

Response to ACCC/C/2017/146 Communication

I. Introduction

The Communication submitted by Fundacja ClientEarth Prawnicy dla Ziemi ("Communicant") with regard to case no. ACCC/C/2017/146 ("Communication") generally refers to the Polish Water Law Act of 20 July 2017¹, which is determining, *inter alia*, the manner and scope of issuing of water permits. The Communicant seems to accuse the Republic of Poland of an incorrect implementation of the Aarhus Convention², in particular Article 6 (1) and Article 9 (2 and 3) (paragraph 8 of the Communication). The Communicant also indicates that the Republic of Poland failed to ensure a sufficient public participation in the issuing of water permits.

For further understanding of the arguments presented in the response to the Communication it is important to point out that under Article 91(1) of the Constitution of the Republic of Poland - *a ratified international agreement shall constitute part of the domestic legal order and shall be applied directly, unless its application depends on the enactment of a statute*. This provision applies to the Aarhus Convention published in the Journal of Laws of the Republic of Poland (Journal of Laws of 2003 item 706), thus, the Aarhus Convention is applied directly in the Polish legal order and it takes precedence over the other acts. The Republic of Poland has ensured the effective mechanism for the implementation of the Convention hereinabove, in principle, through 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 assessment,³ hereinafter referred as the "EIA Act".

II. Remarks on the admissibility of the Communication

The Communicant has not indicated any case of the dismissal of any application for the participation in procedure for the issuance of a water permit, submitted by the Communicant or any other non-governmental organization. The Communicant has not attached any examples of an administrative decision or any judgements on the matters hereinabove. Thus, the problem presented in the Communication is abstract. The correspondence between the Minister of the Environment and the Ombudsman cannot, as such, serve as a ground for determining that public participation in the issuance of water permit was, in any manner, raised in the judicature decisions. Therefore, it should be deemed that the Communicant has not exhausted, nor has it attempted to exhaust, the domestic remedies to solve the alleged problems under the Polish legal system.

The Republic of Poland also expresses its reservations in regard to the allegation set out in paragraph 10 of the Communication, specifically in the following section: "(excluding more common sole abstraction or recharge of water as listed in the Annex I to the Convention)". It is not apparent which water abstractions the allegation pertains to - whether those are the abstractions described in Annex I to the Aarhus Convention (hereinafter referred to as "Annex I"). Such a formulation of the allegation gives rise to **doubts as to its admissibility** in regard to the fact that it is formulated in **an excessively general manner** (see paragraph 19 of the Annex to Decision I/7 of the Meeting of Parties to the Aarhus Convention).

¹Water Law Act of 20 July 2017 (Journal of Laws item 1566, as amended)

²Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention) of 25 June 1998.

³Act of 3 October 2008 on access to information on the environment and environmental protection, public participation in environmental protection and on environmental impact assessment (Journal of Laws of 2017 item 1405, as amended).

Despite the brevity of the allegation hereinabove - described in paragraph 10 of the Communication - and the lack of exhaustion of domestic remedies, the Republic of Poland, due to the processual prudence, will provide clarifications regarding the public participation in decision-making in matters described in Annex I.

It should be emphasized that the Polish law ensures public participation in the proceedings for issuing of water permits at the stage of the environmental impact assessment procedure which is obligatory for projects listed in Annex I.

III. Clarifications for each allegation

1. Amendments to the Water Law Act

In the last 11 years, the Water Law Act has undergone two major amendments that pertained the public participation in the issue of water permits.

The first amendment was introduced in 2007 and it excluded the possibility of applying Article 31 of the Code of Administrative Procedure⁴ that enabled non-governmental organizations to participate in the administrative procedure. The Communicant believes that the exclusion caused the limitation of the public right to participate in the issuance of water permits (paragraph 3 of the Communication). The Communicant also made an allegation as to the unreasonable argumentation presented in the justification to the aforementioned amendment to the Water Law Act. It provided that the public participation was guaranteed at the stage of decision on environmental conditions, described in the EIA Act, therefore, it is not necessary to ensure public participation under Article 31 of the Code of Administrative Procedure. The Republic of Poland does not agree with the Communicant's allegations. According to Article 31 of the Code of Administrative Procedure, a social organisation may intervene in a matter involving another person with a request to participate in proceedings, if such participation is justified by its operation purposes and is supported by social interest. The public authority that makes the decision on the participation of a social organization in the administrative procedure as a Party may also dismiss the organization's request for the admission to the procedure. Therefore, the Article 31 of the Code of Administrative Procedure may not, as such, ensure the public participation in the decision-making with regard to the issuance of water permits. Subject to the justification presented by the Polish legislator:

