

Practical Problems in Implementation of the Appropriate Assessment of Natura 2000

An analysis on Natura 2000 appropriate assessment
in Bulgaria, Estonia, the Czech Republic, Hungary
and Slovakia

Legal Analysis

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Practical problems in implementation of the Appropriate Assessment

Natura 2000

2016

Association Justice and Environment (J&E) is a European network of environmental law organizations that strives to protect the environment and nature by improving environmental legislation and enhancing the enforcement thereof. J&E has been working on nature conservation and biodiversity related legal issues for years tackling and analyzing the implementation of the EU Nature legislation, including the procedure of appropriate assessment.

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Context of the analysis

The Natura 2000 network has been established by the Birds Directive¹ and the Habitats Directive². One of the main legal tools in the protection of Natura 2000 from harmful human activities is the appropriate assessment which includes the evaluation of potential impacts of plans and projects before they are permitted by the competent authorities.

The short guidance of J&E on appropriate assessment³ summarizing the main provisions and the case law of the CJEU in this matter was published in 2016, and it outlined the steps of that proceeding, such as (a) screening, (b) identifying specific adverse effects on the site and the degree of jeopardy to the site, (c) consideration of alternative, more nature-friendly solutions, and (d) consideration of the existence of imperative reasons of over-riding public interests.

It has to be noted that not all procedural steps apply in all cases, however, in case of that any Natura 2000 site could be affected by a given project, the first step (identification of whether the project may have any significant adverse effects on the site and therefore a “full” appropriate assessment must be carried out) shall be taken. If the likelihood of such impacts is established, the screening must be followed by the second stage, i.e. the identification of the specific adverse effects on the site, the degree of jeopardy to the site and the necessary mitigation measures.

If a plan or project - despite all identified mitigation measures - might adversely affect the integrity of the site, it cannot be permitted; and alternative, more nature-friendly solutions must be sought. In case of no better alternatives are found, the plan or project may only be permitted exceptionally, if there are imperative reasons of over-riding public interests (IROPI). When the plan or project is exceptionally allowed based on IROPI, compensatory measures have to be implemented.

An EU level research on the strengths and weaknesses of Natura 2000⁴ concluded that one of the main strengths of the Natura 2000 network is the adequacy of the EU legal frame, but one of the main weaknesses is the lack of political will from local and national governments toward effective implementation. The key findings in relation to the Natura 2000 assessment were that deficient biodiversity knowledge, uncertainty in predicting cause-effect relationships, and ambiguity in the science-policy interface imposed by conflicts among stakeholders hinder the implementation of the appropriate assessment’s results. The low quality of the assessments has been documented which led to investments with negative impact on the conservation status of habitats and species inside Natura 2000 sites. The research highlighted that the improvement in the quality of the Natura 2000 assessment and the stricter implementation thereof are strongly needed.

To evaluate the functioning of Natura 2000 appropriate assessment, J&E gathered information on the problems of implementation from environmental NGOs on national level, and collected cases where development plans or programs came into direct contact with sites of the Natura 2000 network in five Member States (Bulgaria, Estonia, the Czech Republic, Hungary and Slovakia).

¹ Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds

² Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora

³ http://www.justiceandenvironment.org/fileadmin/user_upload/Publications/2016/AA_guide_eng__4_.pdf

⁴ V.Kati et al.: *The Challenge of Implementing the European Network of Protected Areas Natura 2000*. in Conservation Biology, edited by: Mark A. Burgman, 2014.
[http://onlinelibrary.wiley.com/journal/10.1111/\(ISSN\)1523-1739](http://onlinelibrary.wiley.com/journal/10.1111/(ISSN)1523-1739)

Adoption of plans and projects without Appropriate Assessment

According to the provisions of the EU Habitats' Directive explained above, without appropriate assessment, projects or plans which may have significant effects on a site of the Natura 2000 network cannot be authorised. In spite of the basic rule, there could be identified cases where appropriate assessment was not conducted (e.g. in Estonia and in Slovakia).

In the case of the '*Small hydro power plant on the river Nitra - Nové Zámky*' in Slovakia no appropriate assessment took place before the authorization of the project. Although - according to a national nature conservation NGO participating - the small hydroelectric power plant located on the river Nitra in the area of Zúgov will have significant impact on the sites concerned, SPA "Lower Považie" and SAC Zátoň, the evaluation of the potential impacts on these sites was missed. (See the case study on "Appropriate assessment" of Small hydro power plant on the Nitra River on p. 26)

The SEA⁵ Directive provides that where the obligation to carry out assessments of the effects on the environment arises simultaneously from this Directive and other Community legislation, such as Birds Directive or Habitats Directive, in order to avoid duplication of the assessment, Member States may provide for coordinated or joint procedures fulfilling the requirements of the relevant Community legislation. The EU legislation is clear in this point view; in case of plans or projects falling under the scope of the strategic environmental assessment (SEA), which may have significant impact on Natura 2000 sites, appropriate assessment shall be also carried out; however, the question whether appropriate assessment will be conducted during the SEA in practice, is arising.

In Estonia, the spatial plan for sea area surrounding Hiiumaa Island has been approved without conducting the Natura 2000 appropriate assessment for that plan. The SEA report contained the "screening" for appropriate assessment, which concluded that there are several likely adverse effects to a whole range of habitats and species protected under the EU Habitats and Birds Directives. Despite this, a detailed appropriate assessment was not carried out, arguing that it can and should be done at later stages for some planned activities (underwater power cables, fish and crab farms, and offshore wind parks). (See the case study on „Appropriate assessment“ of marine spatial plan for sea area surrounding Hiiumaa Island on p. 14).

The appropriate assessment was therefore skipped based on the reasoning that during the following authorization procedures it can and will be carried out. In the planning procedure the likely impacts of the activities in question did not undergo such assessment, although - in accordance with the EU Law⁶ - it must have been proven that the activity would not have any significant effects on the sites concerned before such a plan could be adopted.

Quality of the Natura 2000 assessment

When evaluating whether a plan or project may have significant effects – beside the aspects already mentioned - best scientific knowledge in the field shall be taken into account.

This principle includes that the experts participating in the assessment should be qualified, competent and independent, and the methods and data applied have to be adequate. In addition to the quality of the assessments, there were number of shortcomings identified which hinder the effectiveness of the Natura 2000 framework.

⁵ Recital (19) of the SEA Directive

⁶ Article 6(3) of the Habitats Directive

'Reasonable scientific doubt' as a criterion in decision-making

During screening and decision-making, in order to identify whether the plan or project will not have significant impacts on the given sites, any **reasonable scientific doubt** on the likelihood of those impacts must be unambiguously excluded. In spite of this principle, in Estonia and in the Czech Republic, J&E identified cases where this requirement was not fulfilled.

In Estonia, the appropriate assessment for the "Plan for perspective connections for passengers and goods of the strait of Suur Väin " was carried out as part of the SEA of the plan. The opinions of the scientists participating in the preparation of the assessment did not accord with each other. As regards birds and ringed seals, specific studies were carried out, and the study on birds concluded that all bridge alternatives would be a significant hurdle for migrating birds and pose a significant risks of collisions and therefore bird mortality. The study on marine mammals concluded that negative impacts of any of the bridge alternatives could not be ruled out.

