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# One national wind power objective and 290 self-governing municipalities\*

## 1. Introduction

The chief question in this chapter is whether Sweden will be able to rapidly permit thousands of wind power installations so that the total electricity production from wind resources increases from around 10 TWh in 2013 to 30 TWh in 2020. The target 30 TWh is part of the Swedish wind power policy, adopted by the Parliament in 2009, and also one of the means to fulfil Sweden's commitment according to the EU Renewable Energy Directive.<sup>1</sup> A potential obstacle to achieving this target is the legal power vested in the municipalities in connection with both physical planning ("municipal planning monopoly") and permitting of big wind power installations ("municipal veto"). This paper analyses the Swedish decision-making procedure for wind power installations and in particular the municipal legal power.

The chapter is structured as follows. Section 2 provides a background in which the Swedish development of wind power is put into a political and legal historical context. Section 3 describes the role of Swedish municipalities in general terms. Section 4 explains the decision-making procedure in connection with wind power developments, which was subject to a legal reform in 2009. The question of how legal municipal powers af-

\* *Renewable Energy Law in the EU: Legal Perspectives on Bottom-up Approaches* (eds. Peeters M. and Schomerus T.), Cheltenham, UK: Edward Elgar Publishing (2014), 144–164.

<sup>1</sup> Directive 2009/28/EC on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC.

fect decisions on wind power development is scrutinized in greater detail, first in Section 5 as regards physical planning according to the Planning and Building Act,<sup>2</sup> then in Section 6 as regards permitting according to chapter 9 of the Environmental Code.<sup>3</sup> Section 7 explains the authorization of smaller wind power installations according to the Planning and Building Act. Section 8 provides the concluding remarks.

## 2. The Wider Energy Policy Context

Modern Swedish energy policy has a history of political controversies, rooted in the oil crises during mid-1970s. The Parliament adopted in 1975 the first national energy policy decision, in which wind, biomass and other renewable energy resources were seen as important future alternatives to fossil fuels. Municipalities were supposed to play an important role in the transition, not least through a legally stipulated “municipal energy planning”, aiming at efficient energy management.<sup>4</sup>

However, the nuclear issue split the Swedish population and the political debate was intense during the late 1970s, even leading to governmental crises. The Three Mile Island nuclear power accident in the USA in 1979 broke the camel’s back, triggering a Swedish referendum on the nuclear issue in 1980. Although the results of the vote were disputed, the Parliament decided, on the one hand, to adopt a long term energy policy where nuclear and fossil fuels gradually are substituted with efficient reduction of energy consumption and increased use of renewable energy resources, but, on the other hand, to expand as soon as possible the number of nuclear reactors from the six already operating to twelve, which the Parliament set as the maximum allowed. Whereas further ex-

<sup>2</sup> [Plan- och bygglagen] (SFS 2010:900).

<sup>3</sup> [Miljöbalken] (SFS 1998:808). The Environmental Code entered into force 1 January 1999, substituting 16 acts. The Code applies to a wide range of activities and issues, such as nature conservation, pollution prevention, remediation of contaminated sites, water works, chemicals, genetically modified organisms and waste. The Code’s objective is “sustainable development” including, *inter alia*, protection of human health and the environment against pollution, conservation of biodiversity and efficient management of resources and energy (ch 1 sec 1). Many regulations have been enacted pursuant to the Code.

<sup>4</sup> Act on Municipal Energy Planning [Lag om kommunal energiplanering] (SFS 1977:439). The role of the act in connection with the national energy policy implementation is described in the government bill, prop. 1976:30, bilaga 1, 335–336. See also prop. 1976/77:129, 42.

tensive development of hydropower was environmentally controversial and halted,<sup>5</sup> the policy envisaged instead a strongly increased use of wind, solar, biomass and other renewable energy resources. The political objective was to close down the last nuclear reactor in 2010, a policy that, not surprisingly, failed.<sup>6</sup> Only two reactors have been terminated.<sup>7</sup> The production in several of the existing reactors has increased and the Parliament decided in 2010 that the ten remaining reactors may be substituted with new ones,<sup>8</sup> provided they are erected at the same place and that new permits are issued in accordance with today's stricter standards. No permit procedures have yet commenced.

Despite the failure to terminate nuclear energy production, the development of renewable energy is still in 2013 an important objective of Swedish energy policy. According to the Swedish National Renewable Action Plan (NREAP), related to the EU Renewable Energy Directive, the target is to attain a 49 per cent share of renewable sources in the gross consumption of energy by 2020, starting from 39.8 per cent in 2005.<sup>9</sup> With regard to the natural conditions in Sweden – a large, not densely populated country with apt wind conditions<sup>10</sup> – and the political aversion towards further extensive development of hydro power, wind power is, together with biomass production, supposed to play the most important role in the implementation of the EU target. As said, the Parliament decided in 2009 upon a planning objective to attain 30 TWh wind power production in 2020.

Economic preconditions for wind power have in general been favourable for many years, although varying from time to time.<sup>11</sup> The green

<sup>5</sup> Environmental Code, ch 4 sec 6 protects a number of water courses from hydropower development, as a principal rule.

<sup>6</sup> See further Michanek and Söderholm (2009), ch. 2.

<sup>7</sup> The first closed in 1999, the second in 2005, both reactors at the Barsebäck nuclear power station in the south of Sweden.

