

Chapter 2.

STANDING OF ENVIRONMENTAL ORGANIZATIONS ACTING UNDER THE RIGHTS OF PARTIES IN THE POLISH ADMINISTRATIVE PROCEEDINGS

Anna Budnik¹

I. Introduction

Social participation in the administrative procedure is a problem that has been broadly discussed in the theory of administrative law in Poland. The said participation is a means by which social values are protected and public authorities are controlled by entities that operate outside the system of public administration. One important aspect of social participation in the administrative procedure is manifested by the participation of social organizations in the procedure before administrative authorities.

In general, participation of social organizations in the Polish administrative procedure is regulated in Art. 31 of the Code of Administrative Proceedings (hereinafter referred to as CAP).² However, the Act of 3 October 2008 on the release of information about environment and its protection, participation of the public in the environmental protection and assessment of the environmental impact (hereinafter referred to as the Act of 2008)³ regulated the status of environmental organizations in all environmental matters requiring

-
- 1 PhD, LL.M., Department of Environmental Law and Public Administration, Faculty of Law, University of Białystok, Poland.
 - 2 Act of 14 June 1960 – the Code of Administrative Procedure (consolidated text – Journal of Laws 2013, item 267, as amended).
 - 3 Consolidated text – Journal of Laws 2013, item 1235, as amended.

social participation separately.⁴ Thus, in these cases the application of the CAP is excluded.

Provisions of the Act of 2008 regarding participation of the public in environmental matters, including ecological organizations, are explication of the rights guaranteed by the Aarhus Convention of 25 June 1998⁵ that Poland ratified in 2001. This Convention refers to two main rights: the right of everyone to receive environmental information that is held by public authorities and the right to participate in environmental decision-making.⁶

The paper presents the right of ecological organizations to participate in environmental decision making. It discusses conditions that they have to meet in order to have standing in the proceedings before public administration bodies. The article argues that in Polish law environmental organizations have a broad access to administrative proceedings in environmental matters and Poland fully implemented the Aarhus Convention with respect to relevant provisions on participation of ecological organizations in the administrative procedure.

The paper starts with an explanation of a definition of a social and ecological organization in the Polish administrative procedure. The second part presents general considerations about social organizations in the administrative procedure. The third paragraph describes the position of social organizations under the CAP. The last section discusses the status of ecological organizations in environmental matters under the Act of 2008.

II. Ecological organizations as social organizations

The Act of 2008 in Art. 3 sec. 10 introduced a notion of an environmental organization to Polish environmental law and defined it as “a social organization whose statutory goal is the environmental

4 A notion of an environmental organization and ecological organization will be used interchangeably.

5 The Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters; came into force on 30 October 2001.

6 About the Aarhus Convention see more at <http://www.unece.org/env/pp/treatytext.html> (15 September 2015).

protection.”⁷ This definition refers to two main aspects. The first one is that all environmental organizations are social organizations. There is no legal definition of a social organization in Polish law. Although Art. 5 para. 2 point 5 of the CAP provides that “social organizations shall mean professional organizations, local government organizations, co-operatives and other social organizations”, this broad and general provision does not explicate what a social organization is. It only gives examples of different types of social organizations. Neither the CAP nor other statutes determine features which all social organizations shall demonstrate. These conditions have been formulated by the theory of administrative law and they are as follows. A social organization is an association of people and this concept embraces associations of different types and forms.⁸ Another feature of social organizations is legality of their operation, which means that associations whose purpose is contrary to the Constitution of the Republic of Poland are prohibited. Legality also implies that bye-laws of social organizations should be based on law whereas legal forms of their actions shall be stipulated by law. Another feature is durability of purpose of social organizations and, finally, the operation of social organizations shall be outside the structure of the State.⁹

The second important element of a statutory definition is that the purpose of an ecological organization shall be the protection of environment. Therefore, only organizations whose bye-laws, i.e. statutes, articles of associations or other internal regulations, provide that environmental protection is their aim of activity can be recognized by public administrative authorities. It is worth mentioning that the aims of social organizations can be various. An organization may provide that

7 Art. 3 point 10 of the Act of 2008.

8 See more: E. Smoktunowicz, *Prawo zrzeszania się w Polsce*, Warszawa 1992; E. Smoktunowicz, *Status administracyjnoprawny obywatela*, [in:] *System prawa administracyjnego*, Vol. 4, Wrocław 1980. It is disputable whether an entity can be regarded as a social organization if its operation is concentrated around property like, for instance, in the case of foundations; see, for example, the decision of the Supreme Administrative Court of 21 December 2001, II SA 786/00, available at: www.orzeczenia.nsa.gov.pl; the decision of the Supreme Administrative Court of 6 May 1998, IV SA 898/96, the decision of the Supreme Administrative Court of 12 December 2005, II OPS 4/05.

