Note: this is a non-official translation!

Bundesgericht
Tribunal federal
Trlbunale federale
Tribunal federal

2C_1176/2013

Judgment of 17 April 2015
II Public Law Division

Panel of judges

Federal Justice Zund, President,
Federal Justice Aubry Girardin,
Federal Justice Donzallaz,
Federal Justice Stadelmann,
Federal Justice Kneubuhler,
Court clerk Mayhall.

Parties to the proceedings

Schweizer Vogelschutz SVS/Swiss Birdlife,
Wiedingstrasse 78, PO Box, 8036 Zurich, Appellant,
represented by
Attorney-at-Law Dr. Hans Maurer,
Fraumunsterstrasse 17, 8001 Zurich,

versus

Office for Agriculture and Nature of the Canton of Bern,
Hunting Inspectorate, Schwand 17, 3110 Münsingen,
Department of Economic Affairs of the Canton of Bern,
Münsterplatz 3a, 3011 Bern.

Subject

Notification of rulings on individual measures against goosander and grey heron,

Appeal against the judgment of the Administrative Court of the Canton of Bern, Administrative Law Division, dated 6 November 2013.

Facts of the case:

A.

The Schweizer Vogelschutz SVS/Swiss Birdlife (SVS) requested the State Chancellery of the Canton of Bern to give notice to the SVS in the form of contestable rulings of all permits or decisions issued by the Canton of Bern pursuant to certain provisions of the Federal Act of 20 June 1986 on Hunting and the Protection of Wild Mammals and Birds (Hunting Act; HuntA; SR 922.0) and the Ordinance of 21 January 1991 on Water Bird and Migratory Bird Reserves of International and National Importance (WMBRO; SR 922.32).

After its request was rejected on the ground that it had no right of appeal, the SVS contacted the Hunting Inspectorate (HI) of the Office for Agriculture and Nature of the Canton of Bern (LANAT) and on 22 April 2011 filed a request to the effect that a contestable ruling should be issued on whether the SVS has a right of appeal in relation to the shooting order issued by the Hunting Inspectorate of the Canton of Bern in respect of grey heron and goosander on the River Schüss and on other bodies of water. In addition, the SVS requested an assurance that it would be notified in writing of future shooting orders at least 30 days before they were due to be carried out and be granted a right of appeal in respect thereof, and that it should be provided with written information on how many grey heron and goosander the Canton of Bern had shot between 2006 and 2010 and in winter 2011 on other bodies of water apart from the River Schüss.

On 9 August 2011, the HI issued a ruling with the following content:

1. It is held that notice and a right of appeal should be given to the SVS in respect of regulatory measures under Art. 12 para. 4 HuntA and orders for several planned individual shootings of protected species of birds under Art. 12 para. 2 HuntA, in particular as part of conservation projects - e.g. to protect threatened species of fish.

2. Otherwise the request filed by the SVS on 22 April 2011 is rejected, insofar as it may be considered. This means in particular that no notice need be given of orders in respect of individual measures taken on an ad hoc basis in accordance with Art. 12 para. 2 HuntA against protected, harmful species of birds, provided the limit of 10% of the local population is not exceeded.

B.

The SVS filed an appeal against this ruling with the Department of Economic Affairs of the Canton of Bern (DEA). Along with various other requests that are no longer relevant to these proceedings, it made the following application:

1. Decisions 1 and 2 of the ruling of 9 August 2011 should be quashed and referred back to the Respondent (Office for Agriculture and Nature and Hunting Inspectorate) for improvement and reassessment. The reassessed ruling should not provide for individual measures (shootings) in respect of grey heron and goosander under Art. 12 para. 2 HuntA.

The DEA rejected the appeal with regard to holding that there is an obligation to give notice of orders for individual shootings, but otherwise referred the matter back to the HI for further consideration (Decision 1). The SVS appealed to the Administrative Court in Bern, requesting that this decision be quashed and that the application that it made in the appeal to the DEA be upheld, i.e. that a new ruling should be issued in which no individual measures (shootings) in respect of grey heron or goosander were provided for. The lower instance was to be required to consider the merits of the requests for declarations and orders. In a judgement dated 6 November 2013, the Administrative Court of the Canton of Bern rejected the appeal, insofar as it was prepared to consider it.

