

*Specialised tribunals and specialisation
of judges in environmental law
The Case of Iceland*

Environmental and Natural Resources Board of Appeal

Nanna Magnadóttir

Chairman and Head of Secretariat

Introduction

- Iceland, 45th Party to the Aarhus convention.
- Iceland chose the administrative route provided by Art. 9 para. 2 of the convention „...have access to a review procedure before a court of law and/or **another independent and impartial body established by law**, to challenge the substantive and procedural legality of any decision, act or omission...”
- Accordingly the Environmental and Natural Resources Board of Appeal was established as of 1 January 2012 on the basis of legislative act no 130/2011 and is an independent administrative appeals body that reviews the legality of decisions appealed against in the field of environment and natural resources.
 - Seven years of experience
 - Big societal changes

About the Board of Appeal

- Who reviews?



- 9 board members
 - Chairman, fulfilling the criteria to become a district court judge
 - Vice-Chair, fulfilling the same criteria as the chairman
 - Two legal experts without further criteria (Currently a Professor of environmental law, Chief District Court Judge)
 - Planning expert (Currently an Architect)
 - Building expert (Currently a Building Engineer)
 - Expert on environmental matters (Currently Phd. Environment and Natural Resources)
 - Expertise on geology, energy and geological resources (Currently Phd. Geology)
 - Expertise on the ecology of dry land, freshwater and marine life (Currently Phd. Ecology of land, alternate member has freshwater and marine life exp.)
- The Board sits in 3 or 5 member panels by decision of the chairman and is chaired by either the chair or vic-chair
- Common composition is 2 legal experts + 1 specialised expert, in environmental cases often 3 or 4 legal experts + 2 or 3 specialised experts
 - Why more legal experts?
- All members appointed by the Minister for Environment and Natural Resources after a competitive recruiting process
- All but Chair and Vice-Chair upon nomination from the Supreme Court

Mandate of the Board

- What can be reviewed?



- The right to challenge decisions, acts and omissions when it comes to proposed activities which have or may have a significant effect on the environment
- Administrative decisions on:
 - Whether projects shall be subject to EIA
 - Whether interrelated projects shall be subject to a joint EIA
 - Whether an EIA needs to be revised
 - Decisions by the Planning Authority under the EIA Act
 - Permits and licenses for activities and projects subject to EIA
 - Decisions by the municipalities, the Environmental Authority, the Food and Veterinary Authority etc. Building permits, development consent, license to operate
- can all be appealed against
- as well as omissions pertaining to public participation in decision making in environmental matters (EIA Act)
- The right to appeal is enshrined in legislation and at the time of the Boards establishment the right to appeal was found across 21 acts, now it is found in some 28 acts

The appeal system in Iceland

- Icelandic law does not allow for the Board to seek an advisory opinion from the EFTA Court
 - But rulings of the Board can be brought to court and the court can seek such an opinion or what?
- Courts
 - Exhaustion of administrative appeal not required, some choose to go directly to court if they have standing
 - Decisions of the Board are rarely examined by the courts
 - No big dissimilarities in approaches by the Board and the courts
 - Caveat, recent interpretation of standing for individuals in environmental fish farming cases
 - Article 60 of the Icelandic Constitution
 - Judges settle all disputes regarding the competence of the authorities.
- Ombudsman
 - Exhaustion of administrative appeal required before decisions by the Board are brought to the ombudsman
 - Very few opinions, none on environmental cases decided by the Board

Locus standi – the issue of standing

- Sufficient legal interest
- ENGOs (interest organisations)
 - Have an interest by default in cases brought on the basis of the EIA Act or if they concern a development/operating permit/license issued after an EIA
 - Additional criteria laid down by law:
 - A minimum of 30 members
 - Membership is open to all
 - An appeal is in line with the goals of the organisation
 - Audited accounts
 - Yearly reports

