

Warsaw, May 16th, 2016

**GENERAL DIRECTOR
FOR ENVIRONMENTAL PROTECTION**

DOOŚoaII.4200.24.2015.EK.7

DECISION

Under Article 138 § 1 Subpar. 1 and Subpar. 2, Article 127 § 2 of the Law of 14 June 1960 – *Code of Administrative Procedure* (Journal of Laws of 2016, item 23, consolidated text), hereinafter referred to as the CAP, in connection with Article 127 Par. 3 of the Act 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: Dz.U.2016.353), hereinafter referred to as the EIA Act, after examining an appeal submitted by Andrzej Kalita against the decision of the Regional Director for Environmental Protection in Wrocław of September 30th, 2015 (ref. No.: WOOŚ.4233.8.2013.LCK.54) on the environmental conditions for the investment entitled “Construction of “Szalejów Górny” – a dry reservoir on Bystrzyca Dusznicka River”,

1. I overrule clause I.2.3 of the decision and I decide as follows in this scope:

“The removal of trees and shrubs colliding with investment implementation shall be performed in the period from the beginning of September to the end of February.”

2. I overrule clause I.2.4 of the decision and I decide as follows in this scope:

“The removal of trees with the circumference at breast height exceeding 50 cm shall be performed under the control of a chiropterologist from the environmental supervision, who shall inspect the trees in terms of bat presence before the removal. If bat presence is confirmed, the chiropterologist shall indicate the permissible manner of performing the removal and its exact period, which shall fall between September 1st and February 28th (the preferred period is September 1st – October 31st).”

3. I overrule clause I.2.5 and I decide as follows in this scope:

“The stubbing of roots of removed trees and shrubs growing on the watercourse bed slopes shall be performed under the supervision of an ichthyologist. The optimal period for the performance of those works is September, but it can be extended till the end of February in the event of a justified necessity for doing so.”

4. I overrule clause I.2.10 and I decide as follows in this scope:

“The works related to topsoil removal shall be performed in the period from the beginning of September to the end of February.”

5. I overrule clause I.2.12 and I decide as follows in this scope:

“Excavations and other locations which may constitute traps for animals shall be inspected every morning (with a reservation that in the periods from March 1st to May 15th and from September 15th to October 15th, the second inspection shall be performed before the evening). The animals found there shall be caught and released beyond the investment area, into the areas appropriate for particular species. The last inspection of animal presence in the excavations shall be performed directly before backfilling the excavations. The inspections shall be performed under the direction and according to the guidelines of a herpetologist from the environmental supervision, who shall also coordinate and indicate the release locations for the caught animal species. All planned chambers/ wells and other anthropogenic objects which may constitute traps for amphibians and small mammals shall be protected according to the remarks and under the direction of a herpetologist from the environmental supervision. The herpetologist shall also be responsible for preventing the formation of isolated still water pools and for performing the works in the Bystrzyca Dusznicka river valley in a manner ensuring amphibian migrations (also across the designed roads).”

6. I overrule clause I.2.17 and I decide as follows in this scope:

“All works in watercourse beds shall be performed under an ichthyologist’s supervision (during works performance, the visits shall take place no rarer than once in 3 days). It is prohibited to perform the works in the river bed in the periods from March 1st to June 30th and from September 1st to December 15th. In addition, the works shall be maximally reduced in the period from December 15th to the end of February.”

7. I overrule clause I.2.18 and I decide as follows in this scope:

“Environmental supervision shall be ensured for the works performance period. It shall consist of the following specialists: an ichthyologist, an ornithologist, a chiropterologist, a herpetologist, a mammalogist and a phytosociologist.”

8. I overrule clause I.2.20 and I decide as follows in this scope:

“In the event of determining threats to the fish population (especially the possibility of fish dying), the ichthyologist from the environmental supervision shall order the performance of measures and activities ensuring the elimination of the danger to the fish or shall order refraining from measures which may result in fish dying.”

9. I overrule clause I.2.24 and I decide as follows in this scope:

“The first transfer of waters from the temporary bed to the inflow bed of the bottom sluice of the dam shall be performed in the period from July 1st to the end of February (the optimal period lasts from July 1st to August 31st).”

10. I overrule clause I.2.28 and I decide as follows in this scope:

“The construction site backyard area, where machines and cars shall move, shall be protected from the substrate. Every day, after completion of works, and in particular on non-working days, machines and cars shall be parked in a designated area within the construction site backyard – the part of the construction site backyard area designated for servicing and filling up machines shall be insulated from the substrate. Moreover, the construction site backyard shall be protected against animal entrance by fencing it with a metal mesh (mesh size: max. 0.5 cm) dug into the ground to a depth of at least 30 cm and with a height of at least 60 cm above the ground level. The upper part of the mesh (at

least 5 cm) shall be bent outside in the direction of the surrounding area at an angle of 45-90°. The fences shall be assembled and used in accordance with the guidelines of a herpetologist from the environmental supervision.”

11. I overrule clause I.3.2 and I decide as follows in this scope:

“Maintain the minimum acceptable flow downstream of the dam ensuring the functioning of habitats 3260 and 6430 in the lower section of the river, according to the guidelines of a phytosociologist from the environmental supervision.”

