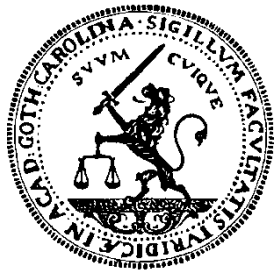

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Balancing Conflicting Interests

- Natural Environmental Values in the Permitting Process for Quarries

JURM02 Graduate Thesis

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Contents

Summary

This thesis investigates what weight the Land and Environmental Court of Appeal (MMÖD) has given aspects of natural protection, in comparison to conflicting interests for exploitation of natural resources, in assessments of permitting processes of quarries. For this purpose, the study is limited to relevant case law in the 21st century.

Natural resources are often preserved and embedded in environments worthy of protection, and the Environmental Code (1998:808) appears to have an ambiguous objective in regards to quarries. It aims to protect and preserve natural environmental values as well as to protect the deposits from significant hinders preventing the exploitation of the natural resources. For this purpose, the Code provides balancing rules for the courts to apply in cases with conflicting interests. The location is of great importance and must be suitable where the activity can be conducted with a minimum damage or detriment to the nature.

In a majority of the eight relevant cases, the MMÖD concluded that the interest for the material overweighed the interest for nature conservation, as the adverse effects on the area was expected to be within acceptable limits. Only two permits were rejected. Circumstances to why the interest for nature conservation was given more weight appears to have been with support of a question mark. Both rejections were made due to the investigations of alternative locations were considered to be insufficient, and thus the MMÖD were unable to assess the suitability of the locations. On the other hand, the application of protective and precautionary measures lessens the weight of the environmental interest, as the measures are means to reduce the otherwise expected adverse effects.

The overall outcome is not surprising. The desired zones for the quarries have, in general, not been located in areas under special environmental protection, but rather adjoined protected sites of which the activities were assumed to have a significant adverse effect. One should keep in mind that a public economics perspective permeates the legislation and the exploitation of natural resources is needed for a better living standard in society. The MMÖD appears to have strived to satisfy the ambiguous objective of the Code. As the quarry often is only expected to affect a small area, the granting of a permit, within the legal frame, can satisfy both interests, although the environmental protection will be somewhat limited. However, I question the accuracy of the permits at Bunge Stucks and Bunge Ducker, as the quarries were expected to cause significant adverse effect on the adjoining Natura 2000 sites. According to EU law, permits cannot be granted if there are any reasonable scientific doubts that the activity induces significant adverse effects to the site. In the three Bunge assessments, uncertainties remained in regard to effects on the sensitive hydrologic system with unknown consequences to the sites.

Sammanfattning

Denna uppsats undersöker vilken tyngd Mark- och miljööverdomstolen (MMÖD) har gett naturvårdsintresset ur ett miljöskyddsperspektiv, i förhållande till motstående intresse för exploatering av naturresurser, i tillståndsprövningar för täktverksamheter. Med anledning av syftet så är studien begränsad till att beakta relevant rättspraxis under 2000-talet.

Naturresurser är ofta bevarade och lagrade i skyddsvärda naturmiljöer och miljöbalken (1998:808) har ett tvetydigt syfte i förhållande till täktverksamheter; nämligen att bevara och skydda naturvärden, samtidigt som den syftar till att skydda fyndigheter från att påtagligt försvåra utvinningen av dessa. Miljöbalken tillhandahåller domstolarna avvägningsregler då motstående intressen står på spel. Platsen för verksamheten är av stor betydelse och en lämplig plats där ändamålet kan uppnås med minsta intrång och olägenhet för miljön ska väljas.

I de flesta av de berörda fallen har MMÖD konstaterat att utvinningsintresset överväger intresset av bevarandet av naturvärden eftersom de negativa effekterna på området förväntades att vara inom ramen för vad som kan accepteras. Endast i två av fallen avvisades tillstånden. Omständigheter till varför naturvårdsintresset har fått större vikt tycks vara med stöd av outredda frågetecken. I båda fallen tilläts inte täktverksamheterna på grund av otillräckliga utredningar av alternativa platser vilket ledde till att MMÖD inte hade möjlighet att ta ställning till platsernas lämplighet. Å andra sidan pekar utredningen på att tyngden för naturvårdsintresset har fått mindre vikt vid tillämpningen av skydds- och försiktighetsåtgärder, eftersom dessa minskar de negativa miljöeffekter som annars skulle uppstå.

Resultatet i sig är inte förvånande. De önskade platserna för täkterna har generellt inte varit inom skyddade områden, utan har snarare angränsat till sådana områden där påtaglig skada har befarats inträffa till följd av verksamheten. Det är viktigt för läsaren att ha i åtanke att lagstiftningen genomsyras av ett samhällsintresse och att utvinningen av naturresurser bidrar till en bättre levnadsstandard i samhället. MMÖD tycks sträva efter att tillgodose miljöbalkens båda mål. Eftersom det ofta endast är begränsade områden som befaras ta skada, kan detta ske genom att tillåta täktverksamheter inom ramen för lagen, även om det innebär på bekostnad av naturvårdsintresset. Däremot ifrågasätter jag riktigheten i tillåtligheten av täktverksamheter på Bunge Stucks och Bunge Ducker, eftersom dessa befarades medföra påtaglig skada på de angränsande Natura 2000 områdena. Enligt EU-lagstiftningen får inte tillstånd beviljas om det finns rimliga tvivel att verksamheten kan medföra påtaglig skada på området. I de tre Bunge-fallen kvarstod osäkerhet kring täkternas effekter på det känsliga hydrologiska systemet med okända följder därav.

Preface

I would like to thank my supervisor, Professor Annika Nilsson, for her constructive feedback and support. Many valuable lessons were learnt along the way. I would also like to thank my family and fellow students for their support and encouragement along the way; in particular Madeleine Morales who contributed with company and encouragement throughout the process, and Lena Lundahl who put time and effort into proof reading my thesis.

Special thanks to my mentor, Per Hallström, at the Ministry of the Environment, for the valuable consultations over the years, for being an inspiration and for guiding me when guidance was needed. It has been much appreciated.

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Abbreviations

CJEU	The Court of Justice of the European Union
EU	The European Union
Lst	The County Administrative Board *(Länsstyrelsen)*
MMD	The Environmental Court *(Mark- och miljödomstolen/Miljödomstolen)*
MMÖD	The Environmental Court of Appeal *(Mark- och miljööverdomstolen/Miljööverdomstolen)*
Prop.	Government Bills (*Propositioner*)
SAC	Special Areas of Conservation *(särskilt bevarandeområde)*
SEPA	Swedish Environmental Protection Agency *(Naturvårdsverket (NVV))*
SGU	Geological Survey of Sweden *(Sveriges geologiska undersökning)*
SLU	Swedish University of Agricultural Sciences *(Sveriges Lantbruksuniversitet)*
SOU	Swedish Governmental Official Reports *(Statens offentliga utredningar)*
SPA	Special Protecting Areas *(särskilt skyddsområde)*
SSICB	The Swedish Species Information Centre works with Biodiversity *(Artdatabanken)*

1 Introduction

1.1 Background

Many natural resources are non-renewable by nature. Deposits of resources like rocks, natural gravel, sand and clay were formed during the last meltdown of the inland ice, and are therefore spread out across the country and vary in size, quality and composition. Deposits of natural resources of interest to the mining industry are often embedded in a natural environment of importance for recreation and natural conservation. Environmental encroachment is inevitable, and often irreparable, when exploiting natural resources,[1] and its adverse environmental impact depends on the resource in question, the method used and the scope of the extracted material.[2] Trees often need to be logged, rocks need to be cracked or drilled through, overburden needs to be removed and heavy machinery is required throughout the operation.[3] The chosen location is thus of great importance.

The Swedish environmental legislation supports preservation of valuable nature. As natural resources are preserved and embedded in the natural environment, the courts often need to balance[4] conflicting interests at stake in the permitting process for quarries.

1.2 Aim and Purpose

In the summer of 2012, the Land and Environmental Court of Appeal (MMÖD) approved a quarry permit at Bunge Ducker in Northern Gotland. The decision caused a debate in Sweden and raised my curiosity for this subject.

The purpose of the thesis is to investigate what weight the Land and Environmental Court of Appeal has given aspects of natural protection in their assessments in comparison to conflicting interests for exploitation of natural resources. For this purpose, the study focuses on permitting processes for quarries as they can entail drastic environmental changes. The following sub questions will be discussed:

- *Is relevant case law in line with the Environmental Code, or has the MMÖD stretched the application?*

[1] SOU 1979:14, pp. 41-46; and prop. 2008/09:144, p. 12.
[2] Jackson; Jackson (1996), *Environmental Science - The Natural Environment and Human Impact*, p. 236.
[3] SOU 1979:14, p. 45.
[4] See *inter alia* ch. 2 sec. 7, ch. 3 sec. 10 and the former ch. 9 sec. 6a of the Environmental Code (1998:808).

- *Do any circumstances indicate why the MMÖD gave natural environmental values a lighter or a heavier weight in applicable case law?*
- *Does the framework provided by the Environmental Code sufficiently protect natural environmental interests?*

What makes this research question even more interesting is that the Environmental Code appears to have an ambiguous objective regarding environmental encroachment in relation to quarrying permits. As will be seen, it aims to conserve nature while simultaneously aiming to prevent obstructions to exploit natural resources. To me, it is a question of eating the cake or keeping it, whereas the objective of the Environmental Code is to manage to do both. The Environmental Code provides balancing rules for this purpose, and special focus is laid on the MMÖDs application of those in order to see what interest that prevails. I chose to focus on the MMÖD as it, in most cases, is the last instance[5] for quarries and its judgments are of judicial precedence.

1.3 Terminology

Most of the material has only been provided in Swedish and extensive translations have therefore been required. For the accuracy of legal concepts, the Glossary for the Courts of Sweden has been used.

I use the term *quarry* to describe the activity called *täktverksamhet* in Swedish, as this is the appropriate term to use for the mining of rock, sand and gravel which are the main materials quarried in relevant case law. The term does not include quarrying for purposes of preparing other establishments, but for the purpose of obtaining and using the material.[6] The term *environmental values* is intended to describe aspects of natural characters worthy of protecting, and is not of financial character, as the value of *natural resources* is.

Throughout the work, I refer to the *Land and Environmental Court of Appeal (MMÖD)* and the *Land and Environmental Court (MMD)* as general terms which are deemed to include their previous appellations of the *Environmental Court of Appeal* and the *Environmental Court* where applicable.[7]

[5] As is the case where the Lst (*Länsstyrelsen)* or another authorised body tried it as a first instance. In these cases, judgments by the MMÖD cannot be appealed unless it is considered to be of importance for the guidance of the legal application to be tried by the Supreme Court. Where the MMD has been the first instance, the Supreme Court is the last instance. (See and compare ch. 5 sec. 5, ch. 1 sec. 2, and ch. 4 sec. 1 of the Act on the Land and Environmental Courts (2010:921) and ch. 23 ss. 8-9 of the Environmental Code).
[6] See prop. 1964:148, p. 74.
[7] Through the Act on Land and Environmental Courts (SFS 2010:921). Changed on 2012-05-02.

1.4 Method and Material

To answer the questions, I have applied the traditional legal method by assessing applicable law, explained through its preparatory works and relevant case law, together with a problem-based method, through an empirical study of relevant judgments by the MMÖD. Out of 37 cases dealing with the permitting process for quarries in the 21st century,[8] 8 were selected as relevant case law due to their dealing with natural values for the MMÖD to consider and assess. The chosen locations of the quarries in the relevant cases were not within protected areas, but they were either close enough to impose a risk to adjoining protected sites, or to protected natural values found in the area. 2 of those are related to the Bunge Ducker case in Gotland and are presented under subchapter 4.6. The issue of the other 29 cases merely related to nuisance, drinking water or other impacts on human health. As these lacked natural environmental values for the MMÖD to consider, they were found irrelevant for the purpose of this thesis. The study thereby deals with cases with conflicting interests in the meaning of the Environmental Code, and not with cases where it is either clear that the exploitation of natural resources should prevail or where the environment of the chosen location enjoys a greater legal protection.

The most important source for the thesis has been the relevant case law together with the Environmental Code. The preparatory works and official reports in relation to various amendments of the Code together with case law from MMÖD and the Court of Justice of the European Union (CJEU) as well as doctrine on the general application of the environmental legislation have filled in the gaps. Doctrine in relation to quarries is unfortunately close to non-existing but the Swedish Environmental Protection Agency (SEPA) has provided a few guidelines on the matter. With regards to the thesis being based on an empirical study and considering the lack of doctrine on the matter, most of my discussion is found under the comments of the cases and in the analysis.

1.5 Delimitations

The research focuses on the natural environmental aspects, such as the interest of species of flora and fauna and important habitats. However, the legislator has often combined the interests for the natural environment with the interest for human health in legal provisions, such as issues regarding outdoor recreation, cultural values, drinking water, nuisance and traffic. As a result, the decisive bodies often need to jointly weigh these interests against the conflicting interest of exploitation. Although human aspects are delimited from my thesis, they must

[8] According to the archive of MMÖD decisions at Juridicum, Lund University. (Last checked 2013-01-09). See full list of delimited cases under Supplement A.

be mentioned in the presentation of applicable law. Neither can these values be completely separated in relevant case law as both types may have contributed with weight to the environmental side of the scales. Due to the complexity of quarries, it is not always possible to isolate a single responsible factor for the final outcome.

The study delimits the quarrying of peat. Effects on wetlands caused by other types of quarries are, however, discussed as they may induce a chain reaction of environmental effects. Some cases involve water operations and water catchments, but the regulation under chapter 11 of the Environmental Code is not taken into consideration in this thesis; merely the discussed effects on surrounding environments. This decision was based on the lack of focus on this matter in the findings by the MMÖD in relevant case law, and with regards to the limited scope of the thesis. The thesis further excludes issues relating to the owner's right to property in the assessments, as well as governmental assessments.

The study is limited to the 21st century and focuses on the Environmental Code. As previous legislation was more or less incorporated directly into the Environmental Code, it is mentioned where applicable to demonstrate that the essence of the matter is the same, as these provisions were applicable in MÖD 2000:24.

Preliminary rulings were requested but rejected in the Bunge Stucks and the Bunge Ducker cases. This issue is delimited from my study. It would, however, be interesting to look further into the accuracy of the interpretation of European Union (EU) law in these cases. Unfortunately this issue is too complex to include in my thesis. It would also be interesting to conduct a deeper evaluation of the role of Environmental Impact Assessments, or to make a comprehensive evaluation of environmental consideration in general, without limiting it to quarries. One could also assess the operators' environmental responsibility or the efficiency of required financial guarantee and restoration of old quarries. Studies could also be assessed from a public economics perspective.

1.6 Disposition

The thesis begins with a presentation of the historical development of today's environmental legislation in chapter 2. Chapter 3 presents and explains relevant sections of the Environmental Code which the courts have to apply and consider in the permitting process. Applicable EU law is incorporated into the presentation. Many of the provisions require the authorised body to balance different interests and levels of accepted impact, but the more decisive balancing rules are presented in the last part of chapter 3. This chapter is important in order

for the reader to get an understanding of what the courts have to assess and therefore includes relevant amendments to applicable provisions. Chapter 4 presents relevant cases in chronological order, starting with a short presentation of the case followed by conflicting interests at stake and the assessment by the MMÖD. In cases where the MMD came to a different conclusion, their findings are presented in order to illustrate a different interpretation of the environmental legislation. All cases are followed by a comment. For a quick overview of chapter 4, the reader can go straight to my comments. The research is analysed under chapter 5 and the thesis ends with a conclusion in chapter 6.

