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The role of science in environmental adjucation

QUESTIONNAIRE

SE answers

1) **Mandate of the court to review techno-scientific matters**

a) In the Swedish environmental court system there are technical judges who assess the cases together with the law-trained judges. The technical judges have scientific education in various relevant fields and long work experience. At district court level (i.e. the Land and Environment Courts) larger cases also involve two expert members. The expert members are appointed by the Judges Proposals Board and represent different types of expertise, e.g. industry, nature, agriculture, water etc. These expert members are not employees of the court but are assigned in each case. Both the technical judges and the expert members are meant to assess the case from a technical/scientific viewpoint and to explore the need for the case material to be further completed, to ask additional questions and so on. The technical judge will also take part in writing the judgement.

b) There are no formal limits as regards forms of scientific references.

c) The Land and Environment Court of Appeal also have technical judges and may investigate scientific questions and review findings of lower courts to the full. The court may also take its own initiative to demand additional material from the applicant.

d) The court has access to geospatial technology (GIS) and would use it if needed/relevant. If such evidence were to be put to the court by the parties it would be assessed accordingly. For example, in cases about granting exemptions for activities in habitat protection areas it is easy to compare and see changes in the biotopes from year to year and to examine if any measures affecting the protected habitat area have been carried out.

2) **When do you gather expert advice?**

a) As the court consists of both legal and technical expertise, these situations – which are common in environmental cases – are dealt with by the court itself.

b) The Swedish environmental courts carry a burden of investigation and the "ex officio-principle" applies. The Environmental Code requires the applicant to fulfil his/her obligation to provide the court with sufficient material in order for the case to be properly assessed. If there are any gaps – the court will ask for further material and answers to relevant questions. If a lack of necessary information remains, the applicant stands a risk of the application being dismissed.

c) Se above.

3) **Rules of expert appointment**

a) The technical judges are appointed by the Government (for life – or until retirement at 67) in the same manner as law-trained judges. The expert members, as described above, are appointed by the Judges Proposals Board after nomination by relevant stakeholders (e.g. the industry and the EPA). They are then engaged by the court on a case by case basis.

b) Any judge or expert member can be challenged in a certain case on grounds of alleged bias. Such a claim will be tried by another judge at the court (and the decision may be appealed).
c) During the court proceedings it is quite common for the court to ask the applicant precise questions. There can be a large number of such questions and they will frequently lead to a need for the applicants to engage experts of their own in order to answer them. As the environmental authorities are parties to the court proceedings – they will from their area of expertise – scrutinize the answers (and all the case material) and ask questions of their own.

4) Evidentiary issues: standard and burden of proof

a) As regards environmental cases regulated by administrative law, it is up to the applicant/operator to prove that the activity or measure being planned or carried out is not harmful to the environment and human health. The precautionary principle applies, which means that any uncertainties will affect the chances of getting the permit etc. This is expressed in the Environmental Code. In civil cases the burden of proof normally lies with the claimant who will have to prove the grounds for the claim. In criminal cases it is up to the prosecutor to prove, beyond reasonable doubt, that the accused is guilty. The presumption of innocence is of course part of Swedish law and the standard of proof follows from precedents by the Supreme Court.
b) The burden of proof in science-intensive cases is allocated with the applicant or operator. For example, if there is a complaint about risk of disturbance causing damage to a local bat population due to a planned windfarm, the burden of proof that the bat populations favourable conservation status will not be threatened lies with the applicant.

5) Rules of evaluating expert evidence: standard (intensity) of review

a) The piece of evidence which best applies to state of the art in the science in question or has the best chances to be agreed upon by the scientific society in general, will have an advantage in the decision by the court.
b) Yes, the court can review the assessments done by a domestic authority and draw its own conclusions.
c) There is no stated standard for this review but in general the court compares if the conclusion of the assessment approves with applicable guidance documents and state of the art in the scientific issue in question. As for the process in making the assessment, the court controls that all necessary phases in the process have been carried out in the right way. A full factual and procedural review will be carried out by the court.

6) The role of science and technology in the courtroom – an overall assessment

a) The difficulties of scientific fact-finding can be a challenge because the parties argue for their respective opinion by engaging experts, as professors in science, of their own. Often you will have two professors arguing against each others opinion using well-founded arguments. Normally they will however only highlight the evidence which is favourable to their own party. Using technical judges hopefully helps to navigate in the jungle of arguments.
b) Yes, the rules of involving experts, see question 3a, secure judicial control over deciding environmental disputes.
c) Considering that the environmental court proceedings in Sweden include technical judges, expert members and full assessment of the cases (in both substance and procedure) we would conclude that the system is set to be effective in applying both

national and EU environmental law, thus giving it proper impact. It goes without saying that a system is never so good that it cannot be improved. In addition the courts are in need of good legislative work and of the environmental authorities doing a proper job. The standard/quality of applications also affects the cases.

d) Of course, it is possible to improve the scientific engagement of judges. Using technical judges, as in Sweden, is one way to promote engagement and knowledge in scientific matters of law-trained judges. To become a good environmental judge it is also necessary to acquire long experience of these questions. Therefore, it is important that judges stay on in the field of environmental law for a longer time in order to become specialized in this area. As regards legal tests to review contradicting scientific evidence, it would be nice if that could be developed but it is hard to figure out how such a test would be possible to conduct.

7) Case study

a) There are several the questions of science in the described case.
What kind of groundwater model has been used? Is this model in line with state of the art? Are there watersheds and if so where are they situated? How large is the area of influence and how is it situated? What information could be found in the assessment about the sensitive and small wetlands found in the rims of the area of the groundwater plant? Can the groundwater plant affect the Natura 2000 area in a way that may harm protected plants, animals and their habitats? Which plants grow in the calcareous fens? Will the plants in the calcareous fens be affected? What does the conservation plan for the Natura 2000 site look like? Are there certain species which are characteristic for the Natura 2000 area?

In general the court would, during the initial written procedure ask the applicant precise questions and scrutinize the answers. The relevant authorities, NGOs, the public concerned etc. will have the possibility to respond and rise questions, add material of their own etc. At the hearing more precise questions will be asked, before the court considers the ruling of the case.

The claim made by the NGO in the example case would be assessed by the court and would, if considered relevant, lead to additional questions being put to the applicant and it might be necessary for the applicant to carry out further scientific investigations. The environmental impact assessment must be sufficient. As it is a case of Natura 2000 the requirements of the Habitat Directive must of course be met as well as the case law from the CJEU (e.g. the Waddenzee case, Alto Sil, Sweetman etc.). If the proclaimed uncertainty is not removed by the applicant – a Nature 2000-permit will not be given.