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**Liability in Environmental  
Protection Regulations  
– Outline of the Issue in Polish Law  
– Part One**

**Introductory Remarks**

The construction of the legal protection of environmental resources in Poland is based, in its basic concept, on the triad of liability, i.e. civil liability, administrative liability and criminal liability.

The basic regulations in this subject can be found in Title VI, Section I, II and III of the Environmental Protection Act<sup>1</sup> (hereinafter referred to as the EPA). It does not mean that the Polish legislator managed to

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<sup>1</sup> Act of 27 April 2001, consolidated text: Journal of Laws of 2001, No 178, item 1060.

create a comprehensive regulation in one compact normative act equivalent to an act of the legislature. As an example, it should be noted that, with reference to liability, it specifies that this liability for damage caused by environmental impacts, the provisions of the Civil Code<sup>2</sup> (hereinafter referred to as the CC) are to be applied, unless the EPA provides different regulations in this area. Given the wording of the provision of article 322 of the EPA, it shall be assumed that the basic constructions relating to civil liability in environmental protection should be sought in the provisions of the CC. Therefore, the standards set in articles 323–328 shall be treated as a catalogue of specific regulations, which include differences concerning the liability due to the specificity of the environment as a value protected by law. With regard to administrative responsibility the following fact should be emphasized. In addition to the provisions of the EPA, the regulations which govern it are also included in the Act on prevention of damages to environment and their repair<sup>3</sup> (hereinafter referred to as the Act on Damages). The list of legal acts, which regulate the legal responsibility and which aim at protecting environmental resources, can be found in other normative acts. As an example, provisions of the Atomic Law<sup>4</sup> may be indicated.

It shall, therefore, be assumed that the Polish system of legal liability related to protection of the environment consists of a number of normative acts based on varied methods of regulation. The diversity of legal rules on liability regarding environmental protection results in the impossibility of assuming that a separate system of liability appropriate for protective regulations only exists. Undoubtedly, legal liability constructions, based on which the environment may be protected, are elaborate and have a specificity resulting from the subject of protection.

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<sup>2</sup> Act of 23 April 1964 Civil Code, Journal of Laws, No 16, item 93, with subsequent amendments.

<sup>3</sup> Act of 13 April 2007 on preventing damages to the environment and their repairing, Journal of Laws, No 75, item 493 with subsequent amendments.

<sup>4</sup> Act of 29 November 2000, consolidated text: Journal of Laws of 2007, No 42, item 276.

## **1. Application of the Civil Code provisions on the grounds of the Environmental Protection Law (selected issues)**

In accordance with article 322 of the EPA of 27 April 2001<sup>5</sup>, in regard to the liability for damage caused by environmental impacts, the provisions of the CC shall be applied, unless otherwise provided by the Act. This provision is an example of a reference to another normative order expressing approval of the legislator for civil law ‘to infiltrate’ into the area of environmental regulations.

In the Polish legal system references are a relatively common way of legislation, it is allowed by the legislator or practice, despite the lack of a clear normative basis for doing so. The reference typically requires additional interpretation treatment, which would permit to read and weigh the values protected by various regulations appropriately<sup>6</sup>. In regard to the text of article 322 of the EPA, despite the fact that this provision clearly indicates the direct application of the provisions of the CC, important doubts concerning its interpretation occur, as the formula ‘shall apply accordingly’ is not used.

As the wording of article 322 of the EPA is a direct reference to the CC (‘the provisions of the Civil Code shall be applied’), it should be assumed that the primary legislation containing the rules of civil liability for damage caused by impacts on the environment is the CC, however, the following provision of article 323 of the EPA clearly induces to revise the approach. According to this provision, anyone who by unlawful impact on the environment is directly threatened with damage or a damage has been done to may require the person responsible for the threat or violation to restore a lawful state and preventive measures to be taken, especially by mounting or installation of protective devices against the hazard or violation, and, where it is impossible or excessively difficult, they may require the activity causing a hazard or violation to be ceased. If a threat or violation concerns the environment as a common good, the State Treasury, a local government unit, as well as an ecological organization may lay claim.

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<sup>5</sup> Act of 27 April 2001, consolidated text: Journal of Laws of 2011, No 178, item 1060.

