeable future for de facto or legal reasons, the project is hindered by an insurmountable hindrance which no longer leaves room for remedying the error in supplementary proceedings. This depends in each case on the circumstances of the specific dispute (cf. on these requirements Federal Administrative Court, Order of 20 January 2004, 4 B 112.03, No. 4 with many further references).

If there is a shortcoming which can be remedied, the remedy can be carried out by adding to the decision, or by means of an additional procedure. Subsection (5) does not contain any stipulations for the structure of the procedure. As in section 75 subsection (1a), sentence 2, of the Administrative Procedure Act, this is in each case a separate error-remedying procedure. In accordance with the respective concrete individual case, for instance, subsequent ancillary and content provisions or permits for alteration can be considered. Such a remedying of errors could be possible, for instance, if there are no problems when it comes to making the decision lawful, for instance by means of an additional ancillary provision, and hence it would be disproportionate to carry out a complete new licensing procedure.

The general provisions apply to the court's ruling on costs (cf. sections 154 et seqq. of the Code of Administrative Court Procedure).

Sentence 2 regulates the relationship with the existing section 75 subsection (1a) of the Administrative Procedure Act. Accordingly, subsection (5), sentence 1, is not applicable if section 75 subsection (1a) of the Administrative Procedure Act can be applied to a decision in accordance with section 1 subsection (1), sentence 1, numbers 1 to 2b and number 5. As a rule, this concerns plan approvals and plan authorisations. In these cases, there is no need for subsection (5), sentence 1, to be applied since section 75 subsection (1a) of the Administrative Procedure Act already provides for substantive errors to be remedied (see above). In order to avoid difficulties in application in practice, sentence 2 explicitly rules out application in such cases. It is at the same time ensured by referring to section 75 subsection (1a) of the Administrative Procedure Act that, in those areas in which specialist planning law provides for supplementary provisions which refer to section 75 subsection (1a) of the Administrative Procedure Act with regard to the remedying of errors (section 18d of the General Rail Act, section 17d of the Federal Highways Act, section 14d of the Federal Waterways Act, section 2c of the Magnetic Suspension Train Planning Act, section 43d of the Energy Industry Act), subsection (5), sentence 1, is also not to be applied.

For information purposes only

Draft Bill Aligning the Environmental Appeals Act  
and other provisions to Stipulations of European and International Law  
(version: ~~1019 June~~ April 2016)

Article 11 of Directive 2011/92 and Article 25 of Directive 2010/75 do not pose an objection to the provision. Both provisions demand that there be a possibility to have environmental decisions reviewed in appeal proceedings as to whether they agree with substantive and procedural requirements. There is, by contrast, no right of rescission with regard to the erroneous decision. The goal pursued in the provisions of the directives is that, with decisions on the permissibility of a project, agreement with substantive and procedural requirements be guaranteed. This goal can also be reached by granting a supplemental procedure to remedy substantive errors. The same evaluation applies to international law.

Subsection (6) provides that section 7 subsection (2), sentences 1 and 3, applies not only to appeals of recognised associations in accordance with section 2, but also to appeals of natural and legal entities, as well as to associations in accordance with the Code of Administrative Court Procedure (section 61 numbers 1 and 2 of the Code of Administrative Court Procedure) within the scope of section 1; subsections (4) and (5) also apply to such appeals. Section 7 subsection (2), sentence 2, is removed from the reference because the possibility of judicial review of plans and programmes only for environmental associations is to be expanded.

re section ~~87~~:

Section ~~87~~ contains the former section 5, in which provisions that have been concluded by virtue of the passage of time (specifically section 5 subsection (3)) will not be pursued in future.

Subsection (1) has already been re-worded by the Act Amending the Environmental Appeals Act on the transposition of the judgment of the European Court of Justice of 7 November 2013 in Case C-72/12. The former sentence 2 ~~is adjusted in editorial term~~ can be deleted because of the deletion of ~~section 4a of the Environmental Appeals Act~~.

