

**Jan Darpö**

*Emeritus professor of Environmental Law  
Faculty of Law/Uppsala Universitet  
PO Box 512, SE-751 20 UPPSALA, Sweden  
Tel. +46 739 137824*

*E-mail: [jan.darpo@jur.uu.se](mailto:jan.darpo@jur.uu.se)*

*On the web: [www.jandarpo.se](http://www.jandarpo.se)*

\*\*\*\*\*

2022-05-13

## ***Integrated permit regimes in conflicting times***

*Questionnaire for the Avosetta meeting in Uppsala on 27-28 May 2022 –*

### ***SWEDEN***

*Authors: Jan Darpö & David Langlet, Faculty of Law, Uppsala Universitet*

#### **Scenarios**

The following cases reflect environmental dilemmas or trilemmas because the conflicting interests on the different sides are in any case environmental (in broad terms, considering climate as an environmental issue).

#### ***A. Renewable energy by wind farming***

Commonly, wind farms require an EIA and a permit according to EU and Member State law. Decisive for the energy transition, wind farms also trigger conflict with various environmental interests, most importantly species protection, landscape and nature conservation. Also other interests may block the development of these installations, such as defence (radar system) and – not least – opposition from people living nearby (the NIMBY social phenomenon or syndrome). The construction of the wind farms including transport of towers and masts (150-200 meters long) may also have a substantial impact on forests and the water environment. In addition, the building of roads cause fragmentation of the areas with an impact on environmental interests.

- How does your system deal with these different interests, is there an integrated or a sectorial (divided) permit procedure? Is there a difference between the permit procedure for land-based and sea-based wind farms? Is the building of the wind farm dealt with in one permit procedure and the electric network and grids in another, or is there a combined decision-making process for the whole development? Are there any planning instruments applicable?
- In what way does your decision-making procedure take account of the benefits of wind energy as a whole in relation to climate, when considering individual permit applications?
- How are the local opinions dealt with in the permit procedure? Are there any economic benefits for the local community connected to the hosting of wind farms such as tax revenues, subsidies or direct support?
- Lastly, and perhaps somewhat beside the focus of this questionnaire, if unforeseen harm is detected when the wind farm is built – e.g. to sensitive species such as bats or birds of prey, how does your system deal with these effects “in the aftermath” so to speak (cf. Article 6.2 of the Habitats Directive)?

## Answer

Developments of wind farms in Sweden require a permit according to Chapter 9 and/or 11 of the Environmental Code (1998:808, MB). Normally when applying for those permits, the operator is also required to undertake an EIA procedure and thus provide for the necessary investigation of the environmental impacts. The project specific EIS is submitted to the permit authority simultaneously with the application for a license. Permits for land-based wind farms are processed by the Regional Licensing Boards (RLB) hosted by twelve of the 21 Country Administrative Boards in Sweden. As for wind farms located at sea or in other waters, the permit procedure is handled by one of the five land and environmental courts. All decisions are appealed in the same line, that is RLB → Land and Environment Court → the Land and Environmental Court of Appeal. In these cases, the permit procedure is integrated and covers all aspects of the installation, from the construction, the operation and to the closing down. However, issues concerning the electric networks and grids lie outside this procedure. On land, those applications are made to the Energy Markets Inspectorate (Ei), whose decisions can be appealed to one specific Land and Environmental Court. At sea, the permit procedure for wind farms is somewhat more disintegrated. For installations inside the territorial boarder (12 nautical miles, about 22 km), the Environmental Code applies. Outside this limit, the Act on the Economic Zone (1992:1140, LEZ) applies. For the laying of cables at sea and investigations of the sea bed, the operator needs a permit according to the Act on the continental shelf (1966:314, KSL). In contrast to licenses for wind farms on land, these permits according to the LEZ and the KSL are issued by the Government, whose decision can be challenged by launching judicial review at the Supreme Administrative Court. Finally, there is no planning instrument on any level covering wind farm developments. There do exist some topic specific strategies, but they are not binding in any practical meaning. It may finally be noted Sweden posits that the time limits according to the EU Renewable Energy Directive (2018/2001) are not applicable on the procedures in the courts, even when they act in “their administrative capacity”, that is when issuing licenses.