<sup>6</sup> Further on the issue of law interpretation see: M. Zieliński, *Wykładnia prawa. Zasady. Reguły. Wskazówki*, Warsaw 2002, p. 74.

The confrontation of the regulations provided in articles 322–328 of the EPA requires a few observations of a more general and ordering nature to be made.

There is no question that because of the nature and uniqueness of the good protected by the EPA preventive measures should be of the utmost importance, especially those that eliminate an immediate threat of damage. Repairing a damage that has already arisen in the environment is often very difficult or even impossible. It should be noted that the legal issues concerning a direct threat of damage and environmental damage is regulated by the Act of 13 April 2007 on prevention of damage to the environment and its repair<sup>7</sup>, and not by provisions of the EPA (article 7a of the EPA). The provisions of the Act on prevention of damages to environment and their repair are a part of public law which uses legal instruments relevant to this law, and, therefore, they essentially contain differences in relation to private law regulations. In literature it is noted that the Act did not contravene the rules of civil liability and criminal liability in wider environmental law, but it only supplements the system of civil liability in a limited scope<sup>8</sup>. The above regulations and the views of representatives of science entitle to take the stand that civil law provisions are of a great importance in the area of the principles of repairing damage to the environment. Therefore, there are no regulation defining the scope and terms of liability for damages contained in the EPA. Given the wording of article 323 of the EPA above mentioned, its relation to the provisions of the CC applicable to damage to the environment, in particular article 435 and other provisions of the CC, should be considered.

### 1.1. Basic issues of the relationship between the Environmental Protection Law and provisions of the Civil Code

The subject-matter literature states that article 323 of the EPA is an independent, ancillary to the provisions of the CC basis for claims for

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<sup>7</sup> Act of 13 April 2007 on prevention of damage to the environment and its repair, Journal of Laws, No 75, item 493 with subsequent amendments.

<sup>8</sup> M. Pchałek, in: M. Górski, M. Pchałek, W. Radecki, J. Jerzmański, M. Bar, J. Jendrońska, S. Urban, *Prawo ochrony środowiska. Komentarz*, Warsaw 2011, p. 185 and the cited literature.

damages caused by impacts on the environment<sup>9</sup>. It is liability detached from the guilt of the perpetrator, based on a tort in the form of a wrongful impact on the environment. The liability is somewhat differently constructed than the liability provided in article 435 section 1 of the CC. The provision of article 435 section 1 of the CC does not require any evidence of illegality, liability for damages is provided regardless of whether the damage occurred in conditions of an unlawful action. This responsibility is not excluded by the fact that the activities taken by a company was fully consistent with legally established requirements, such as administrative standards defining the level of air, water or soil pollution, as well as commonly accepted precepts of safety and precaution, and also that it stayed within the area of average distortion measure determined in accordance with the criteria of article 144 of the CC<sup>10</sup>. In the jurisprudence of the Supreme Court it has been stressed that deliberations whether it is possible to assign fault or wrongful negligence to an entity whose responsibility is constructed on the basis of risk, should be considered unnecessary due to the fact that the evidence of lack of their guilt does not exclude liability<sup>11</sup>. The question of illegality evidence is then a fundamental issue, required in addition under article 323 of the EPA and neglected in the provisions of the CC referred to in the EPA. This requirement that illegality evidence occur, in this respect, narrows the scope of this provision compared to the scope of article 435 section 1 of the CC.

Accepted in article 323 of the EPA the risk principle occurs on the grounds of the CC in strictly specified cases. The interesting solution set in the provision is that its application is admissible not only in case of damage, but also in a situation of the threat of damage. The alternative nature of the basic grounds for liability draws attention: the existence of damage or imminent threat of damage. In this situation, it can be assumed that under article 323 of the EPA the evidence of damage (primary for the

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<sup>9</sup> M. Bar, in: M. Górski, M. Pchałek, W. Radecki, J. Jerzmański, M. Bar, J. Jendrośka, S. Urban, *Prawo ochrony środowiska. Komentarz*, Warsaw 2011, p. 1115.

<sup>10</sup> M. Safjan, Komentarz do art. 435 Kodeksu cywilnego, in: *Kodeks cywilny*, Vol. I, K. Pietrzykowski (ed.), third edition, Warsaw 2005, p. 1233.

