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The Wild Has No Words: Environmental NGOs Empowered to Speak for Protected Species as Swedish Courts Apply EU and International Environmental Law[1]

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Abstract
The Stockholm Administrative Court recently ruled that Sweden's wolf management policies are incompatible with the Habitats Directive. These policies are also the subject of an on-going infringement proceeding by the European Commission. The administrative court's decision has been appealed. This case is significant for two reasons. First, it interprets controversial provisions of the Habitats Directive. But perhaps more importantly, it demonstrates the growing impact of EU law in a member state. This was the first major case in which the national courts were able to review a hunting decision pertaining to a species protected under EU law because standing to bring public interest lawsuits for the protection of species has been recognized only very recently. Under traditional Swedish procedural law, only the government can represent the public interest in administrative decision making and in court. Here, Swedish courts finally applied to hunting decisions the CJEU's holding in *Slovak Brown Bear*, which says that national procedural law must be interpreted so as to allow environmental NGOs to challenge administrative decisions that might contravene EU environmental law. The court did not request a preliminary ruling despite that fact that controversial questions of EU law were implicated however. While the court applied EU law, it preferred to maintain control over its interpretation.

Keywords
Habitats Directive; Aarhus Convention; species; wolves; standing

[1] The title is a reference to Swedish Nobel Prize winning poet Tomas Tranströmer's poem "From March '79" (Från mars '79). *T. Tranströmer*, The Wild Square (Den Vilda Torget), 1983.

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Introduction

It would be difficult to overstate the intensity of passion aroused by the return of wolves to the Swedish landscape. Wolves are protected under Swedish law, as well as under international and EU law. Legal protection has been successful: nearly extirpated by the mid-20th century, Sweden's wolf population currently numbers around 300 individuals. This population nevertheless remains fragile; all individuals are descended from only five ancestors and consequently suffer from genetic problems related to inbreeding. The species does not have favourable conservation status (FCS) and is red listed ('endangered') in Sweden pursuant to the IUCN's guidelines.[2] However, as in many European countries with recovering wolf populations, protection for wolves is opposed by some as fervently as it is supported by others.

Since 2010, Swedish law allows the Swedish Environmental Protection Agency (SEPA) to authorize the so called license hunt of wolves. Although this policy is argued to violate Sweden's international obligation to protect the species, no one has been able to challenge those decisions before a court of law, until recently. The reason for this is that standing to challenge administrative decisions in Sweden is generally limited to parties with an interest in the case, those whom the administrative decision concerns and adversely affects.[3] Under this theory, only those whose application to hunt was denied would have standing to appeal to court, whereas no one representing the "wolves' point of view" would be able to challenge a hunting decision. Only environmental administrative authorities had the right to advocate the public interest in administrative decision making and in court.[4]

There was one exception to this dearth of a possible plaintiff: the European Commission. The Commission can sue member states directly in the Court of Justice of the European Union (CJEU). In 2010, four Swedish NGOs filed a complaint with the Commission regarding the license hunting that took place at the beginning of that year. This was the NGOs' only possibility for legal redress. The European Commission agreed that the hunt violated EU law, and, following several intense rounds of communications and a second hunting season in 2011, threatened a lawsuit against Sweden. In response, the

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2) http://www.artfakta.se/GetSpecies.aspx?SearchType=Advanced This regional classification is based upon the IUCN Red List Criteria, http://www.iucnredlist.org/details/3746/0.

3) Administrative Procedure Act (1986:223) Sec. 22.

4) See *J. Darpö*, Biological Diversity and the Public Interest, in *de Lege*, 2009, pp. 201–237 for analysis of the traditional system for protecting conservation interests in Sweden.

Swedish government announced that there would be no license hunt in 2012. This forestalled the threatened lawsuit, but the conflict continued to build as the Swedish government challenged the Commission's position on the issue. In the beginning of 2013, SEPA authorized a third license hunt.[5]

The complaint to the European Commission had provided an avenue through which NGOs may eventually have their arguments heard in a court, albeit indirectly. By 2013 however, the NGOs had gained a more direct route to arguing on behalf of protected species: Sweden's administrative courts. Standing to bring public interest suits to protect the environment has incrementally but steadily broadened over the last few years, as Swedish courts have acknowledged the right to access to justice in environmental matters created by the Aarhus Convention and interpreted and enforced by the CJEU and European Commission. The expanding ability to bring public interest environmental lawsuits resulted in a victory for environmental NGOs in early 2013 as the Stockholm Administrative Court of Appeal granted the Swedish Society for Nature Conservation's standing to appeal a SEPA wolf hunting decision concerning the culling of an individual wolf. In line with this judgement, the administrative court also granted NGOs standing to appeal the 2013 license hunt. Injunctive relief was granted and the decision was subsequently quashed. This case illustrates the growing influence of international and EU law on domestic procedural, as well as substantive, environmental law.

