

Ecological and Judicial Expertise in Criminal Proceedings Against the Environment in Russia

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Abstract. Environmental expertise plays a special role in the course of the investigation of environmental crimes. Its main task is to recreate the mechanism of the incident, established the causation link, as well as determine the scale the negative impact on the environment and the measures to restore its original state. The author discusses the current practice of the environmental expertise in the Russian Federation. In Russia the experts from the state or private laboratories can be appointed to assist the investigator and the court in performing their tasks. The problem is that there is no commonly accepted expert methodology in a case of environmental offences. While the state experts can be expected to apply the standardised methodology approved by the Russian Centre of Forensic Expertise in Moscow, their colleagues from the private sector are free to use any methods they consider as appropriate depending on the circumstances of the case. Unfortunately, in Russia, as well as in Poland, there are no effective control mechanisms to ensure that the methods applied and the data used by the experts are scientifically valid. It means that the obtained results are not always reliable and accurate. Another problem referred to the difficulties of the damage assessment in such cases. The dynamics of the environment, the complicity of the relations between its elements makes it extremely hard to assess the scale of the negative impact, as well as to establish the causation link between the human's actions or negligence and observed changes.

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The media report daily about new threats resulting from the degradation of the natural environment due to the disturbance of its natural structures and self-regulation mechanisms. There is no doubt that these changes are in most cases caused by human living and economic activity. Since the 1970s, environmental protection has been considered a priority task for the international community. Issues related to nature protection are the subject of numerous international conventions, treaties and multilateral agreements¹. Active measures are taken to reduce the negative impact of humans on the environment. Both in the world and in European Union countries, the authorities of individual states introduce special regulations aimed at stabilizing and, in the long run, improving the local ecological situation. The subject of environmental protection often appears in the context of fundamental human rights². In accordance with Article 42 of the Russian Constitution, everyone has the right to live in a safe environment, the right to information about its

¹ Korzeniowski P (Ed.), *Zagadnienia systemowe prawa ochrony środowiska*. Łódź, 2015, pp. 60–64.

² Krajewski P, *Prawo do życia w zdrowym i bezpiecznym środowisku naturalnym*. *Studia Ecologiae et Bioethicae*, 2015, Vol. 13, Issue 3, pp. 9–24.

condition, the right to compensation and reparation for damage to health or property resulting from the commission of environmental offences. Nature conservation in Russian law is considered a priority direction of internal policy. In the government document entitled 'The Basics of Policy on Ecological Development of the Russian Federation until 2030'³ information can be found that in more than half of the Russian Federation's entities, 54 % of city dwellers breathe air, the pollution of which exceeds the standards set by the WHO many times over. In most of the subjects we can observe progressive degradation of cultivated land, problems with storage and disposal of waste, including highly dangerous for human life and health. The sanitary condition of water facilities also does not meet the requirements. Therefore, one of the principles of the state's environmental expertise, which must be carried out whenever consent is given to commence business activity that may have a negative impact on the local natural environment, is the presumption of the ecological danger of any human activity⁴.

A common preventive measure in the field of environmental protection is the administrative or criminal liability of entities, including legal persons, for violation of applicable norms and standards. In Russia, as in Poland recently, there has been talk of the need to tighten up penalties for similar acts. From the position of citizens, who today are extremely well informed about the current ecological situation, a similar solution may seem quite justified. However, hardly any practitioner who deals with the justice system on a daily basis knows that increasing penalties or criminalising new deeds is not conducive to a real improvement in the situation. Much depends on the effectiveness of the activities of law enforcement agencies. It should be noted how a small number of cases concerning crimes against the environment, both in Poland and in Russia, end up with a final conviction of the perpetrators. The legislator is partly to blame for this. The way in which the legislator describes particular acts prohibited in the field of environmental protection raises concerns among legal authorities⁵.

In Russia, a turning point in the development of penal regulations in environmental protection was the adoption on 13 June 1996 of the penal code in force, which in Chapter 26 entitled 'Environmental Crimes' provided list for the most important crimes. The chapter contains a total of 18 articles:

1. Article 246 — Violation of environmental protection rules when carrying out construction work;
2. Article 247 — Breach of the rules for dealing with non-environmentally safe substances and waste;
3. Article 248 — Breaches of safety rules when handling microbiological or other biological agents or toxins;

³ Основы государственной политики в области экологического развития Российской Федерации на период до 2030 года, 30.04.2012. *Electronic source*: <http://kremlin.ru/events/president/news/15177>, accessed: 30.09.2018.