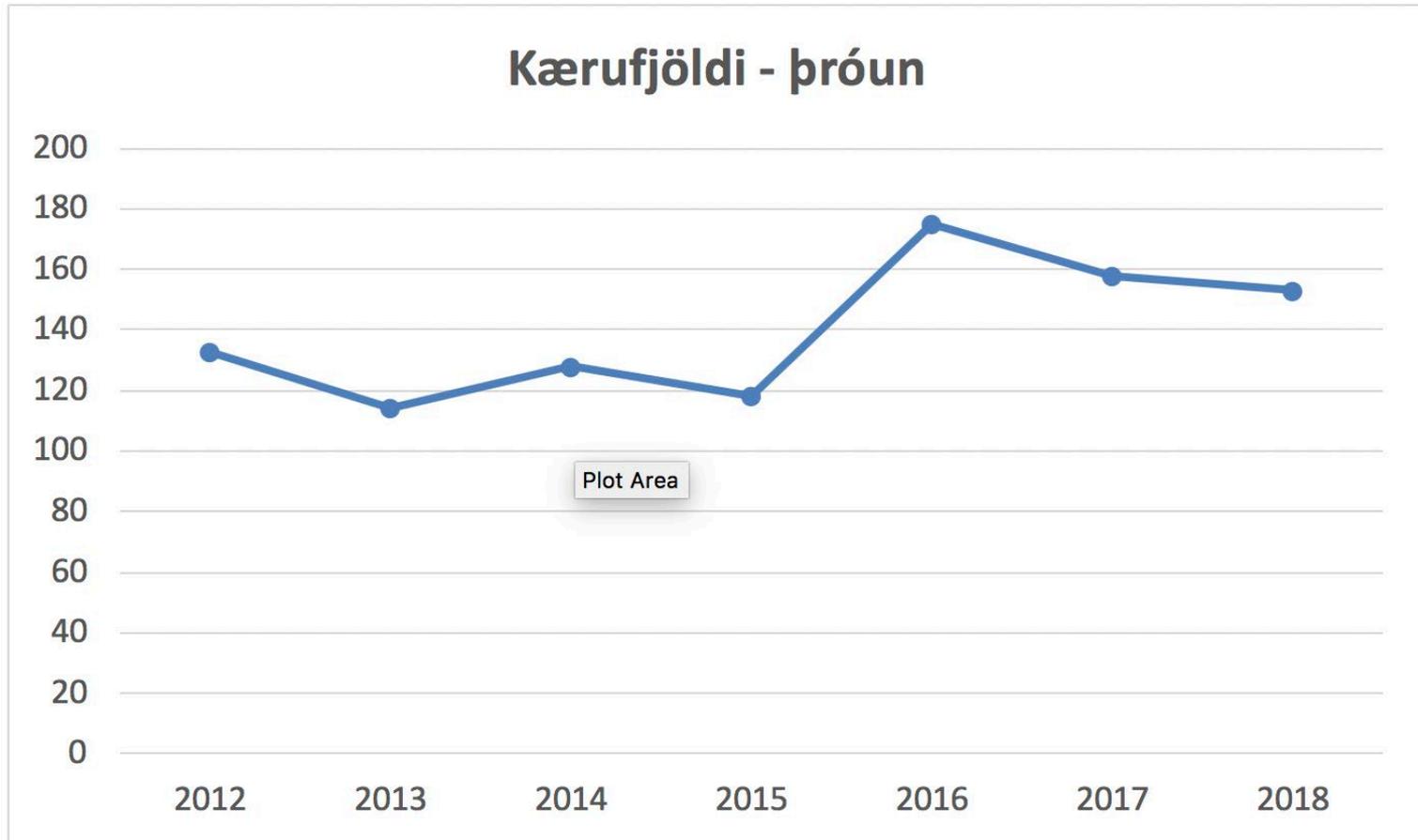
Scope of review by the Board

- Procedure, form, content are all scrutinized ex officio due to the Administrative Procedure Act
- Powers limited to quashing
 - No new decision taken
 - No instructions given, apart from those that can be gleaned from the rulings themselves
 - No damages awarded

