



LEGAL EXPERT OPINION
regarding the compliance
of the construction
of Siarzewo barrage
with European Union law

LEGAL EXPERT OPINION
REGARDING THE COMPLIANCE OF THE CONSTRUCTION
OF SIARZEWO BARRAGE WITH EUROPEAN UNION LAW

WWF Poland Report

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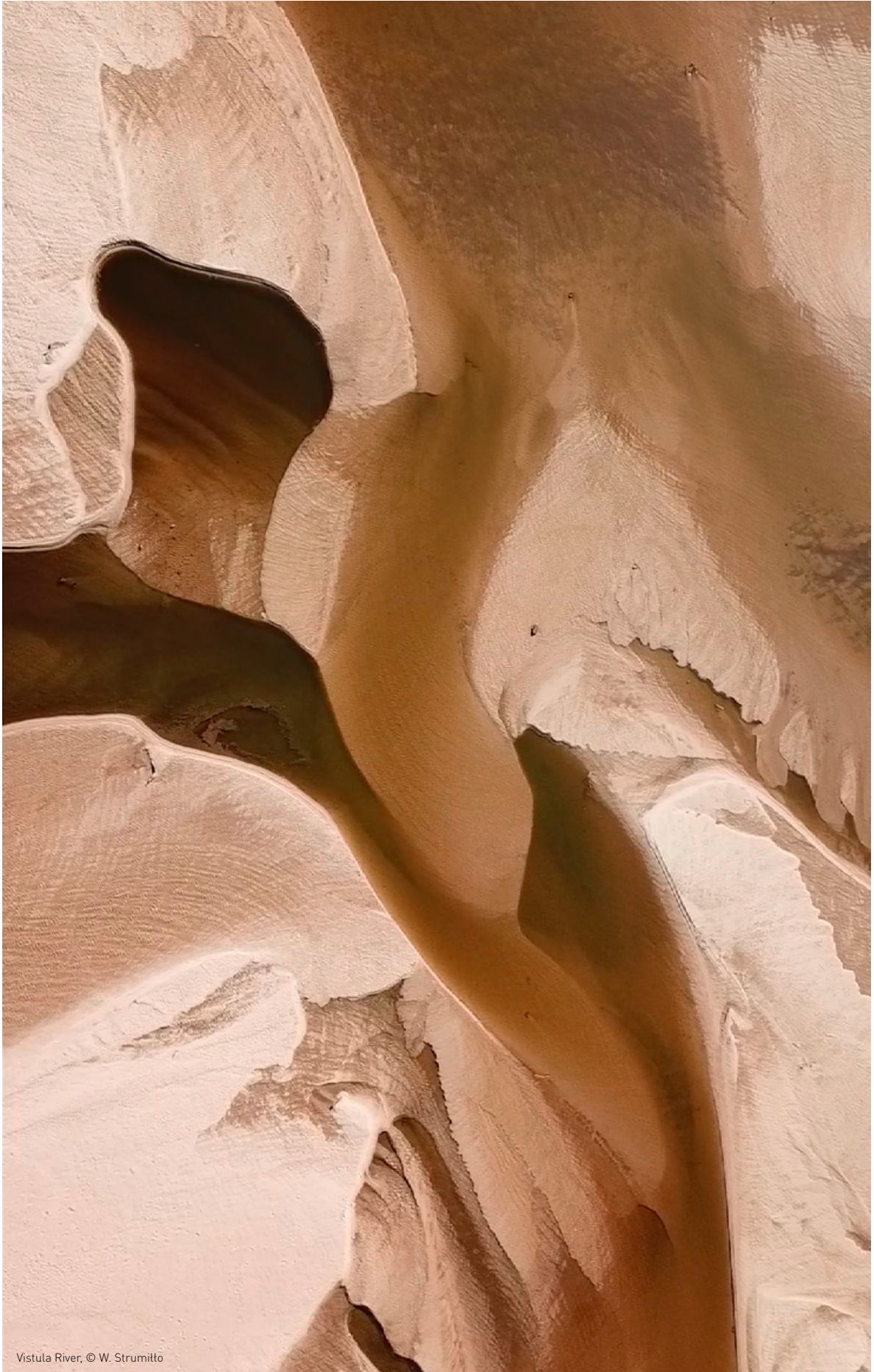
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Vistula River, © W. Strumitto

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LEGAL ISSUE

This expert opinion was commissioned by the WWF Polska Foundation. We were requested to analyse the following issue:

Is the decision by the Regional Director for Environmental Protection in Bydgoszcz no. 124/2017 of 29 December 2017 granting an environmental permit for the Siarzewo option of the “Construction of a barrage on the Vistula river downstream from Włocławek” project (ref.: WOO.4233.3.2016.KŚ.29) compliant with:

- 1) *Article 6 of the Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora,*
- 2) *Article 4(7) of the Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy.*

Hereinafter the quoted decision is referred to as the RDEP Decision, directive from item 1 – the Habitats Directive and directive from item 2 – the Water Framework Directive.

II.

ABOUT THE AUTHORS

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ANALYSED DOCUMENTS

This expert opinion is based on materials provided by WWF Polska Foundation and on the facts resulting thereof. The authors did not conduct independent verification of the findings of facts, but on the other hand, have no reasons to consider these findings to be erroneous. The expert opinion is not a global assessment of the RDEP Decision. During the preparation of the expert opinion the following documents were analysed, which had a final impact on its contents:

- 1) **environmental impact report for the “Construction of a barrage on the Vistula river downstream from Włocławek”** project, prepared by Ove Arup & Partners International Ltd Sp. z o.o. Polish Branch, of 31 July 2017 (vol. I-VII, summary, attachments), hereinafter referred to as the Report;
- 2) **administrative acts and documents** issued in relation to the granting of environmental permit for the construction of a barrage in Siarzewo:
 - a) decision no. 124/2017 by the Regional Director for Environmental Protection in Bydgoszcz of 29 December 2017 granting an environmental permit for the Siarzewo option of the “Construction of a barrage on the Vistula river downstream from Włocławek” project (ref.: WOO.4233.3.2016.KŚ.29),
 - b) notice by the General Director for Environmental Protection on referring the issue to the Minister for Environment of 19 December 2018;
- 3) **appeals against the RDEP Decision and other letters** filed in relation to the pending procedure:
 - a) appeal by the WWF Polska Foundation against the decision no. 124/2017 by the Regional Director for Environmental Protection in Bydgoszcz addressed to the General Director for Environmental Protection of 25 January 2018,
 - b) reply by the Investor to the request by the Minister for Environment of 13 March 2019 and the Investor’s position concerning the appeals against the RDEP decision of 31 July 2019,
 - c) request by the Minister for Environment to the National Water Management Authority to file additional explanations concerning the construction of the barrage in Siarzewo of 16 June 2020 (proc. ref. WOŚ.436.2.2019.4),
 - d) Investor’s position – response to the request by the Minister for Environment for the filing of explanations concerning the construction of the barrage in Siarzewo of 20 August 2020,
 - e) Investor’s position referring to the issue of overriding public interest and the scope of compensation of 91E0 riparian forests of 10 September 2020,

- f) application by the Greenmind Foundation to the Minister for Climate and Environment for extending the period for familiarisation with the collected documentation in the RDEP Decision appeal procedure of 2 March 2021,
- g) letter by the WWF Polska foundation to the Minister for Climate and Environment concerning the handing over of reports and correction of the Investor's information of 10 March 2021,
- h) motion by the WWF Polska Foundation to present evidence filed with the Minister for Climate and Environment in relation to the on-going procedure to appeal the decision to include the "Spawning grounds of the Atlantic sturgeon on the section of the Vistula river downstream from the Włocławek barrage" study of 12 March 2021,
- i) letter by the Greenmind Foundation in the matter DOP-WOŚ.436.2.2019.GŻ/895159.4815055.3817271 addressed to the Minister for Climate and Environment of 13 March 2021,
- j) motion by the WWF Polska Foundation to present evidence filed with the Minister for Climate and Environment in relation to the on-going procedure to appeal the decision to request the Investor to pre-sent the project's environmental impact report study of 15 March 2021,
- k) draft of the motion by the WWF Polska Foundation to present evidence filed with the Minister for Climate and Environment in relation to the ongoing procedure to appeal the decision to include the expert opinion "A review of global experiences related to the removal of dams and the removal and disposal of sediments collected in the basins of removed dam reservoirs" of 7 May 2021;

4) reports and expert opinions:

- a) report of the WWF Polska Foundation, "A study of a comprehensive solution to the problems of the Włocławek barrage and reservoir. Forecast of social, economic and environmental effects (overview)",
- b) report of the WWF Polska Foundation, "Assessment of impact of the Włocławek reservoir and the planned barrage and reservoir at Siarzewo on the conditions of passing of high water, based on the flood of May 2010", of 2012,
- c) report of the WWF Foundation, "Alternative for the planned hydroelectric plant in Siarzewo in the context of energy security" of 2020;

5) position concerning the construction of a barrage in Siarzewo and the safety of the Włocławek barrage:

- a) position of the National Commission for Environmental Impact Assessment concerning the assessment of options of projects to ensure the ecological safety of the Włocławek barrage of 2008,
- b) position of the WWF Polska Foundation concerning the "Ecological safety of the Włocławek barrage" project's environmental impact report of June 2008 and the suggested further actions for a definite and rapid solution to the problems of the Włocławek barrage and reservoir of October 2008,
- c) draft position of the WWF Polska Foundation concerning definite solution to the environmental and social problems created by the barrage on Vistula River at Włocławek of 4 March 2021,

- d) position of the WWF Polska Foundation concerning the construction of the barrage at Siarzewo of 11 March 2021;
- e) position of the Save the Rivers Coalition (Koalicja Ratujmy Rzeki) represented by the Greenmind Foundation, addressed to the President of the National Water Management Authority of 10 December 2019,
- f) position of the Polish Hydrobiological Society concerning the decision granting an environmental permit for the construction of a barrage in Siarzewo of 28 March 2021;

6) intervention letters and answers:

- a) letter by the WWF Polska Foundation addressed to the Prime Minister on probable misleading concerning the justifiability and the effects of the construction of a barrage on the Vistula river at Siarzewo of 19 October 2018,
- b) response by the Ministry of Maritime Economy and Inland Navigation to the letter by WWF Polska Foundation of 19 October 2018 addressed to the Prime Minister of 5 December 2018.

IV.

THE APPLIED CASE-LAW, OPINIONS AND GUIDELINES OF THE COMMISSION

The case-law of the Court of Justice of the European Union and the documents of the Commission concerning the covered issues were used in the preparation hereof. The following judgments of the Court of Justice and the opinions and guidelines of the Commission were finally referred to:

1) the **preliminary considerations**:

- a) Judgment of the Supreme Administrative Court of 4 February 2014 (II OSK 2918/13),
- b) Judgment of the Voivodeship Administrative Court in Warsaw of 27 February 2020 (IV SAB/Wa 1592/19),
- c) Commission Notice “Guidance document on the requirements for hydropower in relation to EU nature legislation” (2018/C 213/01);

2) in the part concerning admissibility of the project in the light of the **Habitats Directive**:

- a) Judgment of the Court (Grand Chamber) of 7 September 2004 in Case C-127/02, *Waddenvereniging and Vogelsbeschermingvereniging*, ECLI:EU:C:2004:482,
- b) Judgment of the Court (Second Chamber) of 26 October 2006 in Case C-239/04, *Commission of the European Communities v Portuguese Republic*, ECLI:EU:C:2006:665,
- c) Judgment of the Court of Justice of 20 September 2007 in Case C-304/05, *Commission of the European Communities v Italian Republic*, ECLI:EU:C:2007:532,
- d) Judgment of the Court (Fourth Chamber) of 24 November 2011 in Case C-404/09, *Commission v Spain*, ECLI:EU:C:2011:768,
- e) Judgment of the Court of Justice of 16 February 2012 in Case C-182/10, *Marie-Noëlle Solvay and Others v Région wallonne*, ECLI:EU:C:2012:82,
- f) Judgment of the Court (Grand Chamber) of 11 September 2012 in Case C-43/10, *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others v Ypourgos Perivallontos, Chorotaxias kai Dimosion ergon and Others*, ECLI:EU:C:2012:560,
- g) Judgment of the Court (Third Chamber) of 11 April 2013, *Sweetman and Others* in Case C-258/11, ECLI:EU:C:2013:220,