12. I overrule clause I.3.3 and I decide as follows in this scope:

“The rock rubble shall be removed from the rubble catcher in September, once in 5 years or rarer, including simultaneous removal of dumps and ensuring the rubble catcher spillway area passability. If those activities require draining the catcher entirely, works commencement shall be preceded by fish and amphibian catching under the control and according to the guidelines of an ichthyologist and a herpetologist. The rubble catcher shall be completely excluded from the use for angling purposes. In the period from March 1st to August 31st, water with a minimum depth of 15-30 cm shall be maintained in the catcher.”

13. I overrule clause I.3.4 and I decide as follows in this scope:

“The maintenance works in the reservoir basin shall be performed in the following periods:

- works interfering with the watercourse bed: in September;
- works interfering with the earth surface, including greenery removal: beyond the period from March 1st to August 31st.”

14. I overrule clause I.3.5 and I decide as follows in this scope:

“The maintenance works in the rubble catcher shall be performed under ichthyological and herpetological supervision.”

15. I overrule clause I.3.6 and I decide as follows in this scope:

“The sluice device shall be cleaned regularly (no rarer than once a year), with special consideration for the flow-differentiating sills and the fish migration slots in those sills. Those activities shall be performed in July and/ or August.”

16. I overrule clause I.3.10 and I decide as follows in this scope:

“Investment lighting shall be limited only to the dam crest and body, the manoeuvring site at the bottom sluice inlet, the car park next to the backyard building and the road along the dam crest. One shall apply lighting fixtures with reflectors reducing light spreading beyond the area anticipated to be lit or use low-pressure sodium-vapour lamps (SOX type) with low UV radiation emission values, which emit light of a clear yellow colour. Moreover, the reconstruction of power lines shall be performed as arranged with and according to the guidelines of an ornithologist from the environmental supervision. If it becomes necessary to use insulators, one shall apply hanging insulators and lay the bridges in a manner preventing them from being touched by birds. Spark gaps are forbidden.”

17. I overrule clause I.4.2 and I decide as follows in this scope:

“A series of permanent sills shall be performed in the sluice channel bottom. The sills shall be 0.1 m high, positioned at right angles to the current and equipped with a 0.9-0.95 m wide slot. The slots in the neighbouring baffles shall be

located opposite. Water speed in the sluice shall not exceed 0.5 m/s in a part of its width. It must be filled at least to a level of 0.25-0.30 m. The works shall be performed under the direction and according to the recommendations of an ichthyologist from the environmental supervision.”

18. I overrule clause I.4.4 and I decide as follows in this scope:

“The slots of the trusses at the sluice device water inlet from the headwater side shall be no smaller than 0.40 m.”

19. I overrule clause I.4.5 and I decide as follows in this scope:

“Concerning the sections where the old bed shall be retained, do not interfere with the watercourse bottom, do not change the watercourse bed width and limit the reinforcements only to trims made of crushed stone on concave banks (the trims shall be laid on geotextile to a maximum height of 2 m or to the height of the watercourse bank). The regulation on the remaining sections shall be performed in a manner permitting Lamprey and Bullhead migration, including by selecting a bottom substrate suitable for those species, appropriate distribution of stones (of a specified size and shape) and suitable water speed. Only natural materials or similar materials shall be used to shape the bottom and the slopes. The inclination of slopes must permit animal migration and movement, so it should not exceed the value of 1:2.5. All works related to river regulation upstream and downstream of the dam shall be performed under the direction and according to the recommendations of an ichthyologist and a mammalogist from the environmental supervision.”

20. I overrule clause I.4.8 and I decide as follows in this scope:

“Do not backfill the river section marked as B–B, i.e. the section from the connection with the designed river bed to the monument bridge marked as N-9. Angling and fishing management shall be completely prohibited along that section and the section itself shall be adjusted to fulfilling the function of a breeding reservoir for amphibians according to the guidelines and under the direction of a herpetologist from the environmental supervision.”

21. I overrule clause II.1.1 and I decide as follows in this scope:

“As part of compensation measures related to the removal of trees and shrubs as well as habitat destruction, trees and shrubs characteristic for habitats 91E0 and 9180 shall be planted before investment completion:

- The planting for habitat 91E0 shall cover a surface area of at least 2.90 ha within the boundaries of plots with register No. 802/13 and 804/9 (a strip in the southern part of the plot), Szalejów Górny precinct. The exact planted species composition shall be indicated by a phytosociologist from the environmental supervision. In the case of habitat 91E0, it should include only native species, i.a. Sycamore, European ash, Crack willow, Grey alder and Wych elm; the following additionally occurring species (no more than 10%): Black alder, White willow and Norway spruce; and the following underwood species: Guelder-rose, Alder buckthorn, Basket willow, Common hazel and Bird cherry.
- The planting for habitat 9180 shall cover a surface area of at least 1.00 ha within the boundaries of plots with register No. 409 and 518/2 (strips in the southern part of the plot), Szalejów Górny precinct. The exact planted species composition shall be indicated by a phytosociologist from the environmental supervision. In the case of habitat 9180, it should include only native species, i.a. Sycamore, Norway maple, Pedunculate oak,

Small-leaved lime, Large-leaved lime and Common beech; the following additionally occurring species (no more than 5%): Norway spruce and Wych elm; and the following underwood species: Guelder-rose, Alder buckthorn, Common hazel, Hawthorn and Blackthorn.

