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**Drawbacks in the Estonian legislation as the circumstances
impeding the construction of Hiiumaa Offshore Wind Farm
and analysis of the Supreme Court of Estonia
decision No. 3-16-1472**

Master's thesis

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Introduction

Offshore wind is an abundant, domestic energy resource that is located close to major coastal load centers. It provides an efficient alternative to long-distance transmission or development of electricity generation in these land-constrained regions. Offshore wind facility design and engineering depends on site-specific conditions, particularly water depth, seabed geology, and wave loading.¹

Offshore wind farms have a lot of advantages. One of them is that offshore wind speeds tend to be faster than on land.² Small increases in wind speed yield large increases in energy production. Faster wind speeds offshore mean much more energy can be generated. A steadier supply of wind means a more reliable source of energy. One of the reasons why offshore wind farms are used is its environmental friendliness over other forms of energy production. It means that the negative impact of the wind farm on the environment is one of the smallest. The wind farm does not produce chemical bursts of air, as is the case with an oil shale power plant, for example. Onshore wind farms have relatively limited potential for collision with nature conservation and local population.³ So it seems like a good idea to build a wind farm in the sea. On the other hand, maritime planning is also a more costly and time-consuming activity, as many data are not collected and are also expensive to collect. This situation puts developers in a precarious position.

Kersti Kaljulaid, the President of Estonia visited the island of Hiiumaa and said in an interview to the local newspaper that Estonia's first offshore wind farm is needed, since renewable energy is required. On her opinion offshore wind farms are the future of energy production.⁴ However, in other European countries offshore marine farms are actively used, there is no offshore marine farms in Estonia by this moment. Inside the Baltic Sea Region aquaculture industry, it is generally considered, that one main reason for the weak performance is the heaviness, fragmentation, inflexibility, and narrow focus of legislative framework and licensing policy.⁵

Hiiumaa Offshore Wind Farm will be the first offshore wind farm project in Estonia. The main developers of this project is „Enefit Green“ (former Nelja Energia). Nelja Energia started

¹ Bureau of Ocean Energy Management. Renewable Energy on the Outer Continental Shelf. – <https://www.boem.gov/renewable-energy/renewable-energy-program-overview> (04.03.2020).

² Ibid.

³ RKHK 3-3-1-15-16.

⁴ H. Roosna. Intervjuu vabariigi presidendiga. – Hiiu Leht 07.08.2017.

⁵ I-L. Paavola, A. Ekroos, H. Veinla, K. Relve. Environmental regulation of aquaculture in the Baltic Sea region: A broad overview of the legal framework. Helsinki: Finnish Game and Fisheries Research Institute 2012, page 6 – http://www.aquabestproject.eu/media/8660/aquabest_3_2012_environmental_regulation_of_aquaculture.pdf (03.10.2019).

developing the Hiiumaa Offshore Wind Farm project already in 2006 by establishing a special project related company – OÜ Hiiumaa Offshore Tuulepark. So far, the project has not been fully approved and construction of the wind farm has not started.

For the first time, the author has been exposed to this topic in the course of writing his research paper two years ago. After that, the Supreme Court of Estonia has made a decision No. 3-16-1472, where was answered many author's questions. So, the author became interested in analyzing the opinion of the Supreme Court and expressing his opinion on the basis of the theory and Estonian legislation. In this thesis are partly presented some author's viewpoints and suggestions, which were discussed in the author's research paper. In the process of writing his research paper, the author has participated in an international project dedicated to the development of the offshore wind energy market in the Baltic Sea. The author's research paper was actively used in this project, and in order to use this thesis in the future on the international level, the author continued to write a master's thesis in the English language.

The aim of this master's thesis is to identify the drawbacks of Estonian legislation, that were the obstacles in case of construction Hiiumaa Offshore Wind Farm and make proposals to amend the Estonian legislation in order to regulate the construction of offshore wind farms in Estonia and reduce the administrative burden for the development of the future offshore wind farm projects in Estonia. The author hopes that his proposals will promote the development of renewable energy in Estonia and conclusions will be useful for use at the level of international environmental projects. In making proposals, the author relied mainly on German legislation and practice and on his own opinion. Over the years, Germany has been pursuing a modern environmental policy with some unique institutional and legal features.⁶ Also, Estonia and Germany have a similar legal framework.

The hypothesis of the author's research is that because the fact that this is the first offshore wind farm project in Estonia, the national legislation is not sufficiently developed for building that kind of power plant. Drawbacks in the legislation of Estonia can lead to an overload of administrative bodies and preventing or slowing down the development of renewable energy in Estonia. The more drawbacks there are in legislation, the greater the discretionary power of the administrative authorities, which places a burden on them. Consequently, the Estonian legislation should be changed. The author is of the opinion that the construction and planning areas, in particular, must be step-by-step regulated by law, since construction is a field that involves a great deal of expense for developers. The legislator needs to pay more attention to

⁶ H. Weidner. Performance and Characteristics of German Environmental Policy. Overview and Expert Commentaries from 14 Countries. Discussion Paper FS II 97 - 301 Wissenschaftszentrum Berlin für Sozialforschung 1997, page 4. – <https://www.econstor.eu/obitstream/10419/48971/1/231883439.pdf> (10.11.2019).

the area of planning, as it requires a large financial contribution. The drawbacks in the law also place a burden on developers not to plan for their project because they do not know what decision will be placed by the administrative bodies. Developers need to have greater certainty, especially for such large projects. The criteria set out in the law must be sure and equal for everyone. Hiiumaa Offshore Wind farm project is not only a financial expense but also a significant contribution to the Estonian environment and economy. In the author's opinion, when the benefits of the economy are so great, authorities must carefully consider all the advantages and disadvantages and make their decisions as soon as possible.

In this thesis, the author has used several different research methods. The thesis is based on the research method of historical law, dogmatic law, systematic interpretation, and the comparative method. The historical law method was used to study and compare the development of Estonian legislation over the years. The dogmatic research method makes it possible to provide answers to questions that were raised during the construction of the wind farm and in the Supreme Court decision on the basis of Estonian legislation. Systematic interpretation is used to search for the connections between norms, to try to find out what a norm means and analyze the court decision. The comparative method was used to compare the Estonian legislation and legislation of other countries.

Thesis consists of three main parts. The structure of the thesis is structured in such a way that the first and the second part of this thesis is more theoretical and declarative. The third part of the thesis is practical and includes analysis of the Supreme Court decision and the authors' proposals to amend the legislation.

The first chapter of this thesis is devoted to the Hiiumaa Offshore Wind Farm project. In this chapter, the author introduces the project developers and outlines the impact of the project. In this part will be also considered the process of permitting and will be named applications submitted by developers and necessary permits for building the OWP farm in Estonia. Also will be outlined the current position of the project.

The second chapter of the thesis is an introductory theoretical part that helps to understand the concept, goals and types of plannings. The procedure of permitting and marine planning also will be considered in this part of paper. In this chapter will be also outlined the changes in Estonian legislation and how they can be a circumstances what impend the construction of Hiiumaa Offshore wind farm. All the changes are listed in the chronological order.

The biggest part of this is dedicated to the analysis of the Supreme Court decision. The main views of the parties and the views of the court will be presented. The main topics what will be discussed are the participation of individuals in the process and the appealing right of individuals, the content of the EIA and SEA, creation the nature reserves and the competence

of the administrative bodies to establish the maritime plan and the involvement of the administrative bodies as the circumstances impeding the construction of Hiiumaa Offshore Wind Farm. Proposals for changing the legislation to prevent future misunderstandings are presented under each topic.

In the master's thesis has mainly been used Estonian legislation, the legislation of European countries (translated to the English language) and the decision of the Estonian Supreme Court No. 3161472. According to § 6 section 1 of the the Code of Administrative Court Procedure⁷ any acts of administrative court procedure are performed in accordance with the law applicable at the time of performance of those acts. The case of Hiiumaa Offshore Wind Farm was initiated in early 2000s, so sometimes it was necessary to use the legislation what was in force this time. In the course of this research, was conducted the interview with developers of the project "Nelja Energia" (now Enefit Green). The materials collected during the interview were presented in the thesis, so the thesis describes more developers' position and reflects their subjective viewpoints. Also in the research was used a document, to which access was obtained through the supervisor of this thesis. The file is not publicly available and only employees who are associated with the project have access to it. For this reason, it is impossible to make a correct reference to it. Also, were used the description of the project from the developer's website, planning, environmental impact assessments, decisions of the Estonian courts and different educational literature. Since the topic has been the subject of much controversy, the media has reflected different views and opinions. The author of this thesis has also highlighted them in his work. As there are very few scientific sources directly related to the topic of the thesis, the conclusions drawn in the thesis contains the author's own thoughts and opinions.

Keywords: environmental law, maritime planning, offshore wind farm.

⁷ Code of Administrative Court Procedure. – RT I, 13.03.2019, 54.

1. Overview of Hiiumaa Offshore Wind Farm

1.1 Overview of the project and the developer

To the present moment, there are no offshore marine farms in Estonia and Hiiumaa Offshore Wind Farm is the first such offshore farm project. Also, it is planned that Hiiumaa Offshore Wind Farm would be the largest offshore marine farm of those currently operating in the world.⁸ According to the developer, the wind farm will help meet the European Union's renewable energy goals.⁹

Hiiumaa Offshore Wind Farm planned capacity is between 700 to 1100 MW, with a distance of 12 km from the coastline of Hiiumaa island. Depending on the turbine type more or less 100-160 wind turbines will be installed. The exact placement of the turbines depends on the national maritime spatial plan and environmental impact assessment (EIA). The wind farm is planned to be connected with the Estonian transmission grid through the Kanapeeksi substation in Hiiumaa island.¹⁰ According to national plan Eesti 2030+ the western coast of Estonia is suitable for the construction of offshore wind farms. The northwestern Estonian offshore wind farm in Estonia was chosen as a possible wind farm location because of the best wind conditions in the area – the average wind speed is over 8.5 m/s and the full wind hour is over 4,000 hours. The initial choice of offshore wind farm location also includes Natura 2000 and other nature reserves, seabed depth, various radar locations, and other factors.¹¹ An approximate location of Hiiumaa Offshore Wind Farm is provided in Appendix A.

The first developer of Hiiumaa Offshore Wind was Nelja Energia. Nelja Energia was the biggest wind power producer in the Baltic States who started its offshore wind power development in 2006 by establishing a special project related company - OÜ Hiiumaa Offshore Tuulepark. Then Nelja Energia was purchased by Enefit Green (Eesti Energia's renewable energy company). The acquisition was completed at the end of 2018. So, now the company OÜ Hiiumaa Offshore is owned by Enefit Green and they are developers of this project at this moment.

⁸ A. Raimer. Maa ilma suurim mere tuulepark kerkib prominentide vastuseisust hoolimata Hiiumaale. – Ärileht 15.08.2019.

⁹ Nelja Energia AS. Interview with Nelja Energia. Tallinn, Estonia (09.09.2017).

¹⁰ Enefit Green AS. Loode-Eesti meretuulepark. Overview of the project. – <http://www.hiimeretuulepark.ee/project> (10.12.2019).

¹¹ Enefit Green AS. Loode-Eesti meretuulepark. Asukoha valik. – <http://www.hiimeretuulepark.ee/projekt/asukoha-valik> (10.12.2019).

1.2 The impact of the project

The main impacts that the project may have on the project are outlined and analyzed below. These factors are also most perceptible to ordinary people and therefore important. If all the impacts are carefully considered, the author believes that the project has more positive effects. Negative effects can be eliminated or replaced by alternatives and the positive impact of realizing this project is much more important than the negative impact.

1.2.1 Visibility and noise

The distance between the offshore wind turbines will be at least 12 km from the coast, according to both the maritime spatial plan and Nelja Energia's (Enefit Green) plans.¹² At such a distance, the wind farm is not visible by people's views from the coast even in clear weather. In a rainy or foggy weather it will be not visible at all. It means that they can not spoil the view of the sea from the coastline. Visualization of the wind turbines from Kärđla harbor is presented in Appendix B.

Noise assessment must take into account nationally established application levels for existing residential areas: 55 dB by day and 40 dB by night. During the environmental impact assessment, noise modeling of the proposed wind farms was carried out to determine the propagation of noise at sea. As a result of noise modeling, the noise level of 55 dB for the most powerful wind turbine spreads up to 270 m from the wind farm. The noise level of 40 dB spreads about 1500 m from the wind farm. For other types of wind turbines, the distances are shorter.¹³ The coast of Hiiumaa is about 12 km from the wind farm. It follows that residential areas are not exposed to noise levels higher than the permitted levels.

1.2.2 Impact on nature

The construction of a wind farm can have significant negative impacts on fauna, habitats (reefs), fishing and birdlife. In the course of the environmental impact assessment (EIA) of the Northwest Estonian offshore wind farm, bird surveys were conducted in autumn 2014 and winter, spring and summer 2015. In order to mitigate the effects on the birdlife, the bird expert has come up with a compromise solution where the windmills will not be built on the Apollo

¹² Enefit Green AS. Loode-Eesti meretuulpark. Keskkonnamõjud. – <http://www.hiimeretuulepark.ee/projekt/keskkonnamojud> (11.12.2019).

¹³ Skepast&Puhkim OÜ. Loode-estli rannikumere tuulepargi keskkonnamõju hindamise aruanne. 08.02.2017, version 6, page 12.– https://www.envir.ee/sites/default/files/loode-estli-meretuulepark_kmh_08022017.pdf (23.11.2019).

shallow.¹⁴ The compromise solution is acceptable to the developer. The impact on birds is not significant when implementing the compromise solution.

At the same time, there is ample evidence that windmill foundations have created a new habitat for marine life, which increases the fish abundance in the area and may make some birds more attractive due to the enrichment of their food base. Birds have also been found to learn how to live with windmills and avoid them if it is necessary.

Minor negative impacts during the construction phase may include water quality, suspended solids distribution, fish fauna (impact of noise and electromagnetic fields), fish species abundance, fauna, and flora.¹⁵

1.2.3 Economic impact

As a result of the construction of Hiiumaa Offshore Wind Farm economic development, employment and security of electricity supply will have a significant positive impact.¹⁶

The Northwest Estonian offshore wind farm has five important economic factors:

- a building fee of at least 15,3 million euros per year;
- revenue from renewable energy sources through the European Union Renewable Energy Cooperation Mechanisms amounting to 100 million euros per year;
- renewable energy production 3 TWh per year;
- a reduction in greenhouse gases of 3 million tonnes per year;
- jobs with high added value.

From the point of view of Hiiumaa, the environmental impact assessment (EIA) concluded that the offshore wind farm had a positive impact on the island's economic development and employment. The proposed activity will result in on-site jobs that can be related to wind turbine transportation (both logistics and implementation), erection of wind turbines (construction and materials both offshore and onshore) and maintenance of wind farms.¹⁷

¹⁴ L. Luigujõe. Lepingu: „Loode-Eesti rannikumerre kavandatava meretuulepargi keskkonnamõju hindamise raames keskkonnaalase lisauuringu läbiviimine ning keskkonnamõju hindamise menetluses osalemine“ aruanne. Tartu 2015. – https://www.envir.ee/sites/default/files/lisa_4_loode-est-meretuulepark-linnustiku-uuring_sept-2016.pdf (12.01.2020).

¹⁵ Skepast&Puhkim OÜ. Loode-est-meretuulepargi keskkonnamõju hindamise aruanne. 08.02.2017, version 6, page 12 and 13.

¹⁶ Ibid.

¹⁷ Enefit Green AS. Keskkonnamõjud. – <http://www.hiiumeretuulepark.ee/projekt/keskkonnamojud> (16.12.2019).

1.3 Permitting process of Hiiumaa Offshore Wind Farm

1.3.1 Applications submitted by Enefit Green (Nelja Energia)

Nelja Energia submitted its application to the Ministry of Environment for the special use of water in 2006. On the basis of the application, the Ministry of Environment initiated the first environmental impact assessment (EIA) on 05.05.2006. In addition, Nelja Energia submitted its application for superficies license to the Estonian Government in 2010. Both water special use permit and superficies license application proceedings were suspended until the full approval of the EIA report.¹⁸

By order of 11 October 2012, the Government of the Republic initiated the preparation of maritime spatial plan for the sea areas bordering Hiiu and Pärnu counties (to the external sea border). The ordinance instructed the Hiiu County Governor to arrange the preparation of a maritime spatial plan along with a strategic environmental impact assessment (SEA) and to submit the plan to the Ministry of the Interior by 31 December 2016 at the latest. The SEA program was approved on 20 June 2013 and the report on 25 March 2015. The Hiiu County Governor established the maritime spatial plan by order No 1-1 / 2016/114 of 20 June 2016.

Hiiu Tuul NGO, Emmaste Parish, Inge Talts, Lembit Vainumäeaeappe appealed to Tallinn Administrative Court to cancel the order of Hiiu County Governor to establish the maritime spatial plan. The case reached the Supreme Court, who annulled the part of Hiiu wind turbines of the maritime spatial plan because the environmental impact of wind turbines and submarine cables had not been determined and no relevant research had been done. For the rest, the maritime spatial plan remained in force. Therefore, it was necessary to carry out a new environmental impact assessment (EIA) report.

The Ministry of Environment published the new environmental impact assessment (EIA) report on the 10th of February, 2017.¹⁹ The Ministry of the Environment announced the disclosure of the EIA report of the Hiiumaa Offshore Wind Farm on the 22nd of August 2019 for the second time.

1.3.2 Necessary permits for building Hiiumaa Offshore Wind Farm

The national legislation sets out relatively few provisions that specifically deal with building of offshore wind farms. In general, the legal regime for building in water bodies is differentiated

¹⁸ Enefit Green AS. Loode-Eesti meretuulpark. Permitting. – <http://www.hiumeretuulepark.ee/permitting> (10.11.2019).

¹⁹ Ibid.

on the basis of whether the construction work has permanent connection to the shore.²⁰ According to the § 104 section 2 of the Building Code²¹ an offshore wind power (OWP) including the off-shore link is considered to be a construction work that does not have a permanent connection to the shore. The Building Code stipulates the general provisions for construction works. There is no single authorization that comprehensively covers all aspects of an offshore wind farm.

For construction of the Hiiumaa Offshore Wind Farm the following permits are required:

- Superficies licence. A building permit is a temporary right to encumber a demarcated part of a public body of water with a structure permanently connected to the bottom thereof, which is not permanently connected to the shore (§ 217 of the Water Act²²). The license is required because seabed belongs to the state. The license makes it possible for a developer to own the OWP without owning the seabed under the OWP. The superficies license is the most specific authorisation for OWPs. For this reason, more details are provided on the license than other types of authorizations. The superficies license effectively determines the scope of building permit although the law does not explicitly stipulate so.

According to the § 224 section 1 of the Water Act superficies license (building permit) gives the right to load the sea with offshore wind turbines for 50 years. Although the application has to set out the location and size of the encumbered area this information may change in the proceedings, especially on the basis of investigations.

- Building permit. A building permit gives the right to build a structure which corresponds to the building design on which the building permit is based (Building Code § 38).

In general, the building permit is valid for five years (§ 45 section 1 of the Building Code). However, the building permit for OWPs and off-shore links is valid for 10 years according to the § 109 section 3 of the Building Code. Validity means that the construction work has to be built within the timeframe.

- Use and occupancy permit. A permit for use shall be granted if the construction of the completed building conforms to the building permit and the building can be used according to the requirements and intended use (§ 50 section 1 of the Building Code). The purpose of the permit is to ensure that the completed construction work conforms to the building permit and it is possible to use the construction work in compliance with the requirements and in accordance with its purpose of use.

²⁰ Estonia. Inventory. Transmission and Electricity Production (private document) (13.09.2017).

²¹ Building Code. – RT I, 21.12.2019, 5.

²² Water Act. – RT I, 21.12.2019, 17.

In general, the use and occupancy permit is valid indefinitely (§ 56 of the Building Code). However, the permit in question is valid for the same period as the superficies license, unless specified otherwise in the permit – § 113 section 5 of the Building Code.

- Water permit. The right of special use of water shall be based on a water permit which grants the right to one or more of the activities specified in § 187 of this Act and on an integrated permit (§ 186 of the Water Act). The purpose of the permit is to manage environmental impacts on water bodies. § 187 provides an exhaustive list of cases when a water permit is required.

Environmental authorizations may be granted for a specific term of time or for an indefinite period. In the case of longer-term activities, a time-limited environmental permit means that an administrative body checks over a certain period of time whether the prerequisites for continuing the same operation are still met and whether it can continue to be allowed. In Estonia, it has been set up to issue more environmental permits for an indefinite period of time, which should also reduce administrative burden. In most cases, an administrative authority may modify or revoke the authorization, in particular when certain circumstances change.²³ Today, environmental permits are issued in the open procedure, so a large number of interested parties are allowed to submit their proposals and objections to the environmental permit. The requirement for disclosure is related to the environmental permit function to resolve conflicts of interest.

