

# Environment Newsletter – Spring 2013

Intervention by non-governmental organisations (NGOs) in environmental decision-making processes appears to be on the increase. In this edition, we take a cross-border comparative look at how NGOs impact on project permitting and other environmental regulatory decisions in:

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## Australia

### What rights do NGOs have to participate in project permitting decisions/environmental regulatory decisions?

NGOs have the same rights as ordinary citizens to participate in planning and environmental impact assessment processes administered by state and territory governments and quite regularly exercise those rights. Similarly, NGOs participate in the environmental impact assessment process administered by the Australian government under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act).

### What rights do they have to challenge such decisions? Are there any conditions in the type of qualifying organisation?

The right of NGOs to challenge decisions depends on the jurisdiction in which the decision was made and whether a statutory appeal process is being invoked or whether broader judicial review based on administrative law grounds is being sought.

Under the EPBC Act, “any person”, including an NGO, may request the Commonwealth Environment Minister to reconsider a decision to assess or not assess a proposed action. However, if an NGO wishes to seek judicial review of a decision under the EPBC Act, the “extended standing” provisions must be satisfied and the NGO must establish that:

the NGO was incorporated or established in Australia or an external territory; and

at any time in the two years immediately before the relevant decision, the NGO engaged in a series of activities in Australia or an external territory for the protection or conservation of, or research into, the environment; and

at the time of the decision, the objects or purposes of the NGO included the protection or conservation of, or research into, the environment.

### **What difficulties do NGOs face in challenging decisions (eg paying the costs) and are protections available to them (eg limits on those costs)?**

An independent review of the EPBC Act carried out in 2009 identified the cost of litigation as the key issue relating to access to courts to challenge decisions.

Prior to 2006, the EPBC Act had reversed the general rule that the person seeking an interim injunction to prevent a breach of the Act was required to provide an undertaking to pay damages if the application was ultimately denied. However, the relevant provision was deleted from the EPBC Act in 2006. As a result, the general rules applying to undertakings as to damages apply, together with the other court rules and conventions in relation to security to be given for costs and costs orders at the conclusion of a court hearing.

### **What impacts do successful (or even unsuccessful) challenges to projects have on the projects themselves or, more generally, on the attitudes and practices of project developers?**

A series of high profile court challenges in relation to climate change issues arising from proposed coal mining developments on the Eastern seaboard advanced Australian jurisprudence on these issues but have ultimately failed to stop those developments from proceeding. It is more likely that delays while court challenges are being resolved, combined with the fragility of export markets or the economic cycle, will have a greater impact on any given project.

There is an increasing emphasis on early stakeholder engagement, including NGOs, which allows particularly controversial projects to be identified early in the development phase. Engagement may not reduce the risk of challenges later in the approval process, but will at least allow for delay from third party challenges to be built into the development timetable.

### **Please give an example of a noteworthy challenge by an NGO in your country against a project or environmental regulatory decision.**

Friends of the Earth (FoE) challenged the grant of certain mining leases to Xstrata Coal Queensland, together with the related environmental authorisation, in the Land Court of Queensland. If granted, the areas of the leases would cover an area of 320 square kilometres – approximately half the area of the island of Singapore. FoE's objections centred on the amount of greenhouse gases estimated to be generated by the mine over its proposed 30 year life that would contribute to anthropogenic climate change. In March 2012, the President of the Land Court rejected the FoE challenge. Based on an interpretation of the relevant provisions of the *Environmental Protection Act 1994* and the *Mineral Resources Act 1989*, and on public interest grounds, the Court was not persuaded that the objections justified a refusal of the mining leases and environmental authorisation. Notwithstanding the Court's decision, both the mining leases and the authorisation are still to be granted.

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## Belgium

### What rights do NGOs have to participate in project permitting decisions / environmental regulatory decisions?

Applications for planning permissions and environmental permits are subject to a public inquiry procedure. In the same way as any interested party, NGOs may consult the permit application during the public inquiry and file objections or representations with the permit granting authority. The permit granting authority will have to give reasons in the permit why the objections made during the public inquiry have or have not been followed.

### What rights do they have to challenge such decisions? Are there any conditions on the type of qualifying organisation?

