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Access to Justice in Environmental Decision-making in Sweden. Standing for the public concerned, the scope of review on appeal and costs

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Summary

Sweden has a “universally” applicable Environmental Code, which harmonised the general rules and principles in this field. The Code applies to all human activities that might harm the environment. However, certain activities are also regulated in special pieces of legislation, such as the Planning and Building Act. Infrastructure installations also have regulations of their own, as do mining and forestry. Fauna is protected, in part, through hunting law.

As for environmental decision-making, the municipalities play a key role under both the Environmental Code and the Planning and Building Act. The County Administrative Boards are also responsible for important environmental legislation and issue permits for environmentally hazardous activities. Installations and activities involving a substantial environmental impact must obtain a permit from the Land and Environmental Court, as must all kinds of water operations. Also national authorities, such as the Environmental Protection Agency and the Swedish Chemicals Agency are responsible for some environmental decision-making.

Sweden has administrative courts for the appeal of administrative decisions and ordinary courts for civil and criminal cases. The administrative courts decide cases on the merits in a reformatory procedure, meaning that they replace the appealed decision with a new one following analysis of all the relevant facts of the case. Furthermore, the ultimate responsibility for the investigation of the case rests with the court according to the “ex officio principle”. The Environmental Code establishes a system of five Land and Environmental Courts and one Land and Environmental Court of Appeal. They are all divisions within the ordinary courts, but essentially act as administrative courts for cases under the Environmental Code and the Planning and Building Act. A Land and Environmental Court has some of the characteristics of a tribunal, consisting of both law-trained judges, technicians and experts. All members of the courts have an equal vote. The route for appeals in cases concerning the environment is always the same: Municipal level → County Administrative Board → Land and Environmental Court → Land and Environmental Court of Appeal (MÖD). Some cases can also be brought to the Supreme Court. Thus all appeals of environmental decisions follow this route, although the starting-point and terminus differ. The decision-making procedure in environmental cases in Sweden is open, meaning that in principle everybody can participate in the proceedings leading to the first decision. On appeal, the scope of the trial is set by the claims of the action, which the appeal body will decide upon in accordance with the “ex officio principle”. Thereby, the appeal body or court decides the case on the merits, thus addressing both substantial and procedural issues raised in the administrative decision. The procedure may include all kinds of “actions” for annulment, performance, altering the decision, remit, etc.

The Swedish concept of standing in administrative cases is strongly “interest-based”. If the provisions in an Act are meant to protect certain interests, the representatives of those interests can challenge the decision by way of appeal. Standing is generally defined as belonging to the “person to whom the decision concerns”. Additional criteria are that the decision affects him or her adversely and that it is appealable, which it always is as long as the decision entails factual or legal consequences in a very broad sense. To get a clearer picture of that scope of persons, one must study the case law that has been established

in each administrative area or even under specific pieces of legislation. Under the Environmental Code, the courts have applied a generous attitude, stating that in principle, every person who may be harmed or exposed to more than a minor inconvenience by the environmentally harmful activity at stake is considered a party with interest. Thus, everyone who may be harmed by an activity or exposed to even minor risks – for example neighbours, people affected by emissions or other disturbances from the activity – should have the right to appeal the decision in question. As the Environmental Code brought together all kinds of legislation which previously was separate, this formula is generally applicable. Accordingly, if a permit concerns water operations such as a marina, neighbours who will be affected by the road traffic to the marina are allowed to appeal. The determination of the public concerned is straightforward and depends on the kinds of disturbance (discharges into air and water, noise, odour, traffic, and so on) that the person in question can be affected by, and at what distance.

In contrast to this case law created state of affairs, standing for ENGOs is decided by criteria in express legislation, at least as a starting point. In recent years, however, and in the wake of the case law of CJEU, ENGO standing rights have expanded by way of national courts applying the “so as to enable” formula according to the *Slovak Brown Bear* case. In the Environmental Code, standing is given to certain organisations in order to appeal decisions on permits, approvals or exemptions, the criteria being that it is a non-profit association whose purpose according to its statutes is to promote nature conservation, environmental protection or outdoor recreation interests. Additional criteria are that the organisation has been active for at least 3 years in Sweden and has at least 100 members or else can show that it has “support from the public”. Thus, ENGOs meeting those criteria are able to defend the public interest according to their statutes, without any further qualification. These criteria have also been used by the courts in areas to which ENGO standing rights have been expanded in case law.

As the administrative procedure in Sweden in all instances is reformatory, the starting point is that the court scrutinizes every part of the appealed decision. Once the applicant is allowed to appeal, the scope of review is complete, meaning that s/he can invoke all kinds of interests in favour of the cause. No arguments are precluded. Thus, the appellant can plead any private or public interest in the case irrespective of the instance of appeal in a higher level of administration or in the courts. Moreover, all kinds of administrative decisions can be brought to the administrative courts by way of appeal, including administrative omissions. Any member of the public who is affected by a certain activity can notify the supervisory authority and ask for administrative action in his or her interest. In this situation, the authority is obliged to issue a decision on the case, be it to take action or not. That decision is appealable using the route described above, and accordingly, the matter will be dealt with in substance by the environmental courts. Thus, there does not exist any administrative discretion in Sweden, at least as a general rule.

The environmental procedure in Sweden is as a general rule free of charge. There are no court fees, no obligation to pay the opponents’ costs, no bonds to be paid for obtaining injunctive relief, or other costs to be paid, irrespective of whether the case is on administrative appeal or goes to court. As the ultimate responsibility to investigate the case lies with the administration and the environmental courts – which both have technicians participating in the decision-making – neither are there any witness or experts’ fees to be

paid. Basically, this makes the environmental procedure cheap and easily accessible to the public. The other side of the coin however is that when applicants want to be represented by counsel or use experts of their own – which may be necessary in complicated cases – they will have to pay out of their own pocket and the costs cannot be remunerated from a losing opponent. It is also noteworthy that there is no obligation to use lawyers in court, not even at the higher judicial levels.

1. Introduction

1.1 General outline over Swedish environmental law and procedure

This text is an updated version of the first sections in the country report from Sweden to the European Commission in the “Effective Justice” study of 2012. That text was written at the beginning of 2012. The reason for updating is that the development of case law on access to justice in environmental matters in Sweden has been rapid since the 2012 study was published. The text is focusing on standing rights for the public concerned – both individuals and their organisations – the scope of review and costs in administrative and judicial proceedings in environmental cases.

1.2 Environmental legislation

Since 1999, Sweden has had a “universally” applicable Environmental Code (1998:808, MB), which harmonised the general rules and principles in this field. The Code applies to all human activities that might harm the environment. It is, in principle, immaterial whether commercial or private operations or measures are involved. The Code contains the environmental principles and provisions providing for environmental quality norms as well as environmental impact assessments. Certain listed water operations, industrial undertakings, quarries and other environmentally hazardous activities are subject to permit or notification requirements. The Code also contains provisions relating to nature protection, flora and fauna, genetically modified organisms, chemicals and waste.

However, certain activities are also regulated in special pieces of legislation. Planning and building issues are covered by the 2010 Planning and Building Act (2010:900, PBL). Infrastructure installations, such as railroads and highways, also have regulations of their own, as do mining and forestry. Fauna is protected, in part, through hunting law.

1.3 System for decision-making and administrative appeal

Both municipalities and special environmental administrative authorities act as supervisors under the Environmental Code. The authority to issue plans and permits under the Planning and Building Act resides with the municipalities. Decisions from the local level are appealed to the regional County Administrative Board. The County Administrative Boards are also responsible for “green” issues – that is, nature conservation and species protection – and supervision concerning water-related activities and larger industrial activities. Additionally, the Counties issue permits for environmentally hazardous activities, landfills, waste transportation and disposal, and chemical activities, amongst others. Installations and activities considered to have a substantial environmental impact must obtain a permit from the Land and Environmental Court, as do all kinds of water operations. This latter situation, in which courts “exercise administrative powers”, is unique in Europe.¹ Also national authorities, such as the Environmental Protection Agency, the Swedish Chemicals Agency and the National Board of Health and Welfare, are responsible for some environmental decision-making.

