

Recent Developments in Polish Environmental Protection Law and chosen issues of application of the Polish Environmental Protection Law (in 2015-2016)

I. Law

In 2015-2016, the Polish legislator introduced or amended several acts from within the scope of environmental protection. Some of the amendments resulted from a duty to adapt the domestic legislation to the EU law. An example is the Act of 20 February 2015 on renewable energy sources or the Act of 9 October 2015 amending the Act on making available information about the environment and its protection, public participation in environmental protection as well as on environmental impact assessments and of several other acts. The latter implements the Directive 2011/92/EU as amended by the Directive 2014/52/EU. At the same time it aims to adjust the Polish law fully to the Directive 2003/4/EC on public access to environmental information.

Three chosen Acts (amendments to the Acts) that have been widely discussed or which represent interesting and original examples of the direction, which development of protection mechanisms of individual environmental resources heads to, as well as attempts to implement them will be briefly presented below.

1. The Act of 24 April 2015 amending certain acts in connection with the strengthening of landscape protection tools¹

The Act constitutes a partial implementation of the arrangements provided for in the European Landscape Convention of 2010.

The Act amends several existing acts by introducing into them additional tools, whose purpose is to directly maintain landscape, including *inter alia* by²:

- the introduction of a legal definition of landscape understood as an area, as perceived by people, containing elements of nature or civilization products, shaped as the result of the action of natural factors or human activity;
- the determination of qualities making up the landscape values (natural, cultural, historical, architectural, urban, rural complexes as well as aesthetic and scenic values);
- the introduction of universal identification and valorization of landscapes through regular (not less often than once in 20 years) preparation of a landscape audit. The landscape audit is to serve: 1) identification and characterization of landscape types; 2) valorization of landscape on a voivodship (provincial) scale in order to determine the qualities of all landscapes in the voivodship's territory and is identify landscapes which are particularly valuable (priority ones); 3) determination of threats to the identified priority landscapes and planning the manners of their protection on the basis of their analysis. Recommendations and conclusions

¹ This act was shortly presented in the last recent development I missed it but leave the text as being prepared but you can skip it.

² Cf. the explanatory memorandum to the draft Act available online at: <http://orka.sejm.gov.pl/Druki7ka.nsf/0/E0EC31AF25E44523C1257BA4002A90F4/%24File/1525.pdf>

contained in the landscape audit are taken into consideration in area development plans at the regional and communal (municipal) level.

- possibility of introducing restrictions within the limits of landscape parks and protected landscape areas serving to preserve the landscape values of these areas;
- extending the scope of environmental impact assessments to include analyses of possibilities of preventing and reducing the negative impact of a (given) venture on landscape;
- new, enhanced regulations concerning the location of advertisements, charging advertising fees and imposing financial penalties for the non-observance of terms and conditions concerning the location of billboards and advertising devices, including the prohibitions on situating them (in certain locations)³, established by communal (municipal) councils in the form of resolutions (acts of local law).

2. The Act of 10 September 2015 amending the Environmental Protection Law Act (EPL Act).

The Act amends the provisions concerning protection of air quality as well as protection against noise which are subject to the Environmental Protection Law Act (EPL Act). The Act, among others, clarifies the provision of Article 96 EPL which constitutes a legal basis for the introduction of a so-called anti-smog resolution (i.e. the resolution, in which one may specify the types and quality of fuels approved for use as well as the minimum technical requirements for appliances used for burning fuels) by the organs of the voivodship (provincial) government.

In the legal state of play before the amendment, the provision of Article 96 of the EPL Act, according to which

"The assembly of the voivodship (province [sejmik województwa]) may by resolution prescribe for the area of the voivodship or its part types or quality of fuels approved for using and the manner of fulfilling and monitoring said obligation with a view to preventing adverse effects on the environment or monuments.

gave rise to numerous uncertainties and a resolution of the Malopolska Regional Assembly [Sejmik Województwa Małopolskiego], adopted in 2013 on its basis as the first in Poland, limiting the use of solid fuels for purposes of heating homes and heating water in the area of the City of Krakow, was repealed by the Regional Administrative Court [WSA] in Krakow.

