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Data: 21/11/2026 19:59:48

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Legal Framework of Wildlife Protection on the Area of Natura 2000 (Emerald Network) on Wind Energy Site: Case of Ukraine

Ramy prawne ochrony przyrody na obszarze Natura 2000 (sieć Emerald) na terenie elektrowni wiatrowych na przykładzie Ukrainy

ABSTRACT

This article provides a comprehensive overview of European law and Ukrainian national law in the field of wildlife protection on special conservation areas on wind farm siting. In the first part, the EU law on renewable energy and some national regulations of the EU countries was examined. The focus was on legal regulation of impact of wind farms special on nature in Natura 2000 sites. In addition, attention was paid to procedural steps that must be applied to plans and projects that are likely to have a significant effect on a Natura 2000 site. The second part of the paper discusses legal issues of wildlife protection on the area of Emerald Network (Natura 2000) on wind energy sites according to the Ukrainian national law. The author argues that Ukraine has various laws which regulate wind farm siting with requiring the environmental impact assessment and strategic environmental assessment as a legal instrument of wildlife protection. Further, specific environmental wildlife protection laws in Ukraine were indicated, which prohibit economic activities in special protected areas. Wildlife protection in wind farm sites in Polonyna Borzhava (Emerald Network) was also discussed in more detail.

Keywords: wildlife protection; wind farm; Natura 2000 sites; Emerald Network; Ukraine

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Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 21/11/2026 19:59:48

INTRODUCTION

Wind energy is the most efficient solution to reduce CO_2 emissions in the power sector, which is traditionally considered as an environmentally friendly source of power with a closed to zero impact on the environment. Unfortunately, we often miss the fact that wind farm (wind turbine) is not only a source of "green energy" it is also a possibility of negative impacts to the wildlife.

Wind power poses risks to wildlife, particularly some birds and bats, associated with siting (where projects are built), construction, and operation.[1] In particular, wind farms construction and operation may result in: 1) injury and death of birds and bats due to their collision with the various parts of the wind turbine or with the other structural components of the wind farm;[2] 2) obstructions uprising to birds and bats rest and reproduction, changes in the direction of movement during migration or flights to other areas;[3] 3) loss of habitat due to visual, noise and vibration effects;[4] 4) degradation and loss of habitat in protected areas of both local and international importance.[5] Fauna researchers from different countries studying wind farm construction impact on biodiversity issues emphasize that the choice of the future wind farm location makes the key point of the consequences of such impact.[6] Despite these negative effects, wind energy projects are fundamentally important for the European Union and its Member States to realize low-carbon energy production, which is necessary to achieve the targets set in the framework of the European Energy Union and meet the requirements of the Paris Agreement on climate change.[7]

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[1] J. Murphy, L. Anderson, *Responsible Wind Power and Wildlife*, Washington 2019, pp. 1–32.

[2] H. Hötker, K.-M. Thomsen, H. Jeromin, *Impacts on Biodiversity of Exploitation of Renewable Energy Sources: The Example of Birds and Bats*, Report by Nature and Biodiversity Conservation Union (NABU) 2006, pp. 1–65.

[3] S.J. Panarella, *For the Birds: Wind Energy, Dead Eagles, and Unwelcome Surprises*, "Hastings West-Northwest Journal of Environmental Law & Policy" 2014, vol. 20, pp. 3–47.

[4] M. Hutchins, M. Parr, D. Schroeder, *ABC's Bird-Smart Wind Energy Campaign: Protecting Birds from Poorly Sited Wind Energy Development*, "Human-Wildlife Interactions" 2016, vol. 10(1), pp. 71–80.

[5] M. Lilley, J. Firestone, *Wind Power, Wildlife, and the Migratory Bird Treaty Act: A Way Forward*, "Environmental Law" 2008, vol. 38(4), pp. 1167–1214.

[6] W.P. Kuvleski, L.A. Brennan, M.L. Morrison, K.K. Boydston, B.M. Ballard, F.C. Bryant, *Wind Energy Development and Wildlife Conservation: Challenges and Opportunities*, "Journal of Wildlife Management" 2007, vol. 71(8), pp. 2487–2498; T.D. Allison, J.E. Diffendorfer, E.F. Baerwald, J.A. Beston, D. Drake, A.M. Hale, C.D. Hein, M.M. Huso, S.R. Loss, J.E. Lovich, M.D. Strickland, K.A. Williams, V.L. Winder, *Impacts to Wildlife of Wind Energy Siting and Operation in the United States*, 2019, www.esa.org/wp-content/uploads/2019/09/Issues-in-Ecology_Fall-2019.pdf [access: 10.05.2021], pp. 1–24.

