

DECISION

No. 13092
Sofia, 04.11.2009

IN THE NAME OF THE PEOPLE

The Supreme Administrative Court of Republic of Bulgaria – Fifth Division, at a court hearing held on the thirtieth of September, two thousand and nine, in composition:

CHAIRMAN:

ANDREY IKONOMOV

MEMBERS:

ILIANA DOYCHEVA

ILIANA SLAVOVSKA

Clerk

Iliana Ivanova

And with the participation
of

Prosecutor

Mihail Kozharev

were acquainted with the
report by

Judge

ILIANA DOYCHEVA

On administrative case No.12652/2008. 

The proceedings have been initiated by virtue of Art. 145 and the next of the Code of Administrative Procedure (CAP).

The proceedings have been initiated based on the appeals of GEO Agrarian and Ecological Projects Association, Plovdiv, the Centre for Environmental Information and Education, Sofia, Green Balkans Non-Profit Association, Plovdiv, Ecoforum Association, Sofia, For the Earth Non-Profit Association, Sofia, Ores and Minerals Association, Sofia, and Green Policy Institute, Sofia, against Decision No. 8/30.07.2008 on environmental impact assessment issued by the Minister of Environment and Waters. The appellants refer to arguments that the contested decision has been passed at the face of essential violations of administrative procedure rules, more precisely: the decision has been passed after more than two years since the last public debate; the public concerned has been identified incorrectly; the substantive provisions of Regulation No. 7/23.05.1992 on hygienic requirements for health protection in towns and villages have been breached since the hygienic protective standoff distances have not been complied with; the Environmental Impact Assessment Report (EIAR) does not contain an evaluation of the health status of the population in the region Zlatitza-Pirdop, the impact of the investment proposal on air pollution in the region referred to hereinabove has not be taken heed of; Art. 96, para. 1, it. 4, para. 3 and 4 of the Environmental Protection Act (EPA) have been infringed upon - no attention has been paid to the issue concerning the impact of cyanides on environment and human health. Decree No. 50/16.03.1994 of the Council of Ministers on the adoption of Rules for the operation of the Interdepartmental Committee for Priority Projects on Environment and the Development of Republic of Bulgaria, as well as Directive 2006/21/EC on the management of waste from extractive industries have been infringed upon by having failed to organize public debates of cyanide emergency and transportation management plan. The contested decision is further claimed to be inconsistent with the object of the statute.

The defendant – Minister of Environment and Waters through his process agents has contested the appeals.

Chelopech Mining EAD in the capacity as stakeholder has come up with an opinion that the appeals lodged by Ecoforum Association and Ores and Mines Association are inadmissible, since the latter are non-profit legal entities operating in private benefit and has further contested the rest of the appeals.

The Prosecutor with the Supreme Administrative Prosecutor's Office has stated that the appeals have no merit.

The objection concerning the inadmissibility of appeals by Ecoforum Association and Ores and Mines Association has been given credit.

The enclosed certificates of good standings for the appellants referred to hereinabove verify that these are non-profit organizations registered to operate in private benefit, i.e. for the benefit of its members, having a seat in Sofia, as a result of which these shall not be deemed stakeholders within the meaning of Art. 99, para. 6, in connection with § 1, it. 25 in connection with it. 24 of EPA and they have no legal interest in contesting the decision. Consequently, the appeals lodged by Ecoforum Association and Ores and Mines Association shall be left without consideration, while the proceedings of the case in this part thereof shall be terminated.

The appeals of the rest of the appellants shall be filed within deadline and shall be deemed procedurally admissible.

In order to render a decision on the merits of the appeals, the present panel of the Supreme Administrative Court has taken heed of, as follows:

With the contested decision the Minister of Environment and Waters has approved the implementation of an investment proposition: expansion of copper gold ores processing at the Chelopech deposit to 3 million tons and production of metals from a concentrate.

The Environmental Impact Assessment procedure was launched on 26.04.2004 with a written notice by the contracting authority of the investment intention to the competent authority. The Municipalities of Chelopech and Chavdar were also notified thereof.