In spite of these statements, the summary study claimed that all of the alternatives proposed were ecologically acceptable. The lead expert claimed that all impacts brought out by the other experts were not "significant" when taking into account experience with other supposedly similar projects.

If it cannot be excluded that the plan or project will have a significant effect on the site (reasonable scientific doubt remains), then significant adverse effects on the site are presumed. As a rule, such a plan or project must therefore be refused authorization, safer alternatives must be sought or if these do not exist, the plan or project is only allowed to be authorized on exceptional grounds.

The competent authority for supervision and review of appropriate assessments, however, approved the assessment report, despite conflicting opinions on the potential impacts. Additional expert opinions concluded that the opinion which the authority has taken into account was too generic and its references were not able to remove doubts. Therefore, the approval of the assessment that claimed all alternatives would be acceptable from the ecological point of view, was contrary to article 6(3) of the Habitats Directive. (See the case study on the „Appropriate assessment“: Plan for perspective connections over „Suur väin“ strait on p. 17)

In the Czech Republic, the appropriate assessment of the project of improving navigability on the Labe River („Děčín canal step“) was carried out as a part of the environmental impact assessment (EIA). In addition to the project, two alternative solutions for its realization were assessed. According to the information received from nature conservation experts, the appropriate assessment was carried out twice. The first assessment determined the impact on Natura 2000 sites as overall significant and introduced numerous mitigation and compensatory measures. The second assessment concluded that the impact on the environment is likely to be significant, however to a lesser extent and therefore it proposed fewer and less stringent measures to be taken by the operator. The assessment concluded that one alternative has significant adverse effects on protected sites and species and their integrity whereas the other alternative does not. The investor chose the more lenient assessment to be submitted for the appropriate assessment procedure which is still pending. (See in case study on the „Appropriate assessment“: Project of improving navigability on the Labe River „Děčín canal step“ on p. 12)

'Qualification and independence of experts'

The appropriate assessment is based on the findings and statements of the study presenting the specific features and environmental conditions of the protected site and impacts of the project on the integrity of the site (AA study). The AA study plays an important role in the final decision, but it

has to be noted that the quality of that study depends on the adequate knowledge and independence of the expert elaborating the assessment.

In Slovakia, lack of appropriate national requirements on **qualification of the experts** and on ensuring the **experts' independence from the investor** has been highlighted by the NGOs. In Hungary the relevant legislation lays down that based on the AA documentation prepared by the project promoter the appropriate assessment shall be conducted by the competent nature conservation authority. The wording of the same article points out that the documentation of the AA may be prepared by an expert qualified in accordance with the specific piece of legislation on nature conservation experts. Namely, the Hungarian legislation provides for, but does not require that the documentation is to be prepared by a qualified expert.

The national provisions requiring that it is the project promoters that have to prepare and submit the study which will be the basis of the authority's decision raise doubts with regard to the independence of the experts, given that the developer is in fact paying for the assessment. The case of the 'Wolfram mine in Velingrad, Bulgaria' illustrates this problem of dependence (See the case study on "Appropriate assessment" of the wolfram mine in Velingrad on p. 8). In this case the AA study had to be carried out by a team of experts, specialized in protection of Eurasian wolf and brown bear and by experts in protection of birds and habitats. Additional requirement to the AA report was to analyze the impact of the project on the underground waters and how that would affect the species and habitats. The experts – contracted by the developer – stated that the project won't have or will have only insignificant impacts on the protected sites. Their opinion entirely contradicted the claims of the experts of the environmental NGO about the likely significant impacts. In order to clarify the contradiction, the proceeding has been suspended until the decision on the quality (and credibility) of the EIA and AA reports which decision will be made by the Expert Environmental Council.

If the independence of the experts can be questionable, it may strongly influence the final results of the AA procedure. The problem is that the experts preparing the AA study who are contracted by the developer tend not to conclude anything decisive against project and, indirectly, support the realization of the project.

It is therefore very important to establish guarantees into the national provisions ensuring that the AA study shall be prepared by independent experts possessing adequate qualification and expertise.

'Adequacy of baseline data'

In practice, the problem of the **adequacy of the baseline data** (or even their existence) has also arisen. In case of the flood bed regulation of the Middle-Tisza River in Hungary environmental NGOs have claimed that some elements of the project (e.g. removing of reefs, shallows and above all the regulation of proliferating vegetation) will likely have significant impacts on the Natura 2000 sites. The appropriate assessment was carried out in 2011, and an NGO following the implementation process claimed that the data which were taken into account as well as the mitigation and compensation measures based thereon were already outdated as the realization of the project started only in 2016. According to the information available, the appropriate assessment has not been updated.

During the SEA of the marine spatial plan for the sea area surrounding Hiiumaa Island in Estonia the SEA Report concluded that likely adverse effects to a whole range of protected habitats and species can be expected. As mentioned above, in this case appropriate assessment was not carried out, referring to that it has to be done at later stages of permitting the planned activities. Furthermore,

there was neither sufficient data on the affected environment (some of the data was out-of-date or missing totally) nor the planned activities to give a detailed assessment on likely effects on the Natura 2000 sites. Lack of baseline data should, however, not have been an excuse to refrain from appropriate assessment – quite the contrary, the CJEU case law requires „best scientific knowledge“ to be used, which implies that data should be gathered, if not available. (See the case study on “Appropriate assessment” of marine spatial plan for sea area surrounding Hiiumaa Island on p. 14)

Conclusions

The Birds and Habitats Directives provide a strong framework for achieving the EU 2020 biodiversity goals; however, there are still deficiencies in their implementation. As regards the implementation of the appropriate assessment, number of practical problems have been identified by both J&E and other experts. While in few cases, no appropriate assessment was carried out at all, use of inappropriate data, issuing development consent in spite of reasonable scientific doubts and other problems were also be found.

The requirement of applying the “best scientific knowledge” means that high standards should be applied both to the experts carrying out the assessment as well as the methods they apply. These must take into account the specific characteristics of the site and cannot be “generic”. Therefore if there are no clear and strict requirements on the qualification and appointment of the assessor/expert, or if reasonable scientific doubts exist, the findings of the assessment cannot not be acceptable.

It has to be highlighted that in case of multi-level decision-making, once the higher-level decision (e.g. adoption of the SEA of a spatial plan) allows, in principle, a certain area to be used for certain development, despite the already known potential negative impacts to Natura 2000 sites, this gives a wrong signal to project promoters who either waste further resources in vain and/or will claim presumption of admissibility of their plans in later proceedings. Therefore it is recommended that according to the EU Directives and interpreting CJEU case law, the decision of excluding certain developments should be taken at the earliest possible stage.

Based on the cases of Děčín canal step and Suur väin, it is also recommended that disagreements within the experts should be regarded as „reasonable scientific doubt“ that has to be solved before adopting the assessment and making the decision on the development consent.