C.

The SVS filed an appeal in public law matters on 12 December 2013, requesting that Decision 2 of the contested judgment of the Bern Administrative Court of 6 November 2013 (relating to rejection of the appeal) be quashed with costs insofar as that decision rejected application 1 in the appeal to the Bern Administrative Court (which corresponds to application 1 in the appeal to the Department of Economic Affairs of the Canton of Bern; see Sec. B. above). The award of costs in the contested judgment of the lower instance should be quashed, and the Respondent be ordered to pay costs and compensation.

The DEA has chosen not to hold any consultative process. The lower instance and the Federal Office of the Environment (FOEN) take the view that the appeal should be rejected. In a submission dated 6 May 2014 and an (unsolicited) submission dated 20 January 2015, the Appellant adheres to its applications.

Matters considered:

1.

1.1 The appellant filed an appeal in public law matters in time (Art. 100 para. 1 Federal Supreme Court Act (FSCA)) and in the correct form (Art. 42 FSCA). It concerns the final decision of a final cantonal instance (Art. 90 FSCA) in the field of animal protection. The appeal is admissible (Art. 82 lit. a, Art. 86 para. 1 lit. d and para. 2, Art. 83 FSCA [e contrario]).

1.2

1.2.1 The matter in dispute is established in the proceedings for retrospective administrative justice by the appeal applications, which for their part must fall within the bounds of the matter contested and accordingly of the decisions in the contested judgment (BGE 136 II 165 E.5 8.174; Judgment 2C_343/2010 I 2C_344/2010 of 11 April 2011 E. 2.5, not publ. in BGE 137 II 199). The matter in dispute before an appeal tribunal may thus be no more than that which was or rightly should have been already in dispute before the lower instance, whereby it is open to the parties to challenge the contested judgment only in relation to certain aspects thereof (BGE 136 II 457 E. 4.2 p. 463; Judgment 2C_961/2013 of 29 April2014 E. 3.3).

In its contested judgment, the lower instance in particular rejected the application to quash the declaratory ruling of the DEA according to which the HI is not obliged to notify the SVS of individual ad hoc measures under Art. 12 para. 2 HuntA taken against protected species of birds that are causing damage, provided a limit of 10 % of the local population is not exceeded. Before the Federal Supreme Court, the appellant requests that the lower instance judgment be quashed to the extent that this appeal application was rejected. What is not contested, and therefore not the subject matter of the present proceedings, is the rejection without consideration by the lower instance of the application for declarations and orders made in the course of the appeal proceedings. The subject matter of the present appeal proceedings before the Federal Supreme Court is therefore solely the duty of the Hunting Inspectorate to notify the appellant of future orders to gamekeepers to shoot grey heron and goosander.

1.2.2 What need not be considered in Federal Supreme Court appeal proceedings is whether the substantive requirements for shooting goosander and grey heron under Art. 12 para. 2 HuntA are met.

The legal classification of the shooting order as an individual measure as defined in Art. 12 para. 2 HuntA in the first instance decision is, contrary to the Appellant's arguments, a mere legal subsumption of this order as one of the various measures under Art. 12 HuntA to prevent game animals from causing damage. This legal classification, although it is (unusually) mentioned in the decisions section, constitutes a point in justification, does not in itself regulate any public law rights or obligations, and may not be regarded as a declaratory ruling (on the definition of a declaratory ruling, see BGE 130 V 388 E. 2.5 p. 392; see on the lack of character of a ruling of information on how circumstances should be assessed in relation to tax according to the administration, Judgment 2C_664/2013 I 2C_665/2013 of 28 April 2014 E. 4.2, in: ASA 82 p. 737). As there was no declaratory ruling in the first instance proceedings, a ruling of this type could not be created in the course of the appeal proceedings (see on the definition of the matter in dispute above, E. 1.2.1). Nor does Art. 12 HuntA contain any requirements as to the form in which the measures should be ordered (below, E. 4.1.1). The question of whether a shooting order meets the requirements for classification as an individual measure in terms of Art. 12 para. 2 HuntA need not be discussed.

