

**URGENT**

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20 September 2012

Dear Anne-Marie Rasmussen

**Cases before the Environmental Board of Appeal, NMK 400-00063, NMK 400-00067 and NMK 400-00069 - complaint against the adoption of the national river basin management plans**

Thank you for your letter of 19 September 2012.

Your reply is inadequate and unsatisfactory.

Consequently, I have the following comments and requests:

**1. Discussions with the joint counsel to the Danish Nature Agency and the Environmental Board of Appeal, the Legal Advisor to the Danish Government:**

In your letter of 6 September 2012, third paragraph, the following is stated in respect of the Board's discussions with the Legal Advisor to the Danish Government:

*"In addition, please note that, in this specific case, the secretariat of the Environmental Board of Appeal has engaged in a discussion with the Legal Advisor to the Danish Government solely about the fact that legal proceedings as well as complaints are pending concerning the adoption of the national river basin management plan. On the basis of this discussion, the Board has decided to continue considering the complaints instead of suspending consideration of the complaints and awaiting the outcome of the legal proceedings pending." (my emphasis).*

In your most recent letter, you attempt to play down this issue by stating contrary to the statements made above that:

*"The discussion with the Legal Advisor to the Danish Government centred on the general practice of the Board in situations where both legal proceedings and complaints are pending in respect of the same decision..."*

In your letter of 6 September 2012, you refer to the discussion in relation to *"in this specific case"*. You refer in the singular using the definite article to *"the adoption of the national river basin management plan"* and you state that the advice rendered by the Legal Advisor to the Danish Government has been decisive to the Board's decision, see the words *"On the basis of this discussion, the Board has decided..."*.

In my opinion, the Legal Advisor to the Danish Government is in a conflict of interests in the case in question as he cannot safeguard the interests of both the Danish Nature Agency and the Board which ideally are mutually contradictory.

If, for example, the Legal Advisor to the Danish Government is of the opinion that the Danish Nature Agency's position is weak in the case, it is hard to imagine that he will submit a pleading to the Board on behalf of the Agency in which he plays down the weak position and at the same time renders legal advice to the Board on the weak case of the Agency. This issue does not only call for an ethical assessment on the part of the Legal Advisor to the Danish Government, but also an administrative assessment on the part of the Board of whether the Board is able to maintain its impartiality and reliability in a case in which the Board receives advice on the case from the lawyer for one of the parties.

I request that the Board expressly state whether it intends to discuss the case at hand with the Legal Advisor to the Danish Government in future without at the same time involving the lawyer for the complainant.

If the Board has received legal advice on the case from the Legal Advisor to the Danish Government to a further extent than stated in your letter of 6 September 2012, or if the Board intends to request such advice in future, I will be compelled to dispute the Board's impartiality, at any rate in respect of the Board's secretariat.

It is surprising to me that the Board, as a presumptive and impartial deciding authority, does not recognise the administrative and procedural problems arising when conducting separate discussions with the lawyer for only one of the parties to a pending case of this nature.

It actually surprises me that, in such an important group action as the one in question involving thousands of farmers, the Board does not understand the importance of, at any rate, *"appearance"* in respect of all parties to the case as the Board's conduct, in my opinion, results in the presumption that governmental authorities and their lawyer, the Legal Advisor to the Danish Government, are given preferential treatment by the Environmental Board of Appeal, see the details below.

**2. The meeting held between the chairman of the Environmental Board of Appeal and one of the parties to the complaints case pending:**

In your letter of 19 September 2012, you deny the request for the production of minutes of meeting, note sheets or the like with reference to s. 6 of the Danish Access to Public Administration Files Act (*offentlighedsloven*). In that connection, you ignore my comments that good administrative practice and general principles of administrative law dictate an extensive duty to prepare notes of all material transactions made in a case, see for example the Parliamentary Ombudsman's report from 2010 (FOB.2010.4.1). I emphasise in that connection that, in your letter of 6 September 2012, you state that the Board "*...of course observe ... and the principles of good administrative practice*".

I ask you to kindly provide me with a detailed statement of the reason why the Board, in a particularly important complaints case as the one at hand, allows itself to hold a separate meeting with one of the parties to the case without summoning the other party. In that connection, I also request that the Board consider whether the Board finds that this is in accordance with the procedural and administrative principles of contradiction and the principle of equal treatment, respectively.

In addition, I request that the Board inform me whether the Legal Advisor to the Danish Government attended the meeting.