In order to improve Natura 2000 implementation it can, among others, be recommended to stress the necessity of the appropriate assessment in SEA procedures, to raise awareness of national decision-makers on the CJEU case law on appropriate assessment, to involve high-quality conservation experts in the assessment and strengthen quality control of the assessment studies. For more detailed suggestions on improving the Appropriate Assessment procedures, see “Making Natura 2000 impact assessments truly appropriate: an action plan”.

„Appropriate assessment“: Investment Proposal for extraction and processing of wolfram ore from the field „Grancharitsa -center“, near the village of Krastava, Velingrad municipality

17.10.2016, Plamen Peev

1. Identification data of the case (decision-maker, title and No. of the decision)

Regional Inspectorate for Environment and Waters (RIEW) -Pazardzhik is the competent authority, the procedure is pursuant to Art. 31, para. 1 and 4 of the Biodiversity Act and Art. 2, para. 1, p. 1 and Art. 39, para. 3 of the Appropriate Assessment Ordinance (*the title shortened*). According to Art. 38 of the Appropriate Assessment (AA) Ordinance the AA procedure is carried out as part of the EIA of the investment proposal. There is not yet a final decision of the RIEW. The procedure has been suspended pending on a decision of the River Basin Directorate „Iztochnobelomorski basin“ for designation of sanitary protected zones around river catchments of the rivers Grancharitsa and Malka Reka, used for drinking water supply of the town of Velingrad.

2. Please, describe the main features of the plan or project, the concerned Natura 2000 site and its conservation objectives (species, habitats) and the likely impacts of the plan or project on the site.

The investor for the project is Resurs -1 JSC, Plovdiv. The main opponents challenging the EIA procedure is the “Citizen Initiative for protection of Velingrad municipality as ecologically clean region without mining” and other NGOs. The main features of the project are the following:

- underground extraction of wolfram-containing ore;
- preliminary treatment of the ore on site;
- disposal of the non-ore sterile material to an open disposal site;
- dressing of the ore will be done at another site – at the ore-dressing plant “Elshitsa”.

The proposed site for the mining project is in the vicinity of two protected areas:

1. Rodopi- Zapadni, code BG0001030, declared as SCI under the Habitats Directive⁷:

The site was designated as a SCI by a Council of Ministers Decision No. 661/16.10.2007 (promulgated SG 85/2007). It was extended by Council of Ministers Decision No. 811/16.11.2010 (promulgated SG 96/2010).

This is the largest proposed SCI in Bulgaria (272851.4060 ha) and one of the largest in Europe. It is also key place for the conservation of the brown bear and –without protecting this area from human impacts and fragmentation, the future of the whole Rilo-Rhodopean population (including the Greek one) will be uncertain. The SCI protects important percentages of the national coverage (A and B values) of many habitats and species.

2. Zapadni Rodopi, code BG0002063⁸, classified as SPA under the Birds Directive:

⁷ <http://natura2000.eea.europa.eu/Natura2000/SDF.aspx?site=BG0001030>

⁸ <http://natura2000.eea.europa.eu/Natura2000/SDF.aspx?site=BG0002063>

The site was classified as SPA by Council of Ministers Decision No. 122/02.03.2007 (promulgated SG 21/2007). The designation order was issued by the Minister of Environment and Water with prohibitions and restrictions on activities contradicting the conservation objectives of the site – Order No. RD – 835/17.11.2008 (promulgated SG 108/2008). The site was extended by Council of Ministers Decision No. 335/26.05.2011 (promulgated SG 41/2011) and an Order No. RD – 890/26.11.2013 was issued and promulgated in SG 107/2013 for extension of the site and introducing in the increased area of the site the prohibitions set by Order No. RD – 835/17.11.2008. The total area is 133384.7816 ha.

The region of the site Zapadni Rodopi (Western Rhodopes) supports 130 bird species, mainly breeding ones, 21 of which are listed in the Red Data Book for Bulgaria (1985). Of the birds occurring there 43 species are of European conservation concern (SPEC) (BirdLife International, 2004), 15 of them being listed in category SPEC 2 and 28 in SPEC 3 as species threatened in Europe. The area provides suitable habitats for 26 species, included in Annex 2 of the Biodiversity Act, which need special conservation measures, of which 23 are listed also in Annex I of the Birds Directive. The Western Rhodopes hold the biggest breeding population of the Capercaillie *Tetrao urogallus* in Bulgaria. It is among the most valuable areas in the country on the level of European Union for this species, as well as for the Hazel Grouse *Bonasa bonasia*, the Pygmy Owl *Glaucidium passerinum*, the Tengmalm's Owl *Aegolius funereus*, European Nightjar *Caprimulgus europaeus*, the Black Woodpecker *Dryocopus martius*, White-backed Woodpecker *Dendrocopos leucotos* and the Honey Buzzard *Pernis apivorus*. The area is also important on a European scale for the European Robin *Erithacus rubecula*, the Common Chaffinch *Fringilla coelebs*, the Ring Ouzel *Turdus torquatus*, the Common Blackbird *Turdus merula*, the Goldcrest *Regulus regulus* and the Blackcap *Sylvia atricapilla*.

The distance between the borders of the protected sites and the site of the proposed project are respectively 2445 m to Rodopi-Zapadni and 850 m to Zapadni Rodopi and part of the concession area falls in protected area Zapadni Rodopi even though there are not any activities or construction planned within it.

The likely impacts of the development on the protected sites include direct destruction of natural habitats and habitats of species, object of protection in the sites, fragmentation of the habitats and habitats of species, disturbance of specimen of animal species, barrier effects for the animal species and possible mortality of specimen of the animal species.

3. Was the „appropriate assessment“ carried out? If yes, please, summarize the stages and results of the procedure in 3-4 paragraphs.

Yes. At the public hearing within the EIA procedure besides other objections and criticism an objection by Wildlife Society Balkani was raised criticising the EIA report about the lack of appropriate assessment of the impacts of the realization of the project on the protected sites Zapadni Rodopi and Rodopi -Zapadni. The WS Balkani claimed that damages to the habitats and biological corridors of the species Eurasian wolf (*Canis lupus*) and of brown bear (*Ursus arctos*), subject of protection in protected site BG0001030 Rodopi -Zapadni are likely to occur, as well as disturbance and damages to the populations of species, subject of protection in protected site BG0002063 Zapadni Rodopi.

Following the public hearing's results the Director of the RIEW Pazardzhik took the decision to require from the investor to file as part of the EIA report a special appropriate assessment report about the degree of impacts of the realization of the project on the protected sites Zapadni Rodopi and Rodopi Zapadni and on their conservation objectives. The assessment had to be carried out by a team of experts, specialized in protection of Eurasian wolf and brown bear and by experts in protection of birds and habitats. Additional requirement to the AA report was to analyse the impact of the project on the underground waters and how that would affect the species and habitats. In February 2016 the investor filed an appropriate assessment report with main conclusions that there are no impacts on the protected sites or they are insignificant.

