

**Analysis of court rulings
for 2008-2011 period, on disputes over access to ecological data, participation
of general public in decision making process and on access to justice in
environmental issues.**

Due to the fact that statistical data and overviews of civil cases provided by websites of Supreme Court of Kazakhstan and regional courts lack information related to claims and lawsuits on environmental issues filed by individuals and legal entities, the analysis is based on information on lawsuits of Environmental organization “Zelyonoye spaseniye” (Green salvation), for 2008-2011 period. As well as ruling of Specialized Inter-district Economic Court of Atyrau region dated April 12th, 2011 to the claim by "Zaman" Public Foundation made to Governmental Agency "Atyrau City Administration" to invalidate decrees granting LLP "TenizService" land for the placement of the North-Caspian ecological base for oil spill response.

According to information posted on <http://www.greensalvation.org> website of “Zelyonoye spaseniye” environmental organization, under section “Legal cases”:

Environmental organization “Zelyonoye spaseniye” has filed 8 lawsuits in 2008, 9 lawsuits in 2009, 8 lawsuits in 2010 and 6 lawsuits in 2011. According to brief overviews of claims, total of 31 lawsuits have been filed throughout 2008-2011 period.

Lawsuits have been filed:

1. against Western-Kazakhstan Regional Statistics Office on failure to present ecological data.
2. against “AlmatygorNPCzem” State Branch Enterprise on failure to present ecological data.
3. on cancellation of decree of Almaty City Administration on allocation of land for private construction at the water protection zone of Esentai river.
4. against Almaty courts administrator due to non-fulfillment of a decision of Specialized Inter-district Economic Court of Almaty on liquidation of unauthorized dump of construction and municipal wastes next to Chymbulak ski resort area.
5. on nonfeasance of the Government of Republic of Kazakhstan, that lead to violation of rights and lawful interests of citizen and on invalidation of a decision made by Chief sanitary medic on the reduction of sanitary-protection zone.

6. against Eastern-Kazakhstan Regional Statistics Office on failure to present ecological data.
7. on prohibiting all forms of economic activity in the water protection zone of Esentai river (Almaty) and clearing land from from waste soil from construction (the defendant is not specified).
8. on finding Final Report of State Ecological Expertise as invalid and suspension of operations of LLP Centrbeton.
9. on invalidation of Government decree and Rules of rendering paid services on realization of products (works, services) by state institutions in the field of forestry and special protected environmental territories.
10. against Ministry of Healthcare on failure to present information (Report on assessment of health status of the population residing in the area of Karachaganak oil & gas field)
11. on presenting false information on situation around water protection zone in Esentai river area (Almaty), by state institutions.
12. on invalidation of decrees, reviews and project approvals for construction of modular veterinary laboratory (Almaty)
13. on non-feasance of a state institution – Court Administration Committee of the Supreme Court.
14. on failure to present information on measures taken in relation to water protection zones and special protected environmental territories, by Almaty City Administration.
15. on non-feasance of a Government, that lead to creation of unauthorized waste dump in Besagash township.
16. on adjudication of a regulation - "Rules of the public hearings" as contrary to the laws of the Republic of Kazakhstan and international agreements of Aarhus Convention.
17. on failure to present ecological information by Ministry of Environmental Protection.
18. on failure to present information on eviction of residents from sanitary-protection zone of Centrbeton LLP, by Mayor of Almaty.

19. on non-feasance of a Government, that lead to creation of unauthorized waste dump in Panfilov village, Talgar region of Almaty district.

Court rulings in favor of Green Salvation Ecological Organization (including partial satisfaction of claims):

1. On lawsuit against Western-Kazakhstan Regional Statistics Office on failure to present ecological data regarding air polluting emissions of Karachaganak Petroleum Operating B.V. Trial court denied all claims (SIEC of EKR). Regional court of Western-Kazakhstan region in appellate and supervisory judgment left trial court's ruling unchanged. Rule of court on reversal of a judgement of trial court and satisfaction of all claims was rendered by Supreme Court's Appellate Collegiate on Civil Cases. Claims were filed on behalf of citizen.

2. On lawsuit against SBE AlmatygorNPCzem on failure to present ecological data (copy of state act for land, allocated in water-protection zone and information on its registration with Almaty Immovables Center), SIEC of Almaty adjudicated to deny the claims. Supervisory collegiate of Almaty City Court issued decree on partial redress of a claim filed by Green Salvation Ecological Organization. Claims were filed on behalf of citizen.

3. Regarding lawsuit on repeal of decree issued by Almaty City Administration on allocation of land in water-protection zone of Esentai river, for private construction (Claims were filed on behalf of citizen).

4. On lawsuit against Almaty city courts administrator in relation to non-fulfillment of a decision of Specialized Inter-district Economic Court of Almaty on liquidation of unauthorized dump of construction and municipal wastes next to Chymbulak ski resort area. Claims sustained by ruling of SIEC of Almaty.

5. On lawsuit against Eastern-Kazakhstan Regional Statistics Office on failure to present ecological data, claims sustained by ruling of SIEC EKR.