- h) Judgment of the Court (Second Chamber) of 15 May 2014, *Briels and Others* in Case C-399/14, ECLI:EU:C:2014:330.
 - i) Judgment of the Court (Third Chamber) of 14 January 2016 in Case C-399/14, *Grüne Liga Sachsen and Others*, ECLI:EU:C:2016:10,
 - j) Judgment of the Court of Justice of 8 November 2016 in Case C-243/15, *Leso-ochranárske zoskupenie VLK*, ECLI:EU:C:2016:838,
 - k) Judgment of the Court (Grand Chamber) of 29 July 2019 in Case C-411/17, *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen*, ECLI:EU:C:2019:622, par. 159,
 - l) Judgment of the Court (Sixth Chamber) of 16 July 2020 in Case C-411/19, *WWF Italia Onlus and Others v Presidenza del Consiglio dei Ministri and Azienda Nazionale Autonoma Strade SpA (ANAS)*, Judgment ECLI:EU:C:2020:580,
 - m) Commission Notice “Managing Natura 2000 sites – The provisions of Article 6 of the ‘Habitats’ Directive 92/43/EEC”, C(2018) 7621 (“Commission Guidelines concerning Article 6 of the Habitats Directive”),
 - n) Commission’s Opinion of 6 December 2011 on works in the port of Hamburg, C(2011) 9090,
 - o) Commission’s Opinion of 5 April 2013 on the deepening of the river Main, C(2013) 1871;
- 3) in the part concerning admissibility of the project in the light of the **Water Framework Directive**:
- a) Judgment of the Court of Justice of 4 May 2016 in Case C-346/14, *Commission v Austria*, ECLI:EU:C:2016:322,
 - b) Judgment of the Court of Justice of 1 June 2017 in Case C-529/15, *proceedings brought by Gert Folk*, ECLI:EU:C:2017:419,
 - c) Common Implementation Strategy for the Water Framework Directive (2000/60/EC): Guidance Document on Exemptions to the Environmental Objectives.

V.

FACTUAL CIRCUMSTANCES

The attempts to expand the hydraulic and hydropower infrastructure at the Lower Vistula river section by supplementing the existing Włocławek barrage with an additional dam have been ongoing in Poland since the 1990s¹.

In 2012 the Energa Capital Group, hereinafter referred to (jointly with the National Water Management Authority) as the Investor has selected the village of Siarzewo in the area of administrative districts Raciążek and Czernikowo at the 706-707th kilometre of the Vistula River to be the location of this project. Arguments for its construction included, in addition to the economic benefits and providing sustainable sources of electric power, providing relief to the existing Włocławek barrage, increasing flood safety and ensuring economic development of the area. The procedure for the “Ensuring public safety in the area of the Włocławek barrage with the use of hydropower and improvement of the potential of water and water-dependent ecosystems” project has however ended in 2016, when the RDEP in Bydgoszcz has refused to issue a permit for the project with its decision of 28 January 2016 (ref: WOO.4233.1.2015.KŚ.65)².

In 2017 a new design for the project was commissioned by the Investor, the main declared goal of which was the improvement of the Włocławek barrage’s operating conditions by restoring the conditions for which this barrage was designed³. The additional goals for the implementation of the project include: reducing the risk of occurrence of ice jams, stopping excessive river bed erosion (washing out of sediments from the river bottom) downstream of the Włocławek barrage; improvement of the potential of water and water-dependent ecosystems; increasing flood protection; ensuring the regulation of outflow from the complex of reservoirs – improvement of the effects of water management, including flood management by ensuring cooperation of two barrages and decreasing the negative phenomena caused by water management at the Włocławek barrage; construction of a road crossing which will be used for the barrage’s management as part of this project. Moreover the project includes the possibility of implementing such goals as the use of hydropower

1 These works and the related public debate are accompanied by a rich body of expert opinions and administrative material, including policies and guidelines referred to in the documents provided by the Employer: “A study of a comprehensive solution to the problems of the Włocławek barrage and reservoir. Forecast of social, economic and environmental effects” and a WWF Polska Foundation report “Alternative for the planned hydroelectric plant in Siarzewo in the context of energy security” of 2020.

2 The decision was justified by the expected: loss of value, importance and function of Włocławska Dolina Wisły and Nieszawska Doliny Wisły Natura 2000 sites, transformation of the current species structure of the avifauna, aquatic organisms and structure of natural habitats directly connected to lowland river valley, as well as permanent loss of some of protected species.

3 As specified by the Investor in the Environmental impact report (Executive summary of the report, p. 11): “the main goal of the project is to ensure permanent safety of the Włocławek barrage by raising the water level below the barrage. The raising of the water level will result from the damming of water (to the elevation of 46.0 m a.s.l. Kr86) by a new barrage located downstream of the existing Włocławek barrage”.

– generation of electricity from a renewable source; construction of a class Va waterway (in accordance with the recommendation of the Regional Water Management Board in Gdańsk) at the section of the new reservoir, with a construction of a navigation lock on the new water barrage; providing electric power necessary for the black start of baseload power plants in the central part of the country in case of a failure of the national power system⁴.

Even though the subject of the planned project is the construction of a barrage on the Vistula river at the Siarzewo village, it will impact a larger part of the Kujawsko-Pomorskie Voivodeship, which includes the powiats of: toruński, aleksandrowski, lipnowski, włocławski and Włocławek (city with powiat rights)⁵. These areas include three Natura 2000 sites: Włocławska Dolina Wisły, Nieszawska Dolina Wisły and Dolina Dolnej Wisły, which are subjects of nature conservation pursuant to the 16 April 2004 Nature Conservation Act (Journal of Laws of 2020, item 55, as amended), hereinafter referred to the Nature Conservation Act, in relation to the habitat directive and Directive 2009/147/WE of the European Parliament and Council of 30 November 2009 on the conservation of wild birds (O.J. UE L of 26 January 2010 20/7), more widely known as the Birds Directive. Moreover, the planned project is located within the limits of Nizina Ciechocińska Protected Landscape Area and the “Zielona Kępa” ecological site.

Here it should be noted that a heated discussion has been going for many years about the justifiability (or necessity) of the construction of a new barrage on the Vistula river, including the implementation of the project, and even about the future of the Włocławek barrage itself. This discussion involves the investor, public administration bodies, local governments and civil society organisations, which use comprehensive analyses and expert opinions to support their positions. Despite the passage of time and the conducted public consultation doubts concerning the effects and justifiability (or necessity) of the project and the existing alternative, expressed in the invoked documents were not all dispelled. This means that there is no scientific consensus concerning the arguments provided for the planned project.

Despite the encountered difficulties with access to public information and environmental information, the WWF Polska Foundation has referred to the matter many times in their publications, positions and reports, and also in letters directed to public administration. The commissioned expert opinions and information campaign resulted, among others, in the publication of the “Alternative for the planned hydroelectric plant in Siarzewo in the context of energy security” report (2020). Other civil society organisations engaged in the issue have also presented their factual findings⁶.

The remarks and conclusions of many entities were also delivered to the RDEP in Bydgoszcz during public consultation conducted as part of the environmental permit procedure. In addition to the Employer they included, among others, the Greenmind Foundation, Towarzystwo na rzecz Ziemi (The Association for the Earth), professor Tomasz Mikołajczyk, PhD from Pracownia Ekspertyz i Badań Ichthyologicznych PEBI (Ichthyological Research and Expert Reports Workshop), Klub Przyrodników (Club of Naturalists) with its

4 Executive summary of the environmental impact report, pp. 11-12.

5 Pursuant to RDEP Decision, p. 2.

6 See for example the position of the Save the Rivers Coalition of 10 December 2019; the position of the Polish Hydrobiological Society of 28 March 2021.

seat in Świebodzin, Towarzystwo Ochrony Przyrody (Society for Nature Protection) with its seat in Warsaw, Ogólnopolskie Towarzystwo Ochrony Ptaków (Polish Society for the Protection of Birds), Stowarzyszenie Ekologiczno-Kulturalne Klub Gaja (Gaia Ecological and Cultural Club Association). The presented remarks pointed out, among others:

- 1) absence of evidence of the risk of loss of stability of the Włocławek barrage, and thus the purpose of the project and the need for a deeper analysis of possible options;
- 2) identified significant impact of the project on the integrity of Natura 2000 sites and intensification of negative impacts in the Vistula river ecosystem (with inappropriate inventory of avifauna and prevention of restoration or impairment of population of selected species of fish, as well as insufficient environmental compensation);
- 3) underestimation of the project's environmental impacts and narrowing the impact analysis to only three Natura 2000 sites;
- 4) no impact (or potentially negative impact) of the project on the ice situation and on the risk of ice jams on the existing reservoir upstream of the Włocławek barrage;
- 5) missing simulation of flood wave passage through the Włocławek reservoir and the project (and even a risk of increasing the flood risk);
- 6) insufficient analyses of the degree of environmental contamination present in bottom sediments of the Włocławek reservoir's basin;
- 7) and also insufficient justification of the premise of overriding public interest as well as not analysing the alternative solutions, consisting, among others, of a comprehensive modernisation of the Włocławek barrage and a construction of a weir raising the water stage downstream of the barrage, which led to the granting of an environmental permit for the project in breach of both national and EU legislation.

In particular, the WWF Polska Foundation (in its letter of 13 November 2017) has referred to the expert opinion "Assessment of impact of the Włocławek reservoir and the planned barrage and reservoir at Siarzewo on the conditions of passing of high water, based on the flood of May 2010" prepared in 2012, indicating the absence of unequivocally positive impact of the construction of an additional barrage in the area of Siarzewo on the improvement of flood safety. Some of the arguments above are quoted herein in section III and IV.

Despite these facts, on 29 December 2017 the RDEP in Bydgoszcz has issued a RDEP Decision upon a motion by the Investor, granting an environmental permit for the "Construction of a barrage on the Vistula river downstream from Włocławek implemented for the Siarzewo option" project, making this decision immediately enforceable.

Obtaining this decision was necessary in order to implement the project. In accordance with the provisions of article 71(2) of the Act of 3 October 2008 on sharing information about the environment and its protection, public participation in environmental protection and environmental impact assessments (Journal of Laws of 2021, item 247, as amended), hereinafter referred to as the Environmental Information and Public Participation Act, obtaining an environmental permit is required for planned projects which may always have a significant impact on the environment and projects likely to potentially have a significant impact on the environment, and the classification of the project as a project which may always have a significant impact on the environment is established by § 2 clause 1 item 35 of the Regulation of Council of Ministers of 10 September 2019 on projects likely to

significantly affect the environment (Journal of Laws of 2019, item 1839, as amended). This was the reason why an assessment of environmental impact was necessary before granting an environmental permit, which is indicated by the RDEP Decision⁷.

Moreover, in accordance with article 72(3) of the Environmental Information and Public Participation Act in relation to article 72(1)(18) thereof such a permit is attached to the motion to issue a project implementation permit for flood control structures (as understood by the provisions of Act of 8 July 2010 on specific terms of preparing for construction of flood structures, Journal of Laws of 2021, item 484, as amended). Pursuant to article 72(3) of the Environmental Information and Public Participation Act (subject to article 72(4) and 72(4b) thereof) a motion to issue a project implementation permit should be filed within 6 years from the day on which the RDEP Decision became final. The RDEP Decision could be appealed to the General Director for Environmental Protection in Warsaw through the RDEP in Bydgoszcz within 14 days from the day of delivery of the RDEP Decision.

On the day of 25 January 2018 the WWF Polska Foundation has appealed the RDEP Decision to the General Director for Environmental Protection in Warsaw through the RDEP in Bydgoszcz. The appealed decision was contested for, among others, the following allegations:

- 1) implementation permit for a project significantly negatively impacting at least 3 Natura 2000 sites and threatening environmental objectives of at least 4 surface water bodies, even though there exist alternative solutions, more environmentally friendly and realising the same goals;
- 2) implementation permit for a project which violates prohibitions in force for the “Zielona Kępa” ecological site without obtaining a required agreement from the appropriate municipal council and even though there exist alternative solutions, more environmentally friendly and realising the same goals;
- 3) not establishing the need to prepare a repeated environmental impact assessment for the project, even though justifications occurred for such a repeated assessment, in particular due to establishing the accumulation of the projects’ impacts within the area of this project, including in 3 Natura 2000 sites and within the “Zielona Kępa” ecological site;
- 4) erroneous finding that the project will not have a significant negative impact on a goal of protecting the Włocławska Dolina Wisły Natura 2000 site, which is the protection of asp (and as a consequence failure to impose a requirement of environmental compensation for this species).