1. Legal Background

1.1. *Substantive International and EU Species Protection Law: The Bern Convention and Habitats Directive*

The relevant laws are both substantive and procedural. Sweden is a party to the Bern Convention on the Conservation of European Wildlife, as is the EU.[6] The Bern Convention is implemented in the EU through the Habitats Directive.[7] Both prohibit the killing of strictly protected species except in

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[5] For more detail about the European Commission's proceedings against Sweden, see *J. Darpö*, Brussels Advocates Swedish Grey Wolves: On the encounter between species protection according to Union law and the Swedish wolf policy, SEIPS EPA 2011 (8) p. 1.

[6] Convention on the Conservation of European Wildlife and Natural Habitats, CETS 104 (19 Sept. 1979).

[7] Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora (1992L0043).

certain circumstances when specified criteria are met. The Habitats Directive protects biodiversity by directing Member States to take measures to "maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest."[8] Member states must also ban the deliberate capture or killing of those species deemed in need of strict protection, such as wolves.[9] Exceptions may be made for only one of five enumerated reasons, and only when there is "no satisfactory alternative" and "derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range."[10] The two of the listed reasons most commonly used as justification for culling wolves are (b) the prevention of serious damage and (e) to allow, under strictly supervised conditions, on a selective basis and to a limited extent, the taking and keeping of certain specimens by the competent national authorities. Sweden's licensed hunting season is justified by SEPA using derogation criteria (e).

1.2. *Procedural International and EU Environmental Law: The Aarhus Convention and Union Law*

In its article 9.3, the Aarhus Convention establishes that members of the public who meet national criteria have a right to challenge acts and omissions related to the environment by national authorities before a court or other impartial tribunal.[11] Both the EU and all its member states are parties to the Aarhus Convention. Although the sections of the Convention pertaining to access to information, public participation and access to justice in relation to listed activities according to Article 6 and 9.2 have been implemented in the EU through regulations and directives, Article 9.3 has not. As widely known, there is a Commission proposal for such an "access to justice directive"; that procedure is on-going.[12]

In recent years, the growing influence of the Aarhus Convention and its principles has become apparent in the member states of the Union. This is

8) Habitats Directive article 2.

9) Habitats Directive article 12, Annex 4.

10) Habitats Directive article 16.1.

11) Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters (25 June 1998).

12) See *J. Darpö*: Effective Justice? Synthesis report of the study on the Implementation of Articles 9.3 and 9.4 of the Aarhus Convention in Seventeen of the Member States of the European Union. European Commission 2012-10-26. http://ec.europa.eu/environment/aarhus/studies.htm.

partly due to the fact that this international instrument is fortified by its status as a "mixed agreement", but also partly due to the development of the EU law principle of effectiveness. CJEU has handed down several judgments interpreting the standing requirements in environmental cases stemming from the Union and member states' obligations under the Convention. This body of case law also reinforces the more general requirement that possible violations of Union law must be able to be challenged in court, regardless of whether the interest being protected is that of the land owner or project operator, or that of environmental or species protection. In this way, it is ensured that EU law is effective and, importantly, that the final interpretation of EU case law at the national level is made by the national courts, rather than the legislator or administrative decision makers. Only courts may request preliminary rulings from the CJEU, so having the national courts as final arbiters at the national level facilitates the ability of the CJEU to rule on interpretations of EU law. This understanding of the EU law principle of effectiveness, which requires national legal systems to ensure the effectiveness of Union law, is of immense importance to the field of environmental law.

This is clearly illustrated when it comes to the implementation of Article 9.3 of the Convention in the member states. Despite lack of EU legislation on standing in cases concerning nature conservation and species protection, CJEU requires the Member States to comply with their obligations under the Aarhus Convention. The primary case interpreting these obligations is the well-known *Slovak Brown Bear* from 2011.[13] The case originated from a request for a preliminary ruling by the Slovakian Administrative Supreme Court. It was decided by the court's Grand Chamber and is ground-breaking on the question of environmental organizations' right to standing. The Slovak Supreme Administrative Court had asked if article 9.3 was sufficiently precise to be "self-executing". The court also asked whether, if article 9.3 was not self-executing, environmental NGOs should nevertheless be given the ability to appeal environmental decisions that involved a question of EU law, even if national procedural law did not allow standing. The CJEU held that article 9.3 was not sufficiently specific to be directly applicable. However, national courts must, to the extent possible, interpret national procedural laws in such a way as to give environmental organizations the right to challenge before a court administrative decisions that might contravene EU environmental law.