Permit decisions according to the specific legislation on mining and infrastructure projects are made by national authorities and their regional branches, such as the National

¹ C-263/08 *DLV* para 37.

Transport Administration and Geological Survey of Sweden. Those decisions can be appealed to the Government. Decisions regarding hunting are made by the County Administrative Boards or the Environmental Protection Agency. The Swedish Forest Agency and its regional branches make decisions regarding forestry.

Some larger projects require a preliminary governmental decision on “permissibility” before a permit can be granted (Chapter 17 MB). This system is today restricted to nuclear activities, major infrastructure projects and wind farms.

1.4 The role of the courts

Sweden has administrative courts for the appeal of administrative decisions and ordinary courts for civil and criminal cases. The administrative courts decide cases on the merits in a reformatory procedure, meaning that they replace the appealed decision with a new one. Another vital difference compared with civil procedure is that in the administrative procedure, the ultimate responsibility for the investigation of the case rests with the court according to the “ex officio principle”.²

The Environmental Code of 1999 established a system of five Land and Environmental Courts and one Land and Environmental Court of Appeal. They are all divisions within the ordinary courts, but essentially act as administrative courts for environmental cases. Their jurisdiction covers all kinds of decisions made pursuant to the Environmental Code and the Planning and Building Act. They are also competent in cases concerning damages and private actions against hazardous activities. A Land and Environmental Court has some of the characteristics of a tribunal. It consists of one professional judge, one environmental technician and two expert members. Industry and national public authorities nominate the expert members. The underlying philosophy is that they will contribute their experience of municipal or industrial operations or public environment supervision. The Land and Environmental Court of Appeal is comprised of three professional judges and one technician. All members of the courts have an equal vote.

The route for appeals in cases concerning the environment is (almost) always the same and quite simple: Municipal level → County Administrative Board → Land and Environmental Court → Land and Environmental Court of Appeal (MÖD). Cases starting in the Land and Environmental Court can ultimately be brought to the Supreme Court (HD). Cases starting in an authority cannot be appealed beyond the Land and Environmental Court of Appeal, except in rare occasions when the court allows for such an appeal to be made. However, this is possible only in cases under the Planning and Building Act. Thus all appeals of environmental decisions follow this route, although the starting-point and terminus differ. Leave to appeal is required to bring an appeal to the Land and Environmental Court of Appeal or the Supreme Court.

Some cases are dealt with in a different manner. Decisions on hunting and forestry are appealed to the administrative courts. Governmental decisions can be challenged by seeking judicial review in the Supreme Administrative Court (HFD) pursuant to Act 2006:304. This procedure furnishes a legality control in accordance with the European Convention on Human Rights (ECHR) and the Aarhus Convention. There is no Constitutional Court in Sweden, nor is there any abstract norm control. Instead, when a court is

² See Nilsson, AK: *Enforcing environmental responsibilities* (2012), also Darpö, J: *Environmental Justice through the Courts* (2009).

dealing with a case, it is obliged to control the legal basis for the decision and must dis-apply any act or statute which is in conflict with the Constitution or superior norms. In addition to this, some municipal statutes and decisions can be challenged in a “legality-control” procedure in the administrative courts by any of the municipality’s inhabitants according to the Local Government Act (1991:900).

1.5 General on standing for the public concerned

The decision-making procedure in environmental cases in Sweden is open, meaning that in principle everybody can participate in the proceedings leading to the first decision. On appeal, the scope of the trial is set by the claims of the action, which the appeal body will decide upon in accordance with the “ex officio principle”. Thereby, the appeal body or court decides the case on the merits, thus addressing both substantial and procedural issues raised in the administrative decision. The procedure is reformatory and includes all kinds of “actions” for annulment, performance, altering the decision, remit, etc.

The set of criteria for standing is always one and the same, irrespective of the type of action and in all instances of appeal. When the appeal body or court decides on standing, this is done as a “preliminary issue”, strictly separated from the substance of the case and considered no later than the first round of communication (written appeal and first response from the counterpart). The preliminary decision exclusively concerns the standing issue, thus leading to situations where even clear cases of administrative misinterpretation of law or misuse of power can never be tried in court because the appellant is not regarded as affected by the decision and consequently did not have the right to appeal.

The Swedish concept of standing in administrative cases is strongly “interest-based”. If the provisions in an Act are meant to protect certain interests, the representatives of those interests can challenge the decision by way of appeal. Commonly in administrative proceedings, it is not very problematic to determine who belongs to the “public concerned” in a typical “two-party case”, that is, a case between an applicant and the authority or an authority and an addressee. The applicant/addressee can appeal if the decision affects him or her adversely. If the appeal body subsequently alters the decision, the deciding authority can then appeal. Things become more complex when a decision affects a broader scope of people. According to a basic principle of administrative procedure, all parties that are affected by an administrative decision and its preparation are able to participate in the proceedings and – at the end of the day – have the right to appeal the final outcome. In principle, this is true irrespective of the nature of the administrative decision-making. Such “multi-party cases” exist within several areas of administrative law, and are most common in areas concerning the environment, planning and building, security, public order, etc. All who are granted standing can vindicate any interest – be it private or public interest – in favour of his or her case. Thus, those other than applicants/addressees who are concerned are not at all dependent on the primary parties to advocate their interests. The time-frame for such an intervention is the same as for all parties in the administrative procedure, which is the time-frame for appeal. Normally, an appeal has to be made within three weeks from publication or notification of the decision. As always in the Swedish administrative procedure, natural and legal persons are treated alike as long as they are parties to the proceedings.

1.6 Standing for individuals

1.6.1 General on standing for individuals in environmental decision-making

Standing is defined generally in Section 22 of the Administrative Procedure Act (1986:223) as belonging to the “person whom the decision concerns”. Additional criteria are that the decision affects him or her adversely and that it is appealable, which it always is so long as the decision entails factual or legal consequences in a very broad sense.³ In some pieces of environmental legislation or case law, you can find definitions relating to “an interest which is protected by the law” or even “rights that have been infringed”, but basically the delimitation of who is entitled to appeal – the “public concerned” – goes back to the general and quite vague definition in the Administrative Procedure Act. To get a clearer picture of who falls within this category, one must study the case law that has been established in each administrative area or even under specific pieces of legislation. For example, people living in the vicinity of an activity or an area can be regarded as concerned by administrative decisions according to the Environmental Code, but not according to the Planning and Building Act. However, generally speaking, there has in recent years been a broadening of the range of individual actors who can appeal and represent themselves before the courts, not least as a result of the influence of EU law. It should also be noted that additional requirements for standing sometimes are expressly made in certain legislation within administrative law.

1.6.2 Standing for individuals in the Environmental Code

In the Environmental Code, the definition of standing for individuals is given in Chapter 16 section 12 (16:12 MB), essentially reflecting the provision in the Administrative Procedure Act (my italics):⁴

Appeals may be made against appealable judgements or decisions by

1. *anyone who is the subject of a judgement or decision against him;*
2. local employees’ associations that organise workers in the activity to which the decision relates in the case of judgements and decisions concerning permits for environmentally hazardous activities;
3. national employees’ organizations within the meaning of the Employment (Co-determination in the Workplace) Act (1976:580), the corresponding employers’ organizations and consumer associations in the case of decisions taken by a county administrative board or a central administrative authority pursuant to an authorization issued in accordance with Chapter 14, provided that the decision does not relate to an individual case; and
4. authorities, municipal committees or other bodies which have a right of appeal pursuant to specific provisions in this Code,(...).

