

Strasbourg, 28 October 2013
[files06e_2013.doc]

T-PVS/Files (2013) 6

CONVENTION ON THE CONSERVATION OF EUROPEAN WILDLIFE
AND NATURAL HABITATS

Standing Committee

33rd meeting
Strasbourg, 3-6 December 2013

Specific Site - File open

**Wind farms in Balchik and Kaliakra –Via Pontica
(Bulgaria)**

REPORT BY THE NGO

*Document prepared by
the Bulgarian Society for the Protection of Birds / (BirdLife Bulgaria),
the Royal Society for the Protection of Birds / (BirdLife UK)*

WINDFARMS IN BALCHIK AND KALIAKRA – VIA PONTICA (BULGARIA)

Follow-up of the NGO`s report

Updated October 2013

Summary

This document provides a follow up update of the report submitted by NGOs to the Bern Convention Standing Committee in May 2013.

Since October 2012 the Bulgarian Society of the Protection of Birds (BirdLife Bulgaria) and the Royal Society for the Protection of Birds (BirdLife UK) consider that although some progress has been made to implement Recommendation 130 (2007), significant issues remain unresolved. The case continues to be at a very critical stage, with new, possibly harmful, wind farm developments being allowed to proceed. .

Apart from the threatened and deteriorated habitats for many migratory birds in the Kaliakra Important Bird Areas (IBAs) and Coastal Dobrudzha, the globally endangered Red-breasted Goose faces immediate and direct threats from continuing large scale wind farm development in the region. Without urgent coordinated actions the most important areas for the species in the world could be damaged.

We thus urge the Bern Convention to take further action, as appropriate, to assist Bulgaria to stop irreversible damage to Europe`s natural heritage. Although there have been some positive steps taken by the Bulgarian authorities since the change of government in late 2009, sadly it seems that without further international pressure the Black Sea coast sites will be damaged further. We also request the Birds Expert Group to assist the Bern Convention with appropriate proposals for further actions in order to stop continuing pressure on birds and habitats in the area of Kaliakra and Dobrudzha.

I. UPDATE OF THE REVIEW OF THE GOVERNMENTAL REPORT TO THE BERN CONVENTION STANDING COMMITTEE - T-PVS/Files (2012) 40

1. Strategic planning

No new information

2. Changes in environmental legislation

No new information

3. Projects for production of energy from Renewable Sources in Dobrudja Region

Wind farms in Kaliakra IBA

In October 2013 the European Commission announced that it had referred the Bulgarian Government to the European Court of Justice due to non-compliance with EU nature conservation law regarding the Kaliakra IBA & Special Protection Area (SPA) / Komplex Kaliakra Site of Community Importance (SCI). As response to this action the Bulgarian Government has started a procedure for full designation of Kaliakra IBA as a Special Protection Area as well as designation of a new SPA "Bilo". In front of the media the Minister of Environment stated that the designation of the two areas will solve the Kaliakra case. Also they mixed the issues about Smin wind farm near Durankulak lake (see below) and Kaliakra. As a result the public information is unclear and it makes it look like the Government has made all the right steps to avoid the procedure in the court. None of the public announcements by the Ministry of Environment detail actions to be taken to remove impacts from wind farms.

SMIN Windfarm near Durankulak SPA.

The Smin Windfarm (WF) of 95 wind turbines next to Durankulak Lake (the world`s most important wintering ground for red breasted goose) was reported last year by the Bulgarian Government as being stopped (T-PVS/File (2012) 40). Our May NGO report reported that the

Supreme Administrative Court had overruled the Ministry of Environment and validated the consent, allowing it to proceed. However, the proposal has been stopped again recently. In summer 2013 BSPB sent information to the Prosecutor's Office in Sofia in relation to the Smin court case, outlining that not all facts were taken into consideration by the court and that new information was available which could significantly change the EIA conclusions. On the basis of this in August 2013 the Prosecutor sent a letter to the Minister of Environment where he justified the right of the Minister of Environment to rescind the approval order for Smin Wind farm and to request that a new procedure be carried out. On 14 October 2013 the Minister of Environment issued a justified order to rescind the decision of Approval of Smin wind farm and to require a new EIA procedure. This is a great success, as there is now hope that this wind farm project will be assessed again and could be stopped entirely, however the final result is not known yet.

General Toshevo wind farm

The other big wind farm reported by the government as a stopped project – General Toshevo Wind farm of 150 wind turbines in Central Dobrudzha was also approved by the Supreme Administrative Court judgement of the 9 May 2013 by rescinding the decision of the Ministry of Environment to stop the project. That wind farm is also located on a very intensive migration route (Via Pontica) both during autumn and spring. The consent for this project has not been consequently rescinded by the Minister of Environment, however, so it is still able to proceed.

