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CONVENTION ON THE CONSERVATION OF EUROPEAN WILDLIFE
AND NATURAL HABITATS

Standing Committee

35th meeting
Strasbourg, 1-4 December 2015

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Complaint on stand-by :

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

REPORT BY THE COMPLAINANT

Document prepared by
Mr Kenneth Rickard, on behalf of Cornwall Waste Forum St Dennis Branch, United Kingdom

CORNWALL WASTE FORUM ST.DENNIS BRANCH.

Additional and Relevant information which we request is included in the next the Bern Convention's Standing committee meeting's determination of the CWFSDB complaint 2012/11.

Natural England has confirmed with CWFSDB and Cornwall Council that it is progressing with a project to increase the area of Breney Common, and Goss and Tregoss Moor SAC, registration No. 0030098 and rename the larger area as the Mid Cornwall Moors SAC with the first step of the process starting in September 2015. To accord with the Habitats Directive this will require a review of all unfinished projects in the area. This will include the Rostowrack Farm, St.Dennis incinerator as it will not be completed or in operation until May 2016.

As a previous review in the form of a shadow assessment was completed in 2008 by Environmental Consultant Kevin Webb of Bureau Veritas and presented as evidence at the 2010 public inquiry. (this has already been submitted as part of our evidence supporting our complaint) It concluded that it could not be ascertained that the emissions from the incinerator would not have an adverse effect on the SAC including Marsupella profunda. This should have resulted in an Appropriate Assessment being conducted, however for whatever reason the competent authorities failed to adhere to the Habitats Directive which was subsequently successfully challenged in the High Court and later over turned at the Court of Appeal following intervention by questionable lobbying and no leave to appeal further was granted. A report commissioned in 2008 by Cornwall Council and complied by ENTAC an environmental consultancy concluded that an Appropriate Assessment was required.

The Appropriate Assessment was never conducted as there was fear of the outcome not being favourable to Cornwall Council or the waste contractor. The ENTAC report was never made public. However as the result of a freedom of information request CWFSDB has now obtained a copy and is included as an attachment.

Under the Habitats Directive the Mid Cornwall Moors site is now a candidate (c) SAC and if the Directive is now adhered to an Appropriate Assessment must be conducted. There is every chance that this will result in proving pollution levels form the in combination effect from the adjacent A30 dual carriageway traffic, the incinerator HGV traffic, 316 movements a day, the Power Generating Station already operating on the SAC and the incinerator would have an adverse effect on the SAC and its protected and rare species.

According to the UK Planning inspectorate (PINS), under section 48 of the Directive, an Appropriate Assessment should have occurred on the first occasion "before any plan or project is undertaken". This point was agreed by Justice Collins in the High Court. Therefore an Appropriate Assessment should be undertaken on this occasion while the plan is still a (c)SAC. This conclusion is reinforced by Gregory Jones QC in a recent book quoting the result of the Public Inquiry into the Sherwood Forrest incinerator. In that case the inspector of the inquiry conducted his own Shadow Assessment of a cSPA and found significant effect would probably be caused, and thus found against granting planning permission, Gregory Jones goes on to say – UK law "provides stringer protection for cSAC that the European position in *Bund Naturschutz* and affords protection to pSACs that do not receive any express protection in European law. It is appropriate that there be a consistent basis for the protection of sites forming part of Natur 2000 which is intended to be a coherent netwok.

And further says in conclusion:

It may open the way for environmental NGOs and independent experts to promote and campaign or designation or classification of sites, and the to argue that a "shadow" assessment ought o be undertaken of any plans or projects likely to harm them.

Therefore we see a favourable decision from Berne Convention to ensure the Habitats Directive is adhered to by Competent Authorities in relation to Natural England's SAC enlargement project would be sufficient to satisfy our complaint. The Competent Authorities are Cornwall Council Planning Authority and the Environment Agency acting with guidance from Natural England.

K.H.Rickard, Chair of CWFSDB. 20 March 2015.

CORNWALL CERC PLANNING SUPPORT

1. TECHNICAL NOTE ON APPROPRIATE ASSESSMENT

1.1 Introduction

This note has been prepared for Cornwall County Council. The following information is based on our current level of understanding of the CERC project and experience of the Appropriate Assessment process; but should not be considered to be conclusive as all decisions are made by the competent authority.

1.1.1 Is Appropriate Assessment required for CERC?

Under Regulation 48(1) of the Conservation *(Natural Habitats & c.)* Regulations 1994 (as amended: also known as the 'Habitats Regulations'), any development likely to have a significant effect on a Natura 2000 site, either on its own or in combination with other projects, that is not directly related to its management for nature conservation, must be the subject of an Appropriate Assessment carried out by the relevant competent authority. The competent authority for the planning application is the Local Planning Authority. The competent authority for the Environmental Permit is the Environment Agency.

The screening process for whether an Appropriate Assessment is required is not quantified and is essentially a question of whether or not there is likely to be a significant effect. In this instance, due to the proximity of the proposed facility to an SAC and its potential to impact upon the site through aerial emissions and hydrological links we cannot see any other decision being reached than that there is a requirement for Appropriate Assessment.

Large amounts of data have been provided in the ES to demonstrate that there will not be a significant effect on the Natura 2000 site. The data and analysis have been provided in order to quantify the size of effect which suggests strongly that Appropriate Assessment is required. If this development could be considered as unlikely to have a significant effect at the screening stage it should be relatively straightforward to dismiss the potential impacts on the SAC without having to provide detailed analysis.

