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# THE IMPACT OF THE AGREEMENT BY THE REGIONAL DIRECTOR OF ENVIRONMENTAL PROTECTION ON THE DECISION ON ENVIRONMENTAL DEPENDENCIES FOR THE IMPLEMEN- TATION OF INVESTMENT IN POLAND

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**ABSTRACT:** The purpose of this study is to attempt answering a question about the impact that the agreement reached by the Regional Director for Environmental Protection has on decisions regarding environmental dependencies in Poland. So far, two positions have been expressed in the literature on the subject. According to the first one, such an agreement is binding for the authority issuing the decision. The opponents of such an approach, on the other hand, argue that the administrative body is independent in that respect. The author, although attempting an in-depth analysis of both approaches, is in favor of the first one, additionally taking into account arguments of a juridical, functional and teleological nature. The case study concerned the construction of five buildings for breeding chicken broilers or turkeys along with the accompanying infrastructure on a property located within Solniki, municipality of Zabłudów.

**KEYWORDS:** decision, the environment, agreement, evaluation

## Introduction

The assessment whether a given investment will have an impact on the environment must be undertaken by every investor who intends to implement an investment project within the territory of the Republic of Poland in order to confirm or eliminate the need to carry out an environmental impact assessment (hereinafter also: EIA) for the project being implemented.

The purpose of the environmental impact assessment is to anticipate potential environmental threats at the investment planning stage, including the scale of those threats and – as a result – prevent or reduce those threats and minimize the negative impact of the planned investments (Bołtryk, 2017, p. 82).

The environmental impact assessment, in accordance with Polish law, may be carried out, e.g. as part of individual proceedings regarding the issuance of a decision pertaining to the environmental aspect of receiving consent to move forward with the project (hereinafter also: environmental decision, decision on environmental dependencies for the implementation of an investment).

The procedure related to the issuance of the environmental decision is one of the stages of a broadly understood investment procedure:

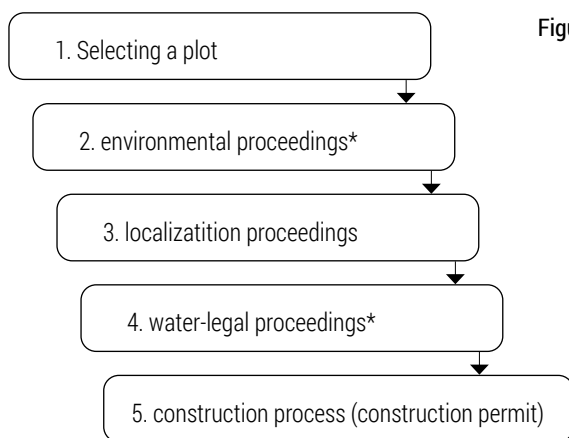


Figure 1. The stages of an investment process

\* non-obligatory proceedings, dependent on the type of investment

The procedure for issuing a decision is conducted pursuant to the Act from October 23, 2008 on the provision of information pertaining to the environment and its protection, public participation in environmental protection and environmental impact assessments (Journal of Laws No. 199, item 1227, as amended – hereinafter referred to as the Act), the Act from June 14, 1960,

the Code of Administrative Procedure (Journal of Laws No. 30, item 168, as amended – hereinafter also the Code of Administrative Procedure), as well as numerous executive regulations to the Act.

Pursuant to the provisions of the Act, decisions on environmental conditions for the implementation of investments are issued by:

**Table 1.** Bodies authorized to issue environmental decisions

Regional Director of Environmental Protection (hereinafter also: RDEP)	<ul style="list-style-type: none"> <li>- projects that can typically have a significant impact on the environment, i.e. roads, overhead power lines, installations for the transmission of crude oil, petroleum products, chemical or gas substances, artificial water reservoirs, nuclear facilities, radioactive waste storage sites,</li> <li>- projects carried out in closed areas established by the Minister of National Defense,</li> <li>- projects implemented in maritime areas,</li> <li>- altering forests which are not owned by the State Treasury for agricultural purposes,</li> <li>- projects involving the implementation of investments in the field of a public-use airports,</li> <li>- investments in the field of terminals,</li> <li>- investments related to regional broadband networks,</li> <li>- undertakings in the field of flood protection structures,</li> <li>- undertakings involving the excavation or exploration of mineral deposits or the extraction of minerals from deposits,</li> <li>- overhead power lines or power stations that may typically have a significant impact on the environment or other projects that may potentially have a significant impact on the environment,</li> <li>- projects for which the applicant is an organizational unit of the State Forests,</li> <li>- investments accompanying nuclear energy,</li> <li>- projects to which the RDEP has previously raised objections,</li> <li>- projects consisting in altering or expanding projects to which the RDEP is competent to issue a decision on environmental conditions,</li> <li>- wind farms,</li> <li>- strategic investments in the oil sector,</li> <li>- investments in railway lines,</li> <li>- investments related to the Central Communication Port</li> </ul>
General Director for Environmental Protection	<ul style="list-style-type: none"> <li>- investments pertaining to the construction of a nuclear power plant.</li> </ul>
Starosta	<ul style="list-style-type: none"> <li>- consolidation, exchange or division of land.</li> </ul>
Director of the Regional Directorate of State Forests	<ul style="list-style-type: none"> <li>- altering forests which are owned by the State Treasury for agricultural purposes.</li> </ul>
municipal leader, mayor, city president	<ul style="list-style-type: none"> <li>- other projects (not listed above).</li> </ul>

As shown in the table above, there are several administrative bodies established by law to consider the investor's application for environmental decisions. Most projects, however – due to the fact that they are implemented by private entities – are assessed in terms of environmental conditions by the executive body of the municipality, i.e. the municipal leader, mayor or city president relevant to the jurisdiction in which the project is to be imple-

mented (judgment of the Supreme Administrative Court in Warsaw from June 6, 2013, reference number II OSK 3064/12).

Zabłudów is a municipal community, therefore the mayor of Zabłudów is competent to consider the investor's application for environmental consent.

## Case study

The discussed administrative proceedings regarding the issuance of a decision on environmental dependencies for the implementation of the project pertained to the assessment of the environmental impact caused by the construction of five buildings intended for the purpose of breeding chicken broilers or turkeys, along with the accompanying infrastructure, on a property located within Solniki, the municipality of Zabłudów.

The proceedings were initiated at the request of the investor on February 28, 2022. Pursuant to Art. 71 sec. 2 point 1 of the Act, the implementation of a project which typically may have a significant impact on the environment (specified in the Regulation of the Council of Ministers from September 10, 2019 on projects that may have a significant impact on the environment – Journal of Laws, item 1839, as amended – hereinafter also: regulation) is allowed only after obtaining a decision on environmental dependencies. In the course of the proceedings, it was found that the proposed investment belongs to the 1st group of projects listed in § 2 section 1 point 51 of the Regulation, for which the preparation of an environmental report and the environmental impact assessment (Figure 2) are required.

