



Polski Klub Ekologiczny

**Zarząd Główny**

Al. Słowackiego 48/IIIp

30-018 Kraków

**Complaint to be lodged with the Danish Energy Board of Appeal by Polski Klub Ekologiczny Zarząd Główny - Polish Ecological Club Main Board**

#### **Decision being appealed**

The complaints are directly against the permit granted by the Danish Energy Agency issued on the 30 October 2019 for construction of the natural gas pipelines covered by the application - route variant NSP2 / NSP2 V1 to Nord Stream 2 AG.

The permit was issued pursuant to Section 4(1) of the Continental Shelf Act, and Section 2(1) of Executive Order No. 1520 of 15 December 2017 on certain pipeline installations in territorial waters and on the continental shelf. This permit covers the construction, including laying, of the natural gas pipelines on the Danish continental shelf area. Before the pipelines are commissioned, Nord Stream 2 AG must apply to the Danish Energy Agency for a permit to operate the pipeline, see Section 2(1) of Executive Order No. 1520 of 15 December 2017 on certain pipeline installations in territorial waters and on the continental shelf.

We appeal in accordance with and in the timescales set out by S. 6a of the Continental Shelf Act.

#### **Description of the complaints**

Below we describe several complaints and include their substance.

#### **1 Permitting a project which has a significant impact on protected species with an unfavourable conservation status. Non-compliance with the Habitats Directive Arts 6(3) and 12, Annex II and IV.**

The appellant wishes to complain on the basis that in granting the permit the Energy Authority has not taken into account Art 6 and 12 and Annex II and IV of the Habitats Directive and recent CJEU case law as required by the Continental Shelf Act, namely a permit was granted although there is a species affected by the project which is protected by Annex IV Council Directive 92/43 / EEC of 21 May 1992 on the conservation of habitats and of wild fauna and flora (Habitats Directive) and is known to be in an unfavourable conservation status and which is impacted unfavourably by the project – Harbour Porpoise (*phocoena phocoena*) Annex II and IV.

The combination of Art 6(3), Art 12 and related case law, as outlines below, means that no projects should be allowed that impact a special area of conservation or species in an unfavourable conservation status unless it is proven at the AA stage, EIA in this case, beyond reasonable doubt that there will be no impact on the site or species.

The Harbour porpoise is also protected by the ASCOBANS Treaty under the Bonn Convention (Conservation of Migratory Species) and the Helsinki Convention being listed on the HELCOM Red List of Baltic Sea species in danger of becoming extinct (2013) for marine mammals with the Baltic Sea Harbour porpoise being Critically Endangered due to dramatic decline and low numbers. See also C2a(ii) under the IUCN Red List facing an extremely high risk of extinction in the wild.





Polski Klub Ekologiczny

**Zarząd Główny**

Al. Słowackiego 48/IIIp

30-018 Kraków

The Habitats Directive protects the Harbour Porpoise (*phocoena phocoena*) as a priority species in Annex IV. This means that under Article 12 strict protection measures are to be taken by Member States, in this case Denmark, to protect the species, including prohibiting deliberate disturbance.

Art 6(3) of the Habitats Directive sets out that:

*"Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to 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 the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall 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."*

Case law from the Court of Justice of the EU has now created a very strict interpretation of Article 6(3). People Over Wind and Sweetman<sup>1</sup> challenged a consent to permit a cable connection to a wind farm from an electricity grid. The case dealt with Appropriate Assessments ("AA") under the Habitats Directive and whether there should be a previous screening stage to the AA. The court decided that mitigation measures should be taken into account when deciding whether the pollution to the river resulting from laying the cable would have effect on a designated/protected pearl mussel, not as a previous stage to the AA.