In many cases, the conditions for issuing a license are not explicitly provided for in the legislative provisions, but the competent authorities reserve the freedom of action. Prudence involves not only an interpretation of the legal provision but also the consideration of general legislative principles (for example, the precautionary principle). Significant opportunities for freedom of action in the case of issuing a license for aquaculture are especially evident in Germany, Sweden, Finland, and Estonia.²⁴ It should be also noticed, that permitting procedure in Estonia is one of the shortest in Europe. For instance, the average length of procedure in Estonia is 3 months while it could be over 12 months in Poland.²⁵

²³ H. Veinla, E. Lopman, K. Relve, M. Triipman. *Keskonnaõigus. Õigusteaduse õpik*. Tallinn: Juura 2016, page 170.

²⁴ N. Varulin. *Инновационные методы и технологии устойчивого развития аквакультуры в регионе балтийского моря*. Aquabest, Minsk: 2016, page 31. – <http://aquacultura.org/upload/files/pdf/library/salmon/Инновационные%20методы%20и%20технологии%20устойчивого%20развития%20аквакультуры%20в%20регионе%20Балтийского%20моря.pdf> (20.12.2019).

²⁵ I-L. Paavola. *Environmental regulation of aquaculture in the Baltic Sea region: A broad overview of the legal framework 2012*, page 10.

1.4 Current position of the project

By this moment Enefit Green submitted an upgraded environmental impact assessment (EIA) of the Northwest Estonian offshore wind farm, according to which an offshore wind farm is planned near Hiiumaa, which would be the largest in the world at present. The necessary detailed studies have finally been prepared and submitted to the Ministry of the Environment.²⁶

The planned number of wind turbines is 107 to 182, depending on the rated power of the wind turbine. The distance between the wind turbines is about 1 kilometer, and the developer has chosen sea areas at least 12 kilometers from the coast of Hiiumaa as the location of the wind farm.²⁷

The preparation of the maritime spatial plan is nearing completion this year. The public display of the draft (basic solution) and the draft impact assessment report II took place from 17 February to 18 March 2020. The presentation of the draft (basic solution) and the draft impact assessment report took place on 18.02.2020 at the Ministry of Finance. Public hearings after the public display will be postponed due to the emergency situation²⁸ in the country. New dates for debates will be announced after the end of the ban on public gatherings.²⁹

The maritime spatial plan is expected to be established by the government in spring 2021.³⁰ The established plan will be the basis for future decisions on the use of the sea area for both ministries and agencies. The plan will be a guide for investors, local governments and coastal communities.³¹

When the maritime spatial plan is finally established and the locations of the energy production areas are finally approved, Enefit Green will be able to start building Hiiumaa Offshore Wind Farm.

²⁶ Keskkonnaministeerium. Loode-Eesti rannikumere tuulepargi keskkonnamõju hindamise aruande avalik väljapanek 2019. – <https://www.envir.ee/et/loode-eesti-rannikumere-tuulepargi-keskkonnamoju-hindamise-aruande-avalik-valjapanek-2019> (05.01.2020).

²⁷ Ibid.

²⁸ The Government of Estonia has declared the emergency situation on 12th March due to the worldwide pandemic of Coronavirus COVID-19 and the threat of mass infections. (Republic of Estonia Government. Emergency situation in Estonia. – <https://www.valitsus.ee/en/emergency-situation-estonia>) (20.03.2020).

²⁹ Rahandusministeerium. Mereala planeering. – <https://www.rahandusministeerium.ee/et/planeeringud> (15.03.2020).

³⁰ Hiiumaa vald. Eilsest saab tutvuda mereala planeeringu põhilahendusega. – https://vald.hiiumaa.ee/uudised-ja-teated/-/asset_publisher/4Ahqku2H581b/content/eilsest-saab-tutvuda-mereala-planeeringu-pohilahendusega (18.02.2020).

³¹ Rahandusministeerium. Mereala planeering.

2. Planning procedure and changes in the Estonian legislation

2.1 Planning procedure in the Estonian legislation

Planning is as old as urban culture. Earlier records of urban genesis date back to Mesopotamia dating back to 5000-6000 BC.³²

Spatial planning is the process of deciding on the spatial development trends of an area.³³ According to the § 3 section 1 of the Planning act³⁴ spatial plan is an inclusive spatial solution that is prepared in respect of a particular land area and that, in the cases provided in law, establishes the land use and building conditions for the area.

The Estonian Planning Act is based on the principles of the European Spatial Planning Charter. The Charter defines the basic principles of contemporary spatial planning and the publicity of spatial planning.³⁵ The Charter mainly promotes long-term planning with public participation. Spatial planning links economic, social, cultural and environmental policies.

According to the Charter, spatial planning must be democratic, inclusive, functional and long-term oriented. According to the Charter all the characteristics should be met in planning:

- Democracy. Planning must be carried out in such a way as to ensure the involvement of interested people and their political representatives;
- Comprehensive. Planning must ensure coordination of the various sectoral policies and integrate them into the general framework;
- Functionality. Planning must take into account the existence of a regional consciousness based on shared values, culture and interests, which sometimes transcends administrative and territorial boundaries while respecting the institutional arrangements of different countries;
- Long-term orientation. Planning must analyze and take into account long-term economic, social, cultural, ecological and environmental trends, developments and changes.³⁶

Another important document on which the Estonian Planning Act is based is the Aarhus Convention (Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters),³⁷ what was implemented in Estonian legislation. Convention stipulates that planning procedure should be open procedure and promotes public participation in environmental decision-making. As the planning process is an

³² J. R. Short. *The Urban Order: Introduction to Urban Geography*. Malden/Oxford: Blackwell Publishers 1996, page 16.

³³ H. Veinla. *Keskkonnaõigus*, page 138-139.

³⁴ Planning Act. – RT I, 19.03.2019, 104.

³⁵ Recommendation no. r (84) 2 of the committee of ministers to member states on the European regional/spatial planning charter. 25.01.1984. – <https://rm.coe.int/native/09000016804c87cb> (13.11.2020).

³⁶ Ibid.

³⁷ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters. – 25.06.1998. <https://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf>.

open process,³⁸ stakeholders in the planning process should be involved in the planning process from the outset of the planning process to ensure balanced development of the planned area, ensure timely information and protect their interests during the planning process. Collaboration and participation of the local community in the planning process is one of the most important prerequisites for successful and balanced spatial development.³⁹ The aim of the planning process is to achieve a balanced spatial solution that helps to achieve public acceptance. The planning procedure is a so-called popular procedure where everyone arrives without a particular interest or if it needs to be proven.⁴⁰ As a result, this is often a process that takes place over a longer period and at different stages.

In simplified terms, the most important stages of the planning process are:

- initiation of strategic planning and environmental impact assessment;
- submitting the draft plan and strategic environmental assessment report for approval and an opinion;
- adoption and public display of the report on the plan and the strategic environmental assessment;
- the introduction of planning.⁴¹

2.1.1 Types of plannings

It is important to make a difference between the types of plannings as they differentiate one from the other. There is a hierarchical relationship between different types of planning, with each subsequent level plan being drawn up based on a higher-level plan.⁴²

When creating a more detailed plan, it is relatively easy to change the more general plan in place to ensure an operational response to changing needs. It is important to note here that by law, a detailed plan can only make a proposal to modify the next plan of generalization. For example, a detailed plan can make a proposal to amend a general plan, but it cannot make a proposal to amend a county plan.⁴³

The main classification of plans is based on the extent of the plan, ie the area covered by the plan. The current Planning Act⁴⁴ distinguishes the following types of plans.

³⁸ N. Parrest. Planeerimismenetluse ja avatud menetluse vahekord. – Juridica 2006, nr 7, page 470.

³⁹ J. Lass. Ruumiline planeerimine ja ehitamine: kodaniku käsiraamat. Pirita Selts MTÜ 2012, page 9.

⁴⁰ N. Parrest. Planeerimismenetluse ja avatud menetluse vahekord, page 464.

⁴¹ R. Kitsing, H. Mark, S. Pajupuu, K. Rohtla. Kaebuse esitamise õigus ehitus-, planeerimis- ja keskkonnavaidlustes Tallinna Ringkonnakohtu praktika näitel. – Juridica 2018, nr 9, page 676.

⁴² E. Oidermaa. Ehitusõigus. TTÜ kirjastus 2007, page 94.

⁴³ J.Lass. Ruumiline planeerimine ja ehitamine: kodaniku käsiraamat, page 14.

⁴⁴ Planning Act. – RT I, 19.03.2019, 104.

- National plan (Planning Act § 13). The plan shall be drawn up for the whole territory of the country and for the exclusive economic zone. A national spatial plan can be prepared as a thematic plan for marine areas and adjacent coastal areas, as well as for the exclusive economic zone, thus it is possible to distinguish between spatial and maritime spatial plans. National planning is the basis for the preparation of county plans.
- National designated spatial plan (Planning Act § 27). The purpose of a national designated plan is to erect a building with a significant spatial impact, the location or operation of which is of national interest. The special state plan is prepared primarily to express cross-county interests in the fields of national defense and security, energy etc, or to express the above-mentioned interests in the public water body and economic zone.
- County-wide plan (Planning Act § 55). The plan is prepared for the territory of the county or a part thereof. The aim of this plan is to define the principles and trends of the spatial development of the whole or part of the county. The county spatial plan specifies what was decided in the national spatial plan.
- Comprehensive plan (Planning Act § 74). The plan is drawn up for the whole or part of the territory of the city or rural municipality. The comprehensive plan defines the principles and trends of the spatial development of the territory of the rural municipality or city or a part thereof. The comprehensive plan determines where the planning needs to be continued with the detailed plan and where the detailed plan can be limited.
- Detailed plan (Planning Act § 124). Usually is prepared in respect of a part of the territory of a local authority and, where necessary, to plan construction works that have a permanent connection to the shore or that are functionally connected to the shore. This is the most detailed level of spatial planning. Its purpose is to implement the comprehensive plan.

2.1.2 Opportunities to challenge plannings and participation of individuals

Spatial planning policies must be based on active citizenship at all levels. It is very important that the public is made aware of institutional and procedural issues in a clear and comprehensive manner at all stages of the planning process.⁴⁵ There can be serious consequences if a plan is challenged: a lot of money is spent on the planning process, construction is postponed until litigation takes place, the investment loses its meaning because of the long suspension of the plan, etc. So, there must be serious grounds for challenging the plan.

⁴⁵ Resolution No. 2 on The European regional/spatial planning charter (Torremolinos Charter). 6th European Conference of Ministers responsible for Regional Planning (CEMAT). Torremolinos, Spain: 19-20 May 1983, on “Prospects of development and of spatial planning in maritime regions“, point 22.

Under the Estonian Planning Act, anyone has the right to appeal to a court within 30 days of the date on which the person was or should have become aware of the decision establishing the plan if he or she finds that decision is contrary to public interest or infringes his or her rights or impinges on his or her freedoms.⁴⁶ This applies to all kinds of plans. Everyone has the opportunity to challenge the decision to set up a plan, but Planning Act does not explicitly provide for the possibility of challenging plan at an earlier stage of the planning process. Therefore, the question arises whether it is possible to challenge the actions taken during the various stages of the planning procedure and the administrative acts issued before the adoption of the plan. It also raises the question of what constitutes a violation of a person's rights and freedoms and what can be the public interest.

In Estonia, the legislator has set limits on the exercise of the right of appeal. As is evident from § 15 of the The Constitution of the Republic of Estonia⁴⁷, the legislator has based its choice of legal policy on a system of subjective legal protection. This means that when filing a complaint with a court, a person must claim a violation of his or her own rights, and must be directly involved in the administrative act or act being challenged, because access to court is guaranteed only in the case of a violation of his own subjective rights.

Another approach is also possible. Under the system of objective judicial protection, a person has the right to apply to a court regardless of whether his or her own rights and interests are affected, when exists a public interest.⁴⁸ The filing of an appeal in the public interest is called the *actio popularis*.⁴⁹ For other purposes, including protection of rights of another person or protection of a public interest, a person may only have recourse to the court in the cases provided by law (§ 44 section 2 of Code of Administrative Court Procedure⁵⁰). So, the appealing right in public interest is very limited. This topic will be also discussed in more detail in the following sections of this thesis.

An appeal is usually lodged with an administrative court in order to protect rights in connection with the final result of an administrative procedure – an administrative act or procedure. In case law, it is often during the construction and planning process that various operations, decisions challenges, which is natural given the specific nature of the procedures and the wide range of interested parties. Taking into consideration the length of the planning process and the likely cost of this procedure, it should be allowed to challenge different

⁴⁶ § 54, § 94, § 123, § 141 of the Planning Act. – RT I, 26.02.2015, 3.

⁴⁷ The Constitution of the Republic of Estonia. – RT I, 15.05.2015, 2.

⁴⁸ K. Relve. Füüsiliste isikute subjektiivne avalik õigus ja põhjendatud huvi keskkonnaasjades. – Juridica 2004, nr 1, page 21.

⁴⁹ A.-T. Kliimann. Haldusprotsess. Tartu: Akadeemilise Kooperatiivi Kirjastus 1937, pages 213-215.

⁵⁰ Code of Administrative Court Procedure. – RT I, 13.03.2019, 54.

procedural acts at an early stage without waiting for the final act – adoption of a plan decision or not adopting a plan.⁵¹

2.1.3 Planning of marine area in Estonia

Maritime planning in Estonia is governed by the Planning Act. Planning extends to land and water areas, airspace and ground below the surface (Planning act § 2). Although Planning Act does not include a specific legal mechanism for planning of marine area, the definition of general conditions for the use of public bodies of water is reflected in several sections of the Planning act at different levels.

The purpose of maritime planning is to agree on the long-term use of the Estonian maritime space as a public resource to promote the maritime economy and to contribute to the achievement and preservation of the good status of the marine environment.⁵² In the preparation of a maritime spatial plan the environmental, economic, social and cultural impacts of these activities will be assessed. It will also aim at reducing conflicts between sectors and creating synergies between different activities, supporting investment through predictability, transparency and clearer rules, increasing cross-border cooperation between EU countries to develop energy networks, shipping lanes, pipelines, submarine cables, and other activities, but also coherent protection areas.⁵³

The maritime spatial plan in Estonia is prepared as a national spatial plan for the entire Estonian marine area. Territory of marine planning of Estonia is presented in Appendix C. The responsible authority in this field is the Ministry of Finance. The plan is due for adoption at the end of 2020.⁵⁴ Although Estonia still do not have a maritime spatial plan for the entire marine area, for example in Germany in 2009, the first maritime spatial plans for the German Exclusive Economic Zone (EEZ) of the North Sea and Baltic Sea came into force.⁵⁵

So, Estonia in this sense lags behind Germany. It remains unclear why the field of maritime spatial planning is still not properly regulated in Estonia. Former minister of the environment of Estonia Siim Valmar Kiisler says: “In our region, energy resources are not too large, if you look at it, it is a pretty serious problem in our region. If at one point there is simply not enough

⁵¹ R. Kitsing. Kaebuse esitamise õigus chitus-, planeerimis- ja keskkonnavaidlustes Tallinna Ringkonnakohtu praktika näitel, page 676.

⁵² Henrikson&Ko, Rahandusministeerium. Eesti mereala planeeringu koostamine. Eskiislahenduse tutvustus 18.04.2019. – http://mereala.hendrikson.ee/dokumendid/Eskiis/2019-04-18_eskiisi_tutvustus.pdf (12.12.2019).

⁵³ Euroopa Komisjon. Mereruumi planeerimine. –

https://ec.europa.eu/maritimeaffairs/policy/maritime_spatial_planning_et (03.03.2020).

⁵⁴ Planeerimisseaduse lahtiseletaja ehk ajaveeb. Mereala planeerimine. – <https://planeerimine.ee/mereala-planeerimine/> (10.02.2020).

⁵⁵ Bundesamt für Seeschifffahrt und Hydrographie (BSH). National spatial planning. –

https://www.bsh.de/EN/TOPICS/Offshore/Maritime_spatial_planning/National_spatial_planning_node.html;jsessionid=6C4D7E767DAE0477B85C04B07807084E.live21302 (29.03.2020).

electricity, we will live a completely different life if that happens.”⁵⁶ Maritime spatial planning offers many opportunities for the efficient use of the maritime space and thus for the development of the country economy. Estonia must definitely head to Germany, where maritime planning is very well and in detail regulated.

The most suitable solution for Estonia would be to add a separate maritime spatial planning type to the Planning Act. All the requirements and procedure should be clearly provided in one place, in order to avoid further disputes. It should be stipulated in the Planning Act that the maritime spatial plan is drawn up for the exclusive economic zone, the territorial sea and the coastal zone. Such a solution will ensure a balanced consideration of all relevant areas.

2.1.3.1 Planning of marine area in case of Hiiumaa Offshore Wind Farm

All the plannings that were initiated before 30.06.2015 are subject to the wording of the Act in force at that time (Code of Administrative Court Procedure⁵⁷ § 1 section 4). In this case, Hiiumaa Offshore farm planning was started before 2015, so the old Planning Act applies. According to the Planning Act what was in force before 30.06.2015⁵⁸, maritime planning took place at the county-wide spatial planning level. Pursuant to § 7 section 2 point 3 a county-wide plan may be prepared for public water bodies.

Pursuant to § 5 section 1 of the old redaction of Water Act⁵⁹, public water bodies are the inland sea, territorial sea and transboundary water bodies located in Estonia. Thus, the maritime area was covered by the county-wide plan. Pursuant to § 55 section 1¹ of the Planning Act what is in force now, a county-wide plan may be prepared for public water bodies, except the inland and territorial sea. Therefore, now the county plan is not appropriate.

The county planning of the marine area adjacent to Hiiu and Pärnu County has been initiated by an order No. 441 of the Government of the Republic of 11.10.2012. Territory of this planning is presented in Appendix D. Answering the question of why these areas were chosen for planning, the former minister of the environments Siim Valmar Kiisler said that the territory was chosen because of the desire to use wind energy and to build wind turbines in the sea.⁶⁰ The order entrusted the Hiiu County Governor with initiating the strategic environmental Assessment (SEA) of Hiiu County Planning and organizing the preparation of the plan to the external border of the territorial sea. By an order dated 23.10.2012, the Hiiu County Governor initiated the county planning of the marine area.

⁵⁶ Vabariigi Valitsus. Vabariigi Valitsuse pressikonverents, 11. oktoober 2012. – <https://www.valitsus.ee/et/uudised/vabariigi-valitsuse-pressikonverents-11-oktoober-2012> (10.03.2020).

⁵⁷ Code of Administrative Court Procedure. – RT I, 13.03.2019, 54.

⁵⁸ Planning Act. – RT I, 13.03.2014, 97.

⁵⁹ Water Act. – RT I, 04.07.2017, 50.

⁶⁰ Vabariigi Valitsus. Vabariigi Valitsuse pressikonverents, 11. oktoober 2012.

The county plan has been adopted on 21.11.2014 by the order of the Hiiu county governor and directed to the public display. The public display of the county plan took place from 02.12.2014 to 06.01.2015. The public consultation on the County Planning and SEA Report took place on 10.02.2015. The Environmental Board approved the SEA report on 25.03.2015. County planning is established by the order of Hiiu County Governor on 20.06.2016.⁶¹

The purpose of the maritime spatial plan for the Hiiu county was to determine the general conditions for the use of the sea space in the sea area adjacent to Hiiu County during the public planning process. The maritime area is used in a variety of traditional ways, the most important being shipping, pipelines, and cables, ice routes, mineral extraction, fishing, recreation, etc. Recently, there has been an increasing interest in using marine space for new uses, such as wind, wave, and aquaculture. Maritime spatial planning aims at placing new and traditional uses in the sea so that different activities do not conflict with one another and at the same time ensure that the natural environment is maintained.⁶²

2.2 Changes in the Estonian legislation as circumstances impeding the construction of Hiiumaa Offshore Wind Farm

2.2.1 Changes in the Planning Act

The first applications were submitted in early 2000s, but no full authorization of an OWP has been granted so far. Meanwhile the Estonian law has been developed and changed extensively. The Planning Act regulates spatial planning of the sea and other water areas on different planning levels, so the codification of the Planning Act has influenced the construction of Hiiumaa Offshore Wind Farm.

On the 1.01.2003, the Planning Act entered into force, which was in force until 30.06.2015. Until now, the amendments to the law have not resulted in any substantial changes. To date, the regulation of the Planning Act 2015 has been amended 8 more times.

