



# GENERAL DIRECTOR FOR ENVIRONMENT PROTECTION

DOOŚ-oa1.4233.21.2015.is.15

## DECISION

Pursuant to Article 138(1) 1 and 2 of the *Act of June 14<sup>th</sup>, 1960 Administrative Procedure Code* (OJ of 2016, item 23, unified text), having examined the challenge by Katarzyna Wróbel and Grzegorz Franciszek Wróbel of the decision of the Regional Director for Environment Protection in Wrocław dated February 27<sup>th</sup>, 2015, ref.: WOOŚ.4233.8.2012.ŁCK.47, on the environmental conditions for the project entitled: *'Construction of Boboszków dry flood control reservoir on the Nysa Kłodzka River'*

### **1. I reverse clause I.2.2 in whole.**

#### **In this regard I decide as follows:**

*'I.2.2 Trees and shrubs should be cleared between September 1<sup>st</sup> and February 28<sup>th</sup> solely in areas in direct collision with investment project execution, i.e.:*

- in an area intended for location of dam body, construction of access, internal roads to the dam, and an overflow structure along the right abutment of the dam,*
- in the strip of land intended for temporary (construction stage) relocation of Nysa Kłodzka River bed.*
- from slopes included in Nysa Kłodzka River bed regulation,*
- in the strip of land intended for the new river bed construction between the outlet of relief structures and the existing river bed. ';*

### **2. I reverse clause I.2.3 in whole.**

#### **In this regard I decide as follows:**

*'I.2.3. Trees intended to be cleared in the investment project area should be marked under environmental supervision (by expert botanist-phytosociologist) as regards preserving the largest possible part of individual patches of natural habitats, in particular of habitat: \*9180 'Great maple, maple, and lime forest on slopes'. Leave intact the part of the patch of habitat \*9180 in the lateral erosion ravine joining Nysa Kłodzka (northern part of plot No. 70/1) and the largest possible surface area of the patch of the habitat on the slope at ravine and river bed intersection of the estimated surface area of 0.35 ha. Riparian zones of the patch on plot No. 70/1 not intended for clearance should be marked in a visible manner in situ (e.g. with poles and reflective tape). All invasive alien species in the investment project area indicated by the phytosociologist from the environmental supervision should be marked for clearance as well. ';*

### **3. I reverse clause I.2.4 in whole.**

#### **In this regard I decide as follows:**

*'I.2.4 Within patches of natural habitat: \*91E0 Riparian poplar, alder, and ash forests growing in the area of the intended reservoir basin, limit tree clearance to the minimum as per environmental supervision phytosociologist's indications. Leave as many trees and shrubs with branches situated low over the bed of Nysa Kłodzka as per comments and indications of the ornithologist from the environmental supervision.'*;

**4. I reverse clause I.2.6 in whole.**

**In this regard I decide as follows:**

*'I.2.6 Carry out the construction of reservoir dam together with discharge structures in a continuous manner, provided that the works should commence before bird breeding season, i.e. between September 1<sup>st</sup> and February 28<sup>th</sup>. The other earth works related to the construction of the access road to the upstream station, demolition of the existing municipality road Boboszków-Psary with two bridges on this road, demolition of all buildings with all technical utility systems, and relocation of the medium voltage line should be carried out from September 1<sup>st</sup> to February 28<sup>th</sup>.'*;

**5. I reverse clause I.2.7 in whole.**

**In this regard I decide as follows:**

*'I.2.7 Stumps of felled trees and shrubs growing on slopes of stream beds should be extracted (on regulated sections) in September. In justified cases, the period of these works may be extended to the end of February under ichthyologist's supervision.'*;

**6. I reverse clause I.2.8 in whole.**

**In this regard I decide as follows:**

*'I.2.8 Works in the river bed should be carried out using the "dry" method (i.e. following removal of water from the section under ichthyologist's supervision). "Wet" regulation works on the river bed are admissible solely over 70 metres of the river section (on the part of the section upstream of the dam, where a correction will be made and river bank will be protected with rip-rap). It is prohibited to carry out any works on the river bed between March 1<sup>st</sup> and June 30<sup>th</sup> and between September 1<sup>st</sup> and December 15<sup>th</sup>. Additionally, limit to the minimum the works that need to be carried out as instructed by the ichthyologist from the environmental supervision between December 15<sup>th</sup> and the last day of February.'*

**7. I reverse clause I.2.11 in whole.**

**In this regard I decide as follows:**

*'I.2.11 Ensure environmental supervision of experts, including an ichthyologist, ornithologist, chiropterologist, herpetologist, and phytosociologist during the works.'*;

**8. I reverse clause I.2.15 in whole.**

**In this regard I decide as follows:**

*'I.2.15 Works related to removal of the topsoil should be carried out from the beginning of September to the last day of February.'*;

**9. I reverse clause I.2.22 in whole.**

**In this regard I decide as follows:**

*'I.2.22 Each morning, inspect excavations and other places that may act as traps for animals: amphibians, reptiles, small mammals, and between March 1<sup>st</sup> and May 15<sup>th</sup> and between September 15<sup>th</sup> and October 15<sup>th</sup> carry out a second inspection before evening. Any animals trapped there should be caught and released outside the investment project area in appropriate*

