

Dear honorable Chair and Vice-Chairs,
Dear honorable members of the Compliance Committee,
Dear members of the Secretariat,

My name is Małgorzata Kwiędacz-Palosz, I am a Senior Lawyer at the Environmental Democracy team in ClientEarth and I will deliver the opening and final statements on behalf of the Communicant. Three other lawyers from ClientEarth, Agata Szafraniuk who is leading our Wildlife work in in Central Eastern Europe, Maja Starosta also from our Wildlife team and Sebastian Bechtel, also from our Environmental Democracy team, are here to support and available to answer, to the best of their abilities, any questions that you may have.

We would like to thank the Committee and the Secretariat for the opportunity to participate in this hearing.

Today, we will focus on the Polish system of issuance of water permits and its non-compliance with the Aarhus Convention's requirements. In order to explain this system, we have prepared an illustration that we have provided in the annex to this opening statement.

If I can draw your attention to this illustration now, you will see in the upper half an illustration of the permitting procedure for a new project, such as a dam, for which there is a positive EIA screening decision. The lower half concerns, on the other hand, the situation where there is a negative EIA screening decision.

Starting off with the upper half, you see here that the EIA decision is issued under the procedure conducted under the EIA law¹ which gives ENGOs three specific rights in its Article 44:

1. to participate in the proceedings with the rights of a party,²;
2. to file an administrative appeal to a higher public authority 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, under the same conditions.

As mentioned in the illustration, all of these public participation and access to justice rights are limited to the EIA decision.

¹ Act on Providing Information on the Environment and Environmental Protection, Public Participation in Environmental Protection and on Environmental Impact Assessment of 3 October 2008

² 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

Water permits are adopted under a separate, subsequent administrative procedure. During this administrative procedure, only “parties to the proceedings” are admitted to participation. There is no public participation that would be open to ENGOs and the public concerned.

As regards access to justice, since 13 May 2021 it is now possible for environmental NGOs to challenge water permits that have been preceded by an EIA based on Article 402(2) Water Law. However, the scope of such a challenge is explicitly limited to the permit’s compliance with the EIA decision, excluding all other violations.

The lower half of the illustration concerns the situation where the EIA screening is negative, meaning that no EIA is conducted.

As indicated in the illustration, the EIA screening procedure does not require public participation, so NGOs cannot rely on the above-mentioned Article 44 EIA law to challenge EIA negative screening decisions. Accordingly, the general standing provision under Article 31 of the Code of Administrative Procedure applies. However, standing under this provision requires the prior participation of the organisation in the first instance administrative procedure. This is well-established in the case-law of the Polish administrative courts. ENGOs are not automatically admitted to participate in these administrative proceedings but need to apply to be admitted.

The water permit proceedings are conducted pursuant to the same rules under the Water Law, as described above. Accordingly, there is no public participation. The difference is that since there is no EIA Decision, there is no legal avenue to challenge the water permit at all. Article 402 (1) Water Law explicitly excludes the applicability of above-mentioned Article 31 of the Code of Administrative Procedure.

Having provided this short introduction, let me recall our four claims in case C146.

First, there is non-compliance of the Polish legal system with requirements stemming from Article 6 (1) together with Article 9 (2) of the Convention as there are water permits which are not covered by the EIA law although they fall under Annex I of the Aarhus Convention.

Second, by not allowing to challenge EIA negative screening decisions, the Polish legal system is not compliant with Article 6 (1) b and Article 9 (2) of the Convention.

Third, as public participation and access to justice is limited to the EIA decision which is the first decision in the tiered process, the party concerned does not correctly implemented Article 6 (1) and 9(2) of the Convention.

Our last, partially alternative, claim states that there is no access to justice for ENGOs to challenge water permits which contravene national law related to the environment in line with Article 9 (3) of the Convention.

As to the first claim, the Communicant recalls that under Polish law the EIA decision is issued for projects likely to have significant effects on the environment which are listed in the Regulation of

the Council of Ministers of 10 September 2019 on types of projects likely to have significant effects on the environment³.

Among the 'projects likely to have a significant impact on the environment' related to water management are mainly: buildings, structures, installations and equipment. 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. The water law concerns these constructed structures, including the way they are built and maintained and the activity conducted on that build structure.

The problem that arises from that distinction is that changes to the activity will not necessarily require EIA, even if Article 6 Aarhus Convention would require public participation.

Particular pertinent cases are those in which the life-time of a water activity is extended. To illustrate this issue, the Communicant provided four water permits⁴ for which an EIA decision had not been issued even if Article 6(1) in conjunction with Article 6(10) Aarhus Convention would have required public participation. All these permits were extended on the basis of Article 414 (7) Water Law which allows to extend certain water permits for a period of up to 20 years without EIA decision or screening.

In the Communicant's view these water permits should have been preceded by public participation as they were 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.

The Committee has adopted two findings on Article 6 and life-time extensions, in regards to nuclear power plant (case C104) and mining site (case C107). Applying the reasoning of these cases to the present permits, an extension of 20 years of the operation of the dams in question is undoubtedly not "minimal" in time, nor would it "obviously [...] have insignificant or no effects on the environment."⁵

The Communicant therefore submits that Article 414(7) Water Law fails to comply with Article 6(1), in conjunction with Article 6(10), Aarhus Convention.

Moreover, since without a prior EIA decision there is no possibility to challenge such permits, there is also a violation of Article 9(2) of the Convention.