- *Native plant species (including Hawthorn and Blackthorn) shall additionally be planted on a surface area of 5-8 ha. The planting location and the species composition shall be determined by a phytosociologist from the environmental supervision in consultation with an ornithologist, a chiropterologist and a mammalogist from the environmental supervision, taking into account in particular the preservation of the migration corridor along the course of the Bystrzyca Dusznicka river.”*

22. I overrule clause II.1.2 and I decide as follows in this scope:

“The following shall be done in order to protect birds:

- a) 4 nest boxes for White-throated dipper and Grey wagtail shall be installed on the Bystrzyca Dusznicka river beyond the greenery removal area. The proposed box installation locations have to obtain a final approval of an ornithologist from the environmental supervision:
 - behind the bridge leading from Szalejów Górny to Polanica-Zdrój (Kłodzka Street), on the section between the bridge and Polna Street (2 boxes),
 - at Wojska Polskiego Avenue in the place where the Bystrzyca Dusznicka river is crossed by a road and a rail bridge (2 boxes).*
- b) Before greenery removal, the following number of nest boxes/platforms for birds shall be installed near the investment under the control of an ornithologist from the environmental supervision in locations indicated by the ornithologist in consultation with a relevant forester of the area:
 - 3 nest platforms,
 - 1 semi-open nest box for Common kestrel,
 - 3 boxes for Eurasian treecreeper,
 - 6 small semi-open nest boxes,
 - 2 big semi-open nest boxes,
 - 1 box of type E,
 - 3 boxes of type D,
 - 50 boxes of type B, including 3 for Eurasian nuthatch and 2 for Eurasian wryneck,
 - 18 boxes of type A,
 - 8 boxes of type A1.*
- c) The boxes shall be cleaned every year and appropriately maintained by an ornithologist from the environmental supervision; if the boxes wear out, the ornithologist shall point out the need for their replacement by the Investor.*
- d) An alternative nest platform shall be performed for Eurasian eagle owl. The platform shall be installed before*

commencing the works related to investment implementation, in the period from August to November, in the forest south-east of Szalejów Górny on a tall pine growing next to a cliff. The exact location of the platform shall be selected by an ornithologist from the environmental supervision in consultation with a relevant forester of the area. The platform shall be developed and assembled in a manner compliant with the recommendations and under the control of an ornithologist from the environmental supervision. The ornithologist shall also be obliged to check the platform population status every year and indicate the need for a possible repair of the platform if it wears out (the Investor shall be obliged to perform the repair).”

23. I overrule clause II.1.3 and I decide as follows in this scope:

“After completing the greenery removal in the investment area and within the distance of up to 1 km from the investment area, 50 nest boxes for bats (Issel and Stratmann models) shall be hung in groups of 6-8 under the control of a chiropterologist from the environmental supervision in the location indicated by them. The chiropterologist from the environmental supervision shall take care of annual cleaning and appropriate maintenance of the boxes as well as shall inform the Investor about the need for their replacement if they wear out.”

24. I overrule clause II.2.1 and I decide as follows in this scope:

“The compensation for habitats 91E0 and 9180 as well as the remaining planted greenery shall be annually supervised and assessed for at least 10 years after reservoir commissioning. If losses are found, they shall be replaced with new plantings in a 1:1 ratio (one new planted item for a single loss). The inspection shall be conducted by a botanist/phytosociologist. In the case of the habitats, one shall strive for obtaining an FV (favourable) conservation status for habitat 91E0 and at least an U1 (unfavourable inadequate) conservation status for habitat 9180.”

25. I maintain the decision in force in its remaining part.

JUSTIFICATION

In a decision of September 30th, 2015 (ref. No.: WOŚ.4233.8.2013.ŁCK 54), the Regional Director for Environmental Protection in Wrocław determined the environmental conditions for the undertaking entitled “Construction of “Szalejów Górny” – a dry reservoir on Bystrzyca Dusznicka River”.

Andrzej Kalita lodged an appeal against the decision in question, applying for repealing the entire decision in question, repealing its order of immediate enforceability and referring the case to re-examination to the body of first instance.

Moreover, he puts forward the following charges:

1. Failure to examine the remarks submitted by the residents of Szalejów village and Kłodzko district during the consultations with the Investor by failing to explain the issues concerning protection against flooding of the houses located in the

immediate vicinity of the planned excavations and the planned construction of the new river bed. Furthermore, the appealing person reckons that the issue of using local roads as access roads has not been sufficiently explained; the measures included in the Report which minimize the burdensome influence of the investment (e.g. of the noise on the residents living nearby) also raise doubts.

2. An insufficient and unreliable survey concerning the presence of Eurasian eagle owl and Brown owl. The appealing person reckons that the ornithological survey in this scope should be repeated. He also accuses the ornithologist conducting the inventory works of failure to consult local residents.
3. An incorrect analysis of investment scenarios. The appealing person reckons that the reservoir should be smaller and the dam should be located further away from houses as the retention function of the reservoir was not taken into account.
4. A groundless order of immediate enforceability of the decision on the environmental conditions.

Observing the principle of two-instance administrative proceedings, which aims at ensuring the parties the right to have the case examined and determined twice, the body analysed the gathered evidence within the appeal proceedings. The body of second instance examined the case in the full scope concerning the factual and legal circumstances within the appeal proceedings.

