

Aberdeen Western Peripheral Route: Complaint to European Commission; Pilot Case 399/09ENVI

Concluding Summary of the Case made by Road Sense 14th August 2009

1. Road Sense maintains that in developing the Aberdeen Western Peripheral Route (AWPR) the Scottish Government has chosen a route which will have adverse impact upon the River Dee Special Area of Conservation (SAC) and upon bats and otters (which are European Protected Species). In selecting the route the Scottish Government has breached both the Habitats Directive and the Strategic Environmental Assessment Directive. If the AWPR is allowed to go ahead on this basis an undesirable precedent would be established.
2. The Scottish Government has plainly shown that it is determined to construct the AWPR along a particular route which crosses the River Dee SAC. It has stated that work on the road will begin in April 2010 and that traffic will be flowing on the road by 2012.
3. Under the Habitats Directive the UK Government must take appropriate action to ensure that no significant deterioration of habitats or disturbance of designated species occurs within a SAC. Agreement to a plan or project must be preceded by an Appropriate Assessment which must also take account of effects from other developments.
4. No Appropriate Assessment under the Habitats Directive of the effects upon the River Dee SAC has yet been carried out for the route, although a Public Inquiry into the route has already taken place and the route itself is now fixed. At no point during the selection of that route did Transport Scotland pay heed to the need to find the least damaging option for crossing the River Dee SAC. Indeed, there is no evidence that the presence of the SAC or of European Protected Species was ever considered to be an important factor in route selection. The route and the crossing point of the River Dee SAC were chosen by the Minister of Transport himself. The route was not the one preferred by officials, it was selected without explanation and without recording any justification for the selection, and it was chosen without consideration of the implications in terms of the Habitats Directive.
5. Following announcement of the route, no further consideration was given to options which would minimise adverse impact upon the Dee SAC. Close reading of the minutes of the Steering Group established to oversee the AWPR Project shows no mention of the River Dee SAC in the minutes of any of the Steering Group meetings held between October 2003 and June 2008. Decisions on the course of the route were taken on engineering, social, or economic grounds. Key environmental considerations, like the presence of the River Dee SAC and European Protected Species, did not receive the attention they deserved. The route having been chosen, Transport Scotland proposed that any problems arising from the presence of the SAC and European Protected Species would be dealt with by mitigation measures. There

was no recognition that different crossing points varied in the degree of damage which they would inflict upon the River Dee SAC.

6. The chosen route was the worst possible option for crossing the River Dee SAC. The AWPR crosses the river and its flood plain at a point where the first major tributary (the Crynoch Burn, also part of the SAC) enters the Dee. There was no attempt by the competent authorities to examine the possibility of resorting to alternative solutions which better respected the integrity of the site. Such solutions should normally have been identified within the framework of an initial assessment carried out under Article 6(3) of the Habitats Directive. They could have involved alternative locations, different scales or designs of development (including tunnels), or alternative processes. The “zero option” should also have been considered. In selecting the best route ecological criteria should have received the strongest consideration. They should not have been overruled by economic and engineering criteria.
7. Transport Scotland correctly concluded that the AWPR was likely to have a significant adverse effect on the River Dee SAC. However, they then concluded that any adverse effects from the construction and operation of the AWPR upon the SAC would be removed through mitigation measures. It is not possible for Transport Scotland to assert, without qualification, that a significant adverse effect can, through the application of extensive mitigation, be transposed into a situation where the project has no adverse effect on the integrity of the site. The Habitats Directive requires that there must remain no reasonable scientific doubt as to the efficacy of mitigation measures. Many of the mitigation measures for the AWPR are left to contractors, or remain to be specified. No evidence has been presented by Transport Scotland on the consequences of failure of mitigation and no risk analysis has been carried out.
8. Transport Scotland also concluded that no other plans and projects could be identified which could have a potential effect in combination with the AWPR River Dee crossing on the conservation objectives or integrity of the River Dee SAC. In doing so Scotland failed to identify two major developments along the Dee which could have an effect ‘in combination’ with the AWPR crossing (a housing and hotel development at Blairs and rebuilding plans for Aberdeen Harbour). Transport Scotland believed that that other developments must be concurrent to qualify under the Directive. They do not.
9. There remains significant scientific doubt over the efficacy of the mitigation measures proposed by Transport Scotland. A strong risk of adverse effects upon the River Dee SAC would remain. Indeed, adverse effects have already taken place during ground investigations for the route. The procedures of Article 6(3) and (4) are triggered not by a certainty but by a likelihood of significant effects arising, in line with the precautionary principle. It is not possible for Transport Scotland to claim that significant adverse effects will be completely eliminated by mitigation measures. The mitigation measures proposed by Transport Scotland are insufficient; they are poorly specified; they are to be carried out by third parties; and they are based on evaluations which have significant scientific and technical flaws. There is a strong likelihood that there will be adverse impact upon the species for which the SAC is designated (salmon, otter & freshwater pearl mussel) and upon the integrity of the site.

