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Liability for environmental damage – a handbook for citizens and non-governmental organizations

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1. Preliminary remarks

The following document is a concise summary of a handbook written in Polish, which will be distributed among Polish non-governmental organizations, grassroot organizations and concerned citizens. The aim of the handbook is to present, in a comprehensive and concise form, the most important issues related to liability for environmental damage, focusing on the Directive 2004/35/EC and its implementation to the Polish law.
2. Introduction

Polish legislator decided to transpose the ELD into the national law by adopting a new Environmental Damage Act, which repealed previously existing sectoral provisions regulating this matter. The overall quality of the new act is good, its provisions are comprehensive and understandable even for non-lawyers. The act correctly transposes the most important provisions of the ELD and in some aspects goes beyond the minimum standards set by the directive. As a result Poland has much more ELD incidents than other member states\(^1\).

Regardless the ELD-based liability, Polish environmental law provides other instruments that may be used by relevant authorities against the entities whose activities are harmful to the environment, e.g. administrative fines, decisions imposing specific duties including an order to stop operation of an installation. However, the Environmental Damage Act provides the broadest rights to the stakeholders and general public and it has priority whenever it’s applicable\(^2\).


\(^2\)Art. 7a of Environmental Protection Law.
3. What is an environmental damage?

In accordance with the ELD, the Environmental Damage Act covers for actual damage to environment as well as for an imminent threat of such damage. The Act defines environmental damage\(^3\) as a negative, measurable change of the state or functioning of the elements of environment, assessed in relation to the initial state, caused directly or indirectly by an entity using the environment\(^4\) in the following three cases:

1. In case of damage to protected species or natural habitats\(^5\) having a significant, negative impact on reaching and maintaining the proper status of conservation of these species or habitats. The Act stipulates an exhaustive list of situations, when such a negative impact is considered legal and therefore does not fit the definition of environmental damage\(^6\).

In case of water damage having a significant negative impact on the ecological potential, ecological, chemical or quantitative status of the water.

In case of land damage defined as any contamination of soil or ground, especially contamination that may cause risk for human health\(^7\).

Therefore the objective scope of Polish Environmental Damage Act is not only in line with the ELD, but goes beyond the minimum requirements set by the directive, especially regarding damage to protected species, natural habitats and land. However, broad spectrum of environmental damages are not covered by the directive and Polish act, e.g. damage of ambient air.

\(^3\)Art. 6 p. 11 of Environmental Damage Act.  
\(^4\)Explained below in the section on subjective scope of the Act.  
\(^5\)Meaning not only species and habitats protected under the Birds Directive and Habitats Directive, but also ones protected under the national law – in this aspect the Polish act goes beyond the requirements of the ELD.  
\(^6\)Art. 6 p. 11 l. a of the Environmental Damage Act; in line with art. 2 p. 1a of the ELD.  
\(^7\)Definition of land damage in Environmental Damage Act is much broader than that stipulated by art. 2 p. 1 c of the ELD.
4. Who is liable for environmental damage?

As a rule the Environmental Damage Act based liability applies to entrepreneurs, other entities and, to a very limited extent, to natural persons not engaged in business activities. The subjective scope of the Act depends on the type of environmental damage:

1. In case of land and water damage liability applies if damage (or imminent threat thereof) was caused by an activity listed in art. 3 of the Environmental Damage Act.

In case of damage to protected species or natural habitats liability applies to all types of activities conducted by entities using the environment.

Therefore the subjective scope of Polish legislation is in line with art. 3 of the ELD.

In accordance with art. 3 of the ELD, liability for damage caused by one of the enlisted types of activities is strict, whereas liability for damage to protected species or natural habitats caused by a different type of activity is fault based (in Polish law negligence is considered as fault).

Liability for damage under Environmental Damage Act is excluded in three cases:

1. In case of historic contamination of land.
2. If damage was caused by natural disaster, armed conflict, warfare or alike, activities related to the defence and safety of the state and activities whose sole purpose is protection against the natural disaster.
3. In case of nuclear damage.

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8Entities using the environment as defined by art. 3 p. 20 of Environmental Protection Law; in line with definition of occupational activity as stipulated by the ELD.

9In accordance with Annex III of the ELD.

10Art. 3 of Environmental Damage Act/Annex III of the ELD.

11As defined hereinafter.