On 27.05.2004, the Ministry of Environment and Waters (MEW) notified the company that the investment proposal came under Annex No. 1, it. 7, let. "a" with Art. 81, para.1, it. 2 of EPA and pursuant to Art. 92, it. 1 of EAP the same shall necessarily be subject to an environmental impact assessment (EIA), whereas the subject of assessment should include also all accompanying or supporting activities related to the implementation of the investment intention pursuant to the requirements of Art. 92, para. 3 of EPA. The Contracting Authority received instructions for the preparation of terms of reference for the scope of EIA, which indicated that an alternative using the best available techniques should be considered and consultations with the ministry of health held on account of the scope and contents of the assessment of health and hygienic aspects of environment and the risks for human health.

By virtue of Art. 95, para. 1 of EPA and Art. 4, para. 1 of the Regulation on the terms and procedure for carrying out an environmental impact assessment (RTPEIA), the contracting authority of the investment proposal notified the competent authorities and the population concerned of its investment intention by having announced it in writing at the earliest possible stage.

The terms of reference on the scope and content of EIAR had been drafted and used as a foundation for the consultations held with the Ministry of Health, the Municipalities of Chelopech and Chavdar, while a number of articles related to the investment intention were published in the press. On 28.10.2004, the Ministry of Health issued specific recommendations for the expansion of the scope of the Environmental Impact

Assessment Report. Recommendations were issued by the Regional Inspectorate of Environment and Waters - Sofia on 03.11.2004. The Municipalities of Chelopech and Chavdar came up with statements. The investment proposal was presented at the consultations held along with the terms of reference concerning the scope, form and contents of the Environmental Impact Assessment Report, pursuant to the requirements of Art. 9, para. 1, 2 and 4 of RTPEIA.

On 15.11.2004, the contracting authority presented at the Ministry of Environment and Waters draft terms of reference on the scope and content of EIA of the investment proposal, as well as a reference report on the consultations held, statements received, records drafted and articles published in the press. The Ministry of Environment and Waters outlined its remarks to the terms of reference in a letter dated 27.12.2004.

An edited version of the Terms of Reference on the scope and content of EIA was presented on 10.10.2005, while the administrative authority issued new instructions for supplements to the terms of reference on 27.10.2005.

On 03.11.2005, the company submitted to the Ministry of Environment and Waters the Environmental Impact Assessment Report, the non-technical summary thereto, the Terms of Reference on the scope and content of EIAR, as well as a reference report for the consultations held, the arguments for the notes and recommendations accepted or turned down, copies of the opinions stated, articles published in the press. In a letter dated 17.11.2005, Chelopech Mining EAD was notified that EIAR received a "B" assessment, whereas by virtue of Art. 16, para 1 of RTPEIA the competent authority identified the concerned municipalities of Chelopech and Chavdar where a public debate was to be organized and held.

Chelopech Mining EAD, holding a First Class Investment Certificate, requested in a letter dated 24.11.2005, by virtue of Art. 15, para. 2 and 3 of Investment Encouragement Act and in connection with Art. 97, para. 3 and 4, a reduction of the term for public access to EIA documentation, whereas this request had been satisfied.

On 16.11.2005 and 17.11.2005 the Municipal Council of Chelopech, respectively Chavdar, decided to convene for a municipal discussion of the Environmental Impact Assessment Report on 14.12.2005 and 15.12.2006, hence the public concerned was notified on 18.11.2005 by posters, information packages delivered in the mailboxes of the residents in the villages of Chelopech and Chavdar, a report was broadcast on Darik Radio, an on 25.11.2005 Kambana newspaper published a notice referring to the dates and time when the public debate on EIAR was scheduled to take place in the respective municipalities.

The public debates on the Environmental Impact Assessment in the municipalities concerned were held on the announced dates, whereas minutes were taken and attendance lists were compiled as a result thereof. A number of opinions were put forward in the course of debates both against and in favour of the project. On 21.12.2005, the contracting authority presented at the Ministry of Environment and Waters the minutes from the public debates accompanied by written opinions. On 29.11.2005, the contracting authority filed at the Ministry of Environment and Waters written opinions by the company on account of the proposals, recommendations, opinions and protests relevant to the public discussions on EIAR.

