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Jerzy Stelmasiak
Maria Curie-Skłodowska University in Lublin, Poland
ORCID: 0000-0002-1397-3595
jerzy.stelmasiak@umcs.pl

Nature Reserve as a Legal Form of Nature Protection

Rezerwat przyrody jako prawna forma ochrony przyrody

SUMMARY

Nature reserve is a territorial legal form of nature protection. It is established in the form of an act of local law issued by the regional director for environmental protection. In addition, the legal effect of its creation is the introduction of an appropriate legal regime in the form of prohibitions allowed by law and the expropriation of real estate for the public purpose of its creation, which is the protection of unique natural values occurring in its territory.

Keywords: natural environment; nature protection; nature reserve; special area of natural character; an act of local law

INTRODUCTION

Nature reserve, as a form of legal area nature protection, is one of the types of special areas of natural character[1]. It should be noted that the strictest legal regime applies within its area in terms of prohibitions, apart from national parks, which will be the subject of further administrative-legal analysis. In addition, it is usually established in the area owned by the State Treasury, while in another area, which is very rare, with the consent of its owner under Article 7 (2) of the Act of

[1] Cf. J. Stelmasiak, *Instytucja obszaru specjalnego w materialnym prawie administracyjnym na przykładzie obszarów specjalnych o charakterze ekologicznym*, [in:] *System Prawa Administracyjnego*, t. 7: *Prawo administracyjne materialne*, red. R. Hauser, Z. Niewiadomski, A. Wróbel, Warszawa 2017, pp. 685–717; P. Zacharczuk, *Obszary specjalne w materialnym prawie administracyjnym*, Warszawa 2017.

16 April 2004 on Nature Protection[2]. Of course, if there is no owner's consent, it is necessary to apply the expropriation procedure pursuant to the provisions of the Act of 21 August 1997 on Real Estate Management[3]. It should be noted that, in this case, the public purpose of establishing a nature reserve is superior in the event of a collision with the individual interest of the owner of such property.

It should also be stressed that in the light of Article 5 (20) ANP, the legal term "natural environment" covers landscape together with creations of inanimate and animate nature, as well as both natural and transformed habitats, including plants, animals and fungi occurring in them. On the other hand, Article 2 (1) ANP states that nature protection means conservation, sustainable use and restoration of resources, objects and components of nature. For these reasons, its primary goal is the sustainable use of resources, objects and components of nature, as well as the possibility of their renewal.

However, in accordance with Article 3 (39) of the Act of 27 April 2001 – Environmental Protection Law[4], the legal term "environment" includes all natural elements of the environment, i.e. also those transformed by human activity. At the same time, the quantifier "in particular" used in the legal definition means that it is not a closed catalogue, but contains its basic elements. These are primarily air, water, land surface, minerals, climate, landscape, as well as other elements of biodiversity, and their interactions. This means that its scope does not cover the working environment.

Moreover, such interactions occur in practice between elements of the environment, but also between elements of biodiversity or even between elements of the environment, including the natural environment, and elements of biodiversity.

In turn, the protection of environmental natural resources is one of the fundamental elements of biosphere protection. This is because the protection of the biosphere in a broad sense includes not only the protection of biodiversity but also the protection of its essential natural elements, such as water, air, the ground surface or climate, implemented by appropriate legal means to prevent pollution.

On the other hand, the legal notion of "protection of the environment", in accordance with Article 3 (13) EPL, covers any activity or inactivity intended to maintain the natural balance. This means that this includes, firstly, the rational formation of natural elements of the environment and the management of environmental resources within the meaning of the constitutional principle of sustainable development, in accordance with Article 5 of the Constitution of the Republic of

[2] Journal of Laws 2018, item 1614 as amended, hereinafter: ANP.
[3] Journal of Laws 2018, item 2204 as amended.
[4] Journal of Laws 2019, item 1396 as amended, hereinafter: EPL.

