

Piotr **BOŁTRYK**

THE PROCEDURE OF OBTAINING A DECISION
ON THE ENVIRONMENTAL CONDITIONS
OF CONSENT FOR THE IMPLEMENTATION
OF AN UNDERTAKING ON THE EXAMPLE
OF AN INVESTING CONSISTING IN THE
CONSTRUCTION OF A BROILER HOUSE IN
A MULCHING SYSTEM TOGETHER WITH
ACCOMPANYING INFRASTRUCTURE
(part 1 – initial assessment of the investment)

Piotr **Boltryk**, PhD – *Białystok University of Technology*

Correspondence address:

Faculty of Civil and Environmental Engineering

Wiejska street 45E, 15-351 Białystok, Poland

e-mail: p.boltryk@pb.edu.pl

ABSTRACT: The purpose of this paper is to give the reader the understanding of the procedure for obtaining a decision on the environmental conditions of consent for the accomplishment of the undertaking in Poland. The method of case study was used in the research. The subject of the study was the implementation of the investment in the municipality of Kuźnica involving the construction of a broiler house in the mulching system for 30,000 broiler chickens with accompanying infrastructure. The tips contained in the paper can provide invaluable assistance to investors wishing to undertake projects requiring environmental conduct.

KEY WORDS: decision, environment, procedure, evaluation

Introduction

The assessment whether an investment will affect the environment must be the subject of analysis by any investor wishing to complete an investment in the territory of the Republic of Poland to confirm or eliminate the need for an environmental impact assessment (herein after: EIA) for the project being implemented.

The purpose of environmental impact assessment is to anticipate potential environmental hazards during the investment planning stage and the scale of these threats, and to counteract or reduce these threats and to minimize the negative impact of the planned investment.

Environmental impact assessment, in accordance with the Polish law, may be carried out, inter alia in individual proceedings on the issue of decisions concerning environmental conditions of the consent to the completion of undertaking (further also: environmental decision, decision on environmental conditions of the implementation of an investment project).

The procedure associated with issuing of environmental decisions constitutes one of the stages of the broadly understood investment proceedings:

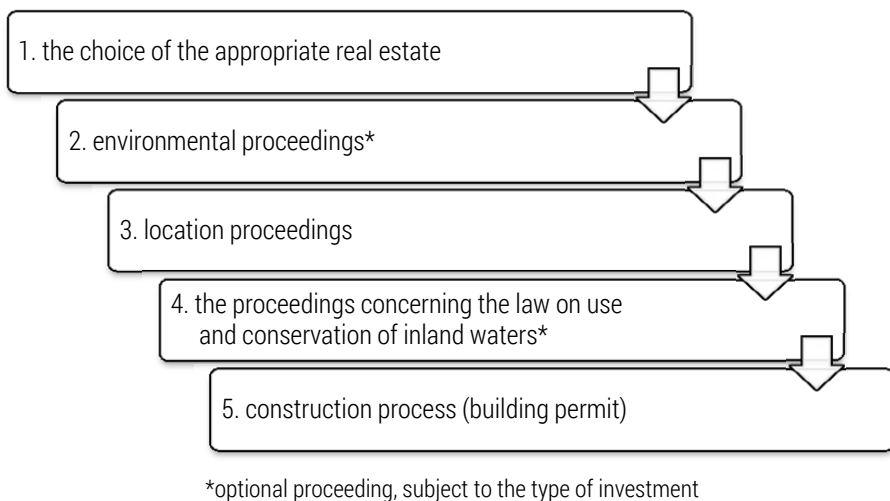


Figure 1. The stages of the investment process

Source: author's own elaboration.

The proceedings on the issue of a decision are conducted on the basis of the act of October 23, 2008 on the provision of information on the environment and its protection, public participation in the protection of the environment and environmental impact assessment (D. U. No. 199, pos. 1227 as

amended, hereinafter referred to as “the act”), the act of 14 June 1960 called the Code of Administrative Procedure (D. U. No. 30, pos. 168 as amended, hereinafter c.a.p), as well as the government order of 9 November 2010 on projects that may have significant effects on the environment (D. U. No. 213, pos. 1397, issued based on the delegated legislation from article 60 from the act – hereinafter referred to as “the order”), which is of key importance for the very existence of an environmental impact assessment in the investment process.