2 Historical Background of the Environmental Legislation

Sweden was a leading country in the international field of environmental law in the 1960's with the Nature Conservation Act of 1964 and the Environmental Protection Act of 1969. Regulations on quarries were introduced to protect the scenery, but the focus changed in 1974 and the environmental protection became of greater importance. The Swedish environmental legislation was improved in the 1980's with the aim to *inter alia* protect biodiversity, natural and cultural sites and to manage natural resources in a sustainable manner.[9] Since 1982, quarry permits in areas with strong interests for nature conservation have required a greater market demand on the natural resource in question.[10] In the preparatory works, it was expressed that the environmental protection was not absolute, and natural resources should be able to be extracted for public or individual benefits and necessity.[11] The following year, the County Administrative Board (Lst) got authorisation to order the applicant to submit a report showing the need of the quarry.[12] Rules on sustainable management of land and water areas were introduced in 1987.[13] Since 1989, the legislation on environmental protection has been applicable to quarries. The introduction of a tax on natural gravel in 1996 further shows an increased awareness of the importance of sustainable management of non-renewable natural resources.[14] In 1997, it was considered necessary to improve the management of natural resources by ten times in order to have a decent living standard twenty years later, with regards to the global increase in populations.[15]

In January 1999, the Swedish Environmental Code entered into force and was a coordination of *inter alia* the Nature Conservation Act, the Environmental Protection Act and the Natural Resources Act.[16] Important principles, such as the principle of eco-cycle, of location, of sustainable management of land and water, and the precautionary principle, were incorporated into the Environmental Code in order to make them legally binding, to raise awareness of our responsibility of environmental protection, to minimise the use and demand of non-renewable natural resources and to minimise environmental damage.[17]

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[9] SOU 1996:103, part 1, pp. 173 and 178.
[10] Prop. 1997/98:45, part 1, pp. 376-377. See sec. 18 of the Nature Conservation Act (1964:822). In Swedish: *Naturvårdslagen.*
[11] Prop. 1981/82:220, p. 10.
[12] Prop. 1997/98:45, part 1, p. 377. See sec. 18 of the Nature Conservation Act (1964:822).
[13] Prop. 1985/86:3, pp. 14-15.
[14] Prop. 1997/98:45, part 1, p. 377. Introduced through (SFS 1995:1667).
[15] Prop. 1997/98:45, part 1, p. 157.
[16] Prop. 1997/98:45, part 1, p. 1. In Swedish: *Naturvårdslagen (1964:822), Miljöskyddslagen (1969:387)* and *Naturresurslagen (1987:12)*.
[17] Prop. 1997/98:45, part 1, pp. 1 and 168-169. These principles will not be further discussed.

3 Relevant Legislation for Permit Procedures

3.1 Objectives of the Environmental Code

The objectives of the Swedish Environmental Code are to promote sustainable development and to provide a good and healthy environment for us and for generations to come. For this purpose we are encouraged to recognise that nature has a value of its own worth protecting and that us humans have a trusteeship to maintain towards the environment, while using our natural surroundings. We must therefore protect and preserve biodiversity and sites with natural and cultural values, protect human health and the environment and ensure the sustainable management of land, water and natural resources.[18] In the preparatory works, nature is explicitly described as having intrinsic values worth protecting, and the importance of nature and natural resources for good living standards and welfare is emphasised.[19]

3.2 Quarry Permits

The obligation for commercial operators to apply to the Lst for a permit[20] to quarry rock, stone, gravel, sand, clay or other types of soil was incorporated into ch. 12 ss. 1-2 of the Environmental Code from the Nature Conservation Act. The authorised Lst or the MMD has to take all environmental effects into account in the assessment[21] which is tried on a case-by-case basis.[22] Provisions regarding quarry permits were transferred to chapter 9 on environmentally hazardous activities, in 2005.[23] Quarries are often permitted upon stipulated conditions and the operator is obliged to provide financial guarantee for the restoration of the zone where the quarrying took place.[24]

[18] Ch. 1 sec. 1 of the Environmental Code (1998:808).
[19] Prop. 1997/98:45, part 2, pp. 7-9.
[20] See ch. 9 sec. 6 para. 1 pt. 1 of the Environmental Code, and sec. 5 of the Decree Concerning Environmentally Hazardous Activities (1998:899) and its annex under point 10.11 and 10.20 for a list of activities. The MDD assesses A-activities, and the Lst assesses B-activities.
[21] Prop. 1997/98:45, part 1, p. 380.
[22] Prop. 2008/09:144, p. 18.
[23] See (SFS 2005:571), and prop. 2004/05:129, p. 10. Ch. 12 sec. 1 regarding permits was incorporated into ch. 9 sec. 6, and ch. 12 sec. 2 was moved to the new ch. 9 sec. 6a para. 1 of the Environmental Code. Quarrying was, of course, considered an environmentally hazardous activity before as well. Compare ch. 9 sec. 1 pt. 2 of the Environmental Code; and see NVV 2003:1, *Prövning av täkter*, p. 12.
[24] Ch. 12 sec. 3 of the Environmental Code.

3.3 General Rules of Consideration

The general rules of consideration were introduced as new features to the Environmental Code to improve the achievement of its objectives and to increase environmental consideration, and were mainly taken from previous legislations and environmental principles[25] as mentioned under chapter 2 of the thesis. These considerations are legally binding provisions[26] and the applicant of a permit has the burden of proof to show that the requirements are met.[27] The rule in regards to the chosen location will be discussed under subchapter 3.4.6 after the assessment of environmental protections. The general rules of consideration should be interpreted in the light of ch. 2 sec. 7 of the Environmental Code, which established the level of reasonable requirements for the activity in question.[28] This is further discussed under subchapter 3.5.3.

The provisions provide for operators, as well as individuals, to acquire sufficient knowledge to assess possible environmental harm of their planned actions. As soon as there is reason to presume that an activity may cause environmental damage, including bad management of natural resources or depletion of natural habitats,[29] necessary precautionary and protective measures of the best available technique should be taken to prevent or reduce the anticipated environmental damage.[30] The requisite of knowledge increases with the scope of the activity,[31] and requires a deeper knowledge of both the activity and its surroundings.[32] If the possible adverse impact cannot be reduced to an acceptable level, the activity should not be permitted.[33]

An Environmental Impact Assessment (EIA)[34] is a prerequisite for quarry applications and enables the court to make an overall assessment, as it *inter alia* shall point out and describe plausible direct or indirect environmental harm that are likely to result from the activity,[35] the sustainable management of land and natural resources as regulated under chapters 3 and 4 of the Environmental Code and an assessment of alternative locations.[36] Since 2001, EIAs should also include information needed for an assessment in relation to a permit to conduct

[25] Prop. 1997/98:45, part 1, p. 169; and prop. 2005/06:182, p. 36.
[26] Nilsson (2010), *Environmental Law*, p. 468.
[27] Ch. 2 sec. 1 of the Environmental Code.
[28] Prop. 1997/98:45, part 1, pp. 206-207.
[29] Ch. 2 sec. 3 of the Environmental Code; and prop. 1997/98:45, part 2, p. 15.
[30] Ch. 2 sec. 3 of the Environmental Code.
[31] Ch. 2 sec. 2 of the Environmental Code; and prop. 1997/98:45, part 2, pp. 13-14.
[32] Prop. 1997/98:45, part 1, p. 212; and ch. 2 sec. 2 of the Environmental Code.
[33] Ch. 2 sec. 2 of the Environmental Code; and prop. 1997/98:45, part 2, pp. 13-14.
[34] Regulated under the EIA Dir. 85/337/EEC and the codified version in Dir. 2011/92/EU.
[35] Caused to flora and fauna, land, water, air, climate, the scenery and cultural environment as listed in ch. 6 sec. 3 of the Environmental Code.
[36] Ch. 6 sec. 1 para. 1 and sec. 3 of the Environmental Code. Also see ch. 6 sec. 7, para 1.

an activity in relation to a Natura 2000 area.[37] According to the preparatory works, activities dependent on special deposits of natural resources may be exempted from the requirement of presenting alternative locations, if such are absent. However, in cases where alternative locations are presumed to exist, the lack or insufficiency of alternative locations in an application may be a ground for rejection.[38] An EIA lacking an assessment of adverse effects on Natura 2000 sites may need to be complemented,[39] or a permit may be rejected[40] as it otherwise contravenes Article 6.3 of the Habitats Directive.[41]

3.4 Land Use and Environmental Protection

The chosen location of an activity is of great importance as it may interfere with environmental protection and the objectives of the Environmental Code. The location will be discussed after the assessment of environmental protection.

3.4.1 Objectives of the EU Directives

The EU has established an important *de minimis* framework[42] on environmental protection through the Habitat and the Bird directives. As the EU law permeates the Swedish legislation, these directives will be briefly described before going into further detail on the environmental protection.

The Habitat Directive 92/43/EEG[43] contributes to sustainable development as it aims to protect, preserve and improve the quality of the environment, including wild flora and fauna and natural habitats. It also promotes the maintenance of biodiversity by considering local characteristics and economic, social, and cultural requirements. It further requires appropriate measures to be taken for this purpose.[44] In addition, appropriate evaluations should be conducted for all

[37] Ch. 6 sec. 7 para. 3 of the Environmental Code, as amended through (SFS 2001:437). In relation to ch. 7 sec. 28b and ch. 7 sec. 29 of the Environmental Code.
[38] Prop. 1997/98:45, part 2, p. 63. Also see MÖD 2002:78.
[39] See MÖD 2004:29 where effects had not been sufficiently assessed in the EIA for a permit under ch. 7 sec. 28b of the Environmental Code; and MÖD 2004:17.
[40] See MÖD 2002:78.
[41] See C-538/09, para. 66; and C-182/10 para. 70.
[42] See Art. 130t of the Single European Act (Art. 193 of the Treaty of the Functioning of the European Union (TFEU)); and Art. 14 of the Dir. 2009/147/EG.
[43] Entered into force on the 10th of June, 1992. See: http://eur-lex.europa.eu/Notice.do?val=186097:cs&lang=sv&list=507103:cs,343601:cs,186097:cs,&pos=3&page=1&nbl=3&pgs=10&hwords=habitat~&checktexte=checkbox&visu=#texte Changed through Dir. 2006/105/EG.
[44] Art. 2 of the Dir. 92/43/EEC. Also see the preamble, and Art. 130r of the Single European Act (Art. 191 of the TFEU).

activities or plans assumed to have significant adverse effects on the objectives of the conservation of designated sites.[45]

The Bird Directive, codified in 2009/147/EG[46], aims to attain sustainable development and to improve the living conditions for wild birds naturally occurring within the EU through preservation, restoration and maintenance of sufficient areas of habitats and the diversity of the birds. Habitats of bird species in need of special protection should be subject to additional conservation measures.[47] Provisions of the directives and related case law are incorporated in the subchapters below.

3.4.2 Protection of Natural Gravel

Since 2009, natural gravel is specially protected under ch. 9 sec. 6b of the Environmental Code in cases where a permit is required under the same chapter due to its limited deposits and its relation to valuable groundwater. The gravel may not be quarried where it is technically possible and economically reasonable to use another material for the intended purpose of use. Neither may a permit be granted if the gravel deposit is part of a valuable natural environment or where the deposit is of importance for future supply of drinking water which is likely to be adversely affected.[48]

3.4.3 Protection of Species

The protection of biodiversity is part of the objective of the Environmental Code,[49] and biodiversity can be protected from harm caused by quarries through the application of protective and precautionary measures under ch. 2 sec. 3. The Decree of the Protection of Species[50] mainly regulates the trade and hunt of certain species of flora and fauna[51] and does not regulate quarrying activities. However, the Decree provides a list of protected species of flora and fauna under

[45] Art. 6.3 of the Dir. 92/43/EEC. Art. 3-11 regulates habitats, and Art. 12-16 regulates species.
[46] Previously Dir. 79/409/EEC and entered into force on the 2nd of April 1979. The codified version entered into force on the 15th February 2010. See <http://eur-lex.europa.eu/Notice.do?val=507103:cs&lang=en&list=646182:cs,507103:cs,504633:cs,496647:cs,484514:cs,473292:cs,438003:cs,420441:cs,343623:cs,260363:cs,&pos=2&page=1&nbl=15&pgs=10&hwords=wild%20birds~&checktexte=checkbox&visu=#texte>
[47] Dir 2009/147/EG, para. 5 and 8 of the preamble. Also see Art. 1. The Directive also regulates the hunting, killing and trading of birds. See Art. 5-9 and para. 9-11 of the preamble.
[48] Implemented through (SFS 2009:649). See prop. 2008/09:144, p. 17; and Ds. 2008:83, pp. 23-24.
[49] Ch. 1 sec. 1 of the Environmental Code.
[50] In Swedish: *Artsförordningen (1998:179).*
[51] See sec. 1 of the Decree of the Protection of Species (1998:179) and its replacement through (SFS 2007:845). For the lists of species, see NFS 1999:7 and NFS 2009:10.

the Habitat and Wild Birds directives.[52] The red-list of protected species may also be taken into consideration in the permitting process,[53] which lists protected species, classified with different grades of protection based on criteria established by the International Union for Conservation of Nature, from near threatened to regionally extinct.[54] The Decree is an important means in order to achieve the objectives of protecting biodiversity and constitutes an important ground in EIAs.[55]

Annexes II and IV (a) - (b) of the Habitat Directive and the Annexes to the Wild Birds Directive also list species of wild flora and fauna, as well as wild birds. For protection, habitats of species listed under Annex II of the Habitat Directive and Annex I of the Wild Birds Directive are required to be specially designated as part of the Natura 2000 network, further discussed below. Annex IV of the Habitat Directive lists species of flora and fauna in need of strict protection[56] and Member States are required to take measures as to prohibit the deliberate killing or disturbance of animal species and the uprooting or destruction of plant species.[57]

3.4.4 Protection of Areas

Out of Sweden's different types of protections of areas, only nature reserves and national parks are mentioned for the purpose of this thesis. If areas under protection are expected to be affected, the decisive body should assess the effects before making a decision.[58]

Areas of land or water can be declared nature reserves by an Lst or a municipality and aim to preserve and protect biodiversity, outdoor recreation, valuable natural environments and habitats for species of flora and fauna worthy of protection.[59] Both the Habitat and the Wild Birds Directive require Member

[52] See NVV 2003:1, *Prövning av täkter*, p. 28.
[53] See M 10582-11, p. 41. Further discussed under subchapter 4.6 of the thesis (Bunge Ducker).
[54] See Swedish University of Agricultural Sciences (SLU): http://www.slu.se/en/collaborative-centres-and-projects/artdatabanken/the-red-list/about-the-red-list/, and http://www.naturvardsverket.se/Start/Naturvard/Biologisk-mangfald/Artskydd/Rodlistade-arter/ (2012-12-09).
[55] See SLU: http://www.slu.se/sv/centrumbildningar-och-projekt/artdatabanken/rodlistan/om-rodlistan1/varfor-rodlistar-vi1/ (2012-12-09).
[56] Species under annex IV of the Dir. 92/43/EEC are regulated under Art. 12-16 of the Habitat Directive.
[57] See Art. 12 and 13 of the Dir. 92/43/EEC.
[58] See NVV 2003:1, *Prövning av täkter*, p. 32.
[59] Ch. 7 sec. 4 of the Environmental Code. Nature reserves in the Environmental Code includes the old designations of natural conservation areas under the Nature Conservation Act (1964:822). See prop. 1997/98:45, part 2, p. 71.