The Supreme Court and the Land and Environmental Court of Appeal have interpreted this provision generously regarding who may be considered to be a member of the public

³ RÅ 2004 ref 8.

⁴ Unofficial translation in a document from the Ministry of the Environment and Energy.

concerned in line with a judgment from the Supreme Administrative Court in 1997 (*RÅ 1997 ref. 38*, see section 1.7), stating that:⁵

...in principle, every person who may be harmed or exposed to other kinds of inconvenience by the environmentally harmful activity at stake in a permit decision is considered a party in interest. However, a mere theoretical or completely insignificant risk of damage or detriment is not sufficient.

According to the quoted decision, everyone who may be harmed by an activity or exposed to even minor risks – for example neighbours, people affected by emissions or other disturbances from the activity – should have the right to appeal the decision in question. As the Environmental Code brought together all kinds of legislation which previously was separate, this formula was made generally applicable. Accordingly, if a permit concerns water operations such as a marina, neighbours who will be affected by the road traffic to the marina are allowed to appeal (*NJA 2004 s. 590 I*). The determination of the public concerned is straightforward in cases pertaining to traditional hazardous activities, and depends on the kinds of disturbance (discharges into air and water, noise, odour, traffic, and so on) that the person in question can be affected by, and at what distance. This can be illustrated by the two cases *MÖD 2003:98* and *MÖD 2003:99*, where a property owner –living 12 km downstream from industrial works discharging substances into a water course – was allowed to appeal a permit concerning certain substances in the first case, but not concerning other substances in the second case, as they were not considered to have any negative effect on her interests. It should however also be noted about Swedish administrative and environmental procedure that once the applicant is allowed to appeal, the scope of review is complete, meaning that he or she can invoke all kinds of interests in favour of the cause. No arguments are precluded. Thus, the appellant can plead any private or public interest in the case irrespective of the instance of appeal in higher levels of administration or in the courts (*RÅ 1993 ref. 97*).

Traditionally, mere public interests did not suffice for standing. Private interests, although generously interpreted, had to be been affected for the individual to gain admission to the court. Thus, in decision-making concerning shore protection, nature conservation and species protection, individuals did not have standing at all – not even close neighbours.⁶ This state of affairs was criticized over the years in the literature and in the remits of the National Implementation Report from Sweden required in terms of the Aarhus Convention.⁷ However, in a recent judgement, the Land and Environmental Court of Appeals expressly dissociated itself from previous case law on this issue (*MÖD 2015:8*). Here, the court instead emphasised that those who are concerned by a certain activity in environmental cases must be able at some point in the procedure to have a say when the issues raised are decided upon. If a certain decision – to which the individual cannot appeal – is decisive for the latter proceedings concerning that activity, those requirements

⁵ The translation is made in the Milieu study 2007.

⁶ *MÖD 2001:29*, *MÖD 2013:32*, see also Darpö, J: *Biological Diversity and the Public Interest*. From de Lege 2009 (Juridiska fakultetens årsbok, Uppsala universitet), s. 201, available in full text on www.jandarpo.se /In English.

⁷ See Opinion by Faculty of Law, Uppsala universitet, on the 2014 National Implementation report, www.jandarpo.se/ Övrigt material (2013: Remissvar: Den nationella implementeringen av Århuskonventionen. Miljödepartementets förslag till rapport till det femte partsmötet 2014), however only in Swedish.

are not met. In this case, a first decision concerned the protection of a species in the area. A second decision concerned the right to land in order to place sewage pipes there. The landowner was not granted standing to appeal the first decision, but he was able to raise the species protection issue in the subsequent proceedings where he had standing rights. However, the effectiveness of this was nullified by the fact that the deciding authority in the second set of proceedings used the first decision as a starting point, without questioning it in substance. According to the Land and Environmental Court of Appeals, such a division of the decision-making is not in line with the Aarhus Convention and it may also be regarded as a deprivation of the individual's right to a fair trial according to ECHR. Therefore, the claimant was granted standing in the species protection case.

All kinds of administrative decisions can be brought to the administrative courts by way of appeal. According to case law in the environmental area, this is also true about administrative omissions. Any member of the public who is affected by a certain activity can notify the supervisory authority and ask for administrative action in his or her interest. According to the jurisprudence of the Parliamentary Ombudsman, the authority must then issue a decision on the case, be it to take action or not (a decision not to take action is called a 0-decision). That decision is appealable using the route described above, and accordingly, the matter will be dealt with in substance by the environmental courts. For example, the inhabitants living on Hornsgatan, one of the main access roads of Stockholm, have been challenging the local authorities' negligence to enforce the air quality standards for particulate matter and oxides of nitrogen in accordance with EU law.⁸ The municipality of Stockholm has been unwilling to take any further action, but, following an administrative appeal, the County Administrative Board ordered additional measures to be taken in order to bring down the levels of PM₁₀. The inhabitants have appealed this decision, asking the Land and Environmental Court to strengthen the precautionary measures to protect their interests. This way, the final decision on how to protect the inhabitants' health will probably be dealt with by the Land and Environmental Court of Appeal. However, for many years this possibility to challenge omissions did not apply when the supervisory authorities refrained from bringing actions for the updating of permits for environmentally hazardous activities, such as IPPC installations. Such initiatives were regarded as the prerogative of the authorities. As this view-point clearly is in breach of the Aarhus Convention and the implementing EU law on access to justice, the case law was revoked by a judgment from the Land and Environmental Court of Appeal in late 2011 (*MÖD 2011:46*).

1.6.3 Standing for individuals in the Planning and Building Act

As already mentioned, standing for individuals is more restricted in the Planning and Building Act (PBL), compared with the Environmental Code. Even though the provision on standing – that is section 22 of the Administrative Procedure Act – has the same phrasing as 16:12 MB, case law differs. Concerning PBL decisions on building permits and local development plans, only those who live closest – “border neighbours” – can appeal. In addition to this, the Planning and Building Act presents additional criteria for standing. Most importantly – and this is unique within administrative law – there is a prior participation requirement. To be able to appeal a decision on a local development plan,

⁸ Accordingly, this is a Swedish equivalent to the *Janecek case* (C-237/07).

the public concerned must have voiced their opinion during the participation phase of the decision-making, more precisely, when the proposed plan is published for consultation (13:11 PBL).

Furthermore, when the public concerned challenges local development plans, the scope of the review in court is supposed to be restricted. According to 13:17 PBL, the court can only scrutinize whether such a decision “is in breach of law in a manner that is described by the applicant or is clear from the circumstances in the case”. This provision is section 7 in Act 2006:306 about judicial review of certain governmental decision. In addition to this and in the same way as in judicial review, the procedure according to 13:17 PBL is cassatory. Thus, in contrast to the ordinary administrative appeal, the reviewing court can only accept or quash the local development plan. This provision in 13:17 PBL was introduced in 2011 when the procedural order for the appeal of such plans changed from the Government to the environmental court system. At the beginning, the Land and Environmental Court of Appeal took a very cautious attitude, largely abiding to the evaluation of the public interests that had been performed by the County Administrative Board. The court also meant that individual complainants could only invoke their own interests in the case (*MÖD 2013:47 Plankan*). This radically new approach was criticized in the literature, as it introduced elements in the procedure that were not foreseen in the legislation and also contradicted what was said in the preparatory works to the reform.⁹ In later case law, the Land and Environmental Court of Appeals distinguished its viewpoint on the matter. In *MÖD 2014:12 Seminariet*, the court emphasized that judicial review according to 13:17 PBL means that the courts shall respect the room for administrative discretion, but only to the extent it is allowed for in the substantive provisions of law. Furthermore, the court is still free to make its own evaluation of those private and public interests which shall be taken into account according to the PBL. Individual members of the public concerned can also invoke any interest – including public interests – to argue their case.