10. With respect to European Protected Species, Transport Scotland maintains that although there are inevitably impacts upon bats and otters these will also be minimised by mitigation. Overall impact on conservation status of the species will therefore be acceptable. This approach does not comply with the strict tests posed by Article 16 of the Habitats Directive, and this case has been supported by a recent UK High Court decision.
11. In terms of the first test imposed by Article 16, imperative reasons of overriding public interest, Transport Scotland simply repeats the assertion that the AWPR is of overriding public interest. It offers no substantiation of that claim, and fails to show that the AWPR is indispensable. Although the AWPR is listed in the National Planning Framework for Scotland, it is not identified by the Scottish Government as being one of 12 nationally important development projects. The route fails the first Article 16 test.
12. The second test asks whether there are alternatives. In relation to the destruction of bat roosts at the International School there is an alternative local route variant that would avoid the buildings containing the roosts. It is clear from material presented by Transport Scotland that a satisfactory alternative route existed and was considered; but was rejected without reasons being given. As there is a satisfactory alternative then the scheme fails the second Article 16 test. In relation to the otter holt at Goval Burn and couches there and elsewhere, there is no evidence that Transport Scotland ever investigated alternatives in the context of Article 16.
13. Transport Scotland proposes, in relation to otters and bats, to take measures during construction and operation to minimise impacts to a level which would maintain both species at favourable conservation status. Road Sense questions the efficacy of the proposed mitigation, especially for bats where there is little evidence that mitigation measures work reliably. In addition, neither Transport Scotland nor SNH have established through appropriate surveys what the current status is of the local bat populations. Transport Scotland fails to establish beyond reasonable scientific doubt that the AWPR meets the third test of Article 16.
14. Furthermore, even if mitigation does create 'minimal' or 'acceptable' levels of impact and therefore satisfies the requirement of the third test, the Habitats Directive requires that all three tests of Article 16 must be met. A recent UK High Court decision in relation to demolition of a property known to contain a bat roost, has confirmed that mitigation to achieve 'acceptable' levels of impact does not satisfy the requirements of Article 16 unless it can be shown that the first and second tests are also satisfied.
15. The initial plan for the AWPR and for the MTS, the strategic transport plan which established need for the AWPR, were originally prepared before the qualifying date for implementation of the Strategic Environmental Impact (SEA) Directive. However, the addition to those plans in 2005/6 of a completely new objective – to provide traffic relief on the A90 route south of Aberdeen and to incorporate into the strategic transport plan a Fastlink from the AWPR to Stonehaven - constituted a major extension and modification to both plans. As the addition of the new objective and the new plan for the Fastlink took place after 20th July 2004, and as the Fastlink itself constituted a new road of four lanes more than 10 kilometres in length, and as it entered the catchment of the Crynoch Burn (part of the Dee SAC) then the inclusion of the Fast Link required

the new plan for the AWPR to be subject to SEA. That SEA would have included an Appropriate Assessment of the impact of the AWPR and the MTS upon the River Dee SAC. Neither an SEA nor an Appropriate Assessment was carried out. The omission of consideration of the environmental impact of major modifications to a strategic transport plan constitutes a breach of the SEA Directive.