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Secretary to the Aarhus Convention
Compliance Committee

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)

The Party concerned presented comments on the submissions on admissibility of the Communication ACCC/C/2017/146. In this letter, the Communicant would like to present arguments in response to those remarks.

Domestic remedies (para. 23 of decision I/7)

In response to the first remark regarding the lack of exhaustion of domestic remedies, the Communicant would like to present several court cases which testify to the fact that the Communicant would not have had access to court with regard to decisions which are the subject of this communication.

For instance, in reference to a case concerning a water permit for sewage disposal from the Municipal Sewage Treatment Plant in Dziemiany (Pomeranian Voivodeship), the District Administrative Court in Gdańsk rejected a NGO's complaint, ruling that it was inadmissible. The appeal had been lodged by the Social Committee for the Protection of Lake Cheb and Surroundings, claiming that sewage disposal is discharged into the drainage ditch rather than into the river and will negatively affect the quality of water in Lake Cheb. In the order of 27 February 2013 (**II SA/Gd 618/12**) the Court stated that:

"*Pursuant to Article 127.8 of the Act of 18 July 2001 Water Law, Article 31 of the Code of Administrative Procedure (CAP) enabling NGOs to participate in proceedings does not apply in water permit proceedings. (…) Adoption of the amendment to the Water Law excluding NGOs from water permit proceedings demonstrates the legislator's will to exclude control of NGOs in such cases. As a consequence, an NGO does not have a right to file a complaint to Administrative Court on decision issued as a result of proceedings in which this NGO could not participate on the date of issuance of said decision. The above circumstances justified dismissal of the complaint of the Committee (…).*"

As another example, in its judgment of 14 September 2015 (**IV SAB/Wa 216/15)** the District Administrative Court in Warsaw stated that:

"Since this provision precludes the application of Article 31 of the CAP and thus, in fact, the participation of social organizations in proceedings regarding a water law permit, authority rightly pointed out in a letter

dated [...] January 2015 and [...] March 2015 that Article 31 of the CAP cannot be applied to the request made by organization."

Similarly, the District Administrative Court in Warsaw, in its judgment of 23 September 2016 (**IV SA/Wa 1397/16**), dismissed a complaint from Foundation X[1] on the order of the President of National Water Management Authority refusing to open proceedings on an annulment of the decision of the Governor of X Province granting a water permit to the Regional Water Management Authority in X and X Inc. The ruling was upheld by the **Supreme Administrative Court** in the judgment of 5 December 2017 (**II OSK 414/17**), in which the Court stated that Article 127.8 of Water Law excludes the admissibility of public participation in proceedings on the annulment of the water permit decision, since this provision does not provide for the admissibility of NGO participation in the rights of a party in ordinary proceedings.

In the absence of being a party to the proceedings in this sense, NGOs also have no access to challenge the resulting permits before the administrative courts. In all of these cases in which there is no public participation and thus no compliance with Article 6 of the Aarhus Convention, applicants also have no access to justice as required by **Article 9(2) of the Convention**.

The above cases demonstrate that there is established jurisprudence on the fact that NGOs, such as ClientEarth, cannot bring proceedings to challenge a water permit. From the perspective of the Communicant, it would have been a waste of resources to nonetheless attempt to file such a challenge with the national courts. It is therefore clear that no domestic remedies were available to the Communicant in the sense of paragraph 21 of decision I/7.

Alleged lack of corroborating information (para. 19 of decision I/7)

In response to the second remark that the allegations in paragraph 10 of the Communication are formulated in a general manner, the Communicant would like to present the following arguments.

Article 6.1 of the Convention requires that the public concerned have the opportunity to participate in the proceedings before the issuance of decisions on whether to permit proposed activities listed in Annex I, with respect to Articles 6.2-6.10 of the Convention. Such participation shall be provided through, inter alia, informing of the proposed activity, the nature of possible decisions, the public authority responsible for making the decision and the envisaged procedure.

The procedure of public participation must provide for the participation of both natural and legal persons acting in defence of private interests and for NGOs acting in defence of public interests.

Such participation must include all proposed activities listed in Annex I and must be provided to all participants at a stage prior to the issuance of a decision allowing these activities. If more than one decision is required by a particular legal system (which is especially the case of systems where decision-making is staged), such participation shall be provided in all proceedings concerning the decision that contains relevant environmental conditions of the activity to be undertaken. In the Polish legal system the procedural requirements set out in Articles 6.2-6.10 of the Convention are fulfilled in two cases, i.e. the general administrative procedure carried out under the CAP and the public participation procedure under the EIA Act[2].

