

3 May 2022

Mr. Jaroslaw Mielnik
Ministry of Climate
Poland

Ms. Agata Szafraniuk
ClientEarth
Poland

Dear Mr. Mielnik,
Dear Ms. Szafraniuk,

Re: Communication to the Aarhus Convention Compliance Committee concerning compliance by Poland with regard to public participation and access to justice in relation to water permits (ACCC/C/2017/146)

I refer to my letter of 5 April 2022 inviting the Party concerned and the communicant to participate in the hearing to discuss the substance of the above communication to be held at the Palais des Nations, Geneva, on Friday, 17 June 2022.

In preparation for the hearing, the Committee has identified a number of questions upon which it seeks clarification from the Party concerned and the communicant in writing prior to the hearing. To this end, please find **enclosed** the questions prepared by the Committee for your attention.

In accordance with the Committee's usual timeframe, the Party concerned and the communicant will have four weeks to prepare their written replies to the Committee's questions. The Committee would accordingly be grateful to receive your replies to the enclosed questions by **Wednesday, 1 June 2022**. Please send your replies to aarhus.compliance@un.org, copying the other party.

Please do not hesitate to contact the secretariat if you have any questions.

Yours sincerely,



Fiona Marshall
Secretary to the Aarhus Convention Compliance Committee

Cc: Permanent Mission of the Republic of Poland to the United Nations
Enc: Questions from the Committee to the Party concerned and communicant

Questions to both the Party concerned and the communicant:

1. At page 10 of its update dated 15 February 2022, the communicant states that on 20 April 2021, the Supreme Administrative Court, in its judgment no. III OSK 3140/21, held that article 402 of the Water Law is contrary, inter alia, to article 9 (3) of the Aarhus Convention and that the lower court had correctly disapplied the above provision in the case before it.

Under Polish law, is the Supreme Administrative Court's judgment binding on lower courts in future cases concerning article 402 of the Water Law? If not, are there any legislative plans underway to modify the Water Law to disapply article 402 in line with the Supreme Administrative Court's judgment of 20 April 2021?

2. At page 3 of its response to the communication, the Party concerned states that article 401 (1) of the 2017 Water Law has extended the scope of parties to the proceedings for the issuance of water permits to include the applicant, entities affected by the intended use of water and entities in the range of impact of the water devices planned to be used.

Please clarify whether environmental non-governmental organizations (NGOs) whose statutes cover the affected territory are deemed to be entities "affected by the intended use of water" under article 401 (1) of the 2017 Water Law? Please provide one or more recent court decisions, in Polish, to substantiate your answer, together with an English translation of the relevant parts thereof.

Questions to the Party concerned:

3. Please provide the text in Polish of the following provisions, together with an English translation thereof:
 - (a) Article 122 (1), point 1, of the Act of 18 July 2001 on Water Law referred to at page 3 of the communication as then in force, and the corresponding provision as currently in force;
 - (b) Articles 401 (1) and 403 of the Water Law of 20 July 2017;
 - (c) Article 407, point 3, of the Water Law as currently in force;
 - (d) Articles 59, 71, 72 (1), item 6, 79, 86 (2) of the Act of 3 October 2008 on access to information on the environment and environmental protection, public participation in environmental protection and on environmental impact assessments;
 - (e) Section 2 (1), items 35, 37, 38 and 39 of the Regulation of the Council of Ministers of 9 November 2010, as in force as at June 2017 when the communication was submitted;
 - (f) With respect to subparagraph (e) above, the corresponding items of the Regulation of the Council of 10 September 2019 on types of projects likely to have significant effects on the environment, as currently in force.
 - (g) Article 127 (1) referred to at page 4 of your letter of 31 October 2018 (it is not clear from the letter whether the Party concerned is referring here to article 127 (1) of the Code of Administrative Procedure or the Water Law).