As we understand, the Environment Agency is currently validating the air model submitted by the applicant as part of the Environmental Permit application. Regardless of the outcome of this process it is still a requirement of the competent authority to understand whether or not there are likely to be in-combination effects with other projects (i.e. cumulative assessment). Given the conclusions drawn above this analysis will be incorporated in to an Appropriate Assessment.

It should be noted that the screening exercise could be used to determine whether other potential impacts (e.g. hydrological changes) could be discounted from the Appropriate Assessment process.

The potential for CERC to be only a small emitter when in comparison with other industries in the area is irrelevant in terms of Appropriate Assessment. It is the potential for this small addition to result in a likely significant impact, on its own or in combination with other projects that is the question.

1.1.2 In-combination Effects and Responsibilities

The wording of the legislation makes it a requirement that all proposals are to be considered in-combination with other plans and projects. This is usually interpreted in the UK as being projects that are currently within the planning system (i.e. planning applications that have been submitted but not yet approved) and projects that have secured permission and are under construction or yet to be constructed. It is normal for existing infrastructure, when considering aerial emissions, to be discounted as this forms part of the baseline data used in the assessment.

The data required for the assessment of in-combination effects needs to be supplied by the applicant under Regulation 48 (2). It is usual for the applicant to also provide an assessment of the effects. The competent authority undertakes the Appropriate Assessment but this is largely based on the data and assessment provided by the applicant. Only in a few instances have our specialists seen documentation showing Appropriate Assessments that undertake analysis independently of the applicant (e.g. assessments for the Thames Array wind farm). In these instances the applicant has supplied all the information and provided an assessment, but the competent authority has also seen fit to assess the same data.

In practice the collation of data will need to be a collaborative effort to arrive at an agreed list of projects. An early meeting between the applicant and the Authority is recommended. The list of the projects to be considered is either drawn up and justified by the applicant or is provided by the competent authority (NB: they are not obliged to do this). Most developments can be screened out at an early stage. In general a mixture of the two methods is followed with local planning officers providing names of projects with the applicant then obtaining the Environmental Statements and/or other documentation in order to be able to undertake the work.

Dependent on the information gathered further air quality modelling may not be required; this is entirely dependent on the level of detail available in the planning documents gained during the data collation process.

Emissions from increased traffic would need to be considered if not already factored in to the modelling for the CERC application and other schemes. However, given the small distances over which the majority of deposition due to transport occurs this is unlikely to prove significant (based on scientific studies of deposition rates).

1.1.3 Precautionary Principle

The AA process is framed by the Precautionary Principle which means that any development that cannot be proved not to have an adverse significant effect on the integrity of a Natura 2000 site will need to be assessed in further stages (i.e. the alternatives test and IROPI - see below) if it is to progress. Within case law it is important to note that decisions regarding Appropriate Assessment rely upon what is considered to be 'reasonable scientific evidence'. The ideas of 'precautionary principle' and 'reasonable scientific evidence' make it essential that it is acknowledged by applicants that all methods used in the assessment are either robust or are precautionary.

In the context of Air Quality modelling, the EA appears to have accepted the modelling methodology used by the applicant and it may be reasonable for the Planning Authority as competent authority to defer to the Agency's position.

1.1.4 Next Steps

Appropriate Assessment is often thought of as an arduous process with little chance of demonstrating no significant adverse effect. Although this is often true, for many projects the Habitats Regulations simply provide a framework in which adequate information can be provided to satisfy the requirements of the competent authority. In this instance much, if not all, of the information required is already available.

In this instance we would suggest that a 'report to inform the appropriate assessment' detailing all potential impacts on Natura 2000 sites, including in-combination effects, is provided to the competent authority. The report will draw together all relevant information provided within the ES and EP and subsequently in responses to the planning authority, Environment Agency and Natural England (including clarifications and correspondence regarding the Agency's findings from the AQ validation exercise). This needs to be framed so that it presents all 'Regulation 48' issues in one easy to read document with reference documents appended.

This will give the planning authority the detailed evidence base to inform and justify its decision on whether or not a significant adverse effect on site integrity is likely. Whilst all of this information may be sitting in one or other submitted or soon to be submitted document (including Regulation 19 and clarification responses), it is still important to extract the relevant information and re-present it as a single AA response document. This will provide confidence to the competent authority regarding its decision when there is a possibility of audit.

The main new piece of work required to achieve this is the assessment of in-combination effects within the Appropriate Assessment. It will be important to identify potential new emitters and to establish whether new operational facilities were included in the air quality baseline. Following this establishing the future predicted impact on the SAC will be necessary.

1.1.5 Decision of Significant Adverse Effects

If all sensible options have been explored and the proposals are still deemed to result in a significant adverse effect on the site integrity of a Natura 2000 site the CERC project is unlikely to gain consent in its current form.

Following a decision of adverse significant effects the project could be re-designed with further mitigation put in place or the alternatives test could be considered. The alternatives test seeks to determine whether or not viable alternatives, to achieve the same aims, exist that would not result in a significant impact on a Natura 2000 site exist. This could be achieved through a change in location or a change in technology but is independent of financial considerations (e.g. there is no argument to say that alternatives are too costly). The frame of reference regarding geographic location would be determined by the competent authority and could conceivably be anywhere within the UK; Entec would consider this stance to be unlikely but alternative sites in the south-west could be considered.

If the alternatives test is passed (i.e. no viable alternatives exist) then it must be shown that the project is required for Imperative Reasons of Over-riding Public Importance (IROPI). IROPI grounds include health and safety of the public and socio-economic considerations. Given the relatively small (in a UK context) amounts of waste to be processed in the facility it is considered unlikely that a reasonable IROPI case could be made.

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