



GENERAL DIRECTOR FOR ENVIRONMENT PROTECTION

DOOŚ-WDŚ/zoo.420.238.2018.is14

DECISION

Under Article 155 of the Law of 14 June 1960 – *Code of Administrative Procedure* (Journal of Laws of 2018, item 2096 as amended), further referred as CAP, in connection with Article 87 of October 3rd, 2008 on *the Provision of Information on the Environment and its Protection, Public Participation in Environmental Protection and Environmental Impact Assessments* (Journal of Laws of 2018, item 2081) , further referred as EIA Act,

I reverse

the decision of the Regional Director for Environmental Protection in Wrocław dated February 27th, 2015, ref.: WOOŚ.4233.8.2012.ŁCK.47, on the environmental conditions for the project entitled: *'Construction of Boboszów dry flood control reservoir on the Nysa Kłodzka River,'* overruled in part to which the new decision has been imposed and upheld in the rest be the resolution of the General Director for Environmental protection of April 6th, 2016, re. No.: DOOŚ-oa1.4233.21.2015.is.15 as follows:

1. I reverse clause I.2.15 in whole.

"I.2.15. The works related to topsoil removal shall be performed in the period from the beginning of September to the end of February.";

In this regard I decide as follows:

"I.2.15. The works related to topsoil removal from reservoir area shall be performed from the beginning of September to the end of April while the works related to topsoil removal in other areas (particularly around the reservoir dam, relief devices, roads) shall be performed throughout the whole year under supervision of environmental experts such as phytosociologist, herpetologist and ornithologist."

2. I reverse clause II.1.2 in whole.

"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. ';

In this regard I decide as follows:

'II.1.2 During the project implementation, in the vicinity and area of the works (within reservoir area where the works will not be performed), hang 42 nest boxes for bats near 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, during the project implementation, in the vicinity and area of the works (within reservoir area where the works will not be performed),, 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 during the works implementation.. Situate the platform in forest division 115p, Forest subdistrict Smreczyna, precinct Międzylesie, district Międzylesie (in Boboszków). 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.';

JUSTIFICATION

The General Director for Environmental Protection (hereinafter GDOŚ) issued a decision dated April 6th, 2016, re. No.: DOOŚ-oa1.4233.21.2015.is.15, in which he overruled in part the decision of the Regional Director for Environmental Protection in Wrocław (hereinafter RDOŚ in Wrocław) of February 27th, 2015, ref. No.: 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* and reversed the part upholding the rest of the decision of the first instance authority.

Acting on behalf of State Water Holding Polish Waters, hereinafter PGW Wody Polskie, Mr.....submitted a letter of December 18th, 2018, pursuant to Article 155 of CAP, appealing to GDOŚ for changing decision on environmental conditions for abovementioned investment. Validity of the powers of attorney of the person signed in the letter and authorized to represent the applicant has been proved by the proxy of May 18th, 2018, ref. No.: KOP.012.40.2018.BM granted by, the President of PGW Wody Polskie to.....the Director of Regional Water Management in Wrocław as well as the substitutable proxy of February 11th, 2019, ref. No.: WR.ROO.012.49.2019.KK granted by.....

The proposal submitted on December 18th, 2018 contained a request for the change of location of nest platform for the black stork established in forest division 197d, subdistrict Smreczyna (according to clause 17 of GDOŚ decision of April 6th, 2016, ref. No.: DOOŚ-oa1.4233.21.2015.is.15 reversing the decision of RDOŚ in Wrocław of February 27th, 2015, ref. No.: WOOŚ.4233.8.2012.ŁCK.47 in the clause II.1.2). The proposal was supported by the arguments of limited possibilities in enforcing the terms of the decision in the established location and of planned maintenance activities in the area by the Forest Service.

