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Anna Haładyj
Maciej Nyka

ENVIRONMENTAL IMPACT ASSESSMENT IN ARTIFICIAL ISLAND PROJECTS IMPLEMENTED IN POLISH MARITIME AREAS: A MISSING ELEMENT IN POLISH REGULATIONS ON EIA PROCEDURES*

1. The development of offshore wind energy and the challenges of present-day Polish energy policy

Both the Energy Policy of Poland until 2030 and the draft Energy Policy of Poland until 2040 envisage a significant increase in the share of RES and a reduction in CO2 emissions by 2030.[1] Technical progress, in particular increasingly demanding emission standards, accelerate transformation towards RES [Mangi 2013, 1000; Szulecki, Fischer, Gullberg, et. al 2016, 1]. Only in 2020, about 2.5 GW of installed capacity in centrally dispatched generating units (CDGU) will be taken out of service due to the inability to adapt or the lack of rationale for adapting to the environmental requirements resulting from the BAT conclusions and effective from 2021.[2] Another transformation stimulus is the increase in the costs of energy

Dr. habil. Anna Haładyj, University Professor, Department of Public Commercial Law, Faculty od Law, Canon Law and Administration, The John Paul II Catholic University of Lublin; correspondence address: Al. Racławickie 14, 20-950 Lublin, Poland; e-mail: anna.haladyj@kul.pl; https://orcid.org/0000-0002-8827-3657

Dr. habil. Maciej Nyka, University Professor, Department of Economic Law and Environmental Protection, Faculty of Law and Administration, University of Gdansk; correspondence address: ul. Bażyńskiego 6, 80-309 Gdańsk, Poland; e-mail: maciej.nyka@ug.edu.pl; https://orcid.org/0000-0003-0786-7785

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[1] See https://www.gov.pl/web/aktywa-panstwowe/zaktualizowany-projekt-polityki-energetycznej-polski-do-2040-r [accessed: 07.07.2020].

[2] Ibid.

generation from fossil fuels, which makes coal-fired power less competitive compared to energy based on RES [Szczerbowski and Ceran 2017, 23]. In the European Union, as well as globally, wind energy is increasingly credited as a tool that can be conducive to the limiting of the scale of climate change [Beleyaev, Marchenko, and Solomin 2005, 326].

The offshore wind power industry is currently among the fastest growing forms of power generation in the world [Causon and Gill 2018, 340]. Offshore wind farms and their development are a key driver in the EU's pursuit of its desired levels of production of electrical energy from RES. They are also a vital component in the implementation of the EU's energy policy.[3] The RES development trends clearly point to offshore wind energy as pivotal in RES advancement in Poland.[4] In the Polish reality, in view of significant constraints placed on onshore wind farm location, pursuant to the Act of 20 May 2016 on Wind Farm Projects,[5] as well as generational (meteorological) advantages of offshore wind energy [Dobrzycki and Wodnicki 2018, 73; Jastrzębska 2017, 23] maritime areas are becoming a more attractive destination for implementing RES investment schemes [Petersen and Malm 2006, 76]. This is attributed to the rapid development of the offshore energy generation technology and a growing awareness of the economic, environmental, social, and technical conditions of projects carried out in this power sector. Its development is also enhanced by the progress of marine spatial planning and the inclusion and protection in such plans of areas located in the Polish Exclusive Economic Zone that are potentially attractive from the viewpoint of offshore wind energy generation and its technical requirements.

[3] The development of offshore wind energy by 2030 will lead to the generation of energy by offshore wind farms at the level of 140GW, which should constitute approx. 10% of the European Union's demand [Causon and Gill 2018].

[4] See https://www.gov.pl/web/aktywa-panstwowe/zaktualizowany-projekt-polityki-energetycznej-polski-do-2040-r [accessed: 07.07.2020].

[5] Journal of Laws of 2016, item 961.

2. Offshore wind energy and the achievement of good environmental status of marine waters: protection of the productivity of the Baltic Sea ecosystem – a legal approach

Although electric power generation from RES is a low-emission alternative to generation from traditional sources, RES, including offshore wind energy, do have an impact on the marine ecosystem. The international legal setting have adopted an ecosystem approach to the protection of marine waters [Nyka 2017, 91]. The Act of 21 March 1991 on the Maritime Areas of the Republic of Poland and on Maritime Administration[6] in its Article 37b(1) introduces the ecosystem approach as the basic criterion in drawing up marine spatial development plans [Pyć 2017, 114]. In defining this approach, Article 37b(1b) highlights that the management of human activity must meet all of the following three conditions: first, the impact of the intended activity on the ecosystem must be maintained at a level enabling the achievement and maintenance of good ecological status of the environment; second, the ecosystem must retain its ability to function properly and respond to human-induced changes; third, present and future generations must be able to use the ecosystem resources and services simultaneously and in a lasting and sustainable manner. Thus, maintaining good environmental status, homeostasis, and sustaining productivity, or the ability to provide ecosystem services [Loreau, Naeem, Inchausti, et al. 2001, 805; McIntyre 2004, 6; Trouwborst 2009, 29], have become evaluation criteria when determining the functions of individual water regions as part of spatial planning procedures [Nyka 2017, 96].