“The proposal for amendments in Article 127(8) of the Water Law Act results from the amendment of July 2005 in the environmental impact assessment system, namely, the exclusion of the environmental impact assessment procedure from the procedure aimed at issuing an investment decision (including a water permit) and its inclusion in the procedure for issuing a decision on the environmental conditions.

In its current wording, Article 127(8) of the Water Law Act refers to Article 33 of the EPL (the Environmental Protection Law) which, in turn, applies solely to the procedure including public participation at the stage of the environmental impact assessment procedure. Due to the fact that the procedure is not conducted at the stage of issuing water permits anymore, Article 127(8) of the Water Law Act is a dead letter.”

Therefore, the aim of the author of the legislation was to adjust the Water Law Act to the amended regulations concerning environmental impact assessments. The amendment was introduced in such a

⁴Act of 14 June 1960, Code of Administrative Procedure (Journal of Laws of 2017 item 1257, as amended).

way as to guarantee non-governmental organizations the participation in the procedure for the issuance of water permits.

The second essential change entered into force on 1 January 2018 - after the adoption of the Water Law Act of 20 July 2017 (the “Water Law of 2017”) which, among others, extends the possibility of public participation in the proceedings for the issuance of water permits. Subject to Article 401(1) of the Act, parties to the proceedings in matters regarding water permits are: the applicant and entities affected by the intended use of water and entities in the range of impact of the water devices planned to be used. According to the legal status prior to 1 January 2018, a party to the proceedings for the issuance of water permits could be, in particular, the owners of the water in the range of impact of the intended use of water, owners of water devices in the range of impact of the intended use of water and owners of the land directly adjacent to the intended use of the water. Therefore, the Communicant unreasonably claims that the amended Act contains identical provisions in the scope of parties to the proceeding for the issuance of water permits, as specified in the Water Law Act of 18 July 2001 (the “Water Law Act of 2001”)⁵.

2. Method for ensuring the effectiveness of provisions under the Aarhus Convention in the Polish legal order (in the regulations on water permits)

A. General remarks

Article 6(1)a of the Aarhus Convention regulates the public participation in the decision-making in matters regarding the projects described in Annex I. The projects described in Annex I, requiring the issuance of a water permit, are set out in the Regulation of the Council of Ministers of 9 November 2010 on types of projects likely to have significant effects on the environment (hereinafter referred to as the “Regulation”)⁶. The projects described in § 2(1) items 35, 37, 38 and 39 of the Regulation correspond with the projects specified in items 13, 10 and 11 of Annex I.

B. Public participation in the procedure for issuing permits under the Water Law Act

The participation of non-governmental organizations in procedures that require public participation is set out in Article 44(1) of the EIA Act. The Article provides that the environmental organisations which, referring to their statutory objectives, inform of their wish to take part in a specific proceeding requiring public participation shall take part therein with the rights of a party, if they have operated in the scope of environmental protection for at least 12 months before the proceeding was undertaken. An environmental organisation shall have the right to appeal against the decision issued in a proceeding requiring public participation where this is justified by the statutory goals of this organisation, including the case where it did not take part in a specific procedure requiring public participation conducted by a first instance authority; the submission of the appeal shall be equivalent to the declaration of its willingness to take part in this proceeding. The organisation shall take part in the review procedure with the rights of a party. Article 44(3) provides that an environmental organisation shall have the right to file a complaint to the administrative court against a decision issued in a proceedings requiring public participation where this is justified by the statutory objectives of this organisation, including the case where it did not take part in a specific proceeding requiring public participation. Considering the above, it should be stated that the Polish law guarantees environmental organizations the right to access to justice, therefore, it fulfils the requirements referred to in Article 9(2 and 3) of the Aarhus Convention.

⁵The Water Law Act of 18 July 2001 (Journal of Laws of 2017 item 1121, as amended).

⁶Regulation of the Council of Ministers of 9 November 2010 on types of projects likely to have significant effects on the environment (Journal of Laws of 2016 item 71).

