



Miljøministeriet

## Aktoversigt

**Sagstitel: Request for a meeting re. the concept of deterioration in the WFD**

**Sagsnummer: 2023 - 4355**

Akt nr.	Dato	Titel	Akt ID	#	Parter	Kommentar
19	21-04-2023 12:56:38	Gammel mail	400523	1		
18	01-05-2023 12:52:00		406096	1		
17	28-04-2023 15:39:58		406097	1		
16	10-05-2023 08:12:28	Talking point til mødet med KOM	411193	5		
15	05-06-2023 09:53:10	Kort samtale med Claudia Olazabal, Kommission	425595	1		
14	05-06-2023 11:59:13	Ang: Kort samtale med Claudia Olazabal, Kommission	427145	1		
13	10-05-2023 17:19:03	Vs: Background note for the meeting on 10 May after the SCG-meeting	411917	4		
12	10-05-2023 17:18:59	Vs: Background note for the meeting on 10 May after the SCG-meeting	411916	4		
11	03-05-2023 16:56:53	RE: Request for a meeting re. the concept of deterioration in the WFD	431322	1		
10	29-05-2023 12:21:37	Follow-up on the DK deterioration questions	421067	4		
9	17-05-2023 11:48:47	Questions on deterioration	415851	3		
8	16-05-2023 18:38:30	DK questions on deterioration in the WFD	415448	3		
7	11-05-2023 16:24:32	Skriftlige spørgsmål til EU-Kommissionen om forringelse i vandrammedirektivet	412737	3		
6	09-05-2023 16:20:08	Talking point - meeting with COM on deterioration	411042	3		
5	08-05-2023 10:44:51	Background note for the meeting on 10 May after the SCG-meeting	409659	4		
4	04-05-2023 13:38:26	Background note on non-deterioration	408775	4		
3	25-04-2023 15:49:15	Background note on non-deterioration	402619	3		
2	24-04-2023 11:35:00	SV: Request for a meeting re. the concept of deterioration in the WFD	401398	1		
1	21-04-2023 15:11:27	Request for a meeting re. the concept of deterioration in the WFD	397031	1		
	21-04-2023 15:12:00	Request for a meeting re. the concept of deterioration in the WFD	463750	1		
	21-04-2023 18:55:22	RE: Request for a meeting re. the concept of deterioration in the WFD	463749	1		
	24-04-2023 11:35:00	SV: Request for a meeting re. the concept of deterioration in the WFD	463748	1		
	24-04-2023 12:10:34	RE: Request for a meeting re. the concept of deterioration in the WFD	463747	1		
	03-05-2023 16:56:53	RE: Request for a meeting re. the concept of deterioration in the WFD	463746	1		

	04-05-2023 17:53:00	SV: Request for a meeting re. the concept of deterioration in the WFD	463742	1		
	10-05-2023 16:33:00	VS: Request for a meeting re. the concept of deterioration in the WFD	463739	1		

# = antal relaterte dokumenter.

Den 20. februar 2024



Miljøministeriet

## Aktdetaljer

Den 20. februar 2024

**Akttitel: Gammel mail**  
**Aktnummer: 19**

Akt ID: 400523

Dato: 21-04-2023 12:56:38

Type: Intern

Dokumenter: [1] Aktdokument.html

Dear Claudia, dear [REDACTED]

Would it be possible for you to schedule a short meeting with us after the SCG-meeting 10 May, please? With Head of Division for Water and Climate Adaptation, Water Director Katrine Rafn, and myself, say 30 minutes. Or at a different time around 10. - 11. May, if that suit you better.

We would like to have an informal talk with you on the interpretation of Article 4(1) of the WFD.

The reason is that our national Environment and Food Board of Appeal\* the 23 February handed down a final decision whereby any additional effect on a water body or any additional influx of a substance into a water body, will establish deterioration when the water body is in the lowest category.

In this interpretation, in order to establish deterioration, it is sufficient that a substance for which the EQS is already exceeded, is added to a water body in the lowest category.

That leads to a situation whereby no concrete evaluation needs to be conducted, and where will not be an assessment of the actual effect on the water body due to the addition of that substance.

To take it to the extreme: Tossing a copper coin into a water body where cobber EQS is already exceeded, will constitute deterioration of the whole water body.

The reading of Article 4(1) in the Environment Ministry is based on a concrete evaluation of the effect of the added substance on the water body shall be conducted to establish deterioration. This entail that deterioration refers to the status at the water body level, i.e. not the specific individual discharges causing **local** increases in pollution.

We consider this to be in line with the explanation in document DS 1473/12, The Commission non-paper *The application of the combined approach and the non-deterioration obligation: the case of ubiquitous PBTs*.

However, this was the interpretation given by the Commission in 2012, i.e. before the key rulings by the ECJ, i.e. C-461/12 and C-535/18, so we would like know how the Commission views the deterioration issue after these rulings.

We realise of course, that the ECJ has the final say on the interpretation of the WFD, however it would be relevant for us to know if the Commission has the same reading of Article 4 as the Danish Board of Appeal.

\* The Environment and Food Board of Appeal is a Danish Court-like institution within the field of nature, environment, agriculture, fisheries and food. The Board issues final administrative decisions that cannot be appealed.

23. februar 2023 i sagen 22/02461 fastslået, at vejledningen til bekendtgørelse om indsatsprogrammer for vandområdedistrikter (indsatsbekendtgørelsen) ikke er i overensstemmelse med EU-Domstolens praksis for, hvornår der foreligger en forringelse af tilstanden af en vandforekomst som omhandlet i vandrammedirektivets artikel 4 ved tilførsel af miljøfarlige forurenende stoffer. Klagenævnet fortolker "forringelse" således, at enhver yderligere påvirkning eller mertilførsel til vandforekomsten vil betyde forringelse af tilstanden, når tilstandsniveauet er lavest muligt. Konkret drejede sagen sig bl.a. om tilførsel af kobber via regnvandsbassiner til et vandløb, hvori miljøkvalitetskravet for kobber allerede var overskredet.

Med venlig hilsen

**Kirsten Vielwerth**

Vand og Klimatilpasning | Miljøministeriets Departementet  
+45 41 28 16 76 | kirst@mim.dk >

**Miljøministeriet**

Vand og Klimatilpasning | Miljøministeriets Departementet | Vester Voldgade 123 | DK 1552 København V | Tlf. +45 38 142 142 | mim@mim.dk | [www.mim.dk](http://www.mim.dk)





## Aktdetaljer

Den 20. februar 2024

### Akttitel: Talking point til mødet med KOM Aktnummer: 16

Akt ID: 411193

Dato: 10-05-2023 08:12:28

Type: Udgående

Dokumenter:

- [1] Godkendelsesdokument.pdf (MEDTAGES IKKE)
- [2] Talking points.docx (MEDTAGES IKKE)
- [3] Background note on non-deterioration under the WFD final ver2.docx
- [4] Bilag 3 - ds01473.en12.doc
- [5] Aktdokument.html (MEDTAGES IKKE)



**Ministry of Environment  
of Denmark**  
Department

Vand og Klimatilpasning  
Case No 2023-4355  
Ref. kirst, rurab, bketu, limni  
May 8 2023

## **Background note on the obligation of non-deterioration under the Water Framework Directive**

### **The issue**

Does Article 4 of the Water Framework Directive, as interpreted by the Court, allow for an individual assessment of the significance of an addition of a substance to a specific water body in order to establish if such addition constitutes “deterioration of the status”, when the EQS for that substance has already been exceeded and the water body has thus been classified in the lowest class?

### **Background**

In February the Danish Environment and Food Board of Appeal <sup>1</sup> (the Board of Appeal) ruled that any additional impact on or discharge to a water body per se will constitute “deterioration of status” if the quality element concerned is already in the lowest class.

The Board of Appeal based its reasoning on C-461/13, C-535/18 and C-525/20. The European Court of Justice was not requested to give a preliminary ruling thereon.

According to The Board of Appeal’s ruling, any discharge of a substance to a waterbody must be regarded as a ‘deterioration in the status’ of the water body contrary to Article 4(1) of the Water Framework Directive when the EQS for that substance has already been exceeded and the water body is thus in the lowest possible class. The Board of Appeal emphasized that the amount of the substance is not decisive when the EQS has already been exceeded, as any additional amount will result in deterioration.

This leads to a situation where no individual assessment of the actual significance of an addition of a substance to the specific water body shall be conducted. Thus, there is no

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<sup>1</sup> The Environment and Food Board of Appeal is an independent Danish Court-like institution within the field of nature, environment, agriculture, fisheries and food. The rulings are binding for state and local authorities’ administration and authorization of plans and projects.

assessment of the actual effect on the quality element/EQS at water body level due to the addition of that substance.

Hence, it will not be possible to take the significance of the impact or discharge on the quality element at water body level into account when it is already in the lowest class. A specific individual discharge causing local pollution will constitute deterioration, without any assessment of the significance of the effect.

It is the Ministry of Environment's view that the Board of Appeal's ruling is not consistent with the explanation of the obligation to prevent deterioration given in document DS 1473/12, the Commission non-paper "*The application of the combined approach and the non-deterioration obligation: the case of ubiquitous PBTs*", when it comes to the level for assessing<sup>2</sup> if deterioration of status will occur.

The Ministry of Environment understands that the interpretation given by the Commission in the above-mentioned non-paper is from 2012, i.e. before the key rulings by the ECJ (C-461/13, C-535/18, C-559/19 and C-525/20).

Therefore, we would like to know how the Commission views the deterioration issue now, i.e, whether Article 4 (1) allows for an individual assessment in the abovementioned situation.

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<sup>2</sup> DS 1473/12, p. 3: The obligation to prevent deterioration.

Article 4.1(a)(i) of the WFD requires Member States to take measures to prevent deterioration of the status of surface water bodies. There are two important elements in this obligation:

- Deterioration refers to status. As regards chemical status, ..... the status is classified as failing to achieve good".
- Status refers to a surface water body. Indeed, the water body, as defined in WFD Article 2.10 and delineated by Member States according to WFD Article 5 and Annex II section 1.1, constitute the unit on which the assessment of status is carried out (see Articles 2.17, 2.18, Annex V section 1.4.3).



**COUNCIL OF  
THE EUROPEAN UNION**

**Brussels, 21 June 2012**

**GENERAL SECRETARIAT**

**DS 1473/12**

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**Interinstitutional File:  
2011/0429 (COD)**

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**LIMITE**

**MEETING DOCUMENT**

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from: General Secretariat  
to: Working Party on the Environment  
on: 2 July 2012

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Subject: Proposal for a Directive of the European Parliament and of the Council amending Directives 2000/60/EC and 2008/105/EC as regards priority substances in the field of water policy

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With a view to the Working Party meeting on 2 July 2012, delegations will find in Annex a non-paper of the Commission's Services on the combined approach in the case of ubiquitous PBTs (Article 8a of the above-mentioned proposal).

**Commission non-paper**  
**The application of the combined approach and the non-deterioration obligation:**  
**the case of ubiquitous PBTs**

Substances that behave as ubiquitous persistent, bioaccumulative and toxic (uPBTs)

The Commission proposal \* identifies a number of substances as behaving as ubiquitous PBTs. These ubiquitous substances, some of them capable of long-range transport, may be found for decades in the aquatic environment at levels posing a significant risk, even if extensive measures to reduce or eliminate emissions have already been taken. All are identified as priority hazardous substances, therefore subject to the aim that their emissions, discharges and losses to the aquatic environment be phased out.

Examples of these substances are:

- Polybrominated diphenylethers (pBDEs): used for many years as flame retardants in many consumer, transport and construction products, some of them are identified as priority hazardous substances under the WFD and are banned under REACH and the POPs regulation. These substances are ubiquitous in the aquatic environment mainly due to leaching from many products in use that contain them.
- Mercury: a naturally occurring substance; measures have been taken that have resulted in significant decreases of emissions from anthropogenic uses to the aquatic environment over the past two decades. Uses are still authorised (chlor-alkali industry, dental amalgam, etc.) but progressively declining. Atmospheric deposition constitutes a main source of aquatic pollution in many areas of Europe (even remote).

The question

A question has been raised regarding application of the non-deterioration obligation and the combined approach for uPBTs. The postulated problem is exemplified in the following statements, which are discussed below in the context of broader explanation.

**Statement 1: Any new authorisation of an urban waste water treatment plant (UWWTP) would be against the obligation to prevent deterioration because any discharge will contain some (even minute) quantities of ubiquitous priority hazardous substances (such as pBDEs or mercury).**

**Statement 2: Even if a permit were given for a new waste water treatment plant, the emission limit values for certain substances (such as pBDEs or mercury), resulting from back-calculating from the proposed EQS, would be so strict that they would be unfeasible to meet.**

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\* 6019/12 - Art. 2(5).

### The obligation to prevent deterioration

Article 4.1(a)(i) of the WFD requires Member States to take measures to prevent the deterioration of the status of surface water bodies. There are two important elements in this obligation:

- deterioration refers to status. As regards chemical status, this is defined in WFD Article 2.24 and Annex V section 1.4.3. "Good" chemical status is achieved when all environmental quality standards set at EU level are not exceeded. If any of these EU standards are exceeded, the status is classified as "failing to achieve good".
- status refers to a surface water body. Indeed, the water body, as defined in WFD Article 2.10 and delineated by Member States according to WFD Article 5 and Annex II section 1.1, constitutes the unit on which the assessment of status is carried out (see Articles 2.17, 2.18, Annex V section 1.4.3).

Therefore, the deterioration of chemical status refers to a situation where the pollution of a water body increases from not exceeding any EQS set at EU level to exceeding one or more. This would mean that the chemical status would deteriorate from "good" to "failing to achieve good". The obligation to prevent deterioration of chemical status refers to the change from good to failing to achieve good at the water body level. **It therefore does not target specific individual discharges causing local increases in pollution** <sup>1</sup>.

Because both diffuse and point sources are responsible for the emissions of uPBTs, acting at the level of individual point sources would, in the case of most water bodies at least, not achieve the objective of good chemical status. And given the ubiquity and expected widespread failure of the EQSs of these substances, deterioration of status would not be likely for uPBTs as most water bodies should already be classified as failing to achieve good chemical status. It can in fact also be argued that the construction of a new collecting system and UWWTP would simply concentrate at one point the discharges that previously came from a multitude of single waste water systems (e.g. septic tanks). The emissions to the aquatic environment of pollutants such as mercury would therefore not increase, but rather globally decrease due to the more advanced treatment at the new UWWTP.

### The combined approach

The combined approach in Article 10 of the WFD establishes a framework for emission controls and quality objectives to work together in a coordinated way. Minimum controls are set in EU legislation for the most significant emissions (from point and diffuse sources), but these should be tightened where they are not sufficient to meet the quality objectives. The ultimate purpose is to ensure a high level of protection of the aquatic environment whilst providing a level playing field for the most significant emissions.

WFD Article 10.3 provides that where the attainment of a quality objective or standard requires stricter conditions than those set by the legislation listed in WFD Article 10.2, Member States need to set more stringent emission controls accordingly.

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<sup>1</sup> In addition to the non-deterioration obligation in WFD Article 4.1(a)(i), WFD Article 4.1(a)(iv) and EQSD Article 3(3) protect against increases of pollution at water body level.

Whilst the approach can easily be applied where emission patterns are simple, complex patterns, for example where both diffuse and point-source emissions are involved, may make it less easy to apply. There is in any case no obligation to set emission limit values for all substances in all discharges.

In particular, it should be noted that Article 10.3 does not target specific individual discharges. Member States can choose to apply the most effective measures to achieve the WFD objectives. They could decide that tightening the emission controls on individual discharges (such as discharges from UWWTPs) for a particular substance would not be effective in addressing the pollution problem (and thus the WFD objectives), and decide to address the pollution at its primary source instead of "end-of pipe".

The source control measures already taken and/or in the pipeline for uPBTs (such as bans and restrictions on use) will ensure that their emissions progressively decline at the level of the river basins and water bodies. Ultimately, the source control measures will reduce all emissions (diffuse and point source), including from urban waste water.

It should also be noted that there is no obligation to back-calculate emission limit values from EQS. This is particularly the case with biota standards for bioaccumulative substances such as mercury, where back-calculation would result in very low EQS for water because of high uncertainty.

The obligations referred to in the above paragraphs are of course without prejudice to the application of the exemptions in WFD Articles 4.4 and 4.5 if the conditions therein apply.



## Aktdetaljer

Den 20. februar 2024

### Akttitel: Kort samtale med Claudia Olazabal, Kommission Aktnummer: 15

Akt ID: 425595

Dato: 05-06-2023 09:53:10

Type: Intern

Dokumenter: [1] Kort samtale med Claudia Olazabal, Kommission.eml (MEDTAGES IKKE)





## Aktdetaljer

**Akttitel: Ang: Kort samtale med Claudia Olazabal, Kommission**  
**Aktnummer: 14**

Akt ID: 427145

Dato: 05-06-2023 11:59:13

Type: Intern

Dokumenter: [1] Ang Kort samtale med Claudia Olazabal, Kommission.eml (MEDTAGES IKKE)

Den 20. februar 2024



## Aktdetaljer

**Akttitel: Vs: Background note for the meeting on 10 May after the SCG-meeting**

**Aktnummer: 13**

Akt ID: 411917

Dato: 10-05-2023 17:19:03

Type: Intern

Dokumenter: [1] Background note for the meeting on 10 May after the SCG-meeting.html  
[2] Background note on non-deterioration under the WFD final ver2.docx  
[3] ds01473.en12.doc  
[4] RE: Request for a meeting re. the concept of deterioration in the WFD (MIM Id nr.: 397031).eml

Den 20. februar 2024

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**Til:** claudia.Olazabal@ec.europa.eu (claudia.Olazabal@ec.europa.eu), [REDACTED]  
[REDACTED]  
**Cc:** Katrine Rafn (kalra@mim.dk), Cecilie Spanner Rydeng (cespa@mim.dk), Rune Raun-Abildgaard (rurab@mim.dk), Lise Marie Johannessen (limni@mim.dk), Benjamin Kelstrup Turner (bketu@mim.dk), Kirsten Vielwerth (kirst@mim.dk)  
**Fra:** Kirsten Vielwerth (kirst@mim.dk)  
**Titel:** Background note for the meeting on 10 May after the SCG-meeting  
**Sendt:** 08-05-2023 10:44

Dear Claudia, dear [REDACTED]

Enclosed, please find a background note on the topic we would like to focus on in the meeting on Wednesday.

As requested, I forward a link to the ruling by the Danish Environment and Food Board of Appeal. It is in Danish - sorry for that - but hopefully you have access to better translation tools than me.

Link to the ruling by the Board:

Afgørelse | Miljø- og Fødevareklagenævnet (naevneneshus.dk)

Both Katrine Rafn and I are looking forward to meeting you.

Kind regards, Kirsten

Med venlig hilsen

Kirsten Vielwerth  
Vand og Klimatilpasning | Miljøministeriets Departementet  
+45 41 28 16 76 | kirst@mim.dk >

**Miljøministeriet**

Vand og Klimatilpasning | Miljøministeriets Departementet | Vester Voldgade 123 | DK 1552 København V | Tlf. +45 38 142 142 | mim@mim.dk | [www.mim.dk](http://www.mim.dk)



**Ministry of Environment  
of Denmark**  
Department

Vand og Klimatilpasning  
Case No 2023-4355  
Ref. kirst, rurab, bketu, limni  
May 8 2023

## **Background note on the obligation of non-deterioration under the Water Framework Directive**

### **The issue**

Does Article 4 of the Water Framework Directive, as interpreted by the Court, allow for an individual assessment of the significance of an addition of a substance to a specific water body in order to establish if such addition constitutes “deterioration of the status”, when the EQS for that substance has already been exceeded and the water body has thus been classified in the lowest class?

### **Background**

In February the Danish Environment and Food Board of Appeal<sup>1</sup> (the Board of Appeal) ruled that any additional impact on or discharge to a water body per se will constitute “deterioration of status” if the quality element concerned is already in the lowest class.

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According to The Board of Appeal’s ruling, any discharge of a substance to a waterbody must be regarded as a ‘deterioration in the status’ of the water body contrary to Article 4(1) of the Water Framework Directive when the EQS for that substance has already been exceeded and the water body is thus in the lowest possible class. The Board of Appeal emphasized that the amount of the substance is not decisive when the EQS has already been exceeded, as any additional amount will result in deterioration.

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assessment of the actual effect on the quality element/EQS at water body level due to the addition of that substance.

Hence, it will not be possible to take the significance of the impact or discharge on the quality element at water body level into account when it is already in the lowest class. A specific individual discharge causing local pollution will constitute deterioration, without any assessment of the significance of the effect.

It is the Ministry of Environment's view that the Board of Appeal's ruling is not consistent with the explanation of the obligation to prevent deterioration given in document DS 1473/12, the Commission non-paper "*The application of the combined approach and the non-deterioration obligation: the case of ubiquitous PBTs*", when it comes to the level for assessing<sup>2</sup> if deterioration of status will occur.

The Ministry of Environment understands that the interpretation given by the Commission in the above-mentioned non-paper is from 2012, i.e. before the key rulings by the ECJ (C-461/13, C-535/18, C-559/19 and C-525/20).

Therefore, we would like to know how the Commission views the deterioration issue now, i.e., whether Article 4 (1) allows for an individual assessment in the abovementioned situation.

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<sup>2</sup> DS 1473/12, p. 3: The obligation to prevent deterioration.

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**COUNCIL OF  
THE EUROPEAN UNION**

**Brussels, 21 June 2012**

**GENERAL SECRETARIAT**

**DS 1473/12**

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**Interinstitutional File:  
2011/0429 (COD)**

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**LIMITE**

**MEETING DOCUMENT**

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from:	General Secretariat
to:	Working Party on the Environment
on:	2 July 2012
Subject:	Proposal for a Directive of the European Parliament and of the Council amending Directives 2000/60/EC and 2008/105/EC as regards priority substances in the field of water policy

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With a view to the Working Party meeting on 2 July 2012, delegations will find in Annex a non-paper of the Commission's Services on the combined approach in the case of ubiquitous PBTs (Article 8a of the above-mentioned proposal).

**Commission non-paper**  
**The application of the combined approach and the non-deterioration obligation:**  
**the case of ubiquitous PBTs**

Substances that behave as ubiquitous persistent, bioaccumulative and toxic (uPBTs)

The Commission proposal \* identifies a number of substances as behaving as ubiquitous PBTs. These ubiquitous substances, some of them capable of long-range transport, may be found for decades in the aquatic environment at levels posing a significant risk, even if extensive measures to reduce or eliminate emissions have already been taken. All are identified as priority hazardous substances, therefore subject to the aim that their emissions, discharges and losses to the aquatic environment be phased out.

Examples of these substances are:

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- Mercury: a naturally occurring substance; measures have been taken that have resulted in significant decreases of emissions from anthropogenic uses to the aquatic environment over the past two decades. Uses are still authorised (chlor-alkali industry, dental amalgam, etc.) but progressively declining. Atmospheric deposition constitutes a main source of aquatic pollution in many areas of Europe (even remote).

The question

A question has been raised regarding application of the non-deterioration obligation and the combined approach for uPBTs. The postulated problem is exemplified in the following statements, which are discussed below in the context of broader explanation.

**Statement 1: Any new authorisation of an urban waste water treatment plant (UWWTP) would be against the obligation to prevent deterioration because any discharge will contain some (even minute) quantities of ubiquitous priority hazardous substances (such as pBDEs or mercury).**

**Statement 2: Even if a permit were given for a new waste water treatment plant, the emission limit values for certain substances (such as pBDEs or mercury), resulting from back-calculating from the proposed EQS, would be so strict that they would be unfeasible to meet.**

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\* 6019/12 - Art. 2(5).

### The obligation to prevent deterioration

Article 4.1(a)(i) of the WFD requires Member States to take measures to prevent the deterioration of the status of surface water bodies. There are two important elements in this obligation:

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Because both diffuse and point sources are responsible for the emissions of uPBTs, acting at the level of individual point sources would, in the case of most water bodies at least, not achieve the objective of good chemical status. And given the ubiquity and expected widespread failure of the EQSs of these substances, deterioration of status would not be likely for uPBTs as most water bodies should already be classified as failing to achieve good chemical status. It can in fact also be argued that the construction of a new collecting system and UWWTP would simply concentrate at one point the discharges that previously came from a multitude of single waste water systems (e.g. septic tanks). The emissions to the aquatic environment of pollutants such as mercury would therefore not increase, but rather globally decrease due to the more advanced treatment at the new UWWTP.

### The combined approach

The combined approach in Article 10 of the WFD establishes a framework for emission controls and quality objectives to work together in a coordinated way. Minimum controls are set in EU legislation for the most significant emissions (from point and diffuse sources), but these should be tightened where they are not sufficient to meet the quality objectives. The ultimate purpose is to ensure a high level of protection of the aquatic environment whilst providing a level playing field for the most significant emissions.

WFD Article 10.3 provides that where the attainment of a quality objective or standard requires stricter conditions than those set by the legislation listed in WFD Article 10.2, Member States need to set more stringent emission controls accordingly.

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<sup>1</sup> In addition to the non-deterioration obligation in WFD Article 4.1(a)(i), WFD Article 4.1(a)(iv) and EQSD Article 3(3) protect against increases of pollution at water body level.



Whilst the approach can easily be applied where emission patterns are simple, complex patterns, for example where both diffuse and point-source emissions are involved, may make it less easy to apply. There is in any case no obligation to set emission limit values for all substances in all discharges.

In particular, it should be noted that Article 10.3 does not target specific individual discharges. Member States can choose to apply the most effective measures to achieve the WFD objectives. They could decide that tightening the emission controls on individual discharges (such as discharges from UWWTPs) for a particular substance would not be effective in addressing the pollution problem (and thus the WFD objectives), and decide to address the pollution at its primary source instead of "end-of pipe".

The source control measures already taken and/or in the pipeline for uPBTs (such as bans and restrictions on use) will ensure that their emissions progressively decline at the level of the river basins and water bodies. Ultimately, the source control measures will reduce all emissions (diffuse and point source), including from urban waste water.

It should also be noted that there is no obligation to back-calculate emission limit values from EQS. This is particularly the case with biota standards for bioaccumulative substances such as mercury, where back-calculation would result in very low EQS for water because of high uncertainty.

The obligations referred to in the above paragraphs are of course without prejudice to the application of the exemptions in WFD Articles 4.4 and 4.5 if the conditions therein apply.

---

**Til:** kirst@mim.dk (Kirsten Vielwerth)  
**Cc:** kalra@mim.dk (Katrine Rafn), cespa@mim.dk (Cecilie Spanner Rydeng), [REDACTED]  
**Fra:** OLAZABAL Claudia (Claudia.Olazabal@ec.europa.eu)  
**Titel:** RE: Request for a meeting re. the concept of deterioration in the WFD (MIM Id nr.: 397031)  
**Sendt:** 03-05-2023 16:56

Dear Kirsten

I can confirm that we can meet after the SCG meeting. We will find a quiet corner in the meeting building for our discussion.

It would be very good to receive prior to that meeting the ruling of the national Environment and Food Board of Appeal you refer to.

Thanks and I look forward to our conversation.

Best regards

Claudia Olazábal

---

**From:** Kirsten Vielwerth <kirst@mim.dk>  
**Sent:** Friday, April 21, 2023 3:11 PM  
**To:** OLAZABAL Claudia (ENV) <Claudia.Olazabal@ec.europa.eu>; [REDACTED]  
**Cc:** Kirsten Vielwerth <kirst@mim.dk>; Katrine Rafn <kalra@mim.dk>; Cecilie Spanner Rydeng <cespa@mim.dk>  
**Subject:** Request for a meeting re. the concept of deterioration in the WFD (MIM Id nr.: 397031)

Dear Claudia, dear [REDACTED]

Would it be possible for you to schedule a short meeting (around 30 minutes) with us after the SCG-meeting 10 May, please? A different time around 10. - 11. May could also be possible, if that would suit you better.

Danish participants will be Head of Division for Water and Climate Adaptation, Water Director Katrine Rafn, and myself.

We would like to talk to you about Article 4(1) of the WFD.

The urgency is due to our national Environment and Food Board of Appeal has issued a final ruling on deterioration in light of the ECJ case law, that has raised doubt among the Danish authorities in relation to their administration and permitting, e.g. in relation to big energy projects, etc.

We will be happy to send you a background note with more information in due time for a meeting.

Hope to hear from you soon.

Best regards,

Kirsten Vielwerth  
Water and Climate Adaptation | Department of the Ministry of Environment  
+45 41 28 16 76 | kirst@mim.dk >

**Ministry of Environment**

Water and Climate Adaptation | Department of the Environment Ministry | Vester Voldgade 123 | DK 1552 Copenhagen V | Tlf. +45 38 142 142 | [mim@mim.dk](mailto:mim@mim.dk) | [www.mim.dk](http://www.mim.dk)



## Aktdetaljer

**Akttitel: Vs: Background note for the meeting on 10 May after the SCG-meeting**

**Aktnummer: 12**

Akt ID: 411916

Dato: 10-05-2023 17:18:59

Type: Intern

Dokumenter:

- [1] Background note for the meeting on 10 May after the SCG-meeting.html (MEDTAGES IKKE)
- [2] Background note on non-deterioration under the WFD final ver2.docx (MEDTAGES IKKE)
- [3] ds01473.en12.doc (MEDTAGES IKKE)
- [4] RE: Request for a meeting re. the concept of deterioration in the WFD (MIM Id nr.: 397031).eml (MEDTAGES IKKE)

Den 20. februar 2024



Miljøministeriet

## Aktdetaljer

**Akttitel: RE: Request for a meeting re. the concept of deterioration in the WFD**

**Aktnummer: 11**

Akt ID: 431322

Dato: 03-05-2023 16:56:53

Type: Indgående

Dokumenter: [1] RE Request for a meeting re. the concept of deterioration in the WFD (MIM Id nr. 397031).eml

Den 20. februar 2024

---

**Til:** Kirsten Vielwerth (kirst@mim.dk)  
**Cc:** Katrine Rafn (kalra@mim.dk), Cecilie Spanner Rydeng (cespa@mim.dk), [REDACTED]  
**Fra:** claudia.Olazabal@ec.europa.eu (claudia.Olazabal@ec.europa.eu)  
**Titel:** RE: Request for a meeting re. the concept of deterioration in the WFD  
**E-mailtitel:** RE: Request for a meeting re. the concept of deterioration in the WFD (MIM Id nr.: 397031)  
**Sendt:** 03-05-2023 16:56

Dear Kirsten

I can confirm that we can meet after the SCG meeting. We will find a quiet corner in the meeting building for our discussion.

It would be very good to receive prior to that meeting the ruling of the national Environment and Food Board of Appeal you refer to.

Thanks and I look forward to our conversation.

Best regards

Claudia Olazábal

---

**From:** Kirsten Vielwerth <kirst@mim.dk>  
**Sent:** Friday, April 21, 2023 3:11 PM  
**To:** OLAZABAL Claudia (ENV) <Claudia.Olazabal@ec.europa.eu>; [REDACTED]  
**Cc:** Kirsten Vielwerth <kirst@mim.dk>; Katrine Rafn <kalra@mim.dk>; Cecilie Spanner Rydeng <cespa@mim.dk>  
**Subject:** Request for a meeting re. the concept of deterioration in the WFD (MIM Id nr.: 397031)

Dear Claudia, dear [REDACTED]

Would it be possible for you to schedule a short meeting (around 30 minutes) with us after the SCG-meeting 10 May, please? A different time around 10. - 11. May could also be possible, if that would suit you better.

Danish participants will be Head of Division for Water and Climate Adaptation, Water Director Katrine Rafn, and myself.

We would like to talk to you about Article 4(1) of the WFD.

The urgency is due to our national Environment and Food Board of Appeal has issued a final ruling on deterioration in light of the ECJ case law, that has raised doubt among the Danish authorities in relation to their administration and permitting, e.g. in relation to big energy projects, etc.

We will be happy to send you a background note with more information in due time for a meeting.

Hope to hear from you soon.

Best regards,

Kirsten Vielwerth  
Water and Climate Adaptation | Department of the Ministry of Environment  
+45 41 28 16 76 | kirst@mim.dk >

**Ministry of Environment**

Water and Climate Adaptation| Department of the Environment Ministry | Vester Voldgade 123 | DK 1552 Copenhagen V | Tlf. +45 38 142 142 | [mim@mim.dk](mailto:mim@mim.dk) | [www.mim.dk](http://www.mim.dk)



## Aktdetaljer

### Akttitel: Follow-up on the DK deterioration questions Aktnummer: 10

Akt ID: 421067

Dato: 29-05-2023 12:21:37

Type: Udgående

Dokumenter: [1] Aktdokument.pdf  
[2] Letter to COM with DK questions on deterioration.docx  
[3] Translation of Environmental and Food Board of Appeal 22-02461 w ad Astra.docx  
[4] Aktdokument.html

Den 20. februar 2024



---

**Til:** claudia.Olazabal@ec.europa.eu (claudia.Olazabal@ec.europa.eu), [REDACTED]  
[REDACTED] Env-Water@ec.europa.eu (Env-Water@ec.europa.eu)  
**Cc:** Katrine Rafn (kalra@mim.dk), Paolo Perotti (paope@mim.dk), Rikke Slot Benyahia (rislb@mim.dk)  
**Fra:** Kirsten Vielwerth (kirst@mim.dk)  
**Titel:** DK questions on deterioration in the WFD  
**Sendt:** 16-05-2023 18:38  
**Bilag:** Letter to COM with DK questions on deterioration.docx; Translation of Environmental and Food Board of Appeal 22-02461 w ad Astra.docx;

Dear Claudia, dear [REDACTED]

Enclosed please find the Danish questions on the concept of deterioration in the Water Framework Directive as well as the English translation of the ruling by the Environment and Food Board of Appeal.

We would appreciate it greatly if you could get back to us urgently, as all permitting is put on hold for now.

Kind regards,

**Kirsten Vielwerth**

Water and Climate Adaptation | Department of the Ministry of Environment  
+45 41 28 16 76 | kirst@mim.dk >

**Ministry of the Environment**

Water and Climate Adaptation | Departement of the Ministry of Environment | Vester Voldgade 123 | DK 1552 København V | Tlf. +45 38 142 142 |  
mim@mim.dk | www.mim.dk



**Ministry of Environment  
of Denmark**  
Department

[Claudia.Olazabal@ec.europa.eu](mailto:Claudia.Olazabal@ec.europa.eu)

Env-Water@ec.europa.eu

Water and Climate Adaptation  
Case No 2023-4355  
Ref. kirst, rurab, limni  
May 16 2023

## Questions on the Water Framework Directive re. deterioration

Dear Claudia Olazabal, dear [REDACTED]

Thank you for taking the time to talk to Head of Division, Katrine Rafn and myself 10. May 2023 on the concept of deterioration in Article 4 of the Water Framework Directive.

As agreed upon in the meeting, we forward our questions in writing, and we would appreciate to get your view and interpretations back in writing. We would be grateful if you would send your reply shortly, as this will help inform our assessment of the way forward. We are aware that the statements will represent the views of the DG ENV of the Commission, and that the European Court of Justice is the sole authority on interpretation of the aquis.

./.

We also forward ruling 22/02461 from the Danish Environment and Food Board of Appeal in English<sup>1</sup>. The most relevant part is: 3.2.3 Ad 2) *Effect on targeted surface water bodies*, pages 38 – 43, in particular the three sections on page 43 which we have highlighted.

For your information, the Environment and Food Board of Appeal is an independent court-like institution within the field of nature, environment, agriculture, fisheries and food. The rulings are binding for state and local authorities' administration and authorization of plans and projects.

### The questions:

- Does Article 4 of the Water Framework Directive, as interpreted by the ECJ, allow for an individual assessment of the significance of an addition of a substance to a specific water body in order to establish if such addition constitutes "deterioration of the status", when the EQS for that substance has already been exceeded and the water body has thus been classified in the lowest class?
  - In other words; will it only constitute deterioration contrary to Article 4 if the discharge will lead to an increase in the

---

<sup>1</sup> Section 3.2.3 Ad 2) *Effect on the targeted surface water body* has been translated by a professional team of translators, whereas the rest of the ruling is google translated.

concentration of a given substance in the water body, i.e. because the discharge contains a higher concentration of the substance than the current concentration in the receiving water body, or will any addition of the substance – independent of amount/concentration – be contrary to Article 4 in this scenario (when the EQS is already exceeded)?

- In either case, in the light of the ECJ rulings, what is the reasoning behind the Commission's interpretation?
- In order to establish an increase in concentration – is it a requirement that it must be measurable? In most situations, it will be possible to calculate even negligible additions – does that constitute an increase and therefore a deterioration?
- If an assessment is allowed, will it be possible to take the significance of the impact or discharge on a quality element at water body level into account when the quality element is already in the lowest class?
- What scale shall the assessment be conducted at? (Water body level or other units?) Is there a distinction between surface water and bodies of ground water?

Should you have any questions, please do not hesitate to contact us, and thank you in advance.

Yours sincerely,

Kirsten Vielwerth  
Special Consultant  
+45 41 28 16 76  
kirst@mim.dk



Miljøministeriet  
Departementet

Vand og Klimatilpasning

J.nr. 2023-4355

Ref. KIRST

Den 16. maj 2023

## Translation<sup>1</sup> of Environment and Food Board of Appeal 22/02461

### Revocation and repatriation of Section 25 permit for the establishment of a new connecting road

22/02461,

The Danish Environment and Food Board of Appeal has made a decision according to section 25, cf. section 49(1), of the Danish Environmental Assessment Act (*miljøvurderingsloven*).<sup>[1]</sup>

The Danish Environment and Food Board of Appeal cancels the decision made by the Municipality of Horsens on 25 January 2022 to grant a section 25 permit for a new link road from the Vega industrial district to motorway E45, exit Horsens C, and remits the case for renewed processing.

The paid appeal fee is not refunded.

The Environmental and Food Complaints Board's decision is final and cannot be appealed to another administrative authority, cf. § 17 of the Act on the Environmental and Food Complaints Board<sup>[2]</sup> and § 2 of the Fees Order.<sup>[3]</sup> Any legal action to review the decision must be brought within 6 months, cf. section 54, subsection of the Environmental Assessment Act. 1.

The decision has been taken by the board, cf. § 1 of the Act on the Environmental and Food Complaints Board, which in accordance with the Environmental Assessment Act § 49, subsection 1, has dealt with the case in the board's medical department (department 10), cf. § 3, subsection 1, no. 10, in the Act on the Environmental and Food Complaints Board.

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<sup>1</sup> Google translation, apart from pages 38 – 43 that has been translated by professional company.

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# 1. The complaint to the Environment and Food Complaints Board

The decision was appealed to the Environment and Food Complaints Board on 9 February 2022 by a resident of the area. The complainant submitted supplementary comments on 4 May 2022, 13 September 2022 and 26 October 2022.

Complainant has stated in particular that

- there is disqualification from the authority according to Section 40, subsection of the Environmental Assessment Act. 3, at Horsens Municipality,

- the prepared Natura2000 impact assessment is flawed and insufficient, including in relation to groundwater lowering
- the consultancy behind the Natura 2000 impact assessment is not impartial,
- the assessment of Annex IV species is flawed and insufficient, including in relation to bats,
- other nature is not described sufficiently in the environmental impact report,
- the studies of alternatives to the alignment are insufficient,
- there is a lack of a description of all the project's characteristics and of intended measures to avoid, prevent or limit significant harmful effects on the environment, and
- The Section 25 permit is in breach of a wetlands declaration registered on part of the area, and that the connecting road is not necessary.

The points of complaint are further elaborated in section 2.4. Due to their volume, the sent letters of complaint are not reproduced in full in the decision. Both the complaint and the supplementary letters of complaint are included in the board's processing of the case in their entirety.

On 23 July 2022, the Environmental and Food Complaints Board refused to grant the complaint suspensory effect.

In addition, a complaint has been filed with the Environmental and Food Complaints Board regarding Horsens Municipality's decision on exemption from § 3 and § 16 of the Nature Protection Act, the municipality's permit for temporary reinjection of groundwater in connection with temporary groundwater lowering and the municipality's crossing permits for the interim bridge over Hatting Bæk and the landscape bridge over Bygholm Å and Hatting Brook.[4]

The complainant has also lodged a complaint with the Planning Complaints Board regarding the underlying planning basis for the project and the environmental assessment of the plan. By decision on 5 December 2022, the Planning Appeals Board did not uphold the complaints about Horsens Municipality's final adoption of municipal plan supplement no. 2017-34 with associated environmental report.[5]

## 2. The details of the case

### 2.1 The area

The project area is located in the rural zone west of Horsens and south of Lund, and the planned alignment crosses Bygholm Ådal, designated as a landscape worthy of preservation. The project area includes protected nature according to Section 3 of the Nature Protection Act, including the streams Bygholm Å and Hatting Bæk, fresh meadows in the lower parts of the river valley, overgrazing on the slopes of the river valley, two registered bogs and a small lake. There are also approx. 300 m west of the project area an area with a south-facing slope with older deciduous trees, as well as approx. 80 m and approx. 200 m east of the project area are wooded slopes.

The landscape in and around the project area appears as an undisturbed river valley, apart from a few agricultural and residential properties located on the edge of the river valley, as well as two high-voltage lines of 400 kV and 150 kV respectively, which cross the river valley approx. 400 m east of the landscape bridge, and which runs parallel from east to south through the southern part of the project area. In addition, the project area consists of cultivated fields.

## 2.2 Natural and planning conditions

### 2.2.1 Natura 2000 area no. 236

The project area is approx. 50 m west of Natura 2000 area no. 236, Bygholm Ådal, which consists of habitat area H236. Bygholm Å runs through the Natura 2000 area approx. 130 m upstream Hatting Bæk outlet in Bygholm Å.

The applicable designation basis for the habitat area appears from the Natura 2000 basic analysis 2022-2027.[6] From this, it appears that the basis for designation includes the following species: spring snail, narrow-mouthed whorl snail, Desmoulin's whorl snail, brook lamprey and otter. In addition, the basis for designation includes the following natural types: nutrient-rich lake, stream, limestone grassland, acidic grassland, occasionally wet meadow, spring forest, rich heather and alder and ash forest.

### 2.2.2 The watershed plans

It appears from MiljøGIS for the water area plans 2015-2021 that both Bygholm Å and Hatting Bæk are targeted for good ecological and chemical condition.[7]

From MiljøGIS on hearing of the water area plans 2021-2027, it appears[8] that the overall ecological condition of Hatting Bæk is poor, as the condition of small animals is moderate, the condition of aquatic plants and environmentally hazardous pollutants[9] is unknown and the condition of fish is poor. The chemical state is unknown.

Furthermore, it appears that the overall ecological condition in Bygholm Å downstream of the outlet from Hatting Bæk is high, as the condition of small animals is high. The other organic quality elements are unknown, as is the chemical state.

Upstream of the outlet from Hatting Bæk, the overall ecological condition in Bygholm Å is poor, as the condition of aquatic plants and fish is poor, the condition of small animals is high and the condition of environmentally hazardous pollutants is not good. The chemical condition is not good, which according to Vandplandata is due to exceeding the environmental quality requirement for mercury in biota fish, anthracene in sediment and nonylphenols in water.[10] In relation to the assessment of the state of environmentally hazardous pollutants as not good, it also appears from Vandplandata that this is due, among other things, to an excess of the content of copper in the water, as a level of copper of 1.717 µg/l has been measured, and that the general environmental quality requirement is 1.48 µg/l. The environmental quality requirement for the maximum concentration of 2.48 µg/l has also been breached, as the highest measured concentration is 2.8 µg/l.

It appears from the Danish Environmental Protection Agency's FAQ on questions and answers about the discharge of certain pollutants into the aquatic environment from 21 December 2021 that the background value for copper in watercourses is 0.48 µg/l.[11] Previously, the background value for copper in streams was calculated to be 0.66 µg/l.[12]

## 2.3 The contested decision

### 2.3.1 The project

The project includes the establishment of a connecting road between Vrøndingvej and E45 exit no. 56b Horsens C. The road connects to the signal system at Vrøndingvej, which gives access to the access

road to a planned business area, called VEGA, north of Vrøndingvej. To the south, the road course is connected with a new "leg" in the roundabout at the E45 exit Horsens C.

The route is approx. 1.3 km long and will be built as a two-lane road with an 8 m wide carriageway and a 5.5 m wide discount on each side of the road. In the middle of the stretch of road, the road leads over Bygholm Å and Hatting Bæk at an approx. 130 m long landscape bridge designed as a 5-span concrete bridge with a clearance of 7 m.

In connection with the project, 2-4 dead alder trees must also be felled in the alignment of the road, and an interim bridge must be built over Hatting Bæk to enable work traffic, which is carried out by putting down wooden or steel poles on both sides of the stream.

Four rainwater basins will be established, and the collected rainwater will be led to four rainwater basins with discharge to Bygholm Å.

### **2.3.2 Section 25 permit**

Horsens Municipality, Traffic and Roads, applied on 7 October 2020 for the construction of a new road connection between Vrøndingvej and E45. On the basis of a hearing from 28 October 2020 to 18 November 2020, Horsens Municipality, Nature and Environment, sent a delimitation of the subjects that were to be included in the environmental impact report. Horsens Municipality, Traffic and Road, as the developer, has had a draft environmental impact report prepared by an external consultant.

The environmental impact report, together with the draft § 25 permit and draft discharge permit, has been in public consultation for 8 weeks from 8 October 2021 to 3 December 2021.

Horsens Municipality, Nature and Environment, has on 14 January 2022 made a decision to issue a Section 25 permit to establish a new road connection between Vega-Horsens C as described in the environmental impact report for the project.

It appears from the Section 25 permit that Horsens Municipality, Traffic and Road, is organizationally separate from Horsens Municipality, Nature and Environment. Horsens Municipality, Nature and Environment, has received assistance from another external consulting company to review the developer's environmental impact report, including calculations and assessments of impact on, among other things, the Natura 2000 area and Annex IV species.

It appears from the Section 25 permit that the permit is granted on the condition that the project does not deviate from what is described in the project description in the environmental impact report and the developer's application for the project, and that the road project must be established within the physical and environmental framework and conditions, which appears in the environmental impact report and within the area allocation specified in municipal plan supplement 2017-34, Technical Facility, Horsens Vest.

It also appears that the permit is granted on terms that are based on the environmental impacts that the environmental impact report uncovers, including the proposals for mitigation measures that are incorporated into the road project under the individual environmental themes and listed together in the report's non-technical summary.

The Section 25 permit stipulates, among other things, the following conditions:

"Terms in connection with the execution of the work:



17. As far as possible, the work must be carried out within normal working hours, which means weekdays between 07:00-18:00. Ramming of sheet piles must not take place outside this period.

18. In connection with the construction of the foundations for the landscape bridge, sheet pile walls for construction pits must be framed around the foundations next to and between Bygholm Å and Hatting Bæk.

Conditions for consideration of Annex IV species:

35. Removal of older, bat-friendly trees must be avoided as far as possible. If older, bat-friendly trees are to be removed, for the sake of bats, this must be done in collaboration with the Danish Nature Agency. Concrete and careful investigations must be carried out before the removal. The trees may only be felled in the period between 1 September and 30 October. Felling at other times requires a dispensation, which must be applied for at the Danish Environmental Protection Agency
36. For each tree removed, three bat boxes of a type corresponding to Schwegler 2FN or 2F of dark wooden concrete must be set up. The boxes are set up on suitable trees along, or in the immediate vicinity of Bygholm Å. The boxes must be installed and functional before the trees are removed.
37. On the bridge, screens in matt material that do not reflect light must be installed at a height of 1.6 meters above the finished road in the full length of the bridge, for the sake of bats and birds.
38. Along the road over the dams in the river valley, a dense planting of trees and shrubs that are naturally native to East Jutland will be established at a height of min. 2.5 m above the finished road, to lift low-flying bats above the traffic. South of the landscape bridge, the planting must follow the course of the road for at least 100 m, on both sides of the road. North of the landscape bridge, the planting must follow the course of the road for at least 130 m, on both sides of the road. At the ends of the bridge, the planting must follow the slope towards the river valley.
39. Until the necessary dense planting has been established, a 2.5 m high game fence/wire fence with dense mesh must be established, cf. the Road Directorate's guidance on fauna passages<sup>4</sup>, on the section with planting cf. conditions 36. The fence or planting must be established and functional when the road is put into use.
40. For the sake of amphibians, the developer must establish a permanent amphibian fence on both sides of the road, on a 200 meter long stretch from the road bridge on the north side of Bygholm Å. The toad fence must be established, cf. instructions The Road Directorate's guide "Fencing along roads"<sup>5</sup> and Experience catalog for toad fences.
41. If, contrary to expectations, finds of Annex IV species are found in the construction area, which have not been located in connection with the field investigations and which are therefore not described and assessed in the environmental impact report, the work must be stopped immediately and Horsens Municipality must be notified immediately."

It also appears from the decision that the Municipality of Horsens has reviewed the environmental impact report in accordance with § 24 of the Environmental Assessment Act with the involvement of the necessary expertise in order to ensure that it meets the requirements of § 20. Overall, the Municipality of Horsens assesses that the project does not entail such a significant impact on the environment, that it cannot be permitted when the terms of the permit and terms of supplementary permits are complied with. Based on the environmental impact report, it has been assessed that there is no need for monitoring.

In relation to the impact on Natura 2000 areas, it appears from the § 25 permit that the nature types that N236, Bygholm Ådal, is designated to protect, will not be affected by the project, or cumulatively with other projects - neither in the establishment phase nor in the operational phase, as the project is outside the Natura 2000 area.

It also appears from the permit that Horsens Municipality assesses that the project will not affect or damage the designation basis and integrity of the natural areas, and the project does not prevent the realization of the goal of favorable conservation status.

Regarding Annex IV species, it appears from the Section 25 permit that there are potentially suitable habitats in the project area for the Annex IV species field lizard, pointed frog, large newt, beach toad and species of bat. No occurrences of Annex IV species of amphibians and reptiles have been registered in the project area, nor have such species been found during the inspections. In the summer of 2021, a lot owner stated that a single individual of a large newt was found, just as the lot owner submitted information in December 2021 about a frog that Horsens Municipality considers to be a butt-nosed frog, which is not an Annex IV species. The municipality has assessed that the construction workers do not pose a threat to these species, as the work takes place during the day outside the times of the day when the amphibians migrate to and from their breeding and resting areas.

It also appears from the permit that, during the inspections, large numbers of a total of nine species of bats were found in the river valley, including long-eared bats, southern bats, brown bats, pygmy bats, troll bats, water bats, pond bats, long-eared bats and pipistrelle bats. Horsens Municipality has noted that the defunct alder trees in the road route must be removed in collaboration with the Nature Agency and the Danish Environmental Protection Agency, and that it has also been assessed that the removal will not affect the occurrence of bat species' ecological functionality. The municipality has also assessed that the bridge will not cause a barrier effect for bats, as the bridge's clearance between the river valley and the underside of the middle three bridge spans is approx. 7 m.

