

## Procedure on the Assessment of the Environmental Impact of Investment Plans on Natura 2000 Sites in the Polish Legal System

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### ABSTRACT

Numerous legal requirements regarding the implementation of all kinds of investment projects are extremely important means to attain goals related to environmental protection. The procedures concerning the assessment of the impact exerted by investment plans on Natura 2000 sites, which are discussed in this article, belong to the crucial ones. Their existence in the Polish legal system results from the implementation of Community directives (79/409/EEC and 92/43/EEC). Establishing this type of legal form of nature protection in a given area limits its investment use, introducing the requirement to verify the actions taken in terms of their influence on the conservation objectives of Natura 2000 areas. Confirmation of the negative environmental impact in this respect obligatorily prevents a specific investment project from being undertaken. The described legal procedure serves to implement the basic rules of environmental protection, contained not only in the Environmental Protection Law, but also in the Constitution of the Republic of Poland, which include the principles of sustainable development and the individualisation of environmental costs associated with running a business.

**Keywords:** Natura 2000 area, investment process, environmental procedure.

### INTRODUCTION

In Poland the provisions of the Nature Conservation Act of April 16, 2004, as one of the forms of legal protection of nature, the catalogue of which is contained in art 6, specify Natura 2000 areas. The act defines (Article 5 (2b)) the form of nature protection in question as a special protection area for birds, a special area of habitat protection or an area important for the Community, established to protect the population of wild birds or natural habitats, or species that are the subject of Community interest. This regulation clearly indicates the legislative order of the European Union (EU) as the source of Natura 2000 sites in the Polish legal order. It results from the necessity to implement the secondary law of the community, including: Council Directive 79/409/EEC of 2 April 1979 on the protection of wild birds (the so-called Birds Directive) and Council

Directive 92/43/EEC on the protection of natural habitats and wild fauna and flora (the so-called Habitats Directive).

Natura 2000 areas in individual countries supplement nature protection systems, which usually function in the form of protected island areas. Natura 2000 is an international network of species and habitat protection areas connected by ecological corridors [Kistowski and Pchałek, 2009]. In such a system, it is possible to maintain biodiversity and achieve sustainable development provided that conservation and management activities are adequately financed [Hermoso et al., 2018; Sobot and Luksic 2020]. Currently, the discussed legal form of nature protection exists in all EU countries. Its importance is best evidenced by the fact that, according to data from the European Commission, it covers a total of 27,000 zones, which account for 18% of the EU territory. Consequently, it is considered to be the largest

coordinated protected zone in the world [European Environment Agency, 2022]. According to the information from the General Directorate for Environmental Protection (GDEP), in May 2022, there were 1,009 Natura 2000 areas in Poland, covering nearly 70,000 km<sup>2</sup> (approximately 20% of the country's area). The number of habitat protection areas reached 864, and bird protection areas – 145, including 10 areas with a dual status [GDEP, 2022]. The importance that legal provisions attach to the protection of Natura 2000 areas is also indicated by the fact that a chapter relating to this issue has been separated from the content of the Act of 3 October 2008 on the provision of information on the environment and its protection, on public participation in environmental protection and on environmental impact assessments (AEIA – Act on Environmental Impact Assessment). With regard to these areas, it is prohibited, pursuant to the provisions of art. 33 paragraph 1 of Nature Conservation Act, to take actions that may, separately or in combination with other activities, significantly affect the conservation objectives of the Natura 2000 area. As examples of such consequences, the Act indicates: deterioration of the condition of natural habitats or habitats of plant or animal species, and a negative impact on the species for the protection of which such an area has been designated, as well as a reduction in the integrity of the Natura 2000 area or its connection with other areas.

It should be emphasized that establishing a form of nature protection in a given area as a Natura 2000 site does not automatically result in the total exclusion of real estate located in this area from implementing investment projects that may significantly affect the protected area, but are not directly related to it [Harasymiuk et al. 2017; Pawlewicz et al. 2017]. A *sine qua non* condition for the feasibility of such projects is conducting an appropriate environmental impact assessment procedure. The work is aimed at analysing the environmental procedure for investments planned in Natura 2000 areas in Poland.

