



# Minister of Climate and Environment

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Ms. Fiona Marshall  
Secretary to the Aarhus Convention Compliance Committee  
UN Economic Commission for Europe  
Environment Division  
Room 429-2 Palais des Nations  
CH-1211 Geneva 10  
Switzerland

*Dear Ms. Marshall,*

following the position presented in the hearing before the Aarhus Convention Compliance Committee (hereinafter the "Committee") in the case ACCC/C/2017/146 and the subsequent e-mail communication, the Minister of Climate and Environment wishes to respond to the assertions of the Communicant expressed in the course of the hearing on 17 June 2022 and provide further explanations in the case.

## **Admissibility of allegations brought in addition to the communication**

It should be noted that in its appearance before the Aarhus Convention Compliance Committee, the Communicant significantly extended the breadth of allegations brought in the communication of 7 June 2017.

In its communication, the Communicant alleged that the Republic of Poland fails to provide the possibility of appealing against the water permit issued on the basis of the decision on environmental conditions (item 14, 18 and 21 of the communication of 7 June 2017). However, as demonstrated by the Polish authorities, in effect of amendments introduced by the Act of 30 March 2021 amending the Act on the provision of information on the environment and its protection, public participation in environmental protection and environmental impact assessment and certain other acts (Journal of Laws item 784) the non-governmental organisations have gained access to justice covering among others water permits.

Notwithstanding the above, in its assertion of 17 June 2022, the Communicant submitted further allegations only tenuously related to the previous arguments stating that the rights obtained by the non-governmental organisations are – in its opinion – insufficient. In its appearance, the Communicant pointed also out at numerous detailed aspects of administrative proceedings in such cases, to which the Polish authorities, as not informed in advance thereon, were unable to duly refer.

Such allegations should be deemed as a significant extension of the communication of 7 June 2017 which is not even mentioning the scope, in which the water permit should be appealable. The Communicant only pointed to the fact that the public is unable to appeal against water permits. In addition, the Communicant expressly indicated in its communication that its main aim is the appealability of water permits in the scope, in which they breach the Polish environmental protection law (par. 16 of the communication of 17 June 2017). In the hearing before the Aarhus Convention Compliance Committee the Communicant asserted explicitly that its aim is the ability to challenge all provisions of water permits. Such statement both extends the content of communication of 7 June 2017 and changes its nature. In effect, such extended allegations should be considered inadmissible.

Nonetheless, the Polish authorities shall refer to a part of assertions raised by the Communicant from an abundance of caution.

### **Access to justice in the Republic of Poland under the current state of law**

The basic act of law governing the rules of public participation and access to justice in the proceedings requiring public participation is the Act of 3 October 2008 on the provision of information on the environment and its protection, public participation in environmental protection and environmental impact assessment (Journal of Laws of 2022, item 1029, as amended), hereinafter referred to as the "EIA Act". Under Article 1(3) of the Act of 30 March 2021 amending the Act on provision of information on the environment and its protection, public participation in environmental protection and environmental impact assessment and certain other acts (Journal of Laws item 784), the environmental organisations gained the process rights of the entities with the rights of the parties in the administrative proceedings on issuing of so called development consents (catalogue of decisions provided for in Article 86f(5) of the EIA Act). These consents include also the water permits for water regulation, construction of water facilities and extraction of stone, gravel sand and other materials from water, issued under the Act of 20 July 2017 – Water Law (Journal of Laws of 2021, item 2233, as amended), hereinafter referred to as the "Water Law". The rights concerned are restricted to the permits preceded by a decision on environmental conditions issued in the public participation proceedings i.e. a decision for the projects likely to always have a significant impact on the environment (so called 1<sup>st</sup> group) or the projects likely to have a potential significant impact on the environment (so called 2<sup>nd</sup> group). The division into the groups referred to above stems from the Ordinance of the Council of Ministers of 10 September 2019 on projects likely to have a significant impact on the environment (Journal of Laws of 2019, items 1839 as amended).

In the course of the administrative proceedings on issuing the water permit the authority is bound by the rulings contained in the decision on administrative conditions.

Considering the fact that the rights of the environmental organisations in the proceedings on the projects having significant effects on the environment derive from the Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment, hereinafter referred to as the "Directive 2011/92/EU", the Polish legislator, while implementing this Directive, guaranteed the rights for these organisations in the national regulations: in the EIA Act and in the Water Law, respectively.

