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COMMISSION OPINION

of 18.12.2015

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

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I. The legal framework

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

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

II. The German request

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

III. The project

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

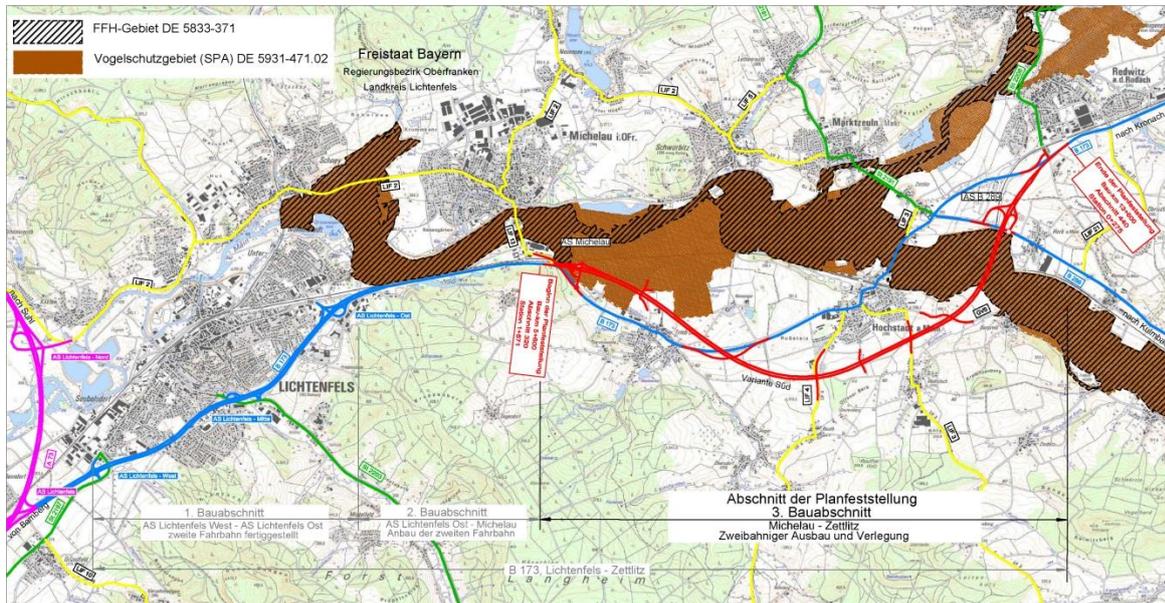


Figure 1: Overview of the construction project (red line) and the surrounding Natura 2000 sites (brown and hatched areas).

IV. The sites

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

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

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

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

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

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

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

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

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

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

V. Implications of the project on the site

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

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

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

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

- Alternative solutions

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

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

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

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

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

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

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

- Imperative reasons for overriding public interest

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

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

- Impact mitigation

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

- Compensatory measures

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

VII. Commission opinion

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

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

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

This opinion is subject to the following conditions:

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

Done at Brussels, 18.12.2015

*For the Commission
Karmenu Vella
Member of the Commission*