## THE ENVIRONMENTAL ASSESSMENT OF AN INVESTMENT PROJECT

### Investment classification

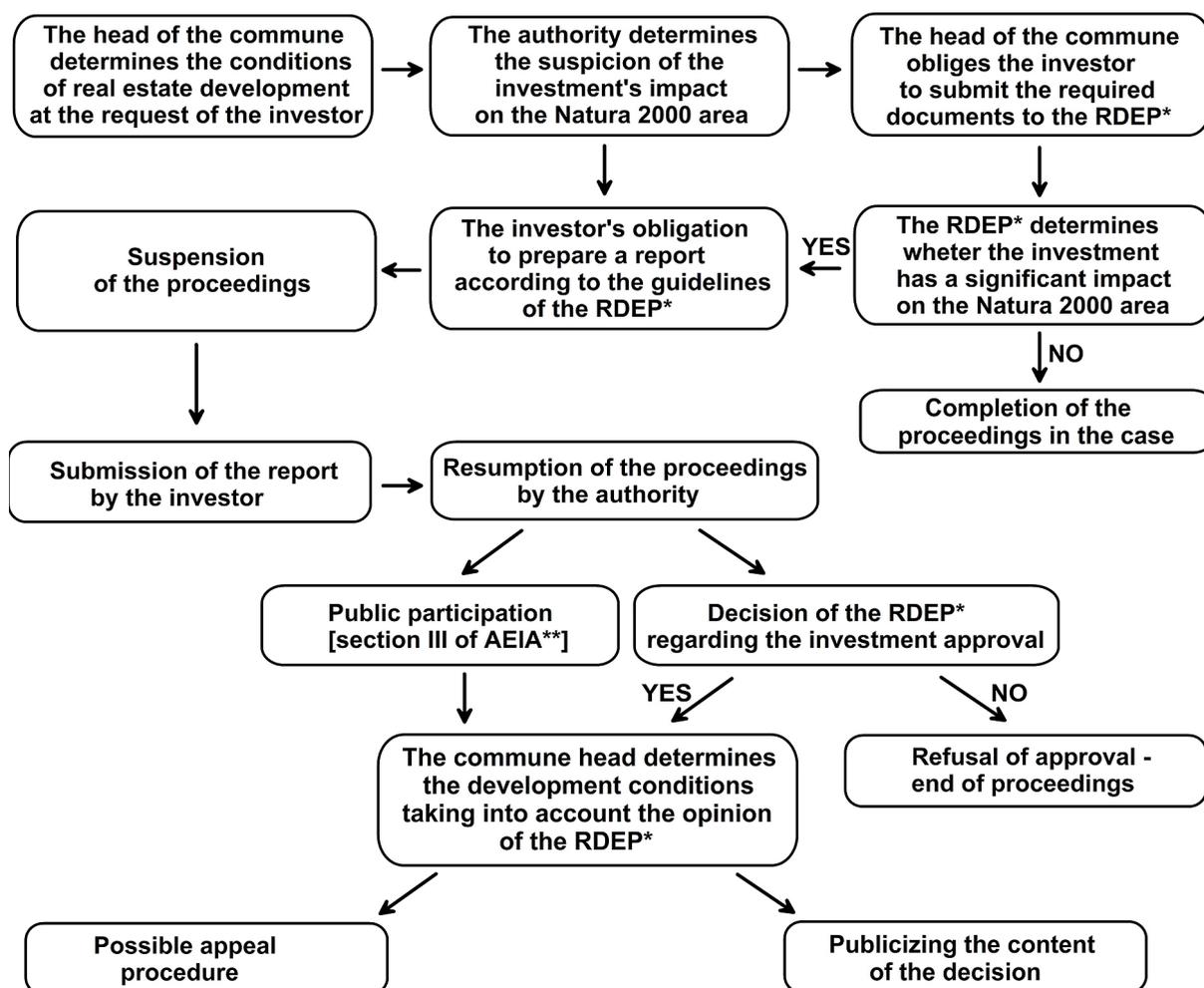
According to the regulations contained in the AEIA (Act on Environmental Impact Assessment), any commencement of the procedure regarding the assessment of the project's impact

on the Natura 2000 area involves initiating the administrative proceedings regarding the implementation of an investment project in a specific area, or notifying the architecture and construction administration authority of the intention to perform construction works, as well as changing the manner of using the facility in relation to the environmental conditions previously established in the decision on environmental conditions. In all the above mentioned cases, the competent authorities are required to carry out an analysis of the potential significant impact of the project on the Natura 2000 site. The considering of the impact on these sites should be deemed as a preventive control instrument, because, as clearly stated in the text of the Act, it should be carried out before accepting the application or issuing a decision.