The discussed order deals with separation and classification of projects that can always have significant (§ 2 of the order) or potentially significant (§ 3 of the order) effects on the environment. The environmental impact assessment is since the initial stage, leading to the issue of a decision on the environmental conditions of consent to the completion of a project (WSA judgment in Wrocław dated 22.05.2014, file no. : II SA/Wr 206/14).

Only the investments belonging to any of the above groups may be subject to proceedings in Poland on the issue of a decision concerning environmental conditions of the implementation of an investment project (at the same time taking into account the investments carried out in Natura 2000 areas – article 59 paragraph 2 of the act). This means that investors wishing to pursue projects not expressly stated in the abovementioned order are legally exempt from the obligation to obtain an environmental decision before applying for a building permit.

Table 1. Exemplary projects that can always have significant or potentially significant impact on the environment

§ 2 of the order: Some of the projects that can always have a significant impact on the environment	§ 3 of the order: Some of the projects that can have a potentially significant impact on the environment
Livestock breeding or animal husbandry in the quantity of over 210 LSU;	Livestock breeding or animal husbandry in the quantity of 60-210 LSU;

Source: author's own elaboration based on § 2 and § 3 of the order.

The investment discussed in this article consists in the construction of a chicken coop in the mulching system of 30,000 broiler chickens together with the accompanying infrastructure. The choice of the above-mentioned undertaking was not accidental. This is an investment that was the subject of issuing a decision on the environmental conditions of investment implementation in the community Kuźnica, Sokółka county, Podlasie province in years of 2014-2017.

The author of the article participated in the proceedings as a plenipotentiary, and the number of legal problems encountered during the proceedings prompted him to discuss them as part of this study.

In the first place, it should be given attention to the question of the classification of the investment in question to a specific category of undertakings resulting from the abovementioned order (30,000 broiler chickens). Unfortunately, it does not use the amount of livestock expressed in heads. In turn, it introduces a term known as Livestock Units (hereinafter referred to as LSU, see table 2). Real heads conversion into Livestock Units is based on the conversion factor constituting an attachment to the order.

Table 2. Head converter into Livestock Units

No.	The type of animals	A conversion coefficient of real heads into Livestock Units (LSU);
(...)30.(...)	Hens and ducks	0.004

Source: author's own elaboration based on an attachment to the order.

Considering the above data, a calculation can be made to classify this investment into one of the two groups listed in the order.

$30,000$ (heads of chickens) \times $0,004$ (conversion factor resulting from the order) = 120 LSU.

Thus, it is already known that this investment is eligible for projects that can potentially have a significant environmental impact and it is required to issue a decision on environmental conditions of the investment implementation.

Investor's request

To be able to obtain such a decision, the investor is required to apply for a decision on the environmental conditions of the investment. This is a proceeding that only can be initiated by a party with a legal interest in this matter (article 61 §1 c.a.p. in conjunction with article 28 c.a.p.). The investor who plans to build a chicken house for 30,000 broiler chickens certainly has such a legal interest.

However, it cannot be forgotten that the applicant does not have to have a right to land at the time of applying for an environmental decision. The obligation to legitimize the right to a real estate for construction properties arises only when applying for a building permit. *"The issue of a decision in his*

favor (that is inventor's – author's note), even if it is final, does not give him rise to the rights to the site for future investment, nor does it affect the ownership or rights of third parties, previous owners or persons with limited rights to property or contractual obligations" (the judgment of NSA in Warsaw dated April 14, 2015, ref. file: II OSK 2145/13).