Less directly, the productivity of ecosystems subjected to diversified use also determines the assessment of the environmental condition of marine waters. In its Article 16(13), the Water Law Act[7] reads that good environmental status of marine waters is when the sea is clean, healthy, and productive within their intrinsic conditions, and when the use of the marine environment is sustainable, thus safeguarding the potential for uses and human activity. To achieve this, activities based on the ecosystem approach are pursued. Therefore, it is fair to say that it is the preservation of ecosys-

[6] Journal of Laws of 2019, item 2169 [hereinafter: AMA].

[7] Journal of Laws of 2017, item 1566.

tem services of marine ecosystems that provides the regulatory framework for the assessment of all offshore projects, including those covering wind energy. The doctrine defines ecosystem services as the flow of energy and materials in the environment but also as the very existence of ecosystem to the benefit of people, their well-being, wealth, and sustainable development [Costanza, D'Arge, De Groot, et. al. 1997, 255; Mace, Norris, and Fitter 2012, 21]. Poskrobko defines ecosystem services as values, forces, and natural processes as well as the effects of their existence and operation. They furnish non-material "values" necessary for the life and development of mankind and contributing to economic production processes, yet absent from these processes physically [Poskrobko 2010, 20]. Considering the above definitions, the process of sourcing electrical energy from offshore wind farms seem to fit within the analytical framework of ecosystem services. Consequently, on the one hand, this process must be carried out in a way that does not affect the marine environment, and, on the other, its potential implementation is guaranteed directly by the relevant provisions of marine spatial development plans and by the general protection of ecosystem services [Tuda, Stevens, and Rodwell 2014, 60; Nyka 2019, 141].

Given the current legal status, the location of artificial islands and transmission cables in Polish maritime areas is based on location permits that set out the conditions for their use in the areas referred to in Section 4 (Article 23(1) AMA). Adoption of marine spatial development plans will not have any adverse impact on permits already granted for locations where only research has been carried out for the purpose of prospective projects. This is due to the fact that the plans respect the acquired rights of operators that have obtained consents provided for in the AMA [Nyka 2019, 144].

The draft spatial development plans for Polish maritime areas makes some underlying assumptions about the development of wind energy in such areas. The function of obtaining renewable energy (E function) has been assigned to seven water regions. Their total area is nearly 2,373.97 km2 and covers 7.86% of Polish maritime areas. These are mainly areas of the Słupsk Bank, Central Bank, and Odra Bank. In the draft plan accommodating offshore wind farms, those areas were selected that were optimal in terms of environmental and economic conditions for renewable energy generation (distance from the shore, depth, wind power, etc.), and

those for which construction permits had already been issued and validated. Contrary to some alarmist information spread by the mass-media, this is not a small area, especially considering the fact that the draft marine spatial development plans leave a significant part of these areas without any assigned function. They are regarded as a kind of development reserve that may serve the function of wind power generation in the future if some plan adjustments are made [Bąkowski 2018, 133]. Several dozen separate sub-regions were also identified. They will enable the connection of any offshore wind farms erected there to the National Power System; also, they will facilitate interconnections between and maintenance of such farms.

Combining the programme of development of offshore wind farms with the implementation of a marine spatial planning system offers many advantages. It enables lessons to be drawn from already existing wind farm projects and controversies that arise around them. It also introduces elements of adaptive management and some aspects of the ecosystem approach to the management of sea areas [Górski and Pawliczka 2019, 12]. Contrary to similar structures erected in the waters of other countries on the Baltic Sea, it was decided to locate the E function water regions only in the Exclusive Economic Zone, i.e. in areas located at least 12 NM from the shore (Article 23(1a) AMA). Thus, controversy regarding the aesthetic side (impact on tourism) of this type of installation was avoided. Turbines will not be erected too close to each other, sea routes, or bird flyways. Recommendations added to the water region charts attached to the marine spatial development plan imposed a number of further restrictions. The width of the bird flyway may not be less than 4 km. Moreover, wind power plants and their internal connection infrastructure may not be closer than 2 NM from the boundaries of water regions serving primary navigation functions. In addition, projects must be laid out in such a way as to open up transit corridors for vessels over 150 m in length [ibid.].

