

THE ENVIRONMENTAL
BOARD OF APPEAL

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ssc/nyape

DECISION
in the cases concerning adoption of the national river basin management plans.

The Environmental Board of Appeal has made a decision pursuant to section 53(1), no. 1, on the preparation of the national river basin management plan¹.

The Environmental Board of Appeal repeals the decision to adopt the 23 national river basin management plans because the eight-day time limit in connection with the supplementary consultation was insufficient and therefore in contravention of section 30 of the Danish Act on Environmental Objectives. The cases are remitted to the Danish Nature Agency for renewed processing.

The decision by the Environmental Board of Appeal is final and may not be brought before another administrative authority, see section 17 of the Act on the Environmental Board Of Appeal². Any legal proceedings of the decision must be instigated within six months, see section 58 of the Danish Act on Environmental Objectives.

The decision was made by the Board of Appeal, see section 5(1) of the Act on the Environmental Board of Appeal.

¹ Consolidation Act no. 932 of 24 September 2009 on environmental objectives etc. for water bodies and international nature protection areas (the Danish Act on Environmental Objectives) with later amendments.

² Act no. 483 of 11 May 2010 on the Environmental Board of Appeal.

The appeal to the Environmental Board of Appeal

Attorney-at-law Håkun Djurhuus appealed the adoption of the plans on behalf of the landowners Nicolai Hansen (the town of Bredebro), Christian Teisen (the town of Regstrup), and Henrik Sunke (the town of Hårlev). The appeal documents on behalf of the three landowners are extensive (39 pages and annexes 1-29). Håkun Djurhuus also represents three additional landowners on whose behalf the Danish Agriculture & Food Council has instigated legal proceedings on the adoption of the river basin management plans.

As an introduction, Håkun Djurhuus states that the Danish Nature Agency has over-implemented the Water Framework Directive with detrimental consequences for up to 25% of Danish farmland. The Agency's guidelines are in conflict with the European Commission's guidelines on the Directive. He also states that, scientifically, there is considerable disagreement about the basis for the entire effort aimed at water bodies, i.e. the so-called baseline, and that there has been no impact assessment of the many measures.

This is followed by a description of the three landowners and their properties as well as the relevant parts of the river basin management plans and the potential implications of the plans for the landowners. About the properties in question it is stated e.g.

- that watercourses have been incorrectly classified;
- that the short time limit for the supplementary consultation made it impossible to take a qualified stance on the implications of the changed maintenance of watercourses; and
- that watercourses not a part of the initial draft river basin management plans were included in these plans in connection with the supplementary consultation, which meant that some landowners were unable to submit a consultation statement on the changed measures because they did not anticipate such changes. As a consequence, some landowners had six months whereas others had only five working days to comment on the same matters (measures aimed at watercourses).

With reference to the initial design of the Danish Act on Environmental Objectives and the legislative background for subsequent amendments, Håkun Djurhuus argues e.g. that the Board of Appeal's review in these cases should cover legal issues in a broad sense, i.e. including the rules and principles of administrative law. In particular the Board is prevented from reviewing the politically determined objectives. Håkun Djurhuus is of the opinion that the actual categorisation of the watercourses on the individual property is based on incorrect application of the rules, which means it is a procedural defect. Furthermore, he states that any issue relating to power of authority would have to be a legal issue which can be subjected to the Board of Appeal's review in the appeals cases. In continuation of this, he argues that the categorisation of watercourses in contravention of the Water Framework Directive and the European Commission's guidelines must be a legal issue.

Håkun Djurhuus states that the legal basis for the consultation process is Article 14 of the Water Framework Directive, which stipulates a time limit of six months for submission of written comments to the water planning documents (the plan proposal). With reference to Article 14(3), it is argued that this time limit also applies to updates to river basin management plans.

The substantial changes to the river basin management plans implemented since the adoption of the plan proposal were carried out in contravention of section 30 of the Danish Act on Environmental Objectives, and this should have led to a new consultation process in accordance with sections 28,

29 and 31 of the Act. In his reasoning, Håkun Djurhuus refers to the fact that it appears from the Danish Nature Agency's extensive consultation memorandum (totalling 391 pages) that the river basin management plans have been changed significantly, as watercourses in catchment areas less than 10 km² are omitted completely if the watercourses do not have high natural value or have already achieved good ecological status. The Danish Nature Agency has also provided information that approx. 6,000 km of watercourses have been removed from the river basin management plans and that there has been a significant reduction in watercourses in which the physical conditions must be improved (from approx. 7,300 km to approx. 5,300 km). Finally, a number of watercourses has been re-categorised.

Håkun Djurhuus also claims that the supplementary consultation process was hurried and seemed to be carried out for mere cosmetic purposes. The supplementary consultation required special IT insight and it therefore contravenes with e.g. fair administrative practices and norms for the conduct of public consultations in planning legislation and nature conservation. No letters were sent out to the parties directly affected nor to the landowners who were entitled to be consulted. The documents made publicly available comprised only map annexes without separate text. Thus, no explanation was offered as to the changes made and as to the principles behind these changes. The relevant stakeholders therefore had no means of relating to the documents. By clicking through the many map annexes, parties entitled to be consulted could not see which changes had been made on their own property; even by specific highlighting or similar. The landowners would require a screen dump of the initial characterisation of the watercourses on their properties for this to be possible.

The hurried consultation process resulted in approx. 1,800 consultation statements, however, according to the Agency's own data. By far the majority of these were previous objections and consultation statements which were resubmitted. The Agency received only approx. 120 consultation statements relating to the specific changes, of which approx. 80 led to adjustments to the final plans. The appeal, including annexes, also includes a comprehensive description of the IT-related issues and of Håkun Djurhuus' request for access to the documents and information on which the supplementary consultation was based. This request for access to documents was filed on behalf of Danish Agriculture & Food Council, which is not a entitled to appeal in these cases.

On behalf of the landowners, Håkun Djurhuus in summary claims that the supplementary consultation was not a proper consultation and that the time limit of eight days is unreasonably short in face of the fact that the changes will have significant implications for a great number of farmers throughout Denmark. In continuation of this, reference is made to the obligations in Article 6(3) of the Aarhus Convention. It is obvious that the supplementary consultation is in conflict with the provision for "reasonable time-frames" and for "the public to prepare and participate effectively" during the decision-making process. The adoption of the river basin management plans therefore violates the Convention and thus also Union law.

Håkun Djurhuus refers to general practice relating to the Aarhus Convention and the extensive precedence relating to section 25(2) of the Danish Planning Act, which corresponds to section 30 of the Danish Act on Environmental Objectives. In summary, it is claimed that adoption of the river basin management plans must be set aside as invalid because the Agency should have completed an entirely new plan procedure.

The appeal states a number of aspects of Danish over-implementation of the Water Framework Directive. For example, with reference to section 15 of the Danish Act on Environmental

Objectives, the appeal claims that the categorisation of artificial or heavily modified watercourses as natural has significant implications. The legal effects of the incorrect categorisation of the watercourses will be hugely burdensome, and this will intensify demands on the legal basis for the designation. Denmark has designated approx. 90% of all its watercourses as natural. In Germany, approx. 10% of the watercourses have been designated as natural, and the same watercourses that have been designated as heavily modified on one side of the border, have been designated as natural on the other side of the border.