In July 2018 in Grace and Sweetman<sup>2</sup> a wind turbine proposal was impacting a Special Protection Area for the Hen Harrier which caused direct loss of habitat but included a Species and Habitat Management Plan aimed at mitigating the adverse effect. The CJEU held that the management plan although adequate in some ways was not sufficiently certain as the real effects of the measure could not be known for several years. The measures would have to be sufficiently certain to their contribution to avoidance of harm "guaranteeing beyond reasonable doubt" that the Hen Harrier's habitat would not be adversely affected by the development.

In November 2018 the CJEU dealt with the Dutch Nitrates case, a reference from the Dutch Council of State on two different challenges brought by conservation groups for permits granted to farms in special areas of conservation with an unfavourable conservation status due to nitrates. The case dealt with a number of issues but the two most relevant parts are those which set out that in deciding whether to permit a farm/project, there has to be a thorough analysis of the scientific evidence contained in the AA and that "there should be no reasonable scientific doubt as to the absence of adverse effects of each plan or project on the integrity of the site concerned" before permitting. So conservation measures, preventative measures or any other type of mitigation measures need to be certain in their benefits, and need to directly relate to the area rather than provide an environmental benefit elsewhere. Although a national or wider national programme for mitigation was acceptable where there was still room for a site by site AA.

A number of countries have objected to the granting of the permit on this basis recognising that there is an impact on the harbour porpoise. Nord Stream in their Espoo report and responses also acknowledge

<sup>1</sup> People Over Wind and Sweetman v Coillte Teoranta (C-323/17).

<sup>2</sup> Edel Grace and Peter Sweetman v An Bord Pleanála. (C-164/17)





Polski Klub Ekologiczny

**Zarząd Główny**

Al. Słowackiego 48/IIIp

30-018 Kraków

that there is an impact. Even if it is considered that the impact is minor that is not acceptable as it must be proven beyond reasonable doubt that no impact is caused.

For example, at page 18 of the ESPOO Report Nord Stream, the developer acknowledges that there will be an impact on the species:

*"Harbour porpoise – The Gulf of Finland where munitions clearance will take place has very low densities of harbour porpoises. Any impact resulting from onset of permanent hearing loss or blast injury will affect insufficient numbers to influence species viability or functioning. Hence the impact will be minor."*

Nord Stream in its response to Objections Espoo Convention (EIA) recognises that there is a possibility of harm in response to country objections, see page 38 and 39:

*"The conclusion of the EIA is that underwater noise may trigger temporary avoidance reactions in individuals, and the overall impact on individuals is therefore assessed to be, at most, minor in Danish waters. On this basis, the EIA concluded that there would be no significant population-level impacts to marine mammals. On this basis, no mitigation measures are suggested in the EIA."*

At Page 57 of the Objections in the Espoo Convention (EIA) Responses Nord Stream's response to the Kalmar Country Administrative Board objection based on the Baltic harbour porpoise again, admits there is a possibility of affecting migration or breeding patterns even after mitigation measures are put in place.

**2. During the Espoo consultation process Danish Energy Agency formulated responses to Consultation Parties in a manner which was incomplete and did not meet the standards for the application of the Espoo Convention.**

There is very limited quantitative, parametric or methodological information in DEA responses to Espoo parties. The replies have essentially been limited to the project owner's clarifications (which were also general and reproduced the contents of the report). Numerous passages stating that "the Danish Energy Agency has no further comments on this topic" are not in line with standards of consultations under the Espoo Convention and the EIA Directive. The fact that the Danish Energy Agency limited itself to forwarding the project owner's clarifications, without providing any substantive comments or referring to the Espoo process, does not indicate that the analyses carried out by the Danish Energy Agency were comprehensive and thorough but rather suggests that the consultation process provided for in Article 5 of the Espoo Convention was not carried out correctly.