The municipality also notes that it appears from the environmental impact report that the planting and the temporary fence, which is established on the road slopes along the road, ensures that the bats are either led down into the river valley or lift the bats that may cross the road higher up. Against this background, and given that it is a two-lane road, the municipality has assessed that the conditions set are sufficient to protect the presence of bats in the area.

Regarding targeted water bodies, it appears from the decision that the discharge of water from the road construction's rainwater basins will not lead to an increased risk of a deterioration of quality elements in Bygholm Å or the final recipients Bygholm Sø and Horsens Fjord. The discharged water quantities are relatively small in relation to the water flow in Bygholm Å, and the dilution is therefore high in relation to oxygen-consuming organic matter, harmful substances and salt.

It also appears that calculations in the environmental impact report show that there will be a net reduction of leached nutrients from the areas involved in the road construction, compared to the current leaching from the agricultural areas, and that the discharge from the rainwater basins will result in a limited discharge of copper and zinc.

Since the concentration increases in cumulation with other known sources are quite small, the discharge is assessed to have no significant overall impact on the water course. The road system's rainwater basins effectively clean PAHs and mercury. Horsens Municipality has therefore assessed that the drainage from the basins to Bygholm Å does not lead to a deterioration of the condition of the surface water area, does not lead to a risk of a decline in any of the quality elements, or hinders the fulfillment of the established environmental target in relation to the substances where there are currently exceedances cf. the Danish Environmental Protection Agency's studies from 2015.

### 2.3.3 The basis for the decision

It appears from section 11.1 of the environmental impact report that a separate Natura 2000 impact assessment called Natura 2000 impact assessment and assessment of Annex IV species for the new connection road, Vrøndingvej – E45, Horsens (hereafter referred to as the "habitat impact assessment"), which is attached as appendix 7 to the environmental impact report.

It also appears from section 11.2 of the environmental impact report that the possible indirect impact on the Natura 2000 area, N236, Bygholm Ådal, is examined in the Natura 2000 impact assessment.

In the following, the parts of the Natura 2000 habitat impact assessment and the environmental impact report that are relevant to the case are reproduced.

### 2.3.4 The Natura 2000 impact assessment

#### Semi-natural dry grassland and scrubland facies on calcareous substrates

It appears from section 7.1 of the habitat impact assessment that the light-open habitat nature types in the Natura 2000 area have been mapped over three study periods, and it is therefore assumed that the current designation basis is fair for the distribution and condition of the nature types.

It also appears that the closest light-open nature type in the Natura 2000 area is an area with Semi-natural dry grassland and scrubland facies on calcareous substrates, located approx. 300 m from the road's route, and that the habitat cannot be physically affected, but can potentially be affected by nitrogen deposition from the road's traffic.

It also appears that nitrogen deposition from the road's traffic emissions in cumulation with existing sources in the area is assessed on the basis of the annually calculated background deposition for the area in connection with air monitoring in the NOVANA programme.

It also appears that, in connection with the preparation of the habitat impact assessment, specific calculations of the nitrogen deposition have been made based on the location of the road and several points of interest. Based on the modeled background load in the area, which amounts to approx. 12.5 kg N/ha/year, and the calculated deposition of a maximum of 0.2 kg N/ha/year, the deposition is assessed, based on the structural and species condition of the grassland, not to pose a threat to the conservation status of the grassland.

It has been concluded in the habitat impact assessment that the nitrogen deposition as a result of emissions from road traffic at the grassland on calcareous substrates will be so low that it will not cause an impact on the conservation status of the nature type in the Natura 2000 area, not even in cumulation with the existing background load, which has been declared to 12.5 kg N/ha/year.

Overall, it is assessed that the establishment of the road will not prevent the achievement of a favorable conservation status for the concrete grassland on calcareous substrates. Likewise, the road is not assessed to pose a risk to the nature in the habitat area and the integrity of the area.

#### Vertigo geyeri whorl snail, narrow-mouthed whorl snail and Desmoulin's whorl snail

It appears from section 5.4.1 of the habitat impact assessment that the marsh snail is on the basis of the designation for habitat area H236 Bygholm Ådal, and that it is found in stable marshy/wet, open or lightly shaded stands of heather or similar stands of other plant species, e.g. tall sweet grass or reed grass. According to the municipality's § 3 registration, in the habitat area within the study area, which constitutes an area around the project's alignment, there are marsh areas with tall perennials/reed swamps. It appears that these areas can be potential habitats for marsh snails, and that the potential of

the areas as habitats has been assessed by the botanical registration. A search for the species has been carried out at one location, which is assessed to constitute a suitable habitat.

It also appears from section 5.4.2 of the habitat impact assessment that no Desmoulin's whorl snails were found during the inspections in the study area.

In relation to the vertigo geyeri whorl snail and narrow-mouthed whorl snail, it appears from the habitat impact assessment section 7.1 that the vertigo geyeri whorl snail and the narrow-mouthed whorl snail are linked to botanically fine, open, calcareous and fairly stable rich sedges, extremely rich sedges and sedges.

In addition, it appears that the three species are registered in connection with springs and sedges in the central and western part of the Natura 2000 area, more than 900 m from the project area. It also appears that no habitat types have been registered that would be able to support the presence of the vertigo geyeri whorl snail or the narrow-mouthed whorl snail near the project area, and that due to the distance, it is estimated that the project will not affect the known populations of the Desmoulin's whorl snail, the vertigo geyeri whorl snail or the crooked screw snail. It also appears that, should a population still be found in the project area outside the habitat area, it is considered not to have a direct impact on the populations in the habitat area.

#### Brook lamprey

In relation to the occurrence of the brook lamprey, it appears from section 7.1.4 of the habitat impact assessment that, in the period 2011-2016, a mapping of the occurrence and distribution of the brook lamprey was carried out with the main focus on the Natura 2000 areas where the species is on the basis of designation. The species has also been monitored by the general NOVANA control monitoring of stream fish across the country both inside and outside the habitat areas in the period 2010-2016.

It also appears that, according to the baseline analysis 2016-2021 for the Natura 2000 area, N236, Bygholm Ådal, the lamprey is not registered by the NOVANA monitoring, and that in the latest baseline analysis 2022-2027 it is stated that no monitoring has been carried out brook lamprey in the Natura 2000 area.

It appears that, according to the Article 17 report in 2019[13], there are no signs of a decline in the populations of the Brook lamprey throughout the country, and that the conservation status of the Brook lamprey is assessed to be favorable.

It has also been assessed that the stretch of watercourse around the project area can be a breeding ground for the species and a migration site when the species seeks out the smaller watercourses to reproduce. The stretch is not considered to be a likely breeding area, as the bottom is mainly sandy and there is considerable sand migration. However, it appears that there will be suitable breeding sites at several of the tributaries to Bygholm Å, including the Hatting Bæk tributary.

In relation to the impact on the brook lamprey during the construction phase, it appears that the project is not assessed to be able to affect a possible population of brook lamprey in the stream system during the construction phase, as the project does not include physical changes to the stream. It is also ensured during the construction phase that, in the event of large rainwater events, surface water with suspended material does not flow from the project area directly to the watercourse, for example by establishing rainwater basins and/or by gutters and culverts. The amount of soil particles and nutrients from surface water during the construction phase is therefore assessed to be of no

importance to lampreys on the basis of the relatively low amount and the lampreys' general autoecology.[14]

In relation to the impact on the brook lamprey during the operational phase, it appears from the habitat impact assessment on fluctuations in the oxygen concentration that any very small impact is not assessed to pose any threat to the brook lamprey, which is not normally considered to be a species that is particularly sensitive to lower oxygen tensions. The species' natural habitat is also in the areas of the stream where the oxygen content is not the highest. It also appears that any impact will be from isolated events which may cause a potential and short-term impact outside the Natura 2000 area.

In relation to the influence of salt, which can continue during the winter season, it appears that in connection with the environmental impact assessment of the project, a worst-case scenario has been calculated, where at the end of the winter, a maximum total concentration of 667 mg/l can occur at full mixing in Bygholm Å. There are no general ecotoxicological limit values for salt in freshwater systems, but it is far below the LC50 values[15] that exist for various animal groups linked to watercourses. It is also below 3,000 mg/l, which according to studies is the value at which there is significantly increased drift for species such as those in Bygholm Å. The drift rate has been used in some studies as an expression of changed behavior in invertebrates, as they use drift as a way to escape unfavorable conditions.

It appears that the salt concentrations at the outlet point can occur in elevated concentrations. Since salt is relatively easily soluble, and since salt will thus only be in a modest plume around the outlet point, it is expected that there will only be a real biological impact of salt in the stream in particularly severe cases. It is assessed against this background that salt discharge to the pools in Bygholm Å will not affect the brook lamprey to such an extent that it could prevent the achievement of favorable conservation status.

In relation to the impact of environmental hazardous substances, it also appears from the habitat impact assessment that today a number of exceedances are seen at the measuring station immediately upstream of the new road at Kørup Bro. It appears that the exceedance is only seen in the priority substances anthracene (PAH), mercury, nonylphenol, which relate to the chemical state, and copper, which is monitored under the package of nationally specific substances.

It appears very unlikely there will be measurable discharge of anthracene from the rainwater basins, that nonylphenol probably originates from sewage treatment plants and domestic waste water and not from road water, and that there is only a small contribution of mercury associated with separate rainwater and thus also road construction. Mercury, nonylphenol and anthracene are therefore not considered to pose a threat to the brook lamprey, which could prevent the achievement of favorable conservation status.

In relation to copper, it appears that the lamprey's LC50 value for copper is 46 µg/l, and that the measured values for Bygholm Å are far from the stated LC50 value for the lamprey. It is therefore assessed that the presence of copper in the stream, neither under existing nor future conditions, will pose a threat to the brook lamprey, which may prevent the maintenance of a favorable conservation status for the brook lamprey.

#### Otter

In relation to the occurrence of otters, it appears from section 7.1.3 of the habitat impact assessment that during the latest monitoring in 2017, tracks/excrement from otters were found at Bygholm Å at Kørup Bro immediately west of the project area, and that according to the baseline analysis 2022-2027

for habitat area H236, it is assessed that the species uses the area to a greater extent than illustrated by the monitoring carried out in 2011-2012. Based on the nature of the area with watercourses and undisturbed areas, it is also assessed to be a stable presence of otters in the area.

It also appears that during a specific search carried out in April 2021 in the planned road route, clear traces of otters were found, but no signs of breeding activity.

It appears from the species in general that otters give birth to their young in a cave in a remote, undisturbed lake or marsh area, and that the immediate area around the road route is grassy and open without good opportunities for hiding.

On this basis, it has been assessed that the areas immediately east of the Natura 2000 area are not significant as a breeding area for otters, but that it is very likely that individuals move along the streams and possibly roost in hiding by the streams.

It also appears from a possible impact during the construction phase that otters are relatively tolerant of noise when they are at rest, but it is likely that any day-resting otters in the area will prefer to move to other parts of the territory while particularly noisy construction activities are carried out as framing of sheet piles or piles. It appears in extension of this, since the area has not been assessed as suitable as a breeding area, and since there are good opportunities for hiding both upstream and downstream of the project, it is assessed that short-term construction activities will not cause a significant negative impact on the population of otters in the Natura 2000 the area.

It appears there will be a need to establish a passage for construction traffic over Hatting Bæk. Otters, which travel along the stream, may therefore have to walk on land for a short distance during the construction phase. It appears this is not considered to constitute a significant impact, as the temporary construction activities will normally take place within normal working hours during the day and not during the night, when otters actively forage in the streams and where otters can therefore pass the construction site.

There is also a stable occurrence of otters in Bygholm Å and a favorable conservation status for the species in Jutland. Disturbances during the construction phase of the project are not considered to cause a negative impact on the conservation status of the otter population linked to Natura 2000 area N236, Bygholm Å.

In relation to the impact on otters during the operational phase, it appears that a road construction over a stream can constitute serious obstacles for otters if good passage conditions have not been established, which ensure that the otter can pass under the road along the stream. It appears that the new road passes the river valley on a landscape bridge that is 130 m long and 12 m wide, and that the three middle bridge spans are each approx. 30 m long with a clearance of at least 7 m. It is stated that the landscape bridge's width and height meet the minimum standards for a fauna passage that can be used by cervids, and that the bridge also creates passage for many species from deer to invertebrates, as well as ensuring a good connection between the habitats and habitats of the animals on each side of the road construction.

In conclusion, it is assessed that the road construction will not cause a barrier effect on the population of otters in the Natura 2000 area, as good passage conditions for otters and other animals are ensured under the road construction during the operational phase, and that the project overall is not assessed to hinder the minimum good conservation status of otters on regional or national level.

#### Temporary groundwater lowering

It appears from section 3.6.6 of the habitat impact assessment that a temporary groundwater lowering must be made at four of the landscape bridge's six support points in connection with the construction of the bridge's foundations and pillars. Groundwater is lowered into the construction pits individually, which means that the four construction pits are not pumped at the same time. Groundwater must be lowered for up to four weeks per construction pit, thus a total of up to 16 weeks in the construction period. It is estimated that the total extent of groundwater lowering is 75,280 m<sup>3</sup>, and as a worst case scenario 10% has been added, so that the calculation is based on a total water volume of 85,000 m<sup>3</sup>. A conservative model calculation has been made of the distribution of groundwater lowering around the construction pits, which can be seen in figures 3-7 of the habitat impact assessment. The calculations show that the spread of the sinking funnels is limited to the proximity of the construction pits, and it will be especially to the north and south, where the greatest spread is up to 120 m. The sinking funnels will not extend into the Natura 2000 area.

It appears from section 7.1 of the habitat impact assessment that the impact from the temporary groundwater lowering of the groundwater table, which must be carried out in connection with the construction of the landscape bridge, is assessed to be very small and completely insignificant for the area's groundwater interests, including their vulnerability and water quality. The impact on local natural areas is also assessed to be very small. It also appears that no impact is seen in habitat area H236, and that it is considered to be excluded that groundwater-dependent nature types in the habitat area as well as stream-dependent nature types and species can in any way be negatively affected by the groundwater lowering.

#### Annex IV species of bats

##### Surveys

It appears from section 5.4 of the habitat impact assessment that, in connection with the early planning of the road project, a review of existing data as well as supplementary field surveys in the area around the road route has been carried out. It also appears that, due to uncertainty about individual habitat types and the road's potential impact on bats, additional studies have subsequently been carried out. Among other things, a search has been carried out for Annex IV species, including bats in summer and autumn 2020 and spring 2021 respectively.

It appears from section 5.4.1 of the habitat impact assessment that, in connection with the study, a study area has been defined as a 200 m buffer zone around the two proposed alternative alignments. The area's bats have been investigated in accordance with the Road Directorate's guidance on "Bats and major roads", and automatic bat detectors have been set up at important structures for bats over three periods in 2020 and 2021. It appears that the three periods have been intended to cover the bats' breeding period, the period in the autumn, when the bats are typically more mobile, and the spring, when the bats can potentially seek out other areas than in the autumn. It also appears that in all periods the automatic detectors are supplemented with a manual review of the area with a hand-held bat detector.

It appears from the note for the bat mapping dated June 2021, which is included as appendix 7 to the habitat impact assessment and the environmental impact report, that the three bat studies were carried out respectively from July 1 to July 4, and from August 17 to August 23 in 2020 and from 7 May to 16 May 2021.

It appears from section 5.4.2 of the habitat impact assessment that the bat mapping showed that there is generally a high activity of bats in the study area. A total of nine species of bats have been recorded,

and there is particularly high activity around Bygholm Å and the surrounding meadows, which serve as a foraging area for a number of species of bats.

It also appears from section 8.1 of the habitat impact assessment that the mapping showed that the study area at Grønhøjvej and Stampemøllevej west of the project area as well as Bygholm Å contains significant bat values, and that a breeding and roosting area west of Grønhøjvej for pipistrelle bats and pygmy bats, and possibly also brown bats, has been found - and troll bats. It appears that the specific area is a steep south-facing slope with many older deciduous trees, including some oak trees with cracks and hollows, which make them suitable as breeding and roosting trees for bats, and that a large part of the bats from here are estimated to forage below in the river valley above the extensively cultivated meadows around Bygholm Å. The breeding and roosting area is drawn on figure 8-2 in the habitat impact assessment.

It also appears that the meadows are also considered to be an important foraging area for southern bats, and that the stream itself is an important foraging area for water bats.

Tables 8-1, 8-2 and 8-3 of the habitat impact assessment show the activity levels, and they indicate the average recordings per species per night in the three study periods. Figure 8-1 shows an overview of the relative distribution of bat activity in the study period in mid-August 2020 and the location of automatic bat detectors. During the investigations, nine different species of bats were recorded - southern, water, pond, brown, troll, pipistrelle, pygmy and long-eared bats.

It also appears from section 8.1 of the habitat impact assessment that at the eastern end of the meadows there are several wooded slopes with potential breeding and roosting trees for bats, and that these have not been mapped more precisely. The associated forest edges and the stream are considered to constitute significant guide lines, and there are several smaller guide lines that lead down towards the stream and the meadows. It also appears that in both summer mapping periods, many individuals of several species of bat were observed foraging over the meadows, and that the meadows are considered to constitute a significant foraging area for the local bats, also upstream and downstream of the study area.

It also appears from section 8.4.1 of the habitat impact assessment that there are a few (2-4) extinct alder trees with woodpecker holes along Bygholm Å in the alignment of the road, and that these have been inspected with a view to ascertaining whether there were roosting bats. It appears that during the manual reviews no bats have been observed entering or leaving, but that it cannot be rejected on that basis that the trees are used periodically for daytime roosting by, for example, water bats. It also appears that the trees in question, however, have a size and condition that makes them considered unlikely as a breeding place and winter roost for bats.

It has been assessed that the removal of the trees in question during the construction phase will not affect the ecological functionality of breeding and roosting areas for the species of bats in the area. These are 2-4 suboptimal trees, where locally in the river valley there are many and better suitable breeding and roosting trees for bats, as stated in the mapping note of June 2021.

It also appears that, in order to ensure that the ecological functionality is maintained at the same level as before, three bat boxes are set up for each of the trees mentioned above that are removed. The bat boxes must be of a type that has been shown, among other things, to accommodate water bats and must be set up in relative proximity to Bygholm Å, either on existing trees or on the bridge construction. The boxes set up must be functional before the trees are felled, or alternatively, if the trees are felled in the winter months, the boxes must be functional before next April.



#### The road course and the landscape bridge

It appears from section 8.4.1 of the habitat impact assessment that the establishment of new road routes can lead to the destruction of breeding and roosting areas for bats. It also appears that changed traffic patterns and new road routes in areas with high bat activity can potentially constitute barriers for bats in relation to access to foraging areas, affect the species' ability to spread in the landscape, deteriorate the quality of the area for bats and pose a risk of traffic-killed individuals.

It also appears from the road's impact on bats during the operational phase that the extent of the specific road's impact largely depends on the design of the road, the permitted speed and the location of the road in the landscape in relation to guide lines and important areas for bats. The connecting road in the specific project crosses Bygholm Å, which is considered to be an important control line, and the road goes across Bygholm Ådal, which is considered to be an important foraging site for several of the local bats.

It appears from section 3.5.1 of the habitat impact assessment that the road construction's crossing of the Bygholm Ådal is constructed as a landscape bridge in accordance with the Road Directorate's road rule on fauna passages, as the Ådalen forms an important ecological corridor in the landscape.[16] It also appears that the bridge is designed so that it meets the minimum requirements for high landscape bridges of the type A1L (wet), which cater for the passage of cervids and deer. The clearance under the three middle spans of the landscape bridge is 7-9 m, which is sufficient for a large part of the bat species to prefer to fly under the road. It appears that the landscape bridge's three middle spans are each approx. 30 m long.

It also appears that the landscape bridge will be established without lighting, and that, in accordance with the road directorate's guidance, fixed matted screens will be installed on the sides of the bridge for the sake of birds and bats in the river valley and protective planting along the sides on the edge of the river valley.

It also appears from section 8.4.1 of the habitat impact assessment that the shielding has a height of 1.6 m above the finished road, and that the shielding will prevent bats from flying low over the road with the associated risk of traffic fatalities. The bats that forage at the height of the bridge above the river valley fly to a lesser extent attached to guide lines and at a distance from fixed structures, and they will thus cross the road at a height beyond the bridge's shielding, and thus above normal car traffic. In relation to trucks and buses, which are significantly higher than 1.6 m, the shielding contributes to the bats having a higher approach height and thereby minimizes the risk of traffic fatalities.

It also appears from the habitat impact assessment that the planting along the road will function as a guide line that can lead low-flying species on the edge of the river valley down into the river valley, where there is a passage under the bridge, and that the planting will also lift crossing bat individuals over the road at a height, which minimizes the risk of traffic fatalities. It appears that the planting is established so that it becomes dense and reaches a height of at least 2.5 m, whereby it becomes functional to guide bats down the river valley or "lift" bats that cross the road. The planting is initially supplemented with a wire fence with a minimum height of 2.5 m, which must be finely meshed so that bats cannot pass through the fence, cf. the Road Directorate's guidance on fauna passage.

On the north side of Bygholm Å, the planting on both sides of the road must extend up to 130 m from the road bridge, and on the south side the planting on both sides of the road must extend up to 100 m from the road bridge.

Table 8-4 of the habitat impact assessment contains an overview of the bat species in the area and their relevant behavior in relation to the impact from roads. In addition, the table contains a general assessment of the species' vulnerability to impact from roads in general.

#### Noise and light nuisance during the operating phase

In relation to noise and light nuisance during the operational phase, it appears from section 3.5.1 of the habitat impact assessment that the screens on the sides of the bridge limit the effects of light and visual disturbance from road traffic. In addition, the screens are made of frosted glass, which does not reflect the light. In addition, it appears from section 3.7.2 of the habitat impact assessment that road lighting will not be established on the stretch.

It also appears from section 8.4.1 of the habitat impact assessment in relation to the impact on bats during the operational phase that noise and sound pollution can impair the quality of habitats along roads. Reference is made to two foreign studies which indicate that a reduced incidence of bats can be seen more than one kilometer from a busy road, but that the effects have however been seen on roads with far more traffic than the current road. The planting around the road and screens on the road bridge are assessed to reduce this potential impact significantly, to an extent where it is not assessed to impair foraging and passage opportunities in the river valley itself. It is likely that the area immediately along the road will become less attractive to the bats in the area, but this is not assessed to be to an extent that will significantly affect the ecological functionality or the populations in the area.

#### Assessment of impact on bats

It is assessed in section 8.4.1 of the habitat impact assessment that the road and the landscape bridge will not cause a deterioration of the ecological functionality of breeding and roosting areas for all of the nine registered species of bats in the study area. The planting around the road and screens on the road bridge will reduce the potential impact significantly to an extent where it is not assessed to impair foraging and passage opportunities in the river valley itself. It follows from this that it is likely that the area immediately along the road will become less attractive for the bats in the area, but that this is not assessed to be of an extent that will significantly affect the ecological functionality or the populations in the area.

It appears in relation to water bats that Bygholm Å is assessed to constitute an important structure as a guide line and foraging site. The species stays low and closely attached to the stream itself and the areas close around. With the planned road course and the landscape bridge, there is not assessed to be an increased risk of traffic fatalities or negative impact due to the barrier effect, and thereby there is also not assessed to be an impact on the ecological functionality of breeding and roosting areas for water bats.

In relation to pond bats, it appears that Bygholm Å is a potential guide line for the species, and that the species has the same behavior as water bats and forages low over water surfaces and flies closely associated with guide lines such as streams. The road is not assessed to pose a risk of road kill of the species or to affect it through a barrier effect, as individuals will follow the stream unimpeded and pass under the landscape bridge. Furthermore, in connection with the surveys in the area, there are only a few scattered records of the species in the spring and autumn. It has been assessed that the road will not impair the ecological functionality of breeding and roosting areas for pond bats.

In relation to pipistrelle and pygmy bats, it appears that they occur commonly in the area with breeding sites west of the alignment. Pipistrelle bats are mainly recorded foraging relatively low and

close along forest edges and leeward fences west of the alignment and partly out over the open river valley, although to a much lesser extent. There is no impact on the primary structures with which the species has been observed. Dwarf bats occur more evenly distributed in the area. The road lies in the upper part of the typical foraging height of both species. The majority of both species' crossings of the facility will take place under the landscape bridge. The fencing along the road will help the bats that had to cross the road to be forced higher above the roadway, thereby reducing the risk of collision considerably. It has been assessed that the area is home to large populations, and that individual traffic fatalities will therefore not affect the population negatively. The road is not assessed to cause a deterioration of the ecological functionality of breeding and roosting areas for pipistrelle or pygmy bats.

In relation to the long-eared bat, it appears that the species may be vulnerable to new road constructions, but that the area does not constitute a significant breeding or foraging location for the species, as there are only very few recordings of it, and that the species is also rarely seen out in open land areas. It has been assessed that the road will not impair the ecological functionality of breeding and roosting areas for the long-eared bat, as the species only has a very rare and sporadic connection to the area, as structures of importance to the species will not be affected, and as it is not assessed that be a significantly increased risk of road kill for the species.

It appears in relation to southern bats and troll bats that these species typically fly at medium altitudes between 2-20 m and that they are to a lesser extent closely linked to landscape guidance lines. Thus, they are at less risk of being affected by the course of the road and traffic. It appears that the road is at a height at which southern bats and troll bats typically forage, and that when crossing the road bridge the species will pass both under and over the road. It has been assessed that the screening along the road helps to force these species to pass the roadway at a greater height and minimize the risk of traffic fatalities, and that a smaller number of the species will possibly also cross under the road out into the open river valley. It is therefore assessed that the road will not lead to a deterioration of the ecological functionality of breeding and roosting areas for southern bats or troll bats.

It appears in relation to brown bats and long-tailed bats that it has been assessed that the species will not be affected during the operational phase, as these species normally fly high and without a particularly close connection to control lines. It is estimated that the species will generally be able to pass the road without problems. The road is therefore not considered to cause a deterioration of the ecological functionality of breeding and roosting areas for brown bats and bats.

#### Annex IV species large water salamander and pointed frog

It appears from section 5.4.1 of the habitat impact assessment that there have been no recorded finds of large newts or pointed frogs in the immediate vicinity of the study area, but that there are potential habitats.

It also appears that large water salamanders and pointed frogs have been mapped in the study area in the summer of 2020 by searching for tadpoles in suitable habitats in accordance with the technical instructions for monitoring amphibians.[17]

It also appears from section 8.2 of the habitat impact assessment that large newts and pointed frogs were not found within the study area in connection with the field survey carried out in 2020, but that a single large newt was found at the end of summer 2021 on a nearby property, probably on its way to roost, and that the nearest known find is also more than 5 km from the study area.

It also appears from section 8.4.2 of the habitat impact assessment that construction works and work areas do not affect known breeding and roosting areas for large water salamanders and sharp-nosed frogs, but that the road in the operational phase may constitute a potential negative impact for the species if it lies between breeding and roosting areas, due to an increased mortality during migration and due to barrier effect. It also appears that the establishment of a permanent toad fence along both sides of the road on the north side of the Bygholm Å will prevent traffic fatalities and lead migrating newts down into the river valley, where there is safe passage under the road bridge.

It has been assessed in the habitat impact assessment that the project, with the establishment of the described mitigation measure, will not impair the ecological functionality of breeding and breeding areas for large water salamanders and sharp-nosed frogs.

### **2.3.5 The environmental impact report**

#### **Natura 2000**

It appears from section 11.2 of the environmental impact report that the alignment of the road is positioned so the Natura 2000 area, H236 Bygholm Ådal, is not directly affected, but the possible indirect impact is investigated in the Natura 2000 habitat impact assessment. The project area is located approx. 50 m east of the Natura 2000 area.

It appears from section 11.2.6 that the Natura 2000 area has been specially designated to protect the occurrences of grassland on calcareous substrates, spring meadows, sedges and streams, as well as the associated species otter, brook lamprey and whorl snails. In the Natura 2000 impact assessment, it is the grassland on calcareous substrates habitat and the otter and brook lamprey species that have been assessed as relevant in relation to a potential impact of the project. Other occurrences of species and habitat nature types on the basis of the designation are more than 500 m from the road route, and in the Natura 2000 habitat impact assessment it was not found that there would be significant potential impacts on these.

In relation to the grassland habitat, it has been assessed that the establishment of the road will not lead to increased nitrogen deposition to an extent that will prevent the development of habitat types on the nearest areas in the Natura 2000 area.

In relation to the brook lamprey, it has been assessed that discharge from the rainwater basins may in certain cases cause local fluctuations in oxygen concentration immediately downstream of the discharge points, where the oxygen level in the rainwater basins may be low. However, it is assessed that the impact will not be significant for the Natura 2000 area's population of brook lampreys, as this is not a breeding area, and as any impact is made up of isolated events, which entail a potential local and short-term impact that is reversible within a short period, outside the Natura 2000 area.

In relation to otters, it has been assessed that the road construction will not cause a significant barrier effect on the Natura 2000 area's population of otters, as good passage conditions for otters and other animals are ensured during the road construction during the operational phase.

For a more detailed review of the Natura 2000 area, the environmental impact report refers to the Natura 2000 habitat impact assessment in the report's appendix 7.

#### **Appendix IV species**

It appears from section 11.2.7 of the environmental impact report that there are potentially suitable habitats around the road route for species of bats, field lizards and the amphibian species pointed frog, large newt and beach toad, all of which are Annex IV species and which may be sensitive to effects of new traffic facilities. Possible impacts include road kills, barrier effects and fragmentation. The mentioned species are therefore searched for during the field surveys in 2020 and 2021.

It appears in relation to large water salamanders that it is estimated that it is likely that the species occurs breeding in one of the river valley's many waterholes. Based on the ascents in 2020, the two waterholes are not assessed as suitable breeding waterholes for large water salamanders, but it cannot be denied that they have occurred breeding in 2021.

There are no known occurrences of field lizard, pointed frog or beach toad near the route of the road, despite searching for potentially suitable habitats in 2020.

In relation to bats, it appears that the mapping in 2020 and 2021 showed that the area contains significant bat values, both in the form of significant foraging areas and breeding and roosting areas. A breeding and roosting area has been found west of the project for pipistrelle bats and pygmy bats, and possibly also brown and troll bats. A large proportion of the bats from here are estimated to forage down in the river valley over the extensively managed meadows around Bygholm Å.

There are a few defunct alder trees in the alignment of the road on the bank of Bygholm Å, which could potentially be a breeding and roosting area for bats. The size and nature of the trees make them unsuitable for roosting in the winter, and on that basis the trees are assessed as not suitable as breeding and roosting areas for bats.

For a more thorough review, the environmental impact assessment refers to the Natura 2000 habitat impact assessment in the report's appendix 7 and the data note for the bat mapping in appendix 9.

#### Other nature

It appears from section 11.2.4 of the environmental impact report that Bygholm Ådal is subject to a wetlands declaration from 2014, which stipulates that the area must permanently remain as a wetland. The declaration also contains a number of restrictions stating that the covered areas may not be cultivated, converted, fertilized or sprayed, and that ditches and drains may not be established or maintained without prior agreement with Horsens Municipality. It appears that the Danish Agency for Agriculture has been consulted in connection with an official hearing prior to the environmental impact assessment, but that the Agency had no comments on the project, as only Horsens Municipality is entitled to prosecution according to the provisions of the declaration. The establishment of the connecting road and the landscape bridge over the river valley is not considered to be in breach of the declaration, as there will continue to be a wetland under the landscape bridge.

It also appears from section 11.2.7 of the environmental impact report that the nearest find of a protected species that is not an Annex IV species is an occurrence of thin-stemmed cuckoo grass from a limestone meadow west of Grønhøjvej. During the inspections in 2020, fry of the butt-nosed frog were also observed in a waterhole in the Natura 2000 area west of Grønhøjvej.

#### Noise during the construction phase

It appears from section 4.6.6 of the environmental impact report that, in connection with the execution of foundations near Bygholm Å and Hatting Bæk, there is a need to frame sheet pile walls for construction pits around the foundations.

It also appears from section 7.3.1 that the noise from the ramming of sheet piles or piles will usually be experienced as particularly annoying, as it is impulse noise. There are two homes located 200 m from the impact site, and a simple noise calculation of the noise propagation has been made on that basis. It shows that noise levels of over 40 dB(A) can be expected more than 300-400 m from the impact site. The duration of the framing work is estimated to last 14 days, and the construction work is only carried out during the daytime between 07.00 and 18.00 on weekdays, as prescribed in Horsens Municipality's regulations for building and construction work. It has also been assessed that there is no need for significant mitigation measures in connection with construction noise.

#### Noise during the operating phase

It appears from the environmental impact report, section 7.1.3, that noise calculations have been carried out for the operational phase in accordance with the Danish Environmental Protection Agency's guidance on noise from roads.[18] In addition, speeds have been entered on the roads according to the municipality's traffic model, and the traffic count from Vrøndingvej is projected for 2030.

It also appears that a noise propagation map has been prepared for the reference scenario, figure 7-1, which involves a projection of the traffic to 2030 with the expected expansion of the business area VEGA. In this scenario, the connecting road north of Vrøndingvej is included. In addition, a noise propagation map has been prepared for the projected connection road, figure 7-2, where the traffic figures, as in the reference scenario, are projected with planned urban development until 2030.

It appears from the noise propagation map for the reference scenario in Figure 7-1 that the noise level at the two potential breeding and roosting areas for bats east of the road is between 48-53 dB(A). From the noise propagation map for the projected connecting road in figure 7-2, it appears that the noise level at the northernmost potential breeding and roosting area for bats east of the connecting road will lie partly within the noise level 63-68 dB(A) and 58-63 dB(A), and that the southernmost potential breeding and resting area east of the road will lie within the noise level of 53-58 dB(A).

#### Copper

It appears, among other things, from the environmental impact report's section 4.7.3 on discharge from the rainwater basins, that the discharge of nutrients, environmentally hazardous substances, and oxygen-consuming and suspended substances from the plant's rainwater basins is calculated on the basis of standard concentrations on outlet water from rainwater basins, assuming that the entire annual discharge is cleaned through the basins. It appears from table 4-5 in the environmental impact report that the calculated average substance concentration of copper in the discharge water from road basins is calculated to be 0.028 mg/l. It appears that the figure comes from the Handbook published by Vejregulgruppen Afvanding in 2020,[19] and that it is supplemented with some data from Faktablad on the dimensioning of wet rainwater basins.[20] The calculation of material quantities that Bygholm Å will be burdened with from the planned new road section is given in Table 4-6, where it appears that the total contribution of copper will be 0.39 kg/year.

It appears from the environmental impact report section 10.3.2 on harmful substances that the environmental quality requirement for copper in water is 1.66 µg/l, and that data from the basic analysis 2021-2027 show an excess of this substance in Bygholm Å, as the concentration is 1.717 µg/l.

Furthermore, it appears that loss of copper from agricultural land constitutes a significant source of the presence of copper in the Danish aquatic environment. According to studies carried out by DCE, the environmental quality requirement has been exceeded for 67% out of 21 investigated measuring

stations, which is attributed to an increase in the content of copper in Danish agricultural land.[21] The above-mentioned report from DCE indicates that by far the largest source of copper in Danish soils primarily comes from the application of pig manure, which makes up 80-90%. Although there is knowledge that there is a certain content of copper in brake pads, it must be expected that the reason for exceeding the environmental quality requirement is primarily due to agriculture.

Furthermore, it appears that it must be assumed that the road water from the new road will be retained in the basins to a greater extent than is the case with the current road construction (Grønhøjvej/Stampemøllevej), since the water in future will be led through basins dimensioned according to the best available technology, and the water is thus both cleaned and delayed. This also results in an increase in the residence time, which means some significant degradation of substances such as e.g. nonylphenol, which has a half-life of approx. a month in water. On the other hand, according to the report, the amount of traffic in the area will increase, and the amount of road water and substances will increase, among other things, due to the greater drainage of the roadway directly to the basin. It is to be expected, however, that the increased cleaning will still mean a smaller discharge of this.

In relation to the importance for Bygholm Å, it also appears from the environmental impact report that there is a known mean concentration for copper in the outlet water from the rainwater basins.[22] If the concentration for copper in table 4-5 is maintained as background concentration in Bygholm Å, the resulting concentration of copper at an average water flow of 1,600 l/s in Bygholm Å and a discharge of 2.1 l/s from the basins will result in a concentration of copper in Bygholm Å of 1.751 µg/l at a discharge concentration of 28 µg/l total copper. It is a worst-case scenario, which assumes that all the copper in the outlet water contributes to the dissolved fraction of the copper in Bygholm Å. The actual resulting concentration in Bygholm Å will be less than 1.751 µg/l, as part of the copper will be bound in non- or hardly-soluble compounds. Although an increase from 1.717 µg/l to less than 1.751 µg/l is a very limited impact, the limit value has been exceeded.

Furthermore, it appears from the environmental impact report that, according to § 8, subsection 3, as a starting point, an increased supply of copper cannot be permitted when the environmental quality requirement has already been exceeded for copper, unless other sources are minimized or a concrete assessment shows that the discharge will not have any significance in practice. [23] In this regard, reference is made to the guidance for the action order, from which it is evident, among other things, that the decision on an additional addition of harmful substances is based on a very specific assessment of the significance of the impact (significance) for the condition of the water area. [24] Furthermore, it appears from the environmental impact report that the very small additional impact of copper, which here is 0.034 µg/l in an average situation corresponding to a 2% impact on the limit value, will not be decisive for whether the objectives are achieved on the ecological parameters (fish, small animals and plants), which must also be assessed under the ecological condition. Furthermore, it appears that the impact is so small that it can be defined as not significant in accordance with the limit for additional introduction of harmful substances of 5%, which appears in the Danish Environmental Protection Agency's FAQ on the discharge of harmful substances.[25]

Overall, it is assessed in the environmental impact report that the runoff from the rainwater basins to Bygholm Å does not lead to a deterioration of the condition of the surface water area or hinder the fulfillment of the established environmental targets.

#### Alternatives

It appears from section 3.1.1 of the environmental impact report that the selected proposal (the main proposal) and reference scenarios must be examined in the environmental impact report.

The main proposal included in the environmental assessment is the scenario in which the requested permit is granted. The only alternative that will be included as a basis for comparison for the main proposal in the environmental assessment is the reference scenario, where permission for the main proposal is not granted and the project cannot be realized.

It appears from section 3.2 of the environmental impact report that the reference scenario corresponds to the existing environmental conditions (the area's current environmental status) and the probable development of the area if the project is not carried out. If the road project is not realized, the current land use will continue unchanged.

In the reference scenario, the probable development of the traffic conditions is projected until 2030. The projection includes the expansion of the VEGA business area, with e.g. the transport company [V1], as well as other planned urban development until 2030, including urban development in Lund. It includes expansion of the harbour, reconstruction of the Town Hall Campus and Nørrestrand. In addition, New Hattingvej and Ringvej Syd, stage 1, have been constructed.

It also appears from section 3.3 of the environmental impact report on the selection of alternatives that, prior to the design of the applied road, three alternative routes in the area, proposed solutions 1, 3 and 4, in addition to the selected project proposal, solution 2, have been assessed. In connection with the public hearing at the start of the environmental impact report, a number of citizen proposals for alternative solutions and alignments have also been submitted, solution proposals 5, 6, 7, 8, 9, 10 and 11. The ten proposals and the applied alignment appear in figure 3-1 of the environmental impact report.

Each proposed solution is described in more detail in sections 3.3.1, 3.3.2 and 3.3.3 of the environmental impact report, together with an initial assessment of their traffic effect with a focus on accessibility to the business area, relief from Ny Silkeborgvej-Silkeborgvej and the rest of the road network, as well as an assessment of road safety and driving comfort in general. In addition, an overall screening of the impact of the individual proposals on natural conditions, the landscape and cultural conditions has been carried out.

Solution proposal 8 involves an upgrade of Silkeborgvej with new intersections and expansion of the section to four lanes, which will be able to handle traffic on the overall road network at an acceptable level towards the two ramp intersections at motorway junction 56a (Horsens V). The Swedish Roads Administration is the authority for the ramp junctions, which is why an extension is a state decision. Horsens Municipality cannot therefore develop these two intersections. It appears that the solution will result in reduced accessibility to the business area VEGA and the residential areas in Lund and the Provstlund area

The proposed solution has not been chosen, as it does not fulfill the project's purpose of increased accessibility and robustness, but on the contrary is assessed to worsen existing problems with accessibility along Silkeborgvej and at several major intersections on the approach roads to Horsens's city centre.

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Solution proposal 11 involves an alignment that runs from motorway junction 56b (Horsens C) and parallel to the motorway with connection to Vrøndingvej. The many sharp curves along the road's route do not make it possible for modular vehicle trains to use the section, just as the desired speed of 80 km/h cannot be maintained on the section. In addition, the E45 motorway is covered by a 50 m road construction line, which is why the alignment had to be placed at least 50 m from the center line of the motorway.

The proposed solution has not been selected, as the alignment does not provide the desired traffic effects, neither in relation to the accessibility to the business area VEGA nor in relation to the traffic relief of Silkeborgvej.

Mapping of protected nature has been carried out for the area around lines 1, 2, 9 and 10 in 2020 and 2021, and new areas with protected nature have been registered in this connection. The routes for the other alignments have not been inspected, as Horsens Municipality has assessed that these alignments will not have the desired traffic effect, and are therefore not realistic alternatives to the selected project proposal.

## **2.4 Content of the complaint**

### **2.4.1 Authority disqualification**

The complainant has stated that the Municipality of Horsens is incompetent according to Section 40 of the Environmental Assessment Act in the specific case, as the approval and the concrete routing of the connecting road is a prerequisite for a conditional purchase agreement with a logistics company in the area. The municipality thus has a significant financial "private" interest in the sale itself, just as the municipality has an interest in the sale being carried out, as it will increase investment and local jobs in the municipality, which is the primary purpose of establishing the road. There is therefore a lack of authority on the part of the municipality, which is why the municipality cannot be the case-handling authority for the EIA investigation and the impact of the connecting road on the environment in Bygholm Ådal. The completed environmental studies should be rejected, and the impact on the environment should be subject to a stricter assessment by the Environmental and Food Complaints Board due to Horsens Municipality's incompetence.

### **2.4.2 Impact on the Natura 2000 area**

The complainant has stated that the Natura 2000 habitat impact assessment does not include several relevant matters, including that the assessments are not sufficiently concretely formulated. Furthermore, the conclusions are not sufficiently justified, and it is not sufficiently described why the protected nature, including protected habitats and species, will not be affected by the planned connection road.

In addition, the complainants have stated that the habitat impact assessment rests on a deficient information base, as it does not relate to or has identified all aspects that may affect the conservation objective for the Natura 2000 area. In this connection, the complainant has referred to the precautionary principle, which means that any doubt must be given to nature and that the authority has the burden of proof to document the absence of harmful effects. Complainants have also pointed out that the protection of Natura 2000 areas also applies to activities outside the area, if the activity can be expected to affect the area, or if the activity can affect migratory species such as birds and fish when they move outside the Natura 2000 area.

The habitat impact assessment therefore suffers from a legal deficiency and cannot form a basis for approving the project, and the Environment and Food Complaints Board should therefore revoke the Section 25 permit as invalid.

Semi-natural dry grassland and scrubland facies on calcareous substrates Complainants have questioned, in relation to Semi-natural dry grassland and scrubland facies on calcareous substrates, whether the already existing impact with nitrogen disposal from Grønhøjvej, which is immediately next to the overdrive, has been taken into account. The complainant has stated that only nitrogen deposition from the planned road appears to have been calculated.

The complainant has also questioned whether the additional load on the Natura 2000 area as a result of traffic from other expansion of the business area has been taken into account.

#### Otter

In relation to otters, the complainant has stated that a temporary bridge is planned to be established during the construction phase over Hatting Bæk, which will disrupt the movement of otters, as otters do not swim under bridges.

#### Brook lamprey

In relation to the brook lamprey, the complainant has referred to the fact that it appears from the habitat impact assessment that there may be a very local and short-term impact on individual individuals of the brook lamprey downstream of the discharge points for the facility's rainwater basins, particularly in relation to oxygen and salt, but that this will not harm Natura 2000 area population of lamprey, as it is not a breeding area. In this connection, the complainant has stated that the Ådalen participated in a wetland project in 2004 with Vejle County, where, among other things, spawning grounds were created for the fish in several places in the stream and in the meander next to the planned road.

The complainant has also questioned how it is ensured that the reinjection of groundwater, which in the complainant's opinion is ochreous, which must be carried out during the construction phase, can be carried out without risk of affecting the brook lamprey, which lives in the fresh water in the stream.

Based on this, the complainants have stated that the assessment of the impact on the lamprey in the operation and construction phase is not sufficient, including that it is not sufficiently clarified whether it is a breeding and resting area for the lamprey downstream from the Natura 2000 area.

#### Source wealth scam snail and skewed scam snail

Complainants have stated in relation to the vertigo geyeri whorl snail and the crooked screw snail that it appears from the habitat impact assessment that no studies have been carried out on the vertigo geyeri whorl snail and the crooked screw snail. In this connection, the complainant refers to the fact that the complainant's advisor has registered additional alder-ash swamps in the route of the planned road, which may constitute a habitat area for the spring snail and the narrow-mouthed whorl snail.

#### Groundwater lowering

In addition, the complainant has stated that in the impact assessment, no further investigations have been carried out into what effect the lowering of the groundwater in connection with the construction of the connecting road will have in interaction with the significant permanent lowering of the groundwater, which must be carried out during the construction of the logic connection center north of the connecting road. Nor has it been assessed what significance groundwater lowering in connection with the expansion of motorway E45 in interaction with the project will have.

Complainants have also questioned how it can affect the well-being and spring flow if there is a delay or if the water level is high during the 16-week period when the groundwater is being lowered.

In the complainant's view, a sample that was mistakenly not examined should be included in the assessment in order to reach a correct conclusion.

#### **2.4.3 Provision of the habitat impact assessment**

The complainant has also stated that the consultant who prepared the impact assessment for the road connection is also a consultant for the logistics company in the area in connection with the construction of a logistics centre. On this basis, the complainant has stated that the adviser in question will not be able to appear as an impartial adviser, as there are far too many financial matters involved, and as the adviser has, among other things, advised on traffic management from the logistics centre. There will therefore never be sufficient confidence in the investigations and estimates carried out by the adviser.

Complainants have referred to the fact that the same does not apply to the habitat assessments as under the Environmental Assessment Act, according to which it is the developer who prepares the environmental impact report. In this connection, the complainants have referred to the fact that the habitat regulations are based on EU law, and that in the practice of the EU Court of Justice, where it has been determined that the assessment according to the habitat regulations is the responsibility of the authority.[26] The task should have been left to another impartial adviser with no separate financial interests in the matter.

The complainant has also stated that the conclusions of the impact assessment have not been verified and approved by a third party, as claimed by the municipality, as the municipality's advisor and external lawyer have only looked at the formal requirements for the impact assessment and not related to the material content, including the investigations carried out, assessments and conclusions in the impact assessment.

#### **2.4.4 Annex IV species**

The complainant has stated that the prepared assessment of Annex IV species is flawed and insufficient, and that it also does not meet the requirements of the habitat order in relation to the impact on bats and newts. Overall, there is not the necessary and required high degree of certainty that the ongoing ecological functionality of the area, such as breeding and resting areas for Annex IV species, will be able to be maintained by the construction of a heavily trafficked connecting road.

##### Bat

In relation to bats, the complainant has referred to an appendix attached to the complaint, which the complainant has had drawn up by an adviser, which states that the distance from the road route to the nearest potential breeding and roosting area for bats is 16-34 m and not 70-80 m, as stated by the municipality, whereby the assessment of the road bridge's impact on bats has not been carried out on the right basis. The complainant has also stated that this is an important breeding and roosting area for bats, which is not mapped in the habitat impact assessment, and that the road will affect important guide lines and result in the loss of some extinct alder trees, which must be assumed to be of significant importance to the surrounding breeding and resting areas.

Furthermore, complainants have stated that it is not sufficient to only examine the bats in the limited search field, which appears from the habitat impact assessment, as bats can move up to 20 km per hour. day.

In addition, complaints in relation to the operation phase have stated that replanting as a mitigation measure is not sufficient to maintain the ecological functionality of the bat sites, as it will take many years for the trees to grow tall. Furthermore, it is not enough that a fauna passage has been made according to the best possible technique, as this does not say anything about whether damage occurs. The complainant has referred to the fact that in the habitat impact assessment it has been noted that higher screens have not been chosen, as this would trap bats over the road between the screens. The complainant has also stated that the bridge is 12 m wide, and that it appears from the literature that hop-overs are probably only usable if the distance between the tree crowns is a maximum of 5 m. Furthermore, there is insufficient knowledge about the effect of the mitigation measures, including in relation to for screens and hop-overs.

The complainant has also stated that it is contrary to the habitat directive that mitigation measures have been included, as they can only be taken into account in a deviation case. In this connection, the complainant has referred to the practice of the European Court of Justice.[27] There are also alternative solutions on the road route that should have been chosen instead of using mitigation measures.

In addition, the complainant has requested the scientific basis for the assessment in the habitat impact assessment that the road in the operational phase will only make the area immediately along the road less attractive for bats, and that this will not be to an extent that will significantly affect the ecological functionality or the populations in the area.

The complainant has also referred to the noise calculations that have been made and stated that there will be a very strong noise impact during the operational phase along the entire road and into the potential breeding and roosting area for bats, which is not in accordance with the precautionary principle in relation to Annex IV species. In this connection, the complainants have referred to the fact that it appears from an English study that bats usually avoid areas with large roads for up to 1.5 km, and that this is a road between two breeding and roosting areas respectively approx. 50-75 m and 250-300 m from the road. Complainants have also stated that the establishment of piles will affect Annex IV species in the river valley, including bats, during the construction phase with noise and disturbances. Complainants have also questioned whether, in connection with lowering the groundwater, there will be a noise impact at night which could affect bats.

#### Large water salamander

In relation to the large newt, the complainant stated that it was found close to the alignment of the road and in the areas involved in the construction work. It cannot be assessed that large water salamanders are not affected when a single adult individual has just been found in the barn on a nearby property, which in the habitat impact assessment is assessed to be on its way to rest.

The complainant has also stated that it has not been assessed whether the road's route or construction work may affect breeding or resting areas for large newts in the area, and that no further investigations were carried out beyond the survey in the summer of 2020, even though large newts were later documented in the area. Based on the above, the complainant has stated that it can be rejected that the investigations and assessments carried out remove any doubt that large water salamanders are affected by the bypass.

#### Otter

In relation to otters, the complainant has stated that a temporary bridge is planned to be established during the construction phase over Hatting Bæk, which will disrupt the movement of otters, as otters do not swim under a bridge.

#### Pointed seed

The complainant has stated that a pointed-nosed frog was observed on a nearby property in August 2021 and that it does not appear from the environmental impact report that the species was observed. In this connection, the complainant has stated that it cannot be ensured that habitats for the sharp-nosed seed are not damaged or destroyed when the habitats have not been mapped.

#### **2.4.5 Other nature**

The complainant has stated that barn owls have been observed at three surrounding addresses, and asks whether it has been investigated in more detail what significance the project may have for barn owls.

Complainants have stated that at the base of several trees along Bygholm Å there are populations of the moss species butterfly hair star.

