Minister of Climate and Environment
Republic of Poland

Anna Moskwa

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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

I am writing with reference to the letter dated 25 January 2023 addressed by the Communicant in case ACCC/C/2017/146 to the Secretariat to the Aarhus Convention Compliance Committee.

The Ministry of Climate and Environment would like to comment some of the statements contained in the position of the Communicant expressed in the above letter. While the Communicant repeats in part arguments already addressed by the Polish side in our previous correspondence with the Committee and at the hearing that took place in Geneva, it also raises issues that require clarification and correction.

Part II of the Communicant's Position

At first, it is necessary to address the claims contained in Part II of the of the Communicant's letter.

Please note that the Act of 20 July 2017 - Water Law (Journal of Laws of 2022, item 2625, as amended), hereinafter referred to as the 'Water Law', regulates the management of water according to the principle of sustainable development, and specifies the principles of shaping, protecting, using and managing water resources. Under Article 393, Section 4, of the Water Law, a water permit does not create any rights to properties and water facilities necessary for its implementation and does not affect the property rights and powers of third parties vested vis-à-vis such properties and facilities.

Bearing in mind that the provisions of the Water Law do not intervene in the economic aspects of investments, trade, finances, public procurement, etc., the Communicant's allegation that these aspects cannot be challenged by environmental organisations at the stage of issuing a water permit is completely misplaced, as these are not the purposes served by the institution of water permits.

The postulate expressed in the Communicant's letter that the above-mentioned aspects should refer to the Aarhus Convention is questionable. This is because they do not in themselves constitute environmental elements of the decision-making process for granting permission to carry out an investment.

(+48) 22 369 29 00
info@klimat.gov.pl
www.gov.pl/klimat

ul. Wawelska 52/54, 00-922 Warszawa
Ministry of Climate and Environment

The granted water permit specifies the conditions for the execution of the entitlement and the obligations necessary for the protection of environmental resources, therefore the regulations do not refer to the possibility of challenging the water permit regarding aspects other than environmental ones, which cannot even be included in the water permit due to the lack of a legal basis in this respect.

Similarly, the allegation concerning the inability of environmental organisations to challenge, in the water permit, 'the very general information contained in the environmental decision', without indicating the specific issues that could be challenged in the water permit, if, of course, such a permit would contain these elements, is an allegation without any legal or factual basis, nor does it result in any real failure of the Polish authorities to comply with the provisions of the Aarhus Convention.

It should be stressed that the water permit is not a decision that closes the entire decision-making procedure related to the implementation of the project. Environmental organisations can still participate in the process of issuing decisions on environmental conditions, which are then the basis for issuing water permits under the aquatic legal survey, a decision on the investment permit or a decision on the construction permit. An inconsistency between the decision on the construction permit or the investment permit and the decision on environmental conditions makes such a decision invalid so based on it, the investment cannot be commenced.

The assessment of the compliance of the construction project's design solutions with the decision on environmental conditions, the water permit and other legally required decisions is primarily the responsibility of the architectural and construction administration authority. NGOs in the investment process may challenge issued water permits, in accordance with the regulation contained in Article 402, Section 2 of the Water Law, which grants them broad and real rights. In the appeal proceedings, an environmental organisation participates as a party, which entails the broadest range of rights, prejudging the possibility of implementing a specific investment.

Regarding the allegation that Section 1 in Article 402 of the Water Law has not been amended, it should be pointed out that Section 2 in Article 402 of the Water Law, which ensures adequate access to justice, is of a special nature (lex specialis) and excludes the application of Section 1 in Article 402 of the Water Law in this regard. Thus, Section 1 in Article 402 of the Water Law is not relevant to the activities of environmental organisations in cases covered by the provisions of the Convention. It must be highlighted that the requirements to ensure access to justice under the Aarhus Convention concern matters that are covered by the EIA Act[1]. Thus, Section 2 in Article 402 of the Water Law relating to proceedings involving the EIA Act guarantees adequate implementation of the Aarhus Convention requirements at the stage of issuing the water permit.

I would like to highlight that Article 402, Section 2 of the Water Law does not introduce a limitation for an environmental organisation as to the type of allegations that can be raised when challenging the irregularity of the water permit - only to the substantive allegations. The indicated provision only sets out the legal requirements that must be met regarding ensuring access to justice when issuing the water permit. A breach of these requirements in any way may lead to a defect in the issued water permit, which may be raised by environmental organisations.

[1] Act of 3 October 2008 on sharing information on the environment and its protection, public participation in environmental protection, and on environmental impact assessments (Journal of Laws of 2022, item 1029, as amended).

Part V of the Communicant's Position

In the opinion of the Minister of Climate and Environment, it is reasonable to provide clarification to the statements made by the Communicant in Part V of its letter dated 25 January 2023. In this part, the Communicant pointed out that the proceedings concern compliance with the Aarhus Convention, and therefore, according to the Communicant, the Ministry's reference to the compliance of Polish legislation with Directive 2011/92/EU is unjustified.

