

APPENDIX No. 6

Relevant EU Precedents

1	Rotterdam	New Port	Opinion of the Commission	24.04.2003
2	Nied	New High Speed Railway Line	E1795/2004	16.09.2004
3	Tenerife	New Port Granadilla	EU Commission Opinion C (2006)	2006
4	River Main	River Fairway, Widening and Deepening	Commission Opinion C(2013) 1871	05.04.2013
5	Lichtenfels	Federal Highway Widening and Relocation between Lichtenfels and Kronach	C(2015) 9085	18.12.2015
6	Stuttgart	Railway Connection	Commission Opinion C(2018) 466 Bad Cannstatt to Stuttgart	30.01.2018

APPENDIX No. 6.1

Relevant EU Precedents

1. Rotterdam

“Project Mainport Rotterdam”

Opinion of the Commission Brussels 24.04.2003



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 24/04/2003

OPINION OF THE COMMISSION

delivered pursuant to Article 6.4 § 2 of Council Directive 92/43/EEC of 21 May 1992 on the conservation of the natural habitats and of wild fauna and flora (Habitats Directive), concerning the “Request by the Netherlands for advice and exchange of information with the European Commission within the framework of the Birds and Habitats Directives”, in relation to the “Project Mainport Rotterdam” Development Plan

I. The legal framework

Article 6(3) of directive 92/43/EEC prescribes that any plan or project not directly connected with or necessary to the management of a Natura 2000 site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, be subject to an appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of its implications for the site and subject to the provisions of paragraph 4, the competent national authorities may agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

According to article 6(4) of directive 92/43/EEC, a plan or a project may be carried out in spite of a negative assessment of the implications for a Natura 2000 site, in the absence of alternative solutions, if it is justified for imperative reasons of overriding public interest, including those of a social or economic nature. In this case the Member States shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected and it shall inform the Commission of the compensatory measures adopted. Where the site concerned hosts a priority natural habitat type and/or a priority species, and if considerations relating to human health, public safety or beneficial consequences of primary importance for the environment cannot be invoked, the project can be justified, further to an opinion¹ from the Commission, by other imperative reasons of overriding public interest.

II. The Dutch request

On 12.03.2002, the Permanent Representation of the Netherlands to the EC sent to DG Environment a formal notification according to article 6(4) of the Habitats Directive regarding

¹Different language versions of art. 6.4 of the Habitats Directive use different terms for “opinion”: the Dutch text mentions “advies”, the French one “avis”, the German one “Stellungnahme”, the Spanish one “consulta” and the Italian one “parere”. The term “opinion” will be maintained throughout this document.

the plan “Project Mainport Rotterdam” (PMR), titled “ PMR Birds and Habitats Directives - Request by the Netherlands for advice and exchange of information with the European Commission within the framework of the Birds and Habitats Directives“ (further: “the notification”).

On 17.05.02, DG Environment requested the Dutch Government to submit for clarification a series of documents and studies mentioned in the text of the notification.

On 03.07.2002 and 08.07.2002, the Dutch government sent the requested documentation to DG Environment.

A detailed account of the exchanges with the Dutch administration and other stakeholders that led to the drafting of the present text is given in annexes 1 and 2.

The documentation received from the Dutch government is listed and numbered in annex 3 . It will be referred to by these numbers in the subsequent part of this text.

III. The Project

The Dutch Government has decided to launch a planning exercise regarding the future of the harbour of Rotterdam. It has justified this measure by reference to predictions that in the case of continuing economic growth trends, a shortage of space for petrochemical industry, container handling and the distribution sector would develop in the Rotterdam harbour and its surrounding industrial areas.

Project Mainport Rotterdam (PMR – further “the plan”) is an extension plan for the port of Rotterdam consisting of a combination of better use of space still available in the existing harbour area, the “Maasvlakte 2” land reclamation from the sea covering 2500 ha (further “the land reclamation project”) and 750 ha new nature and recreation areas on shore.

Under Dutch planning procedures, the project has passed a public consultation and is now at the stage of a cabinet decision which has to be followed by an approval vote in parliament.

There is no doubt that the project will significantly affect in the sense of article 6 (3) of directive 92/43/EEC the integrity of several Natura 2000 sites and habitats and species occurring in them. In this situation, the project can only be carried out if it complies with the requirements of article 6(4) of directive 92/43/EEC.

IV. The Natura 2000 sites that are directly involved

According to the notification the land reclamation project that will result in westward extension into the North Sea of the existing Maasvlakte is expected to significantly affect a priority habitat as well as two other habitats listed in Annex I of directive 92/43/EEC, one plant species of annex II of the Habitats Directive and two bird species listed in annex I of directive 79/409/EEC in a Special Protection Area (SPA - according to directive 79/409/EEC) and in proposed Sites of Community Importance (pSCIs - according to directive 92/43/EEC) in the coastal and estuary zones South of Hoek van Holland.

The affected SPA is : “Voordelta” (NL 4000017)

The affected pSCI's are : “Voorne's Duin” (NL 9803077), “Kwade Hoek” (NL 2000006) “Kop van Goeree” (NL 9801079) and “Voordelta” (NL 4000017)

The affected habitats are : 2130* ("Grey Dunes") , 2120 ("White Dunes"), 1110 ("Sandbanks which are slightly covered by seawater all the time")

The affected plant species is : the fen orchid *Liparis loeselii*

The affected bird species are : the Slavonian grebe (*Podiceps auritus*) and the Scaup (*Anthya marila*)

V. Assessment of the effects of the land reclamation project of PMR on Natura 2000 sites

1. The expected direct effects of the land reclamation project on surrounding Natura 2000 sites have been reported in detail in part B of document IX, which is the annex concerning nature and recreation to the Environmental Impact Assessment covering the whole PMR plan . This EIA was carried out from 1998-2000 and was audited by the Dutch Commission for EIA (Commissie voor MER – doc. III) an independent body in charge of overseeing the application of EIA legislation in the Netherlands. The audit approved the completeness and the validity of the information provided and corroborated the public consultation procedures involving a wide range of private and public stakeholders. The findings from document IX have been taken into account in document VIIIA and document VIIIB, which are important elements in the Dutch decision making procedure.

The Commission holds the view that these assessments can be considered appropriate in the sense of article 6 (3) of directive 92/43/EEC.

According the above mentioned assessment, the following priority habitats, habitats and species listed in annexes of the habitats Directive will be significantly affected by the land reclamation project:

- 2130* ("Grey Dunes") in an order of magnitude of approx. 19.5 ha (priority habitat) located in the pSCI's Voorne's Duin (NL 9803077) and Kop van Goeree (NL 9801079).
- 2120 ("White Dunes"), in an order of magnitude of 23 ha (non priority habitat) located in the pSCI's Voorne's Duin (NL 9803077), Kwade Hoek (NL 2000006) and Kop van Goeree (NL 9801079).
- 1110 ("Sandbanks which are slightly covered by seawater all the time"), in an order of magnitude of 3125 ha (non priority habitat) located in the pSCI Voordelta (NL 4000017).

The expected effects on terrestrial habitats are believed to be caused by a decrease in salt spray which is due to the sheltering from marine influence by land reclamation.

The expected effects on the marine habitat will be caused by direct covering of the underwater shore and expected morphological changes in the Haringvliet estuary.

- The occurrence of the fen orchid *Liparis loeselii* (non priority species) is being significantly affected at one fifth of the sites where it occurs in the pSCI Voorne's Duin (NL 9803077).

This expected effect is thought to be caused by rising of the groundwater table.

According to the above mentioned assessment, the following bird species listed in annex I of the Birds Directive 79/409/EEC are expected to be significantly affected by the land reclamation project, through reduction of the area of habitat 1110:

- The occurrence of the Slavonian grebe (*Podiceps auritus*) is expected to decline by 0.1 to 5 % in the SPA “Voordelta” (NL 4000017).
- The occurrence of the Scaup (*Anthya marila*) is expected to decline by 8 to 16 % in the SPA “Voordelta” (NL 4000017).

The Commission holds the view that the expected changes in habitat structure and species occurrence may affect the overall coherence of Natura 2000 and, subject to meeting other requirements of art. 6.4 of the Habitats Directive, should therefore be adequately compensated. Such compensation has to be seen as a pre-condition for the land reclamation project to go ahead.

2. Effects of sand extraction

The audit of the comprehensive EIA of the PMR plan by the Dutch Commission for EIA (doc. III) contains certain observations about lacking information about the effects on coastal sea habitats of sand extraction from the seabed for land reclamation. These remarks were included in the planning documents VIIIA and VIIIB. The relevant maps in these documents show that the proposed sand extraction perimeter is located right next to the reclamation area, which means that it also borders the SPA “Voordelta”. Although a buffer strip was added on map 3.2 in annex 2 of document VIIIB, it may seem appropriate to investigate the potential for a significant effect on the Natura 2000 site “Voordelta” of sand extraction in this area.

For the reasons explained above, the Commission holds the view that the effects on the Natura 2000 site “Voordelta” of sand extraction in the perimeter indicated in docs. VIIIA and VIIIB are to be considered as a separate project occurring in combination with the land reclamation project and may therefore have to be the subject of separate assessments in the sense of article 6(3) of the Habitats Directive. The Commission notes the explicit mention that is made in document VIIIB to the necessity of halting any sand extraction that may prove to have negative effects on Natura 2000 sites.

3. Effects on the Wadden Sea.

The Wadden Sea is a Natura 2000 site of paramount international importance, designated both as an SPA and as a pSCI and also as a Ramsar Convention Area. The conservation of the natural environment in this area depends largely on the stability of a process of alternating sedimentation and erosion that is fed by sediment transport from the S. part of the North Sea along the Dutch coast. A study by Delft Hydraulics (doc. IV) about the effects of different PMR land reclamation scenarios on sediment transport comes to the conclusion that the largest effects are to be expected S. of the land reclamation area and that effects on the sediment balance in the Wadden Sea are rather small. However, the same study also points out that the error margin of its findings is still considerable and that therefore no firm conclusions about effects on the Wadden Sea can be established, although it appears to be certain that sediment transport towards the N. would decrease as a result of the PMR land reclamation project.

The Commission notes that the assessment of possible effects of the proposed land reclamation on the sediment balance in the Wadden Sea have been investigated as much as current scientific knowledge and assessment techniques allow, but that the margin of error in the results of this assessment remains considerable.

Bearing in mind the precautionary principle, the Commission holds the view that the remaining risk for negative effects of the proposed land reclamation on the sediment balance in the Wadden Sea should be addressed by careful monitoring as an integral part of the execution process of the land reclamation project, with a possibility to take corrective measures if negative significant effects on the state of conservation of the Wadden Sea should occur or would become highly likely.

VI Alternative solutions and mitigation measures – alternative designs

Weighing of alternatives for the PMR plan has been carried out on two levels :

1. Different project approaches

Three different approaches to expand the Rotterdam harbour and to improve living conditions with minimal damage to the environment were studied :

- better use of existing space in the actual Rotterdam port area;
- increased use of existing port sites in the SW Netherlands;
- expansion of the existing Maasvlakte artificial peninsula by the land reclamation project.

Detailed accounts of these studies are given in docs. V, VIIIb and X. According to these planning documents, the SW Netherlands option was abandoned because of large investments in hinterland connections and lack of space for the kind of developments to be expected in Rotterdam, while the landside expansion of the existing Rotterdam port areas was not considered because of a too large potential for conflict with environmental, social and safety requirements.

2. Different land reclamation designs

Three main variants and several reference designs for shaping the new facilities to be established on reclaimed land are presented and studied in docs IV, V, VIIIa and IX. The options presented on p. 29 of the notification are two reference designs that belong to the variant C “ Nature elsewhere / Land within boundaries”. One reference design would make use of the existing harbour entrance, the other proposes a new entry channel farther out to sea. This second option appears to be more suitable to future extension of the land reclamation and is expected to offer better nautical security. But as it makes use of fixed structures that go farther from the coastline, it may have a larger effect on sediment transportation towards the North. In document VIIIb, the Dutch Government states that a phased project execution, including intermediate evaluations of the effects on the natural environment, will be its strategy to deal with uncertain effects and market demand for harbour space.

The Commission holds the view that the selection between alternative project approaches and between different land reclamation designs has been carried out in an appropriate manner, but notes the the second option for the land reclamation reference design would require more attentive monitoring of sediment transport with regard to the conservation status of the

Wadden Sea. The Commission also notes that a phased execution of the land reclamation project is essential for maintaining the possibility of taking corrective measures in the case of unexpected effects on Natura 2000 sites.

