

A dual perspective on the SEA Directive – legal mandates and sustainability



Ulf Kjellerup with the participation of Lone Kørnøv and Ivar Lyhne

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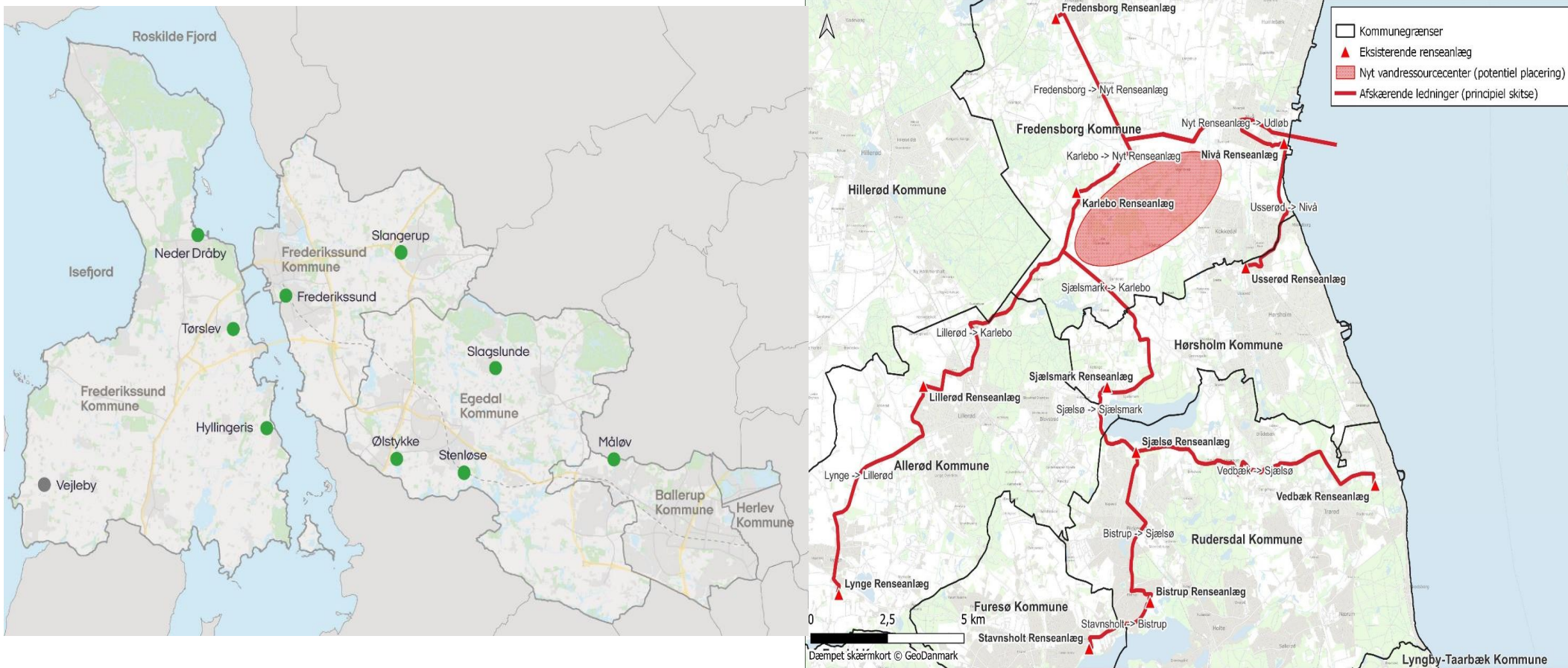
Denmark

ulf@collabora.dk

www.collabora.dk



NOVAFOS long term investment plan for modernisation and restructuring of Waste Water Treatment



Legal issues related to the scope of application – concept of authority

Concept of authority applied in the SEA Directive:

- at the outset traditional authorities are covered by the SEA Directive
- when authorities on the basis of legislation defer their competencies to publicly owned companies:
 1. e.g. every Danish municipality must organise their waste-water and drinking water utilities under the Company Act
 2. Water Sector Act require these companies to comply with strict economic regulation
 3. Board members appointed by the owning municipalities

Implications for the application of the Environmental Assessment Act:

1. The annual investment plan (required in the Water Sector Act) → SEA required/not required...?)
2. A long-term (50-75 years time span) plan for modernisation and restructuring of the waste water treatment infrastructure is adopted by the board → SEA required/not required...?)
3. Who is the competent authority under the SEA Directive in such cases..?
4. The reason for adopting the plan is partly set out in the Water Sector Act (economic efficiency requirement) and partly decided as an administrative decision taken by the board