9 B. Krupa, *Udział organizacji ekologicznych w postępowaniu administracyjnym o wydanie decyzji środowiskowych uwarunkowaniach realizacji przedsięwzięcia*, *Ius et Administratio* 2014, No. 3, p. 21.

its goal is protection of individual interests and rights of its members, protection of socially recognized values and prevention against unfavorable social, economic and environmental events. However, despite these, bye-laws should clearly state that the aim of a social organization is within the environment protection.¹⁰ It does not have to be the only purpose of activities but the protection of environment has to be precisely specified. Consequently, if there is no direct relationship between the case and statutory objectives, then a social organization does not have standing in the administrative procedure.¹¹

III. Social organizations as entities with the rights of the party under the CAP

Ecological organizations like other social organizations can play various roles in the administrative procedure. They can act as public authorities,¹² parties to the proceedings,¹³ bodies taking a position in a matter settled by an administrative decision (Art. 106 of the CPA) or entities with the rights of a party (Art. 31 para. 3 of the CAP). An ecological organization which is not involved in proceedings with the rights of a party may also submit its opinion on the case to the public administration body under Art. 31 para. 5 of the CAP with the consent of a public administration body.

A social organization participating in the proceedings with the rights of a party can intervene in a matter involving another person with a request to:

- 1) commence proceedings,
- 2) participate in proceedings, if such participation is justified by its statutes and where there would be a public benefit in allowing

10 T. Woś, H. Knysiak-Molczyk, M. Romanowska, *Prawo o postępowaniu przed sądami administracyjnymi. Komentarz*, Warszawa 2005, p. 263. B. Krupa, *Udział...*, pp. 23-24.

11 A. Wróbel, *Komentarz aktualizowany do art. 31 Kodeksu postępowania administracyjnego. Stan prawny 2015.09.25*, Lex/el.

12 Where they are designated to deal with cases decided by way of an administrative decision by the virtue of law or on the basis of agreements (see Art. 1 point 1 and 2 of the CAP).

13 If legal interests or responsibilities of a social organization are the object of the proceedings (Art. 28 of the CAP).

it.¹⁴ However, the request to initiate proceedings on behalf of another person is excluded.

Accepting a request of a social organization, a public administration body shall make a ruling on commencement of proceedings or admission of the organization to proceedings. A decision refusing commencement of proceedings or admission to proceedings can be the subject of an interlocutory objection by the social organization (Art. 31 para. 2 of the CAP). Commencing proceedings in a matter involving a third party, a public administration body shall inform the social organization about it if it believes that the organization would be interested in participating in proceedings as a result of its statutory objectives and there would be a public benefit in allowing it to do so (Art. 31 para. 4 of the CAP).

Consequently, a social organization acting as a participant with the rights of a party has standing in administrative proceedings if the following conditions are met: (a) the administrative procedure does not apply to the rights of a social organization but the rights and obligations of another person who is a party to the proceedings, (b) it is reasonably justified by statutory objectives of a social organization, (c) there would be a public benefit in allowing it to do so.¹⁵

A social organization that participates in the proceedings as an entity with the rights of a party has almost all rights a party to the proceedings possesses. In particular, they have the right to: participate actively in each stage of the proceedings; become familiar with the case files; make comments on the facts of the case, evidence and submitted requests; file an appeal; make an objection against rulings; file a complaint in the administrative court. However, they cannot make an agreement with a party to the proceedings and apply for cancelling the proceedings because only the party thereto can exclusively dispose of these rights.¹⁶

Non ecological organizations in all types of cases and ecological organizations in matters that do not require public participation do not have the right to appeal to a higher jurisdiction if they did not participate