In a letter of February 29th, 2016, the General Director for Environmental Protection, under Article 50 § 1 of the CAP, called the Investor's attorney to submit explanations. They concerned i.a. the issue of investment influence on Bodies of Surface Water, birds, bats, amphibians, fish and the river valley ecosystem as well as the compensation issue.

In a letter of April 1st, 2016, the Investor submitted the relevant explanations.

In a letter of April 15th, 2016, the General Director for Environmental Protection, under Article 10 of the CAP, informed the parties that the evidence had been gathered and that they had a possibility of familiarizing themselves with the case documentation. No party submitted remarks within the indicated deadline.

Referring to the charges, I determine as follows:

Ad. 1

Referring to the charge concerning the failure to consider the remarks submitted by the residents of Szalejów village and Klodzko district during the consultations and meetings with the Investor, the designer and the Klodzko Municipality representative, one has to point out that the assessment of the abovementioned meetings and the arrangements made during them is beyond the scope of the proceedings in question and may not be a subject of analyses conducted by the body of second

instance. It must be stated that the body issuing the decision is obliged to ensure public participation as part of the conducted Environmental Impact Assessment under Article 33 of the EPA Act. In an announcement of March 12th, 2015, the Regional Director for Environmental Protection in Wrocław informed the public about: the commencement of conducting an Environmental Impact Assessment for the investment in question; instituting the proceedings; the subject of the decision to be issued on this matter; the relevant body to issue the decision and the relevant bodies to issue the opinion and make arrangements; the opportunity to review the necessary documentation of the case and the location where it is made available for review; and the possibility, manner and place of submitting remarks and motions, as well as indicated a 21-day deadline for their submission. The announcement was placed on the notice boards in the Regional Directorate for Environmental Protection in Wrocław, the Klodzko Municipality Office and the Klodzko City Office, as well as in the Bulletin of Public Information (BPI) of the Regional Directorate for Environmental Protection in Wrocław and in press. Therefore, the body ensured public participation in a correct manner. No remarks or motions were submitted to the proceedings within the defined deadline.

Referring to the issue of the burdensomeness to be suffered by the residents in relation to the implementation of the investment in question (e.g. noise, using the existing roads as access roads), one has to point out that the decision determined a range of conditions aimed at protecting local residents against the burdensomeness related to investment implementation. An exact location of the construction site backyard was indicated (condition 2.34) and a number of conditions concerning the construction site backyard functioning as well as the equipment and machines to be used was imposed (conditions 2.34-2.38), in order to prevent soil and water contamination. Conditions concerning waste management were introduced (2.42-2.43) as well. In order to limit the noise, the construction works shall be performed only in the daytime. Moreover, equipment with low sound emission shall be used. Furthermore, a condition aimed at limiting dust emission during construction works was imposed.

Referring to the appealing person's worries concerning the possible flooding of houses located near the investment, one has to point out that, under condition 2.32, all earthworks related to the construction of the designed investment shall be performed under constant supervision of a geologist. Moreover, the decision on the environmental conditions imposed a range of conditions on the Investor concerning the construction works performance manner, in order to ensure safe investment implementation (i.a. conditions 2.29-2.31).

Referring to the use of existing roads as access roads, it must be stated that, under condition 2.13, the delivery of materials and the traffic of vehicles servicing the investment shall take place first of

all along the existing public, forest or dirt roads. The contractor is obliged under clause 2.33 to regularly remove the dirt formed on the roads in connection with the traffic of cars and machines related to the investment implementation. Moreover, one has to point out that the relevant road manager is responsible for the technical condition of the existing roads and for imposing limitations on truck traffic. In view of the above, the presented charges do not have to be taken into account.

Ad. 2

Referring to the charge concerning an insufficient and unreliable survey concerning the presence of Eurasian eagle owl and Brown owl, it must be stated that the gathered evidence establishes the presence of both Eurasian eagle owl and Brown owl (*Strix aluco*) in the impact area of the considered reservoir.

The General Director for Environmental Protection analysed the distribution of both species and imposed an obligation to perform alternative nest refuges in order to protect them and guarantee their presence in that area. This was mentioned in clause II.1.2. An E type box shall be installed for Brown owl and a special nest platform shall be constructed for Eurasian eagle owl; the platform shall be placed in the forest, south-east of Szalejów Górny, on a tall pine growing next to a cliff. Therefore, both species shall receive alternative habitats in which they shall be able to grow their offspring.

It should also be highlighted that the appellate body significantly widened the bird protection measures for the planned undertaking: it prohibited the removal of trees and shrubs as well as the works related to topsoil removal in the bird fauna breeding period; the reconstruction of power lines shall be conducted under the control and in accordance with the guidelines of an ornithologist to prevent it from constituting a threat to bird fauna; the stubbing of roots of removed trees and shrubs growing on the watercourse bed slopes shall be performed beyond the Kingfisher nesting period; the compensation planting surface area to be inhabited by birds was increased by 5-8 ha; and a total of 4 nest platforms and 92 nest boxes shall be installed for bird fauna. Moreover, constant environmental supervision was introduced during the works; it shall include an ornithology specialist. All those measures shall ensure appropriate protection of birds living in the investment area.

