

Draft findings and recommendations with regard to communication ACCC/C/2017/146 concerning compliance by Poland

Adopted by the Compliance Committee on ...

i. Introduction

1. On 7 June 2017, the non-governmental organization Fundacja ClientEarth Prawnicy dla Ziemi (the communicant) submitted a communication to the Compliance Committee under the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention), alleging Poland failed to comply with articles 6 (1) (a) and 9 (2) and (3) of the Convention with regard to water permit proceedings.
2. On 7 September 2017, the Party concerned provided a statement on the preliminary admissibility of the communication.
3. At its fifty-eighth meeting (Budva, 10–13 September 2017), the Committee determined on a preliminary basis that the communication was admissible in accordance with paragraph 20 of the annex to decision I/7 of the Meeting of the Parties to the Convention. Pursuant to paragraph 22 of the annex to decision I/7, the communication was forwarded to the Party concerned on 19 September 2017 for its response.
4. On 19 February 2018, the Party concerned submitted its response to the communication, on time.
5. On 2 July 2018, the Committee sent a letter to the communicant inviting it to comment on the submissions on admissibility contained in the Party concerned's response. On 1 August 2018, the communicant provided its comments thereon. On 31 October 2018, the Party concerned submitted comments on the communicant's comments.
6. On 15 February 2022, the communicant provided an update.
7. On 3 May 2022, the Committee sent questions to the parties. On 1 and 6 June 2022, respectively, the communicant and the Party concerned submitted their replies.
8. The Committee held a hearing to discuss the substance of the communication at its seventy-fifth meeting (Geneva, 14–17 June 2022) with the participation of representatives of the communicant and the Party concerned.
9. On 13 December 2022, the Party concerned provided additional information. On 25 January 2023, the communicant provided comments on that letter and, on 19 May 2023, the Party concerned provided comments on the communicant's comments.
10. On 4 February 2025, the Committee sent questions to the Party concerned and the communicant and, on 28 February and 6 March 2025, respectively, the communicant and the Party concerned submitted their replies.
11. On 22 April 2025, the Committee sent further questions to the Party concerned and the communicant. On 9 and 14 May 2025, respectively, the Party concerned and the communicant submitted their replies and, on 23 May 2025, the communicant submitted comments on the replies of the Party concerned.
12. The Committee completed its draft findings through its electronic decision-making procedure on 31 March 2026. In accordance with paragraph 34 of the annex to decision I/7, the draft findings were forwarded on 15 April 2026 for comments to the Party concerned and the communicant. Both were invited to provide comments by 27 May 2026.

13. *The communicant and the Party concerned provided comments on the draft findings on [...] and [...] respectively.*

14. *At its [...] meeting (Geneva, [...]), the Committee proceeded to finalize its findings in closed session, taking account of the comments received. The Committee then adopted its findings through its electronic decision-making procedure on [...] and agreed that they should be published as a formal pre-session document to its [...]. It requested the secretariat to send the findings to the Party concerned and the communicant.*

II. Summary of facts, evidence and issues¹

A. Legal framework²

Code of Administrative Procedure

15. Article 31 of the Act of June 1960 on the Code of Administrative Procedure (the CAP) regulates the access of civil society organizations to administrative proceedings. Article 31 applies to all administrative proceedings that result in decisions being issued, unless stated otherwise in a particular act.³

Water Law

At the time the communication was submitted

16. Article 122 (1), point 1, of the 2001 Water Law, as amended in 2007 (2007 Water Law), states that, unless provided otherwise, a water permit is required for the specific use of waters.⁴

17. Pursuant to article 127 (8) of the 2007 Water Law, article 31 CAP is not applicable to proceedings regarding water permits.⁵

Legislative developments since the communication's submission

18. On 1 January 2018, the Act of 20 July 2017 on Water (2017 Water Law), which replaced the 2007 Water Law, came into force.⁶

19. Article 389 of the 2017 Water Law stipulates that, unless provided otherwise, a water permit is required, inter alia, for specific use of waters.⁷

20. Article 402 (1) of the 2017 Water Law duplicates article 127 (8) of the 2007 Water Law, excluding the application of article 31 CAP in water permit proceedings.⁸

21. On 13 May 2021, the Act of 30 March 2021 amending the EIA Act and other special acts entered into force, inter alia, amending the Water Law, including adding a new paragraph 2 to article 402 of the Water Law.⁹

¹ This section summarizes only the main facts, evidence and issues considered to be relevant to the question of compliance, as presented to and considered by the Committee.

² This section reflects the legal framework as at the date the communication was submitted. Subsequent legislative developments are summarized in paras. 39 - 47 below.

³ Communication, p. 4.

⁴ Party's reply to Committee's questions, 6 June 2022, annex 1, pp. 3-4.

⁵ Communication, p. 4.

⁶ Communicant's comments, 1 August 2018, p. 6.

⁷ Party's reply to Committee's questions, 6 June 2022, annex 1, p. 1.

⁸ Communicant's comments, 1 August 2018, p. 6.

⁹ Communicant's update, 15 February 2022, p. 2.

22. Article 402 (2) provides that article 86g of the EIA Act (see paras. 32-33 below) applies to water permit proceedings preceded by a “decision on environmental conditions” (also known as the “EIA decision”).¹⁰

23. Pursuant to article 403 (1) of the 2017 Water Law, the water permit determines, inter alia, the purpose of water facilities and other works to be performed, the purpose and scope of water use, the conditions for exercising the permit and the obligations necessary for the protection of environmental resources, interests of the population and the economy, within the range of impact of the intended use of water or water facilities planned to be constructed.¹¹

24. Article 407 (3) of the 2017 Water Law specifies that, in order to obtain a water permit for damming inland surface waters by a high-rise structure with a damming height above one metre, an “Instruction for management of water” is required to be appended to the water permit.

25. Until 2019, the scope of the Instruction for management of water was specified by the Regulation of the Minister of the Environment of 17 August 2006 on the scope of water management instructions. In 2019, the 2006 Regulation was replaced by the Regulation of the Minister of Maritime Affairs and Inland Navigation of 21 August 2019 on the scope of water management instructions.¹²

EIA Act

26. The Convention is implemented in the Party concerned’s legal framework through, inter alia, the Act of 3 October 2008 on access to information on the environment and environmental protection, public participation in environmental protection and environmental impact assessment (EIA Act).¹³

27. Article 44 (1) of the EIA Act provides that environmental organizations which, relying on their statutory objectives, declare their willingness to participate in administrative proceedings requiring public participation, shall participate therein with the rights of a party, if they conduct statutory activities in the field of the environmental protection for a minimum of 12 months before the proceeding started.¹⁴

28. Pursuant to article 44 (2) and (3) of the EIA Act, an environmental organization shall have the right to appeal to an administrative court against a decision issued in a proceeding requiring public participation, if it is justified by the statutory purposes of the organization, even where it did not participate in the specific proceeding requiring public participation.¹⁵

29. Article 72 (1), item 6, of the EIA Act requires the issuance of a decision on the environmental conditions prior to obtaining a water permit.¹⁶

30. According to article 79 (1) of the EIA Act, prior to the issuance of a decision on the environmental conditions, the competent authority shall ensure the possibility of public participation in the proceedings within the framework of which the EIA for the project is carried out.¹⁷

31. According to article 82 of the EIA Act, all environmental matters are resolved at the stage of issuing the decision on environmental conditions for a given project.¹⁸

¹⁰ Communicant’s update, 15 February 2022, p. 2

¹¹ Party’s reply to Committee’s questions, 6 June 2022, annex 1, p. 1.

