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CONVENTION ON THE CONSERVATION OF EUROPEAN WILDLIFE
AND NATURAL HABITATS

Standing Committee

34th meeting
Strasbourg, 2-5 December 2014

Complaint in stand-by

***MARSUPELLA PROFUNDA* THREATENED BY WASTE
BURN INCINERATOR
AT ROSTOWRACK FARM; ST DENNIS
(United Kingdom)**

REPORT BY THE COMPLAINANT

*Document prepared by
The Cornwall Waste Forum St. Dennis Branch, United Kingdom*

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**INFORMATION RECEIVED FROM THE COMPLAINANT
- 12 JUNE 2014 -**

**REPORT OF ADDITIONAL INFORMATION FOR CONSIDERATION IN CONJUNCTION OF
COMPLAINT NO. 2012/11.**

By Cornwall Waste Forum St.Dennis Branch

NB: Items 1, 2 and 3 is information extracted from the enclosed disc.

1. Information contained in Bureau Veritas Shadow Screening for Appropriate Assessment report compiled for Cornwall Council in 2009, (Disc ref.ECC02)

Likely Impacts--Emissions (4.1.5.1)

There are a number of forms of aerial pollution which can have significant impacts on flora and fauna through the CERC. (Incinerator) and in combination with other projects. Most notable are the production of oxides of sulphur and nitrogen which can decrease plant growth or alter the vegetation communities through changing the chemical properties of the substrate. Increase of airborne pollutants reaching watercourses can also result in increases in plant mortality. The. Precise nature of the CERC proposals suggest that the possibility of direct, indirect and secondary effects on the integrity of Breney Common, Goss and Tregoss moors SAC and the St.Austell Clay Pits SAC cannot be excluded as a result of nitrogen deposition and acid deposition either alone or in combination with other projects.

Further information assessing the contribution of the CERC alone and in combination with other projects identified above should be provided in a statement to inform Appropriate Assessment.

In its summary of Potential Effects (8.0) it is recorded that a number of potential effects have been identified as a result of the CERC development. These effects are possible either alone or in combination with other projects. Table 1 summaries the potential effects where information is required in order to ascertain the significance of the effects. In the Potential Effects Chart regarding air quality (8.1.1) it clearly confirms that Potential Effects cannot be excluded either alone and in combination.

2. Information contained in Kevin Webb's, MIEEM Bsc (hons) MSC of Bureau Veritas, Proof of Evidence for the Public Inquiry 2010 (Disc ref.ECC04)

Mr Webb records in his conclusion (10.0) (10.7) that in respect of the Annex II species, Western rushwort (*Marsipella profunda*) I cannot ascertain that the CERC would not have an adverse effect upon the integrity of the designated feature either alone or in combination with other projects through changes in nitrogen deposition.

3. Information contained in Christopher Boyle QC 's closing submissions appendix on (disc ref. ECC05) submitted at 2010 Public Inquiry

Appendix 282 records, The shadow appropriate assessment was able to conclude that it could be ascertained that there would be no adverse impact on the integrity of the two SACs from water resources and quality, and from dust. By contrast, it concluded that it could not be ascertained that there would not be adverse impact from the scheme (alone and in combination), in respect of air quality. For the designated habitats and species in the Moors SAC this arose from Nitrogen and from Acid deposition; for the designated species in the Clay Pits SAC this arose from Nitrogen deposition.

Appendix 310 records, To describe it as absurd, or describe it as unsafe, the conclusion on the application of the 1% threshold in this case is the same: to follow an approach that uses 1% of critical load to exclude from the account background and in-combination contribution is not to follow the screening process in the Habitats Regulations and Directive. It is to introduce a pre-screen with no statutory basis and no scientific basis. It leads to absurd outcomes in this case where lesser contributions are potentially examined, but greater ones ignored. To follow this approach would be to place the Secretary of State at risk of legal challenge.

4. Brief Background

The contractor, SITA 's planning application was first submitted in 2008 following which it was unanimously refused at Parish, District and Cornwall Council planning committee levels. An appeal by the contractor resulted in a Public Inquiry (2010) with the Inspector acting for the Secretary of State upholding the planning application, even after considering the evidence submitted about the lack of adherence to the Habitats Directive i.e. an Appropriate Assessment was never carried out, and the possibility of a legal challenge. Following this decision CWFSDB after seeking legal advice challenged the decision in the High Court. This resulted in the planning permission being quashed with the the contractor being given leave to appeal which was taken and resulted in a Court of Appeal hearing. Due to lobbying and suspected intervention by the Secretary of State the Court of Appeal reinstated the planning permission and refused CWFSDB leave to appeal to the Supreme Court. Had leave to appeal had been granted CWFSDB would have continued with its challenge in the Supreme Court and to the EC if necessary.

