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DZIKA POLSKA



Complaint to the European Commission concerning alleged breach of Union law

Failure to comply with Articles 6(2) and 6(3) of the Habitats Directive and Article 4(4) of the Birds Directive (by virtue of Article 7 of the Habitats Directive) in relation to the revised Forest Management Plan for Białowieża Forest District

April 2016

In this document we have combined the information required by:

- the online complaint form found at http://ec.europa.eu/atwork/applying-eu-law/complaint_form_en.htm; and
- the special complaint form (supplementary information required) in the case of complaints concerning the failure to apply one of the directives on nature protection, accessible at <http://ec.europa.eu/environment/legal/law/complaints.htm>.

However, we also set out more information in section VI, which may be helpful to the Commission in investigating this complaint and pursuing an infringement action.

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I. IDENTITY AND CONTACT DETAILS

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II. BRIEF DESCRIPTION OF THE SUSPECTED INFRINGEMENT OF UNION LAW

With this complaint we request that the Commission:

- takes infringement action against Poland for failure to comply with its obligations under Articles 6(2) and 6(3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, in relation to the site's designation as a special area of conservation and under Article 4(4) of Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (by virtue of Article 7 of Directive 92/43/EEC) in relation to the site's classification as a special protection area.
- intervenes to ensure the protection of the Bialowieza Forest PLC 200004 in compliance with the Habitats Directive and the Birds Directive, including, based on Article 279 TFEU, by prescribing the necessary interim measures. We consider a suspension of logging in Bialowieza Forest to be vital for the avoidance of an irreversible destruction of natural habitats.

Description of the facts and the reasons for the complaint

The Bialowieza Forest (ca. 1 500km²) is the last remains of primeval deciduous forest of the northern temperate zone in Europe. The Bialowieza Forest is divided between Belarus (ca. 870 km², almost entirely protected as a National Park "Belovezhskaya Pushcha") and Poland (ca. 630 km²). The Polish part of the Bialowieza Forest (hereinafter **Bialowieza Forest**) is managed by the Bialowieza National Park (only 17%) and the State Forests Service, a state-owned organisation (remaining 83%). The part which is managed by the State Forests Service of Bialowieza Forest is divided into three forest districts: Bialowieza, Browsk and Hajnowka.

The whole of the Polish part of the Bialowieza Forest is designated as a special area of conservation under the EU Habitats Directive (92/43) and special protection area under the EU Birds Directive (79/409)¹ also known as a Natura 2000 site (PLC 200004). It has a valid management plan since November 2015 which indicates that removal of dead and dying trees is one of the basic threats to different protected habitats and species,² including those of conservation priority. The management plan is known as the 'Plan of Protection Tasks'. The site also hosts a wide range of bird species that are protected under the EU Birds Directive (79/409), including species listed on Annex I of the Directive which require special conservation measures concerning their habitat in order to ensure their survival and reproduction in their area of distribution.

The subject of this complaint is the approved logging on the territory of the Bialowieza Forest District. This Forest District covers 123 km² and is 24% of the area managed by the State Forests Service within the Bialowieza Forest (and 19% of the whole Polish part of Bialowieza Forest). Accordingly, this Forest District is almost a fifth of the Natura 2000 site.

¹ This Directive has subsequently been codified as Directive 2009/147/EC.

²<http://edziennik.bialystok.uw.gov.pl/#/legalact/2015/3600/>

Each Forest District in Bialowieza Forest has had a 10 year Forest Management Plan (hereinafter **FMP**) in place since 2012³. For Bialowieza Forest District the limit was established as 63 471 m³ of timber harvest over 10 years⁴.

By the end of 2015, i.e. after 4 years of the current plan, the Bialowieza Forest District had already almost reached its harvesting limit for the 10-year period (over 96% exceeded) and therefore would have to abandon timber harvesting for the next 6 years.

The process leading to the decision in question

The Forest Act is the Polish law which governs forest management of state-owned forests. According to the Forest Act, a FMP is approved and supervised by the Minister of the Environment. A change to the FMP can be made through an annex and requires the approval of the Minister of the Environment. However, an increase of the projected timber harvest in the district can be justified only by damage or natural disaster. A FMP is amended following the same procedure that is required by the Forest Act for the approval of a FMP.

In November 2015, the State Forests Service launched a proposal for an annex to update the FMP for Bialowieza Forest District to allow five times more intense timber harvest (up to 317 894 m³ per 10 years) than planned in a valid FMP in 2012 (63 471 m³ per 10 years). The Regional Director for Environmental Protection (hereinafter **RDEP**) in Białystok issued a negative opinion regarding the proposed limits, as it was impossible to exclude an adverse effect of that logging on the Natura 2000 site. As a result, State Forests Service adjusted the harvest limits in the annex – the revised limit was 188 000 m³ over 10 years. The revised limit increases the timber harvest threefold from the level agreed in 2012. In response, the RDEP in Białystok issued a positive opinion regarding the amended version of the annex. On 25 March 2016 the Minister of the Environment approved the annex to the FMP of the Bialowieza Forest District⁵.

Further context

The **State Forests Service** say their decision is motivated by the desire to halt the ongoing outbreak of bark beetle that they claim is ravaging the forest's spruce population. The outbreak is declared as a threat to the 'survival of the forest'. This ignores the fact that bark beetle outbreaks occur in Bialowieza Forest every 8-10 years and should be viewed as a natural factor shaping changes in the forest composition, especially in an era of rapid climate change.

Various scientific bodies have raised their concerns about raising the level of logging in Bialowieza Forest District, and more broadly across Bialowieza Forest. The State Council for Nature Conservation in Poland issued an official statement protesting against the planned increase in forestry activities in the Bialowieza Forest⁶. This was followed by similar statements by the Committee for Nature Conservation of the Polish Academy of Sciences⁷ and the Scientific

³The original FMPs for the period 2012-2021 for three Forest Districts predicted 469,980 m³ of timber harvest over 10 years (averaging c. 47,000 m³ logged annually).

⁴That was viewed as a sharp reduction in logging intensity, as the three previous 10-year management plans for the Bialowieza Forest allowed the extraction of 120,000-150,000 m³ annually (for the three Forest Districts in total).

⁵https://bip.mos.gov.pl/fileadmin/user_upload/bip/strategie_plany_programy/Decyzja.pdf (in Polish)

⁶http://prop.info.pl/pul_bialowieza/ (in Polish)

⁷http://www.polskiwilk.org.pl/download/KOP_PAN.pdf (in Polish)

Council of the Bialowieza National Park⁸. Also the public strongly oppose large-scale cutting of trees in the Bialowieza Forest.

The approval of the revised level of logging represents a major threat to the integrity of the Bialowieza Forest Natura 2000 site, including the conservation status of a number of priority habitats and species⁹. Large-scale logging would seriously disturb natural processes shaping the habitats and leading to impairment of conservation status of certain species.

Breaches of the Habitats Directive

In accordance with **Article 6(3) Habitats Directive**, it is necessary that each plan or project, not directly connected with or necessary for the management of a Natura 2000 site but which is likely to significantly affect the site, be subject to an individual assessment of the implications for the site concerned, in view of the site's conservation objectives – this assessment will henceforth be referred to as the **appropriate assessment**. Further, the law requires that competent authorities are to authorise a plan or project only if they have made certain that it will not adversely affect the integrity of a Natura 2000 site. That is the case where no reasonable scientific doubt remains as the absence of such effect.

Regarding the annex to the FMP for Bialowieza Forest District, which increases threefold the permitted timber harvest, an appropriate assessment of the implications for a protected site has not been carried out. This constitutes a breach of Article 6(3) of the Habitats Directive.

We are not aware that the annex to the FMP is considered by the Minister of the Environment as a plan or project that must be carried out for 'imperative reasons of overriding public interest'. And in any event we are not aware of any assessment of alternative solutions or proposals for compensatory measures necessary to ensure that the overall coherence of Natura 2000 network is protected. Therefore, we have not specifically addressed Article 6(4) of the Habitats Directive in this complaint, but in general we believe that the authorisation of the annex has not been carried out in compliance with Article 6(4) of the Habitats Directive.

For the sake of completeness, we also raise the breach of **the Article 6(2) Habitats Directive** due to failing to take the appropriate measures to avoid the deterioration of natural habitats and the habitats of species, and the disturbance of the species for which a site had been designated.

Urgent need for the Commission to intervene

Approval of the annex to the FMP by the Minister of the Environment is all that is needed for the increased logging to start. Polish law sets no other requirements to be met before logging can start. As the bark beetle is generally active from April until September, it will most probably be used as a justification to start logging as soon as possible. The threat of an irreversible biodiversity loss in the Natura 2000 site is therefore real, probable and imminent.

Therefore we ask the Commission to quickly intervene to halt the irreversible loss that would be caused by intense logging and to ensure the protection of the Bialowieza Forest in compliance with the Habitats Directive.

⁸ http://www.otop.org.pl/uploads/media/stanowisko-rady-bpn_aneks.pdf (in Polish)

⁹ The Habitats Directive defines 'priority natural habitat types' as natural habitat types in danger of disappearance, which are present on the territory referred to in Article 2 and for the conservation of which the Community has particular responsibility in view of the proportion of their natural range which falls within the territory referred to in Article 2; these priority natural habitat types are indicated by an asterisk (*) in Annex I.

Does your complaint relate to the EU Charter of Fundamental Rights, which applies only to the implementation of Union law (Article 51)?

No

III. APPEALS/LEGAL ACTIONS/ OTHER ACTIONS

Have you already taken action in the EU country concerned to attempt to solve this problem, or are you aware of any action in the country concerned covering the issue you raise in this complaint?