Amending Article 96 of the EPL Act was aimed at eliminating such legal uncertainties⁴ and at clarifying:

- the scope of the anti-smog resolution and the manners of its implementation; according to the new wording:

The assembly of the voivodship may by resolution introduce restrictions or prohibitions within the scope of the operation of installations where combustion of fuels takes place, with a view to preventing adverse effects on human health or on the environment.

³ For example, by way of the powers of the communal (municipal) councils to determine, in the form of a resolution, the terms and conditions of locating objects of small architecture, billboards and advertising devices as well as fences, their size, quality standards and the types of building materials, which they may be made from. The explanatory memorandum to the draft act is to be found at the following address:
<http://orka.sejm.gov.pl/Druki7ka.nsf/0/E0EC31AF25E44523C1257BA4002A90F4/%24File/1525.pdf>

⁴ Cf. the explanatory memorandum to the draft amending law
<http://www.sejm.gov.pl/sejm7.nsf/druk.xsp?nr=3667>.

The resolution shall specify: 1) the boundaries of the area on which the restrictions or prohibitions are introduced; 2) types of entities or installations, which restrictions or prohibitions are being introduced against; 3) the type or quality of fuels approved for use or whose use is prohibited or technical solutions or parameters of emissions' installations where combustion of the fuels approved for use in the area takes place.

Additionally, it may also specify:

- 1) the manner or purpose of use of fuels, which are subject to restrictions;*
- 2) the duration of the restrictions or prohibitions during a given year;*
- 3) the obligations of entities covered by the resolution within the scope necessary to control the implementation of the resolution.*

The resolution shall not apply to installations covered by the restrictions introduced by way of permits or notifications.

- **mode of its adoption** (a draft resolution of the executive authority of the voivodship [zarząd województwa] is to be evaluated by an organ of a communal (municipal government and a procedure of its adoption is a public participation procedure)

- **its character** - the resolution is an act of local law.

In the new legal state of play, the Malopolska Regional Assembly [Sejmik Województwa Małopolskiego], in December 2015 adopted another resolution on the introduction, in the area of the Commune of Krakow, restrictions within the scope of operating installations, where the combustion of fuels took place (i.e. the so-called anti-smog resolution), which allowed only the use of gas and light fuel oil in installations where the combustion of fuels took place for home heating and the preparation of domestic hot water (e.g. in fireplaces or stoves). The resolution is an instrument for improving air quality in Krakow and reduce low emissions originating from the so-called surface sources (those associated with human existence and domestic furnaces). The resolution was appealed against to the regional administrative court. The case is pending.

3. The Act of 13 April 2016 amending the Act on forests⁵

The Act introduces legal instruments enabling the State Treasury, represented by the National Forest Farm State Forests⁶ to acquire private forest lands (in Poland, private forests occupy approximately 2 million hectares) in the form of:

- **a pre-emption right (right of first refusal)** - according to the amending law, the State Treasury, represented by National Forest Farm State Forests is entitled by virtue of law to the right of first refusal (non-constituting property of the Treasury) of forest lands sold by a natural person, by a legal person or by an organizational entity without legal personality, whom the law recognizes the legal capacity.

- **a right of repurchase** - if the transfer of ownership of the above-indicated lands occurs as a result of conclusion of a contract other than a contract of sale or by way of a unilateral act –

⁵ Prepared on the basis of the amended provisions of the Act on Forests as well as pursuant to the explanatory memorandum to the draft amending law:

<http://orka.sejm.gov.pl/Druki7ka.nsf/0/E0EC31AF25E44523C1257BA4002A90F4/%24File/1525.pdf>

⁶ Cf. the explanatory memoranda to the draft law as cited above.

the State Forests will be able to make a statement on the acquisition of the very land. The pre-emption and repurchase do not apply in cases of disposal of forest land for the benefit of the next of kin, and in the case of inheriting it.

As emphasized by the authors of the draft law⁷, the adoption of that amendment was related to the expiry of the 12-year period of protection concerning the purchase of, among others, forest lands by foreigners provided for by the Accession Treaty⁸ as well as to the implementation of a national programme to increase forest cover, which envisages the increasing of acreages of forests from the current 29 percent of the country's total surface to 30 percent in 2020. and 33 percent in 2050.