The complainant has stated that a short-nosed frog was observed on a nearby property in August 2021 and that it does not appear from the environmental impact report that the species was observed.

Complainants have also questioned why no further investigation has been carried out for cuckoo herb, when it has previously been registered in Vejle County.

#### **2.4.6 Alternatives**

The complainant has stated that there has not been a real alternative to the intended route, and that the route in question has been agreed from the beginning between the Municipality of Horsens and the logistics company. The complainant has referred to the fact that an intersection had been established on Vrøndingvej before the impact assessment was prepared.

The complainant has also stated that the rejection of the alternative routes is not based on a natural factual basis, but solely on a desire to achieve the direct access to the logistics center for optimal operation. In the complainant's view, the existing Silkeborgvej, solution proposal 8, will be able to handle traffic satisfactorily, just as solution proposal 11 will be gentler on the natural and landscape experience in Bygholm Ådal. Solution proposal 11 should have been investigated more closely, as it is a realistic proposal from the public.

#### **2.4.7 Determination of terms**

The complainant has also stated that there is a lack of a description of all the project's characteristics and the measures that are intended to be taken to avoid, prevent or limit and, if possible, neutralize significant harmful effects on the environment, which the developer must implement, and any monitoring measures, cf. the Environmental Assessment Act Section 27, subsection 1.

The complainant has also stated that there is no requirement in the § 25 permit that the lead planting must consist of non-insect pollinating and fruit-bearing shrubs and trees to avoid insects being attracted, which is otherwise assumed in the habitat impact assessment,

#### **2.4.8 Other complaints**

The complainant has stated that the project is in breach of a registered easement, which stipulates that the project area must permanently remain as a wetland. The complainant does not believe that it makes sense to allow a negative impact on the area when there is this wetlands declaration for the area. Complainants have also referred to the fact that Horsens Municipality cannot restrict the wetland area.

The complainant has also stated that it is not necessary for a new connecting road to be established, as the Roads Directorate has stated that traffic in the area will be able to flow unhindered in a number of years, regardless of whether the connecting road is established.

#### **2.5 Horsens Municipality's comments on the complaint**

Horsens Municipality has submitted comments to the complaint on 28 March 2022, 4 July 2022 and 18 November 2022.

##### **2.5.1 Authority disqualification**

Horsens Municipality has noted that, in the specific case, the municipality is both the land seller, developer and authority in relation to the road connection. It is not possible to avoid this dual role, as the municipality is, among other things, granted authority by the Environmental Assessment Act. Substitution cannot take place, as one municipal council cannot be replaced by another. The municipality has therefore taken a number of measures to ensure that the authority's competence does not influence the decision by having organized itself in the case in a way that ensures handling of conflicts of interest and honors the requirements of Section 40 of the Environmental Assessment Act and Section 15 of the Environmental Assessment Executive Order.[28]

It also appears that in relation to the handling of the road project, the municipality has had a functional division, which has been carried out up to the level of municipal director, after which there is an authority track and a developer track within the municipality.

It appears that the authority track must issue the relevant permits for the project, and that the track includes planners, nature and environmental professionals as well as construction case handlers. The track is further divided into an authority part relating to the planning process related to the municipal plan supplement and an authority part relating to the specific project and the issuing of the necessary permits in that connection.

It appears that the developer track includes constructors and engineers as far as the construction and execution of the concrete road project is concerned, as well as the preparation of environmental impact assessments etc. for the project.

It also appears that stricter assessments have been made with regard to the assessments, permits and approvals related to the road construction in question, which Horsens Municipality as an authority has carried out and issued. This has resulted in some very comprehensive assessments, justifications and stricter conditions in decisions issued by Horsens Municipality as authority for the road project to Horsens Municipality as developer.

Horsens Municipality has also referred to the fact that the municipality, as part of the municipal power of attorney and the general operation of a municipality, can buy and sell real estate, and that it is not unusual for a municipality to be a contracting party in a transaction relating to real estate, to which there is attached conditions for the finality of the transaction.

Furthermore, regardless of the content of the purchase agreement, the logistics company has applied for and received permission to establish the logistics company, and the condition in question in the purchase agreement regarding the establishment of the road is henceforth without legal significance. It has not been possible for the logistics company to order a specific route. It is also not unusual for the buyer to have wished for an efficient road connection to the business area.

#### **2.5.2 Natura 2000 habitat impact assessment**

Semi-natural dry grassland and scrubland facies on calcareous substrates Horsens Municipality has referred to the fact that in the habitat impact assessment an adequate assessment of the impact from nitrogen deposition has been carried out, where the cumulative effects with the existing deposition are also taken into account, which is consistent with the practice of the EU Court of Justice.

##### Otter

Horsens Municipality has noted that in the habitat impact assessment, the importance of the road project for otters in both the construction and operational phases has been adequately explained. The design of the project as a landscape bridge ensures the necessary fauna passage, as described in the management plan for otters.[29]

##### Brook lamprey

Horsens Municipality has noted that a thorough assessment of the project's possible impact on the brook lamprey has been carried out in the habitat impact assessment and the environmental impact report, and that there is no assessment of a threat to the brook lamprey.

Horsens Municipality has also noted that the reinjection of the groundwater takes place in a closed system, where the groundwater does not come into contact with oxygen, which is why the reinjection of the groundwater will not cause a negative impact on the fresh water quality in Bygholm Å.

##### Vertigo geyeri whorl snail, narrow-mouthed whorl snail and Desmoulin's whorl snail

Horsens Municipality has noted that the natural types and habitats of the habitat area have been mapped by the Danish Environmental Protection Agency. On this basis, it has been concluded that the eastern part of the habitat area does not contain habitat types that can support the presence of spring snails or narrow-mouthed whorl snails, and no snails were found. In the habitat impact assessment, it is assessed that there is no risk of impact on the species.

Horsens Municipality has noticed that snails do not migrate between habitats in the same way as mobile species, since the size of the three species of snails is only approx. 1.5-3 mm.

The municipality has also noted that there is a distance of at least 240 m between the potential habitat for the Desmoulin's whorl snail within the habitat area and the pressurized water-affected bog area outside the habitat area just east of the northern section of the road trace, and that the areas in between consist partly of a road and partly of dry grassland nature, which does not constitute a suitable habitat for species of snails. Should a population of snails still be found in the alleged spring, the municipality assesses that a possible population of snails cannot interact with any populations within the habitat area, as the species will not spread via unsuitable habitat types. The alleged source mass is isolated away from the habitat area, and any population in that source mass will not be covered by the possible populations in the Natura 2000 area and therefore not covered by habitat protection.

##### Groundwater lowering

Horsens Municipality has noted that the lowering funnel does not affect the Natura 2000 area, and that it is also a temporary groundwater lowering. The municipality has also noted that there are no cumulative impacts from other groundwater lowering due to the distance, and that it is not the

intention of the Environmental Assessment Act that conditions which are purely hypothetical are also included.

### **2.5.3 Provision of the impact assessment**

Horsens Municipality has noted that the consulting company which prepared the impact assessment is both an adviser to the logistics company in the area and Horsens Municipality as the developer of the connecting road. The adviser has not at any time acted as an authority adviser for the municipality in the case and will not do so either. The municipality, as an authority, entered into negotiations with two other consultancy firms, which have reviewed the relevant consultancy firm's assessments, etc. The adviser's actions or client relationships with two different developers in the same complex of cases have therefore not influenced the process, as the consultancy company in question is not an adviser to the authorities in the case, which is why questions about the adviser's disqualification in that connection are irrelevant.

Horsens Municipality has also noted that the municipality has carried out independent comment rounds of the consultancy company's habitat impact assessments to ensure that the Habitats Directive's requirements for an appropriate assessment have been met before the municipality has issued the relevant permits. According to the habitat guidelines, it is Horsens Municipality's responsibility to ensure that the matter is sufficiently informed, and that all aspects of a plan or project are identified and checked, when and if this may affect the conservation objectives, etc. in a Natura 2000 area, which the municipality has done in this case.[30] The municipality does not agree with complaints that it can be inferred from the practice of the European Court of Justice that the habitat impact assessment must be prepared in all details by the responsible authority.

### **2.5.4 Annex IV species**

#### **Bat**

Horsens Municipality has noted that the area has been examined for bats in accordance with the Road Directorate's guidance Bats and major roads, as well as the precautionary principle, according to which possible breeding and roosting areas have been treated so that they are in fact breeding and roosting areas. In the municipality's view, the investigations carried out, including the survey area laid out, are fully comprehensive and sufficient in relation to the purposes of the investigations and the scope of the intended project.

Horsens Municipality has noticed that the complainant's measurement of the distance from the road to the potential breeding and roosting areas for bats is significantly flawed, as it was not measured from the road route itself. In addition, the municipality has referred to an accompanying annex, from which it appears that during the processing of the case, the municipality has stated that the distance from the road to the potential breeding and resting area is approx. 70-80 m.

Horsens Municipality has noted that the question of the exact distance to the potential breeding and resting area is not decisive in this case, as the assessment of impact is based on the road's calculated traffic load and pattern and the nature of the resulting potential noise and light impact, and that it thus does not change the conclusions drawn in the habitat impact assessment and the environmental impact report.

In relation to the bat boxes, Horsens Municipality has noted that they are intended to prevent damage to potential roosting trees, which are assessed as being of very poor quality in relation to use as a sporadic daytime roosting area and completely unsuitable as a breeding area or winter roosting area. Seen in the context of the quality and extent of breeding and roosting trees locally in the river valley, it



is considered very unlikely that the removal of the extinct alder trees in question can affect the ecological functionality of the area for bats, especially when bat boxes are set up in the area, which overcompensate for the highly questionable day rest areas, possibly in the listed 2-4 trees.

Horsens Municipality does not agree with complaints that it follows from the practice of the European Court of Justice that preventive measures cannot be used in relation to the ecological functionality of Annex IV species' breeding and resting areas. The municipality has also noted that it is assumed that the preventive measures are functional at the time of the interventions and/or when the road or facility is put into use. It would not be possible to place roads anywhere in Denmark if the roads are not allowed to cross areas where there is bat activity, and preventive measures have been used that sufficiently ensure the maintenance of the local populations.

Horsens Municipality has also noted that the lowering of the groundwater does not cause noise that could affect Annex IV species.

In addition, Horsens Municipality has noted that if the Environmental and Food Complaints Board does not believe that it is sufficiently clear what the lead planting must consist of, it has mentioned the possibility of inserting such a condition in the Section 25 permit.

#### Newt and other amphibians

Horsens Municipality has referred to the fact that, as shown in the habitat impact assessment, detailed field investigations have been carried out in 2020 and 2021 in relation to large newts and other amphibians, including the pointed frog.

Horsens Municipality has noted that conditions have been set for the establishment of an amphibian fence, and that it is adequate in relation to preventing population-reducing killings and disturbances of individual individuals. The complainant's observations of the newt and the two frogs do not change the assessment, as the observation was made outside the project area.

#### **2.5.5 Other nature**

Horsens Municipality has noticed that the butt-leaved hair star is red-listed and not covered by the species protection order or listed as an Annex IV species, which is why the species is not covered by the strict protection according to the habitat directive. A voluntary agreement has been made with the developer that the defunct alder trees will be pulled aside in connection with felling, and will remain in the area as continued habitat for the butt-leaved hair star.

Horsens Municipality has also noted that the barn owl is a red-listed species and not covered by the species conservation order or listed as an Annex IV species. The vast majority of barn owls in Denmark breed in open farm buildings or nest boxes, and no buildings suitable for nesting barn owls will be demolished or felled in connection with the project, which is why this is not relevant in this case.

In addition, Horsens Municipality has noted that cuckoo is not an Annex IV species, and that the occurrence of cuckoo is registered on the limestone outcrop in the Natura 2000 area. The impact of the chalk overgrazing in question is assessed in its entirety in the habitat impact assessment.

#### **2.5.6 Alternatives**

Horsens Municipality has noted that, in connection with the sale of land in the business area, a number of different alternative road connections were considered, and that the proposed alignment is the one that is assessed to have the least negative impact on nature and landscape and at the same time fulfills the purpose of the road, which, among other things, is securing the traffic infrastructure.

The municipality has assessed that the road is necessary from a socio-economic perspective, and in weighing up interests, the socio-economic value and necessity as well as local traffic safety have been central to the chosen route.

Horsens Municipality has also noted that according to the Environmental Assessment Act there is a requirement that reasonable alternatives must be described in an environmental impact report, and that there is therefore no requirement that all considered alternatives must be treated in detail. In the municipality's opinion, the assessments carried out in the environmental impact report of a total of 11 alternative alignments are therefore sufficient.

Horsens Municipality has also noted that the intersection at Vrøndingvej has been established to ensure smooth flow of traffic in the area and to create access to a rainwater basin. In addition, several of the alternative alignments described had connections at the crossing.

Horsens Municipality has also noted that the o alternative is described in the environmental impact report, and that the o alternative will not be able to ensure the flow of traffic in the area.

#### **2.5.7 Determination of terms**

Horsens Municipality has noted that Section 27 of the Environmental Assessment Act has been complied with, and has referred to the Section 25 permit containing a number of conditions. Based on the environmental impact report, it has been assessed that there is no need to establish separate monitoring measures.

#### **2.5.8 Other remarks**

Horsens Municipality has noted that the connecting road does not contravene the provisions of the wetlands declaration, and that, in addition, it is not a matter that falls under the competence of the Environmental and Food Complaints Board, as there is no decision in the legal sense in relation to the question of the declaration .

### **2.6 New information during the processing of the case**

On 30 September 2022, Horsens Municipality submitted a response to the Environmental and Food Complaints Board's hearing, where the board asked the municipality to explain in more detail screens and planting in the project, which prevent damage to bats. It appears from this that the client's adviser has drawn up a memorandum, which Horsens Municipality, Nature and Environment, which the authority has reviewed and agrees with.

The prerequisites for the assessment of whether the ecological functionality of breeding and roosting areas for bats will be damaged as a result of the project are, among other things, detailed in the note.

It appears from this that the primary condition for the assessment of the ecological functionality of breeding and roosting areas for bats will not be damaged is that the project does not affect suitable breeding and roosting areas for bats. In addition, the potential barrier effects between breeding and resting areas and foraging areas as a result of the road construction are averted by ensuring the best possible fauna passage in the Bygholm Ådal, including for bats, by establishing the road construction as a landscape bridge with large clearance and openness under the bridge, which according to The Road Directorate's guidance on fauna passages is important for a well-functioning fauna passage. The screening on the landscape bridge and the guide planting will also be established in accordance with the Road Directorate's instructions to ensure that the fauna passage will function as best as possible in relation to ensuring the ecological functionality of breeding and roosting areas for the bat species in the area. The screens on the bridge are only installed as an additional security in relation to

individual protection of the medium-high flying bat species. In this connection, reference is made to the fact that it appears from the Road Directorate's instructions that it may be necessary to mount screens on the sides of bridges, but that the instructions do not contain recommendations for specific heights or the design of screens. In connection with the project, it has therefore been chosen to establish screens at a height of 1.6 m, which corresponds to screens on similar newer landscape bridges.

The guide planting must complement the landscape bridge to ensure the best possible function of the landscape bridge, which ensures that the primary guide line in the area, Bygholm Ådal, will continue to function as the primary guide line. According to the Road Directorate's instructions, the guide planting must not be significantly higher than the screens, which is why it has been chosen that the guide planting must have a height of at least 2.5 m on both sides of the road. Until the guide plants have grown, fences are set up that are tightly meshed as recommended in the Road Directorate's guidance on fauna passages. Leader planting of 5 m is deliberately not chosen to minimize the risk of shelter being formed between the leader planting, where insects can gather during periods of wind.

In the response to the consultation, it is generally assessed that the planned heights of screens and guide plantings best reduce the risk of traffic fatalities on both the road area and the landscape bridge, and that a higher height of the guide plantings and screens will very likely increase the risk of traffic fatalities to individuals.

In addition, based on the flight patterns of the individual species, it has been assessed that most species will use the primary control line under the landscape bridge, and that the less structure-bound species will fly at such a great distance from the control plantings and screens that the planned heights will reduce the risk of collision considerable.

It also appears from the note that it has been assessed that hop-overs are not relevant for the ecological functionality of breeding and roosting areas for bats, as it relates to the individual protection of bats.

### **3. The Environmental and Food Complaints Board's comments and decision**

The following members of the Environment and Food Complaints Board have participated in the processing of the case: Birgitte Egelund Olsen (chairman), formerly county judge Eva Staal and county judge Olaf Tingleff, as well as the lay members Pelle Andersen-Harild, Lene Hansen, Kristian Pihl Lorentzen and Jens Vibjerg.

#### **3.1 Examination by the Environmental and Food Complaints Board**

This appears from § 11, subsection 1, in the Act on the Environmental and Food Complaints Board, that the board can limit its review of a decision to the circumstances complained of. However, it appears from the drafters of the provision,[31] that the board has the opportunity and, depending on the circumstances, the duty to include other matters than what has been complained about, e.g. the question of compliance with applicable EU law or basic principles of administrative law.

It also follows from § 11, subsection 2, in the Act on the Environment and Food Complaints Board, that the board can limit its examination to the most significant matters.

In this complaint, the Environment and Food Complaints Board has found occasion to deal with the following matters:

1. Authority capacity

2. Impact on targeted surface water areas
3. Impact of Natura 2000 area no. 236, Bygholm Ådal
4. Provision of the impact assessment
5. Impact on Annex IV species (bats, otters and newts)
6. Other nature
7. Alternatives

The Environmental and Food Complaints Board has, in continuation of this, found occasion to state a number of matters which the first instance will have to take into account in connection with a renewed examination of the case, see more in section 3.3.

The Environmental and Food Complaints Board notes that matters relating to easements and declarations are not regulated in the Environmental Assessment Act, which is why the board does not have competence to deal with this issue. The board also does not have competence to consider whether it is necessary to establish the connecting road, as the board cannot decide whether the project itself is appropriate, but can only assess legal and discretionary issues connected with the Section 25 permit.

### **3.2 The Environmental and Food Complaints Board's comments**

#### **3.2.1 The legal framework**

##### **The Environmental Assessment Act**

The purpose of the Environmental Assessment Act's rules is to ensure that an assessment of the effects on the environment is carried out as the basis for the decision to grant or refuse permission for project types that can significantly affect the environment.

The environmental assessment rules mean that projects that can be expected to have significant impacts on the environment may not be started before the authority has given written permission to start the project (environmental assessment obligation).

The developer of a project subject to an environmental assessment must, according to Section 20, subsection of the Environmental Assessment Act. 1, prepare an environmental impact report that contains an assessment of the project's impact on the environment. It follows from section 20, subsection 4, no. 2, that the information that the developer must provide about the applied for project in the environmental impact report, cf. subsection 2, in an appropriate manner must demonstrate, describe and assess the significant direct and indirect effects of the project on biological diversity, with particular emphasis on species and habitats protected under the Habitats Directive[32] and the Birds Directive.[33]

This follows from Section 24, subsection of the Environmental Assessment Act. 1, that after receiving the environmental impact report from the client, the authority must review the report with the involvement of the necessary expertise in order to ensure that it meets the requirements in section 20. The authority can, if necessary, obtain additional information from the client to meet the requirements in section 20, PCS. 2.

After reviewing the environmental impact report, the authority must send it for consultation with the authorities concerned and the public, cf. section 24, subsection of the Environmental Assessment Act. 2.

After the consultation, the authority must make a decision according to Section 25 of the Environmental Assessment Act on whether the project can be approved. The decision is made on the

basis of the developer's application, the environmental impact report, any additional information, the results of the hearings that have been carried out and the authority's reasoned conclusion. According to section 5, no. 5, letter d of the Environmental Assessment Act, cf. letter c, the authority's reasoned conclusion deals with the project's significant impacts on the environment, taking into account the results of the authority's investigations of the environmental impact report, any additional information presented by the client, any relevant information received via the hearing and the authority's own supplementary investigation, cf. section 24, subsection 1.

An § 25 permit must include the reasoned conclusion and contain all the environmental conditions attached to the decision, a description of all the project's characteristics and the measures that are intended to be taken to avoid, prevent or limit and, if possible, neutralize significant harmful effects on the environment to be implemented by the developer and any monitoring measures. This follows from section 27, subsection of the Environmental Assessment Act. 1.

The authority can, according to § 27, subsection of the Environmental Assessment Act. 2, attach conditions to a § 25 permit with a view to fulfilling the purpose of the Act. Terms must be proportionate to the nature, location and dimensions of the project as well as the extent of its effects on the environment.

If the project has significant harmful effects on the environment, the authority must, according to Section 27, subsection of the Environmental Assessment Act. 3, also set conditions for the client's monitoring thereof.

#### The relationship between the Environmental Assessment Act and the Water Framework Directive

According to Annex 7 of the Environmental Assessment Act, cf. § 20, subsection 2, no. 6, the environmental impact report must contain a description of the surroundings which may be significantly affected by the project, including e.g. water, as well as contain a description of the project's short-term as well as long-term effects on the environment.

The Water Framework Directive<sup>[34]</sup> establishes and determines the framework for planning and implementing measures and monitoring the water environment in the EU member states. The directive stipulates, among other things, that the Member States must delimit the individual river basins within their national territory and assign them to separate river basin districts for the purposes of this directive. According to Article 1, the overall purpose of the directive is to establish a framework for the protection of streams and lakes, transitional waters, coastal waters and groundwater, which, among other things, prevents further deterioration and protects and improves the condition of aquatic ecosystems.

According to the directive's article 4, subsection 1, letter a, nos. i)-iii), Member States must, when implementing the action programs reflected in the watershed plans, i.a. implement the necessary measures with a view to preventing the deterioration of the condition of all surface water areas, subject, however, to the application of the options for derogation that follow from subsection 6 and 7. With corresponding reservations and subject to possible time extensions pursuant to subsection 4, Member States are further obliged to protect, improve and restore all surface water areas as well as artificial and heavily modified water areas with a view to achieving good condition or good ecological potential and good chemical condition for surface water by 2015 at the latest.

According to the Water Framework Directive, Article 4, subsection 7, there is no breach of the directive in i.a. the cases where the failure to prevent the deterioration of the condition of a surface water area is due to new changes to the physical characteristics of the surface water area, and provided that a number of specified conditions are all met. Among other things, the changes must be justified by the

fact that significant public interests and/or the beneficial effects for the environment and society upon achieving the target must be less than the beneficial effects resulting from the new changes or changes for the health of the population, the maintenance of human safety and sustainable development. Regarding the relationship with the EIA Directive, the Court of Justice of the European Union has stated in the Land Nordrhein-Westfalen judgment that the provision in Article 6 of the EIA Directive, which relates to the information that must be made available during the procedure for a permit for a project, must be interpreted as follows, that an EIA process must include the information necessary to assess the project's impact on the water environment, taking into account the criteria and obligations laid down in accordance with the water framework directive, cf. water framework directive article 4, subsection 1.[35]

The provisions of the Water Framework Directive are implemented in Danish legislation in particular in the Water Planning Act[36] and the Environmental Objectives Act.[37]

The Water Planning Act contains general provisions on water districts, authorities' responsibilities, environmental goals, planning and monitoring, etc. According to section 7 of the Act, subsection 1, the Minister of the Environment and Food lays down rules that determine and specify specific environmental targets for the watershed districts' individual surface water bodies and groundwater bodies, including rules on artificial and highly modified surface water bodies, deadlines for meeting environmental targets and less stringent environmental targets. Concrete environmental targets for the individual surface water areas, etc. is laid down in the environmental target order.[38]

With a view to meeting the concrete environmental goals, the Minister for the Environment and Food, pursuant to § 19, subsection 1, on the basis of the basic analysis, monitoring results and other relevant knowledge for each watershed district, an action programme. Action programs for each water area district are laid down in the action order.[39] The effort programs include, among other things specific measures aimed at individual water areas. The executive order also contains an overview of the basic measures and general supplementary measures of the action programmes.

This appears from section 8, subsection of the executive order. 2, that the authority can only make a decision that involves a direct or indirect impact on a surface water area or a groundwater body where the environmental objective is met, if the decision does not result in a deterioration of the condition of the surface water area or groundwater body.

According to section 8, subsection 3, the authority can only make a decision that involves a direct or indirect impact on a surface water area or a groundwater body where the environmental target is not met, if the decision does not result in a deterioration of the condition of the surface water area or groundwater body, and does not hinder the fulfillment of the established environmental target, including through the measures established in the action programme. When assessing whether the decision will hinder the fulfillment of the established environmental objective, it must be taken into account whether the impact is neutralized later in the planning period.

The Danish implementation of the EIA directive also constitutes a basic measure according to the water area plans. This means that in connection with the proceedings under the Environmental Assessment Act, the environmental objectives and water quality must be described, and it must be assessed whether the project will be able to influence these and, if so, whether the project will constitute an obstacle to achieving the set quality objectives. In connection with this assessment, it is particularly important to consider the possible cumulative effects.[40]

It will also constitute an obstacle to the fulfillment of environmental objectives if a municipality grants a permit which implies that the established environmental objectives, which are assumed to be achieved in the second (2015-2021) or third (2021-2027) planning period, cannot be achieved before the deadline.[41]

#### The relationship between the Environmental Assessment Act and the habitat regulations

This follows from Article 6, subsection of the Habitats Directive. 3,[42] that the national authorities only give their approval to a plan or project that may significantly affect a Natura 2000 area, once they have ensured that the plan or project does not damage the integrity of the site.

Article 6, subsection of the Habitats Directive 3, also applies in cases where the authority's approval of the project is given in the form of a permit pursuant to Section 25 of the Environmental Assessment Act. Permission will thus not be granted for a project pursuant to Section 25 of the Environmental Assessment Act if the project could damage a Natura 2000 area integrity in violation of Article 6, subsection of the Habitats Directive. 3.

Article 12, subsection of the Habitats Directive 1, also obliges the Member States to introduce a strict protection system in the natural range of the animal species mentioned in Annex IV of the directive. According to letter (d) of the regulation, the scheme must include, among other things, a prohibition against damage or destruction of breeding or resting areas.

Article 6, subsection of the Habitats Directive 3, on the protection of Natura 2000 areas and Article 12, paragraph 1, letter d, on the protection of Annex IV species is in Danish legislation mainly implemented in the habitat order.[43]

Section 6 of the Habitats Executive Order, subsection 1, thus states that, before making a decision pursuant to the provisions mentioned in § 7, the authority must make an assessment of whether the project in itself, or in connection with other plans and projects, may affect a Natura 2000 area significantly. If the authority assesses that the project may significantly affect a Natura 2000 area, pursuant to § 6, subsection 2, a detailed impact assessment of the project's effects on the Natura 2000 area is carried out, taking into account the conservation objective for the area in question. If the assessment shows that the project will damage the integrity of the international nature protection area, no permit, dispensation or approval can be granted for the application.

Similarly, it follows from § 10, subsection of the habitat order. 1, no. 1, that when administering the provisions mentioned in § 7 and § 8, a permit, dispensation, approval, etc. cannot be granted if the applied for could damage or destroy breeding or resting areas in the natural distribution area of Annex IV- species.

When issuing a permit, the authority must, in accordance with section 25, subsection of the Environmental Assessment Act. 1, then also ensure that the project will not damage or destroy breeding or roosting areas in the natural range of Annex IV species.

#### **3.2.2 Ad 1) Incapacity of authority**

Section 40, subsection of the Environmental Assessment Act. 1, stipulates that an authority which prepares plans or programs covered by this Act, or which is both the client and authority for an applied for project covered by this Act, must carry out its tasks and powers in an objective manner. It also appears from section 40, subsection 3, that an authority that is the developer of a project covered by this Act may not process the application for the project and make a decision on it, unless an appropriate separation between incompatible functions has been ensured within the authority in

connection with the performance of these tasks and powers . Such a conflict of interest can, according to the EIA directive, i.a. countered through a functional separation or at least an organizationally separate performance of tasks.[44]

According to the drafters, Section 40 of the Environmental Assessment Act is supplemented by the general rules of Danish law on handling official disqualification. It also appears from the processors that in cases where substitution is not possible and an otherwise incompetent authority participates in the processing of a case, it should be noted on the case that the person in question was found to be incompetent, but still contributed, and the reason for this should also be stated . Depending on the background of the disqualification, particularly high demands should be placed on the provision of the relevant information base in the case, so that others who participate in the processing of the case have the opportunity to follow and assess the facts and the premises for the decision of the case.[45]

This is further apparent from § 15, subsection of the environmental assessment order. 1, cf. the Environmental Assessment Act § 40, subsection 4, that in order to prevent official disqualification, a municipal council, etc. carry out a separation of tasks and powers when screening and environmental assessment of plans, programs and projects in accordance with the law. Authority disqualification must, according to section 15, subsection 2, is sought to be resolved by substitution, by which it is understood that a secondary or superior authority takes over the case from the disqualified authority. It also appears from section 15, subsection 3, that if substitution according to subsection 2, is not possible, the disqualified authority must, taking into account the scope and complexity of the project, by law ensure as a minimum that the employees and managers who process applications and make decisions on behalf of the EIA authority are not the same as those, who apply for the specific project. The reason for authority disqualification according to subsection 3, and the specific handling thereof must be noted on the case and appear in the decision, cf. section 15, subsection of the Environmental Assessment Order. 4.

The Environment and Food Complaints Board initially notes that Horsens Municipality has made a decision pursuant to § 25 of the Environmental Assessment Act regarding a project where the municipality itself is the developer, and that there is therefore, as a starting point, authority disqualification.

The Environmental and Food Complaints Board agrees with Horsens Municipality that, in this situation, substitution cannot take place for another subsidiary or superior authority. The board has emphasized that the original competence is vested in the municipality, and that it cannot, as a rule, be left to another authority without express statutory authority. The board has also emphasized that the consideration of ensuring the necessary expertise is best ensured by handling the case in the municipality, as there are no other authorities that have the necessary local knowledge or that represent the municipality's citizens in a similar way. The board has also emphasized that, according to the Environmental Assessment Act, it is assumed that authorities can be disqualified, and that the law, including on the basis of it, lays down special precautions for cases with such a conflict of interest.

A majority in the Environment and Food Complaints Board finds that Horsens Municipality has ensured an appropriate separation between incompatible functions in connection with the performance of tasks and powers under the Environmental Assessment Act, cf. the Environmental Assessment Act § 40, subsection 3, and as embodied in § 15, subsection of the environmental assessment order. 3.

The majority has placed emphasis on the fact that it is clear from the § 25 permit that it is two different departments in Horsens Municipality that have been respectively the developer who has applied for



the project and the authority that has processed the project application and made a decision on § 25 - permission for the project. It also appears from the case that two separate authority tracks and a developer track have been established in the municipality to ensure an appropriate division of incompatible functions in connection with the road project. The majority has also emphasized that it appears from the information in the case that the division in Horsens Municipality has been carried out up to the level of municipal director.

The majority notes that the fact that an advisory company has also carried out tasks for others, which to a certain extent are related to the specific project, does not in itself mean that the adviser is considered not to be impartial. The majority notes in this connection that the advisor in question has been an advisor for the logistics company in the business area and for the municipality as the developer of the connecting road. The consultant has thus not advised Horsens Municipality as an authority in the matter.

A minority (Pelle Andersen-Harrild) finds that Horsens Municipality has not ensured an appropriate separation between incompatible functions in connection with the performance of tasks and powers under the Environmental Assessment Act, cf. the Environmental Assessment Act § 40, subsection 3.

The minority has emphasized that the necessary separation between incompatible functions has not been ensured, as in practice there is no real and actual division between the incompatible functions internally in Horsens Municipality.

### **3.2.3 Ad 2) Impact on targeted surface water areas**

#### **3.2.3 Re 2) Impact on monitored bodies of surface water**

The Danish Environment and Food Board of Appeal initially establishes that the environmental objective for Bygholm Å is good ecological and chemical status.

According to Article 2, no. 21, of the Water Framework Directive (WFD), ecological status is an expression of the quality of the structure and functioning of aquatic ecosystems associated with surface waters, classified in accordance with Annex V, and, according to no. 22, good ecological status is the status of a body of surface water, so classified in accordance with Annex V. No. 24 of the same Article furthermore sets out what is understood by good surface water chemical status.

According to Article 4(1)(a)(i) of the WFD, member states must implement the necessary measures to prevent deterioration of the status of all bodies of surface water. The same obligation is stated in Article 4(1)(b)(i) in relation to preventing the deterioration of the status of all bodies of groundwater.

According to Annex V, paragraph 1.1.1 of the WFD, quality elements for the classification of ecological status for rivers includes pollution by other substances identified as being discharged in significant quantities into the body of water. Paragraph 1.2.1 furthermore includes a table of physico-chemical quality elements associated by a definition of high, good and moderate ecological status in rivers. In respect of specific non-synthetic pollutants, this paragraph states that good status is when the concentration does not exceed the standards set in accordance with the procedure described in Annex V, paragraph 1.2.6.

The Court of Justice of the European Union (CJEU) established in the Weser judgment that Article 4(1)(a)(i)-(iii) must be interpreted as meaning that the member states are required to refuse

authorisation for an individual project where it may cause a deterioration of the status of a body of surface water or where it jeopardises the attainment of good surface water status or of good ecological potential and good surface water chemical status by the date laid down by the directive.<sup>[46]</sup> Among the reasons for this is that the condition for a derogation as provided for by Article 4(7) is that all practicable steps are taken to mitigate the adverse impact on the status of the body of water.<sup>[47]</sup>

The WFD does not specifically define what amounts to a deterioration of the status of a body of surface water. However, it follows from the CJEU Weser judgment that the concept of *deterioration of the status* of a body of surface water must be interpreted as meaning that there is a deterioration as soon as at least one of the quality elements falls by one class, even if that fall does not result in a fall in classification of the body of surface water as a whole. However, if the quality element concerned is already in the lowest class, any deterioration of that element constitutes a *deterioration of the status* of a body of surface water.<sup>[48]</sup>

In the Association France Nature Environnement judgment, the CJEU furthermore established that a temporary, short-term deterioration without lasting consequences can also amount to a deterioration within the meaning of the WFD.<sup>[49]</sup>

Furthermore, the CJEU in its Land Nordrhein-Westfalen judgment concerning the WFD and monitored groundwater held that a similar understanding must be applied to the concept of deterioration of the status irrespective of whether it is surface water or groundwater.<sup>[50]</sup> The CJEU also held that although the classes provided for in Annex V are decisive for determining whether there is a deterioration, after a body of surface water has been classified in the lowest class, further deterioration of the status of that body of water will legally no longer be possible.<sup>[51]</sup>

The judgment furthermore states that the concept of *deterioration of the status* of bodies of water must be interpreted by reference to a quality element and a substance and that the threshold beyond which breach of the obligation to prevent deterioration of the status of a body of water is found must be as low as possible, which entails that the failure to observe one of the quality elements referred to in the WFD definition of good groundwater chemical status constitutes a deterioration of the chemical status of the body of groundwater concerned.<sup>[52]</sup>

The CJEU has subsequently held that any subsequent increase in the concentration of a pollutant that, with reference to Directive 2006/118<sup>[53]</sup>, already exceeds an environmental quality standard or a threshold value set by the Member State also constitutes a deterioration.<sup>[54]</sup>

The judgment furthermore entails that where a quality element is not observed at a single monitoring point in a body of groundwater, it must be found that there is a deterioration of the chemical status of that body of water, for the purposes of Article 4(1)(b)(i) of the WFD.<sup>[55]</sup>

The provisions of the WFD are implemented in the Danish Act on Water Planning (*lov om vandplanlægning*).<sup>[56]</sup> As provided for in this act, section 8(3) of the Executive Order on Programmes of Measures (*indsatsbekendtgørelsen*) stipulates that the authority can only make a decision involving a direct or indirect impact on a body of surface water for which the environmental objective is not met if the decision does not lead to a deterioration of the defined environmental objective, including by the measures defined under the programme of measures.

Pursuant to section 8 of the Danish Act on Water Planning, the minister is authorised to determine specific rules for environmental objectives, including what is to be understood by good surface water status, good ecological potential for artificial and heavily modified bodies of water and good surface water chemical status with a view to the implementation of European Union directives and decisions concerning the protection of surface water and groundwater. The Executive Order on Establishment of Environmental Objectives for Inland Surface Water, Transitional Waters, Coastal Waters and Groundwater (*bekendtgørelse om fastlæggelse af miljømål for vandløb, søer, overgangsvande, kystvand og grundvand*) has been issued in pursuance of this provision.<sup>[57]</sup> Section 3(1), no. 1, of the executive order states that the establishment of environmental objectives for the individual bodies of surface water must include the normative definitions of quality classes for ecological status and ecological potential set out in Annex 1.

Section 2 of Annex 1 to the executive order sets out definitions of high, good and moderate ecological status in rivers in relation to physico-chemical quality elements. It is stated here that in relation to specific non-synthetic pollutants, good status is when the concentrations do not exceed the environmental quality standards established in Annex 2, part B, sections 1 and 2.<sup>[58]</sup> Section 1, part B of Annex 2 states that the general quality standard<sup>[59]</sup> for copper in inland water bodies is 1 µg/l added to the natural background concentration. It also states that the maximum concentration for copper in inland water bodies is 2 µg/l added to the natural background concentration.

Section 8(6) of the Executive Order on Programmes of Measures states that the assessment of whether a decision can be made in pursuance of subsections (2)-(4) must include the normative definitions of quality classes for ecological status and ecological potential for bodies of surface water, cf. Annex 1 to the Executive Order on Establishment of Environmental Objectives for Inland Surface Waters, Transitional Waters, Coastal Waters and Groundwater, cf. Annex 2, part B of the same executive order.

The 2015-2021 river basin management plan for River Basin District Jutland and Funen states the following about environmentally hazardous substances:<sup>[61]</sup>

“The chemical and ecological status of a body of water is good in respect of environmentally hazardous substances when the measured concentrations of substances do not exceed the established environmental quality standards. This means that the environmental objective for a body of water is met when all measured substances are in compliance with the environmental quality standards. Conversely, a body of water will not have achieved the environmental objective if just one of the measured environmentally hazardous substances exceeds an established environmental quality standard, cf. the WFD.”

In addition, the Danish Environmental Protection Agency’s guidance on the Executive Order on Programmes of Measures states the following about measures targeted against environmentally hazardous substances:<sup>[62]</sup>

“The assessment of the chemical status of body of water is based on concentrations of so-called priority substances identified by the EU. Priority substances are substances that present a significant risk to the aquatic environment at EU level. The assessment of the ecological status of a body of water is based on the substances that are monitored because they are assessed to be discharged in significant quantities at national level.

In the assessment of ecological and chemical status of environmentally hazardous substances, the measured concentrations will be compared with environmental quality standards. An environmental quality standard is the concentration of a particular substance in water, sediment or biota (mussels and fish) that must not be exceeded in order to protect human health and the environment. The applied environmental quality standards are set out in table 5 (chemical status) and tables 3 and 4 (ecological status) of Annex 2 to the Executive Order on Establishment of Environmental Objectives for Inland Surface Waters, Transitional Waters, Coastal Waters and Groundwater

For the bodies of water in which one or more substances exceed the established environmental quality standards, the ecological and/or chemical status is assessed as not good. These are the bodies of water in which measures must be implemented.”

The guidance also states the following about the framework for the administration by authorities of legislation in relation to environmentally hazardous substances when the environmental objective has not been achieved:[63]

“Whether a decision can be made for these bodies of water that involves introduction of environmentally hazardous substances depends on a specific assessment of the significance of the impact on the status of the body of water. If the impact is assessed to be significant, a permit cannot be issued for the impact. If the impact is assessed to be insignificant, a permit may generally be issued for the impact. The specific assessment should include an assessment of the quantity and concentration of the substance related to the other introductions (cumulation), including from point sources, diffuse impact and atmospheric deposition. An assessment is made of what happens to the substance in the body of water, including its transport (possibly to other bodies of water) and form (dissolution, binding, chemical reaction, sedimentation, accumulation, immobilisation, degradation/decomposition, etc.). It may include information about the development over time of the introduction and/or presence of the substance in the body of water, e.g. a declining trend in concentrations due to measures/regulation, an assessment of whether the impact is balanced so that the impact does not deteriorate the status or prevent the achievement of the environmental objective for the body of water within the established timeframe. This information helps inform the assessment of whether the impact gives rise to an increase of the concentration in water, sediment or biota, including whether it might, in principle, be registered by measurements. It is presupposed that the activity resulting in an impact is based on the use of best available techniques. Also note that the assessment of achievement of the objectives for environmentally hazardous substances is based on individual substances subject to environmental quality standards, which means that the specific assessment of the impact is made at substance level.”

Similar provisions appear from the draft guidance on the Executive Order on Programmes of Measures from December 2021.[64]

In addition, question 43 in the Danish Environmental Protection Agency’s FAQ about discharge of certain pollutants to the aquatic environment states that the discharge may not result in an increase of the already existing concentration at the boundary of the mixing zone of more than 5% of the value of the general quality standard for the substance for water when the environmental quality standard for the substance is already exceeded in the aquatic environment.[65]

In relation to achieving the objectives set out in the river basin management plan, the Environment and Food Board of Appeal establishes that the objective has not yet been achieved for the Bygholm Å

upstream outlet from Hatting Bæk, among other things because the status for environmentally hazardous substances is not good. The Board furthermore establishes that the status of not good in relation to environmentally hazardous substances is due to an exceedance of the copper content of 0.237 µg/l in relation to the general quality standard of 1.48 µg/l, corresponding to an exceedance of approximately 16% and an exceedance of 0.32 µg/l in relation to the requirement of a maximum concentration of 2.48 µg/l, corresponding to an exceedance of approximately 13%.

Concerning the ecological status of the Bygholm Å downstream outlet from Hatting Bæk, the Environment and Food Board of Appeal establishes that the objective for the ecological status has been achieved. Particularly in relation to environmentally hazardous substances, the Board furthermore establishes that the status is unknown.

It is the opinion of the Environment and Food Board of Appeal that the case law of the Court of Justice concerning the concept of *deterioration of the status* in the Land Nordrhein-Westfalen judgment, relating to additional introduction of a pollutant into groundwater that already exceeds the environmental quality standard for the substance concerned is also applicable to surface water. In this connection, the Board has attached importance to the statement by the CJEU that the concept of *deterioration of the status* must be understood similarly for surface water and groundwater,<sup>[66]</sup> and that the CJEU in the case refers to case law for *deterioration of the status* in the Weser judgment concerning surface water.<sup>[67]</sup> In addition, the Board is not of the opinion that the understanding of the concept of *deterioration of the status* is affected by whether it is a substance that relates to the ecological status or to the chemical status, as it is not found that the CJEU makes or otherwise indicates such distinction. The Board makes reference to, e.g., the statement by the CJEU in the Land Nordrhein-Westfalen judgment that "[...] »deterioration of the status« of bodies of water must be interpreted by reference to both a quality element and a substance".<sup>[68]</sup>

A majority of the Environment and Food Board of Appeal believes that based on notably the Weser and Land Nordrhein-Westfalen judgments, *deterioration of the status* in relation to pollutants must be understood as meaning that when the environmental quality standard for a pollutant has already been exceeded and the body of water is consequently in the lowest possible class, any subsequent increase in the concentration of the pollutant must be considered a deterioration of the status of the body of water in contravention of Article 4(1) of the WFD. The majority notes that a similar understanding must be applied to section 8(3) of the Executive Order on Programmes of Measures, as the executive order is the Danish implementation of the obligation to prevent deterioration of the status of surface water and groundwater.

Against this background, a majority of the Environment and Food Board of Appeal finds that the section 25 permit is not in compliance with section 8(3) of the Executive Order on Programmes of Measures as the project will result in a deterioration of the ecological status of Bygholm Å in the form of a deterioration of the quality element for environmentally hazardous substances. This means that the section 25 permit suffers from a material legal deficiency.

The majority has attached importance to the fact that the environmental quality standard for copper is exceeded, that the status for environmentally hazardous substances is consequently not good, which is the lowest possible status, and that according to an environmental impact assessment, the project will result in additional discharge of copper to the watercourse by up to 0.034 µg/l, corresponding to approximately 2% of the general quality standard for copper in a medium situation.

In this connection, the majority notes that the case does not provide a basis for disregarding the assessment by the Municipality of Horsens that the project will result in additional introduction of copper into the watercourse, which is why the majority has relied on this fact in the case.

Furthermore, the majority has attached importance to the fact that it follows from CJEU case law that also temporary and locally delimited deteriorations of the status of a body of surface water is in contravention of the obligation to prevent deterioration of the status and that the threshold beyond which breach of the obligation to prevent deterioration of the status of a body of water is found must be as low as possible.<sup>[69]</sup>

In addition, the majority has attached importance to the fact that the added amount of copper introduced is not decisive when the quality standard has already been exceeded, as any additional introduction will result in deterioration of the status when the status is the lowest possible. Further, the majority has attached importance to the fact that the impact of the additional introduction of copper on the other ecological parameters is not *per se* decisive for deterioration of the status, as any exceedance of the quality standard must in itself be considered deterioration of the status of the watercourse, cf. the CJEU judgment in Land Nordrhein-Westfalen.<sup>[70]</sup> The fact that the environmental impact report assesses that the additional copper introduced will not be decisive for achieving the quality element objectives for fish, small creatures and aquatic plants cannot result in allowing the additional introduction as the additional introduction of copper results in an independent deterioration in relation to the quality element for environmentally hazardous substances.

As a consequence of the above, the majority also notes that the majority is of the opinion that it is not in compliance with the obligation to prevent the deterioration of the status of surface water to allow additional introduction of copper following a specific evaluation of materiality as stated in the Environmental Protection Agency's guidance on the Executive Order on Programmes of Measures when the quality standard has already been exceeded. The guidance is not in compliance with CJEU case law to the effect that any subsequent increase in the concentration of a pollutant constitutes a deterioration when the quality standard has already been exceeded, which is why the case cannot attach importance to the fact that the Municipality of Horsens has followed the guidance.<sup>[71]</sup> The Board establishes that the environmental impact report also refers to the Danish Environmental Protection Agency's FAQ question 43, which states that an additional discharge may not result in an increase of the already existing concentration at the boundary of the mixing zone of more than 5%, but that a mixing zone has not been identified in the case concerned. The Board is consequently of the opinion that FAQ question 43 is not relevant in the present case. The Board notes that with this decision, the Board has not decided on the application of the Danish Environmental Protection Agency's FAQ question 43 in relation to decisions on identification of mixing zones.

**Kommenterede [KV1]:** The part of the ruling that is at the center of our questions

The minority (Jens Vibjerg and Kristian Pihl Lorentzen) finds that the section 25 permit is in compliance with section 8(3) of the Executive Order on Programmes of Measures.

The minority has attached importance to the fact that the additional introduction of copper into Bygholm Å is so small that it can be defined as non-significant in accordance with the threshold for additional introduction of xenobiotic substances of 5% as set out in the Danish Environmental Protection Agency's FAQ question 43, and that the permit may be granted under this exemption.

### 3.2.4 Ad 3) Impact on Natura 2000 area

This follows from Section 20, subsection of the Environmental Assessment Act, 4, no. 2, that the environmental impact report must demonstrate, describe and assess the project's significant direct and indirect effects on e.g. the biological diversity with particular emphasis on species and habitats protected under the Habitats Directive.

The authority must also observe Natura 2000 protection when issuing the § 25 permit itself, cf. § 6 of the habitat order.

The EU Court of Justice interprets the provision in the Habitats Directive, Article 6, subsection 3, so that the authority must make an assessment of whether it can be ruled out that a plan or project in itself or in connection with other plans and projects may significantly affect the achievement of favorable conservation status for the designated area, including whether the conservation status of the species and/or nature types that the area has been designated to protect will be significantly affected (significance assessment).

If such an impact cannot be ruled out on the basis of objective criteria, if the project is to be promoted, a more detailed assessment (consequence assessment) must be carried out. This assessment must include all aspects of the project that may affect the site in question, and the assessment must be carried out on the basis of the best scientific knowledge in the field.[72]

The competent national authorities only authorize an activity on the protected site on the condition that they have obtained certainty that the activity will not have harmful effects on the integrity of the site in question. This is the case when, from a scientific point of view, it can be determined beyond reasonable doubt that there are no such effects.[73]

In such an assessment, the precautionary principle applies.[74]

The integrity of a Natura 2000 site includes its basic characteristics and ecological functions. It can be defined as a coherent sum of the area's ecological structure, function and the ecological processes across the area, which enable it to maintain the habitat types, the combination of habitat types and/or species populations for which the area has been designated.[75]

As far as species are concerned, the conservation status of a species is defined in Article 1(j) of the Directive as the result of all the conditions that affect the species and which may, in the long term, affect the distribution and abundance of its populations within the Member States' area in Europe where the EU Treaty applies.

The Environment and Food Complaints Board notes that in the delineation of what constitutes harmful effects on the integrity of the site according to the habitat directive's article 6, paragraph 3, the criteria and methods that are expressly stated in the directive's article 6, subsection should also be included. 2. According to the Habitats Directive, Article 6, subsection 2, Member States shall take appropriate measures to avoid deterioration of the habitats and habitats of the species in the special areas of conservation, as well as disturbance of the species for which the areas are designated, insofar as these disturbances have significant consequences for the objectives of this Directive.

The EU Court of Justice has also determined that the impact assessment must contain complete, precise and final findings and conclusions about the impact of a project on a Natura 2000 area with regard to all the habitats and species for which the area has been designated. The impact assessment must therefore partly identify and locate all the habitats and species for which an area is protected, and partly the assessment must also include information about species and habitats outside the protected

location. Since it must be clear from the assessment why the protected habitats and species are not affected, in certain cases it may be sufficient to establish that only certain protected habitats and species in the part of the protected area that are affected by the project, are affected and that the other protected habitats and species on the site are not affected. However, this presupposes that there is sufficiently precise information about where protected species and nature types are located in the individual Natura 2000 areas, as well as the interaction with other species in and close to the Natura 2000 area.[76]

With regard to the geographical extent of the protection, the Court of Justice of the EU has determined that the habitat directive's requirements for significance and impact assessment also apply to a plan or project located outside the affected Natura 2000 area, when these can significantly affect species on the basis of designation. The same applies when the species are outside the Natura 2000 area.[77]

The Environmental and Food Complaints Board finds that, in the specific case, Horsens Municipality has had a sufficient basis to be able to assess whether the project will cause a significant impact on calcareous meadows, brook lampreys, vertigo geyeri whorl snails, narrow-mouthed whorl snails, Desmoulin's whorl snails and otters on the basis of designation for the nearby habitat area H236. The committee also finds that there is no basis for overriding the municipality's assessment that the project will not affect the designation basis for the Natura 2000 area.

#### Semi-natural dry grassland and scrubland facies on calcareous substrates

The Environment and Food Complaints Board has, in relation to semi-natural dry grassland and scrubland facies on calcareous substrates, emphasized on the basis of designation that the nearest area in the Natura 2000 area with grassland on calcareous substrates is approx. 300 m from the road's route, and that the grassland on calcareous substrates is thereby not directly physically affected by the project.

