

## Should locals have a say when it's blowing? The influence of municipalities in permit procedures for windpower installations in Sweden and Norway\*

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### **Abstract**

Windpower is increasingly promoted as an environmentally friendly solution in a power-hungry world. At the same time, local resistance against such large scale developments is growing in many European countries, including Belgium, Denmark, Germany and the Netherlands. Against this background, a crucial issue concerns what voice local communities have in decisions regarding new windpower projects. This article investigates this issue through a comparison between Sweden and Norway, two countries with contrasting experiences.

After a brief description of the development of windpower in Sweden and in Norway, the system for environmental decision-making in Sweden and the permit procedure for wind farms are presented, followed by analysis of how the 'veto rule' is applied in practice and the debate on this issue. A presentation of the Norwegian system for environmental decision-making comes next, followed by a section on lessons learned about the influence of the municipalities in these processes. The article concludes with some remarks from a legal scientific and policy viewpoint on local influence on decision-making concerning renewable energy installations.

The author argues that, basically, local acceptance is crucial for this development. National planning instruments should be combined with possibilities for the municipalities to have

a say concerning the localization of wind farms. Further, financial arrangements to the benefit municipalities hosting such installations ought to be developed in order to increase local acceptance. This combination of local influence and economic benefits for the hosting societies may prove effective in promoting these much-needed renewable energy sources.

### **1. Introduction**

As part of the research project 'Competing land-use pressures in Norway' at the Fridtjof Nansen Institute, I have undertaken a legal scientific comparison between Norway and Sweden concerning local communities' influence on decision-making about windpower installations. For the Swedish part, I have benefitted from the material obtained in the research programme PROSPEC, a cooperative venture between Uppsala Universitet and the Swedish Species Information Centre (ArtDatabanken) at the University of Agricultural Sciences.<sup>1</sup> We have stud-

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<sup>1</sup> <https://jur.uu.se/forskning/forskningsammen/miljoratt/prospec/>.

ied all permits for windpower installations in Sweden 2014–2018, a total of 192 cases involving more than 500 decisions and judgements. Although the focus in that research project is on species protection, we also have learned much about the application of the ‘municipal veto rule’ in Sweden. For the Norwegian part, I have benefitted from research conducted at the Fridtjof Nansen Institute and my own examinations. Taken together, this provided material for a comparative study of Sweden and Norway concerning local influence in the decision-making on wind farming – a topic that is becoming increasingly controversial all over Europe.

However, it should be noted that although Sweden and Norway are close neighbours, the administrative and judicial systems differ greatly, as do the cultural values attached to ownership of natural resources. This point should be borne in mind, as this article aims to describe the systems and offer some comparative remarks – not to undertake a legal transplant in either direction. Additionally, comparison between the two countries may seem simple, as the languages are very similar and are generally mutually intelligible. But also here a caveat is needed, as there are some ‘false friends’ between Norwegian and Swedish: for example, in Norwegian the term *vindkraftverk* refers to a windpower installation or wind farm as a whole, whereas in Swedish it means an individual wind turbine.<sup>2</sup>

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<sup>2</sup> Such ‘false friends’ can lead to comical misunderstandings. A few years ago, a Swedish paper wrote that the Norwegian government claimed that the wolf population created problems by preying on *free ranging pigs*, which in turn threatened the traditional way of country life in Norway. In Norwegian, the word *sau* means sheep, whereas the similar “so” in Swedish refers to a sow, i.e. a female pig. I still wonder if the journalist really believed that there are pigs foraging in the wild in our neighbouring country...

## 2. Windpower development in Sweden and Norway

The development of windpower in both countries has been strong, with some differences in timing. In 2003, Sweden introduced ‘electricity certificates’ – a market-based support system for renewable electricity production – which proved crucial to attracting investment in windpower in those early days. Recent years have seen the rapid development of turbine technology, resulting in taller windpower stations with greater capacity. Whereas turbines constructed between 2010 and 2015 were 150 to 180 m. high, producing between 2 and 3 MW each, modern ones can be 250 meters and have a capacity of 5 to 6 MW.<sup>3</sup> These two factors – state aid and technical development – have been the main drivers behind the windpower boom in Sweden since 2010. As of 2019, Sweden had 4,100 turbines with a total capacity of 8,984 MW; for 2020 the corresponding figures are expected to be 4,550 turbines with total capacity of almost 11,000 MW.<sup>4</sup> Electricity production is forecast to double in four years, from 17 TWh in 2018, to 33 TWh in 2021 and 38 TWh by 2022.<sup>5</sup> In 2018, more than 10% of the electricity produced in Sweden came from windpower. Thus, the goals set for the development of onshore windpower have been met so far. However, this does not apply to the offshore development, as very few wind farms have been

