



**Implementation of the Habitats Directive
in EU Member States**
Collection of Case Studies Natura 2000



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1. Introduction

Justice & Environment (J&E) is a network of public-interest environmental law organisations based in the EU member states. J&E aims to use law to protect people, the environment and nature. Our primary goal is to ensure the implementation and enforcement of EU legislation, through the use of European law and exchange of information.

Having started its work as an informal network in 2003, the first full-year work-plan was developed by J&E in 2006. Implementation and transposition of the Habitats Directive (92/43/EEC) was initially chosen by J&E members as the first of three legal areas within which to work. In 2006, four J&E members were involved: *Estonian Fund for Nature* (Estonia, coordinator of the topic), *Environmental Law Service* (Czech Republic), *Environmental Management and Law Association* (Hungary) and *Via Iuris* (Slovakia).

In 2006, J&E analysis of implementation and transposition within the Habitats Directive, was focused on Articles 6.3 and 6.4. J&E members believe implementation of these articles, specifically, was most problematic within our home countries.

Under analysis of transposition and implementation of Articles 6.3 and 6.4 of the Habitats Directive, two goals were accomplished

1. legal analysis of transposition of the articles
2. collection of case studies, illustrating the gaps in implementation of the articles within EU Member States.

The present compilation contains four case studies from four different EU Member States

1. Estonia
2. Czech Republic
3. Hungary
4. Slovakia

Each of the described cases was selected from the legal practices of relevant J&E members as the most representative of cases, illustrating problems with implementation of the Habitats Directive. Although the nature of the development-projects surveyed is quite different; a wind farm, marine port, cableway and a canal; the nature of conflicts with the Habitats Directive is quite similar.

2. Comparative analysis

The following cases have been selected by J&E members as representative examples of implementation of the Habitats Directive:

Case	Country	Description of the plan	Timeline
Port of Saaremaa	Estonia	A port to host cruise and passenger traffic for 3-4 months a year (some documents reflect the possibility of additional uses for the port)	2003-2005
Slavik Islands	Czech Republic	Plan to build navigation channels parallel to a main branch of Elbe, in order to bypass the non-navigable stretches of the river. The channel will be built through the Slavik Islands	2000- ...
Wind Farm of Hárskút	Hungary	Creation of a wind farm, consisting of 30 wind turbines	2003- ...
Cableway Vrátna	Slovakia	Reconstruction of an old and non-functional cableway in the Vrátna valley, Mala Fatra mountains	2002- ...

All J&E members, involved in the analysis, come from new EU Member States. The accession date of these Member States to EU is 1st May 2004, coinciding with the deadline for transposition of the Habitats Directive. It is debatable whether this date was appropriate as a starting point for implementation of the Habitats Directive for all *development projects*, or only for projects that were initiated after this date. Therefore, it is noted that all cases described in the present collection, were initiated *before* 1st May 2004.

All the cases represent conflicts of development and are listed by national authorities as Natura 2000 sites. More specifically, in three cases, the sites in question were officially listed as Special Protected Area (SPA) and proposed Site(s) of Community Interest (pSCI). In the fourth case, Slavik Islands, the site in question was initially listed by the Czech government as a pSCI and was later left out of the pSCI list for economic reasons.

Despite the fact that all of the sites in question belong (or should belong) because of relevant criteria, to the Natura 2000 network. The requirements of Articles 6.3 and 6.4 of the Habitats Directive have been followed in none of these cases. Although an environmental impact assessment (EIA) has been carried out in all cases, it did not include analysis, as required in Articles 6.3 and 6.4.

In all the cases, a negative impact to Natura sites (or sites that respond to Natura criteria) is to be expected throughout the investment plans. In one case, the habitats of protected species would be literally destroyed (Slavik Islands). In other cases, the threat lies mainly in

disturbances to birds because of operating wind-turbines, the port or a cableway (Wind Farm of Hárskút, Port of Saaremaa, Cableway Vrátna). At the same time, none of the cases are directly connected with, or necessary to the management of the site.

Therefore, competent national authorities should have agreed 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'* as stated in Article 6.3 of the Habitats Directive.

It is noted that there are differences between official and NGO estimates of the strength and significance of possible negative impacts.

For example, in the case of the Slavik Islands, there were no biological inventories made during the EIA. Therefore, the existence of protected species *Large Blue Butterfly* (*Maculinea nausithous* and *Maculinea teleius*) as well as *Hermit Beetle* (*Osmoderma eremite*) was not known when approving permits to build the canal on the site of their habitats. Additionally, in the case of Wind Farm of Hárskút, the environmental NGO stated that research was too limited.

In all cases, permits for carrying out the projects were issued by the relevant authorities, without considering possible alternatives. In none of the given cases, were alternatives proven to be impractical. In none of the cases, were location alternatives considered. The alternatives analysed by authorities were mainly connected to technical solutions of the project. For example

At Cableway Vrátna, the alternatives considered were

- from the standpoint of capacity (cableway with capacity of 200/600/1800 people /hour)
- from the standpoint of technology (4-seats cableway, 6-seats gondola)

At Port of Saaremaa and Slavik Islands, the importance of considering location alternatives was stressed by NGOs, but not taken into account by the competent authorities.

In addition, the question of overriding public interest arises. In none of the cases, was overriding public interest considered. The projects have been (or will be) carried out solely in the interests of the developers or political consideration (e.g. in case of Port of Saaremaa).

In most of the cases, no compensatory measures (necessary to ensure that the overall coherence of Natura 2000 is protected) were taken by the authorities. Only in the case of Slavik Islands, were some measures prescribed. Some of them (e.g. planting several groves) were useful for birds, but failed to consider hollow-tree beetle species. At Cableway Vrátna, the developer was obliged to scythe the nearby habitats and remove plants of protected species, which cannot be considered a compensatory measure, abiding by Natura 2000 network. Uniformly, mitigation measures prescribed by the authorities in order to minimize the negative impact (e.g. restriction of the operation period in some seasons, sensitive for protected species) were ignored.

In at least two cases, the sites in question host priority species (Slavik Islands and Cableway Vrátna). Despite that, the projects have been approved, although there was no consideration of public health and safety, or prior recommendations of the Commission.

3. Conclusions

Taking into account that all of the cases were initiated before the accession date, the obligation to follow Articles 6.3 and 6.4 of the Habitats Directive is questionable. Taking into account the ECJ interpretation in several cases, the described cases cannot be considered violations of EU Directives. However, these cases are indications that new EU Member States must be encouraged to comply with requirements of the *assessment of plans and programmes* according to Articles 6.3 and 6.4 of the Habitats Directive.

In practice, the biggest problem common to almost every MS in question has been the consideration of alternatives and suggested compensatory measures. Unfortunately, there is little positive evidence for the new MS-s when trying to comply with the requirements.

J&E will continue monitoring the practice in the years to come, to detect whether such problems continue to occur with cases initiated after the accession date.

4. Individual Case Studies

ESTONIA: Port of Saaremaa



1. Title of case:

Port of Saaremaa

2. Matter of case:

Construction of a deep port to Küdema bay in Saaremaa, Estonia

3. Country:

Estonia

4. Location:

Island of Saaremaa

5. Geographic dimension:

national

6. Initiator of case:

Estonian Fund for Nature, Estonian Green Movement – Friends of Earth Estonia (environmental NGOs)

7. Participants involved:

Ministry of Environment
Municipality of Mustjala (local community)
AS Tallinna Sadam (developer, 100% state owned business company)
Estonian Fund for Nature
Estonian Ornithological Society
Estonian Green Movement – Friends of Earth Estonia

8. Other interested parties and/or stakeholders:

The County Government of Saaremaa
Union of Saaremaa County Municipalities

9. Background facts:

9.1. Account of facts

Already for many years Estonian Government and private business organizations have been planning a construction of a new deep-sea port for the largest island of Estonia – Island of Saaremaa. At the Soviet period, the coast of island as the former Western border of the Soviet Union was heavily controlled by army, which guaranteed the conservation of natural habitats along the coasts, as massive constructions of neither housing nor ports on the coasts were allowed. Municipal Authority of Mustjala commune in NW Saaremaa and Estonian Ministry of Environment have given consent to the developer - Tallinn Port Ltd (Tallinna Sadama AS) to build a deep-port into Küdema Bay.

The bay has been listed as Special Protection Area (SPA) according to directive 79/409/EEC (Bird Directive) and proposed Site of Community Importance (pSCI) according to directive 92/43/EEC (Habitat Directive). While granting licenses for port construction, Estonian Government and the local authority have not sufficiently assessed all the impacts on the Küdema Bay SPA and pSCI nor consulted the European Commission on the need and specifics of compensatory measures despite of the priority bird species *Polysticta stelleri* involved.

The main problematic issues are:

- a) no strategic environmental assessment has been made to the land-use plans, no alternative locations for the port have been assessed or analyzed according to the directive 2001/42/EC (SEA Directive);
- b) an environmental impact assessment (EIA) was carried out, but the EIA report is incomplete and it does not take all potentially significant effects into account. The faults in report are the following:
 - there is no appropriate assessment according to Art 6 of Habitat Directive made; no information about habitats of Community importance has been produced or analyzed in the EIA report;
 - European Commission has not been consulted, although the Natura site in question contains habitats of Community interest and a priority bird species *Polysticta stelleri*. Moreover, it has been acknowledged in report that the project is likely to affect the Natura site negatively, regarding the purpose of protection of the site;
 - no compensatory measures have been analyzed or communicated to the European Commission in accordance to art 6.4 of the Habitat Directive.

9.2. Description of the Natura 2000 locality concerned

General description of the site(s) affected:

Name of the site:

Küdema Bay

Nearest town/city:

Kuressaare (capital of Saaremaa)

Surface area:

4503 ha

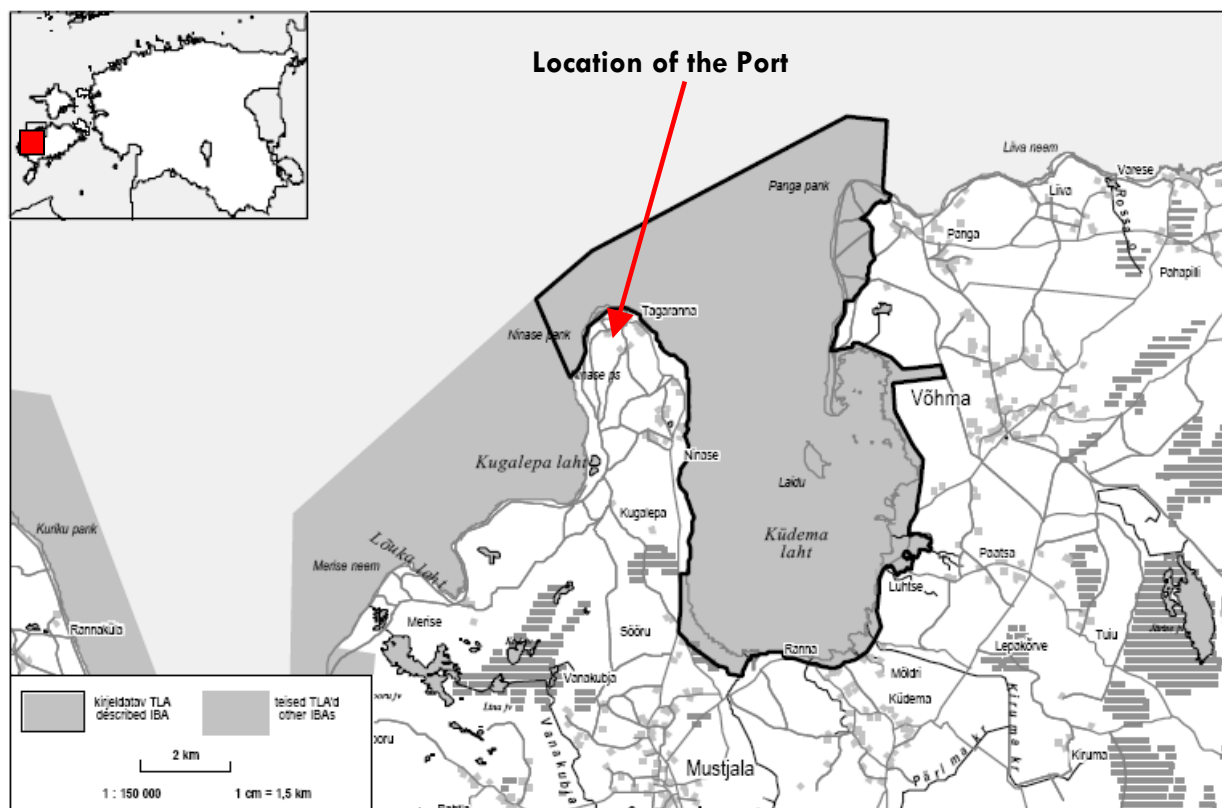
Special Protection Area:

Yes - Küdema Bay SPA

Proposed site of European Community importance:

Yes – code EE0040432

Map of the site or sites affected 1]



Principal habitats and species directly affected

According to Estonian Government regulation on the list of sites of Natura 2000 network to be submitted to the European Commission,¹ the SPA of Küdema Bay is selected for the protection of following bird species:

- Northern Pintail (*Anas acuta*)
- Graylag Geese (*Anser anser*)
- Barnacle Goose (*Branta leucopsis*)
- Goldeneye (*Bucephala clangula*)
- Bewick's Swan (*Cygnus columbianus bewickii*)
- Mute Swan (*Cygnus olor*)
- Common Crane (*Grus grus*)
- Common Merganser (*Mergus merganser*)
- Red-busted Merganser (*Mergus serrator*)
- Grey-cheeked Grebe (*Podiceps grisgena*)
- Steller's Eider (*Polysticta stelleri*)
- Common Eider (*Somateria mollissima*).

The pSCI of Küdema Bay is designated to protect following habitats of Community priority:

¹ Governments regulation No 615-k from 5 August 2004

- Coastal lagoons (*1150)
- Boreal Baltic coastal meadows (*1630)
- Nordic alvar and Precambrian calcareous flatrocks (*6280)
- calcareous fens with *Cladium marsicus* and species of the *Caricion davallianae* (*7210)
- western taiga (*9010).

However, the habitats are located mainly to the opposite shore from the port so the port probably will not affect them very seriously.

9.3. Description of the investment plan and its impacts on the Natura site

Description of the planned activity

State-owned company Tallinna Sadam Ltd has built a deep port to Küdema Bay to host cruise and passenger traffic. According to the initial intentions of the developer, the port is expected to operate 3-4 months a year, hosting cruise ships in its initial and ro-ro ships in the next phase. 3 quays have been built, one meant for cruise ships and ferries (ro-ro ships), second for passenger boats and liners, also for fast ferries, and the third for fishing boats and port fleet. All three quays are connected to each other and were built at the same time. Construction started in late summer 2005 and the port was officially opened in June 2006. The traffic intensity is not fully clear (differing by sources of information), but according to detailed land-use plan it is planned to be following:

- a) 1 cruise ship with 1000 passengers weekly (to be accompanied by 40 buses for travelling around in the island) or 30 cruise ships per year;
- b) 1 ferry with 1000 passengers weekly (to be accompanied by 35 trucks or buses and 60 cars).

There is a possibility that the port will also be used by fishing boats, assistance boats, yachts and launches.

Some of the documents, related to the project, reflect possibility for additional purposes of the port.

Regarding the period for circulation, the cruise ships will visit the port during maximum of 18 weeks per year (from May till September), whereas fishing boats are capable to use the port for 30 weeks per year and ferries and assistance boats all 52 weeks per year. In application for port passport, filed in beginning of 2006, the developer also applied for all-year-round traffic possibility.

There is proven to be intention for further development of the port, outlining a breakwater in length of 200 m to Küdema bay. According to Environmental Impact Assessment (EIA) report, it is impossible to use the port in winter without a breakwater. However, the existing land-use plans do not contain reference to such construction.

On shore the detailed land-use plan allows to establish port building and yacht club with 3 resthouses as well as roads and other technical infrastructure, necessary for exploitation of the port.

Impacts on the Natura site

According to EIA report, the main impacts to ornifauna would be following:

- disturbance from the marine traffic (the area is important nesting and moulting area and passing zone for migratory birds);
- the danger of oil accidents would increase;
- the noise can disturb birds, but usually birds get used to regular and steady noise;
- as a whole, the negative impact of the planned port and water traffic to the avifauna of Laidu Island is estimated as averagely strong up to disastrous (depending on different species). The impact is estimated as disastrous for all hatching water birds;
- the negative impact is summarily strong because of danger of oil pollution; in ordinary situation the impacts of port are small;
- the danger of oil pollution is stronger in case of ship accidents (the risk is bigger in winter when the pollution would be harder to clean and when there are valuable species wintering at the bay).

As the developer claimed that the port will only be used by cruise ships and only during summer season, the Minister of Environment stated in motivation of his approval to EIA report that the impacts of the port probably are not strong and can be reduced by mitigative measures.

The NGOs are of opinion that the threats to Natura sites might be bigger than estimated in EIA approval, for following reasons:

- Although the development plans presently contain only exploitation of the port by cruise ships during summer months, there is no guarantee that the exploitation period will stay as short as declared (this fear has been proven to be true by the developers recent application to navigate the port all-year-round);
- Although the ship accidents are unlikely in this area, it is also possible that oil will be spilled into sea with bilge water. Although the quantities of oil spilled into sea with bilge cannot be very big, the possible environmental damage would be substantial. The oil patch can move to the nesting areas in couple of hours and are therefore difficult to avoid;
- Since the port is declared to be an important regional development project, it is quite likely that the port use will be intensified and extended from 3-4 months to all-year-round operations. Associated impacts on the Natura site, however, have not been assessed;
- The establishment of port to NW coast of Saaremaa is strongly connected to another plan to connect Saaremaa and the main land with a fixed link (bridge or tunnel) which would likely increase the traffic through port and create additional motivation to use the port not only for passenger traffic, but also for goods and encourage all-year-round exploitation.

10. Applicable articles of Directive 92/43/EEC (Habitats Directive):

Articles 6.3 and 6.4

11. Applicable national laws:

Environmental Impact Assessment and Auditing Act (valid until 3 April of 2005)

Planning Act (version valid from 1 January 2003 until 3 April 2005)

The EIA Act provides obligation to carry out EIA when constructing a sea harbor with certain capacity; however, it foresees EIA only as stage of administrative proceedings of an environmental permit (in this case water use permit). At that time, there were no provisions about impact assessment, regarding Natura 2000 sites.

Planning Act establishes provisions for planning proceedings. At the time of planning proceedings of the given case, there was no clear obligation in the Planning Act how to assess the impacts of land-use plans, but such obligations did not rise from EIA Act either (before and after the version applied to the given case, the obligation to assess impacts of land-use plans was established in EIA Act as SEA).

12. Type of procedure (administrative and/or judicial):

Administrative and judicial

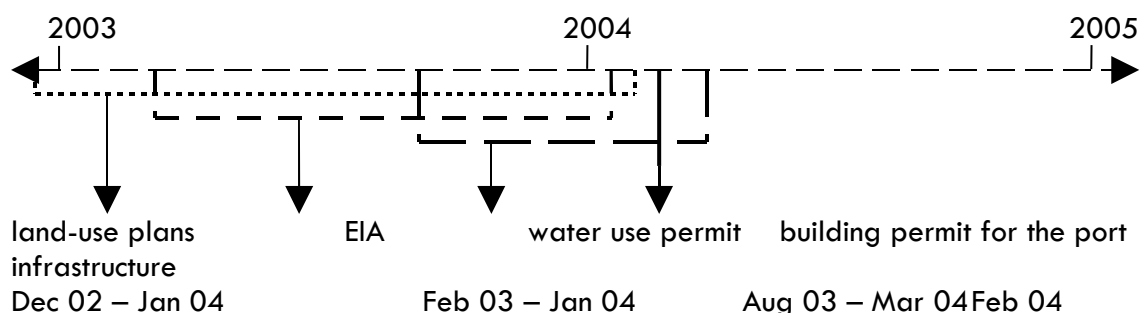
13. Administrative procedural history/timeline:

13.1. Administrative proceedings

The main administrative proceedings have been following:

- 1) proceedings for comprehensive land-use plan of Ninase peninsula
 - initiated by Mustjala local government on 27 December 2002
 - enacting the plan first on 15 July 2003 (declared invalid by court)
 - enacting the plan secondly on 23 January 2004
- 2) proceedings for detailed land-use plan
 - initiated by Mustjala local government on 27 December 2002
 - enacting the plan on 28 January 2004;
- 3) EIA proceedings
 - initiated by Ministry of Environment on 13 February 2003
 - approval of Minister of Environment to the EIA report on 15 January 2004
- 4) water use permit proceedings
 - initiated by Ministry of Environment on 12 August 2003
 - issuing the permit on 15 March 2004
- 5) building permit proceedings for the port infrastructure
 - issued on 19 February 2004

Timeframe of administrative proceedings



13.2. Description of EIA

The EIA was carried out in 2003. It was officially titled as “environmental impact assessment of establishment of Saaremaa port”. Initially, the object of the EIA was establishment of the port as a whole, including exploitation of the port. In his approval to EIA report, the Minister of Environment prescribed special measures for exploitation of the port, e.g. obligations for monitoring the environmental conditions during exploitation etc. However, during the latter court proceedings, initiated by environmental NGOs in order to dispute the EIA report, the authorities changed their opinion and declared that the EIA was carried out in water use permit proceeding and its purpose was to assess only the impacts of building the quays into sea water.

In result of EIA the negative impact of the planned port as a whole and water traffic to the avifauna of Laidu Island was estimated as averagely strong up to disastrous (depending on different species). However, regarding the limited use of the port (cruise ships, limited navigation period), the impacts were not considered to be significant.

The EIA report contains parts that indicate status of Natura 2000 site, but the impacts to the habitats are not described in the report. The EIA report follows the methodological guidelines of assessing the impacts of projects and plans to Natura sites and concludes that:

- 1) the establishment of port is not aimed to management of the site;
- 2) it is likely that the port will have significant effect to future Natura site;
- 3) it is likely that the port will have significant effect to the integrity of the site;
- 4) there are no alternative solutions (on basis of previous studies);
- 5) there are priority habitats on the site;
- 6) there are no considerations, connected to human health, safety of habitants or significant positive environmental impacts;
- 7) in order to give permission in other imperative reasons of overriding public interest, Estonian government must ask consultation and opinion from European Commission;
- 8) Estonian government must implement all the necessary compensatory measures, in order to guarantee overall coherence of Natura 2000 site.

However, the approval of EIA report (where the environmental conditions for further activities are set), did not contain indication to such conclusions or obligations.

13.3. Alternative solutions, considered by authorities

The EIA report contains 2 alternatives besides the planned activity:

- null alternative (i.e. the port will not be established);
- planned activity with limitations (i.e. with mitigative measures).

13.4. Alternative solutions, pointed out by other stakeholder and not considered by the authorities

The NGOs stressed the importance of considering location alternatives. Another location in next bay (Veere) was pointed out by NGOs, but not taken into account in the proceedings.

The developer, AS Tallinna Sadam, carried out an unofficial analysis about different possible locations for the port. In this analysis, 4 different locations (including Veere) were described

and Küdema bay was proposed as most suitable location because the costs of constructing the port to Küdema bay would be least, compared to other locations.