At the moment the procedure has stopped at the stage where the Expert Environmental Council to the RIEW Pazardzhik should review the EIA report together with the AA report. As mentioned above, the procedure has been suspended pending on a decision of the River Basin Directorate „Iztochnobelomorski basin“ for designation of sanitary protected zones in the vicinity of the project site around river catchments of the rivers Grancharitsa and Malka Reka, supplying drinking water for the town of Velingrad. Upon issuing of such a decision EIA procedure including the one of appropriate assessment will be resumed ex officio.

4. If there was not any assessment: was it excluded, on the basis of objective information, that the proposed activity could likely undermine conservation objectives of the Natura 2000 site, either individually or in combination with other plans or projects?

N/A

5. Did the authorities make certain that the proposed activity will not adversely affect the integrity of that site prior to authorization, i.e. no reasonable scientific doubt remained as to the absence of such effects based on the „appropriate assessment“?

Yes, as mentioned above the Director of the RIEW Pazardzhik asked the investor to prepare a full appropriate assessment report as part of the EIA report. The AA had to be carried out by a team of experts, specialized in protection of Eurasian wolf and brown bear and by experts in protection of birds and habitats. Additional requirement to the AA report was to analyse the impact of the project on the underground waters and how that would affect the species and habitats. However, the findings and conclusions (of no impact or insignificant impacts on the protected sites) of these

experts contradict the initial claims of environmental NGO experts about likely significant impacts. Two NGO representatives are appointed as members of the Expert Environmental Council which will decide on the quality (and credibility) of the EIA and AA reports.

6. Were the results of the „appropriate assessment“ – or, if the authorities found it unnecessary, the decision – challenged on court? Who was the claimant?

No, the procedure is still at its administrative stage for issuing of a decision of the RIEW Director for authorizing the investment proposal.

7. If the result of the appropriate assessment was challenged on court, please summarize main findings of the court as regards:

- a. *if the appropriate assessment was needed and why;*
- b. *what was the standard that should be applied to the assessment;*
- c. *when can an activity potentially affecting Natura 2000 site be authorised?*

No, the administrative procedure before the RIEW Pazardzik is still ongoing.

8. Any other relevant comments

In this case the role of the NGO participation in the procedure was critical. WS Balkani possesses the expertise and experience of participating in many EIA and AA procedures and they have blocked successfully with valid arguments other investment proposals with poor quality of the reports or procedural omissions. Their intervention by pointing out the lack of appropriate assessment of the impacts of the proposal on two protected areas in immediate vicinity with the proposed mining project site influenced the decision of the Director of the RIEW Pazardzhik to request from the investor a full appropriate assessment. Strategically, this was a very important move because the new AA procedure bought time for the citizens initiative and other opponents of the mining project to mobilize legal and political support which led to new obstacles to the authorization of the project (under the Water Act designation of sanitary protection sites) and declaration of the municipal council of Velingrad municipality for cancellation of the procedure. The latter does not have any legal effect on the decision of RIEW but it is politically important which is often a decisive factor behind the scene of the formal procedures.

Formally, the procedure is ongoing (currently suspended) but one finding is that the quality of the EIA and AA reports in practice is almost in every case dependant on the interests of the investor who contracts the EIA and AA team of experts so that they are very careful not to conclude anything decisive against project. Often the only chance for a thorough and quality assessment procedure to be carried out is the participation of strong environmental NGOs and active local citizens who oppose the project and bring in arguments and facts for its review and potential rejection.

Case study – Czech Republic

„Appropriate assessment“: Project of improving navigability on the Labe River „Děčín canal step“

22. 7. 2016, Petra Ginova

1. Identification data of the case (decision-maker, title and No. of the decision)

The procedure concerns the project of „Děčín canal step“ (aiming at improving river traffic on the Labe River). Appropriate assessment has been finished in October 2015 and the EIA process is still being finalised, in March 2016, third version of EIA documentation was submitted.

2. Please, describe the main features of the plan or project, the concerned Natura 2000 site and its conservation objectives (species, habitats) and the likely impacts of the plan or project on the site.

The aim of the project is to secure river traffic conditions by widening and deepening the river bed and some other operations ensuring permanent navigability of the Labe River. This enables traffic to function on an all-year-round bases

According to the appropriate assessment of the project, following habitats may be impacted by planned activities:

- 3260 (Water courses of plain to montane levels with the Ranunculion fluitantis and Callitricho-Batrachion vegetation);
- 3270 (Rivers with muddy banks with Chenopodion rubri p.p. and Bidention p.p. vegetation);
- 91E0 (Alluvial forests with Alnus glutinosa and Fraxinus excelsior (Alno-Padion, Alnion incanae, Salicion albae)).

Following Habitats' Directive Annex II species may be impacted:

- Eurasian otter (*lutra lutra*);
- Atlantic salmon (*salmo salar*);
- Eurasian beaver (*castor fiber*).

Potential negative impacts to habitats and species have been specified by the appropriate assessment as likely to have significant or somewhat significant impact on protected sites and species, including destruction of bank vegetation due to increased traffic and construction works, rising water level will result in destruction of species metapopulation affecting species structure on the site, obstruction to significant migration route for salmon and numerous other fish species not protected by Natura 2000, migration limitation for otter and beaver, disturbance of all concerned species by construction works and by operation of the project.

3. Was the „appropriate assessment“ carried out? If yes, please, summarize the stages and results of the procedure in 3-4 paragraphs.

Appropriate assessment was carried out as a part of the EIA of the project. Two alternatives of carrying out the project were assessed. According to our information, appropriate assessment was carried out twice when the first one determined the impact on Natura sites as overall significant and introduce numerous mitigation and compensatory measures. Whereas the second assessment concluded that the impact on the environment is likely to be significant, however in fewer cases and with fewer and less stringent measures to be taken by the operator. The project submitter, therefore, chose the more lenient appropriate assessment to be submitted for the procedure.

The assessment concluded that one alternative has significant adverse effects on protected sites and species and their integrity whereas the other alternative does not.

- 4. If there was not any assessment: was it excluded, on the basis of objective information, that the proposed activity could likely undermine conservation objectives of the Natura 2000 site, either individually or in combination with other plans or projects?**

N/A

- 5. Did the authorities make certain that the proposed activity will not adversely affect the integrity of that site prior to authorization, i.e. no reasonable scientific doubt remained as to the absence of such effects based on the „appropriate assessment“?**

The final decision has not yet been made and the newest version of EIA documentation has not yet been approved as well. In the stage the project is in now and with regard to the conclusions of the second appropriate assessment, the proposed alternative has no adverse effects on the protected species and sites and therefore only minimal measures in order to avoid adverse effects will be taken. This seems to be the result of the submitter choosing his assessor according to the conclusion they make on the project.

- 6. Were the results of the „appropriate assessment“ – or, if the authorities found it unnecessary, the decision – challenged on court? Who was the claimant ?**

No.

- 7. If the result of the appropriate assessment was challenged on court, please summarize main findings of the court as regards:**
- a. if the appropriate assessment was needed and why;
 - b. what was the standard that should be applied to the assessment;
 - c. when can an activity potentially affecting Natura 2000 site be authorised?

N/A

- 8. Any other relevant comments**

The information above were provided by authorised Natura assessors, authors of the first, more stringent assessment. They have many years of experience and claim that „choosing“ your assessor is a usual business in the field (an in effect more profitable for those who provide more lenient assessments).

