

FISHING AND NATURA 2000: CHAPTER 7 SECTION 28(A) OF THE ENVIRONMENTAL CODE IN AN EU LAW CONTEXT

ENGLISH SUMMARY

This report examines to what extent chapter 7 section 28(a) in the Swedish Environmental Code applies to fishery activities. This provision transposes article 6.3 in the EU Habitats Directive. The relation between this article and the 2013 EU Regulation on the Common Fisheries Policy is analysed as well. Although the primary purpose of the report is to clarify and suggest changes in the Swedish legal situation, most of the discussion is relevant also to other member states.

The report focuses on clarifying three questions. The *first question* is whether a permit is required under chapter 7 section 28(a) of the Environmental Code for fishing activities that can impact the environment in a Natura 2000 area.

Even though this question must always be decided with regard to the environmental effects which can arise in each individual fishing situation, the legal analysis shows that chapter 7 section 28(a) of the Environmental Code, considered in light of EU law, has a wide scope that is typically considered to apply to various types of commercial fishing. This is due to the following factors:

- Fishing (as well as bottom-trawling and other fishing methods) is a type of “activity” according to chapter 7, section 28 of the Environmental Code, and should also be considered as a “plan or project” under article 6.3 of the Habitats Directive.
- A permit is required for fishing activities if the activity could have a “significant effect” on the conservation objectives of the site. Even a small possibility of such impact is sufficient to trigger the requirement, or as the Court of Justice of the European Union (CJEU) announced in the Waddenzee case, “if it cannot be *excluded* on the basis of objective information that the plan or project will have significant effects on the site concerned” (authors’ italics). An assessment of impacts must include not only those that are direct, but also those that are indirect (such as effect on the food web) and cumulative (such as the impact from other fisheries or other activities). The determinative factor is not whether the fishing occurs *within* a Natura 2000 area, but rather how it *impacts* the Natura 2000 area.

- Recurring fishing activities should be considered individual projects which require new environmental impact assessments with each occurrence under article 6.3 of the Habitats Directive (and thereby also under chapter 7 section 28(a) of the Environmental Code), even if the fishing activity began before the designation of the Natura 2000 area. This interpretation follows from the case law of the CJEU pertaining to article 6.3 of the Habitats Directive. Article 6.2 is also applicable to recurring fishing activities. This article contains the general responsibility to take appropriate steps to protect the environment in designated areas.
- Because recurring fishing activities should be seen as individual projects, fishing occurring after the entry into force of the Environmental Code (1 July 2001) is not excepted from the requirements of chapter 7 section 28(a) regardless of when the fishing activity occurred for the first time. As stated previously, article 6.2 of the Habitats Directive also applies.

The *second question* is whether chapter 7 section 28(a) of the Environmental code can be applied to the fishing industry without conflicting with the Common Fisheries Policy and the exclusive competence of the EU.

This legal question has largely been clarified by article 11 of the 2013 EU Regulation on the Common Fisheries Policy. Sweden's obligations under article 6 of the Habitats Directive (and thereby chapter 7 section 28(a) of the environmental code) apply to the entire exclusive economic zone. These obligations can apply also to other states' fishing activities, but a special procedure has to be followed when measures are directed at other states fishing activities. Sweden can, under certain conditions, take more stringent measures to conserve Natura 2000 areas than are prescribed by article 6 of the Habitats Directive (see below).

The *third question* concerns which legal solutions may be used in the future to regulate fishing activities that can affect Natura 2000 areas.

EU law does not in principle prevent, for example, the Swedish Agency for Marine and Water Management from promulgating regulations with specific requirements on fisheries in such a way that it is assured that "significant effect" on the environment does not occur, thereby avoiding the requirement for an environmental impact assessment and permit under chapter 7 section 28(a) of the Environmental Code. According to EU case law, however, there are strict requirements on the content of such regulations. These rules must "ensure" that fishing activities will not have a significant effect on the protected area (again with consideration to all possible direct, indirect and

cumulative effects). There have been two cases, discussed in this report, in which member states' laws have been invalidated by the CJEU as insufficient to avoid the requirement for assessment and permitting of certain activities under article 6.3 of the Habitats Directive. This report does not take a position regarding whether it is possible in practice to exclude fishing generally, and if so, how the environmental rules should be formulated (such a determination would require also other competence than legal). If generally applicable rules are used, they must be continually adapted to changes in the natural environment. Rules would most likely need to be specified for each individual Natura 2000 area.

Another possible solution is to generally prohibit all or certain types of fisheries within, and perhaps also in the vicinity of, a Natura 2000 area. Article 11 of the Regulation on the Common Fisheries Policy prevents such a prohibition if it is more stringent than provided for in article 6.2 of the Habitats Directive. In contrast, article 20 makes it possible to enact such a prohibition within the 12 nautical miles zone. Article 19 can be used if the objective of the measures is to sustain fish populations and are only directed towards domestic vessels.

The administrative responsibility for application of chapter 7 section 28 (a) of the Environmental Code could be vested in the Swedish Agency for Marine and Water Management instead of the county administrative boards. The consideration of the potential impact on Natura 2000 areas could then be coordinated with other licensing of the fishery activity. If the decision making takes place within the county administrative board, the Swedish Agency for Marine and Water Management should provide guidance on the applicability of fishing issues. This guidance should be formulated in accordance with the case law of the CJEU.

The full report is available in Swedish as
Christiernsson A, Michanek G, Nilsson P (2014) *Fiske och Natura 2000 – 7 kap. 28 § miljöbalken I EU-rättslig belysning*. Report no 2014:3, 36 pp, Swedish Institute for the Marine Environment (Havsmiljöinstitutet),
<http://hdl.handle.net/2077/35602>.