⁴ Федеральный закон от 23.11.1995 N 174-ФЗ «Об экологической экспертизе». *Российская газета*, No. 232, 30.11.1995 (with changes).

⁵ Lt. Korzeniowski P (Ed.), *Zagadnienia systemowe prawa ochrony środowiska*, pp. 94–95; Калинина О.М., «Мертвые» нормы главы 26 Уголовного кодекса Российской Федерации. *Вестник Омской юридической академии*, 2018, No. 1, pp. 45–48; Бабаев М.М., Пудовочкин Е.Ю., *Проблемы российской уголовной политики*. Москва, 2014, p. 159.

4. Article 249 — Infringement of veterinary legislation and rules;
5. Article 250 — Water pollution;
6. Article 251 — Air pollution;
7. Article 252 — Sea pollution;
8. Article 253 — Violation of the requirements of the legislation of the Russian Federation on the continental shelf and the special economic zones of the Russian Federation;
9. Article 254 — Soil pollution;
10. Article 255 — Violation of the rules on the conservation and use of natural resources;
11. Article 256 — Illegal use of water resources;
12. Article 257 — Violation of the rules on the protection of water resources;
13. Article 258 — Illegal hunting;
14. Article 258.1 — Illegal trade of particularly valuable animals and species listed in the Red Book of the Russian Federation and/or protected by international agreements of the Russian Federation;
15. Article 259 — Destruction of the habitats of species listed in the Red Book of the Russian Federation;
16. Article 260 — Illegal cutting of trees;
17. Article 261 — Destruction or damage to forest plantations;
18. Article 262 — Infringement of the regime of specially protected natural territories and natural sites.

The vast majority of crimes covered by Chapter 26 are of a material nature. Their existence depends on the fact that certain consequences occur in the form of damage, deterioration of the natural environment or causing a real threat to human life and health. Due to the construction of legal norms providing for criminal responsibility for environmental crimes, the key importance from the point of view of the course of criminal proceedings is to determine and prove the fact of occurrence of specific negative effects and a cause-effect relationship between the act or omission of the perpetrator and the observed damage or potential threat. In Russian practice, experts employed in state or private laboratories are appointed for this purpose.

It is worth noting that the Russian penal procedure to a very large extent uses the opinions of experts in various fields. Critical opinions can be found in the literature. Some researchers accuse practitioners of wanting to use expert opinions as their own shield in litigation, the fact that these expert opinions are not always necessary from the point of view of the viewer to explain the merits of the case⁶. However, in the case of environmental crime, there is an objective need to consult experts. Both in Poland and Russia, the legislator makes the possibility of criminal liability subject to a certain threshold in terms of damage. This threshold is usually determined by means of evaluation criteria (significant size, significant damage). It is up to the procedural decision-maker — the prosecutor's office, the judge — to assess whether similar effects occurred in a specific case. Nevertheless, this assessment cannot be arbitrary. The procedural body must make some factual

⁶ Султанов А.Р. Европейские правовые стандарты, уроки истории и правоприменительная практика. Москва, 2012, р. 164.

findings taking into account the current state of knowledge about the environment. This makes it necessary to consult an expert opinion in order to determine the sequence of events, the nature and extent of the damage caused by the actions of a potential perpetrator and to estimate their extent. In practice, the situation with expert opinions on similar issues is ambiguous.

The basic problem very often is the lack of generally accepted (in the expert community) methodology of research. As a result, conclusions made by the expert or experts may be denied by the defence attorney only on the grounds that the expert used or did not use specific methods. In environmental crime cases, the defence attorney very often requests the appointment of another expert, which in itself does not solve the problem, but only deepens it. For a lawyer, it is extremely difficult to assess the opinion of expert in a situation where there are several of them in a case and they relate to the same subject matter. In the absence of a legitimate, unified research methodology, the divergence in the conclusions of experts representing opposing and arguing sides is something that we can certainly expect to see. In a similar case, the multiplication of expert opinions does not in itself bring more clarity, leading to a prolongation of the process⁷.

In Russia, in criminal proceedings since mid-2002, the defence side has the right to present an expert's opinion. According to Article 58 of the Penal Code specialist is a person with special knowledge, whose task is to assist the parties to proceedings in disclosing and securing objects and documents, using technical means, formulating questions for the expert, answering questions falling within the scope of his competence. From 2017 onwards, the defence party's request to participate in the criminal case with a specialist when his or her assistance is necessary must be taken into consideration⁸.