Case study I. - Estonia

„Appropriate assessment“: marine spatial plan for sea area surrounding Hiiumaa Island

4.07.2016, Siim Vahtrus

1. Identification data of the case (decision-maker, title and No. of the decision)

Order No 1-1/2016/114 of Hiiumaa County governor of 20.06.2016 „Approval of the spatial plan for sea area surrounding Hiiumaa island“.

2. Please, describe the main features of the plan or project, the concerned Natura 2000 site and its conservation objectives (species, habitats) and the likely impacts of the plan or project on the site.

The aim of the spatial plan was to determine general terms of use of the sea area surrounding Hiiumaa island. Conflicting uses and plans for the use of sea area such as shipping, underwater pipelines and high-voltage power cables, ice-roads, extraction of minerals, fishing, recreational use, wind and wave energy development as well as fish farming were determined, evaluated and in some cases assigned to a specific area. For example, potential locations for offshore wind farms and fish farming as well as military exercises were determined.

The sea area covered by the spatial plan is an ecologically valuable area. Altogether 3 SPAs and 7 SAC are found in the area. Planned activities that may have most impacts to the conservation objectives of these areas are construction and operations of off-shore wind farms, power lines connecting these to the main grid, reserving area for military exercises (also with live ammunition and charges), fish farming and shipping.

According to the SEA of the plan, following habitats may be impacted by planned activities:

- 1110 (Sandbanks which are slightly covered by sea water all the time);
- 1140 (Mudflats and sandflats not covered by seawater at low tide);
- 1150* (Coastal lagoons);
- 1160 (Large shallow inlets and bays);
- 1170 (Reefs).

Following Habitats' Directive Annex II species may be impacted:

- Grey seal (*Halichoerus grypus*);
- Ringed seal (*Phoca hispida bottnica*);
- European bullhead (*Cottus gobio*).

More than 20 species of bird species belonging to the Annex I of the Birds Directive and found in the area may also be negatively impacted.

Potential negative impacts to habitats and species are numerous, including loss of habitats due to construction works of different objects (open-sea fish and crab farms, cables and wind turbines), disturbance of seals by shipping and mortality of ringed seal pups when ice they inhabit is broken to keep the shipping lanes open, disturbance of water birds by wind turbines that also act as flight barriers and create collision risks.

- 3. Was the „appropriate assessment“ carried out? If yes, please, summarize the stages and results of the procedure in 3-4 paragraphs.**

No.

- 4. If there was not any assessment: was it excluded, on the basis of objective information, that the proposed activity could likely undermine conservation objectives of the Natura 2000 site, either individually or in combination with other plans or projects?**

No. On the contrary, the SEA report contains also the “screening” for appropriate assessment, which concluded that there are several likely adverse effects to a whole range of habitats and species protected under the EU Habitats and Birds Directives. Despite this, the appropriate assessment was not carried out, arguing that this can and should be done at later stages for some planned activities (underwater power cables, fish and crab farms, and offshore wind parks). According to the SEA, at this point of time there was neither sufficient data on the affected environment (some of the data was out-of-date or missing totally) nor the planned activities to give a detailed assessment on likely effects on the Natura 2000 sites.

- 5. Did the authorities make certain that the proposed activity will not adversely affect the integrity of that site prior to authorization, i.e. no reasonable scientific doubt remained as to the absence of such effects based on the „appropriate assessment“?**

No. Although the spatial plan approved is not the final decision for a number of the activities (wind parks, fish farms etc.), it still allocated some areas as potential areas for such development despite the fact that the “screening” for appropriate assessment concluded that these developments would have negative impacts for the conservation objectives. For some activities, such as using a large sea area for military exercises, this is basically last official decision.

- 6. Were the results of the „appropriate assessment“ – or, if the authorities found it unnecessary, the decision – challenged on court? Who was the claimant ?**

Not yet (the due date has not arrived yet). According to information received by EELC, however, there are several potential court challenges planned.

- 7. If the result of the appropriate assessment was challenged on court, please summarize main findings of the court as regards:**

- a. if the appropriate assessment was needed and why;**
- b. what was the standard that should be applied to the assessment;**
- c. when can an activity potentially affecting Natura 2000 site be authorised?**

N/A.

- 8. Any other relevant comments**

This case is an extreme example of how appropriate assessment is “kicked down the road” in case of multi-level decision making. Although impacts can be better assessed the more detailed the development plans are, the more abstract nature of a plan should not be used as an argument not to carry out an appropriate assessment at all. The practical problem here is that once the higher-level decision (e.g. spatial plan) in principle allows a certain area to be used for certain development, despite the already known potential negative impacts to Natura 2000 sites, this gives a wrong signal to project promoters who either waste further resources in vain and/or will claim presumption of admissibility of their plans in later proceedings. According to the EU law and interpreting CJEU case law, the decision of excluding certain developments should be taken at the earliest possible stage.

The second really crucial aspect here is that one of the reasons for not carrying out the appropriate assessment in this case was lack of baseline data. This should never be an excuse to refrain from appropriate assessment – quite the contrary, the CJEU case law requires „best scientific knowledge“ to be used, which implies that data should be gathered, if not available.

„Appropriate assessment“: Plan for perspective connections over „Suur väin“ strait

1 July 2016 by Siim Vahtrus

1. Identification data of the case (decision-maker, title and No. of the decision)

The decision which impacts was assessed is titled „Plan for perspective connections for passengers and goods of the Suur väin strait“. SEA and appropriate assessment have been finished (approved by the Environmental Board 23.09.2011), but the decision by the Government of the Republic is still pending (at the moment suspended indefinitely due to lack of money).

2. Please, describe the main features of the plan or project, the concerned Natura 2000 site and its conservation objectives (species, habitats) and the likely impacts of the plan or project on the site.

The plan concerns transport connections over a strait called Suur Väin in the west of Estonia. The strait separates the largest island of Estonia from the mainland. The connection is currently established by ferry transport. Aim of the plan is to evaluate alternatives for improving transport link. These options include several versions and locations of a bridge, a tunnel as well as improved ferry connection.

The strait and surrounding areas are part of a large Natura 2000 area. The area is protected both under the Birds Directive (as Väinamere SPA) and Habitats Directive (as Väinamere SAC). A large number of habitats and protected species are found in the area that may be affected by alternative bridge or tunnel versions. Most importantly:

- The strait is an internationally important travel route for migratory birds. During the spring migration period, more than half of the European population of species of Birds Directives Annex I, barnacle goose (*Branta leucopsis*) pass through this area. During autumn migration, 12% of the European population of common crane (*Grus grus*), also a threatened bird species belonging to the Annex I of the Birds Directive, pass through the strait. Altogether, about 1 000 000 birds fly through the strait in spring and about 500 000 in autumn.
- Both shores of the strait include protected habitats, including „priority“ habitats 1630 (Boreal baltic coastal meadows), 6280 (Nordic alvar and precambrian calcareous flatrocks), 6530 (Fennoscandian wooded meadows), 9010 (Western Taiga), 9020 (Fennoscandian hemiboreal natural old broad-leaved deciduous forests).
- The strait is an important route for a threatened seal species ringed seal (*Pusa hispida*). Only about 1500 individuals of the species are found in this part of the Baltic Sea and the strait is a crucial travel route between their birthing areas to the north of it and feeding areas to the south. No alternative travel routes exist for the species.

