

## **Reply to the Communication ACCC/C/2017/154**

### **I. Introduction**

In response to the Communication provided by the ClientEarth Foundation regarding a forest management plans, registered under the number **ACCC/C/2017/154**, hereinafter referred to as the "Communication", I kindly inform you of the following.

An author of the Communication claims that Poland failed to properly implement Article 9 paragraph 3 of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, prepared at Aarhus on June 25, 1998, hereinafter referred to as the "Aarhus Convention", with reference to forest management plans, by not providing administrative or judicial measures in Polish law, by means of which private individuals or non-governmental organisations (NGOs) could question the legality of forest management plans.

Article 9 paragraph 3 of the Aarhus Convention provides that in addition and without violating the provisions of the appeal procedures as referred to in paragraphs 1 and 2, each Party shall ensure that members of the public who meet the requirements, if they exist, as defined in national law, will have access to an administrative or judicial procedure allowing for the challenging of acts or omissions of private persons or public authorities violating the provisions of its national environmental law.

In relation with the above, it is necessary to present the state of Polish law in this area to outline the broader context of the case.

### **II. Forest management plan (FMP)**

According to art. 22 paragraph 1 of the Forest Act of September 28, 1991 (OJ of 2017, item 788, as amended), the minister responsible for environmental affairs approves forest management plans for forests owned by the State Treasury. A forest management plan is a basic document for forest management, developed for a specific area, containing a description and assessment of the forest condition as well as the goals, tasks and ways of management in forests owned by the State Treasury. Therefore, the forest management plan is a type of internal technical documentation prepared by competent and experienced specialists, addressed to people who are legally obliged to implement sustainable forest management in each forests district owned by the State Treasury.

At present, the legal act that defines the requirements that must be met by each forest management plan is the ordinance of Minister of the Environment of November 12, 2012 on detailed conditions and procedure for preparing a forest management plan, a simplified forest management plan and inventory of the forest condition (OJ of 2012 item 1302). In addition, the procedure for drawing up the forest management plan is regulated by an internal regulation of the State Forests, introduced by Regulation No. 55 of the General Director of State Forests of November 21, 2011 regarding the Instruction for forest management.

According to these documents, the procedure for creating a forest management plan (FMP) takes place as follows:

- 1) convening by the Director of the Regional Directorate of State Forests (hereinafter "director of RDSF") the Plan Establishing Committee (PEC), which aims to develop the assumptions for the FMP project; PEC is usually convened in the 8th year of validity of the current plan;

- 2) making a public announcement, at least one month prior to convening the PEC, in the Public Information Bulletin and in the local press, information about starting work on drafting a forest management plan for a given district, on the expected date of convening the PEC in this matter, on the possibility of public participation in the PEC proceedings, and about "Assumptions for the forest management plan" determined during the PEC; The National Forest Holding "State Forest", hereinafter referred to as "SF", invites the public to participate in the preparation of the draft plan already at the stage of the meeting of PEC, where its assumptions are created; according to art. 39 of the Act of October 3, 2008 on access to information on environment and its protection, public participation in environmental protection and on environmental impact assessment (OJ of 2017, item 1405, as amended), hereinafter referred to as "EIA Act", an obligation to consult with the public arises at the stage of consulting the draft plan only; in practice, therefore, the SF conduct consultations with the public much sooner than required by law;
- 3) awarding of a public contract for the implementation of the FMP project;
- 4) elaboration of the plan by the selected contractor, including preliminary, preparatory and field works (including a valuation, i.e. field description of each stand, identification of its so-called "breeding needs", tree felling needs etc.), local work (e.g. calculating how much wood can be obtained in the next 10 years, as well as the compilation of natural data in the so-called Nature Conservation Programme);
- 5) development by the contractor of a plan for the forecast of the impact assessment of FMP on the environment;
- 6) convening by the Director of RDSF the Technical and Economic Consultation (TEC), whose task is to:
  - a) conduct an analysis of the past management practices based on a Forest District Manager's report, a report of the head of the Forest Protection Team, the report of the contractor of the Forest Management Plan,
  - b) assess, by the Director of RDSF, of the activities carried out based of the forest management plan of the previous period,
  - c) discuss and accept the draft Forest Management Plan based on the contractor's presentation and the report of the Forest District Manager,
  - d) discuss the draft Nature Conservation Programme based on the contractor's presentation of the Forest Management Plan and the report of the Forest District Manager,
  - e) discuss the forecast of the impact assessment of the Forest Management Plan on the Environment based on the contractor's presentation of the Forest Management Plan and the report of the Forest District Manager. TEC, considering the results of field work and forest management assessments, decide on the most important assumptions regarding forest management for the next 10 years;
- 7) making public announcement in the Public Information Bulletin (PIB) and in the local press on the possibility of getting acquainted with the draft FMP and the Environmental Impact Assessment (usually tabled at the headquarters of the district forest inspectorate) together with the possibility of submitting requests and comments. This solution is a transfer of art. 39 of the EIA Act<sup>1</sup> to the extent of the provisions concerning the Forest Management Plan;
- 8) handing over the draft Forest Management Plan together with the environmental impact assessment to the Regional Director of Environmental Protection (RDEP) and the State Voivodship Sanitary Inspector (SVSI) with a request for an opinion;

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<sup>1</sup> Art. 39 of the EIA Act lists a catalogue of information that the authority preparing a draft document requiring public participation, without undue delay, makes public.