The rights granted under the Act of 30 March 2021 amending the Act on provision of information on the environment and its protection, public participation in environmental protection and environmental impact assessment and certain other acts represent a continuation of process

rights available to the environmental organisations awarded for the proceedings on issuing the decisions on environmental conditions preceding the issuance of water permits under Article 44(1) of the EIA Act. This provision states as follows: *Any environmental organisations which, referring to their statutory objectives, express their will to participate in a specific proceedings requiring public participation, participate in such proceedings with the rights of a party, provided that their statutory activity involves environmental protection or conservation of nature for at least 12 months prior to the date of initiating such proceedings. The Provisions of Article 31(4) of the Code of administrative proceedings shall not apply.*

This means that Article 44(1) of the EIA Act entitles the environmental organisations to participate in the proceeding on issuing the decision on environmental conditions and to initiate the appeal and judicial proceedings in order to ensure proper control of the environmental impact assessment procedure and issuing the decision on environmental conditions. Article 86g added to the EIA Act under the amendment grants the environmental organisations with the right to control, whether the rulings made at the tier of a decision on environmental conditions are duly transferred to the development consents. Article 86g of this Act aims to guarantee the availability of control and potential response to any breach of the obligation under Article 86(2) of the EIA Act by an authority issuing the development consent, including water permit, pursuant to which the decision on environmental conditions is binding for the authorities making the decisions, referred to in Article 72(1), which includes also the water permits.

The solutions referred to above were designed for the purposes of proper implementation of Directive 2011/92/EU and aim at ensuring consistency of the environmental impact assessment scheme.

At present, the Minister of Climate and Environment has no information on any judgments of administrative courts made on the basis of the EIA Act in the wording provided for in the Act of 30 March 2021 amending the Act on provision of information on the environment and its protection, public participation in environmental protection and environmental impact assessment and certain other acts, in which these courts would decide on the cases, in which the subject of appeal would involve non-compliance of water permits or any other decisions following the decisions on environmental conditions, on the basis of which such subsequent decisions (development consents) were issued. Thus, no exemplary case law determining the manner of interpreting the provisions of the EIA Act by the Polish administrative courts and their cognition in the scope of examining compliance of the subsequent decision with the preceding decision on environmental conditions, can be provided.

The assertions of the Communicant pointing out that the content of any subsequent decision, which would go beyond the decision on environmental conditions, would be beyond the cognition of the courts, have not been confirmed by the case law of the Polish courts and are therefore unfounded. At the same time, the Minister of Climate and Environment cannot agree with the request of the Communicant made during the hearing on 17 June this year concerning the scope of access to justice.

#### **Ad. Appendix I to the presentation of the Communicant in the hearing**

While referring to the tables constituting Appendix I to the presentation of the Communicant during the hearing in the case ACCC/C/2017/146, the following aspects should be brought to attention.

Firstly, the decision-making schemes presented in the tables are excessively simplified.

When a water permit is preceded by a decision on environmental conditions for a project included in so called 2<sup>nd</sup> group (a project likely to have a potentially significant impact on the environment), the environmental organisations may apply for participation in the environmental decision-making proceedings under Article 31(1) of the Act of 14 June 1960 – Code of administrative proceedings (Journal of Laws of 2022, item 2000), hereinafter referred to as the „CAP” and, only after the decision imposing the obligation of environmental impact assessment is made, the entitlements of these organisations under Article 44(1) of the EIA Act i.e. possibility to participate in issuing the decision on environmental conditions without applying for participation are activated. At the tier of issuing a water permit, participation of environmental organisations is possible, if this permit is preceded by a decision on environmental conditions issued in public participation proceedings and in the scope of compliance of water permit with such decision. In the case of so called 1<sup>st</sup> group projects (projects likely to always have a significant impact on the environment), public participation is guaranteed and the rights under Article 44(1) of the EIA Act apply from the initiation of the proceedings. The above fails to be presented in the scheme provided in the tables.

The Communicant’s assertion, in which it points out that the public participation and access to justice at the tier of water permits (preceded by a decision on environmental conditions) is limited to the parties to the proceedings and excludes the non-governmental organisations, finds no confirmation in the Polish legislation. The non-governmental organisations have guaranteed the same rights as the parties to the water permit proceedings, which derives from Article 402(2) of the Water Law.

#### **Ad. Appendix II to the presentation of the Communicant in the hearing**

Pursuant to Article 71(1) of the EIA Act, the decision on environmental conditions lays down the environmental conditions for implementation of a project – provided that these conditions refer to the project as a whole.

