

EXPERIENCES OF SWEDEN'S ENVIRONMENTAL COURTS

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The Environmental Code

Swedish law is to a large extent codified. Sweden has four fundamental acts,¹ which together make up the Constitution. One of them is the Instrument of Government which determines how regulations of various kinds are enacted.²

The Instrument of Government includes a general provision about environmental matters stating that public institutions shall promote sustainable development leading to a good environment for present and future generations.³ The same article protects the right to health.⁴

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1. Successionsordningen [SO] [Constitution] (Swed.); Tryckfrihetsföordningen [TF] [Constitution] (Swed.); Yttranderfrihetsgrundlagen [YGL] [Constitution] (Swed.).

2. Regeringsformen [RF] [Constitution] (Swed.).

3. Chapter 1, Article 2.

4. Regeringsformen [RF] [Constitution] 1:2 (Swed.).

The Environmental Code (Code) which came into force in 1999, is Sweden's most important piece of environmental legislation.⁵ The overall purpose of the Code is to promote sustainable development that will assure a healthy and sound environment for present and future generations.

The Code applies in principle to all human activities that may harm the environment or human health. The Code is comprehensive legislation giving environmental courts both civil and administrative jurisdiction and a range of enforcement powers.

The Code is a framework law containing rules from sixteen previous Acts. For example, there are rules on land and water management,⁶ nature conservation,⁷ protection of plant and animal species,⁸ and control of environmentally hazardous products and waste.⁹ The Code covers nature conservation, activities harmful to the environment, and protection of health and water resources.¹⁰ The Code includes special chapters concerning chemicals (how to use them) and waste (how to take care of and get rid of it). In addition, there are provisions about emissions (e.g., use best available techniques (BAT), but do not exceed a reasonable cost) and about energy use (do not use more than is necessary). It also provides for damages.¹¹

Sweden's other laws of importance to the environment such as the Forestry Act, the Mineral Act, and the Act on Planning and Building are linked to the Code.¹² The Code includes references to these acts and covers environmental law, civil law, administrative law and criminal law as well as procedural rules for the environmental courts. The Code covers a full range of important principles, policies and goals, including:

- Sustainable development
- The polluters pay principle

5. Miljöbalk [MB] [Environmental Code] (Swed.).

6. Miljöbalk [MB] [Environmental Code] 3 (Swed.), available at <http://www.sweden.gov.se/content/1/c6/02/28/47/385ef12a.pdf>.

7. *Id.* at 7.

8. *Id.* at 8.

9. *Id.* at 9.

10. *Id.* at 10-15.

11. *Id.* at 31-32.

12. See Miljöbalk [MB] [Environmental Code] (Swed.), available at <http://www.sweden.gov.se/content/1/c6/02/28/47/385ef12a.pdf>.

- The precautionary principle
- The prevention principle
- The burden of proof
- The best available techniques
- The location of activities
- Reuse and recycling
- Cost-benefit balancing.¹³

A characteristic feature of this legislation is that it is very general. Because of its very general nature, many guidelines for implementation and enforcement are issued by public authorities. Though not legally binding, these guidelines suggest how the legislation should be applied and can be a good reference for judges when applying the general principles of the Code.

The Licensing System

Compliance with the general rules in the Environmental Code is ensured by requiring licensing of many environmentally hazardous activities.¹⁴ There are about 5,000 activities or operations for which permits are compulsory under the Code or in an ordinance. These permitted activities and operations are divided into two classes: A and B. An environmental court must issue the license and set permit conditions for the 300-400 Class A activities. A regional or a local authority is responsible for permitting Class B activities.

The licensing authority decides if the activity is permissible under the Code. When granted, the license states the conditions under which the permitted activity may be carried out.¹⁵ The licensing authority considers impacts on land, air, and water. Permits and permit conditions must benefit the aims of the Code ensuring that the requirements of its general rules are fulfilled.

