

## Judicial Progress in Germany's Nuclear Waste Disposal Policy The Konrad Repository Decisions of 26 March 2007

by Gunther Kühne\*

### I. The German Political Situation Regarding Nuclear Waste Repositories

The installation of final repositories for nuclear waste has been a most controversial topic on the German political agenda for decades. The beginning of efforts to solve this problem can be traced back to the 1970s when plans for the establishment of an Integrated Nuclear Waste Disposal Centre (*Integriertes Entsorgungszentrum*) in the State of Lower Saxony were developed. It was in this context that in 1976,<sup>1</sup> the Atomic Energy Act (AEA) of 1959<sup>2</sup> (the 2002 consolidated text is reproduced in Supplement to *Nuclear Law Bulletin* No. 70) was amended by inserting Section 9a, paragraph 3, sentence 1, which reads very succinctly: "The Federation shall establish installations for the safekeeping and final disposal of radioactive waste." Despite the subsequent AEA amendments of Section 9a, paragraph 3 and the addition of a paragraph 4 (1998)<sup>3</sup> that were to allow the Federation to transfer the exercise of its functions to third parties, these administrative provisions were never used. Accordingly, full responsibility of the Federation for the fulfilment of its obligation under Section 9a, paragraph 3 of the AEA remains intact today.

As is commonly known, in June 2001 the red-green federal government entered into an agreement with the four main electric utility companies, and at the same time nuclear power producers, on the phase-out abandonment of nuclear power production. This agreement was incorporated in toto into the 2002 amendment to the AEA.<sup>4</sup> Apart from a ban on the construction of new nuclear power plants, the amendment provides for a phase-out schedule for the (then) existing

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1. Federal Law Gazette 1976, Part I, p. 2573.
2. Federal Law Gazette 1959, Part I, p. 814 (original version).
3. Federal Law Gazette 1998, Part I, p. 694. See the Report in *Nuclear Law Bulletin* No. 61 (June 1998), p. 74.
4. Federal Law Gazette 2002, Part I, p. 1351.

19 nuclear power plants.<sup>5</sup> The future of waste repositories in Germany is also an element of the agreement. Despite the fact that a repository was already needed for those 19 operating nuclear power plants, the agreement that dealt with the Konrad and Gorleben repository projects had a delaying effect, especially upon the Gorleben project.

The future of the exploration and construction of nuclear waste repositories plays an important and crucial role in the present coalition government of Christian and Social Democrats that came into office in the fall of 2005. As is the case for nuclear policy as a whole, Christian Democrats and Social Democrats are deeply divided over the government's future orientation for nuclear waste repositories. The former advocate a moderate departure from the phase-out policies of the red-green coalition allowing, in particular, for extended life cycles of existing facilities, whereas the latter remain adamant on abiding by the nuclear policies adopted within the previous coalition. It is, therefore, no surprise that in the matter of general nuclear policy the coalition agreement of 2005 abides by the *status quo*, that is, the decisions of the previous government. In the area of final repositories, however, the coalition agreement is more dynamic; the question of final repositories is to be tackled "in a speedy and result-oriented manner".<sup>6</sup>

In order to give a more concrete picture of the present situation, an overview of the status of the three existing repository sites is appropriate.

## **II. The Status of the Existing Repository Sites**

At present, there are three existing installations/sites for nuclear waste repositories.

### **1. Morsleben**

Before 1990, Morsleben in the State of Sachsen-Anhalt, was the nuclear waste storage site in operation in the German Democratic Republic. After reunification in 1990, Morsleben, by way of transitional legislation, was transferred into the West-German nuclear licensing regime and operated as the only existing German final repository for low and medium level radioactive waste. In 1998, storage of new waste at that facility was discontinued for factual and legal reasons. Planning preparations for the issuance of a decommissioning licence are under way, but such a licence is not expected to be issued before 2011.