According to § 1 section 4 of the Code of Administrative Court Procedure establishes the general rule according to which an act of administrative court proceeding shall be performed pursuant to the law in force at the time of the act. So, when planning Hiiumaa Offshore Wind Farm it is necessary to look at the redaction of the Planning Act what was in force before 2015.

⁶¹ Rahandusministeerium. Hiiu maakonnaga piirneva mereala maakonnaplaneering. – <https://maakonnaplaneering.ee/et/hiiu-maakonnaga-piirneva-mereala-maakonnaplaneering> (15.01.2020).

⁶² Ibid.

As was already stated in the previous topic, according to the Planning Act⁶³ in force before 1 July 2015, maritime planning took place at the county-wide planning level. At the time this project was initiated, maritime spatial planning was taking place at the county planning level. According to the current Planning Act, a national spatial plan may be prepared as a thematic spatial plan that extends to sea areas, the adjacent coastal areas and also the exclusive economic zone (Planning Act § 13 section 2). In contrast to spatial plans, functions of thematic spatial plans are more connected with water, it means that, they are more specific (Planning Act § 14 section 2). The location of OWP areas and indicative connections to grid on land are shown in county level thematic spatial plans. The plan would presumably set out some details for the off-shore grid.

According to section 1 of § 27 of Planning Act “the aim of a national designated spatial plan is to erect a construction work which has a significant spatial impact and whose chosen location or whose functioning elicits significant national or international interest”. Certain projects cannot be undertaken without adoption of national designated spatial plan. These projects appear to include power stations whose nominal electricity generation capacity exceeds 150 megawatts. Planned wind farm capacity is between 700 to 1100 MW, so such kind of plan is also a mandatory. Designated plan also includes details, such as the location of individual mills. Essentially, the procedure for adopting the plan has two stages. In the first stage the location is determined, in the second stage other details are established. The power station includes any construction works required for the functioning of such installations, which means that off-shore links should be included. According to the § 14 of an Act to Implement the Building Code and the Planning Act⁶⁴ national designated spatial plan is not mandatory if the location of the construction work has been dealt with in the county level spatial plan whose preparation was initiated before July 2015.⁶⁵ In this case, the Government of the Republic started formal consultations for initiating the spatial plan in January 2017, so designated spatial plan is mandatory.

A more substantial change concerns persons involved in the planning process. According to the Planning Act which was in force until 30.06.2015, the possibility to involve an interested person in the planning procedure was provided for only the comprehensive plan (§ 16 section 1 point 4 of the old version of the Planning Act). The new version of the Planning Act provides the possibility for the involvement of interested parties in the planning process for each type of planning. Of course, this increases the administrative burden compared to the old version.

⁶³ Planning Act. –RT I, 13.03.2014, 97.

⁶⁴ Planning Act. – RT I, 19.03.2019, 104.

⁶⁵ Estonia. Transmission and Electricity Production.

The requirements of the strategic environmental assessment (SEA) procedure have been also significantly changed. According to the current Planning Act, the impact of the plans will be assessed during the SEA, with the SEA program being prepared at the beginning of the impact assessment, a report based on it, and both documents subject to public consultation and approval by the Environmental Board. In addition, the obligatory implementation of the SEA has changed – according to the current law, the SEA is always mandatory also for thematic plans.

The another significant change is that now the authority that arranges the preparation of national spatial plans is the Ministry of Finance (Planning Act § 13 section 6). According to the previous version of the law this authority was the Ministry of Interior. Before the new codification of the Planning Act, the authority that was arranging the preparation of county-wide plans was the county governor or the Government of the Republic and its preparation is organized by the county governor (Planning Act⁶⁶ § 10 section 3). Now according to the new Planning Act the authority that arranges the preparation of national spatial plans is the Ministry of Finance (§ 55 section 4). The authorities that organize planning work are, according to their competence, the Ministry of Finance, other relevant government agencies or local authorities (Planning Act § 4). So, the drawback of the current law is the fact that there is no one competent authority for managing the use of marine areas. Every ministry manages a small proportion, one topic of sea use management. This situation undoubtedly overloads administrative bodies. Since each separate administrative body does not know what decision another authority has made, it is forced each time to review the decisions of the previous body. Also, each individual body should be acquainted with the circumstances and facts and it takes a lot of time. For example, it is clear that giving a proxy to one body will take much less time than each of the administrative bodies will wait until another body makes its decision. Therefore, it is necessary to designate the only administrative body that will be responsible for managing the use of marine areas.

Maritime spatial planning is not thoroughly regulated either. Currently, maritime spatial planning in Estonia is derived from land-based spatial planning, not keeping in mind that land and sea have different legal backgrounds.⁶⁷

⁶⁶ Planning Act. – RT I, 13.03.2014, 97.

⁶⁷ PartiSEApate. Multi-level Governance in Maritime Spatial Planning throughout the Baltic Sea Region. Overview of the Maritime Spatial Planning Situation in the Countries of the Baltic Sea Region (2013) – https://sustainable-projects.eu/downloads/Booklet_Country_Fichessmall.pdf (13.08.2018).

2.2.2 Changes in the Water Act

The specific regulation on superficies license for building at the sea was introduced in 2010. Since February 2010 the Water Act⁶⁸ regulates building in public water bodies through a building permit (Water Act § 217 section 1). Before 2010 the only provided by the Water Act⁶⁹ opportunity was to get a permit for the special use of water (Water Act § 9 section 1). According to the Water Act, the authority cannot initiate the proceedings for superficies license if a designated national plan is required or if a thematic planning procedure on the area is ongoing, i.e. the plan has to be adopted before the proceedings for the license can formally be initiated.

Planning Act does not require a spatial planning decision for authorization of offshore wind farms, which do not “elicit significant national or international interest” (§ 27 section 1 of the Planning Act). The Environmental Impact Assessment and Environmental Management Act regulates impact assessments (EIA) is necessary for spatial plans, including cross-border environmental impact assessments. If a relevant spatial plan exists, then the authorizations must be following the plan. If the plan does not exist, then the procedural requirements for issuing the superficies license effectively prevent authorization of the plan before the adoption of the plan. So, the superficies license cannot be issued if a relevant planning decision is being prepared. There is only one exception, which essentially allows the developer to proceed with the authorization on its own risk. Namely, according to § 22⁸ section, 3 of the Water Act, the procedure for issuing the license can be initiated even though a thematic plan is under preparation if the applicant agrees that the license will be valid for only one year after the adoption of the spatial plan.

⁶⁸ Water Act. – RT I, 21.12.2019, 17.

⁶⁹ Water Act. – RT I, 23.12.2010, 41.

3. Supreme Court of Estonia decision No. 3-16-1472

There have been many disputes with this project and as the result the case has gone to the Supreme Court of Estonia. The final Supreme Court decision is due on August 8, 2018. The case number is 3-16-1472. The case was discussed in the Supreme Court in the written procedure, at the next formation of the Court: Ivo Pilving, Nele Parrest and Jüri Põld.

The Administrative Chamber of the Supreme Court resolved the appeal in cassation of the NGO (non-profit organization) Hiiu Tuul, which challenged the maritime spatial plan established by the decision of the Hiiu County Governor dated 20 June 2016. The complaint of the NGO Hiiu Tuul and other persons contested the construction of wind farms.

The most important thing that this case has led to is that the Supreme Court annulled the maritime spatial plan established by the decision of the Hiiu County Governor in the part of Hiiu wind farms in the ruling because the environmental impact of wind turbines and submarine cables has not been determined and no relevant research has been conducted during EIA and SEA procedures. On the Supreme Court's opinion, no proper assessment has been carried out to determine the impact of the proposed activity on Natura areas and protected species.⁷⁰ As a result, the Supreme Court annulled the order of the Hiiu County Governor on June 20, 2016 to establish a maritime plan for wind power production areas. The rest part of the maritime plan remains valid.

The author below focuses only on the main themes discussed in the Supreme Court decision:

- Participation of individuals as the circumstance impeding the Hiiumaa Offshore Wind Farm construction process;
- EIA and SEA as the circumstances impeding Hiiumaa Offshore Wind Farm construction process;
- Formation of nature reserves as the circumstance impeding Hiiumaa Offshore Wind Farm construction process;
- The competence of the administrative bodies to establish the maritime plan and the involvement of the administrative bodies as the circumstances impeding Hiiumaa Offshore Wind Farm construction process.

By order of 11 October 2012, the Government of the Estonian Republic initiated the preparation of county-wide spatial plans for the sea areas bordering Hiiu and Pärnu counties (to the external sea border). The ordinance instructed the Hiiu County Governor to arrange the preparation of a maritime spatial plan along with the strategic environmental assessment (SEA)

⁷⁰ RKHKo 3-16-1472.

and submit the plan to the Ministry of the Interior by 31 December 2016 at the latest.⁷¹ By the order of 23 October 2012, the Hiiu County Governor initiated the maritime plan and by the order of 21 November 2014 adopted the county-wide plan. The planning was coordinated by the Lääne County Government, Saare County Government, Hiiu rural municipality, Pühalepa rural municipality, Ministry of Defense, Ministry of Internal Affairs, Ministry of Agriculture and Communications, Ministry of Agriculture, Maritime Administration, Civil Aviation Administration, Land Board, Police and Border Guard. The planning has not been approved by Emmaste rural municipality and Käina rural municipality.⁷²

The Environmental Board approved the SEA program on 20 June 2013 and the report on 25 March 2015. The Hiiu County Governor established the maritime plan by order no. 1-1 / 2016/114 of 20 June 2016. The organization, drawings and explanatory memorandum identify the uses and conditions of the maritime area by theme: transport, industrial use of the area (including energy), recreational and tourism activities, national, heritage and nature conservation interests, movement restrictions.⁷³

This is the first offshore wind farm project in Estonia, so this Supreme Court decision is now a precedent for further similar cases. Consequently, analyzing and understanding this Supreme Court decision is extremely important and relevant. What makes the Supreme Court's Hiiu Maritime Spatial Plan ruling interesting is the fact that it is the first decision in Estonian case law on planning offshore wind farms. This decision has clarified many of the issues that were still incomprehensible.

3.1 Participation of individuals as the circumstance impeding Hiiumaa Offshore Wind Farm construction process

3.1.1 Appealing right of individuals in the Supreme Court decision

The first thing the court has analyzed is the appealing right of individuals. It is important to clarify, firstly whether the complainants had any right to appeal at all. If the appellants had no right to complain, their appeal would not be accepted by the court.

In the case of Hiiumaa Offshore Wind Farm project, an important obstacle was the ability of individuals to participate in the process of issuing permits. The spatial planning procedures, EIA/SEA procedures and environmental permit procedures are open procedures. Environmental law provisions widen public involvement in building matters. Everyone can

⁷¹ Enefit Green AS. Loamenetlused. – <http://www.hiiumeretuulepark.ee/loamenetlused> (07.01.2019).

⁷² RKHKo 3-16-1472.

⁷³ RKHKo 3-16-1472.

participate in the EIA procedure for issuing a permit, including the superficies licence, the building permit or use and occupancy permit. Technically this concerns only environmental issues of the project but in practice, it is almost impossible to separate environmental issues from other issues.⁷⁴ Anyone can participate in the open proceedings and the comments and objections made need not be related to personal rights or interests. For example, a member of the public can argue that a spatial planning decision is contrary to the public interest. Also, any member of the public, regardless of whether he or she participated in the planning procedure, can challenge the planning decision in court on the basis that it is contrary to public interest.⁷⁵

Hiiu Tuul NGO, Emmaste Parish, Inge Talts, Lembit Vainumäeaeappe appealed to Tallinn Administrative Court to cancel the order of Hiiu County Governor. By decision of 25 November 2016, the Tallinn Administrative Court dismissed the complaints. One of the main issues the court analyzed was the appealing right.

In administrative proceedings, it is not possible to challenge every action which may have an effect on the environment, but only one which has a direct and substantial link with the infringement of a person's subjective rights and with the environment with which he has significant interference.⁷⁶

The Administrative Court found that the complainant residents of Hiiumaa do not have the right to challenge the maritime plan in order to protect their subjective rights and their complaint should therefore be treated as a popular complaint. In the opinion of the Administrative Court, the violation of the rights of the population cannot be established, since the windmills are not erected on the basis of the sea plan and therefore the nature and intensity of the possible disturbances is not known. The Supreme Court has previously stated that access to justice in environmental matters can be based not only on violation of subjective rights but also on the complainant's other involvement with the administrative act or act under challenge. It is the obligation of the complainant to show that the conduct complained of affects his interests. Impact means that the impact on the person must be significant and real. This excludes public interest complaints in environmental matters (popular complaints) unless such a right is expressly provided for by law.⁷⁷

The District Court has also held that individual applicants do not have the right to challenge a maritime plan in order to protect their subjective rights. The Chamber of the Supreme Court

⁷⁴ Estonia. Transmission and Electricity Production.

⁷⁵ Estonia. Transmission and Electricity Production.

⁷⁶ R. Kitsing. Kaebuse esitamise õigus ehitus-, planeerimis- ja keskkonnavaidlustes Tallinna Ringkonnakohtu praktika näitel, page 681.

⁷⁷ RKHK 3-3-1-68-11.

also agrees with the Administrative Court and the District Court that applicants do not have the right to challenge county planning to protect their subjective rights.

3.1.2 Regulation of the appealing right of individuals in the Estonian legislation

Generally, the right of appealing in Estonia is law-based: infringement of subjective rights is the main basis of the right of action. Appealing in order to protect the interests of others or in the public interest is allowed only in the exceptional cases provided for by the law (§ 44 section 2 of the Code of Administrative Court Procedure). Complaints in the public interest regarding environmental matters are not allowed.⁷⁸

Although the right of access to justice is a right for everyone, it does not mean that everyone has the right to challenge any action taken by an administrative authority. According to the § 7 section 1 of the Code of Administrative Court Procedure⁷⁹ what was in force until January 1, 2012, a person who considers that an administrative act has infringed his rights or restricted his freedoms may bring an action before the courts. The logic was that the treatment of subjective environmental law in administrative court practice is based on the concept of subjective public law. As planning law is closely related to the field of environmental law, planning procedures must also follow the concept of subjective public law.

The subjective right is defined as a person's legally protected interest.⁸⁰ The subjective right is also defined as the justification given by a legal norm to a subject of legal relations to demand from other persons certain behavior or refrain from acting in the realization of his/her interests. A subjective public law is the legal capacity conferred on a subject by law to require the State to act with certainty in the exercise of its interests, including requiring the State to take measures to control the activities of third parties.⁸¹ A person may have an interest in everything around him or her, but as a prerequisite for bringing a court action, interest must be considered only if it is protected by law. Such legal protection of a person's interest may derive from the Constitution as well as from other laws, regulations or individual acts. In addition to the interests of individuals, the law also protected the public interest.⁸² The Supreme Court has also referred to fundamental rights, laws and other legislative acts, administrative acts and administrative contracts as the source of subjective public rights.⁸³

According to the § 44 section 1 of the Code of Administrative Court Procedure, what is in force, a person may bring an action before an administrative court only to protect his or her

⁷⁸ H. Veinla. *Keskkonnaõigus*, page 213.

⁷⁹ Code of Administrative Court Procedure. – RT I 1999, 31, 425 – RT 28.11.2011, 2.

⁸⁰ R. Narits. *Õiguse entsüklopeedia*. Tallinn: Tallinna Raamatutrükikoda 2002, page 119.

⁸¹ K. Merusk, I. Koolmeister. *Haldusõigus*. Õpik. Tallinn: Juura 1995, page 51.

⁸² P. Sarv. *Kaebõigusest avalike huvide kaitseks*. – EML ajakiri *MaksuMaksja* 2007 nr 5, page 41.

⁸³ RKEKm 3-3-1-8-01.

rights. According to the explanatory memorandum to the draft of Code of Administrative Court Procedure, the presumption of standing is formulated to extend to all types of complaint.⁸⁴ This immediately precludes individuals from suing in the public interest. Complaints are now allowed only to protect their subjective rights, and of course this will significantly reduce the administrative burden. Because access to justice is generally only available in the event of a person's own rights being violated, the person must credibly claim just infringement of their rights. As a general rule, the right of appeal does not extend to situations in which a person's own interests and rights are not directly prejudiced but he wishes to complain in order to protect the subjective rights of third parties or in the public interest.⁸⁵ The Supreme Court has noted that a right of action in environmental matters cannot be exercised solely through a subjective violation of public law, but that access to justice may also be based on the complainant's exposure to the contested administrative act. The person's interests have to be affected by the action or proposed activity, but it must be significant and realistic.⁸⁶ In another decision the Supreme Court has stated that real effect means, that there must be a causal link between the contested act or procedural act and the alleged consequence, and that the applicant must show that the alleged effect is likely to occur.⁸⁷ Therefore in planning matters, a person may apply to an administrative court regardless of whether his or her subjective rights have been violated. It is sufficient for it to be affected by the contested administrative act.

The Administrative Court need not review the legality of the administrative act if it concludes that it does not affect the applicant's rights. Therefore, two conditions must be met for a complaint to be successful: the contested administrative act or act must be unlawful while also infringing the complainant's subjective rights. Thus, the disputed building, trading or mining permit may be manifestly unlawful, but in the absence of a violation of the complainant's subjective rights, the court can take no action.⁸⁸

3.1.3 Public appeals

Since the Chamber of the Supreme Court said that applicants has no right to challenge the county plan in order to protect their subjective rights, the second option for appellants is appealing in public interest or public appeal. Popular complaints in environmental matters are

⁸⁴ Halduskohtumenetluse seadustiku seletuskiri eelnõu (755 SE) juurde, 25.06.2010, page 14. – <https://m.riigikogu.ee/tegevus/eelnoud/eelnou/377d3bd5-b99a-4563-da3c-75c74c1edd86> (8.10.2019).

⁸⁵ W. F. Murphy, C. H. Pritchett. Courts, Judges, and Politics. An Introduction to the Judicial Process by Walter F Murphy (2001-07-01). New York: McGraw-Hill 1986, page 185.

⁸⁶ RKHKo 3-3-1-86-06.

⁸⁷ RKHKm 3-3-1-87-11.

⁸⁸ P. Sarv. Kaebeõigusest avalike huvide kaitseks, page 41.

permitted by law as the exception. Such a complaint can now be submitted only by non-governmental environmental organizations.

The Administrative Court has found that Emmaste Parish municipality did not have the right to appeal, but the municipality had a right to appeal on whether the offshore plan should have reflected the locations of the offshore cables and whether, due to its lack of coordination, the maritime plan was lawful. The Circuit Court held that, unlike the Planning Act in its earlier version, the new Planning Act does not allow making a popular appeals against a county plan. The Supreme Court Chamber also considers that applicants do not have the right to make a popular appeal in this case. In justifying its position, the Chamber noted that the maritime plan was initiated during the term of the old Planning Act, but was completed during the term of the new Planning Act. Plans initiated before the entry into force of the new version of the Planning Act will be processed in accordance with the requirements set out in the old version of the Planning Act.⁸⁹ If the former law provided for the contestation of the county plan in the form of a popular appeal (§ 26 section 1 of the former Planning Act), the current law does not provide this right.⁹⁰

Pursuant to § 44 section 1 of the Code of Civil Procedure a person may apply to court for other purposes, including for the protection of the right or public interest of another person, only in cases provided by law. So, it is possible to extend the right of appeal provided for in the Code of Administrative Court Procedure and to provide for the possibility of going to court even if his or her own rights and freedoms are not violated by a particular act or decision. There is no provision in the new Planning Act for a popular appeal in the planning procedure. In its judgments the Supreme Court stated that there are two different grounds for appeal, namely infringement of subjective rights and public appeal, but these different grounds and parts of the appeal must be delimited and distinguishable.⁹¹ Thus, the applicant must clearly state in the complaint what public interests are affected by the decision.

3.1.4 Appealing right of the environmental organizations

As has already been mentioned, individuals do not have the opportunity to make a popular appeal, but it is still available to the environmental organizations.

According to the opinion of Administrative Court, the non-profit organization (NGO) Hiiu Tuul has the right of appeal as an environmental organization (§ 30 section 2 and § 31 of the General Part of the Environmental Code Act⁹²). Although the NGO Hiiu Tuul has not been

⁸⁹ RKHKo 3-16-1472.

⁹⁰ RKHKo 3-16-1472.

⁹¹ RKHKo 3-3-1-29-10.

⁹² General Part of the Environmental Code Act. – RT I, 26.06.2018, 12.

active for a long time, the association has highlighted a number of activities aimed at informing the public about the dangers associated with wind farms. Focusing on one topic does not constitute an abuse of the right of appeal. Nor does the court see that the Hiiu Tuul NGO represents anyone's private or business interests.⁹³ The Circuit Court is on the same opinion.