[7] S. Akerboom, H.T. Anker, C. Backes, J. Bovet, E. Cavallin, A. Cliquet, W. Kock, F. Mathews, D. McFillivray, H. Schoukens, *Wind Energy Projects and Species Protection Law: A Comparative*

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 21/11/2026 19:59:48

RESEARCH AND RESULTS

This paper is focused on the wildlife impact from the wind farms on the area of Natura 2000 (special protected areas, special conservation areas, sites of community interests) according to European Law and national Ukrainian legislation. As the core topic of this article relates to the interpretation of the precautionary principle in the context of the EU Birds and Habitats Directive, Renewable Energy Directive, and the Paris Agreement, the paper applies a doctrinal approach to legal research which is predominantly based on a critical examination of environmental legislation and case law.[8] The choice of such a topic was stimulated by the analysis of the case of Ukraine concerning building wind farm construction of 120 MW capacity (34 wind turbines) at the territory of Polonyna Borzhava (Transcarpathian region highlands). Polonyna Borzhava is a particularly valuable area of conservation interest recognized by the Secretariat of the Berne Convention as the Emerald Network (Natura 2000). In the database of valuable species on "Borzhava" subalpine meadow, about 20 species were specificated (14 bird species, 2 bat species, 1 species of mammals, 2 species of plants, 1 species of insect), which are protected under the Bern Convention.[9] Furthermore, mountain ridge Polonyna Borzhava is an important region in Ukrainian Carpathians for autumn migration of birds, including rare species, which are protected by the Ukrainian Red Data Book: Common Crane, Hen Harrier, Stock Dove, Alpine Accentor, Osprey, Peregrine Falcon.[10] At least 48 species of birds migrate over Polonyna Borzhava in autumn.[11]

In European and national law of EU countries, wind power issues are attributable to the broader topic of combating climate change. The Paris Agreement[12] is an important international instrument for climate changes control and its central aim is to keep a global temperature rise this century well below 2 degrees Celsius above pre-industrial levels and to pursue efforts to limit the temperature increase even further to 1.5 degrees Celsius and "achieve a balance between anthropogenic emission by sources and removals by sinks of greenhouse gases in the second half

Analysis of the Application of EU Law in Five Member States, "European Energy and Environmental Law Review" 2019, no. 4, pp. 144–158.

[8] D. Watkins, M. Burton, *Research Methods in Law*, London 2017, pp. 1–260.

[9] Standing Committee of Convention on the Conservation of European Wildlife and Natural Habitats (39th meeting, 3–6 December 2019), Presumed threat to Emerald site "Polonina Borzhava" (UA0000263) from wind energy development (Ukraine), https://rm.coe.int/other-complaints-presumed-threat-to-emerald-site-polonina-borzhava-ua0/1680931a4e [access: 10.08.2021].

[10] O. Dubovyk, A. Bokotey, L. Pokrytiuk, V. Bodnar, Y. Strus, O. Ruchko, *Autumn migration of birds over Polonyna Borzhava (Ukrainian Carpathians*), "Zoodiversity" 2020, vol. 54(1), pp. 43–52.

[11] *Ibidem*.

[12] Council Decision (EU) 2016/1841 of 5 October 2016 on the conclusion, on behalf of the European Union, of the Paris Agreement adopted under the United Nations Framework Convention on Climate Change (OJ L 282, 19.10.2016, pp. 1–3), Paris Agreement (OJ L 282, 19.10.2016, pp. 4–18).

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Data: 21/11/2026 19:59:48

of this century" (Articles 2 and 4). The Paris Agreement sends clear messages to investors that high-carbon assets will not pay dividends in the long run, and offers new opportunities for renewable energy development (wind power engineering in particular).

Renewable energy is a component of Nationally Determined Contributions (NDCs) – the commitment of each Party to reduce carbon dioxide (CO2) and other greenhouse gas emissions, as well as to adapt to the impacts of climate change. The EU submitted its intended NDC in 2015, pledging an at least 40% domestic reduction in greenhouse gas emissions by 2030 compared to 1990.[13]

The European Union has set itself targets for reducing its greenhouse gas emissions progressively up to 2030 and 2050. The framework of the climate and energy policy of the European Union until 2030 provides for the key targets, among them increase of the share of renewable energy in the overall energy consumption to at least 32%. In addition to implementing the Paris Agreement, the 2030 Framework is part of the Energy Union.[14] Moreover, the EU has more ambitious plans to increase the share of the power generated by renewable sources. In particular, in accordance with Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank – A Clean Planet for all: A European strategic long-term vision for a prosperous, modern, competitive and climate neutral economy,[15] by 2050 more than 80% of electricity will be coming from renewable energy sources. On 11 December 2019, Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions – The European Green Deal[16] indicated the rise of the EU's climate ambitions for the years 2030 and 2050 to reap the benefits of a sustainable green economy. It highlighted the essential role of renewable energy sources, of offshore wind energy production, in achieving these objectives.

Legal regulation of the renewable power sources development in the EU has been started at the directives level in 2009. The Renewable Energy Directive

[13] Submission by Latvia and the European Commission on behalf of the European Union and its Member States, Intended Nationally Determined Contribution by the European Union and its Member States, Riga, 6 March 2015, https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Italy%20First/LV-03-06-EU%20INDC.pdf [access: 10.08.2021].