The construction of an underwater shoreline that mimics the natural situation of a “soft seawall” along the edge of the land reclamation area is identified as an important mitigation measure in relation to the effects on the SPA and pSCI “Voordelta” because it allows for partial recreation of habitat type 1110.

VII. Imperative reasons of overriding public interest

In the notification, the Dutch Government has advanced several elements on which it has based its declaration that the land reclamation project has to be executed for an imperative reason of overriding public interest other than those related to human health, public safety or beneficial consequences of primary importance for the environment.

These elements are:

- the fact that the portuary and industrial activity in the Rotterdam area is one of the main pillars of the Dutch economy, which is illustrated in docs. I and VII;
- the fact that the expected growth in global container handling and chemical industrial activity will lead to increased demand for space which will have to be met if the competitive position of the Rotterdam harbour in the Hamburg – Le Havre range has to be maintained;
- the fact that the harbour of Rotterdam is an essential multimodal crossroads in the TEN-T Network as established by “Decision No 1692/96/EC of the European Parliament and of the Council of 23 July 1996 on Community guidelines for the development of the trans-European transport” network and is therefore of Community importance;
- the fact that the PMR project has to be considered as a project of common interest according to the provisions of art. 1 (5b) of “Decision No 1346/2001/EC of the European Parliament and of the Council of 22 May 2001 amending Decision No 1692/96/EC as regards seaports, inland ports and intermodal terminals as well as project No 8 in Annex III”;
- the fact that the project approach that was chosen, which combines better use of available space, improvement of living conditions and development of new space by land reclamation, appears to find the best balance between the human and the natural environment in the Rotterdam urban and portuary area.

VIII. Proposed Compensations

To offset for the expected effects of the land reclamation project on Natura 2000 as described in the notification, Dutch authorities have proposed a compensation package consisting of new dunes and beach habitats and a marine reserve in the coastal sea area which is planned as follows:

1. Compensation for the effects on priority habitat 2130*

- It is proposed to create a new dune area of 100 ha off the Dutch coast between Hoek van Holland and Ter Heijde, inside which a sizable area of habitat 2130* will be allowed to develop over a period of 20 years.

2. Compensation for the effects on other habitats and species

- The loss of area for habitat 1110 will be compensated by a marine reserve of 31250 ha in the SPA “Voordelta”. This will not involve new habitat creation but will entail measures that reduce disturbance of the seabed, such as certain restrictions on fisheries, allowing the creation of better conditions for foraging birds, such as the affected species *Podiceps auritus* and *Anthya marila*.
- The decrease in occurrence of *Liparis loeselii* will be compensated by the creation of 10 ha of habitat 2190 (Humid dune slack) in the above mentioned new dune area.
- The loss of area for habitat 2120 will be compensated by the creation of an equivalent area along the seaside of the Brouwersdam.

The complete set of compensation measures and the reasoning behind them are described in detail in the documents “Advies over natuurcompensatie bij een tweede Maasvlakte”, IX and VIIIb, with maps in annex 2 of document VIIIb detailing their precise locations.

These compensation measures have been widely commented by stakeholders during the public consultation procedure mentioned in document III.

These compensation measures have been discussed in depth between Commission technical units, PMR planners and Dutch nature conservation NGO’s.

The fishery sector has voiced opposition to the expected restriction on its activities, but the Commission has made it known that it considers this kind of measures as a purely national matter, insofar they are compatible with the Common Fisheries Policy and only affect Dutch operators.

The compensation proposal has been included in considerable detail in the document VIIIb and is also part of the practical arrangements mentioned in document XI. It can as such be considered to be ready for adoption as integral and essential part of the land reclamation project by the pending final and binding cabinet decision to execute the entire PMR plan.

Considering the expected effects of the land reclamation project on the priority habitat type 2130 and the expected results from the planned compensatory measures mentioned above, the Commission holds the view that in the long term the overall coherence of Natura 2000 will not be significantly affected.*

The Commission considers that the proposed compensations, as described in the notification and the documents mentioned in annex 3 are adequate to make up for the effects of the land reclamation project of PMR on Natura 2000, if they are executed in a timely manner that corresponds with the phasing of the land reclamation and if they are subject to management plans that assure their long term effectiveness.

The Commission advises the Government of the Netherlands to send reports on the implementation of the PMR plan project as a whole to its Directorate General for Environment on a periodic basis.

IX. Opinion of the Commission

Taking into account the arguments mentioned above, the Commission holds the view that the land reclamation project, as described in the notification and further illustrated in the documentation listed in annex 3 of this text, particularly so in document VIIIb, can be executed for reasons of overriding public interest on the condition that all necessary compensation measures to ensure the overall protection of the coherence of Natura 2000 be taken in due time.

With regard to the opinion expressed in this document the Commission notes the following:

- This opinion is valid for this particular project, as described in the above mentioned additional documents submitted to the Commission by the Dutch authorities and cannot be considered as applicable to possible effects of the PMR land reclamation project on other Natura 2000 areas.
- This opinion presumes that the compensatory measures will be implemented and monitored as described in the above-mentioned documents submitted to the Commission by the Dutch authorities.
- This opinion presumes that the results of accompanying monitoring programmes regarding Natura 2000 are taken into account in the sense that they may, if need be, lead to appropriate rectifications in project design or to additional compensation and mitigation measures.

Annex 1 : Sequence of exchanges between the Environment DG of the Commission and the Dutch administration

In **July 2000** the Dutch administration requested consultations with DG Environment about the application of art. 6 (3) & (4) of the Habitats Directive to an extension project for the Rotterdam Harbour. Several informal meetings between Dutch and EC officials took place during 2000-2001. DG Environment advised the Dutch representatives to notify the complete project to the Commission and to request an opinion from the Commission before taking any operational decisions.

05.11.2001 : Transmission of a draft concept for a notification according to article 6 (4) of the Habitats Directive, accompanied by an advisory study about the possibilities for compensating loss of natural values in affected Natura 2000 areas (“Advies over natuurcompensatie bij een tweede Maasvlakte”, PMR 2001).

27.11.2001 : Meeting between Dutch officials and technical and legal units of DG ENV, following a request by the Netherlands.

- The Commission took note of the description of the project by the Dutch delegation.
- The Commission made the following statements regarding procedural steps:

“The Dutch authorities are advised to formulate the notification of the project according to art. 6 HD and the request for an opinion of the Commission as conditioning their decision to execute it , so as not to put the Commission before accomplished facts.”

“The Commission will study in detail the advisory document on proposed compensation measures it received from PMR and compare it with the documentation on potential compensations that it has received from various Dutch NGO’s and academic sources.”

“The proposed concept for a notification of the PMR project according to article 6 (4) of directive 92/43/EEC does not elaborate on the land reclamation project’s potential effects on the sediment balance in the Dutch coastal sea and the Wadden Sea. As the Wadden Sea is a Natura 2000 site of paramount international importance, the Commission expects that any final decision concerning PMR will contain appropriate monitoring elements and provisions to rectify developments affecting its conservation status.”

“An opinion from the Commission in the sense of article 6 (4) of directive 92/43/EEC on the PMR project will have to take into account inputs from other Directorates General involved in harbour development, such as DG Regional Affairs, DG Transport and Energy and DG Economic and Financial Affairs.”

12.03.2002 : The Netherlands sent to DG Environment a formal notification titled “PMR Birds and Habitats Directives - Request by the Netherlands for advice and exchange of information with the European Commission within the framework of the Birds and Habitats Directives“ . This notification states that the Netherlands seek the opinion of the Commission concerning compensatory measures for the affected priority habitat and wish to inform the Commission concerning compensatory measures for the effects on non-priority species and habitats, prior to the final Cabinet decision (“PKB-plus , deel 4”) to execute the project.

25.03.2002 : DG Environment reply to the notification about consulting other EC services about the project.

17.05.2002 : DG Environment request to the Dutch Government for submission of documents and studies mentioned in the text of the notification.

03.07.2002 and **08.07.2002** : Transmission by the Dutch government of the requested documentation.

Annex 2: Description of exchanges about PMR between DG Environment and other Dutch stakeholders

During **2000-2001**, DG Environment received delegations from several Dutch nature conservation organisations who presented their views about the PMR project and submitted studies and other technical and legal documentation.

During **2000-2001**, DG Environment exchanged views with the Dutch National Fisheries Association ("Produktschap Vis") about the effects of land reclamation and nature compensation measures on fishing activities in the coastal sea.

In **2002**, DG Environment exchanged views with the European Dredging Association about the impact of the Habitats Directive on dredging operations related to the PMR project.

Annex 3 : Documentation received by the Environment DG of the Commission from the Dutch administration and mentioned in the text.

– Transmitted on 03.07.2002 :

(I.) Overview of economic data about the port of Rotterdam (Min. V & W)

(II.) Overview map with different components of PMR (Min V&W)

(III) "Toetsingsadvies over het MER mainportontwikkeling Rotterdam" (Commissie voor MER , 2001)

(IV) "Effecten van Landaanwinning Maasvlakte 2 op het slibtransport langs de Nederlandse kust" (Delft Hydraulics, 2001)

(V) PMR Interim Report "On Course" (PMR, 1999)

(VI) Clarification note about different studies mentioned in the notification (Min V&W)

(VII) Notitie "Het economisch belang van de Mainport Rotterdam" (Min V&W, 2000)

(VIIIa) "Ontwerp PKB-plus , deel 1" (PMR, 2001)

(VIIIb) "PKB-plus , deel 3 : Kabinetsstandpunt" (PMR , 2001)

(IX) "Bijlage Natuur en Recreatie Landaanwinning" (Rijkswaterstaat, 2nd version of May 2000)

(X) "Vervolgstappen bestaand Rotterdams gebied" (Gemeente Rotterdam, 2000)

- Transmitted on 08.07.2002 :

(XI) "Memorandum of understanding for the constituent projects of Rotterdam Mainport Development Project (PMR)"

APPENDIX No. 6.2

Relevant EU Precedents

2. Nied

“TGV (East)” High Speed Railway Line”

Opinion of the Commission Brussels 16.09.2004



COMMISSION EUROPÉENNE
SECRÉTARIAT GÉNÉRAL

Bruxelles, le 9 septembre 2004

FDE

C(2004)3460

NOTE POUR LES MEMBRES DE LA COMMISSION

E/1795/2004

N O R M A L E

Délai:

JEUDI 16 SEPTEMBRE 2004 - 11 H

Observations éventuelles : service des procédures écrites SG-A-2
Fax : 64316 - Tél.: 52362 / 52363

Objet : Directive "Habitats"
- avis de la Commission (France)

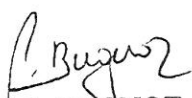
Proposition de Mme WALLSTRÖM

Décision proposée :

- approuver le projet d'avis de la Commission, émis conformément à l'article 6, paragraphe 4, deuxième alinéa, de la directive 92/43/CEE du Conseil, du 21 mai 1992, concernant la conservation des habitats naturels ainsi que de la faune et de la flore sauvages (directive "Habitats"), en ce qui concerne la demande d'avis et d'échange d'informations adressée par la France à la Commission européenne dans le cadre de la directive "Habitats", en relation avec le projet de construction d'une Ligne Grande Vitesse (TGV Est) ;
- le texte en langue française est le seul faisant foi.

Commentaire :

Selon le service responsable, ce projet ne comporte pas d'incidences financières sur le budget communautaire.


Patricia BUGNOT
Directeur du Greffe

Destinataires : Mme DAY, MM. LAMOUREUX, MEADOWS, PETITE

NOTE DU SECRETARIAT GENERAL

PREPARATION DU DOCUMENT

Direction générale responsable

ENV Environnement

Services Associés

pour accord

SG	Secrétariat général	: Accord
TREN	Energie et Transports	: Accord
REGIO	Politique régionale	: Accord

pour avis

SJ	Service juridique	: Avis favorable
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Langue originale : FR

En cas de demande de corrigendum/suspension de cette procédure, les cabinets et/ou le Service juridique sont invités à envoyer leurs observations à la boîte fonctionnelle "SG A-2 ACCORDS CABINETS".

