For information purposes only

Draft Bill Aligning the Environmental Appeals Act
and other provisions to Stipulations of European and International Law
(version: 19 April 2016)

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 Lesoochranárske 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.

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. 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).
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 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, 3 and 4 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.

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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 subsection (5) of the Environmental Impact Assessment Act (*Gesetz über die Umwelt-*

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* 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).

verträglichkeitsprüfung) 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 law;

5. administrative acts which regulate the permissibility of undertakings other than those designated in numbers 1 to 2b, applying environmental provisions of Federal or *Land* law, and

6. administrative acts regarding monitoring or supervisory measures serving compliance with environmental provisions of Federal or *Land* law."

bb) Sentence 3 shall be worded as follows:

"The following shall remain unaffected
1. section 44a of the Code of Administrative Court Procedure (*Verwaltungsgerichts-ordnung*),
2. section 17 subsection (4), sentences 3 to 5, of the Repository Site Selection Act (*Stand-ortauswahlgesetz*), 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 condition of environmental components within the meaning of section 2 subsection (3) number 1 of the Environmental Information Act (*Umweltinformationsgesetz*), or to factors within the meaning of section 2 subsection (3) number 2 of the Environmental Information Act."

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

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) 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."

cc) 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.

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 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) 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 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, 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:

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

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
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 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.

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.

(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 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.

(4) Subsection (2) shall also apply to appeals of parties concerned in accordance with section 61 numbers 1 and 2 of the Code of Administrative Court Procedure.

Section 7
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 handed down subsequent to 25 June 2005.

(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 (*Bundesnatur-schutzgesetz*) 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."

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:

For information purposes only

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(version: 19 April 2016)

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 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. 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 after the word "deadline".

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.”

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 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 “for the licensing procedure” shall be inserted in sentence 5 after the word “objections”.

   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,”.

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 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 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."

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 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 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), the words "for the licensing procedure" shall be inserted after the words "period for filing objections".

Article 8
Amendment of the Nuclear Licensing Procedure Ordinance (*Atomrechtliche Verfahrensverordnung*)

The Nuclear Licensing Procedure Ordinance in the version 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 "for the licensing procedure" shall be inserted in section 7 subsection (1), sentence 2, after the word "admitted".

2. The words "for the licensing procedure" shall be inserted after the words "after expiration of the period for filing objections" in section 7a subsection (1), sentence 3.

Article 9
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 10
Permission to announce

The Federal Ministry for the Environment, Nature Conservation, Building and Nuclear Safety can announce the wording of the Environmental Appeals Act in the version valid from … [insert: date of coming into force in accordance with Article 11 of the present Act] in the Federal Law Gazette.

Article 11
Coming into force

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

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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 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 Lesoochranárske 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 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).

The amendments to the Ordinance on the Licensing Procedure, as well as of the Nuclear Licensing Procedure Ordinance (Articles 7 and 8), 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 9 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 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).

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. 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), according to which a total of 58 sets of court proceedings of recognised environmental associations were identified in 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).
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: 19 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 6 subsection (1) of the Environmental Appeals Act	announcement on application	administration, industry	0, 0
2	section 9 subsection (1c), sentence 3, of the Environmental Impact Assessment Act	additional obligation to report in the context of public notification	administration	0
3	section 9 subsection (1d) of the Environmental Impact Assessment Act	power of the authority to extend the period for comments	administration	0
4	section 14i subsection (3), sentence 4, of the Environmental Impact Assessment Act	additional obligation to report in the context of public notification	administration	0
5	section 14l subsection (2) number 4 of the Environmental Impact Assessment Act	additional obligation to provide information about appeals	administration	0
6	section 63 subsection (1) number 2 of the Federal Nature Conservation Act	addition to the obligation of participation	administration	…
7	section 63 subsection (2) number 4a of the Federal Nature Conservation Act	addition to the obligation of participation	administration	…
8	section 63 subsection (2) number 4b of the Federal Nature Conservation Act	addition to the obligation of participation	administration	…
9	section 63 subsection (2) number 5 of the Federal Nature Conservation Act	addition to the obligation of participation	administration	…

