



Brussels, 24/04/2003

## OPINION OF THE COMMISSION

**delivered pursuant to Article 6.4 § 2 of Council Directive 92/43/EEC of 21 May 1992 on the conservation of the natural habitats and of wild fauna and flora (Habitats Directive), concerning the “Request by the Netherlands for advice and exchange of information with the European Commission within the framework of the Birds and Habitats Directives “, in relation to the “Project Mainport Rotterdam” Development Plan**

### **I. The legal framework**

Article 6(3) of directive 92/43/EEC prescribes 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.

According to 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, 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 States shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected and it shall inform the Commission of the compensatory measures adopted. 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 can be justified, further to an opinion<sup>1</sup> from the Commission, by other imperative reasons of overriding public interest.

### **II. The Dutch request**

On 12.03.2002, the Permanent Representation of the Netherlands to the EC sent to DG Environment a formal notification according to article 6(4) of the Habitats Directive regarding

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<sup>1</sup>Different language versions of art. 6.4 of the Habitats Directive use different terms for “opinion” : the Dutch text mentions “advies”, the French one “avis”, the German one “Stellungnahme”, the Spanish one “consulta” and the Italian one “parere”. The term “opinion” will be maintained throughout this document.

the plan “Project Mainport Rotterdam” (PMR), titled “ PMR Birds and Habitats Directives - Request by the Netherlands for advice and exchange of information with the European Commission within the framework of the Birds and Habitats Directives“ (further: “the notification”).

On 17.05.02, DG Environment requested the Dutch Government to submit for clarification a series of documents and studies mentioned in the text of the notification.

On 03.07.2002 and 08.07.2002, the Dutch government sent the requested documentation to DG Environment.

A detailed account of the exchanges with the Dutch administration and other stakeholders that led to the drafting of the present text is given in annexes 1 and 2.

The documentation received from the Dutch government is listed and numbered in annex 3 . It will be referred to by these numbers in the subsequent part of this text.

### **III. The Project**

The Dutch Government has decided to launch a planning exercise regarding the future of the harbour of Rotterdam. It has justified this measure by reference to predictions that in the case of continuing economic growth trends, a shortage of space for petrochemical industry, container handling and the distribution sector would develop in the Rotterdam harbour and its surrounding industrial areas.

Project Mainport Rotterdam (PMR – further “the plan”) is an extension plan for the port of Rotterdam consisting of a combination of better use of space still available in the existing harbour area, the “Maasvlakte 2” land reclamation from the sea covering 2500 ha (further “the land reclamation project”) and 750 ha new nature and recreation areas on shore.

Under Dutch planning procedures, the project has passed a public consultation and is now at the stage of a cabinet decision which has to be followed by an approval vote in parliament.

There is no doubt that the project will significantly affect in the sense of article 6 (3) of directive 92/43/EEC the integrity of several Natura 2000 sites and habitats and species occurring in them. In this situation, the project can only be carried out if it complies with the requirements of article 6(4) of directive 92/43/EEC.

### **IV. The Natura 2000 sites that are directly involved**

According to the notification the land reclamation project that will result in westward extension into the North Sea of the existing Maasvlakte is expected to significantly affect a priority habitat as well as two other habitats listed in Annex I of directive 92/43/EEC, one plant species of annex II of the Habitats Directive and two bird species listed in annex I of directive 79/409/EEC in a Special Protection Area (SPA - according to directive 79/409/EEC) and in proposed Sites of Community Importance (pSCIs - according to directive 92/43/EEC) in the coastal and estuary zones South of Hoek van Holland.

The affected SPA is : “Voordelta” (NL 4000017)

The affected pSCI’s are : “Voorne’s Duin” (NL 9803077), “Kwade Hoek” (NL 2000006) “Kop van Goeree” (NL 9801079) and “Voordelta” (NL 4000017)

The affected habitats are : 2130\* ("Grey Dunes") , 2120 ("White Dunes"), 1110 (“Sandbanks which are slightly covered by seawater all the time”)

The affected plant species is : the fen orchid *Liparis loeselii*

The affected bird species are : the Slavonian grebe (*Podiceps auritus*) and the Scaup (*Anthya marila*)

## **V. Assessment of the effects of the land reclamation project of PMR on Natura 2000 sites**

1. The expected direct effects of the land reclamation project on surrounding Natura 2000 sites have been reported in detail in part B of document IX, which is the annex concerning nature and recreation to the Environmental Impact Assessment covering the whole PMR plan . This EIA was carried out from 1998-2000 and was audited by the Dutch Commission for EIA (Commissie voor MER – doc. III) an independent body in charge of overseeing the application of EIA legislation in the Netherlands. The audit approved the completeness and the validity of the information provided and corroborated the public consultation procedures involving a wide range of private and public stakeholders. The findings from document IX have been taken into account in document VIIIa and document VIIIb, which are important elements in the Dutch decision making procedure.

