



TO

Ms Fiona Marshall

Acting Secretary to the Århus Convention Compliance Committee

United Nations Economic Commission for Europe

Environment and Human Settlement Division

Room 332, Palais des Nations

CH-1211 Geneva 10

Switzerland

### **Answers to the questions of the Compliance Committee**

The communicant hereby answers the questions of the Compliance Committee, which were annexed to the letter of the acting Secretary to the Århus Convention Compliance Committee, dated 10 November 2011.

#### **Question.1. Please describe in more detail the relation between (i) SEA decisions and EIA statements under the Environmental Protection Act (EPA)<sup>1</sup> and (ii) plans and decisions (permits) under the Spatial Planning Act (SPA)<sup>2</sup>.**

In some cases of plans and decisions (permits) there is relation, in other cases there is not. There are three types of cases:

- Compulsory SEA or EIA: in those cases the environmental assessments are always compulsory pre-condition for adoption of plans or decisions (permits), as provided by in the law, i.e. *ex lege*;
- Subject to a screening procedure: in those cases an administrative body (MOEW or RIEW) finds whether the particular plan or project will need an environmental assessment as a pre-requisite for their lawful adoption; the administrative body does not exercise full discretion in deciding screening a plan or project out of SEA or EIA, as there are certain rules prescribed by the law; once the case is screened for SEA or EIA, the respective environmental assessment becomes a required pre-requisite for adoption of the particular plan or permit in question.

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<sup>1</sup> Unofficial translation of the EPA can be found in attachment 1.

<sup>2</sup> Unofficial translation of the SPA can be found in attachment 2.

#### **Balkani Wildlife Society**

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- No SEA or EIA shall be necessary.

Those three types of cases are outlined in the EPA. Usually, only cases with significant environmental impact are subject to SEA or EIA. In that respect, the criteria used in the law are in compliance with the Århus Convention. We do not claim that the EPA criteria whether an environmental assessment is necessary or not contradicts the Convention.

What is more, if those criteria were always respected, i.e. if SEA or EIA were always conducted when prescribed by the law, there would be no violation of the Convention whatsoever.

### 1.1. SEA statement:

The relation between the SEA statement and the plans under the Spatial Planning Act can be found in articles 81 (1.1), 82 (1) and (4) and 85 (1) of the Environmental Protection Act (EPA) (transposition of Art. 3 of the SEA Directive) and Art. 125 (6) of the Spatial Planning Act (SPA):

Art. 81 (1.1) of the EPA: *Environmental assessment shall be conducted of plans or programmes which are in a process of preparation and/or approval by central or local executive authorities and the National Assembly.*

Art. 82 (1) of the EPA: *The SEA shall be fully compatible with the existing procedures for adoption of plans and programmes.*

Art. 82 (4) of the EPA: *The environmental assessment of plans and programmes shall be completed when an opinion of the Minister of Environment and Water or of the competent RIEW Director is issued; the form and contents of the said opinion shall be determined in the regulation referred to in Article 90 herein. The authorities responsible for adoption and implementation of the plan or the programme shall reckon with the said opinion.*

Art. 85 (1) of the EPA: *An environmental assessment shall be mandatory for any plans and programmes and for significant modifications thereof in the areas of agriculture, forestry, fisheries, transport, energy, waste management, water resources management, and industry, including extraction of subsoil resources, telecommunications, tourism, spatial planning and land use, where these areas set the framework for future development of any development proposals listed in Annexes 1 and 2 hereto.*

Art. 125 (6) of the SPA: *The assignment of the plan should be subject to SEA screening procedure. The environmental assessment (SEA) is part of the spatial plan.*

### 1.2. EIA decisions:

The relation between the EIA decision and the construction permits under the Spatial Planning Act can be found in articles 81 (1.2), 81 (4) and 82 (5) of the Environmental Protection Act (EPA) (transposition of Art. 4 of the EIA Directive) and Art. 144 (1.4) of the Spatial Planning Act (SPA):

Art. 81 (1.2) of the EPA: *Environmental impact assessment (EIA) shall be conducted for development proposals for execution of construction, activities and technologies listed in Annexes 1 and 2 hereto.*

Art. 81 (4) of the EPA: *The environmental impact assessment referred to in Item 2 of Paragraph (1) shall identify, describe and assess in an appropriate manner, in the light of each particular case, the direct and indirect effects of a development proposal for execution of construction, activities and technologies on: human beings; biological diversity and the elements thereof, including flora and fauna; soil, water, air, climate and the landscape; the bowels of the Earth, physical structures and the cultural and historical heritage, as well as the interaction among these factors.*

