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STATEMENT

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08- 700 0855 15-04-2009

Ref 2009-3760-22
Your Ref 511-3917-09

The Halland County Administrative Board
301 86 Halmstad

Submission statement in respect of the notification of measures within Natura 2000-areas Lilla Middelgrund and Fladen.

The Legal, Financial and Administrative Services Agency considers that the material presented by Greenpeace does not contain a thorough enough description of how the proposed measures will be carried out, which causes difficulty in judging the measures from a legal perspective.

Measures within Swedish territory

The right of disposition

The Legal, Financial and Administrative Services Agency reiterates that those who run operations or take part in measures in a water area, must have the right of disposition to do so. The Legal, Financial and Administrative Services Agency is the authority who communicate the required resolution permission.

Permit requirement in accordance with ch. 11 of the Environmental Code

An evaluation ought to be made if the operation in question, the part of which that will be carried out on Swedish territory, requires permission for water operations in accordance with the Environmental Code. In accordance with ch.11 § 2 pt 1 of the Environmental Code water operations constitutes the construction, alteration, repair and removal of dams or other water structures in the water areas, filling or piling in water areas, removal of water from or digging, blasting and cleansing in the water areas as well as other measures in water areas the purpose of which is to alter the depth or position of the water.

The intention of Greenpeace is that the area's favourable conservation status will be maintained. However the aim of the current measures, looked upon objectively, is to also alter the water depth at those points where the stones lie and with that, the seabed structure in its entirety. The result of such measures is that trawling will be obstructed. Measures can be considered as a form of filling in a water area.

If the measures are not judged to be filling, the purpose is still to alter the depth or position of the water. Thus from this approach, the measures also constitute water operations. Opposing that point of view, one could argue that the applicant's intention with the measures is not to alter the water's depth or position rather to preserve a favourable conservation status by obstructing trawling.

What the purpose of the operation is, in accordance with the point of view of The Legal, Financial and Administrative Services Agency, shall however be judged from an objective perspective.

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The applicant's subjective purpose with the operation or measures, shall not in the assessment of ch. 11 § 2 pt. 1 of the Environmental Code, affect the evaluation on whether the operation or the measures are covered by the definition. The Legal, Financial and Administrative Services Agency considers that it is the actual objective effect on the environment by the operation or the measures, that is of significance for the evaluation. At those points where the stone blocks will be placed the water's depth will be altered. Thus the measures, which will be of a permanent nature, are covered by the definition of water operations.

The Legal, Financial and Administrative Services Agency wish to point out that there is no case-law where the above question has been judged. There are however, decisions from the Environmental Courts where the dumping of waste in water areas, which can have the same effect as filling etc., has not been considered a water operation.

Water operations require a permit in accordance with the Environmental Code, if it is not evident that the operation is of such a nature that neither general nor personal interests will be harmed (ch. 11 §§ 9 and 12 of the Environmental Code). It can be assumed that the operation in question may harm general fishing interests, which is also part of the reason for the operation.

The operation ought not to require notification in accordance with the decree on water operations. As far as the Agency can judge from available material, the measures will cover an area greater than 3000 square meters.

Permit requirement in accordance with ch. 7 of the Environmental Code

For measures that significantly risk affecting the environment in a Natura 2000-area, a permit is required, ch. 7 § 28a of the Environmental Code. A permit is not however required for the operations or measures which are directly connected to, or are essential for, the management and administration of the area in question, ch. 7 § 28a of the Environmental Code, second part.

It is not clear from the preparatory work of the regulations, when the exception in ch. 7 § 28a, second part, applies. It is clear from § 16 of the decree on area protection, that the authorities, within the framework of their authority and area of responsibility, should take those measures which are needed or are appropriate with regard to those protection concerns which led to the area being listed as a Natura 2000-area. Greenpeace is not qualified to manage or administrate the Natura 2000-areas. Against that background, the exception in ch. 7 § 28a second part of the Environmental Code is probably not applicable in this current case. An assessment on whether the effect on the area of the measures in question requires a permit, i.e. an assessment of whether the measures significantly risk negatively affecting the environment in the area,

may be made within the framework for the establishment of an EIA etc. in accordance with ch. 6 § 7 of the Environmental Code, final part.

Consequences of permit requirement

It is ultimately up to the applicant themselves to judge if an operation requires a permit in accordance with the Environmental Code. If the operator takes measures requiring a permit without permission they will be subject to prosecution.

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In making an application for permission in accordance with the Act, the application must meet the requirements that are placed on said application in accordance with the Environmental Code, jmf ch. 22 § 1 of the Environmental Code.

Measures within Sweden's economic zone

Large parts of the current Natura 2000-areas lie within Sweden's economic zone. In so much as operations or measures are conducted within Sweden's economic zone, law (1992:1140) on Sweden's economic zone, applies. According to The Legal, Financial and Administrative Services Agency's judgement, the planned measures should not require special permission in accordance with § 5 of that law.

According to ch. 7 § 32 of the Environmental Code the rules pertaining to a specially protected area shall also apply in Sweden's economic zone. The above mentioned, concerning permit questions, therefore also applies within the economic zone. The County Administrative Board has the authority that is required to see that the execution and supervision of the regulations on the specially protected area in ch. 7 of the Environmental Code are followed, and is also the issuing authority, if the current measures are deemed to require permits. At present the risk of a significant effect on the environment in a Natura 2000-area means a permit is required. The County Administrative Board should instruct the applicant to present the additional information that is required to rule on the permit, in accordance with ch. 7 § 28a of the Environmental Code applicable to the current project and also an environmental impact assessment and report required for scrutiny of ch. 7. §§ 28b and 29 of the Environmental Code.

The decision on this statement has been made by head lawyer Bertil Kallner, in the presence of board members Gunnar Edenman and Torgny Norberg as well as prosecuting councils Nils Leine and Karolina Ardesjö Lundén, who submitted the report.

Bertil Kallner

Karolina Ardesjö Lundén

