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Ms Fiona Marshall
Secretary to the Aarhus Convention Compliance
Committee
UN Economic Commission for Europe
Environment Division
Palais des Nations
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By email: aarhus.compliance@un.org

Dear Ms Marshall

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

The Communicant would like to provide the Committee with a reply to the questions on communication ACCC/C/2017/146, dated 3 May 2022. The Communicant hopes that this additional information will facilitate the Committee's preparation for a hearing on this case.

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?

The Communicant confirms that under Polish law, the final judgment issued by the Supreme Administrative Court (hereinafter: SAC) is binding on lower courts in future cases concerning Article 402 Water Law.

Pursuant to Article 170 of the Act of 30 August 2002 - Law on proceedings before administrative courts¹ (further: LPAC): *'A final judgment shall be binding not only on the parties and the court*

¹ Consolidated text OJ of 2019, item 2325, as amended, hereinafter referred to as the "Act of 30 August 2002".

which issued it, but also on other courts and other state authorities and, in cases provided for by law, on another person.'

Nevertheless, the Communicant considers that a change in legislation is still needed, in particular since Article 402 Water Law states the exact opposite of what the SAC held, creating a clear contradiction. As also mentioned in the Communicant's update of 15 February 2022, the Communicant submits that such a legislative change is also necessary to ensure compliance with Article 3(1) Aarhus Convention, which requires that the Convention is implemented by way of a "clear, transparent and consistent framework". This is evidently not the case where the law states the opposite of what the Convention requires.

The Communicant also notes that under Polish law, the binding effect of SAC judgments is, in principle, limited to the decision contained in the operative part of the judgment; it does not extend to the content of the written grounds. The SAC judgement no. III OSK 3140/21 has been applied so far consistently by the regional administrative courts. However, there is no guarantee that it will be applied consistently to give access to justice to NGOs in all relevant factual constellations.

Moreover, the Communicant has no information whether in the administrative proceedings to issue water permits NGOs are now in practice admitted to be parties to the proceedings. The court judgements provided in question 13 below only concern the standing of the NGO, i.e. challenges in which the NGOs have been denied access to the proceedings. In this sense, an issue may arise that is similar to that described by the Committee in its report to the 7th Meeting of the Parties on the compliance by Spain (see paras 29-42).

All the reasons mentioned above, in the Communicant's view confirms the need to amend Article 402 Water Law, despite the SAC judgement.

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?

The legislative plans are available on the website of the Government Legislative Center (Rządowe Centrum Legislacji).² There is no project related to Article 402 Water Law.

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.

² <https://legislacja.rcl.gov.pl/>

The Communicant is not aware of any environmental NGO that has been admitted as a party to the proceedings based on article 401(1) Water Law. In the view of the Communicant, this submission of the Party concerned is therefore rather hypothetical.

To nonetheless attempt to reply to the question in the most complete manner possible, the Communicant includes below a discussion of relevant academic sources and jurisprudence that give an indication as to which entities are to be considered “affected by the intended use of water”.

According to the academic literature, ‘the most unclear issue in practice is to determine the party to the proceedings in the case for issuing a water permit’.³ Although the author in question refers to the no longer binding regulation of Article 127 of the Act of 18 July 2001 Water Law, the quoted statement seems to be the most up to date in relation to the current regulation.

This problem arises mainly in the case of determining the group of entities affected by the intended use of water or those within the range of influence of the water facilities to be constructed. The problem of determining the parties arises from the fact that the legislator uses vague terms and does not specify them in a statutory manner.

The jurisprudence of the administrative courts indicates that: ‘the range of impact of the water facilities planned to be implemented should be determined taking into account the function, form, design and other characteristics of the designed facility as well as the manner of the management of the land located in the vicinity of the designed project, taking into account, inter alia, the content of orders and bans contained in applicable regulations’⁴.

In line with Article 407 Water Law, the information contained in the water report (*operat wodnoprawny*), which is attached to the application for a water permit by the applicant, should serve the authority conducting the proceedings as an aid in determining the other parties to the proceedings. This position is reflected in the jurisprudence of the administrative courts, according to which: ‘*the scope of influence presented in the water supply report obliges the administrative body to specify the parties to the proceedings for the issuance of a water permit, which should be done already at the initiation of the proceedings*’.⁵ It should be kept in mind, however, that the water supply report attached to the application should be objectively assessed by the authority in terms of, inter alia, accuracy and reliability. Failure to conduct an objective assessment of the water permit and the authority's assumption of the full veracity of the information included in the applicant's application may result in incorrect determination of the other parties to the proceedings.