As Håkun Djurhuus sees it, the Danish Nature Agency actually acted as legislator in its guidelines on how the watercourses are to be categorised. Amongst other things, he refers to the fact that the Agency has only *“to a limited extent used “agricultural drainage” as the grounds for designating watercourses as heavily modified”*, and this is in contravention of the European Commission guidelines on the Directive.

The Agency partially admitted this error and consequently extensive re-categorisation of watercourses took place in connection with the supplementary consultation and prior to the final adoption of the river basin management plans. Nonetheless, many of the watercourses in the plans have still been categorised incorrectly.

Furthermore, Håkun Djurhuus lists a number of concerns about implementation of the Water Framework Directive's concepts "artificial surface water body" and "heavily modified surface water body". These concepts have been implemented with the wrong content in the Danish Statutory Order on categorisation and this is detrimental to the agricultural industry because drained urban areas, but not drained agricultural areas, are listed as examples of grounds for designating water bodies as heavily modified.

In summary, the appeal argues that the adoption of the river basin management plans is a decision under administrative law and therefore subject to the rules and principles of administrative law, including the inquisitorial principle and the principle of proportionality. Reference is made, in particular, to the incorrectly categorised watercourses and the missing impact assessments of the farmland in question (e.g flooding, economic aspects) following from the designations and measures in the river basin management plans. The river basin management plans are an administrative burden for the landowners, as the municipalities are obliged to follow the plan in their planning and administration, including their planning and administration under other legislation than the Danish Act on Environmental Objectives.

In the appeal, Håkun Djurhuus describes the specific process of gaining access on behalf of the Danish Agriculture & Food Council to documents held by the Danish Nature Agency. The first request for access to documents on 8 November 2011 was about the basis for the classification of watercourses in the river basin management plans. Later requests were about the preparation of the guidelines from 2008 and the Agency's records on the entire 'case complex'. There was no response to the requests for access to documents prior to the expiry of the time limit for appeal. The Danish Nature Agency responded to Håkun Djurhuus' requests for access to documents on behalf of the Danish Agriculture & Food Council in July and September 2012. The appellants have therefore not had opportunity to assess and comment on the material until after these dates.

Information from the Danish Nature Agency

On 22 December 2011, the Minister for the Environment adopted the national river basin management plans for all of Denmark. The time limit for submitting appeals about adoption to the Danish Nature Agency was 19 January 2012.

The Danish Nature Agency submitted the individual appeals to the Board of Appeals via a number of e-mails which included as attachments e.g.: the individual appeal, any previous consultation statement by the appellant, links to relevant parts of the river basin management plans, as well as the Agency's letter of 21 May 2012 pertaining to all of the appeals. The Agency also submitted other material, such as consultation statements from farmers' associations, the claims mentioned above, a memorandum on the operation of the Agency's website, as well as a copy of announcement in connection with the two consultation periods. The Agency did *not* comment on the content and allegations of the individual appeals.

In a letter of 21 May 2012, the Danish Nature Agency wrote e.g.:

"On 22 December 2011, the Minister for the Environment adopted the river basin management plans through Statutory Order no. 1208 of 15 December 2011 on entry into force of environmental objectives and programmes of measures and priorities etc. in the river basin management plans for the 2010-2015 planning period. The environmental objectives in the river basin management plans as well as its programmes of measures and priorities, guidelines and Annex 2 on the implementation of efforts aimed at improving wastewater treatment in the countryside were therefore issued by the Minister for the Environment pursuant to the Minister's legislative power, see section 29(5) of the Danish Act on Environmental Objectives."

Pursuant to section 53(1), no. 1, of the Danish Act on Environmental Objectives, decisions made pursuant to section 29 of the Act about the preparation of the river basin management plans may be appealed to the Environmental Board Of Appeal. This right of appeal covers matters pertaining to whether the rules on preparation in the sections 27a to 31 of the Danish Act on Environmental Objectives have been complied with.

... ..

Public announcement of draft river basin management plans

A number of appeals claim that the consultation process was inadequate because the landowners should have been individually informed about the river basin management plans.

The Danish Nature Agency points out that the Minister for the Environment is obligated under section 29(1) of the Danish Act on Environmental Objectives to ensure public announcement of the draft river basin management plans. A similar provision on public announcement is in section 29(1) of the original Danish Act on Environmental Objectives, according to which the river basin district authority is responsible for public announcement of the draft river basin management plans. It appears from the legislative background of the provision that: *"Pursuant to subsection (1) the draft plans shall be subject to public announcement. This announcement shall include information that draft plans have been prepared and information about from where these can be requested, possibly against payment. The announcement itself should be in local and commonly read daily and /or weekly papers in the river basin district, on the website of the county, and as is otherwise common practice."*

According to the Agency, the draft river basin management plans were in public consultation during the period 4 October 2010 to 6 April 2011. The consultation on the river basin management plans was announced to the public in several national newspapers and in a number of local newspapers. This announcement is enclosed. As is evident, the announcement said e.g. that draft river basin management plans had been prepared, where these draft plans could be obtained, the that the consultation period would be from 4 October 2010 to 6 April 2011. Furthermore, the consultation was announced at the same time on the website of the Agency for Spatial and Environmental Planning.

On the basis of this, the Danish Nature Agency is of the opinion that the requirements for public announcement in the Danish Act on Environmental Objectives have been met.

Public access to the draft river basin management plans

There are complaints e.g that the consultation documents were not easily accessible. It is stated that the structure of the website of the Danish Nature Agency was difficult to navigate and that it was not possible to understand which measures were to be implemented and when. It is also stated that the information about the plans was only available on the internet and the GIS map, which was difficult to use.

The Danish Energy Agency points out that the requirement of the Danish Act on Environmental Objectives for public accessibility of the draft river basin management plans follows from section 29(1). A similar provision on public accessibility is in section 29(1) of the original Danish Act on Environmental Objectives. It appears from the legislative background of the provision that: *"The draft plans must be publicly accessible, which means that people must have access to read them, e.g. through the county administration, in libraries or similar. It should also be possible to obtain copies of the documents, possibly against payment."*

According to the Danish Nature Agency, the draft river basin management plans and the possibility for submitting consultation statements were publicly accessible on the website of the Agency for Spatial and Environmental Planning for six months (from 4 October 2010 to 6 April 2011). There are comprehensive guidelines available on the website on how to use WebGis. As an alternative, consultation statements could be forwarded to the Agency via post. At the same time, the draft river basin management plans were available for inspection at the local offices of the Agency for Spatial and Environmental Planning. The Agency received more than 4,200 consultation statements.

On the basis of this, the Danish Nature Agency is of the opinion that the requirements for public accessibility have been met.

Publication of draft river basin management plans later than 22 December 2008 and publication of the adopted river basin management plans later than 22 December 2009

Some appellants mention that both the draft river basin management plans and the adopted river basin management plans were delayed.

