Draft Questionnaire
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Access to Justice in matters of environmental law

Answers given by Anna-Lena Rosengardten, technical judge of the Land and Environment Court of Appeal in Stockholm, Sweden

A. General Questions

1. What was the influence on your national legal order, if any, of the recent developments in the case law of the Court of Justice of the European Union (CJEU) on standing of individuals and/or NGOs (notably cases C-237/07 *Janecek*; C-263/08 *Djurgarden*; C 115/09 *Trianel*; C 240/09 *Slovak Brown Bear; C 416/10, Krizan*). Have environmental laws been amended? Please illustrate.

The Swedish legislation concerning which NGO:s that can appeal an environmental judgment has been changed since the CJEU case of the Djurgården-Lilla Värtans Miljöskyddförening (C-263/08). Before that case, the right to appeal was limited to NGO:s with 2000 members or more. Since then, the legislation has been changed so that NGO:s with 100 members or more can appeal. It has not been tried by the CJEU whether the new legislation is consistent with EU law.

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2. Have there been any changes in the jurisprudence of the national courts concerning standing of individuals and/or standing of NGOs as a result of CJEU's recent judgements? Have the courts in your country relied on the principle of effective judicial protection or used arguments about CJEU case law in order to widen up standing for individuals and/or NGOs in environmental procedures since the signing/ratification of the Aarhus Convention? If so, please illustrate.

There have been changes in the Swedish case-law so that the national law has been interpreted in accordance to the EU law and the Århus convention. Some examples from the Land and Environment Court of Appeal are the following.

1. The U.Z.-case (MÖD 2011:46, dated 2011-12-12)
The case concerns a landfill that had got a permit with conditions for the permit since a couple of years. According to Swedish legislation a permit can only be withdrawn or conditions changed of certain reasons and after a process initiated by some specified authorities. Individuals cannot initiate such a process.

An individual, U.Z. claimed that the supervisory authority should initiate a process to withdraw the permit, since he thought that the conditions were not fulfilled. The supervisory authority refused to start such a process. This decision was appealed by U.Z. to the Land and Environment Court in Umeå, which refused the appeal in accordance to the principles of

earlier case-law. Earlier case-law stated that an authority's decision not to start a process for withdrawing a permit or changing the conditions of a permit could not be appealed.
The refuse was appealed to the Land and Environment Court of Appeal.

The Land and Environment Court of Appeal stated that the right for an individual to appeal such a decision was not specified in Swedish law. It also found that the law could be interpreted so that an individual has that right and that this is consistent to international regulation. In principle, it is possible for an individual to appeal a decision of a supervision authority not to start a process to change a permit. Therefore the court abated the refuse and sent the case back to the Land and Environment Court in Umeå to decide if the certain individual in this case, U.Z., was concerned by the landfill in such a way that he could appeal.

2. The Getterön airfield (MÖD 2012:47) and the Härryda municipality (MÖD 2012:48) cases (both dated 2012-11-15)
The first case concerns an airfield, where the owner of the field wanted to asphalt a lane. The airfield is situated close to a bay that constitutes a Natura 2000 area. The asphalting of a small airfield does not need a permit according to Swedish legislation, but a notification to the supervision authority. The authority can then forbid the action, issue an injunction stating what protective measures to take or leave the notification without any measures.

The second case concerned a construction for urban runoff that could affect a breeding area for a certain frog species (rana arvalis) which is listed in appendix 4 of the EU habitat directive. A construction of this kind needs the same kind of notification as mentioned above.

In neither case the supervisory authority forbid the activity, and in both cases the decision was appealed by NGO:s to the Land and Environment Court in Vänersborg. The decision of the court in both cases implied that the NGO:s had no right to appeal, since the case concerned a supervisory decision. According to the Swedish legislation the right for a NGO to appeal is limited to cases that concern permits, conditions for permits and a number of other specified kinds of decisions. Supervisory decisions are not specified in this list.

The rejects were then appealed by the NGO:s to the Land and Environment Court of Appeal, which stated that article 9.3 of the Århus convention was applicable on the decisions by the supervision authorities. The court also referred to the CJEU case of the Slovak Brown Bear (C-240/09) and found that the Swedish legislation should be interpreted in such a way that the NGO:s were allowed to appeal. This was a change of the former case-law in Sweden.

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3. What are, to your opinion, the main challenges for judges in your national legal system when it comes to access to justice in the field of environment and the development of the CJEU´s case law?

I would say that there is an ongoing process in the Swedish legal system in which individuals and NGO:s successively are getting further access to justice, both by changes in the legislation itself and by case-law. I cannot pinpoint any specific issue that could be considered as the main challenge. There are many different situations and all have not as yet been tried by the courts.

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4. Taking into account that access to justice in environmental matters is required to not be prohibitively expensive (cf. Art 25.4. IED; Art 11.4. EIA Directive, both reflecting Art 9.4. Aarhus Convention): How do you, all in all, evaluate the system of access to justice in your country when it comes to costs and liability for costs (e.g., court fees, lawyer´s fees, cost for administrative procedure, expert fees)? Do costs have a chilling effect in environmental litigation?