Enefit Green (Nelja Energia) as the third party argued that the non-profit organization Hiiu Tuul was created specifically to challenge the maritime plan, and that it was therefore not an environmental organization within the meaning of § 30 section 2 of the General Part of the Environmental Code Act. It cannot be based solely on a formal criterion.⁹⁴

The Administrative Chamber of the Supreme Court agrees with the Administrative Court and the Circuit Court that the Hiiu Tuul NGO has the right of appeal to the non-governmental environmental organization. § 30 section 2 of the General Part of the Environmental Code Act stipulates that if an environmental organization appeals an administrative act or action, its interest shall be presumed or its rights shall be violated if the contested administrative act or action is related to the environmental objectives of the organization or its previous field of activities. Although the above rule gives rise to the right of an environmental organization to go to court, the provision also places restrictions on the environmental organization's right of appeal. In addition to the fact that the contested administrative act must be related to the environmental objectives or activities of the organization, it also follows from the logical conclusion that the basis of the environmental organization's complaint (§ 41 section 2 of the Code of Administrative Court Procedure) must relate to the above.

The Code of Administrative Court Procedure⁹⁵, what entered into force on 1 January 2012, provides for specificities in the right of appeal of environmental organizations to challenge decisions in environmental matters. The Code of Administrative Court Procedure, what was in force until 2012, did not provide for differences in the right of appeal in environmental matters. According to the The Code of Administrative Court Procedure memorandum, the introduction of specific rules on environmental organizations' right of appeal in The Code of Administrative Court Procedure was due to the need to transpose into national law the Aarhus Convention. Pursuant to the Article 9 (2) of the Aarhus Convention, an interested public member having a legitimate interest or, where that condition is provided for in the administrative procedure of the Contracting Party, has the right to apply to the courts to challenge the substantive or procedural legality of decisions in environmental matters. Non-governmental organizations promoting environmental protection and meeting any requirements under national law shall

⁹³ RKHKo 3-16-1472.

⁹⁴ RKHKo 3-16-1472.

⁹⁵ Code of Administrative Court Procedure. – RT I, 25.10.2012, 10.

also be deemed to have an interest in the general public, in accordance with Article 2 (5) of the Convention.

According to the General Part of the Environmental Code Act § 30 section 2 an environmental organization is presumed to have right to appeal if the contested administrative act or action relates to its environmental objectives or to its former environmental activities. According to traditional legal thinking, the public interest is the home country of the country of interest, and concentration in organizations does not give people better legal opportunities to defend their interests.⁹⁶ Due to the broader standing of environmental organizations, it is important to identify which associations of persons can be considered as environmental organizations.⁹⁷ Therefore, in order to avoid abuse of the right of appeal and to create too many environmental organizations, the law must lay down certain criteria that the environmental organization must meet. The Aarhus Convention and the Directives do not give a definitive definition, in particular they all contain the same definition: non-governmental organizations promoting environmental protection and meeting the requirements of national law are considered to be of interest to the general public.⁹⁸

According to the General Part of the Environmental Code Act § 31 section 1 non-governmental environmental organisation is:

- 1) a non-profit association and foundation whose purpose under its articles of association is environmental protection and who promotes environmental protection by its activities; The promotion of environmental protection is the most essential criterion of an environmental organization, which should ensure that only those organizations which are genuinely willing and able to defend their environmental interests are recognized as environmental organizations. Nor can an environmental organization have economic goals that compete with environmental protection.
- 2) an association that is not a legal person, but that promotes environmental protection and represents the opinions of a significant portion of the local community on the basis of a written agreement between its members. Accepted forms of an environmental organization include a non-profit association, a foundation and a non-legal entity formed by a written agreement, such as a partnership. Recognizing the form of a partnership allows local people to express their views jointly on environmental issues, and it is very easy to form - a partnership of only two persons is sufficient.⁹⁹

⁹⁶ H. Veinla. Keskkonnaõigus, page 197.

⁹⁷ H. Veinla. Keskkonnaõigus, page 198.

⁹⁸ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters. – 25.06.1998, article 2 section 5.

⁹⁹ H. Veinla. Keskkonnaõigus, page 198.

According to the General Part of the Environmental Code Act § 31 section 2 for the purposes of subsection 1 of this section, the promotion of environmental protection also means the protection of the elements of the environment for the purpose of ensuring human health and well-being as well as the research and introduction of the nature and natural cultural heritage. The district court analyzed the appealing right in case 3-16-1354 and considered it plausible that the NGO represented the interests of the local population, but doubted whether the NGO was actually engaged in promoting environmental protection, and saw the NGO as protecting the personal interests of its members or third parties.¹⁰⁰

According to section 3 of the § 31 of the General Part of the Environmental Code Act section upon assessment of the promotion of environmental protection, the association's ability to attain its goals set out in the articles of association must be considered, taking into account the activities of the association to date or, upon absence thereof, its organisation structure, number of members and the requirements of becoming a member as laid down in the articles of association.

In Estonian legislation all kind of NGOs are regulated by the Non-profit Associations Act¹⁰¹. According to the § section 1 of this Act any natural or legal person who complies with the requirements of the articles of association of a non-profit association may be a member of a non-profit association. A non-profit association must have at least two members, unless a larger number of members is prescribed by law or the articles of association. Other requirements as the duration of activity is not provided by the law. It is necessary to set up the requirements for environmental NGOs in Estonia in order to avoid disputes as to whether a particular NGO has the appealing right and whether it can be considered as an NGO at all or a specially created association. For such a big projects this is more important because if the NGO does not meet the requirements, the court will not have to take their opinion into account and thus the process will go much faster. Special requirements should be laid down for such large projects and for projects of public interest. For example, the law should state that complaints can be made by NGOs that have at least 10 members and have been active for at least 5 years. This provision would allow the immediate elimination of specially created NGOs whose sole purpose is to prevent the project and slow down the construction process.

In Germany NGO organisations usually participate in almost all environmental law-making procedures, and in the public hearings for all major permitting procedures for infrastructure

¹⁰⁰ TlnRnKo 3-16-1354.

¹⁰¹ Non-profit Associations Act. – RT I, 19.03.2019, 24.

(such as airports, energy grids, and railways). All major projects that significantly affect or are likely to affect the environment are challenged in court.¹⁰²

3.1.5 Changing national legislation as a solution

In this case, the applicants had no right to complain in order to protect their subjective rights. However, the court still found that environmental organizations were entitled to appeal.

Code of Administrative Court Procedure underwent a codification: new law do not actually allow a person living in the southern part of Estonia to submit an application against a project in the northern part of the country. In this case, one person who complained was registered in Otepää (located in southern part of Estonia). For submitting an application you must have a special interest. It is unclear, how the person, who live in another part of country can directly be affected by construction of the wind power. The court accepted the procedure, so by this way court broke the procedural rules. Consequently, it is a case-law which now allows to break the procedural rules. Misleading case-law makes this process more complicated and burdensome. In this case court had to dismiss their application, taking into consideration that this person has no special interest.

According to the Code of Administrative Court Procedure, if one individual through whose property goes a cable, registers an appeal to an administrative court, he asks for all this procedure to be canceled. In Estonia, there is a tendency to make a massive appeals, but the practice shows that the administrative courts take all sorts of things in the proceedings.¹⁰³ It seems to be disproportionate. It is not reasonable to deny the whole project for one cable, so the solution would be to limit or refuse individual appeals to an administrative court for such big projects. This will significantly reduce a workload of national courts.

It is also likely that the fact that anyone can make an appeal (if his subjective rights have been violated) will increase the administrative burden. This is due to the fact that absolutely everyone has access to planning information. Even a person who is not territorially affected by the plan can appeal. The administrative burden can be significantly reduced by narrowing and filtering the information, so that it is only accessible to those who are territorially concerned. This could be done, for example, by creating a new web platform where individuals can enter with their ID card and then be able to see where the person resides territorially. When person enters the portal, only the plans initiated in the same county would be visible. But, of course,

¹⁰² A. Fuder, M. Elspaß, M. Wilcock. Environmental law and practice in Germany: overview. – [https://uk.practicallaw.thomsonreuters.com/4-503-0486?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://uk.practicallaw.thomsonreuters.com/4-503-0486?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1) (02.04.2020).

¹⁰³ Nelja Energia AS. Interview with Nelja Energia (09.09.2017).

this is a highly contentious issue, as it could significantly restrict individuals' right to environmental information.

Aarhus Convention has led to the adoption of legislation on access to environmental information in all states that have adhered to the Convention, resulting in a remarkable change in the legislative position over the last 15 years.¹⁰⁴ Aarhus convention Article 4 (1) states: In response to a request for environmental information, make such information available to the public. The Convention's procedural rights entrench the right of access to environmental information within states that are parties to the Convention, and have had a significant influence on how states conceptualize the right in their respective environmental information regimes.¹⁰⁵ Convention and its progressive implementation in Europe is acting as a forerunner and paving the way for a more general openness on the part of administrations.¹⁰⁶ In a broad sense, the right to environmental information is the right to information that is made available to the public for general use, whether made available voluntarily or in compliance with legal obligations.¹⁰⁷ Not all information can and should be disclosed. For example, some information is subject to certain restrictions on access. However, various laws contain lists that must be made public. For example, the public must first be informed of the potential environmental risks. The right to request environmental information means the right to request access to environmental information.¹⁰⁸

For instance, in Germany citizens, business, NGOs and other initiatives had the opportunity to participate in the planning procedure at an early stage by indicating problems and discuss solutions on an online-platform and in workshops in a way that goes beyond what would have been necessary to meet the formal requirements. An example is the participation process in the development of the noise action plan¹⁰⁹ in Berlin. As an addition to mandatory forms of participation, voluntary, informal participation of the public is also becoming increasingly important as part of a good administrative governance.¹¹⁰ So, the same practice could be applied in Estonia. It would significantly reduce the workload of administrative bodies on a stage of reviewing and answering the compliances.

¹⁰⁴ L. Krämer. *Transnational Access to Environmental Information*. Cambridge University Press 2012, page 98.

¹⁰⁵ S. Whittaker. *The Right of Access to Environmental Information and Legal Transplant Theory: Lessons from London and Beijing*, *Transnational Environmental Law*. Cambridge University Press 2017, page 521.

¹⁰⁶ L. Krämer. *Transnational Access to Environmental Information*, page 98.

¹⁰⁷ H. Veinla. *Keskkonnaõigus*, page 203.

¹⁰⁸ H. Veinla. *Keskkonnaõigus*, page 201.

¹⁰⁹ Ministerium für Verkehr Baden-Württemberg. *Lärmaktionspläne*. – <https://vm.baden-wuerttemberg.de/de/mensch-umwelt/laermschutz/laermkarten-und-aktionsplaene/laermaktionsplaene/> (26.03.2020).

¹¹⁰ Umwelt Bundesamt. *A guide to environmental administration in Germany 2019*, page 74. – https://www.umweltbundesamt.de/sites/default/files/medien/376/publikationen/190722_uba_lf_environadmin_21x21_bf.pdf (18.03.2020).

According to the author, the right to environmental information may in some cases be replaced by the right to request environmental information. Asking for information means submitting an application to the competent body. You do not have to justify your interest.¹¹¹ For example, you should specify where you live when making a query.

Always must be considered what is more important, either the disclosure of plans and the unrestricted right of individuals to environmental information or the reduction of administrative burden. In the author's opinion, solving the second problem is much more important, because we must always try to get rid of bureaucracy.

The law also does not indicate in what time frame the administrative body decides whether to initiate proceedings or not. Generally the rule is that the decision has to be made within a reasonable time. The law must contain a specific time, for instance one month. It would be enough time for the court to get acquainted with all the circumstances and facts, consider them and make the right decision.

3.2 EIA and SEA as a circumstances impeding Hiiumaa Offshore Wind Farm construction process

3.2.1 EIA and SEA analysis in the Supreme Court decision

Another major disagreement between the parties in this case was whether the EIA was sufficient to approve a maritime plan or whether further analysis of the project's impacts was needed.

The courts analyzed whether the marine plan is such an abstract planning document that it does not require a more detailed assessment of the effects of wind farm development than is currently the case in the SEA, and whether a more comprehensive assessment can be postponed to later stages of wind farm development.¹¹²

According to the case-law of the Supreme Court, the unlawfulness of the approval of an EIA report can only be established if the approval of the report is vitiated by procedural defects or if the approved report is manifestly incomplete so that it cannot fulfill its purpose. However, the court found that the administrative procedure itself is of decisive importance for the correct resolution of environmental issues and in most cases, it is not possible to make a convincing decision whether, despite the shortcomings in the administrative procedure, the resulting administrative act is substantively lawful.¹¹³

¹¹¹ H. Veinla. Keskkonnaõigus, page 201.

¹¹² RKHKo 3-16-1472.

¹¹³ RKHKo 3-3-1-86-06.

The Administrative Court was on the opinion that the environmental impacts have been assessed and the maritime planning was therefore legitimate. On the opinion of the Administrative Court county planning is a strategic document whose purpose is to determine the principles and trends of the development of the planning area. This means that the number, size, and location of the wind turbines, as well as the location of the cables required for the operation of the wind turbines, are not finally decided in the marine plan. The abstractivity of this document does not mean that it is unlawful. Additional studies mentioned in the SEA report should also be carried out, eg Natura assessment, studies on bird migration in wind farm areas, etc. Thus, wind farms can be built only when it is known exactly where, how many and for what parameters wind turbines are being built, and on this basis, the environmental impacts have been assessed.¹¹⁴

By its judgment, the Tallinn Circuit Court dismissed the appeals and upheld the judgment of the Tallinn Administrative Court.

The Administrative Chamber of the Supreme Court disagreed with the courts of the previous instance and canceled the maritime spatial plan. In its reasoning, the Supreme Court set out the following arguments. The purpose of the SEA is to identify and consider the environmental impact at the earliest stages of the decision-making process when the conceptual alternatives to the proposed activity are still open for decision. The impact should already be taken into account when establishing a "framework" for future projects with significant environmental impacts when making strategic choices.¹¹⁵

The SEA is conducted in parallel with the planning process and allows ongoing information to be taken into account when developing a planning solution (§ 43 section 1 of the Environmental Impact Assessment and Environmental Management System Act¹¹⁶). Thus, the SEA should play an active role in the development of the planning solution, and not be limited to assessing the impact of the solution developed during the planning process, ex-post adjustments and proposing mitigation measures.¹¹⁷

The Supreme Court also does not agree that the EIA can replace the SEA or that the impacts that are the responsibility of the SEA are not to be assessed within the SEA. The EIA and the SEA have different methods and objectives. While EIAs are generally centered on how to perform specific development activities, the goal of the SEA is to influence the choice of development alternatives at an early stage in the decision-making process, when it is still

¹¹⁴ RKHKo 3-16-1472.

¹¹⁵ RKHKo 3-16-1472.

¹¹⁶ Environmental Impact Assessment and Environmental Management System Act. – RT I, 13.03.2014.

¹¹⁷ RKHKo 3-16-1472.

possible to analyze different alternatives and thereby influence strategic choices.¹¹⁸ Therefore, the conclusions drawn during the EIA cannot be used in the context of the SEA and *vice versa*. The Chamber of the Supreme Court also emphasizes that within the framework of the SEA, the impact must not be underestimated and the tasks of the SEA must not be carried out with the argument that the parameters of development activities are not known with certainty. Despite the high level of generalization of county planning, the Act prescribes the obligation of the SEA in its preparation (§ 7 section 6 of the Planning Act, § 31 section 1 of the Environmental Impact Assessment and Environmental Management System Act). It is not justified that the more detailed impact assessment was hampered by uncertainty regarding the developers' further intentions in implementing the plan.¹¹⁹ This outline drawing of the land-based land use plan indicates the approximate locations of the proposed power lines, including the land ends of the submarine cables. Although the Explanatory Memorandum to the disputed marine plan confirms that land connections were being analyzed, the cable corridors and the impact on land were not addressed.¹²⁰ It is incomprehensible why the impact on land has not been analyzed as it is extremely important in this case. In the author's view, there is no direct link between terrestrial and maritime planning, but if it is already clear that there is an impact on land, it needs to be analyzed. In that regard, the Supreme Court has said that the effects of a land-based marine plan are subject to the control of the marine plan, since the seaplane settler must be convinced that the connection of offshore cables from wind farms to the land is in principle possible.¹²¹

3.2.1.1 SEA report content

In the author's view, another important issue, which must be covered in a separate chapter, is the content of the SEA, in order for the SEA to be appropriate and as accurate as possible. The content of the SEA report has been the subject of numerous controversies in case law. In most cases, the criticism is that they are inadequate.¹²²

The Supreme Court has stated in its ruling that the SEA report must contain "the information reasonably required, taking into account the available knowledge and assessment methods, the content and the level of detail of the plan or program, the decision-making stage and the extent to which certain issues can be more accurately assessed at different decision-making levels".¹²³

¹¹⁸ C671/16, Inter-Environnement Bruxelles, Judgment of the Court (Second Chamber) of 07.07.2018, page 63.

¹¹⁹ RKHKo 3-16-1472.

¹²⁰ RKHKo 3-16-1472.

¹²¹ RKHKo 3-16-1472.

¹²² RKHKo, 3-3-1-21-11.

¹²³ Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment. – L 197/30, 21.07.2001, article 5 section 2.

The reference to "existing knowledge and assessment methods" does not imply that the research may be limited to what is already known and what has been done in the past, but refers to scientific data reasonably available at the time of the evaluation, including new research. Otherwise, the objective of the Directive on the assessment of the effects of certain plans and programmes on the environment¹²⁴ of ensuring a high level of environmental protection would not be achieved. For the purposes of the above provision, information includes, for example, information on the proposed activity and the environment affected, on parallel activities being planned and planned in the same area, etc.¹²⁵

However, what is meant by "reasonably required information" has not been clarified. In one of its rulings, the Supreme Court has stated that the planning process must gather information on the likelihood and magnitude of both positive and negative influences, otherwise the administrative body will not have sufficient information to make a legitimate discretionary decision.¹²⁶

One of the most important tasks of strategic environmental assessment at a higher strategic decision-making level is the identification of the combined impact of different activities and other pressures on the state of the environment. This requires a comprehensive overview of what other activities affecting or affecting the planning area are already underway. The requirement for a cumulative impact assessment covers different types of plans and projects, including those that have already been approved but not yet completed and for which a specific application has been made but not yet authorized. Once the best alternative has been selected, taking into account environmental considerations as well as other relevant arguments, it can be further refined according to new knowledge and supplemented by measures to reduce environmental risks.¹²⁷

The first step in the strategic assessment of the environmental impact of spatial planning over a wide area could be an inventory of the existing situation: what is the environmental status of the planning area and what are the important environmental objectives to be considered when planning activities in the area. The information collected will assist in establishing initial alternatives to development plans. Among the alternatives, the so-called "zero alternatives" must also be assessed in the context of the strategic environmental assessment, ie what will happen in the environment if the site is maintained or continues to function.¹²⁸

¹²⁴ Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment. – L 197/30, 21.07.2001.

¹²⁵ RKHKo 3-16-1472.

¹²⁶ RKHKo 3-3-1-54-03.

¹²⁷ P. Kuusk. Planeerimine ja planeeringute keskkonnamõju hindamine: mida uut tõi Riigikohtu lahend Hiiu mereplaneeringu kohtuasjas? – *Juridica* 2019, nr 5, page 337.

¹²⁸ P. Kuusk. Planeerimine ja planeeringute keskkonnamõju hindamine: mida uut tõi Riigikohtu lahend Hiiu mereplaneeringu kohtuasjas?, page 337.

It is understandable that it is impossible to set one SEA content criteria because each plan is different and each plan produces different effects. Perhaps this is rather a matter of discretion and the administrative authorities here have a duty to consider every time what information is needed in a particular case. Due to the wide variety of plans and programs being evaluated, the evaluation methodology cannot be quite uniform.

3.2.2 EIA and SEA regulation in the national legislation

One of the author's hypotheses was that since the EIA was properly conducted to obtain environmental permits, re-doing the SEA is not as mandatory and increases the administrative burden. However, in order to determine whether one can be replaced by another, one must first clarify what the purpose and nature of these two assessments are.

3.2.2.1 EIA (Environmental Impact Assessment)

Environmental impact assessments are an established international and domestic legal technique for integrating environmental considerations into socio-economic development and decision-making process.¹²⁹ Important moment in issuing permits for this project also was getting an EIA. The relevant national acts are complex but the impact assessment is mandatory if the plan will result in projects, which have a significant environmental impact.

The principal executive authority in the field of environmental protection is the Environmental Board. One of the areas of competence of the Board is environmental impact assessment. According to respective laws (Environmental Impact Assessment and Environmental Management System Act¹³⁰ and Planning Act¹³¹) in cases of the building of wind farms on waterbody environmental impact assessment should be always initiated.

