

████████████████████
██████████ Warszawa,
Polska

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 regard to public participation and access to justice in relation to certain water permits (ACCC/C/2017/146)

Given the advanced stage of the proceedings, the Communicant will provide the Committee with its observations limited only to the points raised by the Party Concerned in its letter of 13 December 2022.

I. Admissibility of allegations brought in addition to the communication

Firstly, the initial Communication contains four claims and in the fourth, and alternative, claim of the Communication, the Communicant alleged that even if the water permits complained of were found, for some reason, to not fall under Article 9(2) Aarhus Convention, they would nonetheless be covered by Article 9(3) Aarhus Convention because they are national acts (potentially) contravening national law related to the environment.¹

Moreover, in paragraph 16 of the Communication, the Communicant referred to “*provisions of national environmental law*” and further on several occasions,² the Communicant stated that the Republic of Poland failed to implement relevant provisions of the Aarhus Convention properly. Therefore, the Communication has never been limited to the water permits issued on the basis of the previous EIA decision.

Explicitly, in the Communication, and subsequent documents sent by the Communicant, the non-compliance with both Article 9(2) and 9(3) Aarhus Convention has been stated. Therefore, the Communicant’s assertion of 17 June 2022 has not extended the scope of its initial Communication.

¹ The Communicant’s comments on the Party concerned’s submission on admissibility, p. 6.

² The Communication par. 15, par. 18 and par. 22.

The Party concerned most probably treated examples from the Committee's case law provided by the Communicant to support its allegations as new claims. As provided in the Communicant's update of 15 February 2022,³ the Committee has found "*the review procedures according to article 9, paragraph 2, of the Convention should not be restricted to alleged violations of national law "serving the environment", "relating to the environment" or "promoting the protection of the environment", as there is no legal basis for such limitation in the Convention*".⁴ Accordingly, it should also be possible to challenge 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. The Communicant alleges that Article 402(2) Water Law currently excludes any such claims.

Therefore, the Communicant has not extended its allegations contained in the initial Communication.

II. Access to justice in the Republic of Poland under the current state of law

The effect of the Act of 30 March 2021 amending the Act on Providing Information on the Environment and Environmental Protection, Public Participation in Environmental Protection and on Environmental Impact Assessment dated 3 October 2008 and several so-called special acts which regulate various investment proceedings ("*the EIA amendment*") in relation to each of the claims included in the Communication, was in details explained in the Communicant's update of 15 February 2022.⁵

Article 402 of the Water Law, which is of central importance to this Communication, was partially altered by this amendment. Paragraph 1 of this provision remains the same. It reads:

"1. In proceedings concerning water permits the provisions of Article 31 of the Code of Administrative Procedure shall not apply."

As explained in the Communication, Article 31 Code of Administrative Procedure provides NGOs with a right of access to justice under certain circumstances. Based on Article 402(1) of the Water Law, NGOs can still not rely on this provision to challenge water permits.

At the same time, a new paragraph 2 has been added to Article 402 of the Water Law:

2. The provisions of Article 86f (6), Article 86g and Article 86h of the Act on Providing Information on the Environment and Environmental Protection, Public Participation in Environmental Protection and on Environmental Impact Assessment ["(the EIA Law)"] shall apply to the proceedings relating to the water permit, preceded by a decision on environmental conditions (EIA decision)."

This provision only changes the procedure for those water permits that have been preceded by an EIA. The provisions of the EIA Law referred to establish two main changes to the procedure: Article 86f(6) introduces the obligation to suspend in whole or in part the enforcement of the water permit in circumstances where the EIA decision has been suspended and Article 86g gives the ecological organisation (ENGO) the right to lodge an appeal against the water permit and the right

³ P. 8.

⁴ ACCC/C/2008/31 (Germany), ECE/MP.PP/C.1/2014/8, para. 78

⁵ The Communicant's update of 15 February 2022, pp. 2-8.

to lodge a complaint to the administrative court (this challenge is limited to the permit's compliance with the EIA decision). Article 86h stipulates that in a case where an appeal against the investment permit or a complaint against the investment permit is filed by a party to the proceedings to issue the EIA decision, the body which examines the appeal or the court may request the body which issued the EIA decision to establish whether the appellant or the complainant has the status of a party to the proceedings to issue the decision on environmental conditions.

The wording of the newly added EIA law provisions (Article 86f(6), 86g and 86h) were provided in annex 1 to the Communicant's update of 15 February 2022.