6. Regarding lawsuit on non-feasance of the Government of Republic of Kazakhstan, that lead to violation of rights and lawful interests of citizen and on invalidation of a decision made by Chief sanitary medic on the reduction of sanitary-protection zone. Ruling of SIEK of Astana invalidated findings of Chief sanitary medic, an attachment to "Sanitary-protection area of Karachaganak oil and gas field" project. (Claims were filed on behalf of residents of Beryozovka village, Western Kazakhstan Region)

7. Regarding lawsuit on failure to present information on measures taken in relation to settlement of land disputes in water protection zones and special protected environmental territories, by Almaty City Administration. Court ruled partial redress of a claim.

8. Regarding lawsuit on non-feasance of a Government, that lead to creation of unauthorized waste dump in Besagash township. Court recognized the fact of nonfeasance of Head of Besagash village administration, Talgar region. (Claims were filed on behalf of residents of Besagash village)

9. On failure to present ecological information by Ministry of Environmental Protection. (National report on realization of Aarhus Convention and its discussion materials) SIEC of Astana ruled in absentia to sustain claims.

10. On failure to present information by Mayor of Almaty, on eviction of residents from sanitary-protection zone of Centrabeton LLP. (Claims were filed on behalf of citizen of Almaty)

The court denied the claims:

1. On cancellation of decree of Almaty City Administration on allocation of land for private construction at the water protection zone of Esentai river. (Claims were filed on behalf of citizen of Almaty)

2. On prohibiting all forms of economic activity in the water protection zone of Esentai river (Almaty) and clearing land from waste soil from construction (Claims were filed on behalf of citizen of Almaty).

3. On invalidation of Government decree and Rules of rendering paid services on realization of products (works, services) by state institutions in the field of forestry and special protected environmental territories.

4. On finding Final Report of State Ecological Expertise as invalid and suspension of operations of LLP (Claims were filed on behalf of citizen of Almaty).

5. On failure to present information by Ministry of Healthcare (Report on assessment of health status of the population residing in the area of Karachaganak oil & gas field, Claims were filed on behalf of residents of Beryozovka village, Western Kazakhstan Region).

6. On presenting false information concerning situation around water protection zone in Esentai river area (Almaty), by state institutions (Claims were filed on behalf of citizen of Almaty).

7. On non-feasance of a Government, that lead to creation of unauthorized waste dump in Besagash township (Claims were filed on behalf of Besagash residents).

8. On failure to present information on eviction of residents from sanitary-protection zone of Centrbeton LLP, by Mayor of Almaty (Claims were filed on behalf of citizen of Almaty).

9. On non-feasance of a Government, that lead to creation of unauthorized waste dump in Panfilov village, Talgar region of Almaty district.

Analysis of above mentioned legal actions undertaken by Green Salvation Ecological Organization, in which claims were both redressed, including partially and denied, allows us to conclude that courts in Republic of Kazakhstan, initiate proceedings and try civil cases on claims filed by environmental public organizations, including claims filed by environmental public organizations in protection of interests of other parties, regardless of the nature of claims made.

Attention is drawn to the fact that significant numbers of claims filed by Green Salvation Ecological Organization during the period of 2008-2011, were not tried on its merits by courts due to rejection to accept these claims, abandonment of claims without further movement and return of claims without consideration. Meanwhile these circumstances can not in any way be regarded as a violation of the right of access to justice.

Subject to article 153 of Civil Procedure Code of Republic of Kazakhstan, the judge rejects the claim, if:

- 1) Claim cannot be adjudicated and settled in civil legal proceedings;
- 2) There is already a court decision that has entered into force, on same dispute, between the same parties on the same subject or there is a court ruling on the dismissal of case due to the refusal of the claim of the plaintiff or the approval of a settlement agreement between the parties or an agreement to settle the dispute in order of mediation.

Judge announces motivated ruling on rejection of claim in which he specifies which body should the plaintiff address if the case cannot be tried in civil court. One can file a complaint or protest on judges' ruling to reject the claim.

The grounds on which the court leaves the claim without further movement, is provided in Article 155 of the Civil Procedure Code, which include: nonconformity of claim with requirements of Article 150 of the Code of Civil Procedure of Kazakhstan in form and content; claim is not accompanied by relevant documents, attachment of which is mandatory. Judge announces ruling on leaving the application without further movement and notifies the person who filed the claim, giving him time to correct deficiencies. If plaintiff, in accordance with instructions of the judge and within the specified time fulfills the requirements listed in the ruling, the claim is considered to be filed on the day of initial submission to the court. Otherwise, the claim is considered not filed and by judges' ruling is returned to the plaintiff with all the attached documents.

The return of claim does not preclude recurring filing of claim by the plaintiff to the court against the same defendant, on the same subject and on the same grounds, if he eliminates the deficiencies. To a judge of the return of the application may be submitted by a private complaint or protest. One can file a complaint or protest on judges' ruling to reject the claim.

Thus, total amount of claims that were rejected by court, were left without further movement or were returned without trial may be seen as the indicator of failure to comply with requirements set by procedural legislation.

It appears that violation of the right of access to justice originates from the lack of clear and specific remedial procedures for determining the jurisdiction of civil cases, which leads to unjustified refusal of the courts to accept the claims.

