

First Case Study by Dr Matthias Keller, Aachen

Case:

„Mr Green, the Wind Turbine and the Red Kite“



Structure of the Case Study

Preparation

Action admissible?

Action successful?

Speedy procedure?



Preparation



Red Kite? *Milvus Milvus*?

Here (s)he is.

Protection designations:
Birds Directive: Annex 1



Source:wikipedia



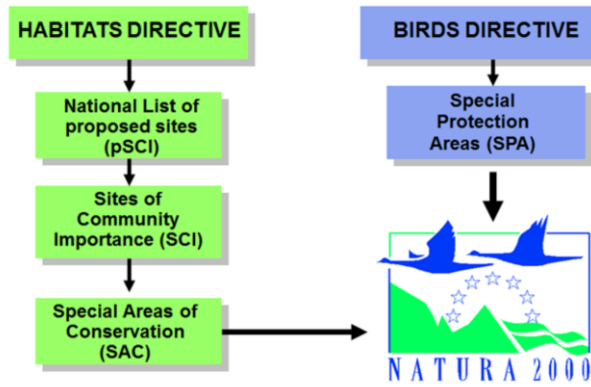
Preparation

**Guidance document of the
European Commission:**

“Wind energy developments and Natura 2000”



SPA ?



Source: Joseph van der Stegen, DG Environment, European Commission



SPA DE 4933420 ?



„SPA DE 4933420“ should lead you to

NATURA 2000 - STANDARD DATA FORM

For Special Protection Areas (SPA),

Proposed Sites for Community Importance (pSCI),
Sites of Community Importance (SCI) and
for Special Areas of Conservation (SAC)

SITE DE4933420

SITENAME „Ackerhügelland nördlich Weimar mit Ettersberg“



NATURA 2000 - STANDARD DATA FORM



- 1. SITE IDENTIFICATION (1.7: 2007-05)**
2. SITE LOCATION
3. ECOLOGICAL INFORMATION
4. **SITE DESCRIPTION**
5. SITE PROTECTION STATUS
- 6. SITE MANAGEMENT**
7. MAP OF THE SITE



4. Site description



4.2 Quality and importance

„Refugium für Vogelarten wie dem Rotmilan“

**Refuge for species of birds
like the red kite (*milvus milvus*)**



6. SITE MANAGEMENT



6.2 Site management Plan:

NO !

6.3 Conservation measures:

**„Securing a permanent
favorable conservation status ...“**



„Nature Directives“:



HABITATS DIRECTIVE

National List of proposed sites (pSCI)

Sites of Community Importance (SCI)

Special Areas of Conservation (SAC)

BIRDS DIRECTIVE

Special Protection Areas (SPA)



Source: Joseph van der Stegen, DG Environment, European Commission



„Nature Directives“:



- 1) habitat conservation
- +
- 2) species protection



The site of the wind turbine a potential SPA ?



Other than the designation of an SAC the designation of an SPA under Article 4 of the Birds Directive does not need a special assessment / decision by the Commission.

Therefore potential (in German "factual") SPAs are recognized.

Potential SPA? Here, the site of the wind turbine?

Difficult. The list of the **Important Bird Areas** (IBA-list) by BirdLife International may help.



Special Protection Area and Articles 6.2 to 6.4 of the Habitats Directive?



The duty to protect SPAs is now – mainly – regulated by the requirements set out in

Articles 6.2 to 6.4 of the Habitats Directive.

Article 6.2 of the Habitats Directive provides a general protection provision for SPAs.

Member States must take appropriate steps to avoid habitat deterioration and the disturbance of species for which the site has been designated.



species protection



Article 5 of the Birds Directive



Member States shall take the requisite measures to prohibit in particular:

- (a) deliberate killing
- (...)
- (d) deliberate disturbance of these birds particularly during the period of breeding and rearing, in so far as disturbance would be significant having regard to the objectives of this Directive;



Action admissible?



Admissibility:

Standing (locus standi)

ENGO
must be recognized
and dedicated to environmental protection.

(details differ from MS to MS)



Action successful?



Relevant question (differs from MS to MS)?

In an „objective“ system of administrative justice that puts „legality“ in its centre:

Are the reasons for non-action given by the authority in conformity with the law?

In a „subjective“ system of administrative justice that puts „rights“ in its centre:

Is the the authority under an obligation to act?



1) Binding force of the permit?

„legal security vs. legality“

National procedural law very often guarantees „legal security“. However, those rules have to be applied in the light of EU law.

EU law on nature protection is clearly in favour of „legality“: Under the Nature Directives measures of conservation of the site (**Art. 6.2 Habitats Directive**) are to be taken regardless of the fact whether the activity that causes a threat to the integrity of the neighbouring habitat has been authorised or not.

„Emergency exit“ for the practitioner: preliminary procedure!



2) The wind turbine is not situated in an SPA ?!

This reasoning of the administration is to be rejected.

Simple counter argument:

**The species protection (Art. 5 Birds Directive)
is not restricted to the protected site (SPA).**

**There is no doubt about it that the integrity of the
site (SPA) could be significantly affected by
influences from „the outside“**

(cf. Art 6.2 and 6.3 of the Habitats Directive).



3) The management plan?

First of all the Standard Data Form does not mention a management plan.

Apart from that, the mere existence of a plan to manage the site may not be used as an excuse for non action.



Result:

In an „objective“ system of administrative justice:

The decision has to be annulled.

In a „subjective“ system of administrative justice

The authority should be obliged to act.



Discretion?

What about the discretion of the administration?

Answer:

In all Member States the fundamental principle of „separation of powers“ has to be observed. Therefore, the judiciary must respect the discretionary powers of the administration.

Here, it is not the task of the judge to choose the measure which seems to be the best to prevent the harm.

The question remains to what extent the judge can interfere in order to guarantee „effective judicial protection“.

(Germany: If discretionary powers are „reduced to zero“ by legal requirements, the scope of legal review is not limited anymore.)



For your inspiration:

The operative part of a judgment could be :

[judgement remitting the case for (new) decision-making]

„The authority is obliged

- to decide on the application of the ENGO concerning the prevention of further harm to the red kite and the SPA and
- observe the legal opinion of the Court within the decision-making.“



However,
the judgement could be too late ...

The danger of

„fait accompli“

„factum consummatum“

„Eintritt irreversibler Tatsachen“



Speedy procedure ?



Is a provisional ruling by the Court (interim relief) possible?

Requirements:

- An application for judicial interim relief must be filed.
- The main case must be - prima facie - **well-founded** (fumus boni juris)
- **Urgency:** Will a (positive) judgment come too late? (periculum in mora)

Here:

It all depends on the time the court will probably need to decide the case in the main proceedings.



What kind of judicial interim order?

An example for your inspiration:

The Court orders as an interim measure (in March 2017):

„The authority is obliged to issue an order against the operator of the wind turbine which prohibits the operation of the wind turbine from 7:00 h to 19:00 h till the end of September 2017.“



Thank you
for your kind attention!