Based on the academic literature and the jurisprudence of the Polish administrative courts, it can be assumed that the authority would apply the principles of Article 28 of the Code of Administrative Procedure and, in effect, consider as parties only those entities (not including the applicant) in relation to which the impact of the intended water use or being within the range of influence of the planned water facilities will cause the violation of a legal interest. It seems therefore that the ‘impact resulting from the intended use of water’ and ‘being in the range of influence of the planned water devices intended water use or water facilities to be constructed’ would in practice translate to having a legal interest.

³ K. Szuma, [in:] *The Water Law. Commentary*, red. Z. Bukowski, B. Rakoczy, Warsaw 2013.

⁴ Judgment of the Kraków Regional Administrative Court of 25 August 2020, case no. II SA/Kr 544/20.

⁵ WSA w Warszawie z dnia 30 grudnia 2016 roku, IV SA/Wa 1944/16

As noted by the Warsaw Regional Administrative Court: *'the essence of a legal interest should be understood as its connection with a particular norm of substantive law, on the basis of which in administrative proceedings a specific subject, in a specific factual state, may demand concretisation of its rights or obligations or demand control of a specific act in order to protect its sphere of rights and obligations against violations committed by this act and to bring this act into conformity with the law'*.⁶

Then, referring to the facts, the court stated that without having rights to the property and facilities and rights to use the waters that will be water facilities or will be affected by the intended use of the waters, no legal interest can be shown.⁷ Accordingly, it can be said that demonstrating a legal interest boils down to determining whether the action of the authority - and in the present case the issuance of a water permit - may in some way affect or infringe the legal sphere of a particular subject.

Applying this test would in practice exclude environmental NGOs from becoming a party to the proceedings, given that they do so in order to protect the environment, rather than a legal interest connected to a substantive law right. The problems related to the notion of the 'violation of a legal interest' forms a part of the claims the Communicant submitted in its communication to the Committee concerning compliance by Poland regarding access to justice in connection with air quality plans (ACCC/C/2016/151).

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.

As previously mentioned by the Communicant, the projects likely to have significant effects on the environment are listed in the Regulation of the Council of Ministers of 9 November 2010 on types of projects likely to have significant effects on the environment (attached in Polish in annex 1 and an English translation in annex 2).

Under Polish law, the catalogue of '*projects likely to have a significant on the environment*' under the EIA law is limited to physical interventions in the landscape, while the catalogue of activities requiring a water permit includes the actual water use. Among the '*projects likely to have a significant impact on the environment*' related to water management are mainly: buildings, structures, installations and equipment. Among the activities requiring a water permit are not only water facilities (including the above-mentioned structures, etc.), but also activities related to the operation of the above-mentioned facilities.

⁶ Decision of 24 June 2020, case no. IV SA/Wa 405/20.

⁷ Ibidem.

Accordingly, in the water sector EIAs will be prepared:

- 1) for construction of water facilities,
- 2) to regulate waters,
- 3) for excavation of stone, gravel, sand and other materials from water.

Once the facilities concerned have been constructed and the EIA conducted, the public authorities issue the related water permits. Water permits are issued for water services and special water utilization, as well as long-term lowering of the groundwater table and the reclamation of surface waters or underground waters.

This can be illustrated at hand of some examples:

First, the construction of a water reservoir may require EIA but subsequently permits will be issued for water abstraction and the introduction (into the environment) of sewage or the disposal (including: discharge) of water from water reservoirs.

Second, an EIA may be prepared for 'devices or complexes of devices enabling water construction' but water abstraction (including change of the volume and conditions of abstraction based on existing facilities) will require a water permit.

Third, the construction of water dams⁸ and other facilities intended for retention and permanent storage of water will usually require EIA but the water management carried out on those dams and other facilities, including the periodical reduction or maximization of discharges in case of drought or flood, do only require a water permit.

As the Communicant had stated in its letter of 1 August 2018, due to this constellation it would be possible that an EIA is not being prepared because changes to the actual water volume only require a water permit. However, the Communicant has no real-life example of such a situation. A situation that arises, however, is that the projects that are extended in operation by way of a water permit, without EIA and therefore no public participation and access to justice.

According to the Polish Water Law, a water permit is granted for a specified period of time, not exceeding 30 years (Article 400 (1)). When this period comes to an end, an investor needs to apply to the competent authority for the extension of the validity of a water permit at least 90 days before the expiry of the initial period (Article 414 (2)). The authority then prolongs a water permit for a period of up to 20 years, without conducting an EIA or a Screening prior to this decision (Article 414 (7)). The Water Law (Article 414) does not exclude EIA directly, it just does not include nor refer to it in any way in the process of extending the water permit. Thus, a screening is not conducted because an extension does not qualify as a project according to the EIA law. Consequently, there will be neither public participation, nor access to justice.