¹² Communicant’s comments, 1 August 2018, p. 5, communicant’s update, 15 February 2022, p. 8; Party’s reply to Committee’s questions, 6 June 2022, annex 1, p. 3.

¹³ Party’s response, 19 February 2018, p. 1.

¹⁴ Party’s response, 19 February 2018, p. 3; communicant’s update, 15 February 2022, p. 12.

¹⁵ Communicant’s update, 15 February 2022, p. 12.

¹⁶ Party’s response, 19 February 2018, p. 5; Party’s reply to Committee’s questions, 6 June 2022, annex 1, p. 4.

¹⁷ Party’s response, 19 February 2018, p. 4; Party’s reply to Committee’s questions, 6 June 2022, annex 1, p. 4.

¹⁸ Party’s response, 19 February 2018, p. 4.

32. Pursuant to article 86g (1) of the EIA Act, an environmental organization that has carried out statutory activities in the field of environmental protection for at least 12 months shall have the right to appeal against an investment permit preceded by a decision on environmental conditions issued in proceedings requiring public participation, also where the organization did not in the administrative proceedings.¹⁹

33. Pursuant to article 86g (2) of the EIA Act, the appeal shall be lodged to the extent that the authority competent to issue the investment permit is bound by the decision on environmental conditions.²⁰

EIA Regulations

At the time the communication was submitted

34. Subject to section 2 (1), items 35, 37, 38 and 39 of the Regulation of the Council of Ministers of 9 November 2010 on types of projects likely to have significant effects on the environment (2010 EIA Regulation) the following are regarded as projects likely to always have a significant effect on the environment:

- Dams or other facilities intended to retain and permanently retain (accumulate) not less than 10 million m³ of new or additional mass of water;
- Devices or sets of devices that enable groundwater abstraction or artificial groundwater recharging with a minimum water abstraction capacity of 1100 cubic metres per hour;
- Water transfer facilities only for the purpose of increasing the water resources of other natural watercourses, channels, lakes and other water bodies, in quantities not lower than 100 million m³ per year, excluding transport of water intended for human consumption through water supply systems;
- Water transport facilities, if the mean annual flow in the catchment area from which the water is taken is not lower than 2 billion m³ per year and the amount of water transported is higher than 5% of this flow, excluding transport of water intended for human consumption through water supply systems.²¹

Legislative developments since the communication was submitted

35. In 2019, the 2010 EIA Regulation (see para. 34 above) was replaced by a Regulation of the Council of Ministers of 10 September 2019 on projects likely to have significant effects on the environment (the 2019 EIA Regulation). The 2019 EIA Regulation added “excluding the transmission of water intended for human consumption through water supply systems” to section 2 (1), items 38 and 39, of the Regulation. Items 35, 37, 38 and 39 are otherwise unchanged.²²

B. Domestic remedies and admissibility

36. The communicant claims that since, under Polish law, environmental NGOs cannot participate in proceedings regarding water permits, no domestic remedies were available.²³ Citing three judgments, including a 2017 judgment of the Supreme Administrative Court, it submits that it would have therefore been a waste of resources for it to attempt to file such a challenge with the national courts.²⁴

¹⁹ Communicant’s update, 15 February 2022, pp. 2, 13.

²⁰ Communicant’s update, 15 February 2022, pp. 2, 13.

²¹ Party’s response, 19 February 2018, p. 4; Party’s reply to Committee’s questions, 6 June 2022, annex 1, p. 5.

²² Communicant’s update, 15 February 2022, p. 3; communicant’s reply to Committee’s questions, 1 June 2022, annex 2, p. 7; Party’s reply to Committee’s questions, 6 June 2022, annex 1, p. 5,

²³ Communication, p. 7; communicant’s comments, 1 August 2018, pp. 1-2.

²⁴ Communicant’s comments, 1 August 2018, p. 2.

37. The Party concerned claims that the matters listed in points 10, 11 and 13 of annex I to the Convention are each subject to an EIA procedure and that therefore, the communicant should in the first place have used the opportunity to take part in EIA proceedings which provide NGOs with effective public participation and, thereafter, access to justice. Since the communicant did not make use of this possibility, the Party concerned submits that the communication should be determined inadmissible.²⁵

38. Regarding the judgments cited by the communicant in paragraph 36 above, the Party concerned submits that the communicant was not a party to any of these cases, and that only one case was considered by the Supreme Administrative Court. Thus, only in this latter case, the available domestic remedies were fully used. The Party concerned submits moreover that the communicant has not demonstrated that these judgments relate to projects which are covered by the Convention. It submits that the communicant has therefore neither exhausted nor attempted to exhaust domestic remedies.²⁶

C. Substantive issues

Article 6 (1) (a) – scope of activities in Annex I, paras. 10, 11 and 13

39. The communicant submits that the permit for the use of waters (“water use permit”) for an installation within the scope of paragraphs 10, 11 and 13 of Annex I to the Convention is a decision permitting an activity under article 6 of the Convention. However, under the legal framework of the Party concerned, a water use permit is not considered to be an activity requiring either EIA or EIA screening.²⁷

40. The communicant submits that the scope of section 2 (1), items 35, 37, 38 and 39, of the 2010 EIA Regulation, now replaced by the 2019 EIA Regulation, is narrower than paragraphs 10, 11 and 13 of annex I of the Convention in that it covers only public participation on decisions on environmental conditions for construction of installations for groundwater abstraction or transfer of water, and not for the use of water itself.²⁸

41. The communicant refers to several examples of water use permits which it claims were issued for activities meeting the thresholds in paragraphs 10, 11 or 13 of Annex I without public participation, including:

(a) *Water use permit of 4 March 2021 for Racibórz Dolny reservoir*

42. The communicant submits that the capacity of Racibórz Dolny reservoir is 185 million cubic metres, and therefore significantly above the threshold of 10 million cubic metres in paragraph 13 of annex I to the Convention. It submits that the reservoir was put into use in 2020 and the water use permit dated 4 March 2021 was the first water permit enabling the operating of the reservoir. It submits that, in light of the capacity of the reservoir, the water use permit was required to undergo public participation under article 6 of the Convention. However, no such public participation was carried out.²⁹

(b) *Water use permit of 22 September 2022 for Słup reservoir*³⁰

43. The communicant submits that the capacity of the Słup reservoir is 25.18 million cubic metres, and therefore above the threshold of 10 million cubic metres in paragraph 13 of annex I to the Convention. It submits that the water permit of 22 September 2022 was a new permit permitting the operation of the reservoir and that, in light of the capacity of the reservoir, it was required to undergo public participation under article 6 of the Convention. However, no such public participation was carried out.