II. IMPLEMENTATION OF THE RECOMMENDATION 130 (2007) – STATE OF IMPLEMENTATION

On 30 November 2006 the Bern Convention on European Wildlife and Natural Habitats 'opened a file' on wind farm development on the Via Pontica bird migration route along the Bulgarian Black Sea coast. On 29 November 2007 the Bern Convention adopted recommendation 130 (2007) following the on-spot appraisal carried out in 2007, and consideration of updated information on the case.

In the following sections of the report, we first describe the progress on implementation of each aspect of the recommendation and then outline key developments in relation to the wind farm developments at Kaliakra and Balchik.

1. Review relevant decisions, at the local, regional and national level, concerning wind energy plants and ensure that new plants are not built in the region unless Environmental Impact Assessment (EIA) prove they do not have a substantial negative effect on the biological diversity protected under the Convention - EIA reports should be more precise and scientifically sound than those already presented and should formulate independent peer reviewed conclusions;

To date (October 2013) none of the relevant decisions mentioned above have been reviewed, except the approval of the SEA of the NAPERES 2011-2020. Despite strong restrictions in the SEA these still allow huge numbers of wind turbines to be constructed in Dobrudzha. For details see NGO's report T-PVS/Files (2012) 16.

2. Fully reconsider the development of approved windfarm projects in the Balchik and Kaliakra region situated within or nearby sites designated as important bird areas and special areas of conservation;

Changes in the Environmental Protection Law and Biodiversity law give legal right to the authorities to reconsider at least part of the decisions taken for construction of wind turbines. So far we cannot obtain public information if any projects are already stopped based on this legal opportunity and if yes – which of them.

3. Investigate the possibility of relocating the windfarm projects already under construction as well as the single turbines (whose building is possible without EIA) in order to restore the integrity of sites to be considered as Natura 2000 sites, IBAs, or under other protection status;

According to our information, the Bulgarian authorities have not taken any actions to implement this point and do not plan to implement this recommendation.

4. Select alternative locations for future and not yet operating turbines based on appropriate data (including long-term monitoring of biodiversity) and assessments (e.g. using multicriteria-analysis); key bird areas, potential SPAs, IBAs, intensive bird migration corridors and sites regularly used by large flocks of roosting species such as storks and wintering geese must be avoided by windfarm development;

In the beginning of December 2013 there will be official presentation of the results of the project "Identification and minimizing the risks for wild birds", which incorporates the Opinion №1-2/2012 of the Minister of Environment and Water (MoEW) on the SEA of the NAPERES 2011-2020 which prevents new investment projects for wind farms to be examined and approved in the geographical area of Dobrudzha and other areas of the country specifically important for birds and other biodiversity. One of the results of the project – the risk map shows which areas in the country should be avoided and where there are good alternatives both from ecological and technical point of view. However it is not clear how the Bulgarian authorities will use the results in order to fulfil this recommendation. According to our information, the authorities have not taken any actions to implement this point in case of approved but not constructed wind farms in Dobrudzha or elsewhere along the Black Sea coast.

5. Assess the impact of the current operating turbines;

The Bulgarian authorities have taken no appropriate action to implement this point. Out of all investors in windfarms in the Dobrudzha region only AES Geopower have published reports of their own monitoring where the main conclusion is that there are no impacts on birds. Independent review of these reports carried out by RSPB (BirdLife UK) and the Wildfowl and Wetlands Trust conclude that there are a number of weaknesses in the methodologies for field studies, data gathering and analysis and interpretation of data in the AES Geopower reports that prevent the results being reliable proof of no impact on birds. One of the major flaws to these reports is a lack of targeted studies which correctly address the questions about possible impacts.

Since September 2010 two projects started to be implemented in Coastal Dobrudzha, which include as one of the activities monitoring of impacts of wind turbines on birds. One project is targeted at Red-breasted goose conservation (Financed by EC LIFE+ fund; to be implemented by BSPB) and the other is a national scale project targeted at elaborating a sensitivity map and guidance in relation to wind farms and birds (financed by the Environmental Operational Programme through MoEW; to be implemented by a Bulgarian-Dutch consortium including BSPB and ALTERA). Final results from the project "Identification and minimizing the risks for wild birds" are ready, and will be officially presented in December 2013. The results show high risk for birds from wind farm development in the whole Dobrudzha region. The impact made by operational wind turbines was not specially studied under this project. Nevertheless barrier effect and avoidance impacts were recorded during the project and documented in the reports.

Intermediate results from the studies under the Red-breasted goose project indicate there may be significant displacement effect to the Red-Breasted goose, but analysis and interpretation of data is still ongoing.

There is no information about any impact monitoring being carried out at any of the other windfarms in Dobrudzha.

6. Conduct a Strategic Environmental Assessment (SEA) of Bulgaria's wind energy programme, taking into account possible conflicts of wind energy production within the most intensive bird movements areas, in particular along the Black Sea coast;

No new information. For details see NGO's report T-PVS/Files (2012) 16.