An example of a catalogue of investment plans in relation to which the competent authority is required to perform the assessment in question is contained in art. 96 sec. 2 AEIA. Its scope covers all types of construction projects that require a building permit or a decision on development conditions, activities requiring geological concessions and water law permits issued on the basis of special acts, permits for the removal of trees and shrubs, as well as a permit for the construction and use of artificial islands, structures and devices in Polish sea areas. The use by the legislator of the term “in particular” in the discussed provision and, consequently, as already mentioned, only an exemplary enumeration of projects that provide a basis for initiating the procedure in question makes it discretionary. The premise for initiating the procedure on the assessment of the project's impact on the Natura 2000 area may be, for example, decisions on the exclusion of agricultural or forest land from production or approving the mining plant operation plan, which are not mentioned directly in the act. Its application in a specific case is always a consequence of a *casu ad casum* analysis of specific factual situations. In practice, proceedings in the case will most often be undertaken in connection with the issuance of a decision on development conditions or a building permit.

### Procedure

The course of the proceedings regarding the assessment of the impact of a project (EIA) on a Natura 2000 area has been shown in Figure 1. The entity competent to decide on a given case will be the head of the commune (town mayor) with



**Explanation:**

\* The Regional Director for Environmental Protection

\*\* The Act of Environmental Impact Assessment

**Figure 1.** The course of the EIA procedure for the Natura 2000 area in Poland

regard to an application for issuing the conditions of development, or the head of the county – with regard to a building permit, respectively.

In the event the indicated administration body finds that the impact of the project on a Natura 2000 area is potentially significant, then, pursuant to the provisions of art. 96 sec. 3 of the AEIA, it issues a decision to impose on the applicant, who in practice will usually be an investor, the obligation to submit the information specified in the text of the Act to the locally competent Regional Director for Environmental Protection (RDEP). The data to be submitted that is required by the AEIA applies to a copy of the notification, or an application for a decision in a specific case, as well as a cadastral map certified by the competent authority, covering the area where the project will be implemented together with the area of the expected impact of the investment. Additionally, it is necessary to attach the project information sheet.

It is worth noting that the regulations contained in art. 96 AEIA do not provide for the possibility of submitting an appeal against the discussed provision in the form of a complaint. On the other hand, according to the general regulation of art. 141 par. 1 of the Act of June 14, 1960, Code of Administrative Procedure, a party may file a complaint against decisions issued in the course of the proceedings, if the code so provides. Therefore, it should be assumed that, in the absence of special provisions contained in the AEIA, the parties will not be entitled to file a complaint.

The issuance of a decision of this type in a case conducted by an authority is also important in relation to the deadlines for issuing a decision provided for by the Code of Administrative Procedure. Pursuant to the general provisions of the Administrative Procedure Code, formulated in art. 35 par. 3 of the Code of Administrative

Procedure, settlement of a case requiring explanatory proceedings should take place no later than within a month, and a particularly complicated case no later than within two months from the date of initiating the proceedings. Pursuant to art. 96 sec. 4 of the AEIA, the consequence of initiating the assessment procedure regarding the impact of an investment on a Natura 2000 area is discontinuation of the time limits for proceedings under which such an obligation was established. It is worth noting that this provision should be considered in connection with art. 106 par.1 of the Code of Administrative Procedure, according to which if a legal provision makes issuance of a decision conditional on taking a stand by another authority (expressing an opinion or consent or expressing a position in a different form), the decision is issued after that authority takes a stand. Additionally, it should be emphasized that in the described situation, the general regulation contained in art. 35 sec. 6 of the Act of 7 July 1994 Building Law does not apply. It obliges the architecture and construction administration authorities to issue a decision regarding a building permit within 65 days from the date of submitting the relevant application, under the threat of imposing a sanction in the form of a penalty of PLN 500 for each day of delay. The above act excludes the application of this provision in relation to proceedings regarding projects that are subject to the assessment of impact on a Natura 2000 area.