I note that the Danish Nature Agency has obviously deemed the meeting so important that it had the person of the Agency responsible for the group action, Helle Pilsgaard, assistant director, and the legal head of department, Oluf Engberg, attend the meeting in addition to two other employees of the Agency.

If the meeting had been a procedural meeting concerning the procurement of documents or the like, only the case handler from the Danish Nature Agency would have attended the meeting.

If the meeting was held only for the purpose of procuring additional information or the like, such information could and should instead have been procured by way of a letter to that effect to the Danish Nature Agency and a copy thereof should have been sent to me.

On the aforesaid basis, there is reason to assume that the facts of the case and the Danish Nature Agency's viewpoints in respect of the complaints case have been discussed at the meeting. I also imagine that the Danish Nature Agency has wished to make the Board aware of the practical consequences of any decision of invalidity in the case, in the opinion of the Agency.

I note that, in your letter, you abstain from considering the reason for the meeting and that, despite the gravity of the case, you do not state in detail which discussions were conducted in connection with the meeting.

Even though the Environmental Board of Appeal did not take notes of the meeting, I assume that the Board attending the meeting represented by you as the chairman of the Board, a vice-chairman and two administrative officers will be able to report in detail what took place at the meeting.

Therefore, I reiterate my request to receive detailed minutes stating the reason for the meeting and mainly the discussions conducted during the meeting, including the discussions of the complaints case in question.

It also surprises me in respect of this issue that you do not recognise that it is at least considered highly problematic that the chairman of the Board holds separate meetings about the group action with the management of one of the parties without involving the other party. I also wonder why you do not take a position on the principle of equal treatment and the principle of contradiction in that respect.

The decisions made by the Board must not only be impartial, but they must also appear impartial, which is highly compromised by the Board's handling of this case.

The powers of the Board make the activities of the Board quasi-judicial.

It would be completely unthinkable that for example five Supreme Court Judges or three High Court Judges, prior to deciding a case, would summon one of the parties to a meeting on the case without at the same time involving the other party and without, at least, preparing detailed minutes of such meeting.

This should not only be unthinkable practice before the Courts. It should also be unthinkable in respect of the Environmental Board of Appeal.

### **3. Notification of the Board members:**

I note that you do not answer my question as to whether this correspondence will be disclosed to the Board members. Since the correspondence may form the basis of the Board's secretariat and the chairman being held disqualified in respect of the decision of the case, this is a matter which must obviously be disclosed in detail to the Board's members (s. 6(1) of the Danish Public Administration Act (*forvaltningsloven*)). I ask you once again to confirm that this will take place.

I refer to s. 3(1) (v) of the Public Administration Act and I also stress that a full assessment of the issue has not yet been possible since no minutes of meeting are presently available, see s. 3(2) of the Public Administration Act.

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Considering the importance of the case, I request a swift and satisfactory answer.

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From the Environmental Board of Appeal I have received a letter stipulating a deadline for submitting the announced supplementary complaint statement in writing. However, I have also

noted from the Environmental Board of Appeal's letter of 6 September 2012 that the Danish Nature Agency has announced a supplementary statement in the middle of this month. I request to be given a deadline of at least four weeks for submitting the complainant's supplementary complaint statement calculated from the date of receipt of the Danish Nature Agency's supplementary statement.

Yours sincerely

Håkun Djurhuus

Cc: the Legal Advisor to the Danish Government, Sune Fugleholm, lawyer

## HASTER

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20. september 2012

## Natur- og Miljøklagenævnets sager NMK 400-00063, NMK 400-00067 og NMK 400-00069 – Klage over vedtagelsen af de statslige vandplaner

Tak for dit brev af 19. september 2012.

Svaret er ufyldstgørende og ikke tilfredsstillende.

Jeg har derfor følgende bemærkninger og anmodninger:

### 1. Drøftelser med Naturstyrelsens og Natur- og Miljøklagenævnets fælles advokat; Kammeradvokaten:

I dit brev af 6. september 2012, 3. afsnit, anføres følgende om nævnets drøftelser med Kammeradvokaten:

*"Jeg kan i øvrigt oplyse dig om, at Natur- og Miljøklagenævnets sekretariat i den konkrete sag alene har haft en drøftelse med Kammeradvokaten om det forhold, at der både verserer retssager og klagesager om vedtagelsen af den statslige vandplan. På baggrund af denne drøftelse har nævnet besluttet at fortsætte behandlingen af klagerne frem for at stille sagerne i bero og afvente udfaldet af de verserende retssager." (Mine understregninger).*

I dit seneste brev forsøger du at bagatellisere dette forhold ved, i strid med det ovenfor anførte, at anføre, at:

*"Drøftelsen med Kammeradvokaten handlede om nævnets generelle praksis i de situationer, hvor der både verserer retssager og klagesager om samme afgørelse ...".*

I dit brev af 6. september 2012 refererer du til drøftelser i relation til "den konkrete sag". Du refererer i singularis, bestemt form, til "vedtagelsen af den statslige Vandplan", og du angiver, at

rådgivningen fra Kammeradvokaten har været afgørende for Nævnets beslutning, jf. ordene "På baggrund af denne drøftelse har nævnet besluttet ...".

