ClientEarth
Prawnicy dla Ziemi

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Ms Fiona Marshall
Secretary to the Aarhus Convention Compliance Committee
UN Economic Commission for Europe
Environment Division
Palais des Nations
CH-1211 Geneva 10 Switzerland

By email: aarhus.compliance@un.org

Dear Ms Marshall

Re: Communication to the Aarhus Convention Compliance Committee concerning compliance by Poland with the provisions of the Convention on access to justice in relation to forest management plans (ACCC/C/2017/154)

The Communicant would like to provide the Committee with an update on communication ACCC/C/2017/154 given that the Communication was submitted in 2017. The Communicant hopes that this additional information will facilitate the Committee's preparation for a hearing on this case.

The Communicant would like to emphasise that it maintains all the claims made in the Communication.

Firstly, this document provides some information on a legislative proposal currently pending before the Polish Parliament which would amend the Law on Forests (Section I). Secondly, it presents the jurisprudence of the administrative courts concerning the possibility to challenge forest management plans (Section II). Thirdly, the available legal remedies under Polish law are presented and their continued ineffectiveness to ensure access to justice to challenge forest management plans are described (Section III). Finally, infringement proceedings against Poland

launched by the European Commission in relation to forest management plans and the current case against Poland before the CJEU are presented (Section IV).

Section I

Currently, a proposed amendment to the Act of 28 September 1991 (Law on Forests) is pending in the Higher Chamber of the Polish Parliament (*Senat*). [1]

According to this proposal, a proposed amendment to Article 1 of the Law on Forests would explicitly introduce the possibility of challenging the approval of a forest management plan before an administrative court. The explicit wording would leave no doubt that the approval of the forest management plan by the competent minister may be subject to judicial and administrative review. The principles and procedures referred to in Art. 3 § 2.4 of the Act of 30 August 2002 - Law on Administrative Court Proceedings would apply to appeals against these forest management plan approvals.

The proposed amendment would give environmental organizations and the Ombudsman the right to lodge a complaint in relation to the approval of a forest management plan or a simplified forest management plan. In the case of private forests, the owners of such forests would also be entitled to lodge a complaint. The translated amendment proposal is provided in annex 1.

This proposal is fully supported by the Polish Ombudsman.[2]

At this point in time, there is no guarantee that this legislative proposal will be adopted, nor a definite timeline as to when such a proposal would be tabled in the chambers of Parliament. **Therefore, in relation to the possibility to challenge forest management plans, at the time of writing, the Forest Act remains unchanged in the version as presented in the Communication in 2017.**

Section II

On 17 April 2019 the Warsaw Regional Administrative Court issued a decision rejecting a complaint submitted by a group of individuals seeking to challenge a forest management plan (case no. IV SA/Wa 76/19).[3] The court referred to the Supreme Administrative Court's judgment of 19 October 2017 (case no. II OSK 2336/17) which states that the "decision" of the Minister of the Environment approving a forest management plan is an internal act over which administrative courts do not have jurisdiction. Thus, the Regional Administrative Court held that there is no judicial control over said decision and the application was inadmissible. The court further held that through this act the State Forests exercised its ownership rights to the forests and such acts cannot be challenged before administrative court

On 18 March 2020, the Supreme Administrative Court (case no. II OSK 649/20) dismissed the cassation appeal lodged by the individuals against the judgement of 17 April 2019. The Supreme

[1] https://www.senat.gov.pl/prace/druki/record,11973.html
[2] https://bip.brpo.gov.pl/pl/content/rpo-senat-plany-urzadzenia-lasu-spoleczenstwo-wplyw
[3] https://sip.lex.pl/orzeczenia-i-pisma-urzedowe/orzeczenia-sadow/iv-sa-wa-76-19-postanowienie-wojewodzkiego-sadu-522816166

Administrative Court confirmed that the forest management plan could not be challenged before the administrative courts. This judgment is final and it cannot be a subject of any further appeal.

Therefore, there continues to be no means of challenging forest management plans under Polish law.

Section III

In its Response to the Communication submitted in 2018, the Party concerned indicated five legal remedies available under the Polish law which could be used to challenge forest management plan:

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

The Communicant briefly comments on the above-mentioned legal avenues to clarify that there have been no changes to any of these avenues that would give an effective possibility to challenge forest management plans.

Ad. 1 The right to public participation in the procedure of strategic environmental assessment carried out by the authority preparing the draft document (plan)

First, the Act of 3 October 2008 on access to information on the environment and its protection, public participation in environmental protection and on environmental impact assessment clearly states that an NGO may challenge “decisions” (*decyzje*). However, forest management plans are not decisions.