*The Commission holds the view that these assessments can be considered appropriate in the sense of article 6 (3) of directive 92/43/EEC.*

According to the above mentioned assessment, the following priority habitats, habitats and species listed in annexes of the habitats Directive will be significantly affected by the land reclamation project:

- 2130\* ("Grey Dunes") in an order of magnitude of approx. 19.5 ha (priority habitat) located in the pSCI's Voorne's Duin (NL 9803077) and Kop van Goeree (NL 9801079).
- 2120 ("White Dunes"), in an order of magnitude of 23 ha (non priority habitat) located in the pSCI's Voorne's Duin (NL 9803077), Kwade Hoek (NL 2000006) and Kop van Goeree (NL 9801079).
- 1110 (“Sandbanks which are slightly covered by seawater all the time”), in an order of magnitude of 3125 ha (non priority habitat) located in the pSCI Voordelta (NL 4000017).

The expected effects on terrestrial habitats are believed to be caused by a decrease in salt spray which is due to the sheltering from marine influence by land reclamation.

The expected effects on the marine habitat will be caused by direct covering of the underwater shore and expected morphological changes in the Haringvliet estuary.

- The occurrence of the fen orchid *Liparis loeselii* (non priority species) is being significantly affected at one fifth of the sites where it occurs in the pSCI Voorne's Duin (NL 9803077).

This expected effect is thought to be caused by rising of the groundwater table.

According to the above mentioned assessment, the following bird species listed in annex I of the Birds Directive 79/409/EEC are expected to be significantly affected by the land reclamation project, through reduction of the area of habitat 1110:

- The occurrence of the Slavonian grebe (*Podiceps auritus*) is expected to decline by 0.1 to 5 % in the SPA “Voordelta” (NL 4000017).
- The occurrence of the Scaup (*Anthya marila*) is expected to decline by 8 to 16 % in the SPA “Voordelta” (NL 4000017).

*The Commission holds the view that the expected changes in habitat structure and species occurrence may affect the overall coherence of Natura 2000 and, subject to meeting other requirements of art. 6.4 of the Habitats Directive, should therefore be adequately compensated. Such compensation has to be seen as a pre-condition for the land reclamation project to go ahead.*

## 2. Effects of sand extraction

The audit of the comprehensive EIA of the PMR plan by the Dutch Commission for EIA (doc. III) contains certain observations about lacking information about the effects on coastal sea habitats of sand extraction from the seabed for land reclamation. These remarks were included in the planning documents VIIIa and VIIIb. The relevant maps in these documents show that the proposed sand extraction perimeter is located right next to the reclamation area, which means that it also borders the SPA “Voordelta”. Although a buffer strip was added on map 3.2 in annex 2 of document VIIIb, it may seem appropriate to investigate the potential for a significant effect on the Natura 2000 site “Voordelta” of sand extraction in this area.

*For the reasons explained above, the Commission holds the view that the effects on the Natura 2000 site “Voordelta” of sand extraction in the perimeter indicated in docs. VIIIa and VIIIb are to be considered as a separate project occurring in combination with the land reclamation project and may therefore have to be the subject of separate assessments in the sense of article 6(3) of the Habitats Directive. The Commission notes the explicit mention that is made in document VIIIb to the necessity of halting any sand extraction that may prove to have negative effects on Natura 2000 sites.*

## 3. Effects on the Wadden Sea.

The Wadden Sea is a Natura 2000 site of paramount international importance, designated both as an SPA and as a pSCI and also as a Ramsar Convention Area. The conservation of the natural environment in this area depends largely on the stability of a process of alternating sedimentation and erosion that is fed by sediment transport from the the S. part of the North Sea along the Dutch coast. A study by Delft Hydraulics (doc. IV) about the effects of different PMR land reclamation scenarios on sediment transport comes to the conclusion that the largest effects are to be expected S. of the land reclamation area and that effects on the sediment balance in the Wadden Sea are rather small. However, the same study also points out that the error margin of its findings is still considerable and that therefore no firm conclusions about effects on the Wadden Sea can be established, although it appears to be certain that sediment transport towards the N. would decrease as a result of the PMR land reclamation project.