It should be noted that the legal structure adopted in the analysed legal regulations to interrupt the running of the time limits for the proceedings while waiting for the RDEP position is correct. The first of the aforementioned entities, which is most often competent in matters relating to building permits or decisions on development conditions, issues a relevant decision, which is usually based only on the suspicion of a specific investment's impact on a Natura 2000 site. Their executive bodies, especially in small communes, frequently do not have appropriate tools to verify this hypothesis. Additionally, the procedure conducted by RDEP may reveal new circumstances relevant to the case, which will have to be taken into consideration in the administrative decision issued by the local government unit. Consequently, the solution used by the legislator in the described situation to interrupt the running of time limits in place of their suspension should also be deemed appropriate.

The investor's submission of information indicated in art. 96 sec. 3 of the AEIA to RDEP results in the initiation of proceedings regarding the possible obligation to conduct an assessment of the project's impact on the Natura 2000 site. The Regional Director is obliged to issue a relevant decision within 14 days after receiving the documents. It should be noted that this is not a strictly binding term. The Act allows for exceptions to its application resulting from the appropriate application of art. 35 par.3 and art. 36 par.1 of the Administrative Procedure Code. As a result, in each case of failure to settle the matter on time, the RDEP is obliged to notify the parties to the proceedings of this fact, stating the reasons, and additionally, indicating the date of settling the matter. Furthermore, the period of suspension of the proceedings, mediation time and periods of delays caused through the fault of the party or for reasons beyond the control of the Regional Director will not be included in the above-mentioned 14-day period.

### **Environmental impact report**

If it is found that the project may have a significant impact on the Natura 2000 area, the RDEP imposes the obligation to assess the effects of the investment project implementation on this area. When conducting the assessment, the authority is obliged to follow exclusively the criteria of the type and characteristics of the project, its location, and the scale of the possible impact of a specific project. With regard to the type and characteristics of the project, it is necessary to take into consideration its scale and the size of the area to be occupied, connections with other ongoing or planned projects in the area, as well as the consumption of natural resources, emissions and other kinds of nuisance and the risk of a serious accident, taking into account the substances and technologies used. The prerequisite for the location of the project relates to the analysis of a possible threat to the environment, in particular with the existing land use and the conditions of local land development plans. On the other hand, the analysis of the scale of environmental effects allows for determining the scope, size and complexity of influences, their probability, duration, frequency and reversibility, as well as the aspect of interactions of a cumulative nature with other ongoing, already implemented, or planned activities. It is worth noting that the assessment

undertaken in this respect cannot refer to the analysis of all environmental consequences of a specific investment project, but pursuant to the provisions of art. 96 sec. 4 of the AEIA, should be limited only to determining the project's impact on the Natura 2000 area.

In the content of the analysed decision, the RDEP obliges the applicant to submit a report on the environmental impact of the project. Additionally, as stated in art. 97 sec. 3 of the AEIA, this entity determines the scope of data to be presented. It seems that such a structure of the described provision leaves a large margin of discretion for the Regional Director in the scope of the required data, which may lead to limiting their content, in relation to the general requirements indicated in art. 66 section 1 of the AEIA. The provision of art. 97 sec. 4a of the aforementioned act requires that this article be used to define the scope of the report, but it refers only to its "appropriate application", as *expressis verbis* emphasized in the text of the analysed provision. It should therefore be assumed that this provision will be applied after adapting it to the specific character of the discussed procedure and taking into account the position of the RDEP. The provision should meet the general requirements specified in art. 124 of the Code of Administrative Procedure, and additionally, contain information on environmental conditions for the implementation of an investment project specified in art. 63 section 1 of the AEIA. Pursuant to art. 97 sec. 7 of the AIA, the decision issued in this case is subject to complaint. This type of appeal will be available to the investor and the social organization if it has notified its intention to participate in the proceedings, and if this is consistent with its statutory goals.

As a result of the investor's obligation to submit a report on the environmental impact of the investment project to the Regional Director of Environmental Protection, the entity competent to issue a decision on the implementation of the project, most often in the form of a building permit or a decision on land development conditions, issues a separate decision on the suspension of the procedure until the required information is submitted. At the same time, in the regulation contained in art. 97 sec. 11 of the AEIA, the legislator specified the maximum period of suspending the conducted proceedings for a period of 3 years. In the event the report is not submitted within this timeframe, the party's request to initiate the proceedings will be deemed to be withdrawn.

According to Harasymiuk et al. [2019], the quality of the report is crucial for investment implementation in a selected location, as well as for shortening the time of the entire procedure.