The Communicant provides the following examples of water permits which were extended in time and fall under paragraph 13 of Annex I of the Aarhus Convention and for which the EIA decisions

⁸ Included in the resolution of Regulation of the Council of 10 September 2019 on types of projects likely to have significant effects on the environment – see annex 1 and annex 2.

have not been issued. In Communicant's view these water permits should have been preceded by the EIA as they are issued for damming up and retaining the waters of several rivers in Poland in water reservoirs. The capacity of the reservoirs in each of these permits exceeds 10 million cubic metres, i.e. it meets the requirements laid out in point 13 of the Annex I of the Aarhus Convention.

1. The water permit of 29 March 2013 related to damming of San river by the concrete dam in Solina in annex 3;
2. The water permit of 16 May 2016 related to damming and retention of water of Dunajec river by the concrete dam in Rożnów in annex 4;
3. The water permit of 4 August 2017 related to damming and retention of water of Raba river by the dam in the village of Dobczyce in annex 5;
4. The water permit of 10 August 2018 related to damming and retention of water of Dunajec river complex of water reservoirs Czorsztyn-Niedzica and Sromowce Wyżne in annex 6.

The water permits are provided in Polish. The translation will be provided without any further delay.

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.

Under the Water Law in force, the water management instruction is covered by Article 407 (3). The Communicant will provide a detailed information on the water management instruction below.

The water management instruction is approved in the water permit for the use of water.⁹ The obligation to prepare it arises in principle at the stage of applying for a water permit¹⁰ and concerns:

-"the damming up of surface waters by a damming structure with a damming height of more than 1 m and equipped with devices enabling the regulation of flow",

⁹ Article 409a of the Water Law - the relevant provisions of the Water Law together with an English translation are provided in annex 7.

¹⁰ Article 407(3) of the Water Law – see annex 7.

-"interdependent use of water by several establishments"¹¹.

The obligation to prepare the water management instruction may also arise if the competent authority deems it necessary. This may occur if, in connection with the implementation of the water permit, the *'interests of third parties'* have been violated.¹² This arises in situations in which water abstraction by one plant prevents water abstraction by another plant in the quantity prescribed under the conditions of the water permit. In such a case, the water permit can be amended with respect to the operation of the facilities that was the cause of the violation.

The water management instruction is approved in the water permit for the use of water¹³, so it is valid as long as the water permit.

As to the content, the water management instruction should describe how the water is to be managed and how the needs of all users benefiting from the water facilities to which the water management instruction relates are to be met.¹⁴ Detailed requirements of the water management instruction are set out in the Regulation of the Minister of Maritime Economy and Inland Navigation of 21 August 2019 on the scope of water management instructions. The Communicant provides the text of the Regulation in annex 8, and an English translation in annex 9.

Further, the Communicant wish to clarify the scope of the EIA decision, the water permit and the water management instruction by providing a table with the detailed information in annex 10. In the table, the Communicant compared the EIA decision, the water permit, and the water management instruction and the following criteria have been included: nature of the decision, period of validity and mandatory elements of each of these decisions. Of particular relevance is the last row concerning the mandatory elements, which demonstrates the elements that are only considered subsequent to the EIA as part of the water permit and, where relevant, water management instructions proceedings.

In order to substantiate its claim, the Communicant provides as an example the EIA decision for the project consisting in reconstruction and renovation of the facilities of the barrage in Włocławek (in annex 11 with a manual English translation in annex 12) and the water management instruction for barrage and reservoir Włocławek (in annex 13 and an English translation in annex 14).

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.

The Communicant recalls that currently Article 402 (2) Water Law gives NGOs the right to lodge an appeal against the water permit and the right to lodge a complaint to the administrative court

¹¹ Establishment is "an entity using water for water services, operating water facilities or carrying out other activities requiring a water permit" (Article 16(73) of the Water Law). There is no provision that clarifies the meaning of 'interdependent use of water'.

¹² Article 410 (1) of the Water Law - see annex 7.

¹³ Article 409a of the Water Law - see annex 7.

¹⁴ Article 407(3) of the Water Law - see annex 7.

but this challenge is limited to the water permit's compliance with the EIA decision. As this is a recent amendment, there is no case law clarifying the scope of the review under new Article 402 (2) of the Water Law.

The Communicant notes that the very different degree of detail in the requirements for the content of water permits and the EIA decisions. As regards the EIA decision, the regulations very generally set out the requirements as to the level of detail of their findings:

1. where no EIA was carried out prior to the issuance of the decision (negative screening) - the only obligatory element is a statement that there is no need to carry out an EIA,
2. where an EIA was carried out prior to the issuance of the decision, the body shall determine, inter alia '*significant conditions for the use of the environment (...)*', '*the environmental protection requirements to be integrated into in the documentation*', required for subsequent decisions.

