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Hydropower in Poland

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1. Introduction

Renewable energy can be obtained from renewable energy sources such as wind, solar radiation, geothermal energy, waves and tides, energy produced from biomass, liquid biofuels, and water. The main focus of this section is on hydropower. The world leaders in hydropower are primarily Asian countries (mainly China), African countries (Namibia, Uganda, Ethiopia, and Zambia), South America (Brazil, Venezuela, Argentina, Ecuador, and Chile), North and Central America (Canada, Mexico, Costa Rica, and Honduras).[1] In Europe, in turn, such countries include mainly Norway,[2] Iceland, Sweden, Switzerland, Austria, Croatia, Finland, Latvia, Macedonia, and Slovenia.[3] The main objective of this part of the study will

[1] A. Jarosiewicz, K. Toczko, *Hydroenergia drogą do poprawy stanu jakości środowiska przyrodniczego* [Hydroenergy as a way to improve the quality of the natural environment], „Słupskie Prace Biologiczne" 2006, No. 3, pp. 15–16, https://www.nationalgeographic.com/environment/global-warming/hydropower/ (access: 19.10.2019).

[2] M. Nowacki, *Prawne aspekty bezpieczeństwa energetycznego w UE* [Legal aspects of energy security in the EU], Warszawa 2010, Lex.

[3] I. Jonek-Kowalska, *Zrównoważone zużycie energii. Polska na tle pozostałych krajów Europy* [Sustainable energy use. Poland compared to other

be to present the Polish regulations affecting the implementation and development of hydropower in Poland. In Poland, the use of hydropower has its own history. Its beginnings date back to the 12th century, and can be exemplified by the use of water to drive water mills, or sawmills and spinning mills.[4] Hydroelectric power plants are generally located in areas with natural slopes, or in places where water has been artificially dammed up, such as in Włocławek, in the Kujawsko-Pomorskie Voivodeship, or on lakes,[5] or streams.[6] Hydropower in Poland is developing mainly in the basin of the Vistula River and its tributaries, as well as in the Oder River and its tributaries. Large power plants are located in Żarnowiec and Włocławek.[7] Statistical data show that in Poland in 2017, energy obtained from renewable sources was mainly derived from solid biofuels (67.9%), wind energy (14.0%), and liquid biofuels (10.0%).[8] Thanks to hydroelectric power plants

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European countries], "Etyka Biznesu i Zrównoważony Rozwój. Interdyscyplinarne studia teoretyczno-empiryczne" ["Business Ethics and Sustainable Development. Interdisciplinary theoretical and empirical studies"] 2017, No. 4: *Rozważania różnorodne*, p. 12.

[4] J. Norwisz, T. Musielak, B. Boryczko, *Odnawialne źródła energii – polskie definicje i standardy* [Renewable energy sources – Polish definitions and standards], "Rynek Energii" 2006, No. 1, p. 10–20; S. Bajkowski, B. Górnikowska, *Hydroenergetyka na tle produkcji energii z innych źródeł odnawialnych* [Hydroenergy compared to the production of energy from other renewable sources], "Przegląd Naukowy. Inżynieria i Kształtowanie Środowiska" 2013, No. 59, p. 77; K. Fodrowska, *Elektrownie wodne w Polsce*, https://enerad.pl/oze/wykorzystanie-i-wytwarzanie/elektrownie-wodne/ (access: 19.10.2019).

[5] E.g. Resolution No. XXI/167/2008 of the Kolbudy Commune Council of 2 December 2008 on the adoption of the local spatial development plan for a fragment of the geodetic area of Lublewo in the commune of Kolbudy in the region of the hydroelectric power plant on Lake Gostyński, Official Journal of the Pomeranian Voivodeship of 2009. See also judgment of the Supreme Administrative Court of 14 September 2018, II FSK 564/18, Legalis No. 1868651.

[6] Judgment of the Provincial Administrative Court in Warsaw of 24 May 2006, VII SA/Wa 117/06, Lex nr 922569.

[7] B. Igliński, *Hydro energy in Poland: the history, current state, potential, SWOT analysis, environmental aspects*, "International Journal of Energy and Water Resources" 2019, No. 3, p. 66, https://doi.org/10.1007/s42108-019-00008-w (access: 18.10.2019).

[8] Energy from renewable sources in 2017, GUS study available at https://

transforming the energy of flowing water into electricity, in 2018 the largest amount of electricity in Poland, i.e. 109,639.733 MWh, was generated in so-called small installations (micro and small ones, so called MEW).[9] However, the largest amount of energy is still generated from conventional fuels, such as hard coal and lignite.[10] The report of the President of the Energy Regulatory Office shows that in Poland the largest share in new production capacity according to fuel technology in the perspective of 2018–2032 "is units operating on the basis of hard coal (33.24%) and wind farms (31.88%)".[11] According to the data provided by the President of the Energy Regulatory Office, as of 31 March 2019, there were approximately 3054 hydroelectric power plants in Poland.[12] As of 30 June 2019, hydroelectric power plants in Poland generated 194,500.653 MWh of electricity.[13]

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stat.gov.pl/obszary-tematyczne/srodowisko-energia/energia/energia-ze-zrodel-odnawialnych-w-2017-roku,3,12.html (access: 18.10.2019).

