

The environmental organisations (ELF and Estonian Ornithological Society) turned to the courts and disputed the general land-use plan for the Ninase peninsula, where the harbour would be built. The administrative court declared on November 24, 2003 that the local government acted illegally and declared that the general plan is invalid. However, the local government immediately enforced a new general land-use plan, as well as a detailed land-use plan. Since the main reason for declaring the general land-use plan invalid by administrative court was lack of motivations, the local municipality only added several pages of motivations to the general land-use plan whereas in other parts the plan was left unchanged.

An EIA was carried out during the proceedings of the water use permit, but it declared that the negative impacts of the harbour may not be extensive and that it is possible to allow the harbour to be built. The Minister of Environment (MoE) approved the EIA report in January 2004. In March 2004 the MoE issued a water use permit with the condition that the harbour only be used from May until September, and only by cruise ships. At the same time the water use permit allowed the construction of all three quays that were meant for different kind of ships.

Table 2 — Timeline of administrative proceedings

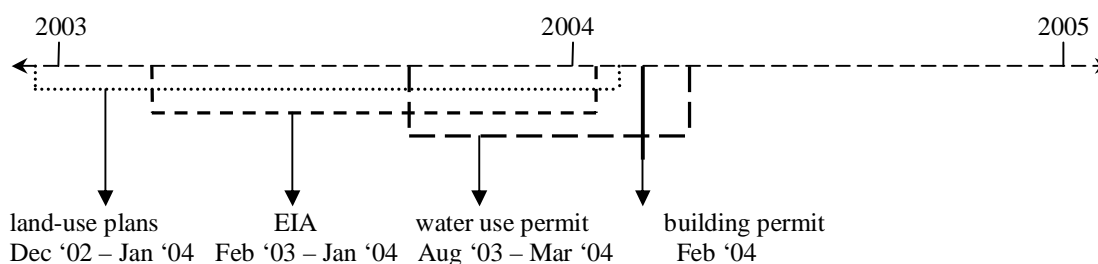
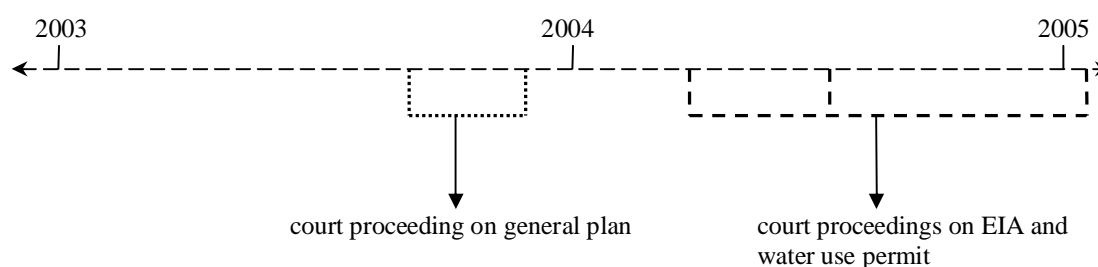


Table 3 — Timeline of court proceedings



As the Kudema Bay is a Natura 2000 site and therefore under the protection of the Habitats Directive, articles 6.3 and 6.4¹ of the Habitats Directive should have been applied and the European

¹ **Article 6(3):** Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not

Commission consulted as well as compensatory measures offered before issuing any permit to the harbour. This was not done, although the EIA statement obliged it.

NGOs participated in all public proceedings, but their objections were not taken into account. Finally, the environmental organisations — ELF and Friends of Earth Estonia (Estonian Green Movement, ERL) — disputed the acts of the MoE in court, saying that the EIA assessment did not assess the environmental risks sufficiently and the proposed measures were not sufficient to avoid possible damages to birds.

Parties and stakeholders of the process

Estonian Fund for Nature (ELF)

- NGO
- interest: nature protection organisation
- plaintiff in court proceedings about general land-use plan of the Ninase peninsula
- plaintiff in court proceedings about EIA and water use permit

Estonian Green Movement – Friends of Earth Estonia (ERL)

- NGO
- interest: nature protection organisation
- plaintiff in court proceedings about EIA and water use permit

Estonian Ornithological Society (EOU)

- NGO
- interest: protection of avifauna
- plaintiff in court proceedings about general land-use plan of Ninase peninsula

Local government of Mustjala

- public authority
- interest: create jobs for local people
- defendant in court proceedings about general land-use plan of Ninase peninsula

adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

Article 6(4): If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.

AS Tallinna Sadam

- 100 percent state-owned company
- interest: to build a harbour and get all the necessary permits
- third person in court proceedings, general land-use plan of Ninase peninsula
- third person in court proceedings about EIA and water use permit

Ministry of Environment

- public authority
- defendant in court proceedings, general land-use plan of Ninase peninsula
- defendant in court proceedings about EIA and water use permit

The local people of Saaremaa were interested in the whole plan of establishing the deep harbour, but were not involved in the court proceedings or the negotiations. The NGOs involved represented the public interest in the court proceedings, on the basis of the Aarhus Convention² and their statutes that contain environmental protection as purpose of their activities.