²⁵ Party’s statement on preliminary admissibility, 7 September 2017.

²⁶ Party’s response, 19 February 2018, p. 1; Party’s comments, 31 October 2018, pp. 1 and 4.

²⁷ Communicant’s comments on Party’s submissions, 1 August 2018, p. 3; communicant’s update, 15 February 2022, p. 3.

²⁸ Communicant’s comments on Party’s submissions, 1 August 2018, p. 3; communicant’s update, 15 February 2022, p. 3.

²⁹ Communicant’s reply to Committee’s questions, 28 February 2025, annex 2.

³⁰ Communicant’s reply to Committee’s questions, 28 February 2025, annex 3.

44. The Party concerned concedes that no public participation was carried out prior to granting the two above permits. It submits, however, it was under no requirement to do so. It states that these permits:

sanctioned the operation of the already constructed facility. These activities are not included in the list referred to in Annex I, items 10, 11 and 13, in relation to Article 6 of the Aarhus Convention. The water law permits granted by the above decision only concern the use of water and do not grant any rights to implement new projects involving the construction of new facilities or the reconstruction or extension of existing water facilities.³¹

Public participation in the decision on environmental conditions but not the water permit itself – article 6 (1)

45. The communicant submits that the Party concerned fails to comply with article 6 (1) of the Convention with respect to decision-making on water permits subject to an EIA procedure, because it provides for public participation only on the decision on environmental conditions and not on the water permit itself.

46. The communicant submits that it is the water permit, and not the decision on environmental conditions, that authorises the undertaking of the proposed activity, and the decision on environmental conditions is only a first decision in a tiered decision-making process. The communicant claims that the water permit determines both environmental and non-environmental aspects of the proposed activity and covers aspects not regulated in the decision on environmental conditions. These include, pursuant to article 403 of the 2017 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, and the interests of people and the economy.³²

47. To substantiate its claim, the communicant points to the “Instruction for management of water” addressed in article 404 of the 2017 Water Law. The obligation to prepare the “Instruction for management of water” arises at the stage of applying for a water permit and not before the decision on environmental conditions and concerns “the damming up of surface waters by a damming structure with a damming height of more than 1 m and equipped with devices enabling the regulation of flow”, the “interdependent use of water by several establishments”, but also whenever the competent authority deems necessary. The Instruction stipulates, inter alia, “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” and how the needs of all users benefiting from the water facilities to which the water management instruction relates are to be met.³³

48. By way of example, the communicant refers to the decision on environmental conditions for the reconstruction and renovation of the facilities of the Włocławek dam and the water management instruction for the Włocławek dam and reservoir.³⁴

49. The Party concerned submits that, under article 72 (1), item 6, of the EIA Act, a decision on environmental conditions must be issued prior to obtaining a water permit and the public authority issuing the water permit is bound by the decision on environmental conditions. It submits that all environmental issues related to a given project are determined at the stage of issuing the decision on environmental conditions, while the water permit is the stage at which the objective, scope and obligations related to the planned use of water are determined.³⁵ It states that, at the stage of issuing a water permit, there is no possibility to change the arrangements regarding the impact of a given project on the environment.

³¹ Party’s reply to Committee’s questions, 9 May 2025, pp. 2-3.

³² Communicant’s comments, 1 August 2018, p. 5.

³³ Communicant’s comments, 1 August 2018, pp. 5-6; communicant’s reply to Committee’s questions, 1 June 2022, pp. 6-7; annex 10, pp. 1-3; annexes 12 and 14.

³⁴ Communicant’s comments, 1 August 2018, pp. 5-6; communicant’s reply to Committee’s questions, 1 June 2022, p. 7; annex 10, pp. 1-3; annexes 12 and 14.

³⁵ Party’s comments, 31 October 2018, p. 2; Party’s reply to Committee’s questions, 6 June 2022, p. 4.

Therefore, the aforementioned legal structure does not “infringe” article 6 (1) (a) of the Convention.³⁶

50. The Party concerned cites the Committee’s report to the third session of the Meeting of the Parties, in which it stated that in the case of a project that is dependent on obtaining multiple 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.³⁷

51. The Party concerned states that, pursuant to article 44 (1) of the EIA Act, NGOs may participate at parties in the process of issuing the decision on environmental conditions, which forms the basis for the water permit.³⁸

52. The Party concerned contends that the communicant’s submissions (see paras. 46 and 47 above) regarding article 403 and article 404 of the 2017 Water Law (now article 407, point 3 of the Water Law) are incorrect. The Party concerned claims 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 EIA report during the EIA procedure. It states that the water management instruction is an executive document which describes the action plans with regard to hydrological conditions and that the water permit approving the water management instruction 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.³⁹

Access to justice regarding the decision on environmental conditions but not the water permit itself – article 9 (2)

53. With respect to water permits subject to an EIA procedure, the communicant submits that the Party concerned provides NGOs with the possibility to challenge the decision on environmental conditions, but not the water permit itself.⁴⁰

54. The communicant submits that the 2021 amendment to article 402 (2) of the Water Law, applying article 86g of the EIA Act to water permit proceedings, has partially addressed this issue, but it has not been completely resolved. Environmental NGOs can now challenge water permits that have been preceded by an EIA procedure, but only to the extent that the water permit is inconsistent with the decision on environmental conditions. Accordingly, access to justice is limited to challenging the permit’s compliance with the decision on environmental conditions. This means, for example, that any claim focused on the procedure for adopting the water permit is excluded. The communicant claims that such a limited scope of review does not comply with article 9 (2) of the Convention.⁴¹

55. The Party concerned submits that, pursuant to article 86g (1) of the EIA Act, environmental organizations meeting the formal requirements are entitled to appeal against the decision on water permit to the extent which the authority competent to issue the permit is bound by the decision on environmental conditions. It submits that the Convention does not require environmental organizations to be granted rights going beyond this scope.⁴²

Access to justice to challenge negative EIA screening decisions on water permits – article 9 (2)

56. The communicant submits that there is no possibility to challenge EIA negative screening decisions without having previously participated in the administrative proceeding,

³⁶ Party’s response, 19 February 2018, p. 5; Party’s comments, 31 October 2018, pp. 2 and 4; Party’s reply to Committee’s questions, 6 June 2022, p. 4.

³⁷ Party’s response, 19 February 2018, p. 6.