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[13] Case C-240/09, Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky, [2011] ECR I—1285, 62009CJ0240.

2. Procedural Law: Standing in Environmental Cases in Sweden

Most areas of environmental law, including species and nature protection, are addressed in Sweden's Environmental Code.[14] The code also contains provisions allowing environmental NGOs to appeal decisions taken under the Code, as required by the Aarhus Convention and affirmed by the CJEU in the *Djurgården* case.[15] However, some areas of law are not included in the Environmental Code, yet have a close connection to the environment, for example forestry and hunting. Decisions made by administrative authorities under these laws could only be appealed by those with a personal interest in the case, like other administrative decisions not relating to the environment. The public interest was represented exclusively by the administrative authority making the decision; only personally affected parties such as landowners and operators could appeal. Environmental NGOs were thus excluded from challenging administrative decisions relating to hunting or forest management, even in matters clearly connected to species and nature protection.

However, the above noted development of the EU law principle of effectiveness and the implementation of the Aarhus Convention has led to major changes in Swedish procedural law, also in areas outside the scope of the Environmental Code. The shift in paradigm has been case law driven and has developed over the past couple years. In November of 2011, SEPA made a decision under administrative provisions on "protective hunting" to cull an individual wolf, known as the Kynna wolf. The Swedish Society for Nature Conservation (SNF) appealed the decision and requested an injunction. The case was rejected by the Stockholm Administrative Court, which found that the NGO lacked standing to proceed. The Stockholm Administrative Court of Appeal (CoA) agreed. The NGO appealed to the Supreme Administrative Court (SAC). Although the wolf had already been shot, SAC ordered the Stockholm Administrative CoA to hear the case.[16] SAC noted that Sweden is a signatory to the Aarhus Convention, and referred to the *Slovak Brown Bear* case, as well as its own lack of precedent on the right of environmental NGOs to appeal administrative decisions pertaining to hunting of species protected by EU law.

The case was referred back to the Stockholm Administrative CoA, where it remained under consideration for eight months. In February of 2013, this

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14) Environmental Code (Miljöbalk) Chapter 7–8.

15) Environmental Code at 13–14; Case C-263/08, Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess marknämnd Case [2009] ECR I-09967, 62008CJ0263.

16) Supreme Administrative Court, 2012-06-28; 2687–12.

appeals court determined that the lower court had erred in denying standing.[17] Article 9.3 of the Aarhus Convention grants the public the right to challenge acts and omissions that violate national environmental law. Jurisprudence of the CJEU in *Slovak Brown Bear* established that while Article 9.3 does not have direct effect, national procedural law must be interpreted so to give effect to Union law. Thus, Swedish administrative law, which generally requires appellants to be "concerned" and negatively affected by a decision, must be interpreted in such a way it that is possible for environmental organizations to challenge in court administrative decisions that conflict with EU environmental law.

Although SEPA's hunting decisions were made under hunting law and not environmental legislation, the decision clearly concerned EU environmental law. The court therefore used the same criteria for NGO standing that is set out in the Environmental Code: in order to have standing to appeal, an NGO must have a primary purpose of nature protection or other environmental interests, be non-profit, have been active in Sweden at least three years, and have at least 100 members.

3. Substantive Law: The Swedish Hunting Legislation and the Habitats Directive

3.1. *Introduction*

As noted in the introduction, no license hunt was held in 2012. The tensions between the Swedish Government and the Commission continued to simmer. By fall of 2012, it became clear that the Government intended to resume management of the wolf population through license hunts. While still utilizing the criteria for derogation under article 16.1(e), the rationale shifted. In 2010 and 2011, the Government emphasized that license hunting was needed to improve public perception of wolves and thus reduce poaching, a claim repeatedly challenged by the Commission. In the wolf management plan that was presented in the Summer of 2012, it was instead emphasized that hunting would improve the genetic health of wolves by reducing the number of inbred wolves. The hunt should be coupled with the introduction of unrelated wolves into

[17] Stockholm Administrative Court of Appeal, 2013-02-07, 4390–12. See also *Y. Epstein*: Population Based Species Management Across Legal Boundaries: The Bern Convention, Habitats Directive, and the Gray Wolf in Scandinavia, GIELR, Vol. 25, 2013 (4) (forthcoming).

the gene pool to be successful, though, and the measures undertaken so far have not been successful. The wolf management plan was criticized by the Commission, which again threatened judicial action. The plan was argued to be too vague in its description of how to improve the wolves' genetic status and not detailed enough in the setting of goals for the measures to be taken.

