



Fighting Environmental Disasters

Environmental Liability

Poland

Case Study

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Environmental damage in habitats of protected species, including corncrake (*crex crex*), ground and water.

1. Basic data

a. Location

Including the territorial extension of the case

Błota Brudzewickie – a few hundred hectares of partially drained peatlands and meadows lying within two Natura 2000 areas: *Dolina Dolnej Pilicy* (PLH 140016) and *Dolina Pilicy* (PLB 14003) in central Poland (*Mazowieckie* and *Łódzkie* voivodships).

b. Operator

The responsible operators are municipality water law companies of municipalities *Odrzywół* and *Poświętne*. Water law companies are legal entities created under the provisions of Water Law act for the purpose of local water management, including land drainage. It is not the Annex III activity, the operators responsibility stems from art. 3 par. 1b ELD as implemented into the Polish law.

c. Authorities

Regional Director for Environmental Protection in Warsaw (*Regionalny Dyrektor Ochrony Środowiska w Warszawie* – hereinafter called *RDOŚ*).

General Director for Environmental Protection (*Generalny Dyrektor Ochrony Środowiska* – hereinafter called *GDOŚ*)

d. Other stakeholders

Ornithological Society of Mazowieckie and Świętokrzyskie (*Mazowiecko-Świętokrzyskie Towarzystwo Ornitologiczne*)

e. Time dimensions

Request for action was submitted by the Ornithological Society in May 2010. In January 2011 *RDOŚ* issued a first decision imposing the obligation to take preventive and remedial actions. The operators filed appeals to the higher authority in February 2011. In July 2011 the higher authority (*GDOŚ*) remanded the decision of *RDOŚ*. In November 2011 *RDOŚ* issued a second decision imposing the obligation to take preventive and remedial actions. The operators filed appeals to *GDOŚ*. In March 2012 *GDOŚ* remanded the decision of *RDOŚ*. In September 2012 *RDOŚ* issued a third decision imposing the obligation to take preventive and remedial actions. The following case study is based on this decision. We have no information on the further course of the proceedings, however, there are strong indications that the decision from 2012 was remanded again and that the proceedings lasted at least till 2014. The definite information on the further course of the proceedings should be obtained from the authority before the end of October.

f. Type of legal basis

The proceedings were carried out under the act of April 13th 2007 on the prevention and remedying of environmental damage (*ustawa z dnia 13 kwietnia 2007 r. o zapobieganiu szkodom w środowisku i ich naprawie*) that implements the ELD into the Polish law (hereinafter called the ELD act).

There was no civil nor criminal procedure.

g. Results

Under the decision of September 2012 the operators were obliged to undertake remedial actions. The authority did not specify the type of remediation, however, it can be deduced that there is a primary one, a complementary one and a compensatory one.

Primary remediation – obligation to reconstruct weirs on drainage ditches.

Complementary remediation – obligation to install safeguards to prevent unauthorized persons to access the weirs and other hydraulic structures on the drainage ditches.

Compensatory remediation (although the authority called it a preventive measure) – prohibition to perform any desilting works on the drainage ditches in the period of 15 years to allow for a natural succession of species and habitats.

However, as mentioned above, the analysed decision was probably not the last one issued in the case, it is highly possible that the proceedings were conducted at least until the second half of 2014.

2. Expert analysis

Both *RDOŚ* and *GDOŚ* are administrative bodies highly specialized in the area of environmental protection, hiring their own experts and possessing their own laboratories etc. therefore in most cases they do not need to hire any external experts. The following information can be deduced from the administrative decision and its reasoning:

The operators undertook engineering works within the area of *Błota Brudzewickie* including desilting of drainage ditches and removing existing weirs. As a result, the rate of drainage was substantially increased, leading to the destruction of habitats of protected species, including corncrake (*crex crex*), black-tailed godwit (*limosa limosa*), northern lapwing (*vanellus vanellus*), common snipe (*gallinago gallinago*), common redshank (*tringa tetanus*), Montagu's harrier (*circus pygarrus*). Most of these species were observed in early 2000's (eg. 25 corncrake males), whereas in 2009 their numbers were significantly lowered and some of them disappeared completely. According to *RDOŚ*, the operators conducted engineering works without taking into account the specific environmental conditions of the protected area.

According to the decision, the remedial actions imposed therein should lead to a successful remediation and reintroduction of the abovementioned species of birds.

3. Legal evaluation

a. Procedural legal issues

The proceedings were led under the provisions of the Code of Administrative Procedure and the Act on the prevention and remedying of environmental damage (implementing the ELD).

No external experts were hired as the authority has sufficient expertise. The proceedings were conducted in a regular manner. Burden of proof lied on the side of the authority. Reasoning of the decision was comprehensive, taking into account that it is a third decision issued in the same case.

No costs were incurred on the stakeholder requesting for action (Ornithological society).

A specific defect of the Polish Administrative Procedure is clearly visible – the proceedings may last indefinitely, rotated between the first and second instance authorities. The first instance authority issued decisions imposing remedial actions whereas the higher authority remanded them due to some procedural flaws, as well as due to the differences in the interpretation of a relatively new law. This vicious cycle could have been stopped by the stakeholder – the Ornithological Society, if it had appealed against the remanding decision of *GDOŚ* to the administrative court. However, in this case the Society was passive, and the operators did not react as the lack of final decision was to their advantage.

b. Substantial legal issues

The obligation was imposed in accordance with the principle of joint and several liability of operators. As the operators activity is not an Annex III activity, their liability was fault-based.

The problems that occurred (and resulted in several remanding decisions of the higher authority) stemmed mostly from the fact that the ELD Act was a relatively new law, thus there was almost no jurisprudence, therefore it was difficult for the authorities involved to properly interpret its provisions. Currently a new case law is emerging and such situations should become rarer.

Another problem was to properly assess to what extent the damage occurred before and after the new Act came into force, as the operators' activities lasted many years. The damage – destruction of protected habitats and reduction of the population of protected species – progressed gradually. It is partly a matter of proper factual analysis, as well as a need of case law that will help the authorities to assess the legal aspects correctly.

The emerging case law (including a first significant judgment of the Supreme Administrative Court) stipulates that the protection of environment and remediation of environmental damage is a priority, therefore the authorities have a relatively wide discretion when selecting measures to be imposed on the liable party.

4. Public participation

The proceedings were initiated due to the NGO's (Ornithological Society's) request for action. As stipulated by the ELD Act the Society was granted rights of a party in the proceedings. It was informed about the course of the proceedings and received all decisions. However, the society was passive after filing the request, though could actively participate, eg. by filing a complaint against the remanding decision of *GIOŚ* to the administrative court.

5. Financial security data

No data.

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