*The Commission notes that the assessment of possible effects of the proposed land reclamation on the sediment balance in the Wadden Sea have been investigated as much as current scientific knowledge and assessment techniques allow, but that the margin of error in the results of this assessment remains considerable.*

*Bearing in mind the precautionary principle, the Commission holds the view that the remaining risk for negative effects of the proposed land reclamation on the sediment balance in the Wadden Sea should be addressed by careful monitoring as an integral part of the execution process of the land reclamation project, with a possibility to take corrective measures if negative significant effects on the state of conservation of the Wadden Sea should occur or would become highly likely.*

## **VI Alternative solutions and mitigation measures – alternative designs**

Weighing of alternatives for the PMR plan has been carried out on two levels :

### **1. Different project approaches**

Three different approaches to expand the Rotterdam harbour and to improve living conditions with minimal damage to the environment were studied :

- better use of existing space in the actual Rotterdam port area;
- increased use of existing port sites in the SW Netherlands;
- expansion of the existing Maasvlakte artificial peninsula by the land reclamation project.

Detailed accounts of these studies are given in docs. V, VIIIb and X. According to these planning documents, the SW Netherlands option was abandoned because of large investments in hinterland connections and lack of space for the kind of developments to be expected in Rotterdam, while the landside expansion of the existing Rotterdam port areas was not considered because of a too large potential for conflict with environmental, social and safety requirements.

### **2. Different land reclamation designs**

Three main variants and several reference designs for shaping the new facilities to be established on reclaimed land are presented and studied in docs IV, V, VIIIa and IX. The options presented on p. 29 of the notification are two reference designs that belong to the variant C “ Nature elsewhere / Land within boundaries”. One reference design would make use of the existing harbour entrance, the other proposes a new entry channel farther out to sea. This second option appears to be more suitable to future extension of the land reclamation and is expected to offer better nautical security. But as it makes use of fixed structures that go farther from the coastline, it may have a larger effect on sediment transportation towards the North. In document VIIIb, the Dutch Government states that a phased project execution, including intermediate evaluations of the effects on the natural environment, will be its strategy to deal with uncertain effects and market demand for harbour space.

*The Commission holds the view that the selection between alternative project approaches and between different land reclamation designs has been carried out in an appropriate manner, but notes the the second option for the land reclamation reference design would require more attentive monitoring of sediment transport with regard to the conservation status of the*

*Wadden Sea. The Commission also notes that a phased execution of the land reclamation project is essential for maintaining the possibility of taking corrective measures in the case of unexpected effects on Natura 2000 sites.*

The construction of an underwater shoreline that mimics the natural situation of a “soft seawall” along the edge of the land reclamation area is identified as an important mitigation measure in relation to the effects on the SPA and pSCI “Voordelta” because it allows for partial recreation of habitat type 1110.

## **VII. Imperative reasons of overriding public interest**

In the notification, the Dutch Government has advanced several elements on which it has based its declaration that the land reclamation project has to be executed for an imperative reason of overriding public interest other than those related to human health, public safety or beneficial consequences of primary importance for the environment.

These elements are:

- the fact that the portuary and industrial activity in the Rotterdam area is one of the main pillars of the Dutch economy, which is illustrated in docs. I and VII;
- the fact that the expected growth in global container handling and chemical industrial activity will lead to increased demand for space which will have to be met if the competitive position of the Rotterdam harbour in the Hamburg – Le Havre range has to be maintained;
- the fact that the harbour of Rotterdam is an essential multimodal crossroads in the TEN-T Network as established by “Decision No 1692/96/EC of the European Parliament and of the Council of 23 July 1996 on Community guidelines for the development of the trans-European transport” network and is therefore of Community importance;
- the fact that the PMR project has to be considered as a project of common interest according to the provisions of art. 1 (5b) of “Decision No 1346/2001/EC of the European Parliament and of the Council of 22 May 2001 amending Decision No 1692/96/EC as regards seaports, inland ports and intermodal terminals as well as project No 8 in Annex III”;
- the fact that the project approach that was chosen, which combines better use of available space, improvement of living conditions and development of new space by land reclamation, appears to find the best balance between the human and the natural environment in the Rotterdam urban and portuary area.