Second, the right to participate in the procedure of strategic environmental assessment carried out by the authority preparing the draft document (plan) is not the same as the right to challenge a final forest management plan.

There have been no changes to these two points since the communication has been submitted, meaning that neither of these avenues give effective access to justice in relation to forest management plans.

Ad. 2 The right to file complaints and requests

This legal avenue is regulated under Article 221 of CAP and Article 63 of the Polish Constitution, and it is essentially a right to address a petition to public authorities (analogous to a petition to the European Parliament under Article 227of the Treaty on the Functioning of the European Union).

It is a simplified administrative procedure with no parties, no procedural obligations imposed on the public authorities and no legal remedies.

Furthermore, the proceeding initiated by a public complaint does not result in an administrative decision, but solely in a notification about the method by which the complaint will be resolved, provided by the public authorities to the complainant. The complainant is not allowed to appeal against the notification nor to lodge a complaint against the notification with an administrative court.

The Committee in its findings on communication ACCC/C/2006/18 (Denmark) held that access to justice under paragraph 3 requires more than a right to address an administrative authority about an illegal activity.

Therefore, this legal avenue cannot be considered as an effective remedy providing access to justice for members of the public as required by Article 9(3) of the Aarhus Convention.

Ad. 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

Polish law provides a possibility to challenge environmental permits for activities that require Environmental Impact Assessment and certain of these activities may be foreseen in a forest management plan. However, by way of such a challenge, members of the public cannot challenge the content of the forest management plan. Therefore, it cannot be considered as a legal remedy and access to justice in relation to forest management plans as it does not enable the members of the public to challenge forest management plans before an independent court.

Ad. 4 The right to file a civil claim before the civil courts

As a general comment, Article 322 of the Act of April 27, 2001 - Environmental Protection Law ("EPL") provides that unless this Act provides otherwise the provisions of the Civil Code apply to the liability for damage caused by an impact on the environment. This provision implements the Environmental Liability Directive and merely creates a possibility to bring claims aimed at preventing or remedying environmental damage. In this way, the Act complements the system of the Code-based liability; it does not create a new type of civil liability, but only adds five modifications to it in successive articles.

irstly, Article 324 of the Act establishes strict liability for certain establishments that are considered particularly risky for the environment.

Secondly, a claim for the prevention of damage or the restoration of the environment may be filed by the entities indicated in the Act, including the State Treasury, a territorial self-government unit and environmental organisations (Article 323(2)).

Thirdly, the liability for damage caused by an impact on the environment is not excluded by the circumstance that the activity responsible for the damage is carried out on the basis of a decision and within its limits (Article 325).

Fourthly, environmental organisations may take legal action demanding that advertisements or other forms of promotion of a commodity or service should be stopped if they are in contradiction with the principles of environmental protection (Article 328).

Fifthly, the entity which has rectified damage to the environment may file a claim for the reimbursement of the resources expended for this purpose from the entity which has caused the damage (Article 326).

It should be added that "the damage caused by an impact on the environment" is only related to human behaviour. Thus, it does not cover the damage caused by certain animals subject to species-specific protection (this issue is regulated by the Act on Nature Conservation).

The Communicant agrees that Article 323 of Poland's 2001 Environmental Protection Law permits ecological organizations to demand that preventive measures be taken when an activity harms the environment. **However, it does not enable members of the public to challenge forest management plans before an independent court. It merely allows to demand the preventive measures to avoid environmental harm or to claim remedial measures after the harm is done, with no impact on the form of the approved plan.**

Ad. 5 The right to report damage to the environment

Article 24 para. 1 of the Act of 13 April 2007 on the prevention of environmental damage and its repair ("APED") provides no right for an NGO to challenge a forest management plan.

Forest management plans are not covered by the scope of the APED that the government mentions in its Response. Therefore, members of the public cannot obtain any remedies on the basis of the APED.

Article 2 APED defines the personal and material scope of application of this act. The APED is applied to "environmental damages or direct risk of environmental damage caused by the activities of the entity using the environment that pose a risk of damage to the environment". The personal scope refers to "the entity using the environment". This term is defined under Article 6 point 9 APED, which refers to Article 3 point 20 EPL and Article 4 of the Act of 6 March 2018 (the entrepreneurs law). "The entity using the environment" is accordingly understood as an entrepreneur that is a private entity or a public entity which conducts commercial activities, which pose a risk of environmental damage. The scope of such activities is listed in Article 3 APED.