The new subsection (2) contains a deadline arrangement for the expanded scope of section 1 of the draft Environmental Appeals Act serving to transpose Article 9 paragraph 3 of the Aarhus Convention to include the new numbers 4 to 6.

In other respects, no transitional provision is required for the scope of section 1 of the Environmental Appeals Act because, for the remaining case constellations, the opening of appeals in accordance with the present Act has taken place, or will take place at the same time when the respective specialist law comes into force.

Subsection (3) takes on the regulatory content of the previously applicable section 5 subsection (2) unchanged; the subsection was worded in a more user-friendly manner.

**re Article 2 (Amendment of the Environmental Impact Assessment Act)**

For information purposes only

Draft Bill Aligning the Environmental Appeals Act  
and other provisions to Stipulations of European and International Law  
(version: ~~1019 June~~ April 2016)

**re number 1 (section 9)**

For projects where an EIS is required, the newly-inserted subsections (1c) and (1d) establish a special arrangement on section 73 subsection (4) of the Administrative Procedure Act with regard to objections in administrative proceedings.

re a)

Sentence 3 makes clear the special role played by the associations that are recognised in accordance with the Environmental Appeals Act. The provision takes up the established case-law of the Federal Administrative Court on the role played by recognised nature conservation associations (cf. only Federal Administrative Court, judgment of 1 April 2015, 4 C 6.14, number 25 with further references). Accordingly, such associations contribute “their expertise in nature conservation so to speak as an administrative aid without decision-making powers in the preparation of official decisions. Their involvement constitutes “expert participation” supporting the authority in its decision and aiming to bring in expertise in nature conservation which is to counter shortcomings in enforcement in the field of nature conservation and landscape management.” These findings of the Federal Administrative Court can be transferred to all associations that are recognised in accordance with the Environmental Appeals Act. The special role includes early, close coordination with the competent authority, as well as contributing the association’s existing knowledge on possible impacts on the environment. Corresponding participation hence serves the purpose of early, effective protection of the environment. **The provision does not regulate on a obligation to participate; the admissibility of an appeal (action or objection) of a recognised environmental association cannot be made to depend on whether it has taken part in the previous initial proceedings (cf. section 2 subsection (1) number 3 (a) of the Environmental Appeals Act).**

The amendment of the reference in the former subsection (1), sentence 3, is a consequential amendment to the inclusion of subsections (1c) to (1e), which make a conclusive special arrangement.

re b)

Subsection (1c), sentence 1, extends by two weeks the period for comments for projects requiring an EIS. All in all, the period for comments will be ~~one-two months and four weeks~~ in future, in accordance with section 73 subsection (3), sentence 1, of the Administrative Procedure Act in conjunction with section 9 subsection (1c) of the Environmental Impact Assessment Act. Also in accordance with the decision of the ECJ of 15 October 2015, the exclusion of objections in administrative proceedings can be retained. The corresponding provisions that are contained in various specialist statutes are correspondingly to be lent concrete form, i.e. they are to be restricted to administrative proceedings. ~~The new S~~sentences ~~two three~~ and ~~threefour~~ contain corresponding, final special provisions concerning objections in administrative proceedings. Sentence ~~23~~ regulates the statements which are not ruled out in the further proceedings. **The obligation, which already exists under the law as it stands, to consider late objections because of the authority’s obligation to carry out official investigations remains unaffected by the new provision (cf. only Federal Administrative Court, judgment of 17 July 1980, 7 C 101/78, No. 30); this is made clear by the last clause in sentence 2.**

For information purposes only

Draft Bill Aligning the Environmental Appeals Act  
and other provisions to Stipulations of European and International Law  
(version: ~~1019 June~~ April 2016)

~~Sentence 3~~ ~~Sentence 4~~ contains the obligation to indicate the consequences of late statements or those which do not satisfy the requirements. ~~Sentence 3 does not apply if this indication is not contained in the public promulgation.~~