Written statements relevant to the report were presented by sections and departments at the Ministry of Environment and Waters, the Regional Inspectorate of Environment and Waters Sofia, East Aegean Sea Basin Directorate Plovdiv. Some of the statements referred to inadequacies in EIAR and issued recommendations for the inclusion of further terms and conditions to the draft decision on the environmental impact assessment. By Order No. ПД -13/13.01.2005, the Minister of Environment and Waters convened a

session dated on 24.01.2006 of the Supreme Expert Environmental Council (SEEC). At the same time, on 19 and 20.01.2006, Chavdar Municipal Council, Zlatitza Municipal Council, Future for Chavdar Youth Association submitted their statements at the Ministry of Environment and Waters with the request to have the implementation of the investment proposal cancelled and take heed of the opinions of the municipalities of Chavdar, Zlatitza and Pirdop. At a session held on 24.01.2006, SEEC suspended decision-making in reference to investment proposal of Chelopech Mining EAD and the Ministry of Environment and Waters required additional opinions by the Ministry of Health, the municipalities of Pirdop and Zlatitza, as well as by the contracting authority. The opinion of the Ministry of Health was submitted on 09.03.2006 and the opinion of the Chief State Health Inspector came in on 10.03.2006.

A decision to improve the investment intention was made at the SEEC session convened on 10.03.2006. The decision was signed with reserves by the Chairperson of SEEC.

A new session of SEEC was held on 27.03.2006 and the decision to upgrade the investment intention was again reiterated.

In light of the above, the panel of the Supreme Administrative Court finds that the contested decision had been issued by the competent authority pursuant to the provisions of Art. 94, para.1, it. 1 of the Environmental Protection Act. The requirements of Art. 95 of EPA in connection with RTPEIA have been met, whereas the competent authorities and the public concerned have been notified thereof at the earliest stage of investment intention, consultations have been organized and held and a reference report has been prepared pursuant to the requirements of Art. 9, para. 5 of RTPEIA. Terms of reference for the scope and content of the Environmental Impact Assessment have been drafted and the EIA Report has been prepared after EIA was updated and submitted for quality assessment pursuant to Art. 13 of RTPEIA. The report has been assessed with a "B", whereas the evidence collected in reference to the case indicate the implementation of procedure under Art. 97 of the Environmental Protection Act in connection with Art. 17 of RTPEIA by virtue of which after a positive assessment of the EIA Report by the competent authority, the investor shall undertake to organize jointly with the relevant municipalities, mayoralities and regions specified by the administrative authority a public debate on EIAR. In compliance with Art. 99 of EPA, the contracting authority submitted to the Ministry of Environment and Waters the results, opinions and minutes of the public discussions held on 21.12.2005, whereas the statutory seven-day term had been observed. The Supreme Expert Environmental Council (SEEC) approved of the implementation of the investment proposal.

This panel of the Supreme Administrative Court finds that the contested decision has been rendered in violation of the substantive provisions of the Environmental Protection Act and the RTPEIA, whereas the arguments for this are, as follows: Undoubtedly, it has been ascertained in reference to the case that the proceedings for the pronouncement of the contested decision started on 26.04.2004, the results of the public debate were presented on 21.12.2005, the decision of SEEC was made on 10.03.2006, while the contested decision was rendered on 30.07.2008, i.e. after about two years and four months. The circumstance that the decision for the approval of the investment proposal was made after the expiry of the term stipulated in Art. 99, para. 2 of the Environmental Protection Act shall not be deemed an essential violation of the administrative procedure rules, since the term is instructive, yet in this case this has resulted in the infringement upon the substantive provision of Art. 11, para. 1 of RTPEIA, which imperatively requires the use of updated data in the preparation of the EIA Report inclusive of a description and analysis of environmental components and factors under Art. 4 and 5 and of material and cultural heritage, which will be affected to a great extent by the investment proposal, as well as the interrelation between them. In this case, it cannot be accepted that the statutory requirements referred to hereinabove have been made at the moment of making the contested decision in view of the long period of time