1.3 Organisations are entitled to file an appeal in public law matters if they are granted this right under federal law (Art. 89 para. 2 lit. d FSCA). Under Art. 12 para. 1 lit. b of the Federal Act of 1 July 1966 on Nature and Cultural Heritage (NCHA; SR 451), national organisations that have been devoted for a minimum of ten years in terms of their articles to the protection of nature, cultural heritage, the preservation of historic monuments or related goals and which pursue purely non-profit objects have such a right of appeal (to what is known as a "associations' appeal"). The Federal Council designates the organisations that are entitled to appeal (Art. 12 para. 3 NCHA). The appellant is listed in the Federal Council Ordinance of 27 June 1990 on the Designation of Organisations entitled to appeal on matters of Environmental Protection and Nature and Cultural Heritage (DORAO; SR 814.076) (No. 4 of the Annex to the DORAO; BGE 136 II 101 E. 1.1 p. 103). The contested lower instance judgment was issued by applying and interpreting the HuntA and thus relates to the fulfilment of a federal task (protection of animals and other species, Art. 79 f. Federal Constitution; MARTI, in: St. Galler Kommentar zur schweizerischen Bundesverfassung, 3rd Edition 2014, N. 11 on Art. 79 Federal Constitution). The appellant is entitled to file an associations' appeal against the lower instance judgment, which rejects any obligation to give notice of orders to shoot protected species of birds unless a limit of 10% of the local population is exceeded (BGE 139 II 271 E. 3 p. 272 f.; Judgment 1C_700/2013 of 11 March 2014 E. 2.1).

1.4 An appeal in public law matters may be used to complain of a breach of legal rights under Art. 95 f. FSCA. The Federal Supreme Court applies this right ex officio (Art. 106 para. 1 FSCA), but, subject to the general duties to state the legal defect and grounds of appeal (Art. 42 para. 1 and 2 FSCA), generally only considers the submissions that are filed, unless additional legal defects are obvious (BGE 138 I 274 E. 1.6 p. 280 f. with reference). It examines violations of fundamental rights and of cantonal and intercantonal law in every case only to the extent that a complaint to such an effect is precisely made and justified in the appeal petition (Art. 106 para. 2 FSCA; BGE 139 I 229 E. 2.2 p. 232; 134 II 244 E. 2.2 p. 246).

2.

The appellant argues that it must be entitled to an associations' right of appeal even if the lower instance correctly qualified orders to shoot protected birds that affect less than 10% of the local population as not being rulings. It claims that in view of the fact that the number of shootings is not restricted and the Canton

of Bern makes excessive use of its alleged shooting right, a high number of birds are affected, which is why there is a justified need for legal remedies. It argues that because of the associations' right of appeal, there is a duty to notify the association of future shooting orders as it has the right to appeal.

3.

3.1 According to the wording of Art. 12 para. 1 lit. b NCHA, an associations' appeal (see above, E. 1.3) can be used to contest *rulings*. Rulings are authoritative, unilateral, individual-specific orders by authorities that are issued in application of administrative law, aim to have legal effects and are binding and enforceable (BGE 135 II 38 E. 4.3 p. 45; 131 II 13 E. 2.2. p. 17). To be a ruling and thus contestable by the associations' right of appeal, the contested act must in particular have the regulation of rights and obligations as its subject matter (BGE 135 II 328 E. 2.1 p. 331; expressly Riva, Die Beschwerdebefugnis der Natur- und Heimatschutzvereinigungen im schweizerischem Recht 1980, p. 82). Acts that trigger the associations' right of appeal must be made public with sufficient precision or must notified in writing, otherwise they frustrate the implementation of federal law (BGE 121 II 224 E. 5/e p. 234 f.; 116 lb 119 E. 2c p. 123; MEYER, Das Beschwerderecht von Vereinigungen; Auswirkungen auf das kantonale Verfahren, in: Verfassungsrechtsprechung und Verwaltungsrechtsprechung, 1992, p. 167 ff.; see since then expressly Art. 12b NCHA).