13.5. Mitigation measures, proposed or considered by the national authorities

The approval of EIA report contains following mitigation measures:

- there developer must have action plan for preventing possible accidents and in case of accidents;
- the noisy construction works must be carried out in end of summer or early autumn so that disturbance of birds would be minimal;
- the habitats for protected species of flora must be preserved;
- the impacts of the construction and exploitation of the port must be monitored (different provisions for marine fauna and flora and ornifauna);
- suggestion to determine navigation period as starting from 20 May and ending on 20 September;
- suggestion to determine distance between navigation area and bird nesting areas at least 1 km.

However, two of the latter conditions have not yet been bindingly enacted in any administrative act.

13.6. Compensatory measures for nature conservation damage, proposed or considered by the national authorities

No compensatory measures were proposed or considered.

13.7. Compensatory measures, pointed out by other stakeholder and not considered by authorities

No compensatory measures were pointed out.

14. Outcome of the actions:

The suggestions and comments of NGOs were in main part not taken into account.

15. Remedies taken:

Estonian Fund for Nature and Estonian Ornithological Society disputed the comprehensive land-use plan in court.

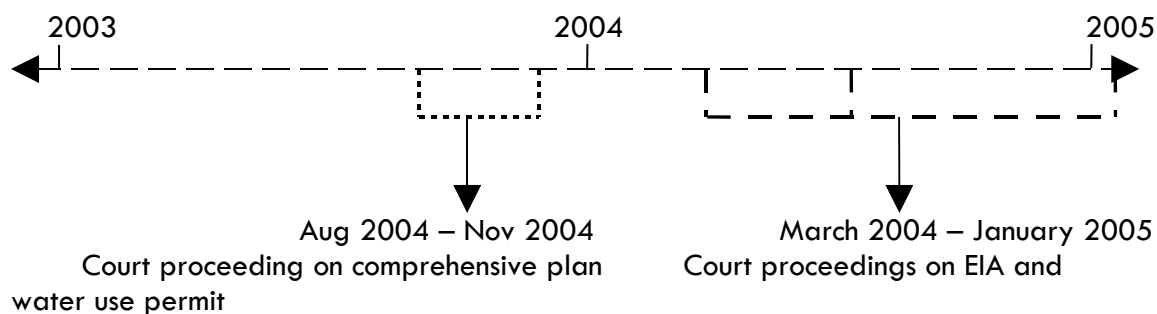
Estonian Fund for Nature and Estonian Green Movement disputed the approval to EIA report and water use permit in court.

16. Judicial procedural history/timeline (if relevant):

Three court proceedings have been initiated, regarding this project. First, on 21 August 2003, Estonian Fund for Nature and Estonian Ornithological Society disputed the comprehensive plan of the Ninase peninsula in court. On 24 November 2003 the court of first stage (Pärnu Administrative Court) confirmed that the comprehensive plan was illegally adopted and the comprehensive plan was declared to be void.

Secondly, in March 2004 Estonian Fund for Nature and Estonian Green Movement-FoE disputed the EIA statement of Saaremaa port project in court. The court proceedings were integrated in one proceeding with the third action when Estonian Fund for Nature and Estonian Green Movement-FoE disputed the water use permit for establishment of Saaremaa port on 15 April 2004.

Court proceedings



17. Outcome of the actions:

The action regarding comprehensive plan was satisfied on reason that it was not motivated. The local government enacted the same comprehensive plan again in January 2005, this time adding motivation to the decision.

The actions of NGOs regarding EIA and water use permit were left unsatisfied by Tallinn Administrative Court on 9 June 2004 and Tallinn District Court on 18 January 2005. The rulings are in force as the NGOs did not challenge the decisions in Supreme Court.

18. Current status of case:

The port of Saaremaa was opened for cruise ships on 16 June 2006. However, until now the port has no passport and is therefore acting illegally. On 7 July 2006, Estonian Fund for Nature and Estonian Green Movement presented a complaint to Estonian ombudsman, asking the ombudsman to give evaluation to legality of behavior of all relevant authorities in course of establishment of the port and also regarding the exploitation of the port.

19. Follow-up actions planned and their timeline (in case of ongoing matter, also estimated end date of case):

The application to ombudsman is pending (not possible to estimate the end date).

After and depending on his answer to the complaint and further events at the port (including possible impacts that could reveal), Estonian Fund for Nature and Estonian Green Movement will be considering presenting a complaint to European Commission.

20. Analysis of legal problems, concerning implementation of Art 6.3 and 6.4 of Habitats Directive, conclusions

The establishment of Saaremaa port is to be regarded as plan or project (depending on the stage of administrative proceedings – project stage follows to the plan stage) in the meaning of art 6.3 of the Habitats Directive. Construction of this kind of port is also a “project” in the meaning of Annex I of Directive 85/337/EEC.

The investment plan is not necessary for the management of the site, but is likely to have a significant effect thereon. According to EIA report, the negative effect to the birds can be averagely strong up to disastrous (depending on different species) and the impact is estimated as disastrous for all hatching water birds. Although the impact may be smaller in case the port will be used in limited ways, there are presently no binding provisions set that would actually limit the use of port to cruise ships and navigation period to summer time. Furthermore, in case such provisions will be established, they can easily be changed (without public participation). Therefore, all possible uses of the port and also possible accidents (oil pollution) must be taken into account when assessing the significance of the effect. Therefore, the project was subject to assessment according to art 6.3 and its implications for the site should have been assessed in view of the site’s conservation objectives.

The decisions about the land-use plans nor the EIA in the given case did not contain proper assessment according to art 6.3 of the Habitats Directive. The decisions about the land-use plans did not refer to impacts to Natura site in the view of the site’s conservation objectives at all. The land-use plans and EIA did refer to impacts to the ornifauna of Küdema bay, but only regarding single species, not regarding the Natura site in its integrity. Although conclusions were made in EIA report regarding implementation of Art 6.3 and 6.4 of the Directive, the conclusions were not supported by more specified assessment. Furthermore, the approval to EIA report did not take these conclusions into account.

As there was no assessment regarding site’s conservation objectives and integrity of the site, the competent national authorities have agreed to the project without having ascertained that it will not adversely affect the integrity of the site. The opinion of public was not taken into account in this matter, although NGOs indicated that proper assessment according to art 6.3 is necessary.

It can be concluded from the EIA report that the assessment of the implications for the site was negative. In opinion of NGOs, the assessment should definitely be negative as the possible oil spill creates big danger for the birds in the area and the disturbance by marine traffic has also negative impact. Therefore, alternative solutions should have been looked for. In course of official proceedings, such alternatives have not been searched or analyzed. Although the EIA report contains 2 alternatives to the planned activity – null alternative and ‘planned activity with limitations’, these alternatives cannot be regarded as alternatives in the meaning of art 6.4. Although the null alternative is one of the options that has to be considered, the other proposed “alternative” is merely planned activity with mitigative measures that are obligatory anyway. In the given case, different locations should have been considered as suitable alternatives, but this was done only in unofficial way by the developer itself and the selection between the locations was made on economic basis (see p 13.4). When assessing the alternatives according to art 6.4, economic aspects should not be put above ecological criteria.² Therefore, the absence of alternative solutions has not been proven.

² Managing Natura sites. The provisions of Article 6 of the ‘Habitats’ Directive 92/43/EEC; p 43; (http://ec.europa.eu/environment/nature/nature_conservation/eu_nature_legislation/specific_articles/art6/pdf/art6_en.pdf)

Even if there were no other alternative solutions, construction of the port to Küdema would have been allowed only in case of imperative reasons of overriding public interest, including those of a social or economic nature. Such overriding public interest have not been brought out by the authorities. In decisions about land-use plans, the local municipality declared that establishment of the port is essential, in order to smoothen the regional differences, rising from the insular peculiarity of Saaremaa. According to the municipality, the public interest lies mainly in rise of employment rate. It is, however, highly questionable, whether such interest could be 'overriding'. No estimation has been made how many or what kind of new jobs would be created in result of this port and if the employment rate would raise so significantly that it could be considered as 'overriding interest'.

Even if all the conditions of implementation of art 6.4 were fulfilled (which obviously is not the case), the decision about permitting the construction of Saaremaa port should have been made by Estonian government. In the given case, the basic decision whether and to where to build the port, was made by the local municipality. Ministry of Environment only issued water use permit (permit to build 3 quays to the sea).

Furthermore, Estonian government should have taken all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected and inform the Commission of the compensatory measures adopted. No compensatory measures have been offered or implemented by the authorities. (Furthermore, it is highly questionable whether Estonian authorities have understood the meaning of art 6.4 regarding compensatory measures at all. As of 11 July 2006, the EIA Act does not include obligation to take compensatory measures when deciding about harmful project in Natura site. Amendments to EIA Act have been prepared by the Ministry of Environment, but according to there amendments the compensatory measures should only be 'considered' not 'taken'.)

It is questionable whether the last paragraph of art 6.4 (presence of priority habitat types and/or species) is applicable in the given case. The pSCI of Küdema bay contains priority habitat types, but these habitats are allegedly (according to claims of Ministry of Environment, presented in course of court proceedings) located on opposite shore from the port. However, as the EIA does not describe the habitats or their location, it is hard to draw conclusions in this regard.

From the species, listed in Annex I of the Directive 79/409/EEC (Bird Directive), the Steller's Eider (*Polysticta Stelleri*) is most important as the species is wintering at the bay and is very vulnerable to disturbances. However, it is questionable whether the species of Annex I of the Bird Directive should be regarded as priority species in the meaning of art 6.4 of the Habitats Directive.

There have been discussions about whether the obligations from art 6 of Habitats Directive were binding to Estonia in the given case. Namely, the EIA was carried out and approved and the land-use plans enacted and water use permit issued before date of accession of Estonia to European Union (1st May 2004). However, Estonia was listed as accession country already in 1998 and therefore had certain obligations to guarantee that the goals of the directive would not be endangered.

Conclusions

Case of Port of Saaremaa has been the first case and so far most significant in Estonia where the Natura issues and need for implementation of Habitats Directive were raised in course of EIA and legal disputes. If to take this case as a touchstone for estimation how capable is Estonian government in such kind of disputes, the authorities have clearly and miserably failed.

21. Lawyer and organization:

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CZECH REPUBLIC: Slavík Islands



1. Title of case:

Slavík Islands

2. Matter of case:

Authorities of the Czech Republic have excluded the locality called Slavík Islands from the National List of pSCIs, which is being currently prepared, not on the basis of scientific criteria but due to a planned construction of a navigable canal parallel to the Elbe (Labe) River, which would seriously endanger the locality.

3. Country:

Czech Republic

4. Location:

Pardubice Region, city of Přelouč

5. Geographic dimension:

Regional

6. Initiator of case:

Svoboda zvířat (Freedom of Animals) Hradec Králové, 50302 Lochenice 156, Czech Republic

7. Participants involved:

- a) Waterborne Traffic Management ("Ředitelství vodních cest", a state organisation responsible for the construction of waterways) as the investor, <http://www.rvccr.cz/>;
- b) The Ministry of Environment of the Czech Republic as an environmental protection body, <http://www.env.cz/>;
- c) Pardubice Region as a construction administration authority and environmental protection body, <http://www.pardubickykraj.cz/>,
- d) The Municipality of Přelouč as a construction administration authority and environmental protection body, <http://www.mestoprelouc.cz/>,
- e) The Government of the Czech Republic as the body approving the National List of pSCIs (preliminary Sites of Community Interest).