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<sup>3</sup> These height figures include the wings. For example, the tower of a 3.6 MW Vestas turbine is 142 meters and the wing span (diameter) is 136 meters; a total height of 210 meters.

<sup>4</sup> Figures from the national trade organization Svensk Vindenergi; <https://svenskvindenergi.org/wp-content/uploads/2020/02/Statistics-and-forecast-Svensk-Vindenergi-feb-2020-FINAL.pdf>.

<sup>5</sup> Figures from the Swedish National Energy Agency (EM); <http://www.energimyndigheten.se/nyhetsarkiv/2020/prognos-sa-mycket-okar-elproduktionen-fran-sol-och-vind-till-2022/>.

built in Swedish waters.<sup>6</sup> The main barrier here – in addition to the high costs – is military, as the Swedish Armed Forces have opposed the construction of almost all wind farms in the Baltic Sea and parts of Sweden's west coast.

Norway is one of the 'big ten' in the world in hydropower; nearly 95% of all electricity production comes from this source. This may have been one reason why the introduction of large-scale windpower came later than in the other Nordic countries. The first 15 years, development proceeded very slowly; Norway came nowhere near to meeting the goal set in 1999 of 3 TW production by 2010.<sup>7</sup> In 2003, a system for financial support was introduced, which resulted in a 'Klondike atmosphere' with many less serious applications for concessions for windpower installations.<sup>8</sup> In 2008, the construction of wind farms was exempted from the municipal planning system, leaving the national administration as the sole decision-maker in the concessions procedure. From 2012, Norway and Sweden have a common electricity certificate market, which permits trading and receiving certificates for renewable electricity production in either country. Thereafter, windpower development in Norway proceeded very rapidly – production doubling from 2.6 TWh in 2016 to 5.5 TWh by 2019. Installed effect in 2019 was 2,444

MW in 800 turbines, corresponding to 3% of the electricity produced.<sup>9</sup> By 2021, production from all windfarms including those under construction today, is expected to amount to somewhere between 14 and 16 TWh, covering 10% of the electricity production. However, as in Sweden, offshore windpower development is quite a different story, with only one wind farm built, although it is the first one floating. In contrast to Sweden though, there are 20 more wind parks planned in Norwegian waters, some of which will be among the largest in Europe.

In sum, windpower development today is strong in both Sweden and Norway. There is a substantial inflow of foreign capital for investments in the sector, and both countries are major exporters of electricity to the European market.<sup>10</sup> These facts may be good to keep in mind in the discussion to follow.

### 3. Sweden: Legislation and permit procedures for wind farms

#### Environmental law and procedures in Sweden

Sweden has a 'universally' applicable Environmental Code (1998:808, MB), which harmonizes the general rules and principles in this field of law. The Code, which applies to all human activities that may affect the environment, specifies the principles and provide with provisions on environmental quality norms as well as environmental impact assessments. Certain listed water operations, industrial undertakings, quarrying

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<sup>6</sup> According to the report *Havsbaserad vindkraft – potential och kostnader* (SWECO 2017-01-31) four are operating and another eight have permits that are finally decided; <https://www.energimyndigheten.se/globalassets/fornybart/framjande-av-vindkraft/underlagsrapport-swe-co---havsbaserad-vindkraft---potential-och-kostnader.pdf>.

<sup>7</sup> Blindheim, B: Implementation of windpower in the Norwegian market; the reason why some of the best wind resources in Europe were not utilized by 2010. *Energy Policy* 58 (2013), pp. 337–346.

<sup>8</sup> Inderberg, THJ & Rognstad, H & Saglie, I-L & Gulbrandsen, LH: Who influences windpower licensing decisions in Norway? Formal requirements and informal practices. *Energy Research & Social Science* 52 (2019) 181–191.