Dossier traité par Ulrike TRAUTENBERGER - BREY 13/17 - 67372

Info-point PROCEDURE : SG/A/2 (52362- 52363)

Info-point NOTIFICATION : Valérie GALLOO (tél. 69522)

Info-point PUBLICATION : Colette Jansen (tél. 60432)

MEMORANDUM TO THE COMMISSION

1. **SUBJECT: OPINION ACCORDING TO ART. 6 (4) OF COUNCIL DIRECTIVE 92/43/EEC OF 21 MAY 1992 ON THE CONSERVATION OF THE NATURAL HABITATS AS WELL AS THE WILD ANIMALS AND PLANTS^[1], DELIVERED UPON REQUEST OF THE REPUBLIC OF FRANCE**

Natura 2000 is a Community-wide network of nature protection areas established under the 1992 Directive 92/43/EEC on the conservation of the natural habitats as well as the wild animals and plants (the 'Habitats directive'). It aims to promote the maintenance of biodiversity by assuring the long-term survival of Europe's most valuable and threatened species and habitats. The network is composed by sites that have been classified by Member States as Special Protection Areas (SPAs) according to the Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds^[2] (the 'Birds directive') or proposed as Sites of Community Importance according to the Habitats Directive.

Natura 2000 sites are subject to the protection regime laid down in article 6 (3) and (4) of the Habitats directive: Any plan or a project having a significant negative effect on a site may only be authorised, if there is no alternative solution and if it is justified for imperative reasons of overriding public interest, including those of a social or economic nature. In this case the Member States shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. If the site hosts a priority natural habitat type and/or a priority species, and if considerations relating to human health, public safety or beneficial consequences of primary importance for the environment cannot be invoked, **the project must be justified by other imperative reasons of overriding public interest, further to an opinion from the Commission.**

The subject of this decision is to adopt an opinion relating to a French project, according to article 6 of the Habitats directive. Corresponding request was submitted to the Commission by the Republic of France. In the following, a short summary of the opinion is given.

The Commission is hereby invited to adopt the above mentioned opinion and approve the notification to the Republic of France.

COMMISSION OPINION

delivered pursuant to the second subparagraph of Article 6(4) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (Habitats Directive), concerning the request from France for advice and exchange of information with the European Commission within the framework of the Habitats Directive in relation to the project to build a high-speed line (TGV East)

1. Legal background

Article 6(3) of Directive 92/43/EEC¹ stipulates that any plan or project not directly connected with or necessary to the management of a Natura 2000 site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, must be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of its implications for the site and subject to the provisions of paragraph 4, the competent national authorities may agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

Article 6(4) of Directive 92/43/EEC stipulates that a plan or a project may be carried out in spite of a negative assessment of the implications for a Natura 2000 site, in the absence of alternative solutions, if it is justified for imperative reasons of overriding public interest, including those of a social or economic nature. In this case, Member States must take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected and must inform the Commission of the compensatory measures adopted. Where the site concerned hosts a priority natural habitat type and/or a priority species, and if considerations relating to human health, public safety or beneficial consequences of primary importance for the environment cannot be invoked, the project can be justified, further to an opinion from the Commission, by other imperative reasons of overriding public interest.

2. France's request

On 12 March 2004 the Permanent Representation of France to the European Union sent DG Environment an official notification, in accordance with Article 6(4) of the Habitats Directive, concerning the project to build a high-speed line (Section F – TGV East), together with a request for advice addressed by France to the European Commission in the framework of the Habitats Directive (hereinafter “the notification”).

Accompanying the notification, the French Government sent the documentation required by DG Environment, namely the impact document relating to Section F of the TGV East.

An account of the exchanges with the French administration and other stakeholders that led to the drafting of the present text is given in **Annex 1**.

¹ JO N° L 206 dated 22.07.1992, p.7

The documentation received from the French Government is listed and numbered in **Annex 2**. Reference will be made to these numbers in the remainder of this document.

3. The project

The TGV East project was declared to be of public utility on 14 May 1996. It involved the construction of a new 406 km railway line between Vaires-sur-Marne (Paris region) and Vendenheim (near Strasbourg) to enable high-speed trains to connect Paris with the cities of eastern France and with neighbouring countries and to connect the eastern regions of France with the country's western, south-western and northern regions without having to go via Paris.

In January 1999 France decided to implement the project in phases, starting with the construction of the new 300 km line between Vaires-sur-Marne and Baudrecourt.

This phased approach requires the construction of an additional 4.6 km of track to link the high-speed line to the existing Metz-Réding line so that the TGV can run to Strasbourg. The new link branches off from the original Herny link (allowing trains to run to Saarbrücken) and crosses the municipalities of Baudrecourt, St Epvre and Vatimont in the Moselle department. This is where the TGV East line cuts across the Natura 2000 site at two points: the link to the Metz-Strasbourg line cuts through the salt meadows of Baudrecourt, while the original link to Saarbrücken (contained in the 1996 declaration of public utility) cuts through the mesophilic and hygrophilous meadows at St Epvre and Vatimont.

The Baudrecourt link was declared to be of public utility on 29 April 2002.

4. The Natura 2000 sites directly involved

There is no doubt that the project will significantly affect, within the meaning of Article 6(3) of Directive 92/43/EEC, the integrity of several sites of Community interest proposed for the Natura 2000 network and the habitats and species occurring in them, as well as areas of major ornithological interest which should have been proposed as Special Protection Areas under Directive 79/409/EEC. In these circumstances, the project may be carried out only if it complies with the requirements of Article 6(4) of Directive 92/43/EEC and the provisions of Directive 79/409/EEC.

Judging by the notification, the project to build the high-speed line (Section F) will significantly affect a priority habitat listed in Annex I to Directive 92/43/EEC – Habitat 1340 “Inland salt meadows” as it crosses a site of Community interest – FR 4100231 “Secteurs halophiles et prairies humides de la vallée de la Nied” – proposed by France under Directive 92/43/EEC.

5. Assessment of the project's effects on Natura 2000 sites

5.1. The direct effects forecast for the project

With the construction of the additional link under the phased approach, the European TGV East line will, in crossing the Natura 2000 area, destroy 3.75 hectares of salt meadow and subhalophytic meadow. This represents 0.55% of France's mainland halophytic areas and 18.6% of the halophytic areas included in the French Nied Valley area proposed for the Natura 2000 network. In terms of mesophilic meadow, the project will affect 0.02% of the mesophilic meadow area included in the Nied Valley Natura 2000 area.

The Commission believes these assessments can be considered appropriate within the meaning of Article 6(3) of Directive 92/43/EEC.

The Commission believes that the expected implications for these habitats may affect the overall coherence of Natura 2000 and that, subject to compliance with other requirements of Article 6(4) of the Habitats Directive, adequate compensatory measures therefore need to be taken. Such measures must be seen as a precondition for the project to go ahead.

6. Alternatives – other options for the project

The advantage of France's decision to phase construction of the high-speed line in Baudrecourt was the proximity to lines already in operation and the fact that work on the Saarbrücken link planned in the initial project was already under way in this area. Having the additional link branch off from the Saarbrücken link, which crosses the Metz-Réding line, would greatly reduce the length of new infrastructure required (4.6 km) and thus have the least impact on the natural environment. Alternative routes for the new link further south would not have avoided the Natura 2000 area.

7. Imperative reasons of overriding public interest

In its notification, the French Government refers in particular to the abovementioned lack of options for linking the existing lines in support of its declaration that the project has to be implemented for an imperative reason of overriding public interest other than those related to human health, public safety or beneficial consequences of primary importance for the environment.

In addition, the European TGV East project was viewed favourably in the Council of Ministers of the European Community on 14 and 15 December 1990 and was chosen as a priority project by the European Council in 1994, having benefited from Union decisions regarding the priority of infrastructure projects to be implemented.

8. Proposed mitigation and compensatory measures

To offset the project's likely effects on Natura 2000 as described in the notification, the French authorities propose a series of mitigation and compensatory measures planned as follows:

Mitigation measures:

- Adaptation of the longitudinal section: to minimise the project's impact on the area concerned, the route has been optimised so as to reduce the longitudinal section and thus limit the surface area occupied by the embankments; the construction of a 300 m viaduct where the existing railway track is crossed also serves to reduce the surface area needed for the project.
- In the work phase, precautionary steps are to be taken to protect the site from any additional harm: for example, ground marking to prevent site machinery moving off the site proper.

Compensatory measures and timetable:

In addition to the effort to reduce the project's impact through the project design, compensatory measures have been planned by the contracting authority and validated by

DIREN Lorraine (decentralised department of the Ministry of the Environment). Designed to perpetuate the salt environment, they operate on three fronts:

- preservation of the remaining salt meadows near the line over a surface area of around 31 hectares by means of a management agreement between the contracting authority and a nature protection body. The latter will draw up individual agreements with each of the farmers concerned. Moves are already under way with the farmers, who have given their agreement in principle. The agreements should be finalised during 2004.
- restoration of the site and re-establishment of salt meadows. A restoration trial was carried out in 2003 on 20 ares of land (preparation of site, sowing of local seeds and implementation of scientific monitoring over 5 years focusing on salinity and vegetation (still under way)). Drainage ditches will be filled in as part of the work associated with the land consolidation in 2005 so as better to preserve the special character of these areas.
- preservation of the Nied Valley salt meadows not adjacent to the TGV line but included in the Natura site. Mapping of the natural habitats in the area proposed for the Natura 2000 network in the Nied Valley, carried out by the University of Metz and financed by the contracting authority (RFF), identified 6 halophytic sites in the valley. The Aubécourt site, which is the most remarkable, has been selected for RFF to purchase 3.5 hectares of land for heritage management via an agreement concluded with the specialised body already approached to manage and preserve the 31 hectares. Purchase of these areas of land should be completed during 2004.

All the compensatory measures and the grounds justifying them are described in detail in the impact document for Section F of the TGV East.

The Commission considers that the proposed compensatory measures, as described in the notification and the documents mentioned in Annex 2, are sufficient to make up for the project's effects on Natura 2000 provided that they are executed in a timely manner corresponding to the phasing of the project and that the proposed management plans assure their long term effectiveness.

9. Opinion of the Commission

Taking into account the arguments set out above, the Commission takes the view that the TGV East high-speed line project, as described in the notification and in the documentation mentioned in Annex 2 to this text, especially the impact document for Section F of the TGV East line, can be executed for reasons of overriding public interest on condition that all necessary compensatory measures to ensure the overall coherence of Natura 2000 are taken in good time.

With regard to the opinion expressed in this document the Commission notes the following:

- this opinion is valid for this particular project, as described in the abovementioned additional documents submitted to the Commission by the French authorities, and cannot be considered applicable to possible effects of the TGV construction project on other Natura 2000 sites;

- this opinion presumes that the compensatory measures will be implemented and monitored as described in the abovementioned documents submitted to the Commission by the French authorities;
- this opinion presumes that the results of the accompanying monitoring programmes regarding Natura 2000 will be taken into account in the sense that they may, if need be, lead to appropriate rectifications in project design or to additional compensatory and mitigation measures.

ANNEX

Annex 1: Sequence of exchanges between the Environment DG of the Commission and the French authorities

At the beginning of November 2003, DG Environment was consulted by DG Transport in relation to an application for Community funding for the TGV East project. DG Environment requested additional information and concluded that the project might have implications for several sites of Community interest and for important bird areas, and decided to open an own-initiative case in order to address the French authorities regarding this matter.

The Commission has analysed the impact studies of the sites in question. The proposed mitigation measures reduce the impact for most of the sites of Community interest. However, in the case of the Nied Valley site, which was proposed by France for the Natura 2000 network, the project will lead to the destruction of a priority habitat and, where it crosses the Meuse Valley, may have an impact on bird species in an area which, although not yet proposed by France as a Special Protection Area, deserves to be listed as such.

On 13 January 2004, at a technical meeting of representatives of the Commission and the Ministries of Infrastructure and Ecology, the French authorities were advised to notify the Commission of the project in accordance with Article 6 of the Habitats Directive. To avoid presenting the Commission with a *fait accompli*, the authorities were also advised to request its opinion as a pre-condition for the decision to go ahead with the project.

The Commission also reminded the authorities that, although the Meuse Valley has not been designated as an SPA, Article 4 of Directive 79/409/EEC nevertheless applies. The area must therefore be strictly protected and the construction of infrastructures that may have an impact on protected species is not permitted.

On 12 March 2004, an official notification was sent in accordance with Article 6(4) of the Habitats Directive, together with an impact study for section F of the TGV East. France requested the Commission's opinion on the compensatory measures for the priority habitat affected and informed it of the measures to mitigate the effects on non-priority species and habitats.

