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RECENT DEVELOPMENTS IN THE POLISH ENVIRONMENTAL PROTECTION LAW

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The legislative process in 2007 has been focused on implementing new EC directives, on eliminating of existing shortages in the transposition of some directives and on eliminating any doubts as regards to the interpretation of environmental regulations which have appeared upon their applying.

The Environmental Protection Law Act (2001) was amended recently. The amendment aimed primarily at¹:

- the implementing of new Directive 2004/107 relating to arsenic, cadmium, mercury, nickel and polycyclic aromatic hydrocarbons in ambient air
- the sorting out of regulations concerning the proceeding in the EIA
- the elimination of existing shortages in the transposition of some community directives,
- the introduction of regulations enabling the application of Regulation 166/2006 concerning the establishment of a European Pollutant Release and Transfer Register

On 13th April, 2007 the Act on the prevention and remedying of environmental damage was adopted. It is a transposition of Directive 2004/35 into Polish law. The Act came into force on 30th April, 2007.

Case law – ‘Rospuda case’²

Augustow bypass – an expressway which cut through the Rospuda River Valley

The most important dispute concerns the building of an expressway Via Baltica – a road which is to be constructed within the framework of the Europe Transportation Corridor and connect Warsaw with Helsinki. The proposed road (its particular sections) would cross precious and unique nature sites of northeastern part of Polish territory.

One of the proposed sections of this road – called ‘Obwodnica Augustowa’ (Augustow bypass) - would cross the Rospuda River Valley in the Augustow Forest. The Valley is a unique and precious nature site, where rare and protected species of fauna and flora occur.

Many scientists have taken actions in defense of the Rospuda River Valley – both in papers and television. An all-Poland campaign of collecting signatures under “The Appeal to the President of the Republic of Poland” for rescuing the Valley has been organized. The aim of these actions is forced public authorities to change the course of the planed road so as to omit the most valuable nature sites and simply choose other possible options.

The process connected with the construction project of the planned bypass began before Poland’s accession to the EU but its successive stages, significant with regard to the protection of the areas of Natura 2000, took place after 2004. Ecological organizations which are against the planned construction project due to its effects on the Rospuda valley, have been involved in the matter of the road construction from the very beginning. The organizations take suitable factual actions (campaigns)

¹ Ground to draft of the Act <http://orka.sejm.gov.pl/>

² The presented information was prepared on the basis of: a) the order of the President of the Court (18th April, 2007) in case C-193/07/R, b) the judgment of the Voivodeship Administrative Court in Warsaw (26th April, 2007), c) a letter of the Ombudsmen concerning the commencement of the proceedings in the matter of an appeal against the Voivode’s decision dated of 18th October, 2006 about the environmental determinants of the permission for the realization of an project consisting in the construction of the Augustów bypass; d) studies regarding the conflict in question: M. Bar, J. Jendrońska, Legal aspects of the Rospuda dispute (PiP 2007/1, p. 49-60), e) information regarding the ‘Rospuda case’ presented by the Association “Workshop for All Beings” (NGO) at its internet page <http://www.pracownia.org.pl/prac/>

and legal ones (exercising the right to participate in the proceedings and the right of access to the court) which aim at the changing the routes for the planned road.

Before Poland's accession to the EU

- the localization of the section of the road 'Obwodnica Augustowa' was determined in local spatial management plan
- the decision about the conditions of building and land development for the project was issued ('decision on land development' 2003)

One of the arguments which is raised by the government is that at present there is no possibility to take into consideration another course of the planned road than those indicated in the local spatial management plan and decision on land development.

After accession (2004)

- **The area was designated as SPA** (Augustow Forest - Puszcza Augustowska) under the bird directive (2004); this site is now also protected as potential SAC called "Ostoja Augustowska" (the Augustow Sanctuary) although it was not included at the national list of candidate SACs which was sent to the Commission. 'Ostoja Augustowska' and 'Pojezierze Sejneńskie' (Sejneńskie Lake District) – the sites connected with the project – were on the 'Shadow list' (the list of green organizations which have elaborated a special report entitled "A proposal of an optimum Natura 2000 network in Poland" - "Shadow list"). These sites are actually protected as potential SAC³.
- **18/10/2006 the decision on environmental determinants of the project Augustow bypass was issued.** The Decision is a permit for the realization of the construction project within the meaning of Art. 2.1 of Directive 85/337 and Art. 6 of Directive 92/43.