Subsection (1d) enables the competent authority, at its duty-bound discretion, to set the period for comments via the period contained in subsection (1c). The provision only applies to projects where the number of the documents to be displayed is considerable ~~as a rule~~ and it can be ~~therefore be particularly~~ time-consuming to draw up the statements. In these proceedings, the competent authority must hence decide in each case prior to the public promulgation whether it is beneficial for the proceedings to determine a longer period for comments. In particular the purpose of the public participation is to be taken into account here: The authority is to already know in the proceedings all the arguments that are relevant to taking a decision, in order to enable it to take a decision that is final. The period for comments can only be extended until the time which, in accordance with section 73 subsection (3a), sentence 1, of the Administrative Procedure Act, is also granted to the authorities involved for their statement. This guarantees that any period for comments which is longer in comparison to subsection (1c) cannot lead to a delay in the proceedings overall.

Section 9 subsection (1) of the Environmental Impact Assessment Act only refers to the environmental impact of a project (requiring an EIS). Other objections are not covered by the provision ~~(however cf. section 7 subsection (4) of the Environmental Appeals Act in this regard)~~. Under the law as it stands, the reference to the Administrative Procedure Act that is contained in section 9 subsection (1), sentence 3, of the Environmental Impact Assessment Act, which is now to be deleted (see above) ensures that the length of the period for filing objections is the same for all objections. This legal situation is replaced by the new subsection (1e), which brings about equality between environmental and other objections for the period for filing objections.

#### re number 2 (section 9a)

In accordance with the addendum in section 9 subsection (1c) of the Environmental Impact Assessment Act, the amendments ~~serve to lend concrete form to adjust~~ the provisions on objections in administrative proceedings.

#### re number 3 (section 14i)

~~In accordance with the addendum in section 9 subsections (1e) and (1d) of the Environmental Impact Assessment Act, the newly-inserted sentences 3 and 4 introduce a substantive exclusion arrangement (cf. reasoning on section 7 subsection (3) of the Environmental Appeals Act) serve to lend concrete form to the provisions on objections in administrative proceedings. A substantive exclusion arrangement is introduced here for plans and programmes (cf. reasoning on section 6 subsection (5) of the Environmental Appeals Act). Section 3 subsection (2), sentence 2, clause 2 of the Federal Building Code applies to zoning plans (cf. section 17 subsection (2) of the Code of Administrative Court Procedure).~~ The provision contained in section 9 subsection (1d) of the Environmental Impact Assessment Act does not need to be taken on for plans and programmes since,

For information purposes only

Draft Bill Aligning the Environmental Appeals Act  
and other provisions to Stipulations of European and International Law  
(version: ~~1019 June~~ April 2016)

in accordance with the applicable section 14i subsection (3), sentence 2, the authority already has latitude as to the duration of the period for a statement.

**re number 4 (section 14l)**

re a) and b)

These are editorial amendments.

re c)

The newly-inserted number 4 is a consequential amendment to the inclusion of plans and programmes within the scope of the Environmental Appeals Act. With regard to the content structure, for proper information on appeals, it is particularly important to both correctly state the body responsible for hearing appeals with regard to territorial and substantive jurisdiction, and for the admissible appeal to be correctly submitted (for instance whether the admissible appeal is constituted by an action that is lodged with an administrative court or by an application for proceedings on the constitutionality of a statute). The competent authority must examine this in each individual case (cf. on this the reasoning above re Article 1 number 1 in relation to the new section 1 subsection (1), sentence 1, number 4 of the ~~draft~~ Environmental Appeals Act).

Information on appeals is not required if no appeal has been initiated in accordance with the Environmental Appeals Act because a decision is handed down on the acceptance of the plan or programme by means of a formal Act.