Referring in the present proceedings to the compliance of Polish legislation with the provisions of Directive 2011/92/EU is justified by two reasons. Firstly, the subject of the proceedings before the Aarhus Convention Compliance Committee is to ensure compliance with the provisions on access to justice in environmental impact assessment cases in the framework of the water permit procedure. Directive 2011/92/EU is a legal measure at European Union level implementing, as it were, the provisions of the Aarhus Convention, even though its provisions are binding on the Parties to the Convention. And secondly, the proceedings in case ACCC/C/2017/146 coincided with the reasoned opinion of 7 March 2019 addressed to the Republic of Poland under Article 258 of the Treaty on the Functioning of the European Union on the failure to fulfil the obligations set out in Article 11, Sections 1 and 3 of the Directive 2011/92/EU, in which the European Commission raised allegations of failure to provide the public concerned (parties to the proceedings and NGOs) with the possibility to seek remedies in the framework of investment permits and interim measures for construction and water projects (infringement procedure 2016/2046).

After the appropriate amendment of the provisions made by the Act of 30 March 2021[2], the European Commission accepted the introduced changes formally closing the infringement procedure, by which it should be assumed that contrary to the allegations of the Communicant, the Polish law is compliant with the 'EU standards'. In addition, the Polish regulations implementing the aforementioned Directive in the scope of Article 11, Sections 1 and 3, as far as they were accepted by the European Commission, thus ensure compliance with the relevant provisions of the Aarhus Convention.

Referring to the Communicant's statement, it should be pointed out that due to the division of the investment process for projects likely to have a significant impact on the environment in the Polish legal system into the stage of determining environmental conditions and the stage of issuing an investment permit, the appropriate remedies and the possibility of challenging these decisions before the courts, including the application of preventive measures, i.e. the suspension of the immediate enforceability of these decisions, have been granted accordingly to these stages and taking into account the nature of the administrative decisions issued during them. So, in the case where an investment permit (a construction permit) is proceeded based on a non-final decision on environmental conditions, due to the fact that it has been granted the status of immediate enforceability, the parties to the proceedings and authorised social organisations are equipped with appropriate legal instruments (Article 86e of the EIA Act , and then a complaint to the court), which, when applied to the case, should effectively prevent, in justified situations, further proceedings of the investment decision, and thus the issuance of e.g. the construction permit or the water permit.

[2] Act of 30 March 2021 on the amendment to the Act on sharing information on the environment and its protection, public participation in environmental protection, and on environmental impact assessments and certain other acts (Journal of Laws of 2021, item 784), hereinafter referred to as the 'amendment to the EIA Act

In the allegations submitted to the Aarhus Convention Compliance Committee, formulated by the Communicant in item V, it was mentioned that the suspension of the decision on environmental conditions suspends only certain subsequent proceedings concerning the investment permits. This issue needs to be clarified, as the amendment to the EIA Act contains two legal instruments, the first one in Article 86e dedicated to public administration authorities reviewing appeals against environmental decisions, and the second one in Article 86f dedicated to administrative courts reviewing appeals against environmental decisions. Both instruments apply to all environmental decisions - regardless of the type of project and the type of decision issued based on the environmental decision. Only due to the momentous effect, which is the issuance of decisions referred to in Article 72, Section 1, Items 1, 2, 4-6, 8-10, 14, 17, 18, 20, 21, 23 or 26, called investment permits, in Article 86f, Sections 5-7 of the EIA Act, a mechanism has been introduced to notify the body issuing these decisions, about the suspension by the court of the execution of the decision on environmental conditions, with the obligation to immediately halt the conducted proceedings. The other decisions are issued between the decision on environmental conditions and the investment permit and do not allow the execution of the project (the nuclear facility construction permit and radioactive waste disposal facility construction permit cited by the Communicant are permits issued by the President of the National Atomic Energy Agency (PAA) pursuant to the Act of 29 November 2000 - the Atomic Law, and the remaining are decisions of a localisation nature).

The Communicant's postulates resulting from the infringements reported in item V.2 goes beyond the rights that the EIA Directive gives to the parties to the proceedings and non-governmental organisations. This demand boils down to the fact that the relevant legal acts, listed for example in item 2, namely the Act on special principles for the preparation and implementation of investments in the field of public roads or the Act on special principles for the preparation and implementation of investments in the field of flood control structures, have been deprived of the restrictions regarding the lack of the possibility to declare final investment decisions invalid, if the applications were submitted after the expiry of the deadline specified therein or when the investor started the construction. Meanwhile, the powers under the Directive 2011/92/EU cannot reach that far. Therefore, the amendment to the EIA Act introduced the possibility of revoking a final investment permit or declaring it invalid if it is inconsistent with the decision on environmental conditions. The structure in this respect is like that of challenging permits for an investment in ordinary proceedings.

Your sincerely

Anna Moskwa
Minister of Climate and Environment
Ministry of Climate and Environment
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