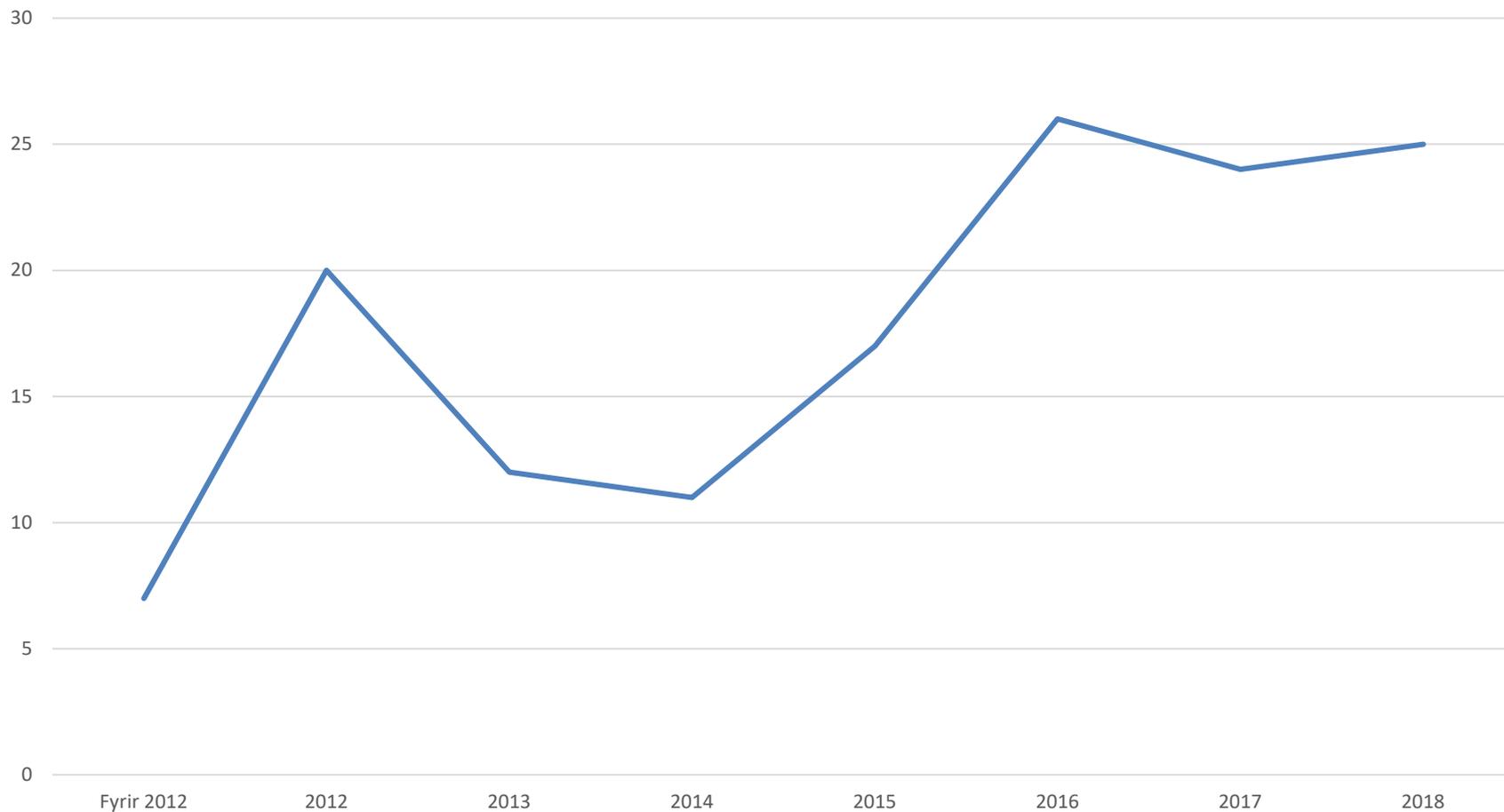
Adequacy and effectiveness of the review