<sup>8</sup> The Act on Nuclear Technology Activities [Lag om kärnteknisk verksamhet] (SFS 1984:3) explicitly prohibited the government from issuing a permit for a new reactor. The act even prohibited the preparation of a new reactor. These prohibitions were revoked 2009.

<sup>9</sup> The Swedish National Action Plan for the promotion of the use of renewable energy in accordance with Directive 2009/28/EC and the Commission Decision of 30.06.2009. Annex to Government Decision 2010-06-23, I27, Doc. No. 2010/742/E (in part 2009/7789/E).

<sup>10</sup> The area of Sweden is 450 295 km<sup>2</sup>, the fifth largest country in Europe.

<sup>11</sup> See for example Michanek and Söderholm (2006), ch 3.

certificate system has in this respect played a crucial role.<sup>12</sup> It is a market-based system aiming to increase the use of renewable energy sources (wind power, solar energy, wave energy, geothermal energy, biofuels and small scale hydro power) and peat by 17 TWh relative to the production in 2002. Basically the system is constructed so that each producer (operating an approved plant) receives one electricity certificate unit for each produced and metered megawatt hour of electricity from the mentioned renewable energy sources or peat. All electricity suppliers and certain users of electricity must purchase certificates corresponding to a proportion (quota) of their electricity sales or electricity use. By selling certificates, the electricity producers receive an income additional to what they earn from selling the electricity. Thereby, the certificate system creates incentives to produce electricity from renewable resources.

Still, despite good natural, political and economic preconditions, the Swedish development of wind power has historically been strikingly slow compared to Denmark, Germany, Spain, the UK and several other states. As late as 1997, only 0.2 TWh was produced by Swedish wind power installations. It was not until the past few years that the construction of wind power installations has increased significantly: 3.5 TWh was produced in 2010 and 7.1 TWh in 2012.<sup>13</sup> Production in 2013 has been estimated at 9.9 TWh.<sup>14</sup>

Why then has wind power development in Sweden been relatively slow? A major reason is legal constraints.<sup>15</sup> Three factors from this domain have been highly influential: (1) imprecise rules for solving conflicts with opposing interests; (2) overlapping permitting and planning procedures; and (3) strong legal power vested in municipalities. These three factors are included in the following discussions.

<sup>12</sup> Act on Electricity Certificates [Lag om elcertifikat] (SFS 2011:1200).

<sup>13</sup> Energimyndigheten, *Energiläget i siffror 2013*, accessed 5 September 2014 at <https://energimyndigheten.a-w2m.se/Home.mvc?ResourceId=2785>.

<sup>14</sup> <http://www.vindkraftsbranschen.se> (accessed 5 September 2014). In comparison, hydro power produced 77.7 TWh and nuclear 61.2 TWh in 2012, Energimyndigheten, *Energiläget i siffror 2013*, accessed 5 September 2014 at <https://energimyndigheten.a-w2m.se/Home.mvc?ResourceId=2785>.

<sup>15</sup> See for example Pettersson (2008). Maria Pettersson has in several publications analysed legal preconditions for wind power development in Sweden in comparison with other European states.

### 3. Local Self-Government

The national energy policy is created by the Parliament and the Ministry of Enterprise, Energy and Communications, assisted by the Swedish Energy Agency (*Energimyndigheten*). Sweden is divided into 21 Counties (regions); County Boards are responsible for the realization of different state interests at the regional level, including, *inter alia*, development of trade and industry, energy and environmental protection.

Sweden has 290 municipalities, varying in geographical size from 8.7 km<sup>2</sup> to 19140.3 km<sup>2</sup> and in population number (as of year 2012) from 2,421 to 881,235.<sup>16</sup> There are direct elections to Municipal Parliaments. Among many other things, the Municipal Parliaments decide upon various local policies, for example concerning future local wind power development. Another important task is to adopt physical plans.<sup>17</sup> The municipal organization includes also committees (*nämnder*) responsible for specific matters: *inter alia*, a Building Committee and a Committee for Protection of Health and the Environment. An important task for committees is to apply the law in individual cases, such as the Environmental Code and the Planning and Building Act (see examples below). This role is often debated as the deciding Committee members are politicians selected from the local parties.

The “Instrument of Government” (*Regeringsformen*),<sup>18</sup> which is the most important constitutional statute, declares in general terms, that Swedish democracy “shall be realized through a representative and parliamentary polity and through local self-government”. The principle of “local self-government” is often referred to by Swedish politicians at central state level when powers are delegated to municipalities; there is in fact a strong political “decentralization culture” in Sweden, affecting many sectors of society, not least in the field of the environment. According to the Environmental Code, municipalities are in charge of, for example, supervision and control of many types of polluting activities, of local health protection, of handling of chemicals and of waste management.

<sup>16</sup> [http://www.scb.se/sv/\\_/Hitta-statistik/Statistik-efter-amne/Befolkning/Befolkningens-sammansattning/Befolkningsstatistik/25788/2013M09/Helarsstatistik-Kommun-lan-och-riket/Folkmand-i-riket-lan-och-kommuner-31-december-2012-och-befolknings-forandringar-2012/](http://www.scb.se/sv/_/Hitta-statistik/Statistik-efter-amne/Befolkning/Befolkningens-sammansattning/Befolkningsstatistik/25788/2013M09/Helarsstatistik-Kommun-lan-och-riket/Folkmand-i-riket-lan-och-kommuner-31-december-2012-och-befolknings-forandringar-2012/) (accessed 22 August 2014).

<sup>17</sup> *Infra*, Section 5.