In the light of all the objections it was requested to annul the contested decision in its entirety and to return the matter to the first instance authority for reconsideration. As resulting from documents provided by the Employer, they were not the only civil society organisation appealing the RDEP Decision. Some of the argumentation presented in the Appeal is quoted herein in the course of its analysis.

Subsequently with the decision by the Prime Minister of 26 November 2018 (ref. DP.122.10.2018.AW) the RDEP Decision appeal procedure was referred to the Minister for Environment for examination, who by his request of 13 March 2019 (ref. DOP-WOŚ.436.2.

⁷ RDEP Decision, pp. 2-55 and 62-64, 130-218.

2019.MK) has requested the Investor to provide explanations. And so, in the Investor's Answer of 31 July 2019 to the request by the Minister for Environment of 13 March 2019 and in the Investor's position in reference to the appeals against the decision by the Regional Director for Environmental Protection in Bydgoszcz of 29 December 2017 no. 124/2017, ref.: WOO.4333.3.2016.KŚ.29 the Investor referred to the objections by the WWF Polska Foundation and other participants in the proceedings.

Despite that fact, due to doubts related to the significant environmental impact of the project, the Investor was requested to remedy the deficiencies in the Investor's Position (request by the Minister for Environment of 16 June 2020). The Investor has presented additional explanations in two letters dated 20 August 2020 and 10 September 2020, in which he referred, among others, to the issues forming the subject hereof, that is, premises established in article 34 of the Nature Conservation Act, implementing, among others, the provisions of the Habitats Directive.

Also other participants in the proceedings have filed additional explanations and motions to present evidence, as demonstrated in the documents handed over by the Employer, among others, motion to present evidence to include the "Spawning grounds of the Atlantic sturgeon on the section of the Vistula river downstream from the Włocławek barrage" study of 12 March 2021 and a motion to request the Investor to present the project's environmental impact report study of 15 March 2021, and also the letter by the Greenmind Foundation in the matter DOP-WOŚ.436.2.2019.GŻ/895159.4815055.3817271 addressed to the Minister for Climate and Environment of 13 March 2021.

It should be noted that on 19 October 2018 the WWF Polska Foundation has also addressed the Prime Minister, providing information on the justifiability of the planned project, presenting a series of arguments critical of or raising doubts about the necessity of barrage's construction, which were raised during the public consultation conducted before the RDEP Decision was issued. The letter indicated, among others::

- 1) a negative impact of the Włocławek barrage on the economic situation of the adjacent areas (and thus potentially a similar impact of the project);
- 2) absence of significant impact of the Włocławek barrage and of the project on water security, and in specific situations even an increased flood risk. Whereas in case an opposite argument is accepted – the project being unnecessary, since an analogous effect may be achieved by constructing a small weir for raising the water level, placed at a distance of a few hundred meters downstream of the Włocławek barrage,
- 3) improvement of the technical conditions of the Włocławek barrage after its modernisation conducted in the years 2013-2015, which undermines the argument about the need to relieve this structure with the planned project,

available alternative solutions for the generation of renewable energy and ensuring energy security of the region, which are at the same time better adapted to the energy needs of the country and less environmentally harmful than the construction of a hydropower plant (due to low water levels in the river the lowest generation of energy in hydropower plants on the Vistula river occurs in the summer months, when the efficiency of coal plants also decreases – stabilisation of the national energy grid should be achieved by combining solar, wind and biogas power plants, which are better at dealing with summer conditions).

The Ministry of Maritime Economy and Inland Navigation has replied to this letter with their letter of 5 December 2018. It confirmed that the provision of electric power necessary for the black start of baseload power plants is not the main goal of the project, but one of its additional goals, stating that the construction of the barrage implements the principle of effective water resources management, which combines protection against flooding and protection against the effects of drought with establishing conditions for the creation of international class inland waterways and the use of hydropower potential of rivers. It was noted that the analyses concerning the barrage should consider the main goal and supplementary goals jointly, instead of considering each of them separately. The existing planning documents were referred to (Flood risk management plan for the Vistula River basin area; Updates to this plan; Assumptions for the inland waterway development plans in Poland for the period 2016-2020 with perspective up to 2030) and analyses which lead to the conclusion that the performance of the project is necessary.

Despite the passage of 3 years from the date of filing the appeals against the RDEP Decision, and the established excessive length of reviewing the appeal and ordering the Minister for Climate to consider the appeal against the RDEP Decision within a month⁸, the appeal procedure is still ongoing, and parties and civil society organisations engaged in the matter are awaiting the matter to be reconsidered.

8 In the Judgment of the Voivodeship Administrative Court in Warsaw of 27 February 2020 (IV SAB/Wa 1592/19).

VI.

THE APPLICATION OF DIRECTIVES IN THE MATTER

Before moving to the substantive analysis it is necessary to explain briefly what is the consequence of compliance with EU directives in this matter. Firstly, the directives form the template for interpretation of national law, pursuant to the principle of indirect effect of European Union law. This means that bodies and courts which apply national law have the duty to interpret it in a manner that is consistent with EU law, including the directives. In the reality of matter at hand this means principally that the interpretation of Polish acts must lead to results that are compliant with the Habitats Directive and the Water Framework Directive⁹. The indirect effect of EU law goes as far, as far the performed interpretation is not *contra legem* and observes the general principles of EU law.

In case when an interpretation compliant with EU law would not be possible, the use of the principle of direct effect combined with the priority rule should be considered. This means that a law applying authority or a national court have the duty to apply the regulation of the directive and to deny the application of the non-compliant provisions of national law. In order to have a direct effect, the provision of the directive must confer right on an individual, be clear, precise and unconditional; moreover, the time limit for the implementation of the directive must have passed, and its regulations may only be invoked against the state and its emanations (and not against private individuals).

Analysis of the RDEP Decision indicates that the authority was aware of the necessity of meeting the premises of legality for issuing the decision which stem from the directives. Achieving compliance with the analysed Article 4(7) of the Water Framework Directive should occur through the interpretation of Article 68 of Water Law, whereas compliance with the most important from the perspective hereof Article 6(4) of the Habitats Directive – of Article 34 of the Nature Conservation Act. The Habitats Directive and the Water Framework Directive are independent legal regulations, which means that projects undertaken by Member States have to be compliant both with the first and with the second directive, and compliance with one of the directives does not automatically result in compliance with the other. Thus, if the project falls in the scope of environmental protection regulated by both directives, it must simultaneously meet the premises of exclusion from Article 6(3) of the Habitats Directive and Article 4(7) of the Water Framework Directive¹⁰.

⁹ See, e.g. Judgment of the Supreme Administrative Court of 4 February 2014 (II OSK 2918/13). See also J. Chmielewski, *Artykuł 6 ust. 4 Dyrektywy Siedliskowej a zasada uwzględniania interesu społecznego i słusznego interesu obywateli – ujęcie procesowe nadrzędnego interesu publicznego* (Article 6(4) of the Habitats Directive and the principle of considering the social interest and legitimate interest of the citizens – procedural formulation of overriding reasons of public interest), in: *Pojęcie nadrzędnego interesu publicznego w prawie administracyjnym* (Concept of overriding reasons of public interest in administrative law), Warsaw 2015, Legalis.

¹⁰ Commission Notice “Guidance document on the requirements for hydropower in relation to EU nature legislation”, 2018/C 213/01, p. 8.

VII.

ADMISSIBILITY OF THE PROJECT IN THE LIGHT OF THE HABITATS DIRECTIVE

VII.1. Reference norm

Article 6 of the Habitats Directive imposes on Member States the obligation to adopt appropriate conservation measures intended to maintain or restore Special Areas of Conservation, in particular covered by a network of Natura 2000 sites (of which as many as three are located within the area of the planned project or within the range of its impact). Articles 6(1) and (2) of the Habitats Directive establish general principles of conservation and indicate that Member States adopt appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitats and habitats of species present on the sites. Whereas Articles 6(3) and (4) specify a multi-stage procedure for assessment of plans and projects by administrative authorities and procedural and substantive protection measures which regulate plans and projects likely to have a significant impact on special areas of conservation¹¹. These regulations together establish framework for protection and proactive, preventive and procedural requirements, which support the achievement of the principles of cohesion and of sustainable development, as well as the European Union policy on biodiversity. The transposition of these regulations was performed, among others, in the Nature Conservation Act (in particular in Article 34 and subsequent articles thereof).

Pursuant to Article 6(3) of the Habitats Directive, in case when the plan or project is not directly connected with or necessary to the management of the site (understood in accordance with Article 6(1) of the Directive, that is management plans specifically designed for the sites or integrated into other development plans, which include appropriate protective measures) but is likely to have a significant effect thereon (either individually or in combination), it shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. The national authorities shall agree to the plan or project only after having ascertained with the assessment that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion

¹¹ Additionally, Article 6(2) to (4) of the Habitats Directive also applies for special protection areas classified pursuant to the Birds Directive.

of the general public. However, should the premises specified in Article 6(4) of the Habitats Directive occur, the national authorities may (but are not required to – the application of this provision is not automatic) may allow the implementation of the plan or project, even though its implementation results in an adverse impact on the area of conservation¹².

Since the project is not directly connected with or necessary to the management of the site, and also significantly and adversely impacts the Natura 2000 sites located within its area, the criteria established in Article 6(4) of the Habitats Directive are key for the assessment of the admissibility of the project, thus also for the assessment of compliance of the RDEP Decision with Article 6 of the Habitats directive. This claim does not require a broader analysis and is not controversial, as resulting from the findings of RDEP in Bydgoszcz and not questioned by the parties appealing the RDEP Decision. We will refer to this issue more broadly further herein.

The quoted Article 6(4) of the Habitats Directive states that if, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected (and the Member State informs the Commission of the compensatory measures adopted). There are two key premises in this context: the absence of alternative solutions and the presence of imperative reasons of overriding public interest. The decision issuing authority is obliged to examine whether they exist in combination, first establishing the absence of alternative solutions, and then moving to establishing the presence of aforementioned imperative reasons resulting from overriding public interest. Therefore, during the procedure the environmental cost resulting from the performance of the plan is juxtaposed with the benefits from the performance of overriding public interest.

The discussed regulation should be at the same time, in accordance with an essential document for the interpretation of Article 6 of the Habitats Directive by Member States, that is, the Commission guidelines of 2018 on the application of this regulation¹³ (hereinafter referred to as the Commission guidelines on Article 6 of the Habitats Directive), interpreted in accordance with the general precautionary principle and strictly as an optionally applied exception to the general principle of inadmissibility of plans and projects with a negative effect on a special area of conservation¹⁴.

None of the terms used by the European legislator to establish these premises was defined in the Habitats Directive. Answers in this regard are thus provided by the case law. And so, an alternative solution should be feasible and minimise the negative impact of the plan or project on the environment while simultaneously maximising the advantages stemming from the performance of the overriding reasons of public interest (a specific balance resulting from the weighing of these two contrasting values has to be achieved)¹⁵. In turn, the “interest which could justify, as understood by Article 6(4) of the Habitats Directive, the

12 This follows from a literal interpretation of Article 6(3) to (4) of the Habitats Directive. Also the guidelines of the Commission on Article 6 of the Habitats directive, section 3.2, pp. 32 ff.

13 Commission Notice “Managing Natura 2000 sites – The provisions of Article 6 of the Habitats Directive 92/43/EEC”, C(2018) 7261.

14 See Commission guidelines on Article 6 of the Habitats Directive Section 5.2, p. 61.

15 See, for example, Opinion of Advocate General Juliane Kokott of 27 April 2006 in Case C-239/04, *Commission of the European Communities v Portuguese Republic*, ECLI:EU:C:2006:255, par. 45.

implementation of the plan or project should be simultaneously “public” and “overriding”, which means that its weight should be high enough so that it can be set against the goal of protection of natural habitats of wild fauna and flora outlined by that directive”¹⁶. In other words, the public interest must outweigh the value of the existence of protected areas. It is irrelevant whether it is performed in the form of a public or private project, and also whether the overriding reasons of public interest are performed in a social or an economic context¹⁷.