The proposal for amending decision was supplemented by the proxy of PGW Wody Polskie with: the letter of January 4th, 2019 (holding certified copy of a power of attorney), the letter of February 15th, 2019 (holding extended scope of the current application), the letter of February 20th, 2019 (holding the attachments with maps and listing of properties) and the letter of March 15th, 2019 (holding the completion of the request for amending the decision) . The extended proposal for amending the decision includes the following aspects:

- location and deadline of platform installation for black stork (during project implementation period and in location agreed upon with the competent Forest District Officer of forest division 115p in Smreczyna forest subdistrict);
- location and deadline of installation of nest boxes for bats (in the project implementation period and in location agreed upon with chiropterologist from the environmental supervision team in consultation with locally competent Forest District officer and in the vicinity or area of project implementation i.e. within reservoir area, in places where works are not performed);
- location and deadline of installation of nest boxes for birds (in the project implementation period and in location agreed upon with ornithologist from the environmental supervision team in consultation with locally competent Forest District officer and in the vicinity or area of project implementation i.e. within reservoir area, in places where works are not performed);
- deadline of topsoil removal (in the project implementation period from September to the end of April in the reservoir area while the works related to topsoil removal in other areas (particularly around the reservoir dam, relief devices, roads) shall be performed throughout the whole year under supervision of environmental experts such as phytosociologist, herpetologist and ornithologist.”

The Proposal was supplemented with the justification of proposed changes to the decision on environmental conditions and supported by updated data on the environment, collected by the experts of environmental supervision team and revealed by the staff of Międzylesie Forest District.

Relevant authority for amending the decision included in the current proceedings the documents collected in the course of the first instance and appeal proceedings, i.e.:

- **the request** for issuing the decision on environmental conditions with the following attachments submitted by the Investor:
 - the report on Environmental Impact Assessment (hereinafter *the report*) with updates;
 - extracts from the land register embracing the area of project implementation and the area of possible impact of the investment;
 - a land survey and height map
- the decision of Regional Director for Environmental Protection in Wrocław dated on February 27th, 2015, ref. No.: WOOS.4233.8.2012.ŁCK.47;
- the decision of GDOŚ of April 6th, 2016, ref. No.: DOOŚ-oa1.4233.21.2015.is.15.

Considering the request for amending the decision, the General Director for Environmental Protection established and held as follows.

The decision on environmental conditions of February 27th, 2015, ref. No.: WOOS.4233.8.2012.ŁCK.47 was issued by RDOŚ in Wrocław for the purpose of the Investor: Regional Water Management in Wrocław. The decision of April 6th, 2016, ref. No.:DOOŚ-oa1.4233.21.2015.is.15 (the decision of the first instance authority was partly overruled by

GDOŚ in the matter and partly upheld) included the administrative and legal aspects of the same entity.

Due to the fact that the request for amending the decision was submitted on behalf of another entity (PGW Wody Polskie), it shall be noticed that, as a result of the provisions of the novelized act of July 20th, 2017 Water Act (OJ of 2018, item 2268) becoming effective as of January 1st, 2018, PGW Wody Polskie, under Article 527, succeeded to all the financial obligations, rights and liabilities of regional water managements. Moreover, pursuant to Article 534 Par. 1 Subpar. 2 of the abovementioned Act and on the date of the entry into force of this Act, PGW Wody Polskie acquire the rights and liabilities arising in connection with the license and permits given to regional water managements, unless other provisions or decisions on granting the licence or permit state otherwise.

As a result, it shall be taken for granted that the request submitted by the proxy acting on behalf of PGW Wody Polskie, originates from the sole party of the proceedings, responsible for implementation of the decision on environmental conditions and interested in the changes included in the request of December 18th, 2018, supplemented by further letters.

According to Art. 155 of the CAP: "the final decision, pursuant to which one party shall be entitled to the right, may be any time, and by the approval of the party involved, overruled or amended by the public authority, which issued the decision, if the provisions do not preclude such overruling or amendments and overriding public interest or the interest of the party involved is justified; the art. 154 Par. 2 is applied in this respect." In the above article, the legislature indicated the right authority which issued the final decision. In the case in which appeal is brought, the final decision is issued by the second instance authority, which according to art.155, holds the right to decide on the request for amendments. Such standpoint is further confirmed by court and administrative judicature (the decision of Supreme Administrative Court of November 8th, 2017, act: II, OSK 2865/16). Thus, in the case in question, GDOŚ is the right authority to decide on the request for amendments.

Such change in the decision, pursuant to which one party was entitled to the right, may be possible if there are positive conditions indicated in art. 155 of the CAP (there is approval for the change of the party involved and overriding public interest or the interest of the party involved is justified) and there are no negative conditions (there is no regulation against the change). If all conditions are met, the competent authority issues a new decision allowing for the change of existing decision, according to Art. 154 Par.2 basing on Art. 155 of the CAP.