Yes

Please see section V for further details.

Reasons for not taking legal action to tackle the problem in the country concerned

No remedy available for the problem

Please see section V for further details.

Contact with other EU institutions and bodies to request help in solving your problem:

None

Contact with any of the institutions or bodies dealing with problems of this nature

None

If, after examining your case, the Commission considers that SOLVIT is better placed to deal with it, do you agree to your complaint being transferred to SOLVIT?

No, I do not agree to the Commission's transferring my complaint to SOLVIT.

IV. CONFIDENTIALITY – DATA PROTECTION

I authorise the Commission to disclose my identity in its contacts with the authorities of the EU country against which I am lodging a complaint.

V. SUPPLEMENTARY INFORMATION FOR SITE RELATED ASPECTS OF NATURA CONSERVATION ISSUES

1) Does the case have any direct link to Community nature conservation legislation?

Yes

2) Applicable nature directive

- 79/409 (the Birds Directive)
- 92/43 (the Habitats Directive)

3) Description of the subject of the environmental issue brought to the attention of the Commission

Full details of the alleged breaches of the Habitats Directive are set out in section VI.

4) Have you already contacted the responsible administrative authorities of your Member State concerning your case?

- Yes *which one*: Minister of the Environment

Correspondence with the Minister of the Environment

We warned the Minister of the Environment that a decision to allow for increased logging in Białowieża Forest would constitute a breach of Articles 6(3) and 6(2) of the Habitats Directive¹⁰. We cited previous judgements of the Court of Justice of the European Union (CJEU), and we informed the Minister that an infringement procedure can be initiated by the Commission, according to the provisions of Article 258 of the Treaty on the Functioning of the European Union (TFEU). Our position was explained in two letters, of 10th March and 30th March 2016.

As of the date of this complaint, no response has been received from the Minister of the Environment.

Copies of the correspondence are annexed to this complaint in Annex 1.

Have national court proceedings addressing the matter been commenced or are they envisaged?

- No

Explanation:

The Forest Act is the Polish law which governs forest management of state-owned forests. According to Article 22 sec. 1 of the Forest Act, the approval of a FMP is granted by the Minister of the Environment. It is worth noting that the Forest Act does not determine the legal form of this approval.

Contradicting interpretations exist as to the correct legal form. Certain commentators argue for assent to be granted by administrative decision. For example, in 'Comments on the Forest Act',

¹⁰ Link to information on the ClientEarth website: <http://www.clientearth.org/pl/publikacje/bioroznorodnos%C4%87-publikacje/list-otwarty-do-ministra-jana-szysko-w-sprawie-podpisania-aneksu-do-planu-urzdzenia-lasu-dla-nadlenictwa-biaowiea-3198> (in Polish).

by Bartosz Rakoczy, it is stated: *'Assent should be granted by administrative decision. There is no doubt what we are facing here is an individual case under the scope of public administration, in which rights and obligations of an individual are established. Therefore, control of decisions to grant or deny assent to the draft version of a plan needs to be assured via rules of procedure'*.¹¹

The judiciary, however, has presented a different opinion. As stated in the judgment of the Supreme Administrative Court (hereinafter **SAC**) of 12th March 2014 (citation II OSK 2477/12), the assent of a FMP by the Minister of the Environment is not an administrative decision, but rather an 'internal act'. The assent cannot be another type of public administrative act or decision concerning rights and duties stemming from the law (Article 3 § 2 point 4 of the Law on Proceedings before Administrative Courts, hereinafter **LPAC**), because every act or decision made under provisions of Article 3 § 2 point 4 LPAC has to be addressed to an external entity. Since the SAC considered the assent to a FMP an internal act, this condition is not fulfilled.

Bialowieza District, being a property of the State Treasury, is managed by the State Forests Service (a state entity without legal personality), which provides legal representation of the Treasury in matters related to said property. The State Forests Service falls under the supervision of the minister responsible for environmental protection. The State Treasury is a legal person that represents the interests of the state as proprietor (dominium, as opposed to emporium – sphere of sovereign rights of state) – such as the state's interest in this particular case. Since the forest in question is a state property, approval of the revised FMP by the Minister of the Environment is therefore an internal act undertaken in the sphere of proprietary rights of the state (dominium). Therefore the approval of the revised FMP under Article 22 of the Forests Act is not an administrative decision as defined by the Code of Administrative Procedure. Nor it is another public administrative act or decision concerning rights and duties stemming from the law (Article 3 § 2 point 4 LPAC, SAC judgment cit. II OSK 2477). Under the Code of Administrative Procedure there is no other procedural legal basis under which the administrative court could examine the approval of the revised FMP given by the Minister of the Environment. As a result, the assent of the revised FMP given by the Ministry of Environment cannot be challenged.

It is irrelevant that, on 25th March 2016, the Minister of the Environment approved the annex to the FMP for the Bialowieza Forest District calling the document 'the Decision', which means a decision within the meaning of the Code of Administrative Procedure, because it contains an instruction on how parties could request reconsideration of the Minister's decision within 14 days¹². Indeed, contrary to the contents of this document and for the reasons explained above, it is not a decision within the meaning of the Code of Administrative Procedure and it cannot be appealed¹³.

Taking the above into consideration, based on Polish law, the decision issued by the Minister of the Environment which approves the revised FMP for the Bialowieza Forest District could not be challenged in the Administrative Court.

¹¹ B. Rakoczy, 'Comments on the Forest Act', Wolters Kluwer, 2011

¹² Link to the Client Earth's press release regarding this topic: <http://www.clientearth.org/pl/informacje-prasowe/bioroznorodnos%C4%87-informacje-prasowe/bdnie-wydana-decyzja-przez-ministra-rodowiska-3201> (in Polish).

¹³ Link for the article in the legal newspaper about this topic: <http://serwisy.gazetaprawna.pl/samorzad/artykuly/930611,plan-urzedzenia-lasu.html> (in Polish).

5) Direct involvement of any EC financing (e.g. structural funds, Life, etc.):

We do not have comprehensive information on this matter. However, we deem that the competent services at the Commission should ascertain whether EU funds are employed for the preservation of the relevant forest areas.

6) Location and description of the site affected

Name of Site(s): Bialowieza Forest

Next big city close by: Białystok

Surface area (ha): 63 147.58

Special Protection Area: Yes

Name: Bialowieza Forest

Proposed site of community importance: Yes

NATURA 2000 Code: PLC 200004

Is the area already under national protection Yes

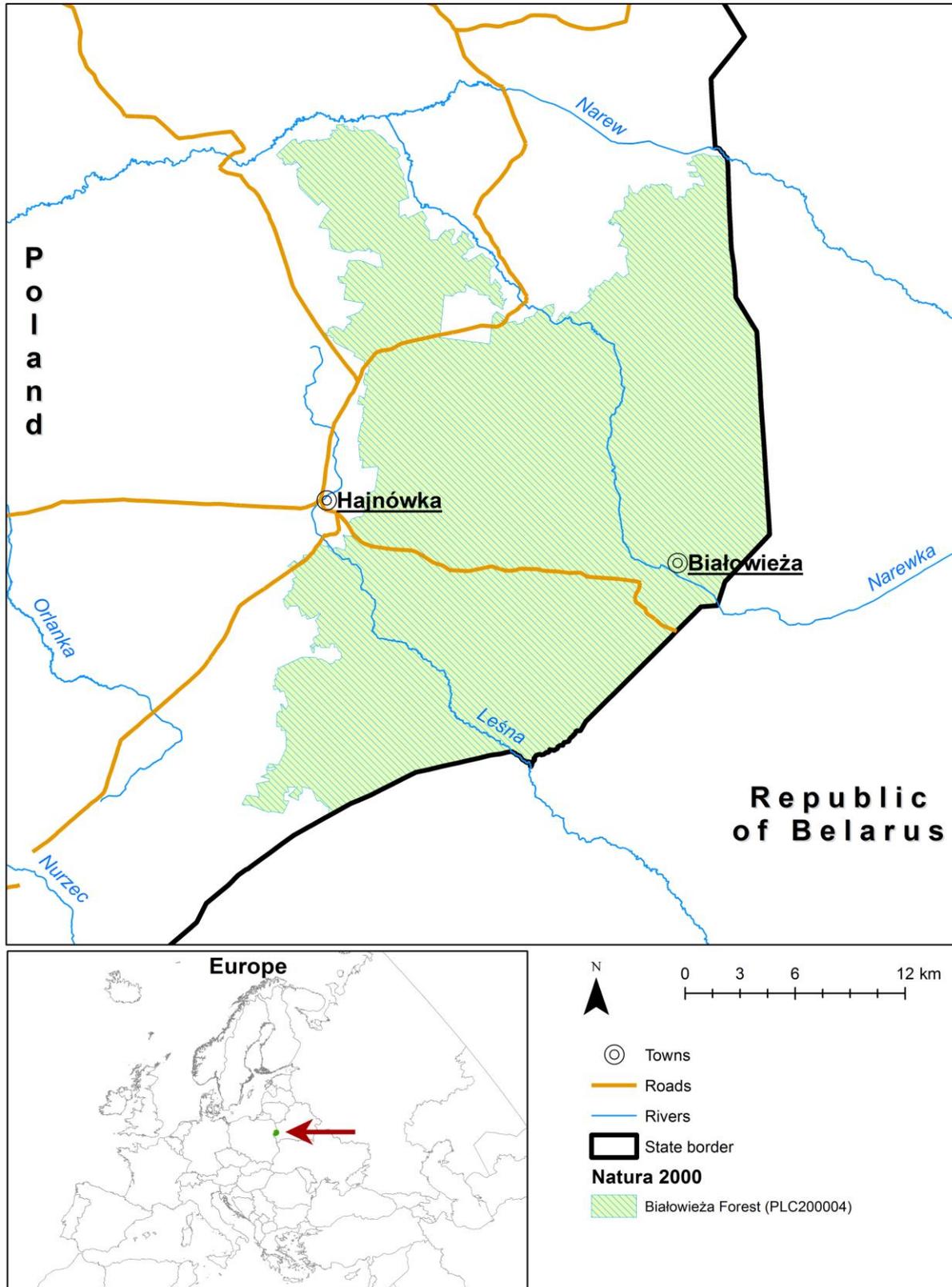
The site of community importance was designated by Poland as a special area of conservation in 2004. Further, 17% of the Natura 2000 site is the Bialowieza National Park - a national designation.