According to the Danish Nature Agency, the draft river basin management plans were published on 4 April 2010, while the adopted river basin management plans were published upon entry into force on 22 December 2011. The Agency observes that the requirements for publication of the draft plans no later than 22 December 2008 and the adopted plans no later than 22 December 2009 were not complied with.

Supplementary consultation on the changes to the draft river basin management plans

A number of appellants state that the period from the consultation on the published draft river basin management plans to the supplementary consultation on the changes to the draft plans saw changes to the draft plans of a scope calling for a renewed six-month consultation period. Furthermore, some appellants state that they did not become aware of the consultation until it was over. It is also pointed out that the landowners should have been informed individually about the consultation. Furthermore, it is cited that the consultation period of ten days was too short, amongst others because some appellants were not covered by the draft river basin management plans until in connection with the supplementary consultation. Furthermore, several appellants mention that the consultation documents were difficult to navigate and that it was not possible to submit consultation statements on the website of the Danish Nature Agency due to service problems with the website.

The Danish Nature Agency states that, pursuant to section 30 of the Danish Act on Environmental Objectives, the Agency conducted a supplementary consultation on the changes to the draft river basin management plans in the period between 3 December and 10 December 2011. ...

... ..

The Agency points out that this consultation was not a broad public consultation on the total revised draft river basin management plans, but merely a focussed consultation to consult the individual authorities and citizens about the changes to the extent that the authorities and citizens were affected by these changes. In practice this means that the individual landowners were given the opportunity to express their opinions about the changes that would have an effect on their properties, however, in principle, not about any of the other changes.

According to the Danish Nature Agency, the supplementary consultation was announced to the public on 3 December 2011 in the following newspapers: Bornholms Tidende, Fyens Stiftstidende, Fyns Amts Avis, Helsingør Dagblad, Jydske Vestkysten, Nordjyske Stiftstidende, Dagbladet Holstebro, Dagbladet Ringkø-bing/Skjern, Morsø Folkeblad, Randers Amtsavise, Skive Folkeblad, Viborg Stifts Folkeblad, Århus Stiftstidende, Dagbladet Ringsted+Roskilde+Køge, Frederiksborg Amts Avis mandag-fredag, Holbæk Amts Venstreblad, Kalundborg Folkeblad, Lolland Falsters Folketidende, Sjællandske, Herning Folkeblad, Horsens Folkeblad, Midtjyllands Avis og Vejle Amts Folkeblad. The announcement is enclosed. As is evident, the announcement said that changes had been made to the draft river basin management plans, where these draft plans could be obtained, and that the consultation would last until 10 December. At the same time, the consultation was announced on the website of the Danish Nature Agency on 2 January 2011.

According to the Danish Nature Agency, maps of the changes, additional information documents and the possibility to submit a consultation statement were made publicly accessible on the Agency's website from 3 December until 10 December 2011. As an alternative, consultation statements could be forwarded to the Agency via post. At the same time, by contacting the Danish Ministry of the Environment Information Centre, interested parties could obtain information about local offices of the Agency where maps were available for inspection. Approx. 1,650 consultation statements were received in connection with the supplementary consultation. With regard to the service problems on the website in connection with the supplementary consultation, the Agency refers to the enclosed memorandum of 12 January 2012 prepared by the National Survey and Cadastre.

Therefore, the Danish Nature Agency is of the opinion that the supplementary consultation on changes to the draft river basin management plans, including the consultation period, the public announcement and the public accessibility of the consultation documents, complies with the provisions of the Danish Act on Environmental Objectives.

Other comments

The Danish Nature Agency also points out that a number of appellants through different wording comment on the issue of access to documents. The Agency judged that these comments did not comprise actual requests for access to documents and therefore the Agency did not take any action in this regard.

Finally, the Agency observes that, in addition to the above subjects, the appellants express a wish to have the content of the river basin management plans subjected to a review, including the environmental objectives and the programme of measures, and according to the Agency's assessment, this falls outside the scope of the right of appeal. Since the environmental objectives, programmes of measures and priorities, guidelines and Annex 2 on the implementation of efforts aimed at improving wastewater treatment in the countryside of the river basin management plans were issued by the Minister for the Environment pursuant to the Minister's legislative power, the Danish Nature Agency is of the opinion that only the Minister for the Environment has the power to change, or to wholly or partly cancel, the river basin management plans with regard to these matters. The Agency has therefore not included any remarks on these subjects.

The Danish Nature Agency refers to <http://www.naturstyrelsen.dk/VandetNandplaner/> for information about the consultations, consultation memorandums, background material and the river basin management plans.

Supplementary statements

On 4 October 2012, the Danish Nature Agency submitted a supplementary report to the Board of Appeal concerning the appeals. This report covers 22 pages, and deals with the following subjects:

1. The legal status and nature of the national river basin management plans.
2. Section 53(1), no. 1 of the Danish Act on Environmental Objectives - the framework for the appeals.
3. A supplementary statement of the facts of the supplementary consultation in December 2011.
4. The Danish Nature Agency did not consider the changes to the river basin management plans to be comprehensive.
5. On individual notification and consultation of significantly affected parties.
6. The consultation period from 3 December 2011 to 10 December 2011.
7. The response options available to the Environmental Board Of Appeal.
8. Summary of the Danish Nature Agency's viewpoints.

Re. item 1) The legal status and nature of the national river basin management plans

In the Danish Nature Agency's opinion the national river basin management plans resemble plans that are known from the Danish Planning Act, and the river basin management plans are an integral part of the principle of framework-based management that characterises the spatial planning legislation. However, the national plans differ from other plans in the framework-based management system as they are adopted by the Minister for the Environment (through delegation to the Danish Nature Agency) and by their environmental objectives, programmes of measures and

priorities are implemented in statutory orders. Once the plans have been realised through a statutory order, in the Agency's opinion, this means the river basin management plans belong in the top-most layer of the legal hierarchy, ranking second under the Act like any other statutory order.

Furthermore, the Danish Nature Agency states e.g. that the Agency disagrees with the appellants' argument that the river basin management plans constitute a specific decision under administrative law. Their adoption is therefore not covered by the Danish Public Administration Act's rules on consultation of parties and on the obligation to provide grounds for decisions. The Agency is of the view that the river basin management plans are the expression of national general regulation and the Agency refers to section 3 of the Act that states that other authorities are bound by the river basin management plans. The river basin management plans are thus directed at and obligate authorities; not landowners along the watercourses covered by the individual plan. The Agency also argues that the measures in the river basin management plans are to be realised by the municipalities through an assessment of the individual watercourse in the action plans and in relevant watercourse regulations, and that an impact assessment is to be carried out of measures in this connection. Thus, it is the specific (municipal) decisions about how to realise the river basin management plans which, according to the Agency, are to be considered as decisions under administrative law.

Re item 2) section 53(1), no. 1, of the Danish Act on Environmental Objectives — the framework for the appeals

The Danish Nature Agency interprets section 53 to mean that the contents of the river basin management plans cannot be appealed, including the characterisation and designation of watercourses, the definition of objectives and watercourse measures. According to the Agency, the concept of preparation (in Danish "tilvejebringelse") covers sections 29-30 of the Act.