In the case in question, Art. 87 of the EIA Act shall be also applied as it includes the provisions concerning changes in decisions on environmental conditions stated in part V and VI of the EIA Act. The above given regulation orders also appropriate use of Art. 155 of the CAP, providing that the agreement for the change is expressed by the party involved or by the subject which acquired the rights for the decision on environmental conditions.

Taking the request of the party of December 18th, 2018 into account, the final decision on environmental conditions for the project entitled: "*Construction of Boboszów dry flood control reservoir on the Nysa Kłodzka River*" (the decision of RDOŚ in Wrocław of February 25th, 2015, re. No.:WOOŚ.4233.8.2012.ŁCK.47, overruled and reversed in part and upheld in the rest by the decision of GDOŚ of April 6th, 2016, ref. No.:DOOŚ-oa1.4233.21.2015.is.15) forms the substantive resolution determining the legal position of the addressee. Due to the decision, the party got the right both to conduct the investment following the conditions established in the decision and to apply for the implementing decision, mentioned in Art. 72 of EIA Act. Moreover, the request for amending the decision in question was submitted on behalf of PGW Wody Polskie (the addressee of the decision referred to in Art. 527 and 534 Par. 1 Subpar.2 of the Water Act), which, beyond no doubt, suggests that the party requesting for some changes agrees upon them at the same time as referred in Art. 87 of the EIA Act. Regardless of the above, the approval of the party is stated in the request itself (point 2 on page 2 of the letter dated on December 18th, 2018 and point 5 on page 3 of the letter dated on February 15th, 2019 – reversed in the letter of March 15th, 2019 correcting the obvious error in point 5 of the request).

Therefore, the requested decision is the final decision, according to Art. 155 of the CAP and the party, having acquired the right, requests for the change of the decision, agreeing upon it as stated in Art.87 of the EIA Act, which means that all positive conditions allowing for the change have been met.

Moreover, it should be noted that, according to Art. 87 of the EIA Act, the authority conducting the proceedings in connection with the change of the decision on environmental conditions takes into account only substantive facts within the request for changing the decision. Such approach is fully supported by, among other, Krzysztof Gruszecki (*the Provision of Information on the Environment and its Protection, Public Participation in Environmental Protection and Environmental Impact Assessments- Comment, edition II, LEX/el. 2013*) who states that: *“In the meaning of the first sentence of Art. 87 of 2008 Act on the Provision of Information on the Environment and its Protection, Public Participation in Environmental Protection and Environmental Impact Assessments, one should not follow the rule regarding the examination of the issued decision from only one standpoint such as interest of public or justified interest of the party involved in the requested amendments or overruling and one should not follow the rule stating that the authority is not required to conduct another substantive analysis of the case since in the proceedings carried out according to Art. 155 of the CAP, the regulations of material law are not applied(the decision of the Local Government Board of Appeal in Wrocław of November 10th, 2010, LGBA 4136/30.10, OWSS 2011, no. 1, p.36). This opinion should be accepted. If the change of the decision must be preceded by the EIA (if necessary), it means that the authority issuing the decision amending environmental conditions of project implementation shall again conduct substantive proceedings. As a result, the freedom of its action is much wider (however, determined by the request of the party) than Art. 155 of the CAP suggests.”* A similar opinion was shared by the Province Administrative Court in Poznań (the decision of August 10th, 2017, file no.:II SA/PO 162/17) which indicated that *“If the change of the decision must be preceded by the EIA (if necessary), it means that the authority issuing the decision amending environmental conditions of project implementation shall again conduct substantive proceedings. As a result, the freedom of its action is much wider (however, determined by the request of the party) than Art. 155 of the CAP suggests.”*

Taking into consideration the necessity of the proper application of provisions of part V and VI resulting from Art. 87 of the EIA Act, the competent authority responsible for examining the request for amending the decision on environmental conditions is obliged to establish and impose the provisions proper for given circumstances and referring to the decisions on environmental conditions. In the Court and Administrative judicature, it is stated that the right application of provisions shall follow the nature of the proceedings, in the scope the most similar to the provisions applied in the standard proceedings (the decision of Supreme Administrative Court of November 10th, 2016, file no: II, OSK 1784/15).