³⁸ Party’s reply to Committee’s questions, 6 June 2022, p. 2.

³⁹ Party’s comments on the communicant’s comments, 31 October 2018, pp. 3-4.

⁴⁰ Communicant’s comments on Party’s submissions, 1 August 2018, p. 5; communicant’s reply to Committee’s questions, 1 June 2022, p. 9.

⁴¹ Communicant’s update, 15 February 2022, p. 8; communicant’s reply to Committee’s questions, 1 June 2022, pp. 8-9.

⁴² Party’s reply to Committee’s questions, 6 June 2022, p. 5.

and since there is no public participation on EIA screening decisions, they cannot be appealed by NGOs under article 44 (1) of the EIA Act.⁴³

57. The communicant submits that the only possibility for environmental organizations would have been to draw on article 31 CAP, but this is expressly excluded by article 402 (1) of the Water Law.⁴⁴

58. The communicant submits, moreover, that access to justice for NGOs under article 31 CAP does not meet the requirements of article 9 (2) of the Convention. First, under article 31 (1) (2) CAP, the NGO must apply to the public authority in charge of the proceedings for permission to participate in those proceedings and the public authority may refuse to grant permission. Second, in order to have access to justice under article 31 CAP the NGO must have itself participated in the administrative proceedings it seeks to challenge. The communicant submits that such a requirement is not in line with the Convention.⁴⁵

59. The communicant states that, if the authority issues a decision rejecting the request of admission, the organization may lodge an interlocutory appeal against that decision. However, the appeal does not have suspensive effect, with the result that the window of opportunity to challenge the negative screening decisions before an administrative court may close before the appeal to allow the participation of an organization has been finalized.⁴⁶

60. The Party concerned submits that the legislator did not provide for the possibility of challenging the EIA screening decision itself, since this may be appealed against as part of an appeal against the decision on environmental conditions, pursuant to articles 127 (1) and 142 of the CAP.⁴⁷ Subject to article 72 (1) item 6 of the EIA Act, a decision on environmental conditions must be issued prior to obtaining a water permit.⁴⁸

61. The Party concerned states that, as of 6 June 2022, it was not aware of any judgments in which an NGO was able to challenge the negative screening decision by means of appealing against the decision on environmental conditions but that this may be due to the short time period which had elapsed since the 2021 amendment to the 2017 Water Law.⁴⁹

Recent judicial developments regarding article 402 (1) 2017 Water Law

62. The communicant submits that in some recent cases the administrative courts have disappplied article 402 (1) of the 2017 Water Law to grant standing to NGOs in line with the Convention. This includes the judgment of 20 March 2020 by the Warsaw Regional Administrative Court on case no. IV Sa/Wa 1248/19, which was upheld by the Supreme Administrative Court in its judgment no. III OSK 3140/21 of 20 April 2021.⁵⁰ Thereafter, in judgment of 21 September 2021 on case no. II SA/Bk 416/21, the Regional Administrative Court of Białystok reached a similar conclusion.⁵¹

63. The communicant submits, however, that, in its judgment of 23 January 2020 on case no. II SA/Bk 751/19, the Regional Administrative Court of Białystok upheld the application of article 402 (1) of the Water Law, holding that, by accepting the participation of an NGO, the competent authority had infringed that provision.⁵²

64. The communicant submits this shows that there has not been a clear shift in the courts' jurisprudence and that a change in legislation is still needed, in particular to comply with article 3 (1) of the Convention, given that the law states the exact opposite of what the courts in some recent cases have held. It also submits that there is no guarantee that the

⁴³ Communicant's update, 15 February 2022, pp. 5-6; communicant's reply to Committee's questions, 1 June 2022, p. 9.

⁴⁴ Communicant's comments on Party's submissions, 1 August 2018, p. 4.

⁴⁵ Communicant's update, 15 February 2022, pp. 5-6.

⁴⁶ Communicant's update, 15 February 2022, pp. 6-7.

⁴⁷ Party's comments on the communicant's comments, 31 October 2018, p. 4.

⁴⁸ Party's response, 19 February 2018, p. 5.

⁴⁹ Party's reply to Committee's questions, 6 June 2022, p. 5.

⁵⁰ Communicant's update, 15 February 2022, pp. 9-10; communicant's reply, 1 June 2022; annexes 16 and 20.

⁵¹ Communicant's update, 15 February 2022, p. 10; communicant's reply to Committee's questions, 1 June 2022; annex 22.

⁵² Communicant's update, 15 February 2022, p. 10; communicant's reply, 1 June 2022; annex 18.

Supreme Administrative Court's judgment no. III OSK 3140/21 will be applied consistently to give access to justice to NGOs in all relevant factual constellations.⁵³

65. The Party concerned agrees with the communicant that the Supreme Administrative Court's judgment no. III OSK 3140/21 is binding only in that specific case and has no legally binding effects in other cases. However, it submits that, while not a source of generally applicable law, the judgment constitutes a significant component of legal interpretation considered by courts of lower instances which usually refer to the Supreme Administrative Court's judgments.⁵⁴

Access to justice regarding water permits not subject to EIA which contravene national law relating to the environment – article 9 (3)

66. The communicant submits that there is no provision in the Party concerned's legal framework that would enable members of the public to challenge decisions on water permits not subject to EIA which contravene provisions of national environmental law. It submits that the Party concerned has therefore failed to implement fully article 9 (3) of the Convention.⁵⁵

67. By way of example the communicant refers to the water permit examined in judgment II SA/Gd 618/12 of the Gdańsk District Court. The communicant submits that, while the permit was not subject to an EIA procedure, it could contravene article 78 (2) of the Water Law, which stipulates that sewage introduced into waters or into the ground as part of normal use of water or water services must not cause negative changes in those waters.⁵⁶

68. The Party concerned submits that its law guarantees environmental organizations the right to access to justice and it fulfils the requirements of article 9 (3) of the Convention. It claims that pursuant to article 402 (2) of the Water Law as in force since 13 May 2021, NGOs may challenge water permits preceded by a decision on environmental conditions before the courts. It further states that while, as of 6 June 2022, it had not identified any court judgments that allowed NGOs to challenge a water permit which was not subject to an EIA procedure, this was likely due to the short time period that had elapsed since article 402 (2) was enacted.⁵⁷

III. Consideration and evaluation by the Committee

69. Poland deposited its instrument of ratification of the Convention on 15 February 2002, meaning that the Convention entered into force for Poland on 16 May 2002, i.e. ninety days after the date of deposit of the instrument of ratification.

Admissibility

70. The Committee notes that a core aspect of the present communication is that the Party concerned fails to provide for access to justice under article 9 (2) and (3) of the Convention with respect to water permits, including negative EIA screening decisions.

71. The communicant has put before the Committee various judgments, including by the Supreme Administrative Court of the Party concerned (see para. 36 above), in support of its claim that environmental NGOs do not have access to justice regarding the matters addressed in its communication.