Consequently, the requirements formulated in this way give a very high degree of freedom to the administrative bodies in determining the level of detail of the above-mentioned conditions and requirements. Whereas with respect to water permits, the requirements for decisions are much more specific and focus on the operation/use of the facility:

1. parameterised quantities of water abstracted, and water and wastewater discharged,
2. the method of water management, including the characteristic damming up levels together with deadlines and conditions for their maintenance and flows (including the quantity of inviolable flow
3. detailed technical conditions for monitoring the permit conditions.

Even more specific arrangements concern the water management instructions as provided in the Communicant's submissions under question 10 above.

The analysis of the content of the above-mentioned decisions shows that many issues of great importance for the environment (concerning the use of large hydrotechnical facilities) remain outside the scope of the EIA decision. The water permit specifies, inter alia, maximum second drop, average daily discharge, annual authorised discharge, industrial wastewater, the percentage of industrial wastewater, determines the wastewater treatment process, obliges to perform water quality analysis once a year, as well as to measurements and quality of wastewater, and specifies the details of these measurements. Such details, which in practice affect the fulfilment of environmental requirements, are not specified in the environmental decision.

Thus, all above-mentioned requirements included in the water permit did not form part of the public participation procedure and could not be challenged by the NGOs as they were not a part of the EIA decision. These are issues that can give rises to claims challenging the substantive legality of the water permit under the Water Law.

Given that Art. 402(2) Water Law only allows for challenges concerning compliance with the EIA, any claims focused on the procedure for adopting the water permit are also excluded.

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.

The claim included on page 5 of the Communicant's letter of 1 August 2018 relates to the violation of Article 6(1) and 9(2) of the Convention as the public participation and access to justice is limited to the EIA decision, which is the first decision in tiered process and does not cover the issuance of a water permit. This claim has been to certain extent impacted by the Act amending the EIA Law on 13 May 2021. As provided above, following the entry into force of this amendment the environmental NGOs can challenge water permits only if there was an EIA decision and to the extent of its compliance with the EIA decision. As this is a recent amendment, there is to the Communicant's knowledge not yet any case law clarifying the scope of the review under the new Article 402 (2) of the Water Law.

The proceedings related to issuance of the EIA decision are covered by the EIA law, while the proceedings related to the water permit are conducted pursuant to the Water Law.

Where an EIA is conducted, Article 44 of the Act on Providing Information on the Environment and Environmental Protection, Public Participation in Environmental Protection and on Environmental Impact Assessment of 3 October 2008 ("the EIA law", see Annex 1 in the update of 15 February 2022) gives environmental NGOs 3 main rights:

1. to participate in the proceedings with the rights of a party, when relying on their statutory objectives and when they conduct statutory activities in the field of environmental protection or nature protection for a minimum of 12 months prior to the date of initiation of such proceedings;
2. to appeal against a decision if it is justified by the statutory objectives of the organization, also in the event that the organization did not participate in a specific proceeding requiring public participation conducted by the authority of first instance;
3. to appeal to an administrative court against a decision if it is justified by the statutory objectives of such organization, also where it did not participate in the specific proceeding requiring public participation.

All of these rights are limited to the EIA decision.

In its update from 15 February 2022, on pages 4-7, the Communicant also described the legal situation of NGOs when the procedure does not require public participation, such as in the case of the EIA negative screening decision. In these cases, the general standing provision under Article 31 of the Code of Administrative Procedure ('the CAP') apply. Again, these proceedings only concern the negative screening decision and not the subsequent water permit.

The Communicant wants to highlight that therefore, despite the amendment to Article 402(2) Water Law, NGOs will continue to be excluded from water permit proceedings which were not preceded by the EIA decision and from those for which the EIA decision was issued without public participation. The public will continue to be deprived of the possibility, for example, to apply for

the annulment of a water permit issued without obtaining the required environmental decision or without obtaining the required agreement on the impact on a Natura 2000 site.

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.

The texts in Polish and the translations of relevant parts of the above judgments are included in the following annexes, respectively:

- (a) Judgment no. IV Sa/Wa 1248/19 – annex 15,
- (b) Translation of the judgment no. IV Sa/Wa 1248/19 - annex 16,
- (c) Judgment no. II SA/Bk 751/19 – annex 17,
- (d) Translation of the judgment no. II SA/Bk 751/19 - – annex 18,
- (e) Judgment no. III OSK 3140/21 – annex 19,
- (f) Translation of the judgment no. III OSK 3140/21 – annex 20,
- (g) Judgment no. II SA/Bk 416/21 – annex 21,
- (h) Translation of the judgment no. II SA/Bk 416/21 – annex 22.

Yours sincerely,

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