NGOs have rights to challenge decisions in a number of ways:

- Administrative appeal procedures - Third parties may challenge environmental permits by means of an administrative appeal procedure before a higher ranking authority than the one that issued the initial permit. In the Flemish Region, third parties can use a similar administrative appeal procedure to challenge planning permissions.
- Council of State proceedings - All decisions of the authorities, including permits and zoning plans, may be challenged as a last resort before the Council of State ("Raad van State"/"Conseil d'Etat", Belgium's highest administrative court), by means of suspension or annulment proceedings.
- Proceedings before the Court of First Instance – By virtue of a law dated 12 January 1993 environmental NGOs may initiate summary proceedings before the Court of First Instance to obtain an injunction requiring cessation of activities harming the environment or requiring preventive measures to be taken. An injunction will be issued if the applicant can demonstrate actual harm, or a threat of harm, to the environment.

An NGO's rights are subject to varying qualifying requirements which depend on the type and level of challenge and the relevant region. These requirements can include criteria as to:

- the legal form of the NGO and how long it has been constituted;
- the NGO's effectiveness and how long it has been operating; and
- its statutory purposes / bylaws and the nature of the impact on the NGO's interests.

### What difficulties do NGOs face in challenging decisions (e.g. paying the costs) and are protections available to them (e.g. limits on those costs)?

The necessary capacity and interest of an NGO that files an appeal before the Council of State is often subject of debate in the proceedings. Establishing that these requirements are fulfilled often proves to be burdensome for NGOs, especially if their statutory purpose is wide and not specifically related to the type of project that is being developed or with the area where it will be located.

Financial constraints may also be a difficulty for NGOs in challenging permit decisions. This is a particular concern for small NGOs which often lack of financial resources. Also, if the NGO loses in legal proceedings before a civil Court, it may be ordered to pay the other side's legal costs. The amount of this compensation is however limited by law and depends, among other things, on the value of the claim.

## What impacts do successful (or even unsuccessful) challenges to projects have on the projects themselves or, more generally, on the attitudes and practices of project developers?

Challenges by NGOs may delay or even jeopardise the development of a project. In practice, however, such challenges do not always have such a major impact.

NGOs may challenge decision of the authorities that are necessary for developing a project, such as the planning permission for example, by means of annulment proceedings before the Council of State. Such proceedings take years and therefore developers may, and often do, start building while the annulment proceedings are still pending (unless summary proceedings are successfully taken, see below). Moreover, if a permit is annulled by the Council of State, the authorities must take a new decision on the initial permit application. In most cases the permit will be re-issued on that occasion, taking into account the conclusions of the Council of State. Only in a limited number of cases will the reasoning of the Council of State ruling render impossible grant of a new permit.

Challenges by an NGO are far more likely to have a material impact on the development of the project if they are combined with summary proceedings (i) before the Council of State to suspend the relevant decision pending completion of the annulment proceedings, or (ii) before the Court of First Instance to obtain the cessation of the works. Applications for suspension or cessation are often refused, especially if the NGO is unable to demonstrate that the relevant decision is plainly illegal.

## Please give an example of a noteworthy challenge by an NGO in your country against a project or environmental regulatory decisions.

During the last few years there have been several challenges and strong lobbying by NGOs against the development of infrastructure projects.

For example, in the Antwerp area, local NGOs are very critical towards plans of the Flemish Government to extend and significantly increase the capacity of the Antwerp ring-road. Their lobbying and protest actions have led to significant delays in the development of the project, a local referendum on certain aspects of the project and to re-assessment of project as a whole. Further, in 2012 these NGOs challenged the permissions for the development of a new prison by the Belgian State because the prison would be situated in location they considered a suitable alternative for the extended ring-road. This challenge appears to have been unsuccessful, since it was rejected and the construction works are now far advanced. The battle is not yet over as the NGOs have now also filed a complaint with the European Commission, claiming, among other things, that the development of the prison project was not subject to the necessary environmental impact assessment.