Article 6(4) of the Habitats Directive formulates two sets of criteria of admissibility of plans and projects likely to have significant impact on a special area of conservation. This follows from par. 2 of Article 6(4) which states that where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are considerations relating to human health or public safety, or considerations of beneficial consequences of primary importance for the environment or considerations of other imperative reasons of overriding public interest (in this case further to an opinion from the Commission).

Since it was established that the project has a significant negative impact on Natura 2000 sites and on an area of natural habitats, a priority natural habitat type, further considerations were narrowed to the second, stricter set of project admissibility requirements established in Article 6 of the Habitats Directive.

Moreover the criteria established in Article 6(4) of the Habitats Directive must be supplemented by requirements established in Article 6(3) thereof, referring to the previous stages of the procedure applied by national authorities, that is, the requirement of assessing implications for the site in view of the site’s conservation objectives and of conducting public consultation¹⁸. This is because Article 6(4) of the Habitats Directive applies to plans and projects with a negative environmental impact, which must be first established by an appropriate administrative authority. The case law clearly states that Article 6(4) of the Habitats Directive may only be applied after such negative impact is established¹⁹.

As a consequence, to deem the project admissible in the light of Article 6 of the Habitats Directive it must meet jointly the following conditions:

- 1) be subjected to appropriate assessment of its implications for the site in view of the site’s conservation objectives, including the cumulative effects and effects in combination with other plans or projects (in accordance with Article 6(3) of the Habitats Directive);

16 Judgment of the Court of Justice of 16 February 2012 in Case C-182/10, *Marie-Noëlle Solvay and Others v Région wallonne*, ECLI:EU:C:2012:82, par. 75 ff.

17 See also M. Michalak, *Odstępstwa od zakazu realizacji inwestycji mogących znacząco negatywnie oddziaływać na obszary Natura 2000 w orzecznictwie europejskiego trybunału sprawiedliwości* (Exemptions from the prohibition of projects likely to have a significant negative impact on Natura 2000 sites in the case law of the Court of Justice of the European Union), in: R. Biskup, M. Pyter, M. Rudnicki, J. Trzewik (eds.), *Działalność Gospodarcza na obszarach chronionych* (Economic activity in protected areas), Lublin 2014, p. 101-112.

18 Article 6(3) of the Habitats Directive states that each project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon (either individually or in combination with other plans or projects) shall be subject to appropriate assessment of its implications for the site in view of the site’s conservation objectives. The agreement to the implementation of such a project may be issued only after ascertaining that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

19 Also e.g. Judgment of the Court of Justice of 20 September 2007 in Case C-304/05, *Commission of the European Communities v Italian Republic*, ECLI:EU:C:2007:532, par. 85.

- 2) be subjected to public consultation (in accordance with Article 6(3) of the Habitats Directive interpreted in connection with Article 6(1) (b) of the Aarhus Convention²⁰);
- 3) in accordance with Article 6(4) of the Habitats Directive present a necessary (alternative-free) form of performance of overriding reasons of public interest, which in this case should be understood as one of the following:
 - a) considerations relating to human health or public safety,
 - b) beneficial consequences of primary importance for the environment,
 - c) (further to an opinion by the Commission) other imperative reasons of overriding public interest);
- 4) provide compensatory measures necessary to ensure that the overall coherence of Natura 2000 sites is protected (in accordance with Article 6(4) of the Habitats Directive).

These conditions are reflected in the contents of already quoted Article 34 of the Nature Conservation Act, which provides an exception to the general prohibition of projects having a significant negative impact on the goal of protecting a Natura 2000 site.

As mentioned, the presented conditions must be interpreted strictly, restrictively and must be met jointly. What is important, it is the administrative authority which issues the decision that is required to establish that the plan or project meets all the conditions presented above, and thus also that the project is actually the only available, alternative-free solution to the problem of overriding reason of public interest²¹. In accordance with the Commission guidelines on Article 6 of the Habitats Directive “the national authorities may authorize a plan or project only if the proof of the existence of the afore mentioned reasons of overriding public interest is given and within the limits within which the plan or project in question proves necessary for the fulfilment of the public interest in question”²².

Therefore in order to contest the compliance of the decision permitting the plan or project with Article 6(4) of the Habitats Directive it is not necessary to prove the existence of alternative solutions with a lower negative impact of the protected areas or that this plan or project does not meet reasons of overriding public interest, but only to present rational and justified doubts concerning the absence of such alternatives and the fulfilment of such overriding public interest, which the authority was required to establish beyond any doubt. This position is confirmed by a wealth of case law of the Court of Justice²³.

Moreover, the interpretation of the described conditions should be conducted in accordance with precautionary principle, which enables preventing an adverse impact of plans or project on the integrity of protected areas by imposing an obligation on the national competent authorities to refuse the issuing of a permit for the plan or project when there is no certainty that the implementation of the plan or project will not have a negative

20 Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters of 25 June 1998 (Journal of Laws of 2003, No 78, item 796, as amended). Also e.g. Judgment of the Court of Justice of 8 November 2016 in Case C-243/15, *Lesoochranárske zoskupenie VLK*, ECLI:EU:C:2016:838, par. 45.

21 See, e.g. Judgment of the Court (Second Chamber) of 26 October 2006 in Case C-239/04, *Commission of the European Communities v Portuguese Republic*, ECLI:EU:C:2006:665, par. 36; Judgment of the Court (Sixth Chamber) of 16 July 2020 in Case C-411/19, *WWF Italia Onlus and Others v Presidenza del Consiglio dei Ministri and Azienda Nazionale Autonoma Strade SpA (ANAS)*, Judgment ECLI:EU:C:2020:580, par. 37-38.

22 Commission guidelines on Article 6 of the Habitats Directive Section 5.8.2, p. 75.

23 See, e.g. Judgment of the Court (Second Chamber) of 26 October 2006 in Case C-239/04, *Commission of the European Communities v Portuguese Republic*, ECLI:EU:C:2006:665, par. 20, 24.

impact on such areas. The application of the precautionary principle in reference to Article 6 of the Habitats Directive, and in particular to Article 6(3) to (4) thereof is confirmed by the Commission guidelines on Article 6 of the Habitats Directive²⁴ and the case law (see in particular Judgments of the Court of Justice in cases *Waddenvereniging and Vogelsbeschermingvereniging*²⁵ and *Grüne Liga Sachsen and Others*²⁶ or *Sweetman and Others*²⁷)²⁸.

As a consequence, in order to establish the non-compliance of the RDEP Decision with Article 6 of the Habitats Directive it is sufficient to demonstrate uncertainty concerning the occurrence of premises which would authorise granting the environmental permit.

VII.2. Analysis

As already mentioned, the issues of direct connection or necessity of the project to the management of the site, and also of significant (or meaningful) adverse impact of the project on the environment is not controversial and confirmed by all documents provided by the Employer, including the environmental impact report prepared at the Investor's request, the Decision issued by the RDEP in Bydgoszcz, and the letters filed by civil society organisations participating in public consultation and appealing the RDEP Decision²⁹ (only the detailed scope of significant negative impact on Natura 2000 sites may be debatable, which is specified slightly differently in individual analyses and expert opinions). That is why RDEP in Bydgoszcz has issued a RDEP Decision, referring to the strict exceptions specified in Article 34(1) of the Nature Conservation Act (corresponding to the conditions specified in Article 6(4) of the Habitats Directive). This follows indirectly from EU law and its transposition into national law, since the concept of significant impact is not subjected to lenient interpretation and is applied objectively³⁰. Thus, if a plan or a project not directly connected with or necessary to the management of the site may prevent permanently maintaining significant features of the site related to the occurrence of a priority natural habitat type, it should be considered that they adversely affect the integrity of the site. When assessing these premises and the environmental impact itself the precautionary principle should apply³¹.

And so, in the RDEP Decision itself it was established: "As a result of a construction of a new barrage on the Vistula river, the river will change its character over the entire section

24 Commission guidelines on Article 6 of the Habitats Directive Section 3.5, p. 41.

25 Judgment of the Court of Justice of 7 September 2004 in Case C-127/02, *Waddenvereniging and Vogelsbeschermingvereniging*, ECLI:EU:C:2004:482, par. 55-58.

26 Judgment of the Court (Third Chamber) of 14 January 2016, *Grüne Liga Sachsen and Others*, in Case C-399/14, ECLI:EU:C:2016:10, par. 48.

27 Judgment of the Court (Third Chamber) of 11 April 2013, *Sweetman and Others* in Case C-258/11, ECLI:EU:C:2013:220, par. 41.

28 See Judgment of the Court (Second Chamber) of 15 May 2014, *Briels and Others* in Case C-399/14, ECLI:EU:C:2014:330. 26.

29 See, e.g. appeal by the WWF Polska Foundation against the decision no. 124/2017 by the Regional Director for Environmental Protection in Bydgoszcz addressed to the General Director for Environmental Protection of 25 January 2018, *passim*; letter by the Greenmind Foundation in the matter DOP-WOŚ.436.2.2019.GZ/895159.4815055.3817271 addressed to the Minister for Climate and Environment of 13 March 2021, *passim*.

30 Also the guidelines of the Commission on Article 6 of the Habitats directive, section 3.5.2, pp. 45-46.

31 Also the Judgment of the Court (Third Chamber) of 11 April 2013, *Sweetman and Others* in Case C-258/11, ECLI:EU:C:2013:220, par. 48.

of the new reservoir. Processes which form the conditions of existence of natural habitats and habitats of species of plants and animals which are the subject of conservation in a Natura 2000 network, including priority species and habitats (...). In accordance with the conducted impact assessment, the “Construction of a barrage on the Vistula river downstream from Włocławek” project significantly deteriorates all the impact indicators for the following Natura 2000 network sites: Włocławska Dolina Wisły (PLH 040039), Nieszawska Dolina Wisły (PLH 040012) and Dolina Dolnej Wisły (PLB 040003), which will result in a significant negative impact on the subjects of nature conservation and on the integrity of the aforementioned Natura 2000 sites. The character of the project will result in the impacts in the area of the new reservoir having a permanent character, and their minimisation to insignificant levels is not possible”³².

The scale of the described impact has to be emphasised in this regard. As established by one of the expert opinions commissioned by the WWF Polska Foundation, “concerning the scale of negative impact on populations of migratory fish species, the Włocławek barrage is certainly the leader in the country, and maybe even in Europe. Due to its location in the lower course of the Vistula river, the barrage has cut off migratory fish access to the best spawning grounds in the Vistula sub-basin. After the construction in the year 1970 of the Włocławek barrage, hydropower plant and its accompanying 58 km long reservoir, Atlantic sturgeon and previously abundant salmon and sea trout became extinct in Vistula river, and the population of vimba bream has catastrophically collapsed”³³.

At the very start of the considerations it should be stated that the project has a significant negative impact on areas of a priority natural habitat type, and thus for the matter under assessment the second, stricter set of requirements of admissibility of the project established in Article 6 of the Habitats Directive has to be applied.

And so, in accordance with the RDEP Decision, the performance of the project will have a significant negative impact, among others, on a code 91E0 natural habitat (riparian forests of willow, poplar, alder and ash), code 3150 natural habitat (natural eutrophic lakes and ponds including their vegetation of *nympheion*, *potamion*), Amur bitterling (*rhodeus sericeus*) and spined loach (*cobitis taenia*), as well as river lamprey and Atlantic salmon and on 7 species of protected birds (little tern and common tern, little ringed plover, common sandpiper, European herring gull, common gull and kingfisher)³⁴.

The riparian forests (91E0) are the priority natural habitat type located within the project area. In the RDEP Decision itself it was stated that “the performance of the project will result in a significant negative impact on the conservation goals of the Natura 2000 site, which is impossible to avoid, reduce or eliminate. A destruction of patches of riparian forests of willow, poplar, alder and ash *Salicetum albo-fragilis*, *Populetum albae*, *Alnenion* (habitat code 91E0*) is anticipated as a result of them being cleared and humus being removed (...). A habitat area of 352.40 ha will be destroyed within the Natura 2000 site Włocławska Dolina Wisły SAC and 37,40 ha within the Nieszawska Dolina Wisły SAC”³⁵.

32 RDEP Decision, p. 160-161.

33 “Alternative for the planned hydroelectric plant in Siarzewo in the context of energy security” of 2020, p. 4.

34 RDEP Decision, p. 160 ff., *passim*.

35 RDEP Decision, p. 190.

Since all the requirements of admissibility of projects likely to have a negative impact on an area of conservation must be met jointly, it is sufficient for one of them not to be met in order for the project to be deemed unacceptable in the light of Article 6 of the Habitats Directive.