This legal avenue is therefore irrelevant for forest management plans and provides no remedy, since approving forest management plan by the Minister is beyond the scope of application of the APED.

Section IV

In July 2018, the European Commission launched infringement procedure no. 2018/2208 and sent a letter of formal notice, followed by a reasoned opinion in July 2019.[4] The Commission called on Poland to ensure that adequate safeguards are in place to protect forests and its plant

[4] See: July infringements package: key decisions (europa.eu)

and animal species, as required under EU nature legislation (Council Directive 92/43/EEC (so-called 'the Habitats Directive')[5], European Parliament and Council Directive 2009/147/EC (so-called 'the Birds Directive')[6]). These Directives establish Natura 2000, an EU-wide network of protected areas aimed at preserving habitats and species of EU interest. Under these laws, forest management plans - which regulate activities, such as logging - must undergo an assessment of their effects on Natura 2000 before authorisation. In Poland, such assessments are carried out, but Polish law does not provide access to justice with regard to forest management plans. As these plans may have significant effects on Natura 2000 sites, the public interest is, thereby, deprived of effective judicial protection under the Habitats Directive in this regard. Therefore, the scope of the infringement procedure is related only to the forest management plans that impact Natura 200 sites.

In addition, Poland exempted forest management from obligations of strict species protection provided in the Birds and Habitats Directives in 2016, which compromises the required protection regime. In response, Poland agreed to consider amending its law regarding the exceptions for forest management. However, no progress has been made.[7]

On 3 December 2020, the European Commission therefore decided to refer Poland to the Court of Justice of the EU over its failure to ensure that adequate safeguards are in place to protect forest habitats and plant and animal species, as required under the Habitats Directive and the Birds Directive.

On 15 July 2021 the European Commission brought an action against Poland before the CJEU (case C-432/21). According to the Commission, Poland has failed to fulfil its obligations arising from the provisions of the Habitats Directive, the Birds Directive and the Aarhus Convention.

In its first plea in law, the Commission submits that the introduction, in 2016, of Article 14b(3) of Forests Act of 1991, according to which forest management based on good practice requirements does not infringe any provisions concerning the conservation of nature, amounts to incorrect transposition of those directives, since that provision disregards the obligation to establish a rigorous systems for the protection of animal species and the obligation to conserve wild birds laid down therein. That new wording of the provision Article 14b(3) of the Forests Act introduces a significant derogation from the provisions of those directives and creates no more than a legal illusion of compatibility with the obligations to protect species of wildlife laid down in Articles 12 and 13 of the Habitats Directive and Articles 5 and 9 of the Birds Directive. Furthermore, Article 6(1) of the Habitats Directive and Article 4(1) of the Birds Directive require the adoption of conservation measures for specific areas. The application of Article 14b(3) of the Law on Forests means that it is no longer necessary to adopt and implement conservation measures in Poland in relation to those specific areas.

In its second plea in law, the Commission submits that there is no guaranteed possibility for environmental organisations to challenge the decisions of the Minister for the Environment

[5] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:31992L0043
[6] EUR-Lex - 32009L0147 - EN - EUR-Lex (europa.eu)
[7] See July infringements package: key decisions (europa.eu) above: "*In reply to a letter of formal notice sent by the Commission in July 2018, Poland agreed to consider amending its forest law regarding the exceptions for forest management. To date, however, no tangible progress has been made*."

whereby forest management plans are approved, which is incompatible with the provisions of the Aarhus Convention. Article 6(3) of the Habitats Directive, read in conjunction with Article 9(2) of the Aarhus Convention, requires that decisions concerning plans and projects within the meaning of Article 6(3) of the Habitats Directive be capable of being challenged by environmental organisations before a court.

Under Polish law, while assessments of forest management plans are carried out, Polish law does not provide access to justice with regard to those plans. As they may have significant effects on Natura 2000 sites, the public is thus deprived of effective judicial protection.

The Polish government - to avoid an unfavourable CJEU ruling, decided to eliminate the below-mentioned non-compliance with the EU law.[8] However, the relevant amendments in Polish law touched upon only the first plea in law and on 10 January 2022 the Polish President signed the law of 17 November 2021 amending the Forests Act and the Environmental Protection Act.[9]

However, the European Commission's second complaint is still valid and under the Polish law there is no guaranteed possibility for environmental organisations to challenge the decisions of the Minister for the Environment whereby forest management plans are approved.