[9] Report – summary information on the production of electricity from renewable energy sources in micro or small installations (Article 17 of the Act on Renewable Energy Sources) prepared by the Energy Regulatory Office, Warsaw, April 2019, https://bip.ure.gov.pl/bip/o-urzedzie/zadania-prezesa-ure/raport-oze-art-17-ustaw/3556,Raport-zbiorcze-informacje-dotyczace-wytwarzania-energii-elektrycznej-z-odnawial.html (access: 18.10.2019).

[10] Report on the activities of the President of the Energy Regulatory Office in 2018, Warsaw April 2019, p. 51. The free development of renewable energy in Poland compared to other EU countries is highlighted in the writings of M. Gorczyca, *Energia ze źródeł odnawialnych w Polsce na tle innych krajów Unii Europejskiej* [Energy from renewable sources in Poland compared to other EU countries], "Energetyka" 2011, No. 8, pp. 515–518.

[11] Information on investment plans concerning new generation capacities in the years 2018–2032, "Bulletin of the Energy Regulatory Office" 2019, No. 1, p. 4–7.

[12] Installations of renewable energy sources as of 31.03.2019, https://www.ure.gov.pl/pl/oze/potencjal-krajowy-oze/8108,Instalacje-odnawialnych-zrodel-energii-wg-stanu-na-dzien-31-marca-2019-r.html (access: 26.10.2019).

[13] The amount of electricity generated from RES in 2005–2019, confirmed by certificates of origin issued up to 30.06.2019, https://www.ure.gov.pl/pl/oze/potencjal-krajowy-oze/5753,Moc-zainstalowana-MW.html (access: 26.10.2019).

2. The concept of hydropower

The starting point for further analysis will be the establishment of a conceptual framework. The broad definition of renewable energy sources was presented by the Renewable Energy Working Party (REWP) set up by the International Energy Agency (IEA).[14] According to Article 28(a) of Directive 2009/28/EC,[15] the term *renewable energy* means energy from renewable non-fossil sources, i.e. wind energy, solar energy, aerothermal, geothermal, hydrothermal and ocean energy, hydropower, energy from biomass, landfill gas, sewage treatment plant gas, and biological sources (biogas). The Polish RES Act defines renewable energy sources as renewable, non-fossil energy sources including wind energy, solar energy, aerothermal energy, geothermal energy, hydrothermal energy, hydropower, wave energy, currents and tidal energy, energy obtained from biomass, biogas, agricultural biogas, and bio-liquids.[16] The subject of the study will be hydropower understood as the mechanical energy of water, excluding energy obtained from pump works in pumped-storage or hydroelectric power plants with a pump module (Article 2 item 12 RES). In the doctrine, energy obtained "from tides, currents, or waves and from the fall of water below the surface of the earth" is excluded from the term.[17]

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[14] Cf. Renewables in Global Energy Supply. An IEA Fact Sheet. International Energy Agency. November 2002, Renewables Information 2002 (with 2000 data), https://www.iea.org (access: 29.10.2019).

[15] Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources, amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, Official Journal EU.L No 140, p. 16, as amended, hereinafter referred to as Directive 2009/28/EC.

[16] Article 2(22) of the Act of 20 February 2015 on Renewable Energy Sources, consolidated text, Journal of Laws of 2021, item 610, hereinafter referred to as RES. Similarly, Article 3(20) of the Energy Law Act of 10 April 1997, consolidated text, Journal of Laws of 2021, item 716, as amended, hereinafter referred to as ELA.

[17] A. Frąckowiak, in: *Ustawa o odnawialnych źródłach energii. Komentarz* [The Act on Renewable Energy Sources. A commentary], eds. J. Baehr, P. Lissoń, J. Pokrzywniak, M. Szambelańczyk, Warszawa 2016, Lex.

The scope of the definition is assumed to include energy used by conventional hydroelectric power stations drawing energy from falling or damming up rivers, but not "the energy used by hydroelectric installations if the water had previously been dammed up by means of pumps powered by electricity".[18] In Annex A, point 3.5.1. of Regulation 1099/2008,[19] hydropower is understood as the potential and kinetic energy of falling water converted into electricity by hydroelectric power plants. Hydropower is a collection of products that includes energy generated by run-of-river plants, run-of-river plants with a pump module, and pumped storage. In jurisprudence, doubts arose as to the understanding of the notion of hydropower. The Civil Division of the Warsaw Court of Appeal, by decision of 1 October 2015 in the proceedings between J.D. and the President of the Energy Regulatory Office, asked the CURIA for a preliminary ruling on the interpretation of the second paragraph of Article 2(a) of Directive 2009/28/EC. The question was referred for a preliminary ruling in a case in which the entrepreneur J.D. conducted business activity in the electricity generation sector on the basis of a licence to conduct business activity consisting in the production of electricity from renewable energy sources in two small biogas power plants and one small hydroelectric power plant located on the dump of (industrial) sewage of another plant whose activity is not related to the production of electricity. The licence

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[18] Ibidem.