8. Other interested parties and/or stakeholders:

- a) Přístav Pardubice a.s. (a commercial company intending to build a river port and transshipment station, for which the implementation of the Přelouč Navigable Canal project is necessary. The shareholders in the company include the Municipality of Přelouč, Pardubice Region, and the Municipality of Břehy), <http://www.pristav-pardubice.cz/>;
- b) The Agency for Nature Conservation and Landscape Protection as a specialised state organisation, <http://www.aopk.cz/>;
- c) The Department of Nature of the Museum of East Bohemia, which carried out natural science surveys of the locality;

- d) The Environmental Law Service, (a NGO focusing on legal instruments in environmental protection), <http://www.eps.cz/>;
- e) Children of the Earth – "Děti země", Sustainable Transport Club – "Klub za udržitelnou dopravu", (a NGO concerned with environmental impacts of transport infrastructure constructions), <http://www.detizeme.cz/>

9. Background facts:

9.1. Account of facts

The Slavík Islands are wetlands on the north side of the Elbe (Labe) river, some twenty kilometres downstream from the town of Pardubice, in the centre of the Czech Republic. One of few remaining blind arms of the Elbe, the islands contain a unique ecosystem with a rich and varied fauna, including some fifty endangered species: beetles, amphibians, molluscs and most importantly the Scarce Large Blue Butterfly, (*Maculinea telieus*) and the related Dusky Large Blue Butterfly (*M. nausithous*). A navigable canal is planned to be built parallel and to the north of the current axis of the Elbe and a section of this canal will pass through the Slavík Islands and destroy the most valuable sites.

Specialist bodies of the Ministry of Environment proposed inclusion of the locality of Slavík Islands into the National List of pSCIs. However, the locality was excluded from the List during the approval process by the Czech Government, not on the basis of technical arguments but on the basis of pressure from supporters of the canal construction.

During the construction permitting process, the Czech Republic and its legal instruments failed to protect the two butterfly species even though the state was required to do so under the Habitat Directive. Neither species was part of the legally binding list of protected species in the Czech Republic at that time.

No alternatives aimed at preserving the locality were considered during the construction authorisation process. In December 2003, the Ministry of Environment approved interference with the locality despite the fact that no factual mitigation or compensatory measures were stipulated (or, to be precise, independent experts are of the opinion that the stipulated mitigation and compensatory measures do not at all guarantee preservation of the locality). The mitigation and compensatory measures have been implemented on the Slavík Islands by a team of natural scientists hired by the investor since 2003. However, the number of individuals in the Large Blue Butterfly populations has been dramatically decreasing as a result of their activities, which confirms the doubts about the factual effects of the mitigation and compensatory measures.

9.2. Description of the Natura 2000 locality concerned

General description of the site(s) affected:

Name of the site

Přelouč – Slavík Islands

Nearest town/city

Přelouč

Surface area (ha)

24.37 ha originally proposed as pSCI

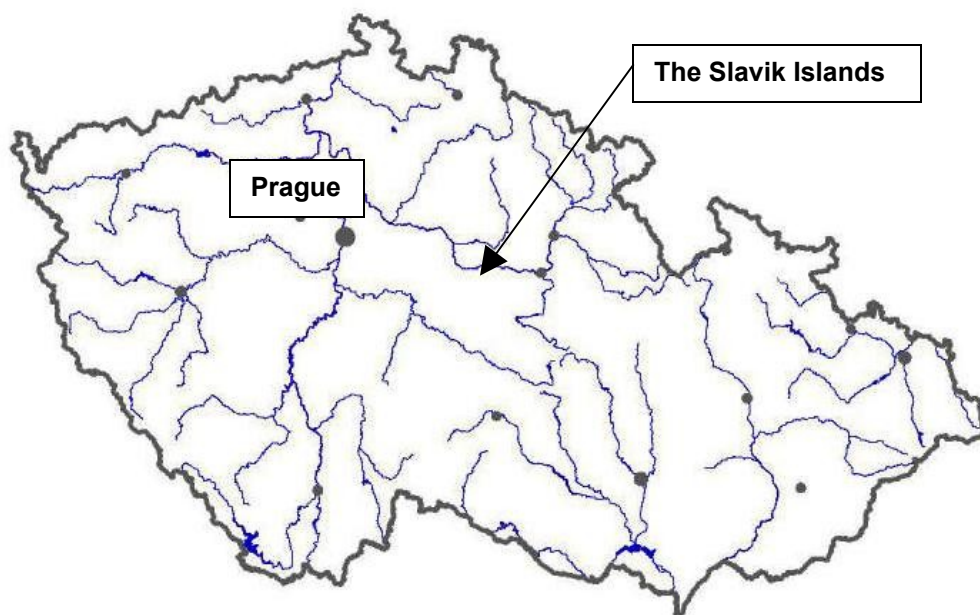
Special Protection Area

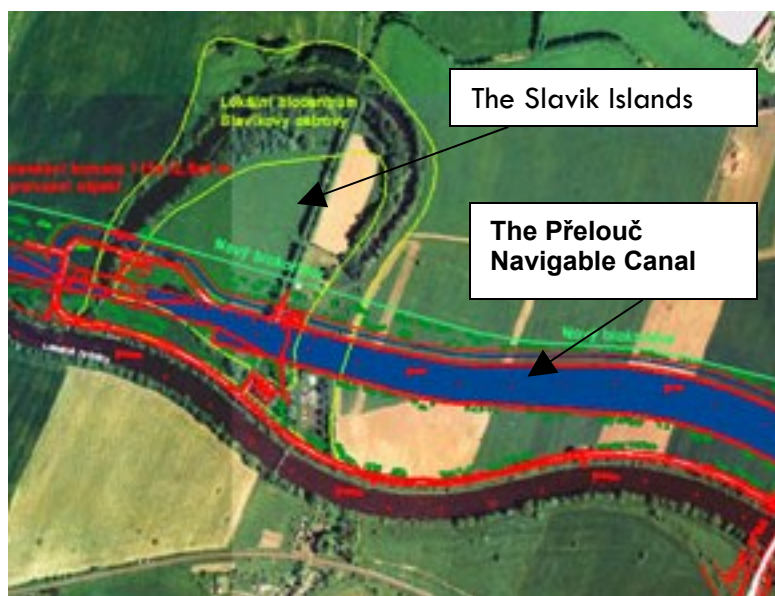
No

Proposed site of European Community importance

The locality had been part of the draft National List of pSCIs (locality code: CZ0533311) but it was excluded from the List during the approval process.

Map of the site or sites affected





Principal habitats and species directly affected (priority habitats are marked with *)

The Slavik Islands were originally on the national list of proposed NATURA 2000 sites for protection of following species:

- Dusky Large Blue Butterfly (*Maculinea nausithous*)
- Scarce Large Blue Butterfly (*Maculinea teleius*)
- Hermit Beetle (*Osmoderma eremita*)*

9.3. Description of the investment plan and background facts and its impacts on the Natura site

The Czech government plans to make the Elbe navigable to the town of Pardubice, the regional centre of eastern Bohemia. Presently, the river is navigable only to the Chvaletice coal power station, approximately 20 km downstream from Pardubice. To realise this plan, the RVC (Ředitelství vodních cest - Waterborne Traffic Management) plans to build a navigation channel parallel to the main branch of the river Elbe very close to the town of Přelouč, which would bypass currently non-navigable stretches of the river. It is this channel that will be built through the Slavik Islands.

There is a bigger picture. The project of making the river Elbe navigable to the town of Pardubice is just one part of an ambitious plan to connect the Elbe with the Danube and the Oder (Odra) by canal. This will be a costly and environmentally harmful exercise. A 1998 estimation of the construction costs of the construction of the Danube-Oder part alone was about 370 billion CZK (12,3 billion EUR). Of relevance to the Slavik Islands is that this plan cannot be completed without making the Elbe navigable to the town of Pardubice.

According to biological survey, prepared by the Waterborne Traffic Management following the EIA statement recommendation, the effect on the habitat of the Slavik Islands is at best controversial. The intended construction will result in the significant and irreversible disturbance

of the communities for the development of entomofauna, including species protected and endangered under Habitat Directive. That the Scarce Large Blue Butterfly will be affected in this location is clear enough, as the canal will eliminate 90% of the area of the meadow and the micro population (where the species is presently most abundant) will be 100% destroyed. The most suitable habitats for the Hermit Beetle will be also destroyed. The mitigation and compensatory measures are very problematic, because it is almost impossible to design unique living conditions of these species at new sites. Nevertheless, the EIA statement (and later also Ministry of Environment decision) agreed with the construction, under the condition of realized mitigation and compensatory measures.

The NGOs opinion follows the biological survey conclusions mentioned above and is supported by other specialists from the Czech Republic and abroad. According to this opinion it is impossible to create new compensatory sites for endangered species (both species of butterflies are closely fixed on specific ant and plant species, the Hermit Beetle is fixed on old leafy trees). Consequently it is important to protect current habitats of these species.

10. Applicable articles of Directive 92/43/EEC (Habitats Directive):

Art 4(1), Art 6(2), (3) and (4), Art 12, Art 16 of the Habitat Directive

11. Applicable national laws:

Act No. 114/1992 Coll., on nature conservation and landscape protection, and Implementation Decree No. 395/1992 Coll. The provision of Section 50 (2) of Act No. 114/1992 Coll. prohibits any interference with biotopes and development of species that are listed as highly protected species in the Implementation Decree, which had not contained Large Blue Butterfly, Dusky Large Blue Butterfly, (any many other species listed in Annex to Directive 92/43/EEC) until 3 May 2006.

The provision of Section 56 of Act No. 114/1992 Coll. regulates the granting of exceptions from the protection of highly protected flora and fauna species (incl. the species listed in the Directive).

12. Type of procedure (administrative and/or judicial):

Administrative and judicial

13. Administrative procedural history/timeline:

13.1. Administrative proceedings

The administrative proceedings have been following:

- a) Regional land-use plan of Hradec-Pardubice region
 - approved in 2002;
 - in contrary with Czech law as no SEA procedure was carried out;
 - re-designed land-use plan of Pardubice region approved in 2004, including wrongful SEA procedure;
- b) Municipal land-use plan of city of Přebouč
 - first plan included navigable canal was approved in 1994;
 - new redesigned plan was approved in 2001;
 - in both cases no SEA procedure was taken;

c) The EIA procedure

- initiated by the Waterborne Traffic Management in the year 1999;
- final statement issued by the Ministry of Environment in the year 2000;

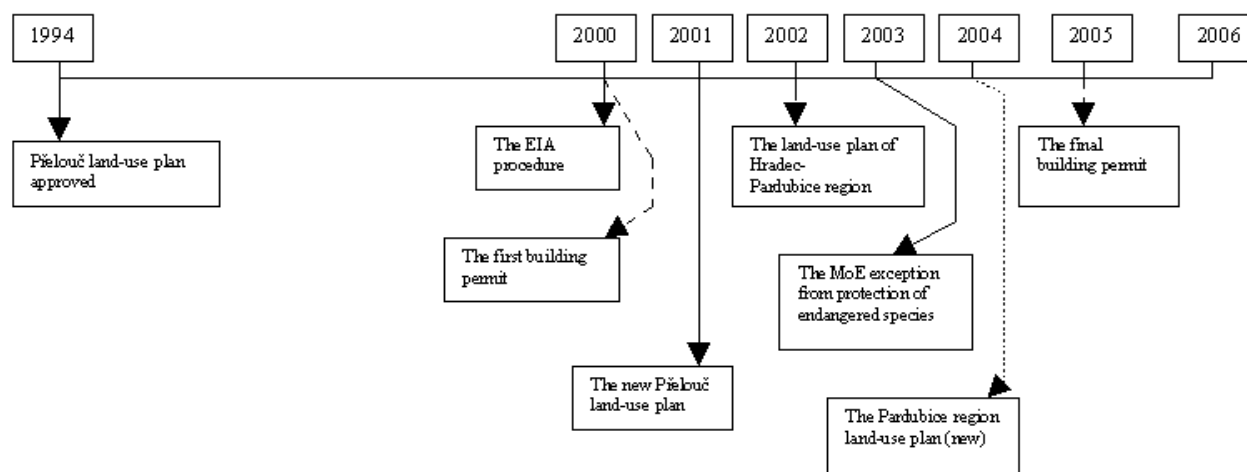
d) Building permit procedure

- initiated in 1999 by the Waterborne Traffic Management;
- first permit issued in the year 2000. Cancelled by the higher authority on the base of an appeal given by NGO;
- new permit issued in the year 2005. The NGOs appeal was rejected by the higher authority;

e) Ministry of Environment exception procedure (concerning endangered species)

- the procedure was initiated by Waterborne Traffic Management in the year 2001;
- final decision issued in the year 2003. The court cancelled this decision in the year 2006 on the base of NGO legal suit. The procedure is still running.
-

Timeline



13.2. Description of EIA

The EIA process took place in the year 2000. The final EIA statement was issued without a prior detailed biological assessment of the territory of the Slavík Islands. The existence of biotopes of protected butterfly and beetle species and, thus, impacts of the construction on their habitats were not known. The EIA statement recommended to build the canal, but imposed on the investor the obligation to obtain an additional biological survey.