Therefore, it was necessary to consider, among other things, whether the change of the decision requires an Environmental Impact Assessment. It is accepted in the doctrine that: *“ (...) the obligation to re-examine in those cases where the scope of the project is limited in ratio specified in the original decision (e.g. instead of two technological lines only one is to be established) should be excluded. Making such a change results in limiting the impact on the environment, instead of increasing it, therefore it should not be necessary to carry out the whole procedure again.”* (abovementioned Comment LEX/el. 2013, as well as the verdict of the Provincial Administrative Court in Poznań from May 14th, 2015, file no.: IV SA/PO 1120/14).

This case concerns a project that may always have a significant impact on the environment for which (in accordance with Art. 59 Par. 1 point 1 of the EIA Act) an environmental impact assessment is required, as defined in Art. 3, par. 1, point 8 of the aforementioned Act, as: *“proceedings regarding the environmental impact assessment of the planned project, including in particular: a) verification of the report on Environmental Impact Assessment, b) obtaining opinions and agreements required by the Act, c) ensuring the possibility of public participation in the proceedings”*.

Taking into account the scope and nature of the changes specified in the request of the

party to amend the decision, it should be noted that they do not lead to a limitation of the scope of the implemented project, and are not applicable to activities that would mitigate the impact of the investment on the environment. Thus, in the case in question, there is no unequivocal basis to withdraw from the Environmental Impact Assessment.

Given the above, GDOŚ determined that in the case in question the resolution on whether the amendment of the decision was justified by the *social interest and the legitimate interest of the party* (i.e. whether the conditions referred to in Art. 155 of the CAP were met), with the necessity of proper application of art. 87 of the EIA Act, requires an Environmental Impact Assessment and examination on the basis of the evidence collected encompassing the results of public participation and positions of co-operating bodies.

Therefore, with the letter dated on March 1st, 2019, ref. No.: DOOS-WDŚ/zoo.420.238.2018.is.8, information about the possibility of getting acquainted with the necessary documentation of the case (including a request to amend the decision on environmental conditions together with attachments and a *report*), as well as the possibility of bringing Comments and requests within 30 days running from March 4, 2019 to April 2, 2019, was publicly disclosed. Within the prescribed period no remarks or motions were submitted from the concerned public.

In the course of the proceedings, GDOŚ also informed the parties to the proceedings (notifications on: January 23rd, 2019, ref. No.: DOOS-WDŚ/zoo.420.238.2018.is.4, March 1st, 2019, ref. No.: DOOS-WDS / zoo.420.238. 2018.is.6) about the possibility to leave a remark concerning the evidence and materials collected and requests submitted. Prior to final determinations, none of the parties exercised their right to actively participate in the proceedings and to submit remarks.

Moreover, with the letter dated on March 6th, 2019, ref. No.: DOOS-WDŚ/zoo.420.238.2018.is.10, on the basis of art. 77 par. 1 point 2 of the EIA Act GDOŚ has requested the Lower Silesian State Sanitary Inspector for the opinion of the body of state sanitary inspection, locally and substantively competent in the case concerning the artificial water reservoir implemented in the province of Lower Silesia, which may always have a significant impact on the environment (in accordance with Art. 78 par. 1 point 1(a), fifth indent of the EIA Act). From the reply provided in the letter of March 14th, 2019, ref. No.: ZNS.9022.2.132.2019.GD, it is implied that the National District Sanitary Inspector of Lower Silesia does not raise any objections concerning the possibility of amending the decision, in accordance with the request by the party.

Based on Art. 77 par. 1 point 4 of the EIA Act, GDOŚ also applied (by the letter on March 6th, 2019, ref. No.: DOOS-WDŚ / zoo.420.238.2018.is.9) for Water Law assessment by the competent authority in the matter. According to art. 397 par. 2 of the Water Law Act, for the project implemented by *State Water Holding Polish Water*, the competent authority for water law permits is a minister competent for the water management.