### Public consultations and decision

The actual procedure regarding the environmental impact of the investment project begins on the day the investor submits a report on the impact of the investment project on the area covered by legal protection, the scope of which is determined, as already mentioned, by the Regional Director for Environmental Protection. Parallel to conducting its own administrative and legal activities, the RDEP is obliged, pursuant to the regulation of art. 98 sec. 4 of the AEIA, to address the authority that requested the initiation of the proceedings to conduct the public consultation procedure. They are based on appropriate application of the provisions regarding public participation in the process of taking decisions related to the environmental conditions of the project implementation. It should be emphasized that this entity, in practice the head of the commune (town mayor) only obtains information reported by natural persons or organizational units whose statutory goals include environmental protection, in the form of comments and conclusions, or during an administrative hearing; however, it is not entitled to provide a substantive evaluation, which can only be performed by the Regional Director for Environmental Protection.

The effect of the assessment of the project's impact on the Natura 2000 area is the issuance of a decision by the Regional Director for Environmental Protection on establishing the conditions for its implementation with regard to its impact on the area protected by the legal form of nature conservation. The AEIA obliges the above entity to issue it within 45 days of receiving the report. Statutory regulations authorize the RDEP to grant this type of approval only in two cases. The first of them concerns the unquestionable situations where the submitted impact assessment indicates that the project will not have a significant influence on the protected area. The second one refers to the circumstances in which the assessment has demonstrated a negative impact of the investment on the analysed area, but at the same time the conditions set out in art. 34 of the Nature Conservation Act are fulfilled.

This provision, which should be treated as a special regulation, lists the overriding public goal and the lack of alternative solutions as circumstances enabling the implementation of activities that may have a negative impact on a Natura 2000 site. It is worth noting that for the discussed consequences to occur, both of the above-mentioned conditions must be fulfilled. In addition, the Act makes the possibility of performing an action dependent on the party's obligation to ensure environmental compensation. The conditions for granting the permit are even more stringent in the situation where the significant negative impact affects the priority habitats and species. In this case, the permission may only be granted in exceptional circumstances which, pursuant to art. 34 sec. 2 of the Nature Conservation Act, include: protection of human health and life, ensuring public safety, obtaining beneficial consequences of primary importance for the natural environment and the fulfilment of necessary requirements of overriding public interest. In addition, with regard to this eventuality, it is also required to obtain the opinion of the European Commission. The provisions of the AEIA explicitly indicate that the Regional Director must refuse to approve of the terms of the investment project implementation if the submitted documentation indicates that this project will have a significant impact on the protected area, and, at the same time, there are no special conditions resulting from the Nature Conservation Act (Art. 98 paragraph 3 of the Act).

Of course, the decision issued by the RDEP in this case must be subject to the general requirements formulated for this type of administrative acts in art. 124 of the Administrative Procedure Code, and also contain additional components indicated in the AEIA, which result from the specific nature of the procedure. They include information on the procedure conducted with the participation of the public and on the manner of taking into consideration the comments and requests submitted during the procedure, as well as a declaration regarding the scope of the inclusion of data contained in the environmental impact report in the opinion issued by the authority. Moreover, it should be emphasized that pursuant to art. 98 sec. 8 of the AEIA, the provisions of art. 106 par. 3, 5 and 6 of the Administrative Procedure Code do not apply to the discussed decision. Therefore, the party will not be entitled to lodge a complaint against the issued decision. Furthermore, the provisions concerning the requirement to submit the

opinion of a given entity within two weeks from the request made by an authorized body, as well as the possibility of request for expediting in the event of failure to settle the matter within the time limit provided for in art. 36-38 of the Code of Administrative Procedure will not be applicable.

The findings of the Regional Director for Environmental Protection that are contained in the issued decision have a very significant legal significance for the resolution of the discussed case. This authority establishes the conditions for the implementation of a project in the form of the discussed administrative act, which was *expressis verbis* stated in art. 98 sec. 2 of the AEIA. In consequence, the entity resolving the case in the form of an administrative decision is bound by the assessment provided by the Regional Director. In particular, it may issue a positive decision expected by the investor only in the case of the RDEP's approval, taking into account all kinds of measures aimed at conserving the protected area indicated in the document. In addition, when resolving the matter as to its essence, the public administration body may additionally oblige the applicant in the content of the issued document to ensure environmental compensation and conduct a post-implementation analysis; it may also impose the obligation to undertake actions related to the monitoring of the impact of the investment process on the Natura 2000 area. The actions to be implemented may be a consequence of the necessity to compensate for environmental damage caused by the conducted activity, and also be related to the fact that the decision issued by the authority is usually based only on the anticipated scope of the impact of the project implementation on the protected area, which is contained in the decision on environmental conditions or in the environmental report. Therefore, it is often advisable to verify the possessed information on the basis of the results of tests and measurements.