In the integrated permit procedure under the Environmental Code, all aspects of the operation is evaluated and tried. All relevant EU Directives are taken into account, most importantly the Birds Directive and the Habitats Directive. In the procedure, the public concerned commonly invokes landscape protection and different disturbances (noise, shadows, flickering lights, etc.) to their living areas for objecting to the localisation of the wind farm at stake. These interests very rarely have an impact on the licenses given, although they may stop a small number of very ill-placed wind turbines. In that sense, priority is given to wind energy as an important source of renewable energy in the weighing of interests. So far, the benefits of wind energy as a whole in relation to climate change have an upper hand. But the picture gets quite different concerning “more absolute” interests such as the land rights of the Sami people or species protection according to the Birds Directive (slow flying birds of prey, forest hens, certain sea birds, etc.) or the Habitats Directive (bats). These “counter-interests” do have an impact on the possibility to establish wind farms in sensitive areas. However, any applicant must first pass two major thresholds; 1) the national defence, and 2) the municipal veto. The interests of the national defence is the major barrier to wind farms in the Baltic Sea, where very few have been established. This development will obviously be consolidated with the coming membership in NATO. The resistance from the National Defence Forces and the municipal veto are complicated to calculate, as the responsible applicant never further on when s/he gets to know the attitude of the representatives from those interests. Even so, when we made a study covering all applications for wind farms (200 cases) during the five year period 2014-18, the result was the following:

All together, the applications included 4,145 wind turbines, out of which 2,985 was granted license (72%) and 28% denied (1,160). Grounds for rejection in numbers and percent of the total number wind turbines:

- Municipal veto: 521 (12,6%)
- Species protection and nature conservation: 384 (9,3%)
- Reindeer farming and the land interests of the Sami people: 120 (2,9%)
- National defence: 108 (2,6%)
- Landscape protection and World Heritage Areas: 24 (0,6%)
- Neighbours: 3 (0,1%).

The municipal veto is obviously very controversial, but so are wind farms on the countryside (there are virtually no wind farms in densely populated areas). This conflict is getting more and more contentious. There is a governmental proposal to the Parliament to reform the regulation in order to force the municipalities to give their say in the planning stage of the development and to make a go-ahead decision binding for five years. However, the political opposition has already announced that they will block the proposition (we have a minority government) until a proposal for the compensation to the local community is presented. A governmental commission is assigned to look into this issue.<sup>1</sup>

Licenses for wind farms are normally limited for a period of 30 years under certain conditions. If unforeseen harm to birds and bats occur during that period, the competent authority may intervene and order the license holder to apply for a review of the conditions or even the withdrawal of the permit in its entirety. This has not occurred in the last 20 years, that is to say, as long as there has been wind farms in Sweden. In a very small number of cases concerning particularly ill-placed wind farms with substantial impact on white tailed eagles, there has been some efforts by the public concerned to alert the authorities in order to have them intervene. In one or two instances, the competent authorities have actually tried, but, at the end of the day, their actions have been rejected by the courts.

---

<sup>1</sup> For further information on this issue, see *Should locals have a say when it's blowing? The influence of municipalities in permit procedures for windpower installations in Sweden and Norway*. Nordic Environmental Law Journal 2020:1, pp. 59-79.

### B. Aquaculture, fish stocks and water quality

Aquaculture, and in particular on shore or off shore fish farming can be associated with environmental pressures, such as emissions of nutrients and genetic contamination of wild stocks, as well as pharmaceutical contamination of coastal waters. However, well-designed, modern aquaculture has the potential to produce high-value protein with less environmental and climate impact than almost or all other forms of animal farming. Aquaculture plants with recirculating systems can also reduce emissions of nutrients quite drastically compared to traditional open-net pen (“cages”) fish farming. However, any increased pressure on a water body may prevent the establishment of aquaculture facilities since they are typically subject to a permit requirement and cannot be authorized if they jeopardize the attainment of good water status according to the water framework directive (WFD), as construed by the CJEU in the *Weser case* (C-461/13).

- Does your system provide for an integrated or sectorial (divided) decision-making procedure for fish farms? Does it differ if it is an open-net pen or a recirculating system?
- To what extent, and if so how, have relevant authorities in your country been willing to factor in wider environmental benefits – such as the fish protein being produced substituting for other, much more polluting animal protein – in such permit assessments?
- Can this be done without infringing the WFD or otherwise undermining the environmental objectives of that directive?

### **Answer**

In principle, both on shore and off shore fish farming activities fall under two distinct parts of the Swedish Environmental Code, namely Chapter 9 on environmentally hazardous activities and Chapter 11 on water operations. While partly different procedural rules apply in these areas, both kinds of operations are subject to the same general requirements (so-called General rules of consideration, set out in Chapter 2 of the Environmental Code) concerning e.g. protective and precautionary measures, siting of operations and conservation of energy and materials. In practice, however, most fish farms are only assessed according to the rules on environmentally hazardous activities. This is a consequence of fish farming being exempted from the general requirement to obtain a license for water operations. The reason for this is to avoid the same activity being assessed twice in relation to largely the same substantive requirements. Small fish farming operations that use no more than 40 tons of feed do not need a license for environmentally hazardous activities either. In such cases a notification to the municipality suffices.