4. Do you agree with the communicant's assertion (pages 5 and 6 of its letter dated 1 August 2018) that public participation is limited to the first decision in the tiered decision-making process, namely the EIA decision, and there is not a separate public participation procedure on the water permit itself? If the communicant's assertion is correct, please explain how, in your view, this meets the requirements of article 6 (1) (a) of the Convention.
5. Do you agree with the communicant's assertion (page 8 of its update of 15 February 2022) that, while following the entry into force of the Act amending the EIA Law on 13 May 2021 it is now possible for environmental NGOs to challenge water permits that have been preceded by an EIA, this is limited to the permit's compliance with the EIA decision only, excluding all other violations.
6. At page 4 of its letter of 31 October 2018, the Party concerned submits that the legislator did not provide the possibility of lodging a complaint against the EIA screening decision itself, as this may effectively be appealed against as part of an appeal against a decision on environmental conditions, pursuant to article 127 (1) in conjunction with article 142 of the Code of Administrative Procedure.

Please provide the text of one or more recent judgments in which an environmental NGO was able to challenge a *negative* EIA screening decision by challenging the decision on environmental conditions. Please provide the text of each judgment in Polish together with an English translation of its relevant parts.

7. At pages 5 and 6 of the communication and page 6 of its letter dated 1 August 2018, the communicant claims that, in contravention of article 9 (3) of the Convention, it is not possible for members of the public to challenge water permits which contravene national law relating to the environment. Please provide the text of one or more recent court decisions in which an environmental NGO or other member of the public was granted access to justice to challenge a water permit not subject to an EIA procedure that was alleged to have contravened national law related to the environment. Please provide each court decision in Polish, together with an English translation of its relevant parts.
8. Please clarify if the "Ombudsman" that you mention on page 1 of your response to the communication is the same institution as the "Polish Commissioner of Human Rights" mentioned on page 5 of the communication.

Questions to the communicant:

9. At page 3 of your letter of 1 August 2018 and at page 3 of your update of 15 February 2022, you claim that paragraph 2 (1), items 35, 37, 38 and 39, of the Regulation of the Council of Ministers of 9 November 2010 on types of projects likely to have significant effects on the environment (now superseded by the Regulation of the Council of 10 September 2019 on types of projects likely to have significant effects on the environment) is narrower than paragraphs 10, 11 and 13 of Annex I of the Aarhus Convention.

In order to substantiate your claim, please provide examples of specific water permits that you claim fell within the scope of paragraphs 10, 11 and 13 of Annex I of the Convention but for which public participation was not carried out.

10. At page 5 of your letter of 1 August 2018, you claim that a water permit determines “relevant environmental conditions of the proposed activity” and covers aspects not regulated in the EIA decision. As an example, you state that article 404 of the Water Law requires a Water Management Instruction to be annexed to a water permit in order to obtain a permit for damming inland surface waters by a high-rise structure with a damming height above 1 m. You claim that the Water Management Instruction appears only at the stage of the water permit itself, and is thus not subject to public participation.

In order to substantiate your claim, please provide an example of a Water Management Instruction that contained aspects which were addressed during the EIA procedure and on which the public did not have the possibility to comment. Please provide the text of the Water Management Instruction in Polish, together with an English translation of those parts that you claim were not addressed during the EIA procedure. Please also provide relevant evidence to demonstrate that those aspects were indeed not addressed in the EIA procedure.

11. In your update of 15 February 2022 you claim that, while following the entry into force of the Act amending the EIA Law on 13 May 2021 it is now possible for environmental NGOs to challenge water permits that have been preceded by an EIA, this is still limited to the permit’s compliance with the EIA decision, excluding all other violations. Please provide some examples of the substantive or procedural legality of a permit which you allege it would still not be possible to challenge under the amended EIA law.
12. Please provide the text in Polish, together with English translations of the relevant parts thereof, of recent court judgments to substantiate your claim at page 5 of your letter of 1 August 2018 that under Polish law access to justice is limited to the EIA decision, (i.e. the first decision in a tiered decision-making process), and does not extend to the water permit itself.
13. Please provide the text in Polish of the following judgments, together with an English translation of the relevant parts:
- (a) Judgment no. IV Sa/Wa 1248/19 dated 20 March 2020 of the Warsaw Regional Administrative Court;
 - (b) Judgment no. II SA/Bk 751/19 dated 23 January 2020 of the Regional Administrative Court of Białystok;
 - (c) Judgment no. III OSK 3140/21 dated 20 April 2021 of the Supreme Administrative Court;
 - (d) Judgment no. II SA/Bk 416/21 dated 21 September 2021 of the Regional Administrative Court of Białystok.
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