Kammeradvokaten har efter min opfattelse en interessekonflikt i den konkrete sag, idet Kammeradvokaten ikke kan varetage både Naturstyrelsens og nævnets, ideelt set modstridende, interesser.

Hvis Kammeradvokaten eksempelvis er af den opfattelse, at Naturstyrelsen har en dårlig sag, er det svært at forestille sig, at Kammeradvokaten laver et partsindlæg til nævnet på Naturstyrelsens vegne, der nedtoner de svage sider af sagen, og samtidig rådgiver nævnet om svaghederne i Naturstyrelsens sag. Dette forhold kalder ikke blot på en etisk vurdering fra Kammeradvokatens side, men også på en forvaltningsmæssig vurdering fra nævnets side af, hvorvidt nævnet kan bevare sin upartiskhed og troværdighed i en sag, hvor nævnet lader sig rådgive af den ene parts advokat om sagen.

Jeg anmoder om, at nævnet udtrykkeligt oplyser, hvorvidt man fremover, har til hensigt, at drøfte den konkrete sag med Kammeradvokaten uden samtidig at inddrage klagers advokat.

Hvis nævnet har rådført sig juridisk med Kammeradvokaten om sagen i videre omfang end oplyst i dit brev af 6. ds., eller hvis nævnet har til hensigt fremover at gøre dette, vil jeg se mig nødsaget til at anfægte nævnets habilitet, i hvert fald for så vidt angår nævnets sekretariat.

Det er overraskende for mig, at nævnet som, præsumptiv, upartisk afgørelsesmyndighed ikke kan se de forvaltningsretlige og processuelle problemer i, at gennemføre separate drøftelser med kun den ene parts advokat i en verserende sag af denne karakter.

Det undrer mig konkret, at nævnet i et så vigtigt sagskompleks som dette, der berører tusindevis af landbrug, ikke forstår vigtigheden af i hvert fald "appearance" i forhold til alle sagens parter, idet nævnets adfærd efter min opfattelse nærer en udbredt formodning om, at statslige myndigheder, og deres advokat, Kammeradvokaten, får positiv særbehandling i Natur- og Miljøklagenævnet, jf. nærmere nedenfor.

## **2. Natur- og Miljøklagenævnets formandsskabs separate møde med den ene part i den verserende klagesag:**

I dit brev af 19. ds. afviser du begæringen om fremsendelse af mødereferat, notatark eller lignende under henvisning til offentlighedslovens § 6. Du forbigår i denne forbindelse mine bemærkninger om, at god forvaltningsmæssig skik og almindelige forvaltningsretlige retsgrund-sætninger tilsiger en videregående notatpligt af alle væsentlige ekspeditioner i en sag, jf. eksempelvis FOB.2010.4.1. Jeg fremhæver i denne forbindelse, at du selv i dit brev af 6. september 2012 anfører, at nævnet "... naturligvis iagttager ... og principperne for god forvaltnings-skik."

Jeg skal anmode om en udførlig redegørelse for baggrunden for, at nævnet i en særdeles vigtig klagesag som denne tillader sig at afholde et separat møde med den ene af sagens parter uden indkaldelse af den anden part. Jeg skal i samme forbindelse anmode nævnet om at forholde sig til, hvorvidt nævnet finder, at dette er i overensstemmelse med det processuelle og forvaltningsretlige kontradiktionsprincip, henholdsvis ligebehandlingsprincippet.

Herudover skal jeg anmode nævnet om at oplyse, hvorvidt Kammeradvokaten deltog i mødet.

Jeg hæfter mig ved, at Naturstyrelsen åbenbart har vurderet mødet som så vigtigt, at man lod Naturstyrelsens ansvarlige for sagskomplekset; vicedirektør Helle Pilsgaard, og den juridiske kontorchef, Oluf Engberg, deltage i mødet udover to andre medarbejdere fra styrelsen.