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## The Czech Republic

### What rights do NGOs have to participate in project permitting decisions / environmental regulatory decisions?

NGOs with protection of the environment set as their objective (according to their by-laws) have a relatively strong position, especially in zoning and building permit proceedings. First of all, they have the right to demand information and to receive notices from governmental bodies and administrative authorities on all intended projects and current proceedings which could possibly have an impact on the environment. Subsequently, if they decide to exercise their rights, they can act in the position of a participant to the permitting proceedings: this allows them (among other rights) to file objections against the

project. Unlike comments made by the general public that only need to be "assessed", objections filed by an NGO as a party to the proceedings need to be properly handled and the relevant governmental body or administrative authority must issue a formal decision dealing with them.

In addition, NGOs can participate in Environmental Impact Assessment (EIA) processes and Integrated Pollution and Prevention Control (IPPC) processes, the results of which form an important basis for the final permitting decision.

### What rights do they have to challenge such decisions? Are there any conditions on the type of qualifying organisation?

As a party to administrative proceedings, NGOs have full rights of a participant in the proceedings, including the right to file an appeal against decisions resulting from such proceedings. Further, they can seek judicial review of final administrative decisions if they feel that their rights were violated in a way that could render a decision unlawful.

Although only those NGOs whose official function is to protect the environment can participate in project permitting decisions in the ways described above, it is not at all difficult or expensive to establish such an NGO, and therefore it is not unusual that spontaneously created NGOs with unclear backgrounds appear with the purpose of stopping one specific project.

### What difficulties do NGOs face in challenging decisions (e.g. paying the costs) and are protections available to them (e.g. limits on those costs)?

NGOs filing an action for judicial review of administrative decisions must pay court fees, although the court can grant exemption from this duty and even decide that no party's costs will be reimbursed. More importantly, there is a rule that the losing party pays the winning party's costs which can be highly financially demanding for NGOs if they lose the dispute, even though the above exception can apply.

### What impacts do successful (or even unsuccessful) challenges to projects have on the projects themselves or, more generally, on the attitudes and practices of project developers?

When a NGO is involved in a project, the developer may expect significant delays in permitting processes. However, only rarely do developers abandon a project if it is successfully challenged by a NGO. More commonly, they would adjust the parameters of the project to avoid any further delays in case of successful (or even unsuccessful) legal challenges or try to negotiate with the NGOs on financial contributions which NGOs may use e.g. to develop green areas elsewhere. These "trade-offs" are not always fully transparent.

### Please give an example of a noteworthy challenge by an NGO in your country against a project or environmental regulatory decision.

Construction of the highway D8 from Prague to Ústí nad Labem was interrupted in August 2012 due to litigation with the ecological organisation "Children of the Earth", who were seeking cancellation of the zoning and building permits. The reason given was there had been insufficient participation of the public and NGOs in the initial environmental permit proceedings. The project is proceeding at present and its completion is scheduled for 2015, however, NGOs are again attempting to achieve a cancellation of the building permits.

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## Germany

### What rights do NGOs have to participate in project permitting decisions / environmental regulatory decisions?

There are various Acts on access to environmental information which are frequently used by NGOs to obtain information about projects which might impact upon the environment.

In general, NGOs are entitled to participate (comment/oppose/propose alternatives) in any project permitting decision / environmental regulatory decision that involves public participation, and in particular almost all facilities which are permitted under the Federal Emission Control Act (Bundesimmissionsschutzgesetz-BImSchG). These representations have to be taken into account by the relevant authority.

In addition, the Federal Nature Conservation Act ("BNatSchG") provides further participation rights to review documentation and provide comments in respect of legislative processes linked to nature conservancy (e.g. the designation of protected areas).

### What rights do they have to challenge such decisions? Are there any conditions on the type of qualifying organisation?

NGOs have the right to challenge project permitting decisions as well as environmental regulatory decisions based on the Environmental Appeal Act (Umweltrechtsbehelfsgesetz – "UmwRG") as well as on Sec. 64 of the BNatSchG. A challenge would be made in the administrative court and, if successful, would result in the permit or decision being quashed entirely or amended (under sec. 42 and 43 of the Act on Administrative Court Procedure, "VwGO").

In order for an NGO to exercise rights of challenge, the issue in question needs to affect the work of that NGO as set out in its constitutional bylaws. In addition, the NGO needs to hold an approval under Sec. 3 UmwRG certifying that the NGO is charitable. Previously, it was also necessary for an NGO to base its challenge on a right that generally could be held by a private person (e.g. property right). Since the European Court of Justice's ruling in Trianel, this is no longer required, although it is currently unclear the extent to which NGOs can challenge purely procedural points, such as errors in carrying out environment impact assessment.