States of the EU to appoint nature reserves.[60] In comparison, national parks aim to preserve a larger coherent area in its natural state or essentially unchanged.[61]

Chapter 4 of the Environmental Code lists geographical areas of national interest in their entirety, due to their natural and cultural values.[62] Exploiting activities may only be permitted according to ch. 4 sec. 1 if they do not interfere with the provisions and do not cause evident harm to the protected values in their entirety in the area.[63] Under special circumstances, the quarrying of material of national interest may be permitted although evident harm is likely to be caused.[64] According to ch. 4 sec. 2, outdoor recreation and tourism should be given special consideration in assessments of environmental exploiting activities. According to Professor Nilsson, the provisions in this chapter should be seen as guidelines for authorities rather than as legally binding rules.[65] This standing point is supported by MMÖD which has claimed that the mere listing under chapter 4 is not legally binding, and that it is for the assessing authority to decide whether the area is of a national interest in the meaning of chapter 3 of the Environmental Code or not.[66] The assessment of national interests in conflict is further discussed under subchapter 3.5.1 of the thesis.

Forests and wetlands are environments of great importance for biodiversity as they host valuable species of flora and fauna as well as a range of important habitats. According to Article 4.2 of the Wild Birds Directive, particular attention should be given to wetland protection. The preservation of Swedish wetlands is of international interest[67] as wetlands around the globe are decreasing.[68] According to the preparatory works on sustainable environmental protection, it is important to regulate some activities conducted outside protected areas. Watercourses are often sensitive and external influences may lead to destroyed habitats and ecosystem services.[69]

3.4.5 Natura 2000

A coherent ecological *Natura 2000* network within the European Union is created through Member States' designations of *Special Areas of Conservation*

[60] Prop. 1997/98:45, part 2, p. 72.
[61] Ch. 7 sec. 2 of the Environmental Code.
[62] Equivalent to chapter 3 of the Natural Resources Act (1987:12).
[63] Also see prop. 1997/98:45, part 2, p. 35.
[64] Ch. 4 sec. 1, para 2 of the Environmental Code.
[65] See Nilsson (2010), p. 473.
[66] MÖD 2007:54.
[67] In 2009, Sweden had 51 appointed areas under the Ramsar Convention. See prop. 2008/09:214, p. 54.
[68] Prop. 2008/09:214, pp. 40 and 54.
[69] Prop. 2008/09:214, p. 45.

(SAC) and *Special Protected Areas* (SPA).[70] SACs are areas of community importance due to their significant contribution to the conservation of natural habitats and species listed in Annex I and II of the Habitat Directive,[71] and SPAs are habitats of birds at risk of extinction, birds vulnerable to specific changes in their habitat, bird species of small populations or those in need of species protection as listed in Annex I of the Wild Birds Directive.[72] National authorities shall observe the preservation or restoration of favourable statuses of biodiversity and of protected species and habitats in areas designated by the Swedish government as Natura 2000 sites,[73] with particular regard given to prioritised species.[74] This is encouraged to be upheld even outside these areas in cases where activities are expected to affect within.[75]

According to Article 6.3 of the Habitat Directive, competent authorities may only permit projects with no direct connection to the management of the site, after having assured that it will not impose adverse effects on the integrity of the site, individually or in conjunction with other projects. If appropriate, the authority should obtain the general public opinion prior to granting a project.[76] In C-127/02, the CJEU explained that activities applicable to Article 6.3[77] should undergo an objective assessment to establish whether or not they are likely to significantly affect a protected habitat or species, in the light of the objectives of the Directive. In such an assessment there cannot be any reasonable scientific doubts that the activity induces significant adverse effects to the area. In cases where the objectives of the Directive are likely to be undermined, significant affects are at stake. In the assessments, regards should be given to the precautionary principle.[78]

In line with Article 6.3 of the Habitat Directive, ch. 7 sec. 28a of the Environmental Code was introduced in 2001. It requires operators to obtain a

[70] Art. 3.1-3.2 of the Dir. 92/43/EEC, and Art. 4.1, third subparagraph, and Art. 4.1(a-d) of the Dir. 2009/147/EG (79/104/EEC). Compare with ch. 7 sec. 27 of the Environmental Code. Art. 3-11 of the Dir. 92/43/EEC are applicable to the Natura 2000 network. In Swedish: *Särskilt bevarandeområde*and *särskilt skyddsområde.*
[71] Dir 92/43/EEC, Art. 1(k) and 1(l).
[72] Dir 2009/147/EG, Art. 4.1, third subpara., and Art. 4.1(a-d).
[73] See ch. 7 sec. 27 para 1(1-2) and 28 para 1-2 of the Environmental Code; and ss. 15 and 16 para 1 of the Decree of Protections of Areas (1998:1252) (In Swedish: *Förordningen om områdesskydd enligt Miljöbalken m.m.*); Also see Art. 3.1-3.2 and the Annexes of the Dir. 92/43/EEC.
[74] Art. 11 of the Dir. 92/43/EEC. Also see Art. 1(d) and (h) of the Dir. 92/43/EEC, and species marked with an asterix in the annexes.
[75] Art. 4.4 of the Dir. 2009/147/EG; and Art. 6.3 of Dir. 92/43/EEC. See Jans & Vedder (2012), *European Environmental Law*, p.515.
[76] Also see C-127/02 para. 29 and C-117/03, para 3. According to Art. 7 of the Dir. 92/43/EEC. Art. 6.2-6.4 of the same Directive replaces Art. 4.1-2 of the Dir. 2009/147/EG.
[77] Which should not be applied in conjunction with art. 6.2 as it is of general character (C-127/02, para. 38).
[78] C-127/02, para. 45, 48, and para. 61. Also see C-6/04, para. 54.

permit to conduct activities in areas where the environment of an area listed[79] as a Natura 2000 site is assumed to be evidently affected.[80] The provision applies to both direct and indirect effects[81] and does not take into account whether the species is vigorous in other parts of the country.[82] Permits under ch. 7 sec. 28a should be assessed by the Lst or the authorised body[83] and shall not be issued unless it is *ascertained* that it will not harm or disturb what the sites aim to protect.[84] For this purpose, ch. 4 sec. 8 of the Environmental Code was introduced to clarify the requirement to obtain this permit.[85] According to Jan Darpö, this indicates that a Natura 2000 permit is needed before other permits under the Environmental Code can be granted.[86] It also means that chapter 4 may preclude a quarry from taking place if it cannot be permitted in relation to an affected Natura 2000 area.[87] Exemptions from these rules require governmental approval.[88]

In MÖD 2003:100, a permit was required for the relocation of groundwater, as the activity with its typical effects, without consideration of protective measures, was likely to evidently affect a Natura 2000 site. For a permit to be granted in accordance with ch. 7 sec. 28b of the Environmental Code, the actual expected effects, with protective measures, had to be taken into consideration. In MÖD 2004:68 the MMÖD granted a permit for a water activity to take place within a Natura 2000 site after conducting a general assessment of the activity with all protective measures taken into consideration, as the area as a whole was not assumed to be significantly harmed or disturbed.[89] In relation to Article 6.3-4 of the Habitat Directive and Article 4 of the Wild Birds Directive, the CJEU found Austria guilty of failing to fulfil their obligations after a national authority authorised an extension of a golf course despite the assessment indicated a negative impact on the habitat of the protected corncrake in an SPA.[90]

[79] The listing is conducted by the SEPA according to sec. 15 of the Decree on Protections of Areas (1998:1252) as regulated under ch. 7 sec. 27 of the Environmental Code (1998:808). Also see prop. 2000/01:111, p. 1.
[80] Introduced through (SFS 2001:437) and entered into force on 1 July 2001.
[81] Also see NVV 2003:9, *Natura 2000 i Sverige*, p. 42. It is the effect that matters.
[82] Prop. 2000/01:111, p. 40; also see Darpö (2007/08), *Natura 2000 I Sverige, Del I: Om rättstillämpningen I miljödomstolarna*, p. 8.
[83] Ch. 7 sec. 29b para. 2 of the Environmental Code as amended through (SFS 2001:437).
[84] Ch. 7 sec. 28b of the Environmental Code as amended through (SFS 2001:437).
[85] Introduced through (SFS 2001:437).
[86] Darpö, (2007/08), p. 8.
[87] NVV 2003:1, *Prövning av täkter*, p. 30.
[88] See ch. 7 sec. 29 of the Environmental Code; and Art. 6.4 of the Habitat Directive. These provisions are not relevant for the purpose of the investigation.
[89] Also see M 350-09, p. 14.
[90] C-209/02, para. 1.

3.4.6 Location

As required by ch. 2 sec. 6 of the Environmental Code, incorporated from previous legislation,[91] the location chosen for an activity is suitable where the purpose of the activity can be achieved with a minimum damage or detriment to the nature.[92] It should be assessed in the light of the objective of the Environmental Code and of applicable provisions under chapters 3 and 4 of the Code.[93] The EIA plays an important role as[94] alternative locations always should be assessed.[95] The MMÖD has clarified that the investigation of alternative locations conducted by the applicant may not be out-dated regarding where circumstances have changed,[96] and insufficient investigations may be a ground for rejecting a permit.[97] The provision has been claimed not to require a thorough investigation of all of Sweden in order to find the best possible location,[98] but in cases where the location is seriously questioned, more stringent requirements apply.[99]

According to the preparatory works, the government decided not to exempt quarries bound to a specific location due to a deposit of a particular material from the requirement of investigating alternative locations. The lack of alternative locations in these cases should, however, be taken into consideration in the assessment.[100] The MMÖD has in later case law held that the requirement of alternative locations to be an unreasonable demand, in relation to already existing establishments, and where the activity is dependent on a natural resource.[101]

The assessment of location may be influenced by ch. 2 sec. 3 of the Environmental Code regarding applicable protective and precautionary measures, and by the balancing of reasonability under ch. 2 sec. 7, further discussed under subchapter 3.5.3, as the provision of location is part of the general rules of consideration.[102]

[91] See sec. 4 of the Environmental Protection Act (1969:387).
[92] Ch. 2 sec. 6 of the Environmental Code as amended through (SFS 2006:1014) (initially ch. 2 sec. 4 of the Environmental Code (SFS 1998:808).
[93] Ch. 2 sec. 6 para 1 and 2 of the Environmental Code. Also see NVV 2003:1, *Prövning av täkter*, p. 9.
[94] Prop. 1997/98:45, part 1, p. 220.
[95] Prop. 1997/98:45, part 2, p. 20.
[96] MÖD 2008:44. Regarding a power plant.
[97] MÖD 2004:29. Regarding a marina in a Natura 2000 area.
[98] MÖD 2000:24. Regarding a quarry. (Bockara – discussed under subchapter 4.1).
[99] MÖD 2001:38. Regarding a wind turbine. Also see MÖD 2002:7 and MÖD 2009:48.
[100] Prop. 1997/98:45, part 1, p. 219.
[101] MÖD 2003:95. (Regarding a propellant production); and MÖD 2008:24 (Regarding a mine).
[102] Prop. 1997/98:45, part 2, p. 20.

3.5 Assessments of Conflicting Interests

As will be seen, the permit procedure is not straightforward. The Environmental Code does not provide a clear answer, but rather rules requiring the courts to carefully weigh conflicting interests.[103]

3.5.1 The Balances in Relation to the Management of Land

In the following discussion, the term *as far as possible* is aimed to take practical and economic consequences, such as public economy, employment and effects for concerned individuals, into consideration in the balancing of conflicting interests.[104] *Evident harm*[105] aims at permanent adverse impact, or temporary effects of significant impact, and excludes harm of trifling character.[106] It is for the decisive bodies to assess what constitutes evident harm in the individual cases. In MÖD 2007:54, the MMÖD considered evident harm to be at stake where a power plant was likely to cause adverse genetic changes to a fish population, with the long-term consequence of adversely affecting the biodiversity in the area protected under ch. 4 sec. 2 of the Environmental Code and rejected the permit.[107]

Quarry permits may be granted or rejected based on the balancing rules under chapter 3 of the Environmental Code.[108] This chapter is to be applied in conjunction with the provision of location under ch. 2 sec. 6, but if a quarry is not in line with the provisions under chapter 3, the permit should be rejected on this ground and alternative locations under ch. 2 sec. 6 need not be assessed.[109] The provisions aim to encourage good decisions through thorough assessment of alternative land use at stake with regards to the nature of the area and existing needs of the material. In cases of conflict, ch. 3 sec. 1 states that the use which better promotes good management from a public-interest perspective should be prioritised[110] over other types of land use. For the purpose of the assessment, ecological, social and public economic interests should be weighed and

[103] Ch. 2 sec. 9 and ch. 9 sec. 10 are delimited form the thesis.
[104] Prop. 1997/98:45, part 2, p. 30. See reference from p. 31 (ch. 3 sec. 3), 33 (ch. 3 ss. 6 and 7 of the Environmental Code).
[105] In Swedish: *påtaglig skada/påverkan.*
[106] Prop. 1997/98:45, part 2, p. 30. See reference from p. 33 (ch. 3 ss. 6 and 7), p. 36 (ch. 4 sec. 1 of the Environmental Code). Also see Prop. 1985/86:3, pp. 155 and 171.
[107] MÖD 2007:54.
[108] Equivalent to ch. 2 of the Natural Resources Act (1987:12). See ch. 2 sec. 6 para. 2 of the Environmental Code. Also see prop. 1997/98:45, part 1, p. 239.
[109] See ch. 2 sec. 6 para. 2 of the Environmental Code; and Rubenson (2008), *Miljöbalken, den nya miljörätten*, pp. 42 and 51.
[110] Prop. 1997/98:45, part 2, pp. 28-29; and Ds. 2008:83, p. 21.

considered.[111] The provision aims to prevent economic benefits of short-term character from overweighing long-term environmental interests.[112]

Large areas which have not been subject to exploitation should be protected as far as possible from intrusion of establishments that may evidently influence the characteristics of the area worth protecting.[113] Areas with sensitive ecology should be protected as far as possible from natural environmental harm. These may be areas with flora and fauna under threat of extinction or areas with special ecological values in order to protect biodiversity.[114]

Ch. 3 sec. 6 para. 1 of the Environmental Code states that areas of general interest, due to its natural or its cultural[115] values or to its valuable outdoor recreation environment, should be protected as far as possible from evident harm being caused, with effects that cannot be replaced once damaged. Unlike ch. 4 sec. 1, ch. 3 sec. 6 intends to take the effects on natural values in the *nearest surroundings* into consideration, hence not in the area as a whole.[116] The preparatory works exemplify the interests for nature conservation with rare flora, rich birdlife, or a combination of valuable factors important for us in order to understand nature. The natural values are often the same for the interests of natural, cultural and recreational values.[117]

On the other hand, the exploitation of natural resources valuable from a public economic perspective, should, for the purpose of future exploitation, be protected as far as possible from measures that may evidently obstruct the extraction of the material according to ch. 3 sec. 7 para. 1 of the Environmental Code. The SGU (Sveriges geologiska undersökning) were given the responsibility to assess and suggest valuable material for this purpose.[118]