<sup>18</sup> Decree on a Decided New Instrument of Government [Kungörelse om beslutad ny regeringsform] (SFS 1974:152).

Municipalities are assigned a right to veto in connection with decisions by the national government on big, potentially very harmful installations (nuclear plants and nuclear deposits, big metal factories, big mines and so on; see further Section 4 below). They also have a right to veto regular permits to wind power installations of a certain size (Section 6 below). Furthermore, municipalities are empowered to decide upon exemptions from the legal protection of shores, which includes a general prohibition on constructing buildings and performing certain other activities 100 meters from the shore line (normally). Very important is the municipal planning monopoly according to the Planning and Building Act, which will further elaborated on in Section 5.

As mentioned in Section 2, Sweden has a specific Act on Municipal Energy Planning, according to which each municipality must have an up-to-date municipal plan. The aim is to promote efficient management of energy (including energy conservation), a secure supply of energy and a coordination of energy issues between different sectors of society. Municipal energy planning is entirely a local issue.<sup>19</sup> No state authority can force a reluctant municipality to carry out an up-to-date plan or to revise a plan which is not in conformity with national energy objectives. The municipal energy plan has no legally binding force.

## 4. Authorization Procedures For Wind Power Installations

Before 1 August 2009, the authorization procedure for the construction of big wind power installations, according to the Planning and Building Act and the Environmental Code, included both physical planning decisions (foremost master plans and/or detailed development plans) and several permits. As each decision was possible to appeal, the applicant had quite often to live with uncertainty for a long period of time, sometimes more than ten years. Investments in wind power were most likely hampered by this overlapping decision-making process.<sup>20</sup>

<sup>19</sup> A strategic environmental assessment is required if the municipal energy plan may cause "significant environmental impact", Act on Municipal Energy Planning, sec 8.

<sup>20</sup> Regarding the procedure before 2009, see Michanek and Söderholm (2006), ch. 5.

The process was criticized and led to a legal reform in 2009.<sup>21</sup> Wind power installations are now basically divided into two categories. The first consists of big installations requiring a permit according to chapter 9 of the Environmental Code,<sup>22</sup> issued by a County Board. These are so called group stations consisting of “two or more wind turbines standing together if each of the turbines including rotor is higher than 150 meters”, or, “seven or more turbines standing together ... if each of the turbines including rotor is higher than 120 meters”.<sup>23</sup> Offshore wind power installations also require a permit according to chapter 11 of the Environmental Code (which applies to “water operations”).<sup>24</sup> When chapter 9 and chapter 11 permits are issued, decisions on wind power installations according to the Planning and Building Act are basically no longer required; no building permit is needed and a detailed development plan is necessary only if the demand for building in the area is high.<sup>25</sup>

Other wind power installations, not permitted according to chapter 9 or 11 of the Code,<sup>26</sup> need instead a building permit according to the Planning and Building Act, issued by a municipal Building Committee, provided the wind turbine exceeds a height of 20 meters.<sup>27</sup> Detailed development plans are sometimes required as well (there is considerable discretion in the law, see further Section 7 below), normally issued by the municipal parliament.<sup>28</sup>

<sup>21</sup> Preparatory works are foremost Commission report SOU 2008:86 *Prövning av vindkraft*, and the subsequent Government bill, prop. 2008/09:146.

<sup>22</sup> Environmental Code, ch 9 applies to “environmentally hazardous activities” [“miljöfarlig verksamhet”] (defined in sec 1), i.e. the use of land, buildings or installations with risk for causing pollution, noise or other nuisances. The EIA procedure is regulated in Environmental Code, ch 6 and the Regulations on Environmental Impact Assessments [förordningen om miljökonsekvensbeskrivningar] (SFS 1998:905).

<sup>23</sup> Environmental Permitting Regulations [miljöprövningsförfordning] (SFS 2013:251), ch 21 secs 10–11. A permit is also required when a wind turbine is added to an existing group station, see further legal text.

<sup>24</sup> A ch. 11 permit is required irrespective of size (basically always), see secs. 9 and 12.

<sup>25</sup> Planning and Building Act, ch. 4 sec. 3 and Planning and Building Regulations [Planoch byggförfordning] (SFS 2011:338), ch. 6 sec. 2 para. 1 item 2.

<sup>26</sup> The operator is still entitled to apply for such a permit on his or her own initiative, Environmental Code, ch. 9 sec. 6 a.

<sup>27</sup> A building permit is needed also if a wind turbine is placed at a distance from the property boundary that is less than the height of the turbine, if it is fixed mounted on a building, or if the turbine exceeds three meters; Planning and Building Regulations, ch. 6 sec. 1 item 6.

<sup>28</sup> Planning and Building Act, ch. 4 sec. 2, see further *infra* Section 5.

This is the main system for decision-making in connection with wind power development. By excluding the bigger installations from the requirements for a building permit and a detailed development plan, the legal reform of 2009 limited somewhat the number of decisions needed and thereby the possibilities to appeal. It was expected that shortened procedures would decrease the costs for investors in wind power.<sup>29</sup> However, other authorizations than those mentioned above are sometimes also required, depending on the individual situation. If an installation is likely to cause a significant impact on a special protection or special conservation area (Natura 2000), a separate permit is required according to the Code.<sup>30</sup> When several permits are required according to the Environmental Code, the permitting procedure is normally coordinated.