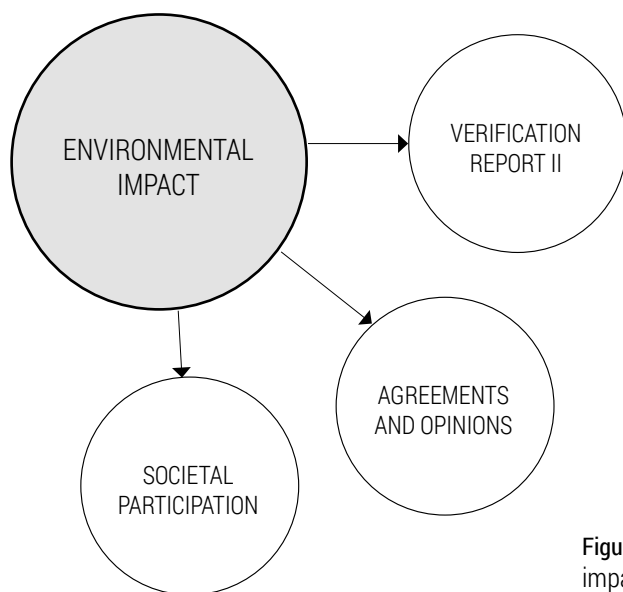
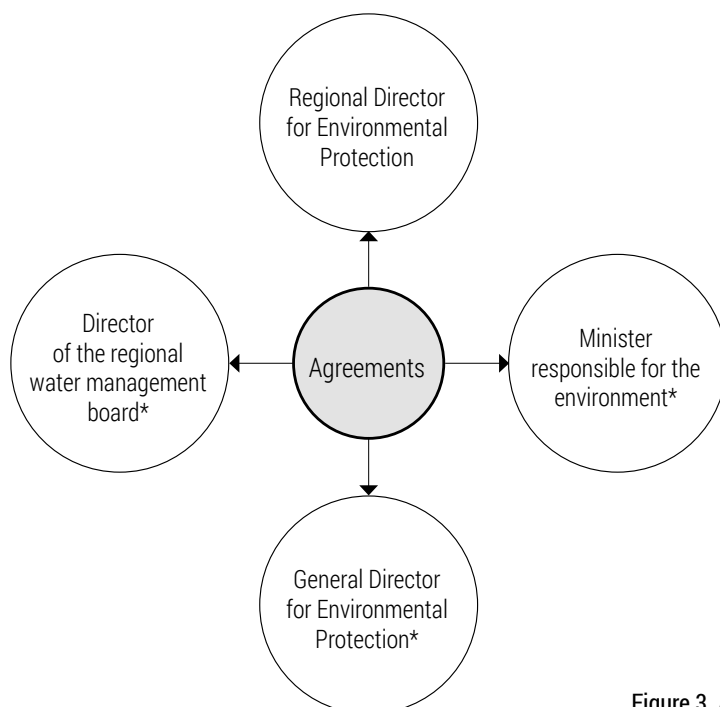


Figure 2. Stages of environmental impact assessment

The project was to be implemented in an area designated as zone B in the Study of Conditions and Directions of Spatial Development of the Zabłudów Municipality (Resolution No. XXIX/179/05 of the Zabłudów City Council from November 26, 2005, as amended). In this zone, agricultural land is preserved mainly for the purposes of agricultural production. The investment was planned to be implemented outside of the protected areas under the Act from 16 April 2004 on nature protection (i.e. Journal of Laws of 2022, item 916), including outside “Nature 2000” areas.

### Agreement procedure

Due to the fact that it was deemed necessary to carry out an environmental impact assessment, the authority conducting the proceedings applied for the approval of the investment implementation with the environmental protection authorities listed in the Act (Figure 3). It should be noted here that the failure to seek the opinion of another body required by law before issuing a decision is a serious procedural error which may justify the resumption of proceedings in the case (Article 145 § 1 point 6 of the Code of Administrative Procedure), even after its final conclusion (Cempura, 2022).



**Figure 3.** Agreements in the environmental procedure

The agreement is made in such a way that the authority conducting the environmental proceedings submits to the agreeing authority:

- the investor's application for a decision on environmental conditions,
- the investor's report on the environmental impact of the submitted project – for verification. The environmental report should be up-to-date and supplemented on the date of its submission for verification (judgment of the Provincial Administrative Court in Poznań of November 17, 2016, reference number IV Sa/Po 519/16 and the judgment of the Supreme Administrative Court in Warsaw of March 16, 2021, reference number III OSK 3925/21),
- extract from the local spatial development plan, if the plan has been adopted, or information about its absence.

The authority conducting the administrative proceedings (in this case, the Mayor of Zabłudów) is obliged to notify the parties about the commencement of the agreement procedure. The approval of RDEP is made within 30 days from the date the documentation referred to above was received. *"It must be emphasized that the above arrangements are not applicable to the provisions of art. 106 § 3, 5 and 6 of the Code of Administrative Procedure, with the stipulation in the Act that – if the opinion is not expressed in a timely manner – the silence of the authority shall be treated as lack of objections. However, no such reservation was made in relation to the agreement made by the Regional Director for Environmental Protection. In the event that it does not issue an appropriate decision within the indicated 30-day period, the authority competent to issue a decision on environmental conditions is obliged to wait for a position to be taken, which stems from Art. 106 § 1 k.p.a. The application of this provision has not been excluded."* (Kościńska, 2008, pp. 90-91).