On January 30, 2013, SEPA issued its decision again authorizing a license hunt. It allowed the killing of 16 wolves from eight different packs. The hunt would begin the following day and run until February 17th, leaving no time for appeal prior to the start of the designated period. SNF and several other NGOs appealed the decision and sought an injunction from the Stockholm Administrative Court.[18] The injunction was denied. The Stockholm Administrative CoA granted the injunction several days later, by which time three wolves had already been killed.[19]

3.2. *SNF et al. v. SEPA [2013]*

In May 2013, the Stockholm Administrative Court handed down its decision on the 2013 license hunt authorized by SEPA. Although the earlier injunction meant that the hunt would not be able to go forward during 2013, as the hunt's end date was in February, the court acknowledged the situation was likely to repeat itself in later years, and thus ruled on the merits of the case.

The three environmental NGOs who brought the appeal made three basic claims: first, that they had standing to bring the appeal; second, that SEPA's decision to authorize the license hunt violated EU and Swedish law; and third, that, in light of the Swedish government's on-going conflict with the European Commission over the correct interpretation of the Habitats Directive, the court should seek a preliminary ruling from the CJEU.

The court first, addressed the NGOs' standing. This was by now an easy question. Referring to the recent decisions from SAC and the Stockholm Administrative CoA, the court found that the plaintiffs had standing.

The court then turned to their argument that the court should seek a preliminary ruling regarding whether hunting was consistent with articles 12 and 16 of the Habitats Directive. According to the court, the conflict between the Commission and Government were outside the scope of the trial. The only matters properly before the court was whether the decision to authorize a

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18) Stockholm Administrative Court, 2013-02-01, Case 2428–13.

19) Stockholm Administrative Court of Appeal, 2013-02-06, Case 746–13.

license hunt was consistent with the Swedish wolf management plan and whether it fulfilled the requirements for derogation under article 16.1(e) of the Habitats Directive. The court held that the hunt did not exceed what was permissible under the national management plan. It also looked at the CJEU's *Finish Wolf* case and concluded that it contained sufficient guidance from the CJEU on how to interpret article 16.1. The court thus declined the request for a preliminary ruling.

The court then considered whether SEPA's decision fulfilled the requirements for derogation under article 16.1(e). Citing *Finnish Wolf*, the court explained that the grounds for derogation must be interpreted strictly, and that the authority has the burden of proof in showing that each element of the prerequisites for derogation is met. It then analysed whether SEPA's license hunt met the requirements, and found that it failed to meet three of them: that there be no other satisfactory alternative, that the exception be on a selective basis and to a limited extent, and that the number of individual animals taken be limited.

SEPA claimed that allowing the killing of a certain number of wolves was the only satisfactory way to improve the genetic makeup of Sweden's wolf population in the short run. By reducing the number of inbred wolves, the impact of introducing unrelated wolves into the gene pool would be magnified. It argued that other methods suggested by the NGOs, such as facilitating the natural immigration of unrelated wolves from the east, introduction of wolf pups from zoos into existing wolf packs, and protecting genetically valuable wolves, could only be effective in the long run.

The court considered whether other solutions might be satisfactory. It noted that SEPA had tried moving wolves in the past without success. One genetically valuable wolf had been moved three times in order to remove it from Sweden's reindeer husbandry area (the "Junsele wolf"), and had returned to its territory all three times. However, the goal motivating those moves was the prevention of damage to reindeer, not the genetic improvement of the wolf population. Although the moving of genetically valuable wolves is another satisfactory solution that could contribute to the reduction of inbreeding in the Swedish wolf population, no active measures had been undertaken to facilitate the permanent establishment of the Junsele wolf in her new surroundings. Additionally, the court found that other alternative satisfactory solutions for reducing inbreeding in the short and long term included exchanging wolves with Russia and placing zoo-raised pups in wild dens. While all of these potential solutions also violated article 12 of the Habitat Directive's prohibition on capturing strictly protected species, they were less

disruptive to the overarching goal of restoring and maintaining the favourable conservation status of species than culling wolves. The court found that according to the proportionality principle, the least disruptive measures should be used. SEPA's decision to authorize a license hunt thus was in breach of article 16.1 because there were less disruptive satisfactory solutions available.