### **2. Gorleben**

Gorleben, located in the State of Lower Saxony, is the site of a salt dome which is under exploration, according to procedures prescribed in the Federal Mining Law (*Bundesberggesetz* – FMA), as an eventual repository for high-level radioactive waste. Two shafts have been sunk into the dome and underground galleries have been constructed with costs as high as roughly 700 million euros (EUR). The agreement between the federal government and the utilities, initialled in 2000 and signed

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5. See the text in Supplement to *Nuclear Law Bulletin* No. 70; for a discussion of the amendment see A. Vorwerk, "The 2002 Amendment to the German Atomic Energy Act Concerning the Phase-out of Nuclear Power", *Nuclear Law Bulletin* No. 69, p. 7 *et seq.*

6. See Section I.5.1. of the Coalition Agreement between CDU and SPD of 11 November 2005, [www.bundesregierung.de](http://www.bundesregierung.de).

in 2001 (see *Nuclear Law Bulletin* No. 66),<sup>7</sup> decreed an exploration moratorium of at least 3, and not more than 10 years, in order to allow for investigation into conceptual and safety issues. Exploration activities were suspended accordingly in 2000. Whether and when to resume exploration activities is one of the thorniest controversies the present government faces in the field of nuclear policy.<sup>8</sup>

### 3. *Konrad*

The Konrad ore mine, also located in the State of Lower Saxony, is the site under preparation for a final repository for low and medium level radioactive waste. Konrad comes closest to becoming Germany's first long-term final repository for radioactive waste. The way leading to this pole position has been long and arduous. As is the case in many other instances of realising industrial projects, judicial proceedings have played a key role in determining the fate of this project.<sup>9</sup>

## III. The Konrad Adjudication Process

### 1. *History*

The Konrad mine is an old iron ore mine that was closed in 1976. Between 1976 and 1982, the mine was explored with regard to its suitability as a final repository for low and medium level radioactive waste with negligible heat. The application for a licence to establish the repository was filed in 1982. The administrative and judicial proceedings concerning Konrad were not, like in the case of Gorleben, significantly hampered or delayed by the 2001 Agreement on the Phase-out of Nuclear Power. On the contrary, it was agreed that administrative proceedings should continue according to the pertinent provisions. After the issuance of the licence (plan approval notice) in 2002 by the Lower Saxonian Authority, its legality was challenged by individual persons and several municipalities. The applicant, through the 2001 Agreement, was committed to withdraw an application for immediate enforcement (*Sofortvollzug*) of the licence in order to leave room for a substantive judicial review. The Higher Administrative Court of Lower Saxony (*Oberverwaltungsgericht*), in several judgements of 8 March 2006,<sup>10</sup> upheld the licence. In addition, the Higher Court denied the right to appeal to the Federal Administrative Court (*Bundesverwaltungsgericht*). The unsuccessful plaintiffs filed complaints against denial of leave to appeal – complaints that were decided upon by the Federal Administrative Court on 26 March 2007.<sup>11</sup> The court rejected the complaints in their entirety.

### 2. *Basic Statutory Foundations*

The decisions, handed down by the Lower Saxonian Higher Administrative Court and the Federal Administrative Court, constitute the first judicial analysis of the statutory provisions dealing

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7. See *supra* No. 4.

8. See *infra* IV.

9. There also exists a fourth repository site: the decommissioned salt mine *Asse II*, which was opened in 1965 as an experimental repository. It was licensed under mining law. There are problems with the influx of water. The facility is presently prepared for closure under mining law provisions. There is public pressure to close the mine under nuclear law mainly because of enhanced public participation rules.

10. See the brief review of the court's reasoning in *Nuclear Law Bulletin* No. 77, p. 42.

11. See the short notice in *Nuclear Law Bulletin* No. 79, p. 57.

with the construction and operation of a final nuclear waste repository. The pertinent provision is Section 9b of the AEA. Under its paragraph 1, sentence 1, the construction and operation of the federal installations referred to in Section 9a, paragraph 3 of the AEA, that is, the final nuclear waste repositories, are subject to a plan approval procedure which, in essence, is a highly sophisticated and voluminous administrative licensing procedure specially designed to fit the requirements of complex infrastructural projects.