The specialist in the Russian criminal trial is usually a private expert who prepares opinions on behalf of the defence attorney. As a rule, the specialist does not carry out any research, because the research is the prerogative of a trial expert, who can only be appointed by an investigator or court, and not by a defense attorney. There is a certain logic in this: the defence attorney in the Russian criminal proceedings does not have access to the original material evidence, so the specialist representing the defence side cannot repeat or carry out the examination of the secured evidence on his own. The procedural institution of the specialist in the Russian criminal trial legalises the so-called meta-opinion. However, his procedural status is similar to the procedural status of a private expert in Poland, who has no legal access to evidence and whose work most often boils down to the analysis of the expert's opinion. Such an expert at best has at his disposal scans of documents from the case file of various quality. The opinion of a private expert in Poland may constitute so-called free evidence, however, the true conclusions contained in it do not bind the procedural decision-maker⁹ in any way. The services of private

⁷ Lt. Ostaszewski P, Klimczak J, Włodarczyk-Madejska J, Joński K, Biegły w postępowaniu sądowym. Kompleksowy obraz systemu w świetle badań aktowych, ankietowych, statystycznych i ekonomicznych. Warsaw, 2016, p. 53.

⁸ Федеральный закон от 17.04.2017 N 73-ФЗ «О внесении изменений в Уголовно-процессуальный кодекс Российской Федерации». *Российская газета*, 19.04.2017, No. 83.

⁹ Compare: Kmiecik R, Kontrowersyjne unormowania w znowelizowanym kodeksie postępowania karnego. *Prokuratura i Prawo*, 2015, Vol. 1–2, p. 13.

experts in Russia are also used by law enforcement agencies. In the Russian practice, just like in Poland, it happens that a private expert (specialist) does not have full and up-to-date knowledge concerning the subject of the research or the necessary equipment.

However, taking into account the large queue in the public laboratories, the conditions offered by private experts (short deadlines for drawing up an opinion, willingness to answer all questions of interest to the procedural authority) play an important role in the selection of the expert¹⁰. Unfortunately, both in Russia and Poland there is a lack of effective control mechanisms to ensure the quality of private expert opinions.

It must be admitted that in Poland some actions are being implemented in order to improve the situation with experts. For example, the creation of the Institute of Economic and Financial Expertise¹¹ is being discussed. In Russia, the government's new draft law on court experts, which is intended to solve the problem of private experts and the quality of their opinions, is still at the stage of discussion in parliamentary committees.

As far as state experts are concerned, a methodology has been developed in Russia for conducting environmental expertise in criminal cases concerning crimes against the environment. In accordance with the Decree of the Ministry of Justice of the Russian Federation of 12 September 2005. N 169 on the amendment of the regulation of the Ministry of Justice of Russia of 14.05.2003 N 114¹² The judicial and environmental expertise is an independent type of judicial expertise. This means that such expert opinions must be carried out in accordance with a specific procedure by people who have been granted the right to carry out such studies themselves. Ecological expertise belongs to the so-called non-identification and diagnostic expertise, and its basic task is to assess the effects of anthropogenic factors on the environment. The expertise is of a comprehensive nature. It is carried out by specialists in biology, ecology, geology, geography, chemistry and other fields. The only centre that performs similar research is the Russian Federal Centre for Forensic Expertise (RFCSE) at the Ministry of Justice of Russia, whose branches are located in many regions (however, ecological research is carried out only in some RFCSE laboratories. Within the framework of judicial and environmental expertise, a number of studies are carried out:

- determining the type and location of the source of negative anthropogenic impact;
- diagnostics of the negative impact of humans on the environment in time and space;
- restoration of the mechanism of negative anthropogenic impact;
- determining the scale of negative anthropogenic impact, factors, circumstances that cause the intensification of such an impact;

¹⁰ Майорова Е.И, Судебно-экологическая экспертиза в судопроизводстве по делам об экологических правонарушениях. *Судья*, 2017, No. 9, p. 3.

¹¹ Institute of Economic and Financial Expertise: Government patent for experts. *Electronic source*: <http://prawo.gazetaprawna.pl/artykuly/1227543,instytut-ekspertyz-ekonomicznych-i-finansowych-rzadowy-patent-na-bieglych.html>, accessed: 30.09.2018.

¹² *Российская газета*, 23.09.2005, No. 3882 with later amendments.

- establishing the circumstances connected with the violation of environmental legislation, the mechanism for the functioning of potentially dangerous industrial structures;
- identification of any acts or omissions by persons authorised to protect the environment and manage natural resources that have contributed to cause any observed damage or created a real risk to human life and health¹³.