The biological survey was carried out by a team of experts, engaged by the Waterborne Traffic Management, in the following years and confirms a high ecological value of the Slavík Islands as well as difficulty or even impossibility to find any moderating or compensatory measures within the proposed alternative of the navigable canal. This document was also one of the bases for proposing the Slavík Islands as part of NATURA 2000 network.

13.3. Alternative solutions, considered by authorities

Within the EIA of the Píelouč Navigable Canal project, which was concluded by a statement of the Czech Ministry of Environment dated 29 September 2000, the following options were assessed as alternatives to the project, which is the subject matter hereof:

- a) A lock chamber, lower navigation channel, lock chamber background, operating building, housing, water treatment plants, and navigation channel interfere with the Slavík Islands locality identically as the alternative being the subject matter hereof. The impacts on the Slavík Islands are identical as within the alternative that was finally recommended for approval.
- b) Zero alternative. Since the size and importance of the Scarce Large Blue Butterfly population and the existence of the population of Hermit Beetle (and other species

bound to old tree hollows) was not known at the time of the project's EIA, the real impacts of the construction or possible non-performance of the construction could not be assessed.

13.4. Alternative solutions, pointed out by other stakeholder and not considered by the authorities

The NGOs proposed alternatives to the Přelouč Navigable Canal, which would not interfere with the Slavík Islands locality:

- a) Allowing river traffic via the existing course of the Labe river and building a lock chamber further downstream from the Slavík Islands;
- b) Allowing river traffic via the existing course of the Labe river with a short left-bank channel (opposite to the Slavík Islands) bypassing the protected weir;
- c) Transporting freight via the existing railway, which runs parallel to the planned waterway, in which event the waterway would end in the Kolín or Chvaletice port.

13.5. Mitigation measures, proposed or considered by the national authorities

Neither EIA procedure nor Ministry of Environment (MoE) exception procedure did make differences between mitigation and compensatory measures, because these procedures did not follow application of Art 6 of Habitat Directive. There are few conditions, recommended by the MoE, which can be indicated as mitigation measures:

- a) Moving the route of the canal by 5 to 10 meters towards the Elbe River.
- b) Leaving the felled old trees in the locality to save hollow-tree beetles (in particular Hermit Beetle).

13.6. Compensatory measures for nature conservation damage, proposed or considered by the national authorities

- a) Creating two new meadows as substitute biotopes for both the Large Blue Butterfly species outside the place of the construction.
- b) Planting several groves. This measure is useful for birds but has no sense for hollow-tree beetle species.
- c) Creating several new pools. This measure is designed to compensate the liquidation of biotopes of amphibians and water fauna and cannot compensate the loss of the population of Large Blue Butterflies, Hermit Beetle, and Flat Bark Beetles.

13.7. Compensatory measures, pointed out by other stakeholder and not considered by authorities

No compensatory measures were pointed out. According to biological survey presented by the Waterborne Traffic Management and opinions of independent experts, all possible mitigation and compensatory measures had little chance to mitigate or compensate environmental damage in this case.

14. Outcome of the actions:

Initiator of the case, the Waterborne Traffic Management, has obtain step by step all necessary permissions and statements, i.e. EIA statement, the building permit, exception from

protection of endangered species issued by MoE and other minor decision of state authorities. No substantive objections of NGOs were taken into account.

15. Remedies taken:

Freedom of Animals has appealed against first building permit in the year 2000 and again in 2005 against new building permit.

Freedom of Animals has appealed against decision of MoE, which allowed exception from protection of endangered species.

16. Judicial procedural history/timeline:

There are two important court proceedings in this case, initiated by Freedom of Animals and Children of the Earth:

- a) Legal action filed in 2004 against the Ministry of Environment's decision to the granting of an exception from the protection of highly protected fauna and flora species.
- b) Legal action filed in 2006 against the Přelouč Navigable Canal building permission.

17. Outcome of the actions:

- a) The Municipal Court of Prague cancelled the Ministry of Environment's decision to the granting of an exception from the protection of highly protected fauna and flora species.
- b) The court procedure against building permission is still pending.

18. Current status of case:

The Přelouč Navigable Canal is still not under construction, however there is a valid building permission for it. This permission was attacked by NGOs before court. Besides other reasons, this legal action is based on direct effect of the Habitat Directive, namely Art 12. This procedure is still pending.

The most important decision, which is necessary for building construction, the Ministry of Environment's exception, was cancelled by the municipal court. The case is now before the court of appeal, so the procedure is still pending.

The European Commission still discusses a NGOs complaint, filed in the year 2004. This complaint is based on breaching of the Habitat Directive by the Czech authorities in this case.

19. Follow-up actions planned and their timeline (in case of ongoing matter, also estimated end date of case):

The court procedures are still pending (not possible to estimate the end date because of unpredictable working mechanisms of Czech courts). Regarding ongoing complaint to European Commission is also not possible to estimate the end date. NGOs plan to participate in these ongoing procedures in next months.

20. Analysis of legal problems, concerning implementation of Art 6.3 and 6.4 of Habitats Directive, conclusions:

a) Conflict with Art. 6 (3) and (4) of the Habitat Directive

The construction of the Přelouč Navigable Canal is to be regarded as project in the meaning of art 6.3 of the Habitats Directive. Construction of this kind is also a "project" in the meaning of Annex I of Directive 85/337/EEC.

The investment plan is not necessary for the management of the site, but is likely to have a significant effect thereon. According to biological survey, which follow requirements of EIA statement, the construction will have a very adverse or even liquidating impact on the biotopes of a priority species in the Community interest (Hermit Beetle) and other animal species in the Community interest for whose the declaration of special protection areas is required (Scarce Large Blue Butterfly and Dusky Large Blue Butterfly). For this species, the locality of Slavík Islands was according to Art 4(1) included at the national list of pSCI. Thus, the condition specified in Art 6(3) of the Habitat Directive citing an adverse impact on the integrity and very existence of the proposed pSCI is fulfilled. The building permission of the project was issued after the EU accession date of the Czech Republic. Thus, the project was subject to assessment according to Art. 6 (3) and its implications for the site should have been assessed in view of the site's conservation objectives.

The decisions about the land-use plans, the EIA statement nor Ministry of Environment decision in the given case did not contain proper assessment according to art 6.3 of the Habitats Directive. The decisions about the land-use plans and EIA did not refer to impacts to NATURA 2000 site in the view of the site's conservation objectives at all. The land-use plans and EIA was not based on detailed biological survey and did not recognized importance of the locality regarding to NATURA 2000.

Contradiction to the requirements set out in Art 6(4) is apparent in particular in the failure of the Czech environmental authorities to take into consideration any existing alternative solutions during the assessment of the impacts of the project on environmental protection interests during land-use plans procedures or other administrative procedures.

Within the EIA of the Přelouč Navigable Canal project pursuant to Act No. 244/1992 Coll., which was concluded by an statement of the Czech Ministry of Environment dated 29 September 2000, the following options were assessed as alternatives to the project, which is the subject matter hereof:

- a) A lock chamber, lower navigation channel, lock chamber background, operating building, housing, water treatment plants, and navigation channel interfere with the Slavík Islands locality identically as the alternative being the subject matter hereof. Even the elevation (embankment) of the terrain is unchanged. The navigation channel is turning towards the Labe River and is planned to connect to the existing course of the Labe River between the Slavík Islands and the power plant. Obviously, the impacts on the Slavík Islands are identical as within the alternative that was finally recommended for approval. This is, in fact, no alternative.
- b) Zero alternative. Since the size and importance of the Scarce Large Blue Butterfly population and the existence of the population of Hermit Beetle (and other species bound to old tree hollows) was not known at the time of the project's EIA, the real impacts of the construction or possible non-performance of the construction could not be assessed. In fact, this alternative was not assessed properly.

In the given case, the possible alternatives to the Přelouč Navigable Canal, which would not interfere with the Slavík Islands locality, are:

- a) Allowing river traffic via the existing course of the Labe River and building a lock chamber further downstream from the Slavík Islands;
- b) Allowing river traffic via the existing course of the Labe River with a short left-bank channel (opposite to the Slavík Islands) bypassing the protected weir;
- c) Transporting freight via the existing railway, which runs parallel to the planned waterway, in which event the waterway would end in the Kolín or Chvaletice port.

These alternatives were not subject of EIA procedure, or land-use planning. Therefore, the absence of alternative solutions has not been proven.

Even if there were no other alternative solutions, construction of the Přelouč navigable canal would have been allowed only in case of imperative reasons of overriding public interest, including those of a social or economic nature. Such overriding public interest has not been brought out by the authorities. The Czech nature protection law imposes to assess overriding public interest to the Ministry of Environment during the procedure concerning exception from the protection of endangered species. The Municipal court decided that Ministry of Environment failed to assess overriding public interest. According to the court, the decision of the Ministry did not describe specific impacts on the nature protection aspects of this case, or confrontation with other public interests. That was the main reason, why its decision was canceled by the court.

Another act of the national environmental authorities that contradicts the requirements of Art 6(4) is the failure of the Member State to provide all the compensatory measures required for the protection of overall coherence of the NATURA2000 network during the approval process concerning the Přelouč Navigable Canal project. The Nature and Landscape Protection Agency, a professional body within the Czech Ministry of Environment, has repeatedly notified the Ministry that the moderating and compensatory measures are insufficient and do not lead to the set objective – establishment of substitute biotopes for Large Blue Butterflies and for the transfer of Hermit Beetle and Large Blue Butterflies to the new locality. The possibility of transfers and the establishment of new biotopes as well as the biological assessment of the Přelouč Navigable Canal are fundamentally questioned by non-governmental organisations and other experts.

The project of Přelouč navigable Canal will negatively affect the biotope of Hermit Beetle (*Osmoderma eremita*), which is included at the list of priority species in Annex IV of the Habitat Directive. On the contrary with last paragraph of Art 6(4) the project was approved, although there was neither no reason of public health and safety or prior standpoint of the Commission.

b) Conflict with Art. 12 of the Directive concerning habitats

The national law of the Czech Republic as an EC Member State does not provide for protection of all the species listed in Annex No IV to the Habitat Directive. Apart from other species, the EC list includes also the species whose populations will be deteriorate or liquidated by the construction of the Přelouč Navigable Canal, namely Scarce Large Blue Butterfly and Dusky Large Blue Butterfly.

The legislation of the Czech Republic provides for species protection in Act No. 114/1992 of the Collection of Laws ("Coll."), on nature and landscape protection, and Decree No.

395/1995 Coll. implementing several provisions of the Act on Nature and Landscape Protection. The Decree contains an enumeration of species enjoying a legal protection in the Czech Republic. However, the enumeration omits the two above-specified Large Blue Butterfly species. Thus, the competent environmental protection authorities (The Ministry of Environment, The Regional Authority of the Pardubice Region, and the Municipal Authority in Přebouč) lack a legal framework to ensure the defence of the said species.