An investor wishing to obtain an environmental decision for a building project of a broiler house for 300.000 broiler chickens (120 LSU) with accompanying infrastructure should submit to the authority that has the right to make the decision (according to the law it is the local commune head or mayor) the following documentation:

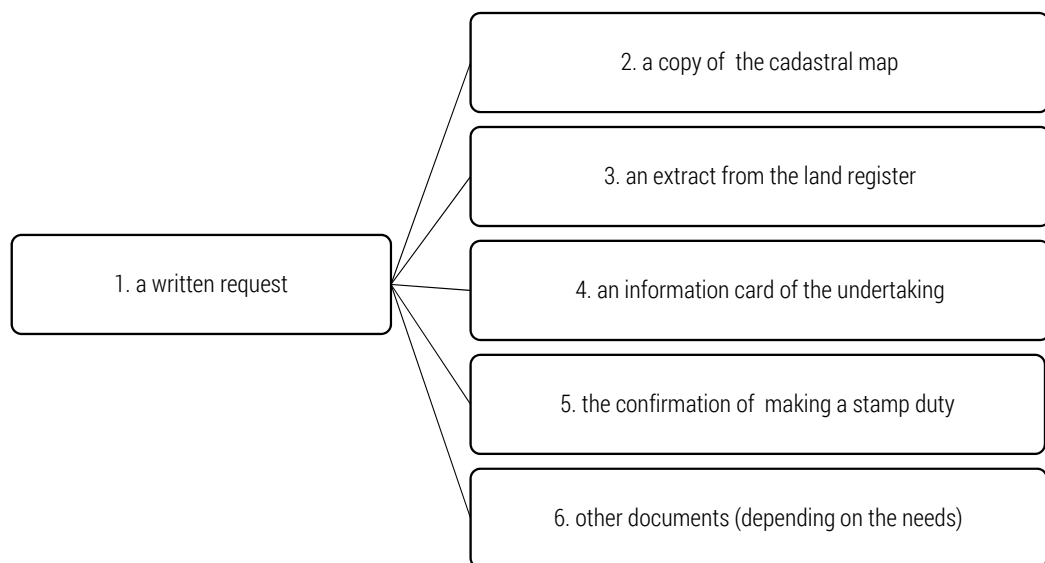


Figure 2. Required elements of the application for an environmental decision for the construction of a poultry house

Source: author's own elaboration based on article 74 pos. 1 of the act.

It should be noted that a copy of the cadastral map should include the projected area on which the project will be implemented and the area to be affected by the project, which together with the extract from the land register will allow the authority to determine the other parties to the proceedings. The fee for issuing the decision is currently PLN 205. Other required documents that need to be attached depending on the needs include the power of attorney together with its fee (PLN 17) when the investor acts by a properly authorized representative.

It should be stressed that in accordance with article 64 §2 c. a. p., if the application is incomplete, or it does not meet other legal requirements, the authority within a period not shorter than 7 days will call the party to supplement it and in the event of the lack of the required documents the application will be left without recognition. Thus, the commented regulation gives the possibility to supplement the missing documents within the time limit set by a commune head or mayor. Only after the expiry of the prescribed time limit the case is not substantively recognized, and the application initiating the proceedings is considered ineffective (Dawidowicz, 1989, p. 89).

As it was already mentioned, the attached cadastral map is used to establish the parties to the proceedings. This is a very important activity that must be undertaken by the authority immediately after the time when the complete application has been received, or supplemented by a request.

In the case of construction of such an investment as poultry breeding, first it should be emphasized that a party in the proceedings concerning the issue an environmental decision to the investor is any entity whose property is within the reach of the planned undertaking. Apart from the applicant, the parties to the proceedings are therefore the owners of the real estate located in the area where the planned undertaking can affect the environment. It is unaffected by the fact that the impact resulting from the planned operation of the installation will cause any nuisance to the owner of such property. It is also irrelevant whether the implementation of this project will result in a breach of environmental standards. The concept of "impact" cannot be narrowed to merely to the effects of excessive influence, exceeding emission or environmental quality standards.

Furthermore, when determining the impact of the project, it should be considered such impacts to which no administrative emission standards have been established. An example is odor emission, which is not currently covered by any of the standards in force to quantify its nuisance (NSA judgment in Warsaw of 15.05.2013, file number: II OSK 108/12).

Failure to notify the initiation of an administrative proceeding and the conduct of the proceeding without the participation of even one of the parties constitutes a qualified procedural flaw, which results in the renewal of the proceedings at the request of the omitted party pursuant to article 145 §1 c. a. p. (NSA judgment in Warsaw dated 06.10.2000, file number: V SA 316/00). In addition, the failure of the authority to notify the party about proceeding initiating cannot be justified by the fact that the party has otherwise learned of the proceedings (WSA judgment in Warsaw of 01.09.2006, file number: I SA/Wa 768/06).