Nowadays, state laboratories carry out several types of ecological expertise:

1. Soil condition expertise;
2. Expertise of the condition of natural and artificial biocenoses;
3. Ecological state expertise of objects located within the city limits;
4. Ecological state expertise of water facilities;
5. Ecological assessment of the condition of components of the natural environment in order to estimate the expenses necessary to restore the original condition¹⁴.

It is worth noting that in Russia there is a procedure of obtaining by experts the right to independently carry out environmental expert opinions in criminal cases. In order to be able to carry out research independently within the framework of any of the above mentioned types of ecological expertise, an expert (state) must have appropriate qualifications. The mandatory requirements are that the candidate has a university degree in one of the following disciplines: ecology, biology, agrochemistry, geology, geography, hydrotechnics, chemistry, physics and mathematics. Candidates receive one year's specialist training, which finishes with a state examination. The examiners, despite assessing the candidate's answers to theoretical questions, analyse the expert opinions carried out as part of the training. After obtaining the 'right to sign', the expert has to prove his or her competence every five years by passing the state examination again¹⁵.

The specific nature of environmental expertise in Russia is that experts estimate not the extent of the damage caused by the acts or omissions of a potential perpetrator, but the cost of restoring the original condition. In accordance with the methodology, the expert's report takes into account each of the components, elements of the environment that have been destroyed. The initial state shall be determined on the basis of an examination of the remaining part of the territory in which there are no negative effects¹⁶.

In his opinion, the expert avoids answering questions of a legal nature. His task is to identify the causes of the phenomenon and to forecast its further development.

¹³ Омелянюк Г.Г, Судебно-экологическая экспертиза. Территория и планирование, 2006, Vol. 2, Issue 4, p. 1.

¹⁴ Приказ Минюста России от 27.12.2012 N 237 (ред. от 19.09.2017) об утверждении Перечня родов (видов) судебных экспертиз, выполняемых в федеральных бюджетных судебно-экспертных учреждениях Минюста России, и Перечня экспертных специальностей, по которым представляется право самостоятельного производства судебных экспертиз в федеральных бюджетных судебно-экспертных учреждениях Минюста России. *Electronic source:* https://www.consultant.ru/document/cons_doc_LAW_278704/, accessed: 30.09.2018.

¹⁵ Майорова Е.И, Судебно-экологическая экспертиза в судопроизводстве по делам об экологических правонарушениях. *Судья*, 2017, No. 9, p. 3.

¹⁶ *Ibid.*, p. 5.

Experts shall not go beyond the limits of their competence by expressing their opinion on matters which are beyond their expertise. Whether the actions or omissions of the perpetrator of the destruction in the natural environment caused by the acts or omissions belong to the category mentioned by the legislator (significant damage) is decided by the procedural body. Nevertheless, the expert may, in his opinion, indicate the legal norms which he considers to have been violated in this case and, from the perspective of his knowledge, explain the meaning of the terms used by the legislature.

The methodology of ecological expertise provides for the expert to become acquainted with the trial documentation collected in the criminal case files, including the protocol of examination of the scene of the incident, protocols of questioning witnesses and suspects, photographs taken at the scene of the incident, secured evidence and protocols of their examination. Material data carriers (process documents, results of tests on environmental components carried out in the context of official controls by the regional authorities of the Federal Environmental Supervision Service, photographs, results of laboratory tests of samples from the scene of the event) do not always give a complete picture of the event, which limits its reconstruction. Therefore, as part of the environmental expertise, the expert may carry out an expert inspection. A similar visual inspection is most appropriate where the procedural body raises a question about the possibility of restoring the destroyed or damaged biological object to its original condition.

Within the scope of the inspection, the expert takes samples, takes photographs, prepares a report and sketches. Sampling at the scene of the event takes place in accordance with the agreed procedure, which describes the manner of securing them and the conditions for further storage¹⁷. In practice, however, when carrying out this activity, the experts often forget that according to the requirements of Russian criminal procedural law, all obtained additional objects should first be included in the case file. Only then the procedural body passes them on to the expert for examination. If there is a need to obtain additional tests, the expert must apply to the procedural body. Another error in the case of expert examination by an expert is the lack of information on whether the initial consent of the procedural body has been obtained. It also happens that the expert does not record the conditions under which the examination was carried out, does not give details of the persons who participated in it. The absence of such information raises doubts about the inspection itself, its circumstances and undermines the objectivity and reliability of the obtained data which the expert refers to in his opinion¹⁸. A common mistake as far as similar visual inspections are concerned is the lack of documentation showing their scope and course as well as the presentation of documents containing serious defects by an expert.