3.2 In the opinion of the lower instance, internal administrative orders to shoot protected birds do not meet the structural requirements to be a ruling because they do not regulate a legal relationship. Applying the administrative practices of the Federal Office of the Environment FOEN, it categorized shooting orders that affect at least 10% of the population as regulatory measures that must be issued as contestable rulings, in order that legal interests may be protected. Shooting orders that affect less than 10 % of the population, on the other hand, would be categorised as individual measures (Art. 12 para. 2 HuntA), which would not be issued in the form of a contestable ruling because there is no need for legal protection and which would thus not give rise to an associations' right of appeal. For this reason, the lower instance found that there was no duty to give notice of the disputed orders.

4.

Accordingly, we must first examine whether orders based on Art. 12 HuntA should be classified as rulings; if the answer is no, the next question is whether appellant nonetheless has the option of having such measures reviewed by a court.

4.1 The lower instance based its distinction between individual measures (in accordance with Art. 12 para. 2 HuntA), which are ordered in no particular form, on the one hand, and regulatory measures (in accordance with Art. 12 para. 4 HuntA), which must be issued in the form of a contestable ruling, on the other, on BGE 136 II 101 E. 5.5 p. 109 ff. (Judgment 2C_911/2008 of 1 October 2009, extracts published in BGE 136 II 101).

4.1.1 We do not however understand this conclusion: in the case in question, the cantonal office granted fish farmers, i.e. private individuals, permission to shoot birds, in particular grey heron, as these birds were causing damage to their fish farming stocks. Accordingly the administration granted private individuals the right to carry out an activity prohibited under Art. 7 para. 1 HuntA for regulatory reasons. Where administrative authorisation is granted, it is without doubt a ruling, which is why the disputed orders without further formalities were classified as rulings subject to the associations' right of appeal (on the

expansion of individual rights through administrative authorisation, see TSCHANNEN/ZIMMERLI/MÜLLER, Allgemeines Verwaltungsrecht, 4th Ed. 2014, p. 422; on the protection of animals and other species as a federal task [Art. 79 f. Federal Constitution] above, E. 1.3). The argument cited in justification of the FOEN's administrative practices (BGE 136 II 101 E. 5.5 p. 109 ft.) relates only to the distinction between individual (Art. 12 para. 2 HuntA) and regulatory measures (Art. 12 para. 4 HuntA); this however does not answer the question of whether these measures must be ordered in the form of a contestable ruling.

4.1.2 The legal classification of an official order that permits the shooting of animals of a protected species cannot depend on whether it is addressed to a private individual or to a subordinate administrative unit, because there is no difference in the nature or extent of the order's ostensible effects. In its judgment in BGE 125 II 29, the Federal Supreme Court held that the order of a cantonal department to a subordinate administrative office to deal with a non-indigenous, imported species of crustacean using an insecticide was clearly a ruling which could ultimately be contested by an administrative court appeal to the Federal Supreme Court (BGE 12511 29 E. 1c p. 33). Where an administrative unit grants administrative permission to a private individual or a subordinate authority, i.e. for example – as in this case - permission for regulatory reasons to carry out an activity that is prohibited under Art. 7 para. 1 HuntA, it must be assumed that this decision is a ruling. In other words, where the administration decides on the (non-) application of a legal rule for its own purposes, it does not merely issue an internal order but issues a contestable ruling (Moor, Droit administratif, vol. II, 3rd Ed. 2011, p. 193 f.).

4.2 This legal classification of the disputed shooting orders is consistent with the requirement of Art. 12 NCHA, according to which measures carried out by state authorities or by private individuals that could harm an object of protection as defined in Art. 1 NCHA must be ordered in the form of a ruling.