14 Art. 31 para. 1 of the CAP.

15 A. Wróbel, *Komentarz aktualizowany...*

16 B. Adamiak, J. Borkowski, *Postępowanie administracyjne i sądownoadministracyjne*, Warszawa 2012, p. 153.

in the proceedings before the first instance. This conclusion derives from the content of Art. 31 para. 3 of the CAP according to which “Social organization shall participate in proceedings with the rights of a party.” If a social organization did not participate in the procedure, it does not have procedural rights in this procedure and has no right to appeal to a higher instance. Moreover, for the same reason, it cannot file a complaint in the administrative court.¹⁷

According to Art. 31 para. 1 of the CAP a public body has to determine whether an ecological organization can act because of a social interest and whether a request of a social organization is justified by the objectives of an organization. In the case of an ecological organization that wishes to act in the proceedings with the rights of a party, it has to demonstrate that a statutory objective of the organization and social interest relate to the protection of environment. Therefore, there has to be a substantive link between an administrative matter before a public authority and the scope of activities (core business) of a social organization. However, a public body is not bound by a social organization’s application and a statement as to its purpose of activity. Verification of these circumstances should be carried out right after a social organization has notified its participation in the proceedings. A public administration body has to establish its own attitude whether the objectives set out in bye-laws of a social organization justify its participation in the proceedings in a matter involving interests of another person. And even if the participation of a social organization is justified by its statutory objectives, a public administration body may determine that a request of a social organization is illegitimate because of a public interest.¹⁸

The interest of an ecological organization cannot prevail over the interest of the parties. A social organization can support a party to the proceedings or object to its demands and interests. The fact that a public body allowed an ecological organization to participate in the administrative proceedings and took into account the opinions presented

17 B. Adamiak, J. Borkowski, *Postępowanie administracyjne...*, p. 279

18 The decision of the Provincial Administrative Court in Warsaw of 10 September 2008, VII SA/Wa 849/08, available at: www.orzeczenia.nsa.gov.pl.

by an organization does not mean that a public authority would decide accordingly to social organization's statements and demands. A social organization is only one of the participants in administrative decision making. It does not have a dominant role since a public authority possesses a superior position in the administrative procedure.¹⁹

Social organizations participate in the administrative proceedings because of the protection of general values. Social organizations are interested in a final decision because of the protection of universal standards since interests and obligations of a party to the proceedings are the subject of the administrative matter.²⁰

Specific statutes can modify or exclude the application of Art. 31 of the CAP and *ipso facto* deprive social organizations of the right to participate in the proceedings with the rights of a party. Unfortunately, the Polish Parliament has decided to do so in several cases. It is allowed in matters about issuing permits to release gases or dust into the air and permits for waste production under Art. 185 sec. 2 and 181 sec. 1 point 1 and 4 of the Environment Protection Law, water permit matters under Art. 127 sec. 8 of the Water Law²¹ and construction permit cases under Art. 28 sec. 3 of the Building Law²² except matters where public participation is obligatory under the Act of 2008. It is evident that the Polish legislator considered that participation of social organizations in these cases would jeopardize the economy and promptness of the proceedings.

IV. Ecological organizations as participants with the rights of a party under the Act of 2008

The Act of 2008 shaped the status of environmental organizations differently than it is regulated in the CAP. According to the Act of 2008, environmental organizations have a special status as participants with the rights of a party in the specified procedure requiring public participation.

19 B. Krupa, *Udział...*, p. 11.

20 *Ibid.*

21 The Act of 18 July 2001, consolidated text – Journal of Laws 2015, item 469.

22 The Act of 7 July 1994, consolidated text – Journal of Law 2013, item 1409, as amended.

According to the Act – Environmental Protection Law,²³ the procedure requiring public participation shall mean taking or resigning from actions designed to keep or restore the environmental balance. Further, the protection of environment includes in particular:

- a) rational management of the environment and its resources pursuant to the rule of sustainable development,
- b) preventing pollution,
- c) restoring natural elements to the appropriate state (Art. 3 point 13).