**3 The timeline for potential objection by the public and entities of the affected parties may be insufficient to enable the use of remedies in transboundary context.**

The administrative decision was issued in Danish language and, pursuant to Article 6 of the Espoo Convention, must be made available to the public in the state of the affected Party in the official language of this state, the timeline for potential objection by the public and entities of the affected parties may be insufficient to enable the use of remedies in transboundary context. In the case of previously issued permits for the Nord Stream 2 gas pipeline in the other state, the deadline for raising objections to the administrative decisions of the affected Parties ran from the date of making the decision in the state of the affected Party available to the public.





Polski Klub Ekologiczny

**Zarząd Główny**

Al. Słowackiego 48/IIIp

30-018 Kraków

**4 Measures which DEA attempts to take to minimize the impact of Nord Stream 2 constructions, which are described in the relevant Conditions section of the permit are vague and contradictory**

Permit condition 11 in particular mentions that "Nord Stream 2 AG shall strive to avoid pipe-laying in the fisheries restriction zone, which is known as the Bornholm Basin during the period July to August when cod spawn". In the respect of such formulation, doubts arise as to the scope of such an obligation. In its response, to a similar Polish Party position during the consultations DEA explained that "if it is not possible the developer can lay pipes in that period" - which directly contradicts the essence of an obligation. Rock placement works may affect the spawning cod (*Gadus moru/a*) by the release of soot and debris into the water toni and manufacture of noise.

**5 The submitted documentation regarding Nord Stream 2 did not contain all required data and information, deployed vague assessment criteria/modelling methods and outdated investigations - violation of Article 4 of the Espoo Convention.**

1. Contents analysis has shown that Espoo report was not the final documentation for Nord Stream 2, therefore could not be regarded as basis for implementation of the investment. As stated by the Espoo report creators, while preparing the documentation they did not possess the detailed information regarding the pipeline route, since it was still in preparation.
2. Possible transboundary impacts of the NS2 construction in Danish EEZ waters were excluded a priori in the EIA (chapter 14.2.3), despite Polish Natura 2000 Special Protection Area Zatoka Pomorska (PLB990003) being located only 7 km away from the pipeline route (route V1). The documents that were submitted by the Danish Party in Polish as necessary for assessment of the potential environmental impact on the territory of Poland contain general conclusions regarding the degree (size) of the impact of the planned project on the Polish EEZ. The following distances are the only criterion provided that excludes the possibility of an impact on the territory of Poland: 7.0 km for route V1 from the Polish EEZ.
3. The authors of the EIA documentation repeatedly refer to the results of the monitoring analyses of the existing Nord Stream Gas Pipeline project. At the same time, they emphasise on the environmental data collected during post-project monitoring. An effective access to data from the monitoring for the Nord Stream Gas Pipeline for the public is absent.
4. The lack of proper analysis of all aspects of the investment is visible also in the fact that the investor has failed to provide an analysis of an environmental impact assessment which would provide an adequate assessment of Nord Stream 2's impact on the entire route of the project and the Baltic basin, not just those areas which are within or directly adjacent to Danish territory

**6 The information presented in the documentation prepared by the developer on the presence of conventional munitions in the Danish section of the project is incomplete and contradictory.**

1. In the NSP2 V1 route area, there are approximately 40,000 tonnes of chemical munitions, the majority of which are mustard gas (approximately 80%) and the remaining resources are CLARK I and II and Adamsite. As confirmed by the investigations conducted under the programmes CHEMSEA, MODUM and DAIMON, samples of benthic sediments in this region showed the presence of chemical warfare (CW) agents even up to 200 m away from the detected objects;
2. Although the investor does not plan to detonate munitions during the construction of the portion of NS2 going through waters under Danish jurisdiction, the investor does take into account the need to do so in exceptional circumstances. The investor, however, did not analyze the effects of detonation and noise propagation (its severity and distance) in relation to every piece of ammunition identified in Danish waters. The lack of such analysis, along with the lack of information on the location of