Ken RICKARD,

Chair CWFSDB

12 June 2014.

**INFORMATION RECEIVED BY THE COMPLAINANT
ON 28TH FEBRUARY 2014**

Dear Mr Rickard

Further to our recent meeting I can confirm that Imerys has had a survey carried out that has identified Marsupella Profunda at several of its China Clay Works across the Mid Cornwall China Clay area. Following discussion with Natural England we now have an agreed Marsupella Profunda Management Plan in place.

Regards

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**RESPONSE TO THE LETTER FROM MR. DAVE WOTTON (DEFRA) ON BEHALF OF CORNWALL
WASTE FORUM ST. DENNIS BRANCH DATED 22 NOV. 2013.**

Dear Ms d'Alessandro,

Fortunately, there is very little to add to Mr. Wotton's letter because he has adequately made our case for us.

The priority feature of St. Austell Clay Pits (EU SAC No. UK 0030282) is given as 1390 *Marsupella profunda* – Western Rustwort.

DEFRA via its arm's length body The Environment Agency, (as a "Competent Authority") was given the task under the EU Habitats Directive 92/43/EEC, to carry out an assessment to ascertain that it (a plan or project – in this case an incinerator) will not adversely effect the site concerned.

Directive 92/43/EEC was transposed into UK Law by the Conservation (Natural Habitats etc) Regulations. Advice given in the Guidance Notes in these Regulations related to Section 48 of the Directive (Appropriate Assessment) at section 15 Point v) states that "(the assessment) Should identify the effects of the proposal on habitats and species of international importance, and how these effects are likely to affect the site's conservation objectives". Also it further states at point 9) that "its (the assessment's) conclusions must be based only on scientific considerations".

Mr. Wotton admits at his reference Paragraph 4 that the effects of the plan or project were not assessed on the species that was the priority feature of the SAC but rather a generic assessment for "vegetation and ecosystems"

As previously stated, *M. profunda* does not have roots and cannot be assessed by the same methods used for "other vegetation and ecosystems"

Mr Wotton admits at his reference Paragraph 5 that the assessment was not made in relation to the habitat extant in the SAC namely a disused Clay. Pit because APIS do not list such a habitat for Critical Load or Level.

The normal "scientific method" used by the Environment Agency would be to use the APIS formula and use computer generated data to show that the plan or project did not add more than 1% of the Critical Load or Critical Level to the pollution experienced by the priority feature species. Mr. Wotton admits that, as this data was not available for *M. profunda*, such scientific process was not carried out.

In his attempted explanation, he uses the mistaken statement used in the explanation given for permit approval. This states that as China Clay substrate is acid, the small amount of additional acid pollution will not cause any problems. This fails to recognise that *M. profunda*, as befits a first stage colonising species, is insulated from the pH effect of the substrate because it has no roots. Therefore the only measurement that will indicate affect on *M. profunda* is deposition directly from air as recorded by Critical Level.

Obviously conscious of the shortcomings of the methodology employed, Mr. Wotton falls back on stating that Natural England (yet another body devolved from DEFRA) has stated that there will be no impact on *M. profunda*. This statement is untrue. At the time when the investigation into effect was undertaken, there were two academics with specialist knowledge of *M. profunda* working for Natural England, Dr. Ron Porley who was stated to be a world expert on the plant and Dr. David Holyoak who was the regional specialist on this species and was responsible for carrying out survey work on the site and also wrote the Environmental Impact Assessment. Dr. Porley stated that the emissions from the incinerator were likely to affect *M. profunda*, particularly its reproductive ability, and Dr. Holyoak, in his last survey said that *M. profunda* was "endangered and declining" and in the EIA states that the species is likely to suffer ill effect from over shading as a result of soil nitrification feeding vascular plants. He also states that pollution deposition effects cannot be accurately predicted due to the climatic variations caused by the unique microclimate of the area (due to the surrounding artificial hills caused by 200 years of spoil from China Clay extraction).

Therefore in conclusion, the assessment was done using data from the wrong plant, in the wrong habitat, using unscientific methods because correct data was unavailable. Statements made by the two experts to the effect that the Priority Feature plant would be endangered by the development were ignored.

The growth of shade vascular plants due to nitrification has never been considered, and as you will see (ref. Mr. Wooton's paragraph 8) he has considered wind direction, not microclimate as the determining meteorological factor. It is worth noting that shortly after publishing their findings, Dr. Porley and Dr. Holyoak both ceased working for Natural England. They have never withdrawn the opinions they expressed. Since 2010, unnamed persons have stated on behalf of Natural England that they consider there will be no detrimental effect on *M. profunda*, but Natural England have refused to disclose the academic and experiential qualifications of the people who made these statements.

We ask you to find that Appropriate Assessment under the terms of Directive 92/43/EEC has not been correctly carried out. We would further point out the importance of this as DEFRA are currently applying to amalgamate all the SACs in the area into one large SAC and to move the boundaries much closer to the proposed Incinerator. We consider that this will require a further Appropriate Assessment, and a finding by you, in our favour, will greatly assist this process.

Yours sincerely.

Rod Toms

On behalf of CWFSDB.