- Not prohibitively expensive
- Rulings binding, in writing and made public at www.uua.is
- Fair and equitable?
 - Legal representation not required
 - Administrative Procedures Act requires the Board to
 - Independently examine the case ex officio
 - Obligation to advice on proceedings etc.
- Timely?
 - In terms of legislation but not in terms of practice...
 - 3 months general rule
 - 6 months if the case so requires
 - Extra resourcers are being provided to the Board
 - Possibilities to prioritize within the case load are utilized

Case-load development

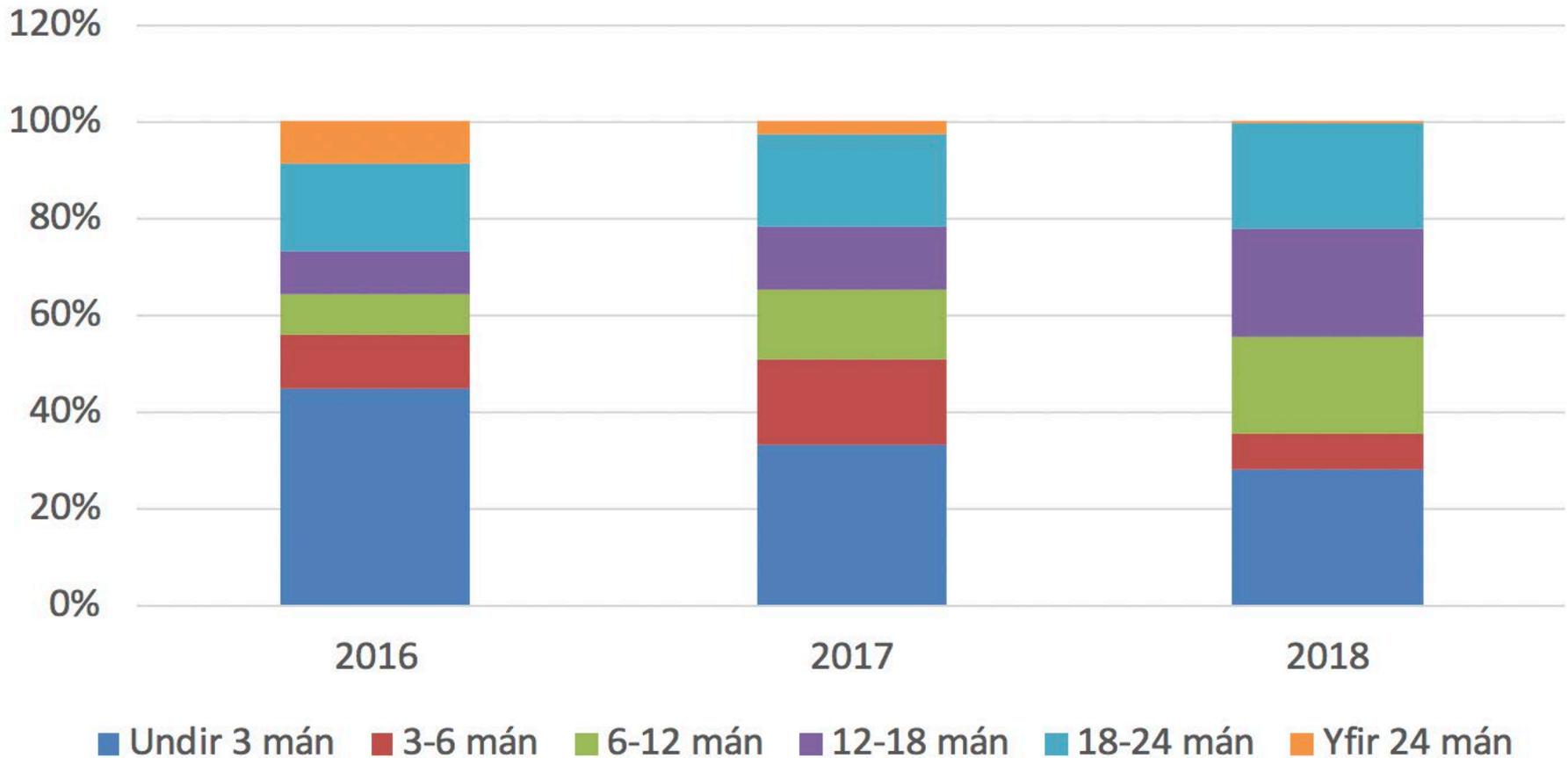


Case-load development in EIA cases



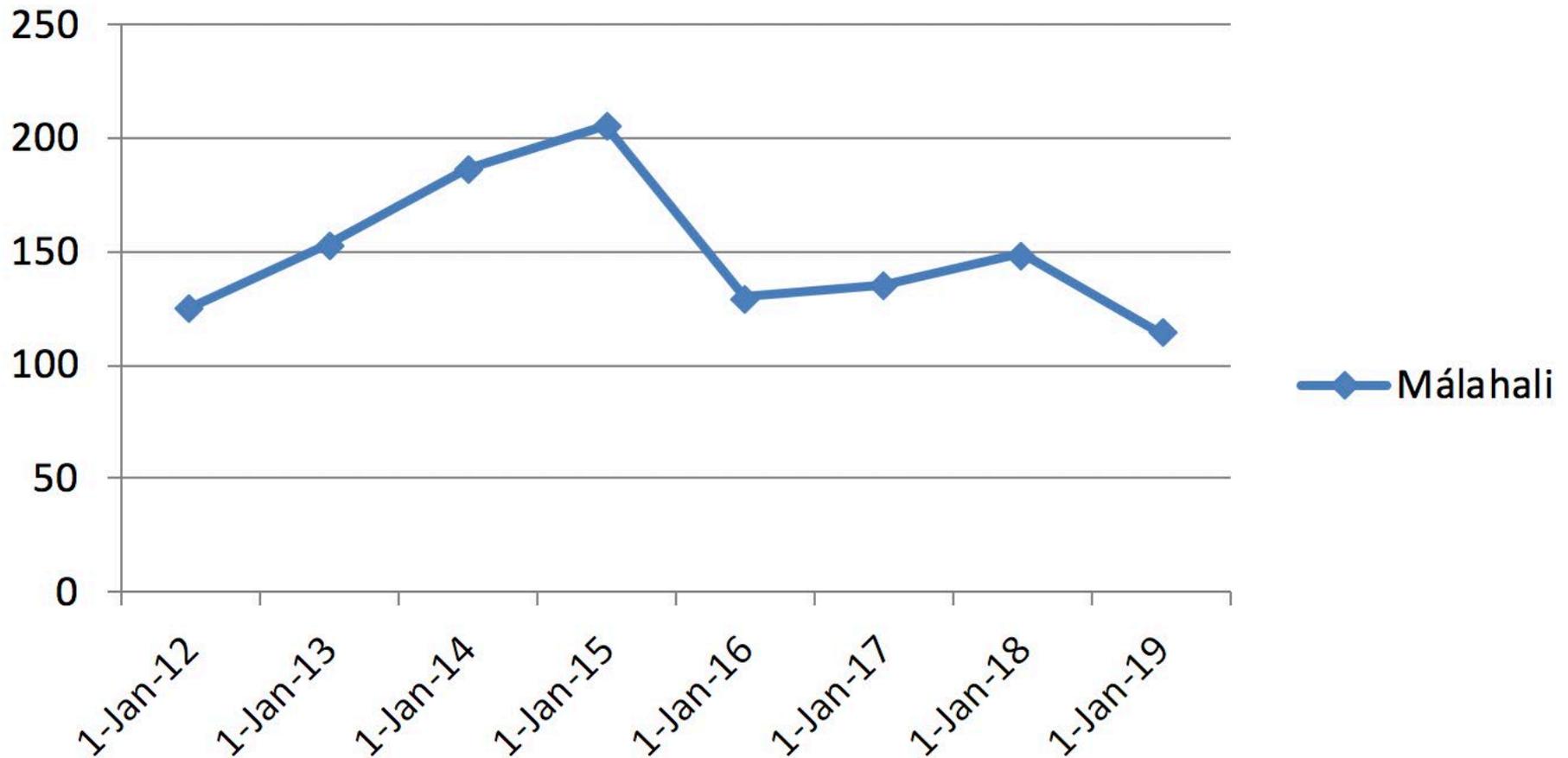
Length of Proceedings

Málsmeðferðartími 2016-2018



Backlog of unresolved cases

Málhali - þróun



Main takeaways

- Board v. Courts in Iceland?

	Board of Appeal	General Courts
What can be reviewed?	Decisions, acts and omissions pertaining to the environment as provided by law (across 28 laws)	All administrative decisions