[14] K. Kulovesi, S. Oberthür, *Assessing the EU's 2030 Climate and Energy Policy Framework: Incremental change toward radical transformation?*, "Review of European, Comparative & International Environmental Law" 2020, vol. 29(2), pp. 151–166.

[15] COM/2018/773 final.

[16] COM/2019/640 final.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 21/11/2026 19:59:48

2009/28/EC (RED I)[17] aimed to ensure that by 2020 energy from renewable sources accounts for at least 20% of the total EU energy consumption for the purposes of electricity generation, transport, heating and cooling.

In the context of the benefits of the fast use of renewable energy, as well as its stable nature and environmental advantages, it has been suggested that the Member States should formulate their law in such a way as to prioritize investment in the renewable energy sector in line with the environmental protection objectives and climate changes prevention.

Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (RED II Directive)[18] was published at the end of 2018. The implementation of the RED II Directive is focused on achieving the new EU objective – to increase the share of renewable energy sources in the EU power sector at least 32% by 2030.

Two other key pieces of EU law are directly relevant to wind farm developments: 1) Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment;[19] 2) Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment.[20]

As wind energy projects are listed under no. 3 (i) of Annex II of Directive 2011/92/EU, Member States need to determine whether and when that activity has to be made subject to an environmental impact assessment. The determination of whether an environmental impact assessment (EIA) is necessary is subject to criteria following from the Directive, as formulated in Annex III. The countries which are the subject of this research have transposed this differently.

According to Articles 2 and 3 of Directive 2001/42/EC plans and programmes containing wind activities that might need an EIA on project level may be subject to an environmental impact assessment. According to Article 3 (4) of Directive 2001/42/EC, Member States must determine whether plans and programmes, which set the framework for future sustainable energy projects, other than those referred to in Article 3 (2), are likely to have significant environmental effects. This determination needs to be made based on the criteria formulated in Annex II.

Along with EU law that promotes wind power development, legislative acts aimed to protect biodiversity during wind farms construction are also of an impor-

[17] 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 and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC (OJ EU L 140/16, 5.06.2009).

[18] OJ EU L 328/82, 21.12.2018.

[19] OJ L 197, 21.07.2001, pp. 30–37, hereinafter: Directive 2001/42/EC.

[20] OJ L 26/1, 28.01.2012, hereinafter: Directive 2011/92/EU.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 21/11/2026 19:59:48

tant role. At the EU level, several laws protect nature and wildlife. In particular, Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds[21] and the Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora[22] proved to be a cornerstone for Europe's wildlife protection. They are a universal mechanism which, although they indeed differ from one country to another, from a pan-European perspective, is becoming one of the basic legal mechanisms having a real impact on nature conservation.[23] They enable all EU Member States to work together, under a common legislative framework, to conserve Europe's most endangered, vulnerable, and valuable species and habitats throughout their natural range within the EU, irrespective of political or administrative boundaries.

Article 6 (1) and Article 6 (2) of the Habitats Directive oblige Member States to (1) take positive conservation measures that correspond to the ecological requirements of habitat types and species present on the sites, and (2) to take measures to avoid any deterioration of the habitat types or any significant disturbance of the species for which the sites have been designated.

Where a site is deteriorating or where there is a threat of deterioration, EU Member States must take appropriate steps to protect their Natura 2000 sites. Based on this provision, the EU Court of Justice in 2007 ordered the Polish authorities to immediately suspend several road projects connected to the construction of the Via Baltica highway.[24] Court proceedings were initiated by the European Commission because Polish authorities planned a route through several Natura 2000 sites, with serious environmental consequences.

Projects that potentially have a significant effect on a Natura 2000 site may proceed only after an assessment has shown that the site's ecological integrity will not be adversely affected.[25] Moreover, the European Commission's guidance document does include assessing the potential impacts of wind farm developments in designated areas.[26]

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[21] OJ L 20/7, 26.01.2010, hereinafter: Birds Directive.

[22] OJ L 206, 22.07.1992, pp. 7–50, hereinafter: Habitats Directive.

[23] A. Niewiadomski *Protection of the Biosphere in Natura 2000 Sites*, "Studia Iuridica Lublinensia" 2020, vol. 29(2), pp. 151–161.

[24] Judgement of the EU Court of Justice in case C-193/07, *Commission of the European Communities v. Republic of Poland*, https://curia.europa.eu/juris/document/document.jsf?text=&docid=60861&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=2323253 [access: 10.07.2021].

[25] J. Verschuuren, *Climate Change: Rethinking Restoration in the European Union's Birds and Habitats Directives*, "Ecological Restoration" 2010, vol. 28(4), pp. 431–439.

[26] European Commission, Managing Natura 2000 sites, The provisions of Article 6 of the Habitats Directive 92/43/EEC (OJ EU C 33/1, 25.01.2019); European Commission, Assessment of plans and projects significantly affecting Natura 2000 sites. Methodological guidance on the provisions of

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 21/11/2026 19:59:48

Article 6 (3) and (4) of the Habitats Directive provides a series of procedural instruments that must be applied to plans and projects that are likely to have a significant effect on a Natura 2000 site.