According to Section 9b, paragraph 4, sentence 1 of the AEA, the plan approval notice may only be issued if the requirements referred to in Section 7, paragraph 2, Nos. 1-3 and 5 have been complied with. Among those requirements imposed for the licensing of nuclear installations generally, No. 3 (necessary precautions in light of the state of the art in science and technology to prevent damage resulting from the construction and operation of the installation) and No. 5 (necessary protection against disruptive action or other interference by third parties) deserve special attention. In addition, under Section 9b, paragraph 4, sentence 2, the plan approval notice may not be issued if the construction or operation of the proposed installation suggests that the common welfare will be impaired and that such impairment cannot be prevented by collateral restrictions and obligations (No. 1), or if the construction or operation of the installation conflicts with other provisions of public law, in particular with respect to the environmental impact of the installation (No. 2). As a result of applicable transitional rules, the Konrad project did not require a formal environmental impact assessment because the application was lodged as early as 1982. For further detailed provisions of the plan approval procedure, Section 9b, paragraph 5, refers to the general rules that apply to plan approval procedures under the Federal Administrative Procedure Act (*Verwaltungsverfahrensgesetz*). This reference to the general rules of the plan approval procedure has sometimes invited erroneous conclusions to the effect that specific aspects of the plan approval procedure under Section 9b of the AEA were neglected and even overlooked.

### **3. *The Character of the 2006 and 2007 Judgements***

While analysing and evaluating the judgements of 2006 and 2007, one has to bear in mind the different functions they have to fulfil. The 2006 judgements of the Higher Court constitute decisions on appeals against the 2002 Plan Approval Notice. Their function was to comprehensively review the legality of the 2002 Notice. Accordingly, the Higher Administrative Court deals with all issues raised as to their substantive merits. The court discusses the respective arguments in an extremely thorough way and abundantly takes into account what has been written in legal literature.<sup>12</sup> On the other hand, the 2007 decision was much more limited in its function. The Federal Administrative Court or Supreme Administrative Court only had to review the legality of the lower court's decision not to grant further appeal. The 2007 decisions, consequently, are of a much more procedural character with frequent reference to the court's own established practice in comparable issues and with limited substantive argumentation. This all the more so as the 2007 court confirms the legality of the lower court's denial of leave to appeal.

The short summary of the 2006 judgements published in the *Nuclear Law Bulletin* No. 77, p. 42, already covers the main arguments and issues dealt with in the 2006 decisions. They encompass a wide range of problems. The 2002 Plan Approval Notice was attacked on various grounds, such as the lack of constitutionality of the basic provision of Section 9b of the AEA for not explicitly mentioning the concept of irretrievable final storage (alleged violation of the principle of legislative or

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12. See G. Gaentzsch, *Struktur und Probleme des atomrechtlichen Planfeststellungsverfahrens*, in: F. Ossenbühl (ed.), *Deutscher Atomrechtstag 2004, 2005*, Nomos-Verlag, p. 115 *et seq.*; S. de Witt, *ibid.*, p. 125 *et seq.*

parliamentary reservation), lack of planning necessity for the project, lack of balancing essential factors such as alternative sites within the administrative procedure which is supposed to inherently require such balancing as an element of planning, insufficient regard for radiation exposure from the repository and transport risks, insufficient protection against airplane crashes in connection with a terrorist act or, finally, insufficient regard for long-term safety aspects.

These grounds popped up again in the 2007 proceedings. The Federal Administrative Court<sup>13</sup> dealt with them from a procedural angle: did the lower court deviate from a supreme court decision? Is the ground relevant to the case at hand? Did the plaintiff have standing? The 2007 decisions very rarely argue in substance. In this respect, the 2006 judgements rendered by the Higher Administrative Court remain uneclipsed as the principal judicial source of argument with regard to licensing of final nuclear waste repositories under German law.