Who can ask for a review (locus standi)?	Those with sufficient legal interest + ENGOs are deemed to have such interests	Only those with sufficient legal interest e.g. landowners
Who carries out the review?	Specialised board (3 or 5 in panel, legal and other experts)	Sitting judge (+ expert(s))
Scope of the review	All aspects of the case as presented by the parties + as investigated by the Board	All aspects of the case as presented by the parties
	Does not take a new decision	Does not take a new decision
Adequacy and effectiveness of the review	<ul style="list-style-type: none"> • Binding decision, in written, made public 	<ul style="list-style-type: none"> • Binding decision, in written, made public
Injunctive relief?	<ul style="list-style-type: none"> • Injunctive relief 	<ul style="list-style-type: none"> • Injunctions
Fair and equitable?	<ul style="list-style-type: none"> • Independent and impartial? 	<ul style="list-style-type: none"> • Independent and impartial
Timely?	<ul style="list-style-type: none"> • Legal representation not required 	<ul style="list-style-type: none"> • Self-representation not encouraged
Costly?	<ul style="list-style-type: none"> • Written and signed complaint • Timely by law as 3-6 months prescribed, not timely in practice 322 days in 2018, target is 240 days in 2019 • No cost 	<ul style="list-style-type: none"> • Strict form and procedure, subpoenas etc. • Time consuming (381 days in 2017) • Expensive to bring a case + loser pays principle

Main takeaways cont.

- Proper resources from the get go
- Specialization increases competence and knowledge
- Flexibility v rigid procedures
- How many levels of reviews?
 - What is sufficient access to justice?
- Ensure credibility
 - Competence of the Board members must be evident
 - High level of expertise
 - Nomination and appointment procedures
 - Avoid undermining by
 - Developers and other stakeholders (soulless administration)
 - Institutions (pointing fingers, voicing discontent)
 - Politicians (lobbying for the constituency)
 - Credibility must be earned

What next for Iceland?