The first step is to determine whether the plan or project should be assessed in an appropriate way. Even if we only assume (it cannot be ruled out) that the project may have a significant impact on the Natura 2000 site, namely on the site area protection tasks, the relevant impact assessment shall be carried out by the relevant national authority. The impact assessment shall be carried out by the competent national authority in order to approve or reject the fact that the plan or project implementation will not have a negative impact on the integrity of the relevant territory the competent national authority approve or reject (para. 3 Article 6 of the Habitats Directive). The European Commission's "Guidance document on wind energy developments and EU nature legislation"[27] stipulates that the assessment is carried out even when, based on unbiased information, a significant adverse impact on the Natura 2000 site cannot be ruled out.

In this regard, the EU Court of Justice clarifies the understanding of para. 3 Article 6 of the Habitats Directive on the carrying out the assessment. In particular, judgements in cases C-127/02 (*Waddenvereniging and Vogelbeschermingsvereniging*)[28] and C-6/04 (*Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland*)[29] provide that para. 3 Article 6 of the Habitats Directive requires an appropriate assessment of the effects of a plan or project provided that there is a likelihood or risk of adverse effects on the respective conservation area. Namely, based on the precautionary principle, such a risk is significant if, based on objective prerequisites, it cannot be ruled out that the plan or project will have a significant impact on the Natura 2000 area.

The second step of the assessment by the national competent authority provides for an appropriate direct assessment of the impact on the nature conservation areas. During this phase, detailed information should be collected on the environmental properties and conservation objectives of the site and the potential consequences of the plan or project for nature conservation purposes. This will allow the competent

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Article 6 (3) and (4) of the Habitats Directive 92/43/EEC, https://ec.europa.eu/environment/nature/natura2000/management/docs/art6/natura_2000_assess_en.pdf [access: 16.05.2021].

[27] European Commission, Commission notice: Guidance document on wind energy developments and EU nature legislation, Brussels, 18.11.2020, C(2020) 7730 final, https://ec.europa.eu/environment/nature/natura2000/management/docs/wind_farms_en.pdf [access: 10.06.2021].

[28] Judgement of the EU Court of Justice in case C-127/02, *Waddenvereniging and Vogelsbeschermingvereniging*, https://curia.europa.eu/juris/liste.jsf?language=en&num=C-127/02 [access: 10.07.2021].

[29] Judgement of the EU Court of Justice in case C-6/04, *Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland*, https://curia.europa.eu/juris/showPdf.jsf?docid=65588&doclang=EN [access: 10.07.2021].

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 21/11/2026 19:59:48

authorities to assess the plan or project activity, individually or in combination with other plans or projects, and decide whether it will make an adverse effect on the Natura 2000 or not. The burden of proof is in proving the absence of a negative impact on the territory. The judgement of the EU Court of Justice (*Commission of the European Communities v. Italian Republic*)[30] states that the relevant assessment must contain comprehensive, accurate and final findings that could dispel, from a scientific point of view, any doubts as to the consequences of future activities.

As a matter of practice, the relevant assessment is a process that is carried out several times, thus making it possible to improve the plan or project activities to avoid negative impact on the Natura 2000 site.[31] Thus, depending on the results of the assessment, the governmental authorities should determine if mitigation measures or restrictions to avoid adverse effects or reduce them to a negligible level may be applied in the permit.

In the meantime, the competent authorities should assess possible alternatives to the project or action plan. The final response referring to the impact assessment can only be made when there is no negative impact on the site. In case of impossibility to rule out such impact, public authorities must refuse to allow going through the next step of impact assessment.

In the event while carrying out an impact assessment, the national authority identifies that the activity has an adverse impact on the conservation area, however, the plan or project itself must be carried out for good (economic) reasons, the Member State shall take all required compensatory measures to ensure general integrity of Natura 2000. In case there is a priority type of natural habitat and/or priority species in the relevant territory, such reasons may be only human health, national security, environmental benefits that are of paramount importance (para. 4 Article 6 of the Habitats Directive).

However, in accordance with the European principle of proportionality referred to in Article 5 (4) of the Treaty on European Union, the Habitats Directive does not wish to ban all human activity in Natura 2000 sites.[32] The EU Court of Justice in 2010 mentioned: "It should be noted, first, that the system of protection afforded by the Habitats and Birds Directives to sites forming part of the Natura 2000 network does not prohibit all human activity within those sites but simply makes authori-

[30] Judgement of the EU Court of Justice in case C-304/05, *Commission of the European Communities v. Italian Republic*, https://curia.europa.eu/juris/liste.jsf?language=en&num=C-304/05 [access: 10.07.2021].

[31] J. Stelmasiak, *Nature Reserve as a Legal Form of Nature Protection*, "Studia Iuridica Lublinensia" 2020, vol. 29(2), pp. 163–172.