Under Article 86 of the EIA Act, the decision on environmental conditions binds the authorities issuing the decisions specifying the environmental use conditions, including among others water permits, to the extent, in which such decision needs to be considered when making such decisions. The authority issuing a water permit cannot ignore any obligations and rights laid down in the decisions on environmental conditions. The decision on environmental conditions provides binding information for the decision-making authorities at the subsequent tier of the project implementation to specify the environmental protection requirements. Binding the authority competent for issuing water permit with the decision on environmental conditions shall not mean however that this authority, in its decision, is supposed to replicate the already imposed obligations. It shall mean that this authority has to determine whether the documentation submitted for the purposes of pending proceeding considers the conditions and obligations laid down in the decision on environmental conditions.

Pursuant to 396(1)(8) of the Water Law, the water permit cannot breach the requirements of environmental protection, conservation of nature and the requirements laid down by the provisions of the Act and separate regulations. In addition, the obligations that might be imposed by the authority in the water permit are governed by Article 403(6) of the Water Law and these obligations may be imposed, if it is necessary for the purposes of precise determination of the conditions and scope of specific use of water being the subject-matter of the water permit.

It should be also pointed out that the example provided by the Communicant is rather peculiar and should not be perceived as a rule. In addition, this example is based on the decision issued

several years ago, which reflects neither the existing practice of the public administration authority, nor current state of law.

### **Compliance of the Polish regulations with Directive 2011/92/EU**

Finally, as an additional argument, it should be noted that the European Commission, in effect of dialogue with the Polish authorities concerning the obligations laid down in Article 11(1) and (3) of Directive 2011/92/EU by the Republic of Poland in the scope of public access, including of the environmental organisations, to justice, confirmed correct implementation to the Polish legislation in the area overlapping with the corresponding regulations of the Aarhus Convention. The Commission closed the proceedings concerned on 2 December 2021.

### **List of regulations not quoted in the letter:**

1. Article 1(3) of the Act of 30 March 2021 amending the Act on providing information on the environment and its protection, public participation in environmental protection and environmental impact assessments and certain other acts (Journal of Laws item 784):

*Articles 86e–86h of the following wording are inserted after Article 86d:*

*“Article 86e. 1. The authority examining the appeal from the decision on environmental conditions may, on request of a party, suspend the immediate implementation of this decision in justified cases.*

*2. Suspension or refusal to suspend the immediate implementation of the decision on environmental conditions shall be made by means of an order which is subject to appeal.*

*Article 86f. 1. To a complaint against the decision on environmental conditions the provisions of Article 61(3) of the Act of 30 August 2022 – Law on proceedings before administrative courts shall apply, provided that the effects which are difficult to reverse, referred to in these provisions, shall be understood as the effects resulting from implementation of a project likely to have a significant impact on the environment, for which such decision was issued.*

*2. The court shall examine the motion for suspension of implementation of the decision on environmental conditions immediately however in any case no later than within 30 days from the day of filing thereof.*

*3. If the order on suspending the implementation of the decision on environmental conditions is issued, the voivodeship administrative court shall examine the complaint against the decision within 3 months from the date of issuing thereof.*

4. *The Supreme Administrative Court shall examine the appeal against the order on suspending the implementation of the decision on environmental conditions within 2 months from the date of lodging the complaint.*

5. *If implementation of decision on environmental conditions is suspended, the authority issuing this order immediately notifies the authority competent for issuing the decision, referred to in Article 72(1)(1), (2), (4–6), (8–10), (14), (17), (18), (20), (21), (23) or 26, hereinafter referred to as the “development consent” of this fact.*

6. *The authority competent for issuing the development consent suspends the proceedings in total or in part within 7 days from the date of becoming aware of suspending the implementation of the decision on environmental conditions. The provisions of Article 97(2) of the Code of administrative proceedings shall apply accordingly.*

7. *The authority which issued the decision on environmental conditions, shall immediately notify the authority competent for issuing the development consent on termination of the reason justifying the suspension of the proceedings, referred to in section 6.*

*Article 86g. 1. An environmental organisation referring to its statutory objectives, provided that its statutory activity involves the environmental protection or conservation of nature for at least 12 months before the day of initiating the proceeding on the development consent, including in the case, in which such organisation did not participate in the proceedings conducted by the first instance authority, or a party to the proceeding on issuing the decision on environmental conditions shall have the right to complain against the development consent, preceded by the decision on environmental conditions issued in the proceeding requiring a public participation. In the appeal proceeding, the environmental organisation shall participate with the rights of a party.*

2. *The appeal is available within the limits, in which the authority competent for issuing the development consent is bound by the decision on environmental conditions pursuant to Article 86(2).*

3. *The appeal shall include:*

1) *an indication of the extent, to which the development consent fails to comply with the decision on environmental conditions or to consider its rulings;*