**re number 5 (section 16)**

The new sentence 2 in section 16 subsection (4) takes account of the fact that the system of regional and development planning in Germany is multi-staged as a rule. The possibility of a direct judicial review of the development plans in accordance with section 1 subsection (1), sentence 1, number 4 of the Environmental Appeals Act which are handed down on the basis of the regional planning, and which are named in subsection (4), sentence 2, remains unaffected. Moreover, approval decisions for projects based on such plans are fully subject to judicial review. An incidental review of the previous plan is then also possible in the context of an appeal against corresponding development plans, as well as against rulings on licensing at project level.

**re number 6 (section 18)**

The addendum ensures that section 9 subsection (1), sentence 3, as well as subsections (1c) and (1d), also apply in plan licensing procedures in accordance with the Federal Mining Act (*Bundesberggesetz*).

**re number 7 (section 19b)**

For information purposes only

Draft Bill Aligning the Environmental Appeals Act  
and other provisions to Stipulations of European and International Law  
(version: ~~1019 June~~ April 2016)

The new sentence 2 continues the former law for the Federal Transport Infrastructure Plan. The provision corresponds to the preparatory and political significance of the Federal Transport Infrastructure Plan for the improvement statutes and the approval decisions for the projects – which are fully subject to judicial review.

**re number 8 (section 21)**

The previous version of the provision already established that the competence for enhancement with installations serving defence purposes is allocated to federal authorities. The federal authorities with specific competence were however only to be determined within a statutory instrument. The new provision is now to apply directly to the determination of the federal authorities in the Act itself. There is no need for an additional statutory instrument.

**re Article 3 (Amendment of the Federal Immission Control Act)**

**re number 1 (section 10)**

The amendments in subsection (3) serve to ~~lend concrete form to~~ adjust the provisions on objections in the licensing procedure; ~~s-~~ See the statements on section 9 subsection (1c) of the Environmental Impact Assessment Act regarding the content and scope.

The new subsection (3a) makes clear the special role that is played by the associations that are recognised in accordance with the Environmental Appeals Act; cf. in this regard the statements on section 9 subsection (1), sentence 3, of the Environmental Impact Assessment Act. **The provision does not regulate on a obligation to participate; the admissibility of an appeal (action or objection) of a recognised environmental association cannot be made to depend on whether it has taken part in the previous initial proceedings (cf. section 2 subsection (1) number 3 (a) of the Environmental Appeals Act).**

**re number 2 (section 19)**

The amendment contained in section 19 subsection (2) makes it clear that the new provision contained in section 10 subsection (3a) does not apply in the simplified proceedings.

**re Article 4 (Amendment of the Federal Nature Conservation Act)**

**re number 1 (section 63)**

re a)

The amendment completes the case-law that has been handed down re section 63 subsection (2) number 5 of the Federal Nature Conservation Act (cf. reasoning re (b) bb)) for protected maritime areas.

For information purposes only

Draft Bill Aligning the Environmental Appeals Act  
and other provisions to Stipulations of European and International Law  
(version: ~~1019 June~~ April 2016)

re b) aa)

The new number 4a expands the rights of participation of nature conservation associations that are recognised by the *Länder* to grant licences for the establishment and expansion of, as well as major changes to or operation of zoos. The new number 4b furthermore expands these rights of participation to cover the approval of exceptions from access, possession and marketing prohibitions under the law on species conservation which are handed down by means of a statutory instrument or through a general ruling. This guarantees that the expertise of the nature conservation associations is included for the only approval in federal nature conservation law that is related to an installation and for decisions on exceptions under the law on species conservation that have far-reaching consequences.

re b) bb)

The amendment completes the case-law that has been handed down regarding this provision. The Federal Administrative Court ruled by judgment of 10 April 2013 – 4 C 3.12 (number 22), in agreement with decisions of the higher courts and the literature, that a derogating decision in accordance with section 34 subsections (3) to (5) of the Federal Nature Conservation Act has the same standing as an exemption within the meaning of this provision.