7. Establish a strict moratorium on further turbines and windfarm projects in the coastal areas of Bulgaria until EIA and SEA reports mentioned in paragraphs 1 and 6 are completed;

No new information. For details see NGO's report T-PVS/Files (2012) 16.

8. Respect the need to focus on the avoidance of the impacts coming from outside having negative effects on areas of recognised conservation importance;

The Bulgarian authorities have taken no actions to implement this point, except for two actions taken on a national strategic level:

1. No new renewable energy development in buffer zones around a small number of SPAs, as outlined in the NAPERES 2011-2020.
2. Risk map for wind farm development in Bulgaria where the areas of high risk, medium risk and no risk are shown; the map is one of the results of the project "Identification and minimizing the risks for wild birds"

9. Take into account the following guidance to improve EIAs for future and not yet operating turbines, including in accordance with "Regulation about the conditions and the order for accomplishment of assessment for compatibility of plans, projects, programmes and investment intentions with the subject and the aims of the conservation of protected zones":

- *further research and monitor birds, bats, other fauna, vegetations and key landscape-ecological structures and processes influencing biodiversity; to this end long-term monitoring of flora and fauna, review and validation of all data is required, including those from NGOs, institutes and independent scientists;*
- *apply collision modelling of cumulative effects of several wind farms or turbines along intensive flyways, followed by the assessment of the suitability of localities using multicriteria-analysis methods;*
- *develop compulsory procedures to peer review the completeness and quality of biodiversity chapters of EIAs and their conclusions before continuing the administrative and legal processes;*

The two projects mentioned above ("Safe grounds for the Red-breasted Goose" and "Identification and minimizing the risks for wild birds") collected significant amounts of data on wintering, migratory and breeding birds in the region of Dobrudzha which could be used to improve the quality of EIA data. Targeted studies on bats and the flora in relation to wind farms were not carried so far.

Under the project "Identification and minimizing the risks for wild birds" the produced risk maps for migratory species, as well as the general risk maps are based on a multicriteria-analysis and modeling. However targeted studies on cumulative impact in terms of collision events were not carried out so far.

No actions have been taken to develop compulsory procedures to peer review the completeness and quality of biodiversity chapters of EIAs.

10. Develop guidelines for appropriate planning of the construction of windfarms and/or individual turbines, taking account of the following issues in order to integrate biodiversity conservation concerns:

- *initiate a broad debate on the precautionary principle regarding development projects in relation to sites with outstanding biodiversity values;*
- *take measures for the removal of turbines in case of unacceptable bird collisions where no alternatives exist; this requires the drafting of a set of mitigating and compensatory measures when biodiversity losses occur;*

A guidance document for planning construction of wind farms and avoiding risks for birds was elaborated under the project "Identification and minimizing the risks for wild birds", which will be officially presented in December 2013. The issue about removal of operational wind turbines in case of unacceptable impacts and lack of alternatives is not talked by the Guidance. All the other issues are covered appropriately.

WINDFARMS IN BALCHIK AND KALIAKRA – VIA PONTICA (BULGARIA)

Follow-up of the NGO`s report

Updated May 2013

SUMMARY

This document provides a follow up update of the report submitted by NGOs to the Bern Convention Standing Committee in 2012 - T-PVS/Files (2012) 16.

Since October 2012 Bulgarian Society of the Protection of Birds (BirdLife Bulgaria) and the Royal Society for the Protection of Birds (BirdLife UK) do not register any progress in implementation of most aspects of the Recommendation. The case continues to be at a very critical stage, where new possibly harmful wind farm developments are allowed to go ahead and no sufficient actions are taken to implement sufficient measures on time to meet Recommendation 130 (2007).

Apart of the threatened and deteriorated habitats for many migratory birds in Kaliakra IBAs and Coastal Dobrudzha, the globally endangered Red-breasted Goose seems to face immediate and direct threat by continuing large scale wind farm development in the region. Without urgent coordinate actions the most important areas for the species in the world could be damaged.

We thus urge the Bern Convention to take further action, as appropriate, to assist Bulgaria to stop irreversible damage to Europe`s natural heritage. Although there have been some positive steps taken by the Bulgarian authorities since the change of government in late 2009, sadly it seems that without further international pressure the Black Sea coast sites will be damaged further. We also request the Birds Experts Groups to assist the Bern Convention with appropriate proposals for further actions in order to stop continuing pressure on birds and habitats in area of Kaliakra and Dobrudzha.

I. UPDATE OF THE REVIEW OF THE GOVERNMENTAL REPORT TO THE BERN CONVENTION STANDING COMMITTEE - T-PVS/FILES (2012) 40

1. Strategic planning

The Opinion №1-2/2012 of the Minister of Environment and Water on the Strategic Environmental Assessment of the proposed NAPERES 2011-2020 is incorporated in the results of the project "Identification and minimizing the risks for wild birds" of the Ministry of Environment and water, in particular the Sensitivity map of Bulgaria, where risk for birds exist due to wind farm development and the Guidance for wind farm development. The results of the project are still under the evaluation of the Ministry and are not adopted and publically available.