At the time of writing, the CJEU has not issued the decision in this set of proceedings. We are informing the Committee of this procedure as an update to section VII "Use of other international procedures" of the required format for communications. We do not consider that this procedure has provided an adequate remedy to resolve the issues mentioned in the Communication.

Conclusion

The above information demonstrates that all submissions included in the Communication are still relevant and the Communication should be declared admissible in its entirety.

Yours sincerely,

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[8] https://www.sejm.gov.pl/Sejm9.nsf/druk.xsp?nr=1728
[9] https://www.prezydent.pl/aktualnosci/wydarzenia/nowelizacja-o-lasach-oraz-ustawy-o-ochronie-przyrody,47404

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Annex 1

Draft Act amending the Law on Forests

Article 1

In the Act of 28 September 1991 on forests (Journal of Laws of 2021, items 1275 and 1718 and of 2022 item 84) in Article 22 sections 6 and 7 shall be added as follows:

"6. The approval referred to in sections 1 and 2 shall be subject to appeal to the administrative court following the principles and in the manner prescribed for acts or activities referred to in Article 3 § 2 item 4 of the Act of 30 August 2002. - Law on proceedings before administrative courts (Journal of Laws of 2019, item 2325, of 2020, item 2299 and 2320 and of 2021, item 54, 159 and 1598).

7. An environmental organisation, referring to its statutory objectives, if it conducts its statutory activity in the field of environmental protection or nature protection for at least twelve months before the day of lodging the complaint and the Ombudsman shall be entitled to lodge a complaint. The right to lodge a complaint against the approval referred to in paragraph 2 shall also be accorded to the forest owner.".

Article 2

In relation to an approval referred to in Article 22 (1) or (2) of the Act amended in Art. 1 which occurred before the entry into force of this Act, a complaint to the administrative court may be lodged within 30 days of the entry into force of this Act.

Article 3

The Act shall enter into force 14 days after the date of its promulgation.

Annex 2

Article 24 [Report on occurrence of imminent threat of environmental damage or environmental damage]

1. The environmental protection authority shall be obliged to accept from each person a report on the occurrence of a direct threat of environmental damage or of the environmental damage.

2. (repealed).

3. The notification referred to in paragraph 1 shall include:

1) the name and surname or the name of the entity reporting a direct threat of environmental damage or environmental damage, its residential address or registered office address;

2) indication of the place of the direct threat of environmental damage or the environmental damage, if possible by giving the address or the number of the cadastral parcel on which it was found;

3) information on the time of occurrence of the direct threat of environmental damage or the environmental damage, if possible by indicating the date of its occurrence

4) description of the situation indicating the occurrence of the direct threat of environmental damage or the environmental damage, including, if possible, determination of its type.

4. The notification should, if possible, include documentation confirming the occurrence of an imminent threat of environmental damage or the environmental damage and indicate the responsible entity using the environment, and in the case of notification concerning damage to the surface of the ground - the names of the substances causing the risk and the results of soil and ground contamination tests with these substances, performed by a laboratory referred to in Article 147a, paragraph 1, point 1 or paragraph 1a of the Act of April 27, 2001. - Environmental Protection Law.

4a. The notification in electronic form shall be accompanied by scanned documentation, referred to in section 4.

5. The environmental protection authority, recognizing as justified the notification referred to in para 1, decides to initiate the proceedings on the issuance of the decision referred to in Article 15 par. 1 section 2 or in cases referred to in Article 16, takes preventive or corrective actions. The provisions of Article 17 shall apply accordingly.

6. The environmental organization making the notification on the basis of which the proceedings were initiated shall be entitled to participate in those proceedings as a party.

7. The environmental protection authority shall refuse to initiate proceedings by way of a decision, which may be appealed against.

ClientEarth is an environmental law charity, a company limited by guarantee, registered in England and Wales, company number 02863827, registered charity number 1053988, registered office 10 Queen Street Place, London EC4R 1BE, a registered international non-profit organisation in Belgium, ClientEarth AISBL, enterprise number 0714.925.038, a registered company in Germany, ClientEarth gGmbH, HRB 202487 B, a registered non-profit organisation in Luxembourg, ClientEarth ASBL, registered number F11366, a registered foundation in Poland, Fundacja ClientEarth Poland, KRS 0000364218, NIP 701025 4208, a registered 501(c)(3) organisation in the US, ClientEarth US, EIN 81-0722756, a registered subsidiary in China, ClientEarth Beijing Representative Office, Registration No. G1110000MA0095H836. ClientEarth is registered on the EU Transparency register number: 96645517357-19. Our goal is to use the power of the law to develop legal strategies and tools to address environmental issues.