Failure to meet any of the criteria of article 16.1 meant that derogation was impermissible. The court nevertheless continued its analysis. The court found that SEPA's hunting decision failed on two elements of derogation ground (e): it was not sufficiently selective and limited, nor was the number of animals to be taken sufficiently limited, to meet the requirements of this derogation ground.

SEPA's decision called for a total of 16 wolves to be hunted, two wolves from each of eight packs. The decision noted that in order to reduce inbreeding, it would be most beneficial if one member of the mating pair were killed in order to increase the chances that the surviving wolf would breed with a less closely related partner. The court noted, however, that SEPA took no measures to identify or mark the mating pair in each pack. Additionally, while SEPA's decision called for the hunt to be suspended if a genetically valuable wolf was discovered in an area where it was authorized, no inventory of these wolves' location was taken prior to the hunt. Furthermore, while killing a parent wolf may lead to decreased inbreeding, there was no justification for killing an additional wolf from each family group. The only purpose for this measure was to reduce the wolf population, not to reduce inbreeding. Therefore, the court held, the license hunt authorized by SEPA was not sufficiently selective.

Finally, the court considered whether killing 16 out of estimated 230–270 wolves, or 5.9–7 %, could be considered a "limited" number within the meaning of article 16.1(e). The court found that the definition was not easily discernible from the text of the directive. The court then looked at the European Commission's reasoned opinion of June 2011 in which it had criticized the 2010 and 2011 decisions to allow the license hunt of 12.9–14.2% and 9.6–10.5% of the wolf populations respectively. The license hunt had accounted for the majority of wolf mortality. This, according to the Commission, could not be regarded as limited. Although the percentages of wolves killed during the 2013 hunt would have been significantly lower both in relation to the total number of wolves in Sweden and in relation to the number of total wolf fatalities, the court found that they were still too high. The requirements for a "limited number" and "limited extent" were not met.

In sum, the court found that SEPA's decision on the 2013 license hunt was impermissible on several grounds. SEPA has appealed this judgement to the Stockholm Administrative CoA.[20]

Conclusion

EU environmental law was thus enforced in Sweden, and the need for the European Commission to sue Sweden in the CJEU potentially obviated. Sweden has been legally bound by international law to protect wolves and many other species since 1983, and by EU law since it joined in 1995. It is only since 2013 that these obligations have been enforceable through the national courts; for the first time NGOs were able to use these courts to speak for a protected species in hunting decisions.

The judgement from the Stockholm Administrative Court shows nuanced understanding of this area of law which is very complex and "new" for that branch of the judiciary. One may have objections to a few details—for example the practicability of "marking" those wolves that are targeted for the hunt—but these are only minor. On the whole, the court undertook a comprehensive and correct analysis of the Habitats Directive and convincingly justified its decision to quash SEPA's hunting decision.

However, there is one aspect of the judgement that is unsatisfying and for which it shall be criticised. The court's reticence to seek a preliminary ruling left many issues unsettled, not least of them whether the management hunting of a strictly protected species that has not reached favourable conservation status is compatible with Article 16.1(e) of the Habitats Directive under any circumstance. The court's rationale given for not asking CJEU for guidance, the prior judgment in *Finnish Wolf,* is not convincing. The *Finnish Wolf* case concerns protective hunting according to Article 16.1(b) of the Directive and has little value when deciding on what constitutes allowing "under strictly supervised conditions, on a selective basis and to a limited extent, the taking and keeping of certain specimens" according to Article 16.1(e).

Moreover, the reasons for asking for a preliminary ruling from the CJEU are not only legal, but also political. The European Commission and the Swedish Government have clearly divergent understandings of both the Swedish wolf management plan and the correct interpretation of Directive's requirements. On the one hand, the Commissioner of the Environment

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[20] The lower court decision was appealed on 20 May, 2013 (Matter NV-04361-13).

intended to recommend that the Commission sue Sweden in the CJEU. On the other hand, the Swedish Government is also under intense pressure from some powerful domestic interest groups that believe that SEPA and the Swedish politicians should stand up to the "bureaucrats in Brussels". Had the administrative court requested preliminary ruling from CJEU, the on-going controversy between the European Commission and the Swedish Government could have been resolved rather than left open. In addition to this, uniformity in applying the Habitats Directive would have been facilitated. Swedish courts have been criticized in the past for preferring to interpret EU law rather than seek CJEU's authoritative interpretation, and have apparently decided to continue that trend for the time being.[21] Nevertheless, this important case illustrates how substantive and procedural EU environmental law has finally given a voice to a protected species in a member state.

[21] *U. Bernitz*, Preliminary Rulings by the EU Court of Justice—The Attitude and Practice of the Swedish Courts, 2010.