### What difficulties do NGOs face in challenging decisions (e.g. paying the costs) and are protections available to them (e.g. limits on those costs)?

Where an NGO's legal challenge is unsuccessful, it will have to bear costs such as the other party's lawyers' and its own experts' costs. Given the typically complex and lengthy nature of such cases, these costs are often a major obstacle. Even if an NGO wins its case, it is only likely to be awarded costs calculated on a standard basis which will rarely cover all of its costs. Since there is no limit on costs, NGOs currently need to have a strong funding in place from private and public sources.

NGOs can be particularly affected by procedural rules requiring objections to be made within strict time limits at the outset of the decision-making process. If the NGO has not been involved early enough in the process, these rules can prevent them from taking any action in relation to the complaint. In addition, the courts will often refuse a judicial remedy where a technical breach has occurred but no substantive harm has resulted. Finally, NGOs often need to seek an injunction in order to obtain an effective remedy in addition to the main procedural action.

### What impacts do successful (or even unsuccessful) challenges to projects have on the projects themselves or, more generally, on the attitudes and practices of project developers?

Challenges by NGOs often directly lead to subsequent improvements in the design of a project. Whilst recent successful challenges have been known to permanently block some projects, the result is more usually a delay whilst processes are carried out in compliance with the law.

On a practical level, NGO involvement in Germany has led developers to reconsider the type of facilities (e.g. coal or gas fired power plant) they are proposing. Developers understand that more environmentally friendly projects gain better public acceptance and less resistance from NGOs.

### Please give an example of a noteworthy challenge by an NGO in your country against a project or environmental regulatory decision.

The *Trianel* ruling of the ECJ is seen as a milestone for NGO challenge rights in Germany. The background was a legal challenge by the BUND (Friends of the Earth Germany) against a coal power plant project by *Trianel* in Lünen, Germany. Ultimately BUND successfully challenged the permitting decision with the effect that it had to be redetermined. Not only has it led to significant changes to the project permit, this challenge also forced the legislator to adopt the law on Environmental Appeals which is currently ongoing.

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## Italy

### What rights do NGOs have to participate in project permitting decisions / environmental regulatory decisions?

NGOs do not have a specific right to participate in project permitting decisions or environmental regulatory decisions. However, like members of the public, they will have the right to be heard if they are regarded as an "interested person", under the Environmental Code (Legislative Decree No. 152 of 2006). NGOs will qualify if they are recognised by the Ministry of Environmental Protection, based on specified environmental protection objectives being contained in their statutes.

NGOs will often take part in the environmental impact assessment process and authorities generally take their views more strongly into consideration because the NGOs are considered to represent the local area. In addition, interested NGOs have a right to request that the Ministry of Environmental Protection takes action to prevent environmental damage or restore the environment if damage has occurred.

Recognised NGOs may either be national or local bodies. Where national bodies have local branches, it is common to see both the national body and the local branch taking an involvement in the same project in different capacities, especially in case of projects with national importance.

### What rights do they have to challenge such decisions? Are there any conditions on the type of qualifying organisation?

NGOs have the right to seek the annulment of any act (or measure) which has been taken in breach of Law; e.g. NGOs can seek annulment of a building permit if an EIA has not been obtained. In addition, where the Ministry of Environmental Protection has failed to take action in relation to environmental damage or threat of damage in response to the NGO's request, the NGO can challenge that decision in order to obtain an "intervention" in front of the Regional Administrative Courts (or, alternatively, if normal time limits to make a challenge have expired, an Extraordinary Judicial Review in front of the President of the Italian Republic).

If granted, an intervention can compel the Minister to take relevant preventive or restorative action or require compensation to be paid by the responsible party to the Ministry of Environmental Protection to be used for such purposes.



