

DECISION

**THE HALLAND COUNTY
ADMINISTRATIVE BOARD**

25-05-2009

511-3917-09

Greenpeace
Box 15164
104 65 STOCKHOLM

With regard to the notification of the intention to carry out conservation measures in Fladen and Lilla Middelgrund.

The County Administrative Board's Decision

The County Administrative Board assesses that the measures presented will not affect the environment in the Natura 2000-areas, in a significant way. Therefore permission is not required in accordance with ch. 7 § 28a of the Environmental Code.

The County Administrative Board recommends that permission is applied for in accordance with ch. 11 of the Environmental Code, for those measures that will be taken within Swedish territory.

The County Administrative Board recommends that there is consultation with professional fishermen who have the right to fish in the areas in question. It should therefore rest upon Greenpeace to state which legal grounds there are in taking measures with the purpose of hindering the fishing industry.

If the measures are taken, the County Administrative Board, with the support of ch. 26 §§ 21 and 22 of the Environmental Code, will order Greenpeace to, no later than one month after the measures are taken, report to the County Administrative Board how and where the measures were carried out. Stated in the account shall be the point in time, co-ordinates and the quantity of stone blocks placed.

The County Administrative Board reiterates that this decision does not release the organiser from the obligation to adhere to what is prescribed in another statute or what is covered by the rights of others.

This decision can be appealed in the Environmental Court, Vänersborg's District Court, see appendix 1.

Background

Greenpeace has presented a writ to Halland County Administrative Board, concerning the notification of the intention to carry out conservation measures for the purpose of preserving a favourable conservation status for nature values in the form of habitat and species in the Natura 2000-areas Fladen and Lilla Middelgrund in accordance with ch. 7 § 28 of the Environmental Code. The intention is to place in Fladen and Lilla Middelgrund, circa 300

stone blocks one by one, at a distance apart of 40 to 50 meters. It also appears from the notification that the result of the planned measures will in practice constitute a trawling obstruction for fishing. A description of the environmental effect of the measures has been attached to the notification.

Since November 2003, Fladen and Lilla Middelgrund have been considered by the government as Natura 2000-areas. The conservation purpose in the long term is to preserve the type of nature that is found in the areas. This type of nature accommodates a very special, and species-rich, flora and fauna. The areas in question lie partly out-with the Swedish territorial boundary but within Sweden's economic zone.

In accordance with ch. 7 § 28 a of the Environmental Code, permission is required of the County Administrative Board to pursue operations or take measures that can effect the environment in a significant way in a Natura 2000-area. Permission is not required for operations and measures that are directly to do with, or are necessary for the management and administration of the area in question.

The County Administrative Board has referred the documents received to The Legal, Financial and Administrative Services Agency, The Swedish Environmental Protection Agency, The Swedish Board of Fisheries, The Swedish National Heritage Board, The Swedish Maritime Administration, The Swedish Transport Agency and The Swedish Coastguard. Statements have been received. Greenpeace has since been given the opportunity of responding with viewpoints on the submissions. Viewpoints have been received.

The County Administrative Board's assessment in accordance with the Environmental Code

Is the environment effected in a significant way?

The Environmental Code applies within the territorial boundaries. The regulations in accordance with ch. 7 § 32 of the Environmental Code also apply in such protected areas as intended in ch. 7 § 27 first section 1 and 2 (i.e. Natura 2000-areas), in Sweden's economic zone. The rules on Natura 2000-areas are thus applicable both within the territorial boundaries and out-with them, within Sweden's economic zone.

In accordance with the County Administrative Board's assessment the notified and described measures involve no risk of a significant effect on the life environments and species which they are intended to protect in the areas in question. That said it follows that permit requirement in accordance with ch. 7 § 28a of the Environmental Code does not exist. The County Administrative Board wishes to point out that this assessment is only in respect of the area's life environments and species, and the effect on rights of others is not included in the assessment.

Water management in accordance with ch. 11 of the Environmental Code?

The Environmental Code applies within territorial boundaries. It does not apply out-with territorial boundaries if it is not specially decreed as such. This means that ch. 11 of the Environmental Code is only applicable within territorial boundaries.