Even though it should be stated that the requirement of conducting an impact assessment for the project area from the point of view of conservation assumptions and of conducting broad public consultation in the matter established in Article 6(3) of the Habitats Directive was met, the documentary evidence presented by the Employer demonstrates that deficiencies occurred in this regard.

Both the Environmental Impact Report commissioned by the Investor and the RDEP Decision referring to it contain an impact assessment for the project area. The objections concerning the first of the expert opinions resulted in requiring the Investor to file additions and clarifications already in the 1st and 2nd instance of the proceedings, in accordance with the factual circumstances established above. Concerning the assessment in the RDEP Decision, in accordance with the factual findings of the WWF Polska Foundation the RDEP in Bydgoszcz has incorrectly acknowledged that the project will not have a significantly negative impact on a species of asp, the habitats of which are located within the Włocławska Dolina Wisły and Nieszawska Dolina Wisły Natura 2000 sites, even though in the Decision itself the RDEP has admitted that the project will destroy all the asp spawning grounds in the reservoir basin while simultaneously cutting off access to the spawning grounds located in the upper course of the Vistula river, thus preventing the fish from breeding. In this case it is difficult to deem this effect to be an insignificant impact.

To summarise, it is difficult to deem the impact assessment for the project area contained in the RDEP Decision to be free from deficiencies, since it was not made in accordance with best knowledge, identifying all the potential effects of the project and does not take into account all the aspects of the project, as well as not dispelling all the reasonable and justified doubts received during the public consultation³⁶. The indicated deficiencies have no influence on the establishing of presence or absence of negative environmental impact itself, they are however important, since they have indirect effect on deficiencies concerning the establishing of appropriate compensatory measures in accordance with Article 6(4) of the Habitats Directive.

Deficiencies may be also pointed out in case of the second formal criterion established in Article 6(3) of the Habitats Directive. As resulting from the documentary evidence presented, RDEP in Bydgoszcz has conducted a public consultation. In accordance with article 33 of the Environmental Information and Public Participation Act it has published information about the initiation of a proceeding and commencing the environmental impact assessment, and also about the possibility of submitting comments and suggestions. Appropriate announcements were published on the website and on bulletin boards of the Regional Directorate for Environmental Protection in Bydgoszcz and appropriate municipal offices until the end of October 2017. Therefore public consultation for the project was

³⁶ Judgment of the Court (Grand Chamber) of 7 September 2004 in Case C-127/02, *Waddenvereniging and Vogelsbeschermingvereniging*, ECLI:EU:C:2004:482, par. 59; Judgment of the Court of Justice of 20 September 2007 in Case C-304/05, *Commission of the European Communities v Italian Republic*, ECLI:EU:C:2007:532, par. 69; Judgment of the Court (Grand Chamber) of 11 September 2012 in Case C-43/10, *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others v Ypourgos Perivallontos, Chorotaxias kai Dimosion ergon and Others*, ECLI:EU:C:2012:560, par. 115.

opened, and the RDEP in Bydgoszcz has then referred to the remarks in the RDEP Decision³⁷.

The consultation was conducted only partially, since after it was opened the Investor has presented two supplements to the environmental impact report, which were not subjected to public consultation by the RDEP in Bydgoszcz, stating that it would not have a material impact on the result of the proceedings, even though in accordance with the RDEP Decision they allowed the clarification of conditions of environmental permit, and thus would impact the contents of the discussed decision³⁸. However, national regulations were not directly breached, since the Environmental Information and Public Participation Act does not anticipate the need to hold public consultation in such cases. It should be noted that the literature does point out a kind of “legislative blunder” in this regard³⁹.

Even though they do not provide a basis for the conclusion of our opinion, we believe that these deficiencies should not be underestimated⁴⁰. As emphasised in the case law, the primary goal of the environmental directive, that is, ensuring a high level of environmental protection will not be reached if environmental organisations are prevented from presenting arguments which could be taken into account by competent authorities⁴¹. Conducting full consultation seems also desirable in the light of the already quoted precautionary principle, which is the basis of European Union environmental policy⁴², in light of which the Habitats Directive should be interpreted. Moreover, the deficiencies on part of RDEP in Bydgoszcz concerning public consultation may breach other provisions of EU or national law which could prove applicable in the matter in question.

Therefore, if additional factual analysis would lead to determining that the absence of additional public consultation of the supplements to the Environmental impact report has resulted in the deterioration of protected Natura 2000 sites, it would have to be concluded that the RDEP Decision was issued in breach of Article 6(3) of the Habitats Directive. However, this does not ensue from the documentary evidence presented so far by the Employer.

The primary prerequisite of admissibility of plans and projects established in Article 6(4) of the Habitats Directive is the non-existence of alternative solutions which would allow achieving the goal of the project or plant, which is the achievement of overriding public interest, which in the matter under assessment should be understood as matters concerning human health or public safety. The facts and the analysis conducted so far indicate that the project does not have beneficial consequences of primary importance for the environment, and also Commission was not requested to provide their opinion in the subject of a project which is necessary for considerations of other imperative reasons of overriding public interest.

37 RDEP Decision, p. 62, 64-65, 94 ff., *passim*.

38 RDEP Decision, p. 64.

39 See J. Szuma, *Udział społeczeństwa w postępowaniu w przedmiocie oceny oddziaływania na środowisko* (Public participation in environmental impact assessment proceeding), in: *Oceny oddziaływania na środowisko w praktyce* (Environmental impact assessments in practice), B. Rakoczy (ed.), Warszawa 2017, LEX.

40 It is also worth noting that RDEP in Bydgoszcz has also not performed arrangements with the appropriate municipal council within the scope required by Article 45(2)(2) of the Nature Conservation Act.

41 See, e.g. Judgment of the Court of Justice of 8 November 2016 in Case C-243/15, *Lesoo-chranárske zoskupenie VLK*, ECLI:EU:C:2016:838, par. 70.

42 Article 91 of the Treaty on the Functioning of the European Union (consolidated version: EU OJ 2016 C 202/47).

The main goal of the project which – according to the Investor and in accordance with the findings of RDEP in Bydgoszcz – is an alternative-free solution to overriding reason of public interest is ensuring permanent safety of the Włocławek barrage by raising the water level downstream of the barrage with a newly constructed barrage, raising the water level to an ordinate of 46.0 m a.s.l., and also the construction of embankments and lateral dams within the area of the newly created reservoir, and enabling icebreakers from the lower course of the Vistula river to reach the Włocławek barrage, leading to (the supposed main goal in the form of⁴³) ensuring of flood safety. In accordance with the Investor’s arguments further operation of the Włocławek barrage in an unchanged river environment could lead to a dam failure, and the project is also an opportunity for the construction of additional flood protection projects. Moreover the project is intended to enable the generation of renewable electricity, and generation of energy in case of shortages in the National Power System⁴⁴.

In this respect, the RDEP Decision may be accused of breaching the Article 6 of the Habitats Directive due to the existence of justified doubts concerning the purpose of the project, and in case this purpose is recognized, the existence of solutions which would enable achieving the goals declared by the Investor or similar, which would not have an environmental impact.

Undoubtedly flood safety meets the provision of public safety referred to in Article 6(4) of the Habitats Directive. It is a model example of public safety as understood by the discussed regulation⁴⁵. It is irrelevant whether the project is public, private, or a public-private partnership⁴⁶. In accordance with the guidelines of the Commission on Article 6 of the Habitats Directive, the goal must be principal, overriding and long-term⁴⁷. It seems that even those premises would be met should the project provide flood safety. However, this is where doubts appear on whether the risk of the Włocławek barrage failure actually exists, and also whether the project and its assumed indirect goals actually provide flood safety.

As results from the documents provided by the Employer⁴⁸ the analyses to date do not demonstrate that the Włocławek barrage, which underwent a deep retrofit in the years 2013-2015⁴⁹, was at risk of failure, and thus constitutes a significant hazard to public safety.

43 As an aside it is also worth noting that in case of the original Environmental impact report this goal had to be deduced from a holistic interpretation of the document, since the Investor did not define it in an unequivocal and precise manner, whereas establishing this goal is key for determining whether the project may be implemented in accordance with Article 6 of the Habitats Directive. The goals to which the Employer has referred in the course of public consultation and in the appeal procedure were thus established pursuant to the RDEP Decision and supplements of the Environmental impact report and Investor’s explanations, which originally were not a subject of public consultations.

44 Executive summary of the report, p. 11 ff.; RDEP Decision, p. 81 ff.

45 Also J. Chmielewski, *Bezpieczeństwo publiczne – element nadrzędnego interesu publicznego* (Public safety – an element of overriding reasons of public interest) in: *Pojęcie nadrzędnego interesu publicznego w prawie administracyjnym* (Concept of overriding reasons of public interest in administrative law), Warsaw 2015, Legalis.

46 Here it should be noted that the so-called “energy security” does not meet the premise of public safety. See Judgment of the Court (Fourth Chamber) of 24 November 2011 in Case C-404/09, *Commission v Spain*, ECLI:EU:C:2011:768, par. 193-194. In reference, however, to the need to consider the indirect effects of such factors, see Judgment of the Court (Grand Chamber) of 11 September 2012 in Case C-43/10, *Nomarchiaki Aftodioikisi Aitolokarnanias and Others v Ypourgos Perivallontos, Chorotaxias kai Dimosion ergon and Others*, ECLI:EU:C:2012:560, par. 125-128; and in particular Judgment of the Court (Grand Chamber) of 29 July 2019 in Case C-411/17, *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen*, ECLI:EU:C:2019:622, par. 159.

47 Commission guidelines on Article 6 of the Habitats Directive, Section 5.3, p. 64.

48 In particular, from the letter by the Greenmind Foundation of 13 March 2021 addressed to the Minister for Climate and Environment.

49 As a part of performance of a “Improvement of Technical Condition and Flood Safety of Włocławek barrage – project POIS.03.01.00-00-012/11” task financed by the Operational Pro-gramme Infrastructure and Environment.

All its elements are in good technical condition, operate free from failure and do not endanger safety⁵⁰.

The RDEP Decision indicates that the flood protection is only an indirect (and not an active) effect of the planned project, since flood embankments would be constructed within the area of the planned new reservoir⁵¹. As it seems, and as indicated by non-governmental organisations engaged in the issue⁵², such structures may be constructed without implementing the project, and thus without a significant negative impact on Natura 2000 sites. Especially in this context it is not possible to accept the construction of another barrage being necessary to enable navigation to a degree necessary for icebreakers to prevent flood risk by reaching the areas of Nieszawa and Przepust from Gdańsk, since (as evident from the letter by the Greenmind Foundation of 13 March 2021) they could reach these locations from Włocławek.

And if so, it is difficult to accept that the project meets the requirement of overriding reasons of public interest in the form of ensuring of public safety, and the RDEP Decision does not meet the criteria established in Article 6 of the Habitats Directive. The Polish Hydrobiological Society has reached similar conclusions in its position of 28 March 2021.

Following, it should be established that – in accordance with the expert opinions prepared by WWF Polska Foundation – the solution proposed by the Investor, which assumes further existence of the reservoir created by the construction of the Włocławek barrage leads to an increase of flood risk, instead of its reduction, and the construction of another barrage will not negate this factor in any manner⁵³. Therefore a solution of removing the Włocławek barrage should be considered instead (especially if one assumes like the Investor that the further existence of this barrage is related to the increase of risk to public safety in the form of a dam failure)⁵⁴. This version of course does not require the implementation of the project and the negative impact on Natura 2000 sites that would be its effect.

In this context it should be emphasised that the analysis of options conducted by RDEP in Bydgoszcz did not exclude the possibility of achieving declared project goals by the removal of the dam in Włocławek proposed by the WWF Polska Foundation, and thus did not prove that the project is one for which there is no alternative. Of course the removal of the

50 Moreover, during the course of proceedings the Investor did not present an expert opinion from the Centre for Technical Inspection of Dams proving the risk to the Włocławek barrage.