In the explanatory memorandum to the draft law, its authors emphasized that the instruments which were subject to adoption would enable⁹: the implementation of the constitutional obligation of public authorities to protect the environment; increasing the area of state forests which are the natural resources of a strategic nature; ensuring the sustainability of forests and their multi-functionality (protective functions, as well as production and social functions); improving the status and condition of forests by extending to them the standards of management and protection being in force in the State Forests.

The authors of the draft act also stressed¹⁰ that those amendments did not limit the essence of the right of ownership, nor that they constituted a violation of the following entitlements, resulting from the treaty law: the prohibition of discrimination on the grounds of nationality, freedom of establishment and the free movement of capital.

The law is still under discussion. Doubts do not only concern the institution of the pre-emption right and of the right of repurchase introduced to the Act on forests, but also those of its solutions that enable e.g. the interference with the price specified in a contract of sale. If the price is grossly different from the market value of the land, in particular, where it exceeds the value determined by a real property appraiser, a forest district manager may apply to a court to determine the price of the very land. The court will then set the price on the basis of the value of the real property determined in accordance with the provisions on the real estate management.

II. **The case law of the Polish Constitutional Tribunal** – liability of the State Treasury for damages caused by animals covered by the species' protection (Article 126 of the Nature Conservation Act).

The Constitutional Tribunal in 2013 – 2015 issued three rulings concerning the compatibility of Article 126 of the Nature Conservation Act with the constitutional principles of equality before the law and equal protection of ownership.

The principles of the State Treasury's liability for damages caused by definite animals covered by species' protection are governed by Article. 126, sec. 1 of the Nature Conservation Act, according to which:

The Treasury shall be liable for damages caused by:

⁷ Cf. the explanatory memoranda to the draft amending law, as cited above.

⁸ The Sejm [The Polish lower house of the Parliament] adopted also the act of 5 August 2015 on the shaping of the agricultural system, in which it considerably restricted turnout concerning the agricultural lands.

⁹ As above.

¹⁰ As above.

- 1) *(European) bisons - in crops, agricultural produce or forest farms;*
- 2) *wolves – in headage of livestock;*
- 3) *lynxes- in headage of livestock;*
- 4) *bears - in apiaries, in headage of livestock and in agricultural crops;*
- 5) *beavers - in agricultural farms, forest farms or fish farms.*

In the first two judgments¹¹, the Constitutional Tribunal found that Article 126, sec. 1 of the Nature Conservation Act within the scope in which it limited the liability of the State Treasury for damages caused by the above-mentioned animals covered by the species' **protection only to the damages caused to a certain type of property was incompatible with the constitutional principle of equality and equal protection of ownership.**

The Constitutional Tribunal stated that “*section 1, point 1 – 4 of Article 126 of the Nature Conservation Act differentiates the situation of subjects who suffered damage inflicted by the animals set forth in those provisions, depending on which property the damage was caused. And as for shaping the principles of liability for damages caused by the animals set forth in article 126, section 1, point 1-4 of the Nature Conservation Act [u.o.p.] it is irrelevant whether the damage was inflicted in crops (cultivation), agricultural produce or in a forest (agricultural) farm, in headage of livestock, in apiaries or in another kind of property. The legislator's obligation to ensure legal protection of property and of other property rights equal for all stems from Article 64, section 2 of the Constitution¹². Depriving some of the subjects of the right to seek damages (compensation) may have a negative impact on the implementation of species' protection, since it does not lead to a greater acceptance of the prohibitions arising from the Act. This may result in activities aimed against the protected species, so as to prevent damages to arise*”.

In the third case (K 20/14)¹³ the Constitutional Tribunal adjudicated in turn that Article 126, sec. 1 of the Nature Conservation Act, within the scope in which it limited the liability of the State Treasury for damages caused by specific species of animals ((European) bisons, wolves, lynxes, bears as well as beavers) **with the exclusion of other species covered by the species' protection** (a strict or a partial one) **was compatible with the constitutional principle of equality and equal protection of ownership.**

The Court emphasized that covering a specific species of animals living in the wild by a strict or by a partial protection was not tantamount to them inflicting damages.

