



6.9.2011

NOTICE TO MEMBERS

Subject: Petition 0777/2009 by Mr. Patrick Kinnersly (British), on behalf of White Horse Alliance, on alleged failure of the British authorities to comply with the EC Habitats Directive in connection with the proposed Westbury bypass and other major highway schemes

1. Summary of petition

The petitioner considers that the relevant British authorities have failed to comply with the provisions of the EC Directive 92/43 on Habitats and of the EC Directive 2001/42/EC on the Strategic Environmental Assessment in connection with the implementation of the Regional Spatial Strategy and associated transport projects, including the Westbury bypass (Wiltshire County, England). According to the petitioner, the proposed road will pass through the Wellhead Valley on the western escarpment of the Salisbury Plain, a special area of protection and conservation, rich in wildlife, including bat species covered by the Habitats Directive. The petitioner explains that the bypass was selected in 1999, but failed to receive government funding in 2001, 2003 and 2005. He maintains that a new application was submitted in 2007 and it is likely to obtain approval as the start of the construction works has already been scheduled for November 2009. The petitioner opposes the imminent authorisation and challenges the conclusion of the environmental impact statement according to which due to the mitigation measures to be taken the bypass would have only a "slight" adverse impact on the dormice and bats population in the area. The petitioner asks the European Parliament to have the Commission investigate possible breaches of the EC environmental legislation.

2. Admissibility

Declared admissible on 8 October 2009. Information requested from Commission under Rule 202(6).

3. Commission reply, received on 25 March 2010.

The EU interest in this case is linked to both the site and species protection provisions of the Habitats Directive.

The petitioner alleges that the development, as well as the broader Regional Spatial Strategy, will affect the integrity of Natura 2000 sites in the south-west region. In accordance with the provisions set out in Article 6 (3) and 6 (4) of the directive, any plan or project not directly connected to, with, or necessary to the management of a Natura 2000 site, but likely to significantly affect the site, must be subject to an appropriate assessment. If it is determined that the integrity of the site will be affected, the development may only proceed, in the absence of alternative solutions, if it is of overriding public interest and with the provision of compensatory measures to offset damage to, or destruction of the site. Where the site hosts priority habitats or species the only considerations that may be raised are in relation to human health and safety or, further to an opinion of the Commission, to other imperative reasons of overriding public interest.

The petitioner considers that there are risks to the integrity of Bath-Bradford on Avon Special Area of Conservation (SAC) and that this has not been subject to an appropriate assessment in accordance with Article 6 of the directive. This SAC has been designated by the UK primarily for the protection of two bat species listed in Annex II to the directive, the Greater Horseshoe Bat, *Rhinolophus ferrumequinum*, and the Bechstein's Bat, *Myotis bechsteinii*. According to information from the Joint Nature Conservation Committee, the Bath-Bradford on Avon SAC is a hibernation site associated with 15 % of the UK population of the Greater Horseshoe Bat.

The petitioner states that there is sufficient evidence from mark and recapture studies, as well as from radio-tracking, to show that there are links between the Bath-Bradford SAC and the area between the Westbury and the Salisbury Plain escarpment in relation to bats, most notably greater horseshoe bats, to seriously question the decision not to undertake an appropriate assessment. None of the bat species that occur in the United Kingdom are listed as priority species in Annex II of the directive and, therefore, an opinion of the European Commission would not be required in application of Article 6(4) of the directive in relation to sites only hosting bat species.

In relation to the broader Regional Spatial Strategy, the petitioner alleges that Natura 2000 sites in the region area are already subject to above critical nitrogen deposition levels and that this will be exacerbated by increased road traffic. Furthermore, it is alleged that the River Avon system and Avon Valley Special Protection (SPA)/Ramsar Area is already subject to adverse effects from excessive water abstraction and water pollution which will be further exacerbated by the developments foreseen under the strategy. These issues have not been subject to appropriate assessment in accordance with Article 6 of the Habitats Directive.