[19] Regulation (EC) No. 1099/2008 of the European Parliament and of the Council of 22 October 2008 on energy statistics, Official Journal EU L No 304, p. 1, as amended, hereinafter referred to as Regulation (EC) No. 1099/2008. The EU legislator distinguished the following types of hydropower plants: run-of-river plants using only the direct natural inflow of water, not having the capacity to store pumped water (pumping water uphill) (point 3.5.1.1. of Annex A to Regulation (EC) No. 1099/2008), run-of-river plants with a pump module – having a natural inflow of water to the upper reservoir where all or part of the equipment can be used to pump water uphill; electricity is generated both by the natural inflow of water and by water that had previously been pumped uphill (point 3.5.1.2. of Annex A to Regulation (EC) No. 1099/2008) and pumped storage power plants – without a natural supply of water to the upper reservoir; most of the water that generates energy had previously been pumped uphill, excluding rainfall and snowfall (point 3.5.1.3. of Annex A to Regulation 1099/2008).

was issued for the period from 20 November 2004 to 20 November 2014. Because of the passage of time, the entrepreneur asked the President of the Energy Regulatory Office to extend the licence. The authority, by decision of 6 November 2013, refused to extend the licence in so far as it concerned a small hydroelectric power plant, on the grounds that only hydroelectric power plants using energy obtained from waves, currents, tides, and falls of rivers can be recognized as generating energy from renewable sources. J.D. appealed against the above decision to the District Court in Warsaw – the Court for Protection of Competition and Consumers. The Court dismissed the appeal in its judgment of 5 November 2014, stating that the energy generated by a hydroelectric power plant which is not a pumped-storage power plant and is located on the dump of technological wastewater from another plant does not constitute a renewable energy source within the meaning of Article 3(20) of ELA. In the judgment of 2 March 2017 concerning the case C-4/16, CURIA assumed that the notion of energy from renewable sources covers "energy generated in a small hydroelectric power plant, which is neither a pumped-storage power plant nor a power plant with a pump module, located on the dump of technological wastewater from another plant, which had previously taken water for its own purposes".[20] In his Opinion, the Advocate General took the view that the concept of hydropower as a renewable energy source within the meaning of Article 2(a) of Directive 2009/28/EC also includes "energy generated by a hydropower plant using wastewater discharged by another plant performing other activities not related to electricity generation".[21] In conclusion, a broad understanding of the concept of hydropower should be accepted in accordance with the jurisprudence of the CURIA.[22] There is

[20] Judgment of the CURIA of 2 March 2017 in case C-4/16, ZOTSiS 2017/3/I-153.

[21] Point 45 of the Opinion of Advocate General, Manuel Campos Sánchez-Bordona of 15 November 2016 in case C-4/16, http://curia.europa.eu/juris/document/document.jsf?text=&docid=185394&doclang=PL (access: 19.10.2019).

[22] Judgment of the Court of Appeal in Warsaw, V Civil Division of 25 May 2017, VI ACa 66/15, Legalis No. 1675941.

no doubt that hydroelectric power plants should be classified as hydrotechnical structures, understood as structures together with equipment and technical installations related thereto, serving water management and the formation of water resources and their use, including: earth and concrete dams, weirs, discharge structures with overflows and drains, embankment culverts and outlet boxes, navigation sluices, flood protection dikes, power plants and water power plants, inland surface water intakes, sewage outlets, water reservoir basins with slopes and scarps, pumping stations, canals, drifts, hydrotechnical pipelines, siphons, aqueducts, control structures on rivers and streams, thresholds, bulkheads, aboveground tanks collecting liquid and semi-liquid substances, ports, pools, overwintering areas, jetties, piers, decks, quays, boulevards, slipways and breakwaters on inland waters, and fish ladders.[23]

3. The impact of the Water Law on the development of hydropower

With regard to the construction of hydroelectric power plants, including small hydroelectric power plants (MEW), the decision on development conditions or the local spatial development plan specifies the conditions that must be met for the execution of the investment, resulting from separate provisions. Such a separate regulation is the Water Law. In the current legal status, the legislator has provided for the obligation to obtain a water permit covering: granting a water permit; accepting a water management notification; issuing a water management assessment, and issuing decisions exempting from Article 77(3) and (8) and Article 176(4) of WL (Article 388(1) of WL).[24] Issuing a water permit or accepting a water management notification takes place before the decision on

[23] § 3 point 1 of the Regulation of the Minister of the Environment of 20 April 2007 on technical conditions to be met by hydrotechnical structures and their location, Journal of Laws No. 86, item 579, hereinafter referred to as the Regulation of 2007.

[24] The Act of 20 July 2017 – Water Law, consolidated text, Journal of Laws of 2021, item 624, as amended, hereinafter referred to as the WL.

the building permit, the decision on the approval of the building project, and the decision on the permit to resume construction works, as well as before the decision on development conditions are obtained. The jurisprudence has considered whether the construction of a hydroelectric power plant, including the MEW belongs to the category of investments requiring a water permit or whether the notification is sufficient.[25] In the case of power plants, there is an obligation to obtain a decision on a water permit (Article 389(6) of WL).[26] The competent authority in the matter of water permits is the relevant Polish Waters Authorities (Article 397(1) of WL). In the case of hydroelectric power plants, the competent authority is the director of the regional water management board of Polish Waters (Article 397(3) item 1 of WL). The issuance of a water permit is connected with the necessity to pay a fee of PLN 217 to the Polish Waters bank account (Article 398(3) in connection with paragraph 8 of WL). The water permit is issued by way of a decision for a definite period of time, not longer than 30 years, counted from the date on which the decision became final (Article 400(1) of WL). The water permit specifies the purpose of the water equipment and other works designed to be made, the purpose and scope of water use, the conditions for exercising the right, and the obligations necessary for the protection of environmental resources, the inter-

[25] Judgment of the Provincial Administrative Court in Poznań of 8 June 2017, IV SA/Po 217/17, Lex No. 2340994.