The legislator decided to introduce liability for species expressly mentioned in Article 126, sec. 1 of the Nature Conservation Act in whose case probability of causing significant damages to humans and to their economy is particularly high.

At the same time the Constitutional Tribunal pointed out that the Council of Ministers was empowered to extend, by way of regulation, a catalogue of species referred to section 1 of Article 126 of the Nature Conservation Act in situations where compensation for damages caused by other species of animals subject to protection was needed.

Such a solution “*enables the correlation of the principles of the State Treasury's liability for damages caused by species of animals covered by the species' protection with requirements*

¹¹ Cf. the file reference numbers: P 49-11 and K 36/13.

¹² According to Article 64 section 2: “Everyone, on an equal basis, shall receive legal protection regarding ownership, other property rights and the right of succession”.

¹³ Cf. the Constitutional Tribunal judgment of 28 September 2015, the file reference number K 20/14.

of protecting specific species of animals and problems resulting therefrom for human activities".

It also pointed out that the rules which were to be created must have a realistic character. Establishing the liability of the State Treasury for damages in relation to all species of animals covered by the strict protection and the partial protection (as applied for by the applicant in the analyzed case) would be significantly reduced or even made impossible, given the rules of liability for torts (delicts) concerning the need to demonstrate the determination of a harmful event as well as of an adequate causal relationship with the detriment inflicted to the property.

III. The Bialowieza Forest

1. The Bialowieza Forest is a forest complex situated at the border between Poland and Belarus. The Polish part of the Bialowieza Forest covers an area of over 60 thousand hectares.

The Bialowieza Forest was placed at the UNESCO World Heritage Site¹⁴. The Polish part of the Bialowieza Forest is covered by protection within the scope of the Natura 2000 program (PLC200004). The area of the Bialowieza Forest was determined by way of the Ordinance of the Minister of the Environment as a special protection area for birds (2004)¹⁵ as well as approved by the decision of the European Commission as a special area of habitats' conservation (2008)¹⁶. In the area of the Bialowieza Forest there are 21 nature reserves, including the Bialowieza National Park¹⁷.

“The Polish part of the Bialowieza Forest (...) is managed by the Bialowieza National Park (only 17%) and by the State Forests Service, a state-owned organisation (the remaining 83%). The part which is managed by the State Forests Service of Bialowieza Forest is divided into three forest districts: Bialowieza, Browsk and Hajnowka”¹⁸. In forest districts, sustainable forest management is carried out on the basis of a forest management plan. This is a basic document of forest management, being developed for forests owned by the State Treasury, containing a description and assessment of the state of a given forest and the goals, tasks and methods of carrying out forest management (Article 6, sec. 1, point 6 of the Forest Act). The forest management plan includes, among others, a determination of tasks, including in particular the amounts of timber, which is envisaged for being harvested.

2. The forest management plan was drawn up for the Bialowieza Forest District for 2012-2021 (2012-2021 FMP). The dispute over the Bialowieza Forest flared up in connection with the planned (threefold) increase of felling of the trees in the very area. On 25 March 2016 the Minister of the Environment approved an annex to the above-

¹⁴ Cf. <http://www.unesco.pl/kultura/dziedzictwo-kulturowe/swiatowe-dziedzictwo/polskie-objekty/> (last accessed on 22 May 2016).

¹⁵ The regulation of the Minister of Environment of 21 July 2004 concerning the areas of the special bird protection Natura 2000 (Journal of Laws No. 229, item. 2313 as amended) repealed by the regulation of the Minister of Environment of 12 January concerning the areas of the special bird protection (Journal of Law of 2011, No. 25, item 133).

¹⁶ The Commission Implementing Decision (EU) 2015/69 of 3 December 2014 adopting an eighth update of the list of sites of Community importance for the Continental biogeographical region (notified under document C(2014) 9072).

¹⁷ Cf. <http://natura2000.gdos.gov.pl/strona/ix-puszcza-bialowieska-podlaskie> (last accessed on 22 May 2016).

¹⁸ Cf. <http://www.documents.clientearth.org/wp-content/uploads/library/2016-04-19-complaint-to-the-european-commission-concerning-alleged-breach-of-union-law-over-logging-bialowieza-coll-en.pdf>

mentioned Forest Management Plan for the Bialowieza Forest District (FMP 2012-2021), in which an increase of the timber harvest from the previous limit of 63,471 cubic metres to 188 thousand cubic metres within 10 years was envisaged.