The purpose of the EIA was to clarify whether and under what conditions the activities proposed by the developer can be carried out and what measures can be taken to mitigate significant negative environmental effects.¹³² According to the Environmental Impact Assessment and Environmental Management System Act¹³³ § 3¹ section 1 the purpose of environmental impact assessment is to give to the issuer of the development consent information on the significant environmental impact of the proposed activity and its reasonable alternatives and regarding the choice of the most suitable solution for the proposed activity,

¹²⁹ P. Sands, J. Peel, A. Fabra, R. MacKenzie. Principles of International Environmental Law. Cambridge University Press 2018, page 657.

¹³⁰ Environmental Impact Assessment and Environmental Management System Act. – RT I 2005, 15, 87.

¹³¹ Planning Act. – RT I, 26.02.2015, 3.

¹³² Skepast&Puhkim OÜ. Loode-eeesti rannikumere tuulepargi keskkonnamõju hindamise aruanne. 08.02.2017, version 6, page 13.

¹³³ Environmental Impact Assessment and Environmental Management System Act. – RT I, 22.02.2019, 15.

which makes it possible to prevent or minimise adverse impact on the environment and to promote sustainable development. Upon assessment of environmental impact, the following is identified, described and assessed: the direct and indirect significant environmental impact of the proposed activity on the environmental elements such as earth, soil, water, ambient air, climate, landscape and natural diversity, on human health, welfare and property, on cultural heritage, protected natural objects etc.

EIA procedure is a very time consuming procedure, but EIA is mandatory in order to obtain a license for this project. According to the Environmental Impact Assessment and Environmental Management System Act¹³⁴ § 3 section 1 point 1 environmental impact is assessed when applying for development consent or for the amendment of development consent whereby the proposed activity which is the reason for applying for the development consent or for the amendment of the development consent potentially results in significant environmental impact. It means that in case of significant environmental impact, the environmental impact must always be assessed and the EIA procedure performed. The legislation also stipulates what exactly is an activity with significant environmental impact. According to section 5 of the same article an activity with significant environmental impact is the installation of wind farms in water bodies. For example in Germany an EIA procedure must be always carried out for large-scale projects. Projects requiring an EIA include power stations.¹³⁵

The Environmental Impact Assessment and Environmental Management System Act § 11 section 6 stipulates that the EIA shall not be initiated if it becomes evident that the environmental impact of the proposed activity has already been adequately assessed in the course of a SEA or an EIA and the decision-maker has sufficient information for granting the development consent. The EIAs may be partially or wholly omitted if the SEA or an earlier EIA is considered to be sufficient by the issuer of the authorization. EIA is essentially a procedure within the permit procedure: the permit proceedings are suspended for the duration of the EIA.¹³⁶

The result of carrying out an EIA procedure is the EIA report. The EIA report is a document that addresses the issues that the program foresees, but also collects other relevant information that will be collected when the report is produced. The content of the report is a set of information and expert opinion on the nature of the environment affected and the impact of the proposed activity on the environment. Once the report has been completed, it will be made public at the public display and a public hearing will be held which will make it possible to

¹³⁴ Environmental Impact Assessment and Environmental Management System Act. – RT I, 22.02.2019, 15.

¹³⁵ A. Fuder, M. Elspaß, M. Wilcock. Environmental law and practice in Germany: overview.

¹³⁶ Estonia. Transmission and Electricity Production.

make suggestions and comment on the content of the report. If the report complies with the requirements, the decision-maker will make the decision to declare the report compliant. The decision will then be taken by the decision-maker on the environmental impact assessment procedure.¹³⁷

The EIA procedure is by its nature an open procedure (Environmental Impact Assessment and Environmental Management System Act § 1 section 2). Public involvement in both the licensing process and the environmental impact assessment is central. Permit procedures require public participation primarily in the EIA phase, which technically is part of the permitting procedure but effectively consists in a procedure within a procedure, i.e. decision to initiate EIA is taken after accepting the permit application and if an EIA procedure is initiated then the permit procedure is suspended until EIA is concluded.¹³⁸ Once the administrative authority has initiated the EIA, both the developer and the general public will be notified. The difficulty of providing information is that virtually any person can be a party to proceedings under the national legislation. The notification process is multi-step. It is first informed of the initiation of proceedings and then of the procedural steps open to the parties.¹³⁹ There are a number of objectives for involving the public. If the decision takes into account different interests, it reduces the possibility of a more recent challenge to the decision. On the other hand, however, it can significantly slow down the entire authorization process.

The Supreme Court has held that the decision to initiate an environmental impact is not to be considered as an administrative act under appeal but as a single procedural act in the permit application process.¹⁴⁰ The person entitled to appeal must be afforded a broader legal opportunity to challenge acts which are the subject of such proceedings separately from the final administrative act. In deciding on the admissibility of a challenge to a procedural act, regard must first be had to the importance of the procedural act and the significance of the alleged infringement in meeting the essential requirements of the procedure.¹⁴¹

Of course, it is possible to challenge the final administrative act, which is the granting or refusal of an environmental permit as a result of conducting an EIA. An administrative act may be challenged pursuant to the general procedure provided for in the Code of Administrative Court Procedure. According to the ruling of the Court of Justice, the members of the "public concerned" have the right to challenge the decision not to initiate an EIA (EK C570/13).¹⁴²

¹³⁷ H. Veinla. Keskkonnaõigus, page 156.

¹³⁸ Estonia. Transmission and Electricity Production.

¹³⁹ H. Veinla. Keskkonnaõigus, page 157.

¹⁴⁰ RKHKo 3-3-1-86-06.

¹⁴¹ Ibid.

¹⁴² T. Pöder. Keskkonnamõju hindamine. Käsiraamat. 2017, page 106. –

https://www.envir.ee/sites/default/files/poder_kmh_kasiraamat.pdf (18.01.2020).

In Germany the decision of initiating or not initiating an EIA procedure shall be made accessible to the public. If no environmental impact assessment is to be made, this shall be announced. The determination cannot be contested in its own right.¹⁴³ Stakeholders may contest the results of an EIA. Environmental NGOs can now contest the results and methodology of EIAs in court. The conclusions drawn from the EIA report by the authority can be challenged by the affected parties only together with the final approval.¹⁴⁴

3.2.2.2 SEA (Strategic environmental assessment)

Unlike an Environmental Impact Assessment (EIA), which focuses on a specific project and its impacts, an SEA considers the interaction of possible development scenarios with other potential activities, for example in the affected region.¹⁴⁵ SEA is mandatory in the planning procedure. According to the Environmental Impact Assessment and Environmental Management System Act¹⁴⁶ § 33 section 1 article 2, the SEA is mandatory for the national, county or comprehensive plan. In addition strategic environmental assessment must be initiated if a strategic planning document is a detailed plan on the basis of which an activity specified in subsection 6 (1) of this Act is proposed (installation of wind farms in water bodies).

Strategic environmental assessment is assessment arranged with the participation of the public and the authorities concerned for the purpose of identifying the significant environmental impact arising from the implementation of a strategic planning document, identification of alternatives and finding measures minimising the adverse impact, the results of which are taken into account upon preparing the strategic planning document and on which a proper report is drawn up (§ 32 of the Environmental Impact Assessment and Environmental Management System Act). The central aim of the SEA process is to collect and analyze information on the environmental impacts of planning and to integrate environmental considerations into the planning process at the earliest possible stage.¹⁴⁷ The purpose of strategic environmental assessment according to the legislation is to contribute to the integration of environmental considerations into the preparation and adoption of strategic planning documents; provide for a high level of protection of the environment; promote sustainable development (§ 31¹ of the Environmental Impact Assessment and Environmental Management System Act).

The preparation, publication, and approval of the SEA program and the SEA report are central parts of the SEA procedure. The SEA program is a baseline exercise that describes what

¹⁴³ Gesetz über die Umweltverträglichkeitsprüfung – UVPG, 5.09.2001 (BGBl. I p. 2350), article 3 a.

¹⁴⁴ Getting the deal through. Environment, Germany 2019. –

<https://gettingthedealthrough.com/area/13/jurisdiction/11/environment-germany/> (20.03.2020).

¹⁴⁵ H. Veinla. Keskkonnaõigus, page 160.

¹⁴⁶ Environmental Impact Assessment and Environmental Management System Act. – RT I, 22.02.2019, 15.

¹⁴⁷ P. Sarv. Keskkonnamõju strateegilise hindamise tõhususest. – Juridica 2008, nr 10, page 688.

and how it will be evaluated and suggests possible alternatives to action (§ 36 of the Environmental Impact Assessment and Environmental Management System Act). The second important step is the SEA report. Pursuant to § 40 section 4 of the Environmental Impact Assessment and Environmental Management System Act, the report must, in addition to describing the impacts, evaluate alternatives to the detailed plan and propose the best alternative development scenario. Measures shall also be proposed, as appropriate, to prevent and mitigate any significant adverse environmental effects associated with the implementation of the plan. In addition to mentioned above, for the SEA report also applies the condition the Article 5 section 2 of the Directive on the assessment of the effects of certain plans and programmes on the environment.

Pursuant to § 33 section of the Environmental Impact Assessment and Environmental Management System Act and § 1 section 5 of the Planning Act, a strategic environmental assessment shall be carried out during the preparation of a planning document prior to its adoption. It follows from the foregoing that the SEA procedure is generally integrated into the planning process and is generally carried out in the framework of the planning process. If the plan envisages activities with significant environmental impacts, contesting the failure to initiate a strategic environmental assessment is permitted. As the administrative body, in this case, has no discretion as to the significance of the environmental impact or the need for a strategic environmental assessment, the failure to initiate a strategic environmental assessment is manifest and significant procedural mistake.

It is not clear from the Planning Act at which stage of the planning process the SEA should take place. SEA aims to integrate environmental considerations at an early stage in the decision-making process, when there is still a choice between different development scenarios.¹⁴⁸ The parallel SEA and planning procedure allows for sufficient data to be collected and speeds up the procedure. Only in this way can the SEA influence the decision-making process in essence, from defining the initial objectives of the plan to monitoring the implementation of decisions and monitoring the actual impacts, and in parallel processes allow for the exchange of information.¹⁴⁹

If the Environmental Board approves the SEA report, its results will be input into the planning. The results of the SEA must be reflected in the adopted planning solution (Planning Act § 8 section 9 and § 9 section 12). The results of the SEA and the approved monitoring

¹⁴⁸ P. Kuusk. Planeerimine ja planeeringute keskkonnamõju hindamine: mida uut tõi Riigikohtu lahend Hiiu mereplaneeringu kohtuasjas?, page 334.

¹⁴⁹ D. Geneletti. Reasons and options for integrating ecosystem services in strategic environmental assessment of spatial planning. – International Journal of Biodiversity Science, Ecosystem Services & Management 2011, volume 7, page 144.

measures shall be taken into account in the preparation of the planning document and opinions expressed by authorities and persons to the extent possible (§ 43 of the Environmental Impact Assessment and Environmental Management System Act). According to the § 9 section 12 of the Planning Act, if a strategic environmental assessment is to be carried out when drawing up a detailed plan, the results of the SEA must be taken into account in the preparation of the detailed plan. According to the § 43 of Environmental Impact Assessment and Environmental Management System Act the results of the strategic environmental assessment shall be taken into account in the preparation of the strategic planning document and according to § 66 section 2 of the Planning Act, the county planning authority shall confirm that the results of the strategic environmental assessment have been taken into account. Adopting a plan also means completing the planning phase. Therefore, a strategic environmental assessment must normally be carried out before the plan is adopted.

The report shall be made public and be open to suggestions and comments. After public consultation, the report shall be submitted to the organizer of the strategic planning document for the assessment of compliance. Existing Estonian legislation allows for the waiving of additional environmental impact assessment if the effects have been sufficiently assessed in a previous strategic environmental assessment.¹⁵⁰ Appealing rights of the individuals in SEA process are the same as for the EIA.

3.2.3 Changing national legislation as a solution

One of the author's views before the Supreme Court decision in this case appeared was that the conclusions drawn during the EIA can be used instead of SEA and *vice versa*. The Supreme Court has not endorsed these views and has ruled that EIA and SEA reports and their goals are very different in nature and cannot be replaced by one another. Of course, at first glance, it can be assumed that an EIA would be sufficient in this case and that an SEA is not mandatory at all, as the main impacts have already been identified within the EIA. But on closer inspection, and after reading everything about the Supreme Court's views, the author agrees with the Supreme Court that in the case of serious issues such as wind farms, the environmental impact cannot be underestimated. Similarly, EIA and SEA assessment procedures have different requirements and objectives. It is understandable that the environmental impact of establishing a wind farm is very high and it is essential that the construction does not result in environmental hazards or damage to birds, the sea, the landscape, etc.

¹⁵⁰ H. Veinla. Keskkonnaõigus, page 163.

As can be seen from the Environmental Impact Assessment and Environmental Management System Act, the law regulates precisely and properly the procedural aspects of the EIA and SEA - its mandatory nature, initiation, notification, contestation, etc. However, the law does not regulate as much of the substantive aspects as the content of the assessment and the content requirements. The requirements of the EIA report shall be established by a regulation of the minister responsible for the area (§ 20 section 22). In the case of the SEA, the substantive requirements of the report are already widely laid down in the Environmental Impact Assessment and Environmental Management System Act. It is understood that the SEA and EIA procedures are different and it is impossible to precisely define the common requirements in law. So the responsible authorities must assess each time whether the content of the EIA and SEA is appropriate for the particular project or not.

Sections 3 and 4 of the § 40 of the Environmental Impact Assessment and Environmental Management System Act lays down exactly what must be taken into account when drawing up the SEA report. This list is quite broad and spacious, with sufficient accuracy. However, this has still caused much controversy in this case. This is probably because there are no substantive requirements. In simpler terms, the law may contain a provision on "the content of the strategic environmental assessment must include all areas directly or indirectly affected by the plan". Of course, the word "affected" can be interpreted differently. For example, for this project, it could be argued that land is not directly affected by this marine plan. However, the marine plan changes the land territory precisely because the wind farm for which the marine plan is being made cannot exist independently, that is, without a connection to the mainland via the power grid. These precise requirements are not laid down in the environmental impact assessment (Environmental Impact Assessment and Environmental Management System Act § 20). According to the § 40 section 3 of Environmental Impact Assessment and Environmental Management System Act, generally recognized knowledge and assessment methodologies and the results of previous relevant assessments shall be taken into account in the environmental impact assessment. It is not specific and it can be configured just like for the SEA.

Purpose of strategic environmental assessment according to the Environmental Impact Assessment and Environmental Management System Act § 3¹ and 31¹ "the purpose of EIA and SEA is to give to the issuer of the development consent information on the significant environmental impact of the proposed activity and its reasonable alternatives and to promote sustainable development." It is not understandable what means "promote sustainable development". It is very vague and should be written, for example, to "minimize environmental risks, minimize the use of toxic substances etc".

The author is of the opinion that when the SEA must take place must be firmly stated in the law, as at present it is understandable only when interpreting the law.

The strategic environmental assessment of the plan was limited to an overall assessment based mainly on earlier studies. The planner considered that a more accurate assessment could be carried out later in the environmental impact assessment in permit procedures when the exact location, size, technology of wind farms is clear. In addition, a number of studies were left for the future, which did not depend on the parameters of future wind farms. The impact on Natura sites was also not assessed in the planning procedure. Of course, since each project is individual in nature, it is impossible to lay down strict requirements in the law. Thus, in this particular situation, it is impossible to reduce the administrative burden by narrowing the law. The administrative bodies still have a heavy administrative burden here and must assess each time whether or not there is a proper environmental impact assessment.

The fact that the decision to initiate or not to initiate an EIA and SEA can be challenged before the final act reduces the administrative burden in Estonia. In Germany, for example, this is not possible. Challenging the decision to initiate the EIA or SEA together with the final act will prevent the realization of the project. For example in case when EIA or SEA was necessary, but this was not carried out and the planning was established, it will be necessary to stop the realization of the project until the proper assessment is carried out. If during the assessment it is determined that the project is not suitable, the whole project should be canceled. Challenging the decision without a final act provides an opportunity to carry out a proper environmental impact assessment immediately. If somebody appeals to the assessment, the new assessment will be done immediately and if the evaluation reveals that the project is not suitable, the developer will not spend his time and resources on the project.

3.3 Formation of nature reserves as a circumstance impeding the construction of Hiiumaa Offshore Wind farm

3.3.1 Analysis of the formation of nature reserves in the Supreme Court decision

The third very important topic of this project was the lack of evaluation of the Natura area. The court found that the Natura area should have been properly evaluated under the SEA, but it has not. The nature of Estonia is unique and the government is constantly looking for opportunities to preserve it in its original condition. One of the possible solutions is the formation of natural reserves. The decision to form such a nature reserve became a serious obstacle for the realization of this project.

One group of people was formed against the Hiiumaa Offshore Wind Farm project. The intention of this group was not to put any wind turbine in the sea¹⁵¹, which is obviously too radical decision. It is believed that nature is more important than wind power construction, there are certain species of animals that have to be protected. In case of this group, it became clear that there were no birds in this area. The criterion is 1% or 20,000 birds. As a result, officials began to look for solutions: how they would increase this area, so that 20,000 birds would be full. The applicant also alleged that the respondent had neither addressed the issue of Natura 2000 nor expressed any views on it. Wind energy production areas are planned for, among other things, Apollo shallow, which is currently under protection. The plan does not include any compelling social or economic justification for causing adverse effects on the natural environment.¹⁵²

The Administrative Court was of the opinion that the establishment of a maritime plan should not, in particular, endanger the integrity of the Natura area or the conservation objective. The possibility of any adverse effect does not preclude the establishment of a plan. It is precisely in line with the objective of protecting the natural environment and Natura 2000 areas that the impact on Natura 2000 sites is assessed in the next steps with complete information.¹⁵³ It is therefore not a ground for cancellation of a plan. The Marine Plan and the SEA report pay due attention to the possible protection of the Apollo shallow and, as a protected area, are not yet subject to restrictions or prohibitions under the Nature Conservation Act¹⁵⁴.¹⁵⁵ It is also questionable whether Apollo's protection is in itself justified or not. The person has the right to submit a proposal, but not the substantive subjective right when submitting to the protection of nature.¹⁵⁶ It is, therefore, necessary to analyze carefully whether the establishment of a protected area is fair and necessary in the present case.

The County Court upheld the position of the Administrative Court in this matter.¹⁵⁷ The Supreme Court is of the opinion that the cumulative effects on Natura sites have been properly assessed. The bases for further evaluation and requirements for further studies by areas of wind power generation have been fixed. Mitigation measures are foreseen. The Apollo shallow protection procedure began after the establishment of the marine area planning. However, according to the marine plan, wind farms can be established in the Apollo and Vinkov shallows only on the condition that the areas are not protected and their importance as birds of international importance is not clear.¹⁵⁸

¹⁵¹ Nelja Energia AS. Interview with Nelja Energia (09.09.2017).

¹⁵² Nelja Energia AS. Interview with Nelja Energia.

¹⁵³ Nelja Energia AS. Interview with Nelja Energia.

¹⁵⁴ Nature Conservation Act. – RT I, 16.05.2013, 16.

¹⁵⁵ RKHKo 3-16-1472.

¹⁵⁶ RKHKo 3-3-1-68-11.

¹⁵⁷ RKHKo 3-16-1472.

¹⁵⁸ RKHKo 3-16-1472.

Article 6 (3) of Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora¹⁵⁹ lays down, firstly, the obligation to assess Natura sites and, secondly, the admissibility of the permit (the provision also extends to bird habitats). They are as follows: „Any plan or project which is not directly related to or directly necessary for the management of the area but which is likely to have a significant effect on the area, alone or in combination with other plans or projects, must be properly assessed goals. The competent national authorities shall approve the plan or project on the basis of the conclusions of the assessment of the plan or project's effects and subject to the provisions of paragraph 4 only after it has determined that it does not adversely affect the integrity of the area concerned.“¹⁶⁰

It follows from the foregoing that the *ex-ante* evaluation of Natura has shown that the proposed activities may have an impact on the Natura 2000 network area, both at sea and on land. An assessment of Natura area must always be initiated and carried out when there is a potential or threat of significant impact on the area, ie it cannot be excluded on the basis of objective circumstances that the plan or project will have a significant impact on the area.¹⁶¹

As a next step, the author considers it necessary to address the shallow protection of Apollo and Vinkov. The location of Apollo and Vinkov shallows is presented in the Appendix E.