## **VIII. Proposed Compensations**

To offset for the expected effects of the land reclamation project on Natura 2000 as described in the notification, Dutch authorities have proposed a compensation package consisting of new dunes and beach habitats and a marine reserve in the coastal sea area which is planned as follows:

1. Compensation for the effects on priority habitat 2130\*

- It is proposed to create a new dune area of 100 ha off the Dutch coast between Hoek van Holland and Ter Heijde, inside which a sizable area of habitat 2130\* will be allowed to develop over a period of 20 years.

## 2. Compensation for the effects on other habitats and species

- The loss of area for habitat 1110 will be compensated by a marine reserve of 31250 ha in the SPA “Voordelta”. This will not involve new habitat creation but will entail measures that reduce disturbance of the seabed, such as certain restrictions on fisheries, allowing the creation of better conditions for foraging birds, such as the affected species *Podiceps auritus* and *Anthya marila*.
- The decrease in occurrence of *Liparis loeselii* will be compensated by the creation of 10 ha of habitat 2190 (Humid dune slack) in the above mentioned new dune area.
- The loss of area for habitat 2120 will be compensated by the creation of an equivalent area along the seaside of the Brouwersdam.

The complete set of compensation measures and the reasoning behind them are described in detail in the documents “Advies over natuurcompensatie bij een tweede Maasvlakte”, IX and VIIIb, with maps in annex 2 of document VIIIb detailing their precise locations.

These compensation measures have been widely commented by stakeholders during the public consultation procedure mentioned in document III.

These compensation measures have been discussed in depth between Commission technical units, PMR planners and Dutch nature conservation NGO’s.

The fishery sector has voiced opposition to the expected restriction on its activities, but the Commission has made it known that it considers this kind of measures as a purely national matter, insofar they are compatible with the Common Fisheries Policy and only affect Dutch operators.

The compensation proposal has been included in considerable detail in the document VIIIb and is also part of the practical arrangements mentioned in document XI. It can as such be considered to be ready for adoption as integral and essential part of the land reclamation project by the pending final and binding cabinet decision to execute the entire PMR plan.

*Considering the expected effects of the land reclamation project on the priority habitat type 2130\* and the expected results from the planned compensatory measures mentioned above, the Commission holds the view that in the long term the overall coherence of Natura 2000 will not be significantly affected.*

*The Commission considers that the proposed compensations, as described in the notification and the documents mentioned in annex 3 are adequate to make up for the effects of the land reclamation project of PMR on Natura 2000, if they are executed in a timely manner that corresponds with the phasing of the land reclamation and if they are subject to management plans that assure their long term effectiveness.*

*The Commission advises the Government of the Netherlands to send reports on the implementation of the PMR plan project as a whole to its Directorate General for Environment on a periodic basis.*

## **IX. Opinion of the Commission**

*Taking into account the arguments mentioned above, the Commission holds the view that the land reclamation project, as described in the notification and further illustrated in the documentation listed in annex 3 of this text, particularly so in document VIIIb, can be executed for reasons of overriding public interest on the condition that all necessary compensation measures to ensure the overall protection of the coherence of Natura 2000 be taken in due time.*

With regard to the opinion expressed in this document the Commission notes the following:

- This opinion is valid for this particular project, as described in the above mentioned additional documents submitted to the Commission by the Dutch authorities and cannot be considered as applicable to possible effects of the PMR land reclamation project on other Natura 2000 areas.
- This opinion presumes that the compensatory measures will be implemented and monitored as described in the above-mentioned documents submitted to the Commission by the Dutch authorities.
- This opinion presumes that the results of accompanying monitoring programmes regarding Natura 2000 are taken into account in the sense that they may, if need be, lead to appropriate rectifications in project design or to additional compensation and mitigation measures.

**Annex 1** : Sequence of exchanges between the Environment DG of the Commission and the Dutch administration

In **July 2000** the Dutch administration requested consultations with DG Environment about the application of art. 6 (3) & (4) of the Habitats Directive to an extension project for the Rotterdam Harbour. Several informal meetings between Dutch and EC officials took place during 2000-2001. DG Environment advised the Dutch representatives to notify the complete project to the Commission and to request an opinion from the Commission before taking any operational decisions.