Following solutions adopted in the EU, it was decided in Poland that the requirements of Article 6.1a of the Convention will be met by a specifically tailored public participation procedure, currently regulated by the EIA Act, based on the right of “everyone” (including environmental NGOs) to participate at the stage of environmental impact assessment and integrated permit. However, water permits are an example of decisions that do concern relevant environmental conditions of the proposed activity but are not always subject to the decision-making procedures (including public participation aspects) covered by the EIA Act.

[1] Personal data in court decisions are anonymized.
[2] Act of 3 October 2008 on access to information on environment and its protection, public participation in environmental protection and environmental impact assessment, Journal of Laws of 2016, item 353, as amended.

Article 6(1)(a) and 9(2) of the Aarhus Convention: Water permits not covered by the EIA Act

It is true that projects described in Annex I of the Aarhus Convention, which require 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: the Regulation). It is also true, as the Party concerned claims in point III.2.A, that projects described in paragraph 2(1) items 35, 37, 38 and 39 of the Regulation mostly correspond with the projects specified in items 10, 11 and 13 of Annex I of the Aarhus Convention. Those projects require issuance of a decision on the environmental conditions (*decyzja o środowiskowych uwarunkowaniach*) (hereinafter: EIA decision) that will govern the project, where the possibility of public participation and consequently access to justice is provided for.

However, public participation pursuant to the EIA Act is provided in the course of the environment impact assessment at the EIA decision only for construction of installations for groundwater abstraction or transfer of water and not for the activity of water abstraction or transfer itself, as should be the case in accordance with the Convention. Annex I in paragraph 10 states: "*Groundwater abstraction or artificial groundwater recharge schemes (…)*" and in paragraph 11 (a) and (b) *"Works for the transfer of water resources (…)".* Therefore the scope of the public participation in regards to paragraph 2(1) items 35, 37, 38 and 39 of the Regulation is narrower than items 10, 11 and 13 of Annex I of the Aarhus Convention.

For instance, there may be a situation where a device for abstraction of groundwater already exists, for which the EIA decision was issued on the basis of an application declaring that, for example, the water abstraction capacity of device is 1000 m3/ h, even though the device allows, for example, for 1500 m3/ h. Then the groundwater abstraction in the characteristics of the project will be determined of less than 10 million m3 per year. Then an increase in water abstraction above certain thresholds per year would require only the issue (change) of a water permit. There will be no obligation to issue the EIA decision (as it will not concern "the development, reconstruction or assembly of projects"[3] and only increase the limits) although the annual volume of water abstracted would exceed 10 million m3 per year, so fall under Article 6.1(a) of the Aarhus Convention by paragraph 22 of the Annex I of the Aarhus Convention. Thus, this would lead to a circumvention of the obligation under **Article 6.1 (a) of the Aarhus Convention**.

Article 9(2) of the Aarhus Convention: No access to justice to challenge negative screening decisions

Article 9.2 of the Convention requires access to justice for all decisions under article 6. Next to the activities listed in Annex I to the Convention, this also encompasses activities that fall under the Convention by way of article 6.1b.In fact, the majority (80%) of issued water permits in Poland concern situations where the specific activity that received the water permit does not fall under any of the categories of Annex I of the Convention but may still have a significant effect on the environment.

Pursuant to the Article 79.1, art. 80.1 and 2 and art. 84.1 of the EIA Act, in the current Polish system of environmental protection there are two types of EIA decisions[4]: those whose issuance was preceded by an environmental impact assessment, i.e. requiring public participation and those that may be issued without this part of the proceeding. According to Article 44.1 and 2 of the EIA Act, the participation of environmental NGOs (and hence in this case challenging the water permits before the administrative courts) is only possible in those proceedings in which public participation is required.

The State Party claims that Article 44.1 of the EIA Act, which allows environmental NGOs to participate in proceedings in which public participation is required, fulfils the requirements referred to in Article 9(2 and 3) of the Convention. As explained below, in the vast majority of water law procedures the Article 44.1 of the EIA Act is not applied. This is because the exclusion of NGOs from participation in the administrative procedure for water permits occur mainly in cases of water permit decisions that are not required to be preceded by a EIA decision.

[3] As The Regulations states in paragraph 2(2).
[4] There is no different terms for EIA decisions preceded by public participation and those which are not.