**re number 2 (section 64)**

re a)

The amendments complete the expansion of the rights of participation contained in section 63 subsection (2) of the Federal Nature Conservation Act for the possibility to lodge appeals, and take account of the judgment of the ECJ of 15 October 2015 (Case C-137/14).

re b)

The amendments contained in subsection (2) are consequential amendments to the deletion of section 2 subsection (3) of the Environmental Appeals Act, as well as to the introduction of the provision on conduct that is abusive or in bad faith in the appeal proceedings in section 5 of the Environmental Appeals Act, and furthermore cause a reference to also be made to section 1 subsection (1), sentence 3, of the Environmental Appeals Act, which is amended by Article 1.

The appeals under the law on nature conservation in accordance with section 64 of the Federal Nature Conservation Act are to be evaluated as to their scope at the latest five years after this Act has come into force.

**re Article 5 (Amendment the Code of Administrative Court Procedure)**

Since the ECJ ruled in its judgment of 15 October 2015 (Case C-137/14) that the exclusion of objections of a factual nature in the court proceedings creates an obstacle which is not provided for in Article 11 of Directive 2011/92 and in Article 25 of Directive 2010/75; section 47 subsection (2a) of the Code of Administrative Court Procedure is also to be restricted accordingly. Since the continued application of the provision on exclusion would not be practical outside the scope of section 1 subsection (1) of the Environmental Appeals Act, section 47 subsection (2a) of the Code of Administrative Court Procedure is rescinded in full. Section 5 of the Environmental Appeals Act can

For information purposes only

Draft Bill Aligning the Environmental Appeals Act  
and other provisions to Stipulations of European and International Law  
(version: ~~1019 June~~ April 2016)

however apply within the scope of the Environmental Appeals Act. The traditional rules on the general requirement of legal protection apply in other respects.

**re Article 6 (Amendment of the Federal Building Code)**

With the removal of exclusion in accordance with section 47 subsection (2a) of the Code of Administrative Court Procedure, the corresponding obligation to provide information also ceases to apply; section 3 subsection (2) clause 2 of the provision hence once more receives the wording which it received from the Act adapting the Federal Building Code to EU Directives (*Europarechtsanpassungsgesetz Bau*) of 26 April 2004 (Federal Law Gazette I p. 1359). The irrelevance clause in section 214 subsection (1), sentence 1, number 2 of the Federal Building Code referring to this obligation to provide information is to be ~~adjusted-deleted~~ as a consequential amendment to this; the omission of the obligations to provide information remaining in section 3 subsection (2), sentence 2, of the Federal Building Code remains material – without any change vis-à-vis the previous law (cf. *Stock*, in: Ernst/Zinkahn/Bielenberg/Krautzberger, *BauGB*, version: February 2016, section 214 No. 50a).

There will be a need in future to indicate exclusion in accordance with section 7 subsection (3) of the Environmental Appeals Act, which applies against land use plans with regard to the new representative action under environmental law (cf. section 7 subsection (2) of the Environmental Appeals Act). This obligation to provide information is to be included in a new subsection (3) of section 3 of the Federal Building Code. This makes section 3 subsection (2) of the Federal Building Code easier to read, and takes account of the fact that this exclusion only relates to the special case of a representative action under environmental law against land use plans. The lack of an indication in accordance with section 214 subsection (1) of the Federal Building Code is immaterial for the legal effectiveness of the land use plan.

**re Article 7 (Amendment of the Federal Mining Act)**

The newly-inserted section 5a of the Federal Mining Act (*BBergG*) creates a possibility to make a public announcement ex officio in accordance with proper exercise of discretion by the authority for decisions which are handed down in implementation of the Federal Mining Act, and which at the same time fall within the scope of the Environmental Appeals Act. In accordance with section 41 subsection (3) of the Administrative Procedure Act, a public announcement requires an explicit empowerment, which is created with the new provision. The provision constitutes a more detailed provision vis-à-vis section 41 subsection (4) of the Administrative Procedure Act which complies with its principles.