## Polski Klub Ekologiczny

### Zarząd Główny

Al. Słowackiego 48/IIIp

30-018 Kraków

munitions in Danish waters, makes it impossible to accept the investor's assertions that no detonations are planned and this, in turn, requires all parties involved to act as though the detonations are to be conducted in situ. Also, no assessment of the impact of underwater noise generated by the detonation (specifically on harbour porpoises and seals) had been made both at the level of individuals and populations. The general documentation prepared by the developer does not contain precise noise propagation distances associated with TTS and PTS in Danish waters;

3. The developer has failed to present specific methods to minimise the impact of underwater noise on marine mammals in the event that munitions detonation is necessary. While, the possible mitigation measures, including the use of ADDs, bubble curtains are not adequate in certain cases, and in others are detrimental to the health of marine mammals (porpoises and seals). ADDs in particular can cause permanent hearing loss in these animals, leading directly or indirectly to their death. On the other hand, the use of acoustic detectors or visual registration by observers to detect the presence of harbour porpoises, for instance are likely to result in false findings. While the company makes the assessment that the intensity and magnitude of the sound is low, there is no analysis of whether the pipeline, in operation, can be expected to have a barrier effect on the distribution of various species;
4. Accordingly, the investor had not proved route NSP2 variant V1 being not risky to the marine environment and even in relation to an existing route the Nord Stream Gas Pipeline;
5. The direct or indirect negative impact of the project on a given species affects the population in the whole area where it occurs. Therefore, we should recognise that the project may also have an impact on the maritime areas as Polish Natura 2000 sites inter alia.

**7 The figures on the seabirds provided in the EIA represent a clumsy compilation of data collected from over ten years ago, which also do not correspond geographically with the route currently being consulted. The abundance of a key species, threatened globally, is underestimated 1000 times in the EIA.**

1. For bird populations, the main information available in the EIA are the results of surveys made in 2007-2009 for other purposes (mainly Skov et al. 2011). These surveys were made only once per winter season, so they do not provide information on the dynamics of bird populations across successive months of their stay on wintering grounds;
2. The figures provided in the EIA actually refer to key areas identified for each species within the Danish EEZ. These key areas differ spatially from species to species and their area never approaches even a quarter of the Danish EEZ. As such, they cannot be used even to approximate bird numbers found in the whole Danish EEZ. Consequently, the claim that "a total of 14 species were observed within the Danish EEZ" is clearly false;
3. For example, Velvet Scoter (species globally threatened) is not listed in Table 7-32 at all, while Map 19 in Skov et al. (2011) shows clearly that species occurs abundantly over SW part of Danish EEZ, particularly in areas to be intersected by NS2 pipeline;
4. The most numerous species to be reported in EIA Table 7- 32, a globally threatened long-tailed duck, is shown as 12 (twelve) birds, whereas the reference publication (Skov et al. 2011; Table 17) shows 12,000 (twelve thousand) birds recorded on Rønne Banke and Adler Grund.
5. Furthermore, as impacted populations regularly move between different haunts within their Baltic wintering area, the negative effects may easily carry over from the areas directly affected by the project to other Baltic sites, including adjacent Polish SPAs;
6. The analysis made no reference to the attached construction works schedule, which shows that the riskiest construction works for the environment are planned for the period of the first quarter that is sensitive for birds wintering in these areas (January - March). The investor also did not conduct additional investigations regarding the period of rest and wintering of marine birds along the gas pipeline route.



Polski Klub Ekologiczny

**Zarząd Główny**

Al. Słowackiego 48/IIIp

30-018 Kraków

For all the reasons set out above Polski Klub Ekologiczny Zarząd Główny - Polish Ecological Club Main Board believes that the permit should not be granted, and/or that errors should be corrected, and full information granted and a response made to all of the points raised above, in order for the Danish Authority to make an appropriate and full assessment of the permit.

Kind regards

**Polski Klub Ekologiczny Zarząd Główny - Polish Ecological Club Main Board**

**Maria Staniszewska – President ZG PKE**

**Agnieszka Fiszka Borzyszkowska – Secretary ZG PKE**