



Danish Ministry  
of the Environment  
Environmental  
Protection Agency  
Organisation & Jura  
J.nr.  
Ref. morim  
Dec 3, 2012

Fiona Marshall  
Environmental Affairs Officer  
United Nations Economic Commission for Europe  
Room 330, Palais des Nations  
CH- 1211 Geneva 10, Switzerland

[Public.Participation@unece.org](mailto:Public.Participation@unece.org)

**Regarding:** *Invitation to comment on second draft of the Recommendations on Public Participation in Decision-making*

Firstly, I would like to thank the Secretariat for this possibility to make comments to the second draft of the Recommendations on Public Participation in Decision-making.

Overall, it is very useful and it is much appreciated that there has been inserted an introduction on p.1 setting the context and purpose of the recommendation.

In particular, it is important that the recommendation is not primarily intended as an aid to interpretation of the Convention, but rather as a tool through which to share expertise and good practice thereby helping Parties to implement the Convention on the ground.

The introduction is an important statement, as it also shows how the recommendations should be seen in connection with the implementation guide. This introduction also clarifies that the aim of the recommendation is not to establish what the legal obligations of the Convention are, but rather to share examples of good practices when implementing the Convention.

Furthermore there is referred to plenty findings of the ACCC, which is very useful. The only problem is that findings are often easier to find with the case number ( ACCC/C/200x/xx) rather than their official title. A reference to the official title as well as the case number would be useful.

Finally, it would be much more in line with the aim of the recommendation and the usage of the recommendation to use wordings like “public authorities *may* take into consideration”, “it *may be* good practice for public authorities” etc. and avoid the wordings “*should*” / “*shall*”. - The legal obligations can be found in the Convention. The aim of the recommendation is to share expertise and good practice and not to create new standards.

## Comments to the introduction and paragraphs:

### Introduction – footnote 2:

“For guidance on interpreting the Convention’s obligations, see the Aarhus Convention Implementation Guide (ECE/CEP/72), second edition forthcoming.”

This sentence should be aligned to the coming foreword in the new Implementation guide. In the existing implementation guide it follows that:

“While this Guide does not purport to be an official interpretation of the Convention, it can serve as an invaluable tool in the hands of governments and parliaments engaged in that task.”

I suppose the foreword will be the same the new implementation guide. Hence, the footnote should be adjusted to new text, especially that the implementation guide is not an official Interpretation of the Convention.

### Para: 2(a), (b), (c):

Para. 2 seem overall inconsistent with the context and purpose of the draft recommendation. As underlined in the introduction to the draft recommendation, the recommendation is not meant to be an aid to the interpretation of the Convention but rather as a tool through which to share expertise and good practice.

For example, the wording in 2 (a) goes beyond this purpose and furthermore the text is clearly inconsistent with the Convention.

The text to 2 (b) - (c), is an aid to interpretation of Article 2, Para. 4 and 5 and, hence inconsistent with the purpose of the recommendation.

Hence, it should be underlined that the text in para. 2 may be an example of good practice.

### Para. 6, h) (and para. 91) :

In paragraph 6, h), a reference could be made to the EU-case C-216/05. The case deals with the level of fees with regarding to a public participation process in Ireland.

### Para 8 a):

#### Text-suggestion:

- (a) Such persons may serve in their personal capacity or as representatives of the public concerned or relevant stakeholders. In the latter case, those persons should be selected through a transparent, democratic and representative procedure ensuring that they are accountable to their constituencies and fully transparent about the constituency they represent. Persons with financial interests or personal interest in the possible outcome of the decision-making should not be permitted to play this role.

### Box on p. 5:

With respect to the legal effects of the public participation process, this may range from a requirement on the competent public authority to take into account the outcomes of a consultation process to a right for the public to make the decision itself if possible in national law:

Para. 11, 2<sup>nd</sup> sentence:

Text-suggestion:

"If in the course of the decision-making process, significant new information comes to light or circumstances change in some significant way, the public concerned should have a further opportunity to participate before the decision is taken. Depending on the new information or circumstances, this may require the decision-making process to be "rewound" to re-open options already closed, and in particular if necessary for the protection of the environment. For the avoidance of doubt, the submission of revised EIA or SEA documentation could be one example of a circumstance requiring the public concerned to be provided with a further opportunity to participate, unless the revisions are of a very minor nature only or their revision is the reason for the public participation in the first place."

**Slettet:** is

**Slettet:** procedural

Para 18-21:

Overall comments: The recommendation to delegate decision making power to others than authorities may not be possible in practice in many legal systems due to constitutional /public law barriers.

Para 18 (b). 2<sup>nd</sup> sentence is too categorical. The recommendation goes without further comments to the conclusion that if the competent authority is also the promoter, the authority is always un-impartial:

- (b) Where the competent public authority has an interest in the outcome of the decision, including where it acts (either itself or through an entity under its control) as a promoter (developer) of the project. In cases where the competent authority is also the promoter, it is recommended to consider whether the responsibility for carrying out the public participation may be delegated to another impartial body;

**Slettet:** that

**Slettet:** is always

Para 19 1 (c):

"Therefore, giving the developers (project proponents) sole responsibility for organizing the public participation, including for making available the relevant information to the public and for collecting comments, would not be compatible with the Convention"

Please put in legal reference for transparency.

Para 25 - Participation of the public concerned from other countries

(b) (i) - The second sentence: "The time-frames for public participation that involves a transboundary element should be at least as long as those that do not involve a transboundary element, to account for cultural and communication problems"

Comment: It could be added to clarify: "It could be considered case by case if the transboundary time-frame should include time for cultural or communication problems."

( b) (iii)- Second sentence:

This recommendation seems very difficult in practice. Let us take an example: Document no. 1 is translated and there is 1 week to make comments. 3 months later document no. 20 is translated with 1 week to make comments. The content of document 20 suddenly brings new light on document 1. The problem is, should there be a new commenting round on document 1? I guess it would be much easier to make one round when all relevant material is translated.

Para 29:

And also for example via the internet.

Para 35:

Another possibility is simply to list in national law which projects that may have “significant effect” and to make revisions on a regular basis.

Para. 36:

The recommendation is not quite clear. Please put some more words on.

Para. 51 and Para. 54:

Para 51 is rather categorical. The important factor is that message gets to the public. If the public all knows that hearings can be found for example on a web-site this must be sufficient.

In some countries almost everybody has, through a private internet connection, access to the internet. Para. 54 is therefore rather categorical.

Para 90 f):

Please insert at the end of the sentence: “and without prejudice to the provisions of article 4.” This is the wording of art Article 6, para.6.

Para 95 (d) (e):

At this stage in the PP process, I don't not think there is a need to “investigate witness” and “provide cross examination”. We are not in a court room.

Para 105:

Text-suggestion:

2. This means that the statement of reasons accompanying the decision should include a discussion of how the public participation was taken into account. It is recommended that the legal framework should therefore include a clear requirement that the statement of reasons include, as a minimum:

**Deleted:** T

Para 113-115:

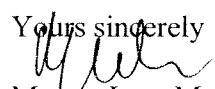
Para. 113-115 seems overall inconsistent with the context and purpose of the draft recommendation. As underlined in the introduction to the draft recommendation, the recommendation is not meant to be an aid to interpretation of the Convention but rather as a tool through which to share expertise and good practice.

Para 116:

Please put some more words in to explain the recommendation.

I look forward to comment the 3<sup>rd</sup> draft next year.

Yours sincerely



Morten Imer Møller

Danish National Focal Point.