Ad. 3

Referring to the analysis of undertaking scenarios, one has to point out that it was described in the environmental impact report for the undertaking and in the decision issued by the body of first instance. It must be stated that the primary function of the reservoir is supralocal (not local) flood protection of the Nysa Kłodzka Valley. The reservoir in question is a part of an entire flood

protection system of that area, so its location was considered in conjunction with other planned reservoirs. The reservoir location was analysed in various documents concerning the Nysa Kłodzka Valley flood risk analysis, e.g. in a study entitled: “Flood Protection of the Nysa Kłodzka Valley – Feasibility Study. Dry flood control reservoirs: Krosnowice, Szalejów Górny, Roztoki and Boboszów, as well as catchment areas of the Nysa Kłodzka, Biała Łądecka and Bystrzyca Dusznicka Rivers”. It was also analysed in a document entitled “Odra river basin flood risk management plan”. The reservoir in the location in question was also considered in the decision of the Kłodzko Municipality Head of April 27th, 2009 on the environmental conditions for the implementation of the investment consisting in flood protection of the Nysa Kłodzka Valley. Other factors deciding about selecting the reservoir implementation area were: lack of residential buildings in the flooded area, a small scope of the necessary infrastructure reconstruction and reservoir location in the local spatial management plan. The dam was located in a morphological narrowing of the valley. Changing its location would be related i.a. to a destruction of habitat 9180 – Tilio-Acerion forests of slopes, screes and ravines, as well as to the necessity of reconstructing the road infrastructure present in the reservoir backwater area. Moreover, the indicated dam location ensures appropriate spatial separation of the flooding from the waste-water treatment plant, thus guaranteeing lack of influence of both investments on each other.

Taking the above into account, the following investment scenarios were analysed in the environmental impact report for the undertaking: performance of a dry reservoir, performance of a reservoir with a permanent damming level and the most favourable scenario to the environment, differing from the dry reservoir scenario in the scope of greenery removal. The most favourable scenario to the environment, consisting in the construction of a dry reservoir with the smallest possible scope of greenery removal, was selected for implementation. A dry reservoir shall ensure flood protection in a more efficient manner than a reservoir with a permanent damming level. Permanent damming has an unfavourable effect on the retention capacities of such a reservoir, decreasing the volume of flood water which can be held in the reservoir basin. A dry reservoir exerts a smaller impact on the geological environment (erosion and abrasion phenomena) in relation to a wet reservoir (constant sloshing). Limiting the greenery removal to the necessary minimum shall simultaneously contribute to the preservation of the existing plant and animal habitats.

Taking the above into account, the body of second instance reckons that the scenario analysis was conducted correctly and the scenario selected for implementation was appropriately indicated.

Ad. 4

Referring to the charge concerning a groundless order of immediate enforceability of the decision

in question, one has to point out that this charge is unjustified.

The order of immediate enforceability was given on the Investor's motion (a letter of July 21st, 2015). The basis for giving an administrative decision an order of immediate enforceability is Article 108 of the CAP, under which a decision which may be appealed against may also receive an order of immediate enforceability, if it is necessary due to protection of human life or health, protection of national economy against heavy losses, another public interest or an exceptionally important interest of a party. An exceptionally important public interest and an important interest of a party was indicated in the case in question.

The investment shall fulfil a flood protection function, so it is necessary to protect human life and health in the areas of flooding risk. It shall also protect the national assets (e.g. the existing bridges and roads) against heavy losses caused by flood.

The second reason for giving the decision an order of immediate enforceability is an exceptionally important interest of a party. The Regional Water Management Authority in Wrocław is in the course of preparing a government programme entitled: "Odra-Vistula Flood Management Project". This project includes i.a. flood protection of the Nysa Kłodzka Valley, as part of which the investment in question shall be implemented. Moreover, the investment shall be financed using EU funds as part of the Infrastructure and Environment Operational Programme 2014-2020. Giving the decision in question an order of immediate enforceability shall accelerate obtaining subsequent decisions issued during the investment-construction process and thus permit more effective planning of construction works as well as shortening the implementation period of the task in question and minimizing the costs of its performance.

The jurisdiction competence of the appellate body covers a comprehensive analysis of case documentation and a subject matter control of the determination made by the body of first instance and is not limited to controlling the justifiability of the charges put forward against the decision of a body of first instance. Therefore, during case examination, the body of second instance noticed minor flaws requiring adjustment in the decision issued by the Regional Director for Environmental Protection in Wrocław.

Clause I.2.3 was overruled and its new wording was imposed. The introduced adjustment consisted in changing the performance period of the works related to the removal of trees and shrubs. The removal scale for this investment is so small that it does not justify performing this activity during the bird breeding period as it could result in direct losses suffered by nests, in which birds are hatched and fed, as well as in losses suffered by nests located in the vicinity due to bird scaring. The condition received a new wording to eliminate the possibility of the abovementioned losses suffered by bird fauna: it now indicates a works' exclusion period lasting from March 1st to August

31st for the removal of trees and shrubs in order to cover the entire breeding period and bird nesting groupings.

Clause I.2.4 was overruled and its new wording was imposed. The clause now makes more precise the removal periods for trees with the circumference at breast height exceeding 50 cm, which can be inhabited by bats: if a chiropterologist from the environmental supervision determines bat presence, the removal shall be possible in the period from September 1st to February 28th, with a reservation that it should take place in September and October, and any deviation from that deadline shall be permissible only in exceptional situations. This is aimed at protecting bats in the periods of flying between their breeding colonies and hibernation locations.