The conditions specified in a permit may concern every aspect of the activity including how it is performed and what steps must be taken to protect the environment and surrounding community. Permits can cover: the purpose and scope of the operation, specific

13. See generally MINISTRY OF THE ENV'T, THE SWEDISH ENVIRONMENTAL CODE (2000), available at <http://www.sweden.gov.se/content/1/c6/02/05/49/6736cf92.pdf>. (includes mention of the principles, policies and goals).

14. Miljöbalk [MB] [Environmental Code] 9:8 (Swed.).

15. *Id.* at 24.

emissions limit values, management of chemicals, energy efficiency measures, waste management, control of traffic to and from the site and in the neighbourhood of the site, measures to prevent accidents, measures to restore the site after the cessation of activities, and financial guarantees.¹⁶

The Environmental Courts

There are five regional environmental courts which are connected to the five district courts of the civil justice system. There is one superior environmental court, the Environmental Court of Appeal. The regional courts are connected to district (civil) courts and the Environmental Court of Appeal is a division of the Court of Appeal in Stockholm. The environmental legal system also includes twenty regional boards and about 250 local environmental bodies. The decisions of the regional boards and local bodies can be appealed to the appropriate regional environmental court.

Environmental courts have legal jurisdiction over both land use and environmental areas incorporating civil and administrative but not criminal powers. The courts have power to review and rule on both the legality and the merits of decisions made by regional boards and by local authorities. Beginning in May 2011, the Environmental Courts will become Land and Environment Courts and also decide cases that arise from the application of the Act of Planning and Building,¹⁷ including review of local land use plans and building permits.

Regional Environmental Courts

The Code provides that each regional environmental court have a panel consisting of one law-trained judge, one environmental technical advisor, and two lay expert members. The judges are appointed by the Minister of Justice. The judge and the technical advisor are employed by the court and work full time as environmental judges.¹⁸ All four members of the panel are equals in its decision-making process.

16. See MINISTRY OF THE ENV'T, THE SWEDISH ENVIRONMENTAL CODE 35-36 (2000), available at <http://www.sweden.gov.se/content/1/c6/02/05/49/6736cf92.pdf>.

17. This pending bill from the Swedish government is currently before the Riksdag (the Swedish Parliament).

18. Miljöbalk [MB] [Environmental Code] 20:4 (Swed.).

The regional environmental courts hear appeals coming from regional boards¹⁹ involving issues such as: permits and conditions for hazardous activities, disposal of waste, and orders to clean up.²⁰ With regard to public health, an authority can order a company to do something, or not to do something to avoid affecting public health or the health of an individual. This decision can be appealed to a court. These courts also hear appeals concerning nature conservation and the special conditions applied to protected areas.

As a court of first instance the regional environmental court deals with:

- Permits for environmentally hazardous activities with a severe impact on the environment (A-class);²¹
- Permits for water undertakings, including buildings in water such as hydro-electricity operations and reservoir construction; and
- Claims for damages or compensation which may be made by individuals, groups, NGO's or government.²²

The Environmental Court of Appeal

The Environmental Court of Appeal hears appeals from the five regional environmental courts. The Court of Appeal is comprised of four law-trained judges. One of them can be replaced with a judge who has technical training in the substantive area at issue in the appeal, if appropriate.²³ Three law-trained judges participate in deciding applications for leave to appeal which are granted in about 20-30% of the appealed cases.

The Environmental Court of Appeal is the final instance in cases where a local or a regional board made the first decision. The Supreme Court of Sweden is the final instance if the environmental

19. *Id.* at 20:9.

20. *Id.* at 20:2, 17:1.

21. Some have proposed to the Swedish government that instead of environmental courts, regional boards should issue all kinds of permits. Sweden had water courts long before they were replaced by the environmental courts in 1999. Water courts issued permits for water undertakings, and they also ruled on compensation to land owners when their land was put under water. While it is an odd system for a court to issue permits, it was convenient that the court ruled on compensation at the same time. See Water Law (1983:291) (Swed.), available at <http://www.ielrc.org/content/e8301.pdf>.

22. *Id.*

23. *Id.* at 20:11.

court was the first instance.²⁴ Leave to appeal is given by the Supreme Court if the case is of great interest from a principle judicial point of view.