<sup>11</sup> As in the Supreme Court ruling of 19 June 2001, II UKN 424/00, OSN 2003, No. 6, item 15 and ruling of 14 February 2002, I PKN 853/00, OSN 2002, No. 18, item 4, see: W. Dubis, Komentarz do art. 435 Kodeksu cywilnego, in: *Kodeks cywilny. Komentarz*, E. Gniewek (ed), 2. edition, Warsaw 2006, p. 728.

liability regulated in the CC) does not have to occur for the liability to be started under this provision.

In addition, an unlawful environmental impact is a crucial element which is clearly stated. It should be emphasized that the content of article 432 of the EPA shows that the condition for assigning the liability is unlawful environmental impact in case of imminent threat of damage, as well as in case of damage.

Furthermore, the provision of article 432 of the EPA is characterized by the fact that anyone who has suffered from damage can lay claim to restore a lawful state, i.e. existing prior to the damage. This provision requires prudence in practical application, since it is possible that the perpetrator of the damage will be obliged to repair other damages, which have not been done by them.

## 1.2. The issue of remedy

It should be noted that the provision of article 323 of the EPA brings limitations to ways of damage redressing, and usually the rules of remedy provided in article 363 of the CC are used only in an appropriate and prudent way. The basic rule in the CC specifying a remedy in practice usually refers to a different type of damage, primarily to damage in substitutable goods (the issue of non-pecuniary damage is omitted here). In accordance with article 363 of the CC, damages should occur at the choice of the aggrieved party, or through restitution or by paying an appropriate sum of money. However, if restitution is impossible or entails undue hardship or costs for the debtor, the claim of the aggrieved party is limited to the provision of money. Article 323 of the EPA does not give the aggrieved party as wide selection of remedy forms as article 363 of the CC. In addition, it should be noted that article 323 of the EPA does not provide an obligation to restore 'the original state', but 'a lawful state'. These two concepts do not always have to overlap with each other. The disparity between these terms can be significant in case of unlawful environmental impact by many factors at different periods of time.

The provision of article 323 of the EPA does not mention the issue of damage remedy by paying an appropriate amount of money (compensation), it does not exclude the possibility of monetary compensation for damages. Mainly due to the nature of the protected good payment of monetary damages

may not be a primary way to remedy environmental damage. The possibility to claim monetary compensation for non-pecuniary damages (articles 445 and 448 of the CC) or payment of an appropriate amount of money for a social purpose indicated by the aggrieved party (article 448 of the CC) is another issue. In the area of environmental protection, due to the nature of the protected good, the most desirable way to remedy resulting damage already done is natural restitution. This process can take many years or centuries, and in many cases, the requested remedy could prove to be impossible, for this reason preventive and proactive actions should be of the utmost importance. Even the best designed system of liability rules will not be able to meet the compensation function in many cases of environmental damage.

It should be also emphasized that article 323 section 2 of the EPA presents a different concept of damage from the model adopted by civil law. The analysed provision indicates that the damage to the environment is understood as a violation of a common good<sup>12</sup>. In contrast to the rules governing the provisions of the CC, the damage here is not identifiable with a specific legal entity occurring as the aggrieved party (the creditor). There is, therefore, a key problem of reconciling the public interest<sup>13</sup> resulting from the ‘spirit’ of the EPA and the private interest essentially protected by the civil law. It seems that in this confrontation the private interest remains overshadowed by the public interest, despite the fact that the provision is based on civil law

It should be noted that damage in both language of the law and legal language is an abstract concept and as a generalization requires filling content<sup>14</sup>.

In Polish legal literature, as in literature of other countries (especially of those originating from the Germanic law system), it is most commonly referred to as detriment to legally protected goods (interests). In case of damage the balance in the area of goods and interests protected by law

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<sup>12</sup> See further on the issue: E. K. Czech, *Szkoda w obszarze środowiska i wina jako determinanty odpowiedzialności administracyjnej za tę szkodę*, Białystok 2008, p. 183.

<sup>13</sup> See further on the issue: J. Ciechanowicz-McLean, *Interes publiczny w prawie ochrony środowiska*, in: *Problemy współczesnego ustrojoznawstwa. Księga Jubileuszowa Profesora Bronisława Jastrzębskiego*, Olsztyn 2007.