72. The Party concerned submits that, since the communicant was not itself a party to any of these proceedings, it has neither exhausted nor attempted to exhaust domestic remedies as envisaged in paragraph 21 of the annex to decision I/7.⁵⁸

⁵³ Communicant's update, 15 February 2022, p. 11; communicant's reply to Committee's questions, 1 June 2022, pp. 1-2.

⁵⁴ Party's reply to Committee's questions, 6 June 2022, p. 1.

⁵⁵ Communication, pp. 5-6.

⁵⁶ Communicant's comments on Party's submissions, 1 August 2018, p. 6.

⁵⁷ Party's response, 19 February 2018, p. 3; Party's reply to Committee's questions, 6 June 2022, p. 6.

⁵⁸ ECE/MP.PP/2/Add.8.

73. As stated in paragraph 118 of the Guide to the Aarhus Convention Compliance Committee,⁵⁹ since the compliance review mechanism is not a redress mechanism, if other members of the public have already exhausted the domestic remedies available to challenge the alleged non-compliance, then this may be taken into account by the Committee for the purposes of paragraph 21 of the annex to decision I/7.⁶⁰ The Committee takes note in this regard of the judgments put before it, including the 2017 judgment of the Supreme Administrative Court (see para. 36 above), which held that environmental NGOs do not have access to justice regarding the matters raised in the communication.

74. Since the Party concerned has not put before the Committee any recent judgments to show that it would indeed have been possible for the communicant to challenge the alleged noncompliance through domestic remedies, the Committee determines the communication to be admissible.

Scope of consideration

75. While the legal basis of the communicant's allegations have remained as set out in the communication, some allegations have been refined in the course of the procedure before the Committee.

76. Recalling its mandate to examine compliance issues and make recommendations if and as appropriate,⁶¹ the Committee will focus its considerations on the following four allegations on which the Party concerned has been provided with due opportunity to respond:

(a) By granting water use permits within the scope of paragraphs 10, 11 and 13 of Annex I to the Aarhus Convention that are not subject to public participation, and therefore access to justice, the Party concerned fails to comply with articles 6 (1) and 9 (2) of the Convention;

(b) By not allowing members of the public, including environmental NGOs, to challenge negative EIA screening decisions, the Party concerned fails to comply with articles 6 (1) (b) and 9 (2) of the Convention;

(c) Since public participation and access to justice regarding water permits is limited to the decision on environmental conditions, which is the first decision in the tiered process, the Party concerned fails to correctly implement articles 6 (1) and 9 (2) of the Convention;

(d) By denying access to justice to environmental NGOs to challenge water permits not subject to an EIA procedure which contravene national law related to the environment, the Party concerned fails to comply with article 9 (3) of the Convention.

Article 6 (1) (a) – scope of activities in Annex I, paras. 10, 11 and 13

77. Under the legal framework of the Party concerned a construction permit is required for a dam to be constructed and a separate water use permit for the dam to be filled and put into operation. It is common ground that the decision permitting the construction of a dam of more than 10 million m³ is a decision to permit an activity within the scope of paragraph 13 of annex I to the Convention, and therefore also article 6 (1) (a).⁶² The question before the Committee is whether the water use permit permitting the operation of the facility once it has been constructed is also a decision subject to the requirements of article 6 (1) (a) of the Convention.

78. On this point, the Committee recalls its findings on communication ACCC/C/2005/17 (European Community), in which it held:

⁵⁹ Second edition (2019), p. 31.

⁶⁰ ECE/MP.PP/2/Add.8.

⁶¹ ECE/MP.PP/2/Add.8, annex, para. 14.

⁶² Communicant's comments on Party's submissions, 1 August 2018, p. 3; communicant's update, 15 February 2022, p. 3; Party's reply to Committee's questions, 9 May 2025, p. 2-3.

The Committee is well aware that Parties to the Convention in their national legal frameworks provide a variety of approaches to regulatory control of activities listed in annex I of the Convention. Not all decisions required within national frameworks of regulatory control should necessarily be considered as “decisions on whether to permit proposed activities”. On the other hand, this does not mean that there is necessarily only one such a decision “to permit proposed activities”. In fact, many national frameworks require more than one such permitting decision.⁶³

79. In determining whether a water use permit for a facility covered by paragraphs 10, 11 or 13 of Annex I to the Convention is a permitting decision within the meaning of article 6 (1) (a) of the Convention, the Committee considers the findings on communication ACCC/C/2005/17 (European Community) to provide further useful assistance:

The Committee [...] considers that some kind of significance test, to be applied at the national level on a case-by-case basis, is the most appropriate way to understand the requirements of the Convention. The test should be: does the permitting decision, or range of permitting decisions, to which all the elements of the public participation procedure set out in article 6, paragraphs 2 to 10, apply embrace all the basic parameters and main environmental implications of the proposed activity in question? If, despite the existence of a public participation procedure or procedures with respect to one or more environment-related permitting decisions, there are other environment-related permitting decisions with regard to the activity in question for which no full-fledged public participation process is foreseen but which are capable of significantly changing the above basic parameters or which address significant environmental aspects of the activity not already covered by the permitting decision(s) involving such a public participation process, this could not be said to meet the requirements of the Convention.⁶⁴

80. Applying the above test to a dam within the scope of paragraph 13 of Annex I to the Convention, the Committee considers that, if in addition to the construction permit, a further permit is required to use and operate the dam, the construction permit itself by no means covers all the basic parameters and environmental implications of the dam. It is clear that a permit authorizing the filling and operation of a dam of 10 million m³ is an environment-related permitting decision with significant environmental implications. In line with the findings on communication ACCC/C/2005/17 (European Community), a water use permit for a dam of 10 million m³ is therefore a permitting decision within the meaning of article 6 (1) (a) of the Convention. The Party concerned is therefore required to carry out public participation meeting the requirements of article 6 prior to granting water use permits for dams of 10 million m³ and above.

81. Turning to the other activities listed in paragraphs 10, 11 and 13 of Annex I to the Convention, it is common ground that the Party concerned’s legal framework as currently in force does not require public participation meeting the requirements of article 6 on water use permits for any activities within the scope of paragraphs 10, 11, or 13 of annex I to the Convention.⁶⁵

82. Accordingly, by maintaining a legal framework which does not require public participation meeting the requirements of article 6 in decision-making to grant water use permits for activities within the scope of paragraphs 10, 11 or 13 of annex I to the Convention, the Party concerned fails to comply with article 6 (1) (a) of the Convention.

Access to justice for members of the public, including environmental NGOs, to challenge negative EIA screening decisions – article 9 (2)

83. In its findings on communication ACCC/C/2010/50 (Czech Republic), the Committee held that an EIA screening decision is a determination under article 6 (1) (b) and

⁶³ ECE/MP.PP/2008/5/Add.10, para. 43.