Poland of 2 April 1997[5] in conjunction with Article 3 (50) EPL. Secondly, it also covers the prevention of environmental pollution, i.e. emissions (of substances or energy), which is harmful to the environment or to human health or even human life (Article 3 (11) EPL), since it may cause damage to property, impair the aesthetic value of the environment, including the natural environment, or violate the requirements established by the legislature on the so-called special use of the environment which requires an appropriate authorisation or permission (Article 3 (49) EPL). Thirdly, environmental protection also entails an obligation to reinstate natural elements to their proper condition. However, the recognition of an area as a nature reserve requires it to be an area preserved in the natural state or at least slightly changed[6]. This means that the legal protection of nature constitutes, in fact, part of the legal protection of the environment.

GENERAL CHARACTERISTICS OF A NATURE RESERVE AS A SPECIAL AREA OF NATURAL CHARACTER

First of all, it must be stated that a special area of natural character is a legal scholarly concept and not a statutory concept[7]. In the scholarly opinion on environmental law, it is considered to be a separate specific space governed by a special legal regime, which at least restricts or sometimes even waives the generally applicable legal order. Moreover, its priority purpose is to carry out the state's overarching tasks in a special area of natural character which is, of course, a means of direct spatial management. This means that the specificity of a special area of natural character is the link between a specific space and the special legal regulation which, for this reason, in practice at least restricts or even excludes generally applicable rules.

The establishment of a special area of natural character cannot be also associated with the basic, special and auxiliary territorial divisions of the country. This is because these are generally binding norms, which serve to implement defined objectives and tasks of the state in a particular special area. This means that the establishment of a nature reserve as a special area of natural character should be

[5] Journal of Laws 1997, No. 78, item 483 as amended. English translation of the Constitution at: www.sejm.gov.pl/prawo/konst/angielski/kon1.htm [access: 10.05.2020].

[6] Cf. E. Radecka, *Rezerwat przyrody jako prawna forma ochrony przyrody*, Toruń 2019, pp. 89–126; A. Jaworowicz-Rudolf, *Formy ochrony przyrody*, [in:] *Prawo ochrony środowiska*, red. M. Górski, Warszawa 2018, pp. 686–692.

[7] Cf. O. Otawski, *Obszarowe instrumenty ochrony zasobów naturalnych środowiska*, Poznań 2006 (doctoral dissertation, copied typescript), pp. 25–52, 82–92; A. Lipiński, *Z problematyki tworzenia niektórych form ochrony przyrody*, [in:] *Człowiek a środowisko. Aspekty prawno-społeczne*, red. E. Ura, J. Stelmasiak, S. Pieprzny, Rzeszów 2010, pp. 159–174.

anchored in the relevant statutory norms of the substantive administrative law on nature protection which serve the protection of natural resources of the environment occurring within it. This is also done by the introduction of appropriate prohibitions in the area of the nature reserve, which cannot be imposed independently by the competent authority recognizing the special area as a nature reserve, as their catalogue is detailed by the legislature in Article 15 (1) ANP.

It should also be noted that the statutory substantive legal prerequisites for the establishment of a nature reserve, introduced under Article 13 (1) ANP, should be divided, on the one hand, into natural values and, on the other hand, values for which the area is covered by the reserve protection[8]. In the first case, these are the natural values that require protection in the form of a nature reserve established on the areas preserved in their natural or hardly modified condition. Moreover, they also include ecosystems, natural habitats and refuges, as well as plant or animal habitats and fungi habitats, and inanimate nature products and components. On the other hand, in accordance with Article 13(1) *in fine* ANP, the values which plead in favour of the recognition of a given area as a nature reserve are not only values of natural character, but also scientific, cultural or landscape values.

Another issue is the recognition as a nature reserve of a given area located within other area legal forms of nature protection, e.g. national park, landscape park or Natura 2000 site[9]. In practice, the above legal and factual situation causes a number of collisions not only in the relation between the public interest and the individual interest but also within the public interest. There is no doubt that the legal regime of prohibitions applicable in the area of a nature reserve is much stricter than those of the Natura 2000 and landscape park areas. Moreover, where the so-called strict reserve is created, it is also a legal regime that is even stricter than that of the national park.