4.2.1 In administrative law, party status and the right to take legal action largely depend on meeting the requirement of having a legitimate interest in the proceedings; this requirement is intended to obviate the undesirable *actio popularis* (BGE 140 II 315 E. 4.3 and E. 4.4 p. 325; RIVA, op.cit., p. 157 f.; GRIFFEL, Das Verbandsbeschwerderecht im Brennpunkt zwischen Nutz- und Schutzinteressen, URP 2006 p. 94; GADOLA, Beteiligung ideeller Verbände vor den unteren kantonalen Instanzen - Pflicht oder blosse Obliegenheit? Zugleich eine Auseinandersetzung mit BGE 116 lb 119 ff. and 418 ff., in: ZBI 93/1992 p. 107). Accordingly, the scope of the guarantee of recourse to the courts conferred by Art. 29a of the Federal Constitution is limited to disputes in connection with an individual legal position that is worthy of protection (on this requirement see BGE 140 II 315 E. 4.4 p. 326, 137 II 409 E. 4.2 p. 411; 136 I 323 E. 4.3 p. 328 f.; Judgment 2C_272/2012 of 9 July 2012 E. 4.3).

4.2.2 This principle cannot, however, be applied indiscriminately to the associations' right of appeal. Where exclusively public interests in protecting cultural heritage, nature, and animal and plant species are affected, adhering to the requirement of the legitimate legal interest in the proceedings as just defined would lead to sensitive gaps appearing in the justice system. These gaps are closed by Art. 12 ff. NCHA. The non-material right of appeal based on specific legislation given to national Swiss organisations for nature and cultural heritage in order to enforce purely public interests, in derogation from the general requirements for entitlement to take legal action, requires neither a personal (actual or legal) interest nor (in contrast to a selfish associations' appeal) the need to safeguard the interest of members (GRIFFEL, op.cit., p. 94; on Art. 89 para. 2 lit. d FSCA WALDMANN, Basler Kommentar zum Bundesgerichtsgesetz, 2nd Ed. 2011, N. 69 on Art. 89 FSCA; MOSIMANN, Beschwerde in öffentlich-rechtlichen Angelegenheiten, in: Prozessieren vor Bundesgericht, 3rd Ed. 2011, N. 4.73 f.).

4.2. Consistent with the object of Art. 12 NCHA, which is to guarantee the duty to maintain, conserve and protect the animal and plant world in all its many forms as required by the constitutional provisions on nature and cultural heritage, the revised provisions of the NCHA on the non-material right of appeal, which came into force in 2007, introduced full party status for organisations with the right to appeal as defined

in the Federal Act on Administrative Procedure (Parliamentary initiative to simplify the environmental impact assessment and to prevent abuses by providing a precise definition of the associations' right of appeal, Report by the Council of States Legal Affairs Committee of 27 June 2005, BBI 2005 5377). Accordingly, the requirement for party status in first instance administrative proceedings (Art. 6 and Art. 48 para. 1 APA) that one must have a legitimate legal interest in the proceedings in that one's own rights and obligations have been affected is replaced in the case of national organisations for nature and cultural heritage that are entitled to appeal by a right to appeal conferred specifically by Art. 12 NCHA, in order to enforce the public interest in protecting nature, cultural heritage and animal and plant species (MARANTELLI-SONANINI/HUBER, in: Praxiskommentar zum VWVG, 2009, N. 12 on Art. 6 APA; GADOLA, op.cit., p. 113 f.). Art. 12 NCHA thus means that measures by state authorities or private individuals that could harm an object of protection in terms of Art. 1 NCHA must be ordered in the form of a ruling, which makes it possible to effectively exercise the associations' right of appeal.

4.2.4 The same result is reached if a comparison is made with the legal position in the case of other measures related to nature and cultural heritage that do not always harm the legitimate interests of private individuals. Thus under Art. 21 para. 1 NCHA, riparian vegetation may neither be cleared nor covered over or otherwise destroyed, although under Art. 22 para. 2 NCHA, the cantonal authority may authorise the removal of riparian vegetation under certain circumstances. These measures, just like orders to shoot protected species of animal based on Art. 12 HuntA, may be contrary to the protection goals of the NCHA. They are expressly stated to require authorisation, with the result that they must clearly be regarded as rulings and are thus subject to the right of appeal under Art. 12 NCHA. The legislature did not make their classification as rulings dependent on quantitative criteria which – as in the matter in dispute here – could neither be justified objectively nor practicable. The Federal Supreme Court always recognises the right to appeal of conservation organisations based on Art. 12 NCHA regardless of the extent of the planned activity (see for example BGE 98 lb 13). We see no grounds to change the practice in relation to the shooting of protected animals. Official shooting orders based on Art. 12 HuntA must thus be regarded as rulings irrespective of whether they are addressed to private individuals or to administrative entities.