Clause I.2.5 concerning stubbing was overruled and its new wording was imposed. The new wording of the condition is necessary due to bird fauna protection. The river section subject to the works constitutes a breeding habitat i.a. for strictly protected Kingfisher (*Alcedo atthis*). When the Regional Director for Environmental Protection in Wroclaw indicated the performance period for the works in question in its determination, it took into account only the fish fauna protection issue. However, it omitted the possible negative impact on other elements of the environment which may take place during stubbing the roots of removed trees and shrubs growing on the river bed slopes. The wording of the described clause imposed by the body of first instance anticipated the performance of the abovementioned works exactly in the middle of the bird breeding period. Stubbing the roots of removed trees and shrubs growing on the river bed slopes could lead to a destruction of Kingfisher breeding habitats. To avoid that, it was necessary to introduce a works performance period taking into account the bird breeding period as well.

Clause I.2.10 concerning the performance period for the works related to topsoil removal was overruled and its new wording was imposed. When the Regional Director for Environmental Protection in Wroclaw indicated the topsoil removal period, it did not take into account i.a. the possibility of early spring migrations by amphibians or the ending of the bird breeding period: works of that kind may prevent those animals from breeding. Thus, the General Director for Environmental Protection was forced to introduce relevant adjustments into the condition.

Clause I.2.12 concerning the control of excavations and other places which might constitute traps for animals was overruled and its new wording was imposed. The condition change concerned a wider scope of the conducted excavation controls in terms of animal presence: the number of controls was increased to two a day in the period of intense spring and autumn migration by amphibians. The clause introduces an obligation to perform all works related to control, catching and releasing the animals from the excavations under the direction and based on the guidelines of a herpetologist from the environmental supervision. The herpetologist shall additionally be

responsible for appropriate protection of potential amphibian traps as well as works performance in a manner preventing the formation of isolated still water pools (which might be inhabited by amphibians) and permitting herpetofauna migrations along the Bystrzyca Dusznicka river and across the designed roads. Detailed knowledge of biology and ecology of individual species possessed by the abovementioned expert shall constitute a sufficient guarantee of safe and effective performance of the activities described above.

Clause I.2.17 concerning the performance period for the works in watercourse beds was overruled and its new wording was imposed. The new wording of the abovementioned condition stems from the need to ensure better protection of fish fauna and other organisms living in the river ecosystem. All works in watercourse beds shall be performed under an ichthyologist's supervision (during works performance, the visits shall take place no rarer than once in 3 days). Moreover, the period excluding works performance in the river bed selected by the body of second instance takes into account the needs of species living in that area, especially Brown trout (*Salmo trutta m. fario*), which spawns in that period, and maximally reduces the possible environmental losses which may take place in the situation in question.

Clause I.2.18 was overruled and its new wording was imposed. The condition adjustment consisted in introducing an obligation to ensure environmental supervision formed by selected specialists during the construction works performance. Their selection was determined by the elements of the environment which may suffer most during the implementation of the planned undertaking. They are: natural habitats, birds, bats, fish and amphibians. Therefore, it was indicated that the works be performed under the supervision of specialists: an ichthyologist, an ornithologist, a chiropterologist, a herpetologist, a mammalogist, and a phytosociologist.

Clause I.2.20 concerning fish fauna control was overruled and its new wording was imposed. The condition change provides more details about the manner of acting in the event of a threat to fish fauna population during the construction of the planned undertaking. It highlights the obligation resting with the ichthyologist from the environmental supervision, who, bearing in mind the protection of fish living in the Bystrzyca Dusznicka river, shall be able to order performance of or refraining from certain measures and activities so as to prevent e.g. fish dying.

Clause I.2.24 concerning the first transfer of waters from the temporary bed to the inflow bed was overruled and its new wording was imposed. The condition adjustment corrects the transfer period so as to make it the least harmful to fish fauna. The above activity should take place in July or August because the spawning period still lasts in June; any deviation from that deadline may only stem from the emergence of an exceptional and previously unanticipated situation.

Clause I.2.28 concerning construction site backyard protection was overruled and its new wording

was imposed. The clause was rephrased so as to protect the construction site backyard against the entrance of fauna representatives, especially amphibians, reptiles and small mammals. The construction site backyard shall be fenced with a metal mesh, the size of which shall prevent the abovementioned fauna representatives from getting to the other side. Additionally, a herpetologist from the environmental supervision shall take care of appropriate performance of the abovementioned protection.

Clause I.3.2 was overruled and its new wording was imposed. The condition was extended to maintain the minimum acceptable flow downstream of the dam ensuring the functioning of habitats 3260 and 6430 in the downstream section of the river. Extending the condition was related to the necessity of not only preserving the minimum acceptable flow of the Bystrzyca Dusznicka river downstream of the dam, but also ensuring an appropriate level and management manner of the waters in the abovementioned watercourse, which determine the maintenance of habitats 3260 and 6430 located downstream of the planned dam and listed in Annex I to Council Directive 92/43/EEC of 21 May 1992 *on the conservation of natural habitats and of wild fauna and flora* (Habitats Directive). A phytosociologist from the environmental supervision shall take care of that: they shall determine the water management manner guaranteeing not only the minimum acceptable flow, but also an appropriate status of natural habitats 3260 and 6430 downstream of the designed investment.