At the same time, however, it should be kept in mind that the sole allocation of a water region to energy generation purposes will not ultimately determine the potential for the construction of offshore wind farms. As schemes that fall into the category of projects that may always have significant effects on the environment, they should be subject to the EIA procedure at the earliest stage of the development process that entails development consent.

3. Technical and legal challenges of offshore wind farm locations: artificial islands and submarine cables

Offshore wind turbines are more efficient than their onshore counterparts. This is due to differences in design (larger blade diameter, higher towers supporting the nacelle) and longer operation times per year (an average of 3500 hours versus 2000 hours of offshore and onshore turbines, respectively), which is a consequence of meteorological and geographical conditions [Czapliński 2016, 174]. Offshore turbines do not differ significantly in terms of design and principle of operation from onshore installations. They are usually three-blade turbines placed along the horizontal axis with the nacelle mounted on the tower. They usually operate at speeds of 5-25 m/s. When these values are exceeded, the rotor orientation towards the wind is shifted to parallel to avoid possible damage [Tytko 2009, 112]. The main design difference is seen in the tower structure and the technical aspects of cable connections in the marine environment in which the turbines operate. On the other hand, in legal terms, the basic challenge in implementing this type of projects offshore is their placement on support structures that elevate turbines to an appropriate height above the sea level and the laying of submarine transmission cables.

The basic assumption made on offshore wind farms, that is, that they are projects that may have a significant impact on the environment and must be subject to the EIA procedure, comes from their definition in the Regulation of the Council of Ministers of 10 September 2019[8] on projects likely to have significant effects on the environment. In its para. 2(1)(5)(b), the regulation regards installations using wind energy to generate electricity and located in the maritime areas of the Republic of Poland, regardless of their capacity or location within a specific category of maritime area, as projects that may likely to always have significant effects on the environment (i.e. group I projects requiring the drawing up of an EIA report under the law).[9] The definition of this type of projects as having an

[8] Journal of Laws of 2019, item 1839.

[9] The previous ordinance included wind power plants with a total nominal power of at least 100 MW and located in the sea areas of the Republic of Poland, among projects that always have a significant impact on the environment, cf. para. 2(1)(5) of the Regulation of the Council of Ministers of 9 November 2010 on projects that may have a significant

environmental impact (always significant) has been present in the Polish legal system since Poland's entry in the EU.[10] At the same time, it should be noted that since submarine transmission cables are necessary for the operation of an offshore wind farm, these should be regarded as technologically related projects, i.e. as one project that requires assessment as a whole even if its individual components (the wind farm and the submarine cables) would be implemented by different contractors (Article 3(1)(13) of the Act on the Provision of Information on the Environment and Its Protection and on Environmental Impact Assessment, hereinafter "APIE"). The unlawfulness of dividing projects has been confirmed in the case-law of the CJEU[11] and domestic courts.[12]

Consequently, there is a need to have a closer look at the applicable regulations to determine whether and at what stage an impact assessment procedure for a offshore wind farm project is carried out. The current legal status requires a critical commentary and change recommendations.

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impact on the environment (Journal of Laws 2016, item 71), cf. also para. 2(1)(5) of the Regulation of the Council of Ministers of 9 November 2004 on determining the conditions of projects that may have a significant impact on the environment and detailed conditions related to the qualification of a project for the preparation of an environmental impact report (Journal of Laws No. 257, item 2573).

[10] Which is acceptable as Member States can lay down stricter environmental rules (Recital 3 of Directive 2011/92).

[11] "The purpose of the amended directive cannot be circumvented by the splitting of projects and the failure to take account of the cumulative effect of several projects must not mean in practice that they all escape the obligation to carry out an assessment when, taken together, they are likely to have significant effects on the environment within the meaning of Article 2(1) of the amended directive (see, as regards Directive 85/337, Case C-392/96 Commission v Ireland [1999] ECR I-5901, paragraph 76, and Abraham and Others, paragraph 27)". See judgment of the Court (Third Chamber) of 25 July 2008, Ecologistas en Acción-CODA v Ayuntamiento de Madrid, ECLI:EU:C:2008:445.

[12] Judgment of the Provincial Administrative Court in Warsaw of 26 February 2013, ref. no. IV SA/Wa 825/12, judgment of the Provincial Administrative Court in Olsztyn of 5 March 2013, ref. no. II SA/Ol 71/13. See also judgment of the Provincial Administrative Court in Warsaw of 24 January 2008, ref. no. IV SA/Wa 2344/07, judgment of the Provincial Administrative Court in Warsaw of 5 February 2008, ref. no. IV SA/Wa 2358/07.