## **What difficulties do NGOs face in challenging decisions (e.g. paying the costs) and are protections available to them (e.g. limits on those costs)?**

Lack of financial resources and manpower are the main difficulties for NGOs in challenging decisions. This is a particular concern for small organisations often seeking redress for environmental matters where the outcome is not necessarily clear. Where an NGO loses its challenge in the courts, it may be ordered to pay the other side's costs. NGOs may access legal aid paid by the Italian State, if they can demonstrate that they are non-profit organisation and their annual income is below Euro 10,628 (under Article 119 of Decree of the Italian President of Republic - No. 115/2002). Legal aid will, however, only cover the NGO's own costs (not those of the winner if the NGO loses the challenge).

## **What impacts do successful (or even unsuccessful) challenges to projects have on the projects themselves or, more generally, on the attitudes and practices of project developers?**

If a challenge is successful, the decision on the project will have to be determined again by the relevant authority. If deficiencies can be avoided upon redetermination (e.g. by basing a decision on different reasoning), then the project will be able to proceed in the absence of any further challenges. Often successful challenges will lead to abandonment of the project or, at the very least, substantial delay.

## **Please give an example of a noteworthy challenge by an NGO in your country against a project or environmental regulatory decision.**

In 2009, WWF Italia challenged the Provincia di Grosseto for the annulment of the "act" resulting from the EIA procedure for the new development of the power plant of Scarlino. The trial was successful for WWF and the Regional Administrative Court of Toscana quashed the relevant act. The decision was confirmed by the Council of State in October of 2012. As a result, approval of the project has been delayed and it is possible that the project will be abandoned. In this case, WWF-Italia sought legal aid support from the Italian State, but was rejected by both Courts because it could not demonstrate that its annual income was below Euro 10,628.

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## **The Netherlands**

### **What rights do NGOs have to participate in project permitting decisions / environmental regulatory decisions?**

Under Dutch administrative law, complex decisions such as environmental decisions are in general made in two phases. In the preparatory process prior to the decision being made, "sufficiently interested parties" ("belanghebbende") are allowed to submit a written or oral opinion.

An NGO can be determined to have a "sufficient interest" when the general or collective interests they are protecting, as reflected in the articles of incorporation and apparent from their actual activities, are directly affected with the outcome of the decision. It is not necessary for the NGO's statutory objectives to be specially drafted for the matter at hand but the more generic the description, the less likely the NGO can be identified as a "sufficiently interested party".



## **What rights do they have to challenge such decisions? Are there any conditions on the type of qualifying organisation?**

NGOs may exercise their rights to challenge administrative decisions by application of judicial review. The judge will grant leave to appeal to an NGO if it has been determined as a "sufficiently interested party" and has provided an opinion at the earlier preparatory stage of the administrative process.

A relevant feature of Dutch administrative law is the reluctance of the judge to overrule and replace decisions of the executive branch of government. Common judicial practice therefore is to annul a contested decision and refer the case back to the public authority for revision or redetermination.

## **What difficulties do NGOs face in challenging decisions (e.g. paying the costs) and are protections available to them (e.g. limits on those costs)?**

NGOs face relatively few difficulties when challenging decisions in judicial review. The court fee is modest and it is not obligatory to have legal representation. NGOs do not have a specific entitlement to be compensated for procedural costs. If the NGO's legal challenge is upheld, the procedural costs (i.e. fixed amounts to compensate for costs of legal/expert assistance) are compensated by the losing party. However, the compensation amount will never cover all of the costs. If the NGO loses in its appeal, the judge will only order the NGO to pay legal and other costs of the winning party in the rare situation that the NGO's case is held to be an abusive action.

## **What impacts do successful (or even unsuccessful) challenges to projects have on the projects themselves or, more generally, on the attitudes and practices of project developers?**

A successful challenge to an administrative decision such as a project permitting decision will often result in the decision being annulled wholly or in part. In that situation, the administrative judge will usually decide to refer the case back to the decision making authority. At the very least, legal challenges (whether successful or unsuccessful), cause delay to the projects, although they do not often cause projects to be abandoned. In this way, NGOs can effectively ensure that environmental norms are complied with, and any breaches sanctioned, through the project development process.

In order to avoid time-consuming legal challenges, developers and NGOs adopted a practice in some cases of negotiating a voluntary agreement during the planning process of a project. An example of this is found in the development of Maasvlakte 2 (an expansion of the port of Rotterdam) where NGOs agreed not to initiate proceedings if the project developers included several environmental protective measures.