from the preparation of EIAR, the results of the public debates, the decision of SEEC and the decision for the approval of the investment proposal despite the fact that the contracting authority has done what was up to it. The aggravated environmental situation in the region as a result of which Chelopech village, town of Zlatitza and Pirdop have been designated as regions of increased health risk pursuant by a Decision of the Council of Ministers dated 19.12.2008 and despite the fact that this decision has come after the contested act had been rendered and is in connection with a Decree of the Council of Ministers No. 50 of 16.03.1994 for the adoption of the Rules for the operation of the Interdepartmental Committee on Priority Projects in the field of Environment and the Development of Republic of Bulgaria, wherein the region of Pirdop – Zlatitza – Topolnitsa river has been declared a "hot spot" in environmental terms. The information provided substantiates a change towards deterioration of environmental components. What is more, the analysis and evaluation of the written materials provided by the contracting authority in connection with the Environmental Impact Assessment Report show that it has been worked out based on data compiled in the period 1996 – 2005, while the contested decision was awarded in July 2008. For that reason, the court finds that the decision has been rendered in violation of the substantive rules referred to hereinabove.

The reference made by Chelopech Mining EAD to the provision of Art. 99, para. 8 of the Environmental Protection Act stipulating that the EIA decision shall become legally invalid if the implementation of the investment proposal has not been initiated for a period of 5 years as of the date of decision award, which shall be ascertained by a verification by the regulatory authorities in the field of environmental protection before the expiry of this period, whereas on 17.06.2008 the company confirmed to the administrative authority its investment proposal and the lack of changes therein, shall be deemed unfounded. On the one hand, the provision referred to is relevant to effective EIA decisions, on the other hand, the rule under Art. 99, para. 9 of the Environmental Protection Act defines as the lack of intention in the investment proposal and the lack of any changes in the environmental conditions a requirement for the re-certification of EIA decision, whereas no evidence has been provided on account of the last circumstance as of the moment of award of the contested decision.

Furthermore, the rule of Art. 97, para. 1 of the Environmental Protection Act (EPA) has been infringed upon. The arguments of the company that in this case the administrative authority shall act under the conditions of operating autonomy shall be deemed to lack grounds. Pursuant to Art. 97, para. 1 of EPA after the positive assessment of the Environmental Impact Assessment Report, the contracting authority shall organize jointly with the concerned municipalities, mayoralities and regions as set forth by the competent authority a public debate on the EIA Report. The fact that the competent authority has identified the concerned parties does not lead to the conclusion that it has implemented its powers under the conditions of operating autonomy. The operating autonomy involves the right to choose among different yet similar in legal terms decisions, hence the choice of any of them may not result in any irregularity of the act. In this case, the rules under Art. 97, para. 1 of the Environmental Protection Act provide that the authority shall identify the public concerned and leaves no choice options. The written evidence collected in the case file point to the conclusion that the concerned municipalities and regions are not only the municipalities indicated by the administrative authority. The opinion on EIAR submitted to the National Center for Public Health Protection on 14.02.2006 shows that the equipment and facilities of Chelopech Mining EAD are located on the territory of Chelopech and Chavdar Municipalities and the villages of Chelopech, Chavdar, Karlievo, Tzurkvishte, and town of Zlatitza all situated in a radius of 5 km from the production site. Since all villages and towns referred to hereinabove are situated at the same standoff distance it is not clear why only Chelopech and Chavdar municipalities have been identified as concerned. The Environmental Impact Assessment Report indicates that in close proximity to the main site are situated the villages of Chelopech - at 300 m, Tzurkvishte - 2 km, town of Zlatitza - 5 km, village of Karlievo - 2 km, village of

Chavdar – about 6 km. The statement of EIAR that the investment proposal will not impact the villages and towns does not mean that the regions referred to hereinabove do not fall under the public concerned within the meaning of the EPA. In this way, the participation of the public concerned in the public debates held has been prevented which is an essential violation of administrative procedure rules. Even if it is assumed that the administrative body has acted under the conditions of operating autonomy, it should have put forward its arguments substantiating the identification of the municipalities concerned, which has not been done in this case. This is the meaning of Interpretation Decision No. 4 of 22.04.2004 under file No. TP-4/2002 of the Supreme Administrative Court.