Clause I.3.3 concerning rock rubble removal from the rubble catcher was overruled and its new wording was imposed. The condition was extended by indicating a period of performing the above activity and by touching upon the issue of ensuring the catcher spillway area passability for fish. Water shall be continuously present in the rubble catcher, so it may constitute a good breeding and wintering location for amphibians. Therefore, the most favourable period of performing the abovementioned works is September; fish fauna and herpetofauna catching shall also be performed at that time, if it becomes necessary to dry the rubble catcher completely. The possibility of a negative impact shall be the smallest at that time. Angling and fishing activity in the rubble catcher area was simultaneously prohibited, which shall also contribute to an improvement of the amphibian living conditions in that area. Moreover, the minimum water level in the herpetofauna breeding period was determined, which shall enable it to grow its offspring in that area.

Clause I.3.4 concerning the performance of maintenance works in the reservoir basin was overruled and its new wording was imposed. The General Director for Environmental Protection found the deadline indicated by the body of first instance unjustified, so it gave the condition a new wording. The maintenance works were divided into those performed in the watercourses and those performed on the earth surface, including greenery removal. A different performance period was

selected for each of those maintenance work types. The periods take into account the biological and ecological requirements of fish fauna with herpetofauna and bird fauna respectively. Representatives of those fauna groups are the most threatened ones in relation to maintenance works performance in the habitats populated by them during the critical periods of their activity (breeding, mating, and spawning migrations).

Clause I.3.5 was overruled and its new wording was imposed. The rubble catcher shall constitute a habitat not only for fish, but also for amphibians, so the condition was extended as follows: the maintenance works in the rubble catcher shall be performed under ichthyological and herpetological supervision.

Clause I.3.6 was overruled and its new wording was imposed. The condition was extended by adding a cleaning period of the sluice devices. This is caused by the necessity of ensuring the protection of the fish living in the Bystrzyca Dusznicka river. To prevent the above activities from colliding with the fish fauna breeding and migration period, one has to perform them in the period from the beginning of July to the end of August. That way, the disruptions caused by the works shall influence the fish in the least perceptible manner.

Clause I.3.10 concerning investment lighting was overruled and its new wording was imposed. Extending the condition in question concerned introducing the possibility of applying various solutions in the scope of investment lighting in a manner not attracting insects and consequently also bats. Application of appropriate lighting shall cause the generated light to exert the most favourable influence on entomofauna and chiropterofauna alike. Moreover, a provision concerning the reconstruction of medium and low voltage power lines was added to the condition. Those facilities constitute one of the biggest threats to the bird fauna. Therefore, in order to limit the possibility of collisions and shocks suffered by bird fauna representatives in contact with the reconstructed power lines, appropriate provisions concerning the planned solutions were introduced. Additionally, all works shall require an approval of an ornithologist from the environmental supervision, who, based on an analysis of local bird fauna conditions, shall suggest the most effective design solutions in that location.

Clause I.4.2 concerning the performance of works in the sluice channel bottom was overruled and its new wording was imposed. The condition was supplemented with the values of water velocity in the sluice and of sluice filling. This is necessary to ensure the fish migration possibility along the Bystrzyca Dusznicka river. Thus, the works shall be performed according to the guidelines and under the direction of an ichthyologist from the environmental supervision.

Clause I.4.4 concerning the size of truss slots was overruled and its new wording was imposed. The introduced change consisted in increasing the slots of trusses at the water inlet to the sluice device

from the headwater side in order to permit migration of not only fish species, but also mammal fauna, especially Eurasian beaver (*Castor fiber*).

Clause I.4.5 was overruled and its new wording was imposed. The new wording of the condition concerns determining the performance manner and method of the regulation works on the new bed section, including optimal distribution of stones and obtaining water velocity appropriate for the fish species present there. In order to protect the fish fauna, provisions concerning appropriate shaping of the river bottom and slopes were also introduced. At the same time, due to a very important matter of animal movement in the migration corridor along the Bystrzyca Dusznicka river bed, the works shall be performed in accordance with the requirements and guidelines set forth not only by an ichthyologist, but also by a mammalogist from the environmental supervision. Clause I.4.8 was overruled and its new wording was imposed. The condition concerning the manner of using the Bystrzyca Dusznicka old river bed section was extended due to the necessity for herpetofauna protection. An alternative site shall be prepared for that fauna group; its role may be played by the Bystrzyca Dusznicka old river bed on the section mentioned in the changed clause. It shall be excluded from angling and fishing management as well as adjusted to playing a role of a breeding site for amphibians in accordance with the guidelines of a herpetologist from the environmental supervision, who shall simultaneously direct the works related to the matter. That way, the losses suffered by the amphibian population in relation to investment construction shall be appropriately compensated for.

Clause II.1.1 concerning greenery planting compensating for the losses caused by greenery removal was overruled and its new wording was imposed. The condition adjustment consists in defining a specific surface area of the natural habitats which are compensated for and which have a priority status in Annex I to the Habitats Directive (for habitat 91E0 and habitat 9180 separately). Moreover, an approximate species composition was provided for restored habitats. At the same time, the clause imposed an obligation to perform additional environmental compensation in the form of planting of native plant species. The planting locations and the species composition shall be defined by a phytosociologist from the environmental supervision in consultation with an ornithologist, a chiropterologist, and a mammalogist from the environmental supervision on the basis of expert knowledge, the nature of habitats in the undertaking implementation area and in adjacent areas, as well as migration and nesting requirements of mammals and birds respectively.

