

Communication to the Aarhus Convention Compliance Committee

VI 2017

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I. INFORMATION ON CORRESPONDENT SUBMITTING THE COMMUNICATION

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II. STATE CONCERNED

Republic of Poland.

III. FACTS OF THE COMMUNICATION

1. The subject of this communication is the lack of proper implementation of Art. 6(1) (a), Art. 9(2) and Art. 9(3) of the Aarhus Convention with relation to water permit proceedings in Polish legal system.
2. Water permits are administrative decisions issued for any entity making use of water in a way that exceeds common or regular usage as per Art. 122 section 1 point 1 of the Water Law¹.
3. Art. 128 of the Water Law specifies that a water permit sets out the purpose and scope of water usage, establishes terms and conditions of exploiting surface and ground water and imposes specific obligations.
4. Therefore, decisions regarding water permits do have a potentially significant environmental impact.

¹The Act of 18 July 2001 on Water Law, Official Journal of 2001 No.115, Item 1229, as amended, available in Polish: <http://isap.sejm.gov.pl/DetailsServlet?id=WDU20011151229>.

5. The matters decided in a water permit are included in the list of activities in Annex I to the Aarhus Convention - points 10, 11 and 13 of the Annex.
6. Thus Article 6, paragraph 1 (a), in which the Convention requires Parties to apply public participation in decision-making is applicable to water permits envisaged in the Polish Water Law. Consequently, Art. 9(2) and Art. 9(3) are applicable as well.
7. Art. 127 section 8 of the Water Law excludes any participation of NGOs in proceedings regarding issuing a water permit.
8. The non-compliance is systemic and general in its nature, as it relates to the failure to implement Art. 6(1) (a), Art. 9(2) and Art. 9(3) of the Aarhus Convention properly.

IV. PROVISIONS OF THE CONVENTION ALLEGED TO BE IN NON-COMPLIANCE

Article 6, paragraph 1 (a) of the Convention,

Article 9, paragraph 2 of the Convention,

Article 9, paragraph 3 of the Convention.

V. NATURE OF ALLEGED NON-COMPLIANCE

1. Art. 127 section 8 of the Water Law excludes any participation of NGOs in proceedings regarding issuing a water permit.
2. Art. 127 section 8 reads: *Art. 31 of the Code of Administrative Procedure is not applicable in proceedings regarding water permits.*
3. Art. 31 of the Code of Administrative Procedure² regulates the access of all civil organisations to administrative proceedings. It is applicable to all administrative proceedings resulting in decisions being issued, unless it is stated otherwise in a particular act.
4. Art. 127 section 8 was introduced to the Water Law by the Act of 26 April 2007³.
5. The abovementioned provision replaced the one passed in 2005, which granted NGOs regular access to administrative proceedings regarding water permits.
6. The justification of the 2007 draft of the Water Law⁴ states that since 2005 water permits are covered by the Environmental Impact Assessment proceedings⁵. Hence regular access of

² The Act of 14 June 1960 the Code of Administrative Procedure, Official Journal of 1960 No.30, Item 168, as amended, available in Polish: <http://isap.sejm.gov.pl/DetailsServlet?id=WDU19600300168>.

³ The Act of 26 April 2007 on amending the Environmental Protection Act and other acts, Official Journal of 2007 No. 88, Item 587, available in Polish: <http://isap.sejm.gov.pl/DetailsServlet?id=WDU20070880587+2007%2408%2419&min=1>.

⁴ The justification of the draft of the Water Law is available in Polish: <http://orka.sejm.gov.pl/proc5.nsf/opisy/1261.htm>.

civil organisations stemming from the Code of Administrative Procedure was deemed redundant.

7. The Polish Commissioner of Human Rights addressed on 16 June 2008, 3 June 2009 and 4 April 2013⁶ the issue of the possibility of violation of the Aarhus Convention and the Polish Constitution by the passed amendment – Art. 127 section 8 – sending three autonomous official notices to the Minister of the Environment.
8. The Minister of the Environment responded on 5 November 2008 and 22 July 2009, stating that the lack of access to administrative proceedings regarding water permits by NGOs is compensated by rights granted in the EIA proceedings.
9. The rationale presented by the Minister cannot be accepted as it is not accurate.
10. The public participation within EIA proceedings regarding water permits, envisaged in the Polish act⁷, is guaranteed in isolated cases of construction of installations for abstraction of groundwater, transfer or recharge of water (excluding more common sole abstraction or recharge of water as listed in the Annex I to the Convention).
11. In conclusion, NGOs or any other members of the public cannot join administrative proceedings regarding water permits. This is a violation of Art. 6(1) (a) of the Convention.
12. Since members of the public do not have access to proceedings in the first instance, they cannot in any way lodge an appeal against an issued water permit decision.
13. Furthermore, there are no provisions regulating access to a review procedure of members of the public concerned, neither having a sufficient interest, nor maintaining impairment of a right, as required by Art. 9(2) of the Aarhus Convention.
14. There are no administrative and judicial remedies through which NGOs can challenge the legality of the issued water permits. Therefore, members of the public concerned do not have access to justice in proceedings regarding water permits.
15. Consequently, members of the public concerned, including NGOs, do not have access to a review procedure to challenge the substantive and procedural legality of water permits decisions, which constitutes a violation of Art. 9(2) of the Convention.
16. Furthermore, there is no legal provision in the Water Law or other acts introducing any special proceedings allowing members of the public to challenge those issued water permit decisions which contravene provisions of national environmental law.

