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National Report - Denmark

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All 23 River Basin Management Plans in Denmark were declared invalid and annulled by the Nature- and Environmental Board of Appeal in December 2012

From a European perspective the most important recent development in Danish Environmental Law is the decision of the Nature and Environmental Board of Appeal in December 2012 to annul all the 23 River Basin Management Plans (RBMP) which were decided by the Minister of Environment in December 2011 as the Danish implementation of the Water Frame Directive (2000/60). The implication of the decision is far reaching since the Danish RBMPs also defines the environmental objectives under article 4 of the Water Frame Directive as well as the program of measures under article 11 of the Water Frame Directive.

To understand the legal implications and the serious questions raised by the annulment of the Danish RBMPs some short background information is needed.

The Water Frame Directive is in Danish Law implemented as the Act on Environmental Goals adopted by the Parliament in 2003. As a legal frame for the implementation of the measures required under the Water Frame Directive, the Act on Environmental Goals seems in accordance with the Directive but the Danish Act is constructed in a way which I think differs from all other Member States. Under the Danish Act, River Basin Management Plans also shall include the environmental objectives under article 4 of the Directive as well as the program measures under article 11. Moreover, the Act requires that the 23 RBMPs are implemented through an action plan in the 99 Danish municipalities, and it is unclear whether and disputed it is the local action plan is needed to comply with the Directive.

The Water Frame Directive includes a timetable which in art. 5 requires that at latest in 2004 all Member States should have made (1) Characteristics of the river basin district, (2) review of the environmental impact of human activity and (3) economic analysis of water use – to ensure sufficient information to set-up the objectives and draw up RBMPs. This deadline was not met in Denmark and it is strongly disputed whether the economic analysis (on 10 pages) really comply with the Directive.

According to the Directive, the RBMPs and the programs of measures should have been adopted at latest in December 2009 which require that the environmental objectives for the different streams and lakes was decided not later than this time. Denmark didn't meet the deadline. First in October 2010 a proposal for the 23 RBMP's (including environmental objectives and program of measures) were sent in 6 month public hearing (until April 2011) as required under article 14 of the Directive. The public hearing gave rise to strong protest from NGOs as well as farmers which submitted 4.200 different interventions. Because of this the Ministry of Environment made changes in objectives and/or planning measures for 27 % of the distance of streams and lakes covered by the first proposal and then from 1 to 8 December held a supplementary hearing of the revised RBMPs

on the homepage of the Ministry without notifying the effected landowners or NGO's. Few days after the RBMPs were formally decided by the Minister of the Environment.

The decision gave cause to legal disputes in a scale never seen before. About 275 complains from NGOs and farmers were submitted to the Nature and Environmental Board of Appeal. In February 2012 the Minister of Environment send a proposal for a change in the legislation on competence of the Appeal Board suggesting that the Appeal Board could not decide on the legal implication in the complains raised before the board on the RBMPs. After strong protest this was withdrawn. In the next month 500 civil litigations were raised before Danish Courts against the Minister of Environment claiming that the different RBMPs were invalid.

The claims before the Nature and Environmental Board of Appeal can roughly be divided into seven:

- Too many (farmers) or too few (NGOs) watercourses were classified as 'Artificial water body' or 'heavily modified water body' in conflict with the definition in art. 2(8) and (9)
- The economic analyses of the water was insufficient and not in compliance with art. 5
- The Environmental Impact Assessments under the SEA-Directive of the RBMPs were insufficient
- The principle of proportionality was neglected
- No assessment on the implication of strongly reduced of the maintenance of water courses were made
- There were many factual mistakes in the RBMPs and the maps on the factual situation of many streams,
- The short hearing on in fact 5 days (except for the weekend) was too short.

The Nature and Environmental Board of Appeal started in the decisions in December 2012 to refer to the limited access to legal review under the Environmental Goal Act section 53 which restricted the legal review of the Appeal Board to creational deficit in drawing the RBMPs. Based on this restriction the Appeal Board rejected all complains about classification and proportionality and restricted the review of environmental impact assessment and economic analysis to a simple control that such a document exist. Moreover, the Appeal Board found that the factual mistakes (which was accepted by the Ministry) could be repaired later .. (!). However, in the end, the Appeal Board found the supplementary hearing too short taking into account the significant impact of the RBMPs and based on this, all RBMPs were annulled. In the decision, the Appeal Board added, that before RBMPs can be adopted an Assessment on impact on Natura 2000 sites must be made (wasn't made before December 2012) and that a new assessment under the SEA Directive also is expected to be needed.

In May 2013 the Ministry of Environment announced that new proposals for the 23 RBMPs are expected to be published in June 2013 and then will be subject to a 6 month public hearing.