*locations. The last animal presence inspection in excavations should be carried out directly prior to backfilling. The inspection should be carried out under the supervision of the herpetologist from the environmental supervision and as instructed by them. They will also coordinate and indicate sites for release of trapped animal species. Any chambers, manholes, and other anthropogenic objects that may act as traps for amphibians and small mammals should be secured as instructed by and under the supervision of the herpetologist from the environmental supervision. It will be responsible for prevention of isolated still water pools formation and for carrying works out in the Nysa Kłodzka valley in a manner that provides amphibians with safe migration routes, including over internal roads as per the design. ’;*

**10. I reverse clause I.3.1 in whole.**

**In this regard I decide as follows:**

*‘I.3. 1 Implement extensive pasture and meadow land use in the reservoir basin. It is recommended to mow the area intended to be mowed in an alternate fashion: half of the area in one year and the other half in the other year. Meadows should be mowed in August, after grass flowering; avoid low mowing height and strive to preserve host plants for the large copper: great water dock, curly dock, bitter dock, red dock, clustered dock, bloody dock, and patience dock. Prevent natural succession towards forest environment. ’;*

**11. I reverse clause I.4.1 in whole.**

**In this regard I decide as follows:**

*‘I.4.1. The new low voltage 0.4 kV power line relocated along the municipality road should be put underground. The new medium voltage 20 kV power line, the section along the municipality road and the section intersecting the priority natural habitat \*9180 Great maple, maple, and lime forest on steep slopes and in the compensation afforestation area should be put underground as well. The medium voltage line should be constructed as an overhead line upstream of the dam over a section of 140 metres. On the overhead section, use FireFly markers on all phase and lightning arrester conductors in an alternate fashion at gradual distances every 10 metres. Installation should be performed under the supervision and as instructed by the ornithologist from the environmental supervision. ’;*

**12. I reverse clause I.4.3 in whole.**

**In this regard I decide as follows:**

*‘I.4.3 The “tunnel opening” through which water from the river bed will flow during regular operation of the reservoir should be adjusted to the width of the bed of Nysa Kłodzka, which is approximately 4 m. The size of the mesh of the grate at the inlet of the tunnel should be at least 40 cm (both height and width of the mesh). ’;*

**13. I reverse clause I.4.4 in whole.**

**In this regard I decide as follows:**

*‘I.4.4 Use natural or similar material as revetment and to protect the bottom of the artificial bed for the time of execution of the tunnel under dam body and new section of river bed so that it will be possible to preserve natural features of adjacent sections of river's valley to the greatest possible extent. The width of the bed should be similar to the width of adjacent section of the river, which is about 4.0 m. Backfill the temporary, 145.0 m long section of the river and use solutions for safe escape of living organisms prior to backfilling after construction of structures related to*

*the operation of the tunnel and redirecting water flow to the structures. Observe the appropriate order of actions so that water flow to the upstream part of the artificial, temporary river bed is blocked first and then implement actions (including trenches) on the liquidated section to facilitate outflow of water with living organisms. Only after the water has flown out, block the connection with the river in the downstream part of the temporary bed and backfill it. All works should be performed under the supervision and as instructed by the ichthyologist from the environmental supervision.*

**14. I reverse clause I.4.5 in whole.**

**In this regard I decide as follows:**

*'I.4.5 Adjust the width of the bottom of the regulated section of river bed upstream and downstream of the dam to the current width of river bottom, i.e. at least 4 m. Use natural or similar materials for river bed regulation. All works related to the regulation of the sections of the river upstream and downstream of the dam must be performed as instructed and recommended by the ichthyologist from the environmental supervision. The manner of regulation of the course of the river should ensure good migration conditions for lampreys and bullheads, among other things by using bottom substrate appropriate for these species and appropriate distribution of stones (of the right size and shape, including, among others, the use of large stones at least 50 cm in diameter without sharp edges), which will facilitate maintenance of water speed appropriate for them and occurrence of microhabitats.'*

**15. I reverse clause I.4.6 in whole.**

**In this regard I decide as follows:**

*'I.4.6 The new section of the river bed (connecting tunnel outlet and the existing bed of about 75.0 m) should have the bottom width of 4 m. Use natural or similar materials to form the bottom and slopes. Slope formation should be carried out as instructed and recommended by the ornithologist in order to adjust it to requirements of the common kingfisher, where possible. Bottom structure should reflect parameters of lamprey and bullhead habitat, including appropriate distribution of stones (of the right size and shape, including, among others, the use of large stones at least 50 cm in diameter without sharp edges), which will facilitate ensuring water speed appropriate for these species and occurrence of microhabitats.'; Any works related to formation of the new section of the river should be carried out as instructed by the ichthyologist from the environmental supervision and as per their guidelines.'*

**16. I reverse clause II.1.1 in whole.**

**In this regard I decide as follows:**

*'II.1.1 After completion of the construction stage of the project, hang one box suitable for the white-throated dipper under each of the two new bridges and under the bridge over the Nysa Kłodzka River of national road No. 33 Kłodzko–Boboszów. Additionally, hang 2 nest boxes for the grey wagtail under two more bridges from the project implementation site. If a retaining wall is constructed downstream of the dam, hang two additional boxes, retaining wall type, for the white-throated dipper and the grey wagtail. Situate them about 100 m apart and the same distance for the nearest bridges, not less than 0.3 m from the upper edge of the wall. Specific location for the boxes will be given by the ornithologist from the environmental supervision who will supervise the hanging process. As part of compensation, ensure annual participation of an ornithologist in cleaning and proper maintenance of the boxes, including replacement if they are*

worn out.';