3.3.1.1 The Protection of the Apollo shallow

Siim Kiisler, former Minister of the Environment, proposed at the Government session the creation of the Apollo marine shallow Nature Reserve and it was approved by the Government. The Establishment and protection of the Apollo Shallow Nature Reserve regulation was published on 05.02.2019¹⁶². The regulation provides the protection of the shallow sea for the protection of reefs, sandbanks and birds. In a report on the environmental impact assessment of the offshore wind farm in Northwest Estonia, the bird expert, advised not to build wind turbines in the Apollo area and suggested moving the Apollo development area south, which was also suitable for the developer.¹⁶³

Apollo Marine shallow Nature Reserve, located near Hiiumaa, will be created to protect marine and migratory bird habitats valued in Europe. The nature reserve also covers the territory of Noarootsi rural municipality. The protected area covers 5216.8 hectares, all with an average depth of 10-20 meters. The proposal to protect the area was made in 2011 by the Baltic Environmental Forum of the Ministry of Environment. Following the creation of the reserve,

¹⁵⁹ Council Directive 92/43/EEC of 21 May 1992, on the conservation of natural habitats and of wild fauna and flora. – No L 206/7.

¹⁶⁰ Ibid.

¹⁶¹ C323/17, People Over Wind ja Sweetman, Judgment of the Court (Seventh Chamber) of 12.04.2018.

¹⁶² Apollo meremadaliku looduskaitseala moodustamine ja kaitse-eeskiri. – RT I, 05.02.2019, 11.

¹⁶³ Ibid.

the European Commission is proposed to include Apollo as a nature and bird area in the Natura network.¹⁶⁴

According to the regulation¹⁶⁵, people are allowed to stay in the protected area, to ride on floating craft, to organize public events and to fish as an economic activity. Economic activities, the use of natural resources and the erection of new buildings shall be prohibited, except for the construction and maintenance of buildings necessary for navigation at sea.¹⁶⁶

3.3.1.2 The protection of the Vinkov shallow

As for the Vinkov shallow, the Ministry of the Environment will not initiate the procedure for the protection of Vinkov shallow waters near Hiiumaa, because the expert does not consider it reasonable to establish a protected area.¹⁶⁷ Siim Kiisler, said that in addition to prerequisites for the protection of the area, should include an assessment of the expediency of protection.¹⁶⁸

The NGO Hiiu Tuul, which opposes the construction of wind farms, proposed the protection of Vinkov shallow sea, located about 15 kilometers northwest of the Hiiumaa coast, because the territory of Vinkov shallow is part of the planned offshore wind farm in Northwest Estonia. In his proposal, Hiiu Tuul highlighted the need to preserve the integrity of the sea bottom and to protect its habitats, marine biodiversity and species.¹⁶⁹

In his proposal, Hiiu Tuul had highlighted, among other things, the Vinkov shallow as international fame and a number of other endangered bird species in the Baltic Sea. In order to clarify this issue, an environmental agency commissioning an expert assessment of the protection of the shallow water commissioned a flight census of waterfowl stopping off the coast of Western Hiiumaa. The researchers found that enough waterfowl do not stop regularly in the Vinkov shallow to justify the area's national protection. However, there are many natural assets in the area, including the moose, which use the area as a migration stop, and these values must be taken into account when planning activities. An environmental impact assessment of the Northwest Estonia wind farm is underway, which should answer the question of whether and how development activities can be carried out in the area without significantly affecting the natural value.¹⁷⁰

¹⁶⁴ U. Lauri. Läänemaa lähetele luuakse Apollo meremadaliku kaitseala. – Lääne elu. 16.11.2016.

¹⁶⁵ Apollo meremadaliku looduskaitseala moodustamine ja kaitse-eeskiri.

¹⁶⁶ Ibid.

¹⁶⁷ Keskkonnaministeerium. Keskkonnaministeerium ei pea Vinkovi meremadaliku kaitse alla võtmist otstarbekaks. – <https://www.envir.ee/et/uudised/keskkonnaministeerium-ei-pea-vinkovi-meremadaliku-kaitse-alla-votmist-otstarbekaks> (11.12.2019).

¹⁶⁸ Tuleenergia Assotsiatsioon. Hiiu Tuul taotleb uuesti Vinkovi madala kaitse alla võtmist. – <http://www.tuleenergia.ee/2018/05/hiiu-tuul-taotleb-ueesti-vinkovi-madala-kaitse-alla-votmist/> (18.02.2020).

¹⁶⁹ BNS. Ministeerium keeldus Vinkovi meremadala kaitse alla võtmisest. – Lääne elu. 04.05.2018.

¹⁷⁰ Ibid.

Onge Talts, a member of the board of the non-profit organization Hiiu Tuul, told BNS on Friday that opponents of wind farms are not agreeing to refuse to create a protected area and will submit a new proposal for the protection of Vinkov's seafloor and its shallows.¹⁷¹

3.3.2 Formation of nature reserves in the Estonian legislation

Conservation and conservation at the European level are regulated by the Habitats Directive (92/43 / EEC)¹⁷². The aim of the Habitats Directive is to ensure the conservation of biodiversity in the territory of the Member States through the conservation of natural habitats and of wild fauna and flora.¹⁷³ The directive addresses the protection and restoration of endangered natural habitats and species as a shared objective of EU countries and the adoption of measures to promote the conservation of priority natural habitats and species of Community interest as a common task of all Member States. Conservation is not specific to sub-areas or countries but is based on the natural range of species and habitat types throughout Europe.¹⁷⁴

The main principals of the directive are:

- action is needed at Community level to conserve habitats and endangered species;
- contribute to the overall objective of sustainable development;
- Member States must designate protected areas and thus establish a European ecological network - Natura 2000.¹⁷⁵

The main criterion for the implementation of the directive is the achievement or maintenance of a favorable conservation status of habitats and species.

Only projects whose significant impact can reasonably be excluded beforehand may be exempted from initiating the Natura assessment.¹⁷⁶ According to Article 6 section 3 of the Habitats Directive, any plan or project which may have an impact on a Natura site and for which it is not certain that there is no significant effect on the conservation objective shall be assessed. Under the Article 6 section 3 of the Directive, only plans and projects for which there is no reasonable doubt as to the existence of negative effects may be authorized.¹⁷⁷ The assessment shall be conducted on the basis of the best and most recent scientific achievements

¹⁷¹ BNS. Ministeerium keeldus Vinkovi meremadala kaitse alla võtmisest.

¹⁷² Council Directive 92/43/EEC of 21 May 1992, on the conservation of natural habitats and of wild fauna and flora. – No L 206/7.

¹⁷³ H. Veinla. Keskkonnaõigus, page 258.

¹⁷⁴ Ibid.

¹⁷⁵ Ibid.

¹⁷⁶ H. Veinla. Keskkonnaõigus, page 260.

¹⁷⁷ H. Veinla. Kas meie looduse mitmekesisus ja väärtus võib olla takistuseks majanduse arengule? – Juridica 2009, nr 9, page 656.

and shall identify any aspect which may significantly affect the conservation objectives of the site.¹⁷⁸

Exceptions are covered by Article 6 section 4 of the Habitats Directive. Projects with a negative impact may be authorized if three conditions are met:

- It is no other alternatives. It is for the competent authorities of the Member State to assess whether there are alternatives to the proposed activity which achieve the conservation objective of the area better. According to the Natura Handbook¹⁷⁹, alternative locations, different scales of action and project solutions should be considered, as should the zero option (abandoning the project).¹⁸⁰
- there is an overriding public interest in the implementation of the plan or project. The second condition is that the implementation of the plan or project is subject to some imperative and extraordinary requirement imperative reasons of overriding public interest. According to the Natura Handbook, such reasons must be so important as to outweigh the Directive's highly ambitious objective of protecting a high level of the Community's natural heritage. Moreover, such reasons must be long-term, not short-term economic or other interests, which must not outweigh the long-term interests of nature conservation.¹⁸¹
- the taking of all appropriate compensation measures. Compensation measures under the Natura Handbook may include, for example, the creation of a new habitat or extension of an existing site, as well as enhancement of the habitat, either within the project area or other Natura site.¹⁸²

In Estonia, nature protection is regulated by the Nature Conservation Act¹⁸³. Under Estonian legislation, the state has no obvious obligation to protect any particular natural feature, as the criteria are very general. For example, the protection of a natural object under existing law supposes that it is endangered, rare, representative, of scientific, historical-cultural or aesthetic value or an obligation under an international treaty (§ 7 section 1 of the Nature Conservation Act). Consequently, the decision to protect a natural object is largely a value-based weighing decision that must be carefully considered and motivated. The latter obligation arises, in particular, from the fact that taking a shelter entails significant rights infringements for individuals.¹⁸⁴

¹⁷⁸ H. Veinla. Keskkonnaõigus, page 260.

¹⁷⁹ Council Directive 92/43/EEC of 21 May 1992, on the conservation of natural habitats and of wild fauna and flora. – No L 206/7.

¹⁸⁰ H. Veinla. Kas meie looduse mitmekesisus ja väärtus võib olla takistuseks majanduse arengule?, page 655.

¹⁸¹ H. Veinla. Kas meie looduse mitmekesisus ja väärtus võib olla takistuseks majanduse arengule?, page 656.

¹⁸² Ibid.

¹⁸³ Nature Conservation Act. – RT I, 14.11.2018, 8.

¹⁸⁴ H. Veinla. Keskkonnaõigus, page 262.

Everyone has the right to submit a proposal for the protection of a natural object to the initiator of protection, but this proposal must not be vague, but must comply with the substantive requirements of the law, such as justification of the protection and description of the restrictions to be protected. In order to exclude apparently unfounded proposals from further proceedings, the initiator of protection must arrange for justification and an examination of the appropriateness of the object covered by the proposal and the feasibility of the proposed restrictions, involving a person with specific knowledge in the field. If during the course of the proceedings, it becomes apparent that the natural object for which protection is sought is not expedient or feasible, protection shall be refused. Refusal to place a natural object under protection shall be decided by a directive of the minister responsible for the area and the initiator of the procedure for the decision to refuse local protection of a natural object (The Nature Conservation Act § 11¹ section 1).

The procedure for the protection of a natural object is an open procedure. The procedure for the protection of a natural object is initiated by the Ministry of the Environment (§ 9 section 1 of the Nature Conservation Act) and is protected by the Government of the Republic as a protected or protected area (§ 10 section 1 of the Nature Conservation Act).

3.3.3 Changing national legislation as a solution

As already stated by the Supreme Court, the impact on a Natura 2000 site must always be assessed. Of course, the author agrees with Supreme Court. Failure to evaluate this area would be in conflict with both European legislation and Estonian national law. Especially for large projects, which naturally have a significant environmental impact, planning cannot be done without a proper impact assessment.

It is understandable that any major project such as the Hiiumaa Offshore Wind Farm will also have negative effects on nature. Only the economy and business can have a positive impact. However, these two areas are very difficult to consider and decide which of these is more important in this case. The European Community nature protection directives are based on the fact that nature is not only a value for man but also an independent intrinsic value that must be taken into account when deciding on nature conservation. Only ecological considerations should be taken into account in the selection of protected areas, and all other considerations - including economic and social ones - must be completely excluded at this stage.¹⁸⁵

¹⁸⁵ H. Veinla. Kas meie looduse mitmekesisus ja väärtus võib olla takistuseks majanduse arengule?, page 656.

One of the major problems with this project, according to the developers, is the creation of a protected area. Today, the Vinkov Protected Area is not protected, but there were some problems with the Apollo Protected Area. As stated above, projects with a negative impact can be allowed if no other alternatives exist. In this case, as part of the environmental impact assessment, bird experts suggested moving the wind farm southward as a mitigation measure so that the impact on birds would not be too great. It suited the developer and the environmental impact assessment was submitted for approval as a new location for the wind farm. The volume of the wind farm did not change during the course. The developer of the offshore wind farm in Northwest Estonia has, as a compromise, abandoned the construction of an offshore wind farm on Apollo shallow and shifted the wind farm, the energy company admitted.¹⁸⁶ However, "In spite of this, our view is that there is no justification for Apollo shallow protection and that the socio-economic impact of the creation of the nature reserve has been underestimated.

Moreover, § 2 section 2 of Nature Conservation Act, what determines principles of nature conservation says that "nature conservation will be based on the principles of balanced and sustainable development and in each individual case, alternative solutions will be considered which, from the position of nature conservation, are potentially more effective". It means, that if there is another way of conserving nature, then it should be applied. So, the formation of a nature reserve is the last method.

An appropriate site should be selected for activities with significant negative environmental impacts. Such activities, which take place within the Natura area or have a sphere of influence extending beyond the Natura area and whose negative impact on the protected habitats and species is not reasonably excluded, are generally not allowed under European Union law.¹⁸⁷ Failure to comply with the obligations under the Nature Conservation Directives may also give rise to liability for damages.¹⁸⁸

The law regulating the formation of nature reserves is Nature Conservation Act. In this law present many inaccuracies and shortcomings, which in turn make the process of applying for the formation of nature reserves too simple. This significantly increases the workload of administrative authorities, as they have to take into consideration all proposals. Further, the shortcomings and problems of this law will be considered in more detail, and ways of solving these problems will be suggested.

¹⁸⁶ K.Pruul. Hiiumaa Apollo kaitseala on energiafirmal pinnuks silmas. – Äripäev. 17.01.2019.

¹⁸⁷ H. Veinla. Kas meie looduse mitmekesisus ja väärtus võib olla takistuseks majanduse arengule?, page 656.

¹⁸⁸ Ibid.

3.3.3.1 Changing the § 7 of the Nature Conservation Act

According to the § 7 of the Nature Conservation Act, what sets up prerequisites for placing natural objects under protection “a natural object that is under risk, is rare or typical, has scientific, historic, cultural or esthetical value or that is subject to protection under an international agreement is deemed to have the prerequisites for placing the natural object under protection based on this Act”. As far as we can see from this article, the prerequisites for the formation of a natural reserve are very general and inaccurate. Practically any part of territory can be attributed to one of these criteria. This makes the process of submitting a proposal much more easy. In order to avoid a similar situation, it is necessary to change § 7 of Nature Conservation Act by making the requirements more specific and exact. For example, words „rare or typical“, have absolutely opposite meaning. Any part of a territory is rare or typical, so this criterias can be prerequisites in no case. The law should specify a list of parameters which the territory has match to.

For example in Germany, the requirements for each type of the nature reserve are clearly defined. In other words, it is clear what conditions the area must meet in order to be designated a protected area. As an example to compare Let's compare, for example, the definition of national park: § 26 of the Estonian Nature Conservation Act stipulates that “national park is a protected area for the preservation, protection, restoration, research and introduction of nature, landscapes, cultural heritage and balanced use of the environment”. According to the German legislation, § 24 section 1 of Germany's Federal Nature Conservation Act¹⁸⁹ (BNatSchG) national parks are defined as "areas that have been designated in a legally binding manner, that are to be protected in a consistent way and that are large, largely unfragmented and have special characteristics, fulfil the requirements for a nature conservation area in the greater part of their territory, and in the greater part of their territory, have not been affected by human intervention at all, or to a limited extent only, or are suitable for developing, or being developed, into a state which ensures the undisturbed progression, as far as possible, of natural processes in their natural dynamics."¹⁹⁰

It is clear, that the difference between two stipulations is quite big. In Germany everything is set clearer and more definitely and is so for each type of nature reserve. Estonia needs to be in the same way, so that people do not think that every natural object is in a protected area and

¹⁸⁹ Conservation of Nature and of Landscapes Act (Gesetz über Naturschutz und Landschaftspflege). – 21.09.1998 (Federal Law Gazette I p. 2994).

¹⁹⁰ BN Federal Agency for Nature Conservation. National Parks. – <https://www.bfn.de/en/activities/protected-areas/national-parks.html> (12.03.2020).

make proposals to the administrative body to create a protected area, which is, of course, a burden on the administrative bodies.

3.3.3.2 Changing the § 8 of Nature Conservation Act

According to the § 8 of the Nature Conservation Act, „everyone has the right to submit a proposal to place a natural object under protection to the authority competent to initiate the proceedings for placing under protection”. It means that absolutely any person can submit a proposal. It is necessary to limit a range of people who will be able to submit a petition. Undoubtedly, it is very important that a person who could petition is competent in this field of activity. For example, limits can be set on the professional activity. Requirements for the applicant must be clearly spelled out in the law. This limitation has to be entered to exclude incompetent people from the process.

2nd section of the § 8 of the Nature Conservation Act says “a proposal to place a natural object under protection must contain: the justification for placing the natural object under protection, the objective for placing the natural object under protection, a map indicating the location or the borders of the natural object and the natural values for the protection of which the proposal was made, a description of the restrictions planned for protection purposes, an estimation of the costs related to placing under protection and organizing of protection”. These requirements are not enough. It is necessary to establish more requirements to make the process more profound. Third section of the same paragraph says that “the authority competent to initiate the proceedings for placing under protection will arrange for expert assessment of the justification and purposefulness of placing the natural object under protection and assessment of the purposefulness of the planned restrictions, involving a person who has relevant specific expertise in the field (hereinafter expert)”. Requirements for an expert are not provided by law. According to practice, any person can present itself as an expert, even if this person has no expectation about this field. In this case, opponents of Hiiumaa Wind Farm used an expert who was not competent in this field, so the process was slowed down. It is necessary to put into the law requirements, such as attestation or experience in this field. The expert should have the same qualification as EIA experts.

If we establish more strict requirements, it will significantly reduce the workload of administrative bodies and will speed up the process, since they will not have to conduct their own investigation. This solution will also save the government money because the process of investigation is also expensive.

6th section of § 8 of Nature Conservation Act says „if a proposal is made to place a natural object under protection or proceedings regarding placing a natural object under protection are

initiated, the administrative authority who has received an application for making an another administrative decision that could affect the state of the natural object specified in the proposal will have the right to suspend the proceedings for making the administrative decision. The proceedings for making the administrative decision will be suspended until a decision to place the natural object under protection or refusal to place the natural object under protection is made.” In this case proceedings regarding placing a natural object under protection are initiated. It means that administrative authority can suspend the proceedings for making the administrative decision. This decision is EIA approval. The granting of such a right is not proportional.

Each limitation in the law must comply with the principle of proportionality. First of all, the limit must be appropriate – a suitable measure that promotes the achievement of the goal. Here is the question of what is the goal. Obviously, the purpose of this article is to prevent any changes in the state of the natural object indicated in the proposal. Sure, by implementing this right, it is possible to achieve the goal. Therefore, such a method is appropriate.

Secondly, the limitation has to be necessary. The limit is necessary if the goal can not be achieved by another, but a less burdensome method, at least as effective as the first. It is difficult to imagine another way of preventing any changes in the state of the natural object indicated in the proposal, so the method is necessary.

And finally, it has to be moderate. The extent and intensity of interference with fundamental rights, on the one hand, and the importance of the purpose, on the other, must be considered. The more intense the restriction, the more important the purpose has to be. In this way, the legislator provides discretionary powers to administrative bodies. Every time the administrative body has to evaluate all the advantages and disadvantages of using the right to suspend the proceedings, what is burdensome.

This article allows submitting a proposal to place a natural object under protection at the time when the work on the project has already begun. This means that in case the administrative body makes a decision to form a nature reserve, the whole project will have to be canceled. This is not reasonable, because the law must give a sense of stability. The article puts developers at a very disadvantageous position. Consequently, this method is not moderate, so should not be applied. If at least one of the principles of proportionality is not fulfilled, then the restriction is inappropriate so the article should be changed. The article has to be changed in a way by not giving the opportunity to submit a proposal if the proceeding has already begun.

3.4 The competence of the administrative bodies to establish the maritime plan and the involvement of the administrative bodies as the circumstances impeding the construction of Hiiumaa Offshore Wind Farm

3.4.1 The competence of the administrative bodies to establish the maritime plan

The last two contentious issues that the author considers it necessary to analyze are the competence of the administrative body in the preparation of the maritime plan and the need to involve the administrative bodies in the procedure. Firstly the author analyzes the competence of Hiiu County Governor in establishing a maritime plan.

The applicant argued that the preparation of the maritime plan was not within the competence of the Hiiu County Governor. As a justification, the applicant has pointed out that since the sea area is not covered by the territory of the county, the respondent, ie the Hiiu County Governor, did not have the right to plan the sea area adjacent to Hiiu county. The § 7 section 1 and 2 of the Planning Act valid until 30 June 2015 and § 4¹ of the Administrative Division of Estonian Territory¹⁹¹ exclude the right of the county governor to plan the territorial sea.¹⁹²

The Administrative Court is of the opinion that the establishment of a maritime plan was within the competence of the Hiiu County Governor. The restriction provided for in § 4¹ of the Administrative Division of Estonian Territory, which entered into force on 1 July 2015, does not apply.¹⁹³ The Circuit Court also agrees with the Administrative Court that the establishment of the maritime plan was within the competence of the county governor,¹⁹⁴ as the Administrative Court has already stated.