51 RDEP Decision, p. 96.

52 Among others, the quoted letter by the Greenmind Foundation of 13 March 2021.

53 In the already quoted report “A study of a comprehensive solution to the problems of the Włocławek barrage and reservoir. Forecast of social, economic and environmental effects (over-view)” it was established that “the Włocławek barrage and reservoir are a source of problems and risks”, which include, among others: “longer presence of ice cover on the reservoir than on the Vistula river, which causes ice jams, which are a cause of flooding; insufficient capacity of the barrage, which increases flood risk in case of high water” (p. 1). It was noted that the construction of an additional barrage “will not solve most of problems caused by Włocławek barrage and will aggravate some of them” (p. 1). The frequency of ice jams in particular will increase, as well as the size of area at risk of ice jam floods. In turn the “Assessment of impact of the Włocławek reservoir and the planned barrage and reservoir at Siarzewo on the conditions of passing of high water, based on the flood of May 2010” report of 2012 concentrated on the risk of river flooding. It stated that “the conducted calculations demonstrate that changes to the manner of operation of the Włocławek barrage and construction of an additional barrage in the area of Siarzewo will not have an unequivocally positive impact on the «increase of flood safety». At best they can be neutral. The 2010 flood in the central Vistula area due to its volume has demonstrated that barrages may also under certain conditions create additional flooding risk.” Also in: the draft position of the WWF Polska Foundation concerning definite solution to the environmental and social problems created by the barrage on Vistula River at Włocławek of 4 March 2021 and position of the WWF Polska Foundation concerning the construction of the barrage at Siarzewo of 11 March 2021. Similar conclusions were reached recently by the Polish Hydrobiological Society as indicated by the position of 28 March 2021.

54 In this context the need to consider the “option zero” is also indicated by the Commission guidelines on Article 6 of the Habitats Directive, Section 5.3, p. 62.

dam in Włocławek proposed by the Employer requires further analyses (which is confirmed for example by the Position of the National Commission for Environmental Impact Assessment concerning the assessment of options of projects to ensure ecological safety of the Włocławek barrage⁵⁵). However, since it was not excluded by the National Commission for Environmental Impact Assessment, then it could also not be excluded by the RDEP in Bydgoszcz, on which – as already indicated – lies the burden of proving that there are no alternative solutions for the project. During the proceedings the RDEP in Bydgoszcz should analyse the discussed solution, since it has the duty to analyse all feasible alternative solutions on the same level of detail. Just in this aspect alone the non-compliance of the RDEP Decision with Article 6(4) of the Habitats Directive should be established⁵⁶.

Further on, the purpose of the project is also undermined by the fact that the solution proposed by the Employer, consisting of removal of the Włocławek barrage would not only allow abandoning the implementation of the project, and thus avoid a significant negative impact on Natura 2000 sites, but would also provide an improvement in comparison to the current condition of the environment⁵⁷.

The project is also not necessary from the point of view of assuring energy security. As established by the WWF Polska Foundation, a similar amount of electric power to the one expected from the planned project may be generated in the area from renewable sources using alternative methods, combining the use of solar power, wind power and bio-gas plants⁵⁸. It would be a much more environmentally friendly solution, and better adapted to the power needs of the country (hydropower plants have the lowest capacity during the summer, when energy demand increases, so exactly inversely to the proposed energy mix).

Finally, even should the purpose of the project be acknowledged, the related overriding reason of public interest in the form of protection of health and public safety may be achieved by implementing other options, with a smaller impact on Natura 2000 sites. It is a key argument for the assessment of compliance of the RDEP Decision with Article 6 of the Habitats Directive⁵⁹. Even as part of analysis of the Article 6(4) itself it should be noted that RDEP in Bydgoszcz was required to demonstrate the absence of alternative solutions first, before attempting to establish whether in case of the project there exist imperative reasons justifying its performance.

55 Position of the National Commission for Environmental Impact Assessment concerning the assessment of options of projects to ensure ecological safety of the Włocławek barrage, p. 5.

56 In accordance with the judgment of the Court of Justice in a similar case: “the examination of alternative solutions requires weighing the environmental consequences of maintaining or re-stricting the use of the works at issue, including closure or even demolition, on the one hand, against the important public interest that led to their construction, on the other” (Judgment of the Court (Third Chamber) of 14 January 2016 in Case C-399/14, *Grüne Liga Sachsen and Others*, ECLI:EU:C:2016:10, par. 74).

57 As stated by the Employer in the draft position of the WWF Polska Foundation concerning definite solution to the environmental and social problems created by the barrage on Vistula River at Włocławek of 4 March 2021, this solution “will enable achieving a full success of the decades-long restitution of population of species of diadromous migratory fish with economic significance (Atlantic sturgeon, salmon, sea trout and vimba bream), the populations of which have gone extinct or significantly collapsed after the construction of the Włocławek barrage”, thus enabling the implementation of HELCOM Action Plan for sturgeon, and will also eliminate a “source of greenhouse gases, that is methane-emitting sediments on the bottom of the Włocławek reservoir basin” and a „risk of uncontrolled release of sediments from the bottom of the Włocławek reservoir in a situation should ice jams cause significant damage to the dam structure”.

58 This issue is widely discussed in the WWF Polska Foundation report “Alternative for the planned hydroelectric plant in Siarzewo in the context of energy security” of 2020, which presents an entire ranking list of solutions alternative to the project (pp. 75 ff.). As specified therein: “the construction of another dam on Vistula river in Siarzewo is therefore not indispensable, neither due to the need to significantly increase the generation of renewable energy in our country nor due to energy security issues” (p. 5).

59 Similarly, see Judgment of the Court (Second Chamber) of 26 October 2006 in Case C-239/04, *Commission of the European Communities v Portuguese Republic*, ECLI:EU:C:2006:665, par. 36.

And so, a solution which would completely avoid a negative impact of the project on Natura 2000 sites (in addition to the afore mentioned removal of the dam in Włocławek) is the use of the existing weir and the modification of the dam in Włocławek to a dry dam, by lowering the water level upstream of the Włocławek dam partially or completely. In turn, solutions consisting of a construction of a weir raising the water in the Hutnicza or Witoszyn location reduce the scale of impact on Natura 2000 sites.

Attention should be paid in particular to the use of the existing weir constructed at a distance of a few hundred meters downstream of the Włocławek barrage dam, which would enable ensuring the safety of the Włocławek barrage declared by the Investor by raising the water level below the barrage to an ordinate of 46 m a.s.l., and at the same time would completely eliminate the risk of the project impacting Natura 2000 sites⁶⁰. Similarly, in the case of another solution proposed by the Employer, consisting of keeping the dam at Włocławek, but modifying it to be a dry dam by partially or completely eliminating the fall on the dam in Włocławek. In this scenario the risk of a dam failure and of flood would be eliminated, with no negative impact on Natura 2000 sites.

Finally RDEP in Bydgoszcz failed to meet the requirement of demonstrating the absence of alternative solutions for the project, even though it has admitted that there are such options in the form of barrages located at Nieszawa and Przypust⁶¹. In accordance with the findings of WWF Polska Foundation both these projects would implement both goals of the project, at the same time having a significantly lower impact on Natura 2000 sites (excluding the Nieszawska Dolina Wisły Natura 2000 site from the direct scope of the project, and also decreasing the number of threatened habitats in the area of Włocławska Dolina Wisły and Dolina Dolnej Wisły sites). Moreover RDEP in Bydgoszcz due to alleged increase of flood risk has excluded at the beginning the construction of a weir near the Włocławek dam, located at Hutnicza or Witoszyn, not conducting further analyses of this option⁶², even though its performance would enable the reduction of the endangered habitats area by 15-20 km of the course of the river. In both cases achieving the goal of the project by protecting the dam in Włocławek against failure would be possible⁶³.

Even though the environmental considerations are the most important for the assessment of the project in the light of the standards of Article 6 of the Habitats Directive⁶⁴, not meeting the criterion of the sole possible (alternative-free) form of performance of the overriding public interest seems even easier to prove (*a fortiori*)⁶⁵, if one considers the lower

60 See the “A study of a comprehensive solution to the problems of the Włocławek barrage and reservoir. Forecast of social, economic and environmental effects (overview)” report, p. 41.

61 RDEP Decision, p. 67.

62 RDEP Decision, p. 121.

63 The working remarks provided by the Employer on the compliance of the “*Construction of a barrage on the Vistula river downstream from Włocławek*” project WOO.4233.3.2016.KŚ.29 with Article 6(4) of the Habitats Directive and Articles 4(7) and 4(9) of the Framework Water Directive (no author and date). See also letter by the Greenmind Foundation in the matter DOP-WOŚ.436.2.2019.GŻ/895159.4815055.3817271 addressed to the Minister for Climate and Environment of 13 March 2021.

64 See M. Pchalek, M. Behnke, *Szczególne procedury oceny oddziaływania na środowisko* (Special environmental impact assessment procedures), in: *Postępowanie w sprawie oceny oddziaływania na środowisko w prawie polskim i UE* (Environmental impact assessment proceedings in Polish and EU law), Warsaw 2009, Legalis.

65 The overriding criterion is the minimisation of damages to the habitats, species and integrity of Natura 2000 species, and not economic reasons. The economic costs may be taken into account, but may not be a determining factor alone in the selection of alternative solutions (see the guidelines of the Commission on Article 6 of the Habitats directive, sections 5.2-5.3, pp. 60 ff.; Judgment of the Court (Third Chamber) of 14 January 2016 in Case C-399/14, *Grüne Liga Sachsen and Others*, ECLI:EU:C:2016:10, par. 77). See Commission's Opinion of 5 April 2013 on the deep-ening of the river Main, C(2013) 1871; Commission's Opinion of 6 December 2011 on works in the port of Hamburg, C(2011) 9090.

economic cost and lower amount of work necessary to implement alternative options for the project⁶⁶. In particular the cheapest (and at the same time most advantageous environmentally) manner of achieving flood safety is to cease operation of the Włocławek barrage, and as a consequence to remove the Włocławek Reservoir⁶⁷. This is all the more important because the decision issuing authority does not establish the non-existence of alternative solutions taking into account solely environmental cost, but seeking balance between the adverse impact of the plan or project and the benefits resulting from the performance of overriding reasons of public interest.

Article 6(2) of the Habitats Directive requires the Member States to take appropriate steps to avoid, in special areas of conservation, the deterioration of natural habitats and of habitats of species as well as disturbance of the species for which the areas have been designated. The prevention of negative impact on the protected areas is thus essential. However, when for imperative reasons of overriding public interest, including those of a social or economic nature, the plan or project must nevertheless be carried out, and in the absence of alternative solutions, in accordance with Article 6(4) the Habitat Directive requires the Member State to take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 sites is protected.

The aforementioned compensation is a last resort, used in the case when despite a negative impact on the special area of conservation the plan or project has to be carried out for imperative reasons of overriding public interest and in the absence of alternative solutions⁶⁸. The assessment within this regard should be performed in accordance with the precautionary principle and with good practice (both concerning the absence of alternative solutions and concerning appropriate compensatory measures – in order to guarantee, that is, ensure, effectiveness, feasibility and appropriate scope, moment of application and location of compensation measures).

Unfortunately, objections may also be formulated for this assessment criterion of the RDEP Decision, since the decision does not completely meet the requirement of establishing compensatory measures necessary to ensure that the overall coherence of Natura 2000 sites is protected. This is because an erroneous environmental impact assessment has resulted in the RDEP Decision failing to include any compensatory measures for asp. Moreover, actions consisting of creating new reservoirs and transferring specimens of spined loach and Amur bitterling into them do not provide effective compensation of the habitats of these species which will be destroyed by the project. RDEP in Bydgoszcz was aware of this fact, since criticism of the compensatory measures proposed by the Investor in this regard was presented during the public consultation. Despite that fact, the RDEP Decision did not impose on the Investor the obligation to conduct monitoring of spined loach and Amur bitterling habitats, even though a similar obligation was imposed for other species⁶⁹.

66 an exception would be, in the Investor's opinion, an ice breaking operation in case of construction of a weir located at Hutnicza or Witoszyn, but even this, according to the Employer, is debatable and surmountable (appeal by the WWF Polska foundation against the decision no. 124/2017 by the Regional Director for Environmental Protection in Bydgoszcz addressed to the General Director for Environmental Protection of 25 January 2018, p. 8).

67 See the "A study of a comprehensive solution to the problems of the Włocławek barrage and reservoir. Forecast of social, economic and environmental effects (overview)", *passim*.