Re item 3) A supplementary statement of the facts of the supplementary consultation in December 2011

The changes to the river basin management plans (which were the subject of the supplementary consultation) included:

Watercourse stretches

- that were no longer included in the planning;
- the characterisation of which had been changed;
- with new measures;
- with measures that had been adjusted compared with before;
- that had been included in the planning;
- that are affected by saltwater;
- for which measures with regard to water abstraction had been changed.

Barrages in watercourses

- that are excluded from the planning;
- with adjusted measures in the upcoming river basin management plans;
- with measures exempted in the upcoming river basin management plans.

Lakes

- for which restoration is no longer included in the planning;
- with new or changed restoration measures.

More specifically, this entailed that

- 5,900 km watercourses covered by an environmental objective were excluded from the river basin management plans;
- measures were cancelled for 1,637 km watercourses covered by the river basin management plans;
- changes to measures were determined for 3,273 km watercourses. This figure covers both the watercourses for which the measures were changed from restoration to changed maintenance, or for which the measures were reduced to changed maintenance or restoration;
- 105 km watercourses were covered by the river basin management plans, and that measures were determined for approx. 12 km of these;
- a measure was determined for 960 km watercourses covered by the river basin management plans for which no measure had been planned previously.

Furthermore, the Danish Nature Agency also provided information that the announcement of the supplementary consultation included guidance on where individual citizens could see whether they were affected by the changes and on how to submit a consultation statement electronically. The initial draft river basin management plans (that were available to the public for six months) were also accessible from the Agency's website. If the individual citizen had problems understanding the guidance or the electronic maps on the website, or did not have access to the Internet, he or she could contact the Ministry's information centre with a view to arranging a physical inspection of the maps at the nearest local office, and there was also the option of submitting comments by letter.

The consultation system consisted of two web systems (a map part and a form part). Both systems were accessible before and after the expiry of the eight-day time limit (from 2 December to 13 December 2012). The Danish Nature Agency explains the service problems during the consultation by e.g. long response times. The Agency received a total of 1,648 consultation statements, of which 1,080 were electronic. All of the consultation statements were reviewed by the Agency which did not carry out an assessment of whether the statements submitted came from authorities or from citizens affected by the plans. According to the Agency, 110 consultation statements raised "significant new questions" and 82 of these gave rise to adjustments of the river basin management plans following the supplementary consultation.

Re item 4) The Danish Nature Agency did not consider the changes to the river basin management plans to be comprehensive

According to the Danish Nature Agency, the changes to the river basin management plans were not comprehensive, see section 30,(1), third clause, of the Act. Thus, there was no need for a new, broad public consultation pursuant to section 29 of the Act.

The Danish Nature Agency interprets the rule on consultation in section 20 to involve three types of changes to the published plan proposal prior to the final adoption: 1) minor 2) significant and 3) comprehensive. *Minor* changes may be incorporated without a supplementary consultation. *Significant* changes for the authorities or citizens affected require a supplementary consultation. *Comprehensive* changes require that all of the river basin management plans be subject to a new broad, public consultation (of six months' duration).

The Danish Nature Agency argues that it appears from the legislative background of the Act from 2003 that significant changes (which call for a consultation) could cover e.g. "the incorporation of new areas as well as the exclusion of areas that were covered by the draft programme of measures". In the same legislative background material, comprehensive changes are exemplified as "comprehensive re-prioritisations in relation to the measures stated in the draft plan".

In its report under item 4, the Agency refers to section 7(2) of the current Planning Act and relevant case law. It is stressed that the area covered by the river basin management plans is unchanged (still covering the entire country). The Agency moreover believes that the wording of section 30 and the legislative background of this section seem to imply that "it would take quite a lot" for the changes to the plans to be considered *comprehensive*. The Agency also argues that, in the river basin management plans, the same five general instruments (e.g. the requirement for catch crops and for buffer zones) as well as the same five specific instruments, are applied to watercourses and lakes both in the draft plans and in connection with the supplementary consultation.

The changes that were introduced between the initial and the supplementary consultation meant that approx. 27% of watercourse stretches had their measure changed or cancelled or received a new measure. Changes to measures were determined for approx. 3,273 km watercourses. A measure was determined for 960 km watercourses that were covered by the draft river basin management plans but for which a measure was not determined, and for 1,637 km watercourses a measure was cancelled. According to the Danish Nature Agency, these changes were significant and called for a supplementary consultation, however not so comprehensive that they in fact constituted an entirely new plan proposal.

A copy of the announcement document for the supplementary consultation is enclosed with the Agency's statement of 4 October 2012. It appears from this announcement that the watercourses are not entirely the same as those that were initially proposed in the first consultation. The Agency assessed the responses to the first consultation and judged there were grounds for prioritising measures differently for several reasons:

- The quality of certain watercourses proved to be better than first assumed.
- New knowledge showed that also other watercourses required measures.
- The first designations of watercourse were based on assessments by the counties which applied criteria differing considerably from county to county. The watercourses are now assessed more uniformly throughout Denmark, which provides a more uniform measures.
- The Agency has become more knowledgeable about the actual functions served by the individual watercourses. Certain watercourses were designated as natural but turned out to be artificial.
- Similarly, for individual lakes, there was a re-assessment which was covered by the consultation.

After the changes, the final river basin management plans cover approx. 21,900 km watercourses. For approx. 5,150 km of these a measure has been determined in the first planning period.

Re item 5) On individual notification and consultation of affected parties

In the Danish Nature Agency's opinion there is no requirement linked to the supplementary consultation, for individual consultation and notification of changes to the river basin management plans, see the statement above arguing that the river basin management plans do not constitute a decision under administrative law. Section 30 of the Danish Act on Environmental Objectives

stipulates requirements that the authorities and citizens affected must have had opportunity to make a statement on the matter. In the Agency's opinion the supplementary consultation addressed this requirement. In this part of its report, the Agency also refers to section 27(2) of the Planning Act and relevant case law. The Agency stresses that local development plans are binding in another way than more general plans, such as the river basin management plans.

The Danish Nature Agency also argues that the river basin management plans concern very large areas for which it is not possible to identify to the same extent who specifically will be affected significantly by the changes. For example, a changed measure aimed exclusively at one stretch of watercourse could affect many landowners if these landowners have drainage-related interests in the watercourse. Accordingly, the Agency was not able to assess beforehand how many people would be affected significantly by the changes to the river basin management plans.

Re item 6) The consultation period from 3 December 2011 to 10 December 2011

The Danish Nature Agency refers to section 30 of the Act that states that the Minister (by delegation to the Danish Nature Agency) is responsible for setting the time limit for the supplementary consultation. Thus, the legislator has provided for a very broad discretion for setting the time limit. This authorisation can only have been exceeded if the time limit was so short that it was not practicable for the affected parties to form an opinion about the changes in the draft river basin management plans, and this must also be seen in relation to the scope of the changes.