4. Procedure for granting a permit for the construction of artificial islands and structures (offshore wind farms)

The legal basis for the implementation of offshore wind farm projects are given in the AMA. It grants the Republic of Poland the exclusive authority to construct and authorize (i) the construction and use, within the Exclusive Economic Zone, of artificial islands, all kinds of structures and installations intended for scientific research, identification or exploitation of resources, and (ii) other projects involving commercial search and exploitation of the Exclusive Economic Zone, in particular the use of water, sea currents and wind for energy generation purposes (Article 22(1) AMA).

Authorizations to construct artificial islands, structures and installations (and to use them, which it out of the scope of this paper), hereinafter referred to as "permits for the construction of artificial islands and structures" or just "permits," are issued (as decisions) by: the Minister of Maritime Economy and Inland Navigation (MMEIN) or the competent local director of the maritime office, depending on whether the water region in which such a project is to be implemented is covered by the marine spatial development plan, and whether a building permit is required for construction, as part of the process of planning and spatial development of maritime areas (Article 37^1 AMA). As provided for in Article 23 AMA, the procedure of issuing permits for the construction of artificial islands and structures involves the prior gathering of opinions of other relevant central authorities, i.e. ministers overseeing energy, economy, climate, culture and protection of national heritage, fisheries, environment, internal affairs and the national defence. All these opinions are collected through a dedicated procedure spanning no more than 90 days; failure to issue an opinion within this period is regarded as the lack of objection. The authority issuing permits (MMEIN or the director of the maritime office, respectively) is obliged to give a negative decision (deny the permit for the construction and use of artificial islands and structures) if a positive decision is likely to pose a threat to: 1) the environment, sea or undersea resources, including rational management of mineral deposits; 2) the interest of the national economy; 3) state defence and security; 4) the safety of sea navigation; 5) the safety of sea fishing; 6) the safety of air traffic; 7) underwater archaeological heritage; 8) the safety of research, identification, and exploitation of mineral

resources of the seabed and the interior of the earth; 9) the performance of the basic functions referred to in Article 37a(3), if defined (article 23(3) AMA).

As follows from the wording of the provision, the authorities issuing permits examine, but not only, whether a positive decision (or more precisely: the implementation of the project authorized by the decision) would pose a threat to the environment and the sea or undersea resources (which falls within the statutory definition of "environment" in Article 3(39) of the Act of 27 April 2001 Environmental Protection Law[13]), including the rational management of mineral deposits (which, in contrast, goes beyond the very concept of the environment and falls within the concept of environmental protection. This leads to the question about grounds on which the maritime administration authorities assess whether a project (i.e. its implementation) "is likely to pose a threat to the environment." A certain interpretation clue can be found in the next paragraph of the same article, which reads that, "The authorities referred to in para. 2, based on separate provisions, indicate the occurrence of the threats referred to in para. 3, or the detailed conditions and requirements referred to in para. 5."

Prima facie, such separate provisions may be those contained in the APIE.[14] They regulate the environmental impact assessment procedures for planned projects that serve the implementation of Directive 2011/92/EU of the Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment.[15] However, it is debatable whether the provisions of this law can be regarded as "separate provisions" in the absence of a direct link between EIA carried out under a separate administrative procedure and aimed at issuing a decision on environmental conditions and the permit for the construction of artificial islands, structures and installations. However, the analysis of this law and the link between EIA, the decision on environmental conditions and the aforesaid permit requires the presentation of the concept of EIA and its implementation in the Polish system of environmental protection law.

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[13] Journal of Laws of 2020, item 1219.

[14] Journal of Laws of 2020, item 283.

[15] Official Journal L. 28.01.2012, p. 1-21.

5. EIA and the decision on environmental conditions in the multi-stage investment process

The purpose of the EIA procedure is that it examines the status of the environment before a project is implemented and attempts to forecast the effects of the implementation of the project on the environment [Filipowicz, Plucińska-Filipowicz, and Wierzbowski 2017, 292]. This means that EIA is carried out, in principle, for a planned, i.e. not existing project[16] (1) and prior to the issuing of the "implementing" decision permitting the project to be carried out (2).[17] Its aim is to diagnose any negative impacts on the environment and prevent them, in accordance with the prevention and precautionary principle, and, if it is impossible, to mitigate their effects and allow for natural compensation. Because EIA takes place at an early stage of the investment process, assumptions made by the future developer regarding the planned project are considered rather general, which renders the EIA procedure "marked by largely hypothetical assumptions" and "evaluative and prediction-laden" [Rakoczy 2010, 14].