<sup>14</sup> M. Kaliński, *Szkoda na mieniu i jej naprawienie*, Warsaw 2008, p. 173 and the works referred to.

is upset. In the civil law compensatory liability is associated with occurrence of damage<sup>15</sup>.

It should be noted that the definition of damage, normatively defined as damage to the environment, remains outside the provisions of the EPA. It has characteristics of a general concept and in case of specific questions it requires clarification. In accordance with article 6 section 11 of the Act of 13 April 2007 on the prevention of damages to environment and their repair, damage to environment means a negative, measurable change in the state or functioning of natural elements, assessed in relation to the initial state, which was caused directly or indirectly by activities carried out by a user:

- a) to protected species or protected natural habitats, having significant adverse effects on reaching or maintaining the conservation status of the species or natural habitats, however damage to protected species or protected natural habitats does not include previously identified adverse effects arising from actions of an entity using the environment under article 34 of the Act of 16 April 2004 on the protection of nature, or in accordance with a decision on environmental conditions of approval for a project within the scope of the EPA of 27 April 2001,
- b) to waters, having a significant negative impact on ecological, chemical and quantitative state of waters,
- c) to the earth's surface, which signifies contamination of soil or earth, including in particular contamination that may pose a threat to human health.

The provision of article 322 of the EPA refers to 'damage caused by impacts on the environment'. It is a concept different in content from the 'damage to the environment'. In literature it is assumed that the cause of damage caused by impacts on the environment is human behaviour causing environmental impacts. Thus, the provision does not apply to damage caused by animals of protected species on the basis of separate regulations<sup>16</sup>.

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<sup>15</sup> T. Dybowski, in: Z. Radwański (ed.), *System Prawa Cywilnego. Prawo zobowiązań – część ogólna*, Wrocław – Warszawa – Kraków – Gdańsk – Łódź 1981, p. 214 and the works referred to.

<sup>16</sup> M. Bar, in: M. Górski, M. Pchalek, W. Radecki, J. Jerzmański, M. Bar, J. Jendrośka, S. Urban, *Prawo ochrony środowiska...*, p. 1110.



Reflecting on types of protected goods, even without a detailed study, it can be stated that, especially in recent decades, it is clear that more and more attention is paid to the protection of goods of a special nature, those that are not traded on the market and do not belong to the sphere of exchange of goods and services. The experiences of the former so-called people's democracy countries clearly indicate that a type and scope of legally protected goods or interests is dependent not only on the progress of civilization, human consciousness and level of education, but also on a political system (which translates into the content of the concept of damage). Human activity in the areas of activities listed in article 8 of the EPA was recognized as an activity which may be conducted only with regard to the principle of environmental protection and sustainable development. The fast progress of civilization and consumerism inevitably involve threats to the environment, hence, the need for special protection of the environment as the foundation of human existence. Damage caused by environmental impacts is most often associated with pollution of air, water and earth. This kind of damage can take the form of a material, as well as intangible damage – damage to property and person.

In practice, material damages, which can be both a detriment to property or injury to a person (e.g. medical expenses, damage of earnings), are the most common damages. Within the concept of 'material injury' the damage (*damnum emergens*) and the damage of expected benefit or profit (*lucrum cessans*) are distinguished. It should be noted, however, that more and more, apart from compensation for material damages, individuals are demanding financial compensation for non-pecuniary damage suffered. The rules determining compensation are more complicated in practice<sup>17</sup>. The size of damage occurring in everyday life is usually significantly smaller than in case of environmental damage.

In literature and judicature, apart from the typical division into material and non-pecuniary damages, or damage to property and damage to person, new classifications and interpretations of damage occur, formulated on the basis on different criteria.

In theory and jurisprudence of the courts the classification of direct and indirect damages is also recorded. Direct damages occur when a damage to interests and goods protected by law refers to a person directly affected

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<sup>17</sup> For further information on the issue see: J. Matys, *Model zadośćuczynienia pieniężnego z tytułu szkody niemajątkowej w kodeksie cywilnym*, Warsaw 2010, p. 177.

by it, and an indirect damage affects other entities, such as family members in case of a damage of earning capacity by a person supporting the family and providing for justified needs of life. No justification is required to state that this distinction can be fully referred to the field of damage caused by impacts on the environment, environmental damage.