If areas under ch. 3 sec. 6 para. 1, at risk of evident harm, or materials under ch. 3 sec. 7 para. 1 of which exploitation is at risk of being evidently obstructed, are of national interest, they *shall* be protected as opposed to the balancing that should be done in the first paragraph of each of those sections.[119]

In relation to a national interest of outdoor life, the preparatory works hold that the accessibility for the public is of special importance. These may be untouched

[111] Prop. 1997/98:45, part 1, p. 169.
[112] Ds. 2008:83, p. 21.
[113] Ch. 3 sec. 2 of the Environmental Code; and prop. 1997/98:45, part 2, p. 30.
[114] Ch. 3 sec. 3 of the Environmental Code; and prop. 1997/98:45, part 2, pp. 30-31.
[115] Values of importance for historical research or for sightseeing. See SOU 2009:45, p. 94.
[116] Prop. 1985/86:3, p. 171.
[117] Ch. 3 sec. 6 of the Environmental Code; and prop. 1997/98:45, part 2, p. 32.
[118] Also see prop. 1985/86:3, pp. 165-166; and prop. 1997/98:45, part 2, p. 33.
[119] Ch. 3 sec. 6 para. 2 and ch. 3 sec. 7 para. 2 of the Environmental Code. Also see NVV 2003:1, *Prövning av täkter*, p. 29; and Michanek, Karnov 2011/12 (2), *Comment to the Environmental Code*, p. 2599, note 111.

areas with a unique, sensitive or threatened flora, fauna or habitats, different biotopes or with the existence of biodiversity that may constitute a national interest for nature conservation.[120] In relation to materials, natural resources important for future supplies may be of national interest. [121]

In cases where *conflicting national interests* under ch. 3 sec. 6 para. 2 and ch. 3 sec. 7 para. 2 of the Environmental Code are at stake, they should be balanced under ch. 3 sec. 10. This provision is thereby only applicable in cases where effects of an activity are assumed to reach the threshold of evident harm.[122] According to the provision, the interest that is most likely to promote a long-term, sustainable management of the land, water or the environment in general, with regards to cultural, social, ecologic and public economic considerations, shall prevail. Such a decision may not contravene rules in chapter 4, or any international commitments of Sweden.[123] Based on ch. 3 sec. 10 of the Environmental Code, MMÖD permitted a prospecting for limestone of high quality as the activity was not assumed to impose evident harm on the valuable and sensitive area.[124] In another case, wind turbines were permitted to be established as the impact on the reindeer industry was assumed to be limited and the area was considered a good location for the purpose.[125]

3.5.2 The Balance of Needs and Damages

The rule on the balancing of needs and damages was incorporated from sec. 18 of the Nature Conservation Act to ch. 12 sec. 2 of the Environmental Code[126] and was to be applied in the light of the assessments under chapters 2, 3 and 4 of the Environmental Code.[127] This balancing rule meant that the body authorised to grant or review a permit should balance the need of a specific resource with the harm that the activity was likely to cause to flora, fauna or to the environment in general. If effects on habitats of any rare or endangered species were likely to be detrimental, a permit should not be granted.[128] According to MMÖD, it was not enough that a species found in the area were listed under the EU directives if the species was vigorous in its entirety in the area.[129] According to the preparatory works, the requirement of the need of the material gradually

[120] Ch. 3 sec. 6 para. 2 of the Environmental Code; and prop. 1997/98:45, part 2, p. 33.
[121] Prop. 1997/98:45, part 2, p. 33.
[122] See M 1644-06, p. 12. Also see MÖD 2006:49 where ch. 3 sec. 10 was not applicable as the quarry was not assumed to cause evident harm to the area of national interest.
[123] Ch. 3 sec. 10 of the Environmental Code; and Prop. 1997/98:45, part 2, p. 35.
[124] MÖD 2006:48.
[125] MÖD 2010:38.
[126] Prop. 1997/98:45, part 1, p. 379, and part 2, p. 146. Under the Nature Conservation Act and the Environmental Protection Act which required a double test.
[127] Rubenson (2008), p.102.
[128] Ch. 12 sec. 2, para 1 of the Environmental Code.
[129] See case MÖD 2008:37.

increased with the value of the environmental interest at stake.[130] Provisions under ch. 3 and 4 were held to be important where regards should be given to geological formations and assessments should be of general and deep character. The assessment was argued to be important as the material could be better used for other purposes.[131] The rule has been used as a ground for rejecting a quarry permit in cases where the need of the material has not been assessed thoroughly enough to show that is has overweighed the environmental interest.[132]

The balancing rule was transferred to ch. 9 sec. 6a para. 1 in August 2005,[133] and was abolished in 2009.[134] The government considered the rule to be too imprecise in terms of what should fall on the scales of the need, as well as in terms of what species of flora and fauna that triggered the application of ch. 9 sec. 6a, para. 1. It was also argued to be a double test in comparison to ch. 1 sec. 1 and ch. 2 sec. 3 of the Environmental Code.[135] Other regulations on quarries remained as the government considered non-renewable and limited resources as being in need of protection.[136] In a report from 2003, the Committee of the Environmental Code claimed that the preservation of biodiversity was given unreasonable weight, and it was argued that the application of chapters 2, 3 and 4 of the Environmental Code could reach the same result as the balancing rule.[137]

3.5.3 The Balance of Reasonability

Ch. 2 sec. 7 of the Environmental Code limits the requirements under the general rules of consideration in ch. 2 ss. 2-5 and sec. 6, para. 1, to the extent that they are not unreasonable to achieve. For this purpose, the balancing of benefits and the cost of precautionary or protective measures should be given special consideration.[138] The assessment should be based on the risk of harm and the impact on the environment or human health.[139] Applicable Environmental Quality Standards established by the government should be used as guidance on how to value protective measures.[140] The applicant has the burden of proof to show that certain measures are neither environmentally motivated nor economically reasonable for the requirements to be adjusted.[141]

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[130] Prop. 1981/82:220, p. 12.
[131] Prop. 1997/98:45, part 2, p. 147. Compare ch. 3 sec. 1 of the Environmental Code.
[132] See MÖD 2006:29; M 2444/07; and MÖD 2006:40. All cases related to groundwater issues.
[133] Ch. 9 sec. 6a of the Environmental Code as amended through (SFS 2005:571).
[134] See ch. 9 sec. 6a of the Environmental Code as amended through (SFS 2009:649).
[135] Prop. 2008/09:144, p. 15. Also see Ds. 2008:83, p. 22.
[136] Prop. 2008/09:144, p. 7.
[137] SOU 2003:124, pp. 207 and 210.
[138] Ch. 2 sec. 7 of the Environmental Code.
[139] Prop. 1997/98:45, part 2, pp. 24-25.
[140] Ch. 2 sec. 7, para. 2 of the Environmental Code.
[141] Prop. 1997/98:45, part 2, pp. 24-25.

4 Relevant Decisions by the Land and Environmental Court of Appeal

The cases are presented in chronological order, except for the two Bunge Ducker cases being presented together. The presentation begins with a short introduction to the case, followed by an outline of the interests at stake. These interests are mainly put forward by parties with environmental interests. As the information is related to the area in question, facts from the case derive from both the MMD and the MMÖD assessments. This presentation is followed by the assessment by the MMÖD. The MMD assessment is presented to shed a light on a different interpretation in cases where it has come to a different outcome than the MMÖD. Every decision is summarised with a comment. All decisions by the MMÖD were unanimous.

4.1 MÖD 2000:24: *Bockara*

Tecomatic AB (Tecomatic) applied for a permit to extract 100,000 tonnes of porphyry rock per year at Bockara 6:3 with the Municipality of Oskarshamn, the Lst and ten concerned parties as opponents. The Municipality and the neighbours claimed for the permit to be rejected.[142] The Lst was in favour of a permit and had, as the first instance, permitted Tecomatic to extract 250,000 tonnes of rock per year.[143] The MMD rejected such permit[144] and the MMÖD affirmed the Lst decision and granted a permit with minor amendments.[145] According to sec. 6 of the Act on the Implementation of the Environmental Code,[146] the case should be tried according to the Environmental Protection Act, which in turn refers to the Natural Resources Act.[147]

[142] M 3864-99, pp. 1 and 4.
[143] M 384-99, p. 1. In Decision 241-1387-97 by the Lst in the County of Kalmar, 1998-06-11.
[144] M 384-99, p. 10. The Växjö District Court, 1999-04-27.
[145] M 3864-99, p. 7. The Svea Court of Appeal, 2000-06-07.
[146] In Swedish: *Lag om införande av Miljöbalken (1998:811).*
[147] M 384-99, p. 9.

4.1.1 Quarrying Interests

The rock material was argued to be needed for road construction,[148] and without a permit, the environmental impact could be worse as the material would have to be transported a longer distance. The Lst held that the material at the site was of rare quality, and were oblivious of other equivalent deposits in Sweden. Material of lower quality would limit its use.[149]

4.1.2 Environmental Interests

Two nearby mountains, *Örnberget* and *Farhågsberget*, were argued by concerned parties to be of great environmental value. *Örnberget* contained habitats important for biodiversity and was valuable for outdoor recreation. *Farhågsberget* had unique rock formations and was part of a nature reserve with the objective to protect the natural pine forest with habituating flora and fauna, to protect deciduous forest and pastureland, and to supply untouched nature for the purpose of enjoying outdoor recreation and scientific research. They further held that the Forestry Board[150] encouraged land owners to leave the area untouched and to avoid using their land for forestry as the area contained great natural values. Concern was also raised in regard to traffic disturbances and increased nuisance in adjoining urban areas.[151]

The Lst referred to a geological inventory conducted by the SGU and held that *Örnberget* was not protected. As the porphyry deposit was located on a hilltop, the groundwater was unlikely to be effected and other protectable natural values were located a safe 1.5 kilometres away. The Lst further disagreed with the flat rock being unique as the quarry zone comprised 12 ha out of 8,000 ha flat rock.[152]

The SEPA refrained from giving their expert opinion in the case.[153]

4.1.3 Findings by the MMD

The MMD considered Tecomatic's investigation of alternative locations to be insufficient as the material was aimed to supply a number of cities in Sweden, which increased the scope of the requirement to include a larger region. The zone's closeness to the nature reserve was considered by the MMD to be a

[148] M 3864-99, p. 5.
[149] M 384-99, p. 8.
[150] In Swedish: *Skogsvårdsstyrelsen.*
[151] M 384-99, pp. 2-4, and M 3864-99, p. 6.
[152] M 384-99, p. 5.
[153] M 384-99, p. 9.

problem as nuisance from the quarry was assumed to interfere with the objective of the nature reserve. The MMD was convinced that another location could be found without an unreasonable cost increase and rejected the permit with support of provisions equivalent[154] to ch. 2 sec. 6, in the light of ch. 2 sec. 7, and ch. 3 sec. 6 of the Environmental Code. [155]

4.1.4 Findings by the MMÖD

According to the MMÖD, the investigation showed a market demand of the rock of that particular quality. In regard to the investigation of alternative locations, the MMÖD stated that the requirement did not imply that the operator must find the best possible location in all of Sweden.[156] The chosen location appeared to be the most suitable one, compared to presented alternatives, and was convenient as the material easily could be distributed to Malmoe, Gothenburg, Stockholm and Norrköping from the nearby shipping port in Oskarshamn.[157]

In the assessment of interests other than of the quarry, the MMÖD concluded that environmental encroachment was inevitable and that the environmental harm was not assumed to be worse in comparison to other sites with equivalent operations. Nuisance could affect the nature reserve, but it was not assumed to be of such an extent that it would infringe the objective of the nature reserve. A concerned party agreed on more rigid conditions for the activity, in addition to noise barriers being established. As nothing appeared to prevent an establishment of a quarry, the MMÖD were satisfied to grant a permit with support of rules equivalent to ch. 2 sec. 6 and probably ch. 3 sec. 1 of the Environmental Code.[158]

4.1.5 Comment

The site was located near a nature reserve, but apart from the inevitable environmental encroachment that a quarry causes, it was only assumed to disturb the area with nuisance according to both the MMD and the MMÖD. It was only neighbours as opposing parties that put forward environmental values in the area, and even the SEPA refrained from providing an expert opinion. The MMD claimed the investigation of alternative locations to be insufficient and was convinced that a more suitable location could be found. The MMÖD on the

[154] Sec. 4 of the Environmental Protection Act, and ch. 2 sec. 6 of the Natural Resource Act.
[155] M 384-99, pp. 9-10.
[156] The same argument as presented under locations in subchapter 3.4.6.
[157] M 3864-99, pp. 4-5.
[158] M 3864-99, pp. 5-7. See sec. 4 of the Environmental Protection Act; and ch. 2 sec. 1 of the Natural Resource Act.

other hand were satisfied with the location and the concern in relation to nuisance was assumed to be solved through countermeasures.

4.2 MÖD 2006:49: *Önneslöv*

AB Sydsten (Sydsten) appealed the MMD decision and claimed to obtain a permit to quarry rock for part 2 of the zone at Önneslöv 38:3, 42:1 and 44:1, with the Lst as the opponent. The Lst[159] and the MMD[160] had only granted a permit for part 1 as a quarry in part 2 of the zone could harm important living conditions for rare or protected species of flora and fauna. The MMÖD extended the permit to include part 2.[161]

4.2.1 Quarrying Interests

The area was of national interest for material supplies according to SGU, and according to the municipal comprehensive plan over the area was suitable for quarries. Sydsten claimed the market demand to be apparent as they had to turn down orders due to a lack of material, and another quarry nearby had recently been permitted.[162]

4.2.2 Environmental Interests

The area was of national interest for nature conservation and for outdoor recreation,[163] and adjoined a Natura 2000 site.[164] The zone comprised 0.8 per cent of the area of national interest for nature conservation, and 0.05 per cent of the total area of national interest. Rare and red-listed species of butterflies were found in the area, including the *maculinea arion*[165] which depends on the *thymus serpyllum*[166] and is only found in a few areas of Scania and Sweden. For the purpose of saving their natural habitats, Sydsten committed to restore nearby land as compensation.[167] The area of Högebjär was important for butterflies and vascular plants among other species. In part 2 of the zone, 22 species of

[159] See Decision 541-57733-02 by the Lst in the County of Skåne, 2004-09-09.
[160] See M 4151-04, the Växjö District Court, 2005-12-23.
[161] M 4151-04, p. 11; and M 456-06, p. 1, Svea Court of Appeal, Stockholm, 2006-10-04.
[162] M 456-06, p. 2. Sydsten. Also see p. 6. The MMÖD.
[163] M 456-06, p. 2. Sydsten.
[164] M 456-06, p. 4. The Municipal Environmental Committee of Lund.
[165] In Swedish: *svartfläckig blåvinge*.
[166] In Swedish: *backtimjan*.
[167] M 456-06, p. 5. The SEPA. Also see p. 2. Sydsten.

butterflies could be found whereof five were red-listed.[168] The SEPA argued the whole area of part 2 of the zone was important to be preserved as it hosted many important natural habitats, and a quarry would put those in danger of deterioration.[169] The lake and the landscape of Romelåsen were protected under ch. 4 sec. 2 of the Environmental Code.[170]

4.2.3 Findings by the MMD

The interest for the natural conservation with rare and red-listed butterflies and the interest for outdoor recreation were confirmed to be protected under ch. 3 sec. 6, and the national interest for material supplies under ch. 3 sec. 7 of the Environmental Code. With the application of ch. 3 sec. 10 of the Environmental Code, the MMD assessed that the interest for nature conservation prevailed as a quarry significantly could limit the biodiversity in the area, and a permit for part 2 of the zone was rejected.[171]

4.2.4 Findings by the MMÖD

As it was a question of conflicting national interests, the MMÖD held that ch. 3 sec. 10 of the Environmental Code could be applied. With regards to the existing quarry, a permit for part 2 of the zone was not assumed to impose evident harm on the area, although it was inevitable that the protected common land would be lost. As Sydsten committed to restore and preserve values in other surrounding areas to retain the character of the common land, the protected land would increase and the quarry was not assumed to cause evident harm to the interests for nature conservation or for outdoor recreation. The protection under ch. 4 sec. 1 of the Environmental Code was therefore not a hinder. As evident harm was not assumed to occur, ch. 3 sec. 6 and ch. 3 sec. 10 of the Environmental Code were not applicable and the exploitation should not be hindered according to ch. 3 sec. 7. The MMÖD confirmed that there appeared to be a need of the material, and the quarry was not likely to worsen any living conditions for species of flora or fauna. Ch. 9 sec. 6a of the Environmental Code did therefore not prevent a permit and one was granted under the condition that the area was compensated accordingly.[172]

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[168] *Maculinea arion; Argynnis niobe;adscita statices; zygaena lonicerae and hesperia comma catena (1933).* In Swedish: *svartfläckig blåvinge, bastardpäremorfjäril, allmän metallvingesvärmare, bredbrämad bastardsvärmare,* and *allmän ängssmygare.*
[169] M 456-06, p. 5. The SEPA.
[170] M 456-06, p. 6. The MMÖD.
[171] M 4151-04, pp. 3, and 12-13.
[172] M 456-06, pp. 6-7. The MMÖD.