The Environmental and Food Complaints Board has also emphasized that specific calculations for nitrogen deposition have been made in the impact assessment, and that based on the modeled background load in the area and the calculated deposition at the time of the project's realization, it has been assessed that the deposition based on the excessive structural and species status does not pose a threat to the conservation status of the grassland.

#### Vertigo geyeri whorl snail, narrow-mouthed whorl snail and Desmoulin's whorl snail

The Environment and Food Complaints Board has emphasized, in relation to the vertigo geyeri whorl snail, the crooked water snail and the swamp water snail, that the three species are registered in association with spring water and sedge in the central and western part of the Natura 2000 area more than 900 m from the project area, and that there are no natural types have been registered which will be able to support the presence of the vertigo geyeri whorl snail or the narrow-mouthed whorl snail near the project area.

The Environment and Food Complaints Board has also emphasized that Horsens Municipality has stated during the appeal that the area with potential habitats for snails outside habitat area H236 lies approx. 240 m from the potential habitat of the Desmoulin's whorl snail within the habitat area. The areas between the potential habitat and the habitat within the Natura 2000 area consist partly of a road and partly of dry grassland, which does not constitute a suitable habitat for species of snails. In this connection, the board has also emphasized that snails do not migrate between habitats, as they are non-mobile species.



The Environmental and Food Complaints Board has, in relation to what was stated in the complaint regarding the finding of potentially suitable habitats for snails in the road route outside the habitat area, emphasized that the source source in question is isolated from the habitat area, and that a possible population will therefore not be covered of the possible populations of snails in the habitat area and therefore not be covered by habitat protection.

#### Brook lamprey

The Environment and Food Complaints Board has emphasized, in relation to the lamprey, that the project in the construction phase is not assessed to be able to affect a possible population of lamprey in the Bygholm Å watercourse system, as no physical changes are made to the watercourse. It also appears that the stretch of watercourse around the project area can be a breeding ground and migration site for the species, but that the stretch of watercourse at the project area is not assessed to constitute a likely breeding area, as the bottom is mainly sandy and as there is considerable sand migration.

The Environmental and Food Complaints Board has also, in relation to the impact on the brook lamprey in connection with the temporary groundwater lowering in the construction phase, emphasized that the groundwater is reinjected and thus not discharged into the stream, and that the groundwater lowering therefore does not cause changes in the stream, including for the brook lamprey.

The Environmental and Food Complaints Board has also emphasized that in the impact assessment, calculations have been made of the discharge of rainwater during the operational phase, and that on this basis it has been assessed that there will be no impact on the river lamp in relation to fluctuations in oxygen concentration, salt impact and environmentally harmful substances.

#### Otter

In relation to otters, the Environmental and Food Complaints Board has emphasized the information that the areas immediately east of the Natura 2000 area are not significant as a breeding area for otters, and that during the construction phase there will be good opportunities for hiding both upstream and downstream of the project area .

In relation to the complaint that the temporary bridge during the construction phase over Hatting Bæk will disturb the otter's movement possibilities, the board has emphasized that any impact during the construction phase will be of a temporary nature and that the construction activities will take place within normal working hours during the day and not during the night hours, when otters actively forage in the streams.

The Environmental and Food Complaints Board has also emphasized that the road construction during the operational phase does not cause a barrier effect for otters, as the construction ensures passage conditions for otters between the Natura 2000 area and any resting areas downstream of the project area in accordance with the management plan for otters.

#### Groundwater lowering

In relation to the impact from groundwater lowering, the Environmental and Food Complaints Board has emphasized that it appears from the model calculation for the distribution of the lowering funnels during groundwater lowering that the lowering funnels for the four middle support points do not reach into habitat area H236, and that on that basis it has been assessed, that the nature types and species dependent on the stream will not be negatively affected by the lowering of the groundwater.

In relation to a possible impact from the groundwater lowering in cumulation with other projects, the Environment and Food Complaints Board has emphasized the calculation of the lowering funnels and the distance to the business area.

The Environmental and Food Complaints Board further notes that, in the board's opinion, it cannot be required that an environmental impact report relate to the cumulative effect with all other projects in the area. The assessment of the cumulative effect must only relate to the other projects in the area that must be considered relevant in relation to a significant increase in the environmental impacts compared to the desired project.

### **3.2.5 Ad 4) Provision of the impact assessment**

This appears from section 6, subsection of the habitat order. 1 and par. 2, that if the authority assesses that a project may significantly affect a Natura 2000 area, a detailed impact assessment of the project's effects on the Natura 2000 area must be carried out, taking into account the conservation objective for the area in question.

It also appears from section 6, subsection of the executive order. 4, that assessments according to subsection 1-3 must appear in the decision.

It is therefore assumed in the regulations that an assessment must first be made of whether the project can significantly affect a habitat area (significance assessment). If this is the case, an assessment of the impact on the area must be carried out (consequence assessment), and this assessment must be included in the decision.

It appears from the habitat guidance that it is the authority's responsibility that a case is decided on a sufficiently informed basis, and that the authority must thus ensure that sufficient information is provided to determine whether a plan or project damages a Natura 2000 area's integrity. According to the practice of the European Court of Justice, it is the authority that is obliged to ensure that an assessment has been made on a sufficiently informed basis.[78] It is further stated in the habitat guidance that if an authority does not have access to the information necessary for the processing of a specific case, the applicant may be ordered to obtain information relevant to processing the application. Reference is made to the fact that, among other things, there is authority in the Environmental Assessment Act § 24, subsection 1, to order the applicant to provide additional information.

The Environmental and Food Complaints Board finds that Horsens Municipality's assessment of the project's impacts on the nearby Natura 2000 area meets the requirements for an impact assessment according to the habitat executive order, and that, based on the information in the case, there is no basis for establishing that the impact assessment was not prepared impartially .

The Environment and Food Complaints Board has emphasized that independent comment rounds have been carried out in Horsens Municipality on the content of the habitat impact assessment in question with the aim of ensuring that the habitat directive's requirements for an appropriate assessment have been met before the municipality announced the relevant permits for the project. The Environment and Food Complaints Board has also emphasized that it appears from the § 25 permit that Horsens Municipality, Nature and Environment, has received assistance from an external consulting company to review the developer's assessments of the impact on the Natura 2000 area and Annex IV- species.

The Environmental and Food Complaints Board has also placed emphasis on the fact that no information has emerged with the complaints that provides a basis for assuming that the content of the impact assessment or the assessments made were insufficient or incorrect.

### **3.2.6 Ad 5) Impact on Annex IV species (bats, otters, newts and toads)**

This follows from Section 20, subsection of the Environmental Assessment Act. 4, no. 2, that the environmental impact report must demonstrate, describe and assess the project's significant direct and indirect effects on e.g. the biological diversity with particular emphasis on species and habitats protected under the Habitats Directive.

The authority must make sure, when issuing the § 25 permit itself, that the project will not damage or destroy breeding or roosting areas in the natural range of Annex IV species, cf. § 10 of the habitat order.

The EU Commission has published guidance on the protection of Annex IV species.[79] The provision in the Habitats Directive, Article 12, subsection 1, letter d, according to the guidance, must be understood as an objective that the ecological function of breeding and resting areas is preserved.

Breeding areas are defined in the guidance as the areas to be used for mating and birth, and also cover the area near the nest or birth site if the offspring are dependent on such areas. Resting areas are defined as the areas used by an animal or a group of animals when they are not active. Roosting areas also include structures that animals establish as roosting areas, e.g. nests, burrows or hiding places.[80]

Likewise, resting areas are defined in the Danish Environmental Protection Agency's habitat guidance as areas that are important to ensure the survival of individual animals or populations when they are at rest. [81] Resting areas are thus areas where the species stays during or outside the breeding season to rest, sleep or hibernate (hibernation) and in hiding in larger concentrations (flocks) and to fulfill important life functions (sunbathing or the like). Breeding and resting areas have in common that they are used regularly by the species.[82]

A breeding or roosting area in the sense of the Habitats Directive and the Habitats Order means a collection ("network") of localities where a population of a species breeds or roosts. The importance of the individual locations in the network may depend on the population's density and spread potential. When assessing whether a breeding or roosting area is damaged or destroyed, it is decisive whether the ecological functionality of the network of sites can be maintained at at least the same level as before.[83]

It is the responsibility of the competent authority, in accordance with the general administrative law investigation principle, to ensure that sufficient information is provided to be able to assess whether breeding or roosting areas for Annex IV species are damaged or destroyed. No clear criteria can be established for the extent and nature of the information that is required. It depends on the specific situation. There can e.g. in the case of older information, there may be a need to assess whether the information needs to be updated to determine whether the species actually continues to occur in the affected areas. Precise criteria cannot be set for when information is too old, as the species are very different, just as the natural development (e.g. overgrowth) of an area can have an impact on whether a species is present. There may be a need for further investigations if decisions are to be made in parts of the country where the species are known to occur and where there is a likelihood that possible breeding or roosting areas may be affected. Any investigations must be carried out in a targeted

manner using suitable methods, and it must be ensured that the investigations take place at the times of the year when the species in question can be expected to utilize a given area. The surveys must therefore take place at times when there will be a high probability of detecting the species if it occurs in the area.[84]

In relation to activities that may affect breeding or resting areas, according to the EU Commission's guidance, a distinction must be made between activities that can be accommodated within Article 12 of the Habitats Directive and activities that require a derogation pursuant to Article 16 of the Directive. Where a derogation under Article 16, compensatory measures will aim to compensate for specific negative effects on a species and thus imply that there is or has been damage or destruction of breeding or roosting areas. This is not the case for measures to ensure ecological functionality, which ensure that the ecological functionality of the breeding or roosting area remains completely intact (quantitatively and qualitatively) when the activity has taken place (remedial measures).[85]

The European Court of Justice has stated in the Grand Hamster II judgment, with reference to the EU Commission's guidance, that according to the habitat directive's article 12, paragraph 1 letter d, in particular, it must be ensured that the breeding and roosting areas of a protected animal species are not damaged or destroyed by human activities, so that these areas continue to offer the conditions necessary for this animal species to roost or breed within this area success. In such an assessment, account must be taken of the ecological requirements that apply to each of the affected animal species to which the individual in question belongs, as well as to the situation at individual level for this animal species that uses the breeding or resting area in question.[86]

The Environmental and Food Complaints Board is of the opinion that the assessment of Annex IV species at the time of the decision does not necessarily have to include a final assessment of whether a given location actually serves as a breeding or resting area for Annex IV species, if, on the basis of a precautionary principle for the time being, it is assumed that this is the case.

If, on the basis of a precautionary principle, a given locality can be assumed to serve as a breeding or roosting area for an Annex IV species, it must then be assessed how the project will affect the locality immediately. If the immediate impact is harmful, it must be assessed whether the site's ongoing ecological functionality as a breeding or resting area can be maintained with the help of mitigation measures. If the preventive measures cannot be expected with a high degree of certainty to work to a sufficient extent, the project must be adapted so that the immediate damage to the site is avoided. It appears from the Danish Environmental Protection Agency's habitat guidance that mitigation measures are suitable for species that are quick to colonize new locations within a network of locations that form a combined area for a stock, and where new suitable habitats can be created over a shorter period of time.

It also appears from the Danish Environmental Protection Agency's habitat guidelines that, where applicable, there must be a high degree of certainty that mitigation measures will work to a sufficient extent. The greater the uncertainty in the knowledge of the specific occurrence of the species in an area, the greater the need for preventive measures in the form of securing possible new breeding or roosting areas. Where mitigation measures are required, according to the Danish Environmental Protection Agency's habitat guidelines, clear terms must be laid down in the specific cases. The term must be drafted in such a way that it can be enforced.[87]

#### **Bat**

The Environmental and Food Complaints Board initially states that, in the investigations carried out in connection with the preparation of the habitat impact assessment, a breeding and roosting area for

pipistrelle and pygmy bats, and possibly also for brown and troll bats, has been found approx. 300 m west of the project area. The board notes that, in addition, it has not been mapped in detail whether there are breeding or resting areas in the wooded area approx. 80 m east of the connecting road, and that possible breeding and roosting areas have been treated as if they were actually breeding and roosting areas.

It appears from the environmental impact report that, in connection with the establishment of the landscape bridge, sheet pile walls for the construction pits around the foundations for the bridge piers must be framed. The noise from the framing of sheet piles will usually be experienced as particularly annoying, as it is impulse noise. Noise calculations have been made in relation to neighboring homes, and on that basis a simple noise calculation of the noise propagation has been made, which shows that noise levels of over 40 dB(A) can be expected more than 300-400 m from the impact site. It appears that the framing work is estimated to last 14 days, and that the work is only carried out during daytime hours on weekdays. It has also been assessed that there is no need for significant mitigation measures in connection with construction noise.

The Environmental and Food Complaints Board finds that Horsens Municipality did not have a sufficient basis for assessing that the project will not affect the ecological functionality of breeding and roosting areas for the nine registered bat species in the area.

The Environmental and Food Complaints Board has emphasized that no assessment has been made of whether the noise during the construction phase from the framing of sheet piles could affect breeding and roosting areas for bats. In this connection, the board notes that in the case Horsens Municipality has chosen to treat the areas east of the connecting road as if they were actually breeding and resting areas, but that no assessment has been made of whether the noise could affect the nearby breeding and resting areas functionality, especially during the breeding season. In addition to this, the committee notes that it appears that noise from hitting is impulse noise, which can be more annoying than other noise. The board refers to the fact that it appears from the Management Plan for bats on securing suitable habitats that disturbances, such as severe noise impact that could harm the local population of bats must be avoided.[88]

A majority of the Environment and Food Complaints Board also finds that Horsens Municipality has had sufficient grounds to assess that the other parts of the project will not affect the ecological functionality of breeding and roosting areas for the nine registered bat species in the area.

In the assessment, the majority emphasized that, in accordance with the guidelines in the Road Directorate's guidance on bats and major roads, bat surveys were carried out during the stated periods, and that both daytime inspections, surveys with automatic detectors and reviews of the area with handheld bat detector. On this basis, it has been determined where in the area there are breeding and roosting areas for bats, or potential breeding and roosting areas, just as significant guide lines and foraging areas of importance for the ecological functionality of the breeding and roosting areas have been determined.

The majority has also emphasized that, in connection with the decision, it has been assessed that most of the registered bat species will use the primary control line under the landscape bridge, and that the smaller structure-bound species will fly at such a great distance from the control plantings and screens that they planned heights of bridge guarding and guide planting will reduce collision risk for bats. In addition, the majority has emphasized that the road's crossing of Bygholm Ådal and Bygholm Å, which are respectively assessed to be an important foraging area and an important control line for bats in the area, be built as a landscape bridge of the type A1L (wet) in accordance with the Road Directorate's road rules about fauna passages, and that the landscape bridge under each of the three

middle spans has a clearance of at least 7 m and a width of approx. 30 m, which is in accordance with the minimum dimensions specified in the guide for the selected type of landscape bridge. In this connection, the majority has emphasized that landscape bridges of the type A1L (wet) in the Norwegian Road Directorate's road rules on fauna passages are indicated as a suitable prevention measure for species of bats, including water bats, pond bats, pygmy bats, pipistrelle bats, troll bats and long-eared bats, and that high landscape bridges with large clearance under the bridge, which in this specific case are also suitable for southern bats. Furthermore, the majority has emphasized that the risk of collision at road crossings for brown bats and long-eared bats is considered low according to the Road Directorate's road rules.

In addition, the majority has emphasized that screens are set up on the sides of the bridge and guide planting is established in accordance with the Roads Directorate's road rule on fauna passages in order to minimize the risk of collision for bats that forage at the height of the bridge above the river valley, and lead low-flying bat species on the edge of the river valley down in the river valley, where there is a passage under the bridge. In the beginning, the guide planting is also supplemented in accordance with the Road Directorate's road rule on fauna passages with a fine-mesh wire fence with a minimum height of 2.5 m, so that bats cannot pass through the fence.

Overall, in relation to the preventive measures described, the majority has emphasized that conditions have been laid down in the section 25 permit in accordance with this.

In relation to the disagreement about the distance to the potential breeding and roosting area for bats east of the connecting road, the majority has emphasized that the actual distance does not deviate significantly from the previously stated distance.

Finally, the majority has emphasized that any impact from light and visual disturbances from traffic during the operational phase is limited by the shielding on the sides of the bridge, and that no road lighting is established on the stretch, just as the planting along the road and the bridge shielding on the road bridge itself will reduce a potential impact of bats in the operating phase significantly. Particularly in relation to a potential noise impact, the majority has emphasized that it is a country road and that the environmental impact report states that the noise in the area will not be significantly increased.

The minority (Pelle Andersen-Harrild) finds that, in relation to noise during the operational phase, Horsens Municipality has not had a sufficient basis for assessing that the project will not affect the ecological functionality of breeding and roosting areas for the nine registered bat species in the area.

The minority has emphasized that Horsens Municipality has not taken a position on the habitat requirements of the individual bat species or differentiated between the species' auditory sensitivity, and that there is not a sufficient basis to conclude that there is no impact during the operational phase.

#### Other Annex IV species

The Environmental and Food Complaints Board finds that Horsens Municipality has had a sufficient basis for assessing that the project will not affect the ecological functionality of breeding and resting areas for large water salamanders, pointed frogs and otters. The committee also finds no basis for overriding the municipality's professional assessment that breeding and resting areas for the species will not be affected by the plan.

In relation to the pointed frog and large newt, the Environmental and Food Complaints Board has emphasized that, in connection with the environmental impact report, a search for tadpoles in suitable

habitats has been carried out in accordance with the technical instructions for monitoring amphibians and included existing data on the occurrence of the species in the area.

The Environment and Food Complaints Board has also emphasized that an amphibian fence be established along both sides of the road on the north side of Bygholm Å, and that it has been assessed that the planned establishment of the prevention measure will not impair the ecological functionality of breeding and resting areas for large newt and pointed frog. In this connection, the committee has emphasized that any individuals of the species will be led under the road bridge.

In relation to otters, the Environmental and Food Complaints Board initially notes that the section 25 permit, the environmental impact report or the habitat impact assessment do not immediately appear to have assessed whether the plan will affect the ecological functionality of breeding and resting areas for otters. However, the board understands the assessment in the habitat impact assessment to mean that, in addition to an assessment of otters on the basis of designation for habitat area H236, the assessment also contains an assessment of the project's impact on the ecological functionality of breeding and resting areas for otters, as the population of otters that reside within and outside the Natura 2000 area, must be considered to coincide.

In the assessment in relation to otters, the Environmental and Food Complaints Board has emphasized that the immediate area around the road route is grazed and open without good opportunities for hiding, and that on this basis it has been assessed that the areas immediately east of the Natura 2000 area are unsuitable as breeding grounds for otters. The committee has also emphasized that the construction activities are temporary and that the activities will take place within normal working hours during the day, and that there are good opportunities for the species to seek refuge both upstream and downstream where the construction works take place.

The Environment and Food Complaints Board has also emphasized that the landscape bridge in the operational phase will ensure good passage conditions, which ensures that otters can pass under the road along the stream in accordance with the management plan for otters.

### **3.2.7 Ad 6) Other nature**

According to Annex 7 of the Environmental Assessment Act, cf. § 20 subsection 1, an environmental impact report must contain a description of the project's expected significant impacts on the environment of those in § 20, subsection 4, mentioned factors, including the biological diversity that can be expected to be significantly affected by the project.

The Environment and Food Complaints Board finds no basis for overriding Horsens Municipality's assessment pursuant to section 24, subsection of the Environmental Assessment Act. 1, according to which the environmental impact report fulfills the requirements of the law as far as description of the project's expected significant impact on nature is concerned, including butt-nosed frog, cuckoo-wort, butt-leaved hair star and barn owl.

The Environmental and Food Complaints Board initially notes that there can be no requirement that an environmental impact report must contain an independent assessment of all species that can potentially be found in an area. The committee points out that it is the project's expected significant impacts on the environment that must be described in an environmental impact report.

The Environmental and Food Complaints Board has emphasized that it is described in the environmental impact report that dead seed was found in the area, just as it is described in the environmental impact report that there is an occurrence of cuckoo grass on a limestone meadow west

of the project area. In this connection, the board has emphasized that, in connection with the project, it has been assessed that there will be no impact from the lime excess, cf. section 3.2.4.

In the opinion of the Environment and Food Complaints Board, it was not necessary in the specific case to carry out a closer assessment of the short-leaved hair star or barn owl, as the project cannot be assumed to have a significant impact on the population of the species in the area. In relation to the butt-leaved hair star, the board has attached importance to Horsens Municipality's information that the extirpated alder trees will remain in the area and can continue to form a habitat for the but-leaf hair star. In relation to barn owls, the board has emphasized that no buildings will be demolished or trees felled in connection with the project, which are suitable for nesting barn owls.

#### 3.2.8 Ad 7) Alternatives

This appears from section 20, subsection of the Environmental Assessment Act. 2, no. 4, that the environmental impact report i.a. must contain a description of the reasonable alternatives that the developer has investigated, which are relevant to the project and its special characteristics, and an indication of the main reasons for the chosen solution, taking into account the project's effects on the environment. The environmental impact report must according to appendix 7, point 3, cf. section 20, subsection 1, also contain a description of the relevant aspects of the current environmental status (the reference scenario or the 0 alternative) and a brief description of its likely development if the project is not carried out.

According to the practice of the Environment and Food Complaints Board, alternatives, including those proposed during the previous public debate, must be dealt with more or less thoroughly. It is sufficient that the overview of alternatives gives the public and politicians an opportunity to assess the desired project in relation to other realistic alternatives. The decisive factor is whether the necessary basis for a decision can be said to have been provided. Thus, it cannot be required that an in-depth analysis of (all) other alternatives be carried out.[89]

The Environment and Food Complaints Board finds no basis for overriding Horsens Municipality's assessment pursuant to section 24, subsection of the Environmental Assessment Act. 1, according to which the environmental impact report fulfills the requirements of the law as far as the description of the investigated reasonable alternatives is concerned.

The Environment and Food Complaints Board has emphasized that the environmental impact report contains a description of the reference scenario and the likely development of the area if the project is not carried out.

The Environment and Food Complaints Board has also emphasized that ten alternative alignments are explained in the environmental impact report, including citizen proposals received in the debate phase, and that there is an initial assessment of the traffic effect of the proposals, and an overall screening of the individual proposals impact on natural conditions, the landscape and cultural conditions.

The Environment and Food Complaints Board notes that the board cannot take a decision on whether a decision, including the choice between different alternatives, is appropriate, just as the board cannot take a decision on whether, in connection with the decision to apply for the connection road at the specific location irrelevant considerations are included.

The environmental assessment rules do not in themselves determine limits on what authorities can decide for political, economic or other reasons, but only set requirements for the basis for the decisions and the procedures for this.



### **3.3 The Environment and Food Complaints Board's other comments**

#### **3.3.1 The Water Framework Directive**

The Environmental and Food Complaints Board notes that Horsens Municipality should pay attention to a renewed treatment to ensure that the project does not result in an additional supply of copper to the watercourse. In this connection, the board also notes how there will not be a total additional supply of copper to the watercourse as a result of the project, if it is documented that the supply of copper through road water is less than the reduction in the supply of copper to the watercourse, which takes place through other sources, including e.g. from agricultural land.

If this is not possible, the Environment and Food Complaints Board draws attention to the fact that the project then only can be permitted if the derogation conditions in the Water Framework Directive are met. 4 pcs. 7. The exemption provision has been implemented in the environmental target order, where it appears from section 4, subsection 3, that the minister, at the request of an authority, has the opportunity, after a concrete assessment, to decide that the authority under the circumstances and conditions mentioned in subsection 1 and 2, may deviate from the established environmental targets, cf. section 8 of the executive order.

The Environmental and Food Complaints Board draws attention to the fact that the board has not herewith taken a decision on the conditions for deviating according to section 4, subsection of the Environmental Targets Executive Order. 3, is fulfilled.

The Environmental and Food Complaints Board also draws attention to the fact that in 8 of Horsens Municipality's executive order on requirements for the discharge of certain pollutants into streams, lakes, transitional waters, coastal waters and sea areas, it is possible to designate a mixing zone around discharge points where the environmental quality requirements within this zone can be exceeded.[90] The board further notes that it is a prerequisite for determining a mixing zone that the discharge of pollutants has previously been reduced as much as possible through the use of BAT, cf. section 5, subsection of the executive order. 1, and that the environmental quality requirements are not exceeded outside the mixing zone. The latter must be ensured by calculation according to § 7, subsection 1, cf. subsection 2.

#### **3.3.2 Annex IV species**

##### **Bat**

In the event of a renewed treatment, Horsens Municipality should carry out an assessment of whether noise from the project in the construction phase in connection with the ramming of sheet piles can affect Annex IV species of bats, particularly during breeding periods. The Environment and Food Complaints Board notes in this connection that the breeding periods of the various species are described in the management plan for bats. If, in a renewed treatment, it is assessed that the impulse noise may have a negative impact on breeding and roosting areas for bats, the municipality may consider setting conditions in the section 25 permit regarding when the framing of sheet piles may take place.

#### **3.4 Fee**

As a result of the decision, the appeal fee paid will be refunded, cf. section 2, subsection of the fee order. 2, No. 1.

### 3.5 Decision of the Environmental and Food Complaints Board

The Environment and Food Complaints Board revokes the decision of 14 January 2022 on the Section 25 permit for a new connecting road from the commercial area Vega to Horsens C and remands the case for renewed consideration.

- [1] Legislative Decree No. 4 of 3 January 2023 on environmental assessment of plans and programs and of specific projects (EIA).
- [2] Act No. 1715 of 27 December 2016 on the Environmental and Food Complaints Board, as amended by Act No. 900 of 21 June 2022 on amendments to the Museums Act, Act on the Environmental and Food Complaints Board and various other laws.
- [3] Executive order no. 132 of 30 January 2017 on fees for lodging complaints before the Environmental and Food Complaints Board, etc.
- [4] Case no. 22/02909, 22/02917, 22/02922, 22/06815 and 22/06836.
- [5] Case no. 22/02446, 22/02414 and 22/02410.
- [6] Natura 2000 baseline analysis 2022-2027, Bygholm Ådal.
- [7] <https://miljoegis.mim.dk/cbkort?&profile=vandrammedirektiv2-bek-2019>.
- [8] <https://miljoegis.mim.dk/spatialmap?profile=vandrammedirektiv3hoering2021>.
- [9] In the Environmental GIS for consultation of the water area plans 2021-2027, environmentally hazardous pollutants are referred to as nationally specific substances.
- [10] <https://vandplandata.dk/vp3hoering2021/vandomraade/vandloeb/DKRIVER6647>.
- [11] Question no. 21, <https://mst.dk/natur-vand/vand-i-hverdagen/spildevand/hvad-er-spidevand-og-hvorfor-reenser-vi-det/spoergsmaal-og-svar-about-environmental-quality-requirements/#G>.
- [12] <https://mst.dk/media/121329/52-baggrunds niveau-for-barium-zinc-kobber-nikkel-og-vanadium-i-fersk-og-havvand.pdf>.
- [13] Conservation status of habitat types and species – 2019. Habitats Directive Article 17 reporting. Aarhus University, DCE – National Center for Environment and Energy, 52 pp. Scientific report no. 340.
- [14] The ecology of the individual organism.
- [15] LC50 value, lethal concentration, expression of a chemical substance's toxicity.
- [16] Road Directorate, Road rule: Fauna passages – a guide: construction and planning, August 2020.
- [17] Amphibian Monitoring, DCE, TA No: A17, Version 2, 2018.
- [18] Danish Environmental Protection Agency, 2007. Noise from roads. Guidance from the Danish Environmental Protection Agency no. 4.
- [19] Vejregelgruppen Drainage, 2020. HANDBOOK - Drainage constructions – Environmental conditions and Authority application – Construction and Planning. Rules of the road. December 2020.
- [20] Vollertsen, J., Hvitved-Jacobsen, T. Nielsen, A.H., 2012. Fact sheet on dimensioning of wet rainwater basins. Aalborg University, August 2012.
- [21] Jensen, J. & Bak, J.L. 2018. Zinc and copper in the aquatic environment. Sources, occurrence and environmental significance. Aarhus University, DCE – National Center for Environment and Energy.
- [22] Cf. Vollertsen, J., Hvitved-Jacobsen, T. Nielsen, A.H., 2012, Fact sheet on dimensioning of wet rainwater basins. Aalborg University, August 2012, and Gregersen, I.B., Rasmussen, S.H., Madsen, S. & Arnbjerg-Nielsen, K., Updating the spreadsheet for Skrift 30 (October 2016), Regnrække Version 4.1, SVK, <https://spildevandskomiteen.dk/skrifters/>.
- [23] Executive order no. 449 of 11 April 2019 on action programs for watershed districts.
- [24] The Environmental Protection Agency's guidance for the executive order on action programs for watershed districts, July 2017, <https://mst.dk/media/133301/bilag-1-vejledning-4-juli-2017.pdf>.
- [25] Danish Environmental Protection Agency, 2021, draft questions and answers on discharge of certain pollutants into the aquatic environment, question 43.

- [26] The judgment of the European Court of Justice of 7 November 2018 in case C-461/17, *Holohan*, and the judgment of the European Court of Justice of 16 July 2020 in case C-411/19, *Italia Onlus*.
- [27] Judgment of the European Court of Justice of 4 March 2021 in joint cases C-473/19 and C-474/19, *Skydda Skogen*.
- [28] Executive order no. 1376 of 21 June 2021 on environmental assessment of plans and programs and of concrete projects.
- [29] Management plan for otter (*lutra lutra*) in Denmark, Forest and Nature Agency, 1996.
- [30] The Habitat Guidelines, guidance no. 9925 of 11 November 2020 for executive order no. 1595 of 6 December 2018 on the designation and administration of international nature protection areas and the protection of certain species.
- [31] Cf. the comments to § 11 in proposal L44 to the Environmental and Food Complaints Board Act (FT 2016-17).
- [32] Council Directive 92/43/EEC of 21 May 1992 on the conservation of nature and wild animals and plants.
- [33] Directive 2009/147/EC of the European Parliament and of the Council of 30 October 2009 on the protection of wild birds.
- [34] Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community water policy measures.
- [35] Judgment of the European Court of Justice of 28 May 2020 in case C-535/18, *Land Nordrhein-Westfalen*, paragraph 90.
- [36] Legislative Decree No. 126 of 26 January 2017 on water planning.
- [37] Legislative Decree no. 119 of 26 January 2017 on environmental targets etc. for international nature conservation areas.
- [38] Executive order no. 448 of 11 April 2019 on environmental targets for surface water areas and groundwater bodies.
- [39] Executive order no. 449 of 11 April 2019 on action programs for watershed districts.
- [40] Guidance draft for the Act on environmental assessment of plans and programs and of concrete projects (EIA) Concrete projects, Danish Environmental Protection Agency 2022, section 3.
- [41] Guideline no. 9627 of 6 July 2017 on executive order on action programs for water area districts, section 8.1.2.
- [42] Council Directive 92/43/EEC of 21 May 1992 on the conservation of nature and wild animals and plants.
- [43] Executive Order No. 2091 of 12 November 2021 on the designation and administration of international nature conservation areas and the protection of certain species.
- [44] See recital no. 25 of the EIA Directive.
- [45] See the comments to section 1, no. 28 of the bill, regarding the amendment of section 40 of the Environmental Assessment Act, 2020/1 LSF 56 of 8 October 2020.
- [46] Judgment of the European Court of Justice of 1 July 2015 in case C-461/13, *Weser*, paragraph 51.
- [47] Judgment of the European Court of Justice of 1 July 2015 in case C-461/13, *Weser*, paragraph 46.
- [48] See the judgment of the European Court of Justice of 1 July 2015, case C-461/13, *Weser*, paragraphs 50 and 69.
- [49] Judgment of the European Court of Justice of 5 May 2022, case C-525/20, *Association France Nature Environnement*, paragraphs 42 and 45.
- [50] Judgment of the European Court of Justice of 28 May 2020, case C-535/18, *Land Nordrhein-Westfalen*, paragraphs 94-96.
- [51] Judgment of the European Court of Justice of 28 May 2020, case C-535/18, *Land Nordrhein-Westfalen*, paragraphs 97-98.
- [52] Judgment of the European Court of Justice of 28 May 2020, case C-535/18, *Land Nordrhein-Westfalen*, paragraphs 100, 101 and 108.

- [53] Directive 2006/118 of 12 December 2006 stipulates according to art. 1 specific measures to prevent and control groundwater pollution, cf. art. 17, subsection 1 and 2 of the water framework directive. The quality requirements for groundwater are laid down in Annex 1 of the directive, cf. art. 3 pieces. 1.
- [54] Judgment of the European Court of Justice of 28 May 2020, case C-535/18, Land Nordrhein-Westfalen, paragraph 110.
- [55] Judgment of the European Court of Justice of 28 May 2020, case C-535/18, Land Nordrhein-Westfalen, paragraph 118.
- [56] Legislative Decree No. 126 of 26 January 2017 on the Water Planning Act.
- [57] Executive Order No. 1625 of 19 December 2017 on the determination of environmental targets for streams, lakes, transition waters, coastal waters and groundwater.
- [58] Elsewhere referred to as Part B, Tables 3 and 4.
- [59] This parameter is the environmental quality requirement expressed as an annual average (general quality requirement).
- [60] This parameter is the environmental quality requirement expressed as the highest permitted concentration (maximum concentration).
- [61] Section 4.6, condition assessment, environmentally hazardous pollutants, <https://mst.dk/media/122170/revideret-jylland-fyn-d-28062016.pdf>.
- [62] Section 4.3, measures for environmentally hazardous pollutants, purpose of the measures and general conditions surrounding implementation, <https://mst.dk/media/133301/bilag-1-vejledning-4-juli-2017.pdf>.
- [63] Section 8.3.2, The environmental target has not been met, environmentally hazardous pollutants, <https://mst.dk/media/133301/bilag-1-vejledning-4-juli-2017.pdf>.
- [64] See especially section 8.3.2 in Draft guidance for executive order on action programs for watershed districts, December 2021, <https://mim.dk/media/225714/udkast-vejledning-til-indsatsprogram-vp3.pdf>.
- [65] Question no. 43 on how requirement values for a given substance in an outfall are determined when environmental quality requirements for the substance have already been exceeded in the aquatic environment, <https://mst.dk/natur-vand/vand-i-hverdagen/spildevand/what-is-wastewater-and-why-do-we-purify-it/questions-and-answers-about-environmental-quality-requirements/#G>.
- [66] Judgment of the European Court of Justice of 28 May 2020, case C-535/18, Land Nordrhein-Westfalen, paragraphs 94-96.
- [67] Judgment of the European Court of Justice of 28 May 2020, case C-535/18, Land Nordrhein-Westfalen, e.g. items 92 and 101.
- [68] Judgment of the European Court of Justice of 28 May 2020, case C-535/18, Land Nordrhein-Westfalen, paragraph 100.
- [69] Judgment of the European Court of Justice of 28 May 2020, case C-535/18, Land Nordrhein-Westfalen, paragraphs 101 and 118, and judgment of the European Court of Justice of 5 May 2022, case C-525/20, Association France Nature Environnement, paragraphs 42 and 45.
- [70] Judgment of the European Court of Justice of 28 May 2020, case C-535/18, Land Nordrhein-Westfalen, paragraph 110.
- [71] Judgment of the European Court of Justice of 28 May 2020, case C-535/18, Land Nordrhein-Westfalen, paragraph 110.
- [72] See case C-127/02 (Hjerte-Muslingejudgment), paragraph 61, and paragraph 4 of the judgment.
- [73] See e.g. case C-404/09, Commission v Spain, paragraph 99.
- [74] See the judgment of the European Court of Justice of 11 April 2013 in case C-258/11, Sweetman, paragraph 48.
- [75] The EU Commission's announcement "Management of Natura 2000 sites - The provisions of Article 6 of the Habitats Directive 92/43/EEC", 2018, section 3.6.4.

[76] See the judgment of the European Court of Justice of 7 November 2018 in case C-461/17 (Holohan), paragraphs 37-40.

[77] See e.g. Judgment of the European Court of Justice of 26 April 2017 in case C-142/16 (Moorburg), paragraph 29.

[78] Judgment of the European Court of Justice of 7 November 2018 in case C-461/17 (Holohan) paragraphs 41-47.

[79] Guidance on the strict protection of animal species of Community importance under the Habitats Directive, Commission Communication of 12 October 2021, C(2021) 7301 (hereafter EU Commission Guidance).

[80] The EU Commission's guidance, section 2.52-2.57.

[81] Guidance no. 48 to executive order no. 1595 of 6 December 2018 on the designation and administration of international nature conservation areas and the protection of certain species, Danish Environmental Protection Agency, December 2020 (hereinafter the Danish Environmental Protection Agency's habitat guidance).

[82] The Environmental Protection Agency's habitat guide, section 9.4.1.

[83] The Environmental Protection Agency's habitat guide, section 9.7.1.4 and the EU Commission's guidance point 2.52, according to which the habitat directive's article 12, subsection 1, letter d, should be understood as a goal of maintaining the ecological function of breeding and resting areas.

[84] Cf. throughout the Environmental Protection Agency's habitat guidance, section 9.6.4-9.6.6.

[85] The EU Commission's guidance, section 2.73.

[86] Judgment of the European Court of Justice of 28 October 2021, 2nd section, case C-357/20, Magistrat der Stadt Wien (Grand hamster - II), paragraph 52.

[87] The Danish Environmental Protection Agency's guidance for executive order no. 1595 of 6 December 2018 on the designation and administration of international nature protection areas and the protection of certain species.

[88] Management plan for bats. Protection and management of the 17 Danish bat species and their habitats, The Norwegian Nature Agency, 2013, p. 37.

[89] Cf. guidance on EIA in the planning act (2009), p. 57, on the practice of the former Nature Complaints Board.

[90] Executive Order No. 1433 of 21 November 2017 on requirements for the discharge of certain pollutants into streams, lakes, transitional waters, coastal waters and sea areas.

Case:

22/02461,

Date:

23 February 2023.

Subjects:

Environmental assessment of specific projects

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The Environment and Food Complaints Board • Nævnenes Hus • Toldboden 2 • 8800 Viborg • Tel. no.: 72 40 56 00 • CVR: 37795526 • [mfkn@naevneneshus.dk](mailto:mfkn@naevneneshus.dk)

Availability Statement

**Til:** claudia.Olazabal@ec.europa.eu (claudia.Olazabal@ec.europa.eu), [REDACTED]  
**Cc:** Rikke Slot Benyahia (rislb@mim.dk), Cecilie Spanner Rydeng (cespa@mim.dk), Paolo Perotti (paope@mim.dk)  
**Fra:** Kirsten Vielwerth (kirst@mim.dk)  
**Titel:** Follow-up on the DK deterioration questions  
**Sendt:** 29-05-2023 12:21  
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Dear Claudia, dear [REDACTED]

I was wondering if you have had time to consider the questions we sent 16 May on deterioration under the Water Framework Directive?

Would it be possible for you to give an indication of when we may expect you to answer them?

I am sorry to put pressure on you for this, as I am sure you are already very busy - but DG ENV/Commissions interpretation and understanding of the concept of deterioration is important and will be taken into account by the Government in the further deliberations and dealings with the 22/02461-ruling by the Environmental and Food Board of Appeal. The next very important step - looking into the economic aspects and consequences - is planned for 5 June.

If there is anything we can do - if you would want any kind of clarification or have questions, please do not hesitate to contact us.

Kind regards, Kirsten

**Kirsten Vielwerth**

Water and Climate Adaptation | Department of the Ministry of Environment  
+45 41 28 16 76 | kirst@mim.dk >

**Ministry of the Environment**

Vand og Klimatilpasning | Miljøministeriets Departementet | Vester Voldgade 123 | DK 1552 København V | Tlf. +45 38 142 142 | mim@mim.dk | www.mim.dk



## Aktdetaljer

**Akttitel: Questions on deterioration**

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[2] Translation of Environmental and Food Board of Appeal 22-02461 w ad Astra.docx (MEDTAGES IKKE)  
[3] Aktdokument.html (MEDTAGES IKKE)

Den 20. februar 2024



Miljøministeriet

## Aktdetaljer

**Akttitel: DK questions on deterioration in the WFD**  
**Aktnummer: 8**

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[2] Translation of Environmental and Food Board of Appeal 22-02461 w ad Astra.docx  
[3] Aktdokument.html

Den 20. februar 2024





**Ministry of Environment  
of Denmark**  
Department

[Claudia.Olazabal@ec.europa.eu](mailto:Claudia.Olazabal@ec.europa.eu)

[Env-Water@ec.europa.eu](mailto:Env-Water@ec.europa.eu)

Water and Climate Adaptation  
Case No 2023-4355  
Ref. kirst, rurab, limni  
May 16 2023

## Questions on the Water Framework Directive re. deterioration

Dear Claudia Olazabal, dear [REDACTED]

Thank you for taking the time to talk to Head of Division, Katrine Rafn and myself 10. May 2023 on the concept of deterioration in Article 4 of the Water Framework Directive.

As agreed upon in the meeting, we forward our questions in writing, and we would appreciate to get your view and interpretations back in writing. We would be grateful if you would send your reply shortly, as this will help inform our assessment of the way forward. We are aware that the statements will represent the views of the DG ENV of the Commission, and that the European Court of Justice is the sole authority on interpretation of the aquis.

./.

We also forward ruling 22/02461 from the Danish Environment and Food Board of Appeal in English<sup>1</sup>. The most relevant part is: *3.2.3 Ad 2) Effect on targeted surface water bodies*, pages 38 – 43, in particular the three sections on page 43 which we have highlighted.

For your information, the Environment and Food Board of Appeal is an independent court-like institution within the field of nature, environment, agriculture, fisheries and food. The rulings are binding for state and local authorities' administration and authorization of plans and projects.

### The questions:

- Does Article 4 of the Water Framework Directive, as interpreted by the ECJ, allow for an individual assessment of the significance of an addition of a substance to a specific water body in order to establish if such addition constitutes "deterioration of the status", when the EQS for that substance has already been exceeded and the water body has thus been classified in the lowest class?
  - In other words; will it only constitute deterioration contrary to Article 4 if the discharge will lead to an increase in the

---

<sup>1</sup> Section 3.2.3 Ad 2) Effect on the targeted surface water body has been translated by a professional team of translators, whereas the rest of the ruling is google translated.

concentration of a given substance in the water body, i.e. because the discharge contains a higher concentration of the substance than the current concentration in the receiving water body, or will any addition of the substance – independent of amount/concentration – be contrary to Article 4 in this scenario (when the EQS is already exceeded)?

- In either case, in the light of the ECJ rulings, what is the reasoning behind the Commission's interpretation?
- In order to establish an increase in concentration – is it a requirement that it must be measurable? In most situations, it will be possible to calculate even negligible additions – does that constitute an increase and therefore a deterioration?
- If an assessment is allowed, will it be possible to take the significance of the impact or discharge on a quality element at water body level into account when the quality element is already in the lowest class?
- What scale shall the assessment be conducted at? (Water body level or other units?) Is there a distinction between surface water and bodies of ground water?

Should you have any questions, please do not hesitate to contact us, and thank you in advance.

Yours sincerely,

Kirsten Vielwerth  
Special Consultant  
+45 41 28 16 76  
kirst@mim.dk



Miljøministeriet  
Departementet

Vand og Klimatilpasning  
J.nr. 2023-4355  
Ref. KIRST  
Den 16. maj 2023

## Translation<sup>1</sup> of Environment and Food Board of Appeal 22/02461

### Revocation and repatriation of Section 25 permit for the establishment of a new connecting road

22/02461,

The Danish Environment and Food Board of Appeal has made a decision according to section 25, cf. section 49(1), of the Danish Environmental Assessment Act (*miljøvurderingsloven*).<sup>[1]</sup>

The Danish Environment and Food Board of Appeal cancels the decision made by the Municipality of Horsens on 25 January 2022 to grant a section 25 permit for a new link road from the Vega industrial district to motorway E45, exit Horsens C, and remits the case for renewed processing.

The paid appeal fee is not refunded.

The Environmental and Food Complaints Board's decision is final and cannot be appealed to another administrative authority, cf. § 17 of the Act on the Environmental and Food Complaints Board<sup>[2]</sup> and § 2 of the Fees Order.<sup>[3]</sup> Any legal action to review the decision must be brought within 6 months, cf. section 54, subsection of the Environmental Assessment Act. 1.

The decision has been taken by the board, cf. § 1 of the Act on the Environmental and Food Complaints Board, which in accordance with the Environmental Assessment Act § 49, subsection 1, has dealt with the case in the board's medical department (department 10), cf. § 3, subsection 1, no. 10, in the Act on the Environmental and Food Complaints Board.

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<sup>1</sup> Google translation, apart from pages 38 – 43 that has been translated by professional company.

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## 1. The complaint to the Environment and Food Complaints Board

The decision was appealed to the Environment and Food Complaints Board on 9 February 2022 by a resident of the area. The complainant submitted supplementary comments on 4 May 2022, 13 September 2022 and 26 October 2022.

Complainant has stated in particular that

- there is disqualification from the authority according to Section 40, subsection of the Environmental Assessment Act. 3, at Horsens Municipality,

- the prepared Natura2000 impact assessment is flawed and insufficient, including in relation to groundwater lowering
- the consultancy behind the Natura 2000 impact assessment is not impartial,
- the assessment of Annex IV species is flawed and insufficient, including in relation to bats,
- other nature is not described sufficiently in the environmental impact report,
- the studies of alternatives to the alignment are insufficient,
- there is a lack of a description of all the project's characteristics and of intended measures to avoid, prevent or limit significant harmful effects on the environment, and
- The Section 25 permit is in breach of a wetlands declaration registered on part of the area, and that the connecting road is not necessary.

The points of complaint are further elaborated in section 2.4. Due to their volume, the sent letters of complaint are not reproduced in full in the decision. Both the complaint and the supplementary letters of complaint are included in the board's processing of the case in their entirety.

On 23 July 2022, the Environmental and Food Complaints Board refused to grant the complaint suspensory effect.

In addition, a complaint has been filed with the Environmental and Food Complaints Board regarding Horsens Municipality's decision on exemption from § 3 and § 16 of the Nature Protection Act, the municipality's permit for temporary reinjection of groundwater in connection with temporary groundwater lowering and the municipality's crossing permits for the interim bridge over Hatting Bæk and the landscape bridge over Bygholm Å and Hatting Brook.[4]

The complainant has also lodged a complaint with the Planning Complaints Board regarding the underlying planning basis for the project and the environmental assessment of the plan. By decision on 5 December 2022, the Planning Appeals Board did not uphold the complaints about Horsens Municipality's final adoption of municipal plan supplement no. 2017-34 with associated environmental report.[5]

## 2. The details of the case

### 2.1 The area

The project area is located in the rural zone west of Horsens and south of Lund, and the planned alignment crosses Bygholm Ådal, designated as a landscape worthy of preservation. The project area includes protected nature according to Section 3 of the Nature Protection Act, including the streams Bygholm Å and Hatting Bæk, fresh meadows in the lower parts of the river valley, overgrazing on the slopes of the river valley, two registered bogs and a small lake. There are also approx. 300 m west of the project area an area with a south-facing slope with older deciduous trees, as well as approx. 80 m and approx. 200 m east of the project area are wooded slopes.

The landscape in and around the project area appears as an undisturbed river valley, apart from a few agricultural and residential properties located on the edge of the river valley, as well as two high-voltage lines of 400 kV and 150 kV respectively, which cross the river valley approx. 400 m east of the landscape bridge, and which runs parallel from east to south through the southern part of the project area. In addition, the project area consists of cultivated fields.

## **2.2 Natural and planning conditions**

### **2.2.1 Natura 2000 area no. 236**

The project area is approx. 50 m west of Natura 2000 area no. 236, Bygholm Ådal, which consists of habitat area H236. Bygholm Å runs through the Natura 2000 area approx. 130 m upstream Hatting Bæk outlet in Bygholm Å.

The applicable designation basis for the habitat area appears from the Natura 2000 basic analysis 2022-2027.[6] From this, it appears that the basis for designation includes the following species: spring snail, narrow-mouthed whorl snail, Desmoulin's whorl snail, brook lamprey and otter. In addition, the basis for designation includes the following natural types: nutrient-rich lake, stream, limestone grassland, acidic grassland, occasionally wet meadow, spring forest, rich heather and alder and ash forest.

### **2.2.2 The watershed plans**

It appears from MiljøGIS for the water area plans 2015-2021 that both Bygholm Å and Hatting Bæk are targeted for good ecological and chemical condition.[7]

From MiljøGIS on hearing of the water area plans 2021-2027, it appears[8] that the overall ecological condition of Hatting Bæk is poor, as the condition of small animals is moderate, the condition of aquatic plants and environmentally hazardous pollutants[9] is unknown and the condition of fish is poor. The chemical state is unknown.

Furthermore, it appears that the overall ecological condition in Bygholm Å downstream of the outlet from Hatting Bæk is high, as the condition of small animals is high. The other organic quality elements are unknown, as is the chemical state.

Upstream of the outlet from Hatting Bæk, the overall ecological condition in Bygholm Å is poor, as the condition of aquatic plants and fish is poor, the condition of small animals is high and the condition of environmentally hazardous pollutants is not good. The chemical condition is not good, which according to Vandplandata is due to exceeding the environmental quality requirement for mercury in biota fish, anthracene in sediment and nonylphenols in water.[10] In relation to the assessment of the state of environmentally hazardous pollutants as not good, it also appears from Vandplandata that this is due, among other things, to an excess of the content of copper in the water, as a level of copper of 1.717 µg/l has been measured, and that the general environmental quality requirement is 1.48 µg/l. The environmental quality requirement for the maximum concentration of 2.48 µg/l has also been breached, as the highest measured concentration is 2.8 µg/l.

It appears from the Danish Environmental Protection Agency's FAQ on questions and answers about the discharge of certain pollutants into the aquatic environment from 21 December 2021 that the background value for copper in watercourses is 0.48 µg/l.[11] Previously, the background value for copper in streams was calculated to be 0.66 µg/l.[12]

## **2.3 The contested decision**

### **2.3.1 The project**

The project includes the establishment of a connecting road between Vrøndingvej and E45 exit no. 56b Horsens C. The road connects to the signal system at Vrøndingvej, which gives access to the access

road to a planned business area, called VEGA, north of Vrøndingvej. To the south, the road course is connected with a new "leg" in the roundabout at the E45 exit Horsens C.

The route is approx. 1.3 km long and will be built as a two-lane road with an 8 m wide carriageway and a 5.5 m wide discount on each side of the road. In the middle of the stretch of road, the road leads over Bygholm Å and Hatting Bæk at an approx. 130 m long landscape bridge designed as a 5-span concrete bridge with a clearance of 7 m.

In connection with the project, 2-4 dead alder trees must also be felled in the alignment of the road, and an interim bridge must be built over Hatting Bæk to enable work traffic, which is carried out by putting down wooden or steel poles on both sides of the stream.

Four rainwater basins will be established, and the collected rainwater will be led to four rainwater basins with discharge to Bygholm Å.