As such, however, Czech law directly contradicts Art 12 of the Habitat Directive, which imposes the obligation on the EC Member States to assure protection of the said species.

c) Conflict with Art. 16 of the Habitat Directive

The Minister of Environment concluded, with his decision dated 28 November 2003, the administrative proceedings on the granting of an exception from the protection requirements for protected species affected by the construction of the Přebouč Navigable Canal. One of the affected species is also Hermit Beetle, which is also a priority species protected in the Community interest.

The above-described administrative proceedings fail to comply with Art. 16 of the Habitat Directive for the following two reasons:

- No alternatives to the submitted plan were examined during the proceedings; the proceedings concerned only the investor's single proposal,
- The documents collected during the proceedings imply that the population of Hermit Beetle will be liquidated if the plan is executed. However, no further investigations took place to find out whether the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range.

d) Conflict with the provision of Art. 4 (1) of the Habitat Directive

Towards the end of 2003, the Agency for Nature Conservation and Landscape Protection completed the draft National List of pSCIs, which was published in May 2004 and consulted with the owners of the land, businesses, regions, and municipalities in summer 2004. Then the Ministry of Environment excluded from the List a majority of localities where there were economic interests in liquidation thereof even though the localities met the biological criteria. This concerned also the Slavík Islands.

In addition the Czech Republic had submitted no list of localities pursuant to Art 4(1) of the Habitat Directive at the EU accession date, 1 May 2004. The list was adopted by the national government in the end of 2004 and submitted in 2005. Consequently, the protection of pSCI, including the Slavík Islands, could not be provided. Thus, the Czech Republic has failed – in conflict with the requirements of that Directive – to make sure that the subject matter of the protection is not destroyed prior to the Commission's decision about inclusion of the Slavík Islands in the national list.

21. Lawyer and organization:

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HUNGARY: Wind Farm of Hárskút



1. Title of case:

Wind Farm of Hárskút

2. Matter of case:

Environmental Impact Assessment and environmental permitting of installations for the harnessing of wind power for energy production at a Natura 2000 area

3. Country:

Hungary

4. Location:

Village of Hárskút

5. Geographic dimension:

Local

6. Initiator of case:

PANGEA Kulturális és Környezetvédelmi Egyesület (PANGEA Cultural and Environmental Association)

7. Participants involved:

- EETEK Hárskút Szélerőmű-park Kft. (EETEK Hárskút Wind Farm Ltd.)
- Közép-Dunántúli Környezetvédelmi, Természetvédelmi és Vízügyi Felügyelőség (Middle Trans Danube Environmental, Nature Conservation and Water Management Inspectorate)
- Környezetvédelmi, Természetvédelmi és Vízügyi Főfelügyelőség (Environmental, Nature Conservation and Water Management Inspectorate General)
- Mr. F. M., Ms. M. D. S., Mr. B. S. and Ms. M. R. P. (4 individuals owning real estates (a house or a forest) in the village of Hárskút)

8. Other interested parties and/or stakeholders:

- Municipality of Hárskút
- Municipality of Lókút
- Municipality of Bakonybél
- Municipality of Pénzesgyőr
- Municipality of Herend
- Magas-Bakony Környezetvédelmi Egyesület (High Bakony Environmental Association)
- Csalán Környezet- és Természetvédő Egyesület (Csalán Environmental and Nature Conservation Association)
- Magyar Szélenergia Társaság (Hungarian Wind Energy Society)
- WWF Magyarország (WWF Hungary)

9. Background facts:

9.1. Account of facts

Since late 2003, the Hárskúti Megújuló Energiaközpont Kft. (Hárskút Renewable Energy Center Ltd.) has planned to build a wind farm in the vicinity of the villages of Hárskút and Lókút, in the picturesque area of the High Bakony mountains, north from the Lake Balaton. After the project developer changed, the new applicant EETEK Ltd. was refused an environmental permit by the competent regional Environmental and Water Management Inspectorate in late 2004. After an appeal by the applicant and a reopened first instance administrative procedure, the applicant received an environmental permit in 2005 that was later appealed by the PANGEA Association, but upheld by the Environmental and Water Management Inspectorate General in a second instance administrative procedure. PANGEA Association then filed a lawsuit against the Environmental and Water Management Inspectorate General and the procedure is currently pending before the court.

9.2. Description of the Natura 2000 locality concerned

General description of the site(s) affected:

Name of the sites:

Északi-Bakony
Papod és Miklád

Nearest town/city:

Town of Zirc

Surface area (ha):

Északi-Bakony 25,803 ha
Papod és Miklád 5,309 ha

Is it a Special Protection Area?

Yes, Északi-Bakony

Is it a proposed site of European Community importance?

Yes (both are special areas of conservation)
(HUBF30001)
(HUBF20002)

1074	<i>Eriogaster catax</i>		1-100	C	C	C	C
1083	<i>Lucanus cervus</i>		C	C	A	C	A
1086	<i>Cucujus cinnaberinus</i>		5000	C	A	C	A
1087	<i>Rosalia alpina</i>	*	C	B	A	C	A
1088	<i>Cerambyx cerdo</i>		1000	C	A	C	A
1089	<i>Morimus funereus</i>		C	C	A	C	A
1188	<i>Bombina bombina</i>		C	C	A	C	A
1193	<i>Bombina variegata</i>		C	C	A	C	A
1303	<i>Rhinolophus hipposideros</i>		100	C	B	C	B
1304	<i>Rhinolophus ferrumequinum</i>		10	D			
1307	<i>Myotis blythii</i>		750	B	A	C	A
1308	<i>Barbastella barbastellus</i>		1000	B	A	C	A
1321	<i>Myotis emarginatus</i>		10	D			
1323	<i>Myotis bechsteini</i>		1000	B	B	C	B
1324	<i>Myotis myotis</i>		200	C	A	C	A
1355	<i>Lutra lutra</i>		10	C	A	C	A
4118	<i>Seseli leucospermum</i>		500	D			

area situated between the aforementioned 2 proposed Natura 2000 (habitat) and 1 Natura (bird) areas.

The distance between the 2 Natura 2000 areas varies between 900 meters and 2,500 meters. Direct land coverage by the wind farm will be 9,737 m², while the overall size of the affected area is 120 hectares.

According to the EIS, the land where the wind farm will be located is an arable land under agricultural cultivation, thus has no significant nature conservation value. Findings of the EIS regarding natural values were based on the following aspects:

- 14 species of protected birds were discovered in the Hárskúti Basin and its adjacent area but the very area of the wind farm is not affected by a massive migratory route of these species;
- the wind turbines and especially the blades will have a disturbing effect, however, these have to be further examined after the installation of the turbines;
- affected bird population will have to modify their flying routes and height, but the impacts of actual collisions will be insignificant;
- neither bat migratory routes were discovered in the planned area of the wind farm nor the endangering of flying invertebrates can be expected;
- one of the towers was relocated because of the appearance of 2 protected plant species on the originally planned location.

Eventually, the wind farm will not breach the interests of nature conservation substantially, according to the EIS.

Contrary to these, according to the action filed at the court by the PANGEA Association, firstly, the analysis of the potential impacts of the wind farm was based on insufficient researches lasting too short and not taking every relevant aspects into consideration; secondly, there are internal contradictions in the EIS (e.g. the EIS acknowledges the existence of bat populations further away from the area but presupposes no impacts thereon, mostly because of scientific uncertainty); thirdly, the area between the 2 Natura 2000 areas is a migratory route of protected birds, therefore the wind farm will have significant impact on their population.

10. Applicable articles of Directive 92/43/EEC (Habitats Directive):

Art. 2 Par. 2
Art. 6 Par. 1
Art. 6 Par. 2
Art. 6 Par. 3
Art. 6 Par. 4

11. Applicable national laws:

Act No. 53 of 1996 on the Conservation of Nature: sets the basic rules of nature conservation in Hungary, including the definition of and the protection requirements applying to Natura 2000 areas

Government Decree No. 21 of 2001 on Environmental Impact Assessment: defines the process of Environmental Impact Assessment

Government Decree No. 275 of 2004 on Nature Conservation Sites of Community Importance: transposes the EU Habitats Directive, including terminology, process of Natura 2000 area designation, conservation rules, exceptions, responsibilities of competent authorities and in the annexes, the list of species, habitats, and sites (both designated and proposed)

Communication of the Minister of Environment and Water Management on the list of Nature Conservation Sites of Community Importance of June 16, 2005: proclaims the parcel identification numbers falling under the scope of Natura 2000 network

12. Type of procedure (administrative and/or judicial):

Administrative and judicial

13. Administrative procedural history/timeline:

December 29, 2003: Hárskút Renewable Energy Center Ltd. submits an environmental impact statement (EIS) to the regional Environmental Inspectorate and applies for an environmental permit for the aforementioned installations

March 17, 2004: name of applicant changes to EETEK Ltd.

Later in 2004: submission of a new EIS by EETEK Ltd. to the regional environmental authority

Findings of the EIS:

- the wind farm will not endanger nature; the latter is not even mentioned among those factors possible endangered;
- among the aspects taken into consideration in the location, the EIS mentions that no protected areas (Natura 2000, landscape protection area) are affected;
- since the wind farm will occupy agriculturally cultivated lands, there will be no impact on nature;
- impact area of the wind farm is 120 ha for flora and fauna, and a 1000-meter radius zone for birds;
- impacts on nature: there will be no loss of protected space, the project will have an impact neither on the habitats of protected birds nor on the feeding base of predator birds, loss of birds stemming from collisions is minimal compared to other reasons of bird mortality;
- preventive or protective measures planned by the project developer: construction of and access of maintenance to the wind farm will be preferred in the non-vegetation period in order to avoid damage to the flora as well as disturbance to the fauna.

Later in 2004: supplement No. 1 to the EIS, submitted to the regional environmental authority

Findings of the supplement:

- extremely poor data are available on bat populations in the Bakony mountains, but there is a well-known resting place of bats 8-9 kilometers away from the area of the wind farm
- impacts of wind farms on birds: global researches call the attention to careful location of wind farms;
- impacts of wind farms on bats: there are very few data available in this topic, even worldwide, but because mostly bats living 5-6 kilometers away from wind farms are

affected during their night moves, the known bat population resting further away will not bear an impact;

- impacts of the wind farm on nature: flora – no impacts on protected plant species, because no activities will be undertaken in the 100-meter protective zones thereof; flying invertebrates – only minor impacts will be produced by the wind turbine rotors; bats – further monitoring is needed but precautionary location (at least 100 meters away from forest ridges) is recommended; birds – collisions of birds with wind turbine rotors is of minor importance, migratory birds will be forced to alter their flying routes to a lesser extent;
- overall evaluation of nature conservation impacts: the area does not represent a significant natural value, there will be no major impacts on the flora and fauna of the area, thus the wind farm will not harm any interest of nature conservation.

October 18, 2004: first instance resolution of the regional Environmental and Water Management Inspectorate refusing the environmental permit application

November 3, 2004: appeal by EETEK Ltd. against the refusal of permit application

January 18, 2005: second instance resolution of the Environmental and Water Management Inspectorate General annulling the first instance resolution of the regional Environmental and Water Management Inspectorate and ordering it to run a new permitting procedure

Later in 2005: supplement No. 2 to the EIS, submitted to the regional environmental authority

Findings of the supplement:

- 17 species of protected birds (3 more compared to the findings of the original EIS) were discovered in the Hárskúti Basin and its adjacent area;
- impacts on migratory birds: the functioning of the rotors will exercise a diverting impact on the birds, thus they will alter their flying routes, plus the height used by the wind turbine rotors (between 50 and 150 meters) is the least used by birds;
- impacts on Natura 2000 areas: the 2 affected areas belong to the ecological network for different reasons; while the Északi-Bakony is a Special Protection Area, both the Északi-Bakony and the Papod és Miklád areas are proposed sites of European Community importance; there is no intense migration of larger-sized birds between the 2 sites; there will be no measurable increase of risk toward the bird fauna stemming from the installation of the wind farm;
- the ideal location of the wind farm was based on analysis of wind power and wind directions, and the fact that it does not affect protected areas.