- 9) optional convening by the Director of RDSF of the Draft Plan Commission (DPC), whose task is to discuss opinions, comments and applications submitted by the society as well as the preliminary wording of the justification regarding comments and conclusions; RDSF informs the public about the convocation of the DPC by an announcement in the local press and in the Public Information Bulletin;
- 10) drafting by Director of RDSF (before referring FMP for approval), a written summary of the Strategic Environmental Impact Assessment. The summary includes justification of the appropriate alternative scenario chosen for FMP and justification, containing information on public participation. Justification of public participation describes how and to what extent remarks and applications submitted by the public were considered (art. 42 paragraph 2 of EIA Act). It also contains information about how and to what extent were considered:
  - a) arrangements contained in the Environmental Impact Assessment, including proposals on monitoring the effects of implementing the provisions of the document,
  - b) opinions of RDEP and the State Voivodship Sanitary Inspector;
- 11) after FMP approval by Minister of the Environment, director of RDSF:
  - a) informs the public of the approval of the plan by the minister responsible for environmental affairs and provides the possibility to familiarize with its content and the justification referred to in art. 42 para. 2 and the summary referred to in art. 55 para. 3 of EIA Act,
  - b) submits a letter confirming the FMP approval, together with a summary and adopted forest management plan, RDEP and SVSI,
  - c) monitors the impact of FMP on the environment.

In the context of the arguments raised in the Communication, it is very important to note that the forest management plan is not an act of a general applicable law. Therefore, the forest management plan cannot be implemented in the event of non-compliance with the law, as the implementation of targets based on the plan does not exempt the authorities from compliance with the law, including the need to obtain appropriate approvals, decisions or appropriate procedures required by general applicable law.

In this context, reference should be made to the judgment of the Supreme Administrative Court in Warsaw of March 12, 2014 ref. no: II OSK 2477/12, dismissing the cassation appeal against the judgment of the Voivodship Administrative Court in Warsaw of June 14, 2012 ref. no: IV SA/Wa 495/12. The court pointed out that, bearing in mind the general principles of the qualification of the administrative authorities' proceedings, it is impossible to prove from the approval of the plan (FMP), made according to art. 22 para. 1 of the Forest Act, that it was an administrative decision. The above position was also confirmed by subsequent judgments of the Voivodship Administrative Court and the Supreme Administrative Court. According to the Supreme Administrative Court, approval by Minister of the Environmental Protection of the Forest Management Plans, if the forests are owned by the State Treasury, is an internal activity undertaken in connection with the execution of tasks of an owner nature.

### **III. Possibilities of questioning activities defined in the forest management plans in terms of their impact on the environment**

#### **1. The right to public participation in the procedure of strategic environmental assessment carried out by the authority preparing the draft document - art. 54-58 of the EIA Act.**

According to the provisions of Section III, chapter 1 and 3 of the EIA Act, the competent director of the regional directorate of state forests, as an authority drafting the document, provides the opportunity for public participation in strategic environmental assessment. For this purpose, he

publishes in the Public Information Bulletin and on bulletin boards and in the local press information on the manner, place and date (at least 21 days from public announcement) of submitting comments and requests, as well as on competences of the Director of RDSF to consider these comments and requests. If the public shows its interest in it, the Draft Plan Commission is convened, providing opportunities for public participation in its deliberations. The participation of the society in the process of creating forest management plans for forest districts has been regulated in detail in the Instruction for Forest Management (FMI Warsaw 2011, Chapter VI, § 125 point 8 - attached).

In addition, according to art. 51 para. 1 of the EIA Act, Director of RDSF prepares a forecast of the environmental impact of the draft forest management plan.

Therefore, a body preparing the draft plan (art. 55 para. 1 of the EIA Act) considers the findings contained in the environmental impact assessment, opinions of the regional director of environmental protection and the voivodship sanitary inspector and takes into account comments and requests submitted by the public.

The draft forest management plan for the forest district cannot be accepted if the strategic environmental impact assessment shows that it may have a significant negative impact on a Natura 2000 site (art. 55 para 2 of the EIA Act).

Director of RDSF draws up a written summary containing, according to art. 55 para 3 of the EIA Act justification of the choice of the adopted document in relation to the considered alternative solutions, as well as information on how and to what extent the following were considered: findings contained in the environmental impact forecast, opinions of competent authorities, submitted comments and conclusions, results of proceedings concerning transboundary impact on environment (if carried out), proposals concerning the methods and frequency of monitoring the effects of the implementation of the provisions of the document.

A summary is attached to the application for approval of the forest management plan - submitted by the General Director of State Forests to the Minister of the Environment. By analysing the application, the authority becomes familiar with the consultation process and decides regarding the approval of the plan.

The above is carried out in the framework of a procedure defined by generally applicable law, enabling the society (including non-governmental organizations) to challenge the proposed provisions of the draft forest management plan.