## **Please give an example of a noteworthy challenge by an NGO in your country against a project or environmental regulatory decision.**

In 2009, Greenpeace was able to stall the construction of a coal power plant in Eemshaven by an annulment of the construction permits. The administrative judge then referred the case back to the relevant authorities. Following a significant delay, a revised (and corrected) permit was issued, including more stringent measures to protect the environment.

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## Poland

### What rights do NGOs have to participate in project-permitting decisions / environmental regulatory decisions?

NGOs' rights to participate in project-permitting processes vary according to the nature of the process and the type of decision. In the case of regulatory processes where public input is seen as key e.g. processes for environmental impact assessment decisions or permits to be issued under the Integrated Pollution Prevention and Control regime), environmental NGOs are given express rights to participate in the process, and also benefit from all the rights available to a party to that process (for example, right to participate in all hearings and to be heard before the regulator, right of access to all documentation of the proceedings, right to challenge the decisions etc.).

Environmental NGOs have to make an application to take part in the process and, to qualify, must prove that their statutory objectives include an activity within the scope of environmental protection.

In order to participate in other regulatory processes, an NGO would need to prove that a specific "public interest" would be served by its participation.

Even where an NGO does not participate in the regulatory process it can still make representations in the process with the authorities' consent.

### What rights do they have to challenge such decisions? Are there any conditions on the type of qualifying organisation?

Where an Environmental NGO has express rights to participate (as mentioned above), it also has the right to lodge an appeal in front of the administration and thereafter to the courts against a decision even if it did not take part in the initial regulatory process. Otherwise, NGOs are generally only permitted to challenge the relevant regulatory decisions if they have been permitted to, and did in fact, participate in the regulatory process.

### What difficulties do NGOs face in challenging decisions (e.g. paying the costs) and are protections available to them (e.g. limits on those costs)?

Lack of funds for legal and expert costs may be an obstacle for small local NGOs when actively participating in challenging proceedings. This is, however, no longer a problem for larger organisations for two reasons: In Poland, NGOs are often supported by relevant interest groups or international sponsors. Secondly, in administrative proceedings or administrative court proceedings the losing party is generally only required to pay the court fees (usually limited to a few hundred euros) and not the winning party's legal costs, nor those of any affected third party such as the project developer. As such, the risk of losing a case is not a real deterrent to an NGO.

### What impacts do successful (or even unsuccessful) challenges to projects have on the projects themselves or, more generally, on the attitudes and practices of project developers?

Administrative and court proceedings are always lengthy, and challenges will therefore always lead to a significant delay in the implementation of a project regardless of whether the challenge is successful or not.

A successful challenge usually results in redetermination of the project permits. In cases where permits are interdependent, the repeal of one permit may cause a domino effect and force the investor to obtain several new project permits (e.g. the environmental decision, planning permit and building permit for a project), which may still be subject to further challenges.

Increasing awareness of the risks of a challenge is forcing project developers to be much more scrupulous when preparing applications and documentation for a project.

### **Please give an example of a noteworthy challenge by an NGO in your country against a project or environmental regulatory decision.**

In January 2012, the ClientEarth Foundation successfully brought a judicial challenge against the environmental decision for the development of new coal-fired units (1800 MW) at a power plant Opole developed by PGE, a state-owned concern and the biggest energy group in Poland. Continuing appeals have caused almost a year's delay in the development process and may result in the project being cancelled altogether (despite the general contractors having been appointed). In the most recent case (in February 2013), mistakes and procedural shortcomings identified by ClientEarth were judged sufficiently serious to cause the court to repeal a building permit for the 780–1050 MW North Power Plant developed by Kulczyk Investment.

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## **Romania**

### **What rights do NGOs have to participate in project permitting decisions / environmental regulatory decisions?**

As a category of the general public, NGOs have a right to information about activities impacting on the environment under the Emergency Government Ordinance no. 195/2005 on environmental protection, as amended (EGO 195/2005). Through implementation of the Aarhus Convention<sup>1</sup>, Romanian law has given NGOs the right to participate in the decision making process conducted by the environmental authorities for specific activities (e.g. major project permitting and environmental permitting).