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<sup>9</sup> Figures from the Norwegian Water Resources and Energy Directorate (NVE); <https://www.nve.no/energi-forsyning/kraftproduksjon/vindkraft/?ref=mainmenu>.

<sup>10</sup> Vasstrøm, M & Lysgård, HK: Bevegelser i norsk vindkraftpolitikk – drivkrefter, motkrefter og fremtidige utfordringer. *WINDPLAN* Policy note #1, University of Agder 2020. <https://windplan.uia.no/wp-content/uploads/2020/03/Policynotat-WINDPLAN-1-Politikkkutvikling-og-fremtidige-utfordringer.pdf>.

Figures from the Norwegian Water Resources and Energy Directorate (NVE); <https://www.nve.no/energi-forsyning/kraftproduksjon/vindkraft/?ref=mainmenu>.

and other environmentally hazardous activities require a permit. The Environmental Code also contains provisions relating to nature conservation, flora and fauna protection, chemicals and wastes. Today, almost all environmental legislation in Sweden emanates from EU law, with some national varieties and some purely national law.<sup>11</sup>

Sweden has administrative courts for the appeal of administrative decisions and ordinary courts for civil and criminal cases. The administrative courts decide cases on their merits in a reformatory procedure, meaning that they replace the appealed decision with a new one following analysis of all the relevant facts of the case. Ultimate responsibility for investigation of cases rests with the court according to the *ex officio* principle. The Environmental Code establishes a system of five Land and Environmental Courts and one Land and Environmental Court of Appeal. These are all divisions within the ordinary courts, but essentially act as administrative courts for cases under the Environmental Code and the Planning and Building Act (2010:900, PBL). A Land and Environmental Court has some of the characteristics of a tribunal, consisting of law-trained judges as well as technicians and experts. All members of the courts have an equal vote.

The Swedish concept of ‘standing’ in administrative cases is heavily interest-based. If the provisions in an Act are meant to protect certain interests, representatives of those interests can challenge the decision-making under that legislation by way of appeal. In recent years in the wake of the case-law of the Court of Justice of the European Union (CJEU), the standing rights of ENGOs (environmental non-governmental

organizations) have been expanded by national courts applying the principle of judicial protection under EU law.<sup>12</sup> As a general rule, environmental procedures in Sweden are free of charge; there are no court fees or any obligation to pay the opponents’ costs.

### **The permit procedure for wind farms**

There is a basic permit requirement in the Environmental Code for the building of wind farms.<sup>13</sup> Environmental impact assessments (EIA) are also compulsory according to Chapter 6 of the Code, as per the EIA Directive (2011/92). Permits are issued by special regional bodies, Regional Licensing Delegations (Miljöprövningsdelegationen, MPD), hosted by 12 of the County Administrative Boards. Decisions by the MPDs can be appealed to one of the five Land and Environmental Courts, and thereafter – if leave to appeal is granted – to the Land and Environmental Court of Appeal.

In decisions on a permit, one applies the general rules of consideration in Chapter 2 of the Environmental Code. This set of rules reflects most of the general principles of environmental law, such as the requirement for knowledge, best available technologies and the precautionary principle. The burden of proof, showing that the operation will satisfy these requirements,

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<sup>12</sup> See Darpö, J: Pulling the trigger: ENGO standing rights and the enforcement of environmental obligations in EU law (In: *Environmental Rights in Europe and Beyond*, eds. Sanja Bogojević and Rosemary Rayfuse. Hart Publishing 2018, pp. 253–281) with reference to CJEU cases C-263/08 *DLV* (2010), C-115/09 *Trianel* (2011), C-240/09 *Slovak Brown Bear* (2011), C-243/15 *LZ II* (2016) and C-664/15 *Protect* (2017).

<sup>13</sup> The statutory limit is two or more turbines if the height exceeds 150 meters including the wings, which in practice includes all wind farms developed in Sweden today. This limit has been altered over the years, but as most finance institutions require a permit for the operation as security for their loans, the provision is of lesser importance. If a permit is not required by law, operators will still apply for a ‘voluntary’ permit.