Moreover, the national government may assess the “permissibility” of big installations or activities according to chapter 17 of the Environmental Code.<sup>31</sup> Apart from certain situations specified in the legislation (such as uranium mining), which as a principal rule shall always be considered according to chapter 17,<sup>32</sup> the government has a large amount of discretion to determine on a case-by-case basis whether, for example, the permissibility of a wind power installation should be assessed according to chapter 17 or not; the government may do so if, “with regard to the interests to be promoted by this Code in accordance with chapter 1, section 1, the scope of the activity is or is likely to be substantial or intrusive”.<sup>33</sup> If the government in a particular case decides to assess the “permissibility”, the chief question is if the project as such should be allowed on the proposed site. If the permissibility decision is positive, subsequent permitting can normally not lead to a prohibition or to disallowance of the site. The main function of the subsequent permitting is instead to for-

<sup>29</sup> Government bill, prop. 2008/09:146, 50.

<sup>30</sup> Ch. 7 sec. 28 a.

<sup>31</sup> The decisions are taken by the entire government, although the case is prepared within a specific ministry, often the Ministry of Environment.

<sup>32</sup> Ch. 17 sec. 1. The government may occasionally, if “special reasons” are present in the particular case, decide not to try such a case under ch. 17.

<sup>33</sup> Ch. 17 sec. 3. This provision refers to ch. 1 sec. 1, which formulates the objectives of the Environmental Code, including, *inter alia*, protection against pollution, conservation of biodiversity and “efficient management of energy”. The municipality may request the government to consider the permissibility of wind power installations of a certain size (sec. 4 a), but it is still the government that finally determines whether or not to assess an activity according to ch. 17.



mulate the specific conditions for the activity (for example noise emission limits).<sup>34</sup> However, if the permitting process indicates, when scrutinising the likely environmental consequences of all the suggested permit conditions, that the project would conflict with EU environmental law (for example the protection of a Natura 2000 area according to the Habitats Directive),<sup>35</sup> the permit authority (normally the County Board or the Land and Environmental Court) shall deny a permit, despite the positive permissibility decision by the national government.<sup>36</sup>

Before the governmental permissibility decision, several authorities have a say. However, the standpoint taken by the municipality, in which the project is planned to be conducted, is normally decisive; the municipality must agree to the application. This so-called “municipal veto” may be overruled by the Government when certain types of installations are assessed (for example, a nuclear waste deposit), if “from national point of view [it] is particularly important that the activity is performed” and certain additional preconditions also are fulfilled. However, this exemption does not apply to wind power installations assessed according to chapter 17; the veto is then final.<sup>37</sup>

## 5. Physical Planning and Wind Power Development

### 5.1 National Competences

Chapters 3 and 4 of the Environmental Code include “provisions concerning the management of land and water areas” that may be characterized as a sort of *national physical planning*. The provisions are applied in connection with municipal physical planning according to the Planning and Building Act and in connection with permitting according to different statutes, for example the Environmental Code. The provisions will not be described in detail here but some general remarks are neces-

<sup>34</sup> The government may already in the permissibility decision (ch. 17) add specific conditions to satisfy public interests.

<sup>35</sup> Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora.

<sup>36</sup> This follows from a recent Supreme Court verdict, NJA 2013 s 613.

<sup>37</sup> Ch. 17 sec. 6.

sary.<sup>38</sup> Many of the formulations are vague and provide for balancing of interests. Some rules provide for rather far-reaching protection, but there are also exemptions that are difficult to interpret.<sup>39</sup> It is therefore not possible to predict with certainty how the provisions affect wind power developments.

The possibility of assigning areas as of “national interest” for certain purposes is particularly important. Specific geographical areas (representing, *inter alia*, mountains, coasts, forests and rivers) in chapter 4 are directly described in the legal text as of “national interest” for nature conservation or cultural heritage. In other words, the national Parliament has in terms of legislation determined to protect, to various extents, these areas from harmful exploitations and other negative impacts (such as pollution). Wind power developments are sometimes hindered or limited by the provisions in chapter 4, depending on which of the provisions applies and the actual conflicts in the particular case.

Chapter 3 is constructed differently; state agencies within various sectors are empowered to designate specific geographical areas as of “national interest” for certain purposes specified in the Chapter 3 provisions, such as reindeer herding, aquaculture, nature conservation and cultural heritage, mineral deposits, military defence installations and industrial and energy installations.<sup>40</sup> For example, the Swedish Environmental Protection Agency designates areas of “national interest” for nature conservation, while the Swedish Energy Agency designates areas of “national interest” for wind power installations (423 areas designated in 2013).<sup>41</sup> If an area is designated as of “national interest” for wind power installations according to chapter 3, other uses are normally prohibited if the use of wind power installations (whether or not already placed in the area) is “significantly obstructed”. Conversely, in areas of “national interest” for other purposes in chapter 3 (for example reindeer farming or nature conservation), wind power installations are prohibited if they significantly

<sup>38</sup> See further Michanek and Zetterberg (2012), ch. 9.

<sup>39</sup> An apparent example is ch. 4 sec. 1, second paragraph; none of the protective provisions in ch. 4 (some of which provide in and of themselves very strict protection of the area) shall constitute “an obstacle to the development of existing urban areas or local industry”.

<sup>40</sup> The assignment is not formal legally binding, courts and other decisionmaking authorities must themselves determine the status in each case. However, prior assignments are almost always accepted as accurate.