Annex 2: documents sent by the French authorities to DG Environment:

- Impact study for section F of the TGV East (sent on 12 March 2004)
- Request for opinion in accordance with Article 6 of Directive 92/43/EEC (sent on 12 March 2004)
- The Commission has also received all the impact studies carried out in the framework of the TGV East project (a copy was sent by the project owner but has not yet been officially forwarded by the French Ministry of Infrastructure).

III

In the different language versions of Article 6(4) of Habitats Directive, the following terms are used for the English “opinion”: “advies” in Dutch, “avis” in French, “Stellungnahme” in German, “consulta” in Spanish and “parere” in Italian. The term “opinion” will be used throughout this document.

APPENDIX No. 6.3

Relevant EU Precedents

3. Tenerife

“New Port of Granadilla (Tenerife)”

Opinion of the Commission Brussels COM (2006) XXX

EN

EN

EN



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels,
COM(2006) XXX

OPINION OF THE COMMISSION

pursuant to Article 6.4 § 2 of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, concerning the “Request by the Kingdom of Spain in relation to the construction project of the new port of Granadilla (Tenerife)”

OPINION OF THE COMMISSION

pursuant to Article 6.4 § 2 of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, concerning the “Request by the Kingdom of Spain in relation to the construction project of the new port of Granadilla (Tenerife)”

I. THE LEGAL FRAMEWORK

Article 6(3) of Directive 92/43/EEC states that any plan or project not directly connected with or necessary to the management of a Natura 2000 site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, should be subject to an appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of its implications for the site and subject to the provisions of paragraph 4, the competent national authorities may agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

According to Article 6(4) of Directive 92/43/EEC, a plan or a project may be carried out in spite of a negative assessment of the implications for a Natura 2000 site, in the absence of alternative solutions, if it is justified for imperative reasons of overriding public interest, including those of a social or economic nature. In this case, the Member States shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected and it shall inform the Commission of the compensatory measures adopted. Where the site concerned hosts a priority natural habitat type and/or a priority species, and if considerations relating to human health, public safety or beneficial consequences of primary importance for the environment cannot be invoked, the project can be justified, further to an opinion from the Commission,¹ by other imperative reasons of overriding public interest.

II. THE SPANISH REQUEST

On 7 November 2005 the Commission received a request from the Spanish authorities seeking an opinion pursuant to Article 6.4 of the 92/43/CEE Habitats Directive regarding the absence of alternative solutions and invoking imperative reasons of overriding public interest.

On 17th November 2005, the regional government of the Canary Islands (Regional Administration responsible for Nature Conservation) sent a clarification note in relation to a proposed Site of Community Importance “Sebadales de Güigüi”.

¹ Different language versions of Art. 6.4 of the Habitats Directive use different terms for “opinion”: the Dutch text has “advies”, the French “avis”, the German “Stellungnahme”, the Spanish “consulta” and the Italian “parere”. The term “opinion” will be maintained throughout this document.

III. THE PROJECT

The opinion requested from the Commission concerns a proposal to construct a new port in Granadilla, Tenerife, Canary Islands. It is argued that the existing port facilities in Santa Cruz are inadequate and that new facilities with increased capacity should be developed to respond to projected increased in maritime traffic.

The definitive Granadilla project foresees the construction of a 650m container terminal covering 26ha, a 200m dock for general goods with an annexed 5,7ha area and a 19,5ha trading harbour area for raw materials traffic.

The port works are made up of a main breakwater of 2.557m length going down to -55mts seabed depth and a total land filling of 786.000m² by using 12mio m³ of quarry material.

The new harbour will dispose of a contiguous terrestrial area with 12,4ha for the development of logistic activities and an area with 15ha for the installation of a natural gas plant.

IV. THE NATURA 2000 NETWORK

The Natura 2000 sites involved are "Sebadales del Sur de Tenerife" (ES7020116) and "Montaña Roja" (ES7020049). These sites were designated by the Spanish authorities as sites of community importance (SCI) and included in the Commission Decision of 28 December 2001, which establishes the sites of Community importance for the Macaronesian biogeographical region, pursuant to Council Directive 92/43/EEC.

The site "Sebadales del Sur de Tenerife" is one of the sites of the Canary Islands hosting a habitat type "1110 *Sandbanks which are slightly covered by sea water all the time*" (Listed in annex I of Council Directive 92/43/EEC) and a habitat required for the conservation of the priority species **Caretta caretta*² (loggerhead turtle) The site "Montaña Roja" is one of the sites hosting a priority habitat type-" 2130 *Fixed coastal dunes with herbaceous vegetation (grey dunes)*".

In addition, the species *Atractylis preauxiana* (a species of plant endemic to the Canary islands) and priority species *Caretta caretta*, included in Annex II and IV of the Habitats Directive, are also affected by the project.

V. DESCRIPTION AND ASSESSMENT OF THE EFFECTS OF THE CONSTRUCTION OF THE PORT ON THE NATURA 2000 SITES

The expected effects of building the new port of Granadilla were described in the environmental impact assessment carried out by the Spanish authorities and in other complementary studies sent to the Commission from 2003 to 2005.

A first project and its environmental impact study were subject to a public information procedure (Spanish Official Gazette on 19 January 2000). The environmental impact declaration was published on 26 February 2003. In order to take into account some of the

² *Caretta caretta*: EN: loggerhead turtle; FR: tortue de carouane; ES: tortuga boba; DE: Unechte Karettschildkröte

different opinions and comments, the original project was reviewed (downsized) and a final project was defined.

The most significant environmental impact of the new port will result from the disruption of natural patterns of sand removal and deposition. Under natural conditions, submarine sand covering the seabed near the coastline is progressively displaced from NE to SW due to the main water stream flow. The port project will interrupt this natural sand flow and this in turn will result in erosion of the sea-bed further down the coast. The Spanish authorities estimate this erosion effect from 0 to 50.000m³/year. This erosion implies an associated partial destruction of habitats in the above-mentioned sites of community importance "Sebadales del Sur de Tenerife" (ES7020116) and "Montaña Roja" (ES7020049), which are located downstream.

In order to mitigate the expected impacts of the interruption of sand movements in the coastal waters, the Spanish authorities have proposed a "North South sand bypass in the Granadilla harbour". This proposal provides for pumping machinery and associated pipework to take all the sand deposited on the north-side of the new port and to pump it to the southern end of the port. Windmills built in the project area would produce the necessary electricity for powering the system. The Commission considers the commitment by the Spanish authorities regarding a properly dimensioned North-South sand by-pass as an essential part of the port project.

In order to respond to important concerns regarding the effects of ships anchors on sensitive habitats, the Spanish authorities' ministerial order 3777/2005, 18 November 2005³ prohibits the anchorage of vessels in the Site of Community Importance "Sebadales del sur de Tenerife" (SCI ES7020116). This measure aims to avoid the negative effects that the movement of anchors and their chains produces on sandy habitats types present in this Site of Community Importance. These movements would produce the erosion of the seabed destroying habitats hosted by the site, which would represent a significant disturbance in the future when the port would in activity.

VI. ALTERNATIVE SOLUTIONS

It can be concluded from the environmental assessment studies and notwithstanding the mitigation measures foreseen by the authorities, that the project is still likely to have a significant impact on important sites and priority species as described in section IV and in these circumstances, the authorities are required to evaluate potential alternatives to the project. The Spanish authorities have studied several alternatives including the option of not developing more port capacity (the "zero-option") as well as the further expansion and development of the existing port in Santa Cruz.

The Commission services have analysed all available information in relation to the alternative solutions. This includes information presented in the context of complaints received by the Commission. With regard to the "zero option", the conclusion of the Commission services is that the existing port facilities will not be able to handle the expected increase in maritime traffic and that additional facilities and increased port capacity is necessary for the economic development of the island.

³ O.J. 289 of 3/12/2005

- With regard to the alternatives which involve an expansion of the existing port facilities in Santa Cruz the Commission services consider that the Spanish authorities have provided adequate justification for rejecting these options in particular as;
- It (the expansion of the existing port facilities) would have a negative impact on the inhabitants of Santa Cruz de Tenerife, both during the construction and once the enlarged port becomes operational;
- It would not have a quarry in the surroundings thus creating problems during construction;
- It would not have the necessary land available for development of the associated industrial and logistical support facilities in the adjoining areas.
- It would further increase the North to South transport imbalance of the island transport system.
- It would compromise the plan to develop a natural gas storage terminal on the island thereby diversifying the energy mix available to the local economy. Due to the proximity of the current port to the town of Santa Cruz, developing such a facility on the existing site would not be possible.

Regarding the possible alternatives to Granadilla as site for the new port, the Commission has assessed the authorities' opinion that Granadilla is the only appropriate site for the new port in Tenerife. This opinion is based on different technical reasons that have to be considered when identifying a site for the construction of a new port. These include factors such as the depth of the seabed at shore, the presence or not of a quarry close enough to the envisaged site, the availability of free adjacent land surface for handling and logistic operations, the adequacy of the transport connections with the hinterland and the proximity to port users.

In conclusion, the Commission accepts that there is a need for improved port facilities and increased port capacity in the island. The Commission recognises that the Spanish authorities have carried out an evaluation of the potential alternatives in accordance with the requirements of Article 6.4 of the Habitats Directive and, following an assessment of available information made by the Commission services, accepts the conclusions from this evaluation.

VII. IMPERATIVE REASONS OF OVERRIDING PUBLIC INTEREST

Notwithstanding the information and the arguments presented in the preceding sections, it remains the case that the Granadilla port project is expected to have a significant negative impact upon a priority species and its habitat and a priority habitat under the habitats directive. As the main purpose of project is not concerned with improvements to human health or public safety and nor is it expected to have any beneficial consequences of primary benefit to the environment, justification for the projects should be based on "other imperative reasons of overriding public interest." and the Commission should give its opinion on these considerations (Article 6.4 Habitats Directive).

The Commission services have analysed all the information available to them. They have also taken account of the advice of independent external bodies in relation to the imperative reasons of overriding public interest presented by the Spanish Authorities.

The Commission accepts that as an island, Tenerife is highly dependent upon maritime transport and an efficient port system. However, the main port, currently located in the capital, Santa Cruz is subject to increasing congestion especially in relation to container traffic which is forecast to increase significantly. The proposed port of Granadilla would add needed capacity to accommodate future growth in container, dry bulk and general freight traffic in the island while at the same time de-congesting the existing port of Santa Cruz. The new port is expected to generate a sound economic rate of return and it will also provide the island with the possibility of attracting international container transshipment traffic.

In the light of the conclusions from section VI and taking into account the considerations presented above, the Commission recognises that there is a demonstrated need to increase and develop port capacity in order to promote economic and social development in the island of Tenerife and the surrounding region. The Commission therefore accepts the arguments put forward by the Spanish authorities that there exist imperative reasons of overriding interest that may justify the execution of this project on condition that appropriate compensatory measures are provided for.

VIII. PROPOSED COMPENSATORY MEASURES

To compensate for the expected effects of the project on the priority species of Community interest *Caretta caretta*, the priority natural habitat “Fixed coastal dunes with herbaceous vegetation (grey dunes”) and the Natura 2000 sites “Sebadales del Sur de Tenerife” and “Montaña Roja”, a set of necessary compensatory measures have been proposed:

A. General Considerations

To ensure that the Granadilla port is built and managed in an environmentally sensitive manner, and independent and permanent foundation will be set up before the construction works are started. The role of this foundation will be to monitor the status and trends in local biodiversity as well as ensuring that mitigation and compensation measures are carried out properly. The authorities have submitted the approval statement for the Statutes relating to the establishment of the foundation. The Commission notes the clarifications provided by the Spanish authorities in their letter of 8 May 2006, which indicate that the Statutes of the foundation have been modified to ensure its institutional independence. Future possible modifications of the statutes of the foundation will not reduce its independence nor its competences nor its permanence. Any modification of the statutes will be notified directly to the Commission.