[32] S. Möckel, *The European ecological network "Natura 2000" and the appropriate assessment for projects and plans under Article 6(3) of the Habitats Directive*, "Nature Conservation" 2017, vol. 23, pp. 1–29.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 21/11/2026 19:59:48

sation of such activity conditional upon a prior assessment of the environmental impact of the project concerned".[33]

Therefore, on the one side, only significant adverse impacts on the integrity of a Natura 2000 site are relevant and, on the other, according to Article 6 (4) of the Habitats Directive, a derogating authorisation is possible in favour of public interests.

However, many Member States choose to assert that designated Natura 2000 areas are per definition '"no-go areas" for the development of wind farms.[34] In most cases, this is dealt with at a country level and based on the relevant wildlife species and their habitats, such as: Panachaiko wind farm in Greece, wind turbines have been installed inside a Special Area of Conservation; in Burgenland (Austria) wind farms have worked successfully in the area where one of the biggest steppe lakes of Europe is situated; in the Czech Republic, there are a number of operational projects in classified "bird areas" (e.g., Vrbice wind farm, Nove Mesto wind farm, Petrovice wind farm).[35]

EU Member States environmental protection law system contains relevant special legal acts that regulate the procedure for wind farms construction sites wildlife negative impact on the conservation area. In particular, the Republic of Poland has the Act of 20 May 2016 on investments in wind power plants[36] and Guidelines for forecasting wind power plants impact on the environment of 2 August 2011.[37]

DISCUSSION AND CONCLUSIONS

Ukraine has ratified Paris Agreement by Ukrainian Law of 14 July 2016[38] and submitted its intended NDC in 2016, pledging it will not exceed 60% of 1990 GHG emissions level in 2030.[39]

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[33] Judgement of the EU Court of Justice in case C-2/10, *Azienda Agro-Zootecnica Franchini sarl and Eolica di Altamura Srl v. Regione Puglia*, https://curia.europa.eu/juris/liste.jsf?language=en&num=c-2/10 [access: 10.07.2021], para. 39.

[34] A.L.R. Jackson, *Renewable energy vs. biodiversity: Policy conflicts and the future of nature conservation*, "Global Environmental Change" 2011, vol. 21(4), pp. 1195–1208.

[35] See more *Wind Energy and Specially Protected Areas: USAID Energy Program*, 26.09.2019, https://pdf.usaid.gov/pdf_docs/PA00W52J.pdf [access: 10.08.2021].

[36] Journal of Laws 2016, item 961 (in Polish).

[37] See M. Stryjecki, K. Mielniczuk, *Wytyczne w zakresie prognozowania oddziaływań na środowisko farm wiatrowych*, Warszawa 2011, https://fnez.pl/wp-content/uploads/2020/06/Wytyczne.pdf [access: 10.08.2021] (in Polish).

[38] Law of Ukraine of 14 July 2016 for ratification of Paris Agreement 2015, https://zakon.rada.gov.ua/laws/show/1469-19#n2 [access: 10.07.2021] (in Ukrainian).

[39] Updated Nationally Determined Contribution of Ukraine to the Paris Agreement, https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Ukraine%20First/Ukraine%20NDC_July%2031.pdf [access: 20.08.2021].

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 21/11/2026 19:59:48

Renewable energy development is envisaged by several political documents of Ukraine[40] (strategies, plans, concepts) in the Energy Strategy of Ukraine for the period up to 2035 "Security, Energy Efficiency, Competitiveness" Pow,[41] the Concept of state policy implementation in climate change sphere for the period up to 2030,[42] the Strategy for Low Carbon Development of Ukraine for up to 2050,[43] the National Action Plan for Renewable Energy for up to 2020.[44] In particular, the National Renewable Energy Action Plan for the period up to 2020 aimed to increase renewable energy share in final energy consumption from 3.8% in 2009 to 11% in 2020.

At the legislative level in Ukraine renewable energy development is regulated by the Law of Ukraine of 13 April 2017 on electricity energy market[45] and the Law of Ukraine of 20 February 2003 on alternative energy sources.[46] Article 5 of the Law of Ukraine on electricity energy market establishes the principles of the state regulation and renewable energy development is one of them. The Law of Ukraine on alternative energy sources binds to consider the natural conditions of the environment during facilities construction related to electricity generation by renewable sources, atmospheric conditions, water resources, geothermal sources availability as well as natural cycles periodicity (Article 10).

Ukraine has various laws which regulate wind farm siting and environmental issues: the Law of Ukraine of 16 October 1992 on the basis of urban development[47] and the Law of Ukraine of 17 February 2011 on urban development activities regulation.[48] In accordance with para. 4 Article 2 of the Law of Ukraine on urban development activities regulation urban planning documentation is subject to strategic environmental assessment in the order.

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[40] V. Dergachova, M. Kravchenko, K. Kuznietsova, T. Kotsko, *Ukraine's energy policy: analysis and development strategy*, "Polityka Energetyczna – Energy Policy Journal" 2020, vol. 23(4), pp. 67–90.

[41] Energy Strategy of Ukraine for the period up to 2035 "Security, Energy Efficiency, Competitiveness", 18.08.2017, https://zakon.rada.gov.ua/laws/show/605-2017-%D1%80#Text [access: 10.07.2021] (in Ukrainian).