Today, EIA is part of a separate (in terms of the subject matter) procedure of issuing a decision on environmental conditions. According to Article 72(5) of APIE it is, in principle, a one-time procedure carried out at the earliest stage of the investment process: without the need to submit construction designs and perform other activities required when applying for implementing decisions [Haładyj 2006, 95]. The decision on environmental conditions (or environmental decision) is an obligatory stage of the process of obtaining permits for the implementation of projects that may have significant effects on the environment. It comes first before other permits are granted [Urban 2013, 87]: "This means that it must be awarded before the investor can obtain development consent, i.e. a decision of the competent authority or authorities that authorizes a developer to proceed with its project."[18]

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[16] Judgment of the Supreme Administrative Court of 26 January 2018, ref. no. II OSK 1053/16.

[17] Judgment of the Court (First Chamber) of 4 May 2006, The Queen, on the application of: Diane Barker v London Borough of Bromley, Case C-290/03, ECLI:EU:C:2006:286.

[18] Case C-290/03.

At the same time, the doctrine is right to emphasize that, "Environmental impact assessment as such is irrelevant. It only assumes importance in the procedure of issuing a decision on environmental conditions. In other words, it is a stage leading to the issuance of the aforesaid decision and allows the competent authority only to have an idea of what possible threats to the environment may occur" [Rakoczy 2010, 14].

The analysis of the relevant normative material permits a conclusion that the connection between the environmental decision and decisions required at further stages of the investment process is regulated in procedural terms, as provided in Article 72(1-1b) APIE saying that the environmental decision is given before obtaining one of several dozen "investment" decisions (development consents). Consequently, to submit an application for the award of any of the other decisions requires the environmental decision to be attached obligatorily. The list of decisions, permits, and approvals that should follow the obtaining of the environmental decision is closed and covers almost 30 types of authorizations. Against the background of these decisions, collectively referred to as "investment" decisions, the decision on environmental conditions reveals some attributes of a prejudication or a *sui generis* "preliminary ruling" governing future development consent for a specific project.[19] Thus, it binds the developer and determines the granting of subsequent permits and consents in the investment process.

The analysis of this list of "investment" decisions clearly shows that there is no permit for the construction of artificial islands and structures among them. This means that before issuing such a permit there is no obligation to obtain the environmental decision, meaning that there is also no obligation to conduct the EIA procedure. This obligation will arise only at

[19] Judgment of the Provincial Administrative Court in Poznań of 2 March 2011, ref. no. II SA/Po 785/10, see also: judgment of the Supreme Administrative Court of 16 September 2008, ref. no. II OSK 821/08, judgment of the Supreme Administrative Court of 26 June 2013, ref. no. II OSK 532/12, judgment of the Provincial Administrative Court in Poznań of 21 March 2007, ref. no. II SA/Po 70/07, II SA/Po 70/07, judgment of the Provincial Administrative Court in Łódź of 25 October 2018, ref. no. II SA/Łd 340/18; judgment of the Provincial Administrative Court in Gorzów Wielkopolski of 9 September 2015, ref. no. II SA/Go 376/15; judgment of the Provincial Administrative Court in Warsaw of 20 April 2017, ref. no. VIII SA/Wa 763/16.

the next stage of the investment process: prior to the award of the building permit. This conclusion is also supported by the fact that the provisions of the APIE specify in detail the competence of authorities issuing decisions on environmental conditions that corresponds to the types of "investment" decisions issued later. There are no maritime administration bodies in this list, which confirms that they are not the ones to perform EIA for projects that would pose a threat to the marine environment if implemented. On the other hand, issuing decisions on environmental conditions without a legal basis (in cases where they are not required) renders them invalid as having no legal grounds (Article 156(1)(2) of the Code of Administrative Procedure[20]);[21] thus, maritime administration authorities that process permits cannot launch and conduct the EIA and environmental decision procedures on their own or demand that it be carried out by any other authority.

The analysis of the APIE in the context of the AMA provisions leads to the conclusion that the former does not contain any separate regulations enabling any of the ministers giving opinions on a draft permit for the construction of artificial islands and structures to conduct an EIA procedure at this stage and issue a decision on environmental conditions for a planned project of offshore wind farms. This position is also upheld in the case-law.[22]

6. Specific procedures in multi-stage investment processes

The legal setting outlined above and showing the absence of legal grounds for conducting an EIA procedure at the stage of issuing a permit for the construction of artificial islands and structures, which seems to be

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20 Journal of Laws of 2020, item 256.