However, the exemption from the rules on water operations only covers the fish farming as such and associated emissions of polluting substances. To the extent that an operation also requires extraction of surface water or groundwater it needs a license for water operations. While fish farming using traditional open-net pens does not generally involve extraction of water – the operation is itself conducted in a water body - land-based farming operations, either they are recirculating or not tend to require water extraction and are thus in need of a license for water operations. In practice, however, the differences are not that great since cases arising from the Code may be dealt with at a single permit procedure if the applicant is the same and the cases relate to the same activity. With respect to fish farming it means that the case concerning environmentally hazardous activities, which would otherwise have been assessed by a Regional Licensing Board (hosted by a County Administrative Board) will instead be examined by a Land and Environmental Court, where permits for water operations are processed. This means that all environmental dimensions of fish farming operations are assessed

in one procedure, even in cases where they require a license both for environmentally hazardous activities and water operations. However, fish farming generally also require other permits and licenses, including ones relating to food safety and animal welfare.

So far, the authorities responsible for assessing license applications concerning aquaculture operations have not shown any inclination to consider wider environmental benefits, e.g. by comparing the emissions caused by producing animal proteins through fish farming with those caused by comparable ways of producing such protein. There tends instead to be a rather narrow focus on the environmental impacts in the immediate vicinity of the fish farm, in particular its potential implications for the ability to maintain or achieve the water quality standard required by the Water Framework Directive (WFD). The concept of ecosystem services do not feature in the reasoning of relevant authorities in relation to licensing for fish farming. (See e.g. judgments by the Land and Environmental Court of Appeal: MÖD 2017:22; MÖD 2017:21, and MÖD 2021-04-15; M 4726-19; <https://www.domstol.se/mark--och-miljooverdomstolen/avgoranden/>).

There seems to be quite limited room for taking broader environmental considerations into account, at least if allowing a fish farming operation would entail a deterioration of the quality of a surface water body or prevent the achievement of good ecological status. The relevant exemptions set out in the WFD allowing for a deterioration of the status of a water body or the failure to achieve good ecological status without that constituting a breach of the directive are not applicable to the situation except, possibly, if the fish farming operation would result in a deterioration from high status to good status of a body of surface water. Also in that case, however, demanding requirements would apply that are unlikely to be met by a fish farming operation. In Sweden, licenses for fish farming activities are currently mostly granted for nutrient poor water bodies or if state-of-the-art recirculating techniques are used for land-based operations.

### C. Forestry and agro-energy cultures and the production of biofuels

Forestry and agricultures are crucial for the production of biomass and biofuel, bioenergy sources that surely will increase in importance with the upcoming Ukrainian crises. However, some of the methods used today for the harvesting of forests and agricultural biomass production are causing clear conflict with other environmental interests such as nature conservation and species protection, water protection and fighting soil erosion. In addition, in densely populated areas other interests may collide, such a cultural heritage and recreational interests. Both bioenergy agriculture and forestry may also cause ecological changes and the weakening of ecosystem services such as pollination, the cleaning of water, combating flooding and draught, access to nature and outdoor activities.

Here, you may choose either forestry or agriculture depending on which activity is the most relevant in your country:

- What kind of regulation covers these activities?
- Are there any integrated approaches in the regulation and decision-making?
- How are conflicting interests balanced against each other?

#### **Answer**

In Sweden (and Finland), forestry is undertaken by way of large scale clear-cutting operations, covering anything between a couple of hectares to more than 100 hectares.<sup>2</sup> The latter is however rare today and the average size is between 4 and 8 hectares depending on the region (larger to the north of the country). Clear-cutting operations have a significant impact on the environmental, most importantly on species and waters.

#### [Normalhygge\\_2048-1024x512.webp](#)

In most regions, a clear-cutting operation does not require a permit according to the Forest Act (1979:429, SVL). Instead, it suffices with a notification to the Forest Agency six weeks ahead of the operation. These notifications are made on the web and the authority's processing of the case is "automatic". The meaning is that if not a map layer alerts that the area is sensitive in any aspect (species, Natura 2000, waters, erosion, cultural heritage or ancient remains, etc.), the notification simply runs through the system without any control from an officer at the Agency. This happens in about 10-20% of the cases, the rest are controlled "at the desk" so to speak. Actual visits to the site for the operation rarely occurs (at the most 1% out of 70,000 notifications per year). There is no obligatory planning for the forestry, although a "forest plan" is one of the conditions for certification through FSC or PEFC. In areas with mostly certain broad leaf trees (south part of the country), areas sensitive to soil erosion (Baltic islands, coasts) and with tougher conditions for regeneration (mountains), there is a permit requirement. However, in practise the case handling at the Forest Agency does not differ very much in these cases compared with the handling of notifications, at least in substance.

It should also be noted that Sweden and Finland take the position that irrespective of the size of an operation and what kind of environmental impact it has in the forest, the EIA Directive does not apply. This interpretation rests upon that the project description *Initial afforestation and deforestation for the purposes of conversion to another type of land use* (Annex

---

<sup>2</sup> During 1970s-1980s a clear-cutting area could even amount to 1,000 hectares thus creating climatic deserts in the forests.