**05.11.2001** : Transmission of a draft concept for a notification according to article 6 (4) of the Habitats Directive, accompanied by an advisory study about the possibilities for compensating loss of natural values in affected Natura 2000 areas (“Advies over natuurcompensatie bij een tweede Maasvlakte”, PMR 2001).

**27.11.2001** : Meeting between Dutch officials and technical and legal units of DG ENV, following a request by the Netherlands.

- The Commission took note of the description of the project by the Dutch delegation.
- The Commission made the following statements regarding procedural steps:

“The Dutch authorities are advised to formulate the notification of the project according to art. 6 HD and the request for an opinion of the Commission as conditioning their decision to execute it , so as not to put the Commission before accomplished facts.”

“The Commission will study in detail the advisory document on proposed compensation measures it received from PMR and compare it with the documentation on potential compensations that is has received from various Dutch NGO’s and academic sources.”

“The proposed concept for a notification of the PMR project according to article 6 (4) of directive 92/43/EEC does not elaborate on the land reclamation project’s potential effects on the sediment balance in the Dutch coastal sea and the Wadden Sea. As the Wadden Sea is a Natura 2000 site of paramount international importance, the Commission expects that any final decision concerning PMR will contain appropriate monitoring elements and provisions to rectify developments affecting its conservation status.”

*“An opinion from the Commission in the sense of article 6 (4) of directive 92/43/EEC on the PMR project will have to take into account inputs from other Directorates General involved in harbour development, such as DG Regional Affairs, DG Transport and Energy and DG Economic and Financial Affairs.”*

**12.03.2002** : The Netherlands sent to DG Environment a formal notification titled “PMR Birds and Habitats Directives - Request by the Netherlands for advice and exchange of information with the European Commission within the framework of the Birds and Habitats Directives“ . This notification states that the Netherlands seek the opinion of the Commission concerning compensatory measures for the affected priority habitat and wish to inform the Commission concerning compensatory measures for the effects on non-priority species and habitats, prior to the final Cabinet decision (“PKB-plus , deel 4”) to execute the project.

**25.03.2002** : DG Environment reply to the notification about consulting other EC services about the project.

**17.05.2002** : DG Environment request to the Dutch Government for submission of documents and studies mentioned in the text of the notification.

**03.07.2002** and **08.07.2002** : Transmission by the Dutch government of the requested documentation.

**Annex 2**: Description of exchanges about PMR between DG Environment and other Dutch stakeholders

During **2000-2001**, DG Environment received delegations from several Dutch nature conservation organisations who presented their views about the PMR project and submitted studies and other technical and legal documentation.

During **2000-2001**, DG Environment exchanged views with the Dutch National Fisheries Association (“Produktschap Vis”) about the effects of land reclamation and nature compensation measures on fishing activities in the coastal sea.

In **2002**, DG Environment exchanged views with the European Dredging Association about the impact of the Habitats Directive on dredging operations related to the PMR project.

**Annex 3** : Documentation received by the Environment DG of the Commission from the Dutch administration and mentioned in the text.

– Transmitted on 03.07.2002 :

(I.) Overview of economic data about the port of Rotterdam (Min. V &W)

(II.) Overview map with different components of PMR (Min V&W)

(III) “Toetsingsadvies over het MER mainportontwikkeling Rotterdam” (Commissie voor MER , 2001)

(IV) “Effecten van Landaanwinning Maasvlakte 2 op het slibtransport langs de Nederlandse kust” (Delft Hydraulics, 2001)

(V) PMR Interim Report “On Course” (PMR, 1999)

(VI) Clarification note about different studies mentioned in the notification (Min V&W)

(VII) Notitie "Het economisch belang van de Mainport Rotterdam" (Min V&W, 2000)

(VIIIa) “Ontwerp PKB-plus , deel 1” (PMR, 2001)

(VIIIb) “PKB-plus , deel 3 : Kabinetsstandpunt” (PMR , 2001)

(IX) “Bijlage Natuur en Recreatie Landaanwinning” (Rijkswaterstaat, 2<sup>nd</sup> version of May 2000)

(X) “Vervolgstappen bestaand Rotterdams gebied” (Gemeente Rotterdam, 2000)

- Transmitted on 08.07.2002 :

(XI) “Memorandum of understanding for the constituent projects of Rotterdam Mainport Development Project (PMR)”