Due to this, all administrative cases regarding the protection of environment are matters in which ecological organizations can participate with the rights of a party. However, Art. 33-35 and Art. 79 of the Act of 2008 suggest the contrary. According to these provisions, prior to the issue of a decision on environmental conditions, the authority which is competent to issue a decision shall ensure the option of public participation in the procedure, under which the said authority performs the environmental impact assessment (hereinafter referred to as EIA). Further, also Art. 71 sec. 2 point 1 and 2 as well as Art. 84 sec. 1 of the Act of 2008 confirmed that not in all environmental cases these organizations can participate actively. According to the regulations a decision on the environmental conditions shall be required for the planned:

- a) projects that may always have a significant environmental impact;
- b) projects that may have a potential significant environmental impact;
- c) other projects.

Qualification and evaluation of the above projects is carried out under the Regulation of the Council of Ministers of 9 November 2010 on projects that may have a significant environmental impact. Therefore social participation is required when a public authority decides to perform the environmental impact assessment. The environmental

23 The Act of 27 April 2001, consolidated text – Journal of Laws 2004, item 1232, as amended.

impact assessment is always required for projects that may always have a significant environmental impact.²⁴

The environmental impact assessment is one of the basic instruments of management and legal protection of the environment which must be analyzed by every investor planning to implement an investment project on the territory of the Republic of Poland in order to confirm or rule out the necessity of conducting the EIA for an implemented project.²⁵

The basic role of conducting the environmental impact assessment is to obtain information about a planned project: the extent to which it impacts the environment as well as the benefits of its implementing which should outweigh the losses resulting from its impact on the environment.²⁶

The aim of the EIA is to predict potential environmental risks and their scale at the stage of investment planning and, consequently, to eliminate those risks or to limit them and minimize the negative impact of the implementation of a planned investment.²⁷

From the above we can conclude that obligatory application of the procedure with social participation requires issuing a ruling to perform the assessment of the project's environmental impact for the planned project by a public body under Art. 59 item 1 and Art. 63 item 1 and 2.

Article 44 of the Act of 2008 provides that ecological organizations which, by referring to their statutory objectives, will notify about their wish to participate in the specified procedure requiring public participation shall participate in the said procedure under the rights of a party.

Under Art. 44 sec. 4 of the Act of 2008, an ecological organization is entitled to more procedural rights than under the provisions of the CAP. An ecological organization has the right to appeal from a decision

24 Environmental impact assessment is also conducted for the region Nature 2000 and decisions as to the genetically modified organisms.

25 Environmental impact assessment in the investment process by LAWARDS Sulej & Wójcik: http://www.paiz.gov.pl/polish_law/environmental_impact_assessment., p. 3 (19 September 2015).

26 *Ibid.*, p. 4.

27 *Ibid.*, p. 3.

issued under the procedure requiring public participation if such an appeal is justified by the statutory objectives of this organization, also in the case when the said organization has not participated in the specific procedure requiring public participation conducted by the first instance authority; submission of an appeal is equivalent with the declaration of wish to participate in such a procedure. The said organization shall participate in such appealing proceedings with the rights of a party.

Therefore, if environmental organizations want to participate in administrative proceedings with the rights of a party, it is sufficient for them to submit a written notification that the organization wishes to participate in a particular proceeding.

An environmental organization does not have to justify its ecological statutory objectives. The authority may, however, make a ruling and refuse admission if a statutory objective of the organization is not the protection of environment.

The problem that may arise at the commencement of the proceedings is whether public administrative authorities shall demand from environmental organizations official bye-laws that contained their aim of operation or shall obtain such information from the National Court Register themselves.

The National Court Register is a centralized, computerized database comprising three distinct registers: the register of entrepreneurs, the register of associations, other social and professional organizations, foundations and public healthcare institutions, and the register of insolvent debtors.²⁸ Pursuant to Art. 8 of the Act of 20 August 1997 on the National Court Register,²⁹ the register is open. Everyone has the right to access data contained in the Register through the Central Information. Moreover, everyone has the right to obtain, also by electronic means, certified copies, excerpts, certificates and information from the registry. In addition, Art. 4 sec. 4aa provides that downloaded computer printouts of the up-to-date information on entities entered into the Register have the power aligned with the power of documents issued by the Central

28 <http://ms.gov.pl/en/national-registers/national-court-register/general-information-on-the-national-court-register/> (15 September 2015).