It should also be stressed that the recognition as a nature reserve of a given area and, optionally, the delimitation of a buffer zone in areas bordering the nature reserve, shall take place in the form of an order of the regional director for environmental protection, which, contrary to the name, is an act of local law within the meaning of Article 94 of the Polish Constitution, and not a source of internal law, as stated in Article 93 of the Polish Constitution. However, it must specify the name of the nature reserve, its location or course of borders and the buffer zone if delimited. In addition, which is typical of this form of nature protection, the act of local law on its establishment must also specify the goals of protection as well as the kind, type and subtype of the nature reserve and the supervisory authority. On the other hand, the regional director for environmental protection may increase the nature reserve area and even change the protection goals in the form of an order,

[8] E. Radecka, *op. cit.*, pp. 89–91.

[9] *Ibidem*, pp. 152–155.

which is an act of local law, issued only after consulting the regional nature protection council. Furthermore, in the event of irreversible loss of natural values for which the nature reserve has been established, he may reduce the nature reserve area or even liquidate the nature reserve. It should be reminded at this point that each act of local law is subject to mandatory publication in the Official Journal of a given voivodeship (province) issued by the voivodeship governor, in accordance with Article 13 (1) of the Act of 20 July 2000 on the Promulgation of Normative Acts and Certain Other Legal Acts[10], so this also applies to any act of local law that liquidates a nature reserve or modifies its boundaries.

Another issue to be presented is the determination of relationships in the area of the impact of spatial planning on protection goals that shape the recognition of a given area as a nature reserve and the prohibitions being introduced in its area. Therefore, Article 13 (3a) ANP rightly states that draft studies of conditions and directions of spatial development of communes, local spatial development plans, regional spatial development plans, as well as spatial development plans for marine internal waters, the territorial sea and the exclusive economic zone in the part related to the nature reserve and its buffer zone need to be agreed, not only consulted with the regional director for environmental protection as regards the arrangements of those plans that may have a negative impact on the nature reserve protection goals[11].

This statutory obligation also applies to draft forest management plans, simplified forest management plans and forest management tasks, as provided for in Article 19 (3) and (4) of the Act of 28 September 1991 on Forests[12], in the part which concerns the nature reserve buffer zone. This means that it also requires reaching an agreement with the regional director for environmental protection on the provisions of those plans or tasks that may have a negative impact on nature protection within the nature reserve. On the other hand, pursuant to Article 13 (1) ANP, the establishment, modification of boundaries, change of goal of protection or, of course, the liquidation of a nature reserve located in the maritime area needs to be agreed with the director of the competent maritime authority if this affects the performance of the tasks by that authority. It should also be emphasized that this agreement should be made within 30 days of the date of service of the request for the agreement. On the other hand, the absence of an agreement within that period by the local director of the maritime authority means that there are no objections, that is to say, in practice, that the agreement has been made. On the other hand, only the regional director for environmental protection may order to charge entry fees for entering the nature reserve site, taking into account the criterion of the need for nature protection.

[10] Journal of Laws 2019, item 1461.

[11] Cf. E. Radecka, *op. cit.*, pp. 261–287; M. Woźniak, *Interes publiczny i interes indywidualny w planowaniu i zagospodarowaniu przestrzennym*, Opole 2018, pp. 383–392.

[12] Journal of Laws 2018, item 2129 as amended.

LEGAL REGIME APPLICABLE IN THE NATURE RESERVE

It should be noted that a nature reserve, as a special area of natural character is essentially a specific method of spatial management, which introduces a special legal regime in the form of an act of local law establishing a nature reserve in the form of selected prohibitions under Article 15 (1) ANP.

At the same time, the prohibitions being imposed must always be rooted in the closed catalogue of prohibitions set out in Article 15 (1) ANP, which means that they cannot be transformed by the regional director for environmental protection into orders or other restrictions. They should also take into account the constitutional principle of proportionality under Article 31 (2) of the Polish Constitution[13]. In addition, one of the most frequently introduced prohibitions is a ban on the construction or reconstruction of structures and technical equipment, if these do not serve the purposes of the nature reserve, the prohibition of hunting except for the areas specified in the protection plan or protective tasks developed for the nature reserve. Other most commonly imposed prohibitions include those related to changes in hydrographic conditions, river engineering, if they are not for the purposes of nature protection, as well as a ban on manufacturing, commercial and agricultural activities, except for the sites set out in the protection plan, as well as the prohibition of the use of chemical and biological plant protection products and fertilisers and, importantly, the performance of earthworks which permanently distort the natural topography.