**17. I reverse clause II.1.2 in whole.**

**In this regard I decide as follows:**

*'II.1.2 Prior to commencement of works, hang 42 bat boxes near the project implementation site in locations indicated by the chiropterologist from the environmental supervision and upon consultation with locally competent Forest District officer. The boxes should be hung in 7 groups, 6 boxes each. In each group use 3 Issel and 3 Stratmann boxes. As part of compensation, ensure annual participation of a chiropterologist in cleaning and proper maintenance of the boxes, including replacement if they are worn out.*

*Additionally, prior to commencement of works, hang the following nest boxes near the project implementation site in the location indicated by the ornithologist from the environmental supervision and upon consultation with locally competent Forest District officer under supervision of the above-mentioned ornithologist:*

- A type nest box: 70 pcs,
- A1 type nest box: 40 pcs,
- B type nest box: 89 pcs, of which 9 for the wryneck and 20 for the nuthatch,
- nest box for the treecreeper: 20 pcs,
- semi-open nest box for the spotted flycatcher: 30 pcs,
- semi-open nest box for the kestrel: 3 pcs,
- D type nest box: 3 pcs.

*As part of compensation, ensure annual participation of an ornithologist in cleaning and proper maintenance of the boxes, including replacement if they are worn out.*

*At the same time, execute a replacement nest platform for the black stork. Install the platform prior to the commencement of works related to implementation of the project in August–November. Situate the platform in forest division 197d, Forest subdistrict Smreczyna, precinct Międzylesie, district Międzylesie. The exact location of the platform will be selected by the ornithologist from the environmental supervision in consultation with locally competent Forest District officer. The platform and the installation should be performed as per guidelines of and under the supervision of the ornithologist from the environmental supervision. As part of compensation, ensure annual inspection with an ornithologist in order to verify the condition of the platform (which should be replaced as instructed by the ornithologist if worn out) and whether it has been inhabited.';*

**18. I reverse clause II.1.6 in whole.**

**In this regard I decide as follows:**

*'II.1.6 On a surface area of at least 1 ha on a slope of the Nysa Kłodzka valley, above the existing habitat \*9180 Great maple, maple, and lime forest on slopes, recreate the slope forest \*9180 on the slopes that are directly adjacent to it. The composition of the new tree stand should be appropriate for a slope forest: domination of great maple with small-leaved lime, ash, Norway spruce, silver birch, and shrubs: common hazel, bird cherry, alpine rose, rowan, and black-berried honeysuckle*

**19. I reverse clause II.1.7 in whole.**

**In this regard I decide as follows:**

*‘II. 1.7 Detailed designs for forest and shrub growth referred to in clause II.1.3 – II.1.6 should be prepared and executed as instructed by the botanist-phytosociologist, dendrologist, and chiropterologist from the environmental supervision upon arrangements with local Forest District. The new plants should facilitate bat flight and maintain the function of the wildlife corridor of Nysa Kłodzka. Planting in early spring or autumn during implementation of the project. Protect the seedlings from chewing by forest animals. Ensure supervision and inspect the newly planted trees and shrubs annually (for at least 10 years), and complement on a 1:1 basis in the case of losses (one new plant for each plant lost).’;*

**20. I reverse clause III in whole.**

**In this regard I decide as follows:**

*‘III. I do not impose the obligation to perform an environmental impact assessment or transboundary environmental impact proceedings under the proceedings to render the decisions referred to in Article 72(1) of the Act of October 3<sup>rd</sup>, 2008 on the dissemination of information about the environment and its protection, public participation in environmental protection and environmental impact assessment’;*

**21. I maintain the decision of the first instance authority in force in its remaining part.**

### **Justification**

Having re-examined the request submitted by Tomasz Wróblewski authorised to act on behalf of the investor, the Regional Water Management Authority in Wrocław, the Regional Director for Environment Protection in Wrocław, hereinafter the *RDOŚ in Wrocław*, rendered a decision dated February 27<sup>th</sup>, 2015, ref.: WOOŚ.4233.8.2012.LCK.47 on the environmental conditions for the project entitled: *Construction of Boboszków dry flood control reservoir on the Nysa Kłodzka River*. The previous decision on environmental conditions (dated January 31<sup>st</sup>, 2013, ref.: WOOŚ.4233.8.2012.LCK.9) has been reversed by a decision of the General Director for Environment Protection of December 6<sup>th</sup>, 2013, ref.: DOOŚ-oa1.4233.15.2013.IS.13 in whole, and the case was submitted for re-examination by the first instance authority owing to, among other things, incomplete evidence and assessment by the *RDOŚ in Wrocław*.

Katarzyna Wróbel and Grzegorz Franciszek Wróbel challenged the decision on environmental conditions dated February 27<sup>th</sup>, 2015, ref.: WOOŚ.4233.8.2012.LCK.47. The challenge contained references to Land and Mortgage Registers for properties owned by Katarzyna Wróbel (LMR No. SW1K/00043264/0) and Grzegorz Wróbel (LMR No. SW1K/00096869/7). Using information available in the subsystem of the Central Land and Mortgage Register Data Base ([ekw.ms.gov.pl/eukw.pdcbdkw.html](http://ekw.ms.gov.pl/eukw.pdcbdkw.html)) and on Ministry of Justice's website, it was confirmed that the indicated properties located in the area of the intended project are owned by the challenging persons who thus have a legal interest in the case and are entitled the status of stakeholders in the proceedings. The challenge was submitted within the mandatory period.