Conflict resolution process

Why was this tool used?

The negotiations about settlement were initiated by AS Tallinna Sadam. The negotiations were held mostly via phone and e-mail discussions and involved mainly ELF, ERL and AS Tallinna Sadam. NGOs also consulted ornithologists (EOU) on bird issues. Several meetings also took place, always in the office of AS Tallinna Sadam. The process was legally guided mainly by a lawyer of AS Tallinna Sadam, who was also instructed by two attorneys from the office of Pohla & Hallmagi, hired for the court proceedings.

Description of the process

The negotiations were divided into the following stages:

- April 2004 – May 2004 negotiations mainly about the substantial conditions of the agreement

May 25, 2004 – first instance court session

June 9, 2004 – first instance court's decision, NGOs lost

The reason for continuing the court proceedings during negotiations was the clear lack of trust that the parties could reach any kind of agreement. The court proceedings were the only guarantee for NGOs to hold AS Tallinna Sadam interest in negotiations.

- II. July 2004 – negotiations about substantial conditions and procedural issues (guarantees)

Output of the process

² Art 2 and 9 of the Aarhus Convention consider environmental NGOs as capable of representing public interests in decision-making processes and court proceedings concerning environmental matters.

At the end of July 2004, NGOs and AS Tallinna Sadam reached an agreement that more or less satisfied both parties. AS Tallinna Sadam agreed to carry out environmental studies about the condition of the environment (including monitoring of birds) around the harbour, provide sufficient protection against oil spills and include special measures in the water use permit to protect the fauna and flora. AS Tallinna Sadam promised to negotiate the conditions with the MoE and made an appointment to discuss the possible conclusion of the agreement. At the appointed time, the MoE announced that it was not possible for the ministry, as a public authority, to participate in this agreement between private persons and impose obligations on AS Tallinna Sadam over the legal requirements. As the MoE was the only body in power to give legal force to the agreed additional conditions (with the possibility to add these conditions in the water use permit), this announcement ended the negotiations.

Related actions and campaigns

There were no related campaigns connected to the process. However, the court proceedings and negotiations were covered routinely in the media, helping to raise public awareness of the issues.

At the time, NGOs discussed approaching the European Commission on the question of breach of EU directives, but decided not to because it was not clear whether the EU directives were legally binding for Estonia before accession (as all the permits and consents were given right before May 1, 2004, when Estonia became a member state of the European Union).³

Final outcome of the case

After the announcement by the Ministry of Environment about not participating in the agreement between the NGOs and AS Tallinna Sadam, the MoE contacted the NGOs several times through their attorney, Juri Raidla of Raidla & Partners. Raidla met ELF's chairman of the board, Marek Strandberg. Due to misunderstandings in communication, no clear conclusions came from this meeting.

After the negotiations failed, court proceedings continued and ended in loss for the NGOs in January 2005. In February 2005, the NGOs declared they were not applying for cassation to the Supreme Court because of the prohibitive legal costs involved.

On August 16, 2005 the cornerstone of Saaremaa harbour was put into place and construction is now taking place.

Conclusions

³ However, a complaint to the European Commission is under preparation as of September 13, 2005.

The negotiations were unsuccessful because one party (MoE) was not willing to conclude any kind of agreement. Therefore it would be useful in the future to determine at the very beginning whether all parties actually want to hold negotiations and are ready to make compromises.

Other obstacles in the process were a lack of time and knowledge. A pattern of behaviour emerged whereby the negotiations sped up before the court session or the date for appealing the court's decision, reaching a high point just a few days before the session or deadline for appeals. The further these dates are the harder it is to maintain the attention of the other party and make progress in the negotiations.

Comments of participants in process

Statement of Mati Kose, representative of Estonian Ornithological Society (EOS):

“I had a previous unsuccessful experience while trying to achieve an extrajudicial solution during the first court case against the harbour building process at the Undva location, on the Saaremaa coast. In both cases the opponent had no real willingness to achieve any compromise between the developer's interests and nature conservation. The negotiations were instead used as a tool to force their opponents to be bound by agreement to development. Developers in both cases tried to reach an agreement which does not avoid or mitigate any environmental risks but offers some cosmetic changes in their project or adds some irrelevant measures that have no connection with the planned projects.

In the case of Kudema harbour, the Minister of the Environment accepted the harbour development in the middle of the SPA designated area before the EIA had been completed. Due to political reasons and conflict over the grounds of the EIA judgement, the MoE had no political will to solve the problem or take part in the negotiation process. Without even the potential for MoE commitments, it is hard to find legal grounds for an agreement between the developer and NGOs. MoE resistance and reasoning for refusing to take part in the negotiations was pretty strange, because the MoE has several years of practice in mutual and voluntary agreements with private enterprises for substituting environmental taxes with pollution reducing investments.

Instead of negotiations and agreement, the MoE hired the top lawyers against the ELF to prove that the permission to develop the harbour in a Natura 2000 area is an entirely legal and ecologically harmless decision. It is sad to mention that ELF has to compile an appeal to the European Commission against decisions of the MoE to get adequate judgement of compliance of these decisions with EU environmental legislation.”

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