In practice, experts very often receive ambiguous, imprecise questions or questions of a legal nature which clearly go beyond the scope of the expert's competence. After the examination, the expert may instruct the procedural authority to modify the questions included in the decision on his appointment. As a part of the so-called expert initiative, an expert in his opinion may independently

¹⁷ Россинская Е.Р, Судебная экспертиза: типичные ошибки. Москва, 2012, р. 220.

¹⁸ *Ibid.*, р. 222.

go beyond the scope of questions asked by a procedural authority if the necessity arises to clarify certain issues related to the subject of the expertise which, in the expert's opinion, may be of importance for the proper examination of the case. It is worth noting that in accordance with the recommendations of the methodology of judicial and ecological expert opinions, the visual inspection of the scene of the incident may be carried out only in the period from April to November, which is associated with the possibility of full observation of the damage or pollution caused by the perpetrator.

In conclusion, I would like to point out that the standardisation of environmental expertise is a necessary step. Especially in a situation when the market for expert services is well-developed. Another obligatory element is the training of practitioners in the field of ecological expertise, which must cover such practical issues as the scope of possibilities and types of research carried out within the framework of a given expertise, methodology of conducting the research on particular components of the environment, the significance of terminology used in expert opinions.

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Streszczenie. Ekspertyza ekologiczna pełni szczególną rolę w sprawach o przestępstwa przeciwko środowisku. Jej głównym zadaniem jest odwołanie mechanizmu zdarzenia. Jednocześnie biegli muszą ustalić, czy zaistniał związek przyczynowo-skutkowy pomiędzy działaniami domniemanego sprawcy albo sprawców a obserwowaną zmianą negatywną w środowisku. Ważnym elementem ekspertyzy jest określenie rozmiaru spowodowanych przez sprawcę szkód oraz wskazanie środków, które należy podjąć w celu przywrócenia stanu maksymalnie zbliżonego do stanu pierwotnego sprzed zdarzenia. Autor omawia aktualne problemy ekspertyzy w zakresie ochrony środowiska w Rosji, m. in. zwraca uwagę na brak powszechnie akceptowanej metodologii w tej dziedzinie. W Rosji ten rodzaj badań mogą wykonywać zarówno biegli zatrudnione w laboratoriach państwowych, jak i biegli prywatni. W odróżnieniu od biegłych państwowych, biegli prywatni nie są zobligowani do stosowania w swojej praktyce metodologii badań opracowanej przez rosyjskie Centrum Ekspertyz Sądowych w Moskwie. Na uwagę zasługują również ten fakt, że obecnie brak jest skutecznych mechanizmów kontroli na jakością ekspertyz wykonywanych przez laboratoria prywatne, rzetelnością, naukowością stosowanych metod i wykorzystywanych danych. Ta sytuacja powoduje, że wyniki końcowe badań takich biegłych nie zawsze są wiarygodne i naukowo uzasadnione. Niezliczone problemy praktyczne wynikają również z samego przedmiotu badań. Dynamiczny charakter zmian zachodzących w środowisku, istnieje skomplikowanych więzi pomiędzy jego komponentami sprawiają, że ustalenie przyczyn zdarzenia, określenie rozmiaru szkód nie jest zadaniem łatwym.

Резюме. Судебно-экологическая экспертиза занимает особое место в процессе расследования преступлений против окружающей природной среды. Её главным заданием является реконструкция происшествия. Эксперты также устанавливают причинно-следственную связь между действиями подозреваемого (подозреваемых) и наступившими или потенциальными негативными последствиями. Важным элементом данного вида экспертизы является определение размера ущерба, а также путей восстановления первоначального состояния окружающей среды и стоимостная оценка такого восстановления. В России данный вид экспертных исследований могут производить эксперты, работающие в государственных лабораториях, а также частные экспертные фирмы. Последние в отличие от государственных экспертов не связаны методологическими рекомендациями, разработанными в Российском Федеральном Центре Судебной Экспертизы. На сегодняшний день нет также эффективных механизмов контроля за качеством частных экспертиз, научностью применяемых ими методик и точностью используемых исходных данных. В результате такие заключения могут быть недостоверными и необоснованными. Множество практических проблем также связаны со спецификой самого предмета исследований. Динамический характер происходящих в окружающей природной среде изменений, существование сложных связей между ее компонентами — это обстоятельства, которые следует учитывать при оценке заключения экологической экспертизы.

