



Aarhus Convention Case Study - Slovenia 2007

1. Case title:

Volovja reber

2. Case subject:

Construction of a wind farm on Volovja reber

3. Country:

Slovenia

4. Location:

Snežnik-Pivka Natura 2000 site (SI5000002)

5. Geographic dimension:

- | | |
|---------------|-------------------------------------|
| local | <input type="checkbox"/> |
| regional | <input checked="" type="checkbox"/> |
| national | <input type="checkbox"/> |
| EU | <input type="checkbox"/> |
| international | <input type="checkbox"/> |

6. Initiator of case:

DOPPS – BirdLife Slovenia (hereinafter: DOPPS)

7. Participants involved:

Environmental Agency for Slovenia (hereinafter: EAS)

Ministry for the Environment and Spatial Planning (hereinafter: MESP)

8. Other interested parties and/or stakeholders:

Elektro Primorska Ltd as investor (hereinafter: Elektro Primorska)

9. Background facts:

In October 2004 EAS received a letter of request from Elektro Primorska for issuing an environmental permit for the construction of a wind farm and interconnectors with the capacity of 110kW in the area of Volovja reber above Ilirska Bistrica.

Access to the tender documentation was available from 11.10.2004 to 10.11.2004 at the municipality of Ilirska Bistrica. Almost immediately after the request was made by Elektro Primorska, DOPPS wanted to gain the status of a *party in the procedure* in the process of issuing the environmental permit.

9.1 Account of facts (a short summary of the case)

In September 2004 DOPPS submitted their application for granting of the status of the party in the aforementioned procedure. The application was denied on both instances of the administrative procedure, because DOPPS has a status of NGO acting in a public interest under the Nature Conservation Act (hereinafter: NCA) and not under the Environmental Protection Act (hereinafter: EPA).

In June 2006 the Administrative Court ruled in favor of DOPPS, and ordered EAS to reconsider granting legal standing to DOPPS. However, granting the requested status was once again denied on the first instance by EAS.

In September 2007 following an appeal, the MESP in a 2nd instance administrative procedure eventually granted DOPPS the status of the party in this procedure.

Meanwhile, the environmental permit for a 33-turbine wind farm was already issued, but DOPPS filed a request for reopening of the procedure.

9.2 Description of the project and its main environmental impacts

The construction of a wind farm on Volovja reber would have a major and inadmissible impact on the Natura 2000 site Snežnik-Pivka (SI5000002) being a special protected area according to the EU Bird Directive. The Wind farm is planned to be located on the edge of the Natura 2000 site, but most of the turbines are only 100 m away from that edge.

Decree on special protection areas (Natura 2000 sites) (OJ~RS, Nos~49/04, 110/04) defines those types of birds that are protected on the specific Natura 2000 site. The species protected on this Natura 2000 site are also rare and endangered bird species. The construction of a wind farm on the very edge of the Natura 2000 site would have a direct impact on this area.

For those reasons the assessment on Natura 2000 site in the procedure of issuing the environmental permit should be done in accordance with the Nature Conservation Act (OJ~RS, No~96/04) (hereinafter: NCA), Articles 101d to 101f, 104a and 105a.

10. Applicable EC and/or international laws:

- Council Directive 79/409/EEC on the Conservation of Wild Birds - "The Bird Directive"
- Council Directive 92/43/EEC on the Conservation of Natural Habitats and of Wild Fauna and Flora - "The Habitat Directive"

Both of these Directives were used in the argument made by DOPPS on why the construction of a wind farm is not appropriate in the intended area. The construction would have a major and inadmissible impact on the Natura 2000 site Snežnik-Pivka and on the endangered birds and other species living in that area.

- Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC
- Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters

11. Applicable national laws:

- Nature Conservation Act (official consolidated text) – NCA;
- Environmental Protection Act (official consolidated text) – EPA;
- Administrative Procedure Act (official consolidated text) – APA.

12. Type of procedure

Administrative procedure, granting the right to act as an accessory participant or a party in the procedure followed by a judicial procedure for revising the administrative decision.

13. Administrative procedural history

On 15th of September 2004, DOPPS notified the competent administrative organ of its interest to become a party in the administrative procedure in the process of issuing environmental permit in the case of construction of a wind farm on the area of Volovja reber in the municipality of Ilirska Bistrica.

The investor in this case was Elektro Primorska. DOPPS's application was based on having the status of *association acting in public interest* in the area of nature conservation according to NCA Article 137 and thus having the right to participate in **all** administrative and judicial procedures in the field of nature conservation. Consequently DOPPS stressed that such associations can also participate in the procedure of issuing of environmental permits.