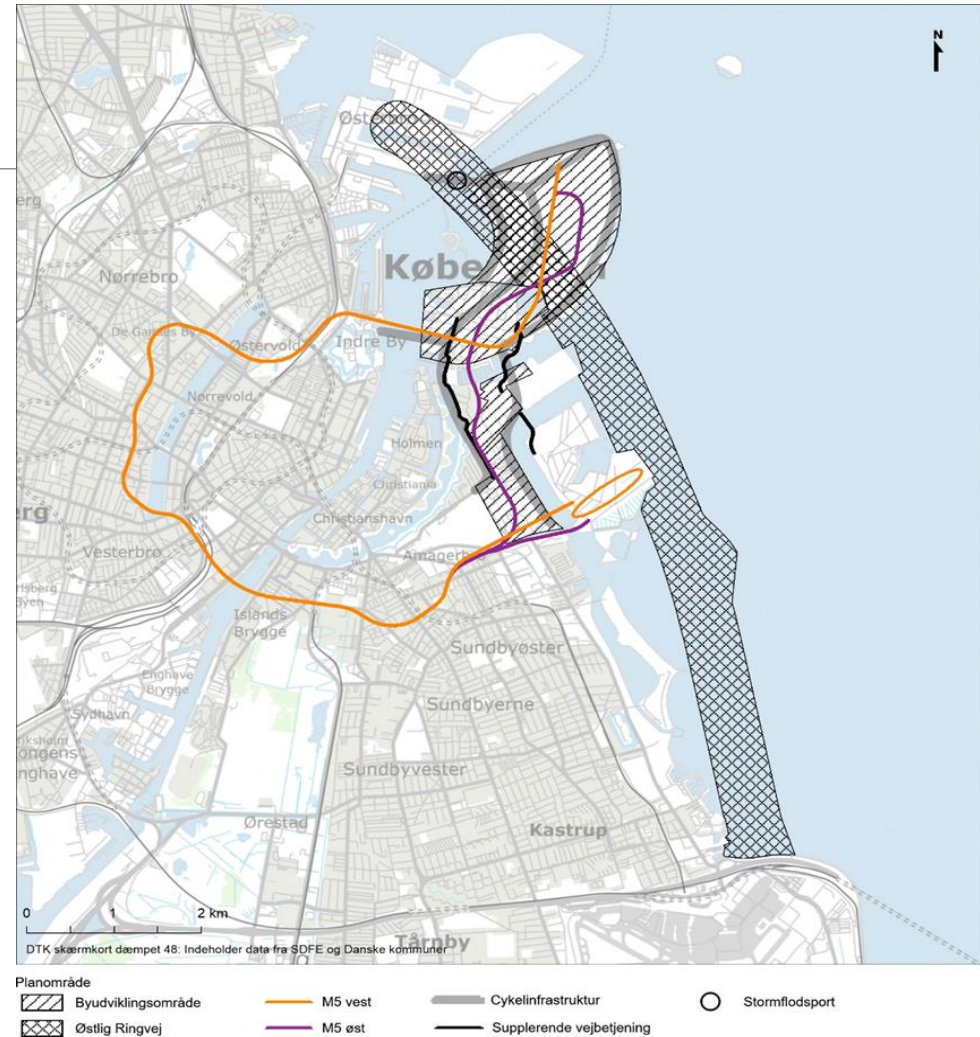
Legal issues related to the scope of application – “Voluntary plans”

According to the SEA Directive guidance (and to some extent EU Court case-law) – “voluntary plans” are not covered by the SEA Directive

This argument is often set forth by national authorities in DK...

- when Parliament requires by specific order the Secretary for Transport to deliver a draft national transport scheme for adoption – is it then a voluntary plan....?

- when Parliament requires the Secretary for Transport to deliver a 50 year development plan for Copenhagen City – and remembers to require an SEA report



Legal issues related to the scope of application – “Legal act” discussion

It is held by the EU Commission and the EU Court of Justice, that the concept of “plan and programme” is to be interpreted in a broad manner.

In C-09/22 “St. Teresa Garden” the concept of “legal act” is addressed as a key issue in deciding whether the SEA Directive applies or not

In Denmark this discussion – and the consequences of making “legal act” a key issue in determining the scope of application of the SEA Directive has resulted in ruling out a large body of plans

Questions that arise from this discussion:

- is the “legal act” requirement an extension of requirements related to the determining the scope of application ? – or is it solely related to the specific circumstances in C-09/22

From the concept of legal act is derived a requirement that the planning authority is legally bound by its planning – often tested against whether the planning authority is required to adopt a new plan to replace the existing plan when relevant – however:

In many cases planning authorities are authorised to plan for specific purposes – but not required to plan for those purposes – and the lack of formal requirement to replace the existing plan with a new plan is then taken to mean that the existing plan did not require an SEA

Sustainability – ambition and prospect

REFIT Evaluation of the SEA Directive (2019)

1. “..remains a suitable and relevant instrument to promote a high level protection of the environment and contribute to sustainable development..”
2. ..has largely kept pace with relevant EU and international policies, objectives, and concepts for SD...”
3. ..sufficiently flexible, setting out general direction and objectives to be met...”
4. ..increased recognition that SEA is needed at higher decision levels, as these set broad direction for subsequent plans/programmes
5. Potential to align SEA with SDGs
6. Has to some extent influenced and even improved planning and decision making processes – and the final content of plan and programmes....

Sustainability – upcoming review of SEA Directive

If the potential for promoting sustainable development is to be unleashed, we need:

1. A more rigorous review of the application of the SEA Directive not only informed by the representatives from government in member states – especially, exploring the vast “grey area” of the Directive’s scope that “is exploited by member states”
 2. To focus the review on the extent to which SD is included at all in SEA reports – and to present information of the good practices – where it exists
- And present recommendations for “tightening the provisions” of the SEA Directive in accordance with the findings
 - Courage and persistence will be the way to deliver a just transition and a just transformation

Let's continue the conversation!

Post questions and comments in the IAIA24 app.



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