4.2.5 Comment

The area hosted protected and red-listed species, mainly rare butterflies and their natural habitats, and the area of national interest for both nature conservation and outdoor recreation, and the gneiss deposit was of national interest for material supplies. The MMD rejected the permit for part 2 as the interest of the material weighed heavier in the assessment of ch. 3 sec. 10. On the contrary, the MMÖD assumed a quarry in part 2 of the zone would not evidently harm the natural interest, and the balancing rule under ch. 3 sec. 10 of the Environmental Code was therefore not applicable. The need of the quarry appeared to overweigh the interest of preserving the natural environment as it was not assumed to impair any living conditions for protected species of flora or fauna. A permit for part 2 could therefore be granted with support of ch. 9 sec. 6a of the Environmental Code.

There were conflicting national interests at stake and protected butterflies in the area, but no nature reserves or Natura 2000 sites adjoined the zone, and the municipal comprehensive plan supported quarries in the area. Without further explanation, the MMÖD assumed that the quarry would not evidently harm the area of national interest for nature conservation.

4.3 MÖD M 236/07: Tännäs and Funäsdalen

Swerock AB (Swerock) applied for a permit to extract 300,000 tonnes of diabase[173] in Tännäs 19:3 and Funäsdalen 6:4, with the Lst and a neighbour as opponents.[174] The Lst granted the quarry a permit to operate.[175] The MMD rejected the permit,[176] and the MMÖD upheld the judgment of the MMD.[177]

4.3.1 Quarrying Interests

According to Swerock, there was a market demand of high quality diabase to be used for the production of different ballasts. Diabase of a satisfying quality was found in the zone but not at the other prospected sites.[178]

[173] M 1374-06, p. 3.
[174] M 236-07, p. 2.
[175] Decision 551-7629-05 by the Lst in the County of Jämtland, 2006-07-03.
[176] M 1374-06, p. 1. The Östersund District Court, 2006-12-06.
[177] M 236-07, p. 1. The Svea Court of Appeal, Stockholm, 2007-11-09.
[178] M 236-07, p. 3.

4.3.2 Environmental Interests

The area was protected under ch. 4 sec. 2 of the Environmental Code and thereby of national interest in its entirety.[179]In addition, eagle owls[180] were known to mate 500 metres away from the quarry.[181] New establishments of mines were expressed to be avoided in the Tännäs municipal comprehensive plan as they were assumed to disturb their valuable tourism and outdoor recreation, as well as the scenery and nature conservation. According to an inventory conducted by the Lst, the area was sensitive to environmental encroachments and due to its nutritious bedrock, location, and its environmental conditions suitable for botanical flora and outdoor recreation, the mountain should be protected.[182] Concern was also raised regarding the scenery, as the quarry would be well exposed from a popular fishing site, as well as regarding disturbance through nuisance.[183]

4.3.3 Findings by the MMÖD

The MMÖD confirmed that the area was of national interest for tourism and outdoor recreation. With regards to the municipal comprehensive plan, and the adverse impact on the national and regional interests, Swerock's investigations of both the need and location were considered to be insufficient. MMÖD simply stated that Swerock had failed to show that the location was suitable for quarrying where the purpose of the activity could be achieved with a minimum damage and detriment to the nature and that the need of the material overweighed plausible environmental harm. With support of ch. 2 sec. 6 and ch. 9 sec. 6a, the MMÖD rejected the claim of a permit and upheld the judgment by the MMD.[184]

4.3.4 Comment

The area was of national interest for outdoor recreation and tourism and the material was of high quality as demanded by the market. However, the MMÖD rejected a permit due to Swerock's insufficient investigation of both the need and location. As this was insufficient, the MMÖD rejected the permit with support of ch. 2 sec. 6 and ch. 9 sec. 6a of the Environmental Code.

[179] M 236-07, p. 4.
[180] In Swedish: *berguv*.
[181] M 236-07, p. 3.
[182] M 236-07, p. 4. Put forward by the Municipality of Härjedalen.
[183] M 236-07, pp. 3-4.
[184] M 236-07, pp. 5.

4.4 MÖD 2009:18: *Byrsta*

Stockholms Åkeri AB (Stockholms Åkeri) claimed to obtain a permit to continue to quarry 900,000 tonnes gravel during 10 years from an old quarry at Byrsta 8:1 before finalising the project with appropriate restoration. The Lst granted a permit in 2005,[185] but 34 concerned parties, the Naturskyddsföreningen and the Municipal of Botkyrka appealed the decision to the MMD[186] which permitted the quarry with minor amendments.[187] The Municipality of Botkyrka, the NSF and 15 concerned parties appealed and claimed the MMD decision to be reversed, but the MMÖD granted a permit in line with Lst's decision, with minor amendments.[188]

4.4.1 Quarrying Interests

The material was claimed to be good to use for the production of concrete but also needed for a range of products that could not be substituted with crushed rock. A new quarry was argued to be needed in the area, as several concrete stations were located nearby and other quarry permits expired in 2014. Without a permit, gravel would need to be transported further distances.[189]

4.4.2 Environmental Interests

The area was of national interest for nature conservation due to valuable flora and fauna, as well as being within the area of the planned nature reserve of *Kagghamra Creek.* New establishments of quarries were to be avoided according to the municipal comprehensive plan.[190] The old quarry was never finalised and had turned into a habitat for two rarely found bees[191] that are important for certain flora, amongst other red-listed species.[192] The bees live in areas where Harebell is found[193] and had only been found in one other location in the County during the past 25 years, and were assumed to have vanished completely from other locations in Sweden.[194] The activity was feared to have an

[185] M 1739-07, pp. 7-8. In Decision 5411-2004-93, by the Lst in the County of Stockholm, 2005-11-28.
[186] M 1739-07, pp. 1-6. The Nacka District Court, 2008-02-06.
[187] M 1739-07, p. 27.
[188] M 1966-08, pp. 1-2. The Svea Court of Appeal, Stockholm, 2009-06-17.
[189] M 1966-08, p. 9. Stockholm Åkeri.
[190] M 1966-08, p. 3. The Municipality of Botkyrka.
[191] *Biastes trancatus* and *Aglaopsis tridentate*. In Swedish: *Pärlbi* and *Kilbi*. The *Biastes trancatus* is a parasite to the redlisted *Dufourea dentiventris* (In Swedish: *ängsolbi*)
[192] M 1966-08, p. 4. The Municipality of Botkyrka, and Naturskyddsförening Stockholm.
[193] M 1966-08, p. 4. Naturskyddsföreningen Stockholm, and the the Swedish Species Information Centre Works with Biodiversity (SSICB).
[194] M 1966-08, p. 7. The SSICB.

adverse impact on the environment and impose a risk to harm the biological life in a nearby *Kagghamra creek* by silting it up and reducing the level of oxygen in the water from released material.[195]

It was further argued to contradict the aim of reducing the use and extraction of natural gravel.[196] Neighbours also raised concern about nuisance and traffic.[197] The Lst in Stockholm believed that the applicant's protective measures were likely to prevent the creek from contamination.[198]

4.4.3 Findings by the MMÖD

The EIA was accepted despite claims of it being insufficient.[199] After weighing the quarrying of 900,000 tonnes of gravel against the costs of merely restoring the old quarry, the MMÖD held, just like the MMD, that a permit was compatible with the principle of good management of land. Without further explanation, the MMÖD concluded that the need overweighed plausible environmental harm. As the harm was not assumed to reach the threshold of impairing any habitats of rare or threatened species of flora or fauna, the plausible harm should not prevent the activity.[200] The legal grounds for the permit appear to have been ch. 3 sec. 1 and ch. 9 sec. 6a, sent. 1 of the Environmental Code.

As the last instance, the MMÖD granted a permit subject to the condition that a further investigation of the two red-listed bees had to be conducted preceding the activity,[201] just like the Lst had requested.[202] Habitats of threatened species, micro climate conditions and food plants also had to be further investigated. The rest of the conditions attached to the permit were a limitation of the annual amount of quarried material, and Stockholm Åkeri had to take certain measures to improve the traffic.[203]

[195] M 1739-07, p. 8. The Municipality of Botkyrka.This would have an impact on the *salmo trutta trutta* and the *lampetra fluviatilis* sensitive for disturbances and changes (in Swedish: *havsöringen and flodnejonögat).*
[196] M 1739-07, p. 9. The Municipality of Botkyrka.
[197] M 1966-08, p. 6.
[198] M 1966-08, p. 24.
[199] M 1966-08, p. 13. The Naturskyddsförening and the Municipality of Botkyrka.
[200] M 1966-08, pp. 13-14.
[201] M 1966-08, p. 14.
[202] M 1966-08, p. 12. The Lst in the County of Stockholm.
[203] M 1966-08, pp. 2 and 14.

4.4.4 Comment

The area was of national interest for nature conservation, but not for the material, and ch. 3 sec. 10 was not applicable. The location was not really in question as it was an old quarry and ch. 3 sec. 1 appears to have been applied. Plausible environmental harm was not assessed to impose an unacceptable impact on the environment. Despite the municipal comprehensive plan and a planned nature reserve, the MMÖD granted a permit with support of ch. 9 sec. 6a where the quarrying interest was considered to overweigh the interest for nature.

4.5 M 5077-11: *Bunge Stucks*

SMA Mineral AB (SMA) applied for an extension of their current quarry permit at Bunge Stucks 1:368 in Gotland and the MMD, as the first instance, sustained their claim.[204] The SEPA, three environmental organisations[205] and four other concerned parties appealed the MMD decision and demanded that the MMÖD either remit the case to the MMD for amplification of the EIA, or to reject the permit.[206] The MMÖD rejected the claims by opposing parties and granted a permit, with an enforcement order, to extract 30 million tonnes of limestone in a separate judgment. The part of the case regarding a further extension was remitted back to the MMD for retrial.[207]

4.5.1 Quarrying Interests

The market demanded a certain consistent quality of limestone suitable for the increasing iron and steel industry, which was found at Bunge Stucks.[208] The deposit of limestone was of national interest for mineral supplies.[209] The quarrying of the natural resource was argued to be of great importance for the Swedish steel and iron industry, as the limestone in question was of rare quality.[210] Limestone of similar quality could be found in Southern Poland, whereas deposits in Estonia were too weak and contaminated by sulphur.[211] The quarry was also argued to be important for the employment on Gotland.[212]

[204] M 463-08, pp. 1 and 11. The Nacka District Court, 2011-05-25.
[205] The Organisation Bevara Ojnareskogen, Gotlands Botaniska Organisation and the Svenska Botaniska Organisation.
[206] M 5077-11, pp. 1-7. Svea Court of Appeal, Stockholm, 2012-05-15.
[207] M 5077-11, pp. 2 and 5. Also see M 463-08, pp. 1 and 11.
[208] M 5077-11, p. 28.
[209] M 463-08, p. 21. The Svenska Botaniska Organisation.
[210] M 463-08, p. 30. The SGU.
[211] M 463-08, p. 31. The SGU.
[212] M 463-08, p. 15. The Organisation for gruvor, mineral och metallproduktion i Sverige.

4.5.2 Environmental Interests

The quarry was located south of Bästeträsk, which was appointed an SAC under Natura 2000 in 1998, due to the findings of prioritised species and habitats with various wetlands with hard oligio-mesotrophic waters,[213] bare limestone soil, swamps and fens.[214] The area was of national interest for environmental conservation, as it contained unique biotopes of international importance,[215] whereof six were protected under the Habitat Directive.[216] Furthermore, it was rich in biodiversity with many red-listed species and rare lichens, and a valuable pine forest.[217] The area also hosted protected mires which in turn hosted protected species under the Habitat Directive, such as the red-listed *pilosella dichotoma*[218] and the prioritised calcareous fens with *cladium mariscus.*[219]

Several organisations as consultation bodies provided expert opinions to the case.[220] Concern was raised regarding difficulties in avoiding groundwater to leak into the quarry,[221] and that the quarry would harm the adjoining Natura 2000 site, the nature reserve of Bästeträsk, harm the natural habitats for protected species and increase the threat for red-listed species.[222] The water supply was of vital importance for the surrounding wetlands,[223] and if the supply was insufficient in quantity or quality, the environmental balance could be lost with irreversible consequences such as environmental deterioration and extinction of protected species.[224]

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[213] With benthic vegetation of *Chara spp.* (3140). (In Swedish: *kalkrika oligio-mesotrofa vatten med bentiska kransalger*).
[214] M 5077-11, p. 30. The MMÖD.
[215] M 463-08, pp. 16 and 21. The Svenska Botaniska Organisation.
[216] M 463-08, pp. 28-29. Gotlands Botaniska Organisation. Prioritised protected habitats were *inter alia: Junisperus communis* formations on heaths or calcareous grassland (5130); rupicolous calcareous or basophilic grasslands of the Alysso-Sedion albi (6110); semi-natural dry grasslands and scrubland facies on calcareous substrates *(Festuco-Brometalia)* (6210); Nordic alvar and precambrian calcareous flatrocks (6280); Calcareous fens with *Cladium marisus* and species of the *Caricion davallianae* (7210); Limestone pavements (8240); and Western Taïga (9010). (In Swedish: *enbuskmarker på hedar eller kalkgräsmarker; gräsmarker på kalkhällar; kalkgräsmarker; nordiskt alvar och prekambriska kalkhällmaker; kalkrärr med gotlandasag; uppspruckna kalkstenshällmarker;* and *västlig taiga*). Also see the Interpretation Manual of European Union Habitats. EUR27. July 2007.
[217] In Swedish: *hällmarkstallskogar på kalk.* Also see p. 29. Gotlands Botaniska Organisation.
[218] In Swedish: *gaffelfibbla.*
[219] M 463-08, p. 27. Gotlands Botaniska Organisation. (In Swedish: *Kalkkärr med gotlandsag (7210*).
[220] The SGU, the SSICB, the Lst in the County of Gotland, Region Gotland, The Municipality of Gotland, The Organisation for gruvor, mineral- och metallproducenter i Sverige, Naturskyddsföreningen (Gotland).
[221] M 5077-11, p. 15. The SEPA.
[222] M 463-08, p. 16. The Svenska Botaniska Organisation.
[223] M 463-08, p. 17. The Svenska Botaniska Organisation.
[224] M 463-08, pp. 22, and 28. The Svenska Botaniska Organisation, and the Gotlands Botaniska Organisation.