The Agency of the Republic of Slovenia for the Environment - EAS (administrative body of first instance) issued a decision on 13th of October 2004, rejecting DOPPS's application, with the explanation that DOPPS does not have the status of *NGO acting in a public interest* under EPA-1¹.

¹ At that time granting the status under EPA-1 was not even possible, because EPA-1 provisions anticipated a regulation passed by the environmental minister, which would regulate the conditions and the procedure in more detail. Without the regulation, execution of EPA-1's provision was not possible. Mentioned regulation was passed only in November 2006.

Article 64 of EPA-1 states that an NGO has the status of an accessory participant in the procedure of issuing environmental permits, if it fulfills the obligations set in Article 152 of the same act. The latter article states that an NGO has a status of acting in the public interest if:

- its founder is not the state, municipality, other public law entity or political party,
- it has sufficient number of members, employees or endowment,
- it is established for the purpose of environmental protection,
- it is independent from public authorities and political parties,
- it is active in the field of environment for at least five years,
- it has audited account records and
- it is active on the whole territory of the Republic of Slovenia.

The minister of the environment issues a decision and grants the status to NGOs that fulfill these obligations. Because the procedure for issuing an environmental permit is conducted on the basis of EPA-1, NGOs have to get standing according to EPA-1, which is more specific than NCA.

EAS issued its decision on the basis of APA Article 142, Paragraph 1. The article states that the official, leading the procedure, tests if the party asking for the status in the procedure can be a party to the procedure and issues a decision. If the status is not granted, a complaint is possible.

DOPPS filed a complaint against the decision made by EAS to the appeal body, the MESP. DOPPS as a complainant argued that the administrative body violated the rules of the procedure because there was no special hearing for consideration of the request. Thus the principle of protection of rights was violated. Complainant also stated that EAS violated substantive law because of the wrong interpretation of EPA-1 in relation to NCA, which grants the right to participate in all administrative and judicial procedures in the field of nature conservation.

In accordance with APA, the appeal administrative body tested the contested decision *ex officio* and determined violations of the procedural provisions and violations of material law. MESP also determined that the scope of NCA includes nature conservation, which is a broader definition than the definition in EPA-1. *Consequently the appeal body decided that DOPPS should have a status of the party in the procedure in the case of the wind farm. In consequence, MESP abolished the decision of EAS and returned the case for a repeat procedure.*

On 14th of November 2005 EAS denied DOPPS's application again and ignored the reasoning made by the appeal body. The decision was based on the same facts as the previous one, but EAS also cited Article 58 of EPA-1 according to which DOPPS has the right to participate in the procedure, *but not as a party to the procedure*, only with the right to give opinions and remarks to the issuance of the environmental permit.

DOPPS filed a complaint against the EAS decision on 16th of December 2005. It proposed the replacement of the contested conclusion and requested the recognition of its right to legal standing in the procedure or proposed to abolish the contested conclusion and replace it with a new decision of the appeal body.

In its complaint DOPPS stated that the EAS again made violations of the procedural provisions of APA and again falsely used the material provisions of NCA and EPA-1. DOPPS arguments

were based on the relations between EPA-1 and NCA² and the Aarhus Convention. The fact that the first instance body abolished the rights gained by NCA because of the provisions set in EPA-1 is in contradiction with the goals and requirements of the Aarhus Convention.

On 13th of January 2006 MESP refused the complaint made by DOPPS. The appeal body stated that according to the provisions set in NCA the appellant cannot be an accessory participant in the procedure of issuing environmental permits if it does not fulfill the conditions set in EPA-1.

Regarding the appellate procedure MESP explained that in an appellant procedure, correctness and legality of the contested conclusion is evaluated regarding the correct usage of material and procedural provisions. The procedure of issuing environmental permit is however an autonomous procedure and is not part of the appellant procedure. MESP can only decide on the correctness of the first instance decision regarding the granting of the status of the party in the procedure.

Against MESP's decision DOPPS filed a complaint to the administrative court, which on 29th of June 2006 decided that the decision made by MESP should be abolished and the procedure remanded to the first instance authority. Its decision is based on the arguments that associations can, without doubt, gain an appropriate status not only on the basis of provisions set in NCA Article 137, but also on the provisions set in EPA-1 Article 153, because the status gained in accordance to one act *does not exclude* the status gained in accordance to the other act.

The court also explained that Article 64, Paragraph 4, of EPA-1 does not solely prescribe that only NGOs which gained the status in accordance to Article 153 of the same act can participate in the procedure of issuing the environmental permit.