Furthermore, it has been ascertained, based on the evidence collected for the case, that the investment proposal envisages the construction of an installation for the production of copper and gold from ore concentrate in compliance with the best available techniques and technologies, as a result of which ore processing will increase up to 2 million tons per year and consequently to 3 million tons per year and the existing practice of exporting copper concentrate for processing abroad shall come to an end. It has been ascertained that the concentrate produced will be processed by the introduction of a high-temperature oxidation under pressure technology. The existing capacities for ore mining will thus expand, the quantities produced will be processed to copper concentrate and the installations planned to be set up will process the copper concentrate to copper, gold and zinc sulfate. Pages 171-242 of EIAR consider the alternatives for the implementation of the investment proposal. It has been noted that there is no official document for the best available techniques drafted particularly on account of technologies used in the field of gold-containing ores, whereas the European Commission has adopted a document for the best available techniques for non-ferrous metal ores processing (A comparative document for complex prevention and control of pollution and Best Available Techniques (BAT) in production of non-ferrous metals dated December 2001). The Environmental Impact Assessment Report analyses the alternative methods, applicable in the processing of Chelopech copper concentrate. A table is drafted to summarize the quality characteristics of technological alternatives of Chelopech concentrate and it is noted that the method of high-temperature oxidation under pressure has not been applied for processing of copper arsenic raw materials. The conclusions drawn from the technical expert report admitted on account of the case, undisputed by the parties, shows that there are several production sites that apply the method of high-temperature oxidation under pressure, whereas this method is not used for the industrial processing of copper concentrate. Hence, the method of high-temperature oxidation under pressure for processing of copper concentrate is not based on the best available techniques and technologies since such technology is not used in the industrial production of copper concentrate with the characteristics of the one in Chelopech. The best available techniques are defined in § 1, it. 42 of the Environmental Protection Act, namely: the most efficient and most advanced stage in the development of activities and methods for their implementation showing practical applicability of the relevant techniques for the provision in principle of the foundations of the relevant standards of emission allowances designed for the sake of prevention and, in the cases when this is practically impossible - for the sake of reduction of emissions and their integrated impact on environment and the legal definition given in Directive 2008/1 EC. Consequently, a given method cannot be defined as the best available technique and respectively the best alternative for the implementation of the investment proposition, without having first applied the method to ascertain its practical suitability.

All facts that have been considered hereinabove show that the contested decision is in violation of the substantive provisions of EPA and RTPEIA and in substantial violation of administrative procedure rules, hence it shall be revoked, the file case returned to the administrative authority for new decision. Based on the arguments referred to hereinabove and by virtue of Art. 172 of the Code of Administrative Procedure, the Supreme Administrative Court, Fifth Division

HAS DECIDED HEREIN:

IT SHALL REVOKE Decision No. 8 of 30.07.2008 on the environmental impact assessment issued by the Minister of Environment and Waters.

IT SHALL SEND BACK the case file to the Minister of Environment and Waters for a new decision pursuant to the instructions given in the arguments to this decision.

IT SHALL LEAVE WITHOUT CONSIDERATION the claims of Ecoforum Association – Sofia and Ores and Mines Association – Sofia against decision No. 8 of 30.07.2008 on the environmental impact assessment issued by the Minister of Environment and Waters.

IT SHALL TERMINATE the proceedings of the case at this part thereof. The decision is appealable before a five-member panel of the Supreme Administrative Court within a 14-day period of its communication to the parties.

**True Copy,
Clerk:**

**CHAIRMAN:
MEMBERS:**

/Signature/ Andrey Ikonov
/Signature/ Iliana Doycheva
/Signature/ Iliana Slavovska

a.i.

I, the undersigned Alexandra Valentinova Pavlova, do hereby certify that this is an accurate translation of the enclosed document, to the best of my knowledge. The translation consists of 7 pages.

Translator:

Alexandra Valentinova Pavlova PIN: 7609011016