[42] Concept of state policy implementation in climate change sphere for the period up to 2030 in Ukraine, 6.12.2017, https://zakon.rada.gov.ua/laws/show/878-2017-%D1%80#Text [access: 10.07.2021] (in Ukrainian).

[43] Strategy of Ukraine for Low Carbon Development of Ukraine for up to 2050, 18.07.2018, https://mepr.gov.ua/files/docs/Proekt/LEDS_ua_last.pdf [access: 10.07.2021] (in Ukrainian).

[44] Ukrainian National Action Plan for Renewable Energy for up to 2020, 1.10.2014, https://zakon.rada.gov.ua/laws/show/902-2014-%D1%80#Text [access: 10.07.2021] (in Ukrainian).

[45] Law of Ukraine of 13 April 2017 on electricity energy market, https://zakon.rada.gov.ua/laws/show/2019-19#n1784 [access: 10.07.2021] (in Ukrainian).

[46] Law of Ukraine of 20 February 2003 on alternative energy sources, https://zakon.rada.gov.ua/laws/show/555-15#Text [access: 10.07.2021] (in Ukrainian).

[47] Law of Ukraine of 16 October 1992 on the basis of urban development, https://zakon.rada.gov.ua/laws/show/2780-12#Text [access: 10.07.2021] (in Ukrainian).

[48] Law of Ukraine of 17 February 2011 on Urban development activities regulation, https://zakon.rada.gov.ua/laws/show/3038-17#Text [access: 10.07.2021] (in Ukrainian).

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 21/11/2026 19:59:48

Power generation industry "wind farms, wind farms with two or more turbines or of the height of 50 meters or more" an object of planned activities belongs to the second category of planned activity types and facilities that may have a significant impact on the environment and are subject to environmental impact assessment (Article 3 (3) and (4) of the Law of Ukraine on environmental impact assessment). The Law of Ukraine on urban development regulation also required for urban planning documentation to conduct "Strategic Environmental Assessment" (SEA). Article 3 of the Law of Ukraine on Strategic Environmental Assessment highlights that SEA must be conducted for urban planning or land management (schemes) and those implementations of which will provide for the carrying out the activities for which the legislation provides for environmental impact assessment procedure implementation, or which require assessment, considering the possible consequences for the territories and assets of the nature reserve fund and ecological network.

Current legislation of Ukraine clearly underlines the possible negative impact on wildlife during wind farms siting and defines specific environmental protection law to balance economic, environmental, and social interests.

First of all, it should be noted that Ukraine ratified the wildlife international environmental law: the Convention on Biological Diversity (1992)[49] (ratified by Ukrainian Law of 29 December 1994),[50] the Convention on the Conservation of European Wildlife and Natural Habitats (1979)[51] (ratified by Ukrainian Law of 29 October 1996),[52] the Convention on the Conservation of Migratory Species of Wild Animals (1979)[53] (ratified by Ukrainian Law of 19 March 1999),[54] the Framework Convention on Conservation and Sustainable Development of Carpathians (2003) (ratified by Ukrainian Law of 7 April 2004).[55] In particular, in accordance with the Berne Convention, the Emerald Network is created for conservation of

[49] Convention on Biological Diversity, 1992, www.cbd.int/doc/legal/cbd-en.pdf [access: 10.07.2021].

[50] Convention on Biological Diversity, ratified by Ukrainian Law of 29 December 1994, https://zakon.rada.gov.ua/laws/show/995_030#Text [access: 10.07.2021] (in Ukrainian).

[51] Convention on the Conservation of European Wildlife and Natural Habitats, Bern, 19.09.1979, ETS no. 104.

[52] Ukrainian Law of ratification the Convention on the Conservation of European Wildlife and Natural Habitats, ratified on 29 October 1996, https://zakon.rada.gov.ua/laws/show/995_032#Text [access: 10.07.2021] (in Ukrainian).

[53] Convention on the Conservation of Migratory Species of Wild Animals, 1979, www.cms.int/en/convention-text [access: 10.07.2021].

[54] Ukrainian Law of ratification the Convention on the Conservation of Migratory Species of Wild Animals, ratified on 19 March 1999, https://zakon.rada.gov.ua/laws/show/995_136#Text [access: 10.07.2021] (in Ukrainian).

[55] Ukrainian Law of ratification the Framework Convention on Conservation and Sustainable Development of Carpathians, ratified on 7 April 2004, https://zakon.rada.gov.ua/laws/show/998_164#Text [access: 10.07.2021] (in Ukrainian).

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 21/11/2026 19:59:48

species and habitats threatened with extinction throughout the continent. According to the secretariat of the Berne Convention, the Polonyna Borzhava (where the wind farm construction is planned) is a part of the Emerald Network, the territories where activities that could make negative impact on the environment are prohibited.

