

Transfer of a water permit

The issue of the permissibility of transfer of an administrative decision to an entity other than its addressee is of considerable significance in the investment process. As a principle, an administrative decision is an administrative act that imposes a unilateral authoritative solution to the legal situation of a specified entity in a specific matter. Consequently, administrative decisions may not be transferred to other entities, unless particular regulations provide otherwise. The legislator has foreseen certain exceptions to this rule. One of them concerns possibility to transfer, under specified conditions, a water permit to an entity other than the addressee of indicated decision.

Issue of water management, including also the necessity to obtain water permits, is regulated by the Water Act as of 18 July 2001 (uniformed text: Journal of Laws as of 2005, no. 239, item 2019, as amended), hereinafter referred to as the “**Act**”. Pursuant to Article 122 paragraph 1 points 1 and 3, water permit is required, among others, for special usage of water and for establishment of water devices. The Act provides with a negative definition of water special usage, stating that this is any usage of water which cannot be classified as common or ordinary usage of water. As a principle, common usage of water is interpreted as a public right to use public inland surface water, internal marine water, including internal marine water of the Gdansk Gulf, and territorial marine water in order to meet personal, household or agricultural needs without the use of special technical devices, as well as for recreation, tourism, water sports and amateur fishing (Article 34 paragraph 1 and 2 of the Act). At the same time, pursuant to Article 36 paragraph 1 of the Act, landowner is entitled to the ordinary usage of water that is his property and of underground water in his land, what is interpreted as usage of such water to meet own household and agricultural needs, excluding, among others, usage of this water for need of conducting business activity. Irrespective of the way of water usage, establishment of water devices also, as a principle, requires obtaining water permit. Consequently, necessity of obtaining indicated decision often arises in course of the investment processes connected with water management.

As mentioned above, a water permit may be transferred to an entity other than the addressee of objective decision. The Act distinguishes two procedures of transfer of the rights and obligations arising from the water permit: statuto-

ry and by application. Pursuant to Article 134 paragraph 1 of the Act, the legal successor of the enterprise, which has obtained a water permit, assumes the rights and obligations arising from that permit, except for the permits allowing the usage of installations, which must be transferred by means of separate decisions. Pursuant to Article 9 paragraph 1 point 25 of the Act, enterprises are interpreted as entities using water within water special usage, establishing water devices, or performing other actions requiring a water permit. In other words, analyzed case is an example of general succession involving the assumption by the intercepting entity of the rights and obligations imposed by the administrative decision on the entity being taken over.

Irrespective of the above, there is also the possibility to transfer a water permit on the basis of the application of an interested entity. The ground for transfer of the water permit to an entity other than the addressee of objective decision, is provided by the regulation of Article 190 paragraph 1 of the Environmental Protection Law of 27 April 2001 (uniformed text: Journal of Laws as of 2008, no. 25, item 150, as amended), hereinafter referred to as the “**Environmental Protection Law**”), in connection with Article 34 paragraph 2 of the Act. Pursuant to Article 190 paragraph 1 of the Environmental Protection Law, an entity interested in acquisition of the legal title to the entire installation may submit an application for the transfer to this entity of the rights and obligations arising from the permits concerning objective installation. Pursuant to Article 3 point 6 in connection with point 4 of the Environmental Protection Law, installation is interpreted as stationary technical device, complex of stationary technical devices connected technologically, belonging to the same entity and located in the same enterprise, as well

as structures not classified as technical devices or its complexes, the use of which could directly or indirectly cause emission of the substances into the air, water, ground or earth. Above broad definition of installation provided by the Environmental Protection Law includes also water devices, as defined in Article 9 paragraph 1 point 19 of the Act. Pursuant to the quoted regulation, water devices are interpreted as devices serving to regulate water resources and usage of such resources, where open list of such devices is provided by the Act. It should be recognised that in practice water permits for water special usage often also regulate that way of water usage by mean of specified devices, so objective decisions may be transferred to entities other than its addressees. Pursuant to Article 190 paragraph 2 of the Environmental Protection Law, transfer of the rights and obligations arising from the water permit is possible only if the acquiring party guarantees to perform those obligations correctly. As the Environmental Protection Law does not indicate the criteria, according to which the relevant administrative authority should assess fulfilment of the abovementioned condition, it must be assumed that this matter is left to the administrative discretion. Consequently, the administrative authority appropriate to issue such decision has some discretion in taking its decision in the case, what obviously can not be confused with complete freedom. At this point, it should be stressed that the authority appropriate to issue the decision on transfer of rights and obligations arising from the water permit is the authority that issued the original decision, which is, as a principle, head of the county (*starosta*).

Significantly, pursuant to Article 191 paragraph 1 of the Environmental Protection Law, the decision on transfer of the rights and obligations arising from the water permit to an entity other than the addressee of objective decision, has the legal effect after acquisition of the legal title to the installation and expires one year from the day it was issued if the applicant has not obtained the legal title to that installation. In other words, the decision on transfer of the rights and obligations arising from the water permit is a conditional decision, whose legal effects arise once the condition indicated in that decision is fulfilled, i.e. following the acquisition by the applicant of the legal title to the installation. Moreover, pursuant to Article 191 paragraph 2 of the Environmental Protection Law, the decision on transfer of the rights and obligations arising from the water permit may be issued for more than one applicant. Objective regulation is amicably with Article 123 paragraph 2 of the Act, according to which water permit does not arise any rights to the real properties and water devices necessary to its execution and does not

infringe the ownership right and entitlements of the third parties to these real properties and devices. In consequence, the applicant, who did not obtain the rights to the real properties and devices necessary to execute the water permit, is not entitled to claim the reimbursement of the expenditures incurred in connection with obtaining of the water permit (Article 123 paragraph 3 of the Act).

Summarising, in course of the investment process it is possible to transfer the rights and obligations arising from the water permit to an entity other than the addressee of objective decision. Above possibility is a significant facilitation to the investors, as it allows them to avoid repeating the proceeding concerning issue of the water permit. At the same time, the abo-

ve represents no danger to protection of water resources, as the applicant assumes all the obligations arising from the transferred decision. Moreover, pursuant to Article 190 paragraph 5 of the Environmental Protection Law, in the decision on transfer of the rights and obligations arising from the water permit, the relevant administrative authority may put an obligation to establish collateral to secure potential claims in case of appearance of negative environmental impact or environmental damages, as defined by separate regulations, or change regulations concerning such collaterals previously established in the transferred water permit. However it should be stressed, that such security is not a compulsory element of the decision on transfer of the rights and obligations arising from the

water permit, but the obligation to provide such security may be imposed on the party if it is justified by the particular significant social interest connected with environmental protection. The issue of establishment of collateral may thus arise in case of larger projects with a significant environmental impact or constituting a considerable environmental threaten.

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