21 Judgment of the Provincial Administrative Court in Kielce of 27 October 2010, ref. no. II SA/Ke 493/10.

22 Judgment of the Supreme Administrative Court of 8 March 2018, ref. no. II OSK 1235/16: "Although the assessment of the wind farm's environmental impact required detailed studies to be carried out at a later stage of the investment implementation, this did not exempt the complainant from providing such information in the application that would enable the authority to taking an appropriate decision at the stage of issuing an opinion pursuant to Article 106 of the Code of Administrative Procedure."

contrary to the standards of EU law and the related CJEU case-law, refers to a situation where the construction of artificial islands and structures will be carried out in locations and in a manner that does not create a risk of significant negative impacts on Natura 2000 sites. If such impacts occurred, it would be necessary to carry out an impact assessment procedure for a Natura 2000 site, known as habitat assessment.

Pursuant to the statutory definition (Article 3(1)(7) APIE), the impact assessment of a project on a Natura 200 site is understood as assessment of the environmental impact of a project limited to the evaluation of the project's impact on a Natura 2000 site, i.e. a site of special bird protection, a special area of conservation of habitats (SAC) or a site of Community importance (SCI) established to protect the population of wild birds, natural habitats or species of Community interest (Article 5(2b) of the Act of 16 April 2004 on the Nature Conservation[23]).

According to Article 96 APIE, the authority competent to issue a decision required before the launch of a project other than project that is likely to have a significant impact on the environment, which is not directly related to the protection of a Natura 2000 site or does not result from this protection, is obliged to consider, before deciding, whether the project is likely to have a potentially significant impact on a Natura 2000 site. The permit for the construction and use of artificial islands, structures and installations in Polish maritime areas issued on the basis of the AMA is among the permits that, prior to issuing, must be preceded by the assessment of its impact on Natura 200 sites (Article 96(2)(5) APIE); the assessment is to be carried out by the issuing authority (MMEIN or director of the maritime office).

At the same time, it should be stressed that the structure of Article 96 APIE – pointing to the obligation to carry out the habitat assessment for "projects other than projects likely to have significant effects on the environment" – suggests that the permit for the construction of artificial islands and structures does not refer to a project that may have significant effects on the environment. However, such a conclusion is completely misguided given that, pursuant to para. 2(1)(5)(b) of the Regulation on projects likely

[23] Journal of Laws of 2020, No. 55 [hereinafter: ANC].

to have significant effects on the environment the construction of wind farms in Polish maritime areas is a project that can always have a significant impact on the environment.[24]

What is relevant for the habitat assessment, the authority conducting the procedure for issuing the permit for the construction of artificial islands and installations is obliged to determine whether the project may potentially have a significant impact on a Natura 2000 site. To this end, it should be guided by the precautionary principle [Gruszecki 2011, 54]. If the effects of the implementation of a specific project are fully predictable, and preliminary assessments show that it cannot have a significant impact on a Natura 2000 site, then EIA will not be necessary at all. If, on the other hand, such effects are difficult to predict and, hypothetically, may be significant, then the EIA procedure will be obligatory [ibid., 55].

As regards the habitat assessment, the legislator provided for the following procedural steps: the obligation to issue a decision imposing the obligation to submit to the competent Regional Director for Environmental Protection (RDEP) (i) a copy of the application for permit for the construction of artificial islands and structures and (ii) the project information sheet together with other required attachments, based on which the RDEP issues a decision on the obligation to conduct impact assessment for a Natura 2000 site if it is found that the project may have a significant impact on that site.

This means that the environmental protection authority (RDEP) recognizes a significant impact on the Natura 2000 site as a qualified (professional) authority but only when the maritime administration authority considers

[24] Cf. the judgment of the Supreme Administrative Court of 4 July 2017, ref. no. II OSK 2133/16: "Provisions referred to in Article 97(1) and (5) APIE, may be issued by the regional environmental protection director only with regard to projects other than projects that may have a significant impact on the environment. In the event that the regional environmental protection director finds, after receiving the documents listed in Article 96(3) above of the Act that the project should be classified as one that may have a significant impact on the environment, this authority should discontinue the procedure on the assessment of the project's impact on the Natura 2000 area based on Article 105(1) of the Code of Administrative Procedure. In such a case, there is an obligation to conduct another procedure with a broader scope of assessment, i.e. the procedure for issuing a decision on environmental conditions, referred to in Article 71(1) of the above mentioned Act."

that such an impact could potentially occur and imposes an obligation on the developer to submit relevant documentation to proceed with the assessment (by the RDEP and not by the maritime administration authority) of whether such a significant impact on the Natura 2000 site occurs.