A hearing of the Environmental Court of Appeal is more like a general meeting than like an appellate court proceeding. Often the hearing takes place in a conference room and testimony is taken informally at a conference table. The court normally travels to the site in dispute. The parties and the people living close to the site are allowed to give comments to the court. They are all allowed to represent themselves without attorneys. The court can require the responsible local, regional and central authorities to give comments on the case. The court can also require independent technical institutes to comment on the case.

The hearing is conducted in a relaxed atmosphere not typical of a court proceeding. The court normally sends an agenda to everyone before the hearing. The chairing judge normally starts by going through the agenda. Then it is up to the chairing judge to see that everyone sticks to the agenda. Like all of Sweden's judges, judges of the Environmental Court of Appeal do not wear robes or wigs. The participants do not have to stand when they address the court.

Benefits of the Swedish Environmental Court System

As a result of many years experience in Sweden's environmental protection efforts, I have concluded that the Environmental Courts have high credibility and are fully accepted both by The Federation of the Swedish Industry and by NGOs focusing on environmental protection. The decision to move appeals concerning the Act on Land and Planning, away from administrative courts and to the soon to be renamed Land and Environmental Court is a testament to the Environmental Court's success.²⁵

Before Sweden adopted the environmental courts system there was a National Licensing Board for Environmental Protection which functioned like a court of justice. The chairman of the board and his deputies were legally trained judges coming from an Appellate Court. In addition there were five water courts. All six of these entities were replaced by the environmental court system established by the Code.

24. *Id.* at 20:1.

25. Plan-och bygglag (Svensk författningssamling [SFS] 1987:10) (Swed.).

The licensing board's most important task was taken over by the environmental courts, namely to balance different interests against each other: for instance, weighing the harm to individuals against the economic benefits of the enterprise causing the harm and trying to find the balance point. This is a very important — and difficult — task for a judge in an environmental dispute. The court's decisions often have impacts far beyond those of the parties directly involved. Technical expertise and trained judges make it easier to find the correct balance point.

The following points help to explain the credibility of Sweden's Environmental Court System:

- The Code allows the court to adopt an integrated and holistic approach when ruling on a case.²⁶

By placing the permit system for polluting activities in the regional courts in the first instance, we have created a "one stop shop," thereby avoiding two-step administrative — followed by judicial — proceedings. The Code's procedural rules are specially adapted to the management of environmental cases.²⁷

- There are no filing fees.

The Code also includes special rules covering costs.²⁸ Both first and second instance environmental courts include technical experts. This is very important as the court has the power to rule both on the legality of a decision and on the merits. Technical judges working together with legal judges give the court and the public confidence in the court's decisions.

- The courts have more power than do ordinary civil courts to prioritize very urgent cases.

26. *Id.*

27. *Id.*

28. The loser normally does not pay the winner's costs. A litigant who appeals the conditions in a permit saying that they are too lenient, and loses, doesn't have to pay the company's costs. But a litigant who sues the company for compensation has to pay, if he loses the case. Normally, when a case starts in an authority the loser doesn't have to pay the cost for the winner. This is an old tradition carried over from the water courts where, continuing today, the water company must pay both sides' procedural costs in cases where an individual objects to water undertakings. *See* Miljöbalk [MB] [Environmental Code] 25:2 (Swed.).

When an urgent case impacting the environment is submitted to the Environmental Court of Appeal a hearing date is usually set within six to eight months and is usually made within two months.

I have travelled all over Sweden for many years, chairing hearings and listening to appealing enterprises, to central, regional and local bodies, to NGOs and to people living close to sites in dispute. My general opinion is that an open and user-friendly hearing is one example of good environmental governance that gives access to justice. People in general are grateful that the court has come to the site to look and listen. They are grateful that they have been allowed to address the judges and argue for what they think is right. "Thank you for coming and listening to us," I have heard many times during the years.

I am sometimes asked, "What is the difference between judging an environmental case and judging a criminal case?" I usually say that the criminal judge looks backward trying to find out what has been proved about what happened, while the environmental judge looks forward asking what will happen in the future as a result of my decision.