### **2.3.2 Section 25 permit**

Horsens Municipality, Traffic and Roads, applied on 7 October 2020 for the construction of a new road connection between Vrøndingvej and E45. On the basis of a hearing from 28 October 2020 to 18 November 2020, Horsens Municipality, Nature and Environment, sent a delimitation of the subjects that were to be included in the environmental impact report. Horsens Municipality, Traffic and Road, as the developer, has had a draft environmental impact report prepared by an external consultant.

The environmental impact report, together with the draft § 25 permit and draft discharge permit, has been in public consultation for 8 weeks from 8 October 2021 to 3 December 2021.

Horsens Municipality, Nature and Environment, has on 14 January 2022 made a decision to issue a Section 25 permit to establish a new road connection between Vega-Horsens C as described in the environmental impact report for the project.

It appears from the Section 25 permit that Horsens Municipality, Traffic and Road, is organizationally separate from Horsens Municipality, Nature and Environment. Horsens Municipality, Nature and Environment, has received assistance from another external consulting company to review the developer's environmental impact report, including calculations and assessments of impact on, among other things, the Natura 2000 area and Annex IV species.

It appears from the Section 25 permit that the permit is granted on the condition that the project does not deviate from what is described in the project description in the environmental impact report and the developer's application for the project, and that the road project must be established within the physical and environmental framework and conditions, which appears in the environmental impact report and within the area allocation specified in municipal plan supplement 2017-34, Technical Facility, Horsens Vest.

It also appears that the permit is granted on terms that are based on the environmental impacts that the environmental impact report uncovers, including the proposals for mitigation measures that are incorporated into the road project under the individual environmental themes and listed together in the report's non-technical summary.

The Section 25 permit stipulates, among other things, the following conditions:  
"Terms in connection with the execution of the work:

17. As far as possible, the work must be carried out within normal working hours, which means weekdays between 07:00-18:00. Ramming of sheet piles must not take place outside this period.
18. In connection with the construction of the foundations for the landscape bridge, sheet pile walls for construction pits must be framed around the foundations next to and between Bygholm Å and Hatting Bæk.

Conditions for consideration of Annex IV species:

35. Removal of older, bat-friendly trees must be avoided as far as possible. If older, bat-friendly trees are to be removed, for the sake of bats, this must be done in collaboration with the Danish Nature Agency. Concrete and careful investigations must be carried out before the removal. The trees may only be felled in the period between 1 September and 30 October. Felling at other times requires a dispensation, which must be applied for at the Danish Environmental Protection Agency
36. For each tree removed, three bat boxes of a type corresponding to Schwegler 2FN or 2F of dark wooden concrete must be set up. The boxes are set up on suitable trees along, or in the immediate vicinity of Bygholm Å. The boxes must be installed and functional before the trees are removed.
37. On the bridge, screens in matt material that do not reflect light must be installed at a height of 1.6 meters above the finished road in the full length of the bridge, for the sake of bats and birds.
38. Along the road over the dams in the river valley, a dense planting of trees and shrubs that are naturally native to East Jutland will be established at a height of min. 2.5 m above the finished road, to lift low-flying bats above the traffic. South of the landscape bridge, the planting must follow the course of the road for at least 100 m, on both sides of the road. North of the landscape bridge, the planting must follow the course of the road for at least 130 m, on both sides of the road. At the ends of the bridge, the planting must follow the slope towards the river valley.
39. Until the necessary dense planting has been established, a 2.5 m high game fence/wire fence with dense mesh must be established, cf. the Road Directorate's guidance on fauna passages<sup>4</sup>, on the section with planting cf. conditions 36. The fence or planting must be established and functional when the road is put into use.
40. For the sake of amphibians, the developer must establish a permanent amphibian fence on both sides of the road, on a 200 meter long stretch from the road bridge on the north side of Bygholm Å. The toad fence must be established, cf. instructions The Road Directorate's guide "Fencing along roads"<sup>5</sup> and Experience catalog for toad fences.
41. If, contrary to expectations, finds of Annex IV species are found in the construction area, which have not been located in connection with the field investigations and which are therefore not described and assessed in the environmental impact report, the work must be stopped immediately and Horsens Municipality must be notified immediately."

It also appears from the decision that the Municipality of Horsens has reviewed the environmental impact report in accordance with § 24 of the Environmental Assessment Act with the involvement of the necessary expertise in order to ensure that it meets the requirements of § 20. Overall, the Municipality of Horsens assesses that the project does not entail such a significant impact on the environment, that it cannot be permitted when the terms of the permit and terms of supplementary permits are complied with. Based on the environmental impact report, it has been assessed that there is no need for monitoring.

In relation to the impact on Natura 2000 areas, it appears from the § 25 permit that the nature types that N236, Bygholm Ådal, is designated to protect, will not be affected by the project, or cumulatively with other projects - neither in the establishment phase nor in the operational phase, as the project is outside the Natura 2000 area.



It also appears from the permit that Horsens Municipality assesses that the project will not affect or damage the designation basis and integrity of the natural areas, and the project does not prevent the realization of the goal of favorable conservation status.

Regarding Annex IV species, it appears from the Section 25 permit that there are potentially suitable habitats in the project area for the Annex IV species field lizard, pointed frog, large newt, beach toad and species of bat. No occurrences of Annex IV species of amphibians and reptiles have been registered in the project area, nor have such species been found during the inspections. In the summer of 2021, a lot owner stated that a single individual of a large newt was found, just as the lot owner submitted information in December 2021 about a frog that Horsens Municipality considers to be a butt-nosed frog, which is not an Annex IV species. The municipality has assessed that the construction workers do not pose a threat to these species, as the work takes place during the day outside the times of the day when the amphibians migrate to and from their breeding and resting areas.

It also appears from the permit that, during the inspections, large numbers of a total of nine species of bats were found in the river valley, including long-eared bats, southern bats, brown bats, pygmy bats, troll bats, water bats, pond bats, long-eared bats and pipistrelle bats. Horsens Municipality has noted that the defunct alder trees in the road route must be removed in collaboration with the Nature Agency and the Danish Environmental Protection Agency, and that it has also been assessed that the removal will not affect the occurrence of bat species' ecological functionality. The municipality has also assessed that the bridge will not cause a barrier effect for bats, as the bridge's clearance between the river valley and the underside of the middle three bridge spans is approx. 7 m.

The municipality also notes that it appears from the environmental impact report that the planting and the temporary fence, which is established on the road slopes along the road, ensures that the bats are either led down into the river valley or lift the bats that may cross the road higher up. Against this background, and given that it is a two-lane road, the municipality has assessed that the conditions set are sufficient to protect the presence of bats in the area.

Regarding targeted water bodies, it appears from the decision that the discharge of water from the road construction's rainwater basins will not lead to an increased risk of a deterioration of quality elements in Bygholm Å or the final recipients Bygholm Sø and Horsens Fjord. The discharged water quantities are relatively small in relation to the water flow in Bygholm Å, and the dilution is therefore high in relation to oxygen-consuming organic matter, harmful substances and salt.

It also appears that calculations in the environmental impact report show that there will be a net reduction of leached nutrients from the areas involved in the road construction, compared to the current leaching from the agricultural areas, and that the discharge from the rainwater basins will result in a limited discharge of copper and zinc.

Since the concentration increases in cumulation with other known sources are quite small, the discharge is assessed to have no significant overall impact on the water course. The road system's rainwater basins effectively clean PAHs and mercury. Horsens Municipality has therefore assessed that the drainage from the basins to Bygholm Å does not lead to a deterioration of the condition of the surface water area, does not lead to a risk of a decline in any of the quality elements, or hinders the fulfillment of the established environmental target in relation to the substances where there are currently exceedances cf. the Danish Environmental Protection Agency's studies from 2015.

### 2.3.3 The basis for the decision

It appears from section 11.1 of the environmental impact report that a separate Natura 2000 impact assessment called Natura 2000 impact assessment and assessment of Annex IV species for the new connection road, Vrøndingvej – E45, Horsens (hereafter referred to as the "habitat impact assessment"), which is attached as appendix 7 to the environmental impact report.

It also appears from section 11.2 of the environmental impact report that the possible indirect impact on the Natura 2000 area, N236, Bygholm Ådal, is examined in the Natura 2000 impact assessment.

In the following, the parts of the Natura 2000 habitat impact assessment and the environmental impact report that are relevant to the case are reproduced.

### 2.3.4 The Natura 2000 impact assessment

#### Semi-natural dry grassland and scrubland facies on calcareous substrates

It appears from section 7.1 of the habitat impact assessment that the light-open habitat nature types in the Natura 2000 area have been mapped over three study periods, and it is therefore assumed that the current designation basis is fair for the distribution and condition of the nature types.

It also appears that the closest light-open nature type in the Natura 2000 area is an area with Semi-natural dry grassland and scrubland facies on calcareous substrates, located approx. 300 m from the road's route, and that the habitat cannot be physically affected, but can potentially be affected by nitrogen deposition from the road's traffic.

It also appears that nitrogen deposition from the road's traffic emissions in cumulation with existing sources in the area is assessed on the basis of the annually calculated background deposition for the area in connection with air monitoring in the NOVANA programme.

It also appears that, in connection with the preparation of the habitat impact assessment, specific calculations of the nitrogen deposition have been made based on the location of the road and several points of interest. Based on the modeled background load in the area, which amounts to approx. 12.5 kg N/ha/year, and the calculated deposition of a maximum of 0.2 kg N/ha/year, the deposition is assessed, based on the structural and species condition of the grassland, not to pose a threat to the conservation status of the grassland.

It has been concluded in the habitat impact assessment that the nitrogen deposition as a result of emissions from road traffic at the grassland on calcareous substrates will be so low that it will not cause an impact on the conservation status of the nature type in the Natura 2000 area, not even in cumulation with the existing background load, which has been declared to 12.5 kg N/ha/year.

Overall, it is assessed that the establishment of the road will not prevent the achievement of a favorable conservation status for the concrete grassland on calcareous substrates. Likewise, the road is not assessed to pose a risk to the nature in the habitat area and the integrity of the area.

#### Vertigo geyeri whorl snail, narrow-mouthed whorl snail and Desmoulin's whorl snail

It appears from section 5.4.1 of the habitat impact assessment that the marsh snail is on the basis of the designation for habitat area H236 Bygholm Ådal, and that it is found in stable marshy/wet, open or lightly shaded stands of heather or similar stands of other plant species, e.g. tall sweet grass or reed grass. According to the municipality's § 3 registration, in the habitat area within the study area, which constitutes an area around the project's alignment, there are marsh areas with tall perennials/reed swamps. It appears that these areas can be potential habitats for marsh snails, and that the potential of

the areas as habitats has been assessed by the botanical registration. A search for the species has been carried out at one location, which is assessed to constitute a suitable habitat.

It also appears from section 5.4.2 of the habitat impact assessment that no Desmoulin's whorl snails were found during the inspections in the study area.

In relation to the vertigo geyeri whorl snail and narrow-mouthed whorl snail, it appears from the habitat impact assessment section 7.1 that the vertigo geyeri whorl snail and the narrow-mouthed whorl snail are linked to botanically fine, open, calcareous and fairly stable rich sedges, extremely rich sedges and sedges.

In addition, it appears that the three species are registered in connection with springs and sedges in the central and western part of the Natura 2000 area, more than 900 m from the project area. It also appears that no habitat types have been registered that would be able to support the presence of the vertigo geyeri whorl snail or the narrow-mouthed whorl snail near the project area, and that due to the distance, it is estimated that the project will not affect the known populations of the Desmoulin's whorl snail, the vertigo geyeri whorl snail or the crooked screw snail. It also appears that, should a population still be found in the project area outside the habitat area, it is considered not to have a direct impact on the populations in the habitat area.

#### Brook lamprey

In relation to the occurrence of the brook lamprey, it appears from section 7.1.4 of the habitat impact assessment that, in the period 2011-2016, a mapping of the occurrence and distribution of the brook lamprey was carried out with the main focus on the Natura 2000 areas where the species is on the basis of designation. The species has also been monitored by the general NOVANA control monitoring of stream fish across the country both inside and outside the habitat areas in the period 2010-2016.

It also appears that, according to the baseline analysis 2016-2021 for the Natura 2000 area, N236, Bygholm Ådal, the lamprey is not registered by the NOVANA monitoring, and that in the latest baseline analysis 2022-2027 it is stated that no monitoring has been carried out brook lamprey in the Natura 2000 area.

It appears that, according to the Article 17 report in 2019[13], there are no signs of a decline in the populations of the Brook lamprey throughout the country, and that the conservation status of the Brook lamprey is assessed to be favorable.

It has also been assessed that the stretch of watercourse around the project area can be a breeding ground for the species and a migration site when the species seeks out the smaller watercourses to reproduce. The stretch is not considered to be a likely breeding area, as the bottom is mainly sandy and there is considerable sand migration. However, it appears that there will be suitable breeding sites at several of the tributaries to Bygholm Å, including the Hatting Bæk tributary.

In relation to the impact on the brook lamprey during the construction phase, it appears that the project is not assessed to be able to affect a possible population of brook lamprey in the stream system during the construction phase, as the project does not include physical changes to the stream. It is also ensured during the construction phase that, in the event of large rainwater events, surface water with suspended material does not flow from the project area directly to the watercourse, for example by establishing rainwater basins and/or by gutters and culverts. The amount of soil particles and nutrients from surface water during the construction phase is therefore assessed to be of no

importance to lampreys on the basis of the relatively low amount and the lampreys' general autoecology.[14]

In relation to the impact on the brook lamprey during the operational phase, it appears from the habitat impact assessment on fluctuations in the oxygen concentration that any very small impact is not assessed to pose any threat to the brook lamprey, which is not normally considered to be a species that is particularly sensitive to lower oxygen tensions. The species' natural habitat is also in the areas of the stream where the oxygen content is not the highest. It also appears that any impact will be from isolated events which may cause a potential and short-term impact outside the Natura 2000 area.

In relation to the influence of salt, which can continue during the winter season, it appears that in connection with the environmental impact assessment of the project, a worst-case scenario has been calculated, where at the end of the winter, a maximum total concentration of 667 mg/l can occur at full mixing in Bygholm Å. There are no general ecotoxicological limit values for salt in freshwater systems, but it is far below the LC50 values[15] that exist for various animal groups linked to watercourses. It is also below 3,000 mg/l, which according to studies is the value at which there is significantly increased drift for species such as those in Bygholm Å. The drift rate has been used in some studies as an expression of changed behavior in invertebrates, as they use drift as a way to escape unfavorable conditions.

It appears that the salt concentrations at the outlet point can occur in elevated concentrations. Since salt is relatively easily soluble, and since salt will thus only be in a modest plume around the outlet point, it is expected that there will only be a real biological impact of salt in the stream in particularly severe cases. It is assessed against this background that salt discharge to the pools in Bygholm Å will not affect the brook lamprey to such an extent that it could prevent the achievement of favorable conservation status.

In relation to the impact of environmental hazardous substances, it also appears from the habitat impact assessment that today a number of exceedances are seen at the measuring station immediately upstream of the new road at Kørup Bro. It appears that the exceedance is only seen in the priority substances anthracene (PAH), mercury, nonylphenol, which relate to the chemical state, and copper, which is monitored under the package of nationally specific substances.

It appears very unlikely there will be measurable discharge of anthracene from the rainwater basins, that nonylphenol probably originates from sewage treatment plants and domestic waste water and not from road water, and that there is only a small contribution of mercury associated with separate rainwater and thus also road construction. Mercury, nonylphenol and anthracene are therefore not considered to pose a threat to the brook lamprey, which could prevent the achievement of favorable conservation status.

In relation to copper, it appears that the lamprey's LC50 value for copper is 46 µg/l, and that the measured values for Bygholm Å are far from the stated LC50 value for the lamprey. It is therefore assessed that the presence of copper in the stream, neither under existing nor future conditions, will pose a threat to the brook lamprey, which may prevent the maintenance of a favorable conservation status for the brook lamprey.

#### Otter

In relation to the occurrence of otters, it appears from section 7.1.3 of the habitat impact assessment that during the latest monitoring in 2017, tracks/excrement from otters were found at Bygholm Å at Kørup Bro immediately west of the project area, and that according to the baseline analysis 2022-2027

for habitat area H236, it is assessed that the species uses the area to a greater extent than illustrated by the monitoring carried out in 2011-2012. Based on the nature of the area with watercourses and undisturbed areas, it is also assessed to be a stable presence of otters in the area.

It also appears that during a specific search carried out in April 2021 in the planned road route, clear traces of otters were found, but no signs of breeding activity.

It appears from the species in general that otters give birth to their young in a cave in a remote, undisturbed lake or marsh area, and that the immediate area around the road route is grassy and open without good opportunities for hiding.

On this basis, it has been assessed that the areas immediately east of the Natura 2000 area are not significant as a breeding area for otters, but that it is very likely that individuals move along the streams and possibly roost in hiding by the streams.

It also appears from a possible impact during the construction phase that otters are relatively tolerant of noise when they are at rest, but it is likely that any day-resting otters in the area will prefer to move to other parts of the territory while particularly noisy construction activities are carried out as framing of sheet piles or piles. It appears in extension of this, since the area has not been assessed as suitable as a breeding area, and since there are good opportunities for hiding both upstream and downstream of the project, it is assessed that short-term construction activities will not cause a significant negative impact on the population of otters in the Natura 2000 the area.

It appears there will be a need to establish a passage for construction traffic over Hatting Bæk. Otters, which travel along the stream, may therefore have to walk on land for a short distance during the construction phase. It appears this is not considered to constitute a significant impact, as the temporary construction activities will normally take place within normal working hours during the day and not during the night, when otters actively forage in the streams and where otters can therefore pass the construction site.

There is also a stable occurrence of otters in Bygholm Å and a favorable conservation status for the species in Jutland. Disturbances during the construction phase of the project are not considered to cause a negative impact on the conservation status of the otter population linked to Natura 2000 area N236, Bygholm Å.

In relation to the impact on otters during the operational phase, it appears that a road construction over a stream can constitute serious obstacles for otters if good passage conditions have not been established, which ensure that the otter can pass under the road along the stream. It appears that the new road passes the river valley on a landscape bridge that is 130 m long and 12 m wide, and that the three middle bridge spans are each approx. 30 m long with a clearance of at least 7 m. It is stated that the landscape bridge's width and height meet the minimum standards for a fauna passage that can be used by cervids, and that the bridge also creates passage for many species from deer to invertebrates, as well as ensuring a good connection between the habitats and habitats of the animals on each side of the road construction.

In conclusion, it is assessed that the road construction will not cause a barrier effect on the population of otters in the Natura 2000 area, as good passage conditions for otters and other animals are ensured under the road construction during the operational phase, and that the project overall is not assessed to hinder the minimum good conservation status of otters on regional or national level.

#### Temporary groundwater lowering

It appears from section 3.6.6 of the habitat impact assessment that a temporary groundwater lowering must be made at four of the landscape bridge's six support points in connection with the construction of the bridge's foundations and pillars. Groundwater is lowered into the construction pits individually, which means that the four construction pits are not pumped at the same time. Groundwater must be lowered for up to four weeks per construction pit, thus a total of up to 16 weeks in the construction period. It is estimated that the total extent of groundwater lowering is 75,280 m<sup>3</sup>, and as a worst case scenario 10% has been added, so that the calculation is based on a total water volume of 85,000 m<sup>3</sup>. A conservative model calculation has been made of the distribution of groundwater lowering around the construction pits, which can be seen in figures 3-7 of the habitat impact assessment. The calculations show that the spread of the sinking funnels is limited to the proximity of the construction pits, and it will be especially to the north and south, where the greatest spread is up to 120 m. The sinking funnels will not extend into the Natura 2000 area.

It appears from section 7.1 of the habitat impact assessment that the impact from the temporary groundwater lowering of the groundwater table, which must be carried out in connection with the construction of the landscape bridge, is assessed to be very small and completely insignificant for the area's groundwater interests, including their vulnerability and water quality. The impact on local natural areas is also assessed to be very small. It also appears that no impact is seen in habitat area H236, and that it is considered to be excluded that groundwater-dependent nature types in the habitat area as well as stream-dependent nature types and species can in any way be negatively affected by the groundwater lowering.

#### Annex IV species of bats

##### Surveys

It appears from section 5.4 of the habitat impact assessment that, in connection with the early planning of the road project, a review of existing data as well as supplementary field surveys in the area around the road route has been carried out. It also appears that, due to uncertainty about individual habitat types and the road's potential impact on bats, additional studies have subsequently been carried out. Among other things, a search has been carried out for Annex IV species, including bats in summer and autumn 2020 and spring 2021 respectively.

It appears from section 5.4.1 of the habitat impact assessment that, in connection with the study, a study area has been defined as a 200 m buffer zone around the two proposed alternative alignments. The area's bats have been investigated in accordance with the Road Directorate's guidance on "Bats and major roads", and automatic bat detectors have been set up at important structures for bats over three periods in 2020 and 2021. It appears that the three periods have been intended to cover the bats' breeding period, the period in the autumn, when the bats are typically more mobile, and the spring, when the bats can potentially seek out other areas than in the autumn. It also appears that in all periods the automatic detectors are supplemented with a manual review of the area with a hand-held bat detector.

It appears from the note for the bat mapping dated June 2021, which is included as appendix 7 to the habitat impact assessment and the environmental impact report, that the three bat studies were carried out respectively from July 1 to July 4, and from August 17 to August 23 in 2020 and from 7 May to 16 May 2021.

It appears from section 5.4.2 of the habitat impact assessment that the bat mapping showed that there is generally a high activity of bats in the study area. A total of nine species of bats have been recorded,

and there is particularly high activity around Bygholm Å and the surrounding meadows, which serve as a foraging area for a number of species of bats.

It also appears from section 8.1 of the habitat impact assessment that the mapping showed that the study area at Grønhøjvej and Stampemøllevej west of the project area as well as Bygholm Å contains significant bat values, and that a breeding and roosting area west of Grønhøjvej for pipistrelle bats and pygmy bats, and possibly also brown bats, has been found - and troll bats. It appears that the specific area is a steep south-facing slope with many older deciduous trees, including some oak trees with cracks and hollows, which make them suitable as breeding and roosting trees for bats, and that a large part of the bats from here are estimated to forage below in the river valley above the extensively cultivated meadows around Bygholm Å. The breeding and roosting area is drawn on figure 8-2 in the habitat impact assessment.

It also appears that the meadows are also considered to be an important foraging area for southern bats, and that the stream itself is an important foraging area for water bats.

Tables 8-1, 8-2 and 8-3 of the habitat impact assessment show the activity levels, and they indicate the average recordings per species per night in the three study periods. Figure 8-1 shows an overview of the relative distribution of bat activity in the study period in mid-August 2020 and the location of automatic bat detectors. During the investigations, nine different species of bats were recorded – southern, water, pond, brown, troll, pipistrelle, pygmy and long-eared bats.

It also appears from section 8.1 of the habitat impact assessment that at the eastern end of the meadows there are several wooded slopes with potential breeding and roosting trees for bats, and that these have not been mapped more precisely. The associated forest edges and the stream are considered to constitute significant guide lines, and there are several smaller guide lines that lead down towards the stream and the meadows. It also appears that in both summer mapping periods, many individuals of several species of bat were observed foraging over the meadows, and that the meadows are considered to constitute a significant foraging area for the local bats, also upstream and downstream of the study area.

It also appears from section 8.4.1 of the habitat impact assessment that there are a few (2-4) extinct alder trees with woodpecker holes along Bygholm Å in the alignment of the road, and that these have been inspected with a view to ascertaining whether there were roosting bats. It appears that during the manual reviews no bats have been observed entering or leaving, but that it cannot be rejected on that basis that the trees are used periodically for daytime roosting by, for example, water bats. It also appears that the trees in question, however, have a size and condition that makes them considered unlikely as a breeding place and winter roost for bats.

It has been assessed that the removal of the trees in question during the construction phase will not affect the ecological functionality of breeding and roosting areas for the species of bats in the area. These are 2-4 suboptimal trees, where locally in the river valley there are many and better suitable breeding and roosting trees for bats, as stated in the mapping note of June 2021.

It also appears that, in order to ensure that the ecological functionality is maintained at the same level as before, three bat boxes are set up for each of the trees mentioned above that are removed. The bat boxes must be of a type that has been shown, among other things, to accommodate water bats and must be set up in relative proximity to Bygholm Å, either on existing trees or on the bridge construction. The boxes set up must be functional before the trees are felled, or alternatively, if the trees are felled in the winter months, the boxes must be functional before next April.

#### The road course and the landscape bridge

It appears from section 8.4.1 of the habitat impact assessment that the establishment of new road routes can lead to the destruction of breeding and roosting areas for bats. It also appears that changed traffic patterns and new road routes in areas with high bat activity can potentially constitute barriers for bats in relation to access to foraging areas, affect the species' ability to spread in the landscape, deteriorate the quality of the area for bats and pose a risk of traffic-killed individuals.

It also appears from the road's impact on bats during the operational phase that the extent of the specific road's impact largely depends on the design of the road, the permitted speed and the location of the road in the landscape in relation to guide lines and important areas for bats. The connecting road in the specific project crosses Bygholm Å, which is considered to be an important control line, and the road goes across Bygholm Ådal, which is considered to be an important foraging site for several of the local bats.

It appears from section 3.5.1 of the habitat impact assessment that the road construction's crossing of the Bygholm Ådal is constructed as a landscape bridge in accordance with the Road Directorate's road rule on fauna passages, as the Ådalen forms an important ecological corridor in the landscape.[16] It also appears that the bridge is designed so that it meets the minimum requirements for high landscape bridges of the type A1L (wet), which cater for the passage of cervids and deer. The clearance under the three middle spans of the landscape bridge is 7-9 m, which is sufficient for a large part of the bat species to prefer to fly under the road. It appears that the landscape bridge's three middle spans are each approx. 30 m long.

It also appears that the landscape bridge will be established without lighting, and that, in accordance with the road directorate's guidance, fixed matted screens will be installed on the sides of the bridge for the sake of birds and bats in the river valley and protective planting along the sides on the edge of the river valley.

It also appears from section 8.4.1 of the habitat impact assessment that the shielding has a height of 1.6 m above the finished road, and that the shielding will prevent bats from flying low over the road with the associated risk of traffic fatalities. The bats that forage at the height of the bridge above the river valley fly to a lesser extent attached to guide lines and at a distance from fixed structures, and they will thus cross the road at a height beyond the bridge's shielding, and thus above normal car traffic. In relation to trucks and buses, which are significantly higher than 1.6 m, the shielding contributes to the bats having a higher approach height and thereby minimizes the risk of traffic fatalities.

It also appears from the habitat impact assessment that the planting along the road will function as a guide line that can lead low-flying species on the edge of the river valley down into the river valley, where there is a passage under the bridge, and that the planting will also lift crossing bat individuals over the road at a height, which minimizes the risk of traffic fatalities. It appears that the planting is established so that it becomes dense and reaches a height of at least 2.5 m, whereby it becomes functional to guide bats down the river valley or "lift" bats that cross the road. The planting is initially supplemented with a wire fence with a minimum height of 2.5 m, which must be finely meshed so that bats cannot pass through the fence, cf. the Road Directorate's guidance on fauna passage.

On the north side of Bygholm Å, the planting on both sides of the road must extend up to 130 m from the road bridge, and on the south side the planting on both sides of the road must extend up to 100 m from the road bridge.



Table 8-4 of the habitat impact assessment contains an overview of the bat species in the area and their relevant behavior in relation to the impact from roads. In addition, the table contains a general assessment of the species' vulnerability to impact from roads in general.

#### Noise and light nuisance during the operating phase

In relation to noise and light nuisance during the operational phase, it appears from section 3.5.1 of the habitat impact assessment that the screens on the sides of the bridge limit the effects of light and visual disturbance from road traffic. In addition, the screens are made of frosted glass, which does not reflect the light. In addition, it appears from section 3.7.2 of the habitat impact assessment that road lighting will not be established on the stretch.

It also appears from section 8.4.1 of the habitat impact assessment in relation to the impact on bats during the operational phase that noise and sound pollution can impair the quality of habitats along roads. Reference is made to two foreign studies which indicate that a reduced incidence of bats can be seen more than one kilometer from a busy road, but that the effects have however been seen on roads with far more traffic than the current road. The planting around the road and screens on the road bridge are assessed to reduce this potential impact significantly, to an extent where it is not assessed to impair foraging and passage opportunities in the river valley itself. It is likely that the area immediately along the road will become less attractive to the bats in the area, but this is not assessed to be to an extent that will significantly affect the ecological functionality or the populations in the area.

#### Assessment of impact on bats

It is assessed in section 8.4.1 of the habitat impact assessment that the road and the landscape bridge will not cause a deterioration of the ecological functionality of breeding and roosting areas for all of the nine registered species of bats in the study area. The planting around the road and screens on the road bridge will reduce the potential impact significantly to an extent where it is not assessed to impair foraging and passage opportunities in the river valley itself. It follows from this that it is likely that the area immediately along the road will become less attractive for the bats in the area, but that this is not assessed to be of an extent that will significantly affect the ecological functionality or the populations in the area.

It appears in relation to water bats that Bygholm Å is assessed to constitute an important structure as a guide line and foraging site. The species stays low and closely attached to the stream itself and the areas close around. With the planned road course and the landscape bridge, there is not assessed to be an increased risk of traffic fatalities or negative impact due to the barrier effect, and thereby there is also not assessed to be an impact on the ecological functionality of breeding and roosting areas for water bats.

In relation to pond bats, it appears that Bygholm Å is a potential guide line for the species, and that the species has the same behavior as water bats and forages low over water surfaces and flies closely associated with guide lines such as streams. The road is not assessed to pose a risk of road kill of the species or to affect it through a barrier effect, as individuals will follow the stream unimpeded and pass under the landscape bridge. Furthermore, in connection with the surveys in the area, there are only a few scattered records of the species in the spring and autumn. It has been assessed that the road will not impair the ecological functionality of breeding and roosting areas for pond bats.

In relation to pipistrelle and pygmy bats, it appears that they occur commonly in the area with breeding sites west of the alignment. Pipistrel bats are mainly recorded foraging relatively low and

close along forest edges and leeward fences west of the alignment and partly out over the open river valley, although to a much lesser extent. There is no impact on the primary structures with which the species has been observed. Dwarf bats occur more evenly distributed in the area. The road lies in the upper part of the typical foraging height of both species. The majority of both species' crossings of the facility will take place under the landscape bridge. The fencing along the road will help the bats that had to cross the road to be forced higher above the roadway, thereby reducing the risk of collision considerably. It has been assessed that the area is home to large populations, and that individual traffic fatalities will therefore not affect the population negatively. The road is not assessed to cause a deterioration of the ecological functionality of breeding and roosting areas for pipistrelle or pygmy bats.

In relation to the long-eared bat, it appears that the species may be vulnerable to new road constructions, but that the area does not constitute a significant breeding or foraging location for the species, as there are only very few recordings of it, and that the species is also rarely seen out in open land areas. It has been assessed that the road will not impair the ecological functionality of breeding and roosting areas for the long-eared bat, as the species only has a very rare and sporadic connection to the area, as structures of importance to the species will not be affected, and as it is not assessed that be a significantly increased risk of road kill for the species.

It appears in relation to southern bats and troll bats that these species typically fly at medium altitudes between 2-20 m and that they are to a lesser extent closely linked to landscape guidance lines. Thus, they are at less risk of being affected by the course of the road and traffic. It appears that the road is at a height at which southern bats and troll bats typically forage, and that when crossing the road bridge the species will pass both under and over the road. It has been assessed that the screening along the road helps to force these species to pass the roadway at a greater height and minimize the risk of traffic fatalities, and that a smaller number of the species will possibly also cross under the road out into the open river valley. It is therefore assessed that the road will not lead to a deterioration of the ecological functionality of breeding and roosting areas for southern bats or troll bats.

It appears in relation to brown bats and long-tailed bats that it has been assessed that the species will not be affected during the operational phase, as these species normally fly high and without a particularly close connection to control lines. It is estimated that the species will generally be able to pass the road without problems. The road is therefore not considered to cause a deterioration of the ecological functionality of breeding and roosting areas for brown bats and bats.

#### Annex IV species large water salamander and pointed frog

It appears from section 5.4.1 of the habitat impact assessment that there have been no recorded finds of large newts or pointed frogs in the immediate vicinity of the study area, but that there are potential habitats.

It also appears that large water salamanders and pointed frogs have been mapped in the study area in the summer of 2020 by searching for tadpoles in suitable habitats in accordance with the technical instructions for monitoring amphibians.[17]

It also appears from section 8.2 of the habitat impact assessment that large newts and pointed frogs were not found within the study area in connection with the field survey carried out in 2020, but that a single large newt was found at the end of summer 2021 on a nearby property, probably on its way to roost, and that the nearest known find is also more than 5 km from the study area.

It also appears from section 8.4.2 of the habitat impact assessment that construction works and work areas do not affect known breeding and roosting areas for large water salamanders and sharp-nosed frogs, but that the road in the operational phase may constitute a potential negative impact for the species if it lies between breeding and roosting areas, due to an increased mortality during migration and due to barrier effect. It also appears that the establishment of a permanent toad fence along both sides of the road on the north side of the Bygholm Å will prevent traffic fatalities and lead migrating newts down into the river valley, where there is safe passage under the road bridge.

It has been assessed in the habitat impact assessment that the project, with the establishment of the described mitigation measure, will not impair the ecological functionality of breeding and breeding areas for large water salamanders and sharp-nosed frogs.

### **2.3.5 The environmental impact report**

#### **Natura 2000**

It appears from section 11.2 of the environmental impact report that the alignment of the road is positioned so the Natura 2000 area, H236 Bygholm Ådal, is not directly affected, but the possible indirect impact is investigated in the Natura 2000 habitat impact assessment. The project area is located approx. 50 m east of the Natura 2000 area.

It appears from section 11.2.6 that the Natura 2000 area has been specially designated to protect the occurrences of grassland on calcareous substrates, spring meadows, sedges and streams, as well as the associated species otter, brook lamprey and whorl snails. In the Natura 2000 impact assessment, it is the grassland on calcareous substrates habitat and the otter and brook lamprey species that have been assessed as relevant in relation to a potential impact of the project. Other occurrences of species and habitat nature types on the basis of the designation are more than 500 m from the road route, and in the Natura 2000 habitat impact assessment it was not found that there would be significant potential impacts on these.

In relation to the grassland habitat, it has been assessed that the establishment of the road will not lead to increased nitrogen deposition to an extent that will prevent the development of habitat types on the nearest areas in the Natura 2000 area.

In relation to the brook lamprey, it has been assessed that discharge from the rainwater basins may in certain cases cause local fluctuations in oxygen concentration immediately downstream of the discharge points, where the oxygen level in the rainwater basins may be low. However, it is assessed that the impact will not be significant for the Natura 2000 area's population of brook lampreys, as this is not a breeding area, and as any impact is made up of isolated events, which entail a potential local and short-term impact that is reversible within a short period, outside the Natura 2000 area.

In relation to otters, it has been assessed that the road construction will not cause a significant barrier effect on the Natura 2000 area's population of otters, as good passage conditions for otters and other animals are ensured during the road construction during the operational phase.

For a more detailed review of the Natura 2000 area, the environmental impact report refers to the Natura 2000 habitat impact assessment in the report's appendix 7.

#### **Appendix IV species**

It appears from section 11.2.7 of the environmental impact report that there are potentially suitable habitats around the road route for species of bats, field lizards and the amphibian species pointed frog, large newt and beach toad, all of which are Annex IV species and which may be sensitive to effects of new traffic facilities. Possible impacts include road kills, barrier effects and fragmentation. The mentioned species are therefore searched for during the field surveys in 2020 and 2021.

It appears in relation to large water salamanders that it is estimated that it is likely that the species occurs breeding in one of the river valley's many waterholes. Based on the ascents in 2020, the two waterholes are not assessed as suitable breeding waterholes for large water salamanders, but it cannot be denied that they have occurred breeding in 2021.

There are no known occurrences of field lizard, pointed frog or beach toad near the route of the road, despite searching for potentially suitable habitats in 2020.

In relation to bats, it appears that the mapping in 2020 and 2021 showed that the area contains significant bat values, both in the form of significant foraging areas and breeding and roosting areas. A breeding and roosting area has been found west of the project for pipistrelle bats and pygmy bats, and possibly also brown and troll bats. A large proportion of the bats from here are estimated to forage down in the river valley over the extensively managed meadows around Bygholm Å.

There are a few defunct alder trees in the alignment of the road on the bank of Bygholm Å, which could potentially be a breeding and roosting area for bats. The size and nature of the trees make them unsuitable for roosting in the winter, and on that basis the trees are assessed as not suitable as breeding and roosting areas for bats.

For a more thorough review, the environmental impact assessment refers to the Natura 2000 habitat impact assessment in the report's appendix 7 and the data note for the bat mapping in appendix 9.

#### Other nature

It appears from section 11.2.4 of the environmental impact report that Bygholm Ådal is subject to a wetlands declaration from 2014, which stipulates that the area must permanently remain as a wetland. The declaration also contains a number of restrictions stating that the covered areas may not be cultivated, converted, fertilized or sprayed, and that ditches and drains may not be established or maintained without prior agreement with Horsens Municipality. It appears that the Danish Agency for Agriculture has been consulted in connection with an official hearing prior to the environmental impact assessment, but that the Agency had no comments on the project, as only Horsens Municipality is entitled to prosecution according to the provisions of the declaration. The establishment of the connecting road and the landscape bridge over the river valley is not considered to be in breach of the declaration, as there will continue to be a wetland under the landscape bridge.

It also appears from section 11.2.7 of the environmental impact report that the nearest find of a protected species that is not an Annex IV species is an occurrence of thin-stemmed cuckoo grass from a limestone meadow west of Grønhøjvej. During the inspections in 2020, fry of the butt-nosed frog were also observed in a waterhole in the Natura 2000 area west of Grønhøjvej.

#### Noise during the construction phase

It appears from section 4.6.6 of the environmental impact report that, in connection with the execution of foundations near Bygholm Å and Hatting Bæk, there is a need to frame sheet pile walls for construction pits around the foundations.

It also appears from section 7.3.1 that the noise from the ramming of sheet piles or piles will usually be experienced as particularly annoying, as it is impulse noise. There are two homes located 200 m from the impact site, and a simple noise calculation of the noise propagation has been made on that basis. It shows that noise levels of over 40 dB(A) can be expected more than 300-400 m from the impact site. The duration of the framing work is estimated to last 14 days, and the construction work is only carried out during the daytime between 07.00 and 18.00 on weekdays, as prescribed in Horsens Municipality's regulations for building and construction work. It has also been assessed that there is no need for significant mitigation measures in connection with construction noise.

#### Noise during the operating phase

It appears from the environmental impact report, section 7.1.3, that noise calculations have been carried out for the operational phase in accordance with the Danish Environmental Protection Agency's guidance on noise from roads.[18] In addition, speeds have been entered on the roads according to the municipality's traffic model, and the traffic count from Vrøndingvej is projected for 2030.

It also appears that a noise propagation map has been prepared for the reference scenario, figure 7-1, which involves a projection of the traffic to 2030 with the expected expansion of the business area VEGA. In this scenario, the connecting road north of Vrøndingvej is included. In addition, a noise propagation map has been prepared for the projected connection road, figure 7-2, where the traffic figures, as in the reference scenario, are projected with planned urban development until 2030.

It appears from the noise propagation map for the reference scenario in Figure 7-1 that the noise level at the two potential breeding and roosting areas for bats east of the road is between 48-53 dB(A). From the noise propagation map for the projected connecting road in figure 7-2, it appears that the noise level at the northernmost potential breeding and roosting area for bats east of the connecting road will lie partly within the noise level 63-68 dB(A) and 58-63 dB(A), and that the southernmost potential breeding and resting area east of the road will lie within the noise level of 53-58 dB(A).

#### Copper

It appears, among other things, from the environmental impact report's section 4.7.3 on discharge from the rainwater basins, that the discharge of nutrients, environmentally hazardous substances, and oxygen-consuming and suspended substances from the plant's rainwater basins is calculated on the basis of standard concentrations on outlet water from rainwater basins, assuming that the entire annual discharge is cleaned through the basins. It appears from table 4-5 in the environmental impact report that the calculated average substance concentration of copper in the discharge water from road basins is calculated to be 0.028 mg/l. It appears that the figure comes from the Handbook published by Vejregelgruppen Afvanding in 2020,[19] and that it is supplemented with some data from Faktablad on the dimensioning of wet rainwater basins.[20] The calculation of material quantities that Bygholm Å will be burdened with from the planned new road section is given in Table 4-6, where it appears that the total contribution of copper will be 0.39 kg/year.

It appears from the environmental impact report section 10.3.2 on harmful substances that the environmental quality requirement for copper in water is 1.66 µg/l, and that data from the basic analysis 2021-2027 show an excess of this substance in Bygholm Å, as the concentration is 1.717 µg/l.

Furthermore, it appears that loss of copper from agricultural land constitutes a significant source of the presence of copper in the Danish aquatic environment. According to studies carried out by DCE, the environmental quality requirement has been exceeded for 67% out of 21 investigated measuring

stations, which is attributed to an increase in the content of copper in Danish agricultural land.[21] The above-mentioned report from DCE indicates that by far the largest source of copper in Danish soils primarily comes from the application of pig manure, which makes up 80-90%. Although there is knowledge that there is a certain content of copper in brake pads, it must be expected that the reason for exceeding the environmental quality requirement is primarily due to agriculture.

Furthermore, it appears that it must be assumed that the road water from the new road will be retained in the basins to a greater extent than is the case with the current road construction (Grønhøjvej/Stampemøllevej), since the water in future will be led through basins dimensioned according to the best available technology, and the water is thus both cleaned and delayed. This also results in an increase in the residence time, which means some significant degradation of substances such as e.g. nonylphenol, which has a half-life of approx. a month in water. On the other hand, according to the report, the amount of traffic in the area will increase, and the amount of road water and substances will increase, among other things, due to the greater drainage of the roadway directly to the basin. It is to be expected, however, that the increased cleaning will still mean a smaller discharge of this.

In relation to the importance for Bygholm Å, it also appears from the environmental impact report that there is a known mean concentration for copper in the outlet water from the rainwater basins.[22] If the concentration for copper in table 4-5 is maintained as background concentration in Bygholm Å, the resulting concentration of copper at an average water flow of 1,600 l/s in Bygholm Å and a discharge of 2.1 l/s from the basins will result in a concentration of copper in Bygholm Å of 1.751 µg/l at a discharge concentration of 28 µg/l total copper. It is a worst-case scenario, which assumes that all the copper in the outlet water contributes to the dissolved fraction of the copper in Bygholm Å. The actual resulting concentration in Bygholm Å will be less than 1.751 µg/l, as part of the copper will be bound in non- or hardly-soluble compounds. Although an increase from 1.717 µg/l to less than 1.751 µg/l is a very limited impact, the limit value has been exceeded.

Furthermore, it appears from the environmental impact report that, according to § 8, subsection 3, as a starting point, an increased supply of copper cannot be permitted when the environmental quality requirement has already been exceeded for copper, unless other sources are minimized or a concrete assessment shows that the discharge will not have any significance in practice. [23] In this regard, reference is made to the guidance for the action order, from which it is evident, among other things, that the decision on an additional addition of harmful substances is based on a very specific assessment of the significance of the impact (significance) for the condition of the water area. [24] Furthermore, it appears from the environmental impact report that the very small additional impact of copper, which here is 0.034 µg/l in an average situation corresponding to a 2% impact on the limit value, will not be decisive for whether the objectives are achieved on the ecological parameters (fish, small animals and plants), which must also be assessed under the ecological condition. Furthermore, it appears that the impact is so small that it can be defined as not significant in accordance with the limit for additional introduction of harmful substances of 5%, which appears in the Danish Environmental Protection Agency's FAQ on the discharge of harmful substances.[25]

Overall, it is assessed in the environmental impact report that the runoff from the rainwater basins to Bygholm Å does not lead to a deterioration of the condition of the surface water area or hinder the fulfillment of the established environmental targets.

#### Alternatives

It appears from section 3.1.1 of the environmental impact report that the selected proposal (the main proposal) and reference scenarios must be examined in the environmental impact report.

The main proposal included in the environmental assessment is the scenario in which the requested permit is granted. The only alternative that will be included as a basis for comparison for the main proposal in the environmental assessment is the reference scenario, where permission for the main proposal is not granted and the project cannot be realized.

It appears from section 3.2 of the environmental impact report that the reference scenario corresponds to the existing environmental conditions (the area's current environmental status) and the probable development of the area if the project is not carried out. If the road project is not realized, the current land use will continue unchanged.

In the reference scenario, the probable development of the traffic conditions is projected until 2030. The projection includes the expansion of the VEGA business area, with e.g. the transport company [V1], as well as other planned urban development until 2030, including urban development in Lund. It includes expansion of the harbour, reconstruction of the Town Hall Campus and Nørrestrand. In addition, New Hattingvej and Ringvej Syd, stage 1, have been constructed.

It also appears from section 3.3 of the environmental impact report on the selection of alternatives that, prior to the design of the applied road, three alternative routes in the area, proposed solutions 1, 3 and 4, in addition to the selected project proposal, solution 2, have been assessed. In connection with the public hearing at the start of the environmental impact report, a number of citizen proposals for alternative solutions and alignments have also been submitted, solution proposals 5, 6, 7, 8, 9, 10 and 11. The ten proposals and the applied alignment appear in figure 3-1 of the environmental impact report.

Each proposed solution is described in more detail in sections 3.3.1, 3.3.2 and 3.3.3 of the environmental impact report, together with an initial assessment of their traffic effect with a focus on accessibility to the business area, relief from Ny Silkeborgvej-Silkeborgvej and the rest of the road network, as well as an assessment of road safety and driving comfort in general. In addition, an overall screening of the impact of the individual proposals on natural conditions, the landscape and cultural conditions has been carried out.

Solution proposal 8 involves an upgrade of Silkeborgvej with new intersections and expansion of the section to four lanes, which will be able to handle traffic on the overall road network at an acceptable level towards the two ramp intersections at motorway junction 56a (Horsens V). The Swedish Roads Administration is the authority for the ramp junctions, which is why an extension is a state decision. Horsens Municipality cannot therefore develop these two intersections. It appears that the solution will result in reduced accessibility to the business area VEGA and the residential areas in Lund and the Provstlund area

The proposed solution has not been chosen, as it does not fulfill the project's purpose of increased accessibility and robustness, but on the contrary is assessed to worsen existing problems with accessibility along Silkeborgvej and at several major intersections on the approach roads to Horsens's city centre.

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Solution proposal 11 involves an alignment that runs from motorway junction 56b (Horsens C) and parallel to the motorway with connection to Vrøndingvej. The many sharp curves along the road's route do not make it possible for modular vehicle trains to use the section, just as the desired speed of 80 km/h cannot be maintained on the section. In addition, the E45 motorway is covered by a 50 m road construction line, which is why the alignment had to be placed at least 50 m from the center line of the motorway.

The proposed solution has not been selected, as the alignment does not provide the desired traffic effects, neither in relation to the accessibility to the business area VEGA nor in relation to the traffic relief of Silkeborgvej.

Mapping of protected nature has been carried out for the area around lines 1, 2, 9 and 10 in 2020 and 2021, and new areas with protected nature have been registered in this connection. The routes for the other alignments have not been inspected, as Horsens Municipality has assessed that these alignments will not have the desired traffic effect, and are therefore not realistic alternatives to the selected project proposal.

## **2.4 Content of the complaint**

### **2.4.1 Authority disqualification**

The complainant has stated that the Municipality of Horsens is incompetent according to Section 40 of the Environmental Assessment Act in the specific case, as the approval and the concrete routing of the connecting road is a prerequisite for a conditional purchase agreement with a logistics company in the area. The municipality thus has a significant financial "private" interest in the sale itself, just as the municipality has an interest in the sale being carried out, as it will increase investment and local jobs in the municipality, which is the primary purpose of establishing the road. There is therefore a lack of authority on the part of the municipality, which is why the municipality cannot be the case-handling authority for the EIA investigation and the impact of the connecting road on the environment in Bygholm Ådal. The completed environmental studies should be rejected, and the impact on the environment should be subject to a stricter assessment by the Environmental and Food Complaints Board due to Horsens Municipality's incompetence.

### **2.4.2 Impact on the Natura 2000 area**

The complainant has stated that the Natura 2000 habitat impact assessment does not include several relevant matters, including that the assessments are not sufficiently concretely formulated. Furthermore, the conclusions are not sufficiently justified, and it is not sufficiently described why the protected nature, including protected habitats and species, will not be affected by the planned connection road.

In addition, the complainants have stated that the habitat impact assessment rests on a deficient information base, as it does not relate to or has identified all aspects that may affect the conservation objective for the Natura 2000 area. In this connection, the complainant has referred to the precautionary principle, which means that any doubt must be given to nature and that the authority has the burden of proof to document the absence of harmful effects. Complainants have also pointed out that the protection of Natura 2000 areas also applies to activities outside the area, if the activity can be expected to affect the area, or if the activity can affect migratory species such as birds and fish when they move outside the Natura 2000 area.



The habitat impact assessment therefore suffers from a legal deficiency and cannot form a basis for approving the project, and the Environment and Food Complaints Board should therefore revoke the Section 25 permit as invalid.

Semi-natural dry grassland and scrubland facies on calcareous substrates Complainants have questioned, in relation to Semi-natural dry grassland and scrubland facies on calcareous substrates, whether the already existing impact with nitrogen disposal from Grønhøjvej, which is immediately next to the overdrive, has been taken into account. The complainant has stated that only nitrogen deposition from the planned road appears to have been calculated.

The complainant has also questioned whether the additional load on the Natura 2000 area as a result of traffic from other expansion of the business area has been taken into account.

#### Otter

In relation to otters, the complainant has stated that a temporary bridge is planned to be established during the construction phase over Hatting Bæk, which will disrupt the movement of otters, as otters do not swim under bridges.

#### Brook lamprey

In relation to the brook lamprey, the complainant has referred to the fact that it appears from the habitat impact assessment that there may be a very local and short-term impact on individual individuals of the brook lamprey downstream of the discharge points for the facility's rainwater basins, particularly in relation to oxygen and salt, but that this will not harm Natura 2000 area population of lamprey, as it is not a breeding area. In this connection, the complainant has stated that the ådalen participated in a wetland project in 2004 with Vejle County, where, among other things, spawning grounds were created for the fish in several places in the stream and in the meander next to the planned road.

The complainant has also questioned how it is ensured that the reinjection of groundwater, which in the complainant's opinion is ochreous, which must be carried out during the construction phase, can be carried out without risk of affecting the brook lamprey, which lives in the fresh water in the stream.

Based on this, the complainants have stated that the assessment of the impact on the lamprey in the operation and construction phase is not sufficient, including that it is not sufficiently clarified whether it is a breeding and resting area for the lamprey downstream from the Natura 2000 area.

#### Source wealth scam snail and skewed scam snail

Complainants have stated in relation to the vertigo geyeri whorl snail and the crooked screw snail that it appears from the habitat impact assessment that no studies have been carried out on the vertigo geyeri whorl snail and the crooked screw snail. In this connection, the complainant refers to the fact that the complainant's advisor has registered additional alder-ash swamps in the route of the planned road, which may constitute a habitat area for the spring snail and the narrow-mouthed whorl snail.