4.3 This result is all the more justified because it is consistent with the obligations under the Convention of 25 June 1998 on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention; SR 0.814.07), which came into force in Switzerland on 1 June 2014.

4.3.1 The Aarhus Convention is based on the three pillars of environmental information (Art. 4 and Art. 5 Aarhus Convention), public participation in the decision-making process (Art. 6, Art. 7 and Art. 8 Aarhus Convention) and access to justice in environmental matters (Art. 9 Aarhus Convention; see Federal Council Dispatch of 28 March 2012 on the approval and implementation of the Aarhus Convention and its amendment, 881 2012 4323 ff.; JANS, Judicial Dialogue, Judicial Competition and Global Environmental Law. A case study on the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, in: National Courts and EU Environmental Law, 2013, p. 145 ft.; WIESINGER, Innovation im Verwaltungsrecht durch lnternationalisierung: eine rechtsvergleichende Studies am Beispiel der Aarhus-Konvention, 2013, p. 57 ff.; EPINEY, Zu den Anforderungen des EU-Rechts und der Aarhus Convention an deb gerichtlichen Zugang für Umweltverbände, in: Staats- und Verwaltungsrecht auf vier Ebenen, Festschrift für Tobias Jaag, 2012 [citing requirements], p. 599 ff.; HESELHAUS, Das Verbandsbeschwerderecht im Vorteld der Ratifikation der Aarhus-Konvention durch die Schweiz, in: Verfahrensrecht am Beginn einer neuen Epoche, 2011, p. 1 ff.; EPINEY, Rechtsprechung des EuGH zur Aarhus-Konvention und lmplikationen für die Schweiz, in: AJP 11/2011 [citing legal precedent] p. 1505 ff.; SCHWERDTFEGER, Der Deutsche Verwaltungsrechtsschutz unter dem Einfluss der Aarhus-Konvention, 2010, p. 286 ff.; PERNICE-WARNKE, Der Zugang zu Gericht in Umweltangelegenheiten für lndividualkläger und Verbände gemäss Art. 9 Abs. 3 Aarhus-Konvention und seine Umsetzung durch die

europäische Gemeinschaft – Beseitigung eines Doppelstandards?, Europarecht 2008 p. 410 ff.).

4.3.2 The judgment of the lower instance is dated 6 November 2013. At this time Switzerland had already signed and approved the Aarhus Convention (Federal Decree of 27 September 2013 on the approval and implementation of the Aarhus Convention and its amendment, SSI 2013 7403), but had not yet ratified it.