The Danish Nature Agency also argues that it would require firm evidence to establish that the authorisation in section 30 has been exceeded. In the Agency's opinion the consultation period of eight days meets the requirement of section 30 of the Act. The Agency also argues that this means that the individual landowners should have opportunity to express their opinion about the changes that would have an effect on their property, however, in principle, not about any of the other changes. In this part of its report the Agency also refers to case law under the Planning Act. Furthermore, the Agency describes and comments on the Aarhus Convention and case law, to which the appellants also refer. With regard to the Convention, the Agency believes that it has involved the public in the preparation of the river basin management plans in a transparent and fair manner, including providing fair time limits.

Re item 7) The response options available to the Environmental Board Of Appeal

The Danish Nature Agency finds that, in general, there is no basis for overriding the adoption of the river basin management plans, either partly or wholly. If the Board of Appeal should conclude that, specifically, in relation to one or several of the appellants, there has been a legal deficiency, e.g. because the appellant, due to personal circumstances, did not have occasion to provide a sufficient statement during the supplementary consultation, this cannot lead to changes or corrections to the river basin management plans by the Board of Appeal. The Agency therefore believes that the Board of Appeal could remit the plans for renewed processing by the Danish Nature Agency. The Agency finds that it would be difficult for the Board of the Appeal to hold the river basin management plans to be invalid for some landowners, as the Board cannot decide on the content of the plans. It may be considered whether the Board can remit the plans as ineffective for the appellants until the Board has taken a position on the consequences of the lack of opportunity to provide a statement. The Agency also argues that the Board of Appeal could approve the Agency's processing of the case, because, despite a (possible) lack of consultation, the Agency does not see any benefits from remitting the river basin management plans for renewed processing.

Håkun Djurhuus provides supplementary information about the appeal on behalf of the three landowners in letters dated 31 August, 10 and 20 September, 8, 10 and 12 October, as well as an e-mail dated 3 November and a letter dated 16 November 2012.

As it appears from the supplementary statements by Håkun Djurhuus, the secretariat of the Board of Appeal held a meeting with officials from the Danish Nature Agency. At this, which was held at the request of the Agency, the Agency expressed a wish to be able to submit a supplementary statement. In Håkun Djurhuus' opinion, as a consequence of the meeting with the Agency, the Board of Appeal and the secretariat are incompetent in the review of the cases concerning the river basin management plans. The Environmental Board of Appeal refers to the separate decision of today's date in which it has addressed the issue of incompetence separately.

The first pages of the statement from Håkun Djurhuus deal with the meeting with the Agency and the subsequent correspondence. The remaining parts of the statement address and elaborate on Håkun Djurhuus' appeal on behalf of the three landowners, in that comments, in particular, deal with the Agency's letter of 4 October 2012 on the appeals, as well as with the written response of 9 November 2012 submitted by the Agency in the legal proceedings. The subjects in this part of the statement by Håkun Djurhuus chiefly deal with the contents of the river basin management plans and the chosen model of implementation, including the Agency's (mis)understanding of the Water Framework Directive. Here is an outline of the arguments:

The legal basis for regulation of the drainage options available to agriculture is the Watercourse Act, which ensures the basic balance between, on the one hand, the commercial and socio-economic interests, and on the other hand, environmental interests. This balancing is also aimed at in the Danish Act on Environmental Objectives, and is most clearly expressed in the Act's provisions on artificial and heavily modified surface water bodies. Then, Håkun Djurhuus elaborates on the subjects of the original appeal, especially with regard to what has been stated about the erroneous classification of watercourses and agriculture's operational conditions, as well as the Agency's guidelines on section 15 of the Danish Act on Environmental Objectives and the concept of drainage in areas close to urban areas versus drainage of areas for the purpose of agriculture. In summary, it is argued that it is a significant deficiency in the preparation of the river basin management plans that the individual classifications of the watercourses were carried out on the basis of obviously incomplete and clearly erroneous guidelines from the Danish Nature Agency, which led to a considerable over-implementation of the Directive. This allegation is clarified in more detail in several places throughout the supplementary statement by the attorney.

In a description and review of the provisions of the Aarhus Convention, Håkun Djurhuus once more repeats that the supplementary consultation of the affected landowners in December 2011 did not provide said landowners with a realistic possibility for exerting any real influence on the contents of the plans.

Håkun Djurhuus also elaborates on the claim that the changes to the initial draft river basin management plans were so comprehensive that they in fact constituted an entirely new overall plan proposal which should have been subjected to a six-month consultation period, see section 30 of the Danish Act on Environmental Objectives. Reference is made to case law under section 27(2) of the Planning Act, as well as to the legislative background of the Danish Act on Environmental Objectives. According to the legislative background, significant changes (which call for a

consultation) could cover e.g. *"the incorporation of new areas as well as the exclusion of areas that were covered by the draft programme of measures"*.

Håkun Djurhuus mentions that he finds it peculiar that the Danish Nature Agency's statement of 4 October 2012 was submitted as late as nine months after the appeals were filed. Håkun Djurhuus maintains that the river basin management plans constitute a decision under administrative law with relevance for the individual landowner, and collated in a series of documents (the 23 plans). The subject is elaborated by referring to sections 53 and 55 of the Act and to what has been stated previously about the classification of watercourses.

Finally, Håkun Djurhuus refers to a legislative bill which has been submitted for consultation by the Minister for the Environment. The bill has not been presented to the Danish Parliament (the Folketing). Had the bill been presented and adopted, it would have changed the implications of the Environmental Board of Appeal's power of review in appeals cases involving the Danish Act on Environmental Objectives.

Decision and comments by the Environmental Board of Appeal

The ten members of the Environmental Board of Appeal have participated in the processing of the case: Mikkel Schaldemose (chairman), Ole Pilgaard Andersen, Martin Glerup, Leif Hermann, Per Larsen, Marion Pedersen, Poul Søgaard, Peter Thyssen, Jens Vibjerg and Henrik Waaben.

The appeal from attorney-at-law Håkun Djurhuus on behalf of the three landowners was processed at the Environmental Board of Appeal's meeting of 3 October 2012, at which appeals from two additional landowners, the Danish Society for Conservation of Nature and the Ecological Council were also presented before the Board of Appeal.

The seven appeals contain several issues of a principal nature with regard to the adoption of the 23 national river basin management plans.

The Danish Act on Environmental Objectives implements, amongst other things, the Water Framework Directive. The requirement for preparing a river basin management plan with a specific content, objectives and procedures for how the public is to be involved, appear from the Directive. The river basin management planning of the Danish Act on Environmental Objectives therefore constitutes a key aspect of compliance with the Water Framework Directive. The provisions of the Danish Act on Environmental Objectives concern both procedures and time limits for the execution of river basin management planning, including involving the public and the requirements on contents, e.g. the obligation to set out specific objectives.

The decisions are made pursuant to section 53(1), no. 1 of the Danish Act on Environmental Objectives on the preparation of the national river basin management plans.

On the basis of amongst other things the legislative background³, the Environmental Board of Appeal assesses that the provisions of the Act on requirements for draft river management plans, final plans and procedures for the national plans, can be appealed to the Board of Appeal insofar as legal issues are concerned.