Likely impacts to the site include permanent destruction of habitats on the potential road links, risks of in-flight collision with a bridge for the birds, disturbances to the seals (which avoid noisy environments) related to use of a bridge as well as serious disturbances related to construction works for all species.

3. Was the „appropriate assessment“ carried out? If yes, please, summarize the stages and results of the procedure in 3-4 paragraphs.

Appropriate assessment was carried out as part of the SEA of the plan. In 2007, the programme for the SEA was developed, together with the detailed plan for carrying out the appropriate assessment. The studies used as the basis for the assessment were carried out in 2008-2009, with the draft report on the assessment ready in December 2009. After publication in May and June 2010, the SEA report was amended according to comments and submitted for review to the Environmental Board in June 2011.

As regards birds and ringed seals, specific studies were carried out by A. Leito (on birds) and I. Jüssi (on marine mammals, incl ringed seals). The study on birds concluded that all bridge alternatives would be a significant hurdle for migrating birds and pose a significant risks of collisions and therefore bird mortality. The study concluded that higher bridge alternatives would not be acceptable from the ecological point of view. The study on marine mammals concluded that negative impacts of any of the bridge alternatives could not be ruled out.

However, the summary study that was composed after specific studies and was authored by the lead expert for the appropriate assessment (R. Yrjölä) disagreed with experts and their findings, claiming that all of the alternatives proposed were ecologically acceptable. The lead expert claimed that all impacts brought out by the other experts were not „significant“ when taking into account experience with other supposedly similar projects.

4. If there was not any assessment: was it excluded, on the basis of objective information, that the proposed activity could likely undermine conservation objectives of the Natura 2000 site, either individually or in combination with other plans or projects?

N/A

5. Did the authorities make certain that the proposed activity will not adversely affect the integrity of that site prior to authorization, i.e. no reasonable scientific doubt remained as to the absence of such effects based on the „appropriate assessment“?

No. The final decision in this case is still pending. The competent authority for supervision and review of appropriate assessments (Environmental Board), however, approved the assessment report, despite conflicting opinions on the potential impacts to birds and sea mammals. As experts directly in charge of carrying out specific studies and assessments in the affected area had come to a conclusion that at least some of the bridge alternatives could adversely affect the site, there were reasonable scientific doubts as regards the impacts of some proposed alternatives.

According to additional expert opinions commissioned by the Estonian environmental NGOs, the opinion of lead expert R. Yrjölä, who based its arguments solely on comparison with experience with other bridges and objects elsewhere, did not remove doubts that this specific project in a given location might have significant impacts on the specific site. The additional expert opinions concluded that opinion of R. Yrjölä was too generic and references too few to remove doubts. Therefore, the approval of the assessment that claimed all alternatives would be acceptable from the ecological point of view (and bridge on a specific route is the preferred option when taking into account socio-economic factors), was contrary to article 6(3) of the Habitats Directive.

6. Were the results of the „appropriate assessment“ – or, if the authorities found it unnecessary, the decision – challenged on court? Who was the claimant ?

Not yet. In the Estonian legal practice, assessments (EIA, SEA or AA) of a plan or project can normally be only challenged together with the final decision.

7. If the result of the appropriate assessment was challenged on court, please summarize main findings of the court as regards:

- a. if the appropriate assessment was needed and why;
- b. what was the standard that should be applied to the assessment;
- c. when can an activity potentially affecting Natura 2000 site be authorised?

N/A

8. Any other relevant comments

This case presents among others an interesting problem. Namely how should the authorities behave in the case there are disagreements within the group of experts that carry out the appropriate assessment? In this particular case the authority exercising supervision over the assessment, sided with the lead expert, finding that his conclusions as regards the (absence of) adverse impacts to the integrity of the site were correct. However, taking into account the strict criteria required by the case law of CJEU, this would appear to be incompatible with the Habitats Directive. Disagreements within the expert group should be qualified as „reasonable scientific doubt“ that bars the decision-maker from approving the plan or project. The same criteria should also apply to authorities that are in charge of approving or rejecting the assessment.

14. 09. 2016.

1. Identification data of the case (decision-maker, title and No. of the decision)

The procedure concerns the project of the floodplain regulation of the Middle Tisza ('Tisza hullámtér: Nagyvízi meder vízszállító képességének javítása a szolnoki vasúti híd és Kisköre közötti szakaszon'). The competent authority was the Inspectorate for Environmental Protection and Nature Conservation of the Middle Tisza Region (No. of the decision: 3746-172/2008.)

2. Please, describe the main features of the plan or project, the concerned Natura 2000 site and its conservation objectives (species, habitats) and the likely impacts of the plan or project on the site.

The floodplain regulation of the Middle Tisza aims to improve the flow carrying capacity of the flood-channel between the settlements of Kisköre and Szolnok. The project includes backward dike relocation, removing of reefs, shallows and the proliferating vegetation. The realization of the project is planned to take three years and will concern 49 settlements indirectly and 15 settlements directly (Besenyszög, Csataszög, Fegyvernek, Kisköre, Kőtelek, Nagykörű, Pély, Szajol, Szolnok, Tiszabó, Tiszabura, Tiszapüspöki, Tiszaroff, Tizasüly, Törökszentmiklós).

The Natura 2000 sites which will be concerned by the project are the Middle Tisza (HUHN10004) SPA, Middle Tisza (HUHN20015) SAC and the Tisza-tó (HUHN20003) SAC.

The site contains the bed of Tisza river and its active floodplain bordered by dams. The river character is middle course. There's a number of oxbow lakes in the site. The floodplain is wide, the most valuable habitats are the riparian forests. Most of them are softwood forest (Populo-Salicetum), but there is also a few remains of hardwood forest (Querco-Ulmetum). The grasslands are secondary, created by cutting the forests. They are mainly used as hayfield. The areas aim at the protection of the habitats of *Peucedanum officinale* and *Gortyna borelii*.¹⁰

The Tisza-tó (Tisza Lake) is a water reservoir. It was established in 1971, the aim was to operate a hydroelectric power station and to reserve irrigation water. Previously the area functioned as an active floodplain of the Tisza river. This 30 km long floodplain-section was relatively broad, contained lots of valuable gallery forests, oxbows, hayfields. The area has kept a lot of ecological values, nowadays this is the biggest wetland-complex of the Great Hungarian Plain. In the last few years the recreation, ecotourism and rod-fishing (angling) became the most important function of the lake. The upper 15 km of the site is not part of the reservoir, it is similar to the other parts of the river's floodplain. The site contains areas outside the dams also, these parts are very valuable wetlands (natural and artificial oxbow lakes).¹¹ According to the information available, a small part of the southern side of the Tisza Lake will be likely concerned by the project.

⁹ The case study is based on the information provided by the NGO participating in the procedure.

