

IN DUBIO PRO NATURA

In dubio pro natura



Z Naturo 2000 smo v Sloveniji dobili vrhunsko naravovarstveno zakonodajo. Ne da bi se povsem zavedali posledic, smo jo dobili v paketu skupaj z Evropsko unijo. V ponorelem svetu, kjer gre z naravo in biodiverziteti povsod samo še navzdol, je Natura 2000 svetla izjema, ki deluje: vrstam ptic, ki jih varuje, gre bolje kot drugim (DONALD *et al.* 2007).

Eden izmed temeljev Nature 2000 je prepoved vseh posegov v prostor, ki bi v območjih Natura 2000 lahko ogrozili varovane vrste. Izjeme od tega splošnega pravila so dovoljene le v zelo omejenih okoliščinah. Pravila so nedvoumna, so pa kompleksna in zahtevajo poglobljen študij. Nemara jim prav zaradi tega v Sloveniji nismo kos. Po mojih izkušnjah jih slabo poznajo tudi mnogi, ki se z varstvom narave ukvarjajo profesionalno, od državnih uradnikov do presojevalcev vplivov na okolje.

V tem smislu je ilustrativna debata, ki se je sprožila na posvetu Zavoda RS za varstvo narave o monitoringu novembra 2007. Uslužbenec Zavoda je izrazil mnenje, da je treba zaradi previdnostnega načela poseg v območje Nature 2000 zavrniti, če o varovanih vrstah nimamo dobrih podatkov. Mnenju je nasprotoval predstavnik okoljskega ministrstva: v takih primerih moramo biti previdni z zavračanjem, saj tvegamo, da bo investitor naročil svojo študijo, in če bo ta pokazala, da vpliva posega na vrsto ne bo, lahko proti državi sproži odškodninsko tožbo.

Gre za fundamentalna vprašanja poseganja v Naturo 2000, ki so hkrati pomembna vprašanja varstva ptic. Poglejmo, kaj o zadevi pravijo predpisi. Temelje postavlja Direktiva o habitatih: pristojni državni organ lahko poseg ali plan dovoli šele potem, ko se prepriča, da ta ne bo škodoval integriteti območja (HD 1992). Na prvi pogled morda nekoliko nejasno. V resnici je glede tolmačenja Direktive potekalo že več sodnih sporov, tako da zdaj jedro evropskih naravovarstvenih pravnih pravil predstavljajo številne sodbe Evropskega sodišča. Najpomembnejše sodbe je Evropska komisija zbrala v brošuri (EK 2006), o pravilih poseganja v Natura 2000 območja in o presojah sprejemljivosti posegov pa je izdala kar tri poglobljene brošure (EK 2000, 2001 & 2007). Sodbe ne puščajo več veliko dvomov. Poseg v prostor je mogoče dovoliti samo v primeru, ko je pristojni državni organ prepričan, da ne bo škodljivega vpliva na varovane vrste območja. Kadar glede tega ostajajo kakšni dvomi, mora organ izdajo dovoljenja zavrniti (EK 2006, str. 38). Še več, škodljivi vpliv je treba predpostaviti tudi v primeru, če podatkov primanjkuje (EK 2001, str. 29). Opraviti imamo s prvotnim primerom okoljskega previdnostnega načela. V primeru dvoma ali pomanjkanja podatkov bo v Sloveniji Agencija RS za okolje (ARSO) morala zavrniti izdajo okoljevarstvenega soglasja. Zakonodaja torej breme dokazovanja in zbiranja podatkov prenaša na investitorja. Če bo želel graditi v območju Natura 2000, se bo pač moral zelo potruditi. Jasno bo moral pokazati, da poseg škodljivega vpliva na varovane vrste ne bo imel.

Na nobeno varovano vrsto! Če bo dvom ostal, ARSO dovoljenja ne bo smela izdati, odločiti bo morala v korist narave: *in dubio pro natura*¹.