According to a report conducted by Golder Associates on instructions by the SMA, nitrogen in the water could be absorbed by the wetlands before reaching Bästeträsk, imposing an evident impact on wetlands deficient in nitrogen.[225] On the other hand, the SMA held that the report showed that the water balance would not change, and the quarry was not believed to affect its surroundings.[226] The SGU supported their view and assessed that hydrological effects from an extension would not be greater compared to the impact from the present quarry. The SGU further held that the geological bedrock in the area was only adversely affected when encroached upon, which could be avoided through the suggested precautionary measures.[227]

Nuisance and private water supplies were raised as concerns, but the issues were not really discussed by the MMÖD.[228]

4.5.3 Findings by the MMÖD

The MMÖD rejected the request by several organisations to coordinate the applications at Bunge Ducker with Bunge Stucks, but took the effects from Bunge Ducker into consideration in their judgment. All complainants had claimed the EIA to be insufficient. The MMÖD approved it, but hinted that the EIA could have been better in relation to the inventory of nature and cumulative effects on the hydrological system with support of the argument of the purpose of the EIA.[229]

It was a question of an already existing quarry and the MMÖD did not discuss alternative locations. The deposit involved conflicting national interests for nature conservation and for material supplies and an extension of the quarry would inevitably effect the natural environment adversely in a way that ch. 3 sec. 6 of the Environmental Code aims to protect. The MMÖD balanced the national interests in accordance with ch. 3 sec. 10 and held that the area of national interest for environmental conservation with unique values and rich biodiversity would be evidently harmed. However, only the natural environment in the zone would be lost and irreparable, whereas the overall area of 9,000 hectares would be preserved and unaffected. With protective measures, the damage could be limited to a level in line with the Environmental Code. On the other hand, the interest of extracting the limestone was confirmed by the SGU to be essential for the steel industry. The MMÖD considered that there appeared to be no realistic alternative locations. Without an extended permit, the national

[225] M 5077-11, p. 18. The Svenska Botaniska Organisation
[226] M 463-08, p. 80. The SMA.
[227] M 463-08, pp. 33-35. The SGU.
[228] M 463-08, p. 26. The Gotlands Botaniska Organisation.
[229] M 5077-11, pp. 25-27.

interest for material supplies would be completely disregarded, and was thereby considered to overweigh the interest for nature conservation. The fact that Gotland was protected under ch. 4 sec. 1 and 2 of the Environmental Code did not make a difference. As the interest of the quarry prevailed, the related water activity could be permitted.[230]

A permit under ch. 7 sec. 28a of the Environmental Code was required as the extension of the quarry was, with *the typical effects of the* activity lacking any protective measures, likely to evidently affect the Natura 2000 sites. The MMÖD were satisfied to grant such a permit after having assessed the actual assumed effects on protected habitats and species, both on its own and in conjunction with other activities. The MMÖD further expressed the importance of keeping the protected area unharmed and for this purpose, leaving the sensitive hydrological system unchanged. Uncertainties remained in this regard but were not believed to be clarified through further investigations. The MMÖD held, however, that there was no reason to doubt that today's technology and knowledge would achieve the purpose to protect the environment and the adjoining Natura 2000 sites in their entirety and prevent the quarry from disturbing protected species.[231]

The MMÖD granted the permit, which extended and increased the quarry in the zone (A-H), and granted a permit to handle water and to prevent damage. The MMÖD stipulated conditions for the SMA to *inter alia* follow their previous commitments, to restrict contamination, keep nuisance within limits and hours, and safely handle harmful substances. A control programme was to be handed in to the supervisory body before the extension could begin, and a restoration plan was to be presented to the supervisory body before any action was taken. Claims regarding a further extension were remitted to the MMD for retrial.[232]

4.5.4 Comment

This case concerned a question of a changed use of land of previously untouched nature due to an extension of an existing quarry with conflicting national interests for nature conservation and for material supplies. Great environmental values such as a number of red-listed species, important natural habitats for protected species, a rich biodiversity, and unique biotopes of international importance were at stake. The irreversible harm and possible deterioration of protected wetlands, habitats and protected species were emphasised, as well as the great importance of preventing effects on the hydrological system.

[230] M 5077-11, p. 27-30.
[231] M 5077-11, pp. 30-33.
[232] M 5077-11, pp. 2-5.

The MMÖD did not assess alternative locations, most likely because the case concerned an extension. When it came to the balancing of national interests, the court assumed that only a small part of a protected site was at risk of harm, and by rejecting a permit the national interest for mineral supplies would be completely disregarded. Once again, the MMÖD considered the national interest for material supplies to overweigh the interest for nature conservation.

Regarding uncertainties of environmental effects on adjoining Natura 2000 sites, the MMÖD had full confidence in the abilities of today's technology and was confident that protective measures would hold environmental effects within acceptable limits, although a further investigation was not believed to clarify the uncertainties. One may react to that argument and wonder if we really are free from environmental harm today, or if our knowledge is not used to its full capacity? Again, environmental values were taken into consideration, but the risk of harm was not believed to be of significant character to the Natura 2000 sites. The protected area as a whole was therefore unlikely to be harmed and the environmental interest weighed a little less.

4.6 M 10582-11 and M 350-09: *Bunge Ducker*

Nordkalk claimed to obtain a quarry permit to extract 2.5 million tonnes of limestone per year at Bunge Ducker 1:64 for approximately 25 years until exhausted and a permit to operate the related water activity.[233] The MMD, as the first instance, rejected the claim.[234] Nordkalk appealed and the MMÖD reversed the MMD's decision and approved the activity. The case was remitted to the MMD for the permit to be granted and conditions to be stipulated. Three governmental bodies[235] and eleven concerned parties were opposing parties to Nordkalk.[236] Nordkalk presented a new action plan for the water activity, which the MMD considered essentially changed the circumstances and invalidated the MMÖD decision. The MMD therefore rejected the permit.[237] Nordkalk appealed the decision and the MMÖD once again granted a permit, this time with an enforcement order and the court stipulated applicable conditions itself.[238] This time, the SEPA, the Lst and one concerned party contested the claim. Nine

[233] M 350-09, p. 3, referring to M 1826-07, p. 4.
[234] M 1826-07, p. 1. The Nacka District Court, 2008-12-19. The MMD was the first instance due to their application of a water activity permit. See ch. 11 sec. 9b of the Environmental Code.
[235] The Municipality of Gotland, the Lst and the SEPA.
[236] M 350-09, pp. 1-2. The Svea Court of Appeal, Stockholm, 2009-10-09.
[237] M 5418-10, p. 1.
[238] M 10582-11, pp. 3-10.

neighbours and eight organisations[239] appealed to the Supreme Court where the enforcement order was put at rest.[240]

4.6.1 Quarrying Interests

The SGU had claimed the limestone deposit at Bunge to be of national interest for mineral supplies. It was unique of its kind and quality, highly valuable for the Swedish limestone demand and a necessary source to uphold future investments. According to the SGU, the nearest deposit of similar quality was to be found in Southern Poland,[241] and the transportation could impose a greater adverse environmental impact.[242] Out of proposed alternative locations, Nordkalk argued that Bunge Ducker was the most suitable location, as the other deposits were either too small or shallow, or too close to the Natura 2000 sites of *Huburgsmyr* and *Mölnermyr* that they previously had agreed with the SEPA and the Lst to abstain from.[243]

A quarry would provide public benefits and Nordkalk was already one of the largest employers in Gotland[244] and approximately 150 jobs would be at stake during 25 year. Moreover, if not permitted, around 150 suppliers in Gotland would further miss out on sales to Nordkalk in the future.[245] The SEPA, however, considered the public benefits to be of short-term character.[246]

4.6.2 Environmental Interests

Gotland is listed as a region of national interest for tourism and outdoor recreation under chapter 4 of the Environmental Code,[247] and according to the municipal comprehensive plan over the area, nature conservation and ecological research should be prioritised.[248] The zone mainly consisted of flat rock and took up two per cent of an area of national interest for nature conservation under ch. 3 sec. 6 of the Environmental Code and seven per cent of the pine forest on limestone soil.[249] The zone hosted a number of red-listed species and key

[239] The Fältbiologerna, the Organisation Bevara Ojnareskogen, the Gotlands Botaniska Organisation, the Naturskyddsföreningen, the SEPA, the Region Gotland, the Svenska Botaniska Organisation, and the Svenska Naturskyddsföreningen.
[240] HD T 3158/12, pp. 1-5.
[241] M 1826-07, p. 10, and M 350-09, p. 10. The SGU.
[242] M 350-09, p. 4. The SGU.
[243] M 1827-07, pp. 7-8. The SEPA.
[244] M 1826-07, p. 56.
[245] M 1826-07, p. 21. Also see M 1826-07, p. 86 (*IF Metallklubb*).
[246] M 350-09, p. 7. The SGU.
[247] Ch. 4 sec. 1 and ch. 4 sec. 2 of the Environmental Code.
[248] M 1826-07, p. 6. Nordkalk.
[249] M 1826-07, pp. 11-12. and 55. The SEPA.

biotopes protected under the EU Habitat Directive[250] but it was not part of an appointed area protected under chapter 7 of the Environmental Code.[251] However, the zone adjoined two Natura 2000 sites of *Bräntingshaid* and *Bästeträsk,*[252] which both hosted a number of prioritised and protected habitats and species.[253] The latter was appointed an area of national interest due to its flat rock, valuable wetlands, peculiar hydrology, rare birds and certain lava findings.[254]

Opponents considered it to be of great importance to maintain the complex and sensitive hydrologic system unchanged, as it provided a vital living condition for the valuable natural resources in the wetlands.[255] It was held that scientific research indicated that the vegetation in swamps changed when the water quality changed, which would entail a risk of obstructing the area preservation[256] and permanently damage parts of the Natura 2000 site.[257] There were additional concerns a quarry would harm natural habitats and living conditions in the adjoining Natura 2000 sites and put red-listed species, or the endemic *pilosella dichotoma*, at risk.[258] Some populations of species were also feared to be reduced and thus adversely affect their preservation and the biodiversity in the area.[259] Noise, dust and vibrations would also disturb the surroundings,[260] and the conveyer belt could disturb the breeding of the golden eagle and the sea eagle.[261]

As countermeasures, Nordkalk committed to move the *pilosella dichotoma* to their old quarry, support scientific research,[262] compensate a valuable pine forest,[263] and to handle water with means argued to fulfil the requirement of best

[250] M 1827-07, p. 8. Also see p. 49. The SEPA. No species or numbers mentioned.
[251] M 10582-11, p. 39. Nordkalk.
[252] M 350-09, p. 13. Appointed as Natura 2000 in 1998. (M 10582-11, p. 39.)
[253] M 1826-07, pp. 34-35. Prioritised habitats types of *Inter alia Rupicolous calcareous* (6110); Nordic alvar and precambrian calcareous flatrocks (6280); Calcareous fens with *Cladium marisus* and species of the *Caricion davallianae* (7210); Western Taïga (9010), and Bog woodland (91D0) amongst a number of unprioritised types could be found. (In Swedish: *gräsmarker på kalkhällar; nordiskt alvar och prekambriska kalkhällmarker; kalkkärr med gotlandsag; västlig taiga;* and *skogsbevuxen myr*). For translations, see the Interpretation Manual of European Union Habitats. EUR27. July 2007. <http://ec.europa.eu/environment/nature/legislation/habitatsdirective/docs/2007_07_im.pdf>
[254] M 1826-07, p. 11.
[255] Svenska Naturrskyddsföreningen, M10582-11, p. 31.
[256] M 10582-11, p. 26. The SEPA.
[257] M 1826-07, p. 57. The SEPA; and M 10582-11, p. 37. The SSICB.
[258] M 1826-07, p. 49. The SEPA; and M 350-09, p. 7. The SEPA.
[259] M 1826-07, pp. 58-59. The SEPA.
[260] M 1826-07, p. 16. Nordkalk.
[261] M 1826-07, p. 53. SEPA. In Swedish: *kungsörn* and *havsörn.*
[262] M 350-09, p. 4. Nordkalk.
[263] M 1826-07, p. 116. The MMD.

technique.[264] In order to retain moistness in the area, unaffected groundwater should be redirected through the *Littorinvallen* to *Bästeträsk*.[265]

4.6.3 Findings by the MMD

The MMD confirmed that the zone was in an area of great environmental values and regardless of the hydrological effects, the quarry could impose evident and irreversible adverse environmental damage. The location at Bunge Ducker was not in line with ch. 2 sec. 6 of the Environmental Code, as alternative limestone deposits, although not of similar quality, were available. With regards to the increased employment opportunities and the environmental values at stake, the MMD found it reasonable according to ch. 2 sec. 7 of the Environmental Code to demand Nordkalk to fulfil the requirements on location.[266]

The MMD considered it to be a question of conflicting national interests under ch. 3 ss. 6 and 7. Although there were public benefits with quarrying limestone from Bunge Ducker, the MMD considered the conservation interest to overweigh the interests for mineral supplies when applying ch. 3 sec. 10 of the Environmental Code. There were alternative locations, however, the natural values could not be replaced, and the damage could not sufficiently be protected through countermeasures. The complexity of the hydrologic system made it hard to foresee all plausible effects on surface and groundwater, and even small changes of the hydrological condition could cause irreversible effects. The MMD did not consider the area protection to be unreasonable or to overrule the individual interest observed under ch. 7 sec. 25 of the Environmental Code.[267] The need of the material could not prevail according to ch. 9 sec. 6a, as the damage likely to harm threatened species of flora and fauna appeared to be too great, and the claim for a permit was rejected.[268]

4.6.4 Findings by the MMÖD

The MMÖD approved the EIA and held that the quarry appeared to lack realistic alternative locations. The MMÖD held that a general assessment should be conducted with the application of chapters 2 and 3 of the Environmental Code as the assessment under ch. 9 sec. 6a was no longer applicable. It further confirmed the two conflicting national interests at stake. As the conservation of the unique wetlands and flat rocks and the rich biodiversity with red-listed species were likely to be evidently harmed by the exploitation, the balancing rule under ch. 3

[264] M 1826-07, p. 18. Nordkalk.
[265] M 10582-11, p. 40.
[266] M 1826-07, pp. 110-111.
[267] M 1826-07, p. 112 and 116.
[268] M 1826-07, pp. 118-120.

sec. 10 of the Environmental Code had to be applied.[269] The environmental impact was assumed to be limited as the zone was only a small part of Bästeträsk. Although irreversible environmental damage could neither be avoided nor repaired, suggested precautionary measures were considered to be sufficient enough to increase the protection of Bästeträsk's surroundings, to preserve its valuable characteristics and to maintain the quality of affected water.[270] The interest for material supplies was assessed to overweigh the environmental considerations. A quarry was considered to be to a good management of land and a permit would meet both interests for a period of 25 years, whereas a rejection would completely disregard the interest of quarrying the highly valuable natural resources. The fact that Gotland was listed under ch. 4 sec. 2 of the Environmental Code was not considered to prevent the quarry.[271]

The fact that the government had not appointed the zone as a Natura 2000 site, although the nature was most likely the same as in one of those sites, was interpreted by the MMÖD as intentional for the purpose of leaving the option to mine valuable resources in the future. A permit under ch. 7 sec. 28a of the Environmental Code was required since the quarry with its *typical effects* would inevitably affect the two adjoining Natura 2000 sites significantly. However, with regards to suggested precautionary and protective measures, the harm on the protected sites in their entirety was believed to fall within an acceptable frame and such a permit could be granted. The highly important and complex hydrological system had been taken into consideration, but as large hydrological variations naturally occur in Gotland, the uncertainty in Nordkalk's investigation was not considered to be any different from the natural variations, and precautionary measures were considered to sufficiently reduce damage to a level below the threshold of evident effects. The MMÖD explicitly pointed out that Nordkalk would have time to acquire further knowledge and improve precautionary measures as it would take approximately ten years before reaching sensitive levels. Precautionary measures were also assessed to hold adverse environmental effects deriving from the conveyer belt within accepted limits and the water activity was not assessed to threaten Bästeträsk as a future source of water supply. Overall, the benefits of the quarry overweighed its costs and possible adverse impact. The case was remitted to the MMD for specification of applicable terms and conditions[272] in accordance with ch. 22 sec. 6 of the Environmental Code.

