

The word 'deliberate' in the strict protection of species regulations – how to understand it using wind power as an example

The Strict Protection of Species regulations according to the two EU nature directives (Birds – and Habitats directives) have been implemented in the Swedish Species Protection Ordinance (artskyddsförordningen; 2007:845). The Species Protection regulations from the two directives are merged in the ordinance, but the use of the word 'deliberate' is the same as in the directives.

An important component of two recent judgments¹ from the Land and Environment Court of Appeal was how the word 'deliberate' in the Swedish Species Protection Ordinance should be understood. In this guidance document the Swedish Environment Protection Agency (SEPA) interprets the present jurisprudence which is assessed not to have changed by these judgments.

The Swedish implementation

According to 4 § (1) in the Species Protection ordinance it is forbidden to deliberately kill birds and such animal species which are listed in annex 1 to the ordinance and marked with a N or n. The prohibition in 4 § (1) implement article 12(1)(a) of the EU Habitats Directive (92/43/EEC) which in turn implement the Bern convention.

Interpretation by the European Court of Justice

How "deliberate" should be understood in this context has been interpreted by the European Court of Justice (ECJ) in two judgments; C-103/00 "Caretta caretta" and C-221/04 "The Spanish Otter". In The Spanish Otter (paragraph 71) referring back to the first judgment (Caretta caretta), the ECJ is more specific in its interpretation. It states: "for the condition as to 'deliberate' action in Article 12(1)(a) of the directive to be met, it must be proven that the author of the act intended the capture or killing of a specimen belonging to a protected animal species or, at the very least, accepted the possibility of such capture or killing". None of the judgments refer to a conditional intent as a prerequisite. The Swedish EPA interprets the present jurisprudence as follows;

Swedish EPA guidance

It is clearly forbidden to kill a single specimen of a protected animal when the intent is to kill. However, regarding an enterprise with an obvious other purpose than killing animals, for instance to produce electricity, it is proportionate that a risk to affect the protected species conservation status in a negative way is necessary in order to trigger the prohibition, especially regarding birds. Such an interpretation is in line with the aim of the Birds directive which is "to maintain the population of all the naturally occurring birds species in the EU at a level which corresponds in particular to ecological, scientific and cultural requirements, while

¹ MÖD 2015-02-16 cases M 2630-14 "Örndalen" and C-221/04 "The Spanish Otter" (6) of the code

taking account of economic and recreational requirements, or to adapt the population of these species to that level.”

The killing of a few individuals of a threatened species can be enough to affect the conservation status negatively, whereas a larger number of killed individuals are needed to have the same effect on commoner species.

Apart from affecting the species conservation status the other prerequisite for the operation to be deliberate is that the operator is aware of that the operation could affect a protected species, and accepts it, in other words applies for a permit knowing about the risk for the applied operation to affect the protected species conservation status in a negative way.

An operator applying for a permit to build wind power plants does not do it with the aim to kill birds but to produce energy. Neither is the building of wind power plants in itself not deliberate killing. It is a certain effect on the conservation status of protected animals that can be prohibited.

Applying the Swedish Environment Code

An operator need (according to the Environment Code (Section two para. 2) 1998:101) to acquire the information necessary for the operation at hand according to its type and extent which includes the knowledge of the effect the operation could have on protected species. According to Section 2 para. 6 of the Code the operation shall be placed in the best suited area as regards the purpose of the operation to be fulfilled with the least intrusion and inconvenience to people's health and to the environment.

Therefore stating that the operator do not aim to kill protected animals it is not enough. In order for the operator not be judged to accept the unlawful risk of killing protected animals, the risk for this to affect the protected species conservation status needs to be limited. If it can be regarded as likely that an operation will kill protected birds and the operator is aware of this risk but still intends to carry out the operation, this must be interpreted as deliberate killing.

According to section 2 para. 6 of the Code a suitable place for an operation is one where the aim of the operation is fulfilled with the most limited inconvenience for the environment among other factors. It should therefore be interpreted as deliberate killing when operation the applied compared to other wind power plants is judged to have an increased risk for collisions with vulnerable species. Vulnerable bird species are those that the research program VINDVAL assessed as specifically vulnerable for wind power plants, for instance certain large birds of prey.

The bird species and site matters

All protected species are not as vulnerable to be killed or otherwise affected in a negative way by wind power plants. Regarding birds, this depends on their flying behavior, presence and other prerequisites such as landscape features. In the commissions guidance on the strict

protection of species² the commission states that killing and catching of birds can cause a population to decrease or other indirect effects on the species populations and this could affect the species conservation status.

This indicates that it is the effect on the population rather than the killing of individuals that matters. This is also in line with the aim of the directive. It is the population size of the bird species population and its status determining whether the killing of a few individuals causes such a negative effect on the population or if a higher number is needed to have that effect.

The problem is not the establishment of wind power plants, but where they are placed. By placing them outside recommended distances from nests of vulnerable bird species and avoiding areas with large numbers of birds and important flying routes, wind power plants can be built without being in breach with the strict protection of species regulations.

² Guidance document on the strict protection of animal species of community interest under the Habitats directive 92/43/2007, EU-Commission 2007