Havde der været tale om et procesmøde vedrørende fremskaffelse af dokumenter eller lignende, ville Naturstyrelsen blot have deltaget på sagsbehandlerniveau.

Hvis der blot var tale om fremskaffelse af yderligere oplysninger eller lignende, kunne, og burde, disse oplysninger i øvrigt i stedet have været indhentet ved fremsendelse af brev herom til Naturstyrelsen med kopi til undertegnede.

Der er på den beskrevne baggrund grundlag for at antage, at selve sagens indhold og Naturstyrelsens synspunkter vedrørende klagesagen har været drøftet i forbindelse med mødet. Jeg kunne ligeledes forestille mig, at Naturstyrelsen har ønsket at gøre nævnet opmærksom på, hvilke praktiske konsekvenser en ugyldighedsafgørelse i sagen efter styrelsens opfattelse vil kunne få.

Jeg noterer mig, at du i dit brev undlader at forholde dig til baggrunden for mødet og til, at du trods sagens alvor undlader udførligt at referere, hvilke drøftelser der blev gennemført i forbindelse med mødet.

Selvom Natur- og Miljøklagenævnet ikke måtte have udarbejdet et notat vedrørende mødet, går jeg ud fra, at Nævnet, der deltog i mødet med dig som nævnsformand, en næstformand og to sagsbehandlere, vil være i stand til udførligt at referere, hvad der passerede under mødet.

Jeg skal derfor gentage min anmodning om, at få tilsendt et udførligt referat, der oplyser om baggrunden for mødet og navnlig drøftelserne i forbindelse med mødet, herunder drøftelserne af den konkrete klagesag.

Det undrer mig også vedrørende dette forhold, at du ikke anerkender, at det i hvert fald opleves som stærkt problematisk, at nævnets formandskab afholder separate møder med den ene parts ledelse om sagskomplekset uden inddragelse af den anden part. Det undrer mig tillige, at du ikke forholder dig til ligebehandlingsprincippet og kontradiktionsprincippet i så henseende.

Nævnets afgørelser skal ikke blot være upartiske, de skal også fremstå som upartiske, hvilket i svær grad kompromitteres af nævnets behandling af denne sag.



Nævnet har kompetencer, der gør nævnets virksomhed domstolslignende.

Det ville være fuldstændig utænkeligt, at eksempelvis 5 højesteretsdommere, eller 3 landsdommere, forud for afgørelsen af en sag, indkaldte den ene part til et møde om sagen, uden samtidig inddragelse af den anden part, og uden, i det mindste, at udarbejde et udførligt referat.

Dette burde ikke blot ved domstolene være utænkeligt. Det burde også være utænkeligt ved Natur- og Miljøklagenævnet.

### **3. Orientering af Nævnsmedlemmerne:**

Jeg noterer mig, at du ikke besvarer mit spørgsmål om, hvorvidt denne korrespondance vil blive udleveret til Nævnsmedlemmerne. Da korrespondancen kan danne grundlag for, at nævnets sekretariat og formandskab kan have gjort sig selv inhabile i relation til sagens afgørelse, er der tale om et forhold, der selvsagt skal oplyses udførligt overfor, i givet fald, nævnets medlemmer (forvaltningslovens § 6, stk. 1). Jeg beder dig endnu en gang om at bekræfte, at dette vil ske.

Jeg tillader mig venligst at henvise til forvaltningslovens § 3, stk. 1, nr. 5, idet jeg samtidig fremhæver, at forholdet endnu ikke har kunnet vurderes fuldt ud, da der p.t. ikke foreligger noget mødereferat, jf. herved forvaltningslovens § 3, stk. 2.

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Henset til sagens vigtighed anmoder jeg om et hurtigt og fyldestgørende svar.

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Jeg har fra Natur- og Miljøklagenævnet modtaget en fristmeddelelse i relation til det bebudede supplerende skriftlige klagesagsindlæg. Jeg har imidlertid samtidig fra Natur- og Miljøklagenævnets brev af 6. ds. noteret mig, at Naturstyrelsen har bebudet en supplerende udtalelse medio denne måned. Jeg anmoder om at få mindst 4 ugers frist til afgivelse af klagerens supplerende klagesagsindlæg regnet fra tidspunktet for modtagelsen af Naturstyrelsens supplerende udtalelse.

Med venlig hilsen

Håkun Djurhuus

C.c.Kammeradvokaten, Att.: Advokat Sune Fugleholm