It should be stressed that the prohibitions imposed should also serve to implement the protection plan defined by the regional director for environmental protection in the form of an order, which is also an act of local law, within 6 months of receipt of the draft protection plan, in accordance with Article 18 ANP in conjunction with Article 19 (6) ANP.

It is also important as the protection plan for the nature reserve shall be developed for 20 years, as stipulated by Article 20 (1) to (3) ANP. The protection plan for the nature reserve in its part overlapping with the Natura 2000 site must also take into account the scope of protection tasks for the Natura 2000 site, in particular in accordance with Article 29 (8) (3a) ANP.

It should also be noted that for a nature reserve until the establishment of the protection plan, under Article 22 ANP, the competent supervisory authority shall prepare a draft of protection tasks for one year or simultaneously for subsequent years, but not longer than 5 years. This also requires the regional director for envi-

[13] Cf. D. Danecka, J.S. Kierzkowska, D. Trzcińska, *Ograniczenia działalności gospodarczej ze względu na ochronę przyrody*, Warszawa 2018, p. 115, 215; B. Rakoczy, *Ograniczenie praw i wolności jednostki ze względu na ochronę środowiska w Konstytucji Rzeczypospolitej Polskiej*, Toruń 2006, pp. 267–283.

ronmental protection to issue an order. In practice, due to difficulties in developing a comprehensive nature-related and other documentation covering the content of the draft protection plan, they were often "replaced" by protection tasks. On the other hand, derogations from the prohibitions are also exhaustively listed in Article 15 (2) ANP[14]. They concern, in particular, the performance of tasks imposed in the protection plan or protection tasks, conducting rescue operations or performing tasks in the field of national defence in a situation of security threat. Particularly noteworthy is the derogation introduced for the areas covered by landscape protection in the course of their economic exploitation by organizational units, legal or natural persons and the exercise of property rights, in accordance with the provisions of the Act of 23 April 1964 – Civil Code[15] (Article 15 (2) ANP).

In contrast, only the general director for environmental protection, having consulted the locally competent regional director for environmental protection, may issue a permit for derogations from the prohibitions in the area of a nature reserve. The above permit must be justified by the nature protection requirements or by the obligation to carry out a public purpose linear infrastructure project or a public purpose non-linear telecommunications infrastructure projects in order to ensure telecommunications in the nature reserve area, as well as where no alternative solution is available. Moreover, this can take place only after the environmental compensation within the meaning of Article 3 (8) ANP has been guaranteed. On the other hand, the regional director for environmental protection can, acting on his own, permit derogations from the prohibitions in the area of a nature reserve if it is necessary for scientific research or for educational, cultural, tourist, recreational, sports or religious purposes and will not have a negative impact on the nature protection objectives of the nature reserve.

However, it should be noted that, pursuant to Article 15 (4a) ANP, in the procedure of obtaining the above opinion by the general director for environmental protection to be issued by the competent authority within 30 days from the date of receipt of the request to do so, Article 106 of the Act of 14 June 1960 – Code of Administrative Procedure[16] shall not apply. However, the above permit is to be issued in the form of an administrative decision within the meaning of Article 104 and Article 107 § 1 CAP with an additional clause of validity for up to 5 years (Article 15 (6) ANP). The permit, in accordance with Article 107 § 2 CAP, must also contain other additional elements required by Article 15 (7) ANP, including in particular the conditions for the implementation of a given derogation due to the nature protection needs. In addition, in accordance with Article 15 (7) (6) ANP, it

[14] Cf. E. Radecka, *op. cit.*, pp. 200–220; A. Kaźmierska-Patrzyczna, *Ochrona różnorodności biologicznej w systemie prawnej ochrony przyrody*, Warszawa 2019, pp. 175–187.

[15] Journal of Laws 2019, item 1145.