1.6.4 Standing for individuals to challenge governmental decisions

In some sectorial legislation, the administrative decisions are appealed to the Government. Some examples are permits for the building of railroads, highways and airports, mines and electric power lines, which all are decided by national agencies (Swedish Transport Administration, Mining Inspectorate of Sweden and Swedish Energy Market Inspectorate). Furthermore, as described above, one of the requirements for obtaining a permit for some large developments is a prior decision by the Government on the “permissibility” of the project according to Chapter 17 MB. All these Governmental decisions can be challenged by way of judicial review in the Supreme Administrative Court (HFD) according to Act 2006:304. The scope of the review in these cases is equally restricted as the one under 13:17 PBL, meaning that the court is supposed to leave more room for administrative discretion in a cassatory procedure. HFD commonly uses this description of the scope of the trial (“the intensity of review”) in judicial review:¹⁰

Judicial review comprises of, besides the pure interpretation of the law, even such matters as facts and evidence evaluation and the question whether the decision is contrary

⁹ Darpö: *Allmänna och enskilda intressen* (2013).

¹⁰ My translation from RÅ 2005 ref 44.

to the requirements of objectivity, impartiality, and equality before the law. The trial also includes errors in procedure which may have affected the outcome of the case. If the applied provisions are so designed that the authority has some discretion in their decision-making, judicial review includes examining the question whether the decision falls within the freedom of action.

However, as in common law systems, the scope of the trial in judicial review largely is decided in case law. Also, on a general level, I think it is safe to say that, in recent years, there has been an expansion of the scope of review by way of court activism, not least as a result of the influence of EU law.

Individuals whose “civil rights or obligations according to Article 6.1 ECHR” are affected can apply for judicial review at HFD (section 1 in Act 2006:304). Under old case law, the Governmental decision on permissibility was binding for the permit bodies, including the courts, in all aspects upon which a judgment had been rendered. This system created two kinds of problems in environmental decision-making. First, it barred the full implementation of the legal requirements for permits – not least according to EU law – as the full consequences of the activity rarely were known when the Government decided on the permissibility and therefore important permit conditions could not be finally evaluated. That such a system is in breach of EU law was made clear by the Supreme Court in the *Bunge case*.¹¹ Second, another problem that occurred in practise regarding standing was that the governmental decision was taken at such an early stage that HFD had not been able to identify those who would be affected by the project. Accordingly, individuals who applied for judicial review were considered to lack standing and thus their cases was dismissed. When subsequently they appealed the permit for the project, they were prevented from challenging its localization and the basic parameters, as those issues had already been decided by the government.¹² This Catch-22 situation clearly is in breach of Article 9.2 of the Aarhus Convention and was heavily criticized for many years in the legal literature.¹³ It therefore came as no surprise when the matter was brought to the European Court of Human Rights by the neighbours to a major railroad development and Sweden was found to be in breach of Article 6 ECHR.¹⁴ However, the standing rule applicable in those days related to the standard formula in section 22 in the Administrative Procedure Act and it seems that HFD in case law under Act 2006:304 allows for a wider circle of individuals who “may be affected” to apply for judicial review of a governmental decision on the permissibility of large scale developments.¹⁵ In my view, this latter problem relating to standing to appeal Governmental decisions is also taken care of by the legislator and HFD.

¹¹ *NJA 2013 s. 613*. The case concerned a Natura 2000 assessment and permit, but the reasoning of the Supreme Court is generally applicable.

¹² *RÅ 2004 ref. 108 Botniabanan I* and *RÅ 2008 ref. 89 Botniabanan II*.

¹³ See decision by the Compliance Committee of the Aarhus Convention on the EU funding of a landfill for waste in Lithuania, C/2006/17 (EU). See also Darpö, J: *Rätt tillstånd för miljön. Om tillståndet som miljö-rättsligt instrument, rättskraften och mötet med nya miljökrav*, part 2.3.5. Final report in the research program ENFORCE. Published 2010-07-12 on www.jandarpa.se/ Artiklar & Rapporter, however only in Swedish.

¹⁴ *ECtHR 2014-09 -25 in case No 29878/09 Karin Andersson and others v. Sweden*.

¹⁵ *RÅ 2008 ref 89, HFD 2011 not 26*.

1.7 Case law in individual's standing on environmental decision-making

As noted, the traditional stance of the courts on individuals' standing is rather generous in the area of environmental law. The courts have also been quite sensitive to modern developments in the concept of standing, not least due to international law. Below, I have listed the landmark cases on standing for individuals in environmental law in Sweden.

1.7.1 Supreme Administrative Court (HFD)

RÅ 1993 ref. 97 Public concerned and the public interest

When an individual appeals a permit decision, both private and public interests can be invoked to advocate his or her cause.

RÅ 1997 ref. 38 Standing for individuals

The right of appeal is given to any person at risk of suffering harm or detriment caused by a decision, if that risk is not merely theoretical or completely insignificant.

RÅ 2005 ref. 44 The public interest and the scope of EIA

A neighbour appealed a municipal decision on a local development plan, claiming that it would have a negative impact on a protected species in the area (great crested newt), which was not taken into account in the EIA. HFD stated that individuals who are affected by such plans are able to invoke the public interest to advocate their cause. As an EIA should cover all relevant impacts of the development in order to be able to take them into account in the decision-making – including species protection – the plan was quashed.

1.7.2 Supreme Court

NJA 2004 s. 590 A uniform definition of public concerned in the Environmental Code

The ambition of the Swedish Environmental Code is to introduce a uniform and generous definition of “the public concerned”. Each person who may suffer any damage or nuisance from an activity – if the risk of such an impact concerns a legally protected interest and is not merely theoretical or insignificant – shall have the possibility to appeal a permit for that activity.

NJA 2012 s. 921 Public concerned in Swedish law and the Aarhus Convention

The Company Taggen Vindpark AB applied and received a permit to build 83 wind turbines 170m high, in the sea off the east coast of Sweden. The permit decision was appealed by a number of individuals and two ENGOs. One of the ENGOs was granted standing, whereas all other parties were dismissed. They appealed that decision first to the Environmental Court of Appeals and then to the Supreme Court.

Concerning the individuals, the Supreme Court noted that according to case law, those individual members of the public concerned who live within 450m to 3 km from a planned wind farm can appeal the permit decision. The qualifying distance to entitle challenges depends upon the size and construction of the installation and the individual circumstances of the case in question. This case law is in line with what has been previously decided by the supreme courts of Sweden (*RÅ 1997 ref 38* and *NJA 2004 s. 590*) and meets the requirements of the Aarhus Convention. In this case, the complainants lived 11-12 km away from the offshore wind farm and although they claimed to be affected by

disturbances from the installation – mainly noise, shadowing and blinking lights – they could not be regarded as affected in a way so as to grant them standing rights. Furthermore, investigations into the case exploring the impact of the windfarm, did not indicate that it would have any negative effect on the value of their properties. As merely an impact upon the aesthetics of the landscape affecting the individuals view of the coastline, was not considered to be a factor that gave rise to standing rights for the individuals, their appeals were dismissed.

1.7.3 Land and Environmental Court of Appeal

MÖD 2002:82 Public concerned at what distance?

Individuals living 5 km from an incineration plant and thus at risk of being affected by air pollution were allowed to appeal the permit decision for that operation.