In relation to water permits the environmental impact assessment is required for projects described in paragraph 2(1) items 35, 37, 38 and 39 of the Regulation which - as it was said before - mostly correspond with the projects specified in items 10, 11 and 13 of Annex I of the Aarhus Convention. Also, in the Regulation there is a list of specific projects that may require environmental impact assessment, but it is essentially the authority's choice whether to do an assessment. The authority (the Regional Director of Environmental Protection) can decide that an environmental impact assessment is not necessary and issue such screening decision (*postanowienie*) which environmental NGOs can not appeal. According to Article 79.1 of the EIA Act, the participation of an environmental NGOs is required only in the proceedings under which the environmental impact assessment is being conducting. As the Supreme Administrative Court in the judgment from 23 February 2017, II OSK 1507/15 said *"Public participation is therefore not necessary in a proceeding in which a decision is issued stating that there is no need to assess the project's environmental impact".*

Accordingly, decisions not to conduct an environmental impact assessment (negative screening decisions) cannot be challenged by environmental NGOs based on Article 44.1 of the EIA Act.

This is contrary to the Committee's findings on communication ACCC/C/2010/50 (Czech Republic), where it held:

"The Committee thus finds that, to the extent that the EIA screening process and the relevant criteria serve also as the determination required under article 6, paragraph 1 (b), members of the public concerned shall have access to a review procedure to challenge the legality of the outcome of the EIA screening process" (para. 82).

Based on jurisprudence of the courts, there is in theory another avenue to challenge a water permit for not preceded by an EIA decision with public participation - the already mentioned Article 31 of the CAP.

As the Supreme Administrative Court said in its judgment from 3th of October 2013, II OSK 1274/12:

"(...) one of the conditions, the fulfilment of which depends on using [Article 44 of EIA Act] is that public participation is required in a particular proceeding. Failure to meet this requirement does not mean, however, that the environmental NGO cannot participate in the proceeding and appeal against the decision. In this situation, however, the general rules governing the participation of social organization in administrative proceedings apply, as indicated in art. 31 of the CAP, a social organization may in a case involving another person's demand:
1) initiate proceedings,
2) admission to participate in the proceedings,

if it is justified by the statutory purposes of this organization and when it is in the public interest."

It means that the only possibility for public participation in the case where it was deemed that there is no need to conduct the environmental impact assessment for a specific activity which needs a water permit, is using the right based on the Article 31 of the CAP. However, since this provision is excluded by virtue of the Article 402 of Water Law, this possibility is excluded for environmental NGOs.

As the decision not to conduct an environmental impact assessment is solely at the discretion of the authority, it can happen that in the end a project is authorized which has a negative impact on the environment. This means that there is no legal possibility to challenge or oppose water permits which would have potential negative impact on the environment.

Consequently, taking account of the fact that under Article 402 of the Water Law the application of Article 31 of the CAP is excluded and that Article 44 of the EIA Act does not apply to all water permits, there is no possibility to participate in violation of article 6(1)(b) and no possibility to challenge the water permit under Article 9(2) of the Aarhus Convention.

Article 6(1) and 9(2) of the Convention: Public participation and access to justice limited to first decision in tiered process

Even if an activity which requires a water permit is found to require an environmental impact assessment including public participation (be it by way of a screening or because it falls under paragraph 2(1) items 35, 37, 38 and 39 of the Regulation), the requirements of Article 6 and 9.2 of the Convention are not fulfilled by the current system, This is because the water permit and not the EIA decision actually authorises the undertaking of the proposed activities, i.e. the EIA decision is only a first decision in a tiered decision-making process. However, Article 6 of the Convention applies to all decisions regarding relevant environmental conditions of the proposed activity.

In this context it is useful to recall the Committee's findings on communication ACCC/C/2011/58 concerning compliance by Bulgaria where the Committee held that it was insufficient to just provide for access to justice on the EIA and not the resulting permit decision.