[269] M 350-09, pp. 11-12. Requested by a concerned party, p. 8.
[270] M 350-09, p. 4.
[271] M 350-09, p. 13.
[272] M 350-09, pp. 14-18.

4.6.5 Changed Circumstances

Nordkalk argued they had improved their action plan regarding incoming water and intended to put the water back into Ojnaremyr instead of Bästeträsk. They also suggested more environmentally friendly strategies regarding the transportation of extracted resources, to keep the establishment further away from the Natura 2000 areas and thereby reduce the impact on surrounding wetlands.[273]

4.6.6 Reassessment by the MMD

As uncertainties remained regarding the environmental effects of the hydrologic system, the MMD fell back into the risk assessment in ch. 7 sec. 28a of the Environmental Code. They emphasised the importance of ascertaining, at the time of granting a permit, that an activity will not evidently harm flora, fauna or their natural habitats. Such assessment could therefore not be postponed. A postponement was further argued to be incompatible with the rule of knowledge and the MMD felt obliged by the law to disagree with the MMÖD decision, as some consequences would not be assessed for another ten years.[274] As the case was remitted to the MMD to establish conditions based on a decision where relevant circumstances now had changed, the MMD did not find it compatible with the Environmental Code to grant a permit for the activity and thus rejected the Nordkalk's claim of granting a permit and establishing condition.[275]

4.6.7 Reassessment by the MMÖD

According to the MMÖD, Nordkalk's changes did not affect the outcome of the case.[276] The MMÖD claimed that the requirement of using the best available technique for necessary measures applies *regardless* of financial expenses in relation to Natura 2000 sites. Further precautionary measures, stipulated by the Lst, to uphold the water quality, should therefore apply although it imposed a considerably higher cost than what Nordkalk argued was environmentally motivated.[277]

After reconsidering the assumed adverse impact on the Natura 2000 sites as a whole, the MMÖD still considered that the quarry, in line with applicable conditions and protective measures and with regards to cumulative effects from nearby activities operated by the SMA and the Region Gotland, could take place

[273] M 5418-10, pp. 3-4.
[274] M 5418-10, p. 35. The Nacka District Court, 2011-11-30.
[275] M 5418-10, pp. 1 and 36.
[276] M 10582-11, p. 45.
[277] M 10582-11, pp. 42-43.

without an illegitimate interference with the environment. A permit according to ch. 7 sec. 28a of the Environmental Code and an exemption from the Decree of the Protection of Species[278] of affected species were granted. The MMÖD thereby granted a permit to quarry 2.5 million tonnes of limestone per year for 25 years, stipulated conditions and issued an enforcement order.[279]

Nordkalk were *inter alia* required to follow their previous commitments, immediately stop the activity where operational disturbances faced a risk of environmental harm, regularly conduct tests, carefully handle harmful substances and treat and control affected water before releasing it back into its natural flow. Furthermore, they were required to follow up certain flora and an action plan should be coordinated with the SMA and the Region Gotland, and approved by the supervisory body, in regard to the water quality and the protection of flora and fauna.[280]

4.6.8 Leave to Appeal to the Supreme Court

The case is to be continued as the Swedish Supreme Court granted a partial leave to the appeal regarding the significance of the MMÖD decision that gave Nordkalk permission to start the activity before the decision had gained legal force.[281] The opponents claimed for a suspension of the MMÖD decision.[282]

The Supreme Court held that the permit holder has the burden of proof to show that the adverse impact of his business, which may occur if the activity cannot start until the decision has gained legal force, overweighs the environmental harm that may occur if an enforcement order is granted with special regards to the possibility to repair such damage in case the enforcement order is cancelled. As a decision on the matter by the Supreme Court could be of importance for the guidance on the application of the law, the Court should be restrained in its issuing of suspensions. Still, the Supreme Court considered the risk of irreversible environmental damage be too high, and inhibited the enforcement order as the environmental concern overweighed Nordkalk's interests.[283]

[278] An exemption is not legally needed, but the MMÖD expressed the exemption to be on the safe side. See M 10582-11, pg. 41.
[279] M 10582-11, pp. 40-43 and 45.
[280] M 10582-11, pp. 4-7.
[281] HD T 3158-12, p. 7, point 4 and 5. The Supreme Court, Stockholm, 2012-10-15.
[282] HD T 3158-12, p. 5. The SEPA, the Municipality, six organisations and nine other concerned parties.
[283] HD T 3158-12, pp. 9-12.

4.6.9 Comment

Ch. 9 sec. 6a of the Environmental Code was abolished at the time of the appeal, but I did not notice much of a difference in the decisive arguments in the case. The MMD found the investigation of alternative locations to be insufficient and the interest for nature conservation overweighed the interest for material under ch. 3 sec. 10. However, the MMÖD was of a different opinion. It confirmed a lack of alternative locations for the quarry. The area hosted great environmental values with a number of red-listed species and habitats, and adjoined two Natura 2000 sites. Furthermore, the zone composed two per cent of Bästeträsk of national interest for nature conservation and Gotland as a whole is an area of national interest for tourism and outdoor recreation. On the other hand, the limestone deposit was of unique quality and of national interest for material supplies protected under ch. 3 sec. 7 of the Environmental Code. As the case had conflicting national interests of both nature conservation and of material demand, they had to be balanced under ch. 3 sec. 10. A quarry was believed to cause evident, irreversible harm to the area which as ch. 3 sec. 6 of the Environmental Code aims to protect, but with regards to protective measures a permit was believed to meet both interests and was thus considered to be the more suitable management of land. As the zone had not been appointed a Natura 2000 site, the MMÖD interpreted that fact as an intention to allow exploitation of natural resources in the area. The quarry required a permit under ch. 7 sec. 28a of the Environmental Code and such was granted as the harm was believed to fall within acceptable levels. Moreover, the uncertainty of hydrological effects was not believed to be worse than natural variations in the area.

The MMÖD considered natural values in its application of the Environmental Code, but in the weighing of interests, the environmental impact was considered to be limited in an overall view of the valuable area. I believe the MMÖD had a point in questioning *why* the area of the zone was not classified as Natura 2000, but in my view their statement is quite straightforward and I have not come across supporting arguments in the preparatory works of the legislation having such an intention. Applicable law is rather demanding when it comes to making a thorough assessment on a case-by-case basis, which was made, and not to forget that indirect affects must be ascertained. Considering the wording of the legislation, it gives the courts a wide discretion where the outcome of the decisive balancing rules is fairly arbitrary. Consequently little can be criticised. However, the uncertainty of effects from changes in the hydrological system did not appear to be in line with the obligations deriving from the Habitat Directive or ch. 7 sec. 28b of the Environmental Code, which only allows activities to be permitted after the court has ascertained that it will not harm or disturb what Natura 2000 aims to protect. In my view, the MMÖD did not give natural environmental values sufficient consideration in this case. The fact that the Supreme Court set aside the enforcement order points in this direction.

4.7 M 497-12: *Skrike*

Svevia AB (Svevia) claimed to obtain a permit to extract 70 per cent rock, 25 per cent moray and 5 per cent gravel of a total of 190 000 tonnes at Skrike 6:9 and 6:17. The Lst rejected the application as the activity and location was considered to contradict the general rules of consideration.[284] The MMD granted a permit but not for the northern part of the zone.[285] The Lst and the SEPA, the two opponents, appealed and claimed the permit to be rejected.[286] The MMÖD upheld the judgment by the Lst and thereby denied a permit for the quarry.[287]

4.7.1 Quarrying Interests

Svevia held that natural gravel could not always be replaced. Sand used for gritting was resource costly and expensive as only 15 per cent of the crushed rock could be used and natural gravel was 50 per cent cheaper to produce. [288] The material was planned to be used by the Swedish Road Administration for road constructions.[289] The chosen location was argued to be convenient as it was located close to the freeway of E4 and to Örnsköldsvik where road construction was planned.[290] Two alternative locations were presented but the moray deposits were small, the bed rocks were of poor quality and urban areas nearby would be disturbed.[291]

4.7.2 Environmental Interests

The area of the zone was well preserved with an unexploited natural environment.[292] It was an area of national interest for nature conservation and outdoor recreation and was located near the popular national park of the Skule forest.[293] According to the municipal comprehensive plan, the aim was to avoid establishments of new quarries as nuisance and traffic would increase and disturb the outdoor recreation.[294] The quarry was located on top of one of the more famous mountains in the area, and as the quarry was assumed to consume around 30 metres, the surroundings would change in character.[295] Great natural

[284] Decision 551-1819-09 by the Lst in the County of Västernorrland, 2010-05-27.
[285] M 1346-11, p. 1. The Östersund District Court, 2011-12-21.
[286] M 497-12, p. 2.
[287] M 497-12, p. 1. The Svea Court of Appeal, Stockholm, 2012-09-28.
[288] M 1346-11, p. 7.
[289] M 1346-11, p. 14.
[290] M 1346-11, p. 8. Svevia.
[291] M 497-12, p. 10. The MMÖD.
[292] M 1346-11, p. 13. The SEPA.
[293] M 497-12, p. 2, and M 1346-11, p. 11. The Lst and the SEPA.
[294] M 497-12, p. 5. The SEPA.
[295] M 1346-11, p. 10. The Municipality of Örnsköldsvik.

environmental and geological values were assumed to be harmed, although not evidently, and the interest of outdoor recreation in the area would be interfered with and adversely affected by the quarry.[296]

The zone adjoined the nature reserve of Skule Mountain that had been protected since 1969 due to its scenery and natural and scientific values. Old, natural forest and geological formations typical to Höga Kusten were found.[297] The national park of Skule forest was established in 1984 and the area was classified as Natura 2000 in 2005.[298]

The area had marks form an old quarry that was active 1970-1996 but was considered to be a natural part of the environment at the time of the application.[299] Alternative locations, such as nearby quarries, were argued by the SEPA to be more suitable.[300]

4.7.3 Findings by the MMD

Although the balancing rule of need and damages had been removed, the MMD considered a need to be apparent from a competitive perspective. The quarry was not assumed to interfere with the scenery, and the area was prepared because of the previous quarry. The noise and disturbance in question, was discussed and assumed to be within acceptable limits. The quarry was not assumed to impose evident adverse effects on the nature or the outdoor recreation and with regards to protective measures the MMD granted Svevia a permit for the quarry.[301]

4.7.4 Findings by the MMÖD

Although not legally binding, the municipal comprehensive plan was considered to be of importance and composed a basis for the assessment of suitability. The MMÖD emphasised the legislator's encouragement to consider alternative locations for rock quarries. The MMÖD assumed that a quarry could be accepted according to ch. 3 sec. 6 of the Environmental Code as the encroachment in the geological formations was not assumed to evidently harm the natural values or evidently disturb the specially protected outdoor recreation in the area. However, due to great natural values in the area, the MMÖD increased the requirement of the assessment if the need of the material of a particular quality could not satisfactorily be supplied from other deposits. In cases with great natural values,

[296] M 1346-11, p. 9, the Lst in the County of Västernorrland and M 497-12, pp. 3-4. The SEPA.
[297] M 1346-11, p. 17.
[298] M 1346-11, p. 9. By the Lst.
[299] M 1346-11, p. 9. Svevia.
[300] M 497-12, p. 5. The SEPA.
[301] M 1346-11, pp. 18-19.

assessments of alternative locations may include deposits located further away than normally required. Like always, the chosen location should be a suitable site.[302]

Svevia's evaluation of alternative locations was considered to be poor and the lack of a specification of the demanded quality made it hard for the MMÖD to take a standing. The MMÖD rejected the permit as Svevia had not presented any equivalent alternative locations and had failed to prove, with regards to conflicting interests, that establishing a quarry was the most suitable use of the land. The location was therefore considered not to be a suitable site where the purpose of the quarry could be achieved with a minimum damage and detriment to the nature.[303] The MMÖD rejected the permit with support of ch. 2 sec. 6 and ch. 3 sec. 1 of the Environmental Code.

4.7.5 Comment

The MMD granted a permit with regards to the impact already caused from an old quarry in the zone and applicable protective measures. The MMÖD was of a different opinion. Although the quarry was not assumed to cause evident environmental harm, the MMÖD rejected the claim as the application lacked an assessment of realistic alternative locations outside the area. As the demanded quality of the material was not specified, no equivalent alternatives could be assessed and the MMÖD did not consider Svevia to have successfully proven that the location was the most suitable for the purpose of a quarry with a minimum damage and detriment to the nature. A permit was rejected in line with ch. 2 sec. 6 and ch. 3 sec. 1 of the Environmental Code.

As no evident environmental harm was likely to occur, ch. 3 sec. 10 was not applicable, but the preservation of the natural environment prevailed in the case, due to the lack of proof that the chosen location was the most suitable with regard to the need and the promotion of sustainable management of land.

[302] M 497-12, pp. 8-9.
[303] M 497-12, p. 10.

5 Analysis

These cases are complex and the permitting process of quarries involves the consideration of different interests which requires the application of different balancing rules – all depending on the circumstances in the individual case. The preparatory works provide poor explanations as to the application of the rules and there is hardly any doctrine in the field of quarries. The reason to why the interest for the material prevailed over the interest for nature conservation was, in some cases, poorly explained by the MMÖD, which made the comparison and evaluation of the research somewhat harder to conduct. Thankfully, the application of the provisions provides an answer to the same question, namely what interest that should prevail in each specific case; an outcome that is for the courts to decide.

The matter I wanted to investigate appears when the two objectives clashes. The relevant case law mainly concerns cases where the zone is not within a protected area, but close enough to impose a risk on what the adjoining protections aim to protect. One should therefore keep in mind that the full protection of the Environmental Code is not assessed as the zones have not been designated stronger protection available under the Code – whether due to finances, the wish to exploit material or the lack of environmental interest in the area remains unknown.

Valuable natural resources are often embedded and preserved in untouched and valuable environments, and with regards to the ambiguous objective of the Environmental Code of satisfying both interests, permitting processes of quarries puts the environmental legislation to test. It appears to be a question of either eating the cake or keeping it. The metaphor pinpoints an interesting issue in my research question: assessments of quarry permits are tough decisions where choosing one means losing the other. For this purpose, the Environmental Code provides balancing rules in order to guide the authorised decisive bodies to an appropriate decision. The following references to sections are in relation to the Code unless otherwise stated.