The measures described consist of the placing of obstructions on the seabed with the explicit purpose of hindering or obstructing trawling. The County Administrative Board states that

this could mean the creation of a structure on the seabed that could require a permit in accordance with ch. 11 of the Environmental Code, in that section where it is created within Swedish territory.

By prop. 1997/98:45 part 2 sec 132 it is clear that initially it is the operator's responsibility to make the assessment on whether the planned water operation requires a permit or not. In doubtful cases permission should be applied for. Therefore it is the operator who intends to take a measure (in this case Greenpeace) who decides if permission should be sought or not. On the 4th of March 2005 (NJA 2005 sec. 109), the Swedish High Court decreed that there was no possibility to get the question on whether a particular operation is exempted from permit requirement for water operations, judged, without the judgement being made at the individual's own risk. The Swedish High Court decreed further, that those who are uncertain always have the option to apply for permission and in that way protect themselves against later liability. Also for those who wish to be completely sure that the measures cannot be brought into question at a later date, it is always possible to apply for permission, see ch. 11 § 9 second part of the Environment Code. In this case, said permission is applied for in the Environmental Court.

Because of the mentioned preparation statement and the High Court decision the County Administrative Board finds it recommendable for Greenpeace to seek permission according to chapter 11 in the Environmental Code for the planned measures if they will be taken in the territory, but that it's up to Greenpeace to decide if they wish to do so.

Further, chapter 2 1§ law (1998:812) about special decisions about water activity sais that the one pursuing water activity has to have the right of disposition for activities in the specific area. The right of disposition can be given by the Legal, Financial and Administrative Services Agency.

Follow up

To be able to follow up the action, the County Administrative Board believes that it should be documented and that a presentation of the action should be sent to The County Administrative Board. Chapter 26 21-22§ in the Environmental Code supports this and Greenpeace is obliged to do this.

General about fishing etc.

The actions' objective is to obstruct trawling. Therefore the County Administrative Board thinks that Greenpeace should consult the fishermen that have legal right to fish in the specific areas. Greenpeace should as well give an account of what legal base they think they have to take action to complicate professional fishing.

Before action, the Maritime Administration has to be contacted to account for sea charts. If there are indications of wrecks this should be reported to the County Administrative Board.

International agreements

Swedish and Danish fishermen fish in Kattegat supported by the "agreement of 1932" up to "a distance of three nautical miles from the other country's coast line or furthest situated island" (H.R.H the King public notice about fishing in Swedish and Danish waters, 1933, No 282).

Lilla Middelgrund is partly situated in the area of the Kattegat where a cod sanctuary was established 2009-01-29 together with Denmark.

Both Fladen and Lilla Middelgrund are included by international agreements like the one above. The County Administrative Board cannot form an opinion about the impact of the planned action on those. The County Administrative Board has informed the government about the received notification.

Greenpeace should discuss the issue of international agreements on fishing with the National Board of Fisheries.

Qualifications for taking action in Nature 2000 areas

In article 6.3 of the Habitats Directive 92/43/EEG from the 21st of may 1992 addressing preservation of habitats, wild animals and plants states:

All plans and projects not directly connected to, or necessary for, the care and administration of an area, but that alone or in combination with other plans might have a major effect on the area, should adequately be evaluated with regard to the goal for the preservation of the area...

In Swedish legislation it's implemented in chapter 7, 28a § 2 part Environmental Code) such as: *... Licence according to the first paragraph is not needed for measures and actions directly linked to, or are necessary for the management and administration of the affected site.*

In the governments proposition 2000/01:11 about the preservation of specific animals and plants and their living areas it's not mentioned that preserving actions have to be taken only by the appointed authority.

As the supervising authority for the specific Nature 2000 areas, the County Administrative Board consider the main principle for whom should carry out preservation measures within Nature 2000 areas is that the supervising authority decides matters concerning it. In this case, when the issue is raised by another party, the County Administrative Board still can't, according to chapter 7 28a § second paragraph, find any specific legislation regulation this.

Decisions in this matter have been taken by the Environmental Director (miljövårdsdirektör) Börje Andersson. AnnaKarin Sandholm, Environment Desk Officer, (miljövårdshandläggare) has contributed with preparations. The County Fisheries Manager (länsfiskekonsulent) Peter Norell, Marine Biologist Bo Gustafsson and Chief Lawyer Peter Ardö have also participated.