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<sup>11</sup> See Darpö, J: *Ömsesidig glädje och nytta? Sverige och EU på miljörettens område*. [http://www.sieps.se/globalassets/publikationer/2019/sieps-2019\\_9epa\\_sieps.pdf](http://www.sieps.se/globalassets/publikationer/2019/sieps-2019_9epa_sieps.pdf).

lies with the applicant. As regards wind farms, the major provision is found in Chapter 2 section 6 of the Code (2:6 MB); that 'a suitable site shall be selected with regard to the purpose being achieved with a minimum of damage or nuisance to human health and the environment'. Guidance on the choice of site can be found in Chapters 3 and 4 of the Code. The latter of the two contains vaguely formulated provisions concerning certain areas, such as the mountains and archipelagos of Sweden. As specified in Chapter 3, the authorities responsible for certain sectors have listed areas of 'national interest'. The Swedish Energy Agency has listed 284 terrestrial areas and 29 areas at sea and in inland waters as being of national interest for wind farming (3:8 MB). The Swedish Environmental Protection Agency has listed areas of national interest for the protection of nature and species (3:6 MB), and the Swedish Armed Forces have termed certain parts of the country and most of the Baltic Sea as unsuitable for wind farming, on grounds of national defence interests (3:9 MB). If an area is of national interest for several incompatible purposes, preference shall be given to the one most likely to promote sustainable management of land and water. If the area is needed for a total defence installation, preference shall be given to that (3:10).

In addition to these rules on the balancing of different interests, a permit for a wind farm must meet requirements that are more 'absolute' according to EU law and international obligations. Species protection and Natura 2000 according to the Birds Directive (2009/147) and the Habitats Directive (92/43) often pose challenges, as wind farms can have detrimental effects on slow-flying birds such as birds of prey and grouse, as well as certain sensitive species of bats found in the southern and middle parts of the country. Also reindeer herding and Sami interests are important, although this is not clearly reflected in

the Environmental Code. According to 3:4 MB, the Swedish Board of Agriculture shall list those areas which are of national interest for reindeer herding, a provision that is accordingly subjected to the balancing of interests under 3:10 MB. In case-law, however, the importance accorded to reindeer herding and Sami interests is greatly strengthened by Sweden's international obligations under the Council of Europe, ILO and UN.<sup>14</sup> And as noted, national defence interests always have preference, not only because of the provision in 3:10 MB, but also because the courts are obliged to refer the case to the government if the Armed Forces so urge.

#### **The municipal 'veto rule'**

In order to obtain permission to construct a wind farm, approval is also required from the municipality(-ies) where the installation is planned. What has become known as the 'municipal veto' rule is regulated in 16:4 MB: '*a permit for a wind-power station may be granted only if the municipality where the power station is intended to be built has approved*'. This approval is regarded as a substantial requirement, which the relevant authorities and courts must respect. Normally, the request for municipal approval is made by the MPD when the permit application and the EIA for the project are 'complete' and ready for public consultations. This may take some time, as several

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<sup>14</sup> In the recent judgement in the *Girjas case* (*Högsta domstolen* 2020-01-23; T 853-18), the Supreme Court stated that Swedish law on the protection of Sami land-use rights shall be understood in the light of the international obligations in the Council of Europe's Framework Convention for the Protection of National Minorities (1995), the 1996 UN Covenants on Economic Social and Cultural Rights, and on Civil and Political Rights, and the UN Declaration on the Rights of Indigenous Peoples (2007). The Court also made it clear that although Sweden – unlike Norway – has not signed the 1989 ILO Indigenous and Tribal Peoples Convention (no. 169), this instrument expresses international law principles that shall be taken into consideration.