This hence particularly covers decisions on the approval of operating plans and mining monitoring and supervisory measures which are undertaken with the application of environmental legal provisions, or for which an obligation to carry out an environmental impact assessment “may” exist, and which, in accordance with section 1 subsection (1), sentence 1, numbers 1, 5 and 6, therefore fall within the scope of the Environmental Appeals Act. When it comes to such decisions, in accordance with the provisions of the Environmental Appeals Act, considerable potential appeals in particular apply to the environmental associations named therein, whilst in accordance with section 2 subsection (3) of the



For information purposes only

Draft Bill Aligning the Environmental Appeals Act  
and other provisions to Stipulations of European and International Law  
(version: ~~1019 June~~ April 2016)

Environmental Appeals Act, an objection and action period of one year applies if the decision has not been announced in accordance with section 1 subsection (1), sentence 1, of the Environmental Appeals Act, either publicly or to the association individually.

This means that, with such decisions, there is as a rule an interest in making the decision public to a large number of addressees. More than 100 environmental associations are recognised at national level alone, plus environmental associations which are recognised at *Land* level, as well as private individuals who are affected. The number of announcements (frequently serving of documents) needed for suitable participation within the meaning of the Aarhus Convention would hence as a rule be more than 200 individual announcements. These are mass proceedings where the individual announcement would entail a considerable administrative effort, as well as uncertainty as to whether all the relevant recipients are really reached.

The provision is necessary and suited to be able to make the decision final at all, or to do so within a suitable period. What is more, the cases covered by the provision are frequently urgent. The majority of the decisions covered are decisions on measures which relate to a mining project that is already in existence. It must be implemented quickly as a rule in order to avert dangers to the public or to the environment, or in order not to damage the project. A large number of the decisions covered for instance relate to maintenance measures on natural gas or other wells which, were they to be delayed, would risk liquification or silting. According to information provided by the competent *Land* authority, the plant operator would incur tens of millions in costs in order to reactivate a natural gas well were the maintenance measures not to be implemented.

In order to be able to create legal clarity here regarding the finality of a decision, and hence legal certainty, as efficiently and rapidly as possible, the authority is hence to be additionally enabled to also carry out a public announcement, in accordance with the proper exercise of discretion, which is to also take into account the interests of the individuals affected, in addition to the individual announcement to those particularly concerned.

With regard to the possibility of a public announcement, the Federal Administrative Court stated as a matter of principle by judgment of 27 May 1983 (ref. 4 C 40, 44, 45/81, NJW 1984, 188, 189) that “the individual announcement of the measure particularly” corresponds to “the interest in legal protection of the citizen affected thereby if one only has this in mind”, but that the constitutional guarantee of legal protection does “not apply absolutely”, and does not “create the claim to the ideal satisfaction of the interest in legal protection without giving regard to other constitutional principles”. “Furthermore, in the case of a conflict, opposing constitutional principles may come to bear against it, here in particular the principle of legal certainty and the principle of administrative efficiency, [...]”. The judgment goes on to state: “The interest of the individual in legal protection does also not take priority to such a degree in areas which are of relevance to fundamental rights that, in order to satisfy it in an optimum manner, the tasks of the administration which need to be carried out in the public interest may be excessively hindered or indeed virtually blocked.” These stipulations of the supreme court judges were also taken as a basis in the present provision.

Similar provisions on public announcements can be found in section 74 subsection (5) and section 69 subsection (2) of the Administrative Procedure Act, in section 10 subsection (8) in conjunction with

For information purposes only

Draft Bill Aligning the Environmental Appeals Act  
and other provisions to Stipulations of European and International Law  
(version: ~~1019 June~~ April 2016)

subsection (3), sentence 1, of the Federal Immission Control Act (*BImSchG*) and section 21a of the Ninth Ordinance Implementing the Federal Immission Control Act (*Neunte Verordnung zur Durchführung des Bundes-Immissionsschutzgesetzes – 9. BImSchV*) as well as other specialist statutes for cases in which an announcement is to be carried out to a large number of addressees.