⁶⁴ ECE/MP.PP/2008/5/Add.10, para. 43.

⁶⁵ Communicant’s comments on Party’s submissions, 1 August 2018, p. 3; communicant’s update, 15 February 2022, p. 3; Party’s reply to Committee’s questions, 9 May 2025, pp. 2-3.

therefore a “decision...subject to the provisions of article 6” under article 9 (2) of the Convention.⁶⁶

84. Article 9 (2), final sentence, requires that NGOs meeting any applicable requirements under national law are deemed to have standing to challenge the substantive and procedural legality of any decision subject to the provisions of article 6. In line with the Committee’s above findings on communication ACCC/C/2010/50 (Czech Republic), this includes EIA screening decisions.

85. The communicant submits that article 31 CAP applies to challenges of EIA negative screening decisions. As a precondition to bring a challenge under article 31, the applicant must have been admitted to and participated in the administrative procedure preceding the decision. While EIA screening decisions are not subject to public participation, an NGO can request to be a party to the administrative procedure, but the public authority has discretion as to whether to grant that request. If permission is refused, the NGO can file an interlocutory appeal against the refusal. However, the appeal has no suspensive effect on the main procedure. The screening decision may therefore be issued before the complainant’s interlocutory appeal is decided, leaving the interlocutory appeal devoid of purpose.⁶⁷

86. As the Committee held in its findings on communication ACCC/C/2012/76 (Bulgaria), “the Convention does not make participation in the administrative procedure a precondition for access to justice to challenge the decision taken as a result of that procedure, and introducing such a general requirement for standing would not be in line with the Convention.”⁶⁸

87. Accordingly, a requirement that, to have standing to challenge a negative EIA screening decision, the NGO must have participated as a party in the administrative procedure leading up to the screening decision is not in line with article 9 (2). This is all the more so given that the NGO has no automatic right to participate in the administrative procedure but rather it must first request to do so, and then be granted permission by the competent public authority at its discretion.

88. In support of its claim that the Party concerned fails to provide for access to justice under article 9 (2) to challenge negative EIA screening decisions, the communicant cites two judgments (a 2019 judgment of the Supreme Administrative Court and a 2021 judgment of the Provincial Administrative Court of Lodz) in which NGOs were denied standing to challenge negative EIA screening decisions.⁶⁹

89. In response, the Party concerned claims that, while a negative EIA screening decision cannot be challenged directly, NGOs can challenge a negative EIA screening decision in the context of a challenge on the decision on environmental conditions.⁷⁰

90. Following the Committee’s invitation to provide relevant judgments to support its above claim, the Party concerned has put before the Committee one 2015 judgment by the Supreme Administrative Court (II OSK 2629/13) in which an environmental NGO was granted standing to challenge a negative EIA screening decision through challenging the decision on environmental conditions. In that judgment, the Court held that the NGO’s standing should have been assessed under article 44 of the EIA Act, rather than article 31 CAP (even though the negative screening decision meant that the proceeding was not subject to public participation).⁷¹

91. The Party concerned concedes that it has not been able to identify any other judgments in which an environmental NGO was granted standing to challenge a negative EIA screening decision, either through challenging the decision on environmental conditions or otherwise.⁷²

⁶⁶ ECE/MP.PP/C.1/2012/11, para. 82.

⁶⁷ Communicant’s update of 15 February 2022, p. 5; communicant’s opening statement for hearing at the Committee’s seventy-fifth meeting, p. 4.

⁶⁸ ECE/MP.PP/C.1/2016/3, para. 68.

⁶⁹ Communicant’s update of 15 February 2022, p. 21.

⁷⁰ Party’s comments on preliminary admissibility, 31 October 2018, p. 4.

⁷¹ Party’s reply to Committee’s questions, 6 March 2025, p. 1, and annex.

⁷² Party’s reply to Committee’s questions, 6 March 2025, p. 1.

92. It would therefore appear that the approach applied by the Supreme Administrative Court in its 2015 judgment has been ignored in the decade since. Indeed, in the two judgments before the Committee decided during the past ten years (the aforementioned 2019 Supreme Administrative Court judgment and 2021 judgment by the Provincial Administrative Court of Lodz), NGOs were denied standing to challenge negative EIA screening decisions.

93. In the absence of any other recent judgments to the contrary, the Committee must conclude that the 2019 Supreme Administrative Court judgment reflects the current legal situation in the Party concerned.

94. Based on the foregoing, the Committee finds that, by making the possibility for environmental NGOs to challenge negative EIA screening decisions conditional on the NGO having participated in the administrative procedure leading up to the screening decision, the Party concerned fails to comply with article 9 (2) of the Convention.

Public participation and access to justice regarding water permits is limited to the decision on environmental conditions - article 6 (1) (a) and 9 (2)

Public participation on decisions on whether to permit proposed activities - article 6 (1) (a)

95. The communicant submits that, under the Party concerned's legal framework, it is the water permit and not the decision on environmental conditions which authorizes the proposed activities to proceed and determines the environmental conditions applicable thereto. The administrative procedure to prepare the water permit is however limited to "parties to the proceedings" which excludes environmental NGOs and also the public concerned more generally.⁷³

96. The communicant submits that, while the decision on environmental conditions sets the general framework, the water permit still determines many important aspects of the actual activity. This includes for instance, parameterised quantities of water abstracted, and water and wastewater discharged, the method of water management, including the characteristic damming up levels together with deadlines and conditions for their maintenance and flows (including the quantity of minimum flow) and detailed technical conditions for monitoring the permit conditions.⁷⁴

97. To substantiate its claim, the communicant provides an example of the Instruction for management of water required under article 407 (3) of the 2017 Water Law.⁷⁵ The Instruction is appended to the water permit and is prepared during the administrative proceeding on the water permit, not at the time of the EIA procedure.⁷⁶

98. The Party concerned submits that all environmental considerations are taken into account in the EIA procedure and reflected in the decision on environmental conditions. There is therefore no requirement to provide for public participation regarding the water permit itself.⁷⁷

99. The Party concerned submits that providing public participation solely at the stage of the procedure on the decision on environmental conditions constitutes no restriction of rights and results from the permissible division of the permitting process (article 2 (2) of the EIA Directive) into two stages – i.e. the stage of issuing the decision on environmental conditions, followed by the stage of issuing the development consent (in the meaning of article 1 (2) (c) of the EIA Directive). It submits that the Convention does not dictate the structure of the decision-making process, that is whether it should be single-tiered or two-tiered.⁷⁸

⁷³ Communicant's update, 15 February 2022, p. 8.

⁷⁴ Communicant's opening statement for hearing at Committee's seventy-fifth meeting, p. 4.

⁷⁵ Communicant's reply to Committee's questions, 6 June 2022, annex 14.

⁷⁶ Communicant's update, 15 February 2022, p. 8.

⁷⁷ Party's response, 19 February 2018, p. 4.