The literature uses the term of ‘future damage’ in the context of article 444 section 2 of the CC providing a claim for a pension<sup>18</sup> when the aggrieved party has lost wholly or partly their earning capacity, or if their needs have increased or their chances for success in future have decreased. The concept of future damage in such a form can be argued, noting that this provision refers substantially to existing damages, because, as article 444 section 2 of the CC says, the aggrieved party has already lost goods determined in that paragraph, as well as in regulations of the EPA referring to the CC.

It seems that future damage can be discussed more clearly in the context of the resolution of the Supreme Court, which ruling is encapsulated in the statement that adjudging a compensation in the case of damages for bodily injury or harm to health does not preclude a determination of the defendant’s liability for damages that may arise in the future from the same event in the same ruling<sup>19</sup>. The quoted ruling refers to a state which may arise in the future in the sphere of goods protected by law and not to ways of repairing existing damages. There is no obstacle to claim to determine the liability for damages that may arise in the future from the same event in the case of damage to the environment.

### 1.3. Damage caused by increased or high risk plants as a structural element of liability

Article 324 of the EPA discloses further doubts about the relationship between the EPA and the CC. According to its provision in case of damage done by an increased or high risk plant article 435 of the CC shall be applied irrespectively whether the latter is propelled by forces of nature or not. Above all, article 324 of the EPA extends admissibility of the application of liability based on article 435 of the CC. According to article 435 section 1

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<sup>18</sup> A. Śmieja, in: A. Olejniczak (ed.), *System Prawa Prywatnego*, Vol. 6, p. 686.

<sup>19</sup> The Resolution of the Supreme Court of 17.04.1970, III PZP 34/69, OSNC 1970, No. 12, item 217.

of the CC, who runs an independent undertaking or a plant propelled by forces of nature (steam, gas, electricity, liquid fuels, etc.), shall be liable for damage to persons or property, caused to anyone by the movement of the undertaking or plant, unless the damage occurred due to force majeure or solely through the fault of the aggrieved party or a third party, which they are not liable for.

The common point is that a tort (delict) is the basis for the application of both provisions – article 324 of the EPA and article 435 of the CC. Moreover, one can assume that the exemption conditions constitute an element connecting both provisions. However, the conditions for their application are different. The wording of article 324 of the EPA shows that the classification of an activity as operating in order to profit is of no significance, but the fact of operating increased or high risk activity, i.e. level of risk imposed to the environment, is relevant. The very concept of ‘a plant’ does not coincide with the term ‘an undertaking’ used in the CC (article 55<sup>1</sup> CC). It should be assumed that a plant has a far broader definition than an undertaking intended to conduct organized business activities for profit. As it can be observed, the regulation uses concepts that require extreme prudence and awareness in the process of evaluating the public interest and interests of the entrepreneurs intervening in environment resources from entities applying the rules. Extending (with regard to the subject and the object) of liability for damage caused by increased or high risk plants may not lead to liability for damages done with any activity.

Although the liability pointed in article 324 of the EPA has several features that differ it from the liability referred to in this provision, i.e. in article 435 of the CC, it does not seem possible to distinguish a new kind of liability, a new legal structure on this basis<sup>20</sup>. The basis (tort) and principle (risk) are the same, and they are mainly determined by the structure of liability.

The role of article 327 of the EPA provision comes down to facilitation of evidence in lawsuits. Anyone who is entitled to claim civil damages done to the environment, filing the claim may demand that the court oblige the person bearing the liability involved in the claim to provide information necessary to determine the extent of this liability. Costs of preparing the information shall be borne by the defendant unless the claim is proved to

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<sup>20</sup> Differently in: J. J. Skoczyłaś, *Odpowiedzialność za szkodę wyrządzoną środowisku – tezy do nowelizacji art. 435 k.c.*, Przegląd Sadowy 2008, No. 7–8, p. 13.

be unfounded. In addition to the facilitation of evidence, this provision includes a preventive element. Anyone who lays unjustified claims to the court shall take into consideration the risk of being charged for the costs.

The legal solution provided in article 328 and article 80 of the EPA is also worth mentioning. Environmental organizations may apply to the court with a claim to cease advertising or other way of promotion of goods or services if their content promotes a consumption model contrary to the principles of environmental protection and sustainable development, in particular use of wildlife images to promote products and services negatively affecting the natural environment.

