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Brussels, 24/04/2003

OPINION OF THE COMMISSION OF 24/04/2003

Delivered upon request of Germany according to Art. 6 (4) Sub Par. 2 of Council Directive 92/43/EEC of 21 May 1992 on the conservation of the natural habitats as well as the wild animals and plants¹, concerning the approval of an operational master plan (“Rahmenbetriebsplan”) of the Prosper Haniel Colliery operated by Deutsche Steinkohle AG (DSK), for the period 2001-2019

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 from the Commission, by other imperative reasons of overriding public interest.

II. The German request

On 21.8.2000 DG ENV received an official note and file dated 2.8.2000 from the German Permanent Representation requesting an opinion of the Commission pursuant to Art. 6 (4) of the Directive 92/43/EEC (“Habitats Directive”) concerning the approval of an operational master plan (“Rahmenbetriebsplan”) of the Prosper Haniel Colliery operated by Deutsche Steinkohle AG (DSK), for the period 2001-2019.

¹ O.J. No. L206 of 22.7.1992, p. 7

On 30.8.2000 DG ENV informed the German authorities that the affected area Kirchheller Heide had not yet been notified as a proposed Site of Community Importance (pSCI) according to Art. 4 (1) of the Habitats Directive. On 20.11. 2000 this area was notified (without maps and standard data forms) as an extension of the pre-existing pSCI 'Hiesfelder Wald'. The missing documents were requested on 30.11.2000 by DG ENV and received in December 2000.

On 12.03.2001 the 25th modification of the local 'Site Development Plan' ('Gebietsentwicklungsplan') for the area affected by mining project was authorised by the State Chancellery in North Rhine Westphalia.

On 12.04.2001 the operational master plan (2001-2019) for the Prosper Haniel Colliery was authorized by the authorities of the Arnsberg District.

On 11.12.2001 a meeting took place between representatives of the DG Environment and German federal and regional authorities. At that meeting, the representative of the Commission requested a number of additional compensatory measures as well as additional information on the compelling reasons of overriding public interest. The requested elements were received by the Commission on 29 January 2002.

On 2.9.2002 a letter dated 19.8.2002 was received from the regional authorities, drawing the attention of the Commission on the Council Regulation (EC) No 1407/2002 of 23 July 2002 on State aid to the coal industry² and the agreement at the European level about the energy policy implications of the domestic coal mining sector. It argued that the perspective offered by the Community Framework to safeguard a minimum level of coal production notably for reasons of supply security was to be taken into consideration when evaluating the overriding public interest of the project.

III. The project

The project consists in implementing a new operational master plan ("Rahmenbetriebsplan") of the Prosper Haniel Colliery, for the period 2001-2019. This plan foresees the extension of the underground coal mining activities of the colliery into areas which so far had not been exploited. This will cause large scale ground subsidence, accompanied by flooding and increase of ground water levels with considerable impacts on all ecosystems in the area. The responsible authorities claim that there are no alternatives for the project and that there are compelling social and economic reasons of an overriding public interest.

IV. The site

The area affected by the project is characterised by two proposed Sites of Community Importance (pSCI) notified as such to the Commission on 20.11. 2000: The Kirchheller Heide und Hiesfelder Wald', DE-4407-301 and the 'Gartroper Mühlenbach', DE-4306-304. The area is mainly characterised by the presence of priority habitat types of Annex I to the directive (bog woodland and residual alluvial forests) and non priority habitat types such as large beech and oak forests.

V. Implications of the project on the site

² O.J. No. L205 of 2.8.2002, p 1

On the site 'Kirchheller Heide und Hiesfelder Wald', DE-4407-301 a new lake of 45 ha (3 - 4 m depth) will develop by subsidence of the ground surface and destroy priority and other habitats. In addition, large areas of forests will be affected by increasing groundwater levels. On the site 'Gartroper Mühlenbach', DE-4306-304 a new lake of 50 ha will develop by the subsidence of the ground surface and destroy priority and other habitats. The following priority habitats and other habitats and species of the habitats Directive will be substantially damaged or destroyed by the project:

- *91D0 ("Bog woodland") in an order of magnitude of approx. 1 hectare (priority habitat)
- *91E0 ("Residual alluvial forests - *Alnion glutinoso-incanae*") in an order of magnitude of approx. 15 hectares (priority habitat)
- 3260 ("Water courses of plain to montane levels with the *Ranunculion fluitantis* and *Callitricho-Batrachion* vegetation"), 4010 ("Northern Atlantic wet heaths with *Erica tetralix*"), 7140 ("Transition mires and quaking bogs"), 9110 ("Luzulo-Fagetum beech forests"), 9160 ("Stellario-Carpinetum oak-hornbeam forests"), 9190 ("Old acidophilous oak woods with *Quercus robur* on sandy plains") in total an order of magnitude of 80 ha and the species *Lampetra planeri* (Bachneunauge) (non-priority habitats and species).
- The species *Lampetra planeri* is being significantly affected by the disappearance or deterioration of 2.9 km of river ("Schwarzbach" and "Elsbach")

In order to reduce the impact of the mining activities, the following mitigation measures were undertaken or assessed:

In 1996, during the preparatory and conception phase of the new operational master plan, the actually planned coal extraction volume had already been voluntarily reduced by 44 million *t* when compared to the potential extraction volume in order to avoid that a sensible habitat situated on the small river "Rotbach" inside the pSCI DE-4407-301 would be affected. A further reduction of the extraction area would have made any rational continuation of coal extraction in the area impossible.

The possibility of re-filling the mines after the extraction of coal was assessed. It was concluded that the potential mitigating effect of that method on the destruction of affected habitats would be negligible (ca. 60 cm less subsidence) The method would also not be applicable for a number of technical and economic reasons (limited thickness of coal layers, high investment costs, security reasons).

There is no doubt that the project will adversely affect in the sense of Art. 6 (3) of the directive the integrity of a site of the Natura 2000 network hosting several habitats including two priority habitat types.

In such a case the project may only be carried out if it complies with the requirements set up by Art. 6 (4) of the Habitats Directive.

VI. Fulfilment of the requirements under Art. 6(4)

- Alternative solutions

The German authorities have informed the Commission that the area situated beneath the Kirchheller Heide has shown to be the only suitable extension area available for the

continuation of the mining activities of the Prosper Haniel colliery. On this location, the Prosper Haniel colliery will have available important resources of high quality coal. The coal layers are well situated in order to allow a safe and cost effective extraction. The colliery has a modern and powerful coal extraction infrastructure. The coal is being used by energy plants situated at a short distance from the mine. Following the competent authorities, no other existing mine in Germany has such favourable geological infrastructure conditions as the Prosper Haniel colliery. The competent authorities therefore consider that there are no suitable alternatives for the continuation of its activities.

- Imperative reasons of overriding public interest

The claim that there exist compelling reasons of an overriding public interest is based on the argument that the closure of the Prosper Haniel mine would have unacceptable direct and indirect economic and social consequences at the regional level with a direct loss of up to 4.400 jobs in coal mining and another 6.000 jobs in up-stream industries and downstream services. The German authorities underline that, because of its geological and infrastructure qualities the Prosper Haniel coal mine and the continuation its mining activities contribute to achieving the general objectives of the German long term energy policy at the federal and regional level, and in particular the interest of supply security and to maintain the leading position of European mining and coal energy technologies.

- Compensatory measures

To compensate the expected impacts of the project the following measures are planned:

Creation of 125 -150 ha of the non-priority habitat types 9190, 9110 and 9160 (beech and oak forests) by re-forestation or transformation/improvement of existing forests. Suitable areas for the compensation measures have been determined following ecological criteria. In total, 57 ha of first choice suitable land and 233 ha of second choice land were selected for potential afforestation, as well as 1,170 ha for potential transformation or improvement of existing forests.

Creation and improvement of alluvial forests and restoration or optimisation of riverbeds to compensate for the loss of the priority habitat type 91EO ("Residual alluvial forests - *Alnion glutinoso-incanae*") and the non-priority habitat type 3260 (water courses of plain to montane levels with floating vegetation). For this measure, a total length of 10.6 km of riverside was determined as potential sites for the creation of 30 - 45 ha of new alluvial forests, including i.a. parts of the rivers "Gartroper Mühlenbach", "Rehrbach" and "Dellbach". The measure will contribute also to compensate the negative impact of the project on the species *Lampetra planeri*.

The measures themselves will be implemented on areas to be determined on a flexible basis in the context of the implementation of a spatial observation, control and steering system (monitoring system). This system falls under the responsibility of the regional authorities. The compensation measures are implemented in the field and co-ordinated by a special "landscape development agency" under the leadership and with the financing of the Deutsche Steinkohle AG.

VII. Opinion of the Commission

The Commission notes that the competent German authorities claim that the approval of the proposed operational master plan was necessary to allow for the continuation of the mining

activities of the Prosper Haniel colliery and that the German authorities found no alternative for this plan.

