



Warsaw, 31st X, 2018 r.

**MINISTRY OF THE ENVIRONMENT
UNDERSECRETARY OF STATE**

Sławomir Mazurek

DZŚ-IV.465.206.2018.JM

**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

With respect to the Communicant's letter of 1 August 2018 in case ACCC/C/2017/146 concerning the admissibility of the above-mentioned communication, and in particular its use of domestic remedies, I submit the following position.

1. In the letter of 1 August 2018, the Communicant referred to three court cases that were pending before Polish administrative courts, allegedly concerning the use of domestic remedies, namely cases with file numbers: II SA/Gd 618/12, IV SAB/Wa 216/15, IV SA/Wa 1397/16, II OSK 414/17. However, it should be stressed, that in none of these cases the Communicant was a party, and only one case was considered by the Supreme Administrative Court (which is the last tier in Polish court-administrative proceedings), so only in this one individual case the full appeal path was exhausted (all the remedies available were fully used).

2. In case of projects specified in Annex I to the Aarhus Convention and planned projects which may potentially significantly affect the environment (in respect of which the authority competent to issue a decision on environmental conditions found it necessary to carry out such an assessment in accordance with the criteria specified in Article 63(1) of the Act of 3 October 2008 on access to information on the environment and environmental protection, public participation in environmental protection and environmental impact assessments; (Journal of Laws of 2017, item 1405, as amended), hereinafter referred to as: EIA Act), an environmental impact assessment procedure with public participation is carried out, ending with issuing a decision on environmental conditions. According to

Article 44 of EIA Act environmental protection associations have the right to appeal against this decision.

As indicated in the reply to the communication of 16 February 2018 all environmental issues related to a given project are determined at the stage of issuing the decision (e.g. the issue of variability of a given project, selection of treatment technology, impact on animal species and habitats is checked at the stage of environmental impact assessment), while issuing a water permit is the stage at which the objective, scope and obligations related to the planned use of water are determined. The issued decision (water permit) must comply with the provisions of the decision on environmental conditions. A water permit is issued only if the requirements specified in the decision on environmental conditions have been met. At the stage of issuing a water permit, it is not possible to change the arrangements regarding the environmental impact of the undertaking.

3. The Communicant does not question the fact that public participation and, consequently, access to justice is ensured for projects listed in Annex I to the Aarhus Convention. However, it claims that a decision on environmental conditions is only required for the construction of installations enabling the abstraction and transfer of waters as defined in Annex I to the Convention, while the mere fact of intake or transfer of water will not be subject to an environmental impact assessment. Moreover, in the opinion of the Communicant, the device/installation¹ may have a greater processing capacity than the declared water transfer, which is to be carried out with its help.

It should be stressed that the key feature that determines the allocation of the project to the category specified in the Regulation of the Council of Ministers of 9 November 2010 on projects which may significantly affect the environment (Journal of Laws of 2016, item 71), hereinafter referred to as "the Regulation", is the *abstraction capacity* of a device or set of devices and not a declared potential of water abstraction in a specific case. Although the provisions of the above-mentioned regulation refer to water abstraction facilities, it is not only their impact on the environment that is a subject to an environmental impact assessment. In the course of the assessment procedure first of all the environmental effect of the maximum possible water abstraction within the framework of a given project is assessed. Arguments raised by the Communicant call into question the mere fact that Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment, hereinafter referred to as the "EIA Directive", has been correctly transposed into national law. The term "groundwater abstraction" is used both in the EIA Directive and in the Convention. The terminology adopted in the Regulation is the effect of a linguistic convention resulting from the Polish principles of legislative technique, but the mere fact of using specific formulations does not yet mean that the Republic of Poland does not respect the Convention and EU law. In specific cases of this kind, the overall environmental impact of groundwater abstraction is assessed and not just the very fact of installing these facilities.

Therefore, we cannot agree with the Communicant's claim that there is no need to obtain a decision on environmental conditions in the event of increasing the amount of water abstraction for an already existing installation. According to Polish law, in the event of no interference with an existing installation, the fulfilment of the criteria set out in § 3(3) of the Regulation should be analysed, i.e. it should be examined whether in relation to the completed project a decision on environmental

¹ Polish law uses term "urządzenie" which might be translated as „device”.

conditions has been issued and whether, in connection with the planned change, there will be a need to modify the conditions set out in the decision. According to this provision:

3. Projects which may potentially have a significant impact on the environment also include projects not related to the reconstruction, extension or assembly of the executed or completed project, resulting in the need to change the conditions specified in the decision on environmental conditions; the provision is applicable, provided that the Act of 3 October 2008 on access to information on the environment and environmental protection, public participation in environmental protection and environmental impact assessments does not exclude the need to obtain a decision on environmental conditions and if the need for changes in the implemented project is not the result of the consequences resulting from the need to comply with the requirements set by law or arrangements contained in the post-implementation analysis, ecological review or summary of the results of monitoring the environmental impact of the implemented project.