MÖD 2003:19, MÖD 2004:31 Challenges to administrative to omissions

A decision of a supervisory authority not to intervene in a certain activity (a so-called 0-decision) can be appealed and its substance can be challenged by the public concerned.

MÖD 2003:98 and MÖD 2003:99 The definition of the public concerned

When deciding on who should be given the right to appeal a permit decision, decisive factors are the distance to the activity, the nature of the emissions (discharged substances) and their likely effects. A property owner, living 12 km downstream from industrial works was granted standing to appeal a permit concerning discharges into the water of not readily biodegradable and toxic substances (MÖD 2003:98). The same person was dismissed in another case, concerning a permit for that same industry for the discharges of formic acid, which is readily biodegradable and therefore was not considered to have any negative effect on her interests (MÖD 2003:99).

MÖD 2011:46 Public concerned and omission by public authority

A company operated a landfill under a permit issued in 2005. A neighbour complained to the supervisory authority (the County Administrative Board), claiming that the activity was operated in breach of several conditions in the permit. He asked the Board to initiate proceedings to revoke or update the permit. The authority, however, found no reason to undertake any measures. The neighbour appealed to the Environmental Court. The court dismissed the appeal on the grounds that the possibility to initiate proceedings to revoke or update a permit was the prerogative of the environmental authorities and that, according to consistent case law of the National Licensing Board and the Environmental Court of Appeal, individuals were not allowed to appeal decisions not to undertake such a measure.

The neighbour appealed to the Environmental Court of Appeal. This court stated that it is a general public law principle that those who are affected by an environmental decision should have the possibility to appeal the decision, and that this principle should also apply in cases where the activity operates under a permit. With reference to Sweden's international obligations – and thus revising its previous case law – the court found that a neighbour has the right to appeal a supervising authority's decision not to undertake any measure to revoke or update a permit. The court also referred to its case law on the possi-

bility to appeal supervisory decisions concerning activities that operate without permits (cf. *MÖD 2003:19* and *MÖD 2004:31*).

MÖD 2014: 12 Appeals on a local development plan (Seminarier)

The city of Uppsala decided a local development plan for the area Seminarier. Neighbours and different associations appealed the decision to the County Administrative Board, which upheld the plan. However, both the Land and Environment Court and the Land and Environmental Court of Appeal – to which the city appealed – disallowed the plan. The Land and Environmental Court of Appeal emphasized that the aim of the trial is to decide whether the local plan is in accordance with the provisions of PBL. If the law gives room for discretion to the deciding administration, this must be respected by the courts. Thus, it is the substantive content of the provisions which set the scope of the trial and individual parties have a right to challenge whether those rules have been correctly applied. Furthermore, even if the County Administrative Board has a certain prerogative in the weighing of different public interest, this does not preclude the court from trying that it has been done according to the law. In this case, the Land and Environmental Court of Appeal found – in contrast to the County Administrative Board – that the proposed development would have a significant impact on the cultural values of the area, why the plan was quashed.

MÖD 2015:8 Public and private interests

A municipality planned to locate sewage pipes for sewage on the land of a private person. In order to be able to do so, they needed, first derogation from the species protection requirements, and second a permit from the Cadastral Offices. The County Administrative Board granted the species derogation and the property owner appealed to the Environmental court. However, the court dismissed his appeal in line with established case law (*MÖD 2001:29*, *MÖD 2004:55*, *MÖD 2013:32* and *MÖD 2007:6*). According to this case law, private parties cannot challenge decisions that merely concern public interests, although they can invoke such interests in cases where they have standing.

The property owner appealed to the Land and Environmental Court of Appeals. The court noted that since the establishment of the old case law on the matter, Sweden and EU have ratified the Aarhus Convention. Article 9.3 of that convention has wide applicability and covers all kinds of decisions concerning the environment. Even though this provision does not have direct effect, the CJEU has emphasized that national standing rules must ensure wide access to justice and cannot invalidate EU law provisions that entitle the public concerned to bring actions before the competent courts. Furthermore, it is an obligation for the national courts to interpret – to the extent possible – existing rules on standing in order to apply them in line with Article 9.3 of the Aarhus Convention and the principle of legal protection in EU law (C-240/09).

Against this backdrop, the court stated, it can be questioned if the old case law – which partly is based on the “protected norm theory” – is compatible with modern environmental law and the Aarhus Convention. The derogation decision concerned general environmental interests to which Article 9.3 applies. The conventional requirements are not only for wide standing rights, but also for effective justice. Thus, those who are affected by a decision must be able at some point in the procedure to have their say when the issues raised are decided upon. If a certain decision – to which the public concerned

cannot appeal – is decisive for the latter proceedings in the matter, those requirements are not met.

In this case, the first decision concerned the protection of a species in the area, which is a subject that an individual can raise in the subsequent proceedings where he has standing rights. However, the effectiveness of this is nullified by the fact that the Cadastral Offices used the first decision as a starting point, without substantively questioning it. Such a division of the decision-making is not in line with the Aarhus Convention and may also be regarded as a deprivation of the individual's right to a fair trial according to ECHR. Thus, the property owner was granted standing in the case concerning derogation from the species protection.

1.8 Standing for groups and ENGOs

1.8.1 General about ENGO standing in Sweden

The experience of ENGO standing has been very positive in Sweden and the general opinion is that the organisations have used the possibility in a responsible manner.¹⁶ The most common appeals made by the Swedish ENGOs – mainly the Swedish Society for Nature Conservation (SNF) and the Swedish Ornithological Society (SOF) – since 1999 have been concerning permits to industrial installations and water works, exemptions to species and habitats protection, and shore protection.¹⁷ Concerning the protection of large carnivores, Swedish Carnivore Association (SRF) and Nordulv have been very active. In recent times and due to the less strict numeric criterion in 16:13 MB, local ENGOs have also raised actions in the courts.

1.8.2 ENGO standing according to the Environmental Code

The standing criteria do not change according to the nature of the claimant so long as the person, company or organisation represent their own interest as a member of the public concerned, stakeholder, operator of a business, owner of real estate, etc. As with civil rights and obligations protected by the ECHR, both natural and legal persons represent interests that they can defend by legal means in the environmental courts. However, according to the Environmental Code, a legal entity cannot represent an individual appellant. But nothing prevents a person who represents that entity from acting as counsel for the individual, something which quite often happens in environmental cases.

Provisions on standing for ENGOs and other organisations under the Environmental Code are provided for in 16:13 and 16:14 MB.¹⁸

Section 13 Appealable judgements and decisions concerning permits, approvals or exemptions issued pursuant to this Code, concerning withdrawal of the status of protected areas pursuant to Chapter 7 or supervision pursuant to Chapter 10 or questions relating

¹⁶ See Implementation Report 2014 from Sweden (http://www.unece.org/env/pp/reports_trc_implementation_2014.html), p. 27f.

¹⁷ The success rate of ENGO standing in environmental cases is reported to be almost 50% in the environmental courts, to be compared with 24 % for appeals from other actors in the environmental procedure, see SOU 2005:59, part 3.3.1.

¹⁸ Unofficial translation in a document from the Ministry of the Environment and Energy.

to provisions adopted pursuant to this Code, may be appealed against by a non-profit association or another legal person

1. whose primary purpose is to promote nature conservation or environmental protection interests;
2. who is non-profit;
3. who has operated in Sweden for at least three years; and
4. who has at least 100 members or by some other means shows that the activity is supported by the public.

The right to appeal pursuant to the first paragraph shall apply even in the cases where the appeal only refers to a condition or other provision in the judgement or decision and also in the cases where the judgement or decision is the result of an assessment pursuant to Chapter 22, Section 26, Chapter 24, Sections 2, 3, 5, 6 or 8 of this Code or an assessment pursuant to Chapter 7, Sections 13, 14 or 16 of the Act (1998:812) Containing Special Provisions concerning Water Operations. However, the right to appeal pursuant to the first paragraph do not apply to judgements or decisions relating to the Swedish Armed Forces, the Swedish Fortifications Agency, the Swedish Defence Materiel Administration or the National Defence Radio Establishment.

