

Communication ACCC/C/2009/37 (abridged)

A full version of this communication contains certain information that the communicant requested be kept confidential, including information concerning the identity of the communicant. All such confidential information has been removed from this abridged version, which will serve as the public version of the communication.

To: Compliance Committee
of the UN ECE Convention on Access to Information, Public
Participation in Decision-Making and Access to Justice in
Environmental Matters

through the Secretariat of the Convention

Mr. Jeremy Wates, Secretary to the Aarhus Convention
United Nations Economic Commission for Europe
Environment and Human Settlement Division
Room 332, Palais des Nations
CH-1211 Geneva 10, Switzerland
E-mail: Jeremy.Wates@unece.org

**Communication
concerning non-compliance by Belarus with the UN ECE Convention on
Access to Information, Public Participation in Decision-Making and
Access to Justice in Environmental Matters**

INTRODUCTION

1. This communication is filed in relation to the Republic of Belarus and alleges non-compliance with Articles 4 and 6 of the Convention.

2. This communication addresses a project for construction of a hydro power plant on Neman river (Belarus). At the time when this communication is filed the implementation of project's first phase is under way for about 12 months. This means further extension of the project is envisaged during subsequent project phases. The hydro power plant construction is part of national energy strategy.

3. Neman river is 937 km long, passes Belarus, Lithuania and Russia and flows into the Baltic Sea where it forms its delta. There are 16 priority habitat types in the delta which are included on Annex 1 of the EU Habitats Directive. Approximately 250 bird species occur in the delta, including 156 breeding species and up to 50 species with special conservation status (*Boere, G.C., Galbraith, C.A. & Stroud, D.A. (eds). 2006. Waterbirds around the world. The Stationery Office, Edinburgh, UK. Page 356*).

I SUMMARY OF THE COMMUNICATION

4. The communicant alleges non-compliance by Belarus related to the implementation of a hydro power plant project on Neman river, Belarus.

5. The communicant alleges that the Government of Belarus was not in compliance with the requirements of paragraph 6 of Article 6 and paragraph 1 of Article 4 of the Convention by refusing to provide relevant information on HPP project on Neman river

6. The communicant alleges that that the Government of Belarus was not in compliance with the requirements of paragraphs 2, 3, 6, 7, 8 and 9 of Article 6 of the Convention by failing to inform and carry out adequate public consultations when taking decision to permit HPP project on Neman river.

7. The communicant requests full confidentiality as to any information, in particular the names of individuals and their addresses mentioned, which can be used to identify the communicant.

II INFORMATION ABOUT THE COMMUNICANT

III BELARUS– THE STATE CONCERNED BY THIS COMMUNICATION

8. The Republic of Belarus is the state party concerned by this communication (hereinafter referred as Belarus).

9. Belarus signed the Convention on Dec 16, 1998; a decision to approve the Convention was taken on Dec 14, 1999 (Decree of the President of the Republic of Belarus No.726). The notification was filed with the depositary on Mar 9, 2000. No declaration or reservation was made upon notification of approval.

10. The Convention entered into force for Belarus on October 30, 2001 (Convention's entry into force date).

IV THE FACTS

11. This communication concerns lack of public participation and informing in the process of construction of a hydro power plant (HPP) on Neman river (Belarus).

The power plant project

12. In 2002 Hrodnaenerga (the developer, regional energy company) developed project feasibility study (so called *Investments Feasibility Study*) which was submitted to the Ministry of Environment for environmental *expertiza* (EIA). Project feasibility study precedes the development of project itself (technical project documentation).

13. On Feb 07, 2003 the Ministry of Environment of Belarus approved positive conclusion of the environmental *expertiza* of the feasibility study. This granted an overall environmental permit for the project implementation (even if later it is split into several construction phases).

14. The project for construction of the HPP on Neman river was approved by the Cabinet of Ministers of Belarus on July 17, 2007. We have no information whether project itself had been submitted for environmental *expertiza* prior to its approval by the Cabinet of Ministers.