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

re No. 1 (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.

re Nos. 2 and 4 (section 9 subsection (1c), sentence 3, and section 14i subsection (3), sentence 4, 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 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, and section 14i subsection (2), sentence 3, of the Environmental Impact Assessment Act. This legal amendment is declaratory in nature to some degree, given that only the general stipulation contained in section 74 subsection (3), sentence 4, of the Administrative Procedures 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. 3 (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. 5 (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 9 (section 63 subsection (1) number 2 and subsection (2) numbers 4, 4a and 5 of the Federal Nature Conservation Act):

…

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.

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 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 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 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 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 that such an establishment of frameworks always exists 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 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, development plans (land use plans and zoning plans) are also covered 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; 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.

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 14l 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 to the question of which court appeal in accordance with the Code of Administrative Court Procedure is relevant:
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 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 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 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 (1), sentence 4, 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 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.
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 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. 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).

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 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 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.

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 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 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 unchanged wording of the provision formerly contained in subsection (4).

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 the Environmental Appeals Act, the general arrangement on exclusion of section 73 subsection (4), sentences 3 and 6, of the Administrative Procedure Act also does not apply.

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

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.

Re number 4 (section 4)

re a)

The amended title serves the purpose of clarification.

re b)

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) and (2) also apply to plans and programmes. Section 46 of the Administrative Procedure Act 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*.

re number 5 (sections 5 to 7)

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.

The former section 4a (stipulations concerning the application of the Code of Administrative Court Procedure) is to be rescinded. This provision has not led in practice to simplifying and facilitating appeal proceedings under environmental law, but has rather tended to create uncertainty. Subsection (1) 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. 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 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 under European law. The European Commission expressed doubts in ongoing pilot proceedings against Germany (EU pilot 5908/13/ENVI) as to whether 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 6:

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. 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), jurisdiction at first instance for appeals of recognised environmental associations in accordance with the Environmental Appeals Act in relation to plans and programmes on the basis of the fundamental comparability of the planning decisions is to be allocated to the Higher Administrative Courts at first instance.

The Higher Administrative Court which has territorial jurisdiction for an appeal in relation to plans or programmes in accordance with section 1 subsection (1), sentence 1, number 4 is to be determined in accordance with section 52 of the Code of Administrative Court Procedure. Where appropriate, a determination of jurisdiction by the Federal Administrative Court is necessary in accordance with section 53 of the Code of Administrative Court Procedure, such as with plans and programmes 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.

Subsection (4) serves to clarify that section 6 subsection (2) 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.

re section 7:

Section 7 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 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)

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 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 month 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 sentences three and four contain corresponding, final special provisions concerning objections in administrative proceedings. Sentence 3 regulates the statements which are not ruled out in the further proceedings. 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 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. 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 amendment serves to lend concrete form to the provisions on objections in administrative proceedings.

re number 3 (section 14i)

In accordance with the addendum in section 9 subsections (1c) and (1d) of the Environmental Impact Assessment Act, the newly-inserted sentences 3 and 4 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). 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, 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 (*Bundesberg-gesetz*).

re number 7 (section 19b)

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 the provisions on objections in the licensing procedure. 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.

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.

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.

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.

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 (*Europarechtsanpass-ungsgesetz Bau*) of 26 April 2004 (Federal Law Gazette I p. 1359). Section 214 subsection (1), sentence 1, number 2 of the Federal Building Code is to be adjusted as a consequential amendment to this.

re Article 7 (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 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 8 (Amendment of the Nuclear Licensing Procedure Ordinance)

The amendment serves to lend concrete form to 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 9 (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 10 (Permission to announce)

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

re Article 11 (Entry into force)

In accordance with Article 82 paragraph 2, sentence 1, of the Basic Law, Article 11 regulates the date of the coming into force of the Act.