Scientific description:

The Białowieża Forest is a relic of primeval forest which dominated this part of Europe in past. A large share of old trees, the presence of many dead wood dependent invertebrates and the fact that the area has never been cleared of forest gives the site an outstanding character. Most of the area is covered by deciduous forest developed on fertile brown and podsol soils. A large share of the area is covered by natural habitats of community interest: east European oak-hornbeam - linden mixed deciduous forest *Tilio - Carpinetum*. River and stream valleys with organic soils are covered by ash - alder along stream forests *Cireceao - Alnetum*, and peatbogs are overgrown by subboreal spruce forests, subboreal birch bog forests, and pine bog forests. Xerothermic mixed and oak forests are characteristic for drier sandy soils. On their edges quite often xerothermic grasslands develop, hosting rare and protected plant species¹⁴.

¹⁴ Source: http://ec.europa.eu/environment/nature/natura2000/financing/docs/bialowiaza_case_study.pdf

Białowieża Forest in the Europe



7) Principal Habitats Directive Annex I habitat types directly affected

* indicates priority habitat types.	Code	Name	Surface area for the whole site PLC 200004 and for Forest District Bialowieza (in brackets) (ha)
	9170	<i>Tilio-Carpinetum, Melitti Carpinetum</i>	39814,56 (7257,61)
*	91D0	<i>Vaccinio uliginosi-Betuletum pubescentis, Ledo-Sphagnetum, Vaccinio uliginosi-Pinetum, Sphagno girgensohnii-Piceetum</i>	2746,92 (290,29)
*	91E0	<i>Salicetum albo-fragilis, Populetum albae, Fraxino-Alnetum</i>	12,63
(*)	91I0	<i>Quercetalia pubescenti-petraeae</i>	6,31 (3,99)

Conservation status:

Bialowieza Forest plays an important role ('A' rating)¹⁵ in the protection of the four forest natural habitats: 9170, 91D0*, 91E0* and 91F0 (Standard Data Form, 2014).

There is one more priority habitat - 91I0* - but PLC 200004 site is of little importance for its preservation ('C' rating): we have indicated this as (*). The area of this habitat is less than 0.01% of the Bialowieza Forest, and in none of its locations at the site is it preserved in a favourable condition.

The above-listed natural habitats from Annex I of the Habitats Directive constitute 67,5% of the forest area of the Bialowieza Forest, of which the largest part (63,1% of the forest area) is occupied by oak-hornbeam forest - habitat 9170 (summary in the table below). Most of the locations of these habitats within the site were assessed in 2007 as remaining in a favourable condition ('A' and 'B' rating), while the poor conservation condition ('C' rating) was the case for 20.6% of habitat 9170 area, 9.3% of habitat 91D0* area, 7,4% of habitat 91E0 area, 12.0% of habitat 91F0 area, and 100% of habitat 91I0(*) area¹⁶. Summary ratings in the table below:

¹⁵ The rating A, B, C, etc. apply to the representativeness of habitat or the importance of the population (species) on a wider scale. In both cases, they measure how 'important' the place/ population and its protection is, from the perspective of the country. And it is given in the SDF for the designation of the area.

In contrast, FV, U1, U2 are to assess the conservation status of the habitat or population served within the framework of reporting the implementation of the Nature Directives (reports are conducted every 6 years).

¹⁶ According to the inventory of Natura 2000 habitats and species conducted by the State Forests Service, 2007.

Inventory of Natura 2000 habitats and species conducted by the State Forests Service in 2007					
Habitat code	Forest District	Habitat area	Conservation condition		
			A	B	C
9170	Białowieża	7257,61	2792,02	2831,04	1524,78
	Browsk	9032,90	2180,34	4258,42	2514,15
	Hajnówka	10129,09	2551,21	6178,56	1392,54
	Total	26419,60	7523,57	13268,02	5431,47
91D0*	Białowieża	290,29	193,72	85,24	11,33
	Browsk	360,67	169,89	150,21	40,57
	Hajnówka	295,69	181,31	76,18	36,18
	Total	946,65	544,92	311,63	88,08
91F0	Białowieża				
	Browsk	13,69	4,84	7,21	1,64
	Hajnówka				
	Total	13,69	4,84	7,21	1,64
9110	Białowieża	3,99			3,99
	Browsk				
	Hajnówka				
	Total	3,99			3,99
Habitats in total		27383.93	8073.33	13586.86	5525.18

By 2015 the general rating of most of these habitats had been revised downwards. In the Białowieża Forest, outside the Białowieża National Park, most of them are now rated 'U1 – unsatisfactory' (see the Plan of Protection Tasks, PLC 200004 Natura 2000 site, 2015). Only habitat 91D0* was assessed in this document as being in a favourable conservation status (FV). On the other hand, habitat 9110(*) was rated as being in a poor conservation condition (U2). The reasons for downgrading differed between habitats.

In the case of habitat 9170, which has the largest area, the following factors were critical reasons for the downgrade:

- Improper dominant species (including the Spruce *Picea abies*, dominant over large areas of habitat);
- Invasive plant species in the ground cover (mainly *Impatiens parviflora*);
- Dead wood (too small an amount in total, and especially the shortage of high-volume dead wood);
- Age of the forest stands (much lower than in the stands of the Białowieża National Park);
- Vertical structure of vegetation (unification of the vertical arrangement of forest stands resulting from inappropriate or simplified species composition and the young age of trees).

Rating of habitat 91E0 has been downgraded due to:

- the lack of characteristic species of this habitat;
- the presence of invasive species in the ground cover and the understory;
- young age of forest stands;
- other reasons (e.g. groundwater level).

However, habitat of type 91F0* was specifically downgraded because of the very small area of the habitat and its inadequate structure and function.

Significant effects of the plan/project:

In the assessment of habitat preservation that have been deemed 'slightly unfavourable' and 'unfavourable' in the Plan of Protection Tasks for Bialowieza Forest, it should be expected that non-removal of dying spruce trees will lead to the improvement of these rating parameters and above all the 'dead wood' parameter.

In the mixed stands covering areas of habitat 9170, the gaps appearing at the site of dead spruce trees will be a place of natural regeneration of the forest. Such clearings will lead to diversification of the age of the trees and will significantly improve the vertical structure of the stand, and will thus improve two other parameters in the assessment of habitat preservation. As a result of the reduction in the dominance of spruce in habitat **9170**, the 'dominant species' parameter will also be improved. It can be expected that, as a result of the outbreak, the spruce, which should be only an admixture in this habitat, will be naturally replaced by deciduous trees, which are typical for this habitat.

Logging of dead spruce trees will not only fail to improve the conservation status of relevant habitats, but it will maintain their unfavourable condition. Removal of the trees will deprive ecosystems of dead wood, and the species composition of the planned artificial regeneration in more deprived habitat types will restore the abnormally high share of spruce in the stands (40-50%). This means that the 'dominant species' parameter will remain in a wrong condition. Sanitary cuts do not give the possibility of precise preservation of single living spruce trees or trees of other species, as these will often be damaged during felling and skidding. Thus, the effect of logging will not have as positive an effect on the vertical structure and age of tree stands, as a non-intervention approach to the bark beetle outbreak.

In habitats **91E0*** and **91F0**, the share of spruce in the stand is generally small, so the bark beetle outbreak is not critical for the preservation of the habitat. On these sites the importance of ash dieback caused by the fungus *Hymenoscyphus pseudalbidus* is greater – and even so, just as in the case of spruce, it is considerably better to leave the dying ash trees in the ecosystem than to remove them.

In the case of habitat **9110(*)**, the possible impact of dying spruces - if any spruces are actually present - should be even positive, as most species of the groundcover that are characteristic of this habitat require a large amount of light and spruce is the species that should not occur at all in that habitat.

Among the **91D0*** habitats, for which the conservation status has been rated as favourable (FV) even outside the Bialowieza National Park, only one type - spruce on peat - can be significantly affected by an outbreak. Past observations of such ecosystems in the area of the park and

nature reserves have shown, however, that if the environmental conditions, especially the ground water level, has not changed, even after almost complete dieback of the stand, the spruce renews profusely, and after a few years, the area is again covered by this species. Therefore leaving this type of habitat under the influence of bark beetle outbreak without any intervention does not threaten its existence, and instead will allow for a natural large-scale population dynamics of spruce.

Another problem results from **invasive species**. In forest ecosystems these are most commonly associated with thin forest stands and open spaces. Logging the trees or leaving them alone to decay will similarly increase the amount of light reaching the ground cover, but logging will have other consequences. Skidding and timber exportation cause local losses in the plant cover of the soil and so will facilitate the colonisation of clearings by invasive species, thus facilitating seed germination and plant growth.

