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To: aarhus compliance
Cc: "valab, Susanne Gerland , Anna Josefsson , Anna Berglund <email addresses redacted>
Date: 01/12/2015 21:08
Subject: SV: ACCC/C/2013/81 (Sweden) - question to the Party concerned

Dear Ms Marshall,

Thanks for your email of 5 November 2015.

In the email, the Committee refers to a sentence in the reasons for the judgment of Nacka District Court Land and Environment Court (the Nacka District Court) of 15 May 2014 (in the case with case numbers P 635-12 and P 1924-12) which, in the English translation, reads as follows (page 21):

“However, the Court makes the assessment that the investigation needed to make a full assessment of the impact of the wind turbines on the area should have been submitted in connection with the application for a building permit or should, at any rate, have been submitted as a supplement to the Committee during the processing of the building permit there.”

According to the email, because of/as a result of this sentence the Committee “understands that there should have been a full assessment of the impact of the wind turbines, but it is not clear whether that means that a full EIA (eg one meeting the requirements of the EIA Directive) should have been required”.

The Committee asks Sweden to confirm whether an EIA meeting the requirements of the EIA Directive should have been carried out during the process of applying for a building permit.

Sweden understands that the Committee by “the process of applying for a building permit”, refer to the process of applying for the building permit for the two wind turbines on the properties Näs 1:4 and Strängnäs Knutsberg 1:2.

Sweden would first like to reiterate that the Nacka District Court is not the highest instance to have passed a judgment in the case concerning the building permit for the two wind turbines on the properties Näs 1:4 and Strängnäs Knutsberg 1:2. Nacka District Court is a lower court than Svea Court of Appeal Land and Environment Court of Appeal (Svea Court of Appeal). Svea Court of Appeal passed its judgment in the case on 9 March 2015 (case with case numbers P 5593-14 and P 5594-14). Svea Court of Appeal was the final instance in the case concerning the building permit for the two wind turbines on the properties Näs 1:4 and Strängnäs Knutsberg 1:2.

Sweden would also like to reiterate that the building permit for the two wind turbines on the properties Näs 1:4 and Strängnäs Knutsberg 1:2 was issued by the Planning and Building Committee in the Municipality of Strängnäs (the Planning and Building Committee) under the Planning and Building Act (1987:10).

In its judgment of 15 May 2014 the Nacka District Court set aside the decision of the Planning and Building Committee to issue the building permit. The reason the court gave for setting aside the Planning and Building Committee’s decision was that the absence of a bird

inventory for the specific area where the wind turbines were planned to be erected meant that the application for a building permit didn't fulfil the requirements stipulated in Chapter 8, Section 20 of the Planning and Building Act (1987:10). The court also made a reference to the judgment of the Land and Environment Court of Appeal of 9 October 2013 in case no P 9722-12.

As stated before, and in accordance with the transitional provisions to the current Planning and Building Act (2010:900), the older wording of the Planning and Building Act was applied in the court proceedings since the matter was initiated at the Planning and Building Committee before 2 May 2011.

Under Chapter 8, Section 20 of the Planning and Building Act (1987:10) an application for a building permit shall be accompanied by the drawings, specifications and other relevant information needed for the examination.

As stated by the Nacka District Court, this means that the court had to – in accordance with Chapter 2, Section 1 of the Planning and Building Act (1987:10) - consider whether the investigation that formed the basis for the decision to grant the building permit for the wind turbines was sufficient for the balancing of interests to be carried out when assessing the suitability of the land for the measure applied for. According to Chapter 2, Section 1 of the Planning and Building Act (1987:10) the provisions of Chapters 3 and 4 of the Environmental Code shall also be taken into account in this assessment.

As stated by the Nacka District Court, Chapter 3, Section 3 of the Environmental Code states that land and water areas that are particularly vulnerable from an ecological point of view shall, as far as possible, be protected against measures that may damage the natural environment. The Nacka District Court refers to the preparatory works to the Code which state that one important purpose of this provision is to safeguard genetic diversity in nature by protecting species whose existence is threatened (see Govt Bill 1997/98:45, Part 2, p.668).

In the reasons for its judgment, Nacka District Court states that the location of the planned wind turbines on the site in question would mean that wind turbines would be erected close to areas that have been deemed to be worthy of protection, partly in view of their bird life (*four bird protection areas in the Rindö-Sundbyholm archipelago are mentioned*). Information had also become known about there being bird species worthy of protection in the vicinity of the planned wind turbines. Moreover, information had been provided by the County Administrative Board in the case stating that there is a white-tailed eagle nest close to the site where the wind turbines were intended to be erected, and the County Administrative Board had not ruled out the presence of osprey either. The presence of white-tailed eagle and osprey had also been shown by the accounts given by the appellants and this information had not been contested, neither by the Planning and Building Committee nor the Diocese of Strängnäs (i.e. the applicant).

In the view of the Nacka District Court, the absence of a bird inventory for the specific area meant that the application for the building permit didn't fulfil the requirements stipulated in Chapter 8, Section 20 of the Planning and Building Act.

The Nacka District Court doesn't say that an EIA meeting the requirements of the EIA Directive should have been carried out during the process of applying for the building permit for the two wind turbines on the properties Näs 1:4 and Strängnäs Knutsberg 1:2.

The sentence referred to by the committee concerns the principle of judicial hierarchy (instansordningsprincipen in Sweden). The sentence is included in the part of the judgment which in its entirety reads as follows;

“The Diocese of Strängnäs has made an undertaking in the Land and Environment Court to investigate the presence of birds of prey in the area in 2014 if the Court finds this necessary. If so, the Diocese of Strängnäs has also stated that the matter should be referred back to the County Administrative Board for further processing. However, the Court makes the assessment that the investigation needed to make a full assessment of the impact of the wind turbines on the area should have been submitted in connection with the application for a building permit or should, at any rate, have been submitted as a supplement to the Committee during the processing of the building permit there. In the assessment of the Court, a referral back to the County Administrative Board would be contrary to the principle of judicial hierarchy.”

There’s nothing in the reasoning of the final instance in the case concerning the building permit for the two wind turbines on the properties Näs 1:4 and Strängnäs Knutsberg 1:2, i.e. Svea Court of Appeal, saying that an EIA meeting the requirements of the EIA Directive should have been carried out during the process of applying for the building permit for the wind turbines. Svea Court of Appeal makes an overall consideration of what has emerged in the case and makes the assessment that the investigation does not provide sufficient support for the conclusion that the siting of the turbines at the location in question meets the requirements for an adaptation to the natural values in the area. This means that the application for a building permission for the proposed siting of the wind turbines was not granted.

Kind regards,

Lina Oskarsson, National Focal Point for the Aarhus Convention