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Permit procedures for industrial installations and infrastructural projects: Assessing integration and speeding up

1. Introduction

1.1 Legislation and system for decision-making and appeal

Since 1999, Sweden has had a "universally" applicable Environmental Code (1998:808), 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. 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). Infrastructure installations, such as railroads and highways, also have regulations of their own, as do mining and forestry.

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] 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 Transport Administration and Geological Survey of Sweden. Those decisions can be appealed to the Government. Some larger projects require a preliminary governmental decision on "permissibility" before a permit can be granted (Chapter 17 Environmental Code). This system is today restricted to nuclear activities, major infrastructure projects and wind farms.

[1] C-263/08 *DLV* para 37.

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 (MMD) and one Land and Environmental Court of Appeal (MÖD). 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 as well as 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. 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. 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 dealing with a case, it is obliged to control the legal basis for the decision and must disapply 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).

1.2 Standing for the public concerned in environmental decision-making

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"

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

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. 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 "interest-based" system for deciding standing means that 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 (*RÅ 1997 ref. 38*)[3]. 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 (*NJA*

[3] Summaries of the Swedish cases are posted on the website of the website of the Task Force on Access to Justice under the Aarhus Convention, see http://www.unece.org/environmental-policy/treaties/public-participation/aarhus-convention/envpptfwg/envppatoj/jurisprudenceplatform.html

2004 s. 590 I). 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.

A.I Industrial installations

1. Forms and scope of permit

Permits according to the Environmental Code for industrial installations listed under Annex I or II of the EIA Directive are issued by either the County Administrative Boards or – for certain large scale operations and water operations – the Land and Environmental Courts. In addition to this, the municipality must issue a Detailed Development Plan which favours such operations and building permits for the constructions in the area.

As mentioned in the introduction, a permit according to the Environmental Code covers all kinds of impacts in a very broad sense on nature, landscape, land use, climate, air, water, noise, soil, energy, use of chemicals in the procedure, waste management, transportations to and through, safety, household issues, etc. The Detailed Development Plan can be regarded as a preliminary standpoint by the municipality on land use issues.

The permit regime under the Environmental Code offers a truly integrated approach. In addition to this, there is a legal requirement both in the Administrative Procedure Act (1986:223) and the Planning and Building Act for the authorities involved in the permit procedures to cooperate and to interact in their decision-making.

2. Procedures

A permit for such an installation will, according to the Regulation on Environmental Permits and Notifications (2013:251), be issued by the Regional Environmental Licensing Delegation (MPD), which are hosted within some of the County Administrative Boards. An application – together with an EIA – will be submitted to the MPD. At an early stage of the procedure, these documents will be remitted to different sections within the County Administrative Boards to get their view on the application. The municipality and different national authorities – such as the Environmental Protection Agency and the Agency for Marine and Water Management – will also be given opportunity to submit their opinion on the project and the application/EIA. When the application/EIA is considered to be satisfactory – which commonly requires repeated demands from the MPD for

complimentary information from the applicant – the case will be announced and documents will be made publically available at the MPD. From the date of the announcement, the public and their organisations will commonly be given 2 months to submit their representations. In many cases – but not always – a public hearing will be held, in which anyone is able to participate. 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. All arguments can be brought into the case and must be considered by the authorities according to the ex officio principle.

The time needed for processing the permit application in MPD is about 10 months. In addition to this, the installation will require a Detailed Development Plan and subsequent building permits from the municipality. If there is no such plan to begin with, this procedure can be quite time consuming. However, there is a time limit amounting to 10 weeks for building permits.

The decision by the MPD is appealed to one of the five Land and Environmental Courts. As always in administrative procedure in Sweden, the procedure is reformatory in all instances and includes all kinds of "actions" for annulment, performance, altering the decision, remit, etc. Thus, the starting point is that the court scrutinizes every part of the appealed decision. In other words, there is no administrative discretion, at least as a general rule. The scope of the trial is set by the claims of the action, which the court will decide upon in accordance with the "ex officio principle". Thereby, it decides the case on the merits, thus addressing both substantial and procedural issues raised in the administrative decision. However, the judicial review of local developments plans under the Planning and Building Act and of Governmental decisions under Act 2006:304 are restricted more or less to legality issues, meaning that the court is supposed to leave more room for administrative discretion in a cassatory procedure. In this way, these appeal procedures under Planning and Building Act and Act 2006:304 are closer to judicial review in the common law sense. On appeal, each case will need at least 10-12 months to be reviewed in the Land and Environmental Court. As there is a general requirement for leave to appeal in the Land and Environmental Court of Appeal –an issue that will be decided within 3 months – the total time for the appeals procedure will commonly not exceed 15-18 months.