The implementation of the activities contained in the forest management plan are subject to the control by administrative and judicial institutions appointed to settle disputes within the scope of their jurisdiction - depending on the subject and category of the violation. Therefore, it cannot be said that there is no access to justice for these activities.

The provisions of the Polish law that apply in this respect are contained in Annex I to this reply.

## **2. The right to submit complaints and applications according to art. 221 of the Act of June 14, 1960 - Code of Administrative Procedure**

The right to question the acts or omissions of public authorities, also in the field of the environment, is ensured in art. 63 of the Act of April 2, 1997 - the Constitution of the Republic of Poland (OJ of 1997, No. 78, item 483, as amended). The procedure for examining applications and complaints is specified in the Act of June 14, 1960 - the Code of Administrative Procedure. A subject



of the complaint may be negligence or improper performance of tasks by competent authorities or their employees, violation of the rule of law or interests of the applicants, as well as protracted or bureaucratic handling of matters. If the specific provisions do not specify other bodies competent to deal with complaints, the authority competent to deal with complaints regarding the tasks or activities of the government administration body, a state enterprise body or other state organizational unit is a higher level or directly supervising body. However, the Prime Minister is competent to consider a complaint regarding the minister's tasks.

The provisions of the Polish law that apply in this respect are contained in Annex II to this reply.

**3. The right to appeal to a higher authority and submit a complaint to the administrative court for a decision on environmental conditions for projects requiring an environmental impact assessment**

Performing activities based of approved by the Minister of the Environment forest management plan does not exempt from the obligation to obtain appropriate approvals, decisions or carrying out procedures specified in the general applicable law. Therefore, if the forest management plan specifies tasks in the area of activities that legally require assessment of the project's environmental impact as part of the procedure for issuing a decision on environmental conditions, members of the public (including non-governmental organizations) may take part in such proceedings, on the terms set out in the law, including appeals to a higher-level authority and a complaint to the administrative court.

As an example, it is worth to point out that as a part of planning and forecasting of activities, the entity who is preparing the forest management plan indicates, among others, tasks related to afforestation and technical infrastructure needs. Afforestation or infrastructure investment can significantly affect the environment<sup>2</sup>. In such a case, proceedings for the issuing a decision on environmental conditions are carried out for activities specified in the previously approved forest management plan. An administration measure in the form of an option to appeal to the General Director of Environmental Protection and a complaint to an administrative court against such a decision is entitled to a non-governmental organization.

The provisions of Polish law that apply in this respect are contained in Annex III to this answer on the example of afforestation of land located in a Natura 2000 area.

**4. The right to file to a court a civil claim according to art. 322-324 of the Act of April 27, 2001 - Environmental Protection Law, in connection with the provisions of the Act of November 17, 1964 - Code of Civil Procedure**

Individuals or NGOs can question the actions of public authorities in terms of their negative impact on the environment through a civil claim.

The Act of April 27, 2001 - Environmental Protection Law in Title VI, chapter I regulates the issue of civil liability in the scope of environmental protection - in case of liability for damage caused by environmental impact the provisions of the Civil Code apply, unless the Act provides otherwise (art. 322 of the Act - Environmental Protection Law). The judicial procedure in matters relating to civil law relations is regulated by the Code of Civil Procedure<sup>3</sup>. If the threat or violation concerns the

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<sup>2</sup> The types of activities that can always and potentially significantly affect the environment have been specified in the regulation of the Council of Ministers of November 9, 2010 on projects that may have significant effects on the environment (OJ of 2016 item 71).

<sup>3</sup>Art. 1 of the Act of November 17, 1964 - Code of Civil Procedure.

environment as a common good, with such a claim an environmental protection organization may apply (art. 324 of the Environmental Protection Act).

**5. The right to report damage to the environment according to art. 24 of the Act of April 13, 2007 on Preventing Environmental Damage and the Remediation of Environmental Damage (OJ of 2018, item 493, as amended)**

According to art. 24 para. 1 of the Act on the Preventing Environmental Damage and the Remediation of the Environmental Damage, the environmental protection authority is obliged to accept from everyone a report of the direct threat or occurrence of environmental damage. Paragraph 6 of the same article stipulates that the environmental organization which submitted the report, based of which the proceeding has been initiated, has the right to participate in this proceeding as the legal party.

**IV. Summary**

Bearing in mind the above, it should be stated that within the framework of the legal system of the Republic of Poland, non-governmental organizations are provided with an opportunity to actively participate in the procedure of drawing up a forest management plan for the Forest Districts of the National Forest Holding "State Forests", under which NGOs can report their comments and conclusions during the preparation of the draft plan. The manner of considering the demands of non-governmental organizations is verified by the Minister of the Environment before the plan is approved. At each stage, non-governmental organizations and individuals may also complain about the operation of an institution involved in creating a forest management plan to a higher-level authority (to the Prime Minister in the case of the Minister of the Environment).

At the same time, the approval of the forest management plan does not prejudice the implementation of the tasks set out in it. Activities that may significantly affect the environment require additional approvals by means of decisions and these decisions may be appealed to higher-level authorities or to the administrative court.

  
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