Taking this into account, the present article will briefly address three aspects of the courts' reasoning: the legal character of the plan approval notice (act of discretion or strict execution of laws), the necessity of planning and safety aspects.

#### **4. *The Legal Character of the Plan Approval Notice (Act of Discretion or Strict Execution of Laws)***

The Higher Court decisions deal extensively with the basic question of the legal character of the plan approval notice.<sup>14</sup> This issue may sound somewhat abstract on first impression, but it is closely connected to the very practical problem always appearing in site approval proceedings, namely, whether the competent authority has to examine the site in question in the light of alternative sites that may be equally or even more suitable.

Indeed, it is generally recognised by permanent judicial practice and legal scholars as a general feature of plan approval proceedings that the competent authority enjoys planning discretion and is under an obligation to use these discretionary powers properly.<sup>15</sup> An essential part of the proper use of discretion is the comprehensive composition of all factual elements relevant to the weighting process which is relevant to the decision-making process in planning matters. Identification and consideration of potential alternatives to the execution of a project are part of this process. During the proceedings in the Higher Court and in the Federal Administrative Court, the plaintiffs had pleaded that alternative sites had not been considered, which was true. Consequently, this procedural argument could only be dismissed if, for legal reasons, a consideration of alternative sites was not required in this particular case; in other words, the authority did not enjoy discretion in this kind of plan approval proceedings.

In its 2006 judgements, the Higher Court argued at length, and rightly so, that within the plan approval proceedings under Section 9b of the AEA, the authority does *not* enjoy planning discretion. This legal position had already gained ground in legal literature during recent years.<sup>16</sup> The argument was that the very wording of Section 9b shows that Parliament did not want to grant planning discretion to the competent authority: the section, in order to define the prerequisites of a plan

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13. The decisions handed down by the Federal Administrative Court (BVerwG) are published in German in: *Neue Zeitschrift für Verwaltungsrecht* (NVwZ) 2007, p. 833 *et seq.*

14. The German expression is: “*Planfeststellungsbeschluss*”.

15. See, for example, Decision of the Federal Administrative Court (*Bundesverwaltungsgericht* – BVerwG) vol. 97, 43 concerning plan approval proceedings with regard to waste management.

16. See G. Gaentzsch and S. de Witt, *supra*, at No. 12.

approval notice, simply refers to the catalogue of statutory requirements under Section 7, paragraph 2 necessary for the issuance of a licence to construct and operate nuclear installations where planning discretion undoubtedly does not apply. In the text of Section 9b, there is no clue to be found that the legislature intended to open up the decision-making process for planning discretion. It obviously wanted to structure this process as a normal licensing process based upon the execution of statutory norms.

But then, why did the legislature choose the plan approval proceedings as the applicable procedural tool? Most probably, the idea was to select the plan approval proceedings for two other features typical of these kinds of proceedings: extended public participation and the so-called “concentration effect” (*Konzentrationswirkung*). The latter means that all public interests relevant to and involved in a project, as well as the pertinent legal materials, are merged into the one plan approval proceedings, thereby replacing all separate licensing requirements. It is because of these two specific features, and not because of the other characteristics, let alone planning discretion, that Parliament subjected the construction and operation of final repositories for nuclear waste to plan approval proceedings.

In this context, the Higher Court refers to another situation of a similar kind: the plan approval proceedings for mining projects under the Federal Mining Act (*Bundesberggesetz – FMA*). Section 52, paragraph 2a of that Act also provides for plan approval proceedings for the licensing of mining projects with a major environmental impact. Generally, mining projects are licensed according to regular licensing proceedings with very little public participation and no concentration effect. It was the elements of enhanced public participation and the concentration effect that prompted the legislature to subject mining projects of a major environmental dimension to the plan approval proceedings.<sup>17</sup> The Higher Court, therefore, was right in establishing this parallel between nuclear law plan approval proceedings and mining law plan approval proceedings.

