

Ruling of the Vänersborgs tingsrätt, miljödomstolen. Case 1714-09.

Ruling

The case was initiated in the County Administrative Board by Greenpeace declaring its intentions to place 300 granite boulders on the sea floor within the so called Natura 2000 sites Fladen and Lilla Middelgrund. The County Administrative Board has in its appealed decision declared that the measures do not require a license and required Greenpeace to declare the positions of the boulders, once they are placed. The Environmental Protection Agency appealed the decision of the County Administrative Board and requested it to be cancelled. A literal interpretation of the request would only lead to the lifting of the requirement to declare the positions. In light of what the Environmental Protection Agency has argued the request has to be interpreted that the EPA wants that the decision of the CAB is to be more restrictive, preferably to a ban of placing of boulders.

The EPA's appeal is only concerning the now taken measures in compliance with the legislation concerning Natura 2000 sites. The EPA has specified that the measures do not constitute constructions in water (as defined in the Environmental Code chapter 11), dumping or any other environmentally hazardous activity. The Environmental Courts' judgement is constrained by the precise arguments of the EPA's appeal, which is why the Environmental Court does not rule if the measures constitute construction in water (as defined by the Environmental Code chapter 11).

As regarding the legislation aiming at Natura 2000 sites the CAB has, after the notification from Greenpeace, had to judge if the measure requires a licence according to Environmental Code chapter 7, §28 a, or if the measure in any other way requires management interference.

According to chapter 7 §28 a first part a measure requires a license if it affects the environment in a significant way. As a matter of exception, according to the second part of the same paragraph, a (conservation-) measure necessary for, or in connection with, the management of the concerned Natura 2000 site does not require a license.

The EPA has primarily rested its appeal on that only authorities are authorized to take conservation measures and that the boulders placed by Greenpeace do not constitute a conservation measure in legal terms.

The EPA is right as to its primarily the authorities who within the frame of their mandate and responsibilities shall take the necessary or appropriate measures in relation to the conservation objectives of the sites. In the same time there is nothing that prevents an authority to contract, or to accept help, from other parties. Whether or not the measure taken by Greenpeace is a conservation measure in the legal definition in 7 chapter 28 a § second part can only be judged if the measure is judged to require a licence according to the first part of the same paragraph.

Against this background, the Environmental Court proceeds to rule whether the notified measure should be considered to require a license according to 7 chapter 28 a § first part of the Environmental Code.

In order for the conducted placement of boulders to be considered requiring a license according to the 7 chapter 28 a § of the Environmental Code the measures in a significant way could affect the environment in the Natura 2000 site. A risk of such significant effect is sufficient. In the term “significant way” there is however a need for this risk to be somewhat qualified. It is primarily Greenpeace as the operator who has to show that such a risk does not exist. However, it can in the same time be demanded that those who claims otherwise makes its statement somewhat plausible.

The EPA has to the CAB and the Environmental Court given scanty data on what environmental consequences can be foreseen due to the boulders. The EPA has primarily considered the risk of so called ghost fishing, but without further developing arguments supporting the claim. The CAB has in its submission to the Environmental Court shown that consequences of ghost fishing can only be marginal. What the CAB concludes is in line with the current experiences in the field and has to be accepted. Except the risk of ghost fishing, the EPA has only claimed that other potential negative effects have not been further described. It is unclear what sort of effects that may be. Nothing suggests that the measures taken by Greenpeace would be contradictory to other planned or possible conservation measures. The taken measures will, from a fisheries perspective, have mainly positive effects.

Considering all aspects, the opinion is that there is not such a risk for significant effects that will trigger the duty to require a license. At such a condition, there is no reason to go into a closer judgement if the measures should be considered as conservation measures as defined by 7 chapter 28 a 2 second part of the Environmental Code.

As described there is no reason to assess the discussed measures as requiring a license according to 7 chapter 28 § a of the Environmental Code. As have been shown, no other reason, as of the legislation concerning Natura 2000 sites to forbid the measures or to require Greenpeace to take further precautionary measures. The appeal is therefore dismissed.

HOW TO APPEAL (annex 2)
Appeal at the latest November 9, 2009.

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