On March 15th, 2019, by letter ref. No.: DOK.DOK2.9750.18.1.2019.AGZ, The Minister of Maritime Economy and Inland Navigation, hereinafter referred to as MG MiŻS, presented a position, according to which the request to agree upon the amendment of the decision issued in the old legal order (i.e. without the required involvement of the competent authority in the matters of Water Law assessments) is unfounded. The cooperating body indicated in the abovementioned letter that the administrative courts have had their say in this matter, including the Supreme Administrative Court in the judgment of November 10th, 2016, file no.: II OSK 1784/15, according to which: *"the legal possibility of applying this procedure (revision of the decision under Article 155 of the CAP) is conditioned on conducting proceedings within the same legal and factual state and with the participation of the same parties"*.

GDOŚ did not share the above argumentation of the body competent to perform Water Law assessment, on the lack of justification for cooperation in the case at question, since:

- the decision amendment procedure is an independent new administrative procedure,

initiated and maintained on the basis of legal provisions that are currently in force;

- there is no legal basis to identify the need to examine and preserve identity of the case (in terms of legal and factual status) with the requirement to run proceedings for amending the decision on the basis of the current legal order, in force on the date in which the decision being amended was issued;
- a fragment, referred to by MG MiŻŚ, of the Supreme Administrative Court's judgment of November 10th, 2016, file no.: II OSK 1784/15, does not constitute an assessment made in this case by the Supreme Administrative Court, but a fragment of justification in which the position taken by the court of first instance is referred to in a sentence of March 24th, 2015, file no.: IV SA/Wa2131/14, repealed by the Supreme Administrative Court;
- in the current legal status, conducting an Environmental Impact Assessment requires, among others, agreeing with the authority competent in water-legal assessment (*Article 77, paragraph 1, point 4 of the EIA Act*).

Intertemporal provisions of the Water Law Act, do not provide for conducting proceedings in extraordinary mode (regarding the amendment of decision on environmental conditions) under the law in force before the January 1st, 2018 (e.g. without the participation of the co-operating authority referred to in art. 77 par. 1 point 4 of the EIA Act). Regulations included in the amended Water Law Act (Art. 545 par. 1) indicate only the application of previous provisions to cases initiated and not completed before the date of entry into force of the abovementioned Act concerning decisions on environmental conditions and regarding issues related to the assessment of the project's environmental impact under the procedure for issuing or changing decisions referred to in art. 72 par. 1 points 1, 10, 14 and 18 of the EIA Act ("re-evaluation"). If the intention of the legislator was to apply the provisions in the manner suggested in the letter of March 15th, 2019, ref. No.: DOC.29797.18.1.2019.AGZ, (contrary to the general rules of the administrative procedure, according to which matters should be settled on the basis of applicable law), this would be expressed clearly in the Act. In connection with the above, GDOŚ, with letter from March 26th, 2019, ref. No.: DOOS-WDS / zoo.420.238.2018.is.1 1, again contacted MG MiŻŚ for reconciliation, explaining the circumstances described above, in the light of which the cooperation of the competent authority for Water Law assessment is required in the case in question.

MG MiŻŚ (by the letter on April 5th, 2019, re. No.: OK.DOK2.9750.18.201.2019.AGZ),

Has requested GDOŚ to update information on:

- monitoring data regarding the assessment of the status for surface and groundwater bodies (hereinafter JCWP and JCWPd) in the context of the impact of the proposed changes;
- impact of the proposed changes on the ability to achieve environmental objectives for protected areas referred to in art. 16 point 32 of the Water Law Act;
- cumulative impacts;

GDOŚ requested the applicant (by the letter on April 9th, 2019, re. No.: DOOS-WDS / zoo.420.238.2018.is.12) to provide explanations to the extent specified by the co-operating authority competent in the matter of the Water Law assessment. The response to the request was forwarded to GDOŚ and directly to the Department of Jurisprudence and Water Management Control at MG MiŻŚ by the proxy acting on behalf of the investor in a letter dated on April 12th, 2019, sign: 2102 / POPDOW/WR/W/2019. Additional explanations were also provided by the attorney of the investor in a letter dated on May 9th, 2019, re. No.: 2188/POPDOW/WR/W/2019.