³ See legislative bills L/15 2003/I introduced 8 October 2003 and L/165 2010/I introduced 5 March 2011 (Green Growth)

The river basin management plans are binding for the authorities. This is stated in section 3(2) of the Danish Act on Environmental Objectives.

The Environmental Board of Appeal's review

The appeals raise questions about the Environmental Board of Appeal's review in connection with the adoption of the 23 river basin management plans.

It appears from section 53 of the Act that *review pursuant to section 29, as far as the preparation of the river basin management plans is concerned* may be appealed to the Environmental Board of Appeal. Thus, the Board of Appeal can and must carry out a review of the decision to adopt the river basin management plans finally if an appeal has been filed timely.

The fact that, following the adoption of the river basin management plans, statutory orders have been issued on some of the content of the river basin management plans which obligate the municipalities in their further planning does not affect the obligation of the Environmental Board of Appeal to subject the decision to adopt the plans to review.

The review covers only the formal requirements for the content of the river basin management plans. In other words, the Environmental Board of Appeal is to determine whether the river basin management plans contain the elements prescribed by the Danish Act on Environmental Objectives, including the requirements of section 28 for basic analysis, status reports etc. Furthermore, the Act also requires that certain specific types of analysis be carried out. The Board of Appeal can only overrule the content of the river basin management plans if the content is completely inadequate because no basic analysis has been carried out, because a status report is lacking, or similar. The Environmental Board of Appeal cannot review the scope, quality and content of the analyses carried out but only observe whether the analyses have been carried out and have been included as a part of the river basin management plans.

Several of the appellants have stated that the river basin management plans ought to contain impact assessments on a number of subjects, including on the economic impacts of objectives, measures and instruments.

The Danish Act on Environmental Objectives does not set out specific requirements for impact assessments in the river basin management plans, however the Act does stipulate requirements for a basic analysis (section 5), an analysis of the characteristics of surface water and groundwater (section 6), an economic analysis of water use (section 6), an economic analysis of the programme of measures (section 25), and a summary of the economic analysis of water use as required pursuant to section 6 of the Act (Annex 2 of the Act). Furthermore, there may be requirements for further impact assessments pursuant to the Act on the Environmental Assessment of Plans and Programmes (Danish SEA Act) and the regulations of the Habitats Directive.

The 23 river basin management plans follow the same structure. The river basin management plans include a *Cost analysis of instruments, measures and economy*, a *Summary report on river basin management plans (Danish SEA Act)* and as annexes to the plans a *Memorandum on the economic analysis of water use*.

The Environmental Board of Appeal does not find that the formal requirements of the Danish Act on Environmental Objectives for carrying out analyses have been disregarded in the national river basin management plan.

The appeals from landowners and organisations alike also argue that the river basin management plans were adopted in contravention of the provisions of the Danish Act on Environmental Objectives with regard to the designation of artificial and heavily modified surface water bodies (section 15), with regard to the determination of less strict environmental objectives, in particular, the question of the impact of human activity (section 16), with regard to the reasons for extending the deadline for achieving the *good status* environmental objective (section 19), and with regard to the minimum requirements for the content of a programme of measures (section 25).

The reasons given in the river basin management plans for extending the deadline for achieving a *good status* in the different water bodies differ in scope and detail. The same applies more or less to the descriptions of the measures for the individual water body in the river basin management plans.

It is the Environmental Board of Appeal's assessment that the formal requirements of sections 19 and 25 of the Act have not been disregarded in the national river basin management plans.

The Environmental Board of Appeal observes that sections 15 and 16 of the Act deal with the content of the plans, including categorisation of water and water quality, which the Board of Appeal is prevented from processing in its review.

The appeals include critique from several of the appellants of the chosen model and of the approach for implementing the Water Framework Directive. It is the Environmental Board of Appeal's assessment that the provisions of the Water Framework Directive have been implemented with the Danish Act on Environmental Objectives. Matters concerning the content of the legislation cannot be reviewed any further by the Board of Appeal.

The Environmental Board of Appeal cannot provide an assessment of whether the contents of the river basin management plans are otherwise appropriate and/or adequate for nature the aquatic environment, landowners and associations. The same applies to the objectives, measures and instruments of the plans.

Pursuant to the Danish Act on Environmental Objectives, the Board of Appeal is prevented from processing appeals about the contents of the national river basin management plans. This also means that the Board of Appeal cannot change or make corrections to the contents of the river basin management plans; only the Danish Nature Agency can do this.

In this context, it is noted that the Danish Nature Agency has acknowledged in a reply to the court dated 9 November 2012 that the river basin management plans are being adjusted as errors and inaccuracies have been observed in the plans. The Agency has become aware that some watercourses, which have been designated as *natural*, should instead have been designated as *artificial*. At the same time, the Agency has provided information that it is in the process of launching a review of all of the 22,000 km watercourses in the river basin management plans in order to identify whether other watercourses should have been designated as artificial.

Adoption in accordance with the time limits of the Danish Act on Environmental Objectives
Without question, the preparation of the river basin management plans exceeded the time limit set out in the Danish Act on Environmental Objectives, as the plans were adopted with a two-year delay.

If a delay in the preparation of the river basin management plans were to lead to an annulment of their adoption, it would mean that new plans could only be adopted for the next six-year period. In the opinion of the Environmental Board of Appeal, such an implication would be in conflict with the objectives of the Danish Act on Environmental Objectives and the purpose of the Water Framework Directive.

The late adoption of the plans conflicts with the time limits of section 29(2), no. 3, and section 31(1), no. 6, of the Danish Act on Environmental Objectives, however this in itself does not render the adoption invalid.

Announcement

It appears from section 29(1) of the Danish Act on Environmental Objectives that the public announcement of the draft river basin management plans may take place exclusively digitally. Furthermore, the Danish Act on Environmental Objectives also provides authorisation for digital publication of decisions to e.g. adopt draft river basin management plans and final river basin management plans, see sections 27a, 29, 31, 31b and 31c of the Act.

At the time of the plan proposal's first consultation phase, there was no authorisation to make announcement exclusively via digital platforms. The Danish Nature Agency chose to announce the initial public period of six months and the supplementary consultation in several large newspapers.

The Environmental Board of Appeal cannot decide in the appellants' favour that the announcement was carried out in too few or in the wrong newspapers, either during the first public period or during the supplementary consultation.

Information to landowners - section 19 of the Danish Public Administration Act (hearing of parties)

The landowners argue that the river basin management plans are so intrusive that the landowners ought to have been consulted individually as parties prior to the adoption of the changed plans. The Danish Nature Agency argues that the adoption of the river basin management plans is not covered by the regulations of the Danish Public Administration Act on the hearing of parties and the obligation to provide grounds for decisions e.g. because the river basin management plans are directed at and obligate authorities and not landowners along the watercourses covered by the individual plan. The Agency also argues that a changed measure for a watercourse stretch could affect many landowners if these landowners have drainage-related interests in the watercourse.

