



Danish Ministry
of the Environment
Nature Agency

Jura

J.nr. NST-4209-00015

Ref. bru

February 8 2013

RE: Case ACCC/C/2012/67 Denmark concerning the Compliance by Denmark with provisions of the Convention on Public Participation in the adaption of river basin management plans.

With reference to the letter of 14 January 2013 from the Secretary to the Aarhus Convention Compliance Committee, the Danish Nature Agency has the following comments on the recent decision from the Danish Nature and Environmental Board of Appeal (Natur- og Miljøklagenævnet) (hereinafter referred to as "the Board")

1. Summary

The communication deals with public participation during the adoption in Denmark of the river basin management plans in accordance with the Water Framework Directive (2000/60/EC).

More specifically the communication concerns whether or not a supplemental hearing, lasting for 8 days, was in compliance with the provisions of the Aarhus Convention on public participation

The legal issue presented in the communication has been pending before both the Board and the Danish courts.

On 6 December 2012 the Board unanimously found that the 8 days supplementary hearing period (from Saturday 3 December 2011 to Saturday 10 December 2011) was "*substantially too short*" taking into account the volume, content and complexity of the river management plans.

Evaluating the hearing period the Board involved Denmark's obligations under article 6 (3) (4) and (8) of The Aarhus Convention including experiences in this context regarding hearing periods (time-limits).

As a consequence of its findings the Board ruled that the adoption of all 23 Danish river basin management plans were invalid. The Board then remitted the plans to the Danish Nature Agency in preparation for the Agency to complete a new hearing.

The decision of the board is legally binding and cannot be challenged by the Danish Nature Agency.

The implications of the decision are:

- The Danish Nature Agency (and the Ministry of the Environment) do no longer contest the claim put forward before the Danish Western High Court by the communicant regarding the invalidity of the Danish river basin management plans as a result of the supplementary hearing period being too short. This lawsuit is therefore likely to be closed, and the Danish Nature Agency acknowledges that the supplemental hearing period in December 2011 was too short. The same goes for the lawsuits filed by more than 370 individual farmers.
- The passing of the Danish river basin management plans is invalid and the plans are therefore to be considered as not yet adopted. The Danish Nature Agency will complete of new and longer hearing in accordance with the guidelines set out in the Board's decision when adopting the river basin management plans again.

Hence the matter of the communication has been settled by local remedies. Therefore, there is no longer any need for the Committee to review the case.

The Nature Agency therefore kindly requests that the Committee decides not to consider the communication further and that the Committee therefore closes the case.

2. The facts of the case in short

Passing of the river basin management plans

The substantive merits of this case concern the public participation during the procurement in Denmark of the river basin management plans.

More specifically this case concerns whether or not a supplemental hearing carried out by the Danish Nature Agency in December 2011, which was part of a larger public participation process regarding the Danish water planning, was in compliance with the provisions of the Aarhus Convention on public participation.

The river basin management plans are a result of the Water Framework Directive (WFD) which was implemented into Danish law in 2003 by adopting the Danish Act on Environmental Objectives (AEO) (in Danish "Miljømålsloven").

According to the AEO, the State of Denmark must prepare and adopt river basin management plans, and in these plans draw up programs of measures adjusted to regional and local conditions.

The State of Denmark is divided into 4 water districts, and these 4 districts are again divided into 23 separate water areas. For each of the 23 water

areas the Danish State (represented by the Danish Nature Agency) has provided a river basin management plan.

In September 2010 an *initial proposal* for each of the 23 river basin management plans was passed. These proposals were among other things based on a so called "phase of ideas", which was a period of 6 months (from the 22 June 2007 to 22 December 2007) where the public was given an opportunity to put forward ideas and suggestions on how the Danish water planning should be framed.

After passing the initial proposal for the 23 river basin management plans the Danish Nature Agency completed a comprehensive public hearing. This hearing took place in 2010/2011, or rather from 4 October 2010 to 6 April 2011, i.e. 6 months.

After the expiry of the public hearing period the Danish Nature Agency had received 4.200 hearing statements from public authorities, environmental organizations, land owners etc. In this context the communicant also put forward a hearing statement (88 pages).

The submitted hearing statements entailed a range of amendments in the initial proposal for each of the 23 river basin management plans.