In my opinion costs have not so much of a chilling effect in environmental litigation in Sweden. There are no court fees or costs for administrative procedures for individuals or NGO:s. If they choose to engage a lawyer or experts, the cost is paid by the applicant when it concerns water operations applying for permit. In other kinds of cases the engagement of lawyers and experts is at the expense of each party. Since the applicant or developer normally has got more resources than NGO:s or individuals, they can engage lawyers and experts to a much larger extent.

B. Examples:
The aim of the following examples is to facilitate understanding of standing rules and conditions for access to justice in the various legal systems. The aim is to illustrate how different countries provide for access to justice in environmental matters and to prepare a discussion on the topic. **Please highlight the specific aspects of your legal system without going to much into detail. If possible, please deal with all the examples.** *Please feel especially welcome to illustrate your answer by referring to examples of national case law.*

Example 1: The competent authority has adopted an action plan on air quality that will not adequately reduce the risk of exceeding EU air quality limits (contrary to relevant secondary EU law).

Questions Example 1:
B.1. What are the possibilities open for the public to legally challenge the plan and to ensure that an adequate plan is adopted and implemented? If any, who (individuals, NGOs, other) is entitled to challenge the plan? Is the appellant/plaintiff required to provide evidence on potential harm/damage and to specify the measures that should have been taken?

An action plan on air quality is not legally binding for individuals or activities that contribute to the air pollution, but authorities and municipalities are – within their responsibility - bound to take measures needed according to the action plan. The plan itself cannot be appealed by anybody. It is the binding decisions that might be the result of actions taken according to the plan that can be appealed.

Example 2: The competent authority has issued a permit for an infrastructural construction project (e.g., a motorway, a power line or a funicular). Part of the site concerned is situated in a Natura 2000 area. In spite of a negative assessment of the implications for the Natura 2000 site, the competent authority agreed to the project for imperative reasons of overriding public interest (Art 6.4. Habitats Directive).

Questions Example 2:
B.2.1. Who (individuals, NGOs, other) is entitled to challenge this decision by legal means? In what way do individuals need to be affected by the decision in order to have standing? With regard to standing rules for individuals and NGOs, does it make any difference whether the project in the example is subject to an EIA or not?

The largest projects of this kind – EIA-projects - are given permissibility by the Swedish government. Both NGO:s and individuals can apply for a judicial review of the decision by the Supreme Administrative Court. Individuals can apply only if their private interests are concerned by the project.

B.2.2. Does an administrative appeal or an application for judicial review automatically have a "suspensive effect" on the decision at stake?

In case there is no automatic suspension in your national legal order: Under which conditions can the appellant obtain a suspension of the permit decision for the infrastructural project? Are there other measures of interim relief available to prevent negative harm to the environment until the final decision has been taken? In case of an automatic suspension: Can the developer of the infrastructural project ask for a "go-ahead-decision" in your national legal order?

An application for a judicial review has not automatically a suspensive effect on the decision.

Example 3: The competent authority has issued a permit and established permit conditions for an installation falling under the scope of the Industrial Emissions Directive – IED (e.g., a waste treatment facility or a tannery) The national permit procedure had been carried out in accordance with requirements on public participation (Art 24 IED).

Questions Example 3:
B.3.1. Are individuals in your country entitled to challenge the permit decision on the grounds that permit requirements of the IED have not been met: say, that the best available techniques have not been applied and energy is not used efficiently?

Individuals can appeal if their private interests are concerned. If their private interests are concerned, they can also plead common interests. In this case, if the individuals live close enough to the installation so that they might be affected by for example the emissions, the noise or the traffic generated by the installation, they can appeal the permit decision and the conditions and claim that the permit should be abated or the conditions changed since the decision is not based on the best available technology. In that case, once it has been accepted that the installation will affect their private interest, they can also claim that the permit should be abated or the conditions changed since energy is not used efficiently.

It is more difficult to say whether they can appeal <u>only</u> on the ground that energy is not used efficiently. They can do that if it concerns their private interest, for instance because the installation will use a combustion plant that generates emissions more than what would be

needed with a more efficient use of energy. If it doesn´t concern their private interest, their appeal would be rejected.

B.3.2. Is an NGO entitled to judicial review of the permit decision, even if it did not previously take up the opportunity to participate in the decision-making procedure?

Yes it is.

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Example 4: Citizens are concerned about a landfill that has been granted permission but is obviously operating in breach of permit conditions. Samples that have been taken by an NGO indicate that there is imminent danger of a drinking water source being contaminated. The competent authority is not taking any action.

Question Example 4:
Evaluate the possibilities of members of the public (individuals, NGOs) to ensure that (remedial) action is taken.

It would be the responsibility of the supervisory authority to take measures. An individual that is affected by the landfill has the right to appeal a decision of the supervisory authority not to take any measures (what we call a zero-decision).

I cannot give a straight answer when it concerns NGO:s. According to the legislation the right for a NGO to appeal is limited to cases that concern permits, conditions for permits and a number of other specified kinds of decisions. Supervisory decisions are not specified in this list. It is thus not obvious that a NGO has the right to appeal. On the other hand, in some recent judgments from the Land and Environment Court of appeal, NGO:s has been given right to appeal certain kinds of supervisory decisions (see the answer to question 2). These cases have concerned activities in Nature 2000 areas and it is stated in the judgments that the Swedish legislation has been interpreted in accordance with the Århus convention and the case law of the CJEU.

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