⁷⁸ Party concerned's reply to Committee's questions, 6 June 2022, p. 4.

100. Article 6 (1) (a) of the Convention requires that each Party “shall apply the provisions of this article with respect to decisions on whether to permit proposed activities listed in annex I”. This means that Parties must provide for public participation meeting the requirements of article 6 on the decision permitting the activity itself.

101. The Committee notes that the Party concerned’s legal framework regarding water permits provides for a tiered decision-making process. The Convention does not require that public participation is necessarily provided for with respect to all the decisions within a tiered decision-making process. In determining which decisions in a tiered decision-making process should provide for public participation, the Committee recalls its findings on communication ACCC/C/2008/17 (European Community), as cited in paragraph 79 above.

102. In the present case, the communicant submits that the water permit still determines many important aspects of the activity (see para. 96 above). The Committee has examined the 186-page example of an Instruction for management of water required under article 407 (3) of the 2017 Water Law provided by the communicant.⁷⁹ Noting that the Instruction is prepared during the administrative procedure on the water permit and not during the EIA procedure, it is clear to the Committee that this is the case.

103. With respect to a legal framework in which public participation is provided for on the decision on environmental conditions but not on the water permit itself, the Committee recalls its findings on communication ACCC/C/2010/50 (Czech Republic), in which it held that:

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.⁸⁰

104. The Committee considers the above findings to be equally applicable to decision-making on water permits.

105. Accordingly, the Committee finds that, by providing for public participation only during the EIA procedure and not during the decision-making on the water permit itself, the Party concerned fails to comply with article 6 (1) (a) of the Convention.

Access to justice regarding water permits – article 9 (2)

At the time the communication was submitted

106. It is common ground that, at the time the communication was submitted, environmental NGOs had access to justice under article 44 of the EIA Law to challenge the decision on environmental conditions but not the water permit itself.⁸¹

107. The Party concerned submits that since the conditions in the decision on environmental conditions are binding on the public authority issuing the water permit, it is sufficient to provide access to justice regarding the decision on environmental conditions only.⁸²

108. The Committee considers the above situation analogous to that it examined in its findings on communication ACCC/C/2011/58 (Bulgaria), in which it held:

...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.

⁷⁹ Communicant’s update, 15 February 2022, annex 14.

⁸⁰ Communicant’s opening statement for hearing at Committee’s seventy-fifth meeting, p. 4.

⁸¹ Communicant’s comments, 1 August 2018, p. 5; Party’s response, 19 February 2018, pp. 5-6.

⁸² Party’s response, 19 February 2018, pp. 5-6.

Therefore, the Party concerned fails to comply with article 9, paragraph 2, in conjunction with paragraph 4, of the Convention.⁸³

109. In line with its findings on communication ACCC/C/2011/58 (Bulgaria), the Committee finds that, by denying the public concerned the possibility to challenge water permits even when the water permit was not in conformity with the conditions and measures contained in the decision on environmental conditions, the legal framework of the Party concerned as in force at the time the communication was submitted failed to comply with article 9 (2) of the Convention.

Following the 2021 amendment to the EIA and Water Laws

110. Pursuant to article 86 (f) (1) of the EIA Law as currently in force, an environmental NGO which has carried out activities in the field of environmental or nature protection for at least 12 months “shall have the right to appeal against the investment permit preceded by a decision on environmental conditions issued in the proceedings requiring public participation.”

111. Pursuant to article 86 (f) (6), the appeal is limited to the “extent the investment project permit is inconsistent with the decision on environmental conditions or fails to take into account its provisions”.

112. The Committee understands that, in the present context, the “investment project permit” is the water permit.

113. Article 9 (2) of the Convention provides for access to justice to challenge the “substantive and procedural legality of any decision, act or omission subject to the provisions of article 6”.

114. In its findings on communication ACCC/C/2008/31 (Germany), the Committee held:

While the Convention relates to environmental matters, there may be legal provisions that do not promote protection of the environment, which can be violated when a decision under article 6 of the Convention is adopted, for instance, provisions concerning conditions for building and construction, economic aspects of investments, trade, finance, public procurement rules, etc. Therefore, review procedures according to article 9, paragraph 2, of the Convention should not be restricted to alleged violations of national law “serving the environment”, “relating to the environment” or “promoting the protection of the environment”, as there is no legal basis for such limitation in the Convention.⁸⁴

115. In its report on decision VI/8d (Bulgaria) to the Meeting of the Parties at its seventh session, the Committee held:

the Party concerned must ensure that members of the public, including environmental organizations, have access to justice to challenge not only those aspects of the procedural and substantive legality of construction and exploitation permits that can be addressed through review procedures on the EIA decision. Rather, the Party concerned must put in place the necessary measures to ensure that members of the public are also able to address any aspects of the procedural and substantive legality of construction and exploitation permits that cannot be addressed through review procedures on the EIA decision itself.⁸⁵

116. In line with its above findings on communication ACCC/C/2008/31 (Germany) and report on decision VI/8d (Bulgaria), the Committee does not consider that providing environmental NGOs with the possibility to challenge the water permit to the extent that it “is inconsistent with the decision on environmental conditions or fails to take into account its provisions” is sufficient to meet the requirement to provide for access to justice to challenge

⁸³ ECE/MP.PP/C.1/2013/4, para. 80.

⁸⁴ ECE/MP.PP/C.1/2014/8, para. 78;

⁸⁵ ECE/MP.PP/2021/49, para. 51.

the “substantive and procedural legality” of a water permit subject to the provisions of article 6 of the Convention.

117. Accordingly, the Committee finds that, by providing environmental NGOs the possibility to challenge only the extent to which a water permit subject to article 6 of the Convention “is inconsistent with the decision on environmental conditions or fails to take into account its provisions”, the Party concerned’s current legal framework fails to provide access to challenge the “substantive and procedural legality” of water permits as required by article 9 (2) of the Convention.

Access to justice for environmental NGOs to challenge water permits conducted without EIA which contravene national law related to the environment – article 9 (3)

Applicability of article 9 (3) to water permits not preceded by EIA

118. Water permits granted under the 2007 and 2017 Water Law are “acts...by public authorities” within the meaning of article 9 (3).

119. As to whether the Water Law is part of the Party concerned’s “national law relating to the environment” within the meaning of article 9 (3), in line with its previous findings,⁸⁶ the Committee considers that whether a law “relates to the environment” should be determined with reference to the implied definition of “environment” in the definition of “environmental information” in article 2 (3) of the Convention. Article 2 (3) (a) includes “water” as an element of the environment. The Committee accordingly considers the Water Law to be part of the Party concerned’s “national law relating to the environment”.

120. Water permits not preceded by EIA may potentially contravene national law relating to the environment. For example, article 403 of the Water Law sets out a list of requirements that all water permits, including those not subject to EIA, must address. A failure to include in a water permit any of the mandatory requirements set out in article 403 of the Water Law would potentially mean that the water permit contravened provisions of “national law relating to the environment”.