Tukaj naletimo na pomembno razliko med biološko in naravovarstveno stroko. Prva mora zagotoviti trdne dokaze, da lahko neki pojav sprejmemo za dejstvo. Pri slednji – vsaj v povezavi z Naturo 2000 – pa dokazujemo ravno nasprotno. Da se poseg lahko dovoli, so potrebni dokazi, da problem (pojav) ne obstaja. Razliko dobro ilustrira debata o preletnih koridorjih beloglavih jastreb v Sloveniji, ki je tekla na straneh *Acrocephalus* v zadnjem času. Študija MIHELČA in GENERA (2005) je pokazala, da je na jugovzhodnem robu snežniškega pogorja ena izmed zgostitev pojavljanja jastreb v Sloveniji. V DOPPSu smo raziskavo sprožili z namenom zagotoviti dodatne argumente za ohranitev Volovje rebri pred grozečo postavitvijo vetrne elektrarne. TOME (2005) je sicer opozoril, da predloženi podatki ne zagotavljajo neizpodbitnega dokaza, da so mesta zgostitev naključno zbranih opazovanj res tudi mesta najpogostejšega pojavljanja jastreb. Vendar, kot je pokazal TRONTELJ (2006), je študija kljub temu najboljše vedenje o zgostitvah preletov jastreb v Sloveniji doslej. Kot taka pa je pomemben argument varstvu narave. V upravnem postopku presojanja vplivov vetrne elektrarne na naravo na Volovji rebri imamo z njo na mizi informacijo o možnem problemu. Za beloglave jastrebe je namreč znano, da so občutljivi za trke z vetrnicami (DREWITT & LANGSTON 2006). Imamo torej dvom, o katerem govori Evropska komisija (EK 2006, str. 38), *dubio!* ARSO bi vetrno elektrarno lahko dovolila le, če bi se prepričala, da škode za jastrebe ne bo – beloglavi jastreb je ena izmed varovanih vrst v območju Natura 2000 Snežnik-Pivka. Takšno prepričanje bi lahko utemeljili le s poglobljeno študijo preletov jastreb na območju načrtovane vetrne elektrarne, ki bi pokazala, da območje jastrebi preletavajo v zanemarljivem številu. ARSO takšnih podatkov ni pridobila. Investitor je sicer predložil rezultate sistematičnega spremljanja preletov ujed (AQUARIUS 2005), ki pa pokriva le hladnejši del leta, čas med koncem oktobra in koncem maja. Kot sta pokazala MIHELČ in GENERO (2005), pa je velika večina opazovanj jastreb v Sloveniji v času med majem in oktobrom, torej v času, ki se ga je investitorjeva raziskava le bežno dotaknila. Dvom je torej ostal praktično v celoti. In v skladu z načelom *in dubio pro natura* bi morala ARSO že samo zaradi beloglavega jastreba izdajo dovoljenja za vetrno elektrarno na Volovji rebri zavrniti.

Poleg pravila *in dubio pro natura* pa ima poseganje v Naturo 2000 še vrsto drugih pravil, naj naštejemo samo nekatera: pravilo daljinskega vpliva (po katerem je treba presojati in zavrniti tudi posege zunaj območja Natura, če bi ti lahko ogrozili varovane vrste v območju; ECJ 2006); pravilo zaupanja državljanov v direktive (po katerem morajo vsi državni organi v državah članicah, torej tudi ARSO in sodišča, pri svojem odločanju neposredno uporabljati direktive, kadar te niso ali so nezadovoljivo prenesene v pravni red članic; ECJ 1996 & 2004); pravilo strožjega varstva IBAjev, ki niso bili razglašeni za Naturo (če država IBAja ne razglasi za območje Natura 2000, se s tem ne izogne prepovedi škodljivih posegov; ECJ 2000). Sama tehtna in zahtevna pravila. Vsako zase je dovolj, da odpihne vetrnice z Volovje rebri. V dosedanjih postopkih nobeno sploh še ni bilo na mizi.

¹ »V primeru dvoma v korist narave.« Izraz je popularni sinonim za previdnostno načelo, ki ga Evropska zakonodaja sicer formalno nikjer ne definira. Priljubljen je posebej med nizozemskimi okoljskimi pravniki (BACKES & VERSCHUUREN 1997).

With Natura 2000, Slovenia has acquired top-level nature-conservation legislation. Without being totally aware of the consequences, we obtained it in a package of European Union legislation. In this crazy world, where nature and biodiversity are going nothing but downhill, Natura 2000 is an exception that actually works: the species of birds protected by it are doing better than others (DONALD *et al.* 2007).

One of the bases of Natura 2000 is a general prohibition of any development being carried out in Natura 2000 areas, which could adversely affect the species for which the site has been designated. Exceptions to this general rule are allowed only in very limited circumstances. The rules are clear, although very complex and in need of a thorough study. It is quite possible that for this very reason we are not equal to them in our country. From my personal experience, they are poorly known also by many of the people dealing with nature conservation professionally, from government officials to the environment impact assessors.

Quite illustrative in this sense was the debate at a conference on monitoring held in November 2007 by the Institute of RS for Nature Conservation. One of the Institute's employees expressed his belief that an activity planned to be carried out in a Natura 2000 area should be turned down, owing to the precautionary principle, if no information is available on the presence or absence of protected species within the proposed development area. His opinion, however, was repudiated by a representative of the Ministry of the Environment who stated that in such cases, we must be cautious in rejecting an activity, as we run the risk of the developer ordering a study, and if this shows that there will be no significant impact on protected species, of the developer filing an indemnity claim against the state.