II; 1(d)) does not cover forestry, as these operations do not change the type of land-use (continued forestry). Be that as it may, the result is that major projects are undertaken in the forests without any preceding investigation as to the impacts on the environment or any other interests.

The Forest Act and the Environmental Code is both applicable on forestry in parallel. However, according to case-law under the Forest Act (HFD 2020 ref. 12), no one can appeal an omission (a decision not to make a formal decision, a so-called 0-decision) by the Forest Agency. Thus, if the Agency does not intervene to a clear-cutting operation with anything but advice, this standpoint cannot be challenged in court. This standpoint concerns not only the environmental interests, but also the Sami villages and their cultural and land-use rights according to EU law, ECHR and international law (Article 27 ICCPR, ILO169, etc.). As for the ENGOs, they may use the Environmental Code to get access to the courts instead (MÖD 2021:11). When alerted about a notification (published on the web), they demand that the Agency handles the case under the Code. When the Agency so refuses, that standpoint is actionable in the Land and Environmental Court. Recent years, these courts have to an astonishing extent stopped clear-cutting operations in sensitive areas and demanded further investigation. Most commonly, these cases have concerned the protection of species and birds. But obviously, compared with the huge amount of notifications (70,000/year), such interventions (10-15/year) represent merely a minor spit in the ocean.

The overarching aim of the Forest Act is production. Truly, the legislation also includes a wide catalogue of other interests that shall be taken into account when undertaking different forestry operations. However, considerations to these “counter-interests” are expressed as recommendations only. Even so, they are allowed to impact the operation in a very limited extent and commonly only if the landowner is compensated for these measures. Accordingly, there is not “weighing of interests” in the forest. Thus, the most important instruments for giving more importance to other interests in the forest is by way of market instruments. Even though both the FSC and PEFC brands are rather weak and do not have effective control functions, the picture may differ in other situations. For example, in densely populated areas with lot of people hiking, the landowner is way more restricted in the land-use activities. Even if s/he is strictly speaking allowed to perform large scale clear-cutting operations in those areas, the negative PR effect would be devastating to the business. In that way, at least certain ecosystem services are taken into account in the forests. The environmental authorities may also intervene under the Code to protect certain water bodies or in order to avoid soil erosion, but this happens rarely. All in all, the ecosystem services have no legal avenue for becoming a part of a “weighing of interests”.

#### D. Illustrating with an example

Please provide us with an example of a case involving a debate about integrated permits and environmental conflicts (e.g. climate neutrality v. traditional environmental interests) in the industrial or energy field which may be of a particular relevance for the general discussion at the meeting.

#### **Answer**

This case in the Land and Environmental Court of Appeal (MÖD 2017:21 *Skaftåsen*) concerned a license for a wind farm in the vicinity of a World Heritage site, namely the Fågelsjö Gammelgård (<https://www.visitdalarna.se/en/book/to-do/1495720/worldheritage-f%C3%A5gelsj%C3%B6-gammelg%C3%A5rd/showdetails>). In addition, some of the turbines were thought to have a negative effect on the local population of the golden eagle.

Eolus Vind AB applied for 63 turbines in several areas, whereas the remit procedure showed that many authorities and the public pointed to the negative effect on the World Heritage site and on species such as birds of prey, eagle owl, forest hens, etc. The Regional Licensing Board in Västernorrland basically accepted the localization close to the Fågelsjö Gammelgård, but excluded 22 turbines in an area sensitive for the birds. The applicant and an association appealed to the Land and Environmental Court of Östersund. The court, however, shared the views of the Regional Licensing Board, although it also accepted another 10 turbines in one area sensitive for other birds than the golden eagle.

The association and the regional County Board appealed to the Land and Environmental Court of Appeal. The claimants now focused on the impact on the World Heritage site and to the fact that UNESCO in an opinion highlighted that wind farms in the vicinity may harm the interest (36COM 8B.40). A remit was also made to the Swedish National Heritage Board which sided with the claimants on this issue. The company on their hand pointed to the fact that the original application covered 130 turbines and sufficient consideration already had been showed by the cutting down on the numbers to less than half (51 turbines). The Land and Environmental Court of Appeal, however, shared the views of the County Board. Especially the turbines situated on the closest mountain Skaftåsen would change the open landscape character in the surroundings and thereby have a negative impact on the cultural values that constituted the protected interest. The Court also sided with the Regional Licensing Board about the protection of the sensitive birds and thus excluded 22 turbines from the permit.

NB: The case is rare. In my experience, UNESCO World Heritage sites have little influence on environmental decision-making in Sweden. I know of one more case among 3-400 where a license for a wind farm has been rejected due to these interests or other areas of great cultural value.