8) Habitats Directive Annex II species directly affected

Group	*	SCIENTIFIC NAME (IN LATIN)
4026 I		<i>Rhysodes sulcatus</i>
4021 I	*	<i>Phryganophilus ruficollis</i>
1084 I	*	<i>Osmoderma eremita</i>
1085 I		<i>Buprestis splendens</i>
1086 I		<i>Cucujus cinnaberinus,</i>
1920 I		<i>Boros schneideri</i>
1437 P		<i>Thesium ebracteatum</i>
1477 P		<i>Pulsatilla patens</i>
1939 P		<i>Agrimonia pilosa</i>

Significant effects of the plan/project:

Significant disturbances would be caused by the removal of trees, if the increased logging goes ahead. Operations related to the removal of dying trees (hauling, storage, deportation) increase the risk of accidental destruction of the habitat of protected species, in particular:

- *Rhysodes sulcatus* 4026 and *Phryganophilus ruficollis* 4021*: for those two species Bialowieza Forest is the last refuge in the country, and at least two of the four habitats of *Phryganophilus ruficollis* are located within the Bialowieza Forest District. Impact: mechanical destruction of habitats during the harvesting, changing habitat conditions and, above all, impoverishment of the

resources of dead wood in Bialowieza Forest District may have a particularly negative impact on the national population of *Phryganophilus ruficollis*.

- *Boros schneideri* 1920 and *Cucujus cinnaberinus* 1086: Decayed trees provide habitats for these very rare species of beetles. Thick trunks that are lying, heavily decayed, and covered by moss, in damp and shady places, become a place of development for such rare beetles.

- *Thesium ebracteatum* 1437 and *Pulsatilla patens* 1477: operations related to the removal of dying trees (hauling, storage, deportation) increase the risk of accidental destruction of the habitat of protected species; in particular for these species the risk is relatively high, as the understanding of the distribution of populations of these species is weak. However, a large number of sightings have been at the roadside in the forest and thus in areas that are vulnerable to destruction by skidded timber, storage of timber on the roadside or vehicular transport of the wood from the forest.

- In addition, the vehicles and the increased movement of people will increase the likelihood that seeds of alien species are transported into the forest. The most common invasive species of ground cover in the Bialowieza Forest - *Impatiens parviflora* - spreads mainly along paths and routes. Lower susceptibility of the unused areas to plant invasions is confirmed by the contrast between areas of the park - over the last 50 years *Impatiens parviflora* has dominated most of forest outside of the National Park.

- All three plant species (*Thesium ebracteatum*, *Pulsatilla patens*, *Agrimonia pilosa*) are photophilous. They prefer the peripheries of the stands or stands with lower crop density. Thus, the decay of spruce trees can have a positive impact on their populations because of the increased influx of light to the forest floor. Therefore, leaving dead spruces alone is not expected to have a negative impact on the conservation status of the species.

- Decayed trees create good conditions for lynx to hunt and rest. Lying logs give lynx good cover which is essential for efficient hunting and hiding their prey and they provide them with shelter during daily rest.

Bibliographic references used

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9) Birds Directive Annex I species directly affected

	SCIENTIFIC NAME (IN LATIN)
A217	<i>Glaucidium passerinum</i>
A223	<i>Aegolius funereus</i>

¹⁷ <https://www.researchgate.net/publication/269819893>

A239	<i>Dendrocopos leucotos</i>
A241	<i>Picoides tridactylus</i>

Significant effects of the plan/project:

Dying and dead trees are the most important foraging sites for two rare woodpeckers. White-backed Woodpecker uses dead spruces as a foraging substrate according to their availability, benefiting thus from emergence of dying and dead spruces during and after the bark beetle outbreak¹⁸. Three-toed woodpecker (*Picoides tridactylus*) clearly prefers dying and dead spruces as a foraging substrate, spending here 75% of time¹⁹. Dead and recently infested spruces are thus a factor limiting occurrence and abundance of the two rare woodpeckers. Accordingly, abundance of both species increased by c.50% in Bialowieza Forest between 2011 and 2015, following the development of bark-beetle outbreak and rapid increase in volume of dying and dead spruces²⁰. Within Bialowieza Forest, both species show a clear, four-fold abundance gradient, being most common in strict reserve of Bialowieza National Park (with at least 100 year history of no logging), less common in nature reserves established in 1970s-2003 (where sanitary logging continued until 2007), and least common in commercially managed stands, with almost 100 year history of logging²¹. This abundance gradient occurs within three major stand types (oak-hornbeam forests, coniferous stands, ash-alder stands) and reflects intensity and history of forest management affecting volume of dead wood and age structure of trees.

Both woodpecker species excavate their nest holes every year and therefore they need a continuous supply of thick dead trees. Three-toed woodpecker use exclusively dead and dying trees (100%), predominantly spruces (80%) to excavate nest holes in Bialowieza Forest.²² Selecting sites for the nest-hole, both woodpeckers avoid the parts of the forest where forestry management occurs, even where the management is low intensity. The recent research in Bialowieza Forest revealed that both species locate nests in forest compartments where intensity of logging is 0.2-1.7 m³/ha/yr, in the years when logging intensity was still generally high (i.e. in 2011, before the new FMP lowered the harvest²³). In 2014-2015, when logging was lower due to new FMP started in 2012, both woodpecker species switched to locate nests in places with still lower intensity of logging²⁴ – 0.1 to 0.6 m³/ha/yr. Interestingly, the places selected for nest-holes had also a 4-5 year history of comparably low logging intensity as compared to randomly selected points in the same forest. In other words, woodpeckers made nest holes in places where the logging intensity was not only low in the focal year, but in places where it stayed low for some 4-5 preceding years.

Removing not only dead spruces but also trees newly infested by bark-beetle, as foreseen by updated FMP for Bialowieza Forest District, will thus reduce the extent of habitats suitable for both woodpecker species. This would impair their conservation status within the SPA, and disrupt the natural population dynamics, where beetle outbreak years boost abundance that then slowly declines until the next outbreak occurs after some 8-11 years. Importantly, the updated FMP predicts the sanitary fellings to be concentrated on the area of 2470 ha only, resulting in

¹⁸ Czeszczewik 2009; Kajzer & Sobociński 2015
¹⁹ Kajzer & Sobociński 2015
²⁰ Kajzer & Sobociński 2015
²¹ Walankiewicz et. al. 2011, Walankiewicz & Czeszczewik 2011.
²² Kajzer & Sobociński 2015; Wesolowski & Tomiałojć 1986.
²³ Kajzer & Sobociński 2012
²⁴ Kajzer & Sobociński 2015

the logging intensity of 8.6 m³/ha/yr²⁵, several times exceeding limits tolerated by woodpeckers while selecting nest hole stands, as reported above.

Old-growth spruce dominated stands are favoured breeding sites for the Boreal Owl (*Aegolius funereus*). These stands provide owls with more food and offer a better shelter against predators, resulting in increased survival and breeding productivity²⁶. At the same time, older spruces are more susceptible to bark beetle infestation, leading to increased infestation rates in older stands. Sanitary fellings are thus expected to disproportionately affect older spruce stands, leading to heavy disturbance in preferred breeding and foraging sites of Boreal Owls. Although selective felling of spruce does not likely threaten the trees with nest holes used by Boreal Owls (in Bialowieza Forest they mostly nest in holes excavated in pine), it would clearly destroy the foraging habitats around nests and safe daily roosting places, where the species is concealed from diurnal predators (e.g. Goshawks²⁷). Protection of old-growth coniferous stands is considered the main conservation measure for this species across Europe.

Dying trees are important nesting site for the Pygmy Owl (*Glaucidium passerinum*). This is a rare species of owl which is dependent on the presence of woodpecker nest holes. In Bialowieza Forest it uses mostly holes excavated by Great Spotted Woodpecker (in various tree species) or by Three-toed Woodpecker, located mostly in dying spruces (see above). Logging of newly or recently infested spruces poses thus a direct threat to nesting sites of that owl species. As with Boreal Owl, large-scale removal of spruces is also a factor of major destruction of its breeding habitat, the old-growth, multi-storey mixed forests.

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2. Kajzer K., Sobociński W. 2015. „Monitoring populacji dzięcioła biało-grzbiętego *Dendrocopos leucotos* i dzięcioła trójpalczastego *Picoides tridactylus* na stałej powierzchni próbnej oraz kontynuacja określenia czynników determinujących występowanie tych gatunków w zagospodarowanej części Puszczy Białowieskiej” Report prepared for the State Forests.
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²⁵ The 10-year limit of 188 000 m³ for 10 years (2012-2021) was reduced by 61 180 m³ harvested already in 2012-2015. That leaves 126 820 m³ for next 6 years (2016-2021). Given 2470 ha where that harvest is to be applied according to updated FMP, this result in the logging intensity of 8.55 m³/ha/yr.

²⁶ Korpimäki & Hakkarainen 2012

²⁷ Mikkola 1983; Korpimäki & Hakkarainen 2012

²⁸ available at: <http://www.lasy.gov.pl/publikacje/copy_of_gospodarka-lesna/ochrona-przyrody/okreslenie-czynnikow-determinujacych-populacje-dzieciola-bialogrzbietego-dendrocopos-leucotos-i-dzieciola-trojpalczastego-picoides-tridactylus-w-puszczy-bialowieskiej/raport-koncowy/view>

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10) Approval of the plan or project by the competent authorities

Yes, the plan or project has already been approved

By which act? Decision of the Minister of the Environment (DLP-I.611.16.2016) dated 25 March 2016²⁹.

and which authority? Minister of the Environment

11) Has any Environmental Impact Assessment (EIA) or environmental impact study been done or is one in progress?