[16] Journal of Laws 2018, item 2096, hereinafter: CAP.

should also include a justification for the lack of alternative solutions. This applies in particular to the planned variant of the implementation of public purpose linear infrastructure projects, as well as in the case of the implementation of public purpose projects in the field of non-linear telecommunications projects, but for the purpose of providing telecommunications in the nature reserve area.

It should be emphasized that the above issues are also reflected in judicial decisions. This is demonstrated by the case law of administrative courts regarding derogations from prohibitions in force in the nature reserve. In particular, in the judgement of 28 June 2019[17], the Supreme Administrative Court ruled that in the light of the facts of this case, the actions planned by the applicant to increase the flow rate in the riverbed, as well as to reduce outpouring from the river in the nature reserve, should be assessed, contrary to the position of the regional administrative court, in terms of the derogation from the prohibition on changing hydrographic conditions referred to in Article 15 (1) (7) ANP.

On the other hand, in the judgement of 29 September 2017[18], the Supreme Administrative Court correctly interpreted Article 15 (1) (15) ANP in conjunction with Article 15 (4) ANP which introduces a ban on pedestrian traffic except for designated routes. The Court stated that both the linguistic and functional (teleological) interpretation of the above provisions indicates that Article 15 (4) (2) ANP is an exception allowed by Article 15 (1) (15) ANP. In addition, Article 15 (1) (15) ANP introduces the legal term of "trail", which in this case covers the implementation of a public-purpose linear infrastructure project involving the construction of a 2m-wide pavement on a planned section in the nature reserve.

However, in the judgement of 3 July 2012[19], the Supreme Administrative Court found that there had been no violation of Article 13 (3) ANP due to the lack of proper agreement on the change in the study of conditions and directions of spatial development of the commune. It results from the fact that the above-mentioned agreement, although not referred to literally as an agreement but an opinion, would, due to its very content, lead to the adoption of the study concerned as an act of internal management.

CONCLUSIONS

The above discussion makes it possible to conclude that the current legal concept and construct of nature reserve must be positively assessed. On the other hand, the most problems to solve are related to establishing the optimal legal model of

[17] II SK 1534/18, LEX No. 2724044.
[18] II OSK 186/16, LEX No. 2599526.
[19] II OSK 973/12, LEX No. 1392970.

prohibitions applicable in the area of a nature reserve in terms of achieving the objective of creating a particular type of reserve nature, e.g. a forest, landscape or peatland reserve. That is why the assessment of such a special area of natural character regarding its proper spatial planning should be reflected in the content of the specific legal regime in terms of the priority goal behind the creation of the nature reserve. Moreover, it is essential that relations between the protection of the public (social) interest and the protection of the individual interest take place as part of the so-called "weighing" of both interests[20]. However, this also requires analysis and evaluation of the relevant provisions of the local spatial development plan in terms of nature protection, if, of course, there is such a plan for the area. On the other hand, it is not possible to define a uniform content of the public interest in the sphere of legal nature protection, since it is, in fact, a dualist model which refers also to separate legislation. This is so because the recognition of a particular special area of natural character as a nature reserve should always take into account the content of the public interest which makes its establishment advisable. This is due to the need to take into account its functions, characteristics and, finally, the extent of the necessary administrative form of regulation of legal relations in order to protect the unique environmental values of the nature reserve but also its cultural, landscape and scientific values. The public interest in this sense should shape the manner and content of legal relations as required by the legislature in the framework of the adopted spatial order in accordance with the constitutional principles of sustainable development and proportionality[21].

REFERENCES

Literature

Danecka D., Kierzkowska J.S., Trzcińska D., *Ograniczenia działalności gospodarczej ze względu na ochronę przyrody*, Warszawa 2018.

Jaworowicz-Rudolf A., *Formy ochrony przyrody*, [in:] *Prawo ochrony środowiska*, red. M. Górski, Warszawa 2018.

Kaźmierska-Patrzyczna A., *Ochrona różnorodności biologicznej w systemie prawnej ochrony przyrody*, Warszawa 2019.