Especially because EPA-1 was passed after NCA. If the regulator wanted to exclude all other associations from the procedure, which gained status in accordance with NCA and are working in the public interest on the field of nature conservation, a specific provision regarding this would have been added. Associations, which gained status pursuant to Article 153 of EPA-1 can participate only in the procedure of issuing an environmental permit, but associations which gained status in accordance with NCA can participate in **all** administrative and judicial procedures.

In the case of wind farm on Volovja reber, the key question is if the envisaged intervention, for which an environmental permit has to be issued, could or would have any impact on nature or its conservation. After that the status of the association should be tested; if the association was founded for acting in the public interest for the protection of that part of nature for which the intervention is envisaged.

The court judgment stated that there are no boundaries for DOPPS to act as an accessory participant in the procedure of issuing environmental permits. The contested decision was abolished and the case was returned to the defendant party for re-hearing of the case³.

² Associations like DOPPS, which have such a status according to NCA, have a right to participate in all administrative and judicial procedures in the field of nature conservation. On the other hand organizations which have a status according to EPA-1 can participate only in the administrative procedure of issuing environmental permits and specific permits in accordance with that act. Consequently, organizations which have the status in accordance with EPA-1, which was accepted later than NCA, do not have the right to participate in other administrative procedures. For more details see the Aarhus Convention legal analysis.

In July 2006, Elektro Primorska filed a complaint against the decision made by the administrative court. The Supreme Court dismissed the revision⁴. According to the preliminary provisions of ADA (Administrative Dispute Act) Article 107, paragraph 2, the Supreme Court determined that the complaint made by Elektro Primorska filed before the enforcement of ADA-1 (Administrative Dispute Act, OJ~RS, No~105/06, 26/07) does not fulfill the conditions to be tested as a complaint in accordance to ADA-1. In consequence, the Supreme Court treated the complaint as a revision.

Nevertheless, the revision was dismissed and the administrative court judgment became final with the enforcement of ADA-1 on 1st of January 2007.

By the final judgment of the administrative court the decision made by the appeal body was abolished. As a result, all legal consequences made because of the decision were also abolished and the administrative case was returned into the state in which it was before the adjudication of the complaint.

Neither the administrative court nor the Supreme Court decided in merits and did not refuse or recognize the status of the party in the procedure to the applicant of the request. The case was returned to MESP for a new procedure.

MESP finally followed the court's judgment and abolished EAS's conclusion with reference to determine if the planned activity has an impact upon nature conservation. As it was determined in one of the previous conclusions made by EAS, that the planned activity has an impact on nature conservation, so it had to be determined again if DOPPS was founded in public interest for nature conservation of that area on which the planned activity will have an impact.

On 27th of July 2007, a new procedure was carried out by EAS, which denied DOPPS a status as a party in the procedure again, even though the hearing was complete. The arguments were again the same as in the previous conclusions made by EAS.

On 17th of September 2007 MESP issued a decision and granted DOPPS the right to act in the procedure of issuing environmental permit as a party in the procedure.

14. Outcome of the actions:

After a long procedure, lasting from 15th of September 2004 to 17th of September 2007, DOPPS finally managed to get the status of an accessory participant in the procedure of issuing an environmental permit in the case of the wind farm on Volovja reber. The status was recognized by MESP after the cancellation of the last decision made on 27th of July 2007 by EAS.

In October 2007 (before the final decision of MESP was known) the Coalition for Volovja reber (group of environmental organizations) proposed mediation procedures with Elektro Primorska and Municipality Ilirska Bistrica. Elektro Primorska refused the mediation with the

³ The decision made by the Administrative Court is legally binding only for the parties involved and we cannot say it is a precedent, as in US systems. Only decisions made by Constitutional Court are legally binding for the parties and also for all other Courts.

⁴ According to ADA-1 Article 83, Paragraph 1, the revision is an extraordinary judicial review used against the final judgment issued on the first instance. Its intention is to ensure the right usage of the procedural and material law in the specific administrative dispute with the consideration of the facts of the case.

coalition, but they are willing to talk to an organization that has the status of a party in the procedure (meaning DOPPS). At this point the beginning of the mediation procedure is still not certain.

15. Remedies taken:

As stated in paragraph 13, four complaints were made; three of them made by DOPPS in administrative procedures and one by Elektro Primorska in judicial procedure. The Supreme Court treated the complaint made by Elektro Primorska as a revision. Nevertheless, the revision was dismissed and the administrative court judgment became final with the enforcement of ADA-1 on 1st of January 2007.

After the last MESP decision DOPPS had 30 days to file an application for reopening the case. They did so and now the case is waiting for the decision of the competent body.