The Danish Nature Agency found that some public authorities, land owners etc. could be substantially affected by these amendments, which led to the completion of a supplemental hearing. This hearing lasted 8 days from Saturday 3 December 2011 to Saturday 10 December 2011 (both days included).

The supplementary hearing was announced on the Danish Nature Agency website on 2 December 2011 and was announced in 20 daily newspapers. The supplementary hearing statements could be submitted both electronically and by letter.

On 22 December 2011 the 23 river basin management plans were passed.

Complaints to the Nature and Environmental Board of Appeal¹

¹ The Nature and Environmental Board of Appeal

The Board is an independent and impartial body in the sense of the Convention and the decisions of the Board are legally binding on the parties of the case. There are 10 members of the Board including two Supreme Court judges.

The independence of the Board is specified in the Act on the Nature and Environmental Board (lov om Natur- og Miljøklagenævnet). According to section 1 (2) the Board does not take instructions regarding its considerations and its decisions in individual complaint cases. Thus the Minister for the Environment has no authority to give instructions to the Board.

After the passing of the river basin management plans the Danish Agriculture Food Council (the communicant) represented by Mr. Håkun Djuurhus on 19 January 2012 filed a complaint to the Board on behalf of 3 farmers. This complaint encompassed 3 of the 23 river basin management plans.

Besides the communicant a large number of farmers (representing themselves) also filed a complaint to the Board in January 2012. These complaints encompassed the majority of the 23 river basin management plans.

Furthermore, on 19 January 2012 the Danish Society for Nature Conservation (Danmarks Naturfredningsforening) filed a complaint to the Board, regarding among other things the procurement of all the 23 river basin management plans.

One issue in all the complaints was whether the supplementary hearing period in December 2011 was in accordance with the Aarhus Convention.

Lawsuits against the Danish Nature Agency and the Ministry of the Environment

On 31 May 2012 the communicant also filed a lawsuit on behalf of 4 farmers against the Danish Nature Agency and the Ministry of the Environment claiming that the river basin management plans encompassed by the suit were invalid. These 4 farmers are not similar to the 3 farmers whom the communicant is representing before the Board. The lawsuit encompassed 5 of the 23 river basin management plans, and these 5 plans are, apart from one, different from the 3 plans challenged by the communicant before the Board.

The case filed by the communicant was originally brought before the district court in the city of Esbjerg, but was subsequently committed to the Western High Court (Vestre Landsret).

Besides the communicant, a large number of farmers (litigating in person or represented by an attorney) also filed a lawsuit against the Danish Nature Agency and the Ministry of the Environment. Thus more than 370 lawsuits are pending and these lawsuits encompassed 20 of the 23 river basin management plans. All these lawsuits are awaiting the result of the case pending before Western High Court, and in all these lawsuits the claims are the same as in the lawsuit brought forward by the communicant

One issue in all the lawsuits was whether the supplementary hearing in December 2011 was in accordance with the Aarhus Convention.

3. Communication to the ACCC

Despite the fact that the legal situation had not been finally settled according to national Danish law, the communicant chose to file a

complaint to the Aarhus Convention Compliance Committee on 23 February 2012.

4. The decisions of the Nature and Environmental Board of Appeal

On 6 December 2012 the Board unanimously found that the supplementary hearing period was not in accordance with section 30, first sentence and second sentence, of the Danish Act on Environmental Objectives (AEO) (in Danish "Miljømålsloven").

Section 30, first sentence, of the Danish AEO states that if amendments are made in the initial proposal for a river basin management plan, the plan can not be passed before public authorities and citizens, who are substantially affected by the amendments, have had the opportunity to comment on these amendments.

The Board stated in its decision that the supplementary hearing period was "*substantially too short*" taking into account the volume, content and complexity of the river management plans. In other words the Board concluded that there had not been enough time for the public to comment on the amendments in the river management plans. On these grounds the Board found that the passing of all 23 Danish the river management plans were invalid and The Board then remitted the plans to the Danish Nature Agency.

Evaluating the supplemental hearing period the Board involved Denmark's obligations under article 6 (3) (4) and (8) of The Aarhus Convention including experiences in this context regarding hearing periods (time-limits).

Attention is drawn to the following sections in the Board's decision (on page 18 of the decision/page 21 and 22 English version):

"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."

Assessing the supplemental hearing period the Board was observant of the fact that the initial proposal for the river basin management plans had

previously been subject to a six-month public consultation period. The Board was also aware of the fact that, there were service problems on the Agency's website (2 days) at the beginning of the supplemental hearing period and that it was possible to access the informations and submit one's statement in other (manual) ways.