Ukraine has a number of legislative acts that establish the legal status of territories and conservation Emerald Network, namely: the Law of Ukraine of 25 June 1991 on environmental protection,[56] the Law of Ukraine of 24 June 2004 on ecological network,[57] the Law of Ukraine of 19 June 2003 on land conservation,[58] the Law of Ukraine of 16 June 1992 on the Nature Reserve Fund of Ukraine,[59] the Law of Ukraine of 13 December 2001 on the wildlife.[60] The above legal acts contain regulations prohibiting economic activities in places of valuable species of fauna habitat and growth, genetic fund, animal migration ways through a combination of territories and natural reserve fund assets.

The Red Book of Ukraine is one of the legal formalizing features of a rare or endangered species as an object of legal protection. According to the Article 11 of the Law of Ukraine of 7 February 2002 on the Red Book of Ukraine,[61] the protection of the species listed in the Red Book of Ukraine is provided by considering special requirements for the protection of the species listed in the Red Book of Ukraine during productive forces deployment, dealing with land plots allocation issues, design and project planning documentation development, environmental impact assessment.

It should be highlighted that despite wide range of laws on wildlife protection in Ukraine, the decision-making process of economic activity in the Emerald Network aimed to the preservation of natural habitats and species of fauna as subject to special protection does not exist. The only document which regulates similar issues is DSTU 8339: 2015 – Wind power sector. Wind power plants. Environmental Impact Assessment of Wind Power Plants[62] (even not a rule of law), but it does

[56] Law of Ukraine of 25 June 1991 on environmental protection, https://zakon.rada.gov.ua/laws/show/1264-12#Text [access: 10.07.2021] (in Ukrainian).

[57] Law of Ukraine of 24 June 2004 on ecological network, https://zakon.rada.gov.ua/laws/show/1864-15#Text [access: 10.07.2021] (in Ukrainian).

[58] Law of Ukraine of 19 June 2003 on land conservation, https://zakon.rada.gov.ua/laws/show/962-15#Text [access: 10.07.2021] (in Ukrainian).

[59] Law of Ukraine of 16 June 1992 on the Nature Reserve Fund of Ukraine, https://zakon.rada.gov.ua/laws/show/2456-12#Text [access: 10.07.2021] (in Ukrainian).

[60] Law of Ukraine of 13 December 2001 on the wildlife, https://zakon.rada.gov.ua/laws/show/2894-14#Text [access: 10.07.2021] (in Ukrainian).

[61] Law of Ukraine of 7 February 2002 on the Red Book of Ukraine, https://zakon.rada.gov.ua/laws/show/3055-14#Text [access: 10.07.2021] (in Ukrainian).

[62] DSTU 8339: 2015 – Wind power sector. Wind power plants. Environmental Impact Assessment of Wind Power Plants, http://online.budstandart.com/ua/catalog/doc-page?id_doc=62884 [access: 10.07.2021] (in Ukrainian).

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Data: 21/11/2026 19:59:48

not verify the specific condition of wildlife protection of wind farm's location in conservation areas.

On 15 January 2019, TOV "Atlas Volovets Energy" has published in the Environmental Impact Assessment Registry the Environmental Impact Assessment (EIA) Report on the construction of a 120 MW wind power plant on the territory of the Volovets settlement council of the Zakarpattya oblast (registration no. 2018821379/7554).[63]

According to the Report, the construction of a wind power plant with a total capacity of 120 MW with the necessary infrastructure (including access roads, underground cable line of 110 kW and underground cable power systems of 35 kW, distribution points and substation) is to be implemented on separate sites with the total area of 30.6041 hectares, the area under the wind power units is 28.259 hectares. Construction is proposed to build on the territory of the Emerald site UA0000263 "Polonyna Borzhava".

Department of Ecology and Natural Resources of the Zakarpattia Oblast State Administration has published on 12 March 2019 a Conclusion on the EIA of the planned activities.[64] According to the Conclusion, the Department of Ecology and Natural Resources of the Zakarpattia Oblast State Administration considers it feasible to carry out the planned activity.

The Zakarpattia County Administrative Court on 18 March 2020 has been taking up in a public court the administrative[65] on the claim of the non-governmental organization International Institute of Man and Global Studies 'Noosphere' to declare the conclusion illegal and revoke it, and has completely satisfied the claim of this organization.

The Eighth Administrative Court of Appeal on 3 November 2020[66] has satisfied by its ruling the appeal of the Volovets settlement council of the Volovets district of the Zakarpattia oblast, the Tybava rural council of the Svalyava district of the Zakarpattia oblast and "Atlas Volovets Energy", and has reversed the ban of the environmental impact assessment conclusion.

For this case of Ukraine, the Standing Committee of the Convention on the Conservation of European Wildlife and Natural Habitats on their 40th meeting (30 No-

[63] The report is available at: http://eia.menr.gov.ua/places/view/1379 [access: 10.08.2021] (in Ukrainian).

[64] Conclusion of the Department of Ecology and Natural Resources of the Zakarpattia Oblast State Administration, http://eia.menr.gov.ua/uploads/documents/1829/reports/b4b9bfdae9d3b32a52c9e-14b54e7e195.pdf [access: 12.08.2021] (in Ukrainian).