The Administrative Chamber of the Supreme Court held that in a situation where the § 7 section 2 of the Planning Act enables planning a public water body with a county plan, the inland and the territorial sea is a public water body (§ 5 section 1 and 2 of the Water Act), and the Government of the Republic had also given a corresponding authorization to the Hiiu County Governor, the Hiiu County Governor was competent to establish a county plan in the maritime area adjacent to Hiiu County.¹⁹⁵

¹⁹¹ RT I, 04.07.2017, 27

¹⁹² RKHKo 3-16-1472.

¹⁹³ RKHKo 3-16-1472.

¹⁹⁴ RKHKo 3-16-1472.

¹⁹⁵ RKHKo 3-16-1472.

3.4.1.1 Regulation in the national legislation of the competence of the administrative bodies and changing legislation as a solution

The planning was initiated on 11 October 2012. Therefore, it is again necessary to proceed from the old version of the Planning Act. As already stated, according to the Planning Act¹⁹⁶ what was in force before 1 July 2015, maritime planning took place at the level of the county plan (§ 7 section 2 point 3). Before the new codification of the Planning Act, the authority that was arranging the preparation of the national spatial plans was the county governor or the Government of the Republic and its preparation is organized by the county governor (old redaction of Planning Act §10 section 3¹⁹⁷).

The Government of the Republic by Order No. 441 of 11 October 2012¹⁹⁸, which has given the Hiiu and Pärnu county governors the competence to prepare and establish a plan in the maritime area bordering Hiiu County. Consequently, the Hiiu County Governor certainly had the competence to establish the plan.

According to the author, the main disadvantage and confusion is that it is not clear which county governor must plan the territory of the sea. The boundaries of counties in the sea are not precisely defined even today, which means that county governors do not have the right to establish a maritime spatial plan on the basis of the Planning Act, as the county governor's planning competence is limited to the county's land territory (§ 4 section 1 of the Planning Act). As the territory of the county does not extend to the sea area, the Government of the Republic has initiated the Hiiu sea area plan by its Order No. 441 of 11 October 2012, which has given the Hiiu County Governor competence to prepare and establish the plan in the sea area adjacent to Hiiu County.¹⁹⁹ Thus, by answering the question of whether the Hiiu County Governor had the right to establish the plan, it is possible to answer in the affirmative, as the Government of the Republic had given the Hiiu County Governor the corresponding authorization.

Now this problem has been solved today. As already mentioned, planning at sea takes place at the level of national planning²⁰⁰. According to the new Planning Act, the authority that arranges the preparation of national spatial plans is the Ministry of Finance (§ 55 section 4). The authorities that organize planning work are, according to their competence, the Ministry of Finance, other relevant government agencies or local authorities (Planning Act § 4).

¹⁹⁶ Planning Act. – RT I, 13.03.2014, 97.

¹⁹⁷ Planning Act. – RT I, 13.03.2014, 97.

¹⁹⁸ Vabariigi Valitsus 11.10.2012 korraldus, nr 441. Maakonnaplaneeringute algatamine Hiiu ja Pärnu maakonnaga piirnevatel merealadel. – RT III, 16.10.2012, 10.

¹⁹⁹ Hiiu Maavanema korraldus 20.06.2016 nr 1-1/2016/114. Hiiu maakonnaga piirnevat merealal maakonnaplaneeringu kehtestamine.

²⁰⁰ RT I, 19.03.2019, 104.

3.4.2 The necessity of involvement of administrative bodies

Another important point in dispute, which the author analyzes, is the necessity of involvement the administrative bodies. The applicant alleged that the maritime plan had not been properly approved due to the lack of approvals from the local governments (Emmaste Parish, Käina Parish) and the Environmental Board. The plan has not been explicitly approved by the Ministry of Finance as the supervisory authority.²⁰¹

The Administrative Court found that the maritime plan was properly coordinated. The objections raised in the refusal to approve Emmaste rural municipality and Käina rural municipality have been processed in an appropriate manner and the reasons for not taking them into account have been sufficiently substantiated. The plan has the approval of the Environmental Board and the Ministry of the Environment and the approval of the Ministry of Finance.²⁰²

The Circuit Court found that the conclusions of the administrative court regarding the approval of the SEA report and the approvals of the Environmental Board and the Ministry of the Environment, as well as the necessity of the consent of the Government of the Republic, are correct. Within the meaning of the § 17 section 4 of the Planning Act²⁰³, the plan must be deemed to be approved by local governments.²⁰⁴

The Administrative Chamber of the Supreme Court found that the allegations of the cassation appeal of NGO Hiiu Tuul in connection with the approvals of Emmaste and Käina rural municipalities and the Ministry of Finance are not related to the mentioned objectives, therefore the Chamber ignores them.

3.4.2.1 Regulation in the national legislation the necessity of involvement of administrative bodies and changing legislation as a solution

The general principle for the involvement of persons in administrative law is that the involvement must take place at an early stage of the procedure. Involvement at an early stage allows for participation at an early stage of the procedure and thus provides more opportunities to express one's views (General Part of the Environmental Code Act²⁰⁵ § 28 section 3).

As this is a plan initiated before 1 July 2015, we must again proceed from the old version of the Planning Act²⁰⁶ in this matter as well.

²⁰¹ RKHKo 3-16-1472.

²⁰² RKHKo 3-16-1472.

²⁰³ Planning Act. – RT I, 13.03.2014, 97.

²⁰⁴ RKHKo 3-16-1472.

²⁰⁵ General Part of the Environmental Code Act. – RT I, 28.12.2017, 21.

²⁰⁶ Planning Act. – RT I, 13.03.2014, 97.

Pursuant to § 16 section 1 point 2 and also § 17 section 2 point 1 of the Planning Act, plans are prepared in the case of a county plan in co-operation with local governments of the planned area, county governors of neighboring counties and ministries the plan addresses. It follows from the law that in order for the approval of the plan to be obligatory for their counties Emmaste and Käina rural municipalities, the plan must either be in the immediate vicinity of these rural municipalities or concern their territory.²⁰⁷ It is clear from the plan that the plan was not approved by Emmaste Parish Council and Käina Parish Council. Despite the fact that the Supreme Court came to the conclusion that the applicant's arguments in this regard must be disregarded, the author considers it appropriate to consider the need for approval, as the applicant alleges that the non-approval is unlawful.

It follows from the plan that the Emmaste Parish Council has clearly expressed and substantiated its opinion. Emmaste Parish Council has come to the conclusion that since no valid legal act has determined the territory of the county in the sea, ie the counties have no territory at sea, the competence of the county governor in the territorial sea is unclear. Emmaste municipality did not approve the maritime spatial plan but has substantiated its position.

It also follows from the plan that Käina Rural Municipality Council has not approved the maritime area plan with its decisions and substantiated its non-approval.

The approval of Emmaste and Käina Rural Municipality Council is not a mandatory condition for establishing the plan. Although the planner has asked him for his opinion and sufficiently substantiated the disregard of his opinion. As the plan is not in conflict with legislation, the plan can be considered approved by Emmaste and Käina Councils.²⁰⁸

Pursuant to § 16 section 1 point 7 of the same Act, a plan is prepared in co-operation with the Environmental Board if the implementation of the plan may have a significant effect on the environment. In this case, the plan certainly had a significant impact on the environment, so the approval of the Environmental Board is required. The parties do not dispute whether approval was necessary or not. The dispute was whether it was granted or not. It is clear from the plan that the plan has been approved by the Environmental Board.²⁰⁹ Consequently, the applicant's complaint is unfounded and must be rejected.

§ 17 section 2 point 4 of the old version of the Planning Act also provides that before adopting a plan, the county governor or local government organizing the preparation of the plan shall coordinate the county plan with the relevant state agency if the plan envisages an object with significant spatial impact. In the author's view, such a provision was not appropriate and

²⁰⁷ Hiiu Maavanema korraldus 20.06.2016 nr 1-1/2016/114. Hiiu maakonnaga piirneval merealal maakonnaplaneeringu kehtestamine.

²⁰⁸ Ibid.

²⁰⁹ Ibid.

precise, so there was confusion in that regard. The law must clearly specify in which case and with which authority the approvals must be made. In this case, the plan has the approval of the Environmental Board and the Ministry of the Environment²¹⁰, and thus this condition is met. Point 8 of the same paragraph states that before establishment, a county plan must be approved by the Ministry of Defense and the Ministry of the Interior if wind generators with a height of more than 28 meters are planned for the planned area or public water body. It follows from the plan that both the Ministry of the Interior and the Ministry of Defense have approved the plan.²¹¹ Therefore, this condition was also correctly fulfilled.

All things considered, it is clear that all the conditions for coordination are met. Even those administrative bodies of the county who have not approved the plan have issued their position and justified the non-approval. Thus, the Hiiu County Governor has complied with all the conditions provided by law and the plan has been legally approved.

In the author's view, too much coordination with the authorities is not rational and necessary in accordance with the principles of procedural economy. Involvement and coordination are time-consuming and can significantly delay the administrative process. Of course, it is not sensible to abandon coordination with the necessary authorities, as a situation can be reached where not all aspects of the plan have been considered with sufficient precision. Each authority is still competent in its own narrow field and no authority is competent to assess all aspects. Therefore, involvement and coordination must still take place, but must be clearly defined and, in some cases, limited in order to reduce the administrative burden and not to prolong the planning process.

Pursuant to § 15 sections 1 and 2 of the current Planning Act, national planning is now prepared in co-operation with ministries and national local government associations. The Parliament and local government units, as well as persons and agencies who may have a justified interest in the expected significant environmental impact or spatial development trends in the planning area, including non-governmental environmental organizations through an organization uniting them, shall be involved in the preparation of the national plan. As maritime spatial planning now takes place at the level of the national plan, but not at the level of the county plan, the conditions for involvement have also changed.

²¹⁰ Hiiu Maavanema korraldus 20.06.2016 nr 1-1/2016/114. Hiiu maakonnaga piirneval merealal maakonnaplaneeringu kehtestamine.

²¹¹ Ibid.

Conclusion

This is the first Offshore Farm project in Estonia, so this is the reason why the whole procedure takes a lot of time. The first applications for Hiiumaa Offshore Wind Farm were submitted in early 2000s, but no full authorization has been granted so far. It is apparent that the lack of specific regulation has significantly delayed the development. Beginning with the second chapter of this thesis are named the circumstances, what slow down the process of authorization. As a result, the administrative bodies are overloaded. In this thesis, the author leads to possible solutions to problems that will help to reduce the administrative burden and speed up the authorization process.

Supreme Court decision which had been done for this project is now a precedent for further similar cases. Consequently, analyzing and understanding this Supreme Court decision is extremely important and relevant. What makes the Supreme Court's decision interesting is the fact that it is the first decision in Estonian case law on planning offshore wind farms. This decision has clarified many of the issues that were still incomprehensible. The most important thing that this case has led to is that the Supreme Court annulled the maritime spatial plan established by the decision of the Hiiu County Governor in the part of Hiiu wind farms. From the decision of the Supreme Court follows that the SEA of the maritime plan did not comply with the requirements of the applicable law: a number of significant effects and relationships to be assessed under the SEA have not been identified and appropriate studies have not been carried out. Also, the Court has come to the conclusion that the impact on Natura area has not been studied. Thus, wind farms can only be built if it is known exactly where, how many and according to which parameters (height, power, etc.) wind turbines will be built, and on this basis the environmental impacts have been assessed and weighed. Of course in this regard the author fully agrees to the Court. Planning cannot be established without assessing the sufficient environmental impact of a project that affects the environment so much.

The first circumstance, what slows down the process of authorization is the fact, that the national law has been developed and changed extensively. The Planning Act underwent an extensive codification and according to the Planning Act in force before 1 July 2015, maritime planning took place at the county-wide planning level. According to the current Planning Act, planning of marine areas takes place on a national spatial plan for the entire Estonian marine area. Another substantial change concerns persons involved in the planning process. According to the Planning Act which was in force until 30.06.2015, the possibility to involve an interested person in the planning procedure was provided for only the comprehensive plan. The new version of the Planning Act provides the possibility for the involvement of interested parties in

the planning process for each type of planning. Of course, this increases the administrative burden compared to the old version, because now the number of appeals from interested parties has increased. After codification of Water Act, it regulates building in public water bodies through a building permit. Before codification the only opportunity was to get a permit for the special use of water.

Another disputed issue was the appealing right of individuals. It is also likely that the fact that anyone can make an appeal (if his subjective rights have been violated) will increase the administrative burden. This is due to the fact that absolutely everyone has access to planning information, even a person who is not territorially affected by the plan can appeal. The administrative burden can be significantly reduced by narrowing and filtering the information, so that it is only accessible to those who are territorially concerned. This could be done, for example, by creating a new web platform where individuals can enter with their ID card and then be able to see where the person resides territorially. Author is also of the opinion that, the right to environmental information may in some cases be replaced by the right to request environmental information. Asking for information means submitting an application to the competent body.

The main opponent of the project was an NGO, who appealed to the court and obstructed the implementation of the project. A dispute between the parties was as to whether NGO has an appealing right in this case. The legislation stipulates, that a non-profit association must have at least two members and other requirements as the duration of activity is not provided by the law. It is necessary to set up the requirements for environmental NGOs in Estonia in order to avoid disputes as to whether a particular NGO has the appealing right and whether it can be considered as an NGO at all or a specially created association. Special requirements should be laid down for such large projects and for projects of public interest. For example, the law should state that complaints can be made by NGOs that have at least 10 members and have been active for at least 5 years. This provision would allow the immediate elimination of specially created NGOs whose sole purpose is to prevent the project and slow down the construction process.

SEA and EIA are mandatory for such big projects. However, the law does not regulate as much of the substantive aspects as the content of the assessment and the content requirements. In the case of the SEA, the substantive requirements of the report are already widely laid down in the Environmental Impact Assessment and Environmental Management System Act. It is understood that the SEA and EIA procedures are different and it is impossible to precisely define the common requirements in law. So the responsible authorities must assess each time whether the content of the EIA and SEA is appropriate for the particular project or not. The requirements set out for the SEA report in the Environmental Impact Assessment and

Environmental Management System Act are quite broad and spacious, with sufficient accuracy. Non-clarifications of the law can be interpreted differently and this is controversial. This is probably because there are no substantive requirements.

One of the major problems with this project, according to the developers, is the creation of a protected area. One of the possible solutions to conserve the nature is the formation of natural reserves. The decision to form such a nature reserve became a serious obstacle for the realization of this project. In Nature Conservation Act present many inaccuracies and shortcomings, which in turn make the process of applying for the formation of nature reserves too simple. This significantly increases the workload of administrative authorities. Further, the shortcomings and problems of this law will be listed. According to the Nature Conservation Act absolutely any person can submit a proposal to formation of the nature reserve. It is necessary to limit a range of people who will be able to submit a petition. Undoubtedly, it is very important that a person who could petition is competent in this field of activity. This limitation has to be entered to exclude incompetent people from the process.

Everyone has the right to submit a proposal for the protection of a natural object to the initiator of protection, but this proposal must not be vague, but must comply with the substantive requirements of the law, such as justification of the protection and description of the restrictions to be protected. In order to exclude apparently unfounded proposals from further proceedings, the initiator of protection must arrange for justification and an examination of the appropriateness of the object covered by the proposal and the feasibility of the proposed restrictions, involving a person with specific knowledge in the field. If during the course of the proceedings, it becomes apparent that the natural object for which protection is sought is not expedient or feasible, protection shall be refused.

The first solution will be changing the § 7 of Nature Conservation Act. As far as we can see from this article, the prerequisites for the formation of a natural reserve are very general and inaccurate, so it is necessary to change § 7 of Nature Conservation Act by making the requirements more specific and exact. According to the § 7 of the Nature Conservation Act, what sets up prerequisites for placing natural objects under protection “a natural object that is under risk, is rare or typical, has scientific, historic, cultural or esthetical value or that is subject to protection under an international agreement is deemed to have the prerequisites for placing the natural object under protection based on this Act”. As it can be seen from this article, the prerequisites for the formation of a natural reserve are very general and inaccurate, so this makes the process of submitting a proposal much more easy.

The second possible solution in changing the Nature Conservation Act would be changing the § 8 of Nature Conservation Act. According to § 8 absolutely any person can submit a

proposal. It is necessary to limit a range of people who will be able to submit a petition. For example, limits can be set on the professional activity. Requirements for the applicant must be clearly spelled out in the law. Requirements what are set up in 2nd section of § 8 of Nature Conservation are not enough. It is necessary to establish more requirements to make the process more profound. 3rd section of § 8 does not set up requirements for an expert also. It is necessary to put into the law requirements for experts, such as attestation or experience in this field. According to practice, any person can present itself as an expert, even if this person has no expectation about this field. In this case, opponents of Hiiumaa Wind Farm used an expert who was not competent in this field, so the process was slowed down. It is necessary to put into the law requirements, such as attestation or experience in this field. This solution reduces the burden of the administrative authorities by the way that they do not have to hire separate experts in order to get the right assessment. 6th section of § 8 of Nature Conservation Act allows administrative authority to suspend the proceedings for making the administrative decision. This article allows to submit a proposal to place a natural object under protection at the time when the construction work on the project has already begun. This means that in case the administrative body makes a decision to form a nature reserve, the whole project will have to be canceled. This is not reasonable, because the law must give a sense of stability. The article puts developers at a very disadvantageous position. If at least one of the principles of proportionality is not fulfilled, then the restriction is inappropriate so the article should be changed. The article has to be changed in a way by not giving the opportunity to submit a proposal if the proceeding has already begun.

As for the involvement of administrative bodies in the author's view, too much coordination with the authorities is not rational and necessary in accordance with the principles of procedural economy. Involvement and coordination are time-consuming and can significantly delay the administrative process. Of course, it is not sensible to abandon coordination with the necessary authorities, as a situation can be reached where not all aspects of the plan have been considered with sufficient precision. Each authority is still competent in its own narrow field and no authority is competent to assess all aspects.

In each chapter where it was relevant the author has compared the old version of the law with the version what is in force. It can be seen that, in comparison with the wording of the old legislation, maritime planning is now regulated much better, but still not enough. There are still inaccurate places that still need to be regulated. The main drawback in the Estonian legislation is that the maritime spatial planning in Estonia is derived from land-based spatial planning, not keeping in mind that land and sea have different legal backgrounds. Also there is still no one competent authority for managing the use of marine areas.

The author has also compared Estonian and other countries' legislation. Mainly as the example was used German legislation. Estonia and Germany, of course, have much in common, as both countries have actively implemented the Aarhus Convention into their national legislation. In most cases, environmental moments are better regulated in Germany than in Estonia. In Germany, for example, non-procedural communication between the parties has been used for a long time, which allows an agreement to be reached without reaching a court. Of course it reduces an administrative burden. Also in Germany, the issues of establishing a protected area are better regulated: in Germany, the law clearly stipulates the conditions that each protected area object must meet. Estonian legislation stops only with vague definitions.

There are also moments where the burden on administrative bodies is less in Estonia due to the regulations of the law. For example, in Estonia it is allowed to challenge the decision of the EIA and the SEA before the final administrative act. This will allow all the facts to be clarified better and immediately and then proceed with the establishment of the project. In Germany, a challenge is only allowed together with a final act, which leads to a situation where at the end of the project it turns out that the assessment was incomplete, the whole project has to be annulled, which entails high financial costs.

Considering all the impacts of the Hiiumaa Offshore Wind Farm project that have been identified so far, the author is of the opinion that the economic impact of the development of renewable energy in Estonia is more important than the possible negative impacts in this case. Of course, negative impacts on nature cannot be ignored. Negative impacts must be properly analyzed and possible alternatives must be implemented to reduce the negative impacts on nature.

The aim of this master's thesis is to identify the drawbacks of Estonian legislation, that were the obstacles in case of construction Hiiumaa Offshore Wind Farm and make proposals to amend the Estonian legislation in order to regulate the construction of offshore wind farms in Estonia and reduce the administrative burden for the development of the future offshore wind farm projects in Estonia. The hypothesis of the author's research was that because the fact that this is the first offshore wind farm project in Estonia, the national legislation is not sufficiently developed for building that kind of power plant. Drawbacks in the legislation of Estonia can lead to an overload of administrative bodies and preventing or slowing down the development of renewable energy in Estonia. As a result of the conducted research, the hypothesis of the author was confirmed and the aim was achieved. The author of this thesis believes, that application of suggested solutions in practice will significantly reduce the workload of administrative bodies and will speed up the process of authorization of the next offshore wind farms in Estonia if it will be decided to build them more.