Art. 82 (5) of the EPA: *The assessment of development proposals shall be completed when a decision of the competent authority referred to in Article 94 (1) herein is issued; this decision shall be binding on the project developer. The decision is a compulsory condition for the further authorization of a development project under a specific law (e.g. the Spatial Planning Plan).*

Art. 144 (1.4) of the SPA: *The development projects, requiring building permit, should be authorized after the developer submits the administrative acts, issued under the Environmental protection Act or special Act as a condition for the authorization of the construction activities.*

**Question. 2. Following from question 1, please specify whether the environmental aspects of individual plans and projects are definitively decided upon in the SEA statements/EIA decisions, or, if not, which aspects, and to what extent, may be further discussed and decided upon when approving the plan or issuing the permit under the SPA.**

According to Art. 81 (3) and 81 (5) of the EPA all environmental aspects of a plan or a development project should be discussed and decided upon in the SEA statement/EIA decision, and if any new environmental aspects may arise when approving the plan or issuing the permit under the SPA, the SEA/EIA procedure should be reinitiated:

Art. 81 (3) of the EPA: *Environmental assessment of plans and programmes shall be conducted simultaneously with the preparation therein, taking into account the objectives and the geographical scope of the plans or programmes and the level of detail thereof, so that the likely effects on the environment of implementation of the development proposals included in the said plans or programmes are appropriately identified, described and evaluated.*

Art. 81 (5) of the EPA: *The environmental impact assessment referred to in Item 2 of Paragraph (1) shall identify, describe and assess in an appropriate manner, in the light of each particular case, the direct and indirect effects of a development proposal for execution of construction, activities and technologies on: human beings; biological diversity and the elements thereof, including flora and fauna; soil, water, air, climate and the landscape; the bowels of the Earth, physical structures and the cultural and historical heritage, as well as the interaction among these factors.*

The public consultation of spatial plans is organised at two different stages which are not formally joined:

- public consultation of SEA of the plans by virtue of Art. 87 (1) it. 2: *“The initiator of the plan or programme shall organize consultations with the public<sup>3</sup> and with persons concerned who are affected by the implementation of the plan or programme.”*

- public consultation of general and detailed<sup>4</sup> spatial plans by virtue of Article 127 (1) and resp. 128 (5) of the SPA: *“...spatial plans shall be subject to public debate according to the procedure established by Article 121 (1) herein prior to the submission thereof to the expert boards on spatial development.”*

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<sup>3</sup> incl. environmental NGOs by virtue of §1, p 24 and 25 of the EPA.

<sup>4</sup> The public concerned of detailed spatial plans is limited by Art. 131 of the SPA to the owners of the plots under spatial planning.

The public consultation of development projects is organized at only one stage and it concerns only the EIA reports of the projects, acc. to Art. 95 (1) and 97 (1)-(2) of the EPA,:

*Art. 95 (1) of the EPA: At the earliest stage of the development-project initiative, the project developer shall inform the competent authority and the public concerned of the proposal, declaring the said proposal in writing and ensuring preparation of terms of reference for the scope of the EIA.*

*Art. 97 (1) of the EPA: After receiving a favorable evaluation under Article 96 (6) herein, the project client shall organize, jointly with the municipalities, wards, mayoralties and regions concerned as specified by the competent authority, public discussions on the EIA statement.*

*Art. 97 (2) of the EPA: All natural and juristic persons concerned may participate in the discussions referred to in Paragraph (1), including representatives of the authority competent to make an EIA decision, the local executive administration, public organizations and citizens.*

Again, if the SEA or EIA is properly proceeded any time when the law provides it is compulsory, there would be no infringement upon the rights of the public concerned under the Århus Convention. Unfortunately, in numerous cases no environmental assessment is conducted (or is not properly conducted), and the public concerned have no effective remedy of amending such omissions during the next stages in the proceedings for adoption of plans or permits.

**Question 3. Please outline which persons are entitled to challenge an EIA decision issued under the EPA through the national courts and the conditions they must fulfil to do so.**

We do not claim there is violation of the Convention in relation to the circle of persons entitled to challenge an EIA decision or to the conditions they must fulfil to do so. The EPA is in full compliance with the convention in that respect.

According to Art. 99 (6), the EIA decision under the EPA could be challenged only by interested parties. Under §1, p 24 and 25 of the EPA the interested parties is the public concerned, incl. the environmental NGOs. The environmental NGOs should be established in compliance with the national legislation.