29 Consolidated text – Journal of Laws 2015, item 1142, as amended.

Information if they have the characteristics enabling them to verify the data contained in the register.

A common practice in the administrative procedure is that if an environmental organization wants to participate in the proceedings and does not attach its bye-laws to the application, then a public authority considers this a failure to comply with formal requirements of an application and takes actions under Art. 64 of the CAP. According to this provision, “if the application does not fulfil the requirements of law, the applicant shall be summoned to correct the defects within 7 days, with a notice advising that failure to comply will result in the application not being examined.” The Code of Administrative Procedure indicates minimum requirements that all applications shall meet. Applications must at minimum indicate the identity of a person making it, their address, the nature of the demand and must fulfil the requirements contained in other legal regulations (Art. 63 para. 2 of the CAP).

According to some opinions, this practice is wrong since Art. 64 of the CAP can be applied only if specific provisions explicitly provide that an applicant must fulfil requirements other than those laid down in the CAP. Neither the Environmental Protection Law nor the Act of 2008 require that an organization has to submit official copies of its bye-laws.³⁰

Administrative courts confirmed this point of view in many verdicts. In the ruling of the Regional Administrative Court in Warsaw of 26 October 2007 the Court held that “a number of acts which are specific to the CAP provide for an obligation that documents from the National Court Register have to be attached to the application but therein obligations apply to strictly prescribed administrative procedures and only at the stage of commencing proceedings the authority conducting the proceedings has the competence to summon a social organization to send a copy, excerpt or certificate from the Register pursuant to Art. 64 para. 2 of the Code of Administrative Procedure. The said regulations as

30 P. Chylarecki, M. Wiśniewska, J. Engel, *Dostęp do informacji o środowisku i udział w decyzjach dotyczących środowiska: społeczna kontrola praktyk administracji publicznej*, Warszawa 2014.

lex specialis do not entitle public authorities to formulate these requests in every pending proceedings.”³¹

The Supreme Administrative Court in 2006 ruled that summons made pursuant to Art. 64 para. 2 of the CAP should serve only for elimination of formal defects resulting from specific regulations and cannot be used as a means to assess the substance of the submitted request and its annexes. Thus, only when a provision of universally binding law explicitly lays down specific requirements for an application form, a public authority may effectively demand them to be met.³²

So if neither the Environmental Protection Law nor other specific regulations stipulate that an applicant must attach a copy from the National Court Register or a copy of the statute to notify the organization, the authority has no legal basis to require these documents.

Another problem that arises in the application of the Act of 2008 is whether Art. 44 of this statute excludes the application of Art. 31 of the CAP.

As mentioned above, the provisions on participation of social organizations in the CAP do not preclude a possibility that other acts will regulate participation of social organizations on different legal basis or even exclude participation of social organizations as participants with the rights of a party. Article 44 of the Act of 2008 is an example of the former situation. Pursuant to this regulation, environmental organizations that wish to participate in particular proceedings requiring public participation participate in the proceedings with the rights of a party.

At the same time Art. 44 sec. 1 of the Act of 2008 *in fine* states that application of Art. 31 para. 4 of the CAP is excluded. As the court stated, the modification of the Code’s requirements as to the participation of ecological organizations in administrative proceedings results from the special nature of environmental matters. According to Art. 62 sec. 1 of the Act of 2008, “As part of the project’s environmental impact assessment the following aspects shall be defined, analyzed and assessed: 1) Direct and

31 VII SAB/Wa 42/07, Lex no. 441237.

32 The decision of 12 May 2006 I OSK 869/05, Lex no. 236563.

indirect impact of a particular project on: a) the environment as well as human health and living conditions; b) material wealth; c) monuments; d) mutual interaction between the components, as referred to in letters a-c; e) access to deposits of minerals; 2) possibilities and methods of prevention and reduction of project's negative environmental impact; 3) required monitoring scope.” Therefore, the interpretation of the provision regulating participation of social organizations in such matters must take into account the subject and purpose of the proceedings.³³