### Summary Notes

The above-mentioned problems associated with the use of the civil law in the area of the environmental protection law clearly show the terminological incoherence of a fundamental nature, such as the concept of damage. Due to different nature of protected goods it is difficult to apply directly (and such a way is indicated by article 322 of the EPA) the provisions of the CC in the area of the environmental law. Despite the fact that the tendency to expand the concept of ‘damage’ is clearly visible in the civil law, it does not include the specific damage caused by the impact on the environment. Moreover, inconsistency of the compensation rules is also evident.

The provisions of articles 325–328 of the EPA are of a complementary nature. The provision of article 325 of the EPA does not create a new quality, it only highlights what can be interpreted pursuant to the provisions of the CC and the Supreme Court jurisprudence. Liability for damage caused by impact on the environment does not exclude the fact that the activity that causes the damage is carried out on the basis of the decision and within its limits.

The literature proposes a division of plants into the following categories:

- 1) plants of increased or high risk, which are set in motion by forces of nature,
- 2) plants of increased or high risk, which are not set in motion by forces of nature,
- 3) other plants which are set in motion by forces of nature.

This division gave rise to an attempt to organize the liability principles covered by the regulation of articles 322–328 of the EPA. This way, plants

belonging to Groups 1, 2 and 3 are responsible for damages on the basis of risk within the meaning of article 435 of the CC. Plants of Group 1 and 3 are liable on the basis of this provision of the CC, whereas Group 2 – under article 324 of the EPA. Only plants belonging to Group 4 are not liable for damages on the basis of article 435 section 1 of the CC, but are liable on the basis of article 415 of the CC if a fault may be assigned to them<sup>21</sup>.

In accordance with article 326 of the EPA, the entity who repaired damage to the environment is entitled to claim reimbursement of expenses made for this purpose, the amount of the claim is limited in this case to reasonable expenses incurred to restore the previous state, from the perpetrator. It is possible that the damage will be repaired by an entity other than the perpetrator. The claim for reimbursement of reasonable expenses can be laid only if the compensation was based on the natural restitution. If the remedy payment was based on an appropriate compensation, the claim under article 326 of the EPA is not permissible<sup>22</sup>. It is worth noting that according to article 326 of the EPA the claim for costs is eligible in case of restoration to the prior state (not to the lawful state, which is mentioned in article 323 of the EPA), which causes additional difficulties in interpretation.

The provision of article 326 of the EPA is a consequence of the legitimate assumption that, in the event of environmental damage, the damage should be repaired through natural restitution, by bringing back the lawful state. Monetary damages as a remedy is definitely of secondary importance. Moreover, it should be added that the provision of article 326 of the EPA indemnity is shaped in a specific way and it clearly differs in its construction from article 441 section 2 and 3 of the CC.

Currently provisions of the CC applicable in case of damage caused by environmental impacts can be classified into those that give rise to the formulation of restitution claims, i.e. article 222 section 2 of the CC serves as a measure of a preventive nature, and provisions giving rise to claim for damages, i.e. article 435, article 415 of the CC. It might be added the legal regulation of article 439 of the CC giving the right to request to take the

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<sup>21</sup> E.K. Czech, *Rola art. 325 Prawa ochrony środowiska w odpowiedzialności cywilnej w ochronie środowiska*, Przegląd Prawa Ochrony Środowiska 2/2010, p. 9–18, see also bibliography there included.

<sup>22</sup> A. Lipski, in: J. Jendroška (ed.), *Ustawa – Prawo ochrony środowiska*, Wrocław 2001, p. 815.

measures necessary to ward off imminent danger, in particular, caused by activities of an undertaking or a plant.

Statutory regulations usually do not keep pace with the needs that arise along with the development of new discoveries and technologies that are man-made. It should be noted that the tendency to widen the area of goods or interests protected by law meets with social approval. Unfortunately, the process is accompanied by dysfunctional phenomena, such as the commercialization of specific goods and values, which stem from ideas foreign to the concept the property. It seems that even the most efficient penal, administrative, compensation and prevention means of law are not able to protect effectively the environment if not accompanied by intense educational activities increasing awareness on uniqueness and irreplaceability of the protected good, i.e. the environment.