rounds of communication with the applicant for additional information are often necessary. Thereafter, the municipality will take some time to deliver its decision, which is normally made by the municipal council, as the issue concerns a 'matter of principal interest' regarding local land-use. Case-law has made clear that the requirement for municipal approval applies not only to original permit applications, but also to permission for changes in the operation according to 16:2 MB.<sup>15</sup> This commonly occurs when the original permit for a wind farm has never been utilized – for financial reasons, lack of net capacity on the electrical grid, etc. – and time has made the height condition obsolete due to recent technical developments. For example, instead of 20 turbines with maximum height 150 meters, the applicant may now wish to have 15 wind turbines, 250 meters in height. This requires new approval by the municipality – which seems logical, as the disturbances from taller wind turbines can be quite different. Importantly, the warning lights from turbines over 150 meters are no longer red, but flickering white – a greater nuisance for those living nearby. On the whole, the public finds these taller, larger wind turbines far more controversial, which obviously puts greater pressure on local politicians. And, as the Land and Environmental Court of Appeal has pointed out, if approval were not necessary for such changes, the operator would be able to circumvent the requirements by first applying for a certain design of the installation, and later intending something quite different, without needing approval from the municipality. Further, the municipal decision is not regarded as binding according to the principles of public law, which enables the municipal council to

change its mind in the course of the procedure, even when the permit is on appeal.<sup>16</sup> Finally, the validity of the municipal decision is not affected by a party requesting judicial review of the decision as such. This may happen when a disappointed applicant wants to challenge the decision in court – thus far, without success.<sup>17</sup>

### **Application of the municipal veto rule 2014–2018**

As noted, our study of wind farm permits between 2014 and 2018 covered 192 cases with decisions and judgements from the MPDs, Land and Environmental Courts and the Land and Environmental Court of Appeal.<sup>18</sup> In about 80% of the cases, the MPDs decisions are appealed to court. Leave to appeal was issued by the Land and Environmental Court of Appeal in about 20% of the cases, a fairly normal share for this kind of procedure under the Environmental Code.<sup>19</sup> Appellants were distributed, about 50/50, between developers (applicants) and opposing individuals and their organizations, including ENGOS.

The 192 cases concerned a total of 4,254 wind turbines. Of these, 11 (390 turbines) were dismissed by the MPDs or courts due to lack of investigation, flawed EIAs, etc. Of the remaining 181 cases (3,864 turbines) which were tried on their merits, permits were issued for 2,891 turbines (75%).

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<sup>15</sup> Land and Environmental Court of Appeal 2018-05-15; M 6227-17 (MÖD 2018:6); <http://www.rattsinfosok.dom.se/>.

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<sup>16</sup> MÖD 2016-09-21; M 10647-15; <https://www.domstol.se/mark--och-miljooverdomstolen/avgoranden/>.

<sup>17</sup> See for example judgement by the Administrative Court in Jönköping 2019-11-07 in case No 5313-18.

<sup>18</sup> Those figures include only cases where a final decision has been made. In addition come slightly more than 20 cases decided by the MPDs during the period, which still are pending.

<sup>19</sup> The portion was lower in the south of Sweden and higher in the six northern counties, largely due to conflicts between wind farming and reindeer herding and other Sami land-use rights.

Of the 25% where the application was tried on the merits and rejected (973 turbines), the reasons were as follows: municipal veto 11% (427 turbines), species protection 8% (311 turbines), Sami land-use rights and reindeer herding interests 3% (116 turbines), and national defence 2.4% (93 turbines). Neighbours, landscape and cultural heritage do not feature in the statistics; these interests sometimes entail stricter conditions or that a couple of turbines are excluded, but rarely result in denial of a permit for a wind park.<sup>20</sup>

Thus, the most frequent reason for denying a permit for a wind farm is the municipal veto. Even if 11% is a rather high figure, is it not in the vicinity of the figures found in other studies applying a similar method?<sup>21</sup> Of course it might be argued that these figures underestimate the impact of the municipal veto, as many applicants simply decide not to proceed past the EIA consultation stage when they realize that the local politicians are negative. That may be so, but it could also be said of all the above-mentioned grounds for refusal and it is impossible to check without further study. Moreover, the system is set up so that the municipal decision enters the procedure rather late, when the EIA has been produced and the application has been complet-

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<sup>20</sup> During the period under study, only one application (for ten wind turbines) was turned down on grounds of cultural heritage interest: the exploitation area was close to Fågelsjö Gammelgård, a UNESCO World Heritage Cultural site.