16. Judicial procedural history/timeline:

1. Application for legal standing – 15.9.2004; **DOPPS**
2. Conclusion about the refusal of legal standing – 13.10.2004; **EAS**
3. Complaint against the conclusion made by ARSO – 26.10.2004; **DOPPS**
4. Cancellation of the conclusion made by ARSO – 20.5.2005; **MESP**
5. Conclusion about the refusal of legal standing – 14.11.2005; **EAS**
6. Complaint against the conclusion made by ARSO – 16.12.2005; **DOPPS**
7. Refusal of the complaint made by DOPPS – 13.1.2006; **MESP**
8. Complaint against the decision made by MESP – 10.2.2006; **DOPPS**
9. Judgment about the decision made by MESP – 29.6.2006; **ADMINISTRATIVE COURT**
10. Complaint regarding judgment of administrative court - July 2006; **ELEKTRO PRIMORSKA**
11. Conclusion about the cancellation of the revision – 24.4.2007; **SUPREME COURT**
12. Cancellation of the conclusion made by ARSO on 14th of November 2005 – 1.6.2007 – **MESP**
13. Conclusion about the refusal of legal standing – 27.7.2007; **EAS**
14. Complaint against the conclusion made by ARSO – 15.8.2007; **DOPPS**
15. Decision about the cancellation of the conclusion made by ARSO and direct approval of legal standing – 17.9.2007; **MESP**

17. Outcome of the actions:

Legal standing to participate as a party to the procedure was gained by DOPPS. However, the problem regarding the relation between EPA-1 and NCA was not solved.

18. Current status of case:

The case was brought to an end when DOPPS finally got legal standing in the procedure for issuing an environmental permit in the case of Volovja reber⁵.

Currently all parties are waiting for the decision of the competent body regarding DOPPS's application for reopening the procedure of issuing the environmental permit.

⁵ If there will be a mediation process, it will be about the facts of where wind farms will be constructed.

19. Follow-up actions planned and their timeline (in the case of ongoing matters, also the estimated end date of the case):

- decision of competent body regarding DOPPS's application for reopening the procedure of issuing the environmental permit,
- possible mediation if both parties agree on it.

20. Analysis of legal problems, conclusions:

The case, which we have described took place mostly in administrative procedure, but the decision of administrative court was crucial regarding the interpretation of the relations between two statuses of NGOs working in a public interest under different laws⁶.

The main legal problem of the case is the legal standing for NGOs in different procedures regarding the environment.

EPA-1 has very strict conditions regarding access to justice in the procedures under its scope, which are not general as they are under NCA. The criteria of EPA-1 only make legal standing of NGOs possible in procedures for issuing environmental permits and environmental consents. Rights under EPA-1 include participation in procedures under EPA-1, participation in the Council of Experts, consultative council, delegations for international conferences and participation in executing other tasks of MESP. Rights under NPA include participation in all administrative and judicial procedures in the field of nature conservation.

Consequently, there is considerable ambiguity regarding the scope of the status for NGOs acting in the public interest under EPA-1 and the relation between the two statuses granted under EPA-1 and NCA. Changes of EPA-1 are now in the legislative process because of the ELD (Environmental Liability Directive) and although MESP (the competent body for the draft law) was/is familiar with the problems, they missed the chance to improve these provisions.

The draft changes only state that if the MESP grants the status to an NGO, the NGO is entitled to reimbursement of half of the costs for the financial revision. It is a step forward but it does not solve other problems with regard to legal standing.

The case in question also did not give an answer regarding the relationship between EPA-1 and NCA, so nothing was changed despite the long process and eventually successful decision for DOPPS.

Conclusions:

The decision made by MESP on 17th of September 2007, which finally granted DOPPS legal standing in the procedure of issuing environmental permit, is now final and executable.

This case clearly demonstrates all weaknesses of definition of "public concerned" under Slovenian legislation. There still is much ambiguity between two statuses granted under EPA-1 and NCA. For that reason the scope of the status for NGOs acting in public interest is not yet clearly defined. At the same time it has to be pointed out that unfortunately, official authorities have not yet reacted and the chance to improve the provisions of EPA-1 was missed.

⁶ For more details see Aarhus Convention legal analysis.

Consequently, we assess that access to justice is very limited under Slovenian legislation and thus, Slovenia is not in compliance with the Aarhus Convention and EU directives.⁷

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⁷ In September 2007 the Constitutional Court of the Republic of Slovenia issued a resolution, with which it decided to take into consideration the initiative for the review of constitutionality of the Decree amending the Decree on protected wild animal species. The initiator (Association for the liberation of animals and their rights) argues that the Decree is not in compliance with NCA and Aarhus Convention.

Acknowledgements

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