[26] A water permit is issued upon application which should be accompanied by the following: 1) statement of water management conditions with the date of its execution, hereinafter referred to as the "statement", together with a description of the intended activity, not including specialist terms; 2) a decision on environmental conditions, if required; 3) an extract from the local spatial development plan, and in the case of its absence – a decision on the location of a public purpose investment project or a decision on development conditions, if required; 4) a water management assessment, if required. The application for a water permit to dam up surface waters with a damming structure with a damming height of more than 1 m. and equipped with devices enabling regulation of flow or dependent water use by several plants is also accompanied by a draft water management manual containing a description of the water management and the satisfaction of the needs of all the users who will benefit from the water equipment covered by the manual, in the number of copies corresponding to the number of water users.

ests of the community, and the economy, within the scope of the impact of the intended water use or water equipment planned to be made (Article 403(1) of WL). The water permit also specifies the obligations of the owner of the equipment. The detailed scope of the permit is specified in Article 403 of WL. The Act also regulates the procedure and required documents for obtaining such a decision. Moreover, the Act regulates an exhaustive catalogue of grounds for refusal to issue a water permit.

It should be noted that the water permit itself entitles the applicant to use the water only in the manner and under the conditions specified in the permit, but it does not entitle the applicant to interfere with the property rights of others. Therefore, the addressee of the water permit should resolve the above issue upon the commencement of the water permit execution.[27] As a rule, investments related to the construction of hydroelectric power plants are located in flowing inland waters and areas owned by the State Treasury (Article 211(2) of WL). Waters owned by the Treasury or local government units are public waters. Inland flowing waters which are public waters are not subject to civil law transactions, with certain exceptions provided for in the Act. The legislator has decided that ownership rights to inland flowing waters and ground waters, with the exception of State Treasury-owned inland waterways of special significance for transport, are exercised by the Polish Waters (Article 212(1), item 1 of WL). Polish waters are a state legal entity within the meaning of Article 9(14) of PFA[28] and include the following organizational units: 1) the National Water Management Board with its registered office in Warsaw; 2) regional water management boards with their registered offices in Białystok, Bydgoszcz, Gdańsk, Gliwice, Kraków, Lublin, Poznań, Rzeszów, Szczecin, Warsaw, and Wrocław; 3) basin authorities; 4) water supervision. Polish Waters represent the State Treasury and exercise ownership rights of the State Treasury in relation to

[27] Judgment of the Provincial Administrative Court in Gdańsk of 31 May 2011, II SA/Gd 899/10, Legalis No. 407357.

[28] The Act of 27 August 2009 on public finance, consolidated text, Journal of Laws of 2021, item 305, hereinafter referred to as the PFA.

inland waters and ground waters, as well as to land covered by inland waters (Article 258(1) of WL). Polish Waters, after obtaining the consent of the minister in charge of water management, may also entrust the exercise of State Treasury ownership rights over inland waters flowing within the territorial self-government units or their associations (Article 213(3) of WL) to territorial self-government units or their associations, by way of an agreement and upon their request.

Owing to the fact that the investments in the field of hydropower generation interfere with the natural environment as indicated above and may potentially have a significant impact on the environment,[29] the implementation of such investments requires prior fulfilment of a number of obligations by the investor, as specified, e.g., in the Act of 3 October 2008 on the provision of information on the environment and its protection, public participation in environmental protection, and environmental impact assessment.[30] Since the construction of a hydroelectric power plant has been classified as a project that may potentially have a significant impact on the environment, the investor is obliged to obtain a decision on environmental conditions (the so-called environmental approval) pursuant to Article 71(2) item 2 et seq. of PIEP. According to the jurisprudence of Polish courts, the essence of the environmental approval is that it "does not infringe the ownership right, does not give the investor any rights to the area of potential investment, but determines the impact of the project on the environment and the requirements to be met to minimize the effects of negative impact of harmful factors".[31] Obtaining the environmental approval takes place before other decisions listed in Article 72(1) of PIEP are issued. These are, e.g. decisions concerning building permits, approvals of the building designs, permits to resume construction

[29] § 3 section 1(5) and section 2(2) of the Regulation of the Council of Ministers of 10 September 2019 on projects that may significantly affect the environment, Journal of Laws of 2019, item 1839.

[30] Consolidated text, Journal of Laws of 2021, item 247, as amended, hereinafter referred to as PIEP.