#### Groundwater lowering

In addition, the complainant has stated that in the impact assessment, no further investigations have been carried out into what effect the lowering of the groundwater in connection with the construction of the connecting road will have in interaction with the significant permanent lowering of the groundwater, which must be carried out during the construction of the logic connection center north of the connecting road. Nor has it been assessed what significance groundwater lowering in connection with the expansion of motorway E45 in interaction with the project will have.

Complainants have also questioned how it can affect the well-being and spring flow if there is a delay or if the water level is high during the 16-week period when the groundwater is being lowered.

In the complainant's view, a sample that was mistakenly not examined should be included in the assessment in order to reach a correct conclusion.

#### **2.4.3 Provision of the habitat impact assessment**

The complainant has also stated that the consultant who prepared the impact assessment for the road connection is also a consultant for the logistics company in the area in connection with the construction of a logistics centre. On this basis, the complainant has stated that the adviser in question will not be able to appear as an impartial adviser, as there are far too many financial matters involved, and as the adviser has, among other things, advised on traffic management from the logistics centre. There will therefore never be sufficient confidence in the investigations and estimates carried out by the adviser.

Complainants have referred to the fact that the same does not apply to the habitat assessments as under the Environmental Assessment Act, according to which it is the developer who prepares the environmental impact report. In this connection, the complainants have referred to the fact that the habitat regulations are based on EU law, and that in the practice of the EU Court of Justice, where it has been determined that the assessment according to the habitat regulations is the responsibility of the authority.[26] The task should have been left to another impartial adviser with no separate financial interests in the matter.

The complainant has also stated that the conclusions of the impact assessment have not been verified and approved by a third party, as claimed by the municipality, as the municipality's advisor and external lawyer have only looked at the formal requirements for the impact assessment and not related to the material content, including the investigations carried out, assessments and conclusions in the impact assessment.

#### **2.4.4 Annex IV species**

The complainant has stated that the prepared assessment of Annex IV species is flawed and insufficient, and that it also does not meet the requirements of the habitat order in relation to the impact on bats and newts. Overall, there is not the necessary and required high degree of certainty that the ongoing ecological functionality of the area, such as breeding and resting areas for Annex IV species, will be able to be maintained by the construction of a heavily trafficked connecting road.

##### **Bat**

In relation to bats, the complainant has referred to an appendix attached to the complaint, which the complainant has had drawn up by an adviser, which states that the distance from the road route to the nearest potential breeding and roosting area for bats is 16-34 m and not 70-80 m, as stated by the municipality, whereby the assessment of the road bridge's impact on bats has not been carried out on the right basis. The complainant has also stated that this is an important breeding and roosting area for bats, which is not mapped in the habitat impact assessment, and that the road will affect important guide lines and result in the loss of some extinct alder trees, which must be assumed to be of significant importance to the surrounding breeding and resting areas.

Furthermore, complainants have stated that it is not sufficient to only examine the bats in the limited search field, which appears from the habitat impact assessment, as bats can move up to 20 km per hour. day.

In addition, complaints in relation to the operation phase have stated that replanting as a mitigation measure is not sufficient to maintain the ecological functionality of the bat sites, as it will take many years for the trees to grow tall. Furthermore, it is not enough that a fauna passage has been made according to the best possible technique, as this does not say anything about whether damage occurs. The complainant has referred to the fact that in the habitat impact assessment it has been noted that higher screens have not been chosen, as this would trap bats over the road between the screens. The complainant has also stated that the bridge is 12 m wide, and that it appears from the literature that hop-overs are probably only usable if the distance between the tree crowns is a maximum of 5 m. Furthermore, there is insufficient knowledge about the effect of the mitigation measures, including in relation to for screens and hop-overs.

The complainant has also stated that it is contrary to the habitat directive that mitigation measures have been included, as they can only be taken into account in a deviation case. In this connection, the complainant has referred to the practice of the European Court of Justice.[27] There are also alternative solutions on the road route that should have been chosen instead of using mitigation measures.

In addition, the complainant has requested the scientific basis for the assessment in the habitat impact assessment that the road in the operational phase will only make the area immediately along the road less attractive for bats, and that this will not be to an extent that will significantly affect the ecological functionality or the populations in the area.

The complainant has also referred to the noise calculations that have been made and stated that there will be a very strong noise impact during the operational phase along the entire road and into the potential breeding and roosting area for bats, which is not in accordance with the precautionary principle in relation to Annex IV species. In this connection, the complainants have referred to the fact that it appears from an English study that bats usually avoid areas with large roads for up to 1.5 km, and that this is a road between two breeding and roosting areas respectively approx. 50-75 m and 250-300 m from the road. Complainants have also stated that the establishment of piles will affect Annex IV species in the river valley, including bats, during the construction phase with noise and disturbances. Complainants have also questioned whether, in connection with lowering the groundwater, there will be a noise impact at night which could affect bats.

#### Large water salamander

In relation to the large newt, the complainant stated that it was found close to the alignment of the road and in the areas involved in the construction work. It cannot be assessed that large water salamanders are not affected when a single adult individual has just been found in the barn on a nearby property, which in the habitat impact assessment is assessed to be on its way to rest.

The complainant has also stated that it has not been assessed whether the road's route or construction work may affect breeding or resting areas for large newts in the area, and that no further investigations were carried out beyond the survey in the summer of 2020, even though large newts were later documented in the area. Based on the above, the complainant has stated that it can be rejected that the investigations and assessments carried out remove any doubt that large water salamanders are affected by the bypass.

#### Otter

In relation to otters, the complainant has stated that a temporary bridge is planned to be established during the construction phase over Hatting Bæk, which will disrupt the movement of otters, as otters do not swim under a bridge.

#### Pointed seed

The complainant has stated that a pointed-nosed frog was observed on a nearby property in August 2021 and that it does not appear from the environmental impact report that the species was observed. In this connection, the complainant has stated that it cannot be ensured that habitats for the sharp-nosed seed are not damaged or destroyed when the habitats have not been mapped.

#### **2.4.5 Other nature**

The complainant has stated that barn owls have been observed at three surrounding addresses, and asks whether it has been investigated in more detail what significance the project may have for barn owls.

Complainants have stated that at the base of several trees along Bygholm Å there are populations of the moss species butterfly hair star.

The complainant has stated that a short-nosed frog was observed on a nearby property in August 2021 and that it does not appear from the environmental impact report that the species was observed.

Complainants have also questioned why no further investigation has been carried out for cuckoo herb, when it has previously been registered in Vejle County.

#### **2.4.6 Alternatives**

The complainant has stated that there has not been a real alternative to the intended route, and that the route in question has been agreed from the beginning between the Municipality of Horsens and the logistics company. The complainant has referred to the fact that an intersection had been established on Vrøndingvej before the impact assessment was prepared.

The complainant has also stated that the rejection of the alternative routes is not based on a natural factual basis, but solely on a desire to achieve the direct access to the logistics center for optimal operation. In the complainant's view, the existing Silkeborgvej, solution proposal 8, will be able to handle traffic satisfactorily, just as solution proposal 11 will be gentler on the natural and landscape experience in Bygholm Ådal. Solution proposal 11 should have been investigated more closely, as it is a realistic proposal from the public.

#### **2.4.7 Determination of terms**

The complainant has also stated that there is a lack of a description of all the project's characteristics and the measures that are intended to be taken to avoid, prevent or limit and, if possible, neutralize significant harmful effects on the environment, which the developer must implement, and any monitoring measures, cf. the Environmental Assessment Act Section 27, subsection 1.

The complainant has also stated that there is no requirement in the § 25 permit that the lead planting must consist of non-insect pollinating and fruit-bearing shrubs and trees to avoid insects being attracted, which is otherwise assumed in the habitat impact assessment,

#### **2.4.8 Other complaints**

The complainant has stated that the project is in breach of a registered easement, which stipulates that the project area must permanently remain as a wetland. The complainant does not believe that it makes sense to allow a negative impact on the area when there is this wetlands declaration for the area. Complainants have also referred to the fact that Horsens Municipality cannot restrict the wetland area.

The complainant has also stated that it is not necessary for a new connecting road to be established, as the Roads Directorate has stated that traffic in the area will be able to flow unhindered in a number of years, regardless of whether the connecting road is established.

#### **2.5 Horsens Municipality's comments on the complaint**

Horsens Municipality has submitted comments to the complaint on 28 March 2022, 4 July 2022 and 18 November 2022.

##### **2.5.1 Authority disqualification**

Horsens Municipality has noted that, in the specific case, the municipality is both the land seller, developer and authority in relation to the road connection. It is not possible to avoid this dual role, as the municipality is, among other things, granted authority by the Environmental Assessment Act. Substitution cannot take place, as one municipal council cannot be replaced by another. The municipality has therefore taken a number of measures to ensure that the authority's competence does not influence the decision by having organized itself in the case in a way that ensures handling of conflicts of interest and honors the requirements of Section 40 of the Environmental Assessment Act and Section 15 of the Environmental Assessment Executive Order.[28]

It also appears that in relation to the handling of the road project, the municipality has had a functional division, which has been carried out up to the level of municipal director, after which there is an authority track and a developer track within the municipality.

It appears that the authority track must issue the relevant permits for the project, and that the track includes planners, nature and environmental professionals as well as construction case handlers. The track is further divided into an authority part relating to the planning process related to the municipal plan supplement and an authority part relating to the specific project and the issuing of the necessary permits in that connection.

It appears that the developer track includes constructors and engineers as far as the construction and execution of the concrete road project is concerned, as well as the preparation of environmental impact assessments etc. for the project.

It also appears that stricter assessments have been made with regard to the assessments, permits and approvals related to the road construction in question, which Horsens Municipality as an authority has carried out and issued. This has resulted in some very comprehensive assessments, justifications and stricter conditions in decisions issued by Horsens Municipality as authority for the road project to Horsens Municipality as developer.

Horsens Municipality has also referred to the fact that the municipality, as part of the municipal power of attorney and the general operation of a municipality, can buy and sell real estate, and that it is not unusual for a municipality to be a contracting party in a transaction relating to real estate, to which there is attached conditions for the finality of the transaction.

Furthermore, regardless of the content of the purchase agreement, the logistics company has applied for and received permission to establish the logistics company, and the condition in question in the purchase agreement regarding the establishment of the road is henceforth without legal significance. It has not been possible for the logistics company to order a specific route. It is also not unusual for the buyer to have wished for an efficient road connection to the business area.

#### **2.5.2 Natura 2000 habitat impact assessment**

Semi-natural dry grassland and scrubland facies on calcareous substrates Horsens Municipality has referred to the fact that in the habitat impact assessment an adequate assessment of the impact from nitrogen deposition has been carried out, where the cumulative effects with the existing deposition are also taken into account, which is consistent with the practice of the EU Court of Justice.

##### Otter

Horsens Municipality has noted that in the habitat impact assessment, the importance of the road project for otters in both the construction and operational phases has been adequately explained. The design of the project as a landscape bridge ensures the necessary fauna passage, as described in the management plan for otters.[29]

##### Brook lamprey

Horsens Municipality has noted that a thorough assessment of the project's possible impact on the brook lamprey has been carried out in the habitat impact assessment and the environmental impact report, and that there is no assessment of a threat to the brook lamprey.

Horsens Municipality has also noted that the reinjection of the groundwater takes place in a closed system, where the groundwater does not come into contact with oxygen, which is why the reinjection of the groundwater will not cause a negative impact on the fresh water quality in Bygholm Å.

##### Vertigo geveri whorl snail, narrow-mouthed whorl snail and Desmoulin's whorl snail

Horsens Municipality has noted that the natural types and habitats of the habitat area have been mapped by the Danish Environmental Protection Agency. On this basis, it has been concluded that the eastern part of the habitat area does not contain habitat types that can support the presence of spring snails or narrow-mouthed whorl snails, and no snails were found. In the habitat impact assessment, it is assessed that there is no risk of impact on the species.

Horsens Municipality has noticed that snails do not migrate between habitats in the same way as mobile species, since the size of the three species of snails is only approx. 1.5-3 mm.

The municipality has also noted that there is a distance of at least 240 m between the potential habitat for the Desmoulin's whorl snail within the habitat area and the pressurized water-affected bog area outside the habitat area just east of the northern section of the road trace, and that the areas in between consist partly of a road and partly of dry grassland nature, which does not constitute a suitable habitat for species of snails. Should a population of snails still be found in the alleged spring, the municipality assesses that a possible population of snails cannot interact with any populations within the habitat area, as the species will not spread via unsuitable habitat types. The alleged source mass is isolated away from the habitat area, and any population in that source mass will not be covered by the possible populations in the Natura 2000 area and therefore not covered by habitat protection.

##### Groundwater lowering

Horsens Municipality has noted that the lowering funnel does not affect the Natura 2000 area, and that it is also a temporary groundwater lowering. The municipality has also noted that there are no cumulative impacts from other groundwater lowering due to the distance, and that it is not the

intention of the Environmental Assessment Act that conditions which are purely hypothetical are also included.

#### **2.5.3 Provision of the impact assessment**

Horsens Municipality has noted that the consulting company which prepared the impact assessment is both an adviser to the logistics company in the area and Horsens Municipality as the developer of the connecting road. The adviser has not at any time acted as an authority adviser for the municipality in the case and will not do so either. The municipality, as an authority, entered into negotiations with two other consultancy firms, which have reviewed the relevant consultancy firm's assessments, etc. The adviser's actions or client relationships with two different developers in the same complex of cases have therefore not influenced the process, as the consultancy company in question is not an adviser to the authorities in the case, which is why questions about the adviser's disqualification in that connection are irrelevant.

Horsens Municipality has also noted that the municipality has carried out independent comment rounds of the consultancy company's habitat impact assessments to ensure that the Habitats Directive's requirements for an appropriate assessment have been met before the municipality has issued the relevant permits. According to the habitat guidelines, it is Horsens Municipality's responsibility to ensure that the matter is sufficiently informed, and that all aspects of a plan or project are identified and checked, when and if this may affect the conservation objectives, etc. in a Natura 2000 area, which the municipality has done in this case.[30] The municipality does not agree with complaints that it can be inferred from the practice of the European Court of Justice that the habitat impact assessment must be prepared in all details by the responsible authority.

#### **2.5.4 Annex IV species**

##### **Bat**

Horsens Municipality has noted that the area has been examined for bats in accordance with the Road Directorate's guidance Bats and major roads, as well as the precautionary principle, according to which possible breeding and roosting areas have been treated so that they are in fact breeding and roosting areas. In the municipality's view, the investigations carried out, including the survey area laid out, are fully comprehensive and sufficient in relation to the purposes of the investigations and the scope of the intended project.

Horsens Municipality has noticed that the complainant's measurement of the distance from the road to the potential breeding and roosting areas for bats is significantly flawed, as it was not measured from the road route itself. In addition, the municipality has referred to an accompanying annex, from which it appears that during the processing of the case, the municipality has stated that the distance from the road to the potential breeding and resting area is approx. 70-80 m.

Horsens Municipality has noted that the question of the exact distance to the potential breeding and resting area is not decisive in this case, as the assessment of impact is based on the road's calculated traffic load and pattern and the nature of the resulting potential noise and light impact, and that it thus does not change the conclusions drawn in the habitat impact assessment and the environmental impact report.

In relation to the bat boxes, Horsens Municipality has noted that they are intended to prevent damage to potential roosting trees, which are assessed as being of very poor quality in relation to use as a sporadic daytime roosting area and completely unsuitable as a breeding area or winter roosting area. Seen in the context of the quality and extent of breeding and roosting trees locally in the river valley, it

is considered very unlikely that the removal of the extinct alder trees in question can affect the ecological functionality of the area for bats, especially when bat boxes are set up in the area, which overcompensate for the highly questionable day rest areas, possibly in the listed 2-4 trees.

Horsens Municipality does not agree with complaints that it follows from the practice of the European Court of Justice that preventive measures cannot be used in relation to the ecological functionality of Annex IV species' breeding and resting areas. The municipality has also noted that it is assumed that the preventive measures are functional at the time of the interventions and/or when the road or facility is put into use. It would not be possible to place roads anywhere in Denmark if the roads are not allowed to cross areas where there is bat activity, and preventive measures have been used that sufficiently ensure the maintenance of the local populations.

Horsens Municipality has also noted that the lowering of the groundwater does not cause noise that could affect Annex IV species.

In addition, Horsens Municipality has noted that if the Environmental and Food Complaints Board does not believe that it is sufficiently clear what the lead planting must consist of, it has mentioned the possibility of inserting such a condition in the Section 25 permit.

#### Newt and other amphibians

Horsens Municipality has referred to the fact that, as shown in the habitat impact assessment, detailed field investigations have been carried out in 2020 and 2021 in relation to large newts and other amphibians, including the pointed frog.

Horsens Municipality has noted that conditions have been set for the establishment of an amphibian fence, and that it is adequate in relation to preventing population-reducing killings and disturbances of individual individuals. The complainant's observations of the newt and the two frogs do not change the assessment, as the observation was made outside the project area.

#### **2.5.5 Other nature**

Horsens Municipality has noticed that the butt-leaved hair star is red-listed and not covered by the species protection order or listed as an Annex IV species, which is why the species is not covered by the strict protection according to the habitat directive. A voluntary agreement has been made with the developer that the defunct alder trees will be pulled aside in connection with felling, and will remain in the area as continued habitat for the butt-leaved hair star.

Horsens Municipality has also noted that the barn owl is a red-listed species and not covered by the species conservation order or listed as an Annex IV species. The vast majority of barn owls in Denmark breed in open farm buildings or nest boxes, and no buildings suitable for nesting barn owls will be demolished or felled in connection with the project, which is why this is not relevant in this case.

In addition, Horsens Municipality has noted that cuckoo is not an Annex IV species, and that the occurrence of cuckoo is registered on the limestone outcrop in the Natura 2000 area. The impact of the chalk overgrazing in question is assessed in its entirety in the habitat impact assessment.

#### **2.5.6 Alternatives**

Horsens Municipality has noted that, in connection with the sale of land in the business area, a number of different alternative road connections were considered, and that the proposed alignment is the one that is assessed to have the least negative impact on nature and landscape and at the same time fulfills the purpose of the road, which, among other things, is securing the traffic infrastructure.



The municipality has assessed that the road is necessary from a socio-economic perspective, and in weighing up interests, the socio-economic value and necessity as well as local traffic safety have been central to the chosen route.

Horsens Municipality has also noted that according to the Environmental Assessment Act there is a requirement that reasonable alternatives must be described in an environmental impact report, and that there is therefore no requirement that all considered alternatives must be treated in detail. In the municipality's opinion, the assessments carried out in the environmental impact report of a total of 11 alternative alignments are therefore sufficient.

Horsens Municipality has also noted that the intersection at Vrøndingvej has been established to ensure smooth flow of traffic in the area and to create access to a rainwater basin. In addition, several of the alternative alignments described had connections at the crossing.

Horsens Municipality has also noted that the 0 alternative is described in the environmental impact report, and that the 0 alternative will not be able to ensure the flow of traffic in the area.

#### **2.5.7 Determination of terms**

Horsens Municipality has noted that Section 27 of the Environmental Assessment Act has been complied with, and has referred to the Section 25 permit containing a number of conditions. Based on the environmental impact report, it has been assessed that there is no need to establish separate monitoring measures.

#### **2.5.8 Other remarks**

Horsens Municipality has noted that the connecting road does not contravene the provisions of the wetlands declaration, and that, in addition, it is not a matter that falls under the competence of the Environmental and Food Complaints Board, as there is no decision in the legal sense in relation to the question of the declaration .

### **2.6 New information during the processing of the case**

On 30 September 2022, Horsens Municipality submitted a response to the Environmental and Food Complaints Board's hearing, where the board asked the municipality to explain in more detail screens and planting in the project, which prevent damage to bats. It appears from this that the client's adviser has drawn up a memorandum, which Horsens Municipality, Nature and Environment, which the authority has reviewed and agrees with.

The prerequisites for the assessment of whether the ecological functionality of breeding and roosting areas for bats will be damaged as a result of the project are, among other things, detailed in the note.

It appears from this that the primary condition for the assessment of the ecological functionality of breeding and roosting areas for bats will not be damaged is that the project does not affect suitable breeding and roosting areas for bats. In addition, the potential barrier effects between breeding and resting areas and foraging areas as a result of the road construction are averted by ensuring the best possible fauna passage in the Bygholm Ådal, including for bats, by establishing the road construction as a landscape bridge with large clearance and openness under the bridge, which according to The Road Directorate's guidance on fauna passages is important for a well-functioning fauna passage. The screening on the landscape bridge and the guide planting will also be established in accordance with the Road Directorate's instructions to ensure that the fauna passage will function as best as possible in relation to ensuring the ecological functionality of breeding and roosting areas for the bat species in the area. The screens on the bridge are only installed as an additional security in relation to

individual protection of the medium-high flying bat species. In this connection, reference is made to the fact that it appears from the Road Directorate's instructions that it may be necessary to mount screens on the sides of bridges, but that the instructions do not contain recommendations for specific heights or the design of screens. In connection with the project, it has therefore been chosen to establish screens at a height of 1.6 m, which corresponds to screens on similar newer landscape bridges.

The guide planting must complement the landscape bridge to ensure the best possible function of the landscape bridge, which ensures that the primary guide line in the area, Bygholm Ådal, will continue to function as the primary guide line. According to the Road Directorate's instructions, the guide planting must not be significantly higher than the screens, which is why it has been chosen that the guide planting must have a height of at least 2.5 m on both sides of the road. Until the guide plants have grown, fences are set up that are tightly meshed as recommended in the Road Directorate's guidance on fauna passages. Leader planting of 5 m is deliberately not chosen to minimize the risk of shelter being formed between the leader planting, where insects can gather during periods of wind.

In the response to the consultation, it is generally assessed that the planned heights of screens and guide plantings best reduce the risk of traffic fatalities on both the road area and the landscape bridge, and that a higher height of the guide plantings and screens will very likely increase the risk of traffic fatalities to individuals.

In addition, based on the flight patterns of the individual species, it has been assessed that most species will use the primary control line under the landscape bridge, and that the less structure-bound species will fly at such a great distance from the control plantings and screens that the planned heights will reduce the risk of collision considerable.

It also appears from the note that it has been assessed that hop-overs are not relevant for the ecological functionality of breeding and roosting areas for bats, as it relates to the individual protection of bats.

### **3. The Environmental and Food Complaints Board's comments and decision**

The following members of the Environment and Food Complaints Board have participated in the processing of the case: Birgitte Egelund Olsen (chairman), formerly county judge Eva Staal and county judge Olaf Tingleff, as well as the lay members Pelle Andersen-Harild, Lene Hansen, Kristian Pihl Lorentzen and Jens Vibjerg.

#### **3.1 Examination by the Environmental and Food Complaints Board**

This appears from § 11, subsection 1, in the Act on the Environmental and Food Complaints Board, that the board can limit its review of a decision to the circumstances complained of. However, it appears from the drafters of the provision,[31] that the board has the opportunity and, depending on the circumstances, the duty to include other matters than what has been complained about, e.g. the question of compliance with applicable EU law or basic principles of administrative law.

It also follows from § 11, subsection 2, in the Act on the Environment and Food Complaints Board, that the board can limit its examination to the most significant matters.

In this complaint, the Environment and Food Complaints Board has found occasion to deal with the following matters:

##### **1. Authority capacity**

2. Impact on targeted surface water areas
3. Impact of Natura 2000 area no. 236, Bygholm Ådal
4. Provision of the impact assessment
5. Impact on Annex IV species (bats, otters and newts)
6. Other nature
7. Alternatives

The Environmental and Food Complaints Board has, in continuation of this, found occasion to state a number of matters which the first instance will have to take into account in connection with a renewed examination of the case, see more in section 3.3.

The Environmental and Food Complaints Board notes that matters relating to easements and declarations are not regulated in the Environmental Assessment Act, which is why the board does not have competence to deal with this issue. The board also does not have competence to consider whether it is necessary to establish the connecting road, as the board cannot decide whether the project itself is appropriate, but can only assess legal and discretionary issues connected with the Section 25 permit.

### **3.2 The Environmental and Food Complaints Board's comments**

#### **3.2.1 The legal framework**

##### **The Environmental Assessment Act**

The purpose of the Environmental Assessment Act's rules is to ensure that an assessment of the effects on the environment is carried out as the basis for the decision to grant or refuse permission for project types that can significantly affect the environment.

The environmental assessment rules mean that projects that can be expected to have significant impacts on the environment may not be started before the authority has given written permission to start the project (environmental assessment obligation).

The developer of a project subject to an environmental assessment must, according to Section 20, subsection of the Environmental Assessment Act. 1, prepare an environmental impact report that contains an assessment of the project's impact on the environment. It follows from section 20, subsection 4, no. 2, that the information that the developer must provide about the applied for project in the environmental impact report, cf. subsection 2, in an appropriate manner must demonstrate, describe and assess the significant direct and indirect effects of the project on biological diversity, with particular emphasis on species and habitats protected under the Habitats Directive[32] and the Birds Directive.[33]

This follows from Section 24, subsection of the Environmental Assessment Act. 1, that after receiving the environmental impact report from the client, the authority must review the report with the involvement of the necessary expertise in order to ensure that it meets the requirements in section 20. The authority can, if necessary, obtain additional information from the client to meet the requirements in section 20, PCS. 2.

After reviewing the environmental impact report, the authority must send it for consultation with the authorities concerned and the public, cf. section 24, subsection of the Environmental Assessment Act. 2.

After the consultation, the authority must make a decision according to Section 25 of the Environmental Assessment Act on whether the project can be approved. The decision is made on the

basis of the developer's application, the environmental impact report, any additional information, the results of the hearings that have been carried out and the authority's reasoned conclusion. According to section 5, no. 5, letter d of the Environmental Assessment Act, cf. letter c, the authority's reasoned conclusion deals with the project's significant impacts on the environment, taking into account the results of the authority's investigations of the environmental impact report, any additional information presented by the client, any relevant information received via the hearing and the authority's own supplementary investigation, cf. section 24, subsection 1.

An § 25 permit must include the reasoned conclusion and contain all the environmental conditions attached to the decision, a description of all the project's characteristics and the measures that are intended to be taken to avoid, prevent or limit and, if possible, neutralize significant harmful effects on the environment to be implemented by the developer and any monitoring measures. This follows from section 27, subsection of the Environmental Assessment Act. 1.

The authority can, according to § 27, subsection of the Environmental Assessment Act. 2, attach conditions to a § 25 permit with a view to fulfilling the purpose of the Act. Terms must be proportionate to the nature, location and dimensions of the project as well as the extent of its effects on the environment.

If the project has significant harmful effects on the environment, the authority must, according to Section 27, subsection of the Environmental Assessment Act. 3, also set conditions for the client's monitoring thereof.

#### The relationship between the Environmental Assessment Act and the Water Framework Directive

According to Annex 7 of the Environmental Assessment Act, cf. § 20, subsection 2, no. 6, the environmental impact report must contain a description of the surroundings which may be significantly affected by the project, including e.g. water, as well as contain a description of the project's short-term as well as long-term effects on the environment.

The Water Framework Directive<sup>[34]</sup> establishes and determines the framework for planning and implementing measures and monitoring the water environment in the EU member states. The directive stipulates, among other things, that the Member States must delimit the individual river basins within their national territory and assign them to separate river basin districts for the purposes of this directive. According to Article 1, the overall purpose of the directive is to establish a framework for the protection of streams and lakes, transitional waters, coastal waters and groundwater, which, among other things, prevents further deterioration and protects and improves the condition of aquatic ecosystems.

According to the directive's article 4, subsection 1, letter a, nos. i)-iii), Member States must, when implementing the action programs reflected in the watershed plans, i.a. implement the necessary measures with a view to preventing the deterioration of the condition of all surface water areas, subject, however, to the application of the options for derogation that follow from subsection 6 and 7. With corresponding reservations and subject to possible time extensions pursuant to subsection 4, Member States are further obliged to protect, improve and restore all surface water areas as well as artificial and heavily modified water areas with a view to achieving good condition or good ecological potential and good chemical condition for surface water by 2015 at the latest.

According to the Water Framework Directive, Article 4, subsection 7, there is no breach of the directive in i.a. the cases where the failure to prevent the deterioration of the condition of a surface water area is due to new changes to the physical characteristics of the surface water area, and provided that a number of specified conditions are all met. Among other things, the changes must be justified by the

fact that significant public interests and/or the beneficial effects for the environment and society upon achieving the target must be less than the beneficial effects resulting from the new changes or changes for the health of the population, the maintenance of human safety and sustainable development. Regarding the relationship with the EIA Directive, the Court of Justice of the European Union has stated in the Land Nordrhein-Westfalen judgment that the provision in Article 6 of the EIA Directive, which relates to the information that must be made available during the procedure for a permit for a project, must be interpreted as follows, that an EIA process must include the information necessary to assess the project's impact on the water environment, taking into account the criteria and obligations laid down in accordance with the water framework directive, cf. water framework directive article 4, subsection 1.[35]

The provisions of the Water Framework Directive are implemented in Danish legislation in particular in the Water Planning Act[36] and the Environmental Objectives Act.[37]

The Water Planning Act contains general provisions on water districts, authorities' responsibilities, environmental goals, planning and monitoring, etc. According to section 7 of the Act, subsection 1, the Minister of the Environment and Food lays down rules that determine and specify specific environmental targets for the watershed districts' individual surface water bodies and groundwater bodies, including rules on artificial and highly modified surface water bodies, deadlines for meeting environmental targets and less stringent environmental targets. Concrete environmental targets for the individual surface water areas, etc. is laid down in the environmental target order.[38]

With a view to meeting the concrete environmental goals, the Minister for the Environment and Food, pursuant to § 19, subsection 1, on the basis of the basic analysis, monitoring results and other relevant knowledge for each watershed district, an action programme. Action programs for each water area district are laid down in the action order.[39] The effort programs include, among other things specific measures aimed at individual water areas. The executive order also contains an overview of the basic measures and general supplementary measures of the action programmes.

This appears from section 8, subsection of the executive order. 2, that the authority can only make a decision that involves a direct or indirect impact on a surface water area or a groundwater body where the environmental objective is met, if the decision does not result in a deterioration of the condition of the surface water area or groundwater body.

According to section 8, subsection 3, the authority can only make a decision that involves a direct or indirect impact on a surface water area or a groundwater body where the environmental target is not met, if the decision does not result in a deterioration of the condition of the surface water area or groundwater body, and does not hinder the fulfillment of the established environmental target, including through the measures established in the action programme. When assessing whether the decision will hinder the fulfillment of the established environmental objective, it must be taken into account whether the impact is neutralized later in the planning period.

The Danish implementation of the EIA directive also constitutes a basic measure according to the water area plans. This means that in connection with the proceedings under the Environmental Assessment Act, the environmental objectives and water quality must be described, and it must be assessed whether the project will be able to influence these and, if so, whether the project will constitute an obstacle to achieving the set quality objectives. In connection with this assessment, it is particularly important to consider the possible cumulative effects.[40]

It will also constitute an obstacle to the fulfillment of environmental objectives if a municipality grants a permit which implies that the established environmental objectives, which are assumed to be achieved in the second (2015-2021) or third (2021-2027) planning period, cannot be achieved before the deadline.[41]

#### The relationship between the Environmental Assessment Act and the habitat regulations

This follows from Article 6, subsection of the Habitats Directive. 3,[42] that the national authorities only give their approval to a plan or project that may significantly affect a Natura 2000 area, once they have ensured that the plan or project does not damage the integrity of the site.

Article 6, subsection of the Habitats Directive 3, also applies in cases where the authority's approval of the project is given in the form of a permit pursuant to Section 25 of the Environmental Assessment Act. Permission will thus not be granted for a project pursuant to Section 25 of the Environmental Assessment Act if the project could damage a Natura 2000 area integrity in violation of Article 6, subsection of the Habitats Directive. 3.

Article 12, subsection of the Habitats Directive 1, also obliges the Member States to introduce a strict protection system in the natural range of the animal species mentioned in Annex IV of the directive. According to letter (d) of the regulation, the scheme must include, among other things, a prohibition against damage or destruction of breeding or resting areas.

Article 6, subsection of the Habitats Directive 3, on the protection of Natura 2000 areas and Article 12, paragraph 1, letter d, on the protection of Annex IV species is in Danish legislation mainly implemented in the habitat order.[43]

Section 6 of the Habitats Executive Order, subsection 1, thus states that, before making a decision pursuant to the provisions mentioned in § 7, the authority must make an assessment of whether the project in itself, or in connection with other plans and projects, may affect a Natura 2000 area significantly. If the authority assesses that the project may significantly affect a Natura 2000 area, pursuant to § 6, subsection 2, a detailed impact assessment of the project's effects on the Natura 2000 area is carried out, taking into account the conservation objective for the area in question. If the assessment shows that the project will damage the integrity of the international nature protection area, no permit, dispensation or approval can be granted for the application.

Similarly, it follows from § 10, subsection of the habitat order. 1, no. 1, that when administering the provisions mentioned in § 7 and § 8, a permit, dispensation, approval, etc. cannot be granted if the applied for could damage or destroy breeding or resting areas in the natural distribution area of Annex IV- species.

When issuing a permit, the authority must, in accordance with section 25, subsection of the Environmental Assessment Act. 1, then also ensure that the project will not damage or destroy breeding or roosting areas in the natural range of Annex IV species.

#### **3.2.2 Ad 1) Incapacity of authority**

Section 40, subsection of the Environmental Assessment Act. 1, stipulates that an authority which prepares plans or programs covered by this Act, or which is both the client and authority for an applied for project covered by this Act, must carry out its tasks and powers in an objective manner. It also appears from section 40, subsection 3, that an authority that is the developer of a project covered by this Act may not process the application for the project and make a decision on it, unless an appropriate separation between incompatible functions has been ensured within the authority in

connection with the performance of these tasks and powers . Such a conflict of interest can, according to the EIA directive, i.a. countered through a functional separation or at least an organizationally separate performance of tasks.[44]

According to the drafters, Section 40 of the Environmental Assessment Act is supplemented by the general rules of Danish law on handling official disqualification. It also appears from the processors that in cases where substitution is not possible and an otherwise incompetent authority participates in the processing of a case, it should be noted on the case that the person in question was found to be incompetent, but still contributed, and the reason for this should also be stated . Depending on the background of the disqualification, particularly high demands should be placed on the provision of the relevant information base in the case, so that others who participate in the processing of the case have the opportunity to follow and assess the facts and the premises for the decision of the case.[45]

This is further apparent from § 15, subsection of the environmental assessment order. 1, cf. the Environmental Assessment Act § 40, subsection 4, that in order to prevent official disqualification, a municipal council, etc. carry out a separation of tasks and powers when screening and environmental assessment of plans, programs and projects in accordance with the law. Authority disqualification must, according to section 15, subsection 2, is sought to be resolved by substitution, by which it is understood that a secondary or superior authority takes over the case from the disqualified authority. It also appears from section 15, subsection 3, that if substitution according to subsection 2, is not possible, the disqualified authority must, taking into account the scope and complexity of the project, by law ensure as a minimum that the employees and managers who process applications and make decisions on behalf of the EIA authority are not the same as those, who apply for the specific project. The reason for authority disqualification according to subsection 3, and the specific handling thereof must be noted on the case and appear in the decision, cf. section 15, subsection of the Environmental Assessment Order. 4.

The Environment and Food Complaints Board initially notes that Horsens Municipality has made a decision pursuant to § 25 of the Environmental Assessment Act regarding a project where the municipality itself is the developer, and that there is therefore, as a starting point, authority disqualification.

The Environmental and Food Complaints Board agrees with Horsens Municipality that, in this situation, substitution cannot take place for another subsidiary or superior authority. The board has emphasized that the original competence is vested in the municipality, and that it cannot, as a rule, be left to another authority without express statutory authority. The board has also emphasized that the consideration of ensuring the necessary expertise is best ensured by handling the case in the municipality, as there are no other authorities that have the necessary local knowledge or that represent the municipality's citizens in a similar way. The board has also emphasized that, according to the Environmental Assessment Act, it is assumed that authorities can be disqualified, and that the law, including on the basis of it, lays down special precautions for cases with such a conflict of interest.

A majority in the Environment and Food Complaints Board finds that Horsens Municipality has ensured an appropriate separation between incompatible functions in connection with the performance of tasks and powers under the Environmental Assessment Act, cf. the Environmental Assessment Act § 40, subsection 3, and as embodied in § 15, subsection of the environmental assessment order. 3.

The majority has placed emphasis on the fact that it is clear from the § 25 permit that it is two different departments in Horsens Municipality that have been respectively the developer who has applied for

the project and the authority that has processed the project application and made a decision on § 25 - permission for the project. It also appears from the case that two separate authority tracks and a developer track have been established in the municipality to ensure an appropriate division of incompatible functions in connection with the road project. The majority has also emphasized that it appears from the information in the case that the division in Horsens Municipality has been carried out up to the level of municipal director.

The majority notes that the fact that an advisory company has also carried out tasks for others, which to a certain extent are related to the specific project, does not in itself mean that the adviser is considered not to be impartial. The majority notes in this connection that the advisor in question has been an advisor for the logistics company in the business area and for the municipality as the developer of the connecting road. The consultant has thus not advised Horsens Municipality as an authority in the matter.

A minority (Pelle Andersen-Harrild) finds that Horsens Municipality has not ensured an appropriate separation between incompatible functions in connection with the performance of tasks and powers under the Environmental Assessment Act, cf. the Environmental Assessment Act § 40, subsection 3.

The minority has emphasized that the necessary separation between incompatible functions has not been ensured, as in practice there is no real and actual division between the incompatible functions internally in Horsens Municipality.

### **3.2.3 Ad 2) Impact on targeted surface water areas**

#### **3.2.3 Re 2) Impact on monitored bodies of surface water**

The Danish Environment and Food Board of Appeal initially establishes that the environmental objective for Bygholm Å is good ecological and chemical status.

According to Article 2, no. 21, of the Water Framework Directive (WFD), ecological status is an expression of the quality of the structure and functioning of aquatic ecosystems associated with surface waters, classified in accordance with Annex V, and, according to no. 22, good ecological status is the status of a body of surface water, so classified in accordance with Annex V. No. 24 of the same Article furthermore sets out what is understood by good surface water chemical status.

According to Article 4(1)(a)(i) of the WFD, member states must implement the necessary measures to prevent deterioration of the status of all bodies of surface water. The same obligation is stated in Article 4(1)(b)(i) in relation to preventing the deterioration of the status of all bodies of groundwater.

According to Annex V, paragraph 1.1.1 of the WFD, quality elements for the classification of ecological status for rivers includes pollution by other substances identified as being discharged in significant quantities into the body of water. Paragraph 1.2.1 furthermore includes a table of physico-chemical quality elements associated by a definition of high, good and moderate ecological status in rivers. In respect of specific non-synthetic pollutants, this paragraph states that good status is when the concentration does not exceed the standards set in accordance with the procedure described in Annex V, paragraph 1.2.6.

The Court of Justice of the European Union (CJEU) established in the Weser judgment that Article 4(1)(a)(i)-(iii) must be interpreted as meaning that the member states are required to refuse



authorisation for an individual project where it may cause a deterioration of the status of a body of surface water or where it jeopardises the attainment of good surface water status or of good ecological potential and good surface water chemical status by the date laid down by the directive.<sup>[46]</sup> Among the reasons for this is that the condition for a derogation as provided for by Article 4(7) is that all practicable steps are taken to mitigate the adverse impact on the status of the body of water.<sup>[47]</sup>

The WFD does not specifically define what amounts to a deterioration of the status of a body of surface water. However, it follows from the CJEU Weser judgment that the concept of *deterioration of the status* of a body of surface water must be interpreted as meaning that there is a deterioration as soon as at least one of the quality elements falls by one class, even if that fall does not result in a fall in classification of the body of surface water as a whole. However, if the quality element concerned is already in the lowest class, any deterioration of that element constitutes a *deterioration of the status* of a body of surface water.<sup>[48]</sup>

In the Association France Nature Environnement judgment, the CJEU furthermore established that a temporary, short-term deterioration without lasting consequences can also amount to a deterioration within the meaning of the WFD.<sup>[49]</sup>

Furthermore, the CJEU in its Land Nordrhein-Westfalen judgment concerning the WFD and monitored groundwater held that a similar understanding must be applied to the concept of deterioration of the status irrespective of whether it is surface water or groundwater.<sup>[50]</sup> The CJEU also held that although the classes provided for in Annex V are decisive for determining whether there is a deterioration, after a body of surface water has been classified in the lowest class, further deterioration of the status of that body of water will legally no longer be possible.<sup>[51]</sup>

The judgment furthermore states that the concept of *deterioration of the status* of bodies of water must be interpreted by reference to a quality element and a substance and that the threshold beyond which breach of the obligation to prevent deterioration of the status of a body of water is found must be as low as possible, which entails that the failure to observe one of the quality elements referred to in the WFD definition of good groundwater chemical status constitutes a deterioration of the chemical status of the body of groundwater concerned.<sup>[52]</sup>

The CJEU has subsequently held that any subsequent increase in the concentration of a pollutant that, with reference to Directive 2006/118<sup>[53]</sup>, already exceeds an environmental quality standard or a threshold value set by the Member State also constitutes a deterioration.<sup>[54]</sup>

The judgment furthermore entails that where a quality element is not observed at a single monitoring point in a body of groundwater, it must be found that there is a deterioration of the chemical status of that body of water, for the purposes of Article 4(1)(b)(i) of the WFD.<sup>[55]</sup>

The provisions of the WFD are implemented in the Danish Act on Water Planning (*lov om vandplanlægning*).<sup>[56]</sup> As provided for in this act, section 8(3) of the Executive Order on Programmes of Measures (*indsatsbekendtgørelsen*) stipulates that the authority can only make a decision involving a direct or indirect impact on a body of surface water for which the environmental objective is not met if the decision does not lead to a deterioration of the defined environmental objective, including by the measures defined under the programme of measures.

Pursuant to section 8 of the Danish Act on Water Planning, the minister is authorised to determine specific rules for environmental objectives, including what is to be understood by good surface water status, good ecological potential for artificial and heavily modified bodies of water and good surface water chemical status with a view to the implementation of European Union directives and decisions concerning the protection of surface water and groundwater. The Executive Order on Establishment of Environmental Objectives for Inland Surface Water, Transitional Waters, Coastal Waters and Groundwater (*bekendtgørelse om fastlæggelse af miljømål for vandløb, søer, overgangsvande, kystvand og grundvand*) has been issued in pursuance of this provision.<sup>[57]</sup> Section 3(1), no. 1, of the executive order states that the establishment of environmental objectives for the individual bodies of surface water must include the normative definitions of quality classes for ecological status and ecological potential set out in Annex 1.

Section 2 of Annex 1 to the executive order sets out definitions of high, good and moderate ecological status in rivers in relation to physico-chemical quality elements. It is stated here that in relation to specific non-synthetic pollutants, good status is when the concentrations do not exceed the environmental quality standards established in Annex 2, part B, sections 1 and 2.<sup>[58]</sup> Section 1, part B of Annex 2 states that the general quality standard<sup>[59]</sup> for copper in inland water bodies is 1 µg/l added to the natural background concentration. It also states that the maximum concentration for copper in inland water bodies is 2 µg/l added to the natural background concentration.

Section 8(6) of the Executive Order on Programmes of Measures states that the assessment of whether a decision can be made in pursuance of subsections (2)-(4) must include the normative definitions of quality classes for ecological status and ecological potential for bodies of surface water, cf. Annex 1 to the Executive Order on Establishment of Environmental Objectives for Inland Surface Waters, Transitional Waters, Coastal Waters and Groundwater, cf. Annex 2, part B of the same executive order.

The 2015-2021 river basin management plan for River Basin District Jutland and Funen states the following about environmentally hazardous substances:<sup>[61]</sup>

“The chemical and ecological status of a body of water is good in respect of environmentally hazardous substances when the measured concentrations of substances do not exceed the established environmental quality standards. This means that the environmental objective for a body of water is met when all measured substances are in compliance with the environmental quality standards. Conversely, a body of water will not have achieved the environmental objective if just one of the measured environmentally hazardous substances exceeds an established environmental quality standard, cf. the WFD.”

In addition, the Danish Environmental Protection Agency's guidance on the Executive Order on Programmes of Measures states the following about measures targeted against environmentally hazardous substances:<sup>[62]</sup>

“The assessment of the chemical status of body of water is based on concentrations of so-called priority substances identified by the EU. Priority substances are substances that present a significant risk to the aquatic environment at EU level. The assessment of the ecological status of a body of water is based on the substances that are monitored because they are assessed to be discharged in significant quantities at national level.

In the assessment of ecological and chemical status of environmentally hazardous substances, the measured concentrations will be compared with environmental quality standards. An environmental quality standard is the concentration of a particular substance in water, sediment or biota (mussels and fish) that must not be exceeded in order to protect human health and the environment. The applied environmental quality standards are set out in table 5 (chemical status) and tables 3 and 4 (ecological status) of Annex 2 to the Executive Order on Establishment of Environmental Objectives for Inland Surface Waters, Transitional Waters, Coastal Waters and Groundwater

For the bodies of water in which one or more substances exceed the established environmental quality standards, the ecological and/or chemical status is assessed as not good. These are the bodies of water in which measures must be implemented.”

The guidance also states the following about the framework for the administration by authorities of legislation in relation to environmentally hazardous substances when the environmental objective has not been achieved:[\[63\]](#)

“Whether a decision can be made for these bodies of water that involves introduction of environmentally hazardous substances depends on a specific assessment of the significance of the impact on the status of the body of water. If the impact is assessed to be significant, a permit cannot be issued for the impact. If the impact is assessed to be insignificant, a permit may generally be issued for the impact. The specific assessment should include an assessment of the quantity and concentration of the substance related to the other introductions (cumulation), including from point sources, diffuse impact and atmospheric deposition. An assessment is made of what happens to the substance in the body of water, including its transport (possibly to other bodies of water) and form (dissolution, binding, chemical reaction, sedimentation, accumulation, immobilisation, degradation/decomposition, etc.). It may include information about the development over time of the introduction and/or presence of the substance in the body of water, e.g. a declining trend in concentrations due to measures/regulation, an assessment of whether the impact is balanced so that the impact does not deteriorate the status or prevent the achievement of the environmental objective for the body of water within the established timeframe. This information helps inform the assessment of whether the impact gives rise to an increase of the concentration in water, sediment or biota, including whether it might, in principle, be registered by measurements. It is presupposed that the activity resulting in an impact is based on the use of best available techniques. Also note that the assessment of achievement of the objectives for environmentally hazardous substances is based on individual substances subject to environmental quality standards, which means that the specific assessment of the impact is made at substance level.”

Similar provisions appear from the draft guidance on the Executive Order on Programmes of Measures from December 2021.[\[64\]](#)

In addition, question 43 in the Danish Environmental Protection Agency’s FAQ about discharge of certain pollutants to the aquatic environment states that the discharge may not result in an increase of the already existing concentration at the boundary of the mixing zone of more than 5% of the value of the general quality standard for the substance for water when the environmental quality standard for the substance is already exceeded in the aquatic environment.[\[65\]](#)

In relation to achieving the objectives set out in the river basin management plan, the Environment and Food Board of Appeal establishes that the objective has not yet been achieved for the Bygholm Å

upstream outlet from Hatting Bæk, among other things because the status for environmentally hazardous substances is not good. The Board furthermore establishes that the status of not good in relation to environmentally hazardous substances is due to an exceedance of the copper content of 0.237 µg/l in relation to the general quality standard of 1.48 µg/l, corresponding to an exceedance of approximately 16% and an exceedance of 0.32 µg/l in relation to the requirement of a maximum concentration of 2.48 µg/l, corresponding to an exceedance of approximately 13%.

Concerning the ecological status of the Bygholm Å downstream outlet from Hatting Bæk, the Environment and Food Board of Appeal establishes that the objective for the ecological status has been achieved. Particularly in relation to environmentally hazardous substances, the Board furthermore establishes that the status is unknown.

It is the opinion of the Environment and Food Board of Appeal that the case law of the Court of Justice concerning the concept of *deterioration of the status* in the Land Nordrhein-Westfalen judgment, relating to additional introduction of a pollutant into groundwater that already exceeds the environmental quality standard for the substance concerned is also applicable to surface water. In this connection, the Board has attached importance to the statement by the CJEU that the concept of *deterioration of the status* must be understood similarly for surface water and groundwater,[66] and that the CJEU in the case refers to case law for *deterioration of the status* in the Weser judgment concerning surface water.[67] In addition, the Board is not of the opinion that the understanding of the concept of *deterioration of the status* is affected by whether it is a substance that relates to the ecological status or to the chemical status, as it is not found that the CJEU makes or otherwise indicates such distinction. The Board makes reference to, e.g., the statement by the CJEU in the Land Nordrhein-Westfalen judgment that "[...] »deterioration of the status« of bodies of water must be interpreted by reference to both a quality element and a substance".[68]

A majority of the Environment and Food Board of Appeal believes that based on notably the Weser and Land Nordrhein-Westfalen judgments, *deterioration of the status* in relation to pollutants must be understood as meaning that when the environmental quality standard for a pollutant has already been exceeded and the body of water is consequently in the lowest possible class, any subsequent increase in the concentration of the pollutant must be considered a deterioration of the status of the body of water in contravention of Article 4(1) of the WFD. The majority notes that a similar understanding must be applied to section 8(3) of the Executive Order on Programmes of Measures, as the executive order is the Danish implementation of the obligation to prevent deterioration of the status of surface water and groundwater.

Against this background, a majority of the Environment and Food Board of Appeal finds that the section 25 permit is not in compliance with section 8(3) of the Executive Order on Programmes of Measures as the project will result in a deterioration of the ecological status of Bygholm Å in the form of a deterioration of the quality element for environmentally hazardous substances. This means that the section 25 permit suffers from a material legal deficiency.

The majority has attached importance to the fact that the environmental quality standard for copper is exceeded, that the status for environmentally hazardous substances is consequently not good, which is the lowest possible status, and that according to an environmental impact assessment, the project will result in additional discharge of copper to the watercourse by up to 0.034 µg/l, corresponding to approximately 2% of the general quality standard for copper in a medium situation.

In this connection, the majority notes that the case does not provide a basis for disregarding the assessment by the Municipality of Horsens that the project will result in additional introduction of copper into the watercourse, which is why the majority has relied on this fact in the case.

Furthermore, the majority has attached importance to the fact that it follows from CJEU case law that also temporary and locally delimited deteriorations of the status of a body of surface water is in contravention of the obligation to prevent deterioration of the status and that the threshold beyond which breach of the obligation to prevent deterioration of the status of a body of water is found must be as low as possible.<sup>[69]</sup>

In addition, the majority has attached importance to the fact that the added amount of copper introduced is not decisive when the quality standard has already been exceeded, as any additional introduction will result in deterioration of the status when the status is the lowest possible. Further, the majority has attached importance to the fact that the impact of the additional introduction of copper on the other ecological parameters is not *per se* decisive for deterioration of the status, as any exceedance of the quality standard must in itself be considered deterioration of the status of the watercourse, cf. the CJEU judgment in Land Nordrhein-Westfalen.<sup>[70]</sup> The fact that the environmental impact report assesses that the additional copper introduced will not be decisive for achieving the quality element objectives for fish, small creatures and aquatic plants cannot result in allowing the additional introduction as the additional introduction of copper results in an independent deterioration in relation to the quality element for environmentally hazardous substances.