Due to the evidence collected in the case, MG MiŻŚ via a letter dated on May 21th,

2019, re. No.: DOK.DOK2.9750.18.3.2019.AGZ, reconciled the prospect of amendment conditions specified in the decision on the environmental conditions for the project under the name: “*Construction of Boboszów – a dry flood control reservoir on the Nysa Kłodzka River*”. The competent authority for the Water Law assessment stated that the requested amendments have no impact on the ability to achieve environmental objectives for protected areas set out in the water management plan for surface and groundwater bodies. Works related to the topsoil removal can cause an increased inflow of suspended solids to the waters (e.g. in the period of intensive rainfall and surface runoff in the direction of the Nysa Kłodzka river bed), but the alteration in the schedule of stripping off that layer alone is not important in the context of environmental objectives indicated in the Water Management Plan for the river basin area. Other requirements resulting from the request to amend the decision do not concern the competence of the co-acting body. The scope of construction works and project parameters are not diverted in relation to the assumptions presented in the report and contained in the decision on environmental conditions. Therefore, the competent authority for the Water Law assessment agreed to respond positively to the request to amend the decision and did not submit any remarks.

The evidence collected in the case, including the request of the party (containing assessed environmental data) and the positions of the co-operating authorities indicates that the amendment of the decision, in accordance with the demand expressed in the letter of December 18th, 2018, does not lead to the implementation of different scope of the project, nor does it alter its parameters. The amendment encompasses only selected conditions aimed at mitigating and compensating the negative environmental impact of the Investment.

Acting within the limits of principles determined in *the EIA Act* (in particular those determined in Articles 80 and 82 read together with Art. 87 of *the EIA Act*), GDOŚ concluded that the amendment of the decision concerning the case in question is justified by the legitimate interest of the party.

The scope of requested amendments does not remain in conflict with the public interest, understood primarily as the need to ensure an adequate level of environmental protection, as a common good whose protection is in the public interest.

In the course of the proceedings to amend the final decision on environmental conditions, the public administration body is obliged to determine whether there are specific provisions that render amendment for the decision unacceptable. In the light of art. 87 of the *EIA Act*, it shall be established that the foremost applicable in this case will be the provisions of the *EIA Act*, which condition i.a. the prospect of consent for the implementation of the project (including Art. 81 of the *EIA Act*). In the case in question the analysis of the evidence collected in the case does not indicate that the amendments encompassed by the request of the party are not compatible with the specific provisions. The introduction of the amendments encompassed by the request will also not contribute to significantly negative impact of the project on the environment, including areas or species subject to protection, or to a negative impact on the prospect of achieving environmental objectives for the waters.

Having the option of choosing a more advantageous solution for the party, which does not collide with the binding legal order and public interest, the authority, acting within the limits of administrative recognition, changed the decision on environmental conditions.

The first of the amendments (point 1 of this decision) concerns the deadline for carrying out works related to the topsoil removal, GDOŚ states that the distribution of occurrence of species and natural habitats in the area of project implementation is not homogeneous. Taking into consideration the current environmental data provided with the request for the amendment of the decision, coming from inspections carried out by the environmental supervision, it should be considered that the current prohibition concerning the removal of topsoil (determined due to the precautionary principle in the absence of sufficiently detailed environmental data at the stage of issuing amended decision) is inadequate to the situation currently demonstrated by the applicant. The condition, aimed at the protection of herpetofauna and avifauna, should take into account the actual occurrence of the individuals at

risk of the above mentioned vertebrate groups. The evidence provided by the applicants confirms the possibility of introducing, according to the interest of the party, an amendment in the condition regarding the site and period of topsoil removal. For this reason, the project implementation area is divided into two sites: basin area of the reservoir and other locations. Considering the distribution of species that inhabit the abovementioned areas and their biology and ecology (including breeding and nesting of the offspring) a ban was established on the topsoil removal in the basin area of the reservoir (since the beginning of May till the end of August). However, on the remaining area, this activity will be permitted throughout the year, but under the surveillance of experts, performing supervision in the period sensitive to particular groups of species. The field inventory carried out in spring of 2018 showed the occurrence of the breeding site of the common frog (*Rana temporaria*) outside the work sites related to the project implementation. In addition, there was an absence of migration routes for batrachofauna, both on the area of the planned reservoir, as well as in its immediate vicinity. Regarding the avifauna, inventory allowed to acknowledge sparse litter (from 1 to 3) of pairs of commonly occurring bird species (both on a national and regional scale), such as Eurasian skylark (*Alauda arvensis*) and corn bunting (*Emberiza calandra*). Any loss, by inventoried individuals of these species, of nests as a result of removing humus will not have a significant impact on their populations in both scales indicated above.