Yes

Article 6(3) and 6(4) of the Habitats Directive are transposed to Polish law mainly by Articles 33, 34 and 35 of the Nature Protection Act of 16 April 2004. Article 33 para. 3 refers to the Polish EIA Act³⁰, and its provisions regulating the procedure of 'relevant environmental impact assessment'. The EIA Act sets out the rules for various procedures that are required in different scenarios:

- The EIA procedure for projects covered by the Directive 2011/92/EU³¹,
- Strategic Environmental Assessment (SEA) procedure for plans and programmes covered by the Directive 2001/42 (SEA Directive)³², and
- a separate 'habitat assessment' procedure for certain (specified) projects and activities not covered by the Directive 2011/92/EU but likely have a significant effect on a Natura 2000 site. This is essentially the 'appropriate assessment' referenced in Article 6(3) of the Habitats Directive.

Therefore, for plans and programmes likely to have a significant effect on a Natura 2000 site, the

²⁹ https://bip.mos.gov.pl/fileadmin/user_upload/bip/strategie_plany_programy/Decyzja.pdf (in Polish)

³⁰ Act on Making Available Information about the Environment and its Protection, the Public's Participation in Environmental Protection, as well as on Environmental Impact Assessments from 3 October 2008

³¹ Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment. Amended by the Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014

³² Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment

appropriate assessment (**more often call a 'habitat assessment' in Polish**) is integrated into the strategic environmental impact assessment (**SEA procedure**), i.e. considerations regarding impact on the Natura 2000 site are part of the SEA. The SEA procedure itself is regulated by Articles. 46 - 58 of the EIA Act.

The obligation to carry out a SEA procedure for FMPs results from the provisions of the EIA Act. According to Articles 46 point 2 of the EIA Act, policies, strategies, plans or programmes in the field of forestry require a SEA to be carried out. Therefore the FMPs, which are plans in the field of forestry, require a SEA. In accordance with Article 56 of the EIA Act, these provisions shall also apply to entities developing the draft document, which are non-administrative bodies.

According to Article 51 of the EIA Act, the authority which prepares the document (i.e. the FMP) prepares the environmental impact prognosis (hereinafter **prognosis**) which contains information on the content and the main objectives of the drafted document; identification, analysis and assessment of the state of the environment in areas likely to be significantly affected and predicted significant impacts on conservation objectives of a Natura 2000 site and the integrity of the site, as well as on the environment more generally. These predicted impacts should include impacts that are direct, indirect, secondary, cumulative, short-, medium- and long-term, permanent and temporary.

On 7 July 2015, the Regional Director of the State Forests Service in Białystok made a request to the RDEP in Białystok for the proposed annex to the FMP to be exempted from the obligation to conduct a SEA. On 14 July 2015 the RDEP in Białystok issued a decision refusing this request and obliging the Regional Director of the State Forests Service in Białystok to carry out the SEA procedure, as required by the EIA Act³³. The preparation of the prognosis, as part of the SEA, was dictated by the need to verify the impact of the proposed changes to the FMP on a Natura 2000 area. On 4 August 2015 the RDEP issued a decision where the detailed scope of the prognosis was presented. The RDEP based his decision on Article 46 points 2 and 3 of the EIA Act, which means that, in respect of this situation, the obligation to conduct a SEA not only arose from the fact that the FMP is 'a programme in the field of forestry' (Article 46 point 2 EIA Act), but also because the implementation of this FMP may result in significant effects on a Natura 2000 site (Article 46 point 3 EIA Act). Therefore, there was already recognition that there was likelihood that the proposed amendment to the FMP would have significant effects on the Natura 2000 site. This means that the annex not only needed an assessment meeting the requirements of the SEA Directive, but that the prognosis prepared for the annex also needed to fulfil all the requirements for an appropriate assessment as required by Article 6(3) of the Habitats Directive.

If yes, give a brief description of its results

The assessment in the SEA³⁴ is superficial and inappropriate **to the requirements of the Habitats Directive**. The prognosis indicated mainly the effects of the failure to conduct the conservation measures (**i.e. logging**) planned by the annex, rather than an analysis of the impact of logging on habitats and species.

³³Information taken from the "Summary of the SEA procedure" p. 3. which could be download from here: http://bip.lasv.gov.pl/pl/bip/dg/rdlp_bialystok/plan_urzadzenia_lasu (in Polish)

³⁴ The prognosis could be download from here: http://bip.lasv.gov.pl/pl/bip/dg/rdlp_bialystok/plan_urzadzenia_lasu (in Polish)

The prognosis goes through the motions of considering the environmental impacts of logging to be authorised by the annex. However the prognosis fails to fully and accurately assess the impact of the planned activities on the Natura 2000 site.

Furthermore, taking into consideration the context, the prognosis did not assess the right questions. Firstly, it was stated in a couple of places that the impact will be not 'significant' – the correct test under Article 6(3) of the Habitats Directive is that there be no 'adverse effect', the effect does not have to be 'significant'. Secondly, the prognosis should seek to answer the question whether the proposed activities will have an adverse effect on site integrity.

Therefore the prognosis carried out in relation to the annex to the FMP for Bialowieza Forest District does not contain a proper analysis of the impact of the planned activity on the Natura 2000 Bialowieza Forest and cannot therefore be regarded as relevant in the context of Article 6(3) of the Habitats Directive.

12) Alternatives

a) Describe any alternative solution(s) to the plan or project which have been considered by the authorities (indicate on the maps if relevant)

The authorities have considered amending the annex to the FMP to allow for 317 894 m³ of timber to be extracted, but did not pursue this option.

The prognosis anticipated two alternative solutions³⁵:

1. Limiting the 'economic and protection activities' to tree stands less than 100 years old (according to the rules contained in the Forest Act and other relevant legislation) - the maximum level of the timber harvest would then be 188 128 m³.
2. Limiting the 'economic and protection activities' to the tree stands less than 100 years old but using an alternative definition of 'forest stands more than 100 years old' is used³⁶, such that more stands fall into this category. Under this scenario the prognosis suggests the maximum level of the timber harvest would be 133 480 m³

Both alternatives were rejected because of the lack of certainty of containing the bark beetle outbreak - this was used as the objective of the logging in the prognosis. We are not aware of any other alternatives that have been considered.

However, the decision taken by the Minister of the Environment does not follow the prognosis exactly. The annex increases the harvest limits to 188 000m³ (as in alternative 1 above) and yet, according to other publicly available documents, it is intended to follow the definition of 'tree stands more than 100 years old' used in alternative 2 above (i.e. using the definition from the Plan of Protection Tasks, such that more stands meet this definition than under the alternative definition). According to the prognosis, using this definition would only allow the lower harvest limit (133 480m³ rather than 188 000 m³).

³⁵ Prognosis, p. 51-52.

³⁶ The difference between the two definitions is the number of trees in the stand that have to be over 100 years old before it is considered a 'forest stand more than 100 years old' - one definition requires the 100 year old trees to be the dominant species, the other only requires that trees over 100 years old make up 10% of the stand. It is worth noting that the latter definition is the one used in the original FMP and the Plan of Protection Tasks.

b) Describe any other alternative solution(s) to the plan or project which you believe are feasible and which have not been considered by the national authorities (indicate on the maps if relevant)

We believe that no logging above the limits agreed in the 2012 FMP should be allowed.

13) Mitigation measures

a) Describe any mitigation measures which have been proposed or considered by the national authorities (indicate in the maps if relevant)

A couple of ways to minimise the negative impacts of the FMP arrangements are identified in the SEA. These are very basic - for example, requiring business operations to comply with the legal requirement to avoid disturbing birds during the nesting season or to ensure that stands meeting certain criteria are not logged. However, the need for these measures highlights that there could be a negative impact from the proposed logging, and therefore is inconsistent with the conclusion of the prognosis that there will be no impact on the Natura 2000 site (see section VI below for more details).

b) Describe any mitigation measures which you consider feasible and which have not been considered or proposed by the national authorities

We believe that sanitary logging is unnecessary and that the logging limits should not be raised above the limits agreed in 2012.

14) Compensatory measures

a) Describe any compensatory measures for nature conservation damage caused by the plan or project which have been proposed or considered by the national authorities (indicate in the maps if relevant)

We are not aware of any compensatory measures proposed or considered by the national authorities.

b) Describe any compensatory measures which you believe are feasible and which have not been considered or proposed by the national authorities (indicate on the maps if relevant)

We believe that no compensatory measures would be feasible.

15) Other information

For completeness, all annexes to this document are listed below:

1. Two letters to the Minister of the Environment: from 10th March and 30th March 2016
2. Negative opinion of the Regional Director for Environmental Protection from 18th January 2016

VI. FULL DETAILS OF ALLEGED BREACHES OF THE HABITATS DIRECTIVE

1) Breach of Article 6(3) of the Habitats Directive

1.1 Legal background

Article 3(2)(b) of the SEA Directive provides for an environmental assessment to be carried out in respect of all plans and programmes which, in view of their likely effect on areas of conservation, have been determined to require an assessment pursuant to Article 6 or 7 of the Habitats Directive. Article 6(3) of the Habitats Directive itself, requires an appropriate assessment of any 'plan or project' likely to have a significant effect on a Natura 2000 site.

It should be noted that the Habitats Directive does not define the term 'plan or project'. The definitions provided by Directive 2011/92/EU (the EIA Directive) have been found useful and relevant by the CJEU. In its judgement in *Waddenzee*, the Court made use of the definition of 'project' found in the Article 1(2)(a) of the EIA Directive, according to which '«project» means: the execution of construction works or of other installations or schemes, [or] other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources'. The CJEU pointed out that the objectives of the Habitats Directive and the EIA Directive are shared, and therefore the interpretation of the term 'project' can also be shared (C-127/02 *Waddenzee*, para. 23-29).