68 Also the guidelines of the Commission on Article 6 of the Habitats Directive, section 5.3, pp. 62 ff.

69 RDEP Decision, p. 87 ff.; appeal by the WWF Polska foundation against the decision no. 124/2017 by the Regional Director for Environmental Protection in Bydgoszcz addressed to the General Director for Environmental Protection of 25 January 2018, p. 10 ff.

There is a similar case for fish migration infrastructure, the construction of which by the Investor is ordered by the RDEP Decision⁷⁰. According to the WWF Polska Foundation, in this context RDEP in Bydgoszcz has disregarded the establishing of an appropriate time limit for the by-pass channel for the new weir, which should be constructed in addition to the fish passes of the new weir, seaward fish migration channel and the fish pass in the Włocławek dam and in weirs on Drwienca before the filling of the new reservoir⁷¹.

Meanwhile in accordance with the guidelines of the Commission on Article 6 of the Habitats directive, the compensatory measures must ensure that the area still continues to maintain appropriate conservation status of natural habitat types and species' habitats⁷². Ensuring the overall coherence of Natura 2000 sites requires that the area is not irrevocably impacted by the project before compensatory measures are taken. Where, however, meeting this obligation is impossible due to the time necessary for the performance of compensatory measures, every effort should be taken to guarantee the adoption of this measures appropriately earlier. Thus, nothing justifies a delay in the construction of the by-pass channel for the new weir.

At this point it is worth mentioning that national authorities inform the Commission about the imposed compensatory measures and about the monitoring of their performance in a manner which allows the assessment of adverse effects and impact on the general coherence of the Natura 2000 network.

To summarise, in light of such serious doubts concerning the purpose of the project, and primarily due to the failure to meet the priority obligation of demonstrating the absence of alternatives to the project, free from negative impact on Natura 2000 sites, one may not accept that the criteria formulated by the EU legislator in Article 6(4) of the Habitats Directive were met.

As a result, the RDEP Decision violates the Habitats Directive.

70 RDEP Decision, p. 17.

71 Appeal by the WWF Polska foundation against the decision no. 124/2017 by the Regional Director for Environmental Protection in Bydgoszcz addressed to the General Director for Environmental Protection of 25 January 2018, pp. 14 ff.

72 Commission guidelines on Article 6 of the Habitats Directive, Section 5.3, pp. 65 ff.

VIII.

ADMISSIBILITY OF THE PROJECT IN THE LIGHT OF THE WATER FRAMEWORK DIRECTIVE

VIII.1. Reference norm

Article 4(7) of the Water Framework Directive establishes derogations from the obligation of preventing deterioration of a body of surface water from high status to good status resulting from the directive. In the analysed matter application of the second dash of the quoted regulation should be considered, in accordance with which such derogations are allowable on the following conditions:

- 1) failure to prevent deterioration is the result of new sustainable human development activities;
- 2) all practicable steps are taken to mitigate them;
- 3) the reasons for those modifications or alterations are specifically set out in the water management plan;
- 4) the reasons are of overriding public interest⁷³;
- 5) the goals cannot be achieved by other means, which are a significantly better environmental option (for reasons of technical feasibility or disproportionate cost).

The aforementioned conditions have to be met jointly. This regulation is supplemented by Article 4(8) of the Water Framework Directive, which states, among others, that the application of Article 4(7) does not permanently exclude or compromise the achievement of the objectives of the Water Framework Directive in other bodies of water within the same river basin district.

On the ground of quoted regulations, it should be first examined whether the given project may result in deterioration in the status of a body of surface water. If so, it should be estab-

⁷³ More precisely, Article 4(7), second dash, letter (c) of the Water Framework Directive states: “the reasons for those modifications or alterations are of overriding public interest and/or the benefits to the environment and to society of achieving the objectives set out in paragraph 1 are outweighed by the benefits of the new modifications or alterations to human health, to the maintenance of human safety or to sustainable development”. In fact however, outweighing benefits for health, safety and sustainable development are a sort of overriding public interest.

lished whether the derogation anticipated in Article 4(7) of the Directive includes this deterioration⁷⁴. The burden of proof that the premises of the derogation were met rests with the Member State⁷⁵. BThis examination should be conducted already at the administrative stage, when granting a permit for an project which is liable to have adverse effects on water, since when it is not conducted a national court which controls the actions of the administration may simply declare the appealed act unlawful without examining substantive conditions from Article 4(7)⁷⁶.

The most significant judgment of the Court of Justice from the point of view of interpretation of the provisions of the directive which is the subject hereof is the judgment in the case *Commission v Austria*⁷⁷. In the case law the Court of Justice has deemed, among others, the production of hydroelectricity, as power from a renewable source to be of overriding public interest. Interestingly, in this judgment a detailed analysis was conducted of the issue whether the supporting in this manner of production of renewable energy may be of overriding public interest at all. The Court of Justice has referred at this, among others, to European Union policy. This contrasts with the approach of the Court of Justice to the requirements of overriding public interest as justification for restrictions on the internal market freedoms. In these cases, the Court of Justice usually stops at establishing the legitimacy of the interest presented by the Member State, without deeper analysis of whether we are actually dealing with a matter of overriding public interest.

In the judgment in case *Commission v Austria*⁷⁸ the Court of Justice has evaluated under Article 4(7) of the Water Framework Directive the weighing of values performed previously by Austrian authorities: on one side benefits which may be obtained by the assessed project, and on the other – deterioration in the status of waters. As a result of this weighing it was established that significant social benefits outweigh the small deterioration for the environment.

VIII.2. Analysis

The issuing of permits for projects such as the one assessed herein by the state is a measure for implementation of the Water Framework Directive⁷⁹ and thus is subjected to this system of assessment. In the matter under analysis this is not disputed anyway. Both the RDEP Decision and the Environmental impact report unanimously state that the Siarzewo barrage falls within the application of the Water Framework Directive and, what's more, constitutes on its basis a derogation which requires justification pursuant to Article 4(7).

74 See Judgment of the Court of Justice of 4 May 2016 in Case C-346/14, *Commission v Austria*, ECLI:EU:C:2016:322, par. 52. Similarly Judgment of the Court of Justice of 1 June 2017 in Case C-529/15, *proceedings brought by Gert Folk*, ECLI:EU:C:2017:419, par. 36.

75 See Judgment of the Court of Justice of 1 June 2017 in Case C-529/15, *proceedings brought by Gert Folk*, ECLI:EU:C:2017:419, par. 37.

76 Judgment of the Court of Justice of 1 June 2017 in Case C-529/15, *proceedings brought by Gert Folk*, ECLI:EU:C:2017:419, par. 38.

77 Judgment of the Court of Justice of 4 May 2016 in Case C-346/14, *Commission v Austria*, ECLI:EU:C:2016:322, par. 71.

78 Judgment of the Court of Justice of 4 May 2016 in Case C-346/14, *Commission v Austria*, ECLI:EU:C:2016:322, par. 74.

79 See Judgment of the Court of Justice of 4 May 2016 in Case C-346/14, *Commission v Austria*, ECLI:EU:C:2016:322, par. 53 ff.

It remains undisputed that the formal condition of including the project in the Vistula river basin management plan was met, therefore it is necessary to commence the examination of the substantive and procedural conditions for admissibility of the project.

From the reading of the RDEP Decision and of the environmental impact assessment it follows that the Siarzewo barrage has no independent significance for the protection of public⁸⁰, interest, only protecting the Włocławek barrage. It is only the operation of the Włocławek barrage which is of public interest. Such a construct is, in our assessment, acceptable under the Directive, on the condition that the Siarzewo barrage is necessary for the operation of the Włocławek barrage, and the Włocławek barrage fulfils all the premises of Article 4(7) of the Water Framework Directive. Some doubts are raised here only by fulfilment of the condition that the failure to prevent deterioration is the result of new sustainable human development activities⁸¹, since the Włocławek barrage is several decades old. In our assessment the protection of this barrage may be deemed such a new development activity.

The RDEP Decision indicates⁸², that the Siarzewo barrage is intended to slow down erosion downstream of the Włocławek barrage, ensuring its safety. The necessity of constructing the Siarzewo barrage results from the fact that the Włocławek barrage was not intended to operate independently⁸³. As a result, according to the Report, the Włocławek barrage is at risk of even a dam failure⁸⁴. However, as noted by the Greenmind Foundation⁸⁵, the hypothesis of a potential failure of the Włocławek barrage has no corroboration in the evidence. It rather seems a speculation made in the Report. It is appropriate to remind that a major overhaul of the Włocławek barrage ended in 2015.

Moreover, the authority did not duly consider other methods of preventing bottom erosion than the construction of a barrage. It should be stressed that practically any other method will be less environmentally invasive.

Finally, it should be reminded that the construction of the Siarzewo barrage does not so much as protect the river against bottom erosion, but moves the erosion downstream from the Siarzewo barrage. It is difficult to consider it to be a solution to the problem.

The authority has excluded any other possible location for the construction of the barrage. Another possibility, which is finally rejected by the authority, would be the removal of the

80 The RDEP Decision and the Environmental impact report use the term “public interest”, whereas the Polish translation of the Water Framework Directive uses the term “social interest”. There is no doubt that this is the same concept, and the RDEP Decision and the Report use the terminology of the Polish act. What’s more, the terminology in the Polish act seems to be much more suitable than the terminology of the Polish translation of the directive, since in the entire *acquis communautaire* we use the Polish term “*public interest*”. The English version of the directive uses the term public interest, French version – *intérêt général*, and the German – *öffentlichem Interesse*. For this reasons herein we use both terms interchangeably. [Translator’s note: in the English translation of the expert opinion the term *public interest* is used throughout, with the exception of this footnote].

81 The Polish translation of the directive states literally: “failure to prevent deterioration from high status to good status of a body of surface water is the result of new sustainable forms of human economic activity”. This is quite a fanciful translation. The end of this fragment in the English version reads as follows: “new sustainable human development activities”, in French version – „activités de développement humain durable”, and in German – „neuen nachhaltigen Entwicklungstätigkeit des Menschen”. It can thus be safely assumed that the directive means any sustainable development, and not only economic activity conducted in new forms.

82 P 81 of the RDEP Decision.

83 P 85 of the RDEP Decision.

84 Report vol. I, p. 120.

85 Letter of 13 March 2021, p. 3.

dam in Włocławek. According to the Report⁸⁶ the removal would result in leaving a lowered base level of drainage of the Vistula river downstream of the barrage, which results from a long period of its incorrect operation, that is, operation unsupported by other barrages. A further consequence would be the lowering of the groundwater table and increased rate of infiltration in the Vistula valley and in the uplands. What's more, further lowering of the base level of drainage will occur. A risk of transporting of contamination downstream of Vistula and to the Baltic Sea would also be present. Flood protection would also decrease.

Therefore, it should be considered what public interest is protected by the Włocławek barrage. The RDEP Decision lists⁸⁷ the importance for energy security and flood safety, the existence of a road crossing and stopping pollutant load carried by the Vistula river.

Concerning flood protection, the RDEP Decision lists⁸⁸ three advantages of the Siarzewo barrage: (1) construction of embankments and dams within the area of the created reservoir, (2) removal of "locations which generate frazil ice and ice jams over the length of the new reservoir" and (3) allowing the ice breakers to reach the Włocławek barrage⁸⁹.

Summary of the Environmental impact report⁹⁰ adds that the Włocławek reservoir provides black start service in case of a failure of the national power system. Whereas in vol. VI of the Report itself additional public interests can be found:

„preventing regional hydrological hazards and problems; coherent regional development of the entire voivodeship; construction of an international E-40 waterway, integration of the Belarusian and Ukrainian water transport system with the European Union's system; using the hydropower potential of the Vistula river”.⁹¹

Nevertheless, flood protection is specified as the main goal of the project again, and in two dimensions: by the Siarzewo barrage downstream of the Włocławek barrage, and by the Włocławek barrage itself⁹².

Therefore, it is this goal of the project which should be assessed under Article 4(7) of the Directive.

As such, flood protection constitutes in our opinion public interest. The category of public interest is present in the EU law practically from the beginning of the European Economic Community and was particularly developed in particular in the case law of the Court of Justice on the ground of exceptions to the internal market freedoms. The Court of Justice has always left a wide margin of discretion for states in defining their public interest, placing more emphasis on controlling the proportionality of state regulations in relation to the declared interest than on verifying whether the protection of this specific interest is justifiable. Even when performing such a verification it should be stated that preventing and mitigating floods is contained in the category of public interest, since it is an indirect form of protection of life, health and property of people, in particular their safe accommo-

86 Report vol. I, p. 135-136.

87 P. 81, similarly p. 119 of the RDEP Decision.

88 P. 94 of the RDEP Decision.

89 The RDEP Decision repeats here the findings of the Report, in particular vol. I, p. 143.

90 P. 14 of the Report's summary.

91 Report, vol. VI, p. 143.

92 Report, vol. VI, p. 143.

dation in their own homes. All these values should be considered legitimate public interests on the ground of the case law of the Court of Justice, and the wording of the directive.