Kvarta til eftirlitsnefndar Árósasamningsins

© 26.02.2019 - 19:09

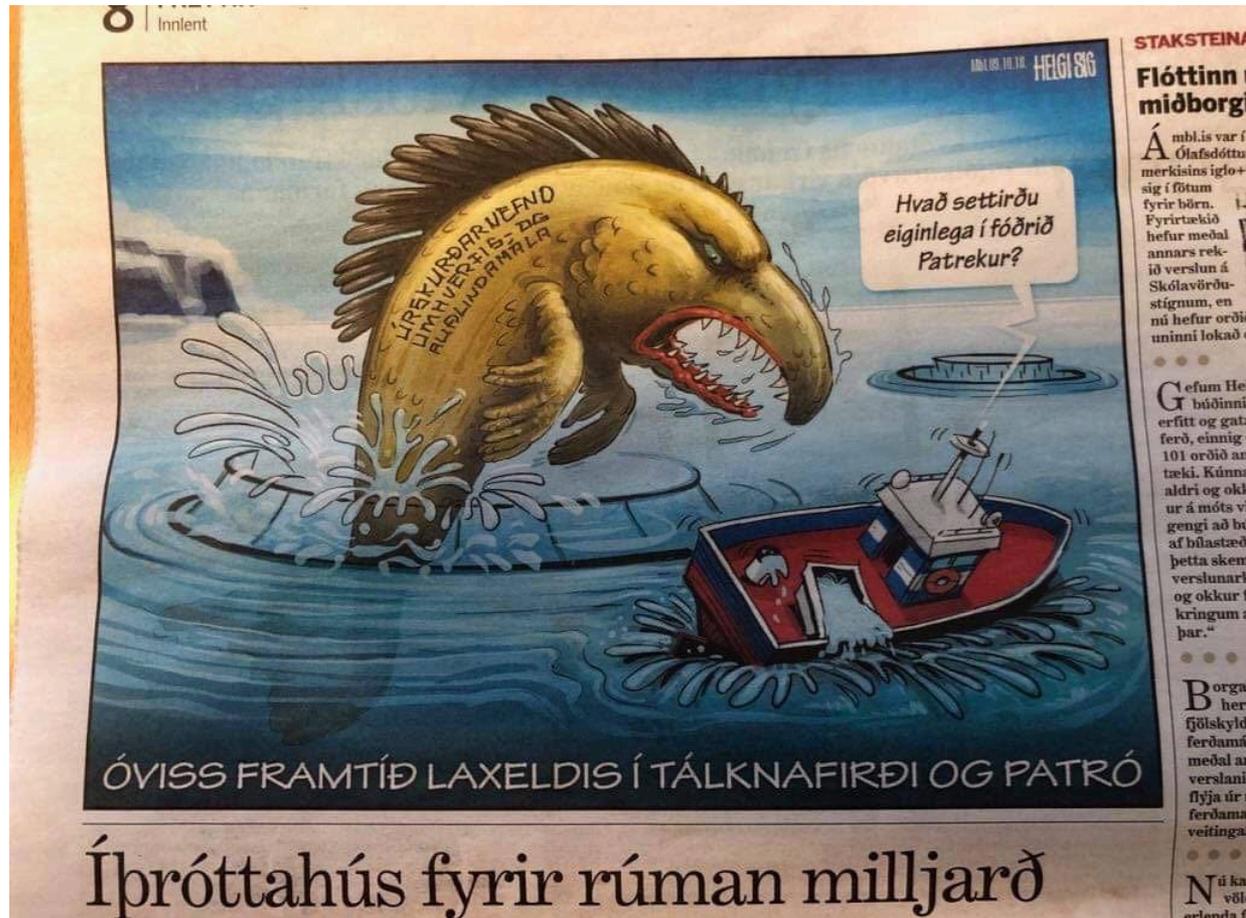


Mynd: Rúnar Snær Reynisson - RÚV

Sjö umhverfisverndarsamtök, Landvernd, Eldvötn, Fjöregg, Fuglavernd, Náttúruverndarsamtök Austurlands,*Náttúruverndarsamtök Suðvesturlands og Ungir umhverfissinnar, hafa kvartað til eftirlitsnefndar Árósasamningsins vegna breytinga á lögum um fiskeldi. Breytingarnar heimilda sjávarútvegs- og landbúnaðarráðherra að gefa fiskeldisfyrirtækjum rekstrarleyfi til bráðabirgða og þann 5. nóvember síðastliðinn gaf ráðherrann út tvö slík leyfi.

The first complaint against Iceland was just lodged with the Compliance Committee

- No public participation before a temporary permit (20 months, 10+10) is issued on the basis of the new legislation.
- The legislation excludes the right to appeal against a decision to issue a temporary permit.
- In enacting the legislation the legislator has undermined the independence of the Board of Appeal.



Thank You!

Nanna Magnadóttir

nanna@uua.is