The present amendment of the Federal Mining Act is in harmony with these pre-existing provisions. Section 74 subsection (5) of the Administrative Procedure Act provides that the service of plan approval resolutions can be substituted by a public announcement if more than 50 instances of serving of documents are necessary. This also applies to plan authorisations.

Section 21a, sentence 1, of the Ninth Ordinance Implementing the Federal Immission Control Act furthermore also facilitates with proceedings where there is no public participation a public announcement in response to the application of the developer. The government reasoning (cf. Bundesrat printed paper [*BR-Drs.*] 494/91) on this provision reads as follows: “The provision on the public announcement of the decision on request by the developer serves the purpose of legal certainty since the approvals that have been granted also become final once the appeals deadline has lapsed if the approval notice is not already to be served in accordance with section 10 subsection (7) or (8), sentence 1, of the Federal Immission Control Act. Furthermore, by the indication prescribed for the announcement of the running of the appeals period, the provision facilitates that the citizen is better able to estimate the risk of going to court with regard to the point of view of forfeiture since they are informed of the relevant deadlines.”

As with regard to the provisions mentioned, the new section 5a creates a provision which facilitates a compensation between the interests of all concerned in obtaining information, the interest in legal certainty of the developer, as well as the interest of the authority in a justifiable bureaucratic effort.

The possibility of an individual announcement to the applicant and to those for whom the decision is intended remains. Furthermore, provisions on the announcement of a decision via serving of documents (in particular provisions regarding a requirement of serving of documents), as well as possibilities or duties of public announcement in accordance with other provisions, in particular in accordance with the provisions of the Administrative Procedure Act, remain unaffected.

As with the similar provisions contained in section 10 subsection (8) of the Federal Immission Control Act or section 74 subsection (5) of the Administrative Procedure Act, the public announcement does not rule out an announcement to individual parties concerned. The recognition authority must, rather, rule when exercising its discretion whether the approval notice is to be individually announced to specific individuals, in addition to the public announcement, in particular to those who have raised objections. If no public announcement takes place, in accordance with section 7 subsection (1) of the Environmental Appeals Act, the possibility furthermore remains to apply for the announcement of the decision to specific individuals and associations for specific decisions within the scope of the Environmental Appeals Act.

Since a licence under water law is also required for mining projects as a rule, the provision contained in the Federal Mining Act should be added to by provisions of water law. In line with the concept followed in the Federal Water Act (*Wasserhaushaltsgesetz*), which as a matter of principle does not

For information purposes only

Draft Bill Aligning the Environmental Appeals Act  
and other provisions to Stipulations of European and International Law  
(version: ~~1019 June~~ April 2016)

contain any provisions on the administrative procedure, but places these in *Land* law, it is however left up to the *Länder* to enact a corresponding provision in their respective provisions of water law.

Subsection (2) regulates how the announcement is to take place, and what legal impact it has. The provision is orientated in line with the provision contained in section 41 subsection (4), section 74 subsection (5) and section 69 subsection (2) of the Administrative Procedure Act, as well as with section 10 subsection (8) of the Federal Immission Control Act. In comparison to the general provision contained in section 41 subsection (4) of the Administrative Procedure Act, a more precise provision is enacted as to how the announcement is to take place as customary in the location. This is to already enable those concerned and interested parties, on the basis of the statutory provision, to locate the decision. Here, the provision provides in the interest of transparency, and in derogation from section 41 subsection (4) of the Administrative Procedure Act, that the announcement is always to be published along with the information on appeals. As with the provisions of federal law on immissions protection, this is to directly create transparency for citizens with regard to the relevant deadlines. What is more, as with the corresponding provisions contained in section 10 subsection (8) of the Federal Immission Control Act and in section 74 subsection (4) of the Administrative Procedure Act, an indication of the conditionality is to be provided. An obligation to publish all ancillary provisions in accordance with sentence 1 would not be expedient, particularly where these are very numerous. As the Federal Administrative Court has stated (judgment of 27 May 1983 - 4 C 40, 44, 45/81, NJW 1984, 188, 190), in particular with extensive projects, the purpose of the information would in fact be missed by literally reproducing all “enacting provisions”, since this would entail a risk of the citizen tending to be confused. As in the corresponding provisions on plan approval, the project, and the provisions handed down on it, must however be announced in such a way that the announcement can exert a follow-through effect and those concerned are enabled to realise that they are concerned, and where appropriate are enabled to obtain further information (see Federal Administrative Court judgment of 31 July 2012 – 4 A 5000/10, 4 A 5001/10, 4 A 5002/10, 4 A 7000/11, NVwZ 2013, 284, No. 32).