Thus on lawsuit of Green Salvation Ecological Organization against Almaty city courts administrator in relation to non-fulfillment of a decision of Specialized Inter-district Economic Court of Almaty on liquidation of unauthorized dump of construction and municipal wastes next to Chymbulak ski resort area. SIEC of Almaty rejected claim due to the fact that this case was not under its jurisdiction. Collegiate on civil cases of Almaty city court, by private complaint from Green Salvation Ecological Organization, has determined that the case will be tried in SIEC of Almaty.

On lawsuit of Green Salvation Ecological Organization on presenting false information concerning situation around water protection zone in Esentai river area (Almaty) SIEC of Almaty rejected claim due to the fact that this case was not under its jurisdiction. Appellate collegiate on civil cases of Almaty city court has determined that the case will be tried in Medeu district court of Almaty.

On lawsuit of Green Salvation Ecological Organization on non-feasance of the Government of Republic of Kazakhstan and on invalidation of a decision made by Chief sanitary medic on the reduction of sanitary-protection zone, on behalf of residents of Beryozovka village WKR, was filed to SIEC of Astana. With the decree of collegiate of civil cases, claim was transferred to Almaty district court of Astana city. Judge of Almaty district court of Astana city ruled that this case was not under its jurisdiction. Collegiate of civil cases of Astana city court has determined that the case falls under the jurisdiction of SIEK of Astana.

Absence of a uniform judicial practice of determining civil cases jurisdiction creates additional obstacles in the administration of justice, leading to unreasonably long delays in resolution of civil disputes on the merits.

An example of declarative features of principles fixed in the legislation of the Republic of Kazakhstan, and how the factor of social benefits outweigh the concern for preserving the environment, is the decision of SIEC of Atyrau region

dated April 12th 2011, on the claim filed by "Zaman" Public Foundation against Governmental Agency "Atyrau City Administration" to invalidate decrees granting LLP "TenizService" land for construction of the North-Caspian specialized ecological base for oil spill response.

Thus, article 5 of environmental code, as part of main principles of environmental legislation, states principle of environmental hazard presumption in relation to planned economic and other activity and mandatory assessment of the impact on the environment and human health when deciding on its implementation. Meanwhile, in the ruling of SIEC of Atyrau district dated April 12th 2011, given principle is not mentioned at all. Moreover, in violation of principle of environmental hazard presumption of planned economic activity, court has categorically denied findings of public environmental expert evaluation, explaining that "the assessment of environmental hazard of the enterprise, as well as the negative impact of the facility on the environment, is beyond the competence of the plaintiff and is carried out by the State Environmental Expertise". It seems that under such judicial practice, conducting public environmental expertise is meaningless.

One cannot fail to draw attention to the court's interpretation of public rights guaranteed by Article 13 of the Law "On the architecture and urban planning in the Republic of Kazakhstan", Part 3 and Part 5 of which states:

Prior to the adoption of urban planning and architectural and construction documents, individuals and legal entities shall have the right to take part in the discussions and make proposals to amend the decisions affecting public or private interests.

Participation of individuals and legal entities in discussions of urban planning and architectural and construction solutions can be in the form of:

- 1) direct participation;*
- 2) representation;*
- 3) other form of participation, not disallowed by legislature*

Refuting the arguments of the plaintiff on violations of Article 13 of the Law "On the architectural and urban planning in the Republic of Kazakhstan" finding them unsound, the court presents following rationale:

...The rights of individuals and legal entities to participate in the discussions and make proposals to amend the decisions is realized through participation in public hearings on preliminary assessment of environmental impact.

Thus, the analysis of rulings made by SIEC of Atyrau district dated April 12th 2011, allows us to conclude that acting legislature of Republic of Kazakhstan does not fully meet the provisions and principles of the Aarhus Convention. Thus, the Land Code of the Republic of Kazakhstan does not provide any public participation in the stage of selection and allocation of land for planned economic activity⁶ that does not meet the requirements of Article 6.4 of the Aarhus Convention on public participation at the earliest of stages.

It is also worth mentioning that in the current legislation of the Republic of Kazakhstan there are no clearly defined procedures and mechanisms of considering public opinion, which in turn does not meet the requirements of Article 6.8 of the Aarhus Convention, according to which the State shall ensure that in the decision due account is taken of the outcome of public participation.

Summary:

1. Courts in Republic of Kazakhstan, initiate proceedings and try civil cases on claims filed by environmental public organizations, including claims filed in protection of interests of other parties, regardless of the nature of claims made
2. The absence of clear and specific procedures for determining jurisdiction of civil cases on claims made by public environmental organizations, leads to unjustified refusal of the courts to accept the claims and causes a violation of the right of access to justice.
3. In insuring concerned publics' real access to justice and its capability to challenge any actions (inaction) and decisions concerning the protection of the environment in court, further implementation of provisions of the Aarhus Convention into the existing substantive and procedural laws is required.

Sources:

http://www.aarhus.kz/index.php?option=com_content&task=view&id=444
<http://www.eco.gov.kz/new2012/inform/>