Amending and increasing the limit of harvesting timber over the amount specified in the original forest management plan (FMP 2012-2012) has been justified by the bark beetle plague which threatened valuable habitats and species, posed a threat to safety and fire hazard.

In decision it was emphasized that:

"(...) In connection with the occurrence of severe damages to tree stands, due to continued gradation of spruce bark beetles resulting, in the period of implementation of the forest management plan, in the need to increase harvest of timber (...) in order to maintain appropriate sanitary conditions of forests, to ensure the sustainability of forest ecosystems as well to cease degradation and to commence the process of regeneration of natural habitats, including those important to the Community. The annex to the forest management plan for the Bialowieza Forest District relates primarily to the removal of habitats' spruce aimed at the limitation of gradation of spruce bark beetle (the need to make sanitary logging). In addition, trees will be removed to ensure safety of the people spending time in the Bialowieza Forest (the Bialowieza Forest District), because the accumulation of dying trees constitutes a threat to the public. This applies to tourist trails, places for rest and recreation in the forest. In addition, the ongoing drought in recent years has intensified dieback of trees and tree stands spruce, which resulted in an increase in the risk of fire in the Bialowieza Forest.¹⁹

3. The planned increase in timber harvest and the decision of the Minister was met with opposition from a part of the scientific communities, environmental organizations and from the public. Protests are being organized and a broad discussion is being carried out, including the one in the public media outlets as well in social media. One calls for the minimizing of interference in ecosystem, also in a situation of periodical, local dieback of trees, because such process constitutes a part of the natural life cycle of a forest, conditioning the desired diversity of habitats, which is a feature of natural forests²⁰. The covering of the entire Bialowieza Forest by protection in the form of a national park is also being called for.

In an open letter of the scientific community concerning the Bialowieza Forest, the researchers emphasize that: *"The plans to increase the timber harvest on the territory of the Bialowieza Forest in order to reduce the gradation of spruce bark beetle constitute the interference in the natural processes occurring therein and may lead to an irreversible transformation of a large part of the Forest in an 'economy forest' as well as to the loss of natural character of its most valuable (from a nature-related point of view) fragment and consequently, to the loss of the status of the World Heritage Site. The current spruce bark*

¹⁹ Cf. the Decision of the Minister:

https://www.mos.gov.pl/fileadmin/user_upload/mos/Aktualnosci/kwiecien_2016/Deczyzja.pdf (last accessed on 22 May 2016)

²⁰ Cf. the position of the Councils of the following Faculties: of Biology of the University of Warsaw adopted on 21 March 2016 and of Biology and Earth Sciences of the Jagiellonian University adopted on 22 March 2016 on the covering of the Bialowieza Forest by protection: http://www.binoz.uj.edu.pl/wydzial/komunikaty?p_p_id=56_INSTANCE_5UvO&p_p_lifecycle=0&p_p_state=normal&p_p_mode=view&p_p_col_id=column-3&groupId=41643&articleId=119379305 (last accessed on 22 May 2016).

*beetle gradation is one of many such events documented in the history of the Forest, it leads to a natural restructuring of tree stands and to their adaptation to climate changes and does not threaten the permanence of the Bialowieza Forest and its biodiversity. The gradation in question, although it brings about dieback of a significant number of spruce population, does not constitute a threat to the presence of this species (that renews itself naturally in the Forest) either, and its high share in some forest communities is a result of anthropogenic disturbances occurring in the last few hundred years”*²¹.

4. Non-governmental organizations on 19 April 2016 filed a complaint with the European Commission, in which they allege a violation of Article 6, sec. 2 and 3 of the Habitats Directive²² by the decision of the Minister of the Environment approving an annex to the Forest Management Plan for the Bialowieza Forest District in which an increase of the timber harvest was envisaged.

“Regarding the annex to the FMP²³ for the Bialowieza Forest District, which increases threefold the permitted timber harvest, an appropriate assessment of the implications for a protected site has not been carried out. This constitutes a breach of Article 6 (3) of the Habitats Directive.