In a recent opinion, the Federal Administrative Court underlined the similarity between nuclear law and mining law in this respect, and it had good reason to do so; in December 2006, the same division that rendered the Konrad decision in March 2007, had handed down two leading opinions concerning plan approval notices for a large underground colliery.<sup>18</sup> In these opinions, the Federal Administrative Court had qualified the plan approval notice under mining law as an administrative act of a strict executive character without any discretionary power for the authority. Both nuclear waste repositories and mining projects have one aspect in common: their site dependency. In addition, the construction of a waste repository and the exploitation of a mineral deposit are both preceded by large-scale exploratory activities involving quite substantial financial investments. In mining law, it is self-evident that the application for a licence to exploit a mineral deposit cannot be denied on the ground that there may possibly be alternative deposits that are more economic to mine. This is also applicable to final waste repositories. As long as the site selected is suitable, it would make no sense to look for alternative sites in question.

Licensing procedures under mining law and under nuclear law, however, show one small difference. While licences in mining law are issued in strict application of statutory requirements, in nuclear law, courts and legal literature have always conceded a residual discretion to deny a licence for exceptional situations such as the existence of unknown risks connected to a certain nuclear

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17. See G. Kühne, *Obligatorische Rahmenbetriebsplanzulassung im Bergrecht und ihre Wirkungen*, in: *Deutsches Verwaltungsblatt* (DVBl.) 2006, p. 662 *et seq.*

18. Decisions of 15 December 2006, 7C 1/06 and 7C 6/06, published in: *Neue Zeitschrift für Verwaltungsrecht* (NVwZ) 2007, p. 700 *et seq.*, 704 *et seq.*

technology.<sup>19</sup> This exceptional situation does not apply here; even less so in light of the urgency to have an operative final repository to cope with waste that is certain to require treatment in the coming decades.

## 5. *Necessity of Planning*

Under the general law of plan approval procedure, it is recognised that projects concerning spatially relevant industrial objects which can have an expropriation effect on third parties may only be approved if there is a need, that is, a demand, for such a project. The judgements of the Higher Court discuss at length the question whether the Konrad project may have such an expropriation effect and whether, in that case, there is a sufficient statutory basis under nuclear and mining law for administrative decisions involving expropriations.<sup>20</sup> The 2006 judgement denies such expropriatory effects of the Konrad project but discusses the element of necessity in the event that there are expropriation effects connected to the realisation of the project.

The Higher Court's primary argument is Section 9a, paragraph 3, sentence 1 of the AEA, according to which the Federal Republic is under an obligation to install facilities serving as final repositories for nuclear waste. This statutory obligation in itself means that the legislature foresees such a demand. The statutory foundation of this obligation is not deficient because of its being unrelated to specific quantities of nuclear waste. In 1976, it could not have been expected that the legislature would foresee future demands in their quantitative dimensions. Incidentally, it is for the competent authorities to issue predictions of future demand for nuclear waste disposal capacities. The court rightly underlines the need to accept a considerable margin of prognosis for the authority in this respect. That is why the probable reduction of nuclear waste as a result of the abandonment policy under the red-green coalition Government (1998-2005) does not invalidate the prognostic basis for the Konrad repository.

There is, however, one element of insecurity in the demand that was caused by the policy shift of the former government. After 1998, the red-green coalition Government changed the basic concept of nuclear waste disposal. Until 1998, it was clear that two final repositories would be required in the future: one for low and medium level radioactive waste (Konrad) and another for high-level radioactive waste (Gorleben). The new Government, after 1998, overturned this concept in favour of a "single repository" policy. Since the Konrad repository is unsuitable for high-level radioactive waste and since the new federal Government had doubts about the suitability of the Gorleben site, the latter established a "Final Repository Working Group" (*Arbeitskreis Endlagerung*) with the mission to develop procedural criteria for the selection of sites to be explored as to their suitability to become the single repository. The Working Group published its final report in 2002.<sup>21</sup> In the Konrad litigation, the plaintiffs had contested the necessity of Konrad by invoking the "single repository" concept (*Ein-*

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19. See Decision of the Federal Constitutional Court in BVerfGE 49, p. 89 (144) with extensive review of legislative history.