As mentioned in the previous report the Opinion №1-2/2012 does not solve (and it can't) the problem with existing harmful development in Kaliakra IBA.

2. Changes in environmental legislation

Since October 2012 there are no results available and it is unknown what steps are taken by Regional Inspectorates of Environment and Water in order to revise and identify which of the already given permissions for wind farms in Dobrudzha are not implemented more than 5 years and thus are not longer valid.

Unfortunately this step also does not solve (and it can't) the problem with existing harmful development in Kaliakra IBA.

3. Projects for production of energy from Renewable Sources in Dobrudzha Region

Smin Windfarm near Durankulak SPA can be constructed.

The Smin WF of 95 wind turbines next to Durankulak Lake (the world most important wintering ground for red breasted goose) has been reported last year by the Government as stopped project (T-PVS/Files (2012) 40). In our report to Bern Convention (T-PVS/Files (2012) 16) we clarified that the

decision of MoEW to rescind the approval of the wind farm is taken to the court by the investor. On 9 May 2013 the Supreme Administrative Court took final decision (cannot be appealed) to rescind the decision of the Ministry of Environment and Water. As a result of this the decision for approval of Smin Wind farm is valid since 9 May 2013 and the wind farm can be constructed. There are almost no any possibilities on a national level to stop this damaging project. If the wind farm is build it will cause huge impact on the wintering population of the Red-breasted Goose in the region, where there are already more than 300 operational wind turbines and 700 which are approved and could be build. In addition to this the threatened area is regularly used by other globally threatened species on migration – the Imperial Eagle and Saker Falcon.

General Toshevo wind farm also could be allowed by the Court

The other big wind farm reported by the government as stopped project – General Toshevo Wind farm of 150 wind turbines in Central Dobrudzha is also pending on a court case. The investor is the same as of the Smin windfarm and appealed against MoEW in front of the Supreme Administrative Court. There is a high risk that the court to decide in favour of the wind farm construction. That wind farm is also located on a very intensive migration route (Via Pontica) both during autumn and spring.

II. IMPLEMENTATION OF THE RECOMMENDATION 130 (2007) – STATE OF IMPLEMENTATION

On 30 November 2006 the Bern Convention on European Wildlife and Natural Habitats 'opened a file' on wind farm development on the Via Pontica bird migration route along the Bulgarian Black Sea coast. On 29 November 2007 the Bern Convention adopted recommendation 130 (2007) following the on-spot appraisal carried out in 2007, and consideration of updated information on the case.

In the following sections of the report, we first describe the progress on implementation of each aspect of the recommendation and then outline key developments in relation to the wind farm developments at Kaliakra and Balchik.

1. Review relevant decisions, at the local, regional and national level, concerning wind energy plants and ensure that new plants are not built in the region unless Environmental Impact Assessment (EIA) prove they do not have a substantial negative effect on the biological diversity protected under the Convention - EIA reports should be more precise and scientifically sound than those already presented and should formulate independent peer reviewed conclusions;

To date (October 2012) none of the relevant decisions mentioned above have been reviewed, except the approval of the SEA of the NAPERES 2011-2020. Despite the strong restrictions approved these still allow huge numbers of wind turbines to be constructed in Dobrudzha. For details see NGO's report T-PVS/Files (2012) 16.

2. Fully reconsider the development of approved windfarm projects in the Balchik and Kaliakra region situated within or nearby sites designated as important bird areas and special areas of conservation;

Changes in the Environmental Protection Law and Biodiversity law give legal right to the authorities to reconsider at least part of the decisions taken for construction of wind turbines. So far there is no progress on in this respect.

3. Investigate the possibility of relocating the windfarm projects already under construction as well as the single turbines (whose building is possible without EIA) in order to restore the integrity of sites to be considered as Natura 2000 sites, IBAs, or under other protection status;

According to our information, the Bulgarian authorities have not taken any actions to implement this point and do not plan to implement this recommendation.

4. Select alternative locations for future and not yet operating turbines based on appropriate data (including long-term monitoring of biodiversity) and assessments (e.g. using multicriteria-analysis); key bird areas, potential SPAs, IBAs, intensive bird migration corridors and sites regularly used by large flocks of roosting species such as storks and wintering geese must be avoided by windfarm development;

The Opinion №1-2/2012 of the Minister of Environment and Water on the SEA of the of the NAPERES 2011-2020 prevents new investment projects for wind farms to be examined and

approved in the geographical area of Dobrudja and other areas of the country specifically important for birds and other biodiversity. Thus at least on paper the Opinion provides information for alternative solutions for new investment proposals. The Opinion is incorporated into results of the project “Identification and minimizing the risks for wild birds”, but the results are still not approved (these are under evaluation by MoEW at present) and it is not clear how the Ministry will use the results.