[31] Judgment of the Provincial Administrative Court in Gdańsk of 18 September 2018, II SA/Gd 341/18, Legalis No. 1824758.

works, permits to change the use of the building or its part, permits to dismantle nuclear facilities, conditions of construction and land development, water permits to regulate water, water permits to make water devices, and water permits to extract stone, gravel, sand and other materials from water, permits to process waste, and permits to collect and process waste. The investor's application for a decision mentioned in Article 72(1) of PIEP requires the submission of an environmental approval. The development of hydropower is also significantly influenced by spatial planning regulations.[32] In principle, the determination of land use, the deployment of public purpose investments, and the determination of methods of land use and development conditions is carried out in the local spatial development plan (Article 4(1) of the spatial planning and land development act, SPLDA), whereas if no local plan has been adopted, the determination of methods of land use and development conditions is done by way of a decision on the location of public purpose investments or a decision on development conditions (Article 4(2) of the SPLD). If the local legislator has adopted a local spatial development plan and provided for the location of equipment generating energy from renewable sources[33] – hydropower, in such a case it is not necessary to apply for a decision. However, in the absence of a local spatial development plan, the investor is obliged to apply for a relevant decision. In principle, decisions on the location of public purpose investments are issued for public purpose investments, and decisions on development conditions apply to other investments. The question arises whether the construction of a hydroelectric power plant constitutes

[32] The Act of 27 March 2003 on spatial planning and land development, consolidated text, Journal of Laws of 2021, item 741, as amended, hereinafter referred to as SPLDA.

[33] The need to regulate the conditions in the study and, in the local plan, the places where devices generating energy from renewable sources, in particular those with a capacity exceeding 100 kW, can be located, is highlighted in the doctrine. A. Fogel, *Planowanie przestrzenne* [Spatial planning], in: W. Federczyk, A. Fogel, A. Kosieradzka-Federczyk, *Prawo ochrony środowiska w procesie inwestycyjno-budowlanym* [Environment Protection Law in the investment and construction process], Warszawa 2015, Lex.

a public purpose investment. According to the definition of "public purpose investment" contained in the Act on Spatial Planning, this type of investment is considered to be an investment of local (commune) and supra-local (poviat, voivodeship, and national), as well as national (including international and supra-regional investments), and metropolitan (including metropolitan area) importance, regardless of the status of the entity undertaking these activities and the sources of their financing, constituting the implementation of the objectives referred to in Article 6 of the Real Property Management Act.[34] The legislator enumerates investments of public purpose investment significance in Article 6 of the RPMA, and the catalogue of these investments is exhaustive.[35] A literal interpretation of Article 6(2) of RPMA leads to the conclusion that the construction of small hydroelectric power plants does not constitute a public purpose investment, since the provision covers only the construction and maintenance of drainage paths, pipes, and equipment for the transmission or distribution of fluids, steam, gases, and electricity, as well as other facilities and appliances necessary for the use of these pipes and equipment, but does not cover equipment for the production of fluids, steam, gases

[34] The Act of 21 August 1997 on real property management, consolidated text, Journal of Laws of 2020, item 1990, as amended, hereinafter referred to as the RPMA.

[35] The Judgment of the Supreme Administrative Court of 24 April 2018, II OSK 2470/17, Legalis No. 1804015. The jurisprudence presents a position according to which "the concept of public purpose investment is in its essence based on the objective criterion, and not on the subjective or functional one. This means that an investment of this type is any action of a local or supra-local nature which pursues public objectives, regardless of whether the investor is a private or a public entity. The involvement of public funds is also irrelevant. Public purpose investments may be financed in full from both private and public funds, provided that they pursue the objectives set out in Article 6 of RPMA. If they pursue objectives from outside the catalogue, even with the exclusive participation of public funds, they will not be public purpose investments within the meaning of the Act on Planning and Spatial Development and if there is no local spatial development plan in the area of their implementation, a decision on development conditions will be issued". Judgment of the Provincial Administrative Court in Wrocław of 6 December 2006, II SA/Wr 315/06, Legalis No. 286285.

and electricity. The jurisprudence of Polish courts considered the nature of the construction of equipment generating energy from renewable sources to be included. Thus, it was assumed that neither a single wind power plant, nor a wind farm is a public purpose investment,[36] as in the case of a construction of a photovoltaic system.[37] The judicature also considered issues related to the construction of hydroelectric power plants and their nature. One of the judgments stated that "an investment consisting in the construction of a small hydroelectric power plant is a public purpose investment, because it is impossible to separate the construction of a hydroelectric power plant from its function of transforming mechanical energy into electricity and sending it through electricity networks".[38] The nature of the public purpose investment is also confirmed by the fact that, in the Court's view, "the electricity that will be produced in the hydroelectric power plant by means of hydro turbines, once connected to the electricity grid, will have to be purchased by the energy company, which means that the electricity will be available to the public".[39] At present, however, the judicature is dominated by the position that hydroelectric power plants do not constitute a public purpose investment.[40] A hydroelectric power plant is not "a device for transmitting or distributing electricity, nor is it an object or device for the use of electricity trans-

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[36] Judgment of the Provincial Administrative Court in Gdańsk of 1 February 2017, II SA/Gd 707/16, Legalis No. 1568942, Judgment of the Provincial Administrative Court in Bydgoszcz of 18 January 2011, II SA/Bd 1307/10, Legalis No. 339839.

[37] Judgment of the Provincial Administrative Court in Kraków of 3 November 2015, II SA/Kr 1179/15, Legalis No. 1371353.

[38] Judgment of the Provincial Administrative Court in Wrocław of 6 December 2006, II SA/Wr 315/06, Legalis No. 286285.

[39] Ibidem.