The qualification of an entity as a party to the proceedings results in making it equal in its rights with the applicant, about to the probatory initia-

tive, the possibility of contesting the decision, and the obligation to deliver all letters with a return delivery note. However, it should not be forgotten about the content of article 74 pos. 3 of the law, according to which if the number of parties of the proceedings exceed 20, the mode of delivery by an official announcement is applied. *“The announcement which is stipulated in article 49 of CPA (in relation with article 74 pos. 3 – author’s note) has the effect that any interested party, who is the party to proceedings, may know about the proceedings and their course, thus enabling its potential participation in them”* (WSA judgment in Poznan dated 18.06.2013, file number: II SA/PO 395/130).

Initial assessment of the investment

It is equally important that the division of undertakings into two categories resulting from the order is not accidental and it is of major importance in the context of environmental decision-making. For projects that potentially have a significant impact on the environment, an environmental impact assessment is optional, depending on the will of the authority conducting the proceedings. However, the decision in this respect cannot be arbitrary.

When determining whether an investment (from a potentially significant environmental impact group) requires EIA, the investigating authority will consider all the following aspects:

- the type and nature of the project, including:
 - its range,
 - its connection with other implemented and planned projects in the area,
 - emissions and the occurrence of other nuisances,
- the location of the project, including:
 - possible threat to the environment, especially in existing land use,
 - natural and landscape values,
 - conditions of local spatial development plans,
- the type and scale of possible impact resulting from, inter alia:
 - the scope and nature of the impact of the project on natural elements,
 - considering probability, duration, frequency and reversibility of the impact (article 63 pos. 1 of the act).

Despite the wording that the conditions should be “taken together”, their assessment can only be limited only to those that occur in the case. It is obvious that for the issuing of a decision imposing the obligation to carry out an environmental impact assessment, it is sufficient to state the possibility of a significant environmental impact of the proposed project on the environment in any of the aspects mentioned in this regulation and not in all taken together (WSA judgment in Poznan on 13,12.2012, file number: IV SA /Po 1056/12).

It cannot also be forgotten that the decision to determine whether an investment requires to carry out the assessment of its environmental impact is preceded by an application for an opinion to the competent authorities. In the case of the discussed investment, they are the local Regional Director for Environmental protection and State County Sanitary Inspector. (Opaliński, 2016, p. 160).

Considering the above, it should be noted that the discussed investment (9a chicken house for 30.000 broiler chickens, 120 LSU) requires both a building permit (Okolski, 2014, p. 56, a contrario in article 29 §§ 1-4 of the act of 7 July 1994 concerning the building law D. U. 1994, no. 89, pos. 414, as later amended) as well as the decision on land development conditions (article 59 §1 in conjunction with article 50 §2 point 2 of the act dated 27 March 2003 concerning planning an spatial development – D. U. 2003, no. 80, pos. 717 as late amended), therefore obtaining an opinion, in this case of the State County Sanitary Inspector (article 78 §1 point 2 of the act) is an obligation of the authority conducting the proceedings.

In article 64 § 2 of the act it is clarified which documents and applications should be submitted to the evaluating authorities.

- an application for a decision on environmental conditions,
- a project information card,
- excerpts and extracts from the local spatial development plan or the information on its absence.

After the reception of the above-mentioned documentation, the evaluating authorities conduct two-step analysis of the investment. In the first place, they determine whether there is a need for an environmental impact assessment, and then (if the answer is yes) they give an opinion on the scope of the environmental impact report.

The produced opinions should be issued within 14 days from the date of receiving the application for their issuance (article 64 § 4 of the act), they should take the form of a decision, but which is not a complaint. As it was stated by WSA in Gorzów Wielkopolski: "The opinion concerning the decision on the need to carry out an environmental impact assessment will be expressed in the form of a decision issued based on article 123 § 1 CAP, which is not a subject to complaint. An entity challenging its correctness, however, will be able to do so in a form of a complaint against the decision on the obligation to carry out an environmental impact assessment filed under article 65 § 2 of the act of 3 October 2008 on the provision of information on the environment and its protection, public participation in environmental protection environmental impact assessments" (WSA judgment in Gorzów Wielkopolski on 02.06.2010, file number: II SA /Go 232/10).