The Common Dormouse, *Muscardinus avellanarius*, and all bat species are listed in Annex IV and are strictly protected under the Habitats Directive. Article 12 of the directive requires Member States to take the necessary measures to establish a system of strict protection for the animal species listed in Annex IV in their natural range, prohibiting, inter alia, deterioration or destruction of breeding sites or resting places.

In accordance with the conditions set out in Article 16 of the Habitats Directive, Member States may derogate from the strict species protection provisions provided that there is no

satisfactory alternative and the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range. Member States are not required to get the prior agreement of the European Commission in relation to their use of derogations under the directive but must report on their use on a biannual basis.

Whereas mitigation measures have been proposed for both the dormouse and bats in relation to the Westbury Bypass resulting in a conclusion in the second environmental statement that the scheme would only have a 'slight' adverse impact on these species, the petitioner argues that this is not the case. An internationally recognized Dormouse expert, Michael Woods, has concluded that without a green bridge linking the woodlands to be separated by the road, the population would be split in two resulting in a "major negative" potential impact. Likewise, Dr John Altringham, an internationally renowned bat expert has concluded that the bypass would have a severe adverse effect on a nationally and internationally important assemblage of bats that includes at least twelve of the UK's resident species strictly protected under the Habitats Directive. Whereas 'bat gantries' were added to the mitigation plan in 2007, the petitioner considers that these devices are experimental and scientifically contentious. The Wiltshire Wildlife Trust has objected that, without enhanced mitigation measures, the scheme would result in an unacceptable impact on the habitats of many species.

Conclusions

Although the Westbury Bypass proposal has been rejected by the United Kingdom authorities, the information supplied by the petitioner raises significant questions as to whether the site and strict species protection provisions of the Habitats Directive were adequately addressed in the decision making process. The Commission is, therefore, seeking clarification from the United Kingdom authorities on the allegations made in the petition. The Commission will inform the Committee on Petitions of the outcome of this enquiry.

4. Commission reply, received on 11 February 2011.

The Commission wrote to the United Kingdom authorities in the context of an EU pilot project case to request information and clarification as to the application of Council Directive 92/43/EEC, Habitats Directive¹, in relation to the allegations made in the petition. They have provided the following information in response.

The bypass proposal was the subject of a planning application made in February 2007 by Wiltshire County Council (as the local highway authority) to Wiltshire County Council (as determining authority) under the Town and Country Planning Act 1990. The application was 'called-in' for decision by the Secretary of State by a direction, made under section 77 of the Town and Country Planning Act 1990, in July 2007. A public inquiry was held between June and October 2008. A report of the Inspector who held the Inquiry was passed to the then Secretary of State in February 2009, recommending that planning permission be refused. The Secretary of State issued his decision to refuse planning permission in line with the Inspector's recommendation in a letter dated 7 July 2009.

¹ OJ L 206, 22.7.1992

According to the UK authorities, the inspector was fully aware of the importance of bats and the other protected species and the need to consider whether an Appropriate Assessment was necessary. He considered the evidence on these matters in the section of his report on biodiversity (IR8.142 to 8.158). The Government's statutory adviser on nature conservation matters, Natural England, was consulted on the proposals (IR2.22). Following amendments to the original proposal, Natural England withdrew its objection to the application (IR8.149 and Inquiry documents WCC/102 and WCC/103, listed on IR page 275).

Overall, the Inspector concluded that national and international responsibilities and obligations for nature conservation could be fully met, that the scheme would ensure effective conservation and enhancement of the diversity of England's wildlife and that the required mitigation measures could be ensured through planning conditions (IR8.158).

The inspector gave explicit consideration to the issue of whether an Appropriate Assessment was necessary (IR8.150 – 151). He considered that, due to the mitigation measures proposed and the distance between local SACs and the scheme, the proposed road would be unlikely to have a significant impact upon their integrity. Consequently, he concluded that an Appropriate Assessment was not necessary. The allegation does not raise any matters which cast doubt on the inspector's assessment. In issuing his decision, the then Secretary of State agreed with the inspector that there was no basis on which to conclude that an Appropriate Assessment was warranted (DL41).