Resumee

Antud magistritöö teemaks on „Eesti seadusandluse puudused Hiiumaa meretuulepargi ehitust takistavate asjaoludena ja Eesti Riigikohtu otsuse nr 3-16-1472 analüüs“. Eesti esimene avamere tuulepark on vajalik sellepärast, et taastuv energia on oluline Eesti jaoks ja see on energia tootmise tulevik. Võrreldes teiste energia tootmise vormidega avamere tuulepargid on üks keskkonnasõbralikumaid. See tähendab, et tuulepargi negatiivne mõju keskkonnale on üks väiksemaid. Kuid teistes Euroopa riikides juba aktiivselt kasutatakse avamere tuuleparke, praegu Eestis ei ole ühtegi avamere tuuleparki.

Hiiumaa avamere tuulepark on esimene avamere tuulepargi projekt Eestis. Arendaja alustas Hiiumaa avamere tuuleparkide projekti arendamist juba 2006. aastal, luues spetsiaalse projektiga seotud ettevõtte – OÜ Hiiumaa Offshore Tuulepark. Siinamaani projekt pole täielikult heakskiidetud ja pole võimalik alustada meretuulepargi ehitamist.

Esmakordselt autor on selle teemaga kokku puutunud kaks aastat tagasi oma uurimistöö kirjutamise käigus. Pärast seda Riigikohus on teinud otsuse nr 3-16-1472, kus kohus vastas paljudele autori küsimustele. Seega autoril tekkis huvi analüüsida Riigikohtu arvamuse ja oma arvamuse avaldada teooria ja Eesti seadusandluse alusel. Käesolevas magistritöös autor püüab välja selgitada, millised on peamised takistused Eesti esimese meretuulepargi projekti realiseerimisel. Ettepanekute tegemisel autor tugines peamiselt Saksamaa seadustele ning oma arvamusele. Aastate jooksul on Saksamaa olnud eeskujuks kogu maailmale keskkonnaalsetes küsimustes. Samuti Saksamaa on hea näide just seetõttu, et Eestil ja Saksamaal on sarnane õigusraamistik. Magistritöös on osaliselt esitatud mõned autori seisukohad ja ettepanekud, mida autor on käsitlenud oma uurimistöös. Uurimistöö kirjutamise käigus autor on osalenud rahvusvahelises projektis, mis on pühendatud avamere tuuleenergia turu arendamisele. Autori uurimistöö oli aktiivselt kasutatud selles projektis ning selleks, et käesolev magistritöö oleks samuti kasutatav rahvusvalisel tasandil, autor jätkas magistritöö kirjutamist inglise keeles.

Magistritöö eesmärk on välja selgitada Eesti seadusandluse puudused, mis olid takistuseks Hiiumaa meretuulepargi projekti elluviimisel ja teha ettepanekuid Eesti seadusandluse muutmiseks, et reguleerida meretuuleparkide rajamist Eestis ja vähendada halduskoormust tulevaste meretuuleparkide projektide arendamiseks Eestis. Autori uurimuse hüpotees on, et kuna tegemist on esimese meretuulepargi projektiga Eestis, Eesti siseriiklikud õigusaktid ei reguleeri piisaval tasemel tuuleelektrijaama meres püstitamist ja see asjaolu omakorda takistab Hiiumaa meretuuleparki projekti elluviimist. Eesti seadusandluse puudused võivad põhjustada haldusorganite ülekoormamise ja taastuvenergia arengu takistamist või aeglustamist. Mida rohkem puudusi seadusandluses on, seda suurem on haldusasutuste kaalutusõigus, mis neid

koormab. Järelikult tekib vajadus Eesti seadusandluse muuta. Autor on seisukohal, et eriti ehitus- ja planeerimispiirkonnad peavad olema seadusega samm-sammult reguleeritud, kuna ehitamine on valdkond, mis nõuab suuri rahalisi kulusi arendajate poolt. Hiiumaa meretuulepargi projekt pole mitte ainult rahaline kulu, vaid ka oluline panus Eesti keskkonda ja majandusesse.

Teema uurimine põhineb peamiselt ajaloolise õiguse, dogmaatilise õiguse, süsteemse tõlgendamise uurimismeetodil. Võrdlevat meetodit kasutati Eesti ja teiste riikide õigusaktide võrdlemiseks.

Lõputöö koosneb kolmest põhiosast. Lõputöö ülesehitus on selline, et töö esimene ja teine osa on teoreetilised ja deklaratiivsed. Lõputöö kolmas osa on praktiline ja sisaldab Riigikohtu otsuse analüüsi ning autori poolt esitatud ettepanekuid seadusandluse muutmiseks. Esimene peatükk on pühendatud Hiiumaa meretuulepargi projektile. Selles peatükis tutvustab autor projekti arendajaid ja kirjeldab projekti mõju, annab ülevaate sellest, millised taotlused on juba esitatud ja millises etapis on projekti realiseerimise menetlus lõputöö kirjutamise hetkel. Töö teine peatükk on osa, mis aitab mõista planeeringute kontseptsiooni, eesmärke ja tüüpe. Selles osas käsitletakse ka lubade andmise ja mereala planeerimise protsessi Eestis. Kronoloogilises järjekorras tutvustatakse ka muudatusi Eesti seadusandluses, mis mõjutasid Hiiumaa meretuulepargi projekti realiseerimist. Suurim osa tööst on pühendatud Riigikohtu otsuse analüüsile. Selles osas on esitatud poolte peamised seisukohad ja kohtu seisukohad. Peamised arutatavad teemad on üksikisikute osalemine protsessis ja kaebeõigus, keskkonnamõju hindamise ja keskkonnamõju strateegilise hindamise sisu, looduskaitsealade loomine ja haldusorganite pädevus ning kaasamine mereplaneeringu koostamisel kui Hiiumaa meretuulepargi ehitamist takistavad asjaolud. Iga teema all on esitatud ettepanekud õigusaktide muutmiseks, et vältida edaspidiseid arusaamatusi.

Esimene asjaolu, mis takistab projekti elluviimist on seaduse muudatused. Planeerimisseadus läbis ulatusliku kodifitseerimise ja enne 1.06.2015.a kehtinud planeerimisseaduse kohaselt toimus mereala planeerimine maakonna planeeringute tasandil. Kehtiva planeerimisseaduse kohaselt toimub merealade kavandamine kogu Eesti mereala riikliku eriplaneeringu tasemel. Samuti on laiendatud huvitatud isikute osalemine planeerimismenetluses. Pärast veeseaduse kodifitseerimist reguleerib avalikes veekogumites ehitamist võimaldab ehitusluba. Varem oli ainus võimalus saada vee erikasutusluba.

Teine probleem oli isikute laiendatud kaebeõigus ja piiratu ligipääs keskkonnateabele. Halduskoormust saab märkimisväärselt vähendada teabe kitsendamise ja filtreerimisega, nii et teabe oleks kättesaadav ainult isikutele, kes on planeeringuga territoriaalselt seotud. Projekti on oluliselt takistanud MTÜ Hiiu Tuul, kes pöördus kohtusse. Kuna seadus ei sätesta nõudeid

MTÜ jaoks, kohe kerkis küsimus, kas MTÜ-l on kaebeõigus. Eestis on vaja kehtestada keskkonnaorganisatsioonidele esitatavad nõuded, et vältida vaidlusi selle üle, kas konkreetsel MTÜ-l on kaebeõigus ja kas seda saab üldse käsitleda MTÜ-na või spetsiaalselt loodud ühenduseks.

KSH ja KMH on sellistele suurtele projektidele kohustuslikud. Eesti seadused ei reguleeri siiski nii palju sisulisi aspekte kui hindamise sisu ja sisunõuded. Autor on jõudnud seisukohale, et kuna iga hindamise protseduur on erinev, siis seaduses pole võimalik sätestatada ühiseid kriteeriume. Nii et vastutavad asutused peavad iga kord hindama, kas KMH ja KSH sisu on konkreetse projekti jaoks sobiv või mitte.

Projekti üheks suuremaks probleemiks on olnud kaitsealade moodustamine territooriumitel, kus alguses oli planeeritud tuulikute püstitamine. Looduskaitseaduses esineb palju ebatäpsusi, mis omakorda teevad looduskaitsealade moodustamise taotlemise protsessi liiga lihtsaks. Muidugi see asjaolu suurendab märkimisväärselt halduskoormust. Autor on jõudnud järeldusele, et ettepanek loodusobjekti kaitse alla võtmiseks peab vastama seaduses sätestatud sisulistele nõuetele ehk on vajalik seaduses määrata loodusobjekti kaitse alla võtmise konkreetseid eeldusi. Praegused looduskaitseala moodustamise eeltingimused on väga üldised ja ebatäpsed, nii et see muudab ettepaneku esitamise protsessi lihtsamaks. Autori arvates sobivaks lahenduseks oleks ka piirata nende isikute ringi, kes saavad ettepanekuid esitada. Samuti on vaja sätestada eksperdile, kes hindab loodusobjekti kaitse alla võtmise vajaduse, esitatavaid nõudeid, näiteks tunnistus või kogemus.

Mis puudutab haldusorganite kaasamist, siis pole liiga pikk kooskõlastamine ametiasutustega ratsionaalne ja vajalik vastavalt menetlusökoonomia põhimõttele. Kaasamine ja kooskõlastamine on aeganõudev protsess ning võib haldusprotsessi märkimisväärselt aeglustada. Muidugi ei ole mõistlik loobuda koordineerimisest vajalike asutustega, kuna võib jõuda olukorrani, kus kõiki mõjusid pole piisavalt uuritud ja kaalutud.

Uuringu käigus autor on võrrelnud Eesti ja Saksamaa seadusandlust. Eestil ja Saksamaal on muidugi palju ühist, kuna mõlemad riigid on Århusi konventsiooni oma siseriiklikesse õigusaktidesse aktiivselt implementeerinud. Muidu enamik momentidest on Saksamaal paremini reguleeritud kui Eestis. Näiteks Saksamaal on pikka aega kasutatud pooltevahelist kohtuvälist suhtlust, mis võimaldab kokkuleppele jõuda kohtusse minemata. See lahendus loomulikult vähendab halduskoormust, kuna vähendab kohtumenetluse asjade arvu. Saksamaal on samuti kaitseala moodustamise küsimused paremini reguleeritud: Saksamaal seadus sätestab selgelt tingimusi, millele iga kaitseala objekt peab vastama. Eesti seadusandlus omakorda sisaldab ainult ebatäpsed määratlusi. Esinevad ka küsimused, kus haldusorganite koormus Eestis on väiksem kui Saksamaal. Näiteks Eestis on lubatud KHM ja KSH otsuseid vaidlustada enne

lõplikku haldusakti. Saksamaal on hinnangute vaidlustamine lubatud ainult koos lõpliku haldusaktiga, mis võib viia olukorrani, kus projekti lõppfaasis selgub, et hindamine oli puudulik. Sellises olukorras tuleb kogu projekt tühistada, mis loomulikult toob kaasa suuri kulusi.

Arvestades kõiki tänaseks päevaks tuvastatud Hiiumaa avamere tuulepargi projekti mõjusid, autor on seisukohal, et taastuenergia areng Eestis ja projekti positiivne majanduslik mõju on palju olulisem kui selle projektiga kaasnevad negatiivsed mõjud. Muidugi ei saa tähelepanuta jätta negatiivseid mõjusid keskkonnale ja loodusele. Negatiivseid mõjusid tuleb korralikult analüüsida ja kaaluda võimalike alternatiivide rakendamist.

Läbiviidud uurimistöö tulemusena sai kinnituse autori hüpotees ja püstitatud eesmärk oli saavutatud. Kuna tegemist on esimese meretuuleparki projektiga Eestis, siseriiklikud õigusaktid ei reguleeri selle liiki tuuleelektrijaama püstitamist piisaval tasemel. Eesti seadusandluse puudused põhjustavad haldusorganite ülekoormamist, taastuenergia arengu takistamist ja aeglustamist Eestis. Töö autor usub, et tema poolt pakutud lahenduste rakendamine vähendab halduskoormust ja kiirendab järgmiste meretuuleparki projekti realiseerimise protsessi. Samuti autor loodab, et tema ettepanekud ja järeldused on kasulikud ka rahvusvaheliste keskkonnaprojektide tasandil.

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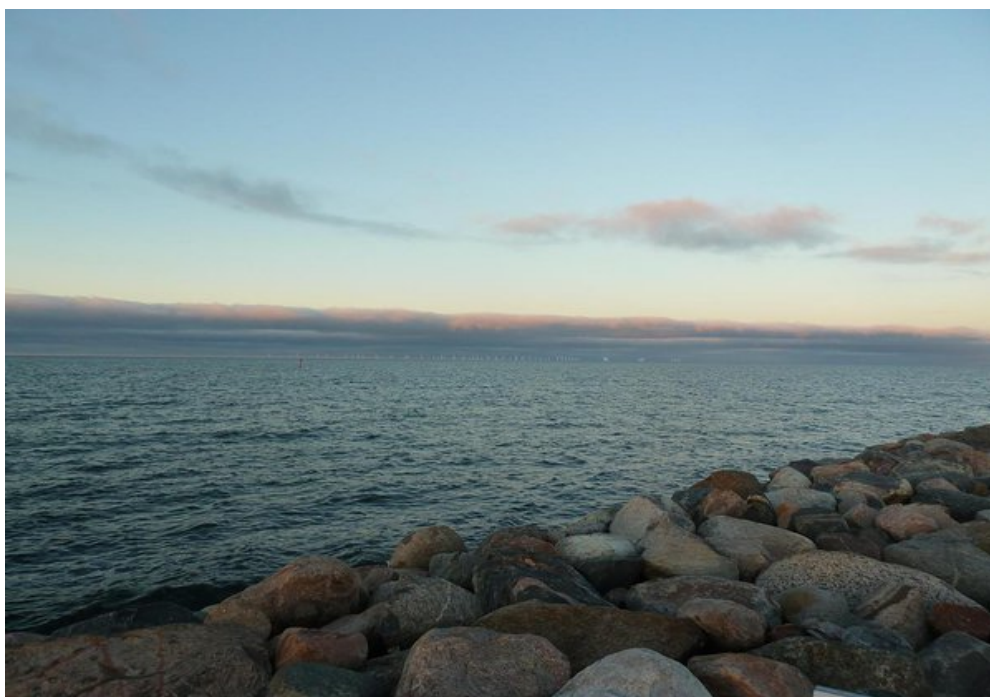
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Appendix A. Location on Hiiumaa Offshore Wind Farm



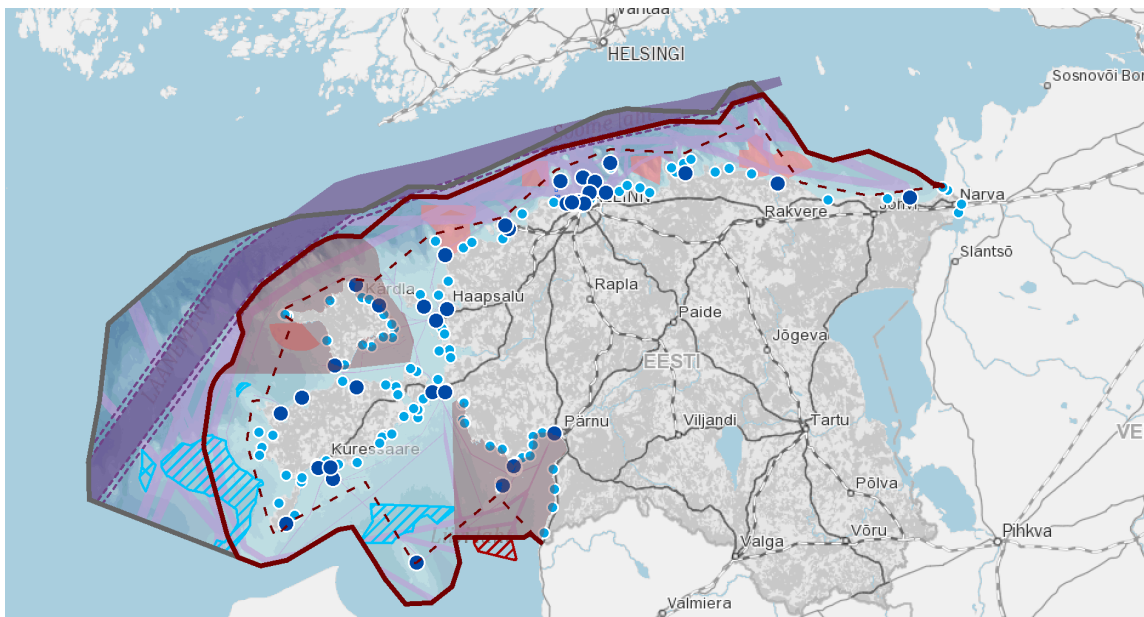
Hiiumaa Offshore Tuulepark OÜ, 2016

Appendix B. Visualization of the wind turbines from Kärdla harbor



Hiiumaa Offshore Tuulepark OÜ, 2016

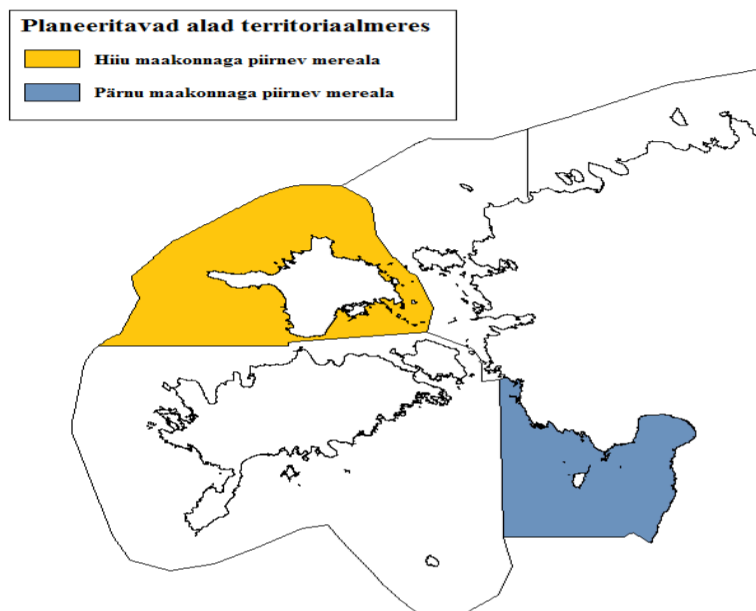
Appendix C. Territory of marine planning



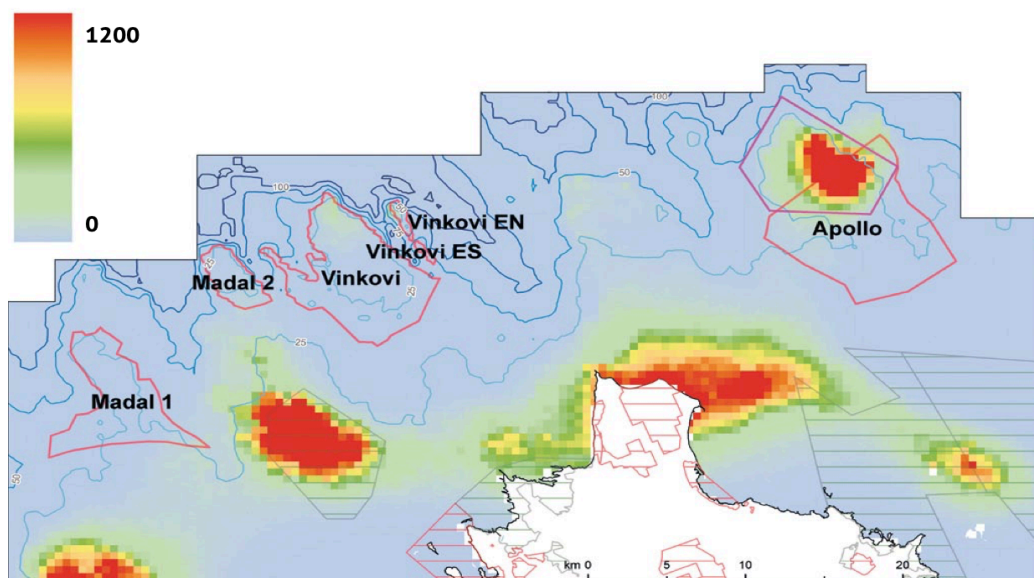
* Blue area is an energy producing area.

Rahandusministeeriumi planeeringute osakond, Hendrikson & Ko OÜ, 2019.

Appendix D. Territory of marine planning by the decision of Hiiu Governor (2012)



Appendix E. Locations of Vinkov and Apollo shallows



Inventory and development of monitoring programme for nature values in Estonian marine areas – NEMA: Summary of project results 2016.