The Regional Director for Environmental Protection, after analyzing the content of the submitted documents, issues a decision in which they consent to the project specifying the environmental conditions for its implementation, or refuses to give such consent (Figure 4). The decision is in the form of a ruling, against which the parties are not entitled to an appeal in the form of a complaint. However, the decision should include a justification, which allows for the verification of the arguments underlying the issued agreement. *"The justification for the decision must therefore be consistent with the content of the resolution of a given procedural issue contained in the operative part of this decision"* (Przybysz, 2022, Art. 124).

In the analyzed case, the Regional Director for Environmental Protection in Białystok, through a ruling from April 8, 2022 (no.: WOOŚ.4221.5.2022. RD) approved the implementation of the investor's project in terms of the environmental impact. Despite the above, the Mayor of Zabłudów, through a decision from August 30, 2022, ref. RGiGG.6220.3.2022 refused to specify the environmental conditions for the implementation of that project com-

prising the construction of five buildings for breeding chicken broilers or turkeys along with the accompanying infrastructure on a property with the registration number 5/7, Solniki, Zabłudów municipality.

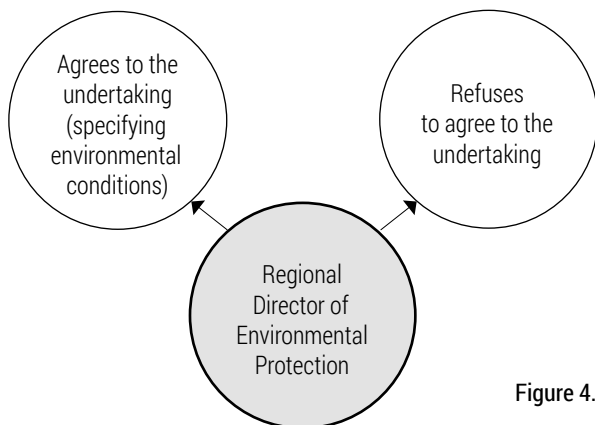


Figure 4. The ruling of the agreeing body

Considering the above, one should consider the legal significance of the agreement made as part of the procedure of issuing an environmental decision by the Regional Director for Environmental Protection. Does the Mayor of Zabłudów (as an entity not specialized in environmental issues) have the right to refuse to issue an environmental decision to the applicant, assuming (which was also the case in this situation) that other assessments were positive.

The answer to this question is not simple, especially considering that the literature and judicature on the subject present different positions.

First of all, the binding and significant nature of the agreement is pointed out. The decisions binding to the body that is conducting the proceedings whose goal it is to issue a decision are attributed a special, substantive character (Świątkiewicz, 1964, p. 778). Zimmermann (1983, p. 63) even claims that, in situations justifying the issuance of such decisions, “we are dealing de facto with a separate administrative decision or with a partial decision, which has effects both for the consulting authority, but also for the party”. Manowska (2005, p. 24) expresses a similar opinion about this problem, assuming that in the case of provisions made in an arrangement or agreement, the cooperating authority participates in settling the case in such a way that its action is part of the resolution adopted in the case. Staniszevska also points out that the position of the cooperating authority can be construed as evidence in an administrative case, sometimes influencing, or even determining its final decision, becoming a substantive element of the decision, and thus the rights and obligations influenced by it (Staniszevska, 2021).

The jurisprudence of administrative law also expresses a similar sentiment: *“The consultation procedure is [...] applicable to assess the compliance of a decision with the provisions of the law governing a specific case, when the legislator imposes an obligation to consult this decision with another body, one specialized in issues that require a certain level of expert knowledge. Due to the specific subject matter of the case, the competence of the authority agreeing to the decision is to review the compliance of the investment project with the given regulations of substantive administrative law”* (judgment of the Supreme Administrative Court from March 22, 2017, reference number II GSK 1519/15). *“The position of the cooperating authority becomes evidence in an administrative case, sometimes influencing, or even determining its final decision, becoming a substantive element of the decision-making process, and thus the rights and obligations influenced by it”* (Staniszewska, 2021, p. 135).