In the Board's view, an 8 day hearing period (of which five were working days) must, in general, be considered inadequate for submitting a reasoned statement, unless the case at hand only contains simple questions for the person concerned.

The decision of the Board is legally binding on the Nature Agency and the Ministry of the Environment.

A copy of the Board's ruling on 6 December 2012 was forwarded to the Committee on 10. December 2012. The decision is translated into English and is annexed to this letter.

5. Implications of the decision

The legal implications of the decision are related to 1) the pending cases before the Danish Courts, 2) the procurement of the river basin management plans and 3) the case before the Compliance Committee.

5.1. The pending court cases regarding the validity of the river basin management plans

On 31 May 2012 the communicant filed a lawsuit claiming that the river basin management plans covered by the lawsuit were invalid because the supplemental hearing was too short.

As a consequence of the ruling of the Board on 6 December 2012, the Danish Nature Agency do no longer contest the claim put forward by the communicant, and the communicant have been notified of this outcome by letter dated 28 January 2013.

The communicant's lawsuit is therefore likely to be closed shortly, and the Danish Nature Agency and the Ministry of the Environment acknowledge that the supplemental hearing in December 2011 was too short.

The above-mentioned will also be the result in the many pending lawsuit filed by individual farmers against the Danish Nature Agency, because the claim in these suits is the same as in the lawsuit brought forward by the communicant.

5.2. The procurement of the river basin management plans - new hearing

On 6 December 2012 the Board ruled that the passing of all 23 Danish the river management plans were invalid because the supplemental hearing period was too short. The Board remitted the plans to the Danish Nature Agency in preparation for the Agency to complete a new hearing.

The invalidity leads to that the Danish river management plans are to be considered as not yet adopted.

The Board, however, did not address how long such a new hearing period should be.

On the one hand, the amendments encompassed by the supplementary hearing were not considered to be so comprehensive, that a 6 months hearing period was required.

On the other hand, the Board established that a supplemental hearing period lasting for 8 days was "*substantially too short*".

The Board stated that it is important that the affected parties 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 Danish Nature Agency will take these guidelines set out in the Board's decision in to close consideration when conducting a new and longer hearing in 2013.

5.3. The use of domestic remedies

The communicant chose not to await the decision of the Board (or the Danish courts) before submitting a communication to the Compliance Committee on 23 February 2012:

In this communication (p. 14) the communicant stated:

"Reality is, however, that the complaints will probably only have effect for the three river basin management plans against which complaints have been filed and it is therefore of decisive importance that the Compliance Committee will make a decision in principle in respect of the Danish process of involving the public in connection with the adoption of the river basin management plans as such process is similar for all 23 river management plans".

In letter of 27 November 2012 (p. 2 and p. 9) the communicant also stated "*The right of review has de facto been exhausted*". Furthermore it was stated (p. 11) that:

"In summary, it can therefore be concluded that a very large number of the members whom the complainant in this case, the Danish Agriculture & Food Council, represents, at this time de facto do not, with respect to the ACCC, have an alternative national right of review - neither administratively nor judicially - and therefore there is in respect of these parties no de facto basis for temporarily suspending the current case.

It should be noted that the above would not apply where a national decision on invalidity in the proceedings would mean that a// adopted river basin management plans would be deemed to be invalid. In such case, the parties who do not have a right of national administrative review or review by the courts, respectively, will also be directly affected by the outcome of the cases in which these parties are not involved.

Undoubtedly, the general rule is that such an invalidity decision only has effect with respect to the river basin management plans which are actually being reviewed. Subsequently, it is up to the authorities to determine whether the invalidity is to be extended to cover the other river basin management plans."

However, the above-mentioned presumptions and statements put forward by the communicant has turned out not to be correct.

The complaints filed to the Board actually lead to a decision by the Board deciding that the adoption of all 23 river basin management plans were invalid.

As a result of the invalidity of the plans the Board remitted the case to the Danish Nature Agency in preparation for the Agency to complete a new hearing.

The implication of the Board's decision is that the matter of the communication has been settled by local remedies and therefore there is no longer any reason for the Committee to review the case.

The Nature Agency therefore kindly requests the Committee considers to end the communication.

Yours sincerely

Oluf Engberg