A separate issue is whether the public interest in the matter under assessment should be considered overriding. This requires a test of balancing of values: benefits and losses caused by the project, similarly as performed by the Court of Justice in the invoked case *Commission v Austria*. This test, also called the test of proportionality *stricto sensu* is the third stage of the test of necessity and proportionality. The second stage is the so-called test of necessity, directly mentioned in Article 4(7) of the Water Framework Directive. At this stage it is examined whether the goal cannot be achieved by less onerous means (in this case, with a lower environmental impact). The first stage is the test of appropriateness, during which it is examined whether the goal can be achieved at all using the measures selected by the state.

Appropriateness of the measure in the form of construction of the Siarzewo barrage for the goal of maintaining the Włocławek barrage, and as a result the reduction of flood hazard does not generally raise any doubts. That is why the analysis focuses further mainly on verifying the necessity of the project.

Analysing each of the measures planned in the project, according to the knowledge of the assessment's authors, the embankments and lateral dams may be constructed independently of the Siarzewo barrage, therefore they may never justify its construction⁹³ – and as a result they do not meet the condition of necessity.

Concerning the removal of locations which generate frazil ice and ice jams over the length of the new reservoir, in accordance with the information we possess the Siarzewo reservoir will only increase the problem of ice accumulation⁹⁴, which is perceived by the authority as a flood risk. Therefore, even the first premise of the test of necessity and proportionality, that is, appropriateness is not met.

The concept of deepening the Vistula river for the ice breakers was accurately summarised by the Greenmind Foundation, with the position of which one may only agree⁹⁵. First, it is not necessary for the entire fleet of Vistula ice breakers to be anchored in Gdańsk. Equally well, some of them may be stationed near the reservoir or at the reservoir itself. Second, the construction of the Siarzewo barrage would improve the navigability of only a short section of Vistula.

What's more, restrictions on the navigability of Vistula which result in difficulties in the navigation of ice breakers result from the raising of the river bottom level, which is caused by the operation of the Włocławek barrage⁹⁶. Similarly the operation of the Włocławek reservoir causes ice jams, the direct cause of which is the slowing of water flow⁹⁷.

As part of analysis of the necessity of the measure the authority was also required to make sure that there are no less environmentally onerous measures than the assessed project, which would allow reaching the same goals. It was necessary to first consider the most radical option – the removal of the Włocławek barrage, which is after all the root cause of

93 Also the letter by the Greenmind Foundation of 13 March 2021 pp. 3-4.

94 A study of a comprehensive solution to the problems of the Włocławek barrage and reservoir, p. 23.

95 Letter by the Greenmind Foundation of 13 March 2021 pp. 4-5.

96 A study of a comprehensive solution to the problems of the Włocławek barrage and reservoir, p. 19.

97 A study of a comprehensive solution to the problems of the Włocławek barrage and reservoir, p. 19.

increased flood risk. In this regard the RDEP Decision and the Report express a negative opinion, however, this is not accompanied by in-depth analyses which could support such an assessment. To the contrary, both the RDEP Decision and the Report are based more on risks related to the removal, and thus on our ignorance.

Meanwhile in the Position of the *National Commission for Environmental Impact Assessment concerning the assessment of options of projects to ensure ecological safety of the Włocławek* barrage document, presenting findings from the year 2008, the Commission has stated that it may not recommend the option of removing the dam in Włocławek “due to absence of sufficient knowledge about the environmental consequences and the cost of implementation of such an option”. The Commission writes in this context about the need to employ appropriate experts to perform suitable analyses. For almost 13 years which have passed since then these proposals were not performed. Meanwhile under Article 4(7) of the Water Framework Directive the national authorities are required to examine alternative solutions, in particular ones which – like the removal of the Włocławek barrage – would potentially prove most environmentally advantageous. Current ignorance concerning the consequences of the removal of the dam at Włocławek is thus not an argument to neglect this possibility. It is an argument concluding the unacceptability of the construction of the Siarzewo barrage, since due to negligence on part of the Polish state we are not able to compare this project with the option of removal of the Włocławek barrage.

What's more, the authority's reasoning (among others, p. 83 of the RDEP Decision) that the existence of the Włocławek barrage is a foregone conclusion of the update of the Vistula river basin management plan may not be accepted. The conditions for admissibility of projects specified in Article 4(7) of the Water Framework Directive are independent, in the sense that they must be met by every project which deteriorates the status of a body of water, and the requirement to actually meet them may not be replaced by an appeal to another act by the Member State, which is supposed to determine compliance with the directive. As a result, the water management plans may not exclude any alternative solutions from the assessment of the necessity of the project, including the removal of the structures anticipated in these plans.

In this context the unspoken conclusion of the Environmental impact report, and following it, of the RDEP Decision, which amounts to the inference that a barrage once constructed can never be removed raises a principal objection. The problems with the removal of the Włocławek barrage specified by the authority all result from the fact that this barrage was operational at all. It is the operation of the barrage which accelerated erosion in the lower course of the Vistula and it is its operation which led to the accumulation of potentially environmentally hazardous material. Now the authority is explaining that due to these adverse, not to say extremely adverse effects of the operation of the barrage it may not be removed. Worse still, this reasoning leads to a logical conclusion that it will never be possible to remove either the Włocławek barrage nor the Siarzewo barrage. In this manner, by constructing a barrage, the state is to become perpetually hostage to a specific vision of water policy, even decades after this policy was deemed antiquated. At this point we do not judge at all that this policy is antiquated at the moment – it is simply that according to the authority, choosing this policy once petrifies state policy permanently. This would be far from rational. It is worth pointing out here the guidance of the European Commission

to choose reversible measure when applying exemptions on the basis of the Water Framework Directive⁹⁸.

The goal of the Water Framework Directive expressed in recital 19 is maintaining and improving the aquatic environment in the Community, primarily the quality of waters⁹⁹. The directive considers maintaining a good water status to be the main principle (see for example recital 26), with cases of deterioration allowed under Article 4(7) are an exemption. The RDEP Decision inverts that order: the initial point of its considerations is the operation of the Włocławek barrage, which of itself deteriorates the status of a body of surface water, after all. The possibility of the removal of the barrage is treated as an absolutely extraordinary solution. In this manner what is examined is not the justifiability of the further operation of the barrage, but the justifiability of its removal, which reverses the order of examination and the burden of proof anticipated by the directive.

It seems that this approach to the matter has the character of rationalisation – coming up *ex post* with a justification for the existing state of affairs. This can be seen in particular in exposing the flood control function of the reservoir in Włocławek. Even though the Report admits that it is not the assumed function of the reservoir¹⁰⁰, this is the function that is supposed to be the reason of public interest.

On one side the desire to maintain the Włocławek barrage and reservoir is understandable – it was an immense project, for which the state, and indirectly its citizens had to expend significant funds. Moreover, it is a permanent material record, a structure which is a testament to the Polish hydrological know-how. Nevertheless, the expenditures on the construction of the Włocławek barrage from the point of current analyses are (aptly named) sunk costs from the point of view of economics¹⁰¹. This means that we should not take these costs into account when deciding on future actions. This is of course counter-intuitive: people have the tendency to finish the projects on which they have already expended a lot of resources. A rational action however is not taking up a project, on which a lot of resources were already expended, but one with the best balance of future costs and profits. The costs that have been already expended have no importance in this balance.

As otherwise indicated by documents referred to in the letter of the WWF Foundation of 10 May 2021 (*A study of a comprehensive solution to the problems of the Włocławek barrage and reservoir. Forecast of social, economic and environmental effects*) it would be also possible to leave the structure of the Włocławek dam by itself, while removing the reservoir. This option should also become a subject of RDEP analysis, and neglecting this analysis exacerbates the problem of not conducting the test of necessity of the project.

To sum up these considerations, it should be stated that neither the RDEP Decision nor the Report have performed appropriate weighing of losses and benefits resulting from the possible construction of the Siarzewo barrage. They are rather an attempt to justify the

98 Common Implementation Strategy for the Water Framework Directive (2000/60/EC): Guidance Document on Exemptions to the Environmental Objectives, s. 11.

99 See also explanations of the European Commission in Common Implementation Strategy for the Water Framework Directive (2000/60/EC): Guidance Document on Exemptions to the Environmental Objectives, p. 6.

100 Report vol. I, p. 142: “Even though the Włocławek barrage and reservoir are not dedicated to flood protection by design, they may fulfil active flood control functions, especially for delaying the flood wave”.

101 *Sunk costs*: this is a technical term from economics. It does not mean that the project had no sense, but only that these costs may not be recovered regardless of the assumed scenario. That is, regardless of whether Poland will construct a barrage at Siarzewo, remove the Włocławek barrage, or do nothing, the costs of construction of the Włocławek barrage will not be recovered.

decision of constructing the Siarzewo barrage and reservoir which was made before (along with defending the previous decision about leaving the Włocławek barrage operational). The RDEP Decision and the Report do not demonstrate either that the Siarzewo barrage is really necessary for the protection of the Włocławek barrage, or that the Włocławek barrage (or the Włocławek barrage together with the Siarzewo barrage) performs the assumed public interest in the form of flood protection. To the contrary: all the available materials indicate that it is the Włocławek reservoir that creates this flood risk.

As a result, the RDEP Decision violates the Water Framework Directive. This is because the reasons specified in Article 4(7) of the directive are cumulative. Not meeting the fundamental premises of necessity (that is, that the goals of the changes may not be achieved by much more environmentally friendly measures) and appropriateness of the measure, the project thus violates the directive regardless of the issue of the remaining premises therein.

It should be here noted that the RDEP Decision also does not meet the requirements of the directive concerning the “mitigation measures”, that is, measures which should be undertaken to minimise the deterioration of the body of water. These measures are listed by items 2.38 and subsequent of the RDEP Decision, whereas the WWF Foundation rightly, in our assessment, criticises the RDEP Decision that it does not contain the obligation of monitoring the environmental compensation of spined loach and Amur bitterling habitats, and also that it does not establish a time limit for the construction of the by-pass channel for the new weir. The Water Framework Directive clearly indicates that “all practicable steps” should be taken in order to mitigate the deterioration, and the measures indicated in the appeal certainly cannot be considered as such.

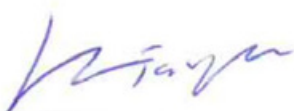
IX.

CONCLUSIONS

Therefore, answering the questions posed herein:

1. **The RDEP Decision is in breach of Article 6 of the Habitats Directive.** Firstly, there were deficiencies at the assessment stage concerning the impacts within the project area from the point of view of the objectives of conservation of Natura 2000 sites which resulted in establishing insufficient compensatory measures, and also deficiencies at the stage of obligatory public consultation. Secondly, and most importantly, the project does not present an alternative-free form of performance of overriding reasons of public interest in the form of protection of health or public safety. Each of the declared goals of the project may be performed in another manner (sometimes with multiple options), with a lower impact or no significant impact at all on the protected Natura 2000 sites.
2. **The RDEP Decision is in breach of Article 4(7) of the Water Framework Directive.** Firstly, it was not proven that the project is necessary for the operation of the Włocławek barrage. Secondly, the project – in combination with the Włocławek barrage – does not serve an overriding reason of public interest indicated in the RDEP Decision in the form of flood protection.

As a consequence of non-compliance with the directives, pursuant to the principle of indirect effect of European Union law, a duty arises to interpret the provisions of Polish legal acts applicable in the manner in such a way as to ensure that the RDEP Decision is also non-compliant with them. This follows from the requirement of ensuring that the regulatory content of Polish law is identical with the content of the implemented EU law. The principle of indirect effect, and the non-compliance of the RDEP Decision with EU law itself mean that – on the basis of the information that we possess – this decision should be repealed. The obligation to repeal the decision applies both to the administrative and the judicial stage of review.



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FOR THE ENVIRONMENT
AND CREATING THE FUTURE,
WHERE THERE WILL BE SPACE
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