On the other hand, if two reviewing authorities, that is the Regional Director of Environmental Protection and the sanitary inspection body, have issued in the same case two opposing views, then the applicant authority may favor one of the submitted stands according to its own assessment according to its own decision (WSA judgment in Gdansk dated 12.11.2011, file number: II SA /GD 698/10).

However, the body conducting the proceedings is not bound by the position of the authorities involved in the case, but it is subject to a final assessment, based on the opinions sought and the selection criteria referred to in article 63 § 1 of the act, whether the assessment of its environmental impact is appropriate for a given project or whether there is no basis for carrying out such an evaluation (WSA judgment in Lublin on 11 May 2011, file number: II SA /Lu 866/10).

In the discussed case, both the State County Sanitary Inspector in Sokółka and the Regional Director for Environmental Protection in Białystok voiced the need for a full environmental impact assessment of the project, about potential social conflicts.

The commune head of the community of Kuźnica issued a decision on the need for an environmental impact assessment and set the scope of the report. According the article 65 § 2 of the act this decision is contestable, which means that at such an early stage of the proceedings the parties other than the investor can verify the validity, as well as the scope of the future environmental impact report.

It is equally important that the decision is also issued when the authority conducting the investigation does not find the need to carry out an environmental impact assessment. In this case, however, it is unappealable. According to the NSA verdict in Warsaw, the possibility of filing a complaint was limited to by the legislator only to the decisions that state the obligation to carry out an environment impact assessment for a proposed project likely to have a significant environmental impact. A complaint that does not require the conduct of an environmental impact assessment of a project is not entitled (NSA judgment in Warsaw on 19.01.2012, file number: II OSK 2084/10). The path to question is not closed, however, as it may be challenged in an appeal against the decision of the first instance authority. Because of the recognition of the appeal as justified, in addition to repealing the decision of the first instance authority, it may also be possible to revoke the decision issued pursuant to article 63 § 1 of the act (WSA judgment in Białystok on 29.09.2009, file number: II SA/Bk 372/09).

It is also worth adding that the environmental impact assessment can also be carried out in the event of a doubt as to the information contained in the project information sheet, which as it is known, a mandatory annex to the

application for a decision on the environmental conditions of the investment. Where there is a doubt as to the evaluation of information contained in the project information sheet, the authority would be obliged, in accordance with the general principle of material truth, according to the instruction of article 7 of the c. a. p. to summon the applicant to remove such doubts. If these doubts were not removed, then, according to the precautionary principle, it would be necessary to declare the need for an environmental impact assessment. Evaluating whether this kind of supplementation of evidence is necessary or not cannot be detached from the order of the individualization of the case and from the realities of the actual case. It cannot also be assumed that for each project it is possible in advance to determine precisely the amount of substances emitted into the environment or to determine precisely the emission of the factors affecting the environment about the implementation of the project. Evaluations or this kind of supplementation of evidence is necessary, however, it cannot be separated from the order of the individualization of the case, and from the actual case (judgment of NSA in Warsaw on 01.02.2013, file number: II OSK 1837/11).

In article 65 § 1 of the act, the legislator indicated a 30-day deadline for issuing a decision on issues that concern the obligation to conduct an environmental impact assessment or the lack of such an obligation. The deadline starts with the date of submission of the complete application, that is the application for a decision on the environmental conditions. It should be noted that the 30-day deadline also considers the 14-day deadline for issuing opinions (Opaliński, 2016, p. 1650).

This means that the first stage of proceedings for undertakings of potentially significant environmental impact should end within 30 days. Until then, the applicant should be informed whether his or her investment will require an environmental impact assessment.

This stage closes first, crucial part of the procedure. By now, the investor should be informed if his/her undertaking should be encompassed with the environment impact assessment or not. In second part of the article, the focus is on further steps that investor has to take into consideration, such as an environmental impact reports, the environment impact assessment (EIA) and the environmental decision itself.

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