[40] Judgment of the Provincial Administrative Court in Łódź of 24 June 2010, II SA/Łd 337/10, Legalis No. 245658. The Court stated that an investment consisting in "the installation of equipment for generating electricity on the existing damming weir on the river and a power cable connecting the power plant with the public network, i.e. the construction of a hydroelectric power plant, is not a public purpose investment".

mitting or distributing equipment".[41] The position of the Courts is based on the idea that the main purpose of the investment (water power plant/hydroelectric power plant) is the generation of energy and not its transmission. Owing to the fact that hydroelectric power plants are not public purpose investments, the execution of such a project requires obtaining a decision on development conditions, which is provided for in Article 59 of SPLDA,[42] if no local spatial development plan has been adopted for the given area. It should be noted that the construction of a hydroelectric power plant requires prior environmental approval. The question arises about the relationship between the environmental approval and the decision on development conditions. Is the environmental approval binding for the body issuing the decision on development conditions pursuant to Article 86 of PIEP, and if so, to what extent? Both in the doctrine and jurisprudence it is assumed unanimously that the environmental approval "determines only the environmental conditions for projects with specific characteristics, the fulfilment of which enables the execution of these projects, and the main point of the procedure for such an approval is to recognize all the threats and nuisances of the planned project in relation to the environment and to determine the impact of the planned investment on the environment. On the other hand, the decision on development conditions is different in its nature: it serves to determine the characteristics of the planned change in the land development so that it is adapted to the existing characteristics of the development of the neighbouring area in order to guarantee the spatial order referred to in Art. 2.1.1 of SPLDA by means of such spatial arrangement as to create

[41] Judgment of the Supreme Administrative Court of 17 December 2010, II OSK 1928/09, Legalis No. 358052.

[42] M. Wolanin, in: *Ustawa o gospodarce nieruchomościami. Komentarz* [The Act on real property management. A commentary], eds. J. Jaworski, A. Prusaczyk, A. Tułodziecki, Warszawa 2020, Legalis. Cf. Judgment of the Provincial Administrative Court in Kielce of 30 October 2008, II SA/Ke 343/08, Legalis No. 259323; Judgment of the Provincial Administrative Court in Kraków of 30 January 2009, II SA/Kr 735/08, Legalis No. 170087; Judgment of the Supreme Administrative Court of 15 May 2008, II OSK 548/07, Legalis No. 135736.

a harmonious whole, taking into account functional, economic, social, and compositional conditions".[43] The environmental approval is binding on the authority issuing the decision on development conditions, however, the extent to which the environmental approval is binding "does not apply to the designated area of the project's impact for the purposes of the procedure, but to the characteristic parameters of a given project and its impact on the environment".[44] The legal nature of the analysed decisions is different. They are issued on the basis of separate legal regulations. In judicature, it is assumed unanimously that the binding nature of the environmental decision referred to in Article 86 of PIEP "takes place only in relation to the identity of the planned project".[45] The decision on development conditions is a constrained decision. If all the conditions specified in Article 54 and Article 61(1) of SPLDA are met, the authority is obliged to issue a decision. In the case of hydroelectric power plants, it is necessary to consider whether such an investment can be regarded as a technical infrastructure installation, which means that the investor would not have to prove the premise of the so-called *good neighbourhood* and access to the public road (Article 61(3) of SPLDA). It should be noted that it has been accepted in the administrative court jurisprudence that Article 61(3) of SPLDA applies to investments consisting in the construction of

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[43] B. Rakoczy, *Ustawa o udostępnianiu informacji o środowisku i jego ochronie, udziale społeczeństwa w ochronie środowiska oraz o ocenach oddziaływania na środowisko. Komentarz* [The Act on Disclosure of Information on the Environment and its Protection, Public Participation in Environmental Protection and Environmental Impact Assessments. A commentary], Warszawa 2010, Lex; K. Gruszecki, *Prawo ochrony środowiska. Komentarz* [Environmental Protection Law], Warszawa 2016, Lex; Judgment of the Supreme Administrative Court of 15 September 2016, II OSK 3092/14, Legalis No. 1588912.

[44] Judgment of the Provincial Administrative Court in Bydgoszcz of 28 September 2016, II SA/Bd 1495/15, Legalis No. 1543628.

[45] Judgment of the Provincial Administrative Court in Gliwice of 6 September 2017, II SA/Gl 342/17, Legalis No. 1668913; Judgment of the Provincial Administrative Court in Gliwice of 6 September 2017, II SA/Gl 340/17, Legalis No. 1668911; Judgment of the Provincial Administrative Court in Bydgoszcz of 28 September 2016, II SA/Bd 1495/15, Legalis No. 1543628.

wind farms,[46] photovoltaic farms,[47] solar power plants.[48] The construction of a hydroelectric power plant has also been considered as such an investment.[49] Since the execution of the investment – construction of a hydroelectric power plant – requires a water permit, the authority examining the application for a decision on development conditions is obliged to make appropriate arrangements with the competent authority (Article 53(4)(11) of SPLDA), and similarly, if the planned investment is located in a flood risk area (Article 169 of WL) Technical conditions to be met by hydrotechnical structures and their location are specified in the regulation of 2007. The authority issuing the decision on development conditions cannot refuse to establish the development conditions if the investment project is not in conflict with separate regulations. In the case of the construction of hydroelectric power plants, the investment project must comply with the provisions of the Water Law. The scope of water use, the conditions for exercising rights and obligations necessary for the protection of environmental resources, the interests of the community and of the economy, result from the water permit. In principle, the scope of the decision on land development conditions cannot cover the issues examined in the separate proceedings. Considerations on the above will be made in the next point.