However according to our information, the Bulgarian authorities have not taken any actions to implement this point in case of approved but not constructed wind farms in Dobrudja or elsewhere along the Black Sea coast.

5. Assess the impact of the current operating turbines;

The Bulgarian authorities have taken no action to implement this point. So far only investors do monitoring of the two big wind farms in Kaliakra IBA. INOS 1 do not publish the results from their monitoring. AES Geopower have published four years of reports on wintering geese and migration, with data collected before the start of operation of windfarm, during construction and post-construction. INOS 1 company provided reports to RIEW, but their period for reporting expired and results of monitoring are not clear.

Since September 2010 two projects started to be implemented in Coastal Dobrudzha, which include as one of the activities monitoring of impacts of wind turbines on birds. One project is targeted at Red-breasted goose conservation (Financed by EC LIFE+ fund; to be implemented by BSPB) and one national scale project is targeted at elaborating a sensitivity map and guidance in relation to wind farms and birds (financed by Environmental Operational Programme through MoEW; to be implemented by a Bulgarian-Dutch consortium including BSPB and ALTERA). Final results from the project “Identification and minimizing the risks for wild birds” are ready, but these are still not approved (these are under evaluation by MoEW at present). The results show high risk for birds from wind farm development in Whole Dobrudzha. The impact made by operational wind turbines was not specially studied under this project. Nevertheless impacts as barrier effect and avoidance were recorded during the project.

Intermediate results from the studies under the Red-breasted goose project show significant displacement effect to the Red-Breasted goose, but still analysis and interpretation of data is going on.

There is no information about any impact monitoring being carried out at any of the other windfarms in Dobrudzha.

6. Conduct a Strategic Environmental Assessment (SEA) of Bulgaria’s wind energy programme, taking into account possible conflicts of wind energy production within the most intensive bird movements areas, in particular along the Black Sea coast;

No new information. For details see NGO’s report T-PVS/Files (2012) 16.

7. Establish a strict moratorium on further turbines and windfarm projects in the coastal areas of Bulgaria until EIA and SEA reports mentioned in paragraphs 1 and 6 are completed;

No new information. For details see NGO’s report T-PVS/Files (2012) 16.

8. Respect the need to focus on the avoidance of the impacts coming from outside having negative effects on areas of recognised conservation importance;

The Bulgarian authorities have taken no actions to implement this point, except for new renewable energy development in buffer zones around a small number of SPAs, as outlined in the NAPERES 2011-2020.

9. Take into account the following guidance to improve EIAs for future and not yet operating turbines, including in accordance with “Regulation about the conditions and the order for accomplishment of assessment for compatibility of plans, projects, programmes and investment intentions with the subject and the aims of the conservation of protected zones”:

- *further research and monitor birds, bats, other fauna, vegetations and key landscape-ecological structures and processes influencing biodiversity; to this end long-term monitoring of flora and fauna, review and validation of all data is required, including those from NGOs, institutes and independent scientists;*
- *apply collision modelling of cumulative effects of several wind farms or turbines along intensive flyways, followed by the assessment of the suitability of localities using multicriteria-analysis methods;*
- *develop compulsory procedures to peer review the completeness and quality of biodiversity chapters of EIAs and their conclusions before continuing the administrative and legal processes;*

Since April 2011 the MoEW initiated the implementation of a project “Mapping and identifying the FCS [Favourable Conservation Status] of habitats and birds Phase I”, with a special section “Birds: **Identification and minimizing the risks for the wild birds**”.

The main goals of the project related to the “Birds” section are:

- An elaborated methodology for monitoring of bird migration prepared and submitted in the Executive Environmental Agency¹ under the Ministry of Environment and Water
- Development of a system for early warning, which will regulate the work of the wind generators
- Development of guidance for conservation of wild birds during wind farm development in Bulgaria
- Development of a map and GIS model with the territories at high risk for birds caused by windfarm development

The minimizing of risks for wild birds is one of the main activities of the project, which aims to identify the most important sites, which are used by the birds on migration for roosting and foraging as well as the main migratory routes in order to ensure their conservation and minimising the risks caused by realisation of **new investment proposals** and projects in these territories.

Final results from the project “Identification and minimizing the risks for wild birds” are ready, but these are still not approved (these are under evaluation by MoEW at present).

10. Develop guidelines for appropriate planning of the construction of windfarms and/or individual turbines, taking account of the following issues in order to integrate biodiversity conservation concerns:

- *initiate a broad debate on the precautionary principle regarding development projects in relation to sites with outstanding biodiversity values;*
- *take measures for the removal of turbines in case of unacceptable bird collisions where no alternatives exist; this requires the drafting of a set of mitigating and compensatory measures when biodiversity losses occur;*

The government is planning to create guidelines as part as the project described above. Final results from the project “Identification and minimizing the risks for wild birds” are ready, but these are still not approved (these are under evaluation by MoEW at present).