June 1, 2005: first instance resolution of the regional Environmental, Nature Conservation and Water Management Inspectorate granting an environmental permit to the planned installation

Provisions of the resolution: Construction activities must result in the emission of the least possible air pollutants. The soil and underground waters can not be polluted, and both materials and equipment of impact mitigation must be place on the site for the case of a possible emergency. Surface waters must be protected from pollution. A landscape analysis and evaluation has to be attached to the construction plans to be prepared later. Special attention must be paid to the prevention of emergencies endangering the protected areas and habitats of international significance (e.g. falling of a tower).

Reasoning to the resolution: The rotors of the wind turbines may endanger bird populations. The impact area and the close vicinity of the turbines include Natura 2000 areas, 1 tower is

150 meters away, and 3 towers are 100 meters away from the Natura 2000 areas in question.

June 15, 2005: appeal of the PANGEA Association against the resolution of the Regional Environmental, Nature Conservation and Water Management Inspectorate

14. Outcome of the actions:

September 22, 2005: second instance resolution of the Environmental, Nature Conservation and Water Management Inspectorate General keeping the first instance resolution of the Regional Environmental, Nature Conservation and Water Management Inspectorate in force, and granting an environmental permit to the proposed wind farm

15. Remedies taken:

November 15, 2005: action of the PANGEA Association and 3 individuals filed at the Fejér County Court against the second instance resolution of the Environmental, Nature Conservation and Water Management Inspectorate General

According to the action, the EIS enlists 14 wind energy measurements at 14 different locations but concludes that the current location is the optimum, without having described the details of the other 13 sites examined. The planned location of the turbines is only 100 meters away from the Natura 2000 sites, despite that a publication of the Ministry of Environment and Water Management available on the Internet with the title "Information on the Nature Conservation and Landscape Aspects of Locating Wind Farms" recommends as follows:

4.1 Factors excluding location:

Locating wind farms is discouraged in the following areas:

- areas of ecological networks (protected nature reserves, the protective zones thereof, natural areas, and the ecological corridors) [...];
- living, feeding and nesting places, migratory routes and its vicinity of wild (especially protected) animal species [...];
- habitats of protected plant species and plant communities [...];
- [...] areas falling under the scope of international nature conservation conventions (Ramsar Convention, Natura 2000, Biosphere Reserves); [...].

For the protection of protected nature reserves, sensitive natural areas, habitats, etc., a protective zone is encouraged to be delineated, thus the location of wind farms is recommended to take place 800-1,000 meters away from such areas."

The action supposes that the wind farm will mean harm to the habitats of birds in the area. The analysis of the potential impacts of the wind farm was based on insufficient researches lasting too short and not taking every relevant aspect into consideration. There are internal contradictions in the EIS (e.g. the EIS acknowledges the existence of bat populations further away from the area but presupposes no impacts thereon, mostly because of scientific uncertainty). The area between the 2 Natura 2000 areas is a migratory route of protected birds; therefore the wind farm will have significant impacts on their population.

16. Judicial procedural history/timeline (if relevant):

February 1, 2006: Fejér County Court allows the EETEK Ltd. to take part in the process as a friend-of-the-defendant

February 14, 2006: Fejér County Court allows the High Bakony Environmental Association to take part in the process as a friend-of-the-applicant

The High Bakony Association then prepared a brief for the court regarding the view plans of the wind farm. Therein, they demonstrated that the EIS does not contain enough view plans, and those that were attached to the EIS, were prepared using an outdated technique, are incorrect as regards the location and height of the individual turbines, thus mislead both the population and the competent environmental authority.

February 28, 2006: Fejér County Court holds the first hearing in the case; parties to the case express their views.

March 17, 2006: submission of the plaintiff PANGEA Association

According to the plaintiff, the EETEK Ltd. has not demonstrated and analyzed any location alternatives for the project. The wind energy evaluations prepared for 14 possible locations represent a purely mechanical approach to the problem of project location, instead of analyzing the environmental and nature conservation aspects of such installations.

June 15, 2006: Fejér County Court holds the second hearing in the case; parties to the case uphold their views.

17. Outcome of the actions:

May 25, 2006: The Environmental, Nature Conservation and Water Management Inspectorate General inform the court that they amended the environmental permit regarding the geographical coordinates of the turbines, and that no installation is planned to be built on Natura 2000 area any more. PANGEA Association began making efforts to clarify whether this amendment is verifiable and credible.

18. Current status of case:

The case is pending before the Fejér County Court

19. Follow-up actions planned and their timeline (in case of ongoing matter, also estimated end date of case):

The estimated end date of case is the end of year 2006.

20. Analysis of legal problems, concerning implementation of Art 6.3 and 6.4 of Habitats Directive, conclusions:

Habitats Directive is transposed into Hungarian law by two major pieces of legislation: the Act No. 53 of 1996 (amended) on the Conservation of Nature (hereafter: Nature Conservation Act) and the Government Decree No. 275 of 2004 on Nature Conservation Sites of Community Importance (hereafter: Natura 2000 Decree). The actual list of parcel

identification numbers falling under the scope of Natura 2000 network is proclaimed by a Communication of the Minister of Environment and Water Management on the list of Nature Conservation Sites of Community Importance of June 16, 2005 (hereafter: Natura 2000 Communication).

Art. 6 Par. 3 of the Habitats Directive

"Any plan or project ..."

The investment plan of the aforementioned wind farm – also by the terminology of Directive 85/337/EEC – is definitely covered by the term "project", therefore – with regard to the implementation of Art. 6.3 of the Habitats Directive – it falls under the scope of the Directive.

"... not directly connected with or necessary to the management of the site ..."

Since the installation of the wind farm is obviously not part of the conservation management of the (proposed) sites (since it is planned to generate power for household consumption that has nothing common with preserving favorable conservation status of the (proposed) sites), it falls under the scope of Art. 6.3 of the Habitats Directive.

"... but likely to have a significant effect thereon, ..."

Deciding the significance of the likely impacts must be objective, and for this reason, Annex III of Directive 85/337/EEC provides a good guidance. Having used the aspects listed therein, we may conclude that both the size of the project and the location of the project (close to Natura 2000 (proposed) sites) qualify it as having likely significant impacts.

"... either individually or in combination with other plans or projects, ..."

The wind farm alone meets the aforementioned criteria, without any combination with other projects.

"... shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives."

Since a full Environmental Impact Assessment complying with the requirements of Directive 85/337/EEC was undertaken by the project developer and submitted to an environmental permitting procedure by the competent authority, we may conclude that the project was subject to an appropriate assessment.

"In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned ..."

This is the most obvious shortcoming of implementation revealed by this very case. In this instance, the conclusions of the assessment undertaken by the project developer show that despite the relatively close existence of protected species and habitats, there will be no significant negative impacts on the bird or bat populations. This, nevertheless, contains a large amount of scientific uncertainty, just like the EIS itself concludes in some cases (lack of data or lack of analytical research findings). In this regard, we may conclude that the competent authority could not ascertain that the project will not adversely affect the integrity of the site concerned, therefore acted contrary to the provision of the Habitats Directive while permitting the wind farm.

"... if appropriate, after having obtained the opinion of the general public."

The EIA process that was undertaken includes opportunities in the procedure when public opinion is obtained. According to the Hungarian EIA Decree, the competent authority transfers

the permit application, the EIS and an announcement to the notaries of municipalities affected by the project, and the latter publish the announcement, as well as make sure that both the permit application and the EIS are available for the public for commenting within 30 days. This and the general standing of environmental NGOs in EIA cases make sure that public opinion is obtained in the procedure.

Art. 6 Par. 4 of the Habitats Directive

"4. If, in spite of a negative assessment of the implications for the site ..."

The EIS in Hungary is prepared either by the project developer or a competent expert commissioned by the project developer. No qualification requirements are set in law for such experts, therefore their findings – although supposed to be objective and verifiable – may even err on the side of the project developer. Filtering such errors is the task of the competent authority. In this case, the project did not have a negative assessment in the EIS.

"... and in the absence of alternative solutions, ..."

The absence of alternative solutions was mostly attributable to the fact that the EIS did not elaborate any project alternatives in respect of location of the wind farm.

"... a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, ..."

The project developer – although describes the positive impacts of the project – never relied on this clause of the Habitats Directive, thus the investment plan was never reasoned by overriding public interest.

If, however, reference was made to this clause, proper implementation of the Habitats Directive would still have excluded permitting of the wind farm, since renewable energy production is a priority and a public interest, it is not guaranteed that it has to be done by harnessing of wind power and not by power generation from biomass for instance.

"... the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected."

In this case, no compensatory measures were taken, since no negative impacts necessitated it, according to the EIS. The EIS findings, however, prove that nature itself will compensate those insignificant changes that will occur in the area due to the installation of the wind farm, e.g. birds will alter their flying routes.

"It shall inform the Commission of the compensatory measures adopted."

This clause was not applicable in this case.

"Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest."

Since both the Északi-Bakony and the Papod és Miklád (proposed) sites are special areas of conservation, this clause could have been referred to by the project developer, however, were never done so. The reason for the lack of such reference is that the EIS did not contain any negative assessment to the project; therefore the project developer did not need to use this clause of the Habitats Directive.

However, if any reference was made to this point, it is positive that it could not have reasoned the installation of the wind farm. Firstly, generation of energy by harnessing of wind power is only one way of using renewable energy resources, but not the only way. Secondly, no human health or public safety is endangered if no wind farm is installed in the given area. Thirdly,

although the environment will benefit from the operation of a wind farm using renewable energy resources, this has no primary importance, due to the fact, that Hungary meets its Kyoto commitments even without having installed more wind farms. Needless to say, there was no Commission opinion at hand to justify the location of the wind farm at the place in question.

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SLOVAKIA: Re-construction of the Cableway Vrátna



1. Title of case:

Re-construction of the Cableway Vrátna

2. Matter of case:

Proceedings on exception permit for re-construction of the cableway in protection areas (National Park)

3. Country:

Slovakia

4. Location:

National Park Malá Fatra (north of Slovakia)

5. Geographic dimension:

Local

6. Initiator of case:

NGO - Society for Protection of Birds in Slovakia

7. Participants involved:

Ministry of the Environment of the Slovak Republic

8. Other interested parties and/or stakeholders:

OMNITRADE, a.s. (business company carrying out the re-construction)

9. Background facts:

9.1. Account of facts

Business company OMNITRADE, a.s. plans to re-construct an old and not-functional cableway in Vrátna valley, area Chleb, Mala Fatra mountains. Relevant area belongs to the special area of conservation with the 3rd or 5th protection level (in accordance with the national law – Nature and Land Protection Act – there are five levels of protection recognised in Slovakia). In accordance with Nature and Land Protection Act certain activities are forbidden in special areas of conservation and one must ask for exemption permit issued by Ministry of the Environment of the Slovak Republic. Exemption permit is inevitable prerequisite for issuing the construction permit itself.

OMNITRADE asked for exemption permit to carry out following activities: presence of motor vehicles and construction devices, people walking off pathway, flying of helicopter over relevant areas, building construction, woods logging (trees hewing), interference with and damaging of vegetation surface, disturbing tranquillity and silence, harming, destroying and

translocating of protected plant species, intruding of protected animals and damaging of their habitats.

The main problems raised by Society for Protection of Birds in Slovakia are following:

- a) the respective area belongs to the most protected areas in Slovakia; it is not only part of national park but also part of National Nature Preserve (area with the highest level of protection), and also part of Special Protected Birds Area;
- b) no detailed and adequate stocktaking and of the biota survey was done and so it was impossible to sufficiently evaluate real cumulative impacts of re-construction and operation of cableway Vrátna – Chleb and of other recreational and ski resorts in Vrátna valley;
- c) there were serious errors and contradictions in environmental impact assessment preceding process of exemption permission.