**re Article 8 (Amendment of the General Rail Act)**

The amendments are a consequential amendment to the insertion of a new sentence 3 in section 9 subsection (1) of the Environmental Impact Assessment Act, and adjust the existing indications in the General Rail Act.

**re Article 9 (Amendment of the Federal Highways Act)**

The amendments are a consequential amendment to the insertion of a new sentence 3 in section 9 subsection (1) of the Environmental Impact Assessment Act, and adjust the existing indications in the Federal Highways Act.

**re Article 10 (Amendment of the Federal Waterways Act)**

For information purposes only

Draft Bill Aligning the Environmental Appeals Act  
and other provisions to Stipulations of European and International Law  
(version: ~~1019 June~~ April 2016)

The amendments are a consequential amendment to the insertion of a new sentence 3 in section 9 subsection (1) of the Environmental Impact Assessment Act, and adjust the existing indications in the Federal Waterways Act.

**re Article 11 (Amendment of the Civil Aviation Act)**

The amendments are a consequential amendment to the insertion of a new sentence 3 in section 9 subsection (1) of the Environmental Impact Assessment Act, and adjust the existing indications in the Civil Aviation Act.

**re Article 12 (Amendment of the Magnetic Suspension Train Planning Act)**

The amendments are a consequential amendment to the insertion of a new sentence 3 in section 9 subsection (1) of the Environmental Impact Assessment Act, and adjust the existing indications in the Magnetic Suspension Train Planning Act.

**re Article 13 (Amendment of the Energy Industry Act)**

The amendments are a consequential amendment to the insertion of a new sentence 3 in section 9 subsection (1) of the Environmental Impact Assessment Act, and adjust the existing indications in the Energy Industry Act.

**re Article 14 (Amendment of the Ordinance on the Licensing Procedure)**

The amendment is a consequential amendment to the new wording of section 10 subsection (3), sentence 5, of the Federal Immission Control Act, and serves to ~~lend concrete form to adjust~~ the provisions on objections in the licensing procedure; cf. the comments re section 9 of the Environmental Impact Assessment Act as to content and scope.

**re Article 158 (Amendment of the Nuclear Licensing Procedure Ordinance)**

The amendment serves to ~~lend concrete form to adjust~~ the provisions on objections in the licensing procedure; cf. the comments re section 9 of the Environmental Impact Assessment Act as to content and scope.

**re Article 169 (Amendment of the Environmental Information Act)**

The article serves to render dynamic a reference contained in section 10 of the Environmental Information Act to sections 11 and 12 of the of the Environmental Impact Assessment Act.

**re Article 170 (Permission to announce)**

The article constitutes an empowerment to re-announce the Environmental Appeals Act as well as of the Federal Immission Control Act in the version valid prior to the coming into force of the amendments brought about by this Act.

For information purposes only

Draft Bill Aligning the Environmental Appeals Act  
and other provisions to Stipulations of European and International Law  
(version: ~~1019 June~~ April 2016)

**re Article 181 (Entry into force)**

In accordance with Article 82 paragraph 2, sentence 1, of the Basic Law, Article ~~19~~ regulates the date of the coming into force of the Act.