<sup>41</sup> These cover ca 10 000 km<sup>2</sup>, i.e. 2 per cent of Sweden’s surface.

obstruct or damage the “national interest”. However, if an area is considered as of “national interest” for both wind power installations and another conflicting purpose (or several conflicting purposes), there is a quite significant discretion for planning municipalities and permitting authorities in applying the provision to individual cases.<sup>42</sup> This competition between different “national interests” comes up from time to time and the Land and Environmental Court of Appeal has in several cases given priority to the wind power interest, claiming its importance with respect to the overall objective in the Code to promote “sustainable development” and in particular for the implementation of the Swedish climate and wind power policies.<sup>43</sup>

## 5.2 Municipal Competences

National Parliament (chapter 4 of the Environmental Code) and state agencies (chapter 3 of this Code) have most of the responsibility for planning at the national level.<sup>44</sup> *Local physical planning* of land and water areas, however, is carried out by municipalities according to the Planning and Building Act. There are four types of physical plans; the most important in connection with wind power development are “master plans” and “detailed development plans”.<sup>45</sup> A master plan reflects the municipality’s intentions as to how to use and conserve land and water areas for different purposes. The plan shall encompass the entire geographical area of the municipality. An important task for the municipality is to indicate in the master plan how to implement “national interests” according to chapters 3 and 4 of the Environmental Code,<sup>46</sup> *inter alia*, the use of areas

<sup>42</sup> Ch. 3 sec. 10: “Where any of the areas mentioned in secs 5–8 are of national interest for incompatible purposes, priority shall be given to the purpose or purposes that are most likely to promote sustainable management of land, water and the physical environment in general”. Ch. 4 prevails if there is a conflict with national interests in ch. 4.

<sup>43</sup> See for example Land and Environmental Court of Appeal [Mark- och miljööverdomstolen] 2011-11-23 in cases M 824-11, M 825-11 and M 847-11.

<sup>44</sup> County Boards and municipalities are involved in the preparation phase where areas of national interest are selected.

<sup>45</sup> Other plans are “regional plans” (not legally binding, covering several municipalities) and “area regulations” (legally binding, normally used for smaller groups of houses in rural areas as an alternative to detail development plans).

<sup>46</sup> Planning and Building Act, ch. 3 sec. 5.

of “national interest” for wind power development according to chapter 3, section 8.

The Planning and Building Act is based upon a *municipal planning monopoly*, meaning planning is actively conducted by the municipality. A Strategic Environmental Assessment is necessary if the plan may lead to “significant environmental impact”. The planning process includes ample opportunities for the general public to participate and argue for alternative solutions. It is normally the Municipal Parliament that decides upon the adoption of physical plans.<sup>47</sup> A person having legal standing can appeal these decisions,<sup>48</sup> but only in terms of a judicial review (which basically excludes the possibility of challenging the municipal balancing of interests).<sup>49</sup> The task for the County Board, as representative of the state, is to control the planning in order to safeguard important state interests, not least the realization of “national interests” according to the Environmental Code. The Board is consulted at an early stage of the planning process, and shall, later, develop a review statement on the plan. The Board “shall” under certain preconditions assess and revoke (but not replace or alter) the planning decision.

### 5.3 Consequences for Wind Power Development

What does the physical planning system mean for wind power development in Sweden? Municipalities with ambitions to develop wind power can significantly influence the location of wind power installations in subsequent permitting by providing up-to-date and informative physical plans.<sup>50</sup> The Land and Environmental Court of Appeal regards a master plan, pointing out specific areas within the municipality for wind power development, as a “document of significant importance for the consideration of sites”, which (according to the Court) is clearly more important than a “municipal wind power policy”.<sup>51</sup> Obviously, a detailed develop-

<sup>47</sup> As regards detailed development plans, the municipality may under certain preconditions apply a “simple plan process” [“enkelt planförfarande”], basically if the plan is deemed to be non-controversial, ch. 5 sec. 7.

<sup>48</sup> The preconditions for legal standing are rather complex and are not described here.

<sup>49</sup> See the example *infra*, Section 7.

<sup>50</sup> The municipality is not legally bound by a master plan when conducting a detailed development plan, but the master plan is nevertheless an important guiding document also in this context.

<sup>51</sup> Environmental Court of Appeal [Miljööverdomstolen] 2009:4.

ment plan fulfils the same guiding function. However, these have, unlike master plans, a legally binding effect in the sense that an area set aside for wind power installations (for example) cannot normally be used for other purposes.<sup>52</sup>

In contrast, municipalities with a negative attitude towards wind power development may prevent the construction of wind power installations. First, the municipality can choose not to plan. Although the Planning and Building Act explicitly requires an up-to-date master plan covering the entire municipality,<sup>53</sup> the act includes no remedies if this obligation is not complied with. The status of master plans therefore varies quite significantly in practice, both as regards topicality and information value. Detailed development plans are also legally required under certain preconditions,<sup>54</sup> but the provision provides for significant discretion for the municipality when it comes to planning in rural areas, where big wind power installations are often located. If a municipality is passive, the national government may under certain preconditions “direct the municipality to adopt, amend or annul a detailed development plan (planning injunction)” and, if necessary, itself conduct the planning assisted by the County Board.<sup>55</sup> A planning injunction may be used for the purpose of satisfying a “national interest” (for example wind power installations in a certain area). However, planning injunctions have never been used in practice according to this or the previous Planning and Building Act (from 1987) and before that only twice. This is presumably a result of a strong political respect, at the national level, for the principle of municipal self governance.<sup>56</sup>

Secondly, municipalities may prevent wind power development also by prioritising other uses of land or water areas. The Planning and Building Act provides a large amount of discretion for the municipalities when balancing different interests.<sup>57</sup> Although the County Board takes part in the planning process, and shall react if the “national interest” for, *inter alia*, wind power development in an area is not satisfied, it is finally the municipality that adopts all plans. The County Board can never assess and revoke a municipal decision to adopt a master plan. The situation is

<sup>52</sup> See e.g. Environmental Code, ch. 2 sec. 6.