Subject to Article 79 of the EIA Act, prior to the issuance of a decision on the environmental conditions, the authority competent to issue the decision shall ensure the possibility of public participation in the proceedings within the framework of which the environmental impact assessment for a project is carried out (subject to the provisions set out in section III of the EIA Act). Subject to Article 59 of the Act hereinabove, such an assessment is required in projects likely to have significant effects on the environment (thus in all kinds of projects indicated in paragraphs 10, 11 and 13 of Annex I). The environmental impact assessment includes the analysis and evaluation of matters such as the direct and indirect effects of the project on the environment and human life, possibilities and ways of preventing and minimizing the negative impact of the project on the environment or the required scope of monitoring. The result of the assessment is the environmental impact report that is a document presenting the results of the environmental impact assessment (of the planned project) conducted by the applicant. The elements that the project environmental impact report should contain are set out in Article 66(1) of the EIA Act. In principle, the elements may be divided into 4 groups. The first is the description of the project, specifying the reasonable alternatives of its implementation. The second is the description of the state of environment. The third group specifies the environmental impact that may potentially occur during the implementation of the project. The fourth group is the description of actions planned to be taken to prevent or reduce the negative environmental impact of the project. The last group may also specify the potential compensation of adverse impacts on the environment.

The significant element of the report is its summary using a non-technical language in reference to all elements in the report. The summary is a basic element that enables the public concerned to participate in the process of environmental impact assessment.

Importantly, as a result of the abovementioned procedure, public participation in the decision-making in matters regarding the water permit is ensured at the very stage when all the alternatives of a given project implementations are still possible.

The decision on environmental conditions is issued by a public authority in view of the arrangements in the project's environmental impact report, results of necessary arrangements and opinions, as well as results of the public participation procedure. Subject to Article 82 of the EIA Act, all environmental matters are resolved at the stage of issuing the decision with regard to a given project. On the other hand, the water permit is the stage when the objective, scope and obligations relating to the planned way of water use are determined, subject to the provisions of the decision on environmental conditions.

C. Issuing water permits and the decision on environmental conditions in the context of Annex I

Subject to paragraph 10 of Annex I, the projects that require public participation include groundwater abstraction or artificial groundwater recharge schemes where the annual volume of water abstracted or recharged is equivalent to or exceeds 10 million cubic metres.

Subject to § 2(1) item 37 of the Regulation, devices or sets of devices that enable the groundwater abstraction or artificial groundwater recharging with the minimum water abstraction capacity of 1100 m³ per hour are regarded as projects that may have significant effects on the environment. The minimum water abstraction capacity of devices in the amount of 1100 m³ per hour is equivalent to the annual water abstraction capacity of at least 9,360,000 m³. This means that, subject to paragraph 10 of Annex I, the abstraction of water of at least 10 million cubic metres is a project that may have always significant effects on the environment. Subject to Article 71 of the EIA Act, such a project requires obtaining a decision on the environmental conditions.

We cannot agree with the statement that the water permit for the abstraction of water which is equivalent or exceeds 10 million cubic metres doesn't require issuing decision on environmental conditions which is implied by the Communicant (paragraph 10 of the Communication) who indicates that § 2(1) item 37 of the Regulation applies only to the devices or sets of devices.

Importantly, the groundwater abstraction exceeding 10 million cubic metres is a very intensive use of groundwater and it particularly pertains the drainage of mine workings. Such an abstraction is not possible without the use of devices and units described in the Regulation. Therefore, the Communicant without any ground claims that the obtainment of administrative decisions enabling the abstraction of groundwater of 10 million cubic metres does not ensure public participation as such abstractions will require obtaining the decision on the environmental conditions.

In order to illustrate the volume of the groundwater abstraction, we present the identified abstractions of groundwater for exemplary bodies of groundwater that include the implementation of projects consisting in the intensive abstraction of groundwater relating to the drainage of mine workings. For example, in case of body of groundwater no. 111 covering the intensively urbanized and industrialized region of Upper Silesia, the annual water abstractions for the needs of supplying the population with water in 2011 were 4,467,000 m³, whereas the groundwater abstraction from mine drainage was 51,240,000 m³. For groundwater bodies no. 130, the need for water supply to the public in 2011 was 4,925,000 m³, whereas the groundwater abstraction from mine drainage was 165 million cubic metres.