¹⁰ <http://natura2000.eea.europa.eu/Natura2000/SDF.aspx?site=HUHN20015>

¹¹ <http://natura2000.eea.europa.eu/Natura2000/SDF.aspx?site=HUHN20003>

3. Was the „appropriate assessment“ carried out? If yes, please, summarize the stages and results of the procedure in 3-4 paragraphs.

The EIA screening procedure was conducted in 2008, and the appropriate assessment was carried out three years later, in 2011. According to the Hungarian legislation the appropriate assessment can be part of the EIA/SEA or can be conducted as an independent procedure by the nature conservation authority, if the EIA/SEA is not required in relation to the project. In case of the activities which are subject to an EIA based on the decision of the environmental authority made in EIA screening (Art. 4(2) of the EIA Directive), but do not reach the lower threshold, or the criteria set forth for the given activity, and in a different procedure (such as in the AA) it has been found that the expected environmental impact of the activity is significant, a full EIA of the project has to be carried out.

According to the project's technical description¹², the environmental authority did not order to conduct the EIA in 2008. Later, when the appropriate assessment was carried out, the environmental authority accepted the results thereof as an environmental audit carried out by the project promoter and the project promoter has not been required to conduct a new environmental permitting procedure. Environmental NGOs claim that some elements of the project (e.g. removing of reefs, shallows and above all the regulation of poliferating vegetation) will likely have significant impacts on the Natura 2000 sites. The main problems claimed by an environmental NGO were that the planned forestry works concern 4,145 hectares and include the extermination of the entire undergrowth, cutting branches of trees to 5 meters, further, there are not any financial resources provided for the maintenance of the cleared flood plain area.

4. If there was not any assessment: was it excluded, on the basis of objective information, that the proposed activity could likely undermine conservation objectives of the Natura 2000 site, either individually or in combination with other plans or projects?

N/A

5. Did the authorities make certain that the proposed activity will not adversely affect the integrity of that site prior to authorization, i.e. no reasonable scientific doubt remained as to the absence of such effects based on the „appropriate assessment“?

The project will likely have adverse impacts on the sites mentioned in Point 2. Based on the project promoter's opinion, in this case the flood prevention is of public interest, therefore IROPI exists which verifies the project.¹³ Furthermore, according to the project promoter the appropriate assessment identified several impact mitigation measures, which have been included into the project description.¹⁴

6. Were the results of the „appropriate assessment“ – or, if the authorities found it unnecessary, the decision – challenged on court? Who was the claimant ?

According to the information available, the decision of the authority has not been challenged.

7. If the result of the appropriate assessment was challenged on court, please summarize main findings of the court as regards:

a. if the appropriate assessment was needed and why;

¹² Technical specification. Source: <http://www.ovf.hu/hu/hazai-futo-projektek/tisza-hullamter-nagyvizi-meder->

¹³ http://kotivizig.hu/index.php?option=com_content&view=article&id=1275:hullamter-rendezes-a-koezep-tiszan&catid=5:arvizvedelem&Itemid=53

¹⁴ Technical specification. Source: <http://www.ovf.hu/hu/hazai-futo-projektek/tisza-hullamter-nagyvizi-meder->

- b. *what was the standard that should be applied to the assessment;*
- c. *when can an activity potentially affecting Natura 2000 site be authorised?*

N/A

8. Any other relevant comments

In Hungary the relevant legislation¹⁵ lays down that based on the AA documentation prepared by the project promoter the appropriate assessment shall be conducted by the competent nature conservation authority. The wording of the same article points out that the documentation of the AA may be prepared by an expert qualified in accordance with the specific piece of legislation on nature conservation experts. Namely, the Hungarian legislation provides for, but does not require that the documentation is to be prepared by a qualified expert.

The appropriate assessment was carried out in 2011 and the NGO following the project implementation process claimed that the data which were taken into account as well as the compensation measures based thereon are already outdated as the realization of the project started in 2016. It has also to be mentioned that when the appropriate assessment was carried out, the forestry works of the project had not been planned in details yet. Preparation of the plans is the task of the entity implementing the project contracted through a public procurement procedure. Logically, the impacts of the concrete activities have not been entirely taken into account in the appropriate assessment in 2011. The forestry works are to be permitted by the forestry authority and where the nature conservation authority will be involved as a special authority, it is however questionable whether the appropriate assessment from 2011 or an updated study will be taken into account.

¹⁵ Art. 10(3) of Gov. Decree No. 275/2004 (X.8) on nature conservation areas of European Community importance, available at: http://njt.hu/cgi_bin/njt_doc.cgi?docid=86484.291496

Case study I. - Slovakia

„Appropriate assessment“: Water reservoir Tichý potok

11 July 2016, Andrej Saxa, State nature conservancy

1. Identification data of the case (decision-maker, title and No. of the decision)

Competent authority: Ministry of the Environment

The water reservoir Tichý Potok was subject to obligatory assessment pursuant to the EIA Act; the case is still pending.

EIA was prepared in 2009 - 2010.

Final Opinion nr. 32/2011-3.4/mv was issued in 2011.

Appropriate assessment according to Art. 6.3 of Habitats directive was developed by State Nature Conservancy subsequently in 2014, according the recommended conditions for the phase of preparation and implementation of the activities mentioned in the final opinion.

2. Please, describe the main features of the plan or project, the concerned Natura 2000 site and its conservation objectives (species, habitats) and the likely impacts of the plan or project on the site.

Basic characteristics and parameters of the water reservoir Tichý Potok, which was subject to an appropriate assessment according to Art. 6.3 of the Habitats Directive:

The water catchment area: 112.0 square kilometers

The total reservoir volume: 24.5 million m³

Elevations of the bottom of reservoir (average): 550.00 meters above the sea level

Max. Retention levels: 608.40 meters above the sea level

Flooded area at max. level: 115 ha

Elevation of the dam crown: 609.90 meters above the sea level

Water reservoir Tichý Potok, according to the conducted surveys, will ensure water supply in the average consumption 638 l.s-1 and daily peak period during the day increases by 20-24%. Low degree of settlement basin reservoirs reduces the demands on hygiene and does not require any flooding of settlements.

Water reservoir Tichý potok is designed directly in the Special Area of Conservation Torysa), takes 75% of its area and also in Special protected area Levoca Mountains (SKCHVU051), which therefore have been assessed as directly affected.

Special Area of Conservation: Torysa

Code: SKUEV0336,

Area: 19.15 hectares,

The objects of protection: *Bombina variegata*, *Myotis myotis*, *Rhinolophus hipposideros*, *Lutra Lutra* habitat and riparian willow-poplar and alder forests Alpine rivers and their ligneous vegetation with *Myricaria germanica*.

Due to the disposal of the majority of SAC Torysa due to flooding, there were identified significant effects on the four subjects of protection. SAC Torysa is due to habitat Alpine rivers and their ligneous vegetation with *Myricaria germanica* one of the largest and qualitatively most valuable areas in Slovakia.