*We are not aware that the annex to the FMP is considered by the Minister of the Environment as a plan or project that must be carried out for “imperative reasons of overriding public interest”. And in any event we are not aware of any assessment of alternative solutions or proposals for compensatory measures necessary to ensure that the overall coherence of Natura 2000 network is protected. Therefore, we have not specifically addressed Article 6 (4) of the Habitats Directive in this complaint, but in general we believe that the authorisation of the annex has not been carried out in compliance with Article 6 (4) of the Habitats Directive. For the sake of completeness, we also raise the breach of the Article 6 (2) Habitats Directive due to failing to take the appropriate measures to avoid the deterioration of natural habitats and the habitats of species, and the disturbance of the species for which a site had been designated”*²⁴.

Describing mitigation measures which they consider feasible and which have not been considered or proposed by the national authorities they indicate that sanitary logging is unnecessary and that the logging limits should not be raised above the limits agreed in 2012.

The organizations also filed a motion that so-called interim measures be applied to ensure suspension of all works related to logging the Forest until an appropriate judgment be issued by the Court of Justice of the European Union.

5. According to the information obtained from the websites of the Ministry, it results that at present an inventory of the state of play of the ecosystem as well as of losses on the territory of the Bialowieza Forest is being carried out. Its results are to known at the beginning of 2017²⁵.

²¹ Cf. <http://www.zbs.bialowieza.pl/arttykul/896.html> (last accessed on 22 May 2016).

²² For the full texts of the complaint see the footnote 18. The complaint was signed by 7 organizations: ClientEarth, Dzika Polska, Greenmind, Greenpeace Polska, WWF Polska oraz Ogólnopolskie Towarzystwo Ochrony Ptaków i Pracownia na rzecz Wszystkich Istot.

²³ Cf. the Forest Management Plan.

²⁴ See the footnote 18.

²⁵ Cf. <https://www.mos.gov.pl/aktualnosci/szczegoly/news/minister-srodowiska-o-klimacie-i-puszczy-bialowieskiej/>, last accessed on 22 May 2016.

6. It results from the press information that the European Commission expressed concern about the “decision of the Polish authorities concerning the increasing of the logging in the Bialowieza Forest in the context of the integrity of the unique Natura 2000 area”²⁶.

IV. The CJEU

1. Infringement action - Breaching of the Environment Impact Assessment Directive (April 2016)

The European Commission referred Poland to the Court of Justice of the EU for failing to ensure that the environmental impacts of exploratory mining drillings are properly assessed²⁷.

According to Polish law it is possible to drill down to depths of 5 000 metres without assessing the potential impact on the environment beforehand. According to the Commission such high threshold does not fit the requirements of directive 2011/92 and does not take into account all relevant criteria and standards established by this directive (like waste production, effects on water and soil, use of natural resources, the risk of accidents, and any cumulative effects they may have with other similar projects or activities).

2. Infringement action - breaching of the EU legislation on ambient air quality and cleaner air for Europe (Directive 2008/50/EC) – December 2015

The European Commission referred Poland to the Court of Justice of the EU for failing to ensure all necessary measures to ensure keeping limit values for PM10 introduced in the directive 2008/50/EC. The Commission pointed out that:

“In Poland, the daily limit values for the airborne particles (PM10) have been persistently exceeded in 35 out of 46 air quality zones for at least for the last five years, including 2014. Additionally, in nine zones the annual limit values have also been persistently exceeded. The PM10 pollution in Poland is predominantly caused by low-stack emissions (emissions from sources with a height lower than 40m) from household heating. The legislative and administrative measures taken so far to limit this persisting non-compliance have been deemed insufficient by the Commission”²⁸.

²⁶ Cf. PAP Nauka Polska (<http://naukawpolsce.pap.pl/aktualnosci/news,409332,ke-zaniepokojona-decyzja-ws-wycinki-w-puszczy-bialowieskiej.html>), last accessed on 22 May 2016.

²⁷ http://europa.eu/rapid/press-release_IP-16-1454_en.htm, (22.05.2016)

²⁸ http://europa.eu/rapid/press-release_IP-15-6225_en.htm, (22.05.2016)