Clause II.1.2 concerning compensation measures for birds was overruled and its new wording was imposed. That condition was made more detailed and more precise. The order of performing 40 boxes for Grey wagtail (*Motacilla cinerea*) and White-throated dipper (*Cinclus cinclus*) was cancelled. Such a big number of boxes is not justified because both the number of pairs of the

abovementioned species, the habitats of which shall be destroyed, as well as the density of Grey wagtail and White-throated dipper populations are significantly lower, so such a number of boxes is unnecessary. It was proposed to install 4 boxes for those species and the location of their distribution was indicated. Additional compensation in the form of hanging nest boxes for bird fauna was introduced as well. This is necessary due to the issue of bird protection during the implementation of the planned undertaking. The investment shall be related to tree stand removal; even though alternative planting was proposed, it shall consist of young trees, so much time shall pass before the planted greenery assumes the features of the removed tree stand. Therefore, the part of the forest bird fauna, which nests mainly in older tree stands, shall lose its nesting habitats for a long time. This concerns especially the group of cavity nesting birds. To counteract that, one has to install nest boxes constituting alternative nesting places for the abovementioned bird group. The appellate body introduced appropriate provisions in this scope on the basis of forecast losses in the nesting populations of local bird fauna in order to compensate for them in an appropriate and adequate manner. When doing so, it took into account the entire planned removal of tree stand (~9.7 ha) and not only the loss of plants in the priority habitats from the Habitats Directive (2.6 ha). It also ensured appropriate maintenance and use of the boxes: they shall be looked after by an ornithologist from the environmental supervision, who has detailed knowledge of the biology and ecology of the bird species, for which the protection in question was introduced. Investment implementation may threaten the site of Eurasian eagle owl (*Bubo bubo*) – a species subject to strict protection under the Regulation of the Minister of the Environment of October 6th, 2014 *on protection of animal species* (Journal of Laws of 2014, item 1348) and requiring protection zones set out around its nests. It must simultaneously be highlighted that the species in question is a subject of protection for “Stolowe Mountains” Special Protection Area (SPA), code PLB020006. Therefore, it is necessary to prepare an alternative breeding site by installing an artificial nest platform for Eurasian eagle owl. The introduced condition defines the location and manner of performing the discussed compensation measure as well as later inspections of its functioning status and population by birds. That way, the species shall obtain an alternative breeding site during investment construction and after its commissioning.

Clause II.1.3 concerning compensation measures for bats was overruled and its new wording was imposed. The condition adjustment consisted in stating the need for hanging the boxes for bats after completing greenery removal (and not after the construction phase completion, as indicated by RDOŚ) in order to enable the animals to populate new habitats instead of those lost due to tree stand removal. Additionally, the issues related to hanging the boxes, their location as well as the manner of their maintenance, cleaning and possible replacement were made more detailed. The

modified provisions shall permit permanent ensuring of alternative breeding refuges for chiropterofauna. The refuges shall be performed in the most appropriate locations for that fauna group as well as used and maintained in a status optimal for bats.

Clause II.2.1 concerning monitoring the habitats compensated for was overruled and its new wording was imposed. The new wording of the condition was necessary due to the need for adding that in the event of losses in the introduced compensation plantings, those losses would be supplemented on a running basis according to a 1:1 ratio. That way, the assumed result of the compensation in question shall be achieved. Referring to habitat 91E0, it was simultaneously indicated that one should aim at preserving it in an appropriate status due to its role and the habitat development possibilities in the compensation location.

The appellate body maintained in force the remaining part of the decision of the Regional Director for Environmental Protection in Wrocław of September 30th, 2015 (ref. No.: WOOŚ.4233.8.2013.ŁCK.54) on the environmental conditions for the investment entitled “Construction of “Szalejów Górny” – a dry reservoir on Bystrzyca Dusznicka River”.

Having examined the case in relation to the submitted appeal, the higher-level body decided that, after applying the partially changed and supplemented conditions determined in the decision on the environmental conditions, undertaking implementation would not have a significant negative influence on the environment, including i.a. climate (the designed dry flood control reservoir shall not change the local conditions shaping the climate or contribute to an increase of its possible changes and shall simultaneously ensure a flooding risk decrease by permitting temporary holding of water), the possibility of achieving the BSW environmental objective, protected areas, precious species of fauna and flora as well as biodiversity in the undertaking impact range (the obligations and restrictions imposed in the decision shall ensure limiting the impact on precious habitats as well as related native species and their migration possibilities, while the wide scope of compensation guarantees restoration of the environmental values threatened by the undertaking).

In view of the above, the General Director for Environmental Protection found no grounds for overruling the decision of the Regional Director for Environmental Protection in Wrocław of September 30th, 2015 (ref. No.: WOOŚ.4233.8.2013.ŁCK.54) on the environmental conditions for the investment entitled “Construction of “Szalejów Górny” – a dry reservoir on Bystrzyca Dusznicka River” and referring the case to re-examination.

In the light of the above, it was ruled as in the sentence.

The present decision is final.

One may lodge a complaint about the decision to the Regional Administrative Court in Warsaw via the General Director for Environmental Protection within 30 days of receiving the decision.

[stamp:

With the authorization of the General Director for Environmental Protection
acting Deputy General Director for Environmental Protection

Marek Kajs /signature/]

Recipients:

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3. The remaining parties under Article 49 of the CAP.

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