20. The Amendment to the AEA of 6 April 1998 (Federal Law Gazette 1998, Part. I, p. 694, see *Nuclear Law Bulletin* No. 61), had inserted provisions (Sections 9d-9g) for expropriation in connection with the exploration or construction of repositories. These provisions were abolished in the 2002 amendment. Possible bases for expropriation may be found in the Federal Mining Act, but it is unclear to what extent they apply; see decision of the Federal Administrative Court in the Gorleben II-case (Decision of 2 November 1995, BVerwGE 100, p. 1 *et seq.*, 14).

21. Report of the working group (*AkEnd-Arbeitskreis Auswahlverfahren Endlagerstandorte*) – Forum, Edition 2/2002.

*Endlager-Konzept*). The 2006 Higher Court decision dismissed the argument by pointing out that even under the “single repository” strategy and in light of the uncertainties surrounding the future of the Gorleben site, an alternative repository would be operative only several decades later and, therefore, too late. The Federal Administrative Court, in its 2007 decision, did not take exception to the Higher Court’s reasoning.

## 6. *Safety Aspects*

Both the 2006 and 2007 decisions deal with safety aspects in a broader sense and under different categories. The final result of both courts is that the Konrad repository does not encounter safety obstacles.

### a) *Principle of best possible danger prevention (Section 7, paragraph 2, No. 3 of the AEA)*

This standard, in order to allow the issuance of nuclear licences under Section 7, paragraph 2, requires that, in light of the state of the art in science and technology, it appears practically impossible that the installation will cause damage to life, health and property of third parties. In order to determine whether this requirement is met, the authority is under an obligation to investigate even improbable causes and risks, and to evaluate these in keeping with the standards of science. The duty to take risk precautions ends only where dangers and risks are “practically non-existent”. The threshold to the remaining residual risk which has to be borne by the public at large is determined by the standard of “practical reason”.<sup>22</sup>

Courts can review such administrative decisions only as to whether the competent authority has observed proper methodological standards, in particular the postulate of a comprehensive ascertainment of all relevant facts. When evaluating court decisions concerning Section 7, paragraph 2, No. 3, one has to bear in mind that, in particular for purposes of determining whether third parties have standing to sue, courts distinguish between the realm of preventing danger to third parties (*Gefahrenabwehr*) and the realm of averting risks beyond the strict prevention of danger (*gefahrenunabhängige Risikovorsorge*). The duty to avert risks beyond the strict prevention of danger aims at risks which do not yet constitute a danger but have the potential of becoming one in the future. In the danger area standing to sue is accepted whereas in the risk area third parties are denied standing to sue.<sup>23</sup> This explains why the 2006 and the 2007 decisions could avoid discussing at length the substance of some arguments raised by the plaintiffs.

This distinction also applies to the aspect of exposure to radiation: statutory radiation limits are part of the “danger area”. Beyond this there is the general statutory obligation to minimise radiation as belonging to the area of “risk aversion” in which individuals have no standing. The same is true of the aspect of long-term safety (100 000 years and beyond). Both courts rejected safety objections raised by the plaintiffs on either one or other of the two grounds.

In some instances, the plaintiffs’ arguments were dismissed for factual insignificance. This was the case for their argument that the repository would be unsafe in case of an (accidental) plane crash

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22. See Decisions of the Federal Constitutional Court, BVerfGE 49, 89, 143, and the Federal Administrative Court, BVerwGE 104, 36, 51.

23. See Decision of the Federal Administrative Court, BVerwGE 61, 256, 267.

into the facility. The courts dismissed that argument in view of the extremely low probability of such an incident.