"The members of the public concerned, including environmental organizations, can challenge in court the EIA decision, i.e., the first decision issued in the tiered process. However, they are not entitled to appeal the final permit, which, after it is issued, subsumes the EIA decision, i.e., it includes the conditions and measures of the EIA decision. This situation gives rise to a number of concerns with respect to access of members of the public concerned to effective judicial review with regard to permitting the activities listed in annex I to the Convention." (para 78)

"(...) since environmental organizations, as well as other members of the public concerned, do not have access to a review procedure before a court of law or another independent and impartial body established by law to challenge such final permits for annex I activities, when EIA decisions are missing, the Party concerned fails to comply with article 9, paragraph 2, of the Convention." (para 79)

"Secondly, there are situations where the EIA statements are issued and these are subject to appeal, but the subsequent/final decisions are not subject to appeal by members of the public concerned, including organizations, even if those decisions are not in conformity with the conditions and measures contained in the EIA decision. This means that even if all the environmental aspects of a proposed activity were covered by the EIA decision, there is no possibility for members of the public, including environmental organizations, to challenge the legality of a final permit that did not respect that EIA decision. Therefore, the Party concerned fails to comply with article 9, paragraph 2, in conjunction with paragraph 4, of the Convention." (para 80)

This is of particular importance because the water permit in fact determines central aspects of the proposed activity, both environmental and non-environmental. Pursuant to Article 403 of the Water Law, the aim and scope of water use, terms and conditions of exploiting surface and ground water and obligations necessary to protect natural resources, the interests of people and the economy are set out, *inter alia*, in the water permit. It should be underlined that, the issuance of the water permit and not the EIA decision authorises the undertaking of the proposed activities. Also, the water permit determines "*relevant environmental conditions of the proposed activity*" and covers aspects not regulated in the EIA decision.

An example to illustrate this point is the Instruction for management of water, which is specified in the Article 404 of the Water Law. It is an elaboration constituting the basis for determination of the way of water management in case of utilization of water by means of damming it up. The Article 404 specifies that in order to obtain a water permit for damming[5] inland surface waters by a high-rise structure with a damming height above 1 m, the Instruction is required. The scope of the Instruction is specified by the Regulation of the Minister of the Environment of 17 August 2006, on the scope of water management instructions. The Instruction is an appendix to the water permit.

[5] Other word: impoundment

The Instruction contains, among others, damming levels, including the minimum level of damming, the minimum energy level, the normal level of damming, the maximum level of damming, the extraordinary level of damming, and their periods of validity; permissible speeds of lowering and increasing water levels in the upper and lower stands and many others. The impact of this particular structure on the hydrological regime below depends on the contents of this Instruction. And on larger dams, the impact on the river below depends on the detailed content of this Instruction.

This document appears only at the stage of the water law permit, not before - so not at the stage of the EIA decision. Consequently, the approval of this document takes place only in the water permit. Therefore the water permit still determines important elements on which NGOs should be able to participate.

In this regard, the findings on communication ACCC/C/2010/50 concerning compliance by the Czech Republic[6] are useful to mention:

"Although the Party concerned contends that the results of the EIA procedure are taken into account in the subsequent phases of the decision-making, members of the public must also be able to examine and to comment on elements determining the final building decision throughout the land planning and building processes. Moreover, public participation under the Convention is not limited to the environmental aspects of a proposed activity subject to article 6, but extends to all aspects of those activities." (para 70)

Article 9(3) of the Convention: No access to justice if water permits contravene national law related to the environment

Even if these water permits were found, for some reason, to not fall under Article 9.2 of the Aarhus Convention, they would nonetheless be covered by **Article 9.3** of the Aarhus Convention because they are national acts (potentially) contravening national law related to the environment. Specifically, the water permit at issue in judgment II SA/Gd 618/12, which was not covered by the EIA obligation under Polish law, could contravene for instance Article 78 point 2 of the Water Law[7].

New Water Law does not alter this situation

Lastly, the Act of 20 July 2017 - Water Law - came into force on 1 January 2018, replacing the previous Water Law that has been a subject of the Communication. However, **Article 402** of the new Law duplicates the provision of Article 127.8 of the previous Water Law excluding the application of Article 31 of the CAP, resulting in the exclusion of NGOs from participation in the administrative procedure for water permits. Contrary to the Party's claims (point III.1), Article 401.1 of the new Water Law does not apply to public participation in the proceedings for the issuance of water permits in terms of guaranteeing participation of non-governmental organisations.

Conclusion

The above information demonstrates that the Communication concerns very specific and concrete issues of non-compliance with the Convention and is supported by sufficient corroborating information in the sense of paragraph 19 of decision I/7.

Accordingly, all submissions included in the Communication are still relevant and the Communication should be declared admissible in its entirety.

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[6] https://www.unece.org/fileadmin/DAM/env/pp/compliance/C2010-50/Findings/ece_mp.pp_c.1_2012_11_eng.pdf
[7] Articel 78 point 2 of the Water Law states that sewage introduced into waters or into the ground as part of normal use of water or water services can not cause negative changes in those waters.