The Convention was therefore not yet directly binding on Switzerland, but was already to be regarded as a strict guideline or basis for interpretation of national law (on interpretation in accordance with international law, see BGE 137 I 305 E. 3.2 p. 318 f.). Even if a state has simply signed a convention and the convention requires ratification to have any legal effect in the legal system of the state concerned, Art. 18 of the Vienna Convention of 23 May 1969 on the Law of Treaties (VCLT; SR 0.111) imposes a basic duty at this stage between signature and ratification for states to refrain from any acts that would defeat the object and purpose of a treaty (BOISSON DE CHAZOURNES/LA ROSA/MBENGUE, in: Corten/Klein [Eds.], Les Conventions de Viennes sur le droit of the traites, 2006, N. 45 on Art. 18 VCLT; VILLIGER, Commentary on the 1969 Vienna Convention on the Law of Treaties, 2009, N. 6 on Art. 18 VCLT [cit. Commentary]; on treaties on the protection of species; BOISSON DE CHAZOURNES/LA ROSA/MBENGUE, op.cit., N. 66 on Art. 18 VCLT). This duty to refrain can also justify a positive duty to act, but only to prevent the object or purpose of a treaty from being defeated; there is no state obligation to apply the content of a treaty before its ratification (BOISSON DE CHAZOURNES/LA ROSA/MBENGUE, op.cit., N. 66 on Art. 18 VCLT; VILLIGER, Commentary, N. 13 on Art. 18 VCLT). The state duty to refrain from carrying out acts that defeat the object or purpose of a treaty requires national law to be interpreted as conferring a duty to notify or publish in the case of acts of this type; there will be an associations' right of appeal against such acts under convention law once the Convention has been ratified (on the object and purpose of the Convention in relation to access to justice in environmental matters, see the Federal Council Dispatch of 8 March 2012 on the approval and implementation of the Aarhus Convention and its amendment, SSI 2012 4323 ff.; JANS, op.cit., p. 145 ff.; WIESINGER, op.cit., p. 57 ff.; EPINEY, requirements, p. 599 ff.; HESELHAUS, op.cit., p. 1 ff.; EPINEY, case law, p. 1505 ff.; SCHWERDTFEGER, op.cit., p. 286 ff.; PERNICE-WARNKE, op.cit., p. 410 ff.).

4.3.3 Under Art. 9 para. 3 of the Aarhus Convention, the contracting states guarantee that members of the public will have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment. The object to be challenged under convention law must be interpreted according to its customary meaning of "acts and omissions" when considered in good faith (Art. 31 para. 1 VCLT; BGE139 II 404 E.7.2.1 p.422 f.; 138 II 524 E.3.1 8.527; PETERS, Volkerrecht, 2nd Ed. 2008, Chapter 7 N. 20), i.e. regardless of the form of the act as defined under domestic law (specifically on the Aarhus Convention, see JANS, op.cit., p. 156; LAVRYSEN, op.cit., p. 665). Art. 9 para. 3 Aarhus Convention provides for a recourse to national law criteria (see on its admissibility in view of Art. 27 VCLT, BGE 140 II 460 E. 4.1 p. 465) merely with regard to the requirements that members the general public must meet in order to qualify as a non-profit association. To define the object being challenged under convention law as the lower instance did (i.e. that the court must have to rule on public law rights and obligations in relation to private individuals) would in certain cases frustrate the declared aim of the convention to enforce objective environmental law through effective judicial mechanisms.

4.3.4 The requirement of being able to challenge state measures relating to environmental law in the courts regardless of the specific form of the act arises from a joint agreement (United Nations Economic Commission for Europe [UNECE], Meeting of 30 June and 1 July 2014 of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Fifth session, Decision V/9b on compliance by Austria with its obligations under the Convention [ECE/MP.PP/2014/L.11]) by all the contracting states with regard to Art. 9 para. 3 of the Aarhus Convention. This (subsequent) agreement between the contracting states clarifies the context in which the wording of

the object of challenge under convention law, i.e. "acts and omissions", must be placed (Art. 31 para. 3 lit. a VCLT). A subsequent agreement of this type, which can itself be categorised as an international law agreement, between all the contracting parties as masters of their agreements is highly important with regard to the issue of interpretation (VILLIGER, Commentary, N. 16 on Art. 31 VCLT).

The contracting states to the Aarhus Convention hold conferences regularly and review compliance with the Convention on a consensus basis (Art. 15 Aarhus Convention); they base their decisions in particular on reports compiled by the Compliance Committee (set up by Resolution 1/7 ECE/MP.PP/2/Add. 8 of the contracting states of 21-23 October 2002). At one such conference held from 30 June 2014 to 2 July 2014, the contracting states decided that the lack of access for members of the general public (in particular for non-governmental organisations) in a contracting state to administrative or judicial proceedings aimed at contesting acts or omissions that violate environmental law infringed the Convention. They thus established the subsequent practice for the interpretation of Art. 9 para. 3 Aarhus Convention in the sense of a non-financial associations' appeal against acts and omissions relating to the environment (Art. 31 para. 3 lit. a and b VCLT).