The term 'project' is, however, to be interpreted as broadly as possible, including periodical activities and modifications of already completed projects. As Advocate General Fennelly explained in his opinion in *Commission v. France*, a narrow interpretation of the terms 'project' and 'plan' is contrary to the conservation objective of the Directive and might therefore cause a threat to sites of Community importance (C-256/98 *Commission v. France*, para.33).

In particular, Article 6 of the Habitats Directive embodies the precautionary principle in relation to protecting Natura 2000 areas: plans and projects can only be permitted having ascertained that there will be no adverse effect on the integrity of the site in question.

There is a key difference between the Article 6(3) appropriate assessment and the EIA and SEA assessment processes which arises from the fact that the Article 6(3) appropriate assessment is determinative of the competent authority's legal power to authorise the project or plan in question, whereas the EIA and SEA processes are merely intended to inform the wider decision-making process and do not dictate any particular outcome.

Article 6(3) clearly provides that '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'. Therefore, while Article 6(3) imposes specific substantive obligations on Member States arising from the outcome of the appropriate assessment, neither the EIA nor SEA Directives require that any specific action be taken as a result of the outcome of the EIA or SEA processes³⁷. Consequently, the two types of assessment processes cannot be equated for the purposes of discharging obligations under EU law and the CJEU, recognizing this lack of legal

³⁷ https://www.ucc.ie/en/media/academic/law/events/lawandtheenvironmentconferencepapers2011/Article_6%283%29_Appropriate_Assessment.pdf

symmetry, has stated that '[A]ccordingly, assessments carried out pursuant to Directive 85/337 [on EIA] or Directive 2001/42 [on SEA] cannot replace the procedure provided for in Article 6(3) and (4) of the Habitats Directive'³⁸.

As an appropriate assessment for the purposes of Article 6(3) may be conducted as part of an EIA or SEA process, the appropriate assessment must be clearly distinguishable and identified within an environmental impact statement or reported separately³⁹. In all cases the conclusions of the appropriate assessment must be distinguishable from those of the overall impact assessment. A SEA cannot substitute for the appropriate assessment.

1.2 Overview of the evaluation carried out

Pursuant to the EIA Act, if a SEA shows that the FMP may significantly negatively impact on the Natura 2000 site, the revised FMP cannot be adopted unless there are circumstances referred in Article 34 of the Nature Protection Act (Article 55 para. 2 of the EIA Act)⁴⁰.

The prognosis for the revised FMP was prepared in 2015 (no precise date is given). In section 4.2 of the prognosis which concerns the impact on the Natura 2000 site, it is written: '*Basically, the provisions about the impact to the Natura 2000 sites, as described in the prognosis for 2012-2021⁴¹, do not have to be updated*'. It should be underlined that the prognosis was prepared in relation to a document which anticipated increasing the timber harvest fivefold compared to levels assessed in the prognosis prepared for the FMP in 2012. Further, elsewhere in the prognosis, a couple of ways to minimize the negative impacts of the FMP arrangements are identified – highlighting inconsistencies with the conclusion in section 4.2 of the prognosis.

On 18 January 2016, the RDEP gave a negative opinion on the documentation (which included the 2015 prognosis) relating to the proposal to increase the timber harvest in Bialowieza Forest District to 317 894 m³. The RDEP stated that the prepared prognosis did not prove the lack of adverse effect⁴² on the protected species and habitats in the Bialowieza Forest Nature 2000 site.

1.3 Results of the evaluation

The 2015 prognosis evaluated the impact on habitats, plant species and animal and bird species. As mentioned above, the 2015 prognosis focused on the impacts of not carrying out the conservation measures outlined in the annex (i.e. sanitary logging) instead of analysing the impact of such logging activities on the area. The results of the evaluation are as follows:

- The impact on natural habitats

In the area managed by the Bialowieza Forest District there are eight natural habitats - four forest habitats and four non-forest. There will be no logging in the non-forest habitats, so it will

³⁸ Case C-418/04 *Commission v. Ireland*, Judgment, 13 December 2007, at para. 231. See further, G. Simons, 'Habitats Directive and Appropriate Assessment', (2010) 17/1 Irish Planning and Environmental Law Journal 4, p. 8.

³⁹ European Commission, Assessment of plans and projects affecting Natura 2000 sites: Methodological guidance on the provisions of Article 6(3) and (4) of the Habitats Directive 92/43/EEC (Luxembourg, 2002), p.12.

⁴⁰ Translation: 'The draft document referred to in Art. 46 or 47 cannot be accepted, unless there are reasons referred to in Art. 34 of the Act of 16 April 2004 on Nature Protection, if the strategic environmental impact assessment shows that it can significantly negatively impact on the Natura 2000'.

⁴¹ The prognosis which was prepared for the FMP in 2012 for the 63,471 m³.

⁴² Opinion of RDEP, p. 1. The opinion is attached in Annex 2 (in Polish).

not adversely affect the status of these habitats. Regarding the environmental impact on the oak-hornbeam forests (habitat 9170) (*Tilio-Carpinetum*, *Melitti Carpinetum*) it is written: 'Consequences of failure to conduct the conservation measures would be oversized precipitation of organic matter, leading to acidification of surface layers of soil, surface water and even groundwater. Such a situation would cause a deterioration of the state of the oak-hornbeam forests habitat. In this situation it is clear that the implementation of the prognosis as presented will not adversely affect the condition of the habitat'⁴³.

In relation to other protected habitats, like the bog woodland (priority habitat 91D0+), ash-alder riparian forest (priority habitat 91E0*) and thermophile oak woods (habitat 91I0(*)) there is only a short sentence for each of those habitats which says: 'Designed treatments will not impact negatively on the conservation status of the habitat'⁴⁴.

- Influence of economic activities on the plant species subject to the protection of the Natura 2000 network

In the Bialowieza Forest District there are three plant species designated as features of Natura 2000 PLC 200004 Bialowieza Forest, which are:

- 1437 *Thesium ebracteatum*⁴⁵,
- 1477 *Pulsatilla patens* (Eastern pasqueflower)
- 1939 *Agrimonia pilosa* (hairy agrimony)

The above-mentioned species are particularly sensitive to deterioration of light in the places where they occur. The evaluation found that conducting the planned activities will provide increased access for light, which is necessary for their proper development and reproduction. 'In this situation it is clear that the implementation of prognosis in the presented form, will have a positive impact on the status of these species'⁴⁶.

- Influence of economic activities on the animal species subject to the protection of the Natura 2000 network

There are three species of birds for which the buffer zones in Bialowieza Forest District were designated: black stork (A030), lesser spotted eagle (A089) and boreal owl (A223). To present the impact of the planned logging on those species a small table⁴⁷ was prepared. For those species different types of impact (short-term as well as long-term impact) were identified, as well as the influence of this impact. In all cases the impact was described as '0' i.e. 'neutral impact'.

Later, in the description of the environmental impact, again it was underlined that the aim of the planned activities is to stop the destruction of forest stands because of the bark beetle.

The prognosis includes a statement that for a number of protected species '*individual cases with the impact affecting their habitat cannot be excluded*'. The prognosis labelled this impact as '*conditionally not significant*'⁴⁸. Those species are:

- A217 Pygmy Owl *Glaucidium passerinum*,

⁴³Prognosis, p. 25.

⁴⁴Prognosis, p. 25.

⁴⁵Often called as one of the most endangered plant species in Europe: <http://link.springer.com/article/10.1007%2Fs10592-013-0522-7>

⁴⁶Prognosis, p.26.

⁴⁷Prognosis, p. 27.

⁴⁸Prognosis, p. 29.

- A238 Middle Spotted Woodpecker *Dendrocopos medius*,
- A241 Three-toed woodpecker *Picoides tridactylus*,
- 1084 Hermit beetle *Osmoderma eremita*,
- 1085 Goldstreifige *Buprestis splendens*
- 1086 Flat bark beetle *Cucujus cinnaberinus*,
- 1920 *Boros schneideri*,
- 4026 Wrinkled bark beetle *Rhysodes sulcatus*.

The analysis of the impact on the protected species concludes that '*stopping the spruce bark beetle outbreak will be beneficial to forest ecosystems and thus for the organisms which exist here*'.

1.4 The logging is a plan or project not related to management of the site

An appropriate assessment is not required in respect of projects undertaken directly and exclusively for the management of the objectives for the site. Moreover in case *European Commission v French Republic* the CJEU held that for such plans and programmes to be exempted they must be specifically tailored the conservation or restoration objectives for the site in question. So even the works and developments provided for Natura 2000 contracts, which may have as their objective the conservation or restoration of a site, should not be exempt from the procedure of assessment of their implications for the site, as they may not be directly connected with or necessary for the management of that site (C-241/08, *Commission v France*, para. 55).

An exemption from the appropriate assessment procedure cannot be extended to cover measures that are not directly related to the management of a Natura 2000 site; exemptions from general rules should be interpreted narrowly. To benefit from the exemption, it is not sufficient that the measures correspond with the protection plan, but they must be directly necessary to put the conservation objectives into practice (Opinion of Advocate General Kokott C-241/08, para. 74). Therefore a component of a plan or project that includes wildlife protection management among its objectives but does not correspond with the management of the site, will still require an assessment⁴⁹. Inclusion of a project in a Natura 2000 protection action plan does not automatically constitute a prerequisite for it to be exempted from the appropriate assessment obligation, unless this project is directly necessary for the protection of species or habitats, and it only serves the purpose of this protection.