The party affected by a decision is at the core of the concept of the hearing of parties, although others may also be parties to a case. What is crucial is whether a person can be said to have a *substantial* and *individual interest* in the decision and outcome of the case.

It follows from section 19 of the Danish Public Administration Act that if a party to a case cannot be presumed to be familiar with the fact that the authority possesses certain information about real circumstances of the case, the authority may not make a decision in the case until the authority has made said party familiar with the information and provided said party occasion to submit a statement. However, this applies only if the information is to the disadvantage of the relevant party and is of substantial importance for the decision. The authority may stipulate a time limit for submitting the statement.

Section 19(1) of the Danish Public Administration Act does not apply if the intended decision will affect a wider, unspecified circle of people, enterprises etc., or if presenting the information to the party is otherwise associated with significant difficulties, see section 19(2) no. 5. This provision is aimed e.g. at environmental and planning cases.

The Board of Appeal's practice in the adoption of plans pursuant to the Planning Act has so far been on the basis that the adoption of a plan is a decision under administrative law and is of a general or more broad nature. Under certain circumstances, the content and significance of the plan may require that one or several individuals be considered as parties in connection with the adoption of the plan.

The national river basin management plans have a certain general nature and they are not legally binding for landowners until their subsequent realisation in municipal action plans. At the same time, the Board of Appeal admits that there is limited room for manoeuvre with regard to changes when realising the national river basin management plans in municipal action plans.

The Environmental Board of Appeal unanimously find that due to the national river basin management plans' detailed designation of measures for e.g. watercourses and lakes, and their binding effect on the municipal action plans, there may be landowners who must be considered to be individually and significantly affected by the plans. These landowners are therefore parties to the decision to adopt the river basin management plans. This judgement also seems to be in alignment with the legislative background of section 30 of the Danish Act on Environmental Objectives to which several of the appellants have referred.

A majority of seven of the members of the Environmental Board of Appeal subsequently find as follows:

The question of status as a party must be assessed generally in relation to the decision to adopt the national river basin management plans and specifically in relation to the landowners who have appealed to the Board of Appeal.

The provision in section 19(2), no. 5., of the Danish Public Administration Act covers the situation in which a decision concerns a wider, unspecified circle of people. In the majority of the members' view, the adoption of the river basin management plans is exempted from the basis of a hearing of parties in situations as the one in question in which landowners are covered by national river basin management plans which contain the same general and specific instruments aimed at the aquatic environment throughout Denmark; plans that have a general nature of setting guidelines for the municipal action plans. The final assessment of how instruments and measures are to be realised in order to achieve the objective must be clarified in the action plans.

In continuation hereof, the majority of the members observe that all of the affected landowners are covered by section 30 of the Danish Act on Environmental Objectives which stipulates provisions aiming to ensure that citizens, who are significantly affected, are provided the possibility to state their opinion about significant changes to the plans.

Based on the appeals and case information, the Board of Appeal finds no other grounds for establishing that the appeals include landowners who should be affected by the contents of the plans

in such a way that these are more of a disadvantage to the appellants than to other landowners whose properties are also covered by the river basin management plans.

The minority of the members (Per Larsen, Marion Pedersen and Jens Vibjerg) find that all significantly affected landowners should have been consulted individually because of the very detailed nature and the intrusive affect of the river basin management plans.

The question is then whether the rules of the Danish Act on Environmental Objectives concerning involvement of the public have otherwise been observed in connection with the adoption of the river basin management plans.

Is it a new plan?

Following the first consultation period of six months, changes were made to the river basin management plans on the basis of the consultation statements. Several of the appellants state that the river basin management plans were changed so significantly that they should be considered new plans subject to a six-month consultation period. The Danish Nature Agency deemed that the changed plans were not new plans.

The wording of section 30 of the Danish Act on Environmental Objectives is as follows:

"If, in connection with the adoption of the final river basin management plan, changes are made to the published proposal which significantly affect other authorities or citizens than those who caused the change by way of objection, the river basin management plan may not be adopted until the parties concerned have been given the opportunity to make a statement. The Minister for the Environment shall fix a deadline for this. Where the change is comprehensive to the extent that it in fact constitutes a new proposal for the river basin management plan, the procedure laid down by sections 28, 29 and 31 shall be followed."

The nature, scope and content of the river basin management plans differ from that of e.g. plans pursuant to the Planning Act. The river basin management plans originate from an EU Directive and cover water bodies across existing administrative boundaries. There is an obligation to prepare the plans at individual water-body level throughout Denmark, and to revise them every six years. The river basin management plans also differ in type by including an obligation to achieve a certain environmental status by 2015, and by the fact that the plans are prepared and revised for all of Denmark at the same time. These plans are very comprehensive with regard to both content and complexity in relation to their impact on watercourses, lakes, coastal waters and groundwater.

Prior to the final adoption, approx. 5,900 km watercourses for which objectives had been set were omitted from the published plan proposal. These watercourse stretches were omitted because the quality of certain watercourses turned out to be better than first assumed; new knowledge showed that also other watercourses required measures; the criteria for designating watercourses were further standardised; and the Agency had obtained knowledge about the actual function of the individual watercourses (certain watercourses were designated as natural but turned out to be artificial). In total, approx. 77% of the watercourse stretches had their measures changed, received a new measure or a measure was cancelled, prior to the supplementary consultation.

The Environmental Board of Appeal finds as follows:

A majority of seven of the members of the Environmental Board of Appeal find that the changes to the river basin management plans following the first consultation period were not as comprehensive as to call for an entirely new plan proposal.

The majority of the members find that it must be possible to make changes of the type described in these cases on the basis of consultation statements and new knowledge procured in connection with a consultation on plans of this nature, without the changed plans having to be considered as new plans. The changes pertaining to watercourses must be seen in the context of the other content of the plans. This assessment is also based on the fact that the plans do not introduce new general or specific instruments for the relevant stretches but rather the same instruments that were contained in the draft river basin management plans. Therefore the same instruments are to be used on other watercourse stretches (re-prioritisation of measures).

The majority of the members therefore find that the changes do not require that the procedures in sections 28, 29 and 31 of the Danish Act on Environmental Objectives be observed again.

The minority of the members (Per Larsen, Marion Pedersen and Jens Vibjerg) find that the changes that were incorporated in the river basin management plans after the first consultation period are so comprehensive that they are in fact to be considered new draft river basin management plans, which means that the procedures in the Danish Act on Environmental Objectives should be observed once more. In other words, the changed plans should have been submitted for a new six-month consultation period.

Consequently, in accordance with the opinions of the majority of the members, the decision by the Environmental Board of Appeal is that the changes to the river basin management plans were so significant that the citizens and authorities affected by the plans must be given the possibility to state their opinion, however, that the changes are not so comprehensive that they are in fact to be considered new river basin management plans

The supplementary consultation - the system of consultation

A number of appellants state that it was technically very difficult to submit a consultation statement during the supplementary consultation. They state that it was difficult and/or impossible to identify the changes applying to the individual properties, and this meant that the individual landowners had to recall what the initial plan proposal said in order to assess whether the changes to the river basin management plans would entail any consequences for their individual properties.