<sup>21</sup> In one region in southwestern Sweden – Västra Götaland – a study of permit applications between 2009 and 2014 found that 45% of all cases were turned down by municipal veto (*Användning av det kommunala vetot mot vindkraft i Västra Götalands län*. Franzén Wallberg, A & Göthe, L. Miljöbyrå Ecoplan AB, March, 2015. There may be various reasons for this discrepancy: the system was introduced in 2009 and was therefore rather new, and communications between applicants and municipalities were less developed; public opinion was more negative towards wind farms at that time – or simply that the figures reflect the fact that the resistance is much greater in densely populated South Sweden than in the northern regions.

ed, at substantial cost for the applicant.<sup>22</sup> Moreover, many municipalities hesitate to give a clear response until they have studied the full application – which also means that they may have a rather positive attitude at the hearing, and later change their minds due to public pressure. Further, it happens that the municipality sets conditions of its own as regards approval, e.g. distance requirements or limit values for noise that are stricter than those decided in case-law on permits for wind farms. These conditions can be enforced effectively if the MPD does not abide by them, as the municipality may appeal the decision if they find it unfavourable and subsequently issue a new and negative 16:4-decision.

### The Swedish debate on the veto rule

The 'veto rule' was introduced in 2009 in order to safeguard municipal influence over decision-making concerning windpower installations when the requirement for local planning was abandoned. The system has since then been criticized for discriminating against windpower in relation to other sources of energy production, thus representing an obstacle to climate-change adaptation. Critics note the waste of resources if applications are denied or withdrawn at a very late stage in the procedure. Local opinions are also said to have too much weight, to the disadvantage of renewable energy production. Further it is claimed that the veto rule can be used in order to 'blackmail' applicants to contribute to the local economy. Finally, the veto power is said to be applied very differently from one municipality to another. Against this backdrop,

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<sup>22</sup> According to the guidelines issued by Swedish Energy Agency, the municipal decision is to be issued *no later than* when the application is complete (Energimyndigheten: *Vägledning om kommunal tillstyrkan vid tillståndsprövning av vindkraft*. ER 2015:05, part 3). However, this guidance is non-binding, and few municipalities deliver the 16:4-decision at an earlier stage.

the system is argued to suffer from lack of predictability and legal certainty, which may be in breach of Article 13.1(d) of the EU Renewable Energy Directive (2008/29), according to which the authorization procedures shall be ‘objective (and) proportionate’.<sup>23</sup>

The windpower industry has strongly advocated reform of the system from the very beginning. Over the years, this criticism has attracted some attention; and in 2017, the Swedish Energy Agency and the Environmental Protection Agency proposed abolishing the municipal veto rule.<sup>24</sup> The majority of the instances that made their voices heard during the remit were in favour, but the proposal never gained political acceptance. My guess is that powerful municipal-level stakeholders in the Parliament would not accept such an idea unless they could be convinced that they would still have a say in the local land-use planning concerning wind farms.

Since then, alternative ideas concerning municipal consent in the Environmental Code has been discussed – for example, requiring that the decision be made early in the procedure and be binding. But even so, the voices are strong from those who advocate the abolishment of any such consent. However, in my view, some of the arguments put forward for such a solution are misleading or misinformed. For example, it is claimed that the municipalities will retain their influence through the comprehensive plan

according to Chapter 3 of the PBL. Such a plan, although not binding, has a certain importance for the localization of wind farms according to jurisprudence. The support for this is a judgement by the Land and Environmental Court of Appeal from 2009 (MÖD 2009:4). That conclusion may have been true some ten years ago, but is no longer relevant when the Energy Agency has designated more than 300 ‘areas of national interest’ for wind farming under the Environmental Code. Such a designation is decisive for the land-use in a given area, regardless of any local efforts at planning otherwise. When a comprehensive plan is displayed for public consultation, the County Administrative Board (CAB) is assigned by law to protect the national interests. If the municipality proceeds to plan for land-use in an area which is not in line with a designation for a purpose of national interest, the CAB is obliged to lodge an objection, which will become a part of the comprehensive plan. If the municipality proceeds and decides to adopt a detailed plan for that area, the CAB is obliged by law to quash that plan (11:10-12 PBL).<sup>25</sup> Moreover, the law is equally clear when an application

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<sup>23</sup> See Michanek, G: One national windpower objective and 290 self-governing municipalities, in: *Renewable Energy Law in the EU: Legal Perspectives on Bottom-up Approaches*, eds. M. Peters & T. Schomerus, Edward Elgar 2014, p. 144, also Malafry, M: *Biodiversity Protection in an Aspiring Carbon-Neutral Society. A Legal Study on the Relationship between Renewable Energy and Biodiversity in a European Union Context* (dissertation, Faculty of Law, Uppsala Universitet, 2016), section 2.5.6.3 Example from Sweden – the municipal veto rule (pp. 75 ff.).