Anyone who wishes to appeal pursuant to the first or second paragraph must do so within the time limit fixed for the parties and for the claimants.

Section 14 The provisions of Section 13 concerning the right of appeal of certain non-profit associations shall be applicable regarding shore protection also for a non-profit association whose purpose according to their statutes is to promote outdoor interests.

In short, a non-profit association whose purpose according to its statutes is to promote nature conservation, environmental protection or outdoor recreation interests may appeal decisions on permits, approvals or exemptions pursuant to the Code. Additional criteria for such ENGO standing are that the organisation has been active for at least 3 years in Sweden and has at least 100 members or else can show that it has “support from the public”. Thus, ENGOs meeting those criteria are able to defend the public interest according to their statutes, without any further qualification.

The possibility for ENGOs to appeal certain environmental decisions originally was established in the Environmental Code in 1999, although at that time, the numeric criterion was 2,000 members. However, due to the judgment by the CJEU in the *DLV case* (C-263/08), the legislation was reformed in 2010. Further changes have been made to meet the access to justice provisions in the ELD (2004/35), enabling ENGOs to appeal supervisory decisions concerning contaminated land. Since 1999, there have also been proposals from different governmental commissions to expand ENGO standing to all kinds of decisions under the Environmental Code. Due to strong resistance from industry, these ideas have to date not survived negotiation within the Governmental offices. Still, there are some proposals pending for further reform of the provisions on ENGO standing. First, the Ministry of the Environment and Energy has suggested that the condition that the ENGO must have been active in Sweden for 3 years should be abolished.¹⁹ The national criterion surely is in breach of the non-discrimination clause in the Aarhus Convention.

¹⁹ Promemoria: Effektivare identifiering, beskrivning och bedömning av miljökonsekvenser. Remiss/Miljödepartementet 2012-08-17 (dnr M2012/2031/R).

However, in practise, this is not a problem when an ENGO from another Nordic country appeals a Swedish decision, as it is equated to a Swedish organization in accordance with the 1974 Nordic Convention on Environmental Protection.²⁰ But if a Polish or a German ENGO appeals a Swedish permit for a combustion plant with far ranging effects on the atmosphere or the Baltic Sea, it will not meet the national criterion. Furthermore, according to the ministerial paper, the time criterion is in breach of Article 11 of the EIA directive (2011/92). It also argues that it is important for the quality of the decision-making and from an environmental democracy point of view that individuals from the public concerned have the possibility to organize in ad hoc groups in order to present their opinions and advocate their cause. For these reasons, the Ministry argues that the criteria on nationality and length of activity cannot stand. However, these proposals have been resting within the Governmental offices for some years now and their future must be regarded as uncertain.

This is quite surprising, as the courts have been very active in promoting standing rights for ENGOs. One can actually say that in this area of law, the role of legislator has been overtaken by the courts and that development has been rapid. In a series of judgements, the Supreme Court and the Land and Environmental Court of Appeals – the latter being in fact the body which creates precedents in the area of environmental law – have expanded the standing rules in 16:13 MB in order to make them in line with the international obligations. In *NJA 2012 s. 921*, the Supreme Court stated that the criteria for ENGO standing in the Environmental Code must not be regarded as fixed, but should instead be used as mere starting-points for considerations on access to justice. Most importantly, the overall picture should be taken into account and someone must be able to challenge the decision at stake. In accordance with this judgement, the Land and Environmental Court of Appeals found that an association of bird watchers enjoyed the support from the public, despite the fact that they had only 40 members (*MÖD 2015:XX*). This court has also expanded the understanding of the locution “decisions about permits, approvals or exemptions” in 16:13 MB in order to have it cover all kinds of decisions by the supervisory authority in relation to activities that *may be in need* of such a formal decision (*MÖD 2012:47*, *MÖD 2012:48* and *MÖD 215:XX*).²¹ Thus, in order for ENGOs to have standing to challenge administrative omissions, it suffices that there is an allegation that a certain activity requires a permit or even that the argumentation in the case has brought the issue to the courts attention.

1.8.3 ENGO standing the Planning and Building Act

ENGOs which meet the requirements in 16:13 MB, can also appeal certain decisions according to the Planning and Building Act. The challengeable decisions are listed in law and all concern local development plans on certain activities, but only if they may have a significant effect upon the environment (13:12 and 4:34 PBL). The list reflects the Public Participation Directive (2003/35) and covers plans for industrial operations, supermarkets, parking lots and similar arrangement for densely populated areas, harbours for leisure boats, ski resorts, hotels, amusement parks, zoological gardens, permanent camping sites, tramways and metros. In addition to this, organisations meeting the 16:13 or 16:14

²⁰ Nordiska Miljöskyddskonventionen (SÖ 1974:99).

²¹ These cases have been confirmed by later decisions from the Land and Environmental Court of Appeals, see for example *MÖD 2014:30* and *MÖD decision 2014-03-18 in case No 11609/13*.

criteria– thus including organisations for outdoor recreation – can appeal municipal planning decisions which may have an impact upon the shore protection in the area (13:13 PBL). In the same way as when individual members of the public concerned appeal decisions on local development plans, 13:17 PBL applies to ENGOs. Thus, the scope of the trial is to evaluate whether there has been any breach of law in the decision-making. However, as ENGOs are regarded as representatives of the public interests (*NJA 2012 s. 921* with reference to *C-115/09 Trianel*), there is little difference compared with an ordinary reformatory administrative appeal procedure concerning the scope of the trial. As for the outcome of the proceedings, the court can only accept or quash the decision at stake.

1.8.4 ENGO standing to apply for judicial review of Governmental decisions

As noted, the provision on access to justice by ENGOs in 16:13 MB has also been expanded to certain other laws dealing with infrastructure projects, mining, electric power lines, and similar activities. Commonly, these permits are appealed to the Government. In relation to those decisions, there is a possibility open to ENGOs to apply for judicial review of governmental decisions in accordance with section 2 of Act 2006:304. Here, it is stated that ENGOs meeting the criteria of the 16:13 MB shall have the possibility available to them to challenge any such “governmental permits to which Article 9.2 of the Aarhus Convention applies”. As the reader is aware, Article 9.2 covers two situations. First, if an activity is listed in Annex I to the Convention (Article 6.1.a). This annex lists major industrial operations, landfills, energy operations, mines and other kinds of large scale operations with great impact on the environment and natural resources. Second, Article 9.2 also covers activities which are not listed, but still may have a “significant effect to the environment” (Article 6.1.b). In most – but not all – situations, the criteria for ENGO standing for judicial review is similar to the obligation to produce an Environmental Impact Assessment according to the EIA Directive (2011/92).

Thus, decisive for ENGO standing is whether an activity may have significant impact to the environment. HFD has dealt with this question in different situations. The first one is obviously when ENGOs apply for judicial review. Such examples can be found in *HFD 2011 not. 17 Tollare* and *HFD 2012 not. 54 Shore protection i Sollentuna*. In these two cases, HFD dismissed the ENGOs as the plans in question did not entail significant effects to the environment. However, in *HFD 2011 ref. 4 Norra Djurgårdsstaden*, the ENGO Djurgården-Lilla Värtan (DLV) was granted standing as the local plan in question concerned a major development in Stockholm, where an EIA procedure was compulsory. The second situation is when individuals ask for judicial review of a Governmental decision, claiming that an EIA procedure should have been performed in the decision-making. Thus, HFDs evaluation of such a claim in substance has importance for the understanding of ENGO standing in other cases, as the requirements are the same.