In its supplementary report, the Danish Nature Agency provides information about e.g. the possibilities for submitting consultation statements (electronically as well as by letter) and about the map of the changes as well as the guidance available about the system on the Agency's website.

Although the system of consultation and the guidance hereon are complicated, the Environmental Board of Appeal finds that the system must be considered to be in accordance with section 30 of the Danish Act on Environmental Objectives which states that significantly affected authorities and citizens *must have had opportunity to voice their opinion* when compared with sections 29 and 31 of the Danish Act on Environmental Objectives which state that *public announcement may take place exclusively digitally*.

The evaluation of the accessibility of information about the changes to the river basin management plans emphasise that it was possible via map annexes to see the effect for the individual property of the initial draft river basin management plans and the changes entailed for the individual property by the supplementary consultation, that it was possible to contact the Ministry with a view to gaining access to view relevant map annexes and to receive help, and that it was possible to submit both electronic consultation statements as well as paper consultation statements by post.

The supplementary consultation - the eight-day time limit

Many of the appellants stress the short time limit in connection with the supplementary consultation. This time limit of eight days (of which five were working days) must be assessed on the basis of section 30 of the Danish Act on Environmental Objectives which states that affected authorities and citizens must *have had opportunity to voice their opinion* before changed plans can be finally adopted.

It appears from section 30 of the Act that the Minister for the Environment is responsible for setting a time limit for submitting comments to changes to the plans, and this time limit is to ensure that the river basin management plans are not adopted until affected authorities and citizens have had opportunity to voice their opinion.

The legislative background to section 30 of the Danish Act on Environmental Objectives which implements Article 14 of the Water Framework Directive, does not provide any detailed guidance on what should apply in the event of a supplementary consultation.

On the basis of the wording in section 30, the Environmental Board of Appeal finds that the affected parties should have a real possibility to make a reasoned statement, and this requires e.g. time to understand the scope and consequences of the changes. The river basin management plans could also have consequences for others than the landowners who own land that borders onto water bodies.

The assessment of whether the eight-day time limit is adequate in relation to the changes made to the plans, requires the inclusion of the scope and purpose of the Danish Act on Environmental Objectives, other time limits for objections, as well as the purpose and provisions on involvement of the public of the underlying Directive. The same applies for the obligations under Article 6(3), (4) and (8) of the Aarhus Convention and experience with e.g. time limits for involving the public (Article 6(3)). Furthermore, it follows from common administrative law that a consultation time limit must provide the affected parties a fair amount of time in which to submit a statement. These circumstances must be aligned with the large quantity of data which the river basin management plans deal with.

In its assessment of the time limit, the Environmental Board of Appeal has emphasised that the river basin management plans had previously been subject to a six-month consultation period, and that there were service problems on the Agency's website at the start of the supplementary consultation which made it difficult to submit a consultation statement and to read the river basin management plans. According to the Danish Nature Agency it was possible to access the information in other ways, however the Board of Appeal does not find that this means the short time limit can be disregarded.

Because the Agency chose to make a general announcement of the supplementary consultation period, thus leaving it up to the individual landowners to examine whether they were affected, within the eight days, affected citizens and authorities had to *both* find out whether they were affected or not, *and* discover how they were affected.

In the Environmental Board of Appeal's view, a time limit of eight days (of which five are working days) must, in general, be considered an inadequate and short time limit for submitting a reasoned statement, unless the case pertains to individual matters to which the affected parties can relate.

In summary, the Environmental Board of Appeal is of the opinion that the time limit for the supplementary consultation was too short seen in the light of the scope, content and complexity of the river basin management plans.

The question is then whether this constitutes a significant legal deficiency in the preparation of the river basin management plans and thus which legal effect this deficiency should have.

The provisions on public involvement are a key aspect of the Danish Act on Environmental Objectives and must be considered an important right to due process and, at the same time, a guarantee for the democratic legitimacy of the plans.

The Danish Act on Environmental Objectives as well as the Water Framework Directive are characterised by provisions on extensive involvement of the public. This is substantiated e.g. by the long time limits for consultation and the provisions on when in the planning process certain material must have been procured prior to involvement of the public. It should also be included, that the river basin management plans involve complex subject matter and large quantities of data on watercourses, lakes, coastal waters and groundwater.

The Environmental Board of Appeal finds that a part of the argument must be that a longer consultation period could have resulted in the submission of relevant viewpoints and information on the content of the river basin management plans, and it cannot be excluded that a longer consultation period might have led to further changes to the plans. Furthermore, information has been provided that the objections submitted during the supplementary consultation period led to changes to the plans.

The Environmental Board of Appeal cannot consult all affected citizens and authorities in order to identify the possible consequences for the content in the river basin management plans of the objections.

The Board of Appeal observes that in view of the content, overall scope and nature of the plans, it is not possible for the Board of Appeal to make a decision on a partial annulment of the adoption of the plans in relation to the landowners that have appealed said adoption.

Such an assessment would assume e.g. that the Board of Appeal could conclude that only the landowners that have appealed to the Board have relevant objections in relation to the changes to the river basin management plans. This would be similar to conducting a review of the content of the river basin management plans, from which the Board of Appeal is prevented. It would also be in conflict with the intention of broad and actual involvement of the public in the planning process.

The Danish Nature Agency's statement that they received many consultation statements in connection with the supplementary consultation and that they read all of the statements irrespective of whether these were received on time or not, and irrespective of whether the party submitting the statement was entitled to be consulted or not, cannot lead the Board of Appeal to arrive at another result.

In summary, the Environmental Board of Appeal finds that the short time limit for consultation must be considered a significant legal deficiency in the preparation of the river basin management plans, and that this deficiency must render the adoption of the plans invalid.

Therefore, the Environmental Board of Appeal's decisions are that the decision of 22 December 2011 to adopt the 23 river basin management plans for all of Denmark are repealed because the short time limit set for the supplementary consultation is in contravention of section 30 of the Danish Act on Environmental Objectives.

The cases are remitted to the Danish Nature Agency for renewed processing.

The Environmental Board of Appeal also observes that the Danish Nature Agency must assess in their further work on the river basin management plans whether the changes to the river basin management plans give rise to a decision pursuant to the Act on the Environmental Assessment of Plans and Programmes (Danish SEA Act). This question has not been raised by the appellants. Since the adoption of the plans has been repealed, the Board of Appeal does not find occasion to process this question.

The question of incompetence raised by Håkun Djurhuus was processed at the Environmental Board of Appeal's meeting on 3 December 2012 prior to the processing of the appeal cases pertaining to the national river basin management plans. The Board of Appeal's decision on this matter is given in a separate decision to which reference is made.

Håkun Djurhuus' appeal about the Agency's (late) response to the request for access to documents on behalf of the Danish Agriculture & Food Council is pending final clarification. The Environmental Board of Appeal will process the issue of access to documents at a later stage if Håkun Djurhuus maintains this part of the appeal.

On behalf of the Board



Susanne Spangsberg
Special Advisor

This decision has been sent to:

The Danish Nature Agency, nst@nst.dk, Ref. no.: NST-4208-00017

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