With regard to the issuance of the environmental decision, it is undisputed that it is the authorities specializing in environmental protection and care (including the Regional Director for Environmental Protection) who are responsible for determining whether a given investment will have a negative impact on the environment in the future. The authority issuing the environmental decision (in this case, the Mayor of Zabłudów) is not legally appointed to this type of duty. Also, the linguistic definition of the word “agree” (PWN, date of access: November 11, 2022) presupposes that without the consent of one authority, there is no possibility of a positive resolution of the case by the other authority (the agreeing authority).

Therefore, it seems undisputed that a public administration body cannot issue a positive decision if it has not been positively agreed with the coordinating body. But what happens in the situation that we’re dealing with in the present case. Is it possible and legally admissible to issue a negative decision (refusing to issue an environmental decision) when the decision of the RDEP (as well as other coordinating bodies) is positive.

At the very beginning, Romańska’s position should be quoted, according to which both cooperating authorities must work out a common position regarding the settlement in the scope of circumstances requiring agreement. The agreement, unlike an opinion, is a form of decisive importance, as it binds the authority that decides in the main proceedings. The scope of the agreement made by the agreeing body usually includes (unless the legislator provides otherwise) the content of the decision to be issued by the body conducting the main proceedings and the position taken by the agreeing body determines the content of the decision issued by the decisive body. The principle of binding the main authority with the position of the agreeing authority should be interpreted in such a way that the decision issued in the main proceedings may not be contradictory to the position of the agreeing authority (it must therefore respect all recommendations formulated by the agree-



ing authority), but may also supplement the position of the agreeing authority, as long as the supplement did not change the meaning of the agreed decision (Romańska, 2019).

Similar theses can also be found in the jurisprudence: “Agreement – unlike an opinion – is a form of decisive importance, because it binds the administrative authority that decides in the main proceedings. The agreement procedure is ancillary in nature and is part of the broadly understood procedure in the main case; however, its result is necessary for the body conducting the main proceedings and cannot be verified by this body on its own, even if the agreement procedure is burdened with procedural defects.” (judgment of the Provincial Administrative Court in Łódź from April 14, 2021, reference number II SA/Łd 51/21 and judgment of the Provincial Administrative Court in Poznań from February 7, 2018, reference number IV SA/Po 292/15).

Unfortunately, the above positions and judgments are of a general nature and do not directly apply to the arrangements referred to in the Act from October 23, 2008 on the provision of information on the environment and its protection, public participation in environmental protection and environmental impact assessments, i.e. which took place in the discussed case. Below we provide various positions, often depending on a particular court or adjudicating panel:

*“the decision on the determination of environmental conditions is issued after consultation, i.e. reaching a consensus with the regional director for environmental protection”* (judgment of the Provincial Administrative Court in Warsaw from January 31, 2018, reference number III SA/Wa 627/17),

*“Issuing a decision on agreeing to the conditions for the implementation of a project is binding for the authority issuing the decision in the field of environmental issues and shapes this decision in practice. The need to justify this decision emphasizes the substantive nature of such a decision, which actually settles the case on the merits”* (judgment of the Supreme Administrative Court in Warsaw from February 21, 2012, reference number II OSK 2544/11),

*“positive agreements on the part of the cooperating authorities are not binding for the authority specifying the environmental conditions for the implementation of a project and do not obligate the authority to issue a positive decision on environmental conditions, in a situation where the authority – for justified reasons – does not accept any of the significant findings or conditions set out in the decision of the agreeing authority”* (judgment of the Provincial Administrative Court in Szczecin from November 22, 2017, reference number II SA/Sz 998/17, judgment of the Supreme Administrative Court in Warsaw of June 10, 2020, ref. II OSK 3873/19),