As a consequence of the above, the majority also notes that the majority is of the opinion that it is not in compliance with the obligation to prevent the deterioration of the status of surface water to allow additional introduction of copper following a specific evaluation of materiality as stated in the Environmental Protection Agency's guidance on the Executive Order on Programmes of Measures when the quality standard has already been exceeded. The guidance is not in compliance with CJEU case law to the effect that any subsequent increase in the concentration of a pollutant constitutes a deterioration when the quality standard has already been exceeded, which is why the case cannot attach importance to the fact that the Municipality of Horsens has followed the guidance.<sup>[71]</sup> The Board establishes that the environmental impact report also refers to the Danish Environmental Protection Agency's FAQ question 43, which states that an additional discharge may not result in an increase of the already existing concentration at the boundary of the mixing zone of more than 5%, but that a mixing zone has not been identified in the case concerned. The Board is consequently of the opinion that FAQ question 43 is not relevant in the present case. The Board notes that with this decision, the Board has not decided on the application of the Danish Environmental Protection Agency's FAQ question 43 in relation to decisions on identification of mixing zones.

The minority (Jens Vibjerg and Kristian Pihl Lorentzen) finds that the section 25 permit is in compliance with section 8(3) of the Executive Order on Programmes of Measures.

The minority has attached importance to the fact that the additional introduction of copper into Bygholm Å is so small that it can be defined as non-significant in accordance with the threshold for additional introduction of xenobiotic substances of 5% as set out in the Danish Environmental Protection Agency's FAQ question 43, and that the permit may be granted under this exemption.

**Kommenterede [KV1]:** The part of the ruling that is at the center of our questions

### 3.2.4 Ad 3) Impact on Natura 2000 area

This follows from Section 20, subsection of the Environmental Assessment Act. 4, no. 2, that the environmental impact report must demonstrate, describe and assess the project's significant direct and indirect effects on e.g. the biological diversity with particular emphasis on species and habitats protected under the Habitats Directive.

The authority must also observe Natura 2000 protection when issuing the § 25 permit itself, cf. § 6 of the habitat order.

The EU Court of Justice interprets the provision in the Habitats Directive, Article 6, subsection 3, so that the authority must make an assessment of whether it can be ruled out that a plan or project in itself or in connection with other plans and projects may significantly affect the achievement of favorable conservation status for the designated area, including whether the conservation status of the species and/or nature types that the area has been designated to protect will be significantly affected (significance assessment).

If such an impact cannot be ruled out on the basis of objective criteria, if the project is to be promoted, a more detailed assessment (consequence assessment) must be carried out. This assessment must include all aspects of the project that may affect the site in question, and the assessment must be carried out on the basis of the best scientific knowledge in the field.[72]

The competent national authorities only authorize an activity on the protected site on the condition that they have obtained certainty that the activity will not have harmful effects on the integrity of the site in question. This is the case when, from a scientific point of view, it can be determined beyond reasonable doubt that there are no such effects.[73]

In such an assessment, the precautionary principle applies.[74]

The integrity of a Natura 2000 site includes its basic characteristics and ecological functions. It can be defined as a coherent sum of the area's ecological structure, function and the ecological processes across the area, which enable it to maintain the habitat types, the combination of habitat types and/or species populations for which the area has been designated.[75]

As far as species are concerned, the conservation status of a species is defined in Article 1(j) of the Directive as the result of all the conditions that affect the species and which may, in the long term, affect the distribution and abundance of its populations within the Member States' area in Europe where the EU Treaty applies.

The Environment and Food Complaints Board notes that in the delineation of what constitutes harmful effects on the integrity of the site according to the habitat directive's article 6, paragraph 3, the criteria and methods that are expressly stated in the directive's article 6, subsection should also be included. 2. According to the Habitats Directive, Article 6, subsection 2, Member States shall take appropriate measures to avoid deterioration of the habitats and habitats of the species in the special areas of conservation, as well as disturbance of the species for which the areas are designated, insofar as these disturbances have significant consequences for the objectives of this Directive.

The EU Court of Justice has also determined that the impact assessment must contain complete, precise and final findings and conclusions about the impact of a project on a Natura 2000 area with regard to all the habitats and species for which the area has been designated. The impact assessment must therefore partly identify and locate all the habitats and species for which an area is protected, and partly the assessment must also include information about species and habitats outside the protected

location. Since it must be clear from the assessment why the protected habitats and species are not affected, in certain cases it may be sufficient to establish that only certain protected habitats and species in the part of the protected area that are affected by the project, are affected and that the other protected habitats and species on the site are not affected. However, this presupposes that there is sufficiently precise information about where protected species and nature types are located in the individual Natura 2000 areas, as well as the interaction with other species in and close to the Natura 2000 area.[76]

With regard to the geographical extent of the protection, the Court of Justice of the EU has determined that the habitat directive's requirements for significance and impact assessment also apply to a plan or project located outside the affected Natura 2000 area, when these can significantly affect species on the basis of designation. The same applies when the species are outside the Natura 2000 area.[77]

The Environmental and Food Complaints Board finds that, in the specific case, Horsens Municipality has had a sufficient basis to be able to assess whether the project will cause a significant impact on calcareous meadows, brook lampreys, vertigo geyeri whorl snails, narrow-mouthed whorl snails, Desmoulin's whorl snails and otters on the basis of designation for the nearby habitat area H236. The committee also finds that there is no basis for overriding the municipality's assessment that the project will not affect the designation basis for the Natura 2000 area.

#### Semi-natural dry grassland and scrubland facies on calcareous substrates

The Environment and Food Complaints Board has, in relation to semi-natural dry grassland and scrubland facies on calcareous substrates, emphasized on the basis of designation that the nearest area in the Natura 2000 area with grassland on calcareous substrates is approx. 300 m from the road's route, and that the grassland on calcareous substrates is thereby not directly physically affected by the project.

The Environmental and Food Complaints Board has also emphasized that specific calculations for nitrogen deposition have been made in the impact assessment, and that based on the modeled background load in the area and the calculated deposition at the time of the project's realization, it has been assessed that the deposition based on the excessive structural and species status does not pose a threat to the conservation status of the grassland.

#### Vertigo geyeri whorl snail, narrow-mouthed whorl snail and Desmoulin's whorl snail

The Environment and Food Complaints Board has emphasized, in relation to the vertigo geyeri whorl snail, the crooked water snail and the swamp water snail, that the three species are registered in association with spring water and sedge in the central and western part of the Natura 2000 area more than 900 m from the project area, and that there are no natural types have been registered which will be able to support the presence of the vertigo geyeri whorl snail or the narrow-mouthed whorl snail near the project area.

The Environment and Food Complaints Board has also emphasized that Horsens Municipality has stated during the appeal that the area with potential habitats for snails outside habitat area H236 lies approx. 240 m from the potential habitat of the Desmoulin's whorl snail within the habitat area. The areas between the potential habitat and the habitat within the Natura 2000 area consist partly of a road and partly of dry grassland, which does not constitute a suitable habitat for species of snails. In this connection, the board has also emphasized that snails do not migrate between habitats, as they are non-mobile species.

The Environmental and Food Complaints Board has, in relation to what was stated in the complaint regarding the finding of potentially suitable habitats for snails in the road route outside the habitat area, emphasized that the source source in question is isolated from the habitat area, and that a possible population will therefore not be covered of the possible populations of snails in the habitat area and therefore not be covered by habitat protection.

#### Brook lamprey

The Environmental and Food Complaints Board has emphasized, in relation to the lamprey, that the project in the construction phase is not assessed to be able to affect a possible population of lamprey in the Bygholm Å watercourse system, as no physical changes are made to the watercourse. It also appears that the stretch of watercourse around the project area can be a breeding ground and migration site for the species, but that the stretch of watercourse at the project area is not assessed to constitute a likely breeding area, as the bottom is mainly sandy and as there is considerable sand migration.

The Environmental and Food Complaints Board has also, in relation to the impact on the brook lamprey in connection with the temporary groundwater lowering in the construction phase, emphasized that the groundwater is reinjected and thus not discharged into the stream, and that the groundwater lowering therefore does not cause changes in the stream, including for the brook lamprey.

The Environmental and Food Complaints Board has also emphasized that in the impact assessment, calculations have been made of the discharge of rainwater during the operational phase, and that on this basis it has been assessed that there will be no impact on the river lamp in relation to fluctuations in oxygen concentration, salt impact and environmentally harmful substances.

#### Otter

In relation to otters, the Environmental and Food Complaints Board has emphasized the information that the areas immediately east of the Natura 2000 area are not significant as a breeding area for otters, and that during the construction phase there will be good opportunities for hiding both upstream and downstream of the project area .

In relation to the complaint that the temporary bridge during the construction phase over Hatting Bæk will disturb the otter's movement possibilities, the board has emphasized that any impact during the construction phase will be of a temporary nature and that the construction activities will take place within normal working hours during the day and not during the night hours, when otters actively forage in the streams.

The Environmental and Food Complaints Board has also emphasized that the road construction during the operational phase does not cause a barrier effect for otters, as the construction ensures passage conditions for otters between the Natura 2000 area and any resting areas downstream of the project area in accordance with the management plan for otters.

#### Groundwater lowering

In relation to the impact from groundwater lowering, the Environmental and Food Complaints Board has emphasized that it appears from the model calculation for the distribution of the lowering funnels during groundwater lowering that the lowering funnels for the four middle support points do not reach into habitat area H236, and that on that basis it has been assessed, that the nature types and species dependent on the stream will not be negatively affected by the lowering of the groundwater.



In relation to a possible impact from the groundwater lowering in cumulation with other projects, the Environment and Food Complaints Board has emphasized the calculation of the lowering funnels and the distance to the business area.

The Environmental and Food Complaints Board further notes that, in the board's opinion, it cannot be required that an environmental impact report relate to the cumulative effect with all other projects in the area. The assessment of the cumulative effect must only relate to the other projects in the area that must be considered relevant in relation to a significant increase in the environmental impacts compared to the desired project.

### **3.2.5 Ad 4) Provision of the impact assessment**

This appears from section 6, subsection of the habitat order. 1 and par. 2, that if the authority assesses that a project may significantly affect a Natura 2000 area, a detailed impact assessment of the project's effects on the Natura 2000 area must be carried out, taking into account the conservation objective for the area in question.

It also appears from section 6, subsection of the executive order. 4, that assessments according to subsection 1-3 must appear in the decision.

It is therefore assumed in the regulations that an assessment must first be made of whether the project can significantly affect a habitat area (significance assessment). If this is the case, an assessment of the impact on the area must be carried out (consequence assessment), and this assessment must be included in the decision.

It appears from the habitat guidance that it is the authority's responsibility that a case is decided on a sufficiently informed basis, and that the authority must thus ensure that sufficient information is provided to determine whether a plan or project damages a Natura 2000 area's integrity. According to the practice of the European Court of Justice, it is the authority that is obliged to ensure that an assessment has been made on a sufficiently informed basis.[78] It is further stated in the habitat guidance that if an authority does not have access to the information necessary for the processing of a specific case, the applicant may be ordered to obtain information relevant to processing the application. Reference is made to the fact that, among other things, there is authority in the Environmental Assessment Act § 24, subsection 1, to order the applicant to provide additional information.

The Environmental and Food Complaints Board finds that Horsens Municipality's assessment of the project's impacts on the nearby Natura 2000 area meets the requirements for an impact assessment according to the habitat executive order, and that, based on the information in the case, there is no basis for establishing that the impact assessment was not prepared impartially .

The Environment and Food Complaints Board has emphasized that independent comment rounds have been carried out in Horsens Municipality on the content of the habitat impact assessment in question with the aim of ensuring that the habitat directive's requirements for an appropriate assessment have been met before the municipality announced the relevant permits for the project. The Environment and Food Complaints Board has also emphasized that it appears from the § 25 permit that Horsens Municipality, Nature and Environment, has received assistance from an external consulting company to review the developer's assessments of the impact on the Natura 2000 area and Annex IV- species.

The Environmental and Food Complaints Board has also placed emphasis on the fact that no information has emerged with the complaints that provides a basis for assuming that the content of the impact assessment or the assessments made were insufficient or incorrect.

### **3.2.6 Ad 5) Impact on Annex IV species (bats, otters, newts and toads)**

This follows from Section 20, subsection of the Environmental Assessment Act. 4, no. 2, that the environmental impact report must demonstrate, describe and assess the project's significant direct and indirect effects on e.g. the biological diversity with particular emphasis on species and habitats protected under the Habitats Directive.

The authority must make sure, when issuing the § 25 permit itself, that the project will not damage or destroy breeding or roosting areas in the natural range of Annex IV species, cf. § 10 of the habitat order.

The EU Commission has published guidance on the protection of Annex IV species.[79] The provision in the Habitats Directive, Article 12, subsection 1, letter d, according to the guidance, must be understood as an objective that the ecological function of breeding and resting areas is preserved.

Breeding areas are defined in the guidance as the areas to be used for mating and birth, and also cover the area near the nest or birth site if the offspring are dependent on such areas. Resting areas are defined as the areas used by an animal or a group of animals when they are not active. Roosting areas also include structures that animals establish as roosting areas, e.g. nests, burrows or hiding places.[80]

Likewise, resting areas are defined in the Danish Environmental Protection Agency's habitat guidance as areas that are important to ensure the survival of individual animals or populations when they are at rest. [81] Resting areas are thus areas where the species stays during or outside the breeding season to rest, sleep or hibernate (hibernation) and in hiding in larger concentrations (flocks) and to fulfill important life functions (sunbathing or the like). Breeding and resting areas have in common that they are used regularly by the species.[82]

A breeding or roosting area in the sense of the Habitats Directive and the Habitats Order means a collection ("network") of localities where a population of a species breeds or roosts. The importance of the individual locations in the network may depend on the population's density and spread potential. When assessing whether a breeding or roosting area is damaged or destroyed, it is decisive whether the ecological functionality of the network of sites can be maintained at at least the same level as before.[83]

It is the responsibility of the competent authority, in accordance with the general administrative law investigation principle, to ensure that sufficient information is provided to be able to assess whether breeding or roosting areas for Annex IV species are damaged or destroyed. No clear criteria can be established for the extent and nature of the information that is required. It depends on the specific situation. There can e.g. in the case of older information, there may be a need to assess whether the information needs to be updated to determine whether the species actually continues to occur in the affected areas. Precise criteria cannot be set for when information is too old, as the species are very different, just as the natural development (e.g. overgrowth) of an area can have an impact on whether a species is present. There may be a need for further investigations if decisions are to be made in parts of the country where the species are known to occur and where there is a likelihood that possible breeding or roosting areas may be affected. Any investigations must be carried out in a targeted

manner using suitable methods, and it must be ensured that the investigations take place at the times of the year when the species in question can be expected to utilize a given area. The surveys must therefore take place at times when there will be a high probability of detecting the species if it occurs in the area.[84]

In relation to activities that may affect breeding or resting areas, according to the EU Commission's guidance, a distinction must be made between activities that can be accommodated within Article 12 of the Habitats Directive and activities that require a derogation pursuant to Article 16 of the Directive. Where a derogation under Article 16, compensatory measures will aim to compensate for specific negative effects on a species and thus imply that there is or has been damage or destruction of breeding or roosting areas. This is not the case for measures to ensure ecological functionality, which ensure that the ecological functionality of the breeding or roosting area remains completely intact (quantitatively and qualitatively) when the activity has taken place (remedial measures).[85]

The European Court of Justice has stated in the Grand Hamster II judgment, with reference to the EU Commission's guidance, that according to the habitat directive's article 12, paragraph 1 letter d, in particular, it must be ensured that the breeding and roosting areas of a protected animal species are not damaged or destroyed by human activities, so that these areas continue to offer the conditions necessary for this animal species to roost or breed within this area success. In such an assessment, account must be taken of the ecological requirements that apply to each of the affected animal species to which the individual in question belongs, as well as to the situation at individual level for this animal species that uses the breeding or resting area in question.[86]

The Environmental and Food Complaints Board is of the opinion that the assessment of Annex IV species at the time of the decision does not necessarily have to include a final assessment of whether a given location actually serves as a breeding or resting area for Annex IV species, if, on the basis of a precautionary principle for the time being, it is assumed that this is the case.

If, on the basis of a precautionary principle, a given locality can be assumed to serve as a breeding or roosting area for an Annex IV species, it must then be assessed how the project will affect the locality immediately. If the immediate impact is harmful, it must be assessed whether the site's ongoing ecological functionality as a breeding or resting area can be maintained with the help of mitigation measures. If the preventive measures cannot be expected with a high degree of certainty to work to a sufficient extent, the project must be adapted so that the immediate damage to the site is avoided. It appears from the Danish Environmental Protection Agency's habitat guidance that mitigation measures are suitable for species that are quick to colonize new locations within a network of locations that form a combined area for a stock, and where new suitable habitats can be created over a shorter period of time.

It also appears from the Danish Environmental Protection Agency's habitat guidelines that, where applicable, there must be a high degree of certainty that mitigation measures will work to a sufficient extent. The greater the uncertainty in the knowledge of the specific occurrence of the species in an area, the greater the need for preventive measures in the form of securing possible new breeding or roosting areas. Where mitigation measures are required, according to the Danish Environmental Protection Agency's habitat guidelines, clear terms must be laid down in the specific cases. The term must be drafted in such a way that it can be enforced.[87]

#### **Bat**

The Environmental and Food Complaints Board initially states that, in the investigations carried out in connection with the preparation of the habitat impact assessment, a breeding and roosting area for

pipistrelle and pygmy bats, and possibly also for brown and troll bats, has been found approx. 300 m west of the project area. The board notes that, in addition, it has not been mapped in detail whether there are breeding or resting areas in the wooded area approx. 80 m east of the connecting road, and that possible breeding and roosting areas have been treated as if they were actually breeding and roosting areas.

It appears from the environmental impact report that, in connection with the establishment of the landscape bridge, sheet pile walls for the construction pits around the foundations for the bridge piers must be framed. The noise from the framing of sheet piles will usually be experienced as particularly annoying, as it is impulse noise. Noise calculations have been made in relation to neighboring homes, and on that basis a simple noise calculation of the noise propagation has been made, which shows that noise levels of over 40 dB(A) can be expected more than 300-400 m from the impact site. It appears that the framing work is estimated to last 14 days, and that the work is only carried out during daytime hours on weekdays. It has also been assessed that there is no need for significant mitigation measures in connection with construction noise.

The Environmental and Food Complaints Board finds that Horsens Municipality did not have a sufficient basis for assessing that the project will not affect the ecological functionality of breeding and roosting areas for the nine registered bat species in the area.

The Environmental and Food Complaints Board has emphasized that no assessment has been made of whether the noise during the construction phase from the framing of sheet piles could affect breeding and roosting areas for bats. In this connection, the board notes that in the case Horsens Municipality has chosen to treat the areas east of the connecting road as if they were actually breeding and resting areas, but that no assessment has been made of whether the noise could affect the nearby breeding and resting areas functionality, especially during the breeding season. In addition to this, the committee notes that it appears that noise from hitting is impulse noise, which can be more annoying than other noise. The board refers to the fact that it appears from the Management Plan for bats on securing suitable habitats that disturbances, such as severe noise impact that could harm the local population of bats must be avoided.[88]

A majority of the Environment and Food Complaints Board also finds that Horsens Municipality has had sufficient grounds to assess that the other parts of the project will not affect the ecological functionality of breeding and roosting areas for the nine registered bat species in the area.

In the assessment, the majority emphasized that, in accordance with the guidelines in the Road Directorate's guidance on bats and major roads, bat surveys were carried out during the stated periods, and that both daytime inspections, surveys with automatic detectors and reviews of the area with handheld bat detector. On this basis, it has been determined where in the area there are breeding and roosting areas for bats, or potential breeding and roosting areas, just as significant guide lines and foraging areas of importance for the ecological functionality of the breeding and roosting areas have been determined.

The majority has also emphasized that, in connection with the decision, it has been assessed that most of the registered bat species will use the primary control line under the landscape bridge, and that the smaller structure-bound species will fly at such a great distance from the control plantings and screens that they planned heights of bridge guarding and guide planting will reduce collision risk for bats. In addition, the majority has emphasized that the road's crossing of Bygholm Ådal and Bygholm Å, which are respectively assessed to be an important foraging area and an important control line for bats in the area, be built as a landscape bridge of the type A1L (wet) in accordance with the Road Directorate's road rules about fauna passages, and that the landscape bridge under each of the three

middle spans has a clearance of at least 7 m and a width of approx. 30 m, which is in accordance with the minimum dimensions specified in the guide for the selected type of landscape bridge. In this connection, the majority has emphasized that landscape bridges of the type A1L (wet) in the Norwegian Road Directorate's road rules on fauna passages are indicated as a suitable prevention measure for species of bats, including water bats, pond bats, pygmy bats, pipistrelle bats, troll bats and long-eared bats, and that high landscape bridges with large clearance under the bridge, which in this specific case are also suitable for southern bats. Furthermore, the majority has emphasized that the risk of collision at road crossings for brown bats and long-eared bats is considered low according to the Road Directorate's road rules.

In addition, the majority has emphasized that screens are set up on the sides of the bridge and guide planting is established in accordance with the Roads Directorate's road rule on fauna passages in order to minimize the risk of collision for bats that forage at the height of the bridge above the river valley, and lead low-flying bat species on the edge of the river valley down in the river valley, where there is a passage under the bridge. In the beginning, the guide planting is also supplemented in accordance with the Road Directorate's road rule on fauna passages with a fine-mesh wire fence with a minimum height of 2.5 m, so that bats cannot pass through the fence.

Overall, in relation to the preventive measures described, the majority has emphasized that conditions have been laid down in the section 25 permit in accordance with this.

In relation to the disagreement about the distance to the potential breeding and roosting area for bats east of the connecting road, the majority has emphasized that the actual distance does not deviate significantly from the previously stated distance.

Finally, the majority has emphasized that any impact from light and visual disturbances from traffic during the operational phase is limited by the shielding on the sides of the bridge, and that no road lighting is established on the stretch, just as the planting along the road and the bridge shielding on the road bridge itself will reduce a potential impact of bats in the operating phase significantly. Particularly in relation to a potential noise impact, the majority has emphasized that it is a country road and that the environmental impact report states that the noise in the area will not be significantly increased.

The minority (Pelle Andersen-Harrild) finds that, in relation to noise during the operational phase, Horsens Municipality has not had a sufficient basis for assessing that the project will not affect the ecological functionality of breeding and roosting areas for the nine registered bat species in the area.

The minority has emphasized that Horsens Municipality has not taken a position on the habitat requirements of the individual bat species or differentiated between the species' auditory sensitivity, and that there is not a sufficient basis to conclude that there is no impact during the operational phase.

#### Other Annex IV species

The Environmental and Food Complaints Board finds that Horsens Municipality has had a sufficient basis for assessing that the project will not affect the ecological functionality of breeding and resting areas for large water salamanders, pointed frogs and otters. The committee also finds no basis for overriding the municipality's professional assessment that breeding and resting areas for the species will not be affected by the plan.

In relation to the pointed frog and large newt, the Environmental and Food Complaints Board has emphasized that, in connection with the environmental impact report, a search for tadpoles in suitable

habitats has been carried out in accordance with the technical instructions for monitoring amphibians and included existing data on the occurrence of the species in the area.

The Environment and Food Complaints Board has also emphasized that an amphibian fence be established along both sides of the road on the north side of Bygholm Å, and that it has been assessed that the planned establishment of the prevention measure will not impair the ecological functionality of breeding and resting areas for large newt and pointed frog. In this connection, the committee has emphasized that any individuals of the species will be led under the road bridge.

In relation to otters, the Environmental and Food Complaints Board initially notes that the section 25 permit, the environmental impact report or the habitat impact assessment do not immediately appear to have assessed whether the plan will affect the ecological functionality of breeding and resting areas for otters. However, the board understands the assessment in the habitat impact assessment to mean that, in addition to an assessment of otters on the basis of designation for habitat area H236, the assessment also contains an assessment of the project's impact on the ecological functionality of breeding and resting areas for otters, as the population of otters that reside within and outside the Natura 2000 area, must be considered to coincide.

In the assessment in relation to otters, the Environmental and Food Complaints Board has emphasized that the immediate area around the road route is grazed and open without good opportunities for hiding, and that on this basis it has been assessed that the areas immediately east of the Natura 2000 area are unsuitable as breeding grounds for otters. The committee has also emphasized that the construction activities are temporary and that the activities will take place within normal working hours during the day, and that there are good opportunities for the species to seek refuge both upstream and downstream where the construction works take place. The Environment and Food Complaints Board has also emphasized that the landscape bridge in the operational phase will ensure good passage conditions, which ensures that otters can pass under the road along the stream in accordance with the management plan for otters.

### **3.2.7 Ad 6) Other nature**

According to Annex 7 of the Environmental Assessment Act, cf. § 20 subsection 1, an environmental impact report must contain a description of the project's expected significant impacts on the environment of those in § 20, subsection 4, mentioned factors, including the biological diversity that can be expected to be significantly affected by the project.

The Environment and Food Complaints Board finds no basis for overriding Horsens Municipality's assessment pursuant to section 24, subsection of the Environmental Assessment Act. 1, according to which the environmental impact report fulfills the requirements of the law as far as description of the project's expected significant impact on nature is concerned, including butt-nosed frog, cuckoo-wort, butt-leaved hair star and barn owl.

The Environmental and Food Complaints Board initially notes that there can be no requirement that an environmental impact report must contain an independent assessment of all species that can potentially be found in an area. The committee points out that it is the project's expected significant impacts on the environment that must be described in an environmental impact report.

The Environmental and Food Complaints Board has emphasized that it is described in the environmental impact report that dead seed was found in the area, just as it is described in the environmental impact report that there is an occurrence of cuckoo grass on a limestone meadow west

of the project area. In this connection, the board has emphasized that, in connection with the project, it has been assessed that there will be no impact from the lime excess, cf. section 3.2.4.

In the opinion of the Environment and Food Complaints Board, it was not necessary in the specific case to carry out a closer assessment of the short-leaved hair star or barn owl, as the project cannot be assumed to have a significant impact on the population of the species in the area. In relation to the butt-leaved hair star, the board has attached importance to Horsens Municipality's information that the extirpated alder trees will remain in the area and can continue to form a habitat for the but-leaf hair star. In relation to barn owls, the board has emphasized that no buildings will be demolished or trees felled in connection with the project, which are suitable for nesting barn owls.

#### 3.2.8 Ad 7) Alternatives

This appears from section 20, subsection of the Environmental Assessment Act. 2, no. 4, that the environmental impact report i.a. must contain a description of the reasonable alternatives that the developer has investigated, which are relevant to the project and its special characteristics, and an indication of the main reasons for the chosen solution, taking into account the project's effects on the environment. The environmental impact report must according to appendix 7, point 3, cf. section 20, subsection 1, also contain a description of the relevant aspects of the current environmental status (the reference scenario or the 0 alternative) and a brief description of its likely development if the project is not carried out.

According to the practice of the Environmental and Food Complaints Board, alternatives, including those proposed during the previous public debate, must be dealt with more or less thoroughly. It is sufficient that the overview of alternatives gives the public and politicians an opportunity to assess the desired project in relation to other realistic alternatives. The decisive factor is whether the necessary basis for a decision can be said to have been provided. Thus, it cannot be required that an in-depth analysis of (all) other alternatives be carried out.[89]

The Environment and Food Complaints Board finds no basis for overriding Horsens Municipality's assessment pursuant to section 24, subsection of the Environmental Assessment Act. 1, according to which the environmental impact report fulfills the requirements of the law as far as the description of the investigated reasonable alternatives is concerned.

The Environmental and Food Complaints Board has emphasized that the environmental impact report contains a description of the reference scenario and the likely development of the area if the project is not carried out.

The Environmental and Food Complaints Board has also emphasized that ten alternative alignments are explained in the environmental impact report, including citizen proposals received in the debate phase, and that there is an initial assessment of the traffic effect of the proposals, and an overall screening of the individual proposals impact on natural conditions, the landscape and cultural conditions.

The Environmental and Food Complaints Board notes that the board cannot take a decision on whether a decision, including the choice between different alternatives, is appropriate, just as the board cannot take a decision on whether, in connection with the decision to apply for the connection road at the specific location irrelevant considerations are included.

The environmental assessment rules do not in themselves determine limits on what authorities can decide for political, economic or other reasons, but only set requirements for the basis for the decisions and the procedures for this.

### **3.3 The Environment and Food Complaints Board's other comments**

#### **3.3.1 The Water Framework Directive**

The Environmental and Food Complaints Board notes that Horsens Municipality should pay attention to a renewed treatment to ensure that the project does not result in an additional supply of copper to the watercourse. In this connection, the board also notes how there will not be a total additional supply of copper to the watercourse as a result of the project, if it is documented that the supply of copper through road water is less than the reduction in the supply of copper to the watercourse, which takes place through other sources, including e.g. from agricultural land.

If this is not possible, the Environment and Food Complaints Board draws attention to the fact that the project then only can be permitted if the derogation conditions in the Water Framework Directive are met. 4 pcs. 7. The exemption provision has been implemented in the environmental target order, where it appears from section 4, subsection 3, that the minister, at the request of an authority, has the opportunity, after a concrete assessment, to decide that the authority under the circumstances and conditions mentioned in subsection 1 and 2, may deviate from the established environmental targets, cf. section 8 of the executive order.

The Environmental and Food Complaints Board draws attention to the fact that the board has not herewith taken a decision on the conditions for deviating according to section 4, subsection of the Environmental Targets Executive Order. 3, is fulfilled.

The Environmental and Food Complaints Board also draws attention to the fact that in 8 of Horsens Municipality's executive order on requirements for the discharge of certain pollutants into streams, lakes, transitional waters, coastal waters and sea areas, it is possible to designate a mixing zone around discharge points where the environmental quality requirements within this zone can be exceeded.[90] The board further notes that it is a prerequisite for determining a mixing zone that the discharge of pollutants has previously been reduced as much as possible through the use of BAT, cf. section 5, subsection of the executive order. 1, and that the environmental quality requirements are not exceeded outside the mixing zone. The latter must be ensured by calculation according to § 7, subsection 1, cf. subsection 2.

#### **3.3.2 Annex IV species**

##### **Bat**

In the event of a renewed treatment, Horsens Municipality should carry out an assessment of whether noise from the project in the construction phase in connection with the ramming of sheet piles can affect Annex IV species of bats, particularly during breeding periods. The Environment and Food Complaints Board notes in this connection that the breeding periods of the various species are described in the management plan for bats. If, in a renewed treatment, it is assessed that the impulse noise may have a negative impact on breeding and roosting areas for bats, the municipality may consider setting conditions in the section 25 permit regarding when the framing of sheet piles may take place.

#### **3.4 Fee**

As a result of the decision, the appeal fee paid will be refunded, cf. section 2, subsection of the fee order. 2, No. 1.



### 3.5 Decision of the Environmental and Food Complaints Board

The Environment and Food Complaints Board revokes the decision of 14 January 2022 on the Section 25 permit for a new connecting road from the commercial area Vega to Horsens C and remands the case for renewed consideration.

- [1] Legislative Decree No. 4 of 3 January 2023 on environmental assessment of plans and programs and of specific projects (EIA).
- [2] Act No. 1715 of 27 December 2016 on the Environmental and Food Complaints Board, as amended by Act No. 900 of 21 June 2022 on amendments to the Museums Act, Act on the Environmental and Food Complaints Board and various other laws.
- [3] Executive order no. 132 of 30 January 2017 on fees for lodging complaints before the Environmental and Food Complaints Board, etc.
- [4] Case no. 22/02909, 22/02917, 22/02922, 22/06815 and 22/06836.
- [5] Case no. 22/02446, 22/02414 and 22/02410.
- [6] Natura 2000 baseline analysis 2022-2027, Bygholm Ådal.
- [7] <https://miljoegis.mim.dk/cbkort?&profile=vandrammedirektiv2-bek-2019>.
- [8] <https://miljoegis.mim.dk/spatialmap?profile=vandrammedirektiv3hoering2021>.
- [9] In the Environmental GIS for consultation of the water area plans 2021-2027, environmentally hazardous pollutants are referred to as nationally specific substances.
- [10] <https://vandplandata.dk/vp3hoering2021/vandomraade/vandloeb/DKRIVER6647>.
- [11] Question no. 21, <https://mst.dk/natur-vand/vand-i-hverdagen/spildevand/hvad-er-spildevand-og-hvorfor-renses-vi-det/spoergsmaal-og-svar-about-environmental-quality-requirements/#G>.
- [12] <https://mst.dk/media/121329/52-baggrunds niveau-for-barium-zinc-kobber-nikkel-og-vanadium-i-fersk-og-havvand.pdf>.
- [13] Conservation status of habitat types and species – 2019. Habitats Directive Article 17 reporting. Aarhus University, DCE – National Center for Environment and Energy, 52 pp. Scientific report no. 340.
- [14] The ecology of the individual organism.
- [15] LC50 value, lethal concentration, expression of a chemical substance's toxicity.
- [16] Road Directorate, Road rule: Fauna passages – a guide: construction and planning, August 2020.
- [17] Amphibian Monitoring, DCE, TA No: A17, Version 2, 2018.
- [18] Danish Environmental Protection Agency, 2007. Noise from roads. Guidance from the Danish Environmental Protection Agency no. 4.
- [19] Vejregelgruppen Drainage, 2020. HANDBOOK - Drainage constructions – Environmental conditions and Authority application – Construction and Planning. Rules of the road. December 2020.
- [20] Vollertsen, J., Hvitved-Jacobsen, T. Nielsen, A.H., 2012. Fact sheet on dimensioning of wet rainwater basins. Aalborg University, August 2012.
- [21] Jensen, J. & Bak, J.L. 2018. Zinc and copper in the aquatic environment. Sources, occurrence and environmental significance. Aarhus University, DCE – National Center for Environment and Energy.
- [22] Cf. Vollertsen, J., Hvitved-Jacobsen, T. Nielsen, A.H., 2012, Fact sheet on dimensioning of wet rainwater basins. Aalborg University, August 2012, and Gregersen, I.B., Rasmussen, S.H, Madsen, S. & Arnbjerg-Nielsen, K., Updating the spreadsheet for Skrift 30 (October 2016), Regnrække Version 4.1, SVK, <https://spildevandskomiteen.dk/skrifters/>.
- [23] Executive order no. 449 of 11 April 2019 on action programs for watershed districts.
- [24] The Environmental Protection Agency's guidance for the executive order on action programs for watershed districts, July 2017, <https://mst.dk/media/133301/bilag-1-vejledning-4-juli-2017.pdf>.
- [25] Danish Environmental Protection Agency, 2021, draft questions and answers on discharge of certain pollutants into the aquatic environment, question 43.

- [26] The judgment of the European Court of Justice of 7 November 2018 in case C-461/17, *Holohan*, and the judgment of the European Court of Justice of 16 July 2020 in case C-411/19, *Italia Onlus*.
- [27] Judgment of the European Court of Justice of 4 March 2021 in joint cases C-473/19 and C-474/19, *Skydda Skogen*.
- [28] Executive order no. 1376 of 21 June 2021 on environmental assessment of plans and programs and of concrete projects.
- [29] Management plan for otter (*lutra lutra*) in Denmark, Forest and Nature Agency, 1996.
- [30] The Habitat Guidelines, guidance no. 9925 of 11 November 2020 for executive order no. 1595 of 6 December 2018 on the designation and administration of international nature protection areas and the protection of certain species.
- [31] Cf. the comments to § 11 in proposal L44 to the Environmental and Food Complaints Board Act (FT 2016-17).
- [32] Council Directive 92/43/EEC of 21 May 1992 on the conservation of nature and wild animals and plants.
- [33] Directive 2009/147/EC of the European Parliament and of the Council of 30 October 2009 on the protection of wild birds.
- [34] Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community water policy measures.
- [35] Judgment of the European Court of Justice of 28 May 2020 in case C-535/18, *Land Nordrhein-Westfalen*, paragraph 90.
- [36] Legislative Decree No. 126 of 26 January 2017 on water planning.
- [37] Legislative Decree no. 119 of 26 January 2017 on environmental targets etc. for international nature conservation areas.
- [38] Executive order no. 448 of 11 April 2019 on environmental targets for surface water areas and groundwater bodies.
- [39] Executive order no. 449 of 11 April 2019 on action programs for watershed districts.
- [40] Guidance draft for the Act on environmental assessment of plans and programs and of concrete projects (EIA) Concrete projects, Danish Environmental Protection Agency 2022, section 3.
- [41] Guideline no. 9627 of 6 July 2017 on executive order on action programs for water area districts, section 8.1.2.
- [42] Council Directive 92/43/EEC of 21 May 1992 on the conservation of nature and wild animals and plants.
- [43] Executive Order No. 2091 of 12 November 2021 on the designation and administration of international nature conservation areas and the protection of certain species.
- [44] See recital no. 25 of the EIA Directive.
- [45] See the comments to section 1, no. 28 of the bill, regarding the amendment of section 40 of the Environmental Assessment Act, 2020/1 LSF 56 of 8 October 2020.
- [46] Judgment of the European Court of Justice of 1 July 2015 in case C-461/13, *Weser*, paragraph 51.
- [47] Judgment of the European Court of Justice of 1 July 2015 in case C-461/13, *Weser*, paragraph 46.
- [48] See the judgment of the European Court of Justice of 1 July 2015, case C-461/13, *Weser*, paragraphs 50 and 69.
- [49] Judgment of the European Court of Justice of 5 May 2022, case C-525/20, *Association France Nature Environnement*, paragraphs 42 and 45.
- [50] Judgment of the European Court of Justice of 28 May 2020, case C-535/18, *Land Nordrhein-Westfalen*, paragraphs 94-96.
- [51] Judgment of the European Court of Justice of 28 May 2020, case C-535/18, *Land Nordrhein-Westfalen*, paragraphs 97-98.
- [52] Judgment of the European Court of Justice of 28 May 2020, case C-535/18, *Land Nordrhein-Westfalen*, paragraphs 100, 101 and 108.

- [53] Directive 2006/118 of 12 December 2006 stipulates according to art. 1 specific measures to prevent and control groundwater pollution, cf. art. 17, subsection 1 and 2 of the water framework directive. The quality requirements for groundwater are laid down in Annex 1 of the directive, cf. art. 3 pieces. 1.
- [54] Judgment of the European Court of Justice of 28 May 2020, case C-535/18, Land Nordrhein-Westfalen, paragraph 110.
- [55] Judgment of the European Court of Justice of 28 May 2020, case C-535/18, Land Nordrhein-Westfalen, paragraph 118.
- [56] Legislative Decree No. 126 of 26 January 2017 on the Water Planning Act.
- [57] Executive Order No. 1625 of 19 December 2017 on the determination of environmental targets for streams, lakes, transition waters, coastal waters and groundwater.
- [58] Elsewhere referred to as Part B, Tables 3 and 4.
- [59] This parameter is the environmental quality requirement expressed as an annual average (general quality requirement).
- [60] This parameter is the environmental quality requirement expressed as the highest permitted concentration (maximum concentration).
- [61] Section 4.6, condition assessment, environmentally hazardous pollutants, <https://mst.dk/media/122170/revideret-jylland-fyn-d-28062016.pdf>.
- [62] Section 4.3, measures for environmentally hazardous pollutants, purpose of the measures and general conditions surrounding implementation, <https://mst.dk/media/133301/bilag-1-vejledning-4-juli-2017.pdf>.
- [63] Section 8.3.2, The environmental target has not been met, environmentally hazardous pollutants, <https://mst.dk/media/133301/bilag-1-vejledning-4-juli-2017.pdf>.
- [64] See especially section 8.3.2 in Draft guidance for executive order on action programs for watershed districts, December 2021, <https://mim.dk/media/225714/udkast-vejledning-til-indsatsprogram-vp3.pdf>.
- [65] Question no. 43 on how requirement values for a given substance in an outfall are determined when environmental quality requirements for the substance have already been exceeded in the aquatic environment, <https://mst.dk/natur-vand/vand-i-hverdagen/spildevand/what-is-wastewater-and-why-do-we-purify-it/questions-and-answers-about-environmental-quality-requirements/#G>.
- [66] Judgment of the European Court of Justice of 28 May 2020, case C-535/18, Land Nordrhein-Westfalen, paragraphs 94-96.
- [67] Judgment of the European Court of Justice of 28 May 2020, case C-535/18, Land Nordrhein-Westfalen, e.g. items 92 and 101.
- [68] Judgment of the European Court of Justice of 28 May 2020, case C-535/18, Land Nordrhein-Westfalen, paragraph 100.
- [69] Judgment of the European Court of Justice of 28 May 2020, case C-535/18, Land Nordrhein-Westfalen, paragraphs 101 and 118, and judgment of the European Court of Justice of 5 May 2022, case C-525/20, Association France Nature Environnement, paragraphs 42 and 45.
- [70] Judgment of the European Court of Justice of 28 May 2020, case C-535/18, Land Nordrhein-Westfalen, paragraph 110.
- [71] Judgment of the European Court of Justice of 28 May 2020, case C-535/18, Land Nordrhein-Westfalen, paragraph 110.
- [72] See case C-127/02 (Hjerte-Muslingejudgment), paragraph 61, and paragraph 4 of the judgment.
- [73] See e.g. case C-404/09, Commission v Spain, paragraph 99.
- [74] See the judgment of the European Court of Justice of 11 April 2013 in case C-258/11, Sweetman, paragraph 48.
- [75] The EU Commission's announcement "Management of Natura 2000 sites - The provisions of Article 6 of the Habitats Directive 92/43/EEC", 2018, section 3.6.4.

- [76] See the judgment of the European Court of Justice of 7 November 2018 in case C-461/17 (Holohan), paragraphs 37-40.
- [77] See e.g. Judgment of the European Court of Justice of 26 April 2017 in case C-142/16 (Moorburg), paragraph 29.
- [78] Judgment of the European Court of Justice of 7 November 2018 in case C-461/17 (Holohan) paragraphs 41-47.
- [79] Guidance on the strict protection of animal species of Community importance under the Habitats Directive, Commission Communication of 12 October 2021, C(2021) 7301 (hereafter EU Commission Guidance).
- [80] The EU Commission's guidance, section 2.52-2.57.
- [81] Guidance no. 48 to executive order no. 1595 of 6 December 2018 on the designation and administration of international nature conservation areas and the protection of certain species, Danish Environmental Protection Agency, December 2020 (hereinafter the Danish Environmental Protection Agency's habitat guidance).
- [82] The Environmental Protection Agency's habitat guide, section 9.4.1.
- [83] The Environmental Protection Agency's habitat guide, section 9.7.1.4 and the EU Commission's guidance point 2.52, according to which the habitat directive's article 12, subsection 1, letter d, should be understood as a goal of maintaining the ecological function of breeding and resting areas.
- [84] Cf. throughout the Environmental Protection Agency's habitat guidance, section 9.6.4-9.6.6.
- [85] The EU Commission's guidance, section 2.73.
- [86] Judgment of the European Court of Justice of 28 October 2021, 2nd section, case C-357/20, Magistrate der Stadt Wien (Grand hamster - II), paragraph 52.
- [87] The Danish Environmental Protection Agency's guidance for executive order no. 1595 of 6 December 2018 on the designation and administration of international nature protection areas and the protection of certain species.
- [88] Management plan for bats. Protection and management of the 17 Danish bat species and their habitats, The Norwegian Nature Agency, 2013, p. 37.
- [89] Cf. guidance on EIA in the planning act (2009), p. 57, on the practice of the former Nature Complaints Board.
- [90] Executive Order No. 1433 of 21 November 2017 on requirements for the discharge of certain pollutants into streams, lakes, transitional waters, coastal waters and sea areas.

Case:

22/02461,

Date:

23 February 2023.

Subjects:

Environmental assessment of specific projects

To-do list:

Add to to-do list

Highlights:

Show/hide highlight

The Environment and Food Complaints Board • Nævnenes Hus • Toldboden 2 • 8800 Viborg • Tel.

no.: 72 40 56 00 • CVR: 37795526 • mfkn@naevneneshus.dk

Availability Statement

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**Til:** claudia.Olazabal@ec.europa.eu (claudia.Olazabal@ec.europa.eu), [REDACTED]  
[REDACTED] Env-Water@ec.europa.eu (Env-Water@ec.europa.eu)  
**Cc:** Katrine Rafn (kalra@mim.dk), Paolo Perotti (paope@mim.dk), Rikke Slot Benyahia (rislb@mim.dk)  
**Fra:** Kirsten Vielwerth (kirst@mim.dk)  
**Titel:** DK questions on deterioration in the WFD  
**Sendt:** 16-05-2023 18:38  
**Bilag:** Letter to COM with DK questions on deterioration.docx; Translation of Environmental and Food Board of Appeal 22-02461 w ad Astra.docx;

Dear Claudia, dear [REDACTED]

Enclosed please find the Danish questions on the concept of deterioration in the Water Framework Directive as well as the English translation of the ruling by the Environment and Food Board of Appeal.

We would appreciate it greatly if you could get back to us urgently, as all permitting is put on hold for now.

Kind regards,

**Kirsten Vielwerth**

Water and Climate Adaptation | Department of the Ministry of Environment  
+45 41 28 16 76 | kirst@mim.dk >

**Ministry of the Environment**

Water and Climate Adaptation | Departement of the Ministry of Environment | Vester Voldgade 123 | DK 1552 København V | Tlf. +45 38 142 142 | mim@mim.dk | www.mim.dk



## Aktdetaljer

**Akttitel: Skriftlige spørgsmål til EU-Kommissionen om forringelse i vandrammedirektivet**

**Aktnummer: 7**

Akt ID: 412737

Dato: 11-05-2023 16:24:32

Type: Intern

Dokumenter: [1] Cover retschefen - Skriftlige spørgsmål til KOM om forringelse.docx  
[2] Bilag 1 - Letter to COM with questions on deterioration.docx (MEDTAGES IKKE)  
[3] Bilag 2 - Background note on non-deterioration under the WFD final ver2 with notes.docx (MEDTAGES IKKE)

Den 20. februar 2024

[REDACTED]



Miljøministeriet  
Departementet

[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]

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[REDACTED]

VAK havde et møde med EU-Kommissionen ved Head of Unit Claudia Olazabal og Kommissionens jurist på vandrammedirektivet, [REDACTED] fra DG Environment, Unit C1 Sustainable Freshwater Management den 10. maj 2023. [REDACTED]  
[REDACTED]

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## Aktdetaljer

Den 20. februar 2024

**Akttitel: Talking point - meeting with COM on deterioration**

**Aktnummer: 6**

Akt ID: 411042

Dato: 09-05-2023 16:20:08

Type: Intern

Dokumenter: [1] Bilag 3 - ds01473.en12.doc  
[2] Background note on non-deterioration under the WFD final ver2.docx  
[3] Talking points.docx (MEDTAGES IKKE)





**COUNCIL OF  
THE EUROPEAN UNION**

**Brussels, 21 June 2012**

**GENERAL SECRETARIAT**

**DS 1473/12**

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**Interinstitutional File:  
2011/0429 (COD)**

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**LIMITE**

**MEETING DOCUMENT**

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from:	General Secretariat
to:	Working Party on the Environment
on:	2 July 2012
Subject:	Proposal for a Directive of the European Parliament and of the Council amending Directives 2000/60/EC and 2008/105/EC as regards priority substances in the field of water policy

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With a view to the Working Party meeting on 2 July 2012, delegations will find in Annex a non-paper of the Commission's Services on the combined approach in the case of ubiquitous PBTs (Article 8a of the above-mentioned proposal).

**Commission non-paper**  
**The application of the combined approach and the non-deterioration obligation:**  
**the case of ubiquitous PBTs**

Substances that behave as ubiquitous persistent, bioaccumulative and toxic (uPBTs)

The Commission proposal \* identifies a number of substances as behaving as ubiquitous PBTs. These ubiquitous substances, some of them capable of long-range transport, may be found for decades in the aquatic environment at levels posing a significant risk, even if extensive measures to reduce or eliminate emissions have already been taken. All are identified as priority hazardous substances, therefore subject to the aim that their emissions, discharges and losses to the aquatic environment be phased out.

Examples of these substances are:

- Polybrominated diphenylethers (pBDEs): used for many years as flame retardants in many consumer, transport and construction products, some of them are identified as priority hazardous substances under the WFD and are banned under REACH and the POPs regulation. These substances are ubiquitous in the aquatic environment mainly due to leaching from many products in use that contain them.
- Mercury: a naturally occurring substance; measures have been taken that have resulted in significant decreases of emissions from anthropogenic uses to the aquatic environment over the past two decades. Uses are still authorised (chlor-alkali industry, dental amalgam, etc.) but progressively declining. Atmospheric deposition constitutes a main source of aquatic pollution in many areas of Europe (even remote).

The question

A question has been raised regarding application of the non-deterioration obligation and the combined approach for uPBTs. The postulated problem is exemplified in the following statements, which are discussed below in the context of broader explanation.

**Statement 1: Any new authorisation of an urban waste water treatment plant (UWWTP) would be against the obligation to prevent deterioration because any discharge will contain some (even minute) quantities of ubiquitous priority hazardous substances (such as pBDEs or mercury).**

**Statement 2: Even if a permit were given for a new waste water treatment plant, the emission limit values for certain substances (such as pBDEs or mercury), resulting from back-calculating from the proposed EQS, would be so strict that they would be unfeasible to meet.**

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\* 6019/12 - Art. 2(5).

### The obligation to prevent deterioration

Article 4.1(a)(i) of the WFD requires Member States to take measures to prevent the deterioration of the status of surface water bodies. There are two important elements in this obligation:

- deterioration refers to status. As regards chemical status, this is defined in WFD Article 2.24 and Annex V section 1.4.3. "Good" chemical status is achieved when all environmental quality standards set at EU level are not exceeded. If any of these EU standards are exceeded, the status is classified as "failing to achieve good".
- status refers to a surface water body. Indeed, the water body, as defined in WFD Article 2.10 and delineated by Member States according to WFD Article 5 and Annex II section 1.1, constitutes the unit on which the assessment of status is carried out (see Articles 2.17, 2.18, Annex V section 1.4.3).

Therefore, the deterioration of chemical status refers to a situation where the pollution of a water body increases from not exceeding any EQS set at EU level to exceeding one or more. This would mean that the chemical status would deteriorate from "good" to "failing to achieve good". The obligation to prevent deterioration of chemical status refers to the change from good to failing to achieve good at the water body level. **It therefore does not target specific individual discharges causing local increases in pollution<sup>1</sup>.**

Because both diffuse and point sources are responsible for the emissions of uPBTs, acting at the level of individual point sources would, in the case of most water bodies at least, not achieve the objective of good chemical status. And given the ubiquity and expected widespread failure of the EQSs of these substances, deterioration of status would not be likely for uPBTs as most water bodies should already be classified as failing to achieve good chemical status. It can in fact also be argued that the construction of a new collecting system and UWWTP would simply concentrate at one point the discharges that previously came from a multitude of single waste water systems (e.g. septic tanks). The emissions to the aquatic environment of pollutants such as mercury would therefore not increase, but rather globally decrease due to the more advanced treatment at the new UWWTP.