Certainly, to exercise those rights under the EPA, one will need an EIA decision to challenge, i.e. a proper EIA procedure and a proper EIA decision issued by the respective authority. If there is no procedure conducted, if there is no decision, one cannot exercise her/his rights under the EPA and the Århus Convention. Later, no participation of the public concerned is possible in decision-making process in authorization of development projects.

**Question 4. If a specific EIA decision is challenged in the court, please explain the legal consequences, if any, on the issuing of subsequent construction/exploitation permits for the project.**

In general, according to Art. 90 and Art. 166 of the Administrative Procedure Code, if an administrative act (incl. EIA decision) is challenged it shall not enter into force and cannot be implemented before the review procedure is finished. In case that an EIA decision is challenged, this prevents the respective construction permit to be issued. Preliminary execution (implementation) of an administrative act is possible prior to the review procedure end solely in

case when an *Order for preliminary execution* of the act is issued under Art. 60, resp. Art. 167 of the APC.

In that respect, there is no contradiction between the Bulgarian national legislation and the Århus Convention. We do not claim such violation, it is out of the scope of our communication.

Our communication covers cases when no EIA is proceeded and the respective permit is issued without the otherwise compulsory environmental assessment.

## **Question 5.**

**Please explain what legal options are available to challenge a Spatial Plan after its adoption on the ground that either (i) the SEA statement was not issued before the adoption of the General or Detail Spatial Plan, or (ii) the SEA procedure was not carried out properly. Which persons are entitled to bring such a challenge? Similarly, please explain what legal options are available to challenge a permit for a given project after its adoption on the basis that an EIA decision was not issued before the permit's adoption. Which persons are entitled to bring such a challenge?**

### **5.1. Spatial plans:**

#### **5.1.1. General Spatial Plans:**

No options.

Persons entitled to bring such challenge:

No one.

Acc. to Art. 215 (6)<sup>5</sup> of the SPA, neither the spatial schemes and the general spatial plans, nor their amendments are subject to a review procedure.

Note: Before 2010, those provisions were regulated by art. 126 (6) and (10).

#### **5.1.1. Detailed Spatial Plans:**

Limited options.

Persons entitled to bring such challenge:

Acc. to Art. 215<sup>6</sup> of the SPA, the detailed spatial plans can be subject to a review procedure,

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<sup>5</sup> Art. 215 (6) of the SPA: *Spatial schemes and general spatial plans, as well as their amendments, are not subject to a review procedure.*

<sup>6</sup> Art. 215 (1) of the SPA: *The individual administrative acts under this Act, the refusals to issue any such acts and the administrative acts reversing or affirming any such acts, with the exception of such covered under Article 216 (1) herein, shall be appealable before the relevant administrative court having jurisdiction over the location of the corporeal immovable. The acts and refusals by the Minister of Regional Development and Public Works, by the Minister of Defence and by the Minister of Interior shall be appealable before the Supreme Administrative Court.*

however Art. 131 of the SPA limits the number of persons (*numerus clausus*) who have the right to express an opinion and have access to judicial review on *Detailed Spatial Plans* as follows:

- 1.) The owners of the plot under spatial planning;
- 2.) The owners of the neighbouring plots (directly contiguous/adjoined plots) in some cases only (that sub-list is *numerus clausus* too):
  - contiguous buildings;
  - if the DSP in question allows buffer building distances below the minimal requirements in the law;
  - in case the DSP provides for change in the designation (purpose) of the land plot in question.
- 3.) The owners of plots in the hygiene protection zones if such are planned.

That *numerus clausus* listing means other people are strictly forbidden to challenge the lawfulness of those orders for DSP adoption, *per argumentum a contrario*. Such interpretation is supported by the reading of art. 120 of the Bulgarian Constitution.

There is no case-law, of appeals based on the Århus Convention itself to be found admissible, i.e. direct application of the Convention to be invoked by the national courts to ensure admissibility of such appeals. Art. 120 of the Bulgarian Constitution, in relation with art.131 of the SPA, prevents application of art. 5 (4) of the Bulgarian Constitution (direct application of international treaty).

What is more in some cases the public concerned is denied any chance even to learn about the DSP procedure, as provided in art. 128 (13) of the SPA. Those are the cases when the DSP procedure was initiated by the very persona under art. 131 of the SPA listings. In such case, any other persons (other neighbors under art. 9-3 of the Convention or public concerned under art 9-2 of the Convention) cannot understand about the DSP in order to file an appeal based on the Århus Convention itself, i.e. to invoke direct application of the Convention to ensure admissibility of their appeals

## **5.2. Construction permit:**

Limited options.