121. Therefore, the Party concerned is required to provide for access to justice meeting the requirements of article 9 (3) with respect to water permits not preceded by EIA which contravene national law relating to the environment. The Committee examines below whether the Party concerned meets the requirements of article 9 (3).

Standing for environmental NGOs to challenge water permits under article 9 (3)

122. In its findings on communication ACCC/C/2015/135 (France), the Committee held:
article 9 (3) permits Parties to lay down criteria in their national law regarding which members of the public are entitled to have access to administrative or judicial procedures to challenge a particular act or omission. [...] [However] Parties may not introduce or maintain 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 law relating to the environment. Moreover, criteria for standing that bar all members of the public except NGOs would not comply with article 9 (3) either.⁸⁷

123. It is common ground that:

(a) Article 402 (1) of the 2017 Water Law expressly excludes the application of article 31 CAP, the general provision on access to justice under the Party concerned’s legal framework (see para. 20 above);

⁸⁶ E.g. findings on communication ACCC/C/2013/88 (Kazakhstan), ECE/MP.PP/C.1/2017/12, para. 128. See also the Aarhus Convention: An Implementation Guide, second edition, United Nations (2014), p. 177.

⁸⁷ ECE/MP.PP/C.1/2020/9, para. 67, see also the Committee’s findings on communication ACCC/C/2006/18 (Denmark), ECE/MP.PP/2008/5/Add.4, para. 30.

(b) Access to justice on water permits is instead regulated by article 402 (2) of the Water Law and article 86 (g) of the EIA Law (see para. 22 above);

(c) Article 86 (g) provides that environmental NGOs that have been active for more than 12 months can challenge a water permit preceded by a decision on environmental conditions that was subject to public participation (see paras. 32-33 above);

(d) Public participation on water permits is carried out in the context of the EIA procedure (see para. 30 above). If there is no EIA procedure, no public participation procedure is carried out.

124. The Party concerned has not put before the Committee any judgments in which environmental NGOs were granted standing to challenge water permits not subject to EIA which contravened national law relating to the environment.

125. The communicant has, however, referred the Committee to several recent judgments, including a 2021 judgment of the Supreme Administrative Court (SAC), in which the court disapplied article 402 (1) of the Water Law as being inconsistent with article 9 (3) of the Convention.⁸⁸ In those judgments, the courts set aside article 402 (1) of the Water Law in order to grant standing to the environmental NGOs to challenge water permits not preceded by EIA under the general access to justice provision of article 31 CAP.

126. However, the Party concerned has informed the Committee that: “such judgment of an administrative court is binding only in this specific case and [has] no binding effect in any other cases. The judgments rendered by the SAC are neither a source of generally applicable law nor amend the existing legal status.”⁸⁹

127. The Committee also notes that the explicit wording of article 402 (1) directly excludes the application of article 31 of the Code on Administrative Procedure in proceedings concerning water permits.

128. The Committee recalls that article 3 (1) of the Convention requires that each Party “shall take the necessary legislative, regulatory and other measures...to establish and maintain a clear, transparent and consistent framework to implement the provisions of this Convention.” While welcoming the abovementioned 2021 judgment of the Supreme Administrative Court, given the explicit wording of article 402 (1) of the Water Law, the Committee does not consider the judgment is sufficient to establish a “clear, transparent and consistent framework” to implement article 9 (3) of the Convention with respect to standing for environmental NGOs to challenge water permits not preceded by EIA which contravene national law relating to the environment.

129. The Committee accordingly finds that, by not establishing a clear, transparent and consistent framework providing access to justice for environmental NGOs to challenge water permits not preceded by EIA which contravene national law relating to the environment, the Party concerned fails to comply with article 3 (1) in conjunction with article 9 (3) of the Convention.

IV. Conclusions and recommendations

130. Having considered the above, the Committee adopts the findings and recommendations set out in the following paragraphs:

A. Main findings with regard to non-compliance

131. The Committee finds that:

(a) By maintaining a legal framework which does not require public participation meeting the requirements of article 6 in decision-making to grant water use permits for

⁸⁸ Communicant’s update, 15 February 2022, p. 10.

⁸⁹ Party concerned’s reply to Committee’s questions, 6 June 2022.

activities within the scope of paragraphs 10, 11 or 13 of annex I to the Convention, the Party concerned fails to comply with article 6 (1) (a) of the Convention;

(b) By making the possibility for environmental NGOs to challenge negative EIA screening decisions conditional on the NGO having participated in the administrative procedure leading up to the screening decision, the Party concerned fails to comply with article 9 (2) of the Convention.

(c) By providing for public participation only during the EIA procedure and not during the decision-making on the water permit itself, the Party concerned fails to comply with article 6 (1) (a) of the Convention;

(d) By denying the public concerned the possibility to challenge water permits even when the water permit was not in conformity with the conditions and measures contained in the decision on environmental conditions, the legal framework of the Party concerned as in force at the time the communication was submitted failed to comply with article 9 (2) of the Convention;

(e) By providing environmental NGOs the possibility to challenge only the extent to which a water permit subject to article 6 of the Convention “is inconsistent with the decision on environmental conditions or fails to take into account its provisions”, the Party concerned’s current legal framework fails to provide access to challenge the “substantive and procedural legality” of water permits as required by article 9 (2) of the Convention;

(f) By not establishing a clear, transparent and consistent framework providing access to justice for environmental NGOs to challenge water permits not preceded by EIA which contravene national law relating to the environment, the Party concerned fails to comply with article 3 (1) in conjunction with article 9 (3) of the Convention.

B. Recommendations

132. The Committee, pursuant to paragraph 35 of the annex to decision I/7 of the Meeting of the Parties, [and noting the agreement of the Party concerned that the Committee take the measures requested in paragraph 36 (b) of the annex to decision I/7,] recommends that the Party concerned take the necessary legislative, regulatory, administrative and practical measures to ensure that:

(a) Water use permits for activities within the scope of paragraphs 10, 11 or 13 of Annex I to the Convention are subject to public participation meeting the requirements of article 6 of the Convention;

(b) NGOs meeting the requirements referred to in article 2 (5) of the Convention are entitled to challenge negative EIA screening decisions even if they did not participate in the administrative procedure leading up to the screening decision;

(c) NGOs meeting the requirements referred to in article 2 (5) of the Convention are entitled to challenge the substantive and procedural legality of water permits subject to article 6 of the Convention, as required by article 9 (2) of the Convention, and not merely the extent to which the water permit is inconsistent with the decision on environmental conditions or fails to take into account its provisions;

(d) It establishes a clear, transparent and consistent framework providing for access to justice for NGOs meeting the requirements referred to in article 2 (5) of the Convention to challenge water permits not preceded by EIA which contravene national law relating to the environment.