These are fundamental questions about locating developments within Natura 2000 areas, and about bird conservation issues. Let us have a look at what the regulations say about this particular matter. The requirements have been laid out in the Habitats Directive: competent national authorities shall agree to a plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned (HD 1992). Perhaps somewhat unclear at first sight. In fact, several judicial disputes have interpreted this particular Directive, so key issues of the European nature-conservation laws have now been addressed by numerous judgments of the European Court of Justice. The most significant of these are presented by the European Commission in a special brochure (EK 2006). The Commission has also published three elaborated guidelines on how these rules should be implemented (EK 2000, 2001 & 2007). The judgments no longer leave much doubt. A plan or project can be allowed only when competent national authorities are convinced that there will be no detrimental effect on protected species within a Natura 2000 area. When, however, certain doubts exist in this respect, the authorities must not issue a permit for the development (EK 2006, p. 38). Furthermore, adverse effects should be assumed in cases where information is lacking (EK 2001, p. 29). Here, we are dealing with a prime example of the environmental precautionary principle. In cases of doubt, or lack of information, the Slovenian Environment Agency should therefore reject applications for the issuing of Environment Protection Consents. The legislation, therefore, places the burden of proof and data gathering on the developers. If they wish to construct a facility in a Natura 2000 area, they must demonstrate that the project will have no detrimental effect on protected species. If doubt persists, the Slovenian Environment

Agency must not issue a permit, but will have to decide in favour of nature: *in dubio pro natura*¹.

Here we meet with a significant difference between biological and nature-conservation disciplines. The first must provide solid evidence that a certain phenomenon can be accepted as a fact. The second – at least as far as Natura 2000 is concerned – must prove the very opposite! If a plan or project is to be allowed, a proof on the absence of a problem (phenomenon) is needed. The difference is well illustrated by a debate on the Griffon Vultures' corridors in Slovenia taking place recently on the pages of this particular journal. The study by MIHELIČ & GENERO (2005) has shown that one of the concentrations of this bird in Slovenia is on the southeastern margin of the Snežnik plateau. DOPPS–BirdLife Slovenia initiated the research with the aim of providing additional arguments to conserve Volovja reber from the threat of wind farm construction. Although TOME (2005) pointed out that the submitted data does not provide irrefutable proof that the areas with the highest concentrations of observations are indeed the areas of most frequent occurrence of Griffon Vultures, TRONTELJ (2006) has shown that the study still comprises the best knowledge on concentrations of Griffon Vultures' migrations in Slovenia to date. As such it is, of course, a significant nature-conservation argument. With it we have obtained, in the administrative proceeding regarding the assessment of the wind farm's impact on nature at Volovja reber, information on a potential problem. Namely, it is well known that Griffon Vultures are sensitive to collisions with wind turbines (DREWITT & LANGSTON 2006). Thus we have doubts of the nature referred to by the European Commission (EK 2006, p. 38), *dubio*! This means that the Slovenian Environmental Agency could allow the wind farm to be built only if it convinced that there will be no damage to the Griffon Vulture, which happens to be one of the protected species within the Snežnik-Pivka Natura 2000 area. Such a conviction could be substantiated only with a thorough study regarding the Griffon Vultures' passages in the area of the planned wind farm, which would clearly show that these birds migrate over this area only in negligible numbers. The Agency, however, has not obtained such data. The developer indeed submitted the report of a systematic monitoring of raptor movements (AQUARIUS 2005), but the monitoring covers only the colder part of the year, the period between the end of October and the end of May. As shown by MIHELIČ & GENERO (2005), however, the great majority of observations of Griffon Vultures in Slovenia are made between May and October, i.e. at the time only slightly considered by the developer's research. The doubts thus remain. In compliance with the *in dubio pro natura* principle, the Environment Agency should thus reject issuing the Environment Protection Consent for Volovja reber wind farm for the sake of Griffon Vultures alone.

Apart from the *in dubio pro natura* principle, there are other principles relevant to placing projects in Natura 2000 areas. To mention just a few: the rule of distance influence (according to which one should also assess and reject projects outside Natura 2000 areas, if they could possibly endanger species for which the area has been protected, ECJ 2006); the direct effect principle

¹ »In doubt, in favour of nature.« The term is a popular synonym for the precautionary principle which, however, has not been formally defined by EU legislation in any document. It is particularly popular with Dutch environmental jurists (BACKES & VERSCHUUREN 1997).