Persons entitled to bring such challenge:

Acc. to Art. 215, the building permits can be subject to a review procedure, however Art. 149 of the SPA limits the number of persons (*Numerus clausus*) who have the right to express an opinion and have access to judicial review on *building permits* of development projects to the investors and in case of reconstruction activities - the neighbours.

The art. 149 of the SPA listing is even more restrictive than the art. 131 of the SPA list. It covers only the plot owners and co-owners or the building owners and co-owners, as well as easement beneficiaries.

## Question 6.

**Please describe in greater detail the main differences between General Spatial Plans and Detailed Spatial Plans adopted under the Spatial Planning Act (in particular what each regulates and in what respects)?**

Acc. to Art. 103 (2-3)<sup>7</sup> of the SPA the General Spatial Plans define the predominant designation and development type in the different structural elements of the territories in the domain of the plan, while the Detailed Spatial Plans define the concrete designation and development type in the different land plots in the domain of the plan.

In more detail, Art. 106<sup>8</sup> of the SPA stipulates that the General Spatial Plan of a Municipality or part of it defines:

1. The general structure of the territory, the subject of the plan, and predominant designation of the structural elements – situation and boundaries of the settlements; the agricultural territories; the forest territories; the nature protection territories, etc.
2. The general regime of planning of each of the territories under p.1.
3. The particular situation of the technical infrastructure (roads, rail roads, water-canals, ski lifts and ski runs, etc.) on the territory of the municipality and its connection with the territories of the adjacent municipalities and the technical infrastructures of national importance.
- 4-6. Other regimes.

Acc. to Art. 108 (1)<sup>9</sup> of the SPA, the Detailed Spatial plans provide details for the development and urbanization of the territories of the settlements. Acc. to Art. 103 (4) of the SPA, every spatial plan should be in compliance with the provisions of the plan or scheme of higher level. Further, Art. 108 (1) of the SPA stipulates that the provisions of the Detailed Spatial Plan are obligatory for the development projects designing.

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<sup>7</sup> Art. 103 of the SPA:

(2) A master plan shall determine the prevailing intended purpose and manner of planning of the separate structural parts of the areas comprehended into the plan.

(3) A detailed plan shall determine the specific intended purpose and manner of planning of the separate lots comprehended into the plan.

<sup>8</sup> Article 106 of the SPA: The master plan of a municipality or of a part thereof shall determine:

1. (supplemented, SG No. 65/2004) the general spatial structure of the spatial-development area subject to the plan, and the prevailing intended purpose of the constituent and structural parts of the said area: location and boundaries of the nucleated settlement and dispersed-settlement areas; the agricultural areas; the forest areas; the nature-conservation areas; the cultural and historical conservation areas, the disturbed areas for rehabilitation, and the areas of special, other, or mixed intended purpose;

2. the general planning mode of each of the spatial-development areas covered under Item 1, with the requisite rules and standard specifications;

3. the sitting of the physical-infrastructure networks and facilities within the territory of the municipality, and the connections of the said networks and facilities to the spatial development areas of the surrounding municipalities and to the infrastructure networks, facilities and projects of national importance;

4. the spatial-development areas constituting public state and public municipal property, and the planning mode thereof;

5. the spatial-development areas susceptible to predictable natural hazards and the requisite precautions and a manner of planning and protection;

6. the spatial-development areas for active application of landscaping and aesthetically effective arrangement.

<sup>9</sup> Article 108 (1) of the SPA: Detailed plans shall particularize the planning and building development of nucleated-settlement areas and of the land-use areas of nucleated settlements, as well as of the dispersed settlements. The projections of detailed plans shall be mandatory in development project designing.

**Question 7 (Question mainly for the Party concerned):**

**Please describe in greater detail the “recent judicial practice associated with the appeal of acts of the environmental authorities”, which you refer to at page 2 of your written statement of 16 August 2011.**

Hereby, we would like to note that the Decision № 8104 / 06.16.2010 of SAC and Decision № 10163/29.07.2009 of SAC, cited by the Party concerned in respect to the “recent judicial practice associated with acts of the environmental authorities” are not relevant to the judicial practice with regard to SEA decisions/statements since both cases concern other type of environmental acts and not SEA decisions/statements.