Within the framework of the adjustments of the decision concerned, the Minister for the Environment, approved the course of this bypass through the Rospuda Valley in one of two variants, i.e. a road tunnel or a ten-span flyover. **His decision has just been reversed by the Voivodeship Administrative Court in Warsaw** (the judgment from 26, April, 2007) as a result of the complaint lodged by NGOs. In the opinion of the court, the body making a decision about environmental determinants of the construction project concerned, due to changes in Polish law (2005), was not bound by arrangements ensuing from the 'decision on land development' and from the development plan (acts adopted before the accession). For this reason the body making the decision concerning environmental determinants of the planned construction project (in 2006) should consider all possible variants of the routes for the road (art. 6 dir. 92/43) and assessed their possible effects on the environment and Natura 2000⁴. **A cassation complaint** against this judgment of the Voivodeship Administrative Court has been lodged with the Superior Administrative Court.

In view of negative effect of the project on SPA "Puszcza Augustowska" the decision on environmental determinants provided for necessary compensatory measures, including, amongst other, afforestation of ca 100 ha situated in the area of Pojezierze Sejneńskie (Sejnow Lake District) which borders on SPA "Puszcza Augustowska" (afforestation is to create new nesting posts for protected bird species). **The President of the ECJ ordered the afforestation to be stopped** (see below)

- **9/02/2007 – the final building permit was issued** (the decision is under verification process)
- **20/05/2007 – a local referendum** was held in the matter of the route of the bypass, which was invalid due to low turnout (below the required 30% of the population entitled to vote).

³ <http://natura2000.mos.gov.pl/natura2000/>

⁴ In the opinion of the court there is no analogy between the case in question and the case adjudicated by the ECJ regarding the construction of the road through the territory of Natura 2000 in Austria.

The Commission⁵ and ECJ activities in Rospuda case

In April 2007 the Commission brought the case before the Court of Justice of the European Communities. By its application, the Commission requests the Court to declare that:

- through failure to take appropriate actions within the framework of the proceedings in the matter of issuing permission for building Augustow bypass which would allow to avoid the deterioration of the condition of SPA Puszcza Augustowska ,
- through the proposal to carry out the project of the afforestation in the area of Pojezierze Sejneńskie as a measure compensating losses in SPA Puszcza Augustowska,
- through the permission to damage the habitat of Puszcza Augustowska, located in the area Ostoja Augustowska (the Augustow Sanctuary), which should be designated as SAC

Poland has failed to fulfill its obligations under Art. 6 (2) and (3) and 7 of the Directive 92/43 in the light of their interpretation provided by the ECJ judgments in Case C-117/03 (Dragaggi) and case C-244/03 (Bund Naturschutz in Bayern)⁶.

18th April, 2007 the President of the ECJ ordered (on Commission application) the afforestation (as a measure compensating losses in SPA Puszcza Augustowska) in the area of Pojezierze Sejneńskie **to be stopped** until a final decision ending the proceedings in the case regarding the taking of temporary measures.

In the application the Commission argued that Poland should propose the territory of Pojezierze Sejneńskie as site of Community importance due to the fact that natural habitats as well as animal and plant species which occur there are those of Community importance, including type of priority significance (Poland questions these views). The planned afforestation requires prior clearing of 17 ha of the forest representing the habitat type of priority significance as well as clearing trees in the habitats of two plant species mentioned in Annex II to Directive 92/43. All this constitutes a major threat to the natural character of this area.

According to the President of the Court, although a number of issues will have to be clarified by the parties, in view of the information presented at this stage of the proceedings, one cannot exclude a possibility that the planned activity creates a risk of final changes in the natural character of that region.

⁵ See on this issue press Release: Poland: Commission takes urgent action to protect threatened wildlife habitats Reference: IP/07/263 Date: 28/02/2007 available at http://ec.europa.eu/environment/news/news_archive.htm

⁶ The complaint concerns also the second project for which permits have also been issued in spite of an adverse effect on SPA Puszcza Knyszyńska /the Knyszyn Forest/.