B. Specifically related to the effects on the species and the integrity of the sites

- i. Effects on the populations of the species *Atractilys preauxiana* listed in Annex II and IV of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora.
 - Designation of a new site of community importance for the protection of the populations detected in the area of the industrial park of Granadilla. The total area of this new SCI will be 0,93 hectares. In addition, it is proposed that this area would serve as a donor for the restoration of southern areas where these subpopulations have disappeared (species reintroduction in SCI "Montaña Roja")

- ii. Effects on the natural habitat of Community interest 1110 “Sandbanks which are slightly covered by sea water all the time” in the SCI “Sebadales del Sur”
 - Designation of two new sites of community importance hosting areas of sandbanks which are slightly covered by sea water all the time (habitat type 1110): Antequera (Tenerife island), total surface 272,61ha; and Güi Güi (Gran Canaria island), total surface 7.219,74ha.
- iii. Effects on *Caretta caretta*
 - Any effects on the priority species *Caretta caretta*, due to impacts on the habitat required for its conservation, would be compensated through the above-mentioned measures.
 - In addition to the above compensatory measures, the foundation will establish and carry out a monitoring programme to assess the conservation status of this species' population in the Canary Islands, as requested by article 11 of the 92/43 Habitats Directive. Methods and conclusions drawn out by the LIFE project B4-3200/97/247 will be considered by the foundation when establishing the above monitoring programme.
- iv. Effects on SCI ES7020049 “Montaña Roja”
 - Implementation of the restoration project on the SCI “Montaña Roja” for re-establishing a favourable conservation status. This measure implies enhancing the conservation status and will allow a significant increase of the area covered by the habitat type “Fixed coastal dunes with herbaceous vegetation (grey dunes)” within the site.

*The Commission considers that given the expected effects of building the new port in Granadilla on the priority species *Caretta caretta* and the priority natural habitat “Fixed coastal dunes with herbaceous vegetation (grey dunes)”, and the expected results from the planned compensatory measures contained in the Compensatory Measures Programme prepared by the competent authority, it can be concluded that in the long term the overall coherence of the Natura 2000 network will not be significantly affected.*

The Commission considers that the proposed compensatory measures described in the project are adequate if they are executed in a timely manner. To this purpose, it is considered necessary that compensatory measures under above-referred points A, Bi and Bii will be completed before the beginning of the construction works⁴. In addition, the implementation of measures B.iii and B.iv must be started before the beginning of the construction works, and progressively completed according to a schedule as agreed by the foundation referred in point A.

⁴

Spanish Authorities will send to the Commission their proposal of three new sites of community importance referred in points Bi and Bii in accordance with the provisions of the 92/43/CEE Habitats Directive and the 97/266/CE Commission Decision of 18 December 1996 concerning a site information format for proposed Natura 2000 sites

The Commission notes the commitment of Spanish authorities to ensure appropriate financial resources for proper monitoring, implementation and reporting of the above referred mitigation and compensatory measures.

The Commission requests the Government of the Kingdom of Spain to send yearly reports on implementation of the project and on the results of the implementation of all above referred compensatory measures. The first report will be sent by the end of the year when the port works start and every year thereafter.

IX. OPINION OF THE COMMISSION

On the basis of the arguments set out above, the Commission holds the view that the new port of Granadilla project, as described in the documents submitted to the Commission by the Spanish authorities, can be executed for reasons of overriding public interest on the condition that all necessary compensatory measures to ensure overall protection of the coherence of Natura 2000 be taken in good time, as established in point VIII.

With regard to the opinion expressed in this document, the Commission notes that:

- this opinion is valid for this particular project, as described in the documents submitted to the Commission by the Spanish authorities⁵ and cannot be considered as applicable to any other similar kind of development in a Natura 2000 site.
- this opinion presumes that the results of accompanying monitoring programmes regarding Natura 2000 will be taken into account in that they may, if need be, lead to appropriate rectifications to project design or to additional compensation and mitigation measures.

⁵ 31 documents (23+8) are referred in the letter A24-15941 04 November 2005 sent by the Permanent Representation of the Kingdom of Spain to the Commission. These documents includes the project description comprising the final design incorporating mitigation measures.

APPENDIX No. 6.4

Relevant EU Precedents

4. River Main

“Deepening and Widening of the Ship Fairway of the River Main”

Commission Opinion 05.04.2013



Brussels, 5.4.2013
C(2013) 1871 final

COMMISSION OPINION

of 5.4.2013

delivered upon request of Germany pursuant to Art. 6(4) sub par. 2 of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (the 'Habitats Directive'), concerning the deepening and widening of the ship fairway of the river Main at the sections Wipfeld, Garstadt and Schweinfurt (Bavaria/Germany)

COMMISSION OPINION

of 5.4.2013

delivered upon request of Germany pursuant to Art. 6(4) sub par. 2 of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (the 'Habitats Directive'), concerning the deepening and widening of the ship fairway of the river Main at the sections Wipfeld, Garstadt and Schweinfurt (Bavaria/Germany)

I. The legal framework

Article 6(3) of directive 92/43/EEC (the 'Habitats Directive') requires that any plan or project not directly connected with or necessary to the management of a Natura 2000 site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, be subject to an appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of its implications for the site and subject to the provisions of paragraph 4, the competent national authorities may agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

According to Art. 6(4) of directive 92/43/EEC, a plan or a project may be carried out in spite of a negative assessment of the implications for a Natura 2000 site, in the absence of alternative solutions, if it is justified for imperative reasons of overriding public interest, including those of a social or economic nature. In this case the Member States shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected and it shall inform the Commission of the compensatory measures adopted. Where the site concerned hosts a priority natural habitat type and/or a priority species, and if considerations relating to human health, public safety or beneficial consequences of primary importance for the environment cannot be invoked, the project can be justified, further to an opinion from the Commission, by other imperative reasons of overriding public interest.

II. The German request

On 21st March 2012, the Commission received a letter dated 5th March 2012, together with accompanying technical files¹, from the German Permanent Representation requesting an opinion from the Commission pursuant to Art. 6(4) of the Habitats Directive concerning the authorization of the deepening and widening of the shipping fairway of the river Main at the sections Wipfeld, Garstadt and Schweinfurt (Bavaria/Germany).

III. The project

The main purpose of the project is to widen the existing fairway of the river Main (see fig. 1) between the floodgates Wipfeld (milestone km 316.12) and Ottendorf (milestone km 345.29) from 36 m to 40 m and to deepen the river's waterway from currently 2.50 m to 2.90 m. At the river bends the widening will be scaled up to 58 m based on physical manoeuvrability of boats. The project's dimension is appropriate to the existing extension stage of the Lower

¹ The request is published in the internet on the following page [accessed on 20.12.2012]: http://www.wsd-sued.wsv.de/aktuelles/bekanntmachungen/planfeststellungsverfahren_wipfeld_garstadt_sft/unterrichtung_ek/index.html [direct link]

Main and the Main-Danube-Canal and is part of the Trans-European Network (TEN). This will create a continuous navigation channel with uniform minimum width and depths and is mainly limited to the existing riverbed.

IV. The sites

The sites DE 6127-371 'Mainaue zwischen Grafenrheinfeld und Kitzingen' and DE 5927-371 'Maintal bei Sennfeld und Weyer' are sites of Community Importance (SCI) and designated under the Habitats Directive. They have a dimension of 1706 ha. According to the standard data form, the sites have been established mainly for the conservation of the following habitat types of community interests:

- 3150 Natural eutrophic lakes with Magnopotamion or Hydrocharition,
- 6430 Hydrophilous tall herb fringe communities of plains and of the montane to alpine levels
- 6510 Lowland hay meadows,
- 9170 Galio-Carpinetum oak-hornbeam forests,
- 91E0* Alluvial forests with *Alnus glutinosa* and *Fraxinus excelsior*,
- 91F0 Riparian mixed forests of *Quercus robur*, *Ulmus laevis* and *Ulmus minor*, *Fraxinus excelsior* or *Fraxinus angustifolia*, along the great rivers (*Ulmion minoris*).

The site DE 6027-471 'Maintal zwischen Schweinfurt und Dettelbach' is classified as Special Protection Area (SPA) pursuant to the Birds Directive 2009/147/EC.

All sites are situated in the continental bio-geographical region.

V. Implications of the project on the site

An appropriate assessment according to Article 6(3) of the Habitats Directive was carried out for the project. It concluded that there would be no significant effects on the site 'Maintal zwischen Schweinfurt und Dettelbach' (SPA), but that there would be significant impacts on the Natura 2000 sites 'Mainaue zwischen Grafenrheinfeld und Kitzingen' and 'Maintal bei Sennfeld und Weyer', both SCI. Particularly affected would be the priority habitat type of Community interest 91E0* 'Alluvial forests with *Alnus glutinosa* and *Fraxinus excelsior*' and the habitat type 6510 'Lowland hay meadows'. Both habitat types would be damaged directly involving a surface loss of 9.460 m² for 91E0* and 6.440 m² for 6510.

As the project would adversely affect the integrity of Natura 2000 sites hosting protected habitat types, including one priority habitat type, the project may only be authorised if it satisfies the requirements set down in Article 6(4) of the Directive.

VI. Fulfilment of the requirements under Art. 6(4)

- Alternative solutions

The German authorities assessed a number of potential alternatives, together with the zero alternative. One alternative foresees the widening of the fairway equally on both riverbanks instead of the proposed project. This would reduce the required space affecting habitat type 91E0* by 7.5%. However, this alternative would negatively affect another Natura 2000 site (DE 6027-471 'Maintal zwischen Schweinfurt und Dettelbach' which won't be affected by the proposed project) and would lengthen both the construction time and the spatial extent of the project. Furthermore, the priority habitat type 'alluvial forests with *Alnus glutinosa* and *Fraxinus excelsior*' would still be negatively affected. As a consequence, this alternative was not taken into consideration.

Another alternative foresees the widening at the outside bend of the Main near the municipality of Schonungen instead of the proposed widening by altering at both sides. This would have approximately 25% less surface impact on the priority habitat type 91E0* and would have less adverse ecological impact. However, the widening at the outside bend would not improve the nautical characteristics of the river, which is one of the objectives of the project. On the contrary, the curve would be intensified. Furthermore, the priority habitat type 'alluvial forests with *Alnus glutinosa* and *Fraxinus excelsior*' would still be negatively affected. As consequence, this alternative was not taken into consideration.

The competent authorities therefore consider that the current proposed solution is the best balance between ecological and river transportation objectives.

- Imperative reasons for overriding public interest

The German authorities submitted well-founded arguments concerning the economic importance of the river Main functioning as a cross-border traffic route for goods connecting Rotterdam (NL) and Konstanz (RO). The river Main is part of the Trans-European Network (TEN) and is the only inland waterway connecting several Memberstates with the south-east of Europe. The project is one of the last missing links needed to adjust this fairway to the changed political and economic developments and requirements of an enlarged European Union. Currently, this part of the river Main still creates a bottleneck of 30 km where ships are still limited in their dimension in width and deep.

- Impact mitigation

Mitigation measures such as postponing the time frames for felling of trees during breeding season and the use of low-noise constructing machinery ensures that the Natura 2000 site DE 6027-471 'Maintal zwischen Schweinfurt und Dettelbach' will not be negatively affected.

Newly constructed river banks will be re-cultivated close to nature and by respecting ecological succession. Dredging activities will be carried out in a successive way to mitigate impacts on invertebrates which are part of the food chain of Asp (*Aspius aspius*) and the European Bitterling (*Rhodeus sericeus amarus*), both protected under Annex II of the Habitat Directive.

- Compensatory measures

The expected impacts of the project on the coherence of the Natura 2000 network, the two affected target features – habitat type 6510 'Lowland hay meadows' and the priority habitat type 91E0* 'Alluvial forests with *Alnus glutinosa* and *Fraxinus excelsior*' – will be compensated.

Habitat type 6510 will be compensated in the proportion of almost 1:7; the priority habitat type 91E0* will be compensated in the proportion of almost 1:4 taking into account that it requires a very long re-creation period which can go beyond several decades. The responsible authority reflected on this argument by increasing the proportion of compensation accordingly. As the local situation fully corresponds to the ecological needs of habitat type 91E0* the outlook for successful compensation areas is positive. The affected Natura 2000 sites will be enlarged by the proposed compensatory measures and subsequently designated and notified by the Member State.

In total, 10 measures are foreseen in the flooding area Schweinfurt and Wipfeld (see fig. 2).

VII. Opinion of the Commission

According to the information submitted by the German Authorities, the deepening and widening of the ship fairway of the river Main at the sections Wipfeld, Garstadt and

Schweinfurt is justified as an important project of overriding public interest for which there are no alternatives. Mitigation measures will be implemented which will limit the negative effects of the project. However, the project will have significant impact on the integrity of two Natura 2000 sites, in particular on the priority habitat type 91E0* 'alluvial forests with *Alnus glutinosa* and *Fraxinus excelsior*' and the habitat type 6510 'lowland hay meadow'.