*“the decision of the agreeing body to which Art. 80 sec. 1 point 1 pertaining to art. 77 act. 1 point 1 of the Act from 2008 on the provision of information on*

*the environment and its protection, public participation in environmental protection and environmental impact assessments is not binding. The mere fact of a contradiction between the environmental decision and such an agreement does not mean that the environmental decision is defective”* (judgment of the Supreme Administrative Court in Warsaw from November 10, 2016, reference number II OSK 1784/15),

*“Positive arrangements from the cooperating authorities (RDEP, PPIS) are not binding for the authority specifying the environmental conditions for the implementation of the project. A positive agreement does not obligate the authority to issue a positive decision on environmental conditions in the situation where the authority – for justified reasons – does not accept any of the significant findings or conditions set out in the decision of the agreeing authority. Therefore, when issuing a negative decision, the authority should demonstrate the defectiveness of the positive positions taken (opinions, arrangements), which requires substantive reference to the content of these documents”* (judgment of the Supreme Administrative Court in Warsaw from 01.07.2016, reference number II OSK 339/15).

## Conclusions

When analyzing the content of the above judgments, it should be noted that they are contradictory at first glance. It is possible to notice inconsistencies in the reasoning of the courts, as well as a lack of reference to the provisions of the Code of Administrative Procedure which, in this case, are applied alternatively, as long as the Act on the provision of information on the environment and its protection, public participation in environmental protection and environmental impact assessments do not contradict them. The provisions of the above Act do not exclude the obligation to apply Art. 106 § 1 k.p.a., the content of which de facto requires the body conducting the proceedings to issue a decision in accordance with the content of the agreement. There is no provision in the analyzed act which *expressis verbis* would authorize the administrative body to make a substantive decision contrary to the position of the agreeing body. An analysis in this respect could possibly be made under Art. 80 sec. 1 point 1 of the Act, which indicates that the authority issues an environmental decision “taking into account” the results of the agreements and opinions. “Taking into account,” however, is nothing more than “not disregarding” or “acknowledging” (wiktionary.org, 2022). In connection with the above, the public administration body must include a positive agreement in the issued decision and, in the author’s opinion, in such a way that the issued decision is not contradictory to it.

An additional argument proving the legitimacy of such a thesis is the undoubted expert knowledge of the Regional Director for Environmental Protection in the field of environmental issues. It seems obvious that, in the discussed case, the authority issuing the decision (the municipal leader, mayor or city president), despite the auxiliary apparatus in the form of officials of a given department, does not possess sufficient knowledge in the field of environmental protection comparable to that of the RDEP. It is not a body specialized in environmental issues. The issuance of a positive agreement should therefore bind the Mayor of Zabłudów and, if the content of the agreement is incomprehensible to them or raises doubts, they should apply to the agreeing body for clarification before issuing a substantive decision in the case. It must not be forgotten that, as part of the approval procedure, RDEP critically analyzes the environmental report, i.e. the basic document on which the investor who wants to obtain a positive environmental decision is based. Thus, the possibility of an equally specialized and critical reference to the report by the executive body of the municipality in the justification of the decision should be questioned. To sum up, in the opinion of the author, the positive agreement of RDEP implies a positive decision on the part of the public administration body (Figure 5), and the action of the Mayor of Zabłudów in this case should be assessed as incorrect and contrary to the law.

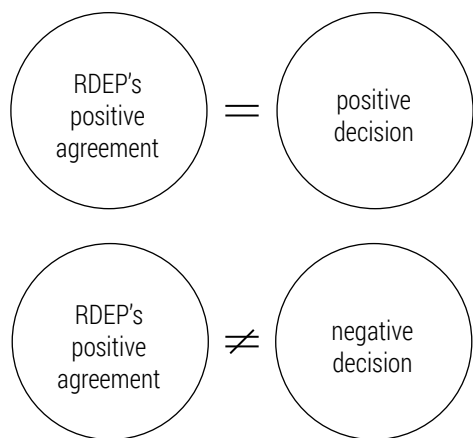


Figure 5. The influence of the RDEP agreement on the environmental decision – conclusions

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