¹ The Agency is responsible for all kind of monitoring of the environment in the country (air, soil, water, biodiversity, protected areas, Natura 2000)



**THE RED-BREASTED GOOSE FACES IMMEDIATE DANGER
BY THE POSSIBLE CONSTRUCTION OF SMIN WIND FARM NEAR DURANKULAK**

Open Case File - Windfarms in Balchik and Kaliakra – Via Pontica (Bulgaria)

NGO Updated Information in relation to Recommendation No.130 (2007),
provided to Bern Convention and AEWA Secretariat
by Bulgarian Society for the Protection of Birds

24.1.2013

The Bulgarian Society for the Protection of Birds (BSPB) and the Royal Society for the Protection of Birds (RSPB) as part of Bird Life International, express our deep concerns about the immediate danger to a species globally endangered by extinction - the Red-breasted Goose, due to possible construction of Smin wind farm (95 turbines) beside Durankulak Lake Natura 2000 site. Durankulak Lake is arguably the most globally important wetland for wintering Red-breasted goose, and because of its unique value for this species and many other water birds it is designated as a Special Protection Area (under the EU Wild Birds Directive), Ramsar site and national protected area.

We would like to inform you that on 17 January 2013, the Supreme Administrative Court of Bulgaria took Decision **No. 805** to denounce the Ordinance of the Minister of Environment and Water which rescinded the decision for approval of Smin wind farm, issued by the Director of the Regional inspectorate for Environment and Water in Varna (RIEW Varna). The only argument of the Court is that the Minister of Environment has restricted power to rescind the decision of the Director of RIEW Varna in terms of the legality of the issued permission because of a previous decision of the Varna Administrative Court on the same case. The Supreme Administrative Court completely neglected the fact that the decision of Varna Administrative Court was denounced a few months ago due to the complainant (NGO Green planet) rescinding its complaint. The full text of the Supreme Administrative Court Decision is attached to this information.

We provided full information about the Smin windfarm case to the Bern Convention Bureau in March 2012 and reported to the Bern Convention Standing Committee in November 2012. During the Standing Committee meeting the Ministry of Environment and Water announced Smin windfarm as one of the greatest success of stopping wind farms in Bulgaria and the BSPB representative clarified that the decision of the Minister had been appealed and could be cancelled by the court, as has happened now.

In brief the history of the case is as follows:

- In March 2012 the RIEW Varna approved the EIA Report and based on it, also allowed preliminary execution of the SMIN project.
- As a result the BSPB appealed the RIEW Varna decision in front of the Ministry of Environment and Water (MoEW). At the same time an unknown NGO from Varna – Green Planet, appealed the RIEW Varna decision in front of the Administrative Court in Varna. On the 16th of May 2012 the Administrative Court in Varna cancelled the decision of the RIEW Varna. On the 29th of June 2012 the MoEW cancelled the decision of the RIEW Varna. The interesting thing is that the MoEW says that they were not aware of the court case where the RIEW was a party.
- On the 16th of July the investor appealed the decision of Varna Administrative Court in front of the Supreme Administrative Court. On the 17th of July the investor appealed the decision of MoEW in front of the Supreme Administrative Court.
- Once the decision of the Minister of Environment and Water was appealed in front of the Supreme Administrative Court by the investor, BSPB took necessary steps, and provided to the

Court detailed arguments against the approval of SMIN windfarm, including details of two infringement procedures run by the European Commission - 4260/27.11.2008 (Kaliakra case) and 4461/29.10.2009 (lack of adequate protection for SPAs), as well as the Recommendation 130/2007 of the Bern Convention.

The Supreme Administrative Court fully neglected these facts when it took decision No.805. The Decision of this Court will allow the Smin windfarm to be constructed if it is not appealed to a higher level of the Supreme Administrative Court (in front of 5 judges) by 31 January 2013. Even if it is appealed, keeping in mind the recent bad practice of the Bulgarian court system to make dubious decisions against Bulgarian Nature, it is very likely that they'll confirm the previous decision. This means that the project will be constructed.

As BSPB has decided to appeal the Court Decision 805/17.1.2013 we and the Ministry of Environment and Water need urgent, strong and very clear support by the international institutions because our influence at a national level are restricted and limited.