(under which an individual can enforce the provisions of a directive against state bodies, including the Environmental Agency, if the provisions are not (or are unsatisfactorily) transposed into the national law of EU members states; ECJ 1996 & 2004); the rule of more strict protection of areas such as IBAs which qualify for designation as Natura 2000 sites but have not been designated (ECJ 2000). These are weighty and demanding rules! And each of them should suffice to blow the wind turbines away from Volovja reber. However, during the proceedings carried out to date, so far none of these principles have been put on the table.

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Literatura / References:

- AQUARIUS (2005): Okoljsko poročilo za vetrno elektrarno in povezovalni 110 kV daljnovod na območju Volovja reber nad Ilirsko Bistrico v skladu s Pravilnikom o presoji sprejemljivosti planov in posegov v naravo na varovana območja; dopolnjeno po reviziji. Aquarius, 13.6.2005. 73 strani.
- BACKES, C.W. & VERSCHUUREN, J.M. (1997): The precautionary principle in international, European and Dutch wildlife law. – *Colorado Journal of International Environmental Law and Policy* 9 (1): 43–70.
- DONALD, P.F., SANDERSON, F.J., BURFIELD, I.J., BIERMAN, S.M., GREGORY, R.D. & WALICZKY, Z. (2007): International Conservation Policy Delivers Benefits for Birds in Europe. – *Science* 317: 810–813.
- DREWITT, A.L. & LANGSTON, R.H.W. (2006): Assessing the impact of wind farms on birds. – *Ibis* 148: 29–42.
- ECJ, EVROPSKO SODIŠČE (1996): Sodba Evropskega sodišča o predhodnem vprašanju v primeru št. C-118/94 – “Regione Veneto”, točka 19. – [<http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:61994J0118:EN:HTML>]
- ECJ, EVROPSKO SODIŠČE (2000): Sodba Evropskega sodišča v primeru C-374/98, Evropska Komisija proti republiki Franciji – “Basses Corbières”, točka 44 in naslednje. – [<http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:61998J0374:EN:HTML>]
- ECJ, EVROPSKO SODIŠČE (2004): Sodba Evropskega sodišča o predhodnem vprašanju v primeru št. C-127/02 – “Waddenvereniging & Vogelbeschermingsvereniging”, točki 65 in 66. – [<http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:62002J0127:EN:HTML>]
- ECJ, EVROPSKO SODIŠČE (2006): Sodba Evropskega sodišča v primeru št. C-98/03, Evropska Komisija proti Zvezni republiki Nemčiji, točke 49 do 51. – [<http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:62003J0098:EN:HTML>]
- EK, EVROPSKA KOMISIJA (2000): Managing Natura 2000 sites: The provisions of Article 6 of the ‘Habitats’ Directive. – [92/43/EEC http://ec.europa.eu/environment/nature/natura2000/management/docs/art6/provision_of_art6_en.pdf]
- EK, EVROPSKA KOMISIJA (2001): Assessment of plans and projects significantly affecting Natura 2000 sites. – Office for Official Publications of the European Communities, Luxembourg. – [http://europa.eu.int/comm/environment/nature/nature_conservation/eu_nature_legislation/specific_articles/art6/pdf/natura_2000_assess_en.pdf]
- EK, EVROPSKA KOMISIJA (2006): Nature and biodiversity cases, Ruling of the European Court of Justice. – Office for Official Publications of the European Communities, Luxembourg.
- EK, EVROPSKA KOMISIJA (2007): Napotki za uporabo člena 6(4) Direktive 92/43/EGS o habitatih. – [Guidance document on Article 6(4) of the Habitats Directive]. – [http://ec.europa.eu/environment/nature/natura2000/management/docs/art6/guidance_art6_4_sl.pdf]

- HD, DIREKTIVA O HABITATIH (1992): Direktiva sveta 92/43/EGS z dne 21. maja 1992 o ohranjanju naravnih habitatov ter prosto živečih živalskih in rastlinskih vrst; 3. odstavek 6. člena.
- MIHELIČ, T. & GENERO, F. (2005): Occurrence of Griffon Vulture *Gyps fulvus* in Slovenia in the period from 1980 to 2005. – *Acrocephalus* 26 (125): 73–79.
- TOME, D. (2005): Komentar na članek MIHELIČ, T. & GENERO, F. (2005): Occurrence of Griffon Vulture *Gyps fulvus* in Slovenia in the period from 1980 to 2005. – *Acrocephalus* 26 (125): 73–79. – *Acrocephalus* 26 (127): 195.
- TRONTELJ, P. (2006): Komentar na članek MIHELIČ, T. & GENERO, F. (2005): Occurrence of Griffon Vulture *Gyps fulvus* in Slovenia in the period from 1980 to 2005. – *Acrocephalus* 26 (125): 73–79. – *Acrocephalus* 27 (128/129): 94–96.