For a permit to be obtained, the quarry may not be assumed to cause harm to the habitats of rare or threatened species of flora or fauna according to the former ch. 12 sec. 2 and the later ch. 9 sec. 6 para. 1 pt. 1 of the Code and sec. 5 of the Decree Concerning Environmentally Hazardous Activities. Neither may it affect a Natura 2000 site in a significant way according to ch. 7 sec. 28a of the Code. The prominent provision of ch. 1 sec. 1 of the Code should permeate the assessment. The general rules of consideration should be fulfilled and the operator has the burden of proof in this regard. The location is essential for the assessment, as this is, in a way, the provision that protects the environment in the

end; the location being suitable or not. The suitability of the location is assessed through the application of chapter 3 and 4 of the Code, where quarries entail a changed use of land, and if the quarry falls through on either of these grounds a permit cannot be granted. The listing of areas of national interest has been argued by the MMÖD and in the doctrine not to be legally binding, but rather assessed and decided by the decisive court. In cases where the location is approved, the quarry could still, up until 2009, be rejected on grounds of the balance of need and damages according to ch. 12 sec. 2 and later to ch. 9 sec. 6a. This balancing test was argued in the preparatory works to still apply after its abolishment through the application of the general rules of consideration and chapter 3.

What weight has the MMÖD given aspects of natural protection in their assessments in comparison to conflicting interests for exploitation of natural resources in relevant case law?

The general rules of consideration only apply to the extent that they are considered reasonable under ch. 2 sec. 7 of the Code. This appears to be of greatest relevance in relation to countermeasures and the choice of location in regard to the protection of environmental values. In relation to Natura 2000 sites, appropriate countermeasures should, however, be applied regardless of reasonability of the expense. The application of ch. 2 sec. 7 was only expressed in MÖD 2006:49 where a permit was granted. All of the granted permits have however been provided with different types of conditions, although not discussed as such in this thesis, but I assume the protective and precautionary measures, as well as the requirement of assessments of alternative locations, have been in line with this provision.

In the following discussion, it should be kept in mind that the application of protective and precautionary measures under ch. 2 sec. 3 of the Code is likely to have played a great role in the MMÖDs grounds to grant a permit, as the environmental harm that otherwise might have been caused could be reduced or prevented. With this said, the environment is in these cases considered to be sufficiently protected in regard to the Environmental Code and the environmental interest can be argued to have been satisfied through this provision.

Ch. 3 sec. 1
In MÖD 2000:24, a permit was granted with support of ch. 3 sec. 1 and ch. 2 sec. 6 on the ground that there was a need of the material and the location appeared to be suitable, as it was close to a harbour from where the material could be distributed. According to opposing parties, the quarry could affect an adjoining nature reserve with a forest containing great environmental values, but

the SEPA had refrained from providing their expert opinion. I assume that the environmental values were not considered to be of importance for further consideration, which may have been a ground to why the material prevailed and the location was claimed to be suitable in accordance with ch. 3 sec. 1.

In MÖD 2009:18, a permit was granted with support of ch. 3 sec. 1 and ch. 9 sec. 6a of the Code. The case regarded a continuation of an old quarry in an area where two red-listed species of bees were found. The special rules on natural gravel were not applicable at the time. The MMÖD appears to have rejected the claim by the Municipality that the area was of national interest, as ch. 3 sec. 6 was not applied. As no habitats of importance for rare or threatened species of flora or fauna were assumed to be impaired, the need of the material was assessed to overweigh the plausible environmental harm under ch. 9 sec. 6a. The permit required a further investigation of the red-listed bees prior to commencement of the activity. Through this countermeasure, the MMÖD could ensure that the activity would not take place until the bees were considered to be safe enough.

In M 497-12, a permit was rejected with support of ch. 3 sec. 1 and ch. 2 sec. 6 of the Code. The zone was in an area of national interest for nature conservation and the use of natural gravel was argued to be irreplaceable for the expected use. The quarry was not assumed to cause evident harm to the area and thus ch. 3 sec. 6 was not applicable. However, the investigation of alternative locations was insufficient and it lacked a specification of the required quality of the material, which made it hard for the MMÖD to compare deposits and locations for the purpose of concluding whether or not the chosen location was suitable. Again, the harm was not considered to be of evident character, and the final ground for rejecting the permit appears to be an insufficient investigation of alternative locations.

Ch. 3 sec. 7

In MÖD 2006:49, a permit was granted with support of ch. 3 sec. 7 and ch. 9 sec. 6a. The area adjoined a Natura 2000 site, the area was classified as of natural interest under ch. 4 sec. 2 and, according to the SEPA, zone 2 was of importance for rare and red-listed butterflies found in the area. The material was also of national interest, but as the MMÖD did not consider the quarry to evidently harm the area, there was no conflict of national interests in the sense of ch. 3 sec. 10. The exploitation of the material should therefore not be obstructed in accordance with ch. 3 sec. 7. The MMÖD did not further explain why the quarry was not assumed to cause evident harm, although it was claimed to be inevitable to lose protected common land. The MMÖD claimed that no living conditions were assumed to be impaired for any valuable species of flora or fauna. As no evident harm was expected to occur, the material overweighed the environmental values.

Ch. 3 sec. 10

Permits were granted in the three Bunge cases after assessments of ch. 3 sec. 10, as they all involved conflicting national interests of both material and of nature conservation, where the plausible environmental harm was considered to be of evident and irreversible character. In all cases, it was a question of plausible effects on the adjoining Natura 2000 sites aimed to preserve red-listed species, whereof several were protected under the Habitat Directive. Important wetlands with complex hydrology systems were also in need of protection. The fact that Gotland is listed under ch. 4 sec. 2 did not prevent permits to be granted.

In M 5077-11, it was a question of an already existing quarry and alternative locations were not discussed, which is in line with applicable case law. A permit under ch. 7 sec. 28a was required as the extension with its typical effect would harm the area. Such a permit was granted as protective measures were considered to keep the adverse environmental impact within acceptable levels, as there was no reason to doubt today's technology. Still, uncertainties remained. With the application of ch. 3 sec. 10, the interest of exploiting the material prevailed as it was only a limited area that would be harmed, whereas a rejection would completely disregard the interests for the material.

In M 350-09, the MMÖD stated there was a lack of alternative locations with regards to the quality of the limestone in question. A permit under ch. 7 sec. 28a was required and was granted, as the environmental harm of the protected areas in their entirety was considered to be within acceptable levels with the application of protective and precautionary measures. With regards to the remaining uncertainties on plausible effects on the hydrologic system, it was argued that the applicant had another ten years to further investigate the issue before the actual harm would be at stake. A quarry was considered to better promote a good management of land. After the case was remitted to the MMD, where the permit was rejected *inter alia* on grounds of the uncertainties of effects on the Natura 2000 site, the case was again appealed to the MMÖD. The MMÖD clarified that a permit could be granted in accordance with ch. 7 sec. 28a and applicable conditions were stipulated.

Having complete faith in countermeasures and technology, the uncertain adverse environmental impact caused by the quarries were assumed by the MMÖD to fall within acceptable levels, the interest of nature conservation was given lighter weight.

Ch. 9 sec. 6a / ch. 12 sec. 2

Apart from the above mentioned assessments in MÖD 2006:49 and in MÖD 2009:18, the MMÖD based its permit decision on the outcome of the application of ch. 9 sec. 6a in MÖD M 236/07, although this time it was a ground for

rejection. The MMÖD acknowledged the national interest of the area for recreation and tourism under ch. 4 sec. 2 and according to the municipal comprehensive plan, quarries should be avoided in the area as it was of interest for nature conservation with valuable geological foundations and flora. The MMÖD considered the investigation of alternative locations to be insufficient and the applicant had thereby failed to show that the location was suitable with minimum damage or detriment to nature. The environmental values thereby overweighed the need of the material under ch. 9 sec. 6a. The uncertainty appears to have given the environmental values extra weight with regards to their argument. The area was of national interest and in my opinion the quarrying should be rejected with support of ch. 3 sec. 6 of the Code. The MMÖD did not argue in line with this, and its application of the provision is only implicitly apparent.

Are relevant judgments in line with the Environmental Code?

Although some of the findings by the MMÖD have been poorly reasoned, the arguments appear to be in line with applicable laws, apart from the Bunge Ducker and the Bunge Stucks cases. These findings were, however, thoroughly explained. One should keep in mind that the Supreme Court is the last instance in these cases, and the Bunge Ducker case will be partly reviewed. The MMÖD granted permits under ch. 7 sec. 28a of the Environmental Code although uncertainties remained in regard to the highly sensitive and important hydrologic system. The plausible consequences were yet unknown and the important wetlands, as well as other protected habitats and species, could be evidently harmed, or in the worst case, extinct. In my view, it was not in line with applicable EU law to grant a permit before such factors were ascertained not to impose evident harm with regards to protective measures. According to C-127/02, there may not be any reasonable scientific doubts that significant harm may occur, and the provision should be applied in line with the precautionary principle. In the Bunge Stucks case, the MMÖD simply expressed their confidence in today's technology and in the Bunge Ducker case, the MMÖD claimed the applicant to have another ten years to further investigate the consequences for the protected areas and species and to find sufficient countermeasures.

The rules do not provide answers, but rather stresses the decisive bodies to assess relevant circumstances on a case-by-case basis in the light of certain criteria. The assessment of harm, and consequently the ground to give environmental values a lighter or a heavier weight, is a decision for the court to make. The accuracy of its assessments is, however, not possible for me to consider on the grounds provided by the court.

As can be seen in the cases, the MMÖD strive to meet both interests, which can be argued to be in line with the ambiguous objective of the Environmental Code. At the same time, the consequence of this application of the law is that the interest for the material prevails more often, and the environment will be encroached, little by little. Although, this is the only way both interests can be satisfied, where no alternative locations are considered to be better. As the MMÖD has reasoned, the zone will often only affect a small part of an area and nature can thus still be preserved to some extent, whereas a rejected permit would disregard the interest for a unique material with no available alternative deposits.

Do any circumstances indicate why the MMÖD gave natural environmental values a lighter or a heavier weight in applicable case law?

In MÖD M 236/07 and M 497-12, both concerning areas of national interest without material deposits of national interest, the permits were rejected due to insufficient investigations of alternative locations. I interpret this insufficiency with uncertainty, and would like to argue that this question mark added weight to the environmental values. Of course, I cannot predict what the findings would have been by the MMÖD if the circumstances were different. This further shows the importance of proper assessments of needs and damages as a result of the investigation of alternative locations. In cases where an assessment has been thorough, the MMÖD have facts to base their decisions on.

With the application of ch. 2 sec. 3 in combination of ch. 2 sec. 7 of the Code, the actual weight that otherwise should have been given the environmental interests may have been reduced. The environmental interest may, therefore, have a greater weight than what appears to be the case in comparison to the conflicting interest of the material. After all, protective and precautionary measures contribute to a better preserved environment in relation to quarries and reduce the adverse environmental impact that otherwise would have been imposed.

Does the framework provided by the Environmental Code sufficiently protect natural environmental interests?

The environmental framework has the objective of preserving valuable natural areas and species of flora and fauna and it is not surprising that natural values cannot always prevail, as we use the land we live on. The objective of the Environmental Code further recognises that we have a responsibility to maintain when we use land and natural resources, and for the purpose of future generations, good management and suitable locations should prevail. These

appear to be sound guidelines to live by. The public interests, and the public economic interest in particular, cannot be foreseen in the light of the society we live in; the society in which we have established rules to live by and apply.

It is stated in ch. 3 sec. 10 para. 2 that a decision may not contravene chapter 4 of the Code. The claim that the listing of areas of national interest is a mere guideline appears to weaken the protection, as it is up to the Court to decide. By looking at the assessments in M 5077-11, M 10582-11 and 350-09 where adjoining Natura 2000 sites were at risk of being affected and where the protection should be greatest out of all the presented cases, the interest of the high quality material still prevailed. One may wonder what it takes for environmental values to be protected. The environment need to be better protected, but after considering improvements it is clear that it is not easy to regulate issues where we have an ambiguous objective. Balancing rules where the interests at stake are tried on a case-by-case basis appear to be appropriate. It may be better to shift focus and improve our regulations on waste, where we increase the requirement of recycling and reusing. This could decrease of the demand of the exploitation of natural resources, and is in line with the objective of sustainable management.

6 Conclusion

The MMÖD appear to strive to satisfy both of the two ambiguous objectives of the Environmental Code, relevant for this study. In doing so, the interest of the material often prevails as this objective and interest otherwise would be disregarded; especially in cases with no reasonable alternative locations at stake. Of course, a consequence that follows is that the interest for nature conservation must give way. The reasoning is grounded on the argument that the larger area will be preserved and that it is only a small part of the valuable area that will be affected by the quarry.

In my view, relevant case law is in line with applicable law, with exception to the Bunge Stucks and Bunge Ducker cases. These decisions appear to have contravened the EU law, as permits were granted when it was still unclear what effects the quarry may have on the adjoining Natura 2000 sites. However, as the MMD was the first instance in these cases, the judgments are not of precedential character, and the Bunge Ducker case will be partly reviewed by the Supreme Court.

The study shows that question marks in relation to adverse environmental effects, contribute with additional weight to the interest for nature conservation. On the other hand, the interest for nature conservation appears to weigh less with the application of protective and precautionary measures, which is logical, as the expected damage is reduced through these means.

After all, it appears that the objective of both keeping the cake and eating it has been interpreted in case law by the MMÖD as to take the whole tray of cakes into consideration, where the cake may be eaten as long as it is not the last cake that is being taken. In other words, natural environmental values may need to give way for the exploitation of natural resources, as long as there is an area, of some extent, where the preservation of nature is protected. It may be hard to make the rules applicable to quarries any stricter. A more rigid legislation on waste with greater requirements of reusing may be a way to give natural values a greater weight and to ensure sustainable management of land and natural resources for us and generations to come.

Supplement A

Cases[304] on quarry permits, irrelevant for the purpose of this thesis:

M 8227-11
M 3894-11
M 5176-11
M 9480-11
M 6204-11
M 8509-11
M 5973-09
M 6361-09
M 10280-08
M 1283-09
M 3160-08
M 2444-07
M 4026-06
M 1263-06
M 243-06
M 1644-06[305]
M 5701-05
M 4832-05
M 7060-05
M 482-05
M 5680-05
M 9151-04
M 1513-04
M 3011-03
M 8510-03
M 337-03
M 84-03
M 305-00
M 6589-01

[304] The cases are presented in reversed chronological order of the dates of their decisions.
[305] The case is delimited, although the MMÖD assesses natural environmental values, as it is merely a question of obtaining a permit to prospect limestone at Bunge Ducker, and not to establish a quarry as such.

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Prop. 1985/86:3	*Med förslag till lag om hushållning med naturresurser m.m.*
Prop. 1997/98:45	*Miljöbalken*
Prop. 2000/01:111	*Skyddet för visa djur- och växtarter och deras livsmiljöer*
Prop. 2004/05:129	*En effektivare miljöprövning*
Prop. 2005/06:182	*Miljöbalkens sanktionssystem, m.m.*
Prop. 2008/09:144	*Enklare och bättre täktbestämmelser*
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SOU 2003:124	*En effektivare miljöprövning*
SOU 2009:45	*Områden av riksintresse och Miljökonsekvensbeskrivningar*

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