These rights are not restricted to environmentally concerned NGOs. Other NGOs operating in the same sector of interest as the relevant project or decision or in the location where the project or decision is to be implemented are entitled to participate, irrespective of their field of activity.

### **What rights do they have to challenge such decisions? Are there any conditions on the type of qualifying organisation?**

Only NGOs registered with the public registries have the right to file a complaint in court. Under EGO 195/2005, NGOs focused on environmental protection activities are given specific rights to file legal actions in court on environmental protection matters. Where an NGO has a complaint against a decision of an environmental authority, it can seek judicial review against the decision.

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<sup>1</sup> Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, done at Aarhus, Denmark, on 25 June 1998

NGOs can also join as plaintiff in proceedings already commenced by other entities or individuals. In such situations, any NGO (whether environmentally focused or otherwise) can join in proceedings, provided they can demonstrate to the court that they have an actual and personal interest in that specific matter.

### **What difficulties do NGOs face in challenging decisions (e.g. paying the costs) and are protections available to them (e.g. limits on those costs)?**

In the event of losing the litigation, the court will order the claimant NGO to pay the costs of the defendant's costs of the court proceedings, such as lawyers' fees. These costs can be significant and the court will only use its discretion to reduce the losing party's costs liability in certain limited circumstances. This is particularly problematic for NGOs in Romania since no legal aid is available for NGO legal claims.

### **What impacts do successful (or even unsuccessful) challenges to projects have on the projects themselves or, more generally, on the attitudes and practices of project developers?**

Any challenge in court invariably causes delays to projects even if the claimant loses the case. If such a challenge is successful, the court will probably decide to annul the project permitting decision / environmental regulatory decision and another decision will have to be issued by the environmental authority, which might result in a similar decision provided that environmental law has been complied with.

Since development of a project is usually suspended during any litigation (which can take around two years to be concluded), challenges in court can also lead to the abandonment of the project by the developer, even before a final decision is handed down by the court.

### **Please give an example of a noteworthy challenge by an NGO in your country against a project or environmental regulatory decision.**

Probably the most well-known case of a battle fought by NGOs is the case of the gold mining project in Rosia Montana. The project, initiated in 1995, is still blocked despite intense campaigns in the media. In early 2012, a final court decision annulled the urbanism plan (which is a pre-requisite for the project to proceed) at the request of Alburnus Maior, a local NGO.

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## **Spain**

### **What rights do NGOs have to participate in project permitting decisions / environmental regulatory decisions?**

NGOs have the same participation rights as the general public in environmental regulatory decisions. As such, NGOs have the right to be informed of proposals for projects that might impact on the environment, as well as other environmental regulatory decisions and wider environmental plans, programmes and legislation. They also have the right to express their views and opinions regarding the proposals before they are approved. The relevant administrative bodies have to give adequate consideration to these views and opinions when making their decisions on the proposals.

## **What rights do they have to challenge such decisions? Are there any conditions on the type of qualifying organisation?**

Where a regulator fails to allow an NGO to participate or does not take into account its views, the NGO can file an administrative claim (an appeal to a superior body in the relevant administrative body), and, where necessary, subsequently make a contentious administrative claim against that body (in front of the courts).

Additionally, "Environmental NGOs" are entitled to file a representative action against acts approved by an administrative body (or relevant omissions) whenever it considers that those acts or omissions are contrary to existing environmental legislation (for example, in relation to a project where environmental impact assessment has not properly been conducted). In order to be considered an Environmental NGO, it must:

- Have a stated purpose to protect the environment its bylaws.
- Have been effectively incorporated for at least two years prior to the court action and have been effectively operating since then.
- Have a stated territorial operating scope in its bylaws that is affected by the issue in question.

## **What difficulties do NGOs face in challenging decisions (e.g. paying the costs) and are protections available to them (e.g. limits on those costs)?**

Where an NGO's challenge is unsuccessful, the NGO will often be responsible for paying the court costs, the costs of the other party and of any affect third party intervening in the case (e.g. where its challenge fails on all points). Given that claims filed by NGOs often relate to important and complex areas of environmental law and to complex projects where the outcome is not clear upfront, the costs can be significant and the likelihood of being responsible for them can be uncertain.