The construction of a hydroelectric power plant as part of the investment process also requires a building permit decision issued pursuant to the Building Law. The building permit may be issued

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[46] Cf. the Judgments of the Supreme Administrative Court of: 3 March 2011, II OSK 2251/10, Legalis No. 360906; 21 April 2010, II OSK 310/10, Legalis No. 283495; the Judgments of: the Provincial Administrative Court in Poznań of: 6 May 2009, II SA/Po 1003/08, Legalis No. 171292; 27 May 2009, II SA/Po 1000/08, Legalis No. 176608; 17 November 2010, IV SA/Po 762/10, Legalis No. 1963277; 1 December 2010, IV SA/Po 763/10, Legalis No. 1963128; the Provincial Administrative Court in Bydgoszcz of 14 October 2009, II SA/Bd 533/09, Legalis No. 875472.

[47] Judgment of the Provincial Administrative Court in Białystok of 20 February 2018, II SA/Bk 940/17, Legalis No. 1860288.

[48] Judgment of the Provincial Administrative Court of 12 January 2018, II OSK 794/16, Legalis No. 1740921.

[49] Judgment of the Provincial Administrative Court in Łódź of 23 February 2012, II SA/Łd 1273/11, Legalis No. 554236.

only at the request of a party (Article 32(4), clause 1 of BL). A hydroelectric power plant is a structure within the meaning of Article 3(3) of BL, in conjunction with § 3(1) of the Regulation of 2007. According to Article 32(1), item 1 of BL, a building permit may be issued after a prior assessment of the environmental impact of the project or, if required, an assessment of the impact of the project on the Natura 2000 site. It should be noted that the obligation to carry out the environmental impact assessment is required by the execution of: the planned project which may always have a significant impact on the environment, or the planned project which may potentially have a significant impact on the environment.

4. Conclusion

The above considerations indicate that hydroelectric power development in Poland is slow in the case of large power plants, while small and micro electric power plants (MEW) are becoming increasingly popular. Such a state of affairs is mainly due to hydrological conditions, such as: geographical location, with lowland areas being predominant in Poland, low atmospheric precipitation, high permeability of land,[50] threats to the environment, in particular large hydroelectric power plants, which pose a threat to fauna (e.g. power plants disturb fish migration, preventing them from moving up and down the river).[51] Moreover, hydroelectric power plants cause changes in the morphology of rivers and river habitats, disturbance of sediment dynamics, changes in the hydrobiological flow system, changes in the chemical quality, mineral composition,

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[50] A. Jarosiewicz, K. Toczko, *Hydroenergia drogą do poprawy stanu jakości środowiska przyrodniczego* [Hydroenergy as a way to improve the quality of the natural environment], „Słupskie Prace Biologiczne" 2006, No. 3, p. 17.

[51] Z. Muras, M. Swora (eds.), *Prawo energetyczne*, t. 1: *Komentarz do art. 1–11* [Energy Law, Vol. 1: Commentaries to Art. 1–11], Warszawa 2016, Lex; K. Fodrowska, op.cit.; Commission Notice 'Guidelines on hydroelectricity requirements in connection with EU nature conservation legislation', May 2018, Official Journal, UE C 213/01, hereinafter referred to as hydroelectricity guidelines.

and pH of the river, and in cycles of seasonal floods.[52] This is only an example of the negative impact of power plants on the environment. It is demonstrated that the advantage of hydroelectric power plants is fewer greenhouse gases and the disadvantage is the negative impact on "water systems and biodiversity".[53] The restrictions on the development of hydropower in Poland also include high costs related to the execution of the project, as well as lengthy procedures for commencing the execution and implementation of the investment. The Polish legislator has introduced a number of legal restrictions on hydroelectric power plant construction permits. Obtaining a power plant construction permit is preceded by the need to receive relevant permits and make arrangements with the competent authorities. These restrictions are regulated in various dispersed legal acts. One may ask whether such restrictions are justified. In the author's opinion, the presented threats to the environment justify the introduction of statutory restrictions on the building of hydrotechnical structures, in particular large hydroelectric power plants. Nevertheless, bearing in mind the advantages associated with low gas emissions, it seems that the use of the already existing potential in the form of functioning facilities and their modernisation, as well as the introduction of appropriate technological solutions to prevent negative impact on the water fauna and flora environment, speak in favour of the thesis for the introduction of procedural facilitations for the development of small and micro water installations (MEW).

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[52] Hydroelectricity guidelines.

[53] M. Stasiak, A. Kaznowski, *Komentarz do rozporządzenia nr 800/2008 uznającego niektóre rodzaje pomocy za zgodne ze wspólnym rynkiem w zastosowaniu art. 87 i 88 Traktatu (ogólnego rozporządzenia w sprawie wyłączeń blokowych)* [Commentary on Regulation (EC) No 800/2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General Block Exemption Regulation)], Warszawa 2013, Lex.