With regard to the mitigation and compensatory measures the Commission notes that mitigation measures have been implemented by voluntarily reducing the planned extraction area and that a compensation concept was proposed taking into account all habitat types and species that will be affected by the project.

For the replacement of alluvial forests (15 ha or 2.5 km of riverside), the very long time periods that will be necessary to re-establish habitats with a nature value equivalent to that which will be destroyed will be compensated by the creation of equivalent habitats by afforestation and improvement of existing forests on a total area that will be 2.5 to 3 times larger than the areas that will be affected or destroyed.

When compared to the 95 hectares of land with high nature conservation value (including approx. 16 ha of priority habitats), which will be destroyed or affected by the project, the planned compensation measures can be considered as an acceptable compensation for the habitats that will be lost, at least from a quantitative point of view.

In the long term, some of the affected or destroyed habitats will evolve towards new habitats with high nature value, such as bog woodland, oligotrophic to mesotrophic standing waters and hydrophilous tall herb fringe communities. These new habitats will also contribute to the coherence of Natura 2000.

Both the monitoring system and the implementation and co-ordination agency will allow to take into consideration the actual dynamic processes that will occur in the affected habitats and consequently to adapt the compensation measures where necessary. This will contribute to achieving an efficient management and monitoring of the planned measures.

Considering the above, the Commission estimates that the proposed compensatory measures are appropriate to protect the overall coherence of Natura 2000.

With regard to the overriding public interest of the project:

1. As regards the overall economic and social consequences, coal mining in Germany requires large public subsidy to remain in operation. Employment in the German coal industry is projected to decline, so that the issue is when, not if, the workers in question lose their jobs. The financial resources freed by closing the mine (together with the savings on the proposed compensatory measures which would no longer be needed) could be used, for example, to retrain the workers, or relocate them to other mines, the operation of which causes less environmental damage, or to attract new employers to the region. Such actions would help to offset the localised short-term negative economic and social effects of accelerated closure of the mine.
2. Concerning security of energy supply, the mine accounts for about 10% of German coal production, or about 1% of overall German energy needs. Coal is readily available on the world market, from a variety of countries, so that the risks of physical disruption of supplies or price instability may be judged as very small. Consequently, the contribution of the Prosper Haniel mine to security of energy supply is minimal.

3. Irrespective of whether maintaining the leading position of European mining and coal energy technologies may be an imperative reason of overriding public interest, it is unlikely to require the extension of a single specific mine.

Nevertheless, the Commission accepts the fears expressed by the competent authorities that an accelerated closure of the Prosper Haniel colliery could have in the short-term significant social and economic effects at the local and regional level.

Considering the factual situation as well as its assessments as described above, the Commission is of the opinion that the adverse effects of implementing the Master Plan 2001-2019 of the Prosper Haniel Colliery (operated by Deutsche Steinkohle AG) on the proposed sites of Community importance ‘Kirchheller Heide und Hiesfelder Wald’, DE-4407-301 and ‘Gartroper Mühlenbach’, DE-4306-304, are justified by imperative reasons of overriding public interest.

In reaching this opinion, the Commission has taken particular account of the exceptional nature of this case, in which the tardy notification of the site in question as a proposed Site of Community Importance may have contributed to inadequate account being taken of ecological impacts when drawing up the operational master plan for the Prosper Haniel colliery. Accordingly, the Commission’s opinion in this case does not constitute a precedent.

Notwithstanding what has been said before, the Commission expresses its concern about the compatibility of extending or even maintaining current levels of coal mining activities with the EU's objective of reducing green house gases. A continued reliance on coal has to be judged in the wider context of the security of energy supply and will have to imply a maximal use of techniques like gasification and carbon sequestration to minimise harmful environment impacts. It will also require supplementary efforts in other areas. The Commission would not want the German government to see this opinion in a way reflecting approval of any relaxation in German national efforts to achieve agreed greenhouse gas reduction targets.

The Commission also does not wish the German government to assume that this opinion in any sense prejudices future Commission decisions on State aids to the coal industry, nor the obligation of the German authorities to conform with the principles announced in the Council Regulation (EC) No 1407/2002 of 23 July 2002 and applying until 31 December 2010, with review measures to be implemented as from 1 January 2008, in particular those concerning the notification, appraisal and authorization procedures.

The opinion is subject to the following conditions:

- The compensatory measures will be implemented and monitored as described in the documents submitted to the Commission by the German authorities, in particular the latest up-date of 24 January 2002;
- Detailed reports on the implementation and monitoring of these measures will be submitted to the Commission (Directorate General for Environment) on a yearly basis between 2002 and 2015.