As already mentioned, the head of the commune (town mayor) or the county head is entitled to issue a decision on terminating the proceedings. Its substantive content is subject to the general rules contained in the Code of Administrative Procedure (Article 107). Additionally, the content of the justification should clearly indicate how the project implementation conditions specified in the RDEP decision were taken into account.

## **NATURA 2000 VS. INVESTMENTS**

Natura 2000 areas, included in a spatial network, are not protected areas, but areas of protection (of species and habitats). It is therefore possible to implement various investments on their territory as long as this does not disturb the functioning of ecosystems. As mentioned before, even in the case of investments exerting a significant impact on the environment, consent to the investment process can be given if: 1) the investment has an overriding social or economic interest, 2) there are no alternative solutions, 3) environmental compensation is provided in order to guarantee coherence and functioning of the network. Nevertheless, Natura 2000 areas are wrongly perceived as ones where investment and economic activities are very limited [Harasymiuk et al., 2017]. Mickiewicz and Mickiewicz [2018] analysed the opinions on investing in Natura 2000 areas expressed by local governments in north-eastern Poland. The authorities assessed that there were restrictions on the inflow of investments and, therefore, state compensatory measures were needed. Investors expect various difficulties. However, if an investment is well designed, it is possible to build in accordance with the assumptions of Natura 2000, as demonstrated by numerous examples, among others those in the branch related to the deepening and development of ports in the Netherlands [Vikolainen et al. 2014]. Perhaps investors do not want to bear the costs of the environmental impact assessment procedure, especially those involved in the preparation of an environmental impact report if they cannot be sure to obtain a positive decision. Witkowski [2021] has indicated that in the agricultural industry in Poland, nearly all investments undertaken in Natura 2000 areas did not require an environmental impact assessment procedure. Moreover, the surveyed farmers took actions to protect the ecosystems only on a small scale, which may result from the lack of appropriate ecological awareness.

The functioning of Natura 2000 areas is not always perceived as controversial. Many local communities are emotionally attached to the surrounding natural environment and remain interested in its protection. In the study by Strzelecka et al. [2022], residents of northern Polish villages positively assessed various aspects of the protection policy in Natura

2000 areas, although they admitted to having had many concerns at the stage of creating these areas. Natural values related to the Natura 2000 network may be a factor contributing to the development of tourism [Kordowska, 2016; Stanciu et al., 2014]. It could be wildlife tourism related to nature exploration, which requires appropriate infrastructure. In such cases, the income of local communities is based on accommodation, food and guide services, the construction of hiking trails and information facilities, the provision of tourist equipment, etc. Another part of the tourism industry in Natura 2000 areas may be agritourism, related to the production of ecological and traditional products, which may lead to the creation of a local brand and, consequently, economic development.

## **CONCLUSIONS**

The environmental impact assessment procedure for Natura 2000 sites is a relatively new, but very important legislative instrument in our country, which results from implementing the Community directives in the Polish legal system. The consequence of applying the discussed procedure may be the issuance of an administrative decision regarding the refusal to approve of the project implementation, if the investment activity carried out in the area covered by the analysed legal form of nature protection may have a significant negative impact on the Natura 2000 area. It is also worth noting that the rules for conducting this type of proceedings, assuming a wide public participation and its significant impact on the issuance of an administrative decision in a given case, may be considered an important legal measure aimed at shaping pro-environmental attitudes. It seems that the overriding goal of all undertaken activities is to reduce the environmental effects of the investment activities carried out at the design stage, which leads to an increase in their economic efficiency. This can be considered a good example of the practical implementation of the principles of prevention and prudence in the use of environmental resources, resulting both from the Polish (Article 6 of the Act of 27 April 2001 Environmental Protection Law) and the Community legal order (Article 191 (2) of the Treaty on Functioning of the European Union).

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