As previously elaborated, under Polish law, it is the water permit and not the EIA decision which actually authorises the undertaking of the proposed activities and determines relevant environmental conditions of the activity. Therefore, the EIA decision is only the first decision in a tiered decision-making process and access to justice only concerning the EIA decision is insufficient. This claim has been impacted by the EIA amendment described above but the issue has not been fully resolved. ENGOs can now challenge water permits that have been preceded by an EIA. However, this challenge is limited to the permit's compliance with the EIA decision. The newly added provision to the Article 402(2) of the Water Law (Article 86g of the EIA law) only deals with the situation where the water permit is found to be inconsistent with the EIA decision.

Such limited scope of review does not comply with Article 9(2) 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 Aarhus Compliance Committee has for instance held on that basis that NGOs could not be limited to seeking review of only the substantive, and not procedural, legality of decisions.⁶ Equally, the scope of review cannot be limited to an inconsistency with the EIA Decision, thus excluding all other legal violations.

As the Communicant has argued at the hearing, water permits determine many important aspects of the activity that lie outside of the scope of the EIA Decision, yet they are relating to the environment and are based on national environmental legislation. The amendment therefore still does not ensure that ENGOs can challenge water permits for failing to comply with requirements of the Polish Water Law, let alone with other laws. The example previously submitted by ClientEarth to illustrate this point, related to the instruction for management of water (previously Article 404 of the Water Law),⁷ remains valid.

To reiterate the Committee's recommendations, "*the review procedures according to article 9, paragraph 2, of the Convention should not be restricted to alleged violations of national law "serving the environment", "relating to the environment" or "promoting the protection of the environment", as there is no legal basis for such limitation in the Convention*".⁸ Accordingly, it should also be possible to challenge 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.

Consequently, currently, the possibility to appeal against the water permit is limited to its compliance with the EIA decision and excludes any such claims.

⁶ ACCC/C/2010/50 (Czech Republic), para. 81.

⁷ The Communicant's comments on the Party concerned's submission on admissibility, 31 October 2018, pp. 5-6.

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

III. Ad. Annex I to the statement of the Communicant at the hearing

It was the Communicant's aim to provide the Committee at the hearing with an overview of public participation and access to justice rules regarding the water permits. This is why annex I contains a simple diagram representing all relevant provisions. The information provided in annex I is in line with Polish law and was explained in more detail in the statement delivered at the hearing.

The Party concerned in its letter of 12 December 2022 submits that "*non-governmental organisations have guaranteed the same rights as the parties to the water permit proceedings, which derives from Article 402(2) Water Law*".⁹ This is incorrect.

As provided above, a new paragraph 2 has been added to Article 402 Water Law:

2. The provisions of Article 86f (6), Article 86g and Article 86h of the Act on Providing Information on the Environment and Environmental Protection, Public Participation in Environmental Protection and on Environmental Impact Assessment [(the EIA Law)] shall apply to the proceedings relating to the water permit, preceded by a decision on environmental conditions (EIA decision)."

As highlighted above, this provision introduces (1) the obligation to suspend in whole or in part the enforcement of the water permit in circumstances where the EIA decision has been suspended (Article 86f (6)), (2) gives the ecological organisation the right to lodge an appeal against the water permit and the right to lodge a complaint to the administrative court - this challenge is however limited to the permit's compliance with the EIA decision (Article 86g) and (3) regulates a request for a determination of the appellant's or appellant's attribute as a party to the proceedings on the issuance of a decision on environmental conditions (Article 86h).

As already provided by the Communicant,¹⁰ only in proceedings requiring public participation, Article 44 of the EIA law gives environmental NGOs three main rights including a right 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. This provision of the EIA law (namely Article 44 of the EIA law) does not form part of a new paragraph 2 which has been added to Article 402 Water Law.

Therefore, Article 402(2) of the Water Law does not guarantee public participation for ENGOs. Access to justice is limited to the water permit's compliance with the EIA decision. This is explained in annex I to the Communicant's statement and in the statement itself.¹¹

IV. Ad. Annex II to the statement of the Communicant at the hearing

The Party concerned did not provide any comments related to the substance of the example provided by the Communicant. The example provided by the Communicant showed what kind of requirements are contained in the EIA decision and the water permit in order to clearly distinguish the level of detail and type of information contained therein. Furthermore, the Party concerned did

⁹ The Party concerned's letter of 12 December 2022, p. 4.

¹⁰ The Communicant's update of 15 February 2022, p. 4.

¹¹ The Communicant's opening statement for hearing, p. 2.

not provide any legal grounds which would enable an ecological organisation to challenge the requirement provided for in the water permit which is based on the very general information contained in an EIA decision.

V. Compliance of the Polish regulations with Directive 2011/92/EU

On this point, it should first be noted that the present proceedings concern Poland's compliance with the Aarhus Convention and not with the Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment ("*EIA Directive*") (or any other provisions of EU law). It is therefore unclear where the Party concerned's argument leads it.