The challenge requested formal and factual verification of correctness of the proceedings carried out by the *RDOŚ in Wrocław* and its decision; should any irregularities be found, the settlement was requested to be reversed in whole and submitted for re-examination.

The stakeholders argue that the proceedings resulting in the challenged decision did not take into consideration arrangements of the *Framework Environmental Management Plan* prepared under the 'Odra-Vistula' Flood Management Project with its appendices and results of public consultations held pursuant to the above-mentioned document; additionally, they indicated non-conformance with recommendations resulting from the decision of December 6<sup>th</sup>, 2013, ref.: DOOŚ-oal.4233.15.2013.IS. 13. According to the challenging stakeholders, the defects are tantamount to infringement of Articles 7 and 8 of the Act of June 14<sup>th</sup>, 1960 *Administrative Procedure Code* (OJ of 2016, item 23, unified text), hereinafter the *APC*, that require that evidence is collected and assessed pursuant to Article 80 of the Act.

With the principle of two-instance administrative proceedings in mind which purpose is to provide stakeholders with a right to two examinations and settlements of cases. The General Director for Environment Protection, hereinafter the *GDOŚ*, has examined the case as regards factual and legal circumstances and has found the following.

The *RDOŚ in Wrocław* was competent to render the decision on environmental conditions for the project involving construction of the Boboszków dry flood control reservoir on the Nysa Kłodzka River pursuant to Article 75(1) I of the Act of October 3<sup>rd</sup>, 2008 on the dissemination of information about the environment and its protection, public participation in environmental protection and environmental impact assessment (OJ of 2016, item 353, unified text), hereinafter the *EPA Act*, owing to the implementation of the investment project involving execution of a flood control structure as defined in the Act of July 8<sup>th</sup>, 2010 on specific terms of preparing for implementation of projects in the scope of flood protection facilities (OJ of 2015, item 966 as amended) being a project specified in para. 2(1)35 of the Regulation of the Council of Ministers of November 9<sup>th</sup>, 2010 on projects that may significantly affect the environment (OJ of 2016, item 71, unified text) 'water damming structures of damming height 5 m and more'. The *RDOŚ* is therefore the competent authority to examine the challenge of the decision of February 27<sup>th</sup>, 2015.

In *RDOŚ*'s opinion, the proceedings prior to rendering the challenged decision by the authority of the first instance were carried out correctly as regards formal and factual aspects. In the course of the proceedings, the authority of the first instance specified a wide range of stakeholders, which included owners, holders of perpetual usufruct rights, and administrators of properties located within the impact range of the project, including provisions for a failure, and those located in the area of environmental compensation. Participation of the stakeholders, the public, and competent authority of sanitary inspection were appropriately provided for in the proceedings. The number of stakeholders exceeded 20, which meant that according to Article 74 of the *EPA Act*, Article 49 of the *APC* is applied. Pursuant to this Article, stakeholders are notified by an announcement or another manner of public announcement traditionally applied in the given place. The first instance authority has notified the stakeholders about consecutive stages of the proceedings and their rights in the form of announcements published in line with Article 49 of the *APC*, available in the Public Information Bulletin of the *RDOŚ in Wrocław* and on a notice board of this institution and of Międzylesie Municipality and City Office. Consecutive announcements included such information as: information on the initiation of the proceedings, requests and complementation of evidence, specified deadlines, completeness of evidence, opportunity to comment, and on rendition of the challenged decision of February 27<sup>th</sup>, 2015. The manner of informing the public about the opportunity for interested parties to become familiar with case documentation and about the 21 days' period for submitting comments and requests should also be deemed appropriate. Relevant announcements were published from December 18<sup>th</sup>, 2014 to January 9<sup>th</sup>, 2015 on the notice board and in the Public Information Bulletin

of the RDOŚ in Wrocław, notice board of the Międzyzlesie Municipality and City Office, and in press (addendum for Gazeta Wyborcza for Lower Silesia dated December 18<sup>th</sup>, 2014). The applied manner of notification conformed to Article 3(1)11 of the *EPA Act* pursuant to which: ‘Any references in the Act to: (...)

11) disseminating information to the public is construed as:

- a) publishing the information on the website of the Public Information Bulletin of the competent authority,
- b) announcing the information in a customary manner in the seat of the competent authority,
- c) announcing the information by notice in a customary manner applied in the place of the intended project; in case of a document draft that requires participation of the public, in a newspaper which range matches the type of document,
- d) in the case when competent authority's seat is located in a different municipality than the one locally competent for the object of the proceeding, also in a newspaper or in a customary manner in the place or places relevant to the object of the proceedings’.

In fulfilment of statutory requirements, the information on the issue of the decision on environmental conditions of February 27<sup>th</sup>, 2015 was also disclosed to the public. The manner of disclosing information to the public conformed to recommendations of the decision referred to by the challenging party dated December 6<sup>th</sup>, 2013, ref.: DOOS-oal.4233.15.2013.IS.13 where it was stressed that all the required manners of disseminating information to the public must be applied in light of the fact that the authority competent for the case is located in a different municipality than the municipality where the project is planned to be implemented.