In addition, the court ruled that “According to Art. 44 sec. 2 and 3 of the Act of 2008, an environmental organization has the right to appeal against a decision issued in the proceedings requiring public participation as well as make a complaint in an administrative court if this is justified by the statutory objectives of the organization, even when it did not participate in the proceedings requiring public participation. In such circumstances, if an ecological organization wishes to participate in the proceedings, it does not have to meet the conditions laid down in Art. 31 of the CAP.”³⁴

A public administrative authority will issue an order only if it refuses a social organization to participate in the case. “Modification of the application of Art. 31 of the CAP by Art. 44 of the Act of 2008 has a subjective and objective nature. In a subjective sense, Art. 44 of the Act of 2008 is addressed solely to environmental organizations assumed as social organizations whose statutory purpose is to protect the environment (...). In the objective sense, a modification is manifested by the fact that Art. 44 of the Act of 2008 is applicable only with respect to the categories of cases in the field of environmental protection that require public participation. As it was stated above, public participation is required in all cases in which the environmental impact assessment is carried out. The environmental impact assessment is carried out for projects that are always likely to have a significant impact on the environment and those projects that have the potential to have

33 The decision of the Provincial Administrative Court in Wrocław of 22 May 2010, II SA/Wr 89/10, available at: www.orzeczenia.nsa.gov.pl

34 *Ibid.*

significant effects on the environment, for which this obligation has been established by order.”³⁵

The third problem that arises in the application of Art. 44 is how a public administrative authority shall notify an ecological organization about admission to the administrative proceedings. This is a problematic issue as under Art. 31 of the CAP accepting a request of a social organization, a public authority shall make an ex officio decision on the commencement of proceedings or admission of the organization to the proceedings. Since this problem is not regulated by the Act of 2008, in practice, public bodies inform ecological organizations on admission to the proceeding using different forms or they do not inform them at all. This problem could be resolved by appropriate amendments of the Act of 2008 that would introduce the same solutions as those stipulated in the CAP. All requests submitted by environmental organizations shall be analyzed and applicants have to be informed about the results thereof in a form strictly regulated by law.³⁶

V. Conclusions

The above considerations show that we need to distinguish two situations in which ecological organizations play the same role – they act as participants with the rights of a party – but their status depends on the nature of a matter before public administrative authorities. The first one is when the assessment of environmental impact is not required and an ecological organization can act with the rights of a party under Art. 31 of the CAP. The second one is when a public body has to issue a decision on environmental conditions of a project and to carry out the environmental impact assessment. Then the status of an ecological organization is regulated by the Act of 2008.

Although environmental organizations under both acts: the Code of Administrative Procedure and the Act of 2008, have the status of a

35 *Ibid.*

36 P. Chylarecki, M. Wiśniewska, J. Engel, Dostęp do informacji o środowisku i udział w decyzjach dotyczących środowiska: społeczna kontrola praktyk administracji publicznej, Warszawa 2014, p. 53.

participant with the rights of a party, their position is stronger under the second statute. First of all, in environmental matters requiring public participation environmental organizations do not have to meet all requirements set in Art. 31 of the CAP. Thus they do not have to demonstrate that their participation is reasonably justified by their statutory objectives and there would be a public benefit in admission of an ecological organization to the proceedings. Secondly, under the Art. 44 of the Act of 2008, ecological organizations have the right to appeal to a higher instance in the administrative procedure and file a complaint with an administrative court even though they did not take part in the proceedings before public authorities. Environmental organizations that wish to participate in these cases only have to notify that their statutory aim is environmental protection.

Article 44 of the Act of 2008 only applies to matters requiring public participation. However, it does not mean that ecological organizations cannot participate in other environmental matters. They can use relevant provisions of the CAP but they will have to comply with stricter conditions in order to have standing in the administrative procedure.

Above conclusions suggest that environmental organizations have a broad access to all administrative cases and the Polish legislator fully implemented the Aarhus Convention into the Polish law. Undoubtedly, these legal solutions should be assessed positively. However, the fact that Polish Parliament has limited participation of ecological organizations in many environmental matters show a dangerous tendency in Polish environmental law. It is doubtful whether the speed and economy of administrative proceedings is an appropriate justification for introducing such regulations. It seems that a social interest and the protection of environment should rather prevail whenever natural environment is at stake.