15. In spring 2008 local population noticed that construction works started on Neman river. This provoked a number of local initiatives against the construction.

16. The HPP project has the following parameters:

- HPP power capacity: 17Mw, app. 87,6 mln Mwh/year
- Water dam height: 10 m
- Length of the water reservoir: 43 km
- Width of the water reservoir: 1 km
- Estimated amount of water stored: 48 mln cubic meters

17. As it is understood from the information available, the construction works were started for Phase I of the project. This effectively means that more dams will be constructed under the HPP project in the future.

Access to information and public participation efforts

V. NATURE OF ALLEGED NON-COMPLIANCE

18. We claim that the Government of Belarus was not in compliance with the requirements of the Aarhus Convention in the process of taking decision for the construction of the HPP on Neman river. There're grounded expectations that further decisions for the extension of the current project within original feasibility study will not be in compliance with the Aarhus Convention.

19. We claim that the during the process for approval of the HPP project on Neman river the Government of Belarus was not in compliance with Articles 4 and 6 of the Aarhus Convention.

Violation of access to information procedures under Article 4 and 6

20. Article 4 (1) requires that:

“[the parties] shall ensure that, subject to the following paragraphs of this article, public authorities, in response to a request for environmental information, make such information available to the public [...]”

21. Namely, the following information about the project was never provided:

- a) project documentation
- b) information on when and where the environmental impact statement was published;
- c) information on how and when the public was informed about public hearings;
- d) conclusions of the environmental *expertiza*;

22. **In conclusion**, by not providing requested information on HPP project on Neman river the Government of Belarus was not in compliance with the requirements of the paragraph 1 of Article 4 of the Aarhus Convention.

23. Article 6, paragraph 6 requires that:

“Each Party shall require the competent public authorities to give the public concerned access for examination, upon request where so required under national law, free of charge and as soon as it becomes available, to all information relevant to the decision-making referred to in this article that is available at the time of the public participation procedure, without prejudice to the right of Parties to refuse to disclose certain information in accordance with article 4, paragraphs 3 and 4”.

It also further sets minimum requirements for relevant information.

24. Applicability of Article 6 is argued below under subsection “*Violation of public participation procedures under Article 6*”.

25. Hrodnaenerga, refused to provide any relevant information about the project. In particular, no project documentation was ever provided.

26. **In conclusion**, by not providing relevant information on HPP project on Neman river the Government of Belarus was not in compliance with the requirements of paragraph 6 of Article 6 of the Convention.

Violation of public participation procedures under Article 6

Applicability of Article 6

27. Approval of a HPP project on Neman river falls under the scope of Article 6 on two grounds: first, it falls under activity listed in para.13 of the Annex I to the Convention; second, falls under activities listed in para.20 of the Annex I to the Convention.

28. Article 6(1)(a) sets that:

“Each Party [s]hall apply the provisions of this article with respect to decisions on whether to permit proposed activities listed in annex I”.

29. HPP project on Neman river involves construction of dam which will create a water reservoir of estimated capacity of 48 million cubic meters.

30. Paragraph 13 of the Annex I to the Convention lists the following activity:

“Dams and other installations designed for the holding back or permanent storage of water, where a new or additional amount of water held back or stored exceeds 10 million cubic metres”.

31. Therefore, a decision making process to grant permit on construction of the HPP on Neman river falls under para.13 of Annex I, and therefore falls under the scope of Article 6.

32. Paragraph 20 of the Annex I to the Convention lists the following activity:

“Any activity not covered by paragraphs 1-19 above where public participation is provided for under an environmental impact assessment procedure in accordance with national legislation”.

33. Construction of HPP requires environmental impact assessment under national legislation of Belarus (Decision of the Government of Belarus, List of Planned Activities Requiring EIA of June 17, 2005, No.30).

34. The Procedures for Carrying Out Environmental Impact Assessment (approved by the same Decision of the Government of Belarus of June 17, 2005, No.30) require public consultation process during preparation of the EIA documentation. It is replies, both the Ministry of Environment and the developer assumed this obligation for the HPP project on Neman river.