2) *a statement of reasons;*

3) *in the case of an appeal lodged by a party to the proceedings on issuing the decision on environmental conditions – information or documents confirming the property rights to a real estate within the range of impact of the project, containing at least the plot number and, if revealed, number of mortgage register.*

4. *The appeal shall be lodged within 14 days from the date of expiry of the date for making the content of the development consent available to the public pursuant to Article 72(6).*

5. *An environmental organisation or a party, referred to in section 1, is entitled to a complaint against the development consent to an administrative court, preceded by the decision on environmental conditions issued in the proceedings requiring public participation in the scope, referred to in section 2, including also when such environmental organisation or party did not participate in the proceedings on issuing the development consent.*

6. *The complaint shall include:*

1) *an indication of the extent, to which the development consent fails to comply with the decision on environmental conditions or to consider its rulings;*

2) *statement of reasons;*

3) *in the case of a complaint lodged by a party to the proceedings on issuing the decision on environmental conditions – information or documents confirming the property rights to a real estate within the range of impact of the project, containing at least the plot number and, if revealed, number of mortgage register.*

7. *The complaint shall be lodged within 30 days from the date of expiry of the date for making the content of the development consent available to the public pursuant to Article 72(6).*

8. *The court may, on request of the complaining environmental organisation or party, issue the order on suspension of implementation of the complained decision in total or in part, if there is a risk of significant damage or effects, which are difficult to reverse. The provisions of Article 61(4-6) of the Act of 30 August 2002 - Law on proceedings before administrative courts shall apply accordingly.*

9. *The provisions of this Article shall not apply to the proceedings on issuing or amending the decision, referred to in Article 72(1)(1), (10), (14) and (18), under which the repeated environmental impact assessment is performed.*

*Article 86h. 1. If the appeal or complaint against the development consent is lodged by the party to the proceedings on issuing the decision on environmental conditions, the authority examining the appeal or court may apply to the authority issuing the decision on environmental conditions to determine, whether the appellant or complainant is entitled to act as the party to the proceedings on issuing the decision on environmental conditions.*

2. *The authority issuing the decision on environmental conditions shall respond to the application referred to in section 1 within 7 days from the date of receiving thereof.*

3. *The application referred to in section 1 shall suspend the period prescribed for examination of the appeal or complaint.”.*

2. Article 31(1) of the Act of 15 June 1960 – Code of administrative proceedings (Journal of Laws of 2022, item 2000):

*A social organisation may, in the case pertaining to the other person, apply for:*

1) *initiating the proceedings,*

2) *admitting it for participation in the proceedings,*

*if justified by the statutory objectives of this organisation and social reasons.*

3. Article 402(2) – Water Law:

*To any proceedings on water permit preceded by the decision on environmental conditions the provisions of Article 86f(6), Article 86g and Article 86h 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 shall apply.*

4. Article 71(1) of the EIA Act:

*The decision on environmental conditions shall lay down the environmental conditions of implementation of the project.*

5. Article 86 of the EIA Act:

*The decision on environmental conditions shall be binding to the authorities:*

*1) issuing the decisions determining the conditions of use of the environment to the extent, to which it should be considered when making these decisions;*

*2) issuing the decisions, referred to in Article 72(1);*

*3) receiving the submissions, referred to in Article 72(1a).*

6. Article 396(1)(8) of the Water Law:

*Water permit cannot infringe the requirements of human health protection, environmental protection, conservation of nature and protection of cultural heritage entered into the register of monuments and resulting from the provisions of the Act and the separate provisions.*

7. Article 403(6) of the Water Law:

*If necessary for precise determination of the conditions and scope of use of water, maintaining water or designing, constructing or maintaining water facilities, or rights of any third parties, the water permit may additionally impose the obligation of:*

*1) measuring quality of groundwater and inland waters running upstream and downstream of the sewage discharge site, providing the frequency and methods of these measurements;*

*2) performing the works or participating in the costs of designing, constructing or maintaining water facilities proportionally to the obtained or projected benefits;*

*3) performing the works or participating in the costs of maintaining water proportionally to the increase of this costs in effect of enforcement of this water permit;*

*4) restoring the retention by the construction of applicable water facilities or implementation of the other projects, if in effect of enforcement of water permit the natural or artificial retention of inland water decreases;*

*5) taking the actions to improve fish resources or participating in the costs of stocking the inland water, if in effect of enforcement of water permit the fish population is decreased or its migration is impeded;*

*6) providing the date of commencing the use of water, construction of water facilities or taking any other actions that require issuing of water permit.*



Yours sincerely,

SIGNATORY\_NAME\_SURNAME

SIGNATORY\_POSITION

Ministry of Climate and Environment

/ – signed digitally/