<sup>53</sup> Ch. 1 sec. 3.

<sup>54</sup> Ch. 4 sec. 2.

<sup>55</sup> Ch. 11 secs. 15–16.

<sup>56</sup> *Supra* Section 3.

<sup>57</sup> Ch. 2.

different after a municipal decision to adopt a detailed development plan. The Board “shall” assess and revoke the plan decision if certain legally defined preconditions are present.<sup>58</sup> This is so if the plan decision does not satisfy a “national interest”. For example, a decision shall be assessed and revoked if the plan provides for new dwellings and these buildings would significantly obstruct the extraction of wind energy in an area of “national interest” for wind power installations. This legal control protects the wind power interest to a considerable extent if the area is of “national interest” for wind power development only, but not if the same area is of national interest also for an additional purpose (see above). Moreover, the ambitious Swedish national wind power policy presumably necessitates location of wind power installations in many windy areas not designated as “national interest” for wind power development. If the precondition “national interest” is absent, the County Board cannot assess and revoke a detailed development plan on the ground that it does not satisfy the wind power interest.

Besides the County Board’s “*ex officio*” control of detailed development planning, persons with legal standing can appeal municipal decisions to adopt both detailed development plans and master plans. However, although a potential wind power developer can have the right to appeal (for example, as land owner) to a plan which prevents wind power installations in an area, the plan decision can only be subject to a judicial review, with no possibility of questioning, for example, whether the interest of wind power development is neglected while giving priority to other interests; balancing of interests is a matter that can be decided by the municipality only, not by a court during judicial review.

## 6. Municipal “Veto” in Connection With Permitting of Wind Power Installations According to Chapter 9 of the Environmental Code

Big wind power installations require a permit according to chapter 9 of the Environmental Code, which is assessed by the County Board, more precisely by a specific regional Environmental Permitting Board (allo-

<sup>58</sup> Ch. 11 secs. 10–11.

cated within the County Boards).<sup>59</sup> Decisions can be appealed to the Land and Environmental Court and after that to the Land and Environmental Court of Appeal.<sup>60</sup>

The process is initiated by consultations with different stakeholders, resulting in an EIA which has to be separately approved by the County Board.<sup>61</sup> In the subsequent permitting, the Board must be assured that the project complies with certain “general rules of consideration”, which stipulate requirements to take different kinds of precautionary measures.<sup>62</sup> Not least important in connection with wind power projects is the obligation to choose a site where it is “possible to achieve the purpose with a *minimum* of damage or detriment to human health and the environment” (author’s italics).<sup>63</sup> The burden of proof is on the operator (applicant),<sup>64</sup> who needs to indicate (foremost in the EIA) that the proposed site is the best from a health and environmental protection point of view compared to alternative sites in the region where wind energy could be extracted.<sup>65</sup> The resource management provisions in chapters 3 and 4 of the Code are also applied when the site is considered.<sup>66</sup> As already mentioned, up to date and informative municipal plans adopted according to the Planning and Building Act provide important additional guidance.<sup>67</sup>

Various authorities, organizations, neighbours and the public can take part in the process, both during the prior EIA procedure and in the subsequent permitting, which includes an official meeting. On the whole,

<sup>59</sup> Supra Section 4.

<sup>60</sup> Sweden has 21 County Boards, five Land and Environmental Courts (within five of the civil courts) and one Land and Environmental Court of Appeal (within the Civil Court of Appeal in Stockholm. Leave of appeal is required in order to have an appeal heard). The courts were before 2011 named “Environmental Courts” and the “Environmental Court of Appeal”. The term “Land” was added to indicate that the courts became responsible also for the application of land and planning legislation, inter alia appeals according to the Planning and Building Act.

<sup>61</sup> The EIA decision cannot be appealed separately, but criticized in connection with an appeal of the permit.

<sup>62</sup> Ch. 2 secs. 2–6. The requirements shall not be “unreasonable”: ch. 2 sec. 7. See also ch. 2 secs. 9–10, which occasionally can halt the entire activity.

<sup>63</sup> Ch. 2 sec. 6.

<sup>64</sup> Ch. 2 sec. 1.

<sup>65</sup> This is the principle rule. However, an alternative location may be considered unreasonable, primarily because of costs, ch. 2 sec. 7.

<sup>66</sup> Supra Section 4.