However, as the local plans since 2011 no longer are appealed to the Government, but to the environmental courts, fewer cases of this category will occur in HFD. But for those activities which remain to be appealed to the Government, Act 2006:304 still applies, including the Article 9.2 criteria. It should be noted that those criteria are “closed” in that they cannot be interpreted to include environmental decisions according to Article 9.3. In my view, this procedural order certainly does not meet the requirement of the Aarhus Convention when the Government decides on matters which do not require an EIA, but

which still relate to the environment. This problem may be solved by way of a generous attitude from the government in granting ENGO standing directly, as all “parties to the proceedings” can ask for judicial review. This is however less likely, considering the general attitude at the political level towards ENGO standing.

1.8.5 ENGO standing in sectorial legislation

Traditionally, ENGO access to justice was not provided for in important environmental legislation outside the Environmental Code, such as the Forestry Act and the legislation on hunting. Although vital parts of the Habitats Directive are implemented by this legislation, decisions pursuant to those laws could not be challenged by ENGOs. However, on this area of law, the general principles on standing according to section 22 of the Administrative Procedure Act apply and the development of case law after the *Slovak Brown Bear* has been rapid.

It all started when the Swedish Environmental Protection Agency (SEPA) authorized hunting seasons both in early 2010 and again in early 2011 with a bag limit of 27 and 20 wolves respectively. Several ENGOs appealed these decisions; but the appeals were thrown out because the organisations were found not to have standing under Swedish law. However, in early 2012, the CJEU’s judgement in the *Slovak Brown Bear* case (C-240/09) had begun to influence the jurisprudence of the Swedish administrative courts concerning hunting decisions. As the reader knows, in this case, the CJEU ruled that national courts must, to the extent possible, interpret national procedural rules in such a way so as to allow ENGOs standing to appeal national implementation of EU environmental laws. So when yet another hunting decision was taken at the end of 2011 and the complaining ENGOs were denied access to justice by the lower administrative courts, HFD in the summer of 2012 decided that the issue of standing must be reviewed in light of our international obligations. The case was remitted back to the Stockholm Administrative Court of Appeal, which subsequently granted the ENGOs standing, referring to the Aarhus Convention and the case law of CJEU (the *Kynna wolf case*). In doing so, it applied the criteria for standing in 16:13 MB, as the hunting legislation for obvious reasons, lacks such provisions. Ever since that case, ENGOs have standing to challenge hunting decisions by the SEPA. Accordingly, the decisions on the hunting licenses in 2013 and 2014 were brought to court and subsequently quashed. After this, the Swedish government barred the possibilities to challenge these decisions in court, which triggered the EU Commission to initiate an infringement case in 2014. Moreover, in January 2015, HFD issued leave to appeal on the question as to whether such a procedural order is in line with EU law.

ENGOs standing rights have also expanded into areas of (exclusive) national environmental legislation. In the *Änok case*, HFD granted standing to the Swedish Society for Nature Conservation in a case concerning a permit for a clear-cutting operation according to the Forestry Act. The Land and Environmental Court of Appeals has applied the same viewpoint in cases concerning the legislation on shore protection, which also is mainly according to national law.²²

²² MÖD 2013:6.

1.9 Case law on ENGO standing in environmental decision-making

Below, you can find the landmark cases concerning ENGO standing in environmental matters.

1.9.1 Supreme Administrative Court

HFD, decision 2012-06-28 in case No 2687-12 and Stockholm Administrative Court of Appeals, judgement 2013-02-07 in case No 4390-12: The Kynna wolf case

In November of 2011, SEPA made a decision under administrative provisions on ‘protective hunting’ to cull an individual wolf, known as the Kynna wolf. The Swedish Society for Nature Conservation (SNF) appealed the decision and requested an injunction. The case was rejected by the Stockholm Administrative Court, which found that the organisation lacked standing to proceed. The Stockholm Administrative Court of Appeal (CoA) agreed. SNF appealed to the Supreme Administrative Court (HFD). Although the wolf had already been shot, HFD ordered Stockholm Administrative CoA to hear the case. HFD noted that Sweden is a signatory to the Aarhus Convention, and referred to the *Slovak Brown Bear* case, as well as its own lack of precedent on the right of environmental NGOs to appeal administrative decisions pertaining to hunting of species protected by EU law.

In February of 2013, the Stockholm Administrative CoA determined that SNF should have had standing in the case. Article 9.3 of the Aarhus Convention grants the public the right to challenge acts and omissions that violate national environmental law. Jurisprudence of the CJEU in *Slovak Brown Bear* established that while Article 9.3 does not have direct effect, national procedural law must be interpreted so to give effect to Union law. Thus, Swedish administrative law, which according to section 22 in the Administrative Procedural Act generally requires appellants to be ‘concerned’ and negatively affected by a decision, must be interpreted in such a way that it is possible for environmental organizations to challenge in court administrative decisions that conflict with EU environmental law.

Although SEPA’s hunting decisions were made under hunting law and not environmental legislation, the decision clearly concerned EU environmental law. The court therefore used the same criteria for ENGO standing that is set out in the Environmental Code: in order to have standing to appeal, an NGO must have a primary purpose of nature protection or other environmental interests, be non-profit, have been active in Sweden for at least three years, and have at least 100 members or else show that it has “support from the public”.

HFD 2014:8 Änok: ENGO standing according to the Forestry Act

The National Forest Agency permitted a clear-cutting operation in Northern Sweden in a mountain forest with high conservation value. The Swedish Society for Nature Conservation (SNF) appealed the decision and claimed that the operation was in breach of the Forestry Act. The Administrative Court granted standing and quashed the decision. The property owners and the Forest Agency appealed to the Administrative Court of Appeal, which decided that the ENGO lacked standing in the case. SNF appealed to the Supreme Administrative Court (HFD).

HFD noted that there is no standing rule in the Forestry Act, and this is why the issue must be decided using general administrative law principles. In case law, those who have

“noteworthy interest” in the matter shall be considered to have standing to appeal the decision at stake (*RA 1994 ref. 82, RA 1995 ref. 77*).

HFD then went on to consider if the decision to permit clear-cutting in the area is an administrative act which is covered by the Aarhus Convention. According to the court, Article 9.2 is not applicable as forestry operations are not mentioned in the list in Annex I to the Convention (Article 6.1.a) and the operation in this case cannot be regarded as having a significant effect on the environment (Article 6.1.b). Concerning Article 9.3, the court referred to the Implementation Guide 2013 (at page 206f) and noted that the provision covers decisions which relate to the environment. Furthermore, it is not necessary to establish that a breach of law has taken place in order to give standing, it suffices if the public concerned alleges that there has been such unlawful conduct. HFD then noted that according to the Forestry Act, nature conservation and environment protection shall be taken into account in the decision-making. Also, a permit for a clear-cutting operation in the mountains must not be issued if it “contravenes essential nature conservation values”. The Environmental Code can also be applied in these cases. HFD therefore concluded that the permit in question was clearly covered by Article 9.3 of the Aarhus Convention.

Regarding the issue of ENGO standing, HFD pointed out that although the legal basis for the decision was national law, this situation was closely related to those to which EU law on the environment applies. The court then cited the *Slovak Brown Bear (C-240/09)*, where CJEU established that it is a Union law requirement to interpret the national procedural rules widely in order to allow ENGO standing in environmental decision-making. HFD furthermore stated that there is also, on a more general level, a need for a common understanding of the standing rules, irrespective of whether national or EU law is applied. In sum, in order to secure effective legal remedies for the public concerned, they should be able to appeal a decision on clear-cutting in the mountains. Accordingly, SNF was granted standing in the case.