As regards the complaint concerning disregarding the arrangements of publicly consulted draft of the document: ‘Framework Environmental Management Plan’, hereinafter *FEMP*, by the RDOŚ in Wrocław prepared by institutions planning a number of investment projects under the ‘Odra-Vistula Flood Management Project’, the following issues need to be clarified. First of all, it needs to be stressed that the scope of evidence to be examined prior to rendition of a decision on environmental conditions has been detailed in the *EPA Act*. Use of any framework documents, policies, or strategies to assess the impact of a specific project on the environment is not required by law. The required content of the necessary evidence (to facilitate in-depth assessment of a specific investment project in a given location) is, however, specified, including environmental impact assessment report content (Article 66 of the *EPA Act*), hereinafter the *report*. The requirements specified in the *EPA Act* facilitate obtaining information and analyses necessary prior to rendering a decision on environmental conditions, which are generally not available in framework documents (drafted for other purposes) in the required detail. In the course of the proceedings prior to the rendition of the challenged decision a complemented and unified version of the report was submitted (dated August 2014), and the first instance authority strived for in-depth clarification of the existing state. It did not settle the case until it found that, following requests to complement and clarify, it had all the necessary information about the planned project and its surrounding environment. In the opinion of the GDOŚ, the first instance authority rendered the decision in the case based on complete evidence required as per the *EPA Act* (including in accordance with Article 74(1) and Article 80(1) of the *EPA Act*. If the stakeholders wanted the evidence to be complemented with an additional document, they had the opportunity to submit a relevant request prior to the rendition of the challenged decision. According to case records, none of the participants of the proceedings of the RDOŚ in Wrocław, including the challenging parties, submitted any reservations as regards the documentation compiled in the first instance or requested that it be complemented with the *FEMP* draft. As regards the challenge, the stakeholders did not specify any findings included in the document that would in their opinion indicate defects in the proceedings or rendered settlement as well. The public consultations referenced in the challenge as



regards the content of the *FEMP* draft should not be construed as ensuring public participation in the assessment of environmental impact of the project carried out as part of *RDOŚ in Wrocław's* proceedings based on necessary case documentation, including the report. In the opinion of the *GDOŚ*, the fact that the arrangements in the draft of the *FEMP* were not included in the proceedings and in the challenged decision is not a defect, and the environmental impact assessment of the project and the relevant decision on environmental conditions do not conflict with the document. The *FEMP* draft lists such elements as environmental components that may be affected with a specific probability and severity and available minimising means, but it was also stressed that the assessment is of framework nature (cf. p. 120 of the *FEMP*). The necessity to carry out analyses and specify conclusions at the stage of environmental impact assessment of a given project was mentioned as well (cf. p. 15 of the *FEMP*, pp. 46 and other of Appendix 2 to the *FEMP*: Environmental impact. Monitoring plan and mitigation measures. Component 2: Flood protection of the Klodzko Valley). The appropriate environmental impact assessment for the planned project was ensured by conformity of the first instance authority with the requirements specified in the *EPA Act* as regards the environmental conditions decision proceedings. The complaint regarding disregarding arrangements of the draft *FEMP* is not indicative of proceedings defect that would justify reversing the challenged decision.

The request of the stakeholders to reverse the challenged decision and refer the case to be re-examined by the first instance authority may not be deemed justified in light of the course of the proceeding and the content of the rendered decision, which includes all elements required by law and thus meets the requirements specified, inter alia, in Articles 82 and 85 of the *EPA Act*. Prior to the rendition of the decision, the first instance authority had held an exhaustive investigation proceedings where it requested (on March 19<sup>th</sup>, 2014 and September 8<sup>th</sup>, 2014) that numerous complements and clarifications are provided, which should be deemed in line with the principle of objective truth specified in Article 7 of the *APC*. In light of the contents of the requests and the scope of replies, it should be noted that they included issues specified as vital to be clarified in *GDOŚ's* decision of December 6<sup>th</sup>, 2013, ref.: DOOS-oal.4233.15.2013.IS.13 (including, i.a. issues related to cumulative impact, bat, fish, valuable natural habitat, and body of water impact). Additionally, as regards the complaint concerning disregarding the recommendations of *GDOŚ's* decision of December 6<sup>th</sup>, 2013, it should be made clear that when re-examining a case, the first instance authority is not completely bound by the legal assessment and requirements of a cassation decision (cf. ruling of the Second Administrative Court Łd 965/08 of March 3<sup>rd</sup>, 2009) in such a manner as to determine the form of activity of the first instance authority taken in order to determine the current existing state and legal status of the case. According to the law, the authority acts independently during a re-examination of a case, and any of its challenged decisions are submitted for control of a higher instance authority. In the case at hand, case files (including requests by the *RDOŚ in Wrocław*, relevant replies, and the content of the challenged decision), the investigation proceedings involved the issues referred to in the decision of December 6<sup>th</sup>, 2013, ref.: DOOŚ-oal .4233.15,2013.IS. 13,