SUMMARY

Hydropower in Poland

The subject of the analysis in the article is the issue of hydropower development in Poland. The considerations concern legal regulations enabling the construction of hydropower plants. The article postulates the introduction of procedural facilitations in the development of small water and micro-installations (MEW).

Keywords: hydropower; law; renewable energy

STRESZCZENIE

Hydroenergia w Polsce

Przedmiotem analizy w artykule jest problematyka rozwoju hydroenergii w Polsce. Rozważania dotyczą regulacji prawnych umożliwiających budowę elektrowni wodnych. W artykule postulowane jest wprowadzanie ułatwień proceduralnych w zakresie rozwoju małych i mikroinstalacji wodnych (MEW).

Słowa kluczowe: hydroenergia; regulacje prawne; odnawialne źródła energii

BIBLIOGRAPHY

Bajkowski S., Górnikowska B., *Hydroenergetyka na tle produkcji energii z innych źródeł odnawialnych*, "Przegląd Naukowy. Inżynieria i Kształtowanie Środowiska" 2013, No. 59.

Energy from renewable sources in 2017, GUS study available at https://stat.gov.pl/obszary-tematyczne/srodowisko-energia/energia/energia-ze-zrodel-odnawialnych-w-2017-roku,3,12.html.

Fodrowska K., *Elektrownie wodne w Polsce*, https://enerad.pl/oze/wykorzystanie-i-wytwarzanie/elektrownie-wodne/mozliwosci-budowy-i-potencjal/.

Fogel A., *Planowanie przestrzenne*, in: W. Federczyk, A. Fogel, A. Kosieradzka-Federczyk, *Prawo ochrony środowiska w procesie inwestycyjno-budowlanym*, Warszawa 2015, Lex.

Frąckowiak A., in: *Ustawa o odnawialnych źródłach energii. Komentarz*, eds. J. Baehr, P. Lissoń, J. Pokrzywniak, M. Szambelańczyk, Warszawa 2016, Lex.

Gorczyca M., *Energia ze źródeł odnawialnych w Polsce na tle innych krajów Unii Europejskiej*, "Energetyka" 2011, No. 8.

Gruszecki K., *Prawo ochrony środowiska. Komentarz*, Warszawa 2016, Lex.

Igliński B., *Hydro energy in Poland: the history, current state, potential, SWOT analysis, environmental aspects*, "International Journal of Energy and Water Resources" 2019, No. 3, https://doi.org/10.1007/s42108-019-00008-w.

Information on investment plans concerning new generation capacities in the years 2018–2032, "Bulletin of the Energy Regulatory Office" 2019, No. 1, p. 4–7.

Installations of renewable energy sources as of 31.03.2019 r., https://www.ure.gov.pl/pl/oze/potencjal-krajowy-oze/8108,Instalacje-odnawialnych-zrodel-energii-wg-stanu-na-dzien-31-marca-2019-r.html.

Jarosiewicz A., Toczko K., *Hydroenergia drogą do poprawy stanu jakości środowiska przyrodniczego*, „Słupskie Prace Biologiczne" 2006, No. 3, https://www.nationalgeographic.com/environment/global-warming/hydropower/.

Jonek-Kowalska I., *Zrównoważone zużycie energii. Polska na tle pozostałych krajów Europy*, "Etyka Biznesu i Zrównoważony Rozwój. Interdyscyplinarne studia teoretyczno-empiryczne" 2017, No. 4: *Rozważania różnorodne*.

Muras Z., Swora M. (eds.), *Prawo energetyczne*, t. 1: *Komentarz do art. 1–11*, Warszawa 2016, Lex.

Norwisz J., Musielak T., Boryczko B., *Odnawialne źródła energii – polskie definicje i standardy*, "Rynek Energii" 2006, No. 1.

Nowacki M., *Prawne aspekty bezpieczeństwa energetycznego w UE*, Oficyna 2010, Lex.

Rakoczy B., *Ustawa o udostępnianiu informacji o środowisku i jego ochronie, udziale społeczeństwa w ochronie środowiska oraz o ocenach oddziaływania na środowisko. Komentarz*, Warszawa 2010, Lex.

Renewables in Global Energy Supply. An IEA Fact Sheet. International Energy Agency. November 2002, Renewables Information 2002 (with 2000 data), https://www.iea.org.

Report on the activities of the President of the Energy Regulatory Office in 2018, Warsaw April 2019.

Report – summary information on the production of electricity from renewable energy sources in micro or small installations (Article 17 of the Act on Renewable Energy Sources) prepared by the Energy Regulatory Office, Warsaw, April 2019, https://bip.ure.gov.pl/bip/o-urzedzie/zadania-prezesa-ure/raport-oze-art-17-ustaw/3556,Raport-zbiorcze-informacje-dotyczace-wytwarzania-energii-elektrycznej-z-odnawial.html.

Stasiak M., Kaznowski A., *Komentarz do rozporządzenia nr 800/2008 uznającego niektóre rodzaje pomocy za zgodne ze wspólnym rynkiem w zastosowaniu art. 87 i 88 Traktatu (ogólnego rozporządzenia w sprawie wyłączeń blokowych)*, Warszawa 2013, Lex.

Wolanin M., in: *Ustawa o gospodarce nieruchomościami. Komentarz*, eds. J. Jaworski, A. Prusaczyk, A. Tułodziecki, Warszawa 2020, Legalis.