Decisive authorities contravened the provisions of art. 6 par. 3 and 4 of Habitat Directive on following:

- a) no appropriate assessment of re-construction implications were implemented;
- b) despite of presence of priority species in concerned area, the competent authorities issued exemption permit without accomplishing the requirements of Habitat Directive (art. 6 par. 4 in fine: *where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health of public safety, to beneficial consequences of primary importance for the environment...*).

9.2. Description of the Natura 2000 locality concerned

General description of the site(s) affected:

Name of the site:

National Park Malá Fatra

Nearest town/city:

Žilina

Is it a Special Protection Area?

Yes:

National Park Malá Fatra

National Nature Preserve Chleb,

Special Protected Area under Bird Directive Mala Fatra

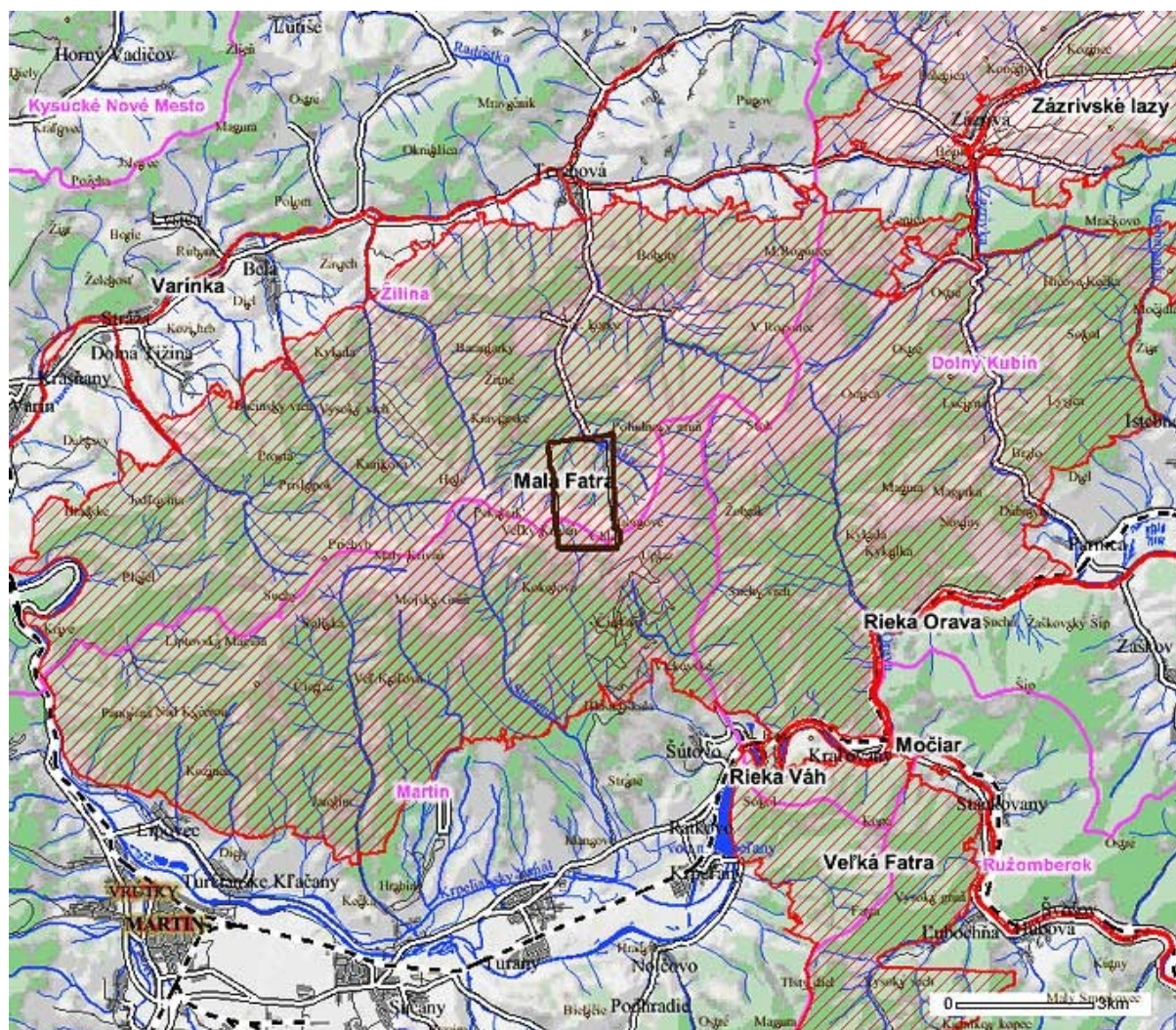
Is it a proposed site of European Community importance?

Yes:

SKUEV 0252, Special protected birds area

SKCHVU 013 Malá Fatra

Map of the site or sites affected



This is a map of Natura Site Mala Fatra, the brown rectangle in the middle is marking the approximate area of cableway and its slopes.

Principal habitats and species directly affected (the priority species are marked with *)

- *Aconitum firmum* ssp *moravicum*
- *Soldanella carpatica*
- *Campanula serrata**
- *Traunsteinera globosa*
- *Gymnadenia conopsea*
- *Gymnadenia odoratissima*
- *Pinguicula alpina*
- *Orchis mascula*
- *Malaxis monophyllos*
- *Platanthera bifolia*
- *Salamandra salamandra*
- *Bombina variegata*
- *Bufo bufo*

- *Rana temporaria*
- *Vipera berus*
- *Anguis fragilis*
- *Lacerta vivipara*
- *Tetrao tetrix*
- *Tetrao urogallus*
- *Sorex alpinus*
- *Sorex minutus*
- *Sorex araneus*
- *Microtus tatricus*
- *Sicista betulina**
- *Dryomys nitedula*
- *Ursus arctos**

In addition, species, which are listed in National List of Special Protected Birds Areas, but were not listed in relevant decisions, particularly:

- *Falco peregrinus*
- *Aquila chrysaetos*
- *Bubo bubo*
- *Picus canus*
- *Aegolius funereus*
- *Dendrocopos leucotos*
- *Dryocopus martius*
- *Ficedula albicollis*
- *Monticola saxatilis*

Habitats:

- Alpine and subalpine calcareous grasslands (6170)
 - Alpine and Boreal heaths (4060)
 - Mountain hay meadows (6520)
- plus habitats in nearby forests which are to be touched:
- Tilio – Acerion forests of slopes, screes and ravines (9180)*
 - Asperulo – Fagetum beech forests (9130)
 - Medio-European subalpine beech woods with *Acer* and *Rumex arifolius*

Description of the investment plan and its impacts on the Natura site

There are 2 main problems:

- damage of above mentioned species of flora and threaten to the fauna species during the re-construction;
- long-term damaging and disturbing of the all species mentioned + escalation of erosion in the area concerned during the operation of the cableway.

10. Applicable articles of Directive 92/43/EEC (Habitats Directive)

Art. 6 par. 3 and 4

11. Applicable national laws:

Nature and Land Protection Act No. 543/2002

12. Type of procedure (administrative and/or judicial):

Administrative and judicial

13. Administrative procedural history/timeline

Timeline

EIA:

2000 – 2002, The EIA Final Statement was issued in December 2002

Land use permission procedure:

2004, July: the land use permit was issued, despite of exemption permit was not valid yet

Procedure on exemption permit:

2003, December: petition of the investor to the Ministry of the Environment

2004, March: Ministry of the Environment issued the decision on exemption permit

2004, April: Wolf Society (non-governmental organisation) filed an appeal

2004, October: Minister of the Environment dismissed the exemption permit in appellate procedure

2004, November: new procedure on exemption permit began

2005, April: Ministry of the Environment issued the exemption permit (second one)

2005, May: Society for the protection of Birds in Slovakia filed an appeal

2005, June: Minister of the Environment confirmed the exemption permit (with only two minor changes)

Description of environmental impact assessment

Environmental impact assessment was carried out throughout the year 2002 in accordance with the Environmental Impact Assessment Act No. 127/1994.

Ministry of the Environment of SR recommended execution of Re-construction of cableway Vrátna – Chleb with capacity 900 people / hour during winter season and 240 people / hour during summer season.

EIA Report states that there is lack of information on biota of the area concerned, that's why it is impossible to quantitatively and qualitatively assess real extent of contemporary impacts of anthropogenic presence in the area and even more difficult to determine the adversal effects of the realised activity. In other words, there was not enough information given during EIA process itself, so the real impact could not be adequately assessed. The EIA Report states as well that update of existing information, especially new inventory reconnaissance of the area is needed. Despite of this situation, in Final EIA Statement the optimal variant of the activity assessed is approved.

Alternative solutions to the plan or project, considered by the authorities

From the standpoint of capacity of the cableway there were 3 alternatives assessed:

- cableway with the capacity of 200 people / hour;
- cableway with the capacity of 600 people / hour;
- cableway with the capacity of 1800 people / hour.

From the standpoint of technology there were 2 alternatives considered by the competent authorities:

4-seats cableway;
6-seats gondola (with “cabin”).

Alternative solutions, pointed out by other stakeholder(s)

Suggestions of the NGOs during the EIA:

- no re-construction, to leave the old cableway and then to dismantle it without any substitute;
- if re-construction, then max. 240 people / hour (original capacity of the old cableway), plus elimination of operation annually from April, 1 till July, 15 (due to birds nesting in the area concerned).

NGOs already during the EIA objected insufficiency of assessment of the assessment of the implication of the re-construction and the operation of the cableway to the fauna and flora.

Mitigation measures, proposed or considered by national authorities

No such measures were proposed or considered by national authorities.

Compensatory measures, proposed or considered by national authorities

OMNITRADE, a.s. is obliged to:

- scythe the nearby habitats within area of one hectar;
- remove the plants *Aconitum firmum* ssp. *Moravicum*;
- remove the plants of *Malaxis monophyllos* and *Traunsteinera globosa*.

There are other conditions assigned by competent authority, but they have no “compensatory” character.

14. Outcome of the actions:

Requirements and objections of the NGOs are so far mostly ignored (also due to lack of focused and assertive proceedings by the Nature protection authorities).

15. Remedies taken:

Administrative appeal, petition to the court

16. Judicial procedural history/timeline (if relevant):

August, 29, 2005: petition filled

December, 23, 2005: preliminary injunction granted

17. Outcome of the actions:

Since December there were repeated claims from the attorney to the Court to call for trial, but with no success.

Despite of the preliminary injunction granted in December, the cableway was constructed and is operating. This is due to the court proceedings delay – while the court was deciding on the preliminary injunction (which took about 4 months), the investor was working on the cableway construction. In addition, the investor is not a party of the court proceedings, these are Society for the protection of Birds in Slovakia and Ministry of the Environment. Investor was then not officially informed about the preliminary injunction by court and Ministry did not fulfill its duties in this. The whole procedure is real taunt of the environmental protection in Slovakia.

18. Current status of case:

Case itself is pending (at the Regional Court in Bratislava), but the cableway was re-constructed and is functioning.

19. Follow-up actions planned and their timeline (in case of ongoing matter, also estimated end date of case):

The end date of case is hard to estimate: due to incredibly dilatory court proceedings the re-construction of the cableway is not only finished, but the cableway itself is operating.

20. Analysis of legal problems, concerning implementation of Art 6.3 and 6.4 of Habitats Directive, conclusions:

The competent authorities totally ignored the Habitats Directive as such. They did not follow the art. 6.3 of the Habitats Directive. The adverse effects of the activity planned were not properly assessed due to lack of inevitable actual information on biota of the area concerned (this was stated even during the EIA and despite of this the Final EIA Statement was issued):

- there was no *appropriate assessment*,
- no *combination with other plans* was assessed,
- the competent authorities did not have the information that *it will not adversely affect the integrity of the site concerned*.

The competent authority ignored also the art. 6.4 – despite of the findings of the EIA (possible negative impact of cableway), they issued the exemption permission without considering the conditions of the art. 6.4.

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