Despite complaints of the challenging stakeholders, case files do not suggest that the proceedings violated the law, in particular principles specified in Articles 7 and 8 of the *APC*. The fact that the proceedings were conducted in a manner earning trust of its participants to the public authority is confirmed by the manner of granting stakeholders' requests by the authority (including the request of the challenging stakeholders for direct notification about actions taken), actions taken to compile and assess evidence, and the exhaustive justification for the decision of February 27<sup>th</sup>, 2015, which

included, i.a. a description of the course of the proceedings, stakeholder and public participation, clarification of the basis of the assessment made by the first instance authority and the reasons for the decision, including identified impacts, means of minimisation, and compensation of expected losses. Whereas the decision-making competency of the challenge-handling authority is not limited solely to controlling the legitimacy of claims in a challenge, investigation proceedings were carried out in the course of the proceedings as per Article 136 of the *APC*, and legitimacy of the conditions specified in the decision of February 27<sup>th</sup>, 2015 was verified. The requests to investor's attorney (of October 19<sup>th</sup>, 2015 and January 19<sup>th</sup>, 2016) concerned i.a. complementation of information about investment project impact on the Body of Surface Water No. PLRW60004121169, 'Nysa Klodzka River from its source to Różanka', hereinafter the *BSW*, with indices concerning fish fauna and macrobenthos as per the Regulation of the Minister of the Environment of October 22<sup>nd</sup>, 2014 on the procedure for classification of bodies of surface water and environmental quality standards for priority substances in force (OJ of 2014, item 1482), and further concerned clarification of doubts regarding the scope of planned investment project (including the type of relocated power lines) and the possibility of applying additional minimising and compensating measures for expected environmental impact (as regards bats, birds, amphibians, fish, and other elements). Received replies (letters dated November 17<sup>th</sup>, 2015 and February 4<sup>th</sup>, 2016) confirmed that it was possible to carry out the investment project without any negative impact on environmental goals of the above-mentioned *BSW* and mentioned possibilities of application of additional means for minimising and compensating for project's environmental impact.

Stakeholders of the challenge proceedings were notified about the complement of the evidence (notifications of February 9<sup>th</sup>, 2016). Based on the compiled evidence, the higher instance authority decided to reverse some clauses of the challenged decision and render decision regarding them in the scope of the purpose of the proceedings. The introduced amendments and changes result first and foremost from the necessity to describe more fully some conditions specified in the decision on environmental conditions formed by the first instance authority in an overly general manner or to specify such conditions that will provide more extensive limitation of environmental impact of the planned investment project.

Decisions were made regarding, among other things:

- rewording clause I.2.2 of the challenged decision;

The amendment consists in a change of the period of works related to removal of trees and shrubs. The period specified by the first instance authority is too short; it does not take the biology of many species fully into consideration as they may have their breeding periods at the beginning of March and end of August. In order to eliminate the possibility of a loss, the wording of the condition was modified and the acceptable period of works involving removal of trees and shrubs was specified between March 1<sup>st</sup> and August 31<sup>st</sup>.

- rewording clause I.2.3 of the challenged decision;

The condition was complemented as per the *report* (chapter 14.3, p. 161) with a provision on ear-marking invasive alien plants for removal as specified by the phytosociologist from the environmental supervision. The purpose of this provision is to restrict the threat for Polish flora and biodiversity posed by alien species, which, if left in the project implementation area, could result in displacement of native species and growth of invasive, alien plant groups.

- rewording clause I.2.4 of the challenged decision;

Modification of the condition results from the necessity to include requirements of the common kingfisher (*Alcedo atthis*) and preservation around the Nysa Klodzka River bed as many trees and shrubs with low branches, as per recommendations of the ornithologist from the environmental supervision. They are a valuable part of this species's habitat and must not be completely liquidated.

- rewording clause I.2.6 of the challenged decision;

The modification of this condition stems from the same reasons as in the case of clause I.2.2. It is necessary to amend condition I.2.6 as well in order to maintain coherence as regards works periods.

- rewording clause I.2.7 of the challenged decision;

Amendment of this condition is necessary to protect bird fauna. The section of the river involved in the works is an attractive habitat of such species as the protected common kingfisher (*Alcedo atthis*). When specifying the period for stump extraction from river slopes, *RDOŚ in Wrocław* took into consideration solely the issue of fish fauna protection. Performance of the works as per the condition in the middle of the bird breeding season could endanger common fisherman's breeding habitats, which has to be free from interference over the whole breeding period (until the end of August). In the case of justified need to extend the work period till the end of February, the works should be carried out under the supervision of the ichthyologist owing to the spawning and hatching period for the brown trout.

- rewording clause I.2.8 of the challenged decision;

The new wording for this condition results from the necessity to ensure appropriate protection for fish fauna and other organisms in the river ecosystem. The currently specified period of exclusion of works in the river bed takes into consideration needs of the species that inhabit

the river. It effectively limits the environmental loss potential, which will be additionally ensured by the supervising ichthyologist.

- rewording clause I.2.11 of the challenged decision;

The condition specified in clause I.2.11 of *RDOŚ in Wrocław*'s decision restates generally applicable regulations on zone-based protection. If there is a functional protection zone for the nest of the black stork (*Ciconia nigra*), there is no need to repeat valid regulations; their inclusion in the decision is a mistake. The provision should therefore be reversed. It should be replaced with a condition on introduction of environmental supervision involving engagement of selected experts during works related to the project. The field of expertise to be selected should be related to the expected environmental impact, including natural habitats, birds, bats, fish, and amphibians.

- rewording clause I.2.15 of the challenged decision;

When specifying the period for removal of topsoil, *RDOŚ in Wrocław* did not take into consideration such factors as: the possibility of early-spring migration of amphibians and the end of breeding season of birds. Therefore the condition should be modified as stated hereinabove.