After building of Water reservoir Tichý Potok there will be destroyed and flooded 94% of habitat sites of SAC Torysa, which is about 13% of habitats in Slovakia, which is only protected in the 6 SAC's in Slovakia. There will be terminated priority habitat Alluvial willow-poplar and alder forests in the extent of at least 80%. Existing habitats yellow-bellied toad (flow, dents, water and

wintering pads) will flow around a length of 2600 m disposed (61%). Eurasian Otter lost during construction of water reservoir Tichý Potok most of its habitats that are linked primarily to flow Torysa (shelters, residential and foraging habitats).

There is assuming only slightly significant impacts on bats, because there should be no narrowing of their populations.

Special Protection Area: Levoca Mountains

Code: SKCHVU051,

Area: 45597.6347 ha

Object of protection: ensuring the favorable conservation status of habitats of European importance bird species and habitats of migratory bird species *Ciconia nigra*, *Picoides tridactylus*, *Crex crex*, *Tetrastes bonasia*, *Aegolius funereus*, *Glaucidium passerinum*, *Muscicapa striata*, *Aquila pomarina*, *Aquila chrysaetos*, *Coturnix coturnix*, *Alcedo atthis*, *Strix uralensis*, *Lanius excubitor*, *Dryocopus martius*, *Tetrao urogallus*, *Tetrao tetrix*, *Pernis apivorus*, *Bubo bubo* and *Picus canus* and ensuring the conditions for their survival and reproduction.

In the SPA Levoca Mountains are identified significant effects on the four subjects of protection. Significantly will be affected species because of interventions to their breeding habitats, which will lead to reduce their number in SPA: Water reservoir Tichý Potok reduced 3% nesting habitats of the population *Crex crex* in SPA; intervenes in the nest of a pair of *Aquila pomarina*, which is 7% of the total population in SPA; loss of fishing and breeding habitats of *Strix uralensis* reduce the frequency of its population by 4%; the loss of one of three pairs of *Bubo bubo* in SPA will reduce their number by 33%. Slightly significantly affected will be five species mainly due to the loss of their hunting habitats.

3. Was the „appropriate assessment“ carried out? If yes, please, summarize the stages and results of the procedure in 3-4 paragraphs.

Appropriate assessment according to Art. 6.3 of the Habitats Directive was elaborated by State Nature Conservancy subsequently in 2014 under the recommended conditions and measures referred to in the final opinion no. 32 / 2011-3.4 / m.

In 2015 was elaborated a proposal for compensatory measures according Art 6.4 of the Habitats Directive.

4. If there was not any assessment: was it excluded, on the basis of objective information, that the proposed activity could likely undermine conservation objectives of the Natura 2000 site, either individually or in combination with other plans or projects?

Appropriate assessment took place, has identified the significant negative effects on Natura 2000 sites on SAC Torysa and SPA Levoca Mountains.

5. Did the authorities make certain that the proposed activity will not adversely affect the integrity of that site prior to authorization, i.e. no reasonable scientific doubt remained as to the absence of such effects based on the „appropriate assessment“?

Water reservoir Tichý Potok is not yet permitted. Scientific concerns were not mentioned.

6. Were the results of the „appropriate assessment“ – or, if the authorities found it unnecessary, the decision – challenged on court? Who was the claimant ?

No

7. **If the result of the appropriate assessment was challenged on court, please summarize main findings of the court as regards:**
 - a. **if the appropriate assessment was needed and why;**
 - b. **what was the standard that should be applied to the assessment;**
 - c. **when can an activity potentially affecting Natura 2000 site be authorised?**

N/A

8. **Any other relevant comments**

Case study II. - Slovakia

„Appropriate assessment“: Small hydro power plant on Nitra river

5 August 2016, Jozef Ridzoň, Birdlife Slovakia

1. Identification data of the case (decision-maker, title and No. of the decision)

Small hydro power plant on the Nitra river.

The decision of the Ministry of Environment of the Slovak Republic, Division of state water management and fisheries no. 6140 / 2013-6.1 from 31.10.2013.

The Ministry of Environment, as the competent appeal body rejected the appeal of the public concerned against the decision of District Regional Environmental Authority Nitra, no. 1813/2013/63 of 28.03.2013. With the first instance decision was issued a building permit to carry out the water construction "Small hydro power plant on the river Nitra - Nové Zámky" river kilometer 16,270 on the river Nitra and authorized the use of the hydropower potential of surface water watercourse Nitra in the same river kilometer.

The decision was issued despite the fact that small hydro has not been considered in the EIA process and also for this plan was never realized an appropriate assessment process on Natura 2000 sites. Small hydroelectric power plant is already constructed. It is quite obvious that the realized project of small hydropower plant will have a significant impact on the affected Natura 2000 areas.

2. Please, describe the main features of the plan or project, the concerned Natura 2000 site and its conservation objectives (species, habitats) and the likely impacts of the plan or project on the site.

It is a small hydroelectric power plant located on the river Nitra in the area of Zúgov. The site is part of the SPA "Lower Považie", while there *Alcedo atthis* nests in the number of 2-3 pairs. The part of area is also included in the SAC Zátoň. The territory is a river island, which is surrounded by the shoulders and represents in the Danube Lowland unique system, which are found nowhere else on the river Nitra preserved. Island and arms are annually flooded during floods and river that form an exceptional ecosystem.

The object of protection of SAC Zátoň are *Castor fiber*, *Lutra Lutra*, *Bombina bombina*, *Rhodeus amarus*, *Lucanus cervus* and habitat Alluvial willow-poplar and alder forests and habitat riparian oak-elm-ash forests around lowland rivers. Among others nest here and the *Ciconia Nigra*, *Ardea cinerea* colony, *Corvus corax* and other species. The area has great natural and social value.

3. Was the „appropriate assessment“ carried out? If yes, please, summarize the stages and results of the procedure in 3-4 paragraphs.

No.

- 4. If there was not any assessment: was it excluded, on the basis of objective information, that the proposed activity could likely undermine conservation objectives of the Natura 2000 site, either individually or in combination with other plans or projects?**

In our opinion, the competent authorities were not interested in to get those information. After final decision was issued, we send complaint to the General Prosecutor's Office and non-appealable action at MoE, where we provide information about incorrect decision (we have also pointed out the lack of appropriate assessment), but nothing has changed.

- 5. Did the authorities make certain that the proposed activity will not adversely affect the integrity of that site prior to authorization, i.e. no reasonable scientific doubt remained as to the absence of such effects based on the „appropriate assessment“?**

Appropriate assessment has never been implemented, competent authorities therefore did not have relevant information and ignore the obligation to carry it out.

- 6. Were the results of the „appropriate assessment“ – or, if the authorities found it unnecessary, the decision – challenged on court? Who was the claimant ?**

The process for authorizing small hydropower plant has not been challenged in court. An application was made to the General Prosecutor's Office and proceeded to have an extraordinary remedy, but our objections were not accepted.

- 7. If the result of the appropriate assessment was challenged on court, please summarize main findings of the court as regards:**

- a. if the appropriate assessment was needed and why;*
- b. what was the standard that should be applied to the assessment;*
- c. when can an activity potentially affecting Natura 2000 site be authorised?*

N/A

- 8. Any other relevant comments**