In light of your letter to the Ministry of Environment and Water on 18 January 2013 and the upcoming meeting of the Bureau on 8th April and the Group of Experts on Birds on 31st May, as well as based on the Decision taken during 32nd meeting of the Bern Convention Standing Committee, we would like to ask you to take immediate appropriate actions to help the Ministry of Environment and Water and make clear to the Supreme Administrative Court the value of the area for the Convention Parties and the consequences for the Bulgarian Government if Smin wind farm is constructed. In particular we ask for:

- The Bureau of the Bern Convention to ask the Ministry of Environment and Water to provide detailed information about the Smin windfarm case in its report, that should be delivered by 15th March 2013, expressing its concerns about the threats to the Red-Breasted Goose
- The Bureau of the Bern Convention, during its meeting on 8th April to discuss the case in detail and according to its rules to prepare and send a letter to the Bulgarian Government addressing the Kaliakra case and Smin windfarm case in particular, requesting the Government and institutions (including the Bulgarian judicial system) to take appropriate actions to ensure protection of these sites
- During its Bird Expert meeting on 31 May, to come up with a position in particular for Kaliakra and for Smin windfarm cases in Bulgaria, to send to the Bulgarian Government
- To coordinate with AEWA a joint mission to Bulgaria this year (AEWA is also informed about the recent developments in the Smin windfarm case).

The Bulgarian Society for the Protection of Birds will provide all necessary available information to help the actions of the Bern Convention with regard to the Smin windfarm case.

Appendices:

DECISION № 805, Sofia, 17.01.2013, the Supreme Administrative Court of Bulgaria

DECISION № 805
Sofia, 17.01.2013

IN THE NAME OF THE PEOPLE

The Supreme Administrative Court of Bulgaria - Fifth Division, in a hearing on the 19
December 2012, with members:

Chairman: Andrey IKONOMOV

MEMBERS: Diana Dobрева

ILIANA Slavovska

Secretary: Nikolina Avramova, with the participation of prosecutor Maria Begamova reported hearing
Chairman Andrey IKONOMOV on adm. case № 11084/2012.

Production is under Art. 126 et seq of the Administrative Procedure Code (APC) in conjunction with Art. 99, para. 6 of the Law on Protection of the Environment. The case is based on an appeal of "Wind Energy Consortium" Ltd. against Decision № 181/29.06.2012 of the Minister of Environment and Waters.

The appeal was filed on time and the procedure is admissible.

In the contested decision, the Minister, based on illegality and violations of rules specified by the Ordinance on the conditions and procedures for assessing the environmental impact and the Ordinance on the conditions and procedures for assessing the compatibility of plans, programs, projects and investment proposals with the object and purpose of the conservation of protected areas, has canceled EIA Decision № VA-7/2012 of the Director of the Regional Inspectorate of Environment and Waters - Varna (REI) and has remitted the case to the administrative authority for reconsideration in account of the reasons for the decision.

Dissatisfied, the Consortium has appealed the decision of the Minister and considers it invalid for lack of jurisdiction of the authority which has issued it. The Consortium has also developed alternative arguments for its illegality and asks for declaring the decision null and void and possibly cancelling the same as wrong.

The Respondent - the Minister, through its procedural representative considers the complaint against Decision № 181/29.06.2012 inadmissible; Develops arguments for lack of justification; Asks leaving the complaint with no response or rejecting it as unfounded.

The interested party Bulgarian Society for Protection of Birds (BSPB), considers the appeal the Consortium inadmissible; asks leaving it without examination.

The interested party Association "Green Balkans" takes no position on the appeal.

The prosecutor gives an opinion on the complaint of the Consortium as unfounded.

The Supreme Administrative Court, a panel of the Fifth Division (SAC), to rule took into account the following:

In connection with an investment proposal by the Consortium received at RIEW Varna, after the prescribed procedures, the Director has issued EIA Decision № VA-7/2012, with which she has approved the implementation of the investment proposal for construction of a wind energy park consisting of 95 turbines and two substations in the lands of the villages Vaklinovo, Chernomortsi, Smin, Staevtsi, Bozhanovo, Granichar, Zahari Stoyanovo and Bezhanovo in Shabla Municipality and General Toshevo Municipality. This administrative decision was appealed by the NGO "Green Planet" in front of the Administrative Court of Varna (ACVn) with the argument of illegality. It was

also appealed by the interested parties in this case - BSPB and the "Green Balkans" following the administrative order – through the Director RIEW to the Minister on the grounds of the act's illegality and inexpediency.

Following the appeal of Green Planet, administrative case № 1084/2012 was initiated on the list of ACVn. The appeals of BSPB (registered in Varna RIEW with ref. № 26-00-6095 (61) of 19.03.2012) and Association "Green Balkans" (registered in Varna RIEW ref. № 26-00-6095 (63) of 21.03.2012), letter ref. № 26-00-6095/28.03.2012, were sent by the Director of RIEW to ACVn to join the administrative case 1084/2012, and for their joint consideration by the court. Since in them there are arguments against the appropriateness of Decision № VA-7/2012, however, by order № 1562/30.03.2012 ACVn on the case, ACVn held that they were not under their jurisdiction and sent them on the competence of the Minister. The ruling was not appealed and entered into force on 16.05.2012.