To nonetheless reply to the Party concerned's statement, it should first be clarified that the EIA Directive does not fully implement Article 9 Aarhus Convention under EU law. There is hardly any debate on this. Specifically as regards water permits, the CJEU has clarified that, even as a matter of EU law, Article 9(3) Aarhus Convention requires more than the EIA Directive (see Cases C-664/15 *Protect* and C-535/18 *NRW*).

Second, as rightly pointed by the Party concerned, the EIA amendment was supposed to address Poland's non-compliance with the EIA directive. However, although the infringement procedure was closed by the European Commission, Polish law still does not fully implement the relevant provisions of the EIA Directive, namely Article 11 of the EIA Directive.

The points of non-compliance with the EIA Directive can be summarized as follows:

- 1) No possibility for ENGOs to obtain an effective injunction relief when challenging decisions covered by the EIA Directive, thus allowing that works start before the court proceedings are concluded (contrary to Article 11(1) and (3) of the EIA Directive) - the EIA amendment gives ENGOs the possibility to request that the immediate enforceability of the EIA decisions be suspended. However, such a suspension of the EIA decision only suspends certain subsequent proceedings regarding development consents, such as certain construction permits, while other decisions that authorize works are not covered.¹²
- 2) Limitation to court-ordered remedies in cases challenging the development consents for specific activities, which have been issued with an order of immediate enforceability – the court can only declare that the challenged decision was issued in violation of the law; it can neither annul the decision nor stop the works (contrary to Article 11(1) of the EIA Directive) - Based on the EIA amendment, certain permits (under the special acts on: roads, railway transport, transmission network, anti-flood structures, airports, regasification terminal in Świnoujście, nuclear investments, Vistula Split canal) can always be challenged; however, the court can annul the final

¹² Specifically, a developer could still obtain a:

- 1) nuclear construction permit;
- 2) radioactive waste storage construction permit;
- 3) decision on development conditions;
- 4) location decisions regarding:
 - (i) new railway lines;
 - (ii) Euro 2012;
 - (iii) regasification terminal in Świnoujście;
 - (iv) Central Transport Hub;
 - (v) strategic gas investments;
 - (vi) broadband network;
- (vii) transmission network.;

permit or declare its invalidity only when the permit does not comply with the EIA decision. This is insufficient to address non-compliance with the EIA Directive.

- 3) No (or limited) possibility for ENGO to challenge water permits, construction permits and geological and mining licences with regard to their compliance with the EIA Directive (contrary to Article 11(3) of the EIA Directive).

The European Commission considers these points of non-compliance to be resolved by the EIA amendment. However, the amendment in fact only partially addresses these points. With regard to the scope of the Communication, the last point is relevant and based on the EIA amendment, the ENGO can now challenge water permits, construction permits, and geological and mining licenses. However, this challenge is limited to the permit's compliance with the EIA decision. For one, this does not comply with the Court of Justice of the European Union's case law, which requires that applicants are able to challenge acts based on violations of the rules of national law implementing EU environmental law.¹³ For example, ecological organisations cannot challenge water permits for failing to comply with requirements of the Polish Water Law, which implements the EU Water Framework Directive. Secondly, if there is a negative EIA screening decision (which cannot be challenged by ENGOs), ENGOs have no grounds to challenge these permits.

Therefore, the fact the European Commission closed the infringement procedure related to the EIA Directive does not mean that the Polish law is in full compliance with the EU standards, let alone the Aarhus Convention.

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,

Małgorzata Kwiędacz-Palosz

Senior Lawyer, Environmental Democracy

[mkwiedacz](mailto:mkwiedacz@clientearth.org)

www.clientearth.org

Beijing Berlin Brussels London Los Angeles Luxembourg Madrid Warsaw

ClientEarth is an environmental law charity, a company limited by guarantee, registered in England and Wales, [redacted] London [redacted] a registered international non-profit organisation in Belgium, ClientEarth AISBL, [redacted] a registered company in Germany, ClientEarth gGmbH, [redacted] a registered non-profit organisation in Luxembourg, ClientEarth ASBL, [redacted] a registered foundation in Poland, Fundacja ClientEarth Poland, [redacted] a registered [redacted] organisation in the US, ClientEarth US, [redacted], a registered subsidiary in China, ClientEarth Beijing Representative Office, [redacted], [redacted]. Our goal is to use the power of the law to develop legal strategies and tools to address environmental issues.

¹³ Cases C-664/15 Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation v Bezirkshauptmannschaft Gmünd, ECLI:EU:C:2017:987 and C-535/18 IL and Others v Land Nordrhein-Westfalen, ECLI:EU:C:2020:391)