Bialowieza Forest PCL 200004 has a valid Plan of Protection Tasks which sets out how the Natura 2000 site is to be managed. It was issued by the RDEP on 12th November 2015, and came into force 14 days later. It indicates that removal of dead and dying trees is one of the basic threats to habitats of continental mixed deciduous forests, coniferous forests and bog woods and riparian forests, while the forest clearance and removal of over 100 years old and dead spruce trees threatens the preservation of relic forest fauna, especially tree hollow birds and rare insect species from the xylobiontic and xylocambiophagous group.

A FMP is defined by the Forest Law under Article 6 para.1 point 6: 'forest management plan - basic document of forest management developed for a specific object, including a description

⁴⁹ More in: 'Commission guidelines for the interpretation of Art. 6 of the Habitats Directive'.
http://ec.europa.eu/environment/nature/natura2000/management/docs/art6/provision_of_art6_en.pdf

and assessment of the state of the forest and the goals, tasks and methods of forest management'.

The FMP for Bialowieza Forest District does not relate to the management of the Nature 2000 site and is a totally separate document to the Plan of Protection Tasks for Bialowieza Forest PCL 200004 which is the basic tool for management of Natura 2000 sites in Poland. Taking the above into consideration, the FMP, nor its Annex, can be exempted, on this basis, from the requirement to undertake an appropriate assessment of its implications for the site, as it is not directly connected with or necessary for the management of that Natura 2000 site.

1.5 Legal analysis - conclusions

The prognosis presented by the Regional Director of Forest District in Białystok fails to present convincing conservation arguments in favour of the planned logging, nor does it assess the potential negative impact as significant. Moreover, the assessment does not sufficiently reference evidence to allow verification of a thorough assessment of the impacts of this annex on the protected habitats and species present in the Bialowieza Forest.

Taking the above into consideration, the environmental impact prognosis does not contain a proper analysis of the impact of the planned activity on the integrity of the Natura 2000 Bialowieza Forest and cannot therefore be regarded as an appropriate assessment in the context of Article 6(3) of the Habitats Directive.

An assessment carried out under Article 6(3) of the Habitats Directive cannot have gaps and **must contain complete, precise and definitive findings** and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the protected site concerned (Case C-404/09, *Commission v Spain*, para. 100 and the case-law cited).

Under Article 6(3) of the Habitats Directive, an appropriate assessment of the implications for the site concerned of the plan or project implies that, prior to its approval, all aspects of the plan or project which can, by themselves or in combination with other plans or projects, affect the site's conservation objectives must be identified in the light of the best scientific knowledge in the field. The competent national authorities are to authorise an activity on the protected site only **if they have made certain that it will not adversely affect the integrity of that site**. That is the case where no reasonable scientific doubt remains as to the absence of such effects (C-418/04, *Commission v Ireland*, para. 243).

It follows that the prognosis concerning the annex to the FMP for Bialowieza Forest District cannot be regarded as an appropriate assessment since it is characterised by gaps and by the lack of complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of this plan on the Bialowieza Forest site, and in particular on the protected habitat and species, the protection of which constitutes one of the objectives of that area.

Furthermore, subject to the provisions of Article 6(4), the second sentence of Article 6(3) of the Habitats Directive **allows a plan or project to be authorised, following an appropriate assessment, only on the condition that it will not adversely affect** the integrity of the site concerned (C-258/11, *Sweetman*, para. 31). Taking this into consideration, and comparing with the content of the prognosis, clearly the prognosis did not assess the right questions. Firstly, it

was stated in a couple of places that the impact will be not 'significant' – the correct test under Article 6(3) of the Habitats Directive is that there be no 'adverse effect', the effect does not have to be 'significant'. Secondly, the prognosis should seek to answer the question whether the proposed activities will have adverse effect on site integrity.

The concept of '**integrity of the site**', which must not be adversely affected, is referred to in Article 6(3) but it is not defined. The judgment of the CJEU in *Sweetman* has provided clarification on the concept of site integrity. The judgment explains that, in order for the integrity of a site not to be adversely affected, the site needs to be preserved at a favourable conservation status, and this entails 'the lasting preservation of the constitutive characteristics of the site concerned that are connected to the presence of a natural habitat type whose preservation was the objective justifying the designation of that site' (para. 39). Specifically, any intervention in a site which will 'prevent the lasting preservation of the constitutive characteristics of the site that are connected to the presence of a priority natural habitat whose conservation was the objective justifying the designation of the site', will be held to be an 'adverse effect on site integrity' (para. 48). The arguments in this case are expressed to apply a fortiori to priority natural habitat types but they would also be applicable to any natural habitat covered by Annex I.⁵⁰

It should be borne in mind that even a small-scale project can have significant effects on the environment if it is in a location where the environmental factors, such as fauna and flora, soil, water, climate or cultural heritage, are sensitive to the slightest alteration (Case C-392/96, *Commission v Ireland*, para. 66).

The prognosis and all the other relevant documents were prepared for the proposal to increase the timber harvest in Bialowieza District to 317 894m³. In the end, the State Forests Service have revised the proposal to increase timber harvest to 188 000m³. This proposal was approved by the Minister of the Environment. No new prognosis or other document assessing the environmental impact of this harvest limit has been conducted. Furthermore, no new public consultation regarding the new harvest limits has taken place either.

The approved annex to the FMP is in the form of a two page document⁵¹. No details concerning the location (e.g. maps) of the planned logging has been given. Although, there will be no 'economic activities' on the tree stands which are more than 100 years, sanitary logging will still be conducted on those tree stands⁵². It is also written, that the dead wood will be not removed, unless it threatens public security. **The details of the annex are very vague and give a lot of open space for interpretation by the State Forests Service - this ambiguity might have serious adverse effect on the integrity of the Bialowieza Forest.**

It cannot therefore be maintained that, before the authorisation of those operations, all the aspects of the plan or project capable, by themselves or in combination with other plans or projects, of affecting the conservation objectives of the Bialowieza Forest site were identified, taking into account the best scientific knowledge on the matter. Moreover, it was impossible for decision-making authority to have had certainty that the revised limit (188 000m³) has no adverse effect, because in the end **the quantity is three times more what was previously agreed with the European Commission as having no adverse effect.**

⁵⁰<http://www.clientearth.org/reports/natura-2000-site-integrity-briefing.pdf>, p. 6.

⁵¹https://bip.mos.gov.pl/fileadmin/user_upload/bip/strategie_plany_programy/Aneks.pdf, (in Polish)

⁵² The document issued by the General Director of the State Forests Service from 12.02.2016 to the Minister of the Environment, available on-line: http://bip.lasy.gov.pl/pl/bip/dg/rdlp_bialystok/plan_urzadzenia_lasu, p. 2. (in Polish)

The annex to the FMP could not be authorised, on the basis that adverse effect would result from logging, unless the Art 6(4) criteria are satisfied. As an exception to the authorization criterion laid down in the second sentence of Article 6(3) of the Habitats Directive, Article 6(4) can apply only after the implications of a plan or project have been analysed in accordance with Article 6(3) (C-182/10, *Solvay and Others*, para. 73 and 74).

As demonstrated above, the annex to the FMP has not been analysed in accordance with Article 6(3), therefore Article 6(4) cannot be applied. Therefore the increased logging limits cannot be legally approved and there is a breach of Art 6(3) Habitats Directive and Article 33 of the Nature Protection Act.

In these circumstances, the prognosis does not demonstrate that the competent national authorities could have acquired the certainty that the planned operations would be free of damaging effects for the integrity of the Bialowieza Forest Natura 2000 site. It follows that the authorisation of the annex to the FMP for Bialowieza Forest District did not comply with Article 6(3) of the Habitats Directive.

2) Breach of Article 6(2) of the Habitats Directive

The purpose of all the measures taken under the Habitats Directive has to correspond to the objectives of the Directive and, in the case of special protection areas, the objectives of the Birds Directive. The deterioration of habitats is therefore also to be assessed against the objectives of these directives.

Deterioration is the **physical degradation** of a habitat. It can be directly assessed through a series of indicators, for example, a reduction in the area or characteristics of the habitat. Habitat deterioration occurs in a site when the area covered by the habitat in this site is reduced or the specific structure and functions necessary for the long-term maintenance or the good conservation status of the typical species which are associated with this habitat is reduced in comparison to its initial status. This assessment is made according to the contribution of the site to the coherence of the network⁵³.

The bark beetle outbreak is used by the State Forests, as well as the Ministry of Environment, as a justification to take 'appropriate steps' to prevent deterioration, as described in Article 6(2) of the Habitats Directive. However, the **outbreak is a consequence of natural conditions**, a phenomenon that cannot be construed as 'deterioration' in terms of Article 6(2). Spruce bark beetle is not an invasive species, and its presence forms a part of the normal ecosystem functioning in Bialowieza Forest as well as in all European forests with significant share of spruce. After the Second World War, bark beetle outbreaks occurred here seven times, forming an **8-10 year cycle** with accelerating return periods. All these outbreaks dwindled after 3-5 years. Alongside with cyclic outbreaks of other insects, e.g. Winter moth (*Operophtera brumata*) causing heavy defoliation of deciduous trees every 10-11 years⁵⁴, bark beetle outbreaks represent an integral part of ecosystem dynamics in Bialowieza Forest.

Detailed studies conducted in other areas have convincingly shown that **leaving forest unmanaged in face of bark beetle outbreak enhance species richness** of most taxa, while

⁵³ http://ec.europa.eu/environment/nature/natura2000/management/docs/art6/provision_of_art6_en.pdf, p. 26 -27.