The Secretary of State has now refused planning permission; the issue of any need for an Appropriate Assessment has simply fallen and is no longer relevant.

At the time the application was determined, the Regional Strategy (RS) for the South West Region comprised outdated 'Regional Planning Guidance' issued in 2001. A revision has been in progress since 2004, in line with the previous government's policy on regional planning. A draft revision was produced by the South West England Regional Assembly in June 2006 and this was subject to an Examination in Public before an independent Panel in April-July 2007. The Panel produced a report advising on improvements to the draft revision in Dec 2007 and in July 2008 the previous government issued a 'Proposed Changes' version of the revision for consultation. This was accompanied by a Habitats Regulations 'Appropriate Assessment' (AA), as required by the EC Habitats Directive (Council Directive 92/43/EEC).

The current Secretary of State has now revoked all RSs in his statement to Parliament made on 6 July 2010. This means that no further work will be undertaken on the RS revision for the South West Region and a final version of it will not be published.

According to the UK authorities, the reasons for revocation of the RS have nothing whatsoever to do with the matters raised by the petitioner. The UK authorities consider that the petitioner's statement is in any event incorrect in the following respects.

- a) A Westbury bypass was not listed as a transport proposal in the draft RS. The AA published in July 2008 did not identify any unresolved adverse effects on Natura 2000 sites. Rather, it concluded that it is uncertain whether there will be adverse effects in relation to a list of 37 sites. This list did not include the Bath & Bradford on Avon SAC.
- b) The reason why no action had been taken since July 2008 to modify or withdraw the RS is because the Secretary of State was, until the election in May this year, still considering whether he should propose further changes to it. In particular, the Secretary of State was

concerned whether the Strategic Environmental Assessment (SEA) complied with the SEA Directive, 2001/42/EC,¹ in relation to the identification and assessment of alternatives to some of the policies and proposals in the published Proposed Changes. He commissioned additional work on the SEA to determine whether reasonable alternatives had been identified and assessed, and, if not, to identify and assess them. In consequence, the content of the RS was still under consideration, and (had it not been subsequently revoked by the Secretary of State) it could have been modified in response to findings of the AA. However, it should be noted that none of the findings of uncertainty over effects of the RSS related to the Bath & Bradford on Avon SAC.

Conclusions

On the basis of the information supplied by the UK authorities it seems that planning permission has been refused for the proposed Westbury bypass and a decision has been taken that there will be no further work on the Regional Strategy revision for the South West Region, a final version of which will not be published. Furthermore, the UK authorities have provided evidence to show that the requirements of Council Directive 92/43/EEC were properly taken into account in relation to both the Westbury bypass and the Regional Strategy. On the basis of this information, the Commission cannot identify a breach of Directive 92/43/EEC.

The additional information received from the petitioner in January 2011, and which relates to the County of Devon, does not alter the observations given above, but the Commission will, nonetheless, raise the new allegations in the correspondence with the UK authorities and report on the outcome.

5. Further Commission reply (REV. II), received on 6 September 2011.

The additional information sent by the petitioner consists of a complaint from a regional NGO against the (5km) bypass of Kingskerswell, near Exeter.

The provisions of the Habitats Directive² are called into question because of the occurrence of bat species in the area: the fear is that they would be disturbed and lose some of their feeding area. However, mitigation measures are foreseen. The Commission's examination of the complaint shows that there is no Natura 2000 site in the immediate vicinity of the project - the South Harms SAC (several small patches, dedicated to bat roosting/wintering sites) is a good distance from this road project. What is applicable, therefore, is the species protection requirements of Article 12 of the Habitats Directive and, according to the study attached by the petitioner, mitigation measures are foreseen as regards the impact on the bat population.

The Commission would also point out that, from an environmental point of view, there is no link between the original petition concerning the Westbury bypass and this additional submission concerning the Kingskerswell bypass. The two are separated by some 160km.

¹ OJ L 197, 21.7.2001, p. 30-37

² OJ L 206, 22.7.1992