5 Since 2005 Environmental Impact Assessment procedure was regulated in Art 33 of Environment Protection Act. In 2008 the Act of 3 October 2008 on access to information concerning the environment and its protection, public participation in the protection of the environment and environmental impact assessments was passed regulating the EIA procedure in its entirety.

6 Signature of case documentation: RPO-568853/07.

7 The Act of 3 October 2008 on access to information concerning the environment and its protection, public participation in the protection of the environment and environmental impact assessments, Official Journal of 2008 No. 199, Item 1227, as amended, available in Polish: <http://isap.sejm.gov.pl/DetailsServlet?id=WDU20081991227>.

17. Hence the Republic of Poland has failed to implement Art. 9(3) of the Convention properly.
18. To conclude – Art. 127 section 8 of the Water Law violates Art. 6(1) (a), Art. 9(2) and Art. 9(3) of the Aarhus Convention.
19. It must be noted that the Polish government was to pass a new act by the end of 2016 as per the judgment of the Court of Justice of the European Union⁸, which found the current Water Law in violation of the Water Framework Directive⁹.
20. In April 2017 the act of a new Water Law was passed to the Polish parliament¹⁰.
21. However, Art. 401 of the government's proposed act¹¹ has the same wording as the current Art. 127 section 8 of the Water Law.
22. Therefore, ClientEarth, as a member of the public concerned, is deprived of access to justice rights that should be conferred on it in accordance with Art. 6(1) (a), Art. 9(2) and Art. 9(3) of the Aarhus Convention.
23. There is a number of statements of Aarhus Convention's Compliance Committee supporting ClientEarth's standpoint on the matter:
 - a. In the case regarding compliance by Belgium (ACCC/C/2005/11) in the document ECE/MP.PP/C.1/2006/4/Add.2, the Committee stated in para. 28 that: "Article 9, paragraph 3, is applicable to all acts and omissions by private persons and public authorities contravening national law relating to the environment. For all these acts and omissions, each Party must ensure that members of the public "where they meet the criteria, if any, laid down in its national law" have access to administrative or judicial procedures to challenge the acts and omissions concerned.";
 - b. In the case regarding compliance by Austria (ACCC/C/2011/63) in the document ECE/MP.PP/C.1/2014/3, the Committee stated in para. 51 that: "The Committee recalls that "the criteria, if any, laid down in national law" in accordance with article 9, paragraph 3, should not be seen as an excuse for introducing or maintaining so strict criteria that they effectively bar all or almost all environmental organizations or other members of the public from challenging acts or omissions that contravene national laws relating to the environment (see findings on communication ACCC/C/2005/11 (Belgium) (ECE/MP.PP/C.1/2006/4/Add.2, paras. 35-37) and ACCC/C/2006/18 (Denmark) (ECE/MP.PP/C.1/2008/5/Add.4, paras. 29-31)).";
 - c. In the case regarding compliance by Denmark (ACCC/C/2006/18) in the document ECE/MP.PP/2008/5/Add.4, the Committee stated in para. 28 that: " Access to justice in the sense of article 9, paragraph 3, requires more than a right to address an administrative agency about the issue of illegal culling of birds. This part of the Convention is intended to provide members of the public with access to adequate

⁸ Judgment of 30 June 2016, European Commission v Republic of Poland, Case C-648/13.

⁹ Directive 2000/60/EC of the European Parliament and of the Council establishing a framework for the Community action in the field of water policy, OJ L 327.

¹⁰ The number of the government's project in the Parliament is 1529.

¹¹ Available in Polish: <http://www.sejm.gov.pl/sejm8.nsf/druk.xsp?nr=1529>.



remedies against acts and omissions which contravene environmental laws, and with the means to have existing environmental laws enforced and made effective. Thus, Denmark is obliged to ensure that, in cases where administrative agencies fail to act in accordance with national law relating to nature conservation, members of the public have access to administrative or judicial procedures to challenge such acts and omissions.";

- d. In the same case, the Committee stated in para. 30 that: "When evaluating whether a Party complies with article 9, paragraph 3, the Committee pays attention to the general picture, i.e. to what extent national law effectively has such blocking consequences for members of the public in general, including environmental organizations, or if there are remedies available for them to actually challenge the act or omission in question. In this evaluation article 9, paragraph 3, should be read in conjunction with articles 1 to 3 of the Convention, and in the light of the purpose reflected in the preamble, that "effective judicial mechanisms should be accessible to the public, including organizations, so that its legitimate interests are protected and the law is enforced.", the same was stated in the case ACCC/C/2008/32 (Part I); ECE/MP/PP/C.1/2011/4/Add.1 in para. 79.

VI. USE OF DOMESTIC REMEDIES

Taking into consideration the nature of the problem described in section V of the communication that according to Polish law environmental non-governmental organisations cannot participate in proceedings regarding water permits, no domestic remedies are available to be applied.

VII. USE OF OTHER INTERNATIONAL PROCEDURES

No other international procedures were used by the correspondent in this regard.

VIII. CONFIDENTIALITY

The correspondent does not request for any information included in this communication to be kept confidential.

IX. SIGNATURE

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Signature:



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Date:

7/06/2017