[65] Judgement of the Ukrainian Zakarpattia County Administrative Court in case no. 260/771/19, https://reyestr.court.gov.ua/Review/85768642 [access: 10.07.2021].

[66] Judgement of the Ukrainian Eighth Administrative Court of Appeal in case no. 260/771/19, https://reyestr.court.gov.ua/Review/92787005 [access: 10.07.2021].

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Data: 21/11/2026 19:59:48

vember – 4 December 2020)[67] expressed its concern at the worrying situation in Ukraine and mandated a mission to take place during 2021 and to take into account other complaints in Ukraine related to Emerald Network sites. In the meantime, the Standing Committee called on the Ukrainian authorities to not commence any works before the conclusions of the mission been assessed.

Some years ago, Bulgaria has a similar case. On 14 January 2016, the EU Court of Justice issued a ruling regarding the Kaliakra case,[68] where it found that Bulgaria failed to comply with EU nature conservation law, in particular the Birds Directive, Habitats Directive and Directive 2011/92/EU. Bulgaria is under a legal obligation to take the necessary measures to comply with the judgement of the Court (Article 260 of the Treaty on the Functioning of the European Union).

The Court declared that by failing to include all the territories of the important bird areas in the special protection area covering the Kaliakra region, the Republic of Bulgaria has failed to classify as special protection areas the most suitable territories in number and size for the conservation, first, of the biological species listed in Annex I to Directive 2009/147/EC and, secondly, of the migratory species not listed in that Annex but regularly occurring in the geographical sea and land area where that Directive applies, with the result that the Member State has failed to fulfil its obligations under Article 4 (1) and (2) of that Directive.

As a conclusion, renewable energy is an important component of measures needed to combat climate change. In developing climate change law, we must not forget the need to protect and enhance biodiversity, special in a conservation area. The EU has complementary climate change (renewable energy) and biodiversity (wildlife) policies and laws. Unfortunately, the potential negative wildlife impacts are often ignored according to Ukrainian law. On the one side, Ukraine has several special laws, which emphasized wildlife protection in conservation areas during wind farm construction. On the other side, in practice the judges are guided by the general legal provisions, based on the principle of state, private and public interests combining. The case of wind farm construction at the Emerald Network territory "Polonyna Borzava" – UA00002634 (conservation area with international status) is a hands-on example of it.

Ukraine has signed an Association Agreement with the European Union in 2014[69]. Both the EU Birds and Habitats Directives are covered in the Association

[67] Standing Committee of the Convention on the Conservation of European Wildlife and Natural Habitats on their 40th meeting (30 November – 4 December 2020), List of decisions and adopted texts, https://rm.coe.int/draft-list-of-decisions-of-the-40th-standing-committee/1680a09902 [access: 14.08.2021].

[68] Judgement of the EU Court of Justice in case C-141/14, *European Commission v. Republic of Bulgaria*, https://curia.europa.eu/juris/liste.jsf?language=en&num=C-141/14 [access: 10.07.2021].

[69] Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part (OJ L 161, 29.05.2014, pp. 3–2137).

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Data: 21/11/2026 19:59:48

Agreement. Their transposition into national law and implementation should be fully ensured according to the timelines of the Agreement only in 2027. Meanwhile, implementing European law, Ukraine should take into consideration only the best practices with respect of wildlife impact during the wind farms sites in special conservation areas.

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Data: 21/11/2026 19:59:48

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ABSTRAKT

W artykule przedstawiono kompleksowy przegląd prawa europejskiego i ukraińskiego prawa krajowego w zakresie ochrony przyrody na specjalnych obszarach ochrony przyrody na terenie farm wiatrowych. W pierwszej części przeanalizowano prawo Unii Europejskiej dotyczące energii odnawialnej na tle przeciwdziałania zmianom klimatycznym oraz niektóre przepisy krajowe państw Unii. Skupiono się na prawnej regulacji oddziaływania farm wiatrowych na przyrodę na obszarach Natura 2000. Ponadto zwrócono uwagę na kroki proceduralne, które muszą być stosowane w przypadku planów i przedsięwzięć mogących znacząco oddziaływać na obszar Natura 2000. W drugiej części artykułu omówiono kwestie prawne ochrony przyrody zgodnie z ukraińskim prawem krajowym na obszarze sieci Emerald (Natura 2000) na terenach elektrowni wiatrowych. Autorka wskazuje, że Ukraina posiada różne ustawy regulujące lokalizację farm wiatrowych, które wymagają przeprowadzenia oceny oddziaływania na środowisko oraz strategicznej oceny oddziaływania na środowisko jako instrumentu prawnego ochrony dzikiej przyrody. Następnie wskazane zostały konkretne przepisy dotyczące ochrony przyrody na Ukrainie, które zabraniają prowadzenia działalności gospodarczej na specjalnych obszarach chronionych. Szerzej omówiono też ochronę przyrody na terenach farm wiatrowych na obszarze Połoniny Borżawskiej (sieć Emerald).

Słowa kluczowe: ochrona przyrody; farma wiatrowa; obszary Natura 2000; sieć Emerald; Ukraina