- rewording clause I.2.22 of the challenged decision;

The change of the condition concerns increasing the requirements for excavation inspection for animal presence; the number of inspections was increased to two a day in the period of intense spring and autumn migration of amphibians. Also the obligation was introduced to carry out works related to the inspection, trapping, and releasing of animals from excavations under the supervision of and as instructed by the herpetologist from the environmental supervision. They will additionally be responsible for appropriate securing any potential amphibian traps, and ensuring that the works are carried out in a manner preventing occurrence of isolated still water pools (as potential habitats) and facilitating herpetofauna communication along the Nysa Klodzka River. Expert's expertise (in biology and ecology of individual species) will guarantee the safe performance.

- rewording clause I.3.1 of the challenged decision;

The amendment of the condition results from preservation of the position of the large copper (*Lycaena dispar*), which may be achieved through avoidance of low mowing of the reservoir basin and preservation of its caterpillar's host plants.

- rewording clause I.4.1 of the challenged decision;

The condition specified in clause I.4.1 should be reversed as redundant. Execution of the earth-fill dam does not pose a limitation or obligation for the investor in light of the fact that in all described variants of implementation, the intent was to execute an earth-fill dam, which can be found in the report (cf. pp. 62, 78) and which was included in the challenged decision on environmental conditions (p. 14) and the project specification attached to it (p. 2).

Based on the analysed evidence (including submitted clarification dated November 17<sup>th</sup>, 2015) the reversed condition was replaced with means to limit the possible negative environmental impact of the power lines relocated in relation with the project that may have a negative impact on birds

by leading to collisions, crashes, or electrocution. The vast majority of power lines will be relocated underground, which eliminates these threats completely. The lines will be overhead lines on a short distance only. In order to minimise the risk of collision of birds with the aerial part, FireFly markers will be put on the lines, which will increase the visibility of this section of the line to birds and limit the possibility of negative impact. The visibility of the above-mentioned markers is increased by such factors as the presence of reflective elements and movement capabilities of the elements.

- rewording clause I.4.3 of the challenged decision;

The condition was complemented with specification of parameters of the grating of the tunnel entrance, which facilitates rock rubble transport downstream, which influences, among other things, the possibility of creation of a bottom structure appropriate for organisms downstream of the dam.

- rewording clause I.4.4 of the challenged decision;

The manner of determining the revetment and bottom protection of the artificial bed was changed by introducing a provision to use natural or similar materials to take into account the natural appearance of adjacent sections of the river. It is inadmissible, among other things, to leave on the bank, in the zone of potential migration of terrestrial animals, uncovered gaps or such elements as meal meshes of gabions that may pose a threat to them.

The condition was also complemented as per the requirements set in the report (p. 159) with indications of the manner of liquidation of the artificial section of the bed in such a manner as to limit the negative impact on aquatic life.

Simultaneously, all the works have to be carried out under the supervision of an ichthyologist from the environmental supervision who will make sure that the artificial bed is suitable for fish species inhabiting Nysa Kłodzka and its liquidation will be as safe for aquatic life as possible.

- rewording clause I.4.5 of the challenged decision;

The amendment involves introduction of a provision concerning the use of natural or similar materials and performance of works as indicated by the expert ichthyologist in a manner that will ensure appropriate living and migration conditions for such species as lampreys and bullheads.

- rewording clause I.4.6 of the challenged decision;

The new wording of the condition provides more specific requirements for appropriate execution of the new section of river bed while preserving its correct structure, which will be decisive for preserving appropriate environmental features and fish migration corridor (including particularly sensitive lampreys and bullheads). Execution of this section will be supervised by the ichthyologist who will determine the most effective solution to ensure patency and functionality of a migration corridor of lampreys, bullheads, and other fish species based on detailed environmental conditions in the place of execution. Simultaneously, ornithology supervision over appropriate formation of slopes will facilitate adjusting them to requirements of the common kingfisher, where possible.

- rewording clause II.1.1 of the challenged decision;

The condition specified in clause II.1.1 of the decision of the *RDOŚ in Wrocław* did not include all bird species that will be deprived of their riparian breeding habitats owing to the investment project. The first instance authority was right to impose the obligation to execute compensation nest boxes for the white-throated dipper (*Cinclus cinclus*), but missed the fact that the same area is inhabited by the grey wagtail (*Motacilla cinerea*) whose breeding biotope will be destroyed as well. Therefore, the provision was complemented with the obligation to provide additional boxes for the grey wagtail. This way, the previously omitted species will be provided with nesting locations as well. Simultaneously, the requirement to preserve the boxes was set in order to increase the efficacy of the applied compensation measures.

- rewording clause II.1.2 of the challenged decision;

The amendment of the condition involves, among others, specification of the period for hanging bat boxes (prior to commencement of works).

At the same time, an additional compensation obligation was introduced to hang nest boxes for birds. The project will involve tree clearing. Despite the fact that appropriate compensation planting is foreseen, the trees will be young and achieve properties of the removed tree stand after some years. For this reason, part of forest bird fauna will lose its breeding habitat for a long time. The problem concerns primarily cavity-nesting species. To prevent it, it is necessary to install nest boxes that will substitute nesting sites for these birds. The challenge-handling authority has introduced provisions based on forecast losses in breeding population of local bird fauna to provide appropriate and adequate compensation. The ornithologist from the environmental supervision, who has expertise in bird fauna biology and ecology, will take care of appropriate maintenance of the boxes,

*RDOŚ in Wrocław* did not take into consideration the possibility of limiting the threat related to the planned investment project near the nesting couple of the black stork. In light of the small distance of the current location of the species from the intended dam (450 m east), the planned works could result in the birds abandoning the nest. Owing to the fact that the construction works under the investment project will last a few years, the abandonment may be permanent, and the birds may fail to return to this breeding site after completion of the construction of the reservoir. It is, therefore, necessary to execute a substitute breeding location by installing a man-made nesting platform for the black stork. The introduced condition specifies the location where the compensation measure should be implemented and the manner of execution and subsequent inspections of the functional condition and inhabitation. This way, the couple of black storks that could be scared away from the currently used nest will be given a new breeding site both during the construction works related to the investment project and after it is operational.