<sup>24</sup> *Kommunal tillstyrkan av vindkraft*. Redovisning av regeringsuppdrag i regleringsbrevet för 2016. Skrivelse 2017-06-19; dnr NV-00099-16, EM 2016-4752.

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<sup>25</sup> This system for state control was illustrated in a case in one of the Land and Environmental Courts concerning an application for a permit to construct three wind turbines in Lilla Edet on the Swedish west coast (Mark- och miljödomstolen in Vänersborg, judgement 2015-01-29 in case No. P 2142-14). The municipality turned down the application, on grounds that, according to the comprehensive plan, that area was designated for outdoor recreation. On appeal from the developer, the CAB annulled this decision, referring to the fact that the area had been designated by the Energy Agency as of national interest under 3:8 of the Environmental Code. The municipality then appealed to the Land and Environmental Court, which accepted the decision to deny a permit for the windpower installations. Decisive here was that the CAB had failed to state its objections at the consultation stage, which is why the comprehensive plan took precedence. From this line of argument, it is obvious that a designation from a national agency as to land-use in a certain area takes precedence over any conflicting municipal decision under that law in all normal circumstances.



for a permit for a windpower installation is to be decided under the Environmental Code; according to 3:8 MB, areas of the national interest for energy production 'shall be protected against measures that may substantially obstruct the establishment or use of such facilities'. And on this matter, case-law is firm; any municipal interest in the land-use of that area must yield to the national interest in wind farming (MÖD 2019:5, MÖD 2017:20, MÖD 2010:38).

#### **4. Norway: Legislation and permit procedure for wind farms**

##### **Norway and the EEA Agreement**

Norway is not a member of the EU. However, as a member of the EFTA, it has been bound by most EU laws since 1994 through the EEA (European Economic Area) Agreement.<sup>26</sup> This means that most (but not all) EU regulations and directives apply in Norway. For example, the EU Water Framework Directive (2000/60), the Renewable Energy Directive (2008/29), the EIA Directive (2011/92) and the Public Participation Directive (2003/35) are all included in the Norwegian EEA Agreement. However, the nature conservation directives – that is the Birds Directive (2009/147) and the Habitats Directive (92/43) – have been left out. This has consequences for wind farming, as such installations may have detrimental effects on birds and bats. On the other hand, under the Council of Europe, Norway is bound

by the 1979 Bern Convention.<sup>27</sup> This international instrument is the overarching European agreement that the both nature conservation directives intended to implement into the Union. Thus, the level of species protection is meant to be similar.

The difference between the obligations under EU law and under the Bern Convention lies not in the substance of law, but in the mechanisms for implementation and enforcement. The Commission is the main driver for the integration of the EU Directives in the Member States by way of guidelines, communications and – if necessary – infringement cases brought to the CJEU. Judgements of the CJEU are binding on the Member States, and the Commission can apply for fines if a Member State is found in breach of EU law<sup>28</sup>, as Sweden has painfully experienced.<sup>29</sup> In addition, all national courts in the Member States have the possibility – and for the final instances, an obligation – to request the CJEU for a preliminary ruling on the understanding of EU law in a given issue. Over the years, this possibility has been widely used by various courts to obtain a common understanding of the EIA Directive, the Birds Directive and the Habitats Directive. In contrast, the only compliance mechanism in the Bern Convention is the possibility for the public concerned or another Party to notify the Standing Committee of alleged infringements. This Standing Committee is mainly a tool for diplomatic negotiations, and

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<sup>26</sup> Today, Norway, Iceland, Liechtenstein and Switzerland constitute the European Free Trade Association (EFTA), to which also Sweden belonged before joining the EU in 1995. Norway, Iceland, Liechtenstein have, together with EU's 27 Member States, formed the European Economic Area (EEA), aimed at an internal market governed by the basic rules of