Our second claim relates to challenging EIA negative screening decisions. As the Committee has previously held, to the extent that the EIA screening process and the relevant criteria serve also as the determination required under article 6 (1) (b) Aarhus Convention, members of the public

³ Text in Polish and English were submitted in the Communicant's replay of 1 June 2022, annexes 1 and 2.

⁴ In the Communicant's replay of page 6.

⁵ Committee's findings on communication ACCC/C/2014/104 (Netherlands), para. 71 and ACCC/C/2013/107 (Ireland), para. 83.

concerned shall have access to a review procedure to challenge the legality of the outcome of the EIA screening process.⁶

As mentioned above, Article 31 of the Code of Administrative Procedure applies to challenges of EIA negative screening decisions. As a precondition to use this provision, the applicant needs to have been admitted to and participated in the administrative procedure preceding the decision. ENGOs are not automatically admitted to participate in the EIA screening proceedings. If an ENGO is not admitted by the public authority, it can challenge this refusal before the administrative courts. However, the EIA proceedings are not suspended during this court procedure. Accordingly, the EIA procedure will often have concluded by the time a judgement is rendered, meaning that there is no effective remedy.

Under our third claim, we allege non-compliance with the Convention's requirement as public participation and access to justice are limited to the EIA decision, which is the first decision in a tiered process.

The EIA decision sets the general framework but the water permit still determines many important aspects of the actual activity that will be performed. This includes for instance, parameterised quantities of water abstracted, and water and wastewater discharged, 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) and detailed technical conditions for monitoring the permit conditions.

As the Committee has held in its findings on communication C50 (Czech Republic): "*Members of the public must also be able to examine and to comment on elements determining the final building decision throughout the land planning and building processes. Moreover, public participation under the Convention is not limited to the environmental aspects of a proposed activity subject to article 6, but extends to all aspects of those activities.*"⁷

We submit that the same issue applies in relation to water permits under the Polish law: the public concerned is not able to examine and comment on all elements determining the final decisions in the permitting process, in this case the water permit. Instead, public participation is limited to the EIA procedure.

The administrative proceedings to prepare the water permit are limited to parties to the proceedings which in practice excludes environmental NGOs and also large parts of the public concerned more generally. Again, this is fully comparable with the Czech legal system at the time. Following the Committee's findings, the Czech EIA Act was amended to provide for a right to submit comments to "subsequent proceedings" following the EIA Decision.⁸

⁶ Committee findings on communication ACCC/C/2010/50 (Czech Republic), para. 82.

⁷ Ibid, para. 70.

⁸ Report of the Committee to the sixth session of the Meeting of the Parties on compliance by Czechia with its obligations under the Convention, ECE/MP.PP/2017/38, para. 30.

This failure to comply with Art. 6 directly links to a failure to comply with Art. 9(2) of the Convention.

The newly added provision, Article 402 (2) Water Law, gives a possibility to challenge water permits but only on the ground that the water permit is inconsistent with the EIA decision. Such limited scope of review does not comply with Article 9(2) of the Aarhus Convention, which specifies that members of the public concerned have the right to “challenge the substantive or procedural legality” of decisions, acts or omissions.

The Committee has clarified in its findings on communication C31 (Germany) that the scope of review under Article 9(2) is not limited to contraventions of “environmental law”. Rather, it should also be possible to challenge final decisions, such as the water permit, based on provisions that are not derived from environmental law, such as concerning economic aspects of investments, trade, finance, public procurement rules, etc.⁹

This is not possible under the Polish system. NGOs cannot even allege a failure of the water permit to comply with the requirements of the Polish Water Law itself, let alone with other laws.

Our last claim concerns the lack of possibility to challenge water permits if they contravene national law related to environment in line with Article 9 (3). As mentioned, Article 402 (1) Water Law explicitly excludes the applicability of Article 31 Code of Administrative Procedure, meaning the general provision on access to justice. As long as there is no prior EIA, there is therefore no access to justice at all.

The Communicant is aware and notified the Committee of the recent case-law of Polish administrative courts disapplying Article 402 (1) Water Law and giving legal standing to challenge water permits to ENGOs based on EU law, including the Supreme Administrative Court’s judgment no. III OSK 3140/21.¹⁰

Nevertheless, as the Party concerned stated itself: *‘One should note that such judgment of an administrative court is binding only in this specific case and have no binding effect in any other cases. The judgments rendered by the SAC are neither a source of generally applicable law nor amend the existing legal status.’*¹¹

Therefore, these cases do not ensure compliance with Article 9(3) Aarhus Convention. This is also confirmed by Article 3(1) Aarhus Convention, which requires that the Convention is implemented by way of a “clear, transparent and consistent framework”.

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 by the Communicant only concern the standing of the NGO, i.e. challenges in which the NGOs have been denied access to the proceedings.¹²

⁹ ACCC/C/2008/31 (Germany), ECE/MP.PP/C.1/2014/8, para. 78.

¹⁰ Update from 15 February 2022.

¹¹ Replay from 6 June 2022.

¹² Update from February 2022

In conclusion, the Communicant submits that Polish system of water permitting is non-compliant with the Aarhus Convention as:

1. There are water permits which are issued without prior public participation although they may have significant effects on the environment, contravening Article 6(1)(a), in conjunction with Article 6(10), and Article 9(2);
2. EIA negative screening decisions are issued without public participation under Article 6(1)(b) and cannot not be challenged as required by Article 9(2);
3. Public participation does not extend to water permits subsequent to an EIA Decision and access to justice is limited to compliance with the EIA Decision, contravening Article 6 and 9(2);
4. There is no access to justice to challenge water permits not preceded by EIA that contravene national laws related to the environment as required by Article 9(3).