- rewording clause II.1.6 of the challenged decision;

The change of the condition was necessary for correct determination of the scope of necessary compensation. In clause II.1.6, *RDOŚ in Wrocław* ordered restoration of habitat \*9180 on a surface area of at least 0.2 ha. Whereas, according to decision justification (p. 34) and the report (p. 163), compensation of the habitat should involve at least 1.0 ha.

In view of analyses of the authors of the report and administration authorities and the fact of destruction of 0.2 ha of the priority habitat \*9180, compensation of slope forests should take up at least 1.0 ha, which will guarantee appropriate restoration of lost environmental values of the habitat.

- rewording clause II.1.7 of the challenged decision;

The introduced change is aimed to ensure appropriate implementation of conditions regarding new planting imposed by the environmental authority. Supervision should be provided by a chiropterologist because the newly planted plants should, among other things, ensure maintenance of a migration corridor along Nysa Kłodzka for bats, which are abundant in the area, including in locations of Community importance. A provision was added that in the case of any losses in the compensation planting, it is necessary to complement them 1:1 on an on-going basis. This way the assumed result of the compensation will be achieved.

- rewording clause III of the challenged decision;

The condition was complemented as per requirements of Article 82(1)4 of the *EPA Act* pursuant to which authority's opinion on the necessity to re-evaluate environmental impact (under proceedings to render an executive decision) should include references to the necessity of ensuring transboundary environmental impact proceedings at this stage as well. The complement is a matter of formality and is within the scope of analyses performed also by the *RDOŚ in Wrocław*. The first instance authority's opinion that there was no need to carry out a transboundary assessment due to the impossibility of a significant negative impact of the project on a territory of another state was included in justification for the decision on environmental conditions (pp. 28 and 29 of the decision of February 27<sup>th</sup>, 2015). The justification contains clarification of the reasons behind first instance authority's opinion that here was no need to re-evaluate environmental impact (p. 36 of the decision). The higher-tier authority shares *RDOŚ in Wrocław's* assessment in this regard. In light of the fact that no other environmental impact assessment is necessary (as the environmental conditions specified in the decision do not have to be specified in more detail based on detailed solutions in the construction design) and there is no justification for transboundary proceedings (impossibility of significant impact of the project implemented in the territory of the Republic of Poland), the decision is fully justified. The challenge-handling authority has maintained the decision dated February 27<sup>th</sup>, 2015, ref: WOOŚ.4233.8.2012.ŁCK.47 on environmental conditions for the project entitled 'Construction of Boboszów dry flood control reservoir on the Nysa Kłodzka River' in the remaining part.

Having considered the case in relation to the challenge, the higher-tier authority has deemed that following application of partially amended and complemented conditions specified in the environmental conditions decision, the implementation of the project will not have a significant impact on the environment, including, among other things, the climate (the intended dry flood control reservoir will not affect local climate-forming conditions,

15

will not contribute to its possible changes, and at the same time will reduce flood risk by facilitating temporary retention of water with flow value from the one expected once every 10 years and larger), the possibility of achieving the environmental goal of the *BSW*, objects protected under the Natura 2000 network, valuable animal and plant species, and biodiversity in project's impact range (the obligations and restrictions imposed in the decision will ensure limited impact on valuable habitats, and relevant native species with their migration freedom; the broad range of compensation guarantees restoration of environmental values threatened by the project).

The *GDOŚ* did not find it justified to reverse the decision of the Regional Director for Environment Protection in Wrocław dated February 27<sup>th</sup>, 2015, ref.: WOOŚ.4233.8.2012.LCK.47, on the environmental conditions for the project entitled: 'Construction of Boboszów dry flood control reservoir on the Nysa Kłodzka River', and to submit the case for re-examination.

In consideration of the above, it was decided as stated above.

This decision is final.

This decision may be appealed against to the Provincial Administration Court in Warsaw via the General Director for Environment Protection, ul. Wawelska 52/54, 00-922 Warsaw within 30 days following receipt hereof.

52/54, 00-922 Warszawa, w terminie 30 dni od dnia otrzymania decyzji.



Z upoważnienia  
Generalnego Dyrektora Ochrony Środowiska  
p.o. Zastępcy Generalnego Dyrektora  
Ochrony Środowiska  
Marek Kajs

cc:

- Katarzyna Wróbel, Boboszów 50A, 57-530 Międzylesie;
- Grzegorz Franciszek Wróbel, Boboszów 50A, 57-530 Międzylesie;
- Tomasz Wróblewski, investor's attorney (Regional Authorities for Water Management in Wrocław) – Hydroprojekt Wrocław Sp. z o.o. ul. Wybrzeże Wyspiańskiego 39, 50-370 Wrocław;
- The remaining stakeholders by announcement as per Article 49 of the *APC*.

For attention of:

- Regional Director for Environment Protection in Wrocław – pl. Powstańców Warszawy 1, 50-153 Wrocław