This extremely interesting procedural line also means that the maritime administration assesses a potential impact on Natura 2000 sites without being able to perform such assessment based on such subjective premises as life experience and intuition. For it does not possess the "environmental" documentation (the project information sheet is required only following the relevant decision, i.e. when the authority has already decided that such an impact may occur) not may be guided by other assessment criteria.

The result of the RDEP's recognition that a project may have significant effects on a Natura 2000 site is that it carries out the habitat assessment for that site along with drawing up a report, taking care of public participation, gathering opinions of other authorities in accordance with the provisions of the APIE. What follows is a decision which sets out the project conditions given the potential impacts on the Natura 2000 site, which, as a measurable and binding effect of cooperation, must be included in the permit for the construction of artificial islands and structures. Importantly, the RDEP agrees to the conditions of project implementation if (i) the assessment of the project's impact on the Natura 2000 site shows that the project will not have a significant negative impact on the site, or (ii) if the assessment of the project's impact on the Natura 2000 site shows that it may have a significant negative impact on the site while, at the same time, the conditions referred to in Article 34 ANC are met, i.e. there are imperative reasons of overriding public interest [Haładyj 2009, 37]. Otherwise, the RDEP refuses to agree to the conditions of the project. However, it should be emphasized that in the event that projects are implemented in a maritime area, prior to its decision, the RDEP seeks the opinion of the competent director of the maritime office (which is not binding). This is a somewhat bizarre solution given that it is the director of the maritime office who is competent to issue the permit because they have initiated the procedure of impact assessment for the Natura 2000 site. This convoluted process is anything but justified and is an example of unfounded overregulation in environmental protection law: the maritime administration

authority has to assume the existence of an impact on Natura 2000 sites in order for the RDEP to initiate the procedure.

To sum up, domestic law requires the assessment of impacts of a planned project before issuing a permit for the construction of artificial islands and structures only when the authority competent to issue it (and then the RDEP) decides that the project may have significant effects on a Natura 2000 site and covers only the assessment of impacts on that Natura 2000 site. As regards the remaining scope, prior to the issuance of the permit, recognition of a project of construction of offshore wind farms and submarine cables as requiring EIA is not necessary; moreover, it is not necessary to submit a decision on environmental conditions before issuing the permit, as provided in the wording of Article 72(1) APIE.

However, the doctrine subscribes to view, which we fully support, that decision on environmental conditions (and EIA) should precede the issuance of permits for the construction and use of artificial islands, structures and installations in Polish maritime areas [Urban 2010], including the construction of offshore wind farms. We justify this position by the fact that, according to the CJEU case-law, EIA must be carried out before the competent authority or authorities issue a decision, on the basis of which the developer is authorized to carry on with the project.[25]

7. Recognition of a permit for the construction of artificial islands and installations as "development consent"

In the ruling cited above, the court stated that under Article 2(1) of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment[26] projects that may have significant effects on the environment, within the meaning of Article 4 of the directive in conjunction with Annexes I or II thereto, must be made subject to an assessment with regard to their effects, and where national law provides for a consent procedure comprising more than one stage, one involving a principal decision and the other involving an implementing decision which cannot extend beyond

[25] Cf. Case C-290/03.

[26] Nowadays replaced by Directive 2011/92/EU.

the parameters set by the principal decision, the effects which a project may have on the environment must be identified and assessed at the time of the procedure relating to the principal decision.[27] This means that it is necessary to decide whether the permit for the construction of artificial islands and structures can be regarded as development consent, i.e. one that allows projects to be carried out (even if it is not the only decision in a consent procedure comprising more than one stage). As a result, recourse should be made to the provisions of the AMA, according to which the permit specifies project type and its location using geocentric geodetic coordinates, its characteristic technical parameters, precise conditions and requirements resulting from separate provisions (Article 23(5) AMA). This means that the permit determines both the location of the project (in a very precise manner by specifying geocentric geodetic coordinates) and the technical parameters of the installation, including its height, rotor diameter, noise level, etc. as well as other technical conditions, e.g. related to power transmission onshore.

On the basis of this permit, the developer is authorized to apply for a building licence. Since the permit for the construction of artificial islands and structures is the first decision in the chronological sequence of approvals required for offshore wind farm projects and extremely precisely determines the location of the project and its technical parameters, it should be considered development consent, the award of which should be preceded by EIA carried out as part of the procedure of an environmental decision (it should also cover the habitat assessment for Natura 2000 sites).