### The combined approach

The combined approach in Article 10 of the WFD establishes a framework for emission controls and quality objectives to work together in a coordinated way. Minimum controls are set in EU legislation for the most significant emissions (from point and diffuse sources), but these should be tightened where they are not sufficient to meet the quality objectives. The ultimate purpose is to ensure a high level of protection of the aquatic environment whilst providing a level playing field for the most significant emissions.

WFD Article 10.3 provides that where the attainment of a quality objective or standard requires stricter conditions than those set by the legislation listed in WFD Article 10.2, Member States need to set more stringent emission controls accordingly.

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<sup>1</sup> In addition to the non-deterioration obligation in WFD Article 4.1(a)(i), WFD Article 4.1(a)(iv) and EQSD Article 3(3) protect against increases of pollution at water body level.

Whilst the approach can easily be applied where emission patterns are simple, complex patterns, for example where both diffuse and point-source emissions are involved, may make it less easy to apply. There is in any case no obligation to set emission limit values for all substances in all discharges.

In particular, it should be noted that Article 10.3 does not target specific individual discharges. Member States can choose to apply the most effective measures to achieve the WFD objectives. They could decide that tightening the emission controls on individual discharges (such as discharges from UWWTPs) for a particular substance would not be effective in addressing the pollution problem (and thus the WFD objectives), and decide to address the pollution at its primary source instead of "end-of pipe".

The source control measures already taken and/or in the pipeline for uPBTs (such as bans and restrictions on use) will ensure that their emissions progressively decline at the level of the river basins and water bodies. Ultimately, the source control measures will reduce all emissions (diffuse and point source), including from urban waste water.

It should also be noted that there is no obligation to back-calculate emission limit values from EQS. This is particularly the case with biota standards for bioaccumulative substances such as mercury, where back-calculation would result in very low EQS for water because of high uncertainty.

The obligations referred to in the above paragraphs are of course without prejudice to the application of the exemptions in WFD Articles 4.4 and 4.5 if the conditions therein apply.

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**Ministry of Environment  
of Denmark**  
Department

Vand og Klimatilpasning  
Case No 2023-4355  
Ref. kirst, rurab, bketu, limni  
May 8 2023

## **Background note on the obligation of non-deterioration under the Water Framework Directive**

### **The issue**

Does Article 4 of the Water Framework Directive, as interpreted by the Court, allow for an individual assessment of the significance of an addition of a substance to a specific water body in order to establish if such addition constitutes “deterioration of the status”, when the EQS for that substance has already been exceeded and the water body has thus been classified in the lowest class?

### **Background**

In February the Danish Environment and Food Board of Appeal<sup>1</sup> (the Board of Appeal) ruled that any additional impact on or discharge to a water body per se will constitute “deterioration of status” if the quality element concerned is already in the lowest class.

The Board of Appeal based its reasoning on C-461/13, C-535/18 and C-525/20. The European Court of Justice was not requested to give a preliminary ruling thereon.

According to The Board of Appeal’s ruling, any discharge of a substance to a waterbody must be regarded as a ‘deterioration in the status’ of the water body contrary to Article 4(1) of the Water Framework Directive when the EQS for that substance has already been exceeded and the water body is thus in the lowest possible class. The Board of Appeal emphasized that the amount of the substance is not decisive when the EQS has already been exceeded, as any additional amount will result in deterioration.

This leads to a situation where no individual assessment of the actual significance of an addition of a substance to the specific water body shall be conducted. Thus, there is no

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<sup>1</sup> The Environment and Food Board of Appeal is an independent Danish Court-like institution within the field of nature, environment, agriculture, fisheries and food. The rulings are binding for state and local authorities’ administration and authorization of plans and projects.

assessment of the actual effect on the quality element/EQS at water body level due to the addition of that substance.

Hence, it will not be possible to take the significance of the impact or discharge on the quality element at water body level into account when it is already in the lowest class. A specific individual discharge causing local pollution will constitute deterioration, without any assessment of the significance of the effect.

It is the Ministry of Environment's view that the Board of Appeal's ruling is not consistent with the explanation of the obligation to prevent deterioration given in document DS 1473/12, the Commission non-paper "*The application of the combined approach and the non-deterioration obligation: the case of ubiquitous PBTs*", when it comes to the level for assessing<sup>2</sup> if deterioration of status will occur.

The Ministry of Environment understands that the interpretation given by the Commission in the above-mentioned non-paper is from 2012, i.e. before the key rulings by the ECJ (C-461/13, C-535/18, C-559/19 and C-525/20).

Therefore, we would like to know how the Commission views the deterioration issue now, i.e, whether Article 4 (1) allows for an individual assessment in the abovementioned situation.

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<sup>2</sup> DS 1473/12, p. 3: The obligation to prevent deterioration.

Article 4.1(a)(i) of the WFD requires Member States to take measures to prevent deterioration of the status of surface water bodies. There are two important elements in this obligation:

- Deterioration refers to status. As regards chemical status, ..... the status is classified as failing to achieve good".
- Status refers to a surface water body. Indeed, the water body, as defined in WFD Article 2.10 and delineated by Member States according to WFD Article 5 and Annex II section 1.1, constitute the unit on which the assessment of status is carried out (see Articles 2.17, 2.18, Annex V section 1.4.3).



## Aktdetaljer

**Akttitel: Background note for the meeting on 10 May after the SCG-meeting**

**Aktnummer: 5**

Akt ID: 409659

Dato: 08-05-2023 10:44:51

Type: Udgående

Dokumenter: [1] Background note for the meeting on 10 May after the SCG-meeting.eml

[2] Background note on non-deterioration under the WFD final ver2.docx

[3] ds01473.en12.doc

[4] RE: Request for a meeting re. the concept of deterioration in the WFD (MIM Id nr.: 397031).eml

Den 20. februar 2024

**Til:** claudia.Olazabal@ec.europa.eu (claudia.Olazabal@ec.europa.eu), [REDACTED]  
**Cc:** Katrine Rafn (kalra@mim.dk), Cecilie Spanner Rydeng (cespa@mim.dk), Rune Raun-Abildgaard (rurab@mim.dk), Lise Marie Johannessen (limni@mim.dk), Benjamin Kelstrup Turner (bketu@mim.dk), Kirsten Vielwerth (kirst@mim.dk)  
**Fra:** Kirsten Vielwerth (kirst@mim.dk)  
**Titel:** Background note for the meeting on 10 May after the SCG-meeting  
**Sendt:** 08-05-2023 10:44  
**Bilag:** Background note on non-deterioration under the WFD final ver2.docx; ds01473.en12.doc; RE: Request for a meeting re. the concept of deterioration in the WFD (MIM Id nr.: 397031).eml;

Dear Claudia, dear [REDACTED]

Enclosed, please find a background note on the topic we would like to focus on in the meeting on Wednesday.

As requested, I forward a link to the ruling by the Danish Environment and Food Board of Appeal. It is in Danish - sorry for that - but hopefully you have access to better translation tools than me.

Link to the ruling by the Board:

Afgørelse | Miljø- og Fødevareklagenævnet (naevneneshus.dk)

Both Katrine Rafn and I are looking forward to meeting you.

Kind regards, Kirsten

Med venlig hilsen

Kirsten Vielwerth  
Vand og Klimatilpasning | Miljøministeriets Departementet  
+45 41 28 16 76 | kirst@mim.dk >

## Miljøministeriet

Vand og Klimatilpasning | Miljøministeriets Departementet | Vester Voldgade 123 | DK 1552 København V | Tlf. +45 38 142 142 | mim@mim.dk | www.mim.dk





**Ministry of Environment  
of Denmark**  
Department

Vand og Klimatilpasning  
Case No 2023-4355  
Ref. kirst, rurab, bketu, limni  
May 8 2023

## **Background note on the obligation of non-deterioration under the Water Framework Directive**

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Does Article 4 of the Water Framework Directive, as interpreted by the Court, allow for an individual assessment of the significance of an addition of a substance to a specific water body in order to establish if such addition constitutes “deterioration of the status”, when the EQS for that substance has already been exceeded and the water body has thus been classified in the lowest class?

### **Background**

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According to The Board of Appeal’s ruling, any discharge of a substance to a waterbody must be regarded as a ‘deterioration in the status’ of the water body contrary to Article 4(1) of the Water Framework Directive when the EQS for that substance has already been exceeded and the water body is thus in the lowest possible class. The Board of Appeal emphasized that the amount of the substance is not decisive when the EQS has already been exceeded, as any additional amount will result in deterioration.

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assessment of the actual effect on the quality element/EQS at water body level due to the addition of that substance.

Hence, it will not be possible to take the significance of the impact or discharge on the quality element at water body level into account when it is already in the lowest class. A specific individual discharge causing local pollution will constitute deterioration, without any assessment of the significance of the effect.

It is the Ministry of Environment's view that the Board of Appeal's ruling is not consistent with the explanation of the obligation to prevent deterioration given in document DS 1473/12, the Commission non-paper "*The application of the combined approach and the non-deterioration obligation: the case of ubiquitous PBTs*", when it comes to the level for assessing<sup>2</sup> if deterioration of status will occur.

The Ministry of Environment understands that the interpretation given by the Commission in the above-mentioned non-paper is from 2012, i.e. before the key rulings by the ECJ (C-461/13, C-535/18, C-559/19 and C-525/20).

Therefore, we would like to know how the Commission views the deterioration issue now, i.e., whether Article 4 (1) allows for an individual assessment in the abovementioned situation.

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Article 4.1(a)(i) of the WFD requires Member States to take measures to prevent deterioration of the status of surface water bodies. There are two important elements in this obligation:

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- Status refers to a surface water body. Indeed, the water body, as defined in WFD Article 2.10 and delineated by Member States according to WFD Article 5 and Annex II section 1.1, constitute the unit on which the assessment of status is carried out (see Articles 2.17, 2.18, Annex V section 1.4.3).



**COUNCIL OF  
THE EUROPEAN UNION**

**Brussels, 21 June 2012**

**GENERAL SECRETARIAT**

**DS 1473/12**

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**Interinstitutional File:  
2011/0429 (COD)**

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**LIMITE**

**MEETING DOCUMENT**

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from:	General Secretariat
to:	Working Party on the Environment
on:	2 July 2012
Subject:	Proposal for a Directive of the European Parliament and of the Council amending Directives 2000/60/EC and 2008/105/EC as regards priority substances in the field of water policy

---

With a view to the Working Party meeting on 2 July 2012, delegations will find in Annex a non-paper of the Commission's Services on the combined approach in the case of ubiquitous PBTs (Article 8a of the above-mentioned proposal).

**Commission non-paper**  
**The application of the combined approach and the non-deterioration obligation:**  
**the case of ubiquitous PBTs**

Substances that behave as ubiquitous persistent, bioaccumulative and toxic (uPBTs)

The Commission proposal \* identifies a number of substances as behaving as ubiquitous PBTs. These ubiquitous substances, some of them capable of long-range transport, may be found for decades in the aquatic environment at levels posing a significant risk, even if extensive measures to reduce or eliminate emissions have already been taken. All are identified as priority hazardous substances, therefore subject to the aim that their emissions, discharges and losses to the aquatic environment be phased out.

Examples of these substances are:

- Polybrominated diphenylethers (pBDEs): used for many years as flame retardants in many consumer, transport and construction products, some of them are identified as priority hazardous substances under the WFD and are banned under REACH and the POPs regulation. These substances are ubiquitous in the aquatic environment mainly due to leaching from many products in use that contain them.
- Mercury: a naturally occurring substance; measures have been taken that have resulted in significant decreases of emissions from anthropogenic uses to the aquatic environment over the past two decades. Uses are still authorised (chlor-alkali industry, dental amalgam, etc.) but progressively declining. Atmospheric deposition constitutes a main source of aquatic pollution in many areas of Europe (even remote).

The question

A question has been raised regarding application of the non-deterioration obligation and the combined approach for uPBTs. The postulated problem is exemplified in the following statements, which are discussed below in the context of broader explanation.

**Statement 1: Any new authorisation of an urban waste water treatment plant (UWWTP) would be against the obligation to prevent deterioration because any discharge will contain some (even minute) quantities of ubiquitous priority hazardous substances (such as pBDEs or mercury).**

**Statement 2: Even if a permit were given for a new waste water treatment plant, the emission limit values for certain substances (such as pBDEs or mercury), resulting from back-calculating from the proposed EQS, would be so strict that they would be unfeasible to meet.**

---

\* 6019/12 - Art. 2(5).

### The obligation to prevent deterioration

Article 4.1(a)(i) of the WFD requires Member States to take measures to prevent the deterioration of the status of surface water bodies. There are two important elements in this obligation:

- deterioration refers to status. As regards chemical status, this is defined in WFD Article 2.24 and Annex V section 1.4.3. "Good" chemical status is achieved when all environmental quality standards set at EU level are not exceeded. If any of these EU standards are exceeded, the status is classified as "failing to achieve good".
- status refers to a surface water body. Indeed, the water body, as defined in WFD Article 2.10 and delineated by Member States according to WFD Article 5 and Annex II section 1.1, constitutes the unit on which the assessment of status is carried out (see Articles 2.17, 2.18, Annex V section 1.4.3).

Therefore, the deterioration of chemical status refers to a situation where the pollution of a water body increases from not exceeding any EQS set at EU level to exceeding one or more. This would mean that the chemical status would deteriorate from "good" to "failing to achieve good". The obligation to prevent deterioration of chemical status refers to the change from good to failing to achieve good at the water body level. **It therefore does not target specific individual discharges causing local increases in pollution<sup>1</sup>.**

Because both diffuse and point sources are responsible for the emissions of uPBTs, acting at the level of individual point sources would, in the case of most water bodies at least, not achieve the objective of good chemical status. And given the ubiquity and expected widespread failure of the EQSs of these substances, deterioration of status would not be likely for uPBTs as most water bodies should already be classified as failing to achieve good chemical status. It can in fact also be argued that the construction of a new collecting system and UWWTP would simply concentrate at one point the discharges that previously came from a multitude of single waste water systems (e.g. septic tanks). The emissions to the aquatic environment of pollutants such as mercury would therefore not increase, but rather globally decrease due to the more advanced treatment at the new UWWTP.

### The combined approach

The combined approach in Article 10 of the WFD establishes a framework for emission controls and quality objectives to work together in a coordinated way. Minimum controls are set in EU legislation for the most significant emissions (from point and diffuse sources), but these should be tightened where they are not sufficient to meet the quality objectives. The ultimate purpose is to ensure a high level of protection of the aquatic environment whilst providing a level playing field for the most significant emissions.

WFD Article 10.3 provides that where the attainment of a quality objective or standard requires stricter conditions than those set by the legislation listed in WFD Article 10.2, Member States need to set more stringent emission controls accordingly.

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<sup>1</sup> In addition to the non-deterioration obligation in WFD Article 4.1(a)(i), WFD Article 4.1(a)(iv) and EQSD Article 3(3) protect against increases of pollution at water body level.

Whilst the approach can easily be applied where emission patterns are simple, complex patterns, for example where both diffuse and point-source emissions are involved, may make it less easy to apply. There is in any case no obligation to set emission limit values for all substances in all discharges.

In particular, it should be noted that Article 10.3 does not target specific individual discharges. Member States can choose to apply the most effective measures to achieve the WFD objectives. They could decide that tightening the emission controls on individual discharges (such as discharges from UWWTPs) for a particular substance would not be effective in addressing the pollution problem (and thus the WFD objectives), and decide to address the pollution at its primary source instead of "end-of pipe".

The source control measures already taken and/or in the pipeline for uPBTs (such as bans and restrictions on use) will ensure that their emissions progressively decline at the level of the river basins and water bodies. Ultimately, the source control measures will reduce all emissions (diffuse and point source), including from urban waste water.

It should also be noted that there is no obligation to back-calculate emission limit values from EQS. This is particularly the case with biota standards for bioaccumulative substances such as mercury, where back-calculation would result in very low EQS for water because of high uncertainty.

The obligations referred to in the above paragraphs are of course without prejudice to the application of the exemptions in WFD Articles 4.4 and 4.5 if the conditions therein apply.

---

**Til:** kirst@mim.dk (Kirsten Vielwerth)  
**Cc:** kalra@mim.dk (Katrine Rafn), cespa@mim.dk (Cecilie Spanner Rydeng), [REDACTED]  
**Fra:** OLAZABAL Claudia (Claudia.Olazabal@ec.europa.eu)  
**Titel:** RE: Request for a meeting re. the concept of deterioration in the WFD (MIM Id nr.: 397031)  
**Sendt:** 03-05-2023 16:56

Dear Kirsten

I can confirm that we can meet after the SCG meeting. We will find a quiet corner in the meeting building for our discussion.

It would be very good to receive prior to that meeting the ruling of the national Environment and Food Board of Appeal you refer to.

Thanks and I look forward to our conversation.

Best regards

Claudia Olazábal

---

**From:** Kirsten Vielwerth <kirst@mim.dk>  
**Sent:** Friday, April 21, 2023 3:11 PM  
**To:** OLAZABAL Claudia (ENV) <Claudia.Olazabal@ec.europa.eu>; [REDACTED]  
**Cc:** Kirsten Vielwerth <kirst@mim.dk>; Katrine Rafn <kalra@mim.dk>; Cecilie Spanner Rydeng <cespa@mim.dk>  
**Subject:** Request for a meeting re. the concept of deterioration in the WFD (MIM Id nr.: 397031)

Dear Claudia, dear [REDACTED]

Would it be possible for you to schedule a short meeting (around 30 minutes) with us after the SCG-meeting 10 May, please? A different time around 10. - 11. May could also be possible, if that would suit you better.

Danish participants will be Head of Division for Water and Climate Adaptation, Water Director Katrine Rafn, and myself.

We would like to talk to you about Article 4(1) of the WFD.

The urgency is due to our national Environment and Food Board of Appeal has issued a final ruling on deterioration in light of the ECJ case law, that has raised doubt among the Danish authorities in relation to their administration and permitting, e.g. in relation to big energy projects, etc.

We will be happy to send you a background note with more information in due time for a meeting.

Hope to hear from you soon.

Best regards,

Kirsten Vielwerth  
Water and Climate Adaptation | Department of the Ministry of Environment  
+45 41 28 16 76 | kirst@mim.dk >

**Ministry of Environment**







## Aktdetaljer

### Akttitel: Background note on non-deterioration Aktnummer: 4

Akt ID: 408775

Dato: 04-05-2023 13:38:26

Type: Intern

Dokumenter: [1] Bilag 3 - ds01473.en12.doc  
[2] Bilag 2 - RE Request for a meeting re. the concept of deterioration in the WFD (MIM Id nr. 397031).msg  
[3] Cover Retschef - Background note on non-deterioration.docx (MEDTAGES IKKE)  
[4] Bilag 1 - Background note on non-deterioration under the WFD final.docx (MEDTAGES IKKE)

Den 20. februar 2024



**COUNCIL OF  
THE EUROPEAN UNION**

**Brussels, 21 June 2012**

**GENERAL SECRETARIAT**

**DS 1473/12**

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**Interinstitutional File:  
2011/0429 (COD)**

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**LIMITE**

**MEETING DOCUMENT**

---

from:	General Secretariat
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Subject:	Proposal for a Directive of the European Parliament and of the Council amending Directives 2000/60/EC and 2008/105/EC as regards priority substances in the field of water policy

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Best regards,

Kirsten Vielwerth  
Water and Climate Adaptation | Department of the Ministry of Environment  
+45 41 28 16 76 | kirst@mim.dk >

**Ministry of Environment**





## Aktdetaljer

Den 20. februar 2024

### Akttitel: Background note on non-deterioration Aktnummer: 3

Akt ID: 402619

Dato: 25-04-2023 15:49:15

Type: Intern

Dokumenter: [1] Aktdokument.html (MEDTAGES IKKE)  
[2] ds01473.en12.doc  
[3] Background note on non-deterioration under the WFD.docx (MEDTAGES IKKE)





**COUNCIL OF  
THE EUROPEAN UNION**

**Brussels, 21 June 2012**

**GENERAL SECRETARIAT**

**DS 1473/12**

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**Interinstitutional File:  
2011/0429 (COD)**

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**LIMITE**

**MEETING DOCUMENT**

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Subject:	Proposal for a Directive of the European Parliament and of the Council amending Directives 2000/60/EC and 2008/105/EC as regards priority substances in the field of water policy

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With a view to the Working Party meeting on 2 July 2012, delegations will find in Annex a non-paper of the Commission's Services on the combined approach in the case of ubiquitous PBTs (Article 8a of the above-mentioned proposal).

**Commission non-paper**  
**The application of the combined approach and the non-deterioration obligation:**  
**the case of ubiquitous PBTs**

**Substances that behave as ubiquitous persistent, bioaccumulative and toxic (uPBTs)**

The Commission proposal \* identifies a number of substances as behaving as ubiquitous PBTs. These ubiquitous substances, some of them capable of long-range transport, may be found for decades in the aquatic environment at levels posing a significant risk, even if extensive measures to reduce or eliminate emissions have already been taken. All are identified as priority hazardous substances, therefore subject to the aim that their emissions, discharges and losses to the aquatic environment be phased out.

Examples of these substances are:

- Polybrominated diphenylethers (pBDEs): used for many years as flame retardants in many consumer, transport and construction products, some of them are identified as priority hazardous substances under the WFD and are banned under REACH and the POPs regulation. These substances are ubiquitous in the aquatic environment mainly due to leaching from many products in use that contain them.
- Mercury: a naturally occurring substance; measures have been taken that have resulted in significant decreases of emissions from anthropogenic uses to the aquatic environment over the past two decades. Uses are still authorised (chlor-alkali industry, dental amalgam, etc.) but progressively declining. Atmospheric deposition constitutes a main source of aquatic pollution in many areas of Europe (even remote).

**The question**

A question has been raised regarding application of the non-deterioration obligation and the combined approach for uPBTs. The postulated problem is exemplified in the following statements, which are discussed below in the context of broader explanation.

**Statement 1: Any new authorisation of an urban waste water treatment plant (UWWTP) would be against the obligation to prevent deterioration because any discharge will contain some (even minute) quantities of ubiquitous priority hazardous substances (such as pBDEs or mercury).**

**Statement 2: Even if a permit were given for a new waste water treatment plant, the emission limit values for certain substances (such as pBDEs or mercury), resulting from back-calculating from the proposed EQS, would be so strict that they would be unfeasible to meet.**

---

\* 6019/12 - Art. 2(5).

### The obligation to prevent deterioration

Article 4.1(a)(i) of the WFD requires Member States to take measures to prevent the deterioration of the status of surface water bodies. There are two important elements in this obligation:

- deterioration refers to status. As regards chemical status, this is defined in WFD Article 2.24 and Annex V section 1.4.3. "Good" chemical status is achieved when all environmental quality standards set at EU level are not exceeded. If any of these EU standards are exceeded, the status is classified as "failing to achieve good".
- status refers to a surface water body. Indeed, the water body, as defined in WFD Article 2.10 and delineated by Member States according to WFD Article 5 and Annex II section 1.1, constitutes the unit on which the assessment of status is carried out (see Articles 2.17, 2.18, Annex V section 1.4.3).

Therefore, the deterioration of chemical status refers to a situation where the pollution of a water body increases from not exceeding any EQS set at EU level to exceeding one or more. This would mean that the chemical status would deteriorate from "good" to "failing to achieve good". The obligation to prevent deterioration of chemical status refers to the change from good to failing to achieve good at the water body level. **It therefore does not target specific individual discharges causing local increases in pollution <sup>1</sup>.**

Because both diffuse and point sources are responsible for the emissions of uPBTs, acting at the level of individual point sources would, in the case of most water bodies at least, not achieve the objective of good chemical status. And given the ubiquity and expected widespread failure of the EQSs of these substances, deterioration of status would not be likely for uPBTs as most water bodies should already be classified as failing to achieve good chemical status. It can in fact also be argued that the construction of a new collecting system and UWWTP would simply concentrate at one point the discharges that previously came from a multitude of single waste water systems (e.g. septic tanks). The emissions to the aquatic environment of pollutants such as mercury would therefore not increase, but rather globally decrease due to the more advanced treatment at the new UWWTP.

### The combined approach

The combined approach in Article 10 of the WFD establishes a framework for emission controls and quality objectives to work together in a coordinated way. Minimum controls are set in EU legislation for the most significant emissions (from point and diffuse sources), but these should be tightened where they are not sufficient to meet the quality objectives. The ultimate purpose is to ensure a high level of protection of the aquatic environment whilst providing a level playing field for the most significant emissions.

WFD Article 10.3 provides that where the attainment of a quality objective or standard requires stricter conditions than those set by the legislation listed in WFD Article 10.2, Member States need to set more stringent emission controls accordingly.

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<sup>1</sup> In addition to the non-deterioration obligation in WFD Article 4.1(a)(i), WFD Article 4.1(a)(iv) and EQSD Article 3(3) protect against increases of pollution at water body level.

Whilst the approach can easily be applied where emission patterns are simple, complex patterns, for example where both diffuse and point-source emissions are involved, may make it less easy to apply. There is in any case no obligation to set emission limit values for all substances in all discharges.

In particular, it should be noted that Article 10.3 does not target specific individual discharges. Member States can choose to apply the most effective measures to achieve the WFD objectives. They could decide that tightening the emission controls on individual discharges (such as discharges from UWWTPs) for a particular substance would not be effective in addressing the pollution problem (and thus the WFD objectives), and decide to address the pollution at its primary source instead of "end-of pipe".

The source control measures already taken and/or in the pipeline for uPBTs (such as bans and restrictions on use) will ensure that their emissions progressively decline at the level of the river basins and water bodies. Ultimately, the source control measures will reduce all emissions (diffuse and point source), including from urban waste water.

It should also be noted that there is no obligation to back-calculate emission limit values from EQS. This is particularly the case with biota standards for bioaccumulative substances such as mercury, where back-calculation would result in very low EQS for water because of high uncertainty.

The obligations referred to in the above paragraphs are of course without prejudice to the application of the exemptions in WFD Articles 4.4 and 4.5 if the conditions therein apply.



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## Aktdetaljer

**Akttitel: SV: Request for a meeting re. the concept of deterioration in the WFD**

**Aktnummer: 2**

Akt ID: 401398

Dato: 24-04-2023 11:35:00

Type: Udgående

Dokumenter: [1] SV Request for a meeting re. the concept of deterioration in the WFD (MIM Id nr. 397031).eml

Den 20. februar 2024

---

**Til:** [REDACTED]  
**Cc:** Katrine Rafn (kalra@mim.dk), Cecilie Spanner Rydeng (cespa@mim.dk), claudia.Olazabal@ec.europa.eu (claudia.Olazabal@ec.europa.eu), [REDACTED]  
**Fra:** Kirsten Vielwerth (kirst@mim.dk)  
**Titel:** SV: Request for a meeting re. the concept of deterioration in the WFD  
**E-mailtitel:** SV: Request for a meeting re. the concept of deterioration in the WFD (MIM Id nr.: 397031)  
**Sendt:** 24-04-2023 11:35

Thank you, very much, [REDACTED] – much appreciated.

Unless I hear something else, Katrine and I will be at outside the meeting room in the CCAB at 16:45, i.e. right after the SCG meeting 10. May.

I will send you a background note soon, realistically it will be in the beginning of next week.

Best regards, Kirsten

---

**Fra:** [REDACTED]  
**Sendt:** 21. april 2023 18:55  
**Til:** Kirsten Vielwerth <kirst@mim.dk>  
**Cc:** Katrine Rafn <kalra@mim.dk>; Cecilie Spanner Rydeng <cespa@mim.dk>; OLAZABAL Claudia <Claudia.Olazabal@ec.europa.eu>; [REDACTED]  
**Emne:** RE: Request for a meeting re. the concept of deterioration in the WFD (MIM Id nr.: 397031)

Dear Kirsten,

Thanks you for your e-mail.

Whilst I haven't had a chance to check with Claudia (on leave for some days), I am sure she would be happy to meet you after the SCG meeting and discuss the issue raised in your below e-mail. It would indeed be very useful to receive a background note explaining the issue in a bit more detail, prior to the meeting.

Kind Regards

[REDACTED]  
[REDACTED]  
Legal adviser  
European Commission - Directorate General for Environment  
Unit DG ENV C1 – Sustainable Freshwater Management  
Office BRE 2 - 7/DCS

Website: <http://ec.europa.eu/environment>

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---

**From:** Kirsten Vielwerth <kirst@mim.dk>  
**Sent:** Friday, April 21, 2023 3:11 PM  
**To:** OLAZABAL Claudia (ENV) <Claudia.Olazabal@ec.europa.eu>; [REDACTED]  
[REDACTED]  
**Cc:** Kirsten Vielwerth <kirst@mim.dk>; Katrine Rafn <kalra@mim.dk>; Cecilie Spanner Rydeng

<cespa@mim.dk>

**Subject:** Request for a meeting re. the concept of deterioration in the WFD (MIM Id nr.: 397031)

Dear Claudia, dear [REDACTED]

Would it be possible for you to schedule a short meeting (around 30 minutes) with us after the SCG-meeting 10 May, please? A different time around 10. - 11. May could also be possible, if that would suit you better.

Danish participants will be Head of Division for Water and Climate Adaptation, Water Director Katrine Rafn, and myself.

We would like to talk to you about Article 4(1) of the WFD.

The urgency is due to our national Environment and Food Board of Appeal has issued a final ruling on deterioration in light of the ECJ case law, that has raised doubt among the Danish authorities in relation to their administration and permitting, e.g. in relation to big energy projects, etc.

We will be happy to send you a background note with more information in due time for a meeting.

Hope to hear from you soon.

Best regards,

Kirsten Vielwerth

Water and Climate Adaptation | Department of the Ministry of Environment

+45 41 28 16 76 | kirst@mim.dk >

**Ministry of Environment**

Water and Climate Adaptation | Department of the Environment Ministry | Vester Voldgade 123 | DK 1552 Copenhagen V | Tlf. +45 38 142 142 | mim@mim.dk | www.mim.dk



Miljøministeriet

## Aktdetaljer

**Akttitel:** Request for a meeting re. the concept of deterioration in the WFD

**Aktnummer:** 1

Akt ID: 397031

Dato: 21-04-2023 15:11:27

Type: Udgående

Dokumenter: [1] Aktdokument.html

Den 20. februar 2024



---

**Til:** claudia.Olazabal@ec.europa.eu (claudia.Olazabal@ec.europa.eu), [REDACTED]  
**Cc:** Kirsten Vielwerth (kirst@mim.dk), Katrine Rafn (kalra@mim.dk), Cecilie Spanner Rydeng (cespa@mim.dk)  
**Fra:** Kirsten Vielwerth (kirst@mim.dk)  
**Titel:** Request for a meeting re. the concept of deterioration in the WFD  
**Sendt:** 21-04-2023 15:11

Dear Claudia, dear [REDACTED]

Would it be possible for you to schedule a short meeting (around 30 minutes) with us after the SCG-meeting 10 May, please? A different time around 10. - 11. May could also be possible, if that would suit you better.

Danish participants will be Head of Division for Water and Climate Adaptation, Water Director Katrine Rafn, and myself.

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Hope to hear from you soon.

Best regards,

**Kirsten Vielwerth**  
Water and Climate Adaptation | Department of the Ministry of Environment  
+45 41 28 16 76 | kirst@mim.dk >

**Ministry of Environment**

Water and Climate Adaptation | Department of the Environment Ministry | Vester Voldgade 123 | DK 1552 Copenhagen V | Tlf. +45 38 142 142 | mim@mim.dk | www.mim.dk



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## Aktdetaljer

**Akttitel:** Request for a meeting re. the concept of deterioration in the WFD

**Aktnummer:**

Akt ID: 463750

Dato: 21-04-2023 15:12:00

Type: Udgående

Dokumenter: [1] Request for a meeting re. the concept of deterioration in the WFD (MIM Id nr. 397031).eml

Den 20. februar 2024

---

**Til:** claudia.Olazabal@ec.europa.eu (claudia.Olazabal@ec.europa.eu), [REDACTED]  
**Cc:** Kirsten Vielwerth (kirst@mim.dk), Katrine Rafn (kalra@mim.dk), Cecilie Spanner Rydeng (cespa@mim.dk)  
**Fra:** Kirsten Vielwerth (kirst@mim.dk)  
**Titel:** Request for a meeting re. the concept of deterioration in the WFD  
**E-mailtitel:** Request for a meeting re. the concept of deterioration in the WFD (MIM Id nr.: 397031)  
**Sendt:** 21-04-2023 15:11

Dear Claudia, dear [REDACTED]

Would it be possible for you to schedule a short meeting (around 30 minutes) with us after the SCG-meeting 10 May, please? A different time around 10. - 11. May could also be possible, if that would suit you better.

Danish participants will be Head of Division for Water and Climate Adaptation, Water Director Katrine Rafn, and myself.

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We will be happy to send you a background note with more information in due time for a meeting.

Hope to hear from you soon.

Best regards,

**Kirsten Vielwerth**

Water and Climate Adaptation | Department of the Ministry of Environment  
+45 41 28 16 76 | kirst@mim.dk >

**Ministry of Environment**

Water and Climate Adaptation | Department of the Environment Ministry | Vester Voldgade 123 | DK 1552 Copenhagen V | Tlf. +45 38 142 142 | mim@mim.dk | www.mim.dk



Miljøministeriet

## Aktdetaljer

**Akttitel:** RE: Request for a meeting re. the concept of deterioration in the WFD

**Aktnummer:**

Akt ID: 463749

Dato: 21-04-2023 18:55:22

Type: Indgående

Dokumenter: [1] RE Request for a meeting re. the concept of deterioration in the WFD (MIM Id nr. 397031).eml

Den 20. februar 2024

**Til:** Kirsten Vielwerth (kirst@mim.dk)  
**Cc:** Katrine Rafn (kalra@mim.dk), Cecilie Spanner Rydeng (cespa@mim.dk), claudia.Olazabal@ec.europa.eu (claudia.Olazabal@ec.europa.eu), [REDACTED]  
**Fra:** [REDACTED]  
**Titel:** RE: Request for a meeting re. the concept of deterioration in the WFD  
**E-mailtitel:** RE: Request for a meeting re. the concept of deterioration in the WFD (MIM Id nr.: 397031)  
**Sendt:** 21-04-2023 18:55

Dear Kirsten,




Thanks you for your e-mail.

Whilst I haven't had a chance to check with Claudia (on leave for some days), I am sure she would be happy to meet you after the SCG meeting and discuss the issue raised in your below e-mail. It would indeed be very useful to receive a background note explaining the issue in a bit more detail, prior to the meeting.

Kind Regards

[REDACTED]  
[REDACTED]  
Legal adviser  
European Commission - Directorate General for Environment  
Unit DG ENV C1 – Sustainable Freshwater Management  
Office BRE 2 - 7/DCS

Website: <http://ec.europa.eu/environment>

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---

**From:** Kirsten Vielwerth <kirst@mim.dk>  
**Sent:** Friday, April 21, 2023 3:11 PM  
**To:** OLAZABAL Claudia (ENV) <Claudia.Olazabal@ec.europa.eu>; [REDACTED]  
**Cc:** Kirsten Vielwerth <kirst@mim.dk>; Katrine Rafn <kalra@mim.dk>; Cecilie Spanner Rydeng <cespa@mim.dk>  
**Subject:** Request for a meeting re. the concept of deterioration in the WFD (MIM Id nr.: 397031)

Dear Claudia, dear [REDACTED]

Would it be possible for you to schedule a short meeting (around 30 minutes) with us after the SCG-meeting 10 May, please? A different time around 10. - 11. May could also be possible, if that would suit you better.

Danish participants will be Head of Division for Water and Climate Adaptation, Water Director Katrine Rafn, and myself.

We would like to talk to you about Article 4(1) of the WFD.

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We will be happy to send you a background note with more information in due time for a meeting.

Hope to hear from you soon.

Best regards,

Kirsten Vielwerth

Water and Climate Adaptation | Department of the Ministry of Environment

+45 41 28 16 76 | [kirst@mim.dk](mailto:kirst@mim.dk) >

**Ministry of Environment**

Water and Climate Adaptation | Department of the Environment Ministry | Vester Voldgade 123 | DK 1552 Copenhagen V | Tlf. +45 38 142 142 | [mim@mim.dk](mailto:mim@mim.dk) | [www.mim.dk](http://www.mim.dk)



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## Aktdetaljer

**Akttitel: SV: Request for a meeting re. the concept of deterioration in the WFD**

**Aktnummer:**

Akt ID: 463748

Dato: 24-04-2023 11:35:00

Type: Udgående

Dokumenter: [1] SV Request for a meeting re. the concept of deterioration in the WFD (MIM Id nr. 397031).eml

Den 20. februar 2024

---

**Til:** [REDACTED]  
**Cc:** Katrine Rafn (kalra@mim.dk), Cecilie Spanner Rydeng (cespa@mim.dk), claudia.Olazabal@ec.europa.eu (claudia.Olazabal@ec.europa.eu), [REDACTED]  
**Fra:** Kirsten Vielwerth (kirst@mim.dk)  
**Titel:** SV: Request for a meeting re. the concept of deterioration in the WFD  
**E-mailtitel:** SV: Request for a meeting re. the concept of deterioration in the WFD (MIM Id nr.: 397031)  
**Sendt:** 24-04-2023 11:35

Thank you, very much, [REDACTED] – much appreciated.

Unless I hear something else, Katrine and I will be at outside the meeting room in the CCAB at 16:45, i.e. right after the SCG meeting 10. May.

I will send you a background note soon, realistically it will be in the beginning of next week.

Best regards, Kirsten

---

**Fra:** [REDACTED]  
**Sendt:** 21. april 2023 18:55  
**Til:** Kirsten Vielwerth <kirst@mim.dk>  
**Cc:** Katrine Rafn <kalra@mim.dk>; Cecilie Spanner Rydeng <cespa@mim.dk>; OLAZABAL Claudia <Claudia.Olazabal@ec.europa.eu>; [REDACTED]  
**Emne:** RE: Request for a meeting re. the concept of deterioration in the WFD (MIM Id nr.: 397031)

Dear Kirsten,

Thanks you for your e-mail.

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Kind Regards

[REDACTED]

[REDACTED]  
Legal adviser  
European Commission - Directorate General for Environment  
Unit DG ENV C1 – Sustainable Freshwater Management  
Office BRE 2 - 7/DCS

Website: <http://ec.europa.eu/environment>

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---

**From:** Kirsten Vielwerth <kirst@mim.dk>  
**Sent:** Friday, April 21, 2023 3:11 PM  
**To:** OLAZABAL Claudia (ENV) <Claudia.Olazabal@ec.europa.eu>; [REDACTED]  
[REDACTED]  
**Cc:** Kirsten Vielwerth <kirst@mim.dk>; Katrine Rafn <kalra@mim.dk>; Cecilie Spanner Rydeng



<cespa@mim.dk>

**Subject:** Request for a meeting re. the concept of deterioration in the WFD (MIM Id nr.: 397031)

Dear Claudia, dear [REDACTED]

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Hope to hear from you soon.

Best regards,

Kirsten Vielwerth

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+45 41 28 16 76 | kirst@mim.dk >

**Ministry of Environment**

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## Aktdetaljer

**Akttitel:** RE: Request for a meeting re. the concept of deterioration in the WFD

**Aktnummer:**

Akt ID: 463747

Dato: 24-04-2023 12:10:34

Type: Indgående

Dokumenter: [1] RE Request for a meeting re. the concept of deterioration in the WFD (MIM Id nr. 397031).eml

Den 20. februar 2024

---

**Til:** Kirsten Vielwerth (kirst@mim.dk)  
**Cc:** Katrine Rafn (kalra@mim.dk), Cecilie Spanner Rydeng (cespa@mim.dk), claudia.Olazabal@ec.europa.eu (claudia.Olazabal@ec.europa.eu), [REDACTED]  
**Fra:** [REDACTED]  
**Titel:** RE: Request for a meeting re. the concept of deterioration in the WFD  
**E-mailtitel:** RE: Request for a meeting re. the concept of deterioration in the WFD (MIM Id nr.: 397031)  
**Sendt:** 24-04-2023 12:10

Thanks Kirsten,

That's fine with us.

Kind Regards

[REDACTED]

---

**From:** Kirsten Vielwerth <kirst@mim.dk>  
**Sent:** Monday, April 24, 2023 11:36 AM  
**To:** [REDACTED]  
**Cc:** Katrine Rafn <kalra@mim.dk>; Cecilie Spanner Rydeng <cespa@mim.dk>; OLAZABAL Claudia (ENV) <Claudia.Olazabal@ec.europa.eu>; [REDACTED]  
**Subject:** SV: Request for a meeting re. the concept of deterioration in the WFD (MIM Id nr.: 397031)

Thank you, very much, [REDACTED] – much appreciated.

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Best regards, Kirsten

---

**Fra:** [REDACTED]  
**Sendt:** 21. april 2023 18:55  
**Til:** Kirsten Vielwerth <kirst@mim.dk>  
**Cc:** Katrine Rafn <kalra@mim.dk>; Cecilie Spanner Rydeng <cespa@mim.dk>; OLAZABAL Claudia <Claudia.Olazabal@ec.europa.eu>; [REDACTED]  
**Emne:** RE: Request for a meeting re. the concept of deterioration in the WFD (MIM Id nr.: 397031)

Dear Kirsten,

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Kind Regards

[REDACTED]

[REDACTED]  
Legal adviser  
European Commission - Directorate General for Environment  
Unit DG ENV C1 – Sustainable Freshwater Management  
Office BRE 2 - 7/DCS

Website: <http://ec.europa.eu/environment>

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---

**From:** Kirsten Vielwerth <kirst@mim.dk>

**Sent:** Friday, April 21, 2023 3:11 PM

**To:** OLAZABAL Claudia (ENV) <Claudia.Olazabal@ec.europa.eu>; 

**Cc:** Kirsten Vielwerth <kirst@mim.dk>; Katrine Rafn <kalra@mim.dk>; Cecilie Spanner Rydeng <cespa@mim.dk>

**Subject:** Request for a meeting re. the concept of deterioration in the WFD (MIM Id nr.: 397031)

Dear Claudia, dear 

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Hope to hear from you soon.

Best regards,

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## Aktdetaljer

**Akttitel:** RE: Request for a meeting re. the concept of deterioration in the WFD

**Aktnummer:**

Akt ID: 463746

Dato: 03-05-2023 16:56:53

Type: Indgående

Dokumenter: [1] RE Request for a meeting re. the concept of deterioration in the WFD (MIM Id nr. 397031).eml

Den 20. februar 2024

---

**Til:** Kirsten Vielwerth (kirst@mim.dk)  
**Cc:** Katrine Rafn (kalra@mim.dk), Cecilie Spanner Rydeng (cespa@mim.dk), [REDACTED]  
**Fra:** claudia.Olazabal@ec.europa.eu (claudia.Olazabal@ec.europa.eu)  
**Titel:** RE: Request for a meeting re. the concept of deterioration in the WFD  
**E-mailtitel:** RE: Request for a meeting re. the concept of deterioration in the WFD (MIM Id nr.: 397031)  
**Sendt:** 03-05-2023 16:56

Dear Kirsten

I can confirm that we can meet after the SCG meeting. We will find a quiet corner in the meeting building for our discussion.

It would be very good to receive prior to that meeting the ruling of the national Environment and Food Board of Appeal you refer to.

Thanks and I look forward to our conversation.

Best regards

Claudia Olazábal

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**From:** Kirsten Vielwerth <kirst@mim.dk>  
**Sent:** Friday, April 21, 2023 3:11 PM  
**To:** OLAZABAL Claudia (ENV) <Claudia.Olazabal@ec.europa.eu>; [REDACTED]  
**Cc:** Kirsten Vielwerth <kirst@mim.dk>; Katrine Rafn <kalra@mim.dk>; Cecilie Spanner Rydeng <cespa@mim.dk>  
**Subject:** Request for a meeting re. the concept of deterioration in the WFD (MIM Id nr.: 397031)

Dear Claudia, dear [REDACTED]

Would it be possible for you to schedule a short meeting (around 30 minutes) with us after the SCG-meeting 10 May, please? A different time around 10. - 11. May could also be possible, if that would suit you better.

Danish participants will be Head of Division for Water and Climate Adaptation, Water Director Katrine Rafn, and myself.

We would like to talk to you about Article 4(1) of the WFD.

The urgency is due to our national Environment and Food Board of Appeal has issued a final ruling on deterioration in light of the ECJ case law, that has raised doubt among the Danish authorities in relation to their administration and permitting, e.g. in relation to big energy projects, etc.

We will be happy to send you a background note with more information in due time for a meeting.

Hope to hear from you soon.

Best regards,

Kirsten Vielwerth  
Water and Climate Adaptation | Department of the Ministry of Environment  
+45 41 28 16 76 | kirst@mim.dk >

**Ministry of Environment**

Water and Climate Adaptation | Department of the Environment Ministry | Vester Voldgade 123 | DK 1552 Copenhagen V | Tlf. +45 38 142 142 | [mim@mim.dk](mailto:mim@mim.dk) | [www.mim.dk](http://www.mim.dk)



Miljøministeriet

## Aktdetaljer

**Akttitel: SV: Request for a meeting re. the concept of deterioration in the WFD**

**Aktnummer:**

Akt ID: 463742

Dato: 04-05-2023 17:53:00

Type: Udgående

Dokumenter: [1] SV Request for a meeting re. the concept of deterioration in the WFD (MIM Id nr. 397031).eml

Den 20. februar 2024



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**Til:** claudia.Olazabal@ec.europa.eu (claudia.Olazabal@ec.europa.eu)  
**Cc:** Katrine Rafn (kalra@mim.dk), Cecilie Spanner Rydeng (cespa@mim.dk), [REDACTED]  
**Fra:** Kirsten Vielwerth (kirst@mim.dk)  
**Titel:** SV: Request for a meeting re. the concept of deterioration in the WFD  
**E-mailtitel:** SV: Request for a meeting re. the concept of deterioration in the WFD (MIM Id nr.: 397031)  
**Sendt:** 04-05-2023 17:53

Dear Claudia, dear all,

Thank you very much. Much appreciated.

I will send a background note and the ruling from the Board on Monday around noon.

Tomorrow is a national holiday in Denmark, so I will not be able have the material ready before then.

Looking forward to meeting you.

Best regards, Kirsten

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**Fra:** OLAZABAL Claudia <Claudia.Olazabal@ec.europa.eu>  
**Sendt:** 3. maj 2023 16:57  
**Til:** Kirsten Vielwerth <kirst@mim.dk>  
**Cc:** Katrine Rafn <kalra@mim.dk>; Cecilie Spanner Rydeng <cespa@mim.dk>; [REDACTED]  
**Emne:** RE: Request for a meeting re. the concept of deterioration in the WFD (MIM Id nr.: 397031)

Dear Kirsten

I can confirm that we can meet after the SCG meeting. We will find a quite corner in the meeting building for our discussion.

It would be very good to receive prior to that meeting the ruling of the national Environment and Food Board of Appeal you refer too.

Thanks and I look forward to our conversation.

Best regards

Claudia Olazábal

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**From:** Kirsten Vielwerth <kirst@mim.dk>  
**Sent:** Friday, April 21, 2023 3:11 PM  
**To:** OLAZABAL Claudia (ENV) <Claudia.Olazabal@ec.europa.eu>; [REDACTED]  
**Cc:** Kirsten Vielwerth <kirst@mim.dk>; Katrine Rafn <kalra@mim.dk>; Cecilie Spanner Rydeng <cespa@mim.dk>  
**Subject:** Request for a meeting re. the concept of deterioration in the WFD (MIM Id nr.: 397031)

Dear Claudia, dear [REDACTED]

Would it be possible for you to schedule a short meeting (around 30 minutes) with us after the SCG-meeting 10 May, please? A different time around 10. - 11. May could also be possible, if that would suit you better.

Danish participants will be Head of Division for Water and Climate Adaptation, Water Director Katrine Rafn, and myself.

We would like to talk to you about Article 4(1) of the WFD.

The urgency is due to our national Environment and Food Board of Appeal has issued a final ruling on deterioration in light of the ECJ case law, that has raised doubt among the Danish authorities in relation to their administration and permitting, e.g. in relation to big energy projects, etc.

We will be happy to send you a background note with more information in due time for a meeting.

Hope to hear from you soon.

Best regards,

Kirsten Vielwerth

Water and Climate Adaptation | Department of the Ministry of Environment

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**Ministry of Environment**

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## Aktdetaljer

**Akttitel: VS: Request for a meeting re. the concept of deterioration in the WFD**

**Aktnummer:**

Akt ID: 463739

Dato: 10-05-2023 16:33:00

Type: Udgående

Dokumenter: [1] VS Request for a meeting re. the concept of deterioration in the WFD (MIM Id nr. 397031).eml

Den 20. februar 2024

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**Til:** Katrine Rafn (kalra@mim.dk)  
**Fra:** Kirsten Vielwerth (kirst@mim.dk)  
**Titel:** VS: Request for a meeting re. the concept of deterioration in the WFD  
**E-mailtitel:** VS: Request for a meeting re. the concept of deterioration in the WFD (MIM Id nr.: 397031)  
**Sendt:** 10-05-2023 16:33

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**Fra:** OLAZABAL Claudia <Claudia.Olazabal@ec.europa.eu>  
**Sendt:** 3. maj 2023 16:57  
**Til:** Kirsten Vielwerth <kirst@mim.dk>  
**Cc:** Katrine Rafn <kalra@mim.dk>; Cecilie Spanner Rydeng <cespa@mim.dk>; [REDACTED]  
[REDACTED]  
**Emne:** RE: Request for a meeting re. the concept of deterioration in the WFD (MIM Id nr.: 397031)

Dear Kirsten

I can confirm that we can meet after the SCG meeting. We will find a quiet corner in the meeting building for our discussion.

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Thanks and I look forward to our conversation.

Best regards

Claudia Olazábal

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**From:** Kirsten Vielwerth <kirst@mim.dk>  
**Sent:** Friday, April 21, 2023 3:11 PM  
**To:** OLAZABAL Claudia (ENV) <Claudia.Olazabal@ec.europa.eu>; [REDACTED]  
[REDACTED]  
**Cc:** Kirsten Vielwerth <kirst@mim.dk>; Katrine Rafn <kalra@mim.dk>; Cecilie Spanner Rydeng <cespa@mim.dk>  
**Subject:** Request for a meeting re. the concept of deterioration in the WFD (MIM Id nr.: 397031)

Dear Claudia, dear [REDACTED]

Would it be possible for you to schedule a short meeting (around 30 minutes) with us after the SCG-meeting 10 May, please? A different time around 10. - 11. May could also be possible, if that would suit you better.

Danish participants will be Head of Division for Water and Climate Adaptation, Water Director Katrine Rafn, and myself.

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Hope to hear from you soon.

Best regards,

Kirsten Vielwerth

Water and Climate Adaptation | Department of the Ministry of Environment

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