The second of the changes (point 2 of this decision - referring to point II.1.2 of the decision of RDOŚ in Wrocław, February 27th, 2015, re. No.: WOŚ.4233.8.2012.ŁCK.47, whose wording was given in point 17 of the GDOŚ decision from 6th, April 2016, re. No.:

DOŚ-oal.4233.21.2015.is.15) regards the correction of period for placing reproduction boxes for bats and alluvial boxes for birds, as well as changing deadline and construction site of an artificial breeding platform for the black stork (*Ciconia nigra*). Due to the nesting season currently in progress, there is no need to suspend avifauna boxes and boxes for chiropterofauna prior to commencement of the works, as these will be settled only in the next season. The implementation of the obligation during the implementation of the project, in accordance with the request of the party, will ensure effective compensation of the anticipated impacts.

Changing the location of the breeding platform for the black stork is prompted by the habitat demands of the species in question and by updating the information on the means of the forest complex development, that was indicated in the amended decision, as the place of implementation of the obligation imposed on the Investor. From the findings made with the the State Forest Distric in Międzylesie, it appears that the planned economic and maintenance activities will significantly reduce the suitability of the originally designated area for the effective implementation of the planned compensation. Additionally, as part of the field inventory carried out by the applicant in 2018, the location of the artificial breeding platform more desirable for the black stork was indicated. Both stand features (its composition and age, adapted to the needs of the discussed species) were taken into account, as well as the places of potential feeding grounds for the black stork. GDOŚ shares the view that the newly chosen location is favorable for the location of the replacement breeding platform and will provide the necessary conditions for its settlement by the abovementioned species. Changing the date of the platform assembly is acceptable due to the lack of presence in 2018 of both the previously established (at the stage of preparing the *report*) black stork's nest, as well as the lack of presence of specimens of this species in the research submitted by the applicant. Compensation can therefore occur without harm to the environment during the implementation of the project, and the legitimacy of its implementation results from earlier findings on the presence of the black stork in the region and the prospect to ascertain it again in this area.

In this case, the legal and factual prerequisites allowing the possibility of amending the decision in question are met. At the same time, there are no specific provisions to oppose the repeal of that decision.

In view of the above, it was adjudicated as in the operative part.

Information

The dissatisfied with the present decision party may apply to the General Director for Environmental Protection, within 14 days of the delivery date, with a motion for a reconsideration of the case.

During the period for filing an application for reconsideration, a party may, pursuant to Art. 127a par. 1 read together with Art. 127 par. 3 of the CAP, waive their right to file a motion for reconsideration of the case against the General Director for Environmental Protection. On the date of service of the motion of waiver of the right to file an application for reconsideration by the last party to the proceedings pursuant to Art. 127a par. 2 read together with Art. 127 par. 3 of the Code, this decision shall become final and legally binding.

A party may file a complaint against present decision in accordance with art. 52 par. 2 of the Act of 30th, August 2002 - *Law on proceedings before administrative courts* (Journal of Laws of 2018, item 1302), hereinafter referred to as *pbac ACT*, without the need to exercise the right to submit a request for reconsideration. The complaint must be filed in writing with the District Administrative Court in Warsaw, via the General Director for Environmental Protection, within 30 days from date of service.

By filing a complaint against present decision, the party, in accordance with art. 230 of the *pbac Act*, is obliged to pay an entry from the complaint in the amount of 200 zł. Party, which results from art. 239 of the *pbac Act*, may be exempt from the obligation to pay court costs. In accordance with art. 243 of the *pbac Act*, a right of assistance may be granted to a Party at its request. This motion is free from court fees.

Recipients:

- - the Proxy of the Director of State Water Holding Polish Water - Sweco Consulting Sp. z o. o. – Leader of the JV, Al. Armii Krajowej 61, Building C, 50-541 Wrocław
- The parties to the proceedings, pursuant to Art. 49 Par. 1 of the CAP read together with Art. 74 Par. 3 point 2 of *the EIA Act*.

To the attention of:

- **Regional Director for Environmental Protection in Wrocław**
- Al. Jana Matejki 6, 50-333 Wrocław

[stamps:]

Regional Director for Environmental Protection in Wrocław

pp. Regional Director for Environmental Protection in Wrocław
Marek Kajs */illegible signature/*