4.3.5 The interpretation of Art. 9 para. 3 Aarhus Convention according to the requirements of Art. 31 VCLT leads to the result that the object of challenge under the Convention, i.e. "acts and omissions" is not limited to a specific form of public law act against private individuals. The disputed orders to shoot protected birds are capable of harming the protection goals of Art. 1 NCHA and since the entry into force of the Aarhus Convention have therefore been subject to the associations' right of appeal in accordance with Art. 9 para. 3 of the Convention.

In addition, the Federal Council in its dispatch on the ratification of the Aarhus Convention took the view that the Swiss legal system guarantees legal protection that satisfies the requirements of the Convention. In connection with the requirement to have the opportunity of a judicial review of official acts or omissions under Art. 9 para. 3 of the Aarhus Convention, the Federal Council stated that under Swiss law organisations entitled to appeal under Art. 12 NCHA in the field of nature and cultural heritage can go to the courts to have related decisions reviewed (Dispatch on the approval and implementation of the Aarhus Convention and its amendment dated 28 March 2012, BBI 2012 4323, 4348).

4.3.6 In view of this clear interpretation result, there is no need to have recourse to supplementary means of interpretation in terms of Art. 32 VCLT (BGE 139 II 404 E. 7.2.1 p. 423; Judgment 2C_436/2011 of 13 December 2011 E. 3.3; Judgment 2A.239/2005 of 28 November 2005 E. 3.4.1) and in particular to the case law of the EuCJ (Judgments of the EuCJ of 12 May 2011 C-115/09 Trianel, and of 8 March 2011 C-240/09 Lesoochranarske zoskupenie VLK), which could be considered at a subsidiary level as the practice of some contracting states with regard the interpretation of convention law (VILLIGER, 1969 Vienna Convention on the Law of Treaties, Collected Courses of the Hague Academy of International Law 2009, Vol. 344, p. 120; differently in the case of an express agreement under convention law on their relevance see BGE 140 II 460 E. 4.1 p. 465 f.). The same applies to the findings of the Compliance Committee (a supervisory committee appointed by the contracting states), which reached the same conclusion (see Findings and recommendations of the Compliance Committee with regard to compliance by Belgium with the Convention [Findings Belgium], Addendum 2 of 28 July 2006 to the report of the 12th meeting of the Committee [ECE/MP.PP/2006/4/Add.2], N. 28 f.; see also – with regard to the culling of crows - Findings of the Compliance Committee with regard to compliance by Denmark with its obligations under the Convention, Addendum 4 of 29 April 2008 to the Report of the Compliance Committee to the 3rd meeting of the Parties [ECE.MP.PP/2008/5/Add.4]. N. 24 and N. 28).

5.

In conclusion, the court finds that the disputed shooting orders must be regarded as rulings in terms of Art. 12 para. 1 NCHA. As far as the appellant is concerned, they trigger the associations' right of appeal and therefore a duty to publish or give notice. The appeal is upheld on this point.

6.

The appeal is allowed and the contested lower instance judgment is quashed. Given the outcome of the proceedings, no court costs are imposed (Art. 66 para. 1 and 4 FSCA). The Canton of Bern must pay the appellant compensation of Fr. 5,000 in respect of legal fees (Art. 68 para. 1 FSCA). The case is referred back to the lower instance, so that the lower instance decision on costs and compensation may be reconsidered (Art. 67 FSCA).

Accordingly the Federal Supreme Court decides as follows:

1.

The appeal is upheld and the judgment of the administrative court of the Canton of Bern of 6 November 2013 is quashed in relation to the appellant. The Office for Agriculture and Nature of the Canton of Bern, Hunting Inspectorate, is instructed to notify the appellant of orders to shoot grey heron and goosander.

2.

No court costs are charged.

3.

The Canton of Bern must pay compensation of Fr. 5,000.-- to the appellant in respect of the Federal Supreme Court proceedings.

4.

Written notice of this judgment will be given to the parties to the proceedings, the administrative court of the Canton of Bern and the Federal Office for the Environment.

Lausanne 17 April 2015

On behalf of the II. Public Law Division
of the Federal Supreme Court

The President: The Clerk:

Zund Mayhall