Lipiński A., *Z problematyki tworzenia niektórych form ochrony przyrody*, [in:] *Człowiek a środowisko. Aspekty prawno-społeczne*, red. E. Ura, J. Stelmasiak, S. Pieprzny, Rzeszów 2010.

[20] Cf. J. Stelmasiak, *Interes indywidualny a interes publiczny w ochronie środowiska w obszarze specjalnym o charakterze ekologicznym*, Rzeszów 2013, pp. 143–188; J. Zimmermann, *Aksjomaty prawa administracyjnego*, Warszawa 2013, pp. 95–99.

[21] Cf. J. Zimmermnn, *op. cit*., pp. 73–101; T. Suski, *Instytucja uznania administracyjnego na gruncie prawnej ochrony przyrody w Polsce*, „Prawo i Środowisko" 2013, nr 2, pp. 69–81.

Otawski O., *Obszarowe instrumenty ochrony zasobów naturalnych środowiska*, Poznań 2006 (doctoral dissertation, copied typescript).
Radecka E., *Rezerwat przyrody jako prawna forma ochrony przyrody*, Toruń 2019.
Rakoczy B., *Ograniczenie praw i wolności jednostki ze względu na ochronę środowiska w Konstytucji Rzeczypospolitej Polskiej*, Toruń 2006.
Stelmasiak J., *Instytucja obszaru specjalnego w materialnym prawie administracyjnym na przykładzie obszarów specjalnych o charakterze ekologicznym*, [in:] *System Prawa Administracyjnego*, t. 7: *Prawo administracyjne materialne*, red. R. Hauser, Z. Niewiadomski, A. Wróbel, Warszawa 2017.
Stelmasiak J., *Interes indywidualny a interes publiczny w ochronie środowiska w obszarze specjalnym o charakterze ekologicznym*, Rzeszów 2013.
Suski T., *Instytucja uznania administracyjnego na gruncie prawnej ochrony przyrody w Polsce*, „Prawo i Środowisko" 2013, nr 2.
Woźniak M., *Interes publiczny i interes indywidualny w planowaniu i zagospodarowaniu przestrzennym*, Opole 2018.
Zacharczuk P., *Obszary specjalne w materialnym prawie administracyjnym*, Warszawa 2017.
Zimmermann J., *Aksjomaty prawa administracyjnego*, Warszawa 2013.

Legal acts

Act of 14 June 1960 – Code of Administrative Procedure (Journal of Laws 2018, item 2096).
Act of 23 April 1964 – Civil Code (Journal of Laws 2019, item 1145).
Act of 28 September 1991 on Forests (Journal of Laws 2018, item 2129 as amended).
Act of 21 August 1997 on Real Estate Management (Journal of Laws 2018, item 2204 as amended).
Act of 20 July 2000 on the Promulgation of Normative Acts and Certain Other Legal Acts (Journal of Laws 2019, item 1461).
Act of 27 April 2001 – Environmental Protection Law (Journal of Laws 2019, item 1396 as amended).
Act of 16 April 2004 on Nature Protection (Journal of Laws 2018, item 1614 as amended).
Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws 1997, No. 78, item 483 as amended).

Case law

Judgement of the Supreme Administrative Court of 3 July 2012, II OSK 973/12, LEX No. 1392970.
Judgement of the Supreme Administrative Court of 29 September 2017, II OSK 186/16, LEX No. 2599526.
Judgement of the Supreme Administrative Court of 28 June 2019, II SK 1534/18, LEX No. 2724044.

STRESZCZENIE

Rezerwat przyrody jest obszarową prawną formą ochrony przyrody. Jego utworzenie następuje w formie aktu prawa miejscowego wydanego przez regionalnego dyrektora ochrony środowiska. Ponadto skutkiem prawnym jego utworzenia jest wprowadzenie odpowiedniego reżimu prawnego w formie zakazów ustawowo dozwolonych oraz wywłaszczenie nieruchomości na cel publiczny jego utworzenia, którym jest ochrona wyróżniających się szczególnych wartości przyrodniczych występujących na jego terenie.

Słowa kluczowe: środowisko przyrodnicze; ochrona przyrody; rezerwat przyrody; obszar specjalny o charakterze przyrodniczym; akt prawa miejscowego