<sup>67</sup> Supra Section 5.

without discussing the details, the procedure gives good opportunities for different interest representatives to participate and to appeal.<sup>68</sup>

However, due to chapter 16, section 4 of the Code, the role of the municipality is particularly important: “Permit to a wind power installation may be issued only if the municipality where the installation is intended to be constructed *has agreed to it*”. This “municipal veto” was directly connected to the legal reform of 2009,<sup>69</sup> when the Parliament decided that wind power installations of a certain size should be assessed under the Environmental Code only. As the Planning and Building Act was thereby basically rendered inapplicable, the municipalities lost much of their control over big wind power developments (although, as mentioned above, physical planning can still be performed and influence the permitting). The municipal veto should be seen as a political compensation for that loss.<sup>70</sup>

The municipal veto as legal instrument is not an innovation; it has existed as far back as 1972 in connection with national governmental decisions on permissibility of big industrial and similar installations with strong impact on environmental and other public interests, today included in chapter 17 of the Code.<sup>71</sup> Still, the veto according to chapter 16, section 4 is remarkable in several aspects. It applies to *all* permitting of big wind power installations according to chapter 9 of the Code (while governmental considerations according to chapter 17 are conducted on a case-by-case basis and are relatively rare in practice). Moreover, the veto in chapter 16, section 4 applies in connection with permitting of *wind power installations only*, not other types of “environmentally hazardous installations”, such as factories or mines. Consequently, wind power development is put in an unfavourable position compared to other energy

<sup>68</sup> Environmental Code, ch. 16 secs. 12–13. The right for environmental organizations to appeal was significantly strengthened after a verdict by the CJEU, Case C-263/08 *Djurgården–Lilla Värtans Miljöskyddsförening* [2009] ECR I-09967. The CJEU did not accept 2000 members as a minimum requirement for appeal. After an amendment (resulting from the CJEU verdict), ch. 16 sec. 13 now stipulates 100 members as a minimum or that the organization “otherwise indicates that it has a public support”. The provision was also changed so that not only non-profit organizations have the right to appeal, also e.g. foundations like the WWF.

<sup>69</sup> Supra Section 4.

<sup>70</sup> Government bill, prop. 2008/09:146, 40.

<sup>71</sup> Supra Section 4.



installations that are also subject to permitting according to chapter 9 of the Code and for which this veto does not exist.

According to provisions in the Environmental Code, the municipality may use the veto for any reason at all. This unlimited discretion in the Code might conflict with the national target to attain 30 TWh wind power in 2020, as it indirectly may be necessary to make use of sites where wind conditions are not optimal. The veto may also indirectly lead to allocation of installations to alternative sites where the conflicts with nature conservation, reindeer farming, oppositional neighbors and other interests are stronger compared to the area where a proposed installation could not be permitted because of the veto.

The veto is strongly criticized by the wind power industry for creating lack of legal certainty and for hampering the willingness to invest in wind power development. It is in this context important that the municipality must *actively agree* to the permit (the commonly used expression “veto” is not formally correct). The investor cannot legally extort a decision from a municipality. The risk is that an investor plans for wind power installations in an area but that the municipality late in the process, perhaps during the permitting, decides not to agree or decides nothing. This could happen even if the municipality at an early stage has indicated a preliminary positive attitude towards the project. If the municipality formally decides not to agree to the application, this decision is sometimes possible to appeal, but, again, the administrative court can only make a judicial review of the decision; the court cannot question the appropriateness of the negative municipal standpoint. If the court would find the municipal decision illegal (basically on formal grounds), it can still not replace the decision. If the veto decision is revoked it is, again, up to the municipality to decide if it shall actively agree to the project or not.

Municipalities have from time to time required economic or other benefits from the wind power investor as a condition for agreeing to the permit. In a report from the Swedish Union for Wind Power (Svensk Vindenergi) 10 out of 23 investors in wind power claim that the municipality has required a return of this kind as a condition in order to favour local interests.<sup>72</sup> It could be argued that such use of the veto by a municipality is not in line with chapter 1, section 9 of the Instrument of Government (part of the Swedish constitution): “Courts of law, administrative authorities and others performing public administration functions

<sup>72</sup> Svensk Vindenergi (2010), 9.

shall pay regard in their work to the equality of all before the law and shall observe objectivity and impartiality.” It has also been argued in Swedish legal literature that, although there are no specific provisions determining how a municipality shall decide on a matter, it cannot use its discretion in a way that is “indecent” (*otillständigt*), as that would constitute an “illegal use of power” (*illojal maktutövning, détournement de pouvoir*).<sup>73</sup> Conflicts between the municipal veto and superior public law norms have to my knowledge not been subject to any Swedish court case, but if that should happen, the court would only question the validity of the agreement between the municipality and the operator. The court decision would not affect a permit decision as such.

Still, the Swedish veto should also be discussed in relation to the EU Renewable Energy Directive, which includes several requirements on the administrative procedures related to renewable energy plants. The directive stipulates, *inter alia*, that national “rules governing authorization, certification and licensing are objective, transparent, proportionate, do not discriminate between applicants and take fully into account the particularities of individual renewable energy technologies”.<sup>74</sup> The right for Swedish municipalities to block permits, by simply not approving for any reason, can of course counteract a process based upon objectivity and proportionality. This legal disharmony could be subject to a reaction from the EU Commission, possibly leading to a future infringement case at the CJEU. In contrast, in a Swedish permit case, it is not possible to interpret chapter 16, section 4 in conformity with the directive as the Swedish provision is clearly formulated and does not provide for any discretion.

To conclude, the veto for municipalities in chapter 16, section 4 of the Environmental Code is a potential legal barrier to achieving the Swedish wind power targets. The Swedish government cannot get around the obstacle by reserving the right to consider the permissibility of a particular wind power installation according to chapter 17 of the Code as the same kind of unconditional municipal veto would also apply here.<sup>75</sup>

<sup>73</sup> Madell (1998), 147.

<sup>74</sup> EU Renewable Energy Directive, Article 13.1(d).

<sup>75</sup> Ch. 17 sec. 6, *supra* Section 4.