During judicial proceedings, the plaintiffs had also invoked the dangers and risks related to the transport of nuclear material to the repository. The courts dismissed those arguments because transport to the site was not part of the project under examination. The transport of nuclear material requires a separate licence under the AEA.<sup>24</sup>

*b) Necessary protection against disruptive action or other interference by third parties (Section 7, paragraph 2, No. 5 of the AEA)*

According to Section 7, paragraph 2, No. 5, a licence may only be granted if the necessary protection has been provided against disruptive action or other interference by third parties.

Both the 2006 and the 2007 decisions, under this rubric, discuss at length the hypothetical situation – not so theoretical after 11 September 2001 – of a terrorist attack involving an intentional plane crash into the facility. Legal debate in this respect has been controversial.<sup>25</sup> The Higher Court argues that the term “disruptive action” cannot be interpreted as to encompass sources of disruption that – similar to war activities – are completely beyond control of the operator. Moreover, such disruptive action cannot be averted factually by the operator. This is beyond his technical possibilities. It is true that the Federal Administrative Court, in an earlier decision, had ruled that the operator is under an obligation to take precautionary measures against individuals from outside intruding into premises where nuclear facilities are located.<sup>26</sup> At the same time, however, the court said that the prevention of dangers and risks resulting from the general political situation or from a general trend in society towards a certain kind of criminal activity is a public duty to be typically fulfilled by police functions.<sup>27</sup>

Even assuming that averting such risks falls within the ambit of the AEA, the plaintiffs would not have standing to attack the plan approval notice on that ground. The reason is that taking such precautionary measures would involve complex intelligence investigation and political assessment with a high degree of prognostic elements which can only be realised by authorities in pursuit of the general public interest. The 2006 Court therefore denied standing to individual persons in this respect. The Federal Administrative Court saw no procedural need to invalidate that reasoning.

## **7. Other Areas of Law**

The preceding review of the essential elements of the Konrad decisions of the Higher Court (2006) and the Federal Administrative Court (2007) might convey the impression that this exhausts the list of legal problems connected with final repositories. Such an inference, however, would be wrong.

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24. See Section 4, paragraph 1, sentence 1 and Section 16, paragraph 1, sentence 1 of the AEA.

25. See, for example, F. Ossenbühl, *Terroristische Angriffe auf Kernkraftwerke – aus rechtlicher Sicht*, in: *Neue Zeitschrift für Verwaltungsrecht* 2002, p. 290 *et seq.* (AEA not applicable); H. J. Koch/M. John, *Atomrechtliche Fragen der Sicherheit und Sicherung von Kernkraftwerken nach den Terroranschlägen vom 11. September in den USA*, in: *Deutsches Verwaltungsblatt (DVBl.)* 2002, p. 1578 *et seq.* (AEA applicable).

26. Decision of the Federal Administrative Court, BVerwGE 81, 185.

27. Decision of the Federal Administrative Court, *supra* No. 26, 188.

A subject other than nuclear law that is of particular importance is mining law. As explained above, the legislature, in Section 9b, paragraph 1 of the AEA chose the plan approval proceedings because it wanted the plan approval notice to exercise the so-called concentration effect. But Section 9b, paragraph 5, No. 3 makes one exception to this effect in favour of mining law. This means that final repositories are subject not only to licensing requirements under nuclear law but also to licensing requirements under the Federal Mining Act (*Bundesberggesetz* – FMA). This, consequently, also applies to Konrad. As a result of the specific character of mining operations (especially their spatially dynamic character), the FMA requires a staged licensing system of operations plan procedures with normally the skeleton operations plan (*Rahmenbetriebsplan*) as the initial licence. Under mining law, skeleton operation plan proceedings for nuclear waste repositories also have to be conducted as plan approval proceedings.<sup>28</sup> It is not quite clear how these two proceedings are to be coordinated. It is clear, however, that a duplication of identical proceedings has to be avoided. Section 57b, paragraph 3, sentence 2 of the FMA gives “priority” to Section 9b of the AEA. The meaning of “priority”, however, is not beyond doubt. In the Konrad approval notice, the skeleton operations plan approval under mining law is a part of this notice. One could argue as well that the licence under mining law would have to be issued separately without the specific qualifications of a plan approval notice.<sup>29</sup> This may suffice as evidence that the law that relates to final repositories in general and to Konrad in particular holds in store many more legal delicacies.