However, Environmental NGOs are entitled to legal aid (covering their own and other parties' costs), which significantly reduces their cost liability for the proceedings. Nonetheless, they have to demonstrate a lack of sufficient financial means (among other criteria) to qualify.

## **What impacts do successful (or even unsuccessful) challenges to projects have on the projects themselves or, more generally, on the attitudes and practices of project developers?**

A successful challenge can result in the overturning of the project permits and a requirement for earlier stages of the administrative decision-making process to be started again. This is likely to cause delays in the project, and could potentially result in the permits being refused second time around (if full compliance with environmental law requires this).

Often project promoters will implement and construct a project even where a court challenge is proceeding. It sometimes occurs that the court decision is issued after the project has been fully constructed and is in operation. In case of successful challenges, there are a number of examples in which the court has ordered the demolition of the project.

Whether or not challenges are successful, the continued existence of court proceedings will adversely impact on the availability of project financing.

## **Please give an example of a noteworthy challenge by an NGO in your country against a project or environmental regulatory decision.**

In recent times, it has been common for NGOs to challenge authorisations granted to industrial or renewable energy projects located in rural areas and which are subject to criticism for their impacts on the environment. As a result, a significant

number of authorisations have been invalidated by court decisions leading to the types of project delay, financing problems and demolition requirements mentioned above.

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## UK (England & Wales)

### **What rights do NGOs have to participate in project permitting decisions / environmental regulatory decisions?**

NGOs can, and frequently do, make representations in the planning process for major projects and these have to be taken into account by the relevant determining authorities. In some cases, NGOs have specific rights to be consulted on applications and provide input to the decision-making process. In others they will make representations on the same basis as members of the public, although the authority may place more weight on them.

In general, NGOs do not have specific rights to be heard in relation to other types of environmental regulatory decisions. A major exception is the right of "interested persons" to request action (i.e. to require damage to be remedied or compensation to be paid) under the Environmental Damage Regulations (relevant environmental NGOs are likely to qualify). In addition, some NGOs are invited to participate in the setting of BREF technical environmental standards under the Integrated Pollution Prevention and Control (IPPC) Directive.

### **What rights do they have to challenge such decisions? Are there any conditions on the type of qualifying organisation?**

NGOs will be able to take advantage of rights to seek judicial review against administrative decisions by environmental authorities. In broad terms, NGOs will have to demonstrate that they have a "sufficient interest" in the matter. Where questions of environmental law arise (e.g. correct application of environmental assessment rules), environmental NGOs will not generally have a problem in persuading the courts to allow them to pursue a challenge if they are found to have a genuine and serious interest. Sometimes NGOs join in proceedings that have been commenced by others if they feel important legal principles are at stake. An NGO will normally have to be an incorporated body.

### **What difficulties do NGOs face in challenging decisions (e.g. paying the costs) and are protections available to them (e.g. limits on those costs)?**

The main pressure on NGOs is the costs rule. This provides that, in principle, the losing party in litigation pays the winning party's costs. Cases brought by NGOs often relate to important and complex areas of environmental law where the outcome is not necessarily clear. NGOs, (and particularly small organisations) will be concerned at the prospect of having to pay the costs of the authority making the decision, and potentially any affected third party project developer or operator if they lose. Courts can award "protective costs orders" in certain cases to protect NGOs against the full implications of having to pay costs.

### **What impacts do successful (or even unsuccessful) challenges to projects have on the projects themselves or, more generally, on the attitudes and practices of project developers?**

Legal challenges invariably cause delays to projects even if they are unsuccessful. If they are successful, normally the decision on the project will have to be determined again by the relevant authority. If deficiencies can be avoided upon

redetermination, then the project will be able to proceed (subject to any further challenges), but occasionally successful challenges will lead to abandonment of the project. Project developers have become used to forensically reviewing applications to ensure that the challenge risk is minimised.

**Please give an example of a noteworthy challenge by an NGO in your country against a project or environmental regulatory decision.**

In 2012, Friends of the Earth (and two solar photovoltaic developers) successfully judicially reviewed the Government's decision to reduce solar feed-in tariff rates. The government had consulted on cutting the rates but unlawfully decided that this should take effect before the end of the consultation period. The impact was a delay in the application of the reduced rate which benefitted a number of projects.

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