Simultaneously, administrative case proceedings № 1084/2012, of ACVn initiated by Green Planet was completed with decision № 1296/16.05.2012. The decision was appealed by the Director of the RIEW Varna and the Consortium, whose appeals resulted in administrative case № 9325/2012 instituted on 25/07/2012 in the list of SAC. Meanwhile, an application with ref. № s.d.13872/21.07.2012 was filed by Green Planet, which states a refusal to challenge the decision of the Director of RIEW Varna. On the basis of this application, by order № 11239/14.09.2012 on administrative case № 9325/2012, SAC discharged decision № 1296/16.05.2012 on administrative case № 1084/2012 of ACVn and left without consideration the cassation complaints of the Director of RIEW Varna and the Consortium against it, and the proceedings of SAC were terminated. The ruling was not appealed and became final.

After the appeals of BSPB and the "Green Balkans" were received in the Ministry of Environment and Water (MoEW), the Minister issued the contested Decision № 181/29.06.2012.

With these findings of fact, the appeal of the Consortium is justified. The Minister's decision is invalid, given the absence of substantive jurisdiction, for the following reasons:

Article 129 of the APC regulates the manner of connection of appeals issued against an administrative act when its legality and appropriateness are challenged in judicial and administrative proceedings. It solves the issues of the Code provided substantive jurisdiction of the court and the superior administrative authority to challenge the merits of the act. According to para. 1 of the norm, if the legality of an administrative act or the refusal to be issued one is appealed to both a higher administrative authority and the court, the appeals are joined in a common proceedings within the jurisdiction of the court. I.e. in all cases complaints of illegality are considered in common proceedings, no matter to whom they are addressed (superior court or administrative body) and the jurisdiction to rule on them belongs to the court. This rule, according to par. 2 shall not apply where the appeal to a higher administrative body questions the appropriateness of the act. In these cases, jurisdiction to rule belongs to the higher authority. In such cases, if there are court proceedings, they shall be suspended until the higher administrative authority pronounces.

In this case, an appeal by Green Planet of the illegality of the decision of the Director of RIEW Varna was submitted to ACVn and proceedings started. At the same time, appeals were filed against the same administrative act by BSPB and the "Green Balkans" addressed to the Minister, which along with the argument of illegality target its appropriateness. ACVn in accordance with that provision of the APC sent these complaints to the Minister for a decision for lack of jurisdiction to hear and rule on the arguments for the appropriateness of the measure.

For his part, the Minister, pursuant to Art. 129, para. 2, sentence. 1 of the APC was to consider and decide only on the arguments in the appeals BSPB and the "Green Balkans" concerning the appropriateness of the decision of the Director of RIEW Varna. Its jurisdiction is limited, as based on an appeal against the legality of that decision submitted by Green Planet, a case has been formed by ACVn. Ruling in the contested decision № 181/29.06.2012, by which she annulled the first decision as unlawful and remitted the case to the Director for reconsideration, the Minister held an invalid administrative act because of lack of substantive jurisdiction procured for this.

The argument of inadmissibility of the Consortium's appeal pursuant to Art. 145, para. 2, item 2 of the APC is unfounded. Under this rule, subject to challenge is a decision of the higher administrative authority, which amends the original administrative act or the latter has been canceled and the issue is resolved on the merits. In this case there is no actual pronouncement of the Minister on the merits. There is only a repeal of the original act and return request for reconsideration by the Director of RIEW Varna, taking into consideration the reasons for the decision of the Minister. However, the Minister's decision is void, as while there were proceedings pending for checking the legality of the decision by the court, she also ruled it illegal, with no competence whatsoever. If the original act was canceled due to his inappropriateness and the file - returned for reconsideration without ruling on the merits, the appeal against the decision with such content would be inadmissible under the said provision.

In view of the comments, the Minister's decision, however, also affects the rights and interests of the Consortium and its cancellation affects the latter's legal interest. The order of the Director of RIEW favors the Consortium and its cancellation gives rise to a legal interest in the annulment of the act of the Minister. The appeal of the latter is permissible under the general principle of appeal of administrative decisions based on Art. 120, para. 2 of the Constitution, because of the effect on the rights and interests of the applicant.

In this case there is no competition between the nullity of the decision of the Minister, established by SAC, and the alleged inadmissibility of the Consortium's appeal. Nullity in all cases has a priority and any interested person may request its notification. Appeal is inadmissible only against a valid administrative act which does not meet the conditions of Art. 145, para. 2, item 2 of the APC. On those grounds, the decision of the Minister should be declared null and void and therefore pursuant to Art. 172, para. 2 of APC SAC

RULED:

Announces, as a response to the appeal of "Wind Energy Consortium" Ltd, the nullity of Decision № 181/29.06.2012 of the Minister of Environment and Water, which has canceled EIA Decision № VA-7/2012 of the Director of RIEW Varna and returned the file to the administrative authority for reconsideration in compliance with the reasons for the decision.

The decision may be appealed to the five-member panel of the Supreme Administrative Court within 14 days of notification of the parties.

CHAIRMAN: / s / Andrei Ikonov

MEMBERS: / s / Diana Dobrova

/ s / Iliana Slavovska