⁵⁴ Wesolowski T., Rowiński P. 2006. Tree defoliation by winter moth *Operophtera brumata* L. during an outbreak affected by structure of forest landscape. *Forest Ecology & Management* 221: 299-305.

not impairing water quality⁵⁵. Also studies conducted during a similar outbreak in Šumava National Park in Czech Republic suggest, the 'natural disturbance, represented by the bark beetle outbreak, had a smaller effect on ground layer vegetation than additional anthropogenic disturbance in the form of salvage logging'⁵⁶. Collectively, research has shown that bark beetle function as a keystone species⁵⁷, often serving as **agent of natural changes in stand composition, typical for the era of rapid climate change.**

It should be stressed that the intensity of control measures does not alter the duration or the speed of development of outbreak, or the amount of dying trees⁵⁸. The outbreak of the bark beetle always disappeared about the same time both in managed forests (where infested spruce were removed) as well as in the area of strict protection i.e. Bialowieza National Park (where no intervention was undertaken). The detailed study calibrated in Bayerische Wald revealed that to control the spread of the outbreak, one should remove no less than 80% of infested spruces in a short time window before the adult insects emerge to infect another trees⁵⁹. Such an efficiency is hardly possible to achieve in general, and in Bialowieza Forest in particular, as only 65% of forest area was available for control measures (the rest being strictly protected as National Park or nature reserves). It should be stressed that lower efficiency in removing infested trees does not translate into lower efficiency in controlling the outbreak. The relationship between efficiency in removing infested trees and probability of controlling the outbreak is strongly non-linear, and **efficiency below 80% result in no effect at all for the control of outbreak.**

The current outbreak began in 2013, and, according to estimates by the National Forests, has so far caused about 4,000 ha (40 km²) of forest to die out (about 6% of the total area of Bialowieza Forest). However, simple area estimates are often inappropriate, given spruce is often just an admixture to broadleaved stands. Thus, saying that dead spruces constitute now some **3% of Bialowieza Forest trees (all species) or c. 11% of spruce trees**, may better convey the message about the spatial scale of bark beetle impact on local ecosystems.

From the point of view of habitats and species protected by Natura 2000, the way of dealing with infested trees is very important. Maintaining the current harvest limits will allow for the dead spruces to be left in the ecosystems, and this will have a positive impact on the conservation condition of natural habitats, particularly habitat 9170. **It should be emphasized that the conservation status of all the forest habitats has been found to be favourable in the area of Bialowieza National Park, where the forest management activities have not been undertaken for years. So the lack of sanitary cuts has a positive impact on the conservation status of natural habitats.**

Taking the above into consideration, classifying the possible damage caused by the bark beetle as a 'disturbance' according to Article 6(2) is erroneous. In contrary, allowing the increased

⁵⁵ Beudert B. et al. 2015. Bark Beetles Increase Biodiversity While Maintaining Drinking Water Quality. *Conservation Letters* 8: 272-281; Lehnert L.W. et al. 2013. Conservation value of forests attacked by bark beetles: Highest number of indicator species is found in early successional stages. *Journal for Nature Conservation* 21: 97-104.

⁵⁶ Jonášová M., Prach K. 2008. The influence of bark beetles outbreak vs. salvage logging on ground layer vegetation in Central European mountain spruce forests. *Biological Conservation* 141: 1525-1535.

⁵⁷ Muller J. et al. 2008. The European spruce bark beetle *Ips typographus* in a national park: from pest to keystone species. *Biodiversity Conservation* 17: 2979-3001.

⁵⁸ Grodzki W. et al. 2006. Effects of intensive versus no management strategies during an outbreak of the bark beetle *Ips typographus* (L.) (Col.: Curculionidae, Scolytinae) in the Tatra Mts. in Poland and Slovakia. *Ann. Forest Science* 63: 55-61; Gutowski J.M., Jaroszewicz B. 2015. Zmiany udziału świerka pospolitego w drzewostanach Puszczy Białowieskiej w kontekście dynamiki liczebności kornika drukarza (*Ips typographus* (L.)). unpublished manuscript.

⁵⁹ Fahse L., Heurich M. 2011. Simulation and analysis of outbreaks of bark beetle infestations and their management at the stand level. *Ecological Modelling* 222: 1833-1846

logging will lead to the interruption of natural processes leading to impairment of recovery of certain species and is therefore itself a cause of 'disturbance'.

Therefore, for the sake of completeness, we raise the breach of the Article 6(2) of the Habitats Directive due to the failure to take the appropriate measures to avoid the deterioration of natural habitats and the habitats of species and the disturbance of the species for which a site had been designated.

2) Breach of Article 4(4) of the Birds Directive

By virtue of Article 7 of the Habitats Directives the arguments outlined above also apply to Bialowieza Forest as a special protection area, as well as a special area of conservation. Therefore, the breaches of Articles 6(2) and 6(3) of the Habitats Directive in relation to the special protection area are also breaches of Article 4(4) of the Birds Directive.

VIII. REQUEST FOR ACTION FROM THE COMMISSION

1) Request for Commission action

We ask that the Commission take infringement action against Poland for failure to comply with its obligations under Article 6(2) and (3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora and under Article 4(4) of Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (by virtue of Article 7 of Directive 92/43/EEC):

(a) by failing to take the appropriate measures to avoid the deterioration of natural habitats and the habitats of species and the disturbance of the species for which a site had been designated;

and

(b) by having permitted the revision of the Forest Management Plan for Bialowieza Forest District in Bialowieza Forest PCL 20004, which is likely to have a significant effect on the site at issue, without carrying out a proper appropriate assessment of the implications, as is laid down in Article 6(3);

and

(c) by having permitted the revision of the Forest Management Plan for Bialowieza Forest District in Bialowieza Forest PCL 20004, it has agreed to a plan or project which will adversely affect the integrity of Bialowieza Forest PCL 200004, which is prohibited in Article 6(3) unless the criteria of Article 6(4) apply, and in this case these criteria are not satisfied.

We ask the Commission to **intervene** to ensure the protection of the Bialowieza Forest PCL 200004 in compliance with the Habitats and Birds Directives.

2) Request for necessary interim measures

Based on art. 279 TFEU we hereby request the necessary interim measures to be prescribed. We consider a suspension of logging in Bialowieza Forest to be vital for the avoidance of an irreversible destruction of natural habitats.

Approval of the annex to the FMP by the Minister of the Environment is sufficient for the increased logging to be started. The Forest Act and the related Ordinance of the Minister of the Environment⁴² set no other requirements to be met before logging can start. Similarly, no restrictions can be found in the Forest Management Instruction⁴³.

The bark beetle is generally active from April until September. This will most probably be used as a justification to start logging as soon as possible. The threat of an irreversible biodiversity loss in the Natura2000 site is therefore real, probable and imminent.

The approval of the annex for the Bialowieza Forest District by the Minister of the Environment has opened the door for similar 'updates' of the FMPs for the Browsk and Hajnowka Forest Districts to be approved. In such circumstances, even greater damage to the Bialowieza Forest would be on the horizon.

On the basis of art. 279 TFE we hereby request for necessary interim measures to be prescribed. We request these interim measures to require:

1. Poland to take action, in a form of annulment of the decision of the Minister of the Environment from 25 March 2016 (DLP-I.611.16.2016), in order to prevent the infringement of the EU law as a result of the logging authorised by that decision; or
2. Poland to refrain from proceeding or allowing to proceed any activity pursuant to the decision of the Minister of the Environment from 25 March 2016 (DLP-I.611.16.2016) that could result in an infringement of EU law.

IX. SIGNATURES

Place: Warsaw

Date: 19 April 2016

Signatures

Lead complainant

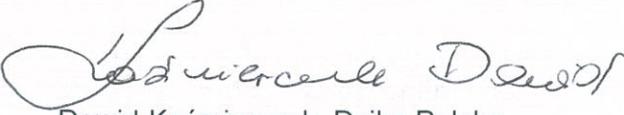
Członek Zarządu
Fundacji ClientEarth Poland
dr Marcin Stoczkiewicz

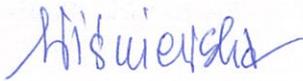
Marcin Stoczkiewicz, Member of the Management Board of Fundacja ClientEarth Poland

⁴² Journal of Laws, 2012, no. 1302.

⁴³ Introduced by Order no. 55 of the General Director of the State Forests Service of 21 November 2011 (ZU-7019-72/2011).

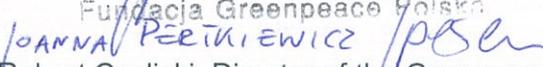
Supporting complainants


Dawid Kaźmierczak, Dzika Polska



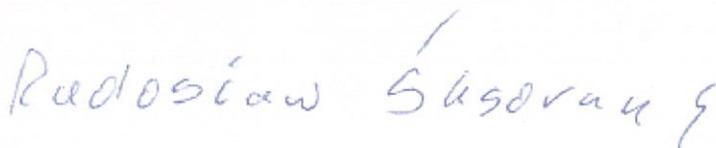
PhD Marta Wiśniewska, Member of the Board, Greenmind Foundation

mgr Joanna Pertkiewicz

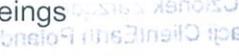
Pełnomocnik Zarządu
Fundacja Greenpeace Polska

Robert Cyglicki, Director of the Greenpeace Polska



Danuta Kaczyńska, Director, Polish Society for the Protection of Birds



Radosław Ślusarczyk, Chairman of the Board, Workshop for All Beings


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Magdalena Dul-Komosińska, Chairman of the Board, Fundacja WWF Polska