§ 2(1) items 38 and 39 of the Regulation specify the need to conduct an environmental impact assessment, including efficient public participation, also in reference to other projects determined in paragraph 11 of Annex I. Paragraph 11 specifies projects that pertain the use of water, such as works for the transfer of water resources between river basins where the objective of the transfer is the prevention of potential shortages and the volume of the water transferred exceeds 100 million cubic metres annually, as well as all other cases. Paragraph 11 also refers to works aimed at the transfer of water resources between river basins where the long-term flow in the water abstraction basin exceeds 2,000 million cubic metres annually and where the amount of water transferred exceeds 5% of this flow.

Such a situation also pertains to projects specified in paragraph 13 of Annex I that are specified in § 2(1) item 35 of the Regulation, including water dams or other devices designed for holding back or permanent storage (retention) of not less than 10 million cubic metres of water per year.

Projects such as ports or water-retention structures raising water levels by 5 metres or more also require issuing a decision on environmental conditions.

D. Enforceability of the decision on environmental conditions

Subject to Article 72(1) item 6 of the EIA Act, the issuance of the decision on the environmental conditions shall be made prior to the obtainment of the water permit. Article 86(2) of the Act provides that the decision on the environmental conditions is binding for public authorities that issue the decisions described in Article 72(1). Public participation in the decision-making with regard to environmental conditions is, therefore, ensured subject to the Aarhus Convention as the water permits issued in the further procedure must always be compliant with the decision on environmental conditions. At the stage of issuing the very water permit, there is no possibility to change the arrangements regarding the impact of a given project on the environment. Additionally, Article 86c of the EIA Act provides that the fulfilment of the requirements of decisions on environmental conditions, that were not included in the decisions mentioned in Article 86 of the Act is subject to the administrative execution pursuant to the regulations on the enforcement procedure in administration, provided that the project is being implemented.

It seems, that in its report presented at the third Meeting of Parties to the Convention, the Aarhus Convention Compliance Committee⁷ put forward the position specifying that, in case when the beginning of a given project is dependent on obtaining numerous decisions, there is no need to ensure public participation in the procedure of issuing each of these decisions. However, it is necessary to ensure that the participation is guaranteed at the stage when all the environmental matters are being resolved. It is unacceptable that the arrangements regarding the impact of a given project on the environment are changed by follow-up decisions that do not provide for public participation.

As indicated above, subject to the EIA Act, the public authority issuing the water permit is bound by the previous decision on the environmental conditions at the stage of which all the environmental matters are being resolved.

Also the Polish administrative courts expressed their opinions on the aspect, that the decision on environmental conditions is legally binding to the public authority.

The Supreme Administrative Court, in its judgement of 12 July 2016, ref.: II OSK 2732/14, stated, *inter alia*, the following: “The conditions determined in the environmental decision with regard to the implementation of the project (including planting a green belt) must not be modified or changed in further stages of the investment process and they are binding for public authorities that issue the decision on the investment implementation permit.” In another ruling of 3 September 2014, the Voivodship Administrative Court in Łódź stated, *inter alia*, the following: “More to the point, the architecture-construction administrative body does not have any competence to independently review environmental conditions that enable the implementation of the project or make conclusions other than those presented by the administrative body competent for issuing the environmental decision.”

IV. Summary

The Polish law is fully compliant with the Aarhus Convention. The procedure for issuing water permit provides the public, including non-governmental organizations, with the possibility to participate in issuing decisions regarding environmental conditions. The participation is ensured at the earliest possible stage of issuing the decision on the environmental conditions - the moment when all project alternatives are being considered. In the scope of the Polish law, the projects described in Annex I to the Aarhus Convention are projects likely to always have significant effects on the environment. For such projects an environmental impact assessment is always carried out. After the abovementioned procedure competent authorities issue a decision on environmental conditions taking into account results of public consultations. The arrangements in the decision regulate all matters related to the impact of a given project on the environment, and the very decision is binding for the authority that issues the water permit.

In consequence, the allegation formulated in the Communication should be deemed unjustified.

⁷“The Aarhus Convention, An Implementation Guide”, The United Nations Economic Commission for Europe, Second edition, 2014, p. 129.