5. Request for action

The competent administrative bodies are Regional Directors of Environment Protection (one in every voivodship, hereinafter: RDOŚ) and General Director of Environmental Protection (hereinafter: GDOŚ) as a higher instance. In case of damage caused by genetically modified organisms, competent authority is Minister of Environment. RDOŚ and GDOŚ are highly specialised in the area of environmental protection.

According to Environmental Damage Act, request for action (called in Polish zgłoszenie – notification) can be submitted by anyone, including natural persons, legal persons and non-government organizations. There are no additional requirements regarding legal or factual interest, therefore it can be considered as a form of action popularis. In that aspect the Polish law allows for broader participation than required by art. 12 of the ELD.

Request for action is free of charge and subject to minimal formal requirements (it should include name and address of the submitting person, place, time and general description of the situation). It can be submitted in a letter, directly in the authority’s (RDOŚ) office or via the Internet.
6. Initiation, course and aim of the proceedings

The competent authority is obliged to analyse any request for action and if it deems it justified it should commence proceedings leading to issuance of a decision imposing an obligation to take preventive or remedial action. In case of imminent threat to health of citizens or irreversible damage in environment, being unable of identifying responsible operator or failure of previously taken actions, the authority may take preventive or remedial actions by itself.

According to the Polish jurisprudence, during the initial analysis of a request for action the authority should only consider if it fulfils the basic formal requirements. At this stage the facts of the case are not examined. Refusal to commence the proceedings if the request is formally correct should be considered as flawed.

The aim of the proceedings under the Environmental Damage Act is to prevent environmental damage or to remedy it if it already happened. As a rule it is an obligation of the entity responsible for the damage to take preventive and remedial actions. If such actions were ineffective, the entity should inform the competent authorities (RDOŚ and Voivodship Inspectorates of Environmental Protection – WIOŚ) and establish conditions for the preventive and remedial actions in a form of a formal agreement with the authority. Failure to comply with these obligation is a criminal offence.

If an entity responsible for an environmental damage fails to comply with the obligations described above, it is a role of environmental NGOs, local grass-root organizations and concerned individuals to notify the authorities by submitting requests for action. It should be emphasized that burden of proof in environmental damage cases lies on the administrative body, entities submitting request for action are not obliged to provide any substantive evidence.

Considering whether an environmental damage happened, the authority should

Determining whether an environmental damage happened the authority is guided by the Ministry of Environment’s Regulation on the criteria of damage to environment. If the request for action is deemed justified, the authority issues a decision imposing remedial actions. Types of remedial actions are described in the Regulation on the remedial actions, which is in line with the ELD. If there is no damage but an imminent threat of damage, the authority imposes a duty to undertake
7. Legal remedies

If the authority refuses to commence the proceedings after a request for actions was submitted, it should issue a formal resolution which can be appealed to the higher authority. The appeal should be submitted within 7 days and is free of charge. If the higher authority upholds the refusal, one can challenge it's resolution to the administrative court. A complaint to the administrative court should be submitted within 30 days and the court fee is 100 zł (around 20 €).

If the authority ignores the request for action and does not commence the proceedings nor issue a formal resolution refusing to do so, after one month passes one can file a complaint on the authority’s failure to act to the higher authority and subsequently a complaint to the administrative court.

The right to appeal against a resolution refusing to commence the proceedings should not be mixed with the right to challenge substantive decisions issued after the proceedings were started. Such decisions include: a decision imposing a duty to take preventive or remedial actions, a decision refusing to impose such duty and a decision to dismiss the case. Conditions under which such decisions may be challenged are governed by the Code of Administrative Proceedings.

An appeal against a substantive decision may be submitted only by a party to the proceedings. However, the range of persons who may become parties to the environmental damage proceedings is limited. Most importantly, an individual who submitted a request for action will not be allowed to join the proceedings as a party, unless they prove a sufficient legal interest. However, if a request for action was submitted by an environmental NGO (as defined by Polish Environmental Protection Law), it will be allowed to join the proceedings with the rights of a party. Therefore only environmental NGO will be allowed to challenge substantive decisions issued in the course of the already started proceedings.