3. Main characteristics of permit procedures

As the permit regime under the Swedish Environmental Code is an integrated procedure, the only "additional permit" required is the Detailed Development Plan and the the subsequent building permits. The answers are therefore quite straightforward and not very complicated:

- One of the 12 Regional Environmental Licensing Delegation (MPD) and one of the 290 municipalities.
- The EIA is integrated in the permit procedure.
- According to the Environmental Code, different activities and operations may require a permit from the MPD or the Land and Environmental Court. For some operations, a notification to the competent authority within the municipality suffices. There has been a clear development recent years in line with the "better regulation movement" to lessen the administrative burdens for industry by way of replacing permit obligations with noti-

fication requirements. However, any systematic analysis has not been undertaken on whether this actually has been the effect of the reform, and in many occasions the operators still apply for "voluntary permits" in order to obtain economic security for the enterprise (something that is commonly demanded by the banks).
- The planning and the environmental authorities are always consulted during the permit processes. There are no time limits stipulated in law, but commonly the representations are requested to be submitted within 1-2 months (although the municipalities can be quite slow and often ask for prolongation). It is hard to have an opinion about the weight of different opinions, but both MPD and the Land and Environmental Courts are quite independent in their decision-making.
- Public participation is always required in permit cases and quite often in notification cases in the municipality concerning at least installations with some environmental impact. No stipulated time limit, although 1-2 months is quite common. As noted, public participation relates to the application and EIA.
- No time limit, although most cases are dealt with within 10-12 months. A decisive factor in this phase is the quality of the application/EIA…
- See above under 1. Introduction: 1.1.

A.II Infrastructural projects

Every four year, the Government proposes a program for the next coming 12-years period, "Goals for Transportation Policy", which sets the budgetary frames for building new and maintaining existing infrastructural projects (highways and railroads). When this program is confirmed by Parliament, the Swedish Transport Administration (STA) – the national competent authority for roads and railroads – is assigned to produce a more detailed National Development Plan for Infrastructural Projects. In this plan, the different projects for the coming 4 years are described, together with a SEA. The National Development Plan is confirmed by the Government, which also makes a statement according to Article 8 and 9 of the SEA Directive (2001/42).

Permits for the building of railroads and highways ("Road Plans") are decided by the STA according to the Road Act (1971:948). A project description and an EIA is produced and processed according to the requirements in the EIA Directive. The average time needed for infrastructural plans is 4 months, but for a plan for an express highway, at least 1 year will be required. In this process, there is a possibility for STA to ask the Government for a prior decision on the "permissibility" of the project according to Chapter 17 of the Environmental Code, but this is rather rare nowadays.

The Road Plan can be appealed to the Government by way of administrative appeal. As already mentioned in the Introduction, the Governmental decision can be challenged by seeking judicial review in the Supreme Administrative Court (HFD) pursuant to Act 2006:304. The public concerned – including the ENGOs – has standing to appeal and ask for judicial review in cases according to the Road Act. In the Government, the appeal case will need at least 1 year to process, and the judicial review in HFD will require at least another year, although the latter procedure does not have suspensive effect on the permit. Thus, unless HFD grants injunction – which rarely happens – the construction of the highway may commence.

1. Requirement for a plan according to Directive 2001/42/EC

See above

2. Several permits, EIA & procedure

See above

B. Describing and evaluating integration and speed up legislation

Both systems for decision-making integrate all kinds of environmental impacts from the planned operations – industrial installations and infrastructural projects – since long and functions well in that respect. As the Swedish appeal system in both administration and courts is reformatory and the instances are many, time has been an issue. This has been dealt with by allocating specific funds to the MPDs and Land and Environmental Courts to make them handle the permit cases swifter. As noted, permit obligations have been replaced by notification requirements, although the effect is uncertain. To date, no serious attempts have been made to weaken the public's access to justice, although this is repeatedly demanded by industry and developers. In contrast with those views, I would say that the main problem in the Swedish system for environmental decision-making in these sectors is the poor quality of the EIAs. Quite often, the permit body – after having repeatedly asked for more and better information – states that this "EIA is not very good, although it suffices for this particular case". In my view, this attitude is evidently not in line with the EIA Directive. However, this may change to the better with the coming implementation of Directive 2014/52, which will take effect in 2017. Thereafter, the Swedish system will become more similar to the Finnish, as the County Administrative Boards will have to take a separate (but still preliminary) decision on the quality of the EIA.

C. Locus standi for local government within the permitting procedure

Local governments have standing to defend their interests in permit cases concerning industrial installations and infrastructural projects within their own or boarding municipalities. They will be heard during the participatory stage in the decision-making procedure and they have standing according to case law since at least 50 years back.

D. Further comments

There is an additional problem that is not elaborated upon in the questionnaire. Article 21 of the IED brings about a much stronger updating requirement in relation to industrial installations, basically stating that the permits shall be reconsidered and updated within 4 years after the publication of a new BAT conclusion. In Sweden, the BAT conclusions will be implemented by way of a separate regulation (2013:250), where the conclusions will take immediate effect" in addition to existing permits for the installation. Thus, each operation will be regulated by both a "basic" permit and additional limit values and other kinds of conditions in Regulation (2013:250). Even if the existing system is not very transparent for the public concerned (with a number of different permits for one operation), this new mixture will be extremely complicated for other than experts to fully grasp…