#### **IV. Konrad and its Impact on the Issue of Final Repositories in Germany**

The Konrad decisions rendered by the Federal Administrative Court in March 2007 constitute the first court decisions with *res judicata* effect on the construction of a final repository for radioactive waste in Germany. This circumstance has not terminated the political controversy but has at least tempered passions. Legal skirmishes continue, however, because both the municipality of Salzgitter and an individual person have lodged constitutional complaints against the 2007 decisions with the Federal Constitutional Court.

On 30 May 2007, the Federal Ministry for the Environment (*Bundesumweltministerium* – BMU) instructed the Federal Office for Radiation Protection (*Bundesamt für Strahlenschutz*) to start preparations for establishing Konrad as a final repository. According to existing schedules, the facility could be operative by 2013. During this preparatory phase new legal issues may arise. The Plan Approval Notice was issued in 2002. In the meantime alterations and modifications of the project may turn out to be necessary in order to keep abreast with technical progress. For licensing purposes, Section 9b, paragraphs 1 and 2 of the AEA distinguish three categories of alterations: insubstantial ones (basically no new licensing procedure), substantial ones with no detrimental effects upon interests protected under environmental law (planning licence, a smaller version of the plan approval procedure) and substantial ones with such detrimental effects (plan approval procedure). In all

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28. See Section 1, No. 7 of the “*Verordnung über die Umweltverträglichkeitsprüfung bergbaulicher Vorhaben (UVP-V Bergbau)*” (“Ordinance on the Environmental Impact Assessment of Mining Projects”), Federal Law Gazette 1990, Part I, p. 1420.

29. As to this problem, see more specifically G. Kühne, *Genehmigung von Endlagern für radioaktive Abfälle: Planerische Gestaltungsfreiheit oder Gesetzesvollzug?*, in Norbert Pelzer (ed.), *Bausteine eines globalen Atomrechtsregimes* (Elements of a Global Nuclear Regime), *Tagungsbericht der AIDN/INLA-Regionaltagung* in Goslar 2006, 2007 p. 75 *et seq.*, 86.

likelihood, the categorisation of future modifications within the context of Section 9b, paragraph 1, will give rise to both legal and political controversies.<sup>30</sup>

With Konrad being prepared to become a federal repository for low and medium level radioactive waste the “single repository” strategy pursued by the Federal Government since 1998 becomes obsolete. The centre of political and legal controversies in the field of final repositories will shift to the issue of selecting a suitable site for a repository for high-level radioactive waste. In this respect, differences between the political parties that form the present coalition appear to be irreconcilable. The Social Democrats insist upon a new round of exploration of the best-suitable site on the basis of a new statute to be enacted by Parliament which would contain procedural rules for such exploration activities. In this concept, Gorleben is reduced to being just one of the options. The Christian Democrats insist on accomplishing the Gorleben exploration and on looking for alternatives only if Gorleben should turn out to be unsuitable. It will be a thrilling experience to watch whether and how the present coalition will overcome this dilemma during the present legislative period.

## **V. Final Observation**

The Konrad decisions signal a noticeable progress in the resolution of the dispute over final nuclear waste repositories. The very high quality of those decisions, especially of the 2006 Higher Court opinions, has shown some convincing strength and contributed to reducing the bias that traditionally characterises such debates in Germany. Politically, it has foiled the “single repository” concept. It remains to be hoped that the ongoing debate over the site for the high-level nuclear waste repository will also embark on a less biased course in the (near) future.

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30. See the discussion by H. Näser, Konrad und kein Ende – alte und neue Rechtsprobleme, in Norbert Pelzer (ed.), *supra* No. 28, p. 91 *et seq.*, 101 *et seq.*