An appeal against a substantive decision should be submitted within 14 days and is free of charge. If the higher authority upholds the decision of the first instance, one may challenge this decision to the administrative court, within 30 days. A court fee amounts to 200 zł (around 45 €).
8. Registry of environmental damage cases

General Directorate of Environmental Protection (GDOŚ) runs a digital registry of environmental damage cases\(^\text{13}\), that include the following data:

information on the notified imminent threats and environmental damage situations including their type, characteristics, time and place;

1. information on the preventive and remedial actions and their effects;

2. name and other data of an entity whose activities caused an imminent threat or an environmental damage;

3. other information on the imminent threats and environmental damages, including information on the course of administrative and court proceedings in such cases.

A detailed list of information that should be included in the registry is stipulated by the Ministry of Environment’s Regulation on the registry of environmental damage.

A direct access to the registry is allowed only to certain administrative bodies. Other entities may obtain specific information by filing a formal request for access to information about the environment and its protection. A request may be filed by anyone and is free of charge.

As a rule the authority should provide any requested information in any form (e.g. scanned documents via e-mail) within one month period (in complicated cases it may be prolonged to two months). Nevertheless, a direct access to the registry to should be allowed to the general public, as it would not cause any technical difficulties.

\(^{13}\text{https://rejestry.gdos.gov.pl/}.\)
9. Other provisions

In case of conflict with provisions of different acts of law in the area of environmental protection, provisions of the Environmental Damage Act have a priority. Environmental Protection Act consist other provisions which impose administrative and penal sanctions upon entities exploiting and using the environment. Objective and subjective scope of those is broader and takes under consideration all negative actions taken against environment. However, rights of interested persons (non-government organizations, concerned citizens) are usually narrower in proceeding where the Environmental Damage Act is not in force.

A specific regime of liability is in force regarding the historic contamination of land, defined as contamination that occurred before 30 April 2007, or as an effect of activity, which has ended before that date, or environmental damage of land that was caused by emission or event that happened 30 years ago. In such cases provisions of Environmental Protection Law are applicable, however, they are very similar to those of the Environmental Damage Act.

A different issue, that goes beyond the scope of this handbook, is civil liability for the environmental damage. Environmental Protection Law contains several provisions that allow environmental NGOs to file civil lawsuits against entities violating the environmental law.
10. Legal basis and useful links

The most important legal acts governing liability for environmental damage are as follows:
1. Act of 13 April 2007 on the prevention and remedying of environmental damage, hereinafter: Environmental Damage Act\textsuperscript{14}.
2. Regulation of the Minister of Environment of 1 September 2016 on the criteria for the assessment of damage to environment\textsuperscript{15}.
3. Regulation of the Minister of Environment of 1 September 2016 on the register of environmental damage\textsuperscript{16}.
4. Regulation of the Minister of Environment of 1 September 2016 on the Remedial Actions\textsuperscript{17}.
5. Act of 27 April 2001 Environmental Protection Law\textsuperscript{18}.
6. Act of 14 June 1960 Code of Administrative Procedure\textsuperscript{19}.
7. Act of 30 August 2002 Law on Proceedings Before Administrative Courts\textsuperscript{20}.
8. Regulation of the Council of Ministers of 16 December 2003 on court fees in proceedings before administrative courts\textsuperscript{21}, hereinafter: Court Fees Regulation.

All acts of Polish law may be accessed via the Internet System of Legal Acts (http://isap.sejm.gov.pl/). Legal acts issued by the EU are available via the EU legal acts database: (http://eur-lex.europa.eu). All judgments and decisions of Polish administrative courts are available in the Central Database of Decisions of Administrative Courts (http://orzeczenia.nsa.gov.pl).

Information on the environmental damage proceedings and notifying them is provided on the website of General Directorate of Environmental Protection: http://www.gdos.gov.pl/szkody-wsrodowisku.

Frank Bold Foundation based in Krakow offers free legal counselling in the area of environmental law, including environmental damage cases: http://frankbold.pl/. A legal query may be submitted via e-mail: poradniaprawna@frankbold.org.

\textsuperscript{14}Journal of Laws of 2014, item 1789.
\textsuperscript{15}Journal of Laws of 2016, item 1399.
\textsuperscript{16}Journal of Laws of 2016, item 1398.
\textsuperscript{17}Journal of Laws of 2016, item 1396.
\textsuperscript{18}Consolidated text, Journal of Laws of 2016, item 672.
\textsuperscript{19}Consolidated text, Journal of Laws of 2016, item 23.
\textsuperscript{20}Consolidated text, Journal of Laws of 2016, item 718.
\textsuperscript{21}Journal of Laws of 2003, item 221.