On the other hand, changes to the decision are treated as if the environmental conditions had been established from the beginning, and as a consequence, according to Article 87 of the EIA Act, they will require meeting all the requirements discussed above. As indicated in point 2 of this letter, the decision on environmental conditions is binding on the authorities issuing the subsequent investment decisions. Therefore, if in the technical documentation prepared at a later stage of the investment process changes will occur, which turn out to be inconsistent with the earlier findings of the decision on environmental conditions, it will be necessary to carry out the procedure specified in the provisions of the EIA Act with all its stages and to issue a new decision on environmental conditions (or its changes).

Thus, if an increase in the amount of water abstraction would cause the need to change at least one condition specified in the issued decision on environmental conditions, the investor would be obliged to obtain a new decision on environmental conditions. It is important to notice that according to Article 82(1) of the EIA Act, the decision on environmental conditions determines, among others, conditions for using the land at the stage of implementation and exploitation or operation of the project, with particular emphasis on the protection of precious natural values, natural resources and monuments and reducing the nuisance for neighbouring areas. Consequently, changes consisting in the extension of the operating time of the installation, raising the level of damming up on a water reservoir or a watercourse or changing the raw material in a power plant are connected with the need to obtain a decision on environmental conditions, if:

- 1) these features have been included in the previous decision as conditions or,
- 2) change of these features will entail the necessity to change the conditions specified earlier in the decision.

4. The reasoning of the Communicant, which consists in quoting Articles 403 and 404 of the Act of 20 July 2017 - Water Law (Journal of Laws No. 1566, as amended), is incorrect in relation to the circumstances of case ACCC/C/2017/146. In the case of damming by means of a damming structure with a damming height of more than 1 m, the water permit shall be accompanied by a water management manual specifying, among other things, how water is to be managed under normal conditions of use and in the event of flooding.

It should be noted that issues relating to damming levels and their impact on the environment, both under normal conditions and in the event of flooding, are analysed in the environmental impact report during the environmental impact assessment procedure. The water management manual is an executive document which describes the action plans with regard to hydrological conditions. The

water permit approving the water management manual must comply with the provisions of the decision on environmental conditions, which is issued after a variant analysis of the impact of individual levels of damming on the environment.

5. The Communicant states that social organisations have no possibility to lodge a complaint against the order not to carry out an environmental impact assessment in the case of projects likely to have a significant impact on the environment specified in the Regulation. However, this order, issued in the course of proceedings for the issuance of a decision on environmental conditions, concerns substantive issues, but does not decide on the merits of the case. Such a decision is a decision on environmental conditions, which is issued after the end of the proceedings. In case of issuing an order on the lack of obligation to carry out an environmental impact assessment (according to Article 63(2) of the EIA Act), the legislator did not indicate the possibility of lodging a complaint or application to the administrative court, as the **order may be effectively appealed against as part of an appeal against a decision on environmental conditions, pursuant to Article 127(1) in connection with Article 142 of the Act of 14 June 1960 - Code of Administrative Procedure (Journal of Laws of 2017, item 1257, as amended).**

6. The Communicant states that 80% of water permits are not listed in Annex I to the Convention but may have an impact on the environment. Firstly, the statement of "80%" is not supported by any data, and secondly, the Communicant ignores the fact that the most water permits are issued in cases, when the environmental impact of the intended use of water is minimal. Article 6(1) of the Convention requires that public participation must be ensured in respect of planned projects listed in Annex I and in respect of planned projects not listed in Annex I which are likely to have a significant effects on the environment. Meanwhile, the system of water permits also applies to small-scale projects, such as the construction of a ditch, a pier or a ship stoppage place, which have a relatively small impact on the environment.

7. In conclusion, it should be pointed once again that, contrary to his claims, the Communicant did not show that he had exhausted all domestic remedies. Indeed, he was not a party to the court-administrative cases mentioned by him. He had not demonstrated that judgments relate to projects which are covered by the Aarhus Convention. Therefore, the Communicant's argument calling into question the possibility of access to justice in case ACCC/C/2017/146 is not valid, as such access is already provided at the stage of issuing a decision on environmental conditions. It seems doubtful that the order not to carry out an environmental impact assessment cannot be appealed against before a court. It is also impossible to agree with the Communicant's opinion stating that the water permit regulates environmental issues, which were not the subject of the previous decision on environmental conditions.

As shown in this letter and in response to the Communication on ACCC/C/2017/146, the water permit cannot be incompatible with the decision on environmental conditions. Such inconsistency results in the defectiveness of the water permit by operation of law. It is also not justified to claim that an installation/device for which a water permit has been issued may legally increase its processing capacity beyond that specified in the decision on environmental conditions and in the water permit. In view of the above facts, Communication ACCC/C/2017/146 should be considered as lacking any legal basis and as such should be rejected.


PODSEKRETARZ STANU
Sławomir Mazurek