Conclusions

Due to the lack of provisions explicitly imposing an obligation to carry out an EIA procedure before issuing a permit for the construction of artificial islands and structures and due to the absence of this permit from the list of decisions that should precede the award of a decision on environmental conditions, domestic law should be regarded as failing to comply with the requirements of Directive 2011/92. This is very likely to culminate

[27] Cf. Case C-290/03.

in action taken against Poland on the grounds of improper implementation of the said regulation.

The most adequate response of the Polish government should be to make amendments to the Act on the Provision of Information on the Environment and Its Protection and on Environmental Impact Assessment that will supplement the list of decisions contained in Article 72 of the act. Thus, there is a significant legal risk that a far-reaching amendment to the law entails. This risk is very likely to occur during the several years' process of preparing documentation of offshore wind farm projects and obtaining the necessary permits and approvals for their implementation.

No adequate response of the Polish side, even in no action is taken against Poland regarding the improper implementation of EU law, always involves a real economic risk: the lack of financial support for investment schemes or the need to return funds already obtained in a situation when managing authorities decide that missing decisions on environmental conditions breach the rules of seeking support from EU funds. Moreover, presently, the authorities issuing permits for the construction of artificial islands and structures do not even have a legal basis to overcome this deficiency. It should be kept in mind that although the managing authority does not exercise any "legal powers" to examine decisions on environmental conditions that are final and have not been invalidated under both ordinary and extraordinary legal measures,[28] still, it has the right to verify whether an EIA procedure was required for the issuance of relevant permits and approvals; when the managing authority deems that requirement unfulfilled, it has the right not to grant funding or withdraw funding already granted.

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Environmental Impact Assessment in Artificial Island Projects Implemented in Polish Maritime Areas: A Missing Element in Polish Regulations on EIA Procedures

Abstract

The aim of the article is to determine, taking into account the requirements of EU law, at which point of the multi-stage procedure of granting development consent for the construction of offshore wind farms it is necessary to conduct EIA of project types, within the meaning of Directive 2011/92/EU, and what the legal consequences are of failure to obtain a decision on environmental conditions for schemes carried out in Polish maritime areas. Our conclusions may provide guidance as to the necessary amendment to the Polish Act on the Provision of Information on the Environment and Its Protection and on Environmental Impact Assessment and the Act on the Maritime Areas of the Republic of Poland and on Maritime Administration in order to ensure compliance with EU law, environmental safety, as well as reducing the legal risk that such projects entail.

Keywords: offshore wind farm, environmental impact assessment, permit for the construction and use of artificial islands

Oceny oddziaływania na środowisko w realizacji projektów wznoszenia sztucznych wysp na potrzeby energetyki wiatrowej w Polskich Obszarach Morskich

Abstrakt

Celem artykułu jest określenie, z uwzględnieniem wymogów wynikających z prawa UE, na jakim etapie wieloetapowego postępowania w sprawie udzielenia zezwolenia na realizację inwestycji polegającej na budowie morskich elektrowni wiatrowych konieczne jest przeprowadzenie oceny oddziaływania na środowisko w rozumieniu dyrektywy 2011/92/WE w sprawie rodzajów przedsięwzięć i jakie są skutki prawne zaniechania uzyskania decyzji o środowiskowych uwarunkowaniach dla przedsięwzięć realizowanych na obszarach morskich RP. Wnioski stanowić zaś mogą wskazówki dotyczące koniecznej nowelizacji ustawy o ocenach

oddziaływania na środowisko oraz ustawy o administracji morskiej RP celem zapewnienia zgodności z normami prawa UE, bezpieczeństwa ekologicznego, ale również ograniczenia ryzyka prawnego realizacji tego typu inwestycji.

Słowa kluczowe: morska farma wiatrowa, ocena oddziaływania na środowisko, pozwolenie na wznoszenie i wykorzystywanie sztucznych wysp

Informacje o Autorze: Dr hab. Anna Haładyj, prof. KUL, Katedra Publicznego Prawa Gospodarczego, Wydział Prawa, Prawa Kanonicznego i Administracji, Katolicki Uniwersytet Lubelski Jana Pawła II; adres do korespondencji: Al. Racławickie 14, 20-950 Lublin, Polska; e-mail: anna.haladyj@kul.pl; https://orcid.org/0000-0002-8827-3657

Informacje o Autorze: Dr hab. Maciej Nyka, prof. UG, Katedra Prawa Gospodarczego Publicznego i Ochrony Środowiska, Wydział Prawa i Administracji, Uniwersytet Gdański; adres do korespondencji: ul. Bażyńskiego 6, 80-309 Gdańsk, Polska; e-mail: maciej.nyka@ug.edu.pl; https://orcid.org/0000-0003-0786-7785