35. **Therefore**, a decision making process to grant permit on construction of the HPP on Neman river falls under para.20 of Annex I, and therefore falls under the scope of Article 6.

Environmental expertiza is a permitting process under Article 6

36. Similar to many post-Soviet countries, in Belarus the development of EIA documentation precedes so called environmental *expertiza*.

37. Under Belarus legislation EIA is part of documents comprising project proposal (documentation). EIA is developed by the developer (normally, it is subcontracted from experienced companies).

38. Development of EIA as part of project proposal is required for certain projects which may have significant environmental impacts, including hydro power plants.

39. Upon completion, EIA is submitted to the environmental protection agency for check-through and approval. This process is called “environmental *expertiza*”, it is performed by environmental authorities. The final decision is given in the form of “conclusions” which effectively mean an environmental permit. If a project requires environmental *epxertiza*, it cannot be implemented without positive conclusions.

40. Under Belarus legislation, it is the developer who bears the obligation to inform the public (including publishing environmental impact statement) and to hold consultations with public. This is directly stated in specific provisions of the above mentioned Procedures for Carrying Out Environmental Impact Assessment approved by the Decision of the Government of Belarus of June 17, 2005, No.30 (see, e.g., paragraphs 19, 23, 26, 36, 38, etc). In addition, Part VI of the Procedures sets requirements for holding for public hearings.

41. Therefore, under national legislation the developer is entrusted and required to inform the public and hold consultations on proposed project. These obligations are set as part of the legislation on EIA issues. The public

authorities control compliance with these obligations during environmental *expertiza* process, which effectively is a permitting procedure.

42. **Therefore**, under national legislation of Belarus environmental *expertiza* is a permitting process in the meaning of Article 6 (1)(a). The developer bears obligations on informing and public participation during development of the project proposal (EIA part of it).

Approval of HPP project on Neman river was in violation with public participation requirements under Article 6

43. Article 6(2) requires that “the public concerned shall be informed, either by public notice or individually as appropriate, early in an environmental decision-making procedure, and in an adequate, timely and effective manner” about proposed activity. It sets further requirements as to content of such informing (subparagraphs from a) to e).

44. This obligation may have been put in practice by publishing environmental impact statement (EIS) as required by national law. This communication does not discuss whether national requirements for EIS is in compliance with the requirements of Article 6(2).

45. EIS for HPP on Neman river was never published. This constitutes violation of Article 6(2).

46. Therefore, by not informing the public concerned about proposed HPP on Neman river the Government of Belarus was not in compliance with paragraph 2 of Article 6 of the Convention.

47. The developer argues that the public consultation was held via discussion of the project in newspapers and TV.

48. The communicant claims that the discussion of the proposed project in the newspapers and through TV programs is not an adequate procedure for ensuring effective public participation in the meaning of the Article 6, in particular paragraphs 3 and 7.

49. By not complying with paragraphs 2, 3, 6 and 7 the Government of Belarus was not in compliance with paragraph 8 of Article 6.

50. By refusing to provide final decision (conclusions of the environmental *expertiza*), the Government of Belarus was not in compliance with paragraph 9 of Article 6.

51. **In conclusion**, by failing to inform and carry out adequate public consultations on proposed HPP project on Neman river the Government of

Belarus was not in compliance with paragraphs 2, 3, 6, 7, 8 and 9 of Article 6 of the Convention.

VI. USE OF DOMESTIC REMEDIES OR OTHER INTERNATIONAL PROCEDURES

VII. CONCLUSIONS

52. By not providing relevant information on HPP project on Neman river the Government of Belarus was not in compliance with the requirements of paragraph 6 of Article 6 and paragraph 1 of Article 4 of the Convention.

53. By failing to inform and carry out adequate public consultations when taking decision to permit HPP project on Neman river the Government of Belarus was not in compliance with paragraphs 2, 3, 6, 7, 8 and 9 of Article 6 of the Convention.

LIST OF ANNEXES