## 7. Wind Power Installations Authorized Under the Planning and Building Act

Wind power installations that are not permitted according to chapter 9 or 11 (offshore installations) of the Environmental Code are instead assessed according to the Planning and Building Act.<sup>76</sup> This category concerns not only very small installations; it applies, for example, to group stations with less than seven wind turbines if the height is less than 150 meters and to all group stations (irrespective of the number of turbines!) if the height is less than 120 meters.<sup>77</sup>

A building permit is normally required for such wind power installations, only quite small turbines are exempted, such as those not exceeding a height of 20 meters.<sup>78</sup> Building permits are issued by Municipal Building Committees. If the proposed site is within a detailed development plan or area regulations, these documents essentially determine if a permit can be issued, especially a detailed development plan which in principle provides a “building right” for the developer if the proposed construction is in conformity with the plan.<sup>79</sup> However, if the proposed location is outside such planned areas, which is a frequent situation in practice, the discretion for the Municipal Building Committee is extensive; the Committee applies the generally formulated consideration provisions in chapter 2 of the Planning and Building Act. Master plans can sometimes, but far from always, provide useful guidance.

<sup>76</sup> The Environmental Code is not as such non-applicable, only the permit requirement according to ch. 9. The general rules of consideration in ch. 2 apply also to these installations, *supra* Section 5. Supervising authorities are empowered to enforce these provisions by issuing injunctions in a particular case, ch. 26 sec. 9. To avoid such interference, the operator is entitled to apply for a permit on voluntary basis according to ch. 9 sec. 6 b; such a permit entails a considerable degree of legal security for the operator (ch. 24 sec. 1).

<sup>77</sup> *Supra* Section 4. Ch. 21 secs. 10–11 Environmental Permitting Regulations stipulate the permit obligation. It is hard to understand the rationale behind these provisions. E.g., an installation with thousands of wind turbines on a site does not normally require a permit according to the regulations if the turbines do not exceed 120 meters. However, a supervisory authority (e.g. a Municipal Board for protection of Health and the Environment) may on a case-by-case basis order an operator to apply for a permit, if the activity “involves a risk of significant pollution or other significant damage”, Environmental Code, ch. 9 sec. 6 a.

<sup>78</sup> See further Planning and Building Regulations, ch. 6 sec. 1 item 6.

<sup>79</sup> Planning and Building Act, ch. 9 sec. 30.

One of the issues for the Municipal Building Committee to consider in the permitting process is if the “detailed development planning requirement” applies.<sup>80</sup> This requirement imposes an obligation on the municipality to work out and adopt a detailed development plan if there is a risk of “significant impact on the environment” or if the “demand for building is high in the area”, situations which may occur if, *inter alia*, a group of wind turbines or one very big wind turbine, would be granted a building permit. The formulations are apparently not precise and there are also several exemptions from this planning requirement (which are not described here); in short, the rules provide for considerable discretion. Still, if the Building Committee in a particular case finds that a detailed development plan is necessary in the area, it shall not issue a building permit.<sup>81</sup> This is a problematic situation for the developer as there is no provision, apart from the never used planning injunction,<sup>82</sup> enforcing the municipality to actually develop such a plan.

## 8. Concluding Observations

The Swedish wind power policy goes back to the mid 1970s but the expected development of wind power installations has until recent years been strikingly slow compared to Denmark, Germany, Spain and several other European states. Two major reasons for the delay have been the complex decision-making procedure and the strong legal power vested in the municipality. A legal reform of 2009 decreased some of the complexity, but the municipal power became even stronger than before.

Given its physical planning competence, the municipality has good opportunities to promote wind power development but also to obstruct it. The strong municipal planning monopoly in the Planning and Building Act limits significantly the possibilities for the County Boards, representatives of the state at the regional level, to promote and defend the national wind power policy.

Moreover, although since 2009 the Planning and Building Act has generally not been applicable to the authorization of such installations that are subject to permitting according to chapter 9 of the Environmental Code, the municipality is in these cases provided with a veto which

<sup>80</sup> Planning and Building Act, ch. 4 sec. 2.

<sup>81</sup> Planning and Building Act, ch. 9 sec. 31 item 2.

<sup>82</sup> *Supra* Section 5.

is absolute according to the provisions in the Code. The veto may be incompatible with the EU Renewable Energy Directive, but the Swedish veto provision cannot be interpreted in conformity with the directive. Thus, at present (2013), the veto is a potential significant barrier to the attainment of the Swedish wind power target of 30 TWh in 2020. A careful investor in wind power should not only investigate sites where wind conditions are good and where potential conflicts with opposing environmental interests are likely to be overcome. The investor should also ask if the municipality likes the project but, if the answer is yes, also consider the possibility that the municipality could later change its standpoint.

The municipal attitude to wind power is important also for installations that are subject to a building permit requirement under the Planning and Building Act. If the proposed location is outside a detailed development plan in which the site is already assigned for wind power installations such plans are not that frequent. Municipal authorities are empowered to decide upon both building permits and, where such situations occur, upon detailed development plans. The possibilities for a developer to successfully appeal to the municipal decisions are in practice very small.

This chapter has indicated deficiencies in the Swedish legal system for decision-making relating to wind power installations; it has not suggested how the legislation should be improved. That is a far more complex issue, involving, inter alia, a discussion on whether it would be useful to substitute the regular time consuming, case-by-case permission with physical planning, including effective remedies for implementing significant national interests (such as the national wind power policy), in combination with general emission limits stipulated directly in legislation.<sup>83</sup>

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<sup>83</sup> For a thorough discussion on these issues, see Pettersson (2008), ch. 8.

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