1.9.2 Supreme Court

NJA 2010 s. 419: Numeric criterion

As a result of the preliminary ruling by the CJEU in the *DLV case (C-263/08)*, the Supreme Court set aside the numeric criterion in the Environmental Code for NGOs to have at least 2,000 members as a requirement for having standing rights.

NJA 2012 s. 921: Fixed criteria for ENGO standing

The Company Taggen Vindpark AB applied and received a permit to build 83 wind turbines 170m high, in the sea off the east coast of Sweden. The permit decision was appealed by a number of individuals and two ENGOs. One of the ENGOs was granted standing, whereas all other parties were dismissed. They appealed that decision first to the Environmental Court of Appeals and then to the Supreme Court.

The decision to dismiss the appeal for one of the ENGOs was confirmed by the Supreme Court, although some clarifying statements were made. According to Chapter 16 sections 13-14 of the Environmental Code, a “non-profit association whose purpose according to its statutes is to promote nature conservation, environmental protection or outdoor recreation interests” may appeal decisions on “permits, approvals or exemptions” pursuant to the Code. Additional criteria for such NGO standing are that the organisation

has been active for at least 3 years in Sweden and has at least 100 members or else can show that it has “support from the public”. The Supreme Court started by citing CJEU in the *DLV case* (C-263/08), where that court accepted numeric criteria, but only to the extent that they are necessary to decide whether the organisation still exists and is active. The standing criteria furthermore must not be set at a level that conflicts with the aim of providing the public concerned a wide access to justice. Also local associations must be able to use legal means to protect their interests according to the environmental legislation. It is therefore necessary, stated the Supreme Court, that one utilizes a generous attitude in these matters, and that fixed criteria in law is applied only as a starting point for decisions on standing to appeal. One must also consider the overall picture – especially in cases where no individuals have standing rights – and take into account that someone must be able to challenge the decision. In this case, however, it was unclear how much support the ENGO had, and it was therefore acceptable to dismiss their appeal (one should note however, that the other ENGO was allowed to appeal).

1.9.2 Land and Environmental Court of Appeal

MÖD 2001:9: In Sweden

The geographic criterion “in Sweden” in Chapter 16 section 13 of the Environmental Code for NGO standing entails the possibility to appeal decisions concerning permits, approvals or exemptions in all parts of Sweden, irrespective of where the organisation is registered according to its statutes or has its activities. However, the provision does not furnish a right to appeal a supervisory decision in a case concerning nature protection.

MÖD 2006:22: Different associations

The national association of real estate owners (Villaägarnas Riksförbund) was not considered to be an environmental NGO from the mere fact that its statutes said that one of the objectives of the organisation was to promote environmental interests.

MÖD 2008:28: Different associations

The national association of fishermen (Sveriges Fiskares Riksförbund) was not regarded as an environmental NGO having standing under the Environmental Code.

MÖD 2008:45: Numeric criterion

MILKAS, an established NGO opposing nuclear power, was not allowed to appeal a decision concerning a deposit of radioactive waste at Forsmark nuclear power station due to the fact that the organisation has only two other legal entities as members, the well-known NGOs Friends of the Earth and The Peoples Campaign against Nuclear Power.

MÖD 2009:6: Numeric criterion

A subdivision of the Swedish Society for Nature Conservation (SNF) is a separate legal entity and cannot appeal a decision according to Chapter 16 section 13 of the Environmental Code if it does not have the required number of members (at least 2,000 at the time).

MÖD 2012:47 and MÖD 2012:48: Different kinds of decisions

According to Chapter 16 section 13 of the Environmental Code (16:13 MB), certain ENGOs may appeal decisions on “permits, approvals or exemptions” pursuant to the Code. According to old case law, those provisions were read narrowly, restricting the types of decision which could be subject to appeal. In two cases, the Land and Environmental Court of Appeals distinguished itself from this old case law and clarified that the application of fixed standing criteria must comply with the Aarhus Convention and EU law.

In both cases, the Swedish Society for Nature Conservation (SNF) appealed a decision from the County Administrative Board to accept that certain activities were undertaken without a formal decision. The first (*MÖD 2012:47*) concerned the necessity of having an exemption from the species protection regime, and the second (*MÖD 2012:48*) a permit according to the legislation on Natura 2000. Both appeals were dismissed by the Environmental Court.

The Environmental Court of Appeals, however, noted that the Swedish Council of Legislation had criticised the formulation of 16:13 MB for being too restrictive, especially concerning the possibility to challenge decisions from the supervisory authorities. Moreover, case law of CJEU emphasises the necessity of giving the public concerned wide access to justice in environmental matters (*C-240/09 Slovak Brown Bear*). Even though both County Boards’ decisions can be regarded as such supervisory decisions that are not covered by 16:13 MB, they are not expressly excluded. The decisions were also closely connected to “exemptions and permits”, as they related to the legislation on species protection and Natura 2000. Furthermore, developments within EU law should be taken into account when deciding the standing issue and the national courts have a responsibility of their own in this regard. Also, the challenged decisions were without any doubt covered by Article 9.3 of the Aarhus Convention. Given this context, 16:13 MB should be read in order to fulfil the international obligations and thus be understood as also relating to a decision on whether an exemption and a permit is needed or not. SNF was therefore granted standing in both cases.

MÖD 2015:XX (MÖD 2015-04-15 in case No M 8662-14) Public support

According to Chapter 16 section 13 of the Environmental Code (16:13 MB), an ENGO has standing rights on condition that it has at least 100 members or else can show that it has “support from the public”. In old case law, this criterion has been read narrowly, excluding for example an organisation with 92 members (*MÖD decision 2010-09-21 in case No M 1505-10*). In this case, a local bird association with only 37 members appealed a municipal decision relating to the development of wind turbines, but was dismissed both by the County Administrative Board and the Environmental Court for lack of standing. The ENGO appealed to the Land and Environmental Court of Appeals.

To begin with, the Land and Environmental Court of Appeals noted that the Swedish Council of Legislation had criticised the formulation of 16:13 MB for being too restrictive and that the Supreme Court has emphasised that the standing criteria in 16:13 MB should be read generously. One must also consider the overall picture – especially in cases where no individuals have standing rights – and take into account that someone must be able to challenge the decision. Moreover, case law of CJEU emphasises the necessity of giving the public concerned wide access to justice in environmental matters (*C-263/08 DLV* and *C-240/09 Slovak Brown Bear*). Even though the number of members in the organisation did not meet the numeric criterion in 16:13 MB, it had been regularly active

for a long period of time. The organisation had arranged annual bird watching exhibitions with as many as 500 visitors and it also had taken part in public hearings in cases concerning nature protection. Therefore, the Land and Environmental Court of Appeals found that the ENGO had the support from the public in the sense that was meant in 16:13 MB. As the court also considered – along with previous case law from recent years (*MÖD 2012:47*, *MÖD 2012:48*, *MÖD 2014:30*) – that the decision in question was covered by 16:13 MB, the ENGO was granted standing in the case.

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Despite the rapid development of case law in this area, very little has been written on access to justice in environmental matters in Sweden in recent years, be that in Swedish or English. Besides case notes and basic text books on environmental law, most works on the subject has my name on it.²³ This does not, however, mean that the issue is uncontroversial or undebated, quite the contrary. As evidenced by the fierce wolf debate (see Darpö & Epstein 2015), strong interests within industry and the administration are actively working to weaken access to justice in environmental matters. However, they rarely provide reasons for their stance, at least not in law journals or analytic papers. So for now at least, the advanced discussion about the implementation of our international obligations on access to justice in such a context consists of an exchange between those academics who advocate greater environmental democracy and the responses received from the courts.

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