**Question 8 (presented to the communicant during the hearing session)**

**Since the Detailed Spatial Plans could provide for all the relevant details of the subsequent construction permit, are there examples when an investment project is subject only to a SEA (or screened out of SEA), without subsequent EIA of the relevant construction permit, based on the very same DSP?**

Answer:

Indeed, there is wide-spread practice of preparation of a very small scale DSPs, covering only one investment project or only one real estate plot. In those cases, if a SEA procedure of those DSPs blueprints is conducted, we face two typical possibilities in practice:

- 1.) The DSPs are screened out of SEA, while the subsequent construction permits (or investment projects) are also screened out of EIA, based on the initial RIEW/MOEW SEA screening decision;
- 2.) The DSPs are screened out of SEA, while the subsequent construction permits (or investment projects) are not put under an EIA procedure at all, based on the initial RIEW/MOEW SEA screening decision;
- 3.) The DSPs are approved after SEA is conducted, while the subsequent construction permits (or investment projects) are not put under an EIA procedure at all, based on the RIEW/MOEW SEA statement;

Such practice is mainly used for small-scale resort villages, villas or cottages near the seacoast, seacoast resorts or mountain resorts in forest areas. List of some exemplary cases is enclosed as attachment No. 6 to the present letter.

Further, we need to note that in general the final authorisation of projects for village complexes under p.12 of Annex II of the EPA<sup>10</sup> is done on basis of a SEA decision, rather than on basis of an EIA decision. In these cases, the SEA decision regarding the Detailed Spatial Plan of the project is actually the only environmental permit for village complexes. Once a SEA decision is issued for the DSP, the Municipality adopts the DSP and issues final construction permit for the village complex solely on basis of the referred SEA decision.

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<sup>10</sup> The village complexes under p.12 of Annex II of the EPA can be considered as projects under p. 20 of Annex I of the Aarhus Convention.



On the one hand, the EIA procedure is omitted since it is generally accepted that the SEA report on such Detailed Spatial Plans discusses most of the environmental aspects of the relevant village development projects whereby concrete preventive measures are foreseen with regard to the construction activities (see f.e. Decision No. BA-5/2011 of the Varna RIEW and Decision No. BC-6-1/2011 and No. BC-11-2/2011 of the Burgas RIEW – Att. 3, 4 and 5). A comprehensive list of the village projects authorized only by SEA decision can be found in Att. 6.

On the other hand, this practice seems to be in conformance with Art. 81 (7) of the EPA<sup>11</sup> and Art. 91 (2) of the EPA<sup>12</sup>.

Except the village complexes, we are not aware of other types of Annex I projects under the Convention which are granted environmental permits only by SEA decisions rather than by EIA decisions.

We believe that this practice is just another option for avoiding the compulsory EIA procedure of investment projects. We believe this practice, although arguably considered legal under the national law, is in pure violation of the Convention. Even though in some cases an SEA is conducted or screened out after an EPA, it by no means fulfils the obligations under the Convention to allow public participation, access to information and access to justice under the Convention. The reason is that the SEA procedure under EPA cannot allow assessment and public discussion of all details of a particular investment project, despite the fact that the DSPs provide for all relevant details of the prospective construction. The SEA procedure under the EPA is not designed to allow get into details of a particular project, since it is not meant or aimed at particular projects. Its subject should rather be plans and programs with really strategic impact, not providing details for the further construction. In other words, despite the practice of proceeding small-scale and too detailed DSPs, the SEA procedure (or SEA screening procedure) for those DSP cannot and is not is not meant to fulfil the Convention requirements by itself, since it does not cover all the details of the particular investment projects in question.

Yours faithfully,



Alexander Dountchev,

On behalf of the Balkani Wildlife Society

Date: 11.02.2012

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<sup>11</sup> Art. 81 (7) of the EPA: *An EIA procedure shall not be conducted for development proposals where, according to a procedure established by a special law, the said proposals are subject to approval in a procedure including a similar assessment and provided that public access to the relevant information is ensured.*

<sup>12</sup> Art. 91 (2) of the EPA: Upon request of the developer or upon its own opinion, the competent authority may require the execution of only one of the assessments types (e.g. EIA or SEA) under Chapter Six, when for development project listed in Annexes 1 and 2 hereto, an individual plan or a program under art. 85 (1) and (2) should be prepared.

Attachments:

1. Translation of the EPA (unofficial copy, old version of the Act)
2. Translation of the SPA (unofficial copy, old version of the Act)
3. Decision No. BA-5/2011 of the Varna RIEW
4. Decision No. BC-6-1/2011 of the Burgas RIEW
5. Decision No. BC-11-2/2011 of the Burgas RIEW
6. A comprehensive list of the village projects authorized only by SEA decision