The negative effects will be compensated for by the designation of additional Natura 2000 surface and the creation of equivalent habitats on a total area that will be significantly larger than the area that will be affected. The German authorities have committed themselves to implement a concrete and timed monitoring and implementation scheme. The protection of the overall coherence of the Natura 2000 network will in this way be ensured. **On the basis of the detailed information and explanations provided by the German authorities and taking into account in particular the issues set out in the present document, the Commission is of the opinion that the adverse effects of the deepening and widening of the ship fairway of the river Main at the sections Wipfeld, Garstadt and Schweinfurt (Bavaria/Germany) are justified by imperative reasons of overriding public interest.**

The opinion is subject to the following conditions:

- The mitigation and compensatory measures will be implemented and monitored as described in the documents submitted to the Commission by the German authorities. The affected Natura 2000 sites will be enlarged by the proposed compensatory measures and subsequently designated and notified by the Member State.
- Detailed reports on the implementation and monitoring of these measures will be made available to the broad public via internet as committed to by the German authorities in the years 1, 3 and 10 starting after the implementation of the measures. Concerning the priority habitat type 91E0* and its long-term development, the monitoring will be undertaken for at least 30 years according to the agreed time intervals and will be prolonged – if needed – until a viable floodplain population in good conservation status is established.
- The results of the accompanying monitoring programme regarding Natura 2000-sites will be taken into account in that it may, if need be, lead to appropriate rectification of the project design or to additional compensation and/or mitigation measures.

Done at Brussels, 5.4.2013

For the Commission
Janez Potočnik
Member of the Commission

ANNEX

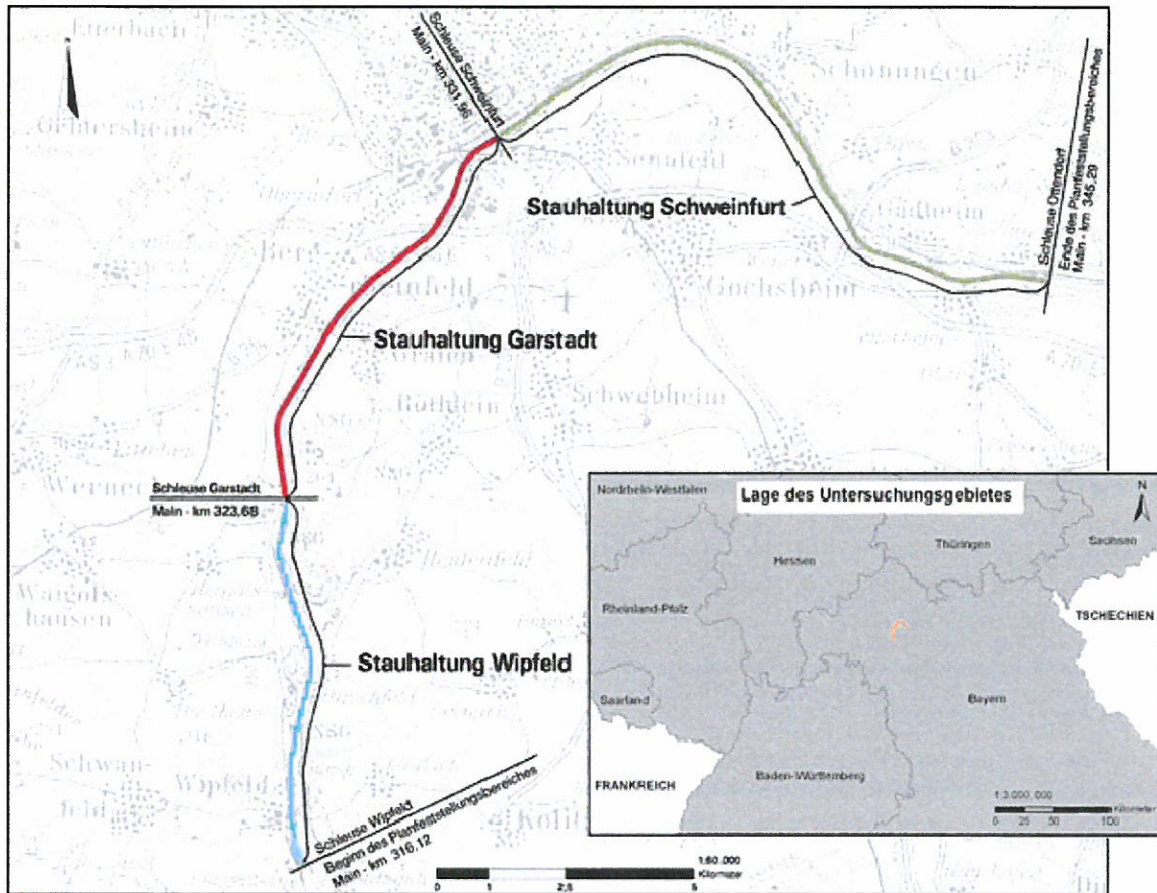


Figure 1: Overview of the construction project (map no. 1 of the plan approval document, modified).

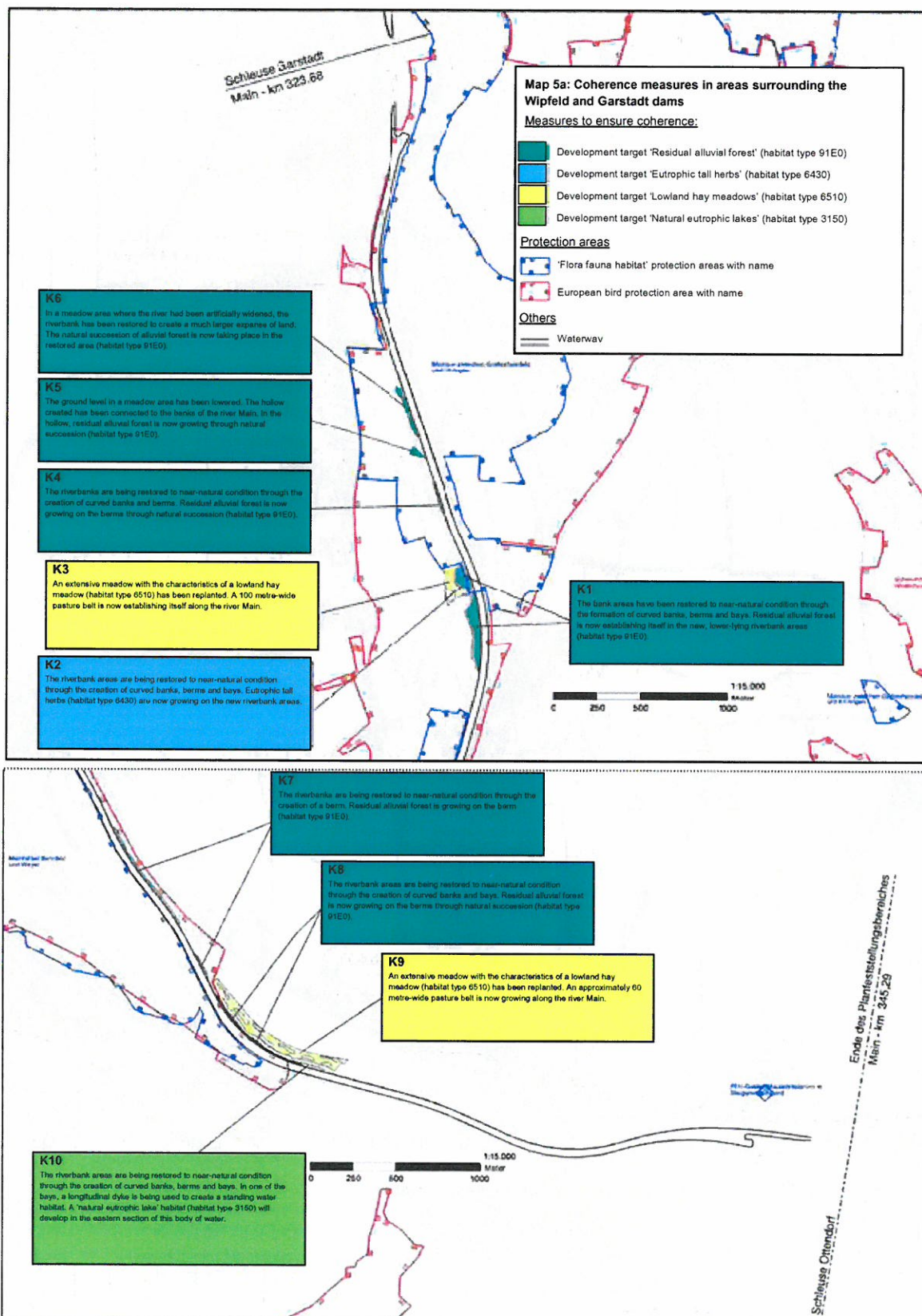


Figure 2: Location of the compensation measures (maps no. 5a+b of the plan approval document, modified).

APPENDIX No. 6.5

Relevant EU Precedents

5. Lichtenfels

“Widening and Relocation of B173 Federal Highway”

Commission Opinion 18.12.2015



Brussels, 18.12.2015
C(2015) 9085 final

COMMISSION OPINION

of 18.12.2015

issued at the request of Germany pursuant to the second subparagraph of Article 6(4) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora: Widening of the B 173 between Lichtenfels and Kronach, Michelau-Zettlitz section (Germany/Bavaria)

COMMISSION OPINION

of 18.12.2015

issued at the request of Germany pursuant to the second subparagraph of Article 6(4) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora: Widening of the B 173 between Lichtenfels and Kronach, Michelau-Zettlitz section (Germany/Bavaria)

I. The legal framework

Article 6(3) of Directive 92/43/EEC (the ‘Habitats Directive’) requires that any plan or project not directly connected with or necessary to the management of a Natura 2000 site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, be subject to an appropriate assessment of its implications for the site in view of the site’s conservation objectives. In the light of the conclusions of the assessment of its implications for the site and subject to the provisions of paragraph 4, the competent national authorities may agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

Under Article 6(4) of Directive 92/43/EEC, a plan or a project may be carried out in spite of a negative assessment of the implications for a Natura 2000 site and in the absence of alternative solutions if it is justified for imperative reasons of overriding public interest, including those of a social or economic nature. In this case the Member State is required to take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected and to inform the Commission of the compensatory measures taken. Where the site concerned hosts a priority natural habitat type and/or a priority species, and if considerations relating to human health, public safety or beneficial consequences of primary importance for the environment cannot be invoked, the project may be justified, further to an opinion from the Commission, by other imperative reasons of overriding public interest.

II. The German request

The Commission received a letter dated 9 May 2014, together with accompanying technical files, from the German Permanent Representation requesting an opinion from the Commission pursuant to Article 6(4) of the Habitats Directive concerning the widening of the B 173 between Lichtenfels and Kronach, Michelau-Zettlitz section, in Bavaria. On 12 December 2014, the requesting authority informed the Commission that additional documents relating to the planned compensatory measures would be sent subsequently. These were sent to the Commission by the German Permanent Representation on 26 June 2015.

III. The project

The Federal Republic of Germany, represented by the Bavarian Road Administration, is planning to relocate the B 173 Federal highway and turn it into a four-lane dual carriageway between Michelau and Zettlitz (see Fig. 1).

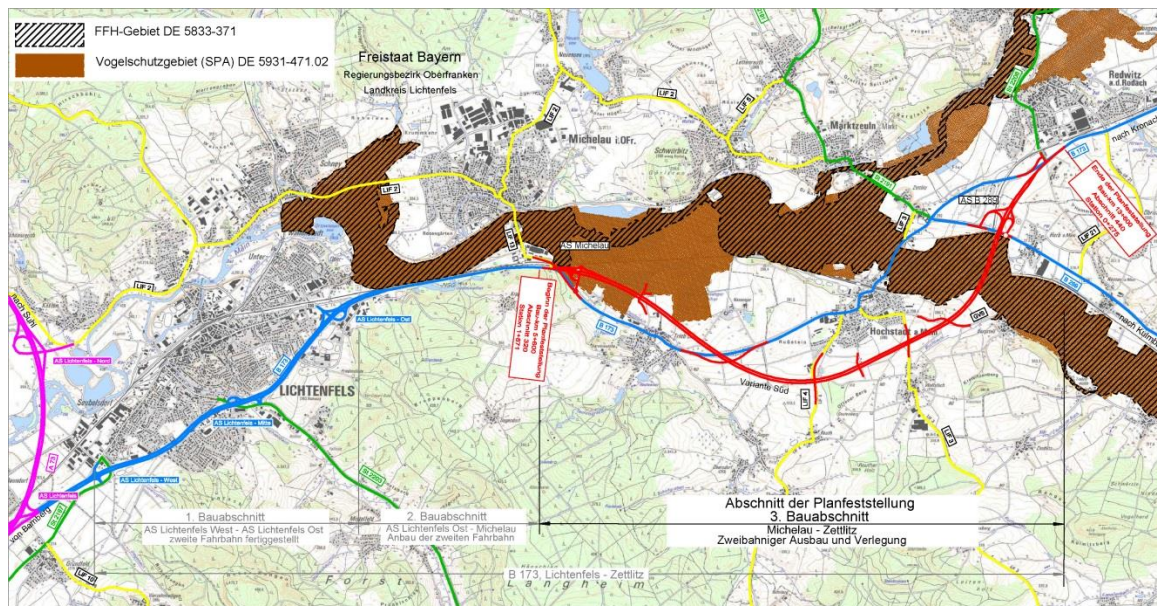


Figure 1: Overview of the construction project (red line) and the surrounding Natura 2000 sites (brown and hatched areas).

IV. The sites

The Natura 2000 site DE 5833-371 ‘Maintal von Theisau bis Lichtenfels’, covering an area of 872 ha, is designated a Site of Community Importance under the Habitats Directive. It is characterised by its riverbanks, with their typical open-country habitats, and its water bodies and water courses. According to the area’s conservation objective¹, the site has been established primarily for the conservation of the following habitat types and species of Community interest:

The following habitat types in accordance with Annex I to the Habitats Directive:

- 3150 Natural eutrophic lakes with *Magnopotamion* or *Hydrocharition*-type vegetation
- 3260 Water courses of plain to montane levels with *Ranunculion fluitantis* and *Callitriche-Batrachion* vegetation
- 3270 Rivers with muddy banks with *Chenopodion rubri* p.p. and *Bidention* p.p. vegetation
- 6430 Hydrophilous tall herb fringe communities of plains and of the montane to alpine levels
- 6510 Lowland hay meadows (*Alopecurus pratensis*, *Sanguisorba officinalis*)
- 91E0* Alluvial forests with *Alnus glutinosa* and *Fraxinus excelsior*

¹ Government of Upper Franconia (2007): NATURA 2000 Bavaria – Conservation objective for the area, version of 31.12.2007.

Link: http://www.lfu.bayern.de/natur/natura_2000_erhaltungsziele/datenboegen_5526_5938/doc/5833_371.pdf [accessed on 24.9.2015]

The following species in accordance with Annex II to the Habitats Directive: *Vertigo angustior*, *Maculinea teleius*, *Maculinea nausithous*, *Misgurnus fossilis* and *Castor fiber*.

The following species in accordance with Annex IV to the Habitats Directive: *Maculinea teleius*, *Maculinea nausithous* and *Castor fiber*.

According to the impact assessment, there is currently no proposal for a management plan for the protected site. A protected area regulation is currently being drawn up². Functional relationships exist with nine other protected sites.

Site DE 5931-471 'Täler von Oberem Main, Unterer Rodach und Steinach' is designated as a special protection area under the Birds Directive (2009/147/EC) and partly overlaps with site DE 5833-371.

All sites are situated in the continental bio-geographical region.

V. Implications of the project on the site

An assessment of the project's implications has been carried out pursuant to Article 6(3) of the Habitats Directive. This concluded that sites DE 5833-371 and DE 5931-471 will both be significantly affected. The Federal highway B 173 will have a significant impact on the two sites both inherently through the loss of areas of protected habitat types which will be built on and as a result of construction operations and the loss of ecological function.

According to the national reference book on the determination of significant impact³ (*Fachkonvention zur Bestimmung der Erheblichkeit*), habitat types 3150 (Natural eutrophic lakes with Magnopotamion or Hydrocharition-type vegetation), 6430 (Hydrophilous tall herb fringe communities of plains and of the montane to alpine levels) and 6510 (Lowland hay meadows (*Alopecurus pratensis*, *Sanguisorba officinalis*)) and the priority habitat type 91E0* (Alluvial forests with *Alnus glutinosa* and *Fraxinus excelsior*) will be significantly affected. The assessment of implications in terms of bird protection rates the relevance of the impact for the raptor species *Circus aeruginosus*, which is protected under Annex I of the Birds Directive, as 'high'.

The project will impact on Natura 2000 sites, including one involving a protected priority habitat type (91E0*). Consequently, the project may be approved only if it fulfils the requirements of Article 6(4) of the Directive.

VI. Fulfilment of the requirements of Article 6(4)

- Alternative solutions

The German authorities have examined alternatives covering the entire section, parts of the section and the so-called 'zero' option.

All alternative solutions are associated with significant effects on the Natura 2000 sites, including those hosting the priority habitat 91E0* (alluvial forests with *Alnus glutinosa* and *Fraxinus excelsior*). For each solution, sites DE 5833-371 and DE 5931-471 are significantly affected. None of the alternatives gives rise to a significantly lower impact than the chosen option because they would either cover a larger area of the Natura 2000 sites than the

² Link: <http://www.stmuv.bayern.de/umwelt/naturschutz/natura2000/verbandssanhoerung.htm> [accessed on 5.10.2015].

³ Lambrecht, H. & Trautner, J. (2007): Fachinformationssystem und Fachkonventionen zur Bestimmung der Erheblichkeit. FuE-Vorhaben im Rahmen des Umweltforschungsplanes des Bundesministeriums für Umwelt, Naturschutz und Reaktorsicherheit', report commissioned by the Federal Agency for Nature Conservation in the context of the Agency's assessment of implications under the Habitats Directive.

Link: http://www.bfn.de/fileadmin/MDB/images/themen/eingriffsregelung/BfN-FuE_FFH-FKV_Bericht_und_Anhang_Juni_2007.pdf [accessed on 24.9.2015]

proposed project or would lead to more nitrogen input as a result of the critical load value being exceeded. The 'zero' option does not meet the project criterion of reducing traffic in the municipalities of Trieb and Hochstadt am Main.

The competent authorities therefore consider that the current proposed solution offers the best balance between ecological and economic objectives.

- Imperative reasons for overriding public interest

The B 173 is an important east-west link connecting the A 73 motorway at Lichtenfels with the A 9 motorway at Hof. It is therefore one of the main transport routes in Upper Franconia and is of structural importance to the area. The German authorities intend to enhance Kronach as a business location on a sustainable basis and to ensure that it remains attractive in the long term to new firms locating on sites situated in the vicinity of the motorways. The planned widening of the B 173 aims in particular to improve the east-west link to other business centres, e.g. in Saxony. The widening of the road between Bamberg and Lichtenfels also forms part of the 'German Unification' transport project.

Under the Western Upper Franconia regional plan, through traffic is to be diverted away from the municipalities of Trieb and Hochstadt am Main. According to the transport study covering the period up to 2025, the widening and re-routing of the B 173 is likely to reduce traffic by between 75 % and 82 % in these municipalities. These figures clearly demonstrate the dominance of long-distance traffic on the existing road and its national rather than just local importance.

- Impact mitigation

The planned impact mitigation measures involve in particular the construction of flyovers on those sections of the B 173 crossing the protected site in order to minimise direct damage to the area. In addition, water containing salt coming from the carriageway will be channelled away from the Natura 2000 site through pipes and will be prevented from entering habitat areas by means of splash protection walls on both sides of the road.

- Compensatory measures

The expected negative impact of the project on the coherence of the Natura 2000 network will be compensated for at a ratio of 1:3 for the affected priority habitat type 91E0* (Alluvial forests with *Alnus glutinosa* and *Fraxinus excelsior*) and habitat types 3150 and 6430, and at a ratio of 1:6 for the habitat type 6510. Under compensatory measures, the Natura 2000 site DE 5833-371 will be enlarged by 2 ha. Compensatory measures relating to the raptor species *Circus aeruginosus* will take the form of the development of reed beds.

VII. Commission opinion

According to the information submitted, the widening and re-routing of the B 173 between Michelau and Zettlitz is justified as an important project of overriding public interest for which there are no better alternatives. Mitigation measures will be implemented which will reduce the negative effects of road construction. The project will have a significant impact on the integrity of two Natura 2000 sites, in particular on priority habitat type 91E0* (alluvial forests with *Alnus glutinosa* and *Fraxinus excelsior*).

The negative effects will be compensated for by the creation of equivalent habitats on a total area that will be at least three times larger than the area that will be affected. The German authorities have put in place a specific implementation and monitoring scheme involving a specific timetable. Protection of the overall coherence of the Natura 2000 network will therefore be safeguarded. **On the basis of the detailed information and explanations provided by the German authorities, and taking particular account of the issues set out**

in this document, the Commission is of the opinion that the adverse effects of the widening and re-routing of the B 173 between Michelau and Zettlitz (Bavaria) are justified by imperative reasons of overriding public interest.

This opinion is subject to the following conditions:

- The mitigation and compensatory measures must be implemented and monitored as described in the documents submitted to the Commission by the German authorities. The Natura 2000 site DE 5833-371 must be enlarged accordingly as described by the German authorities.
- Detailed reports on the implementation and monitoring of these measures must be made available to the public via the internet in line with the commitment entered into by the German authorities.
- The results of the accompanying monitoring programme for the Natura 2000 sites affected must be taken into account in order, where necessary, to make appropriate corrections to the project design or to implement additional compensatory and/or impact-mitigation measures.
- For Natura 2000 site DE 5833-371, the outstanding requirements of Articles 4(4) and 6(1) of the Habitats Directive must be met by Germany before the implementation of this project begins, in particular as regards the establishment of the necessary conservation measures to preserve or restore the favourable conservation status of the features of the site that are protected.

Done at Brussels, 18.12.2015

*For the Commission
Karmenu Vella
Member of the Commission*

APPENDIX No. 6.6

Relevant EU Precedents

6. Stuttgart

“Long Distance and Suburban Railway Connection”

Commission Opinion 30.01.2018



Brussels, 30.1.2018
C(2018) 466 final

COMMISSION OPINION

of 30.1.2018

issued at the request of Germany pursuant to the second subparagraph of Article 6(4) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora: long distance and suburban railway connection from Bad Cannstatt to Stuttgart via the Rosenstein portal (Germany/Baden-Württemberg)

Only the German version is authentic

COMMISSION OPINION

of 30.1.2018 issued at the request of Germany pursuant to the second subparagraph of Article 6(4) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora: long distance and suburban railway connection from Bad Cannstatt to Stuttgart via the Rosenstein portal (Germany/Baden-Württemberg)

Only the German version is authentic

I. The legal framework

Article 6(3) of Directive 92/43/EEC (the ‘Habitats Directive’) requires that any plan or project not directly connected with or necessary to the management of a Natura 2000 site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, be subject to an appropriate assessment of its implications for the site in view of the site’s conservation objectives. In the light of the conclusions of the assessment of its implications for the site and subject to the provisions of paragraph 4, the competent national authorities may agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

Under Article 6(4) of Directive 92/43/EEC, a plan or a project may be carried out in spite of a negative assessment of the implications for a Natura 2000 site and in the absence of alternative solutions if it is justified for imperative reasons of overriding public interest, including those of a social or economic nature. In this case the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected and it shall inform the Commission of the compensatory measures adopted. Where the site concerned hosts a priority natural habitat type and/or a priority species, and if considerations relating to human health, public safety or beneficial consequences of primary importance for the environment cannot be invoked, the project may be justified, further to an opinion from the Commission, by other imperative reasons of overriding public interest.

II. The German request

The Commission received two letters dated 3 and 4 April 2017 from the German Permanent Representation requesting an opinion from the Commission pursuant to Article 6(4) of the Habitats Directive concerning the long distance and suburban railway connection from Bad Cannstatt to Stuttgart via the Rosenstein portal (Baden-Württemberg). On 11 August 2017, the requesting authority informed the Commission that additional documents relating to the planned compensatory measures would be sent at a later date. These were sent to the Commission by the German Permanent Representation on 19 September 2017.

III. The project

‘Deutsche Bahn Netz AG’, represented by ‘Deutsche Bahn Projekt Stuttgart-Ulm GmbH’, is planning a long distance and suburban railway connection from Bad Cannstatt to the new Stuttgart Central Railway Station. The route is due to pass through the Rosenstein portal, with two double-track tunnels running under Rosensteinpark (see Figure 1).

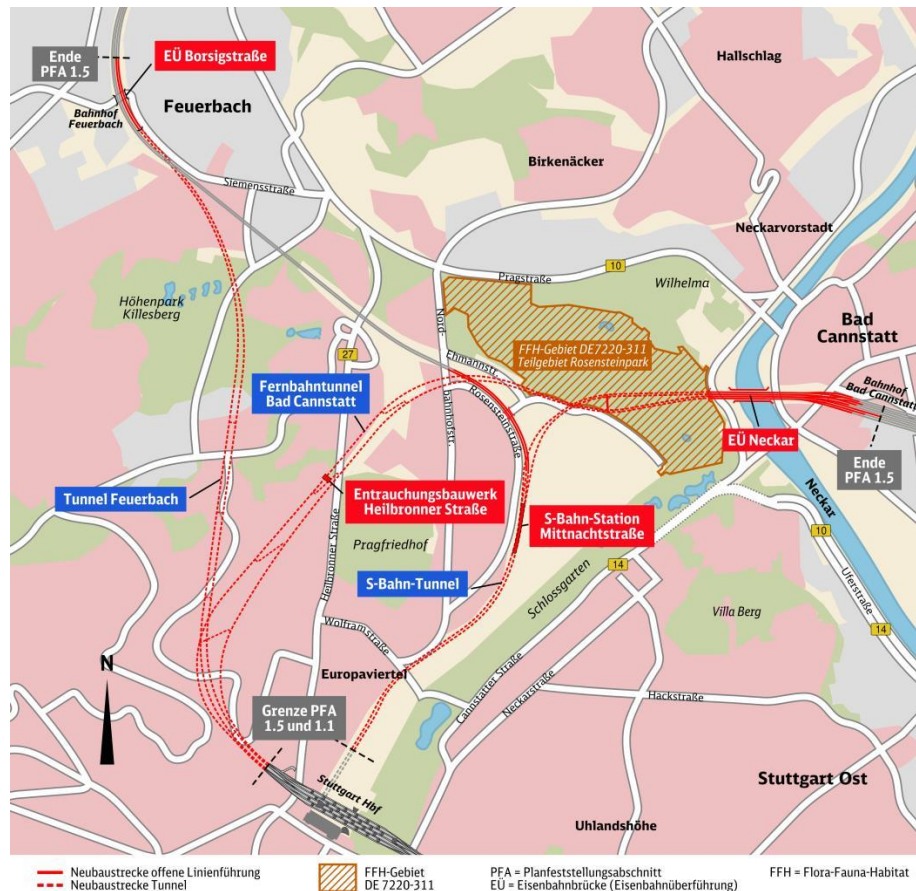


Figure 1: Overview of the construction project (red lines) and affected Natura 2000 site (brown and hatched areas).

IV. The site

The Natura 2000 site DE 7220-311 ‘Glemswald und Stuttgarter Bucht’ is designated a site of Community importance under the Habitats Directive and was created by merging the previous Natura 2000 sites DE 7220-341 ‘Stuttgarter Bucht’ and DE 7320-341 ‘Glemswald’ in 2015. It comprises 31 fragmented sites and covers an area of 3 813 ha. Large connected parcels of woodland characterise the area, together with historic park forests and woodland pastures in which unique populations of ancient trees and meadow valleys with near-natural watercourses are found. The project only affects the Rosensteinpark sub-site which has an area of approximately 60 ha.

As the competent authorities had not identified conservation objectives specific to the site¹, it was necessary for such objectives to be derived from the standard data form, backed up by biotope mapping. For the Natura 2000, 14 habitat types under Annex I and 10 animal and plant species under Annex II to the Habitats Directive have been identified as protected

¹ http://www2.lubw.baden-wuerttemberg.de/public/abt2/dokablage/oac_13/vo/1/81110000039.htm [downloaded on 10.10.2017]

elements, with special importance being given to the hermit beetle (*Osmoderma eremita*) in accordance with Annex IV, as a priority species listed under Annex II.

Rosensteinpark – the sub-site affected by the project – has only one protected habitat type and one protected species:

The following habitat type in accordance with Annex I to the Habitats Directive:

6510 Lowland hay meadows (*Alopecurus pratensis*, *Sanguisorba officinalis*)

The following species in accordance with Annexes II and IV to the Habitats Directive:

**Osmoderma eremita*

Owing to the approximately 2.6 km distance between Rosensteinpark and the next nearest sub-site within the Natura 2000 site, and given the beetles' limited mobility and the barrier effect of the town, the **Osmoderma eremita* subpopulation in Rosensteinpark is considered isolated and unconnected to other potential populations at other sites.

To date, no mandatory conservation objectives under Article 4(4) or conservation measures under Article 6(1) of the Habitats Directive have been set for the Natura 2000 site.

The site is located in the continental bio-geographical region.

The conservation status of **Osmoderma eremita* is 'unfavourable-inadequate' to 'unfavourable-bad' in all Member States in the continental bio-geographical region and on a deteriorating trend, i.e. including in Germany. However, the local population of **Osmoderma eremita* at the Rosensteinpark sub-site of the Natura 2000 site has a very good conservation status, highlighting the importance of the site for the Natura 2000 network.

V. Implications of the project on the site

An assessment of the project's implications has been carried out pursuant to Article 6(3) of the Habitats Directive. It concluded that the Natura 2000 site DE 7220-311 'Glemswald und Stuttgarter Bucht' will be significantly affected. The significant effects would result from encroachment on 1.11 ha of the Natura 2000 site and the loss of several first-order trees offering potential for **Osmoderma eremita*. Due to the particular way that **Osmoderma eremita* live in old deciduous trees – the majority spend their entire lives in tree hollows – removal of trees in which they live is equivalent to destroying their natural habitat. Brood trees, as primary breeding sites, are therefore an essential part of their habitat. According to the German reference book on the determination of significant impact², felling such trees would be considered to have a significant effect.

According to the assessment of implications, habitat type 6510 – lowland hay meadows (*Alopecurus pratensis*, *Sanguisorba officinalis*), which is found at the Rosensteinpark site, will not be significantly affected by the project.

An assessment of the cumulative effects of other plans and projects has been carried out, the results of which indicate that a significant effect on the Natura 2000 site is not expected.

² Lambrecht, H. & Trautner, J. (2007): *Fachinformationssystem und Fachkonventionen zur Bestimmung der Erheblichkeit. FuE-Vorhaben im Rahmen des Umweltforschungsplanes des Bundesministeriums für Umwelt, Naturschutz und Reaktorsicherheit*, report commissioned by the Federal Agency for Nature Conservation in the context of the Agency's assessment of implications under the Habitats Directive.

Link: http://www.bfn.de/fileadmin/MDB/images/themen/eingriffsregelung/BfN-FuE_FFH-FKV_Bericht_und_Anhang_Juni_2007.pdf [downloaded on 26.9.2017]

According to the assessment of implications, planned mitigation measures have already been taken into account in the selected project as the railway line is intended as a tunnel running through the Natura 2000 site. As little surface area as possible will therefore be used from the Natura 2000 site. Environmental supervision when felling trees for the Rosenstein portal is planned, with the trees to be felled being gradually cut back, enabling any **Osmoderma eremita* breeding burrows which are discovered to be carefully removed. The stages of development of **Osmoderma eremita* would be ascertained, they would be bred and then transferred to alternative trees.

The German authorities take the view that the project would significantly affect a Natura 2000 site which is a habitat for a protected priority species (**Osmoderma eremita*). Consequently, the project may be approved only if it fulfils the requirements of Article 6(4) of the Directive.

VI. Fulfilment of the requirements of Article 6(4)

- Alternative solutions

The German authorities have examined route alternatives covering the entire section, parts of the section and the so-called 'zero' option.

In their view, all alternative solutions would significantly affect the Natura 2000 site, including sites with the **Osmoderma eremita* priority species. All solutions would significantly affect the DE 7220-311 'Glemswald und Stuttgarter Bucht' Natura 2000 site. None of the alternatives would give rise to a significantly lower impact than the chosen option because they would either cover a larger area of the Natura 2000 site than the proposed project or would lead to a larger number of trees which provide potential habitats for **Osmoderma eremita* being cleared. The 'zero' option would not meet the project criteria of linking Stuttgart and Bad Cannstatt stations and renovating the railway bridge over the River Neckar.

The competent authorities therefore consider that the current proposed solution offers the best balance between ecological and economic objectives.

- Imperative reasons of overriding public interest

According to the German authorities, the project to establish a long distance and suburban railway connection from Bad Cannstatt to the new Stuttgart Central Railway Station will improve regional and long-distance passenger transport services, creating and strengthening cross-regional links to other development areas.

Construction of the new Stuttgart station will mean a ring system can be created allowing trains to travel from the planned new train depot in Untertürkheim to the Central Station without them having to change direction. The connection to Bad Cannstatt station would be part of this ring system and would involve having to rebuild the Neckar bridge-crossing which is more than 100 years old.

- Compensatory measures

According to the German authorities, the expected negative impact of the project on the coherence of the Natura 2000 network will be offset for the affected priority species requiring protection, i.e. **Osmoderma eremita*. Under compensatory measures, the area of Natura 2000 site DE 7220-311 would be enlarged by approximately 50 ha. The area to be covered by compensatory measures is currently outside the Natura 2000 site at Waldenbuch, near the 'Neuweiler Viehweide' national conservation area. By integrating it into the Natura 2000 network, two previously isolated sites would be linked together. The compensatory measures

would involve, in particular, thinning out the future site and implementing maintenance measures to make the site suitable for hosting trees providing a habitat for **Osmoderma eremita*. Due to the scope of the compensatory measures and the detailed development of them, the conservation status of **Osmoderma eremita* is expected to remain ‘favourable’ (A).

VII. Commission opinion

In accordance with Article 6(1) of the Habitats Directive, the compensatory measures for Natura 2000 site DE 7220-311 must clearly differ from mandatory conservation measures which, for example, may be included in a future management plan³. As all compensatory measures will be implemented outside the existing Natura 2000 site – involving an extension to the Natura 2000 site – and as those measures will have to be made environmentally stricter for **Osmoderma eremita*, the aforementioned requirement is considered to have been met. They will therefore be implemented in addition to and going beyond the conservation measures which are in any case mandatory.

The applicant could not use the standard data form for Natura 2000 site DE 7220-311 on its own for assessing the implications for the conservation objectives as its data applies to the whole Natura 2000 site and not to the 31 individual, isolated sub-sites which have only a very limited environmental link with each other. It is therefore expected that the lack of an environmental link between the sites’ protected species and habitats will be taken into account when determining the necessary conservation measures for the Natura 2000 site. By setting the conservation objectives and necessary conservation measures, e.g. the management plan under Article 6(1) of the Habitats Directive, in a timely manner, it is easier to assess the implications of plans and projects which may significantly affect Natura 2000 sites.

According to the information submitted by Germany, the long distance and suburban railway connection from Bad Cannstatt to Stuttgart via the Rosenstein portal is an important project of overriding public interest for which there is no better alternative. Mitigation measures will be implemented which will reduce the negative effects of the project. Nevertheless, the project will significantly affect the integrity of a Natura 2000 site, in particular the protected priority species **Osmoderma eremita*.

The negative effects will be compensated for by the creation of equivalent habitats on a total area that will be at least 45 times larger than the area that will be affected. The German authorities have put in place a specific implementation and monitoring scheme with a short-term and long-term timetable. Protection of the overall coherence of the Natura 2000 network will therefore be safeguarded.

On the basis of the detailed information and explanations provided by the German authorities, and taking particular account of the issues set out above, the Commission is of the opinion that the adverse effects of the long distance and suburban railway connection from Bad Cannstatt to the new Stuttgart Central Railway Station (Germany/Baden-Württemberg) on the Natura 2000 network are justified by imperative reasons of overriding public interest.

This opinion is subject to the following conditions:

- The mitigation and compensatory measures must be implemented and monitored as described in the documents submitted to the Commission by the German authorities.

³ According to comments received from the competent authorities on 10 October 2017, the management plan will be available from mid-2018.

Natura 2000 site DE 7220-311 must be enlarged accordingly as described by the German authorities. Within one year of this opinion being signed the Natura 2000 site must be enlarged, the necessary thinning out completed, and suitable trees provided as habitats.

- Detailed reports on the implementation and monitoring of these measures must be made available to the public via the internet in line with the commitment entered into by the German authorities. They must also be sent to the Commission. The first report must be submitted within one year of this opinion being signed. Follow-up reports must be provided every three years.
- The results of the accompanying monitoring programme for the Natura 2000 sites affected must be taken into account in order, where necessary, to make appropriate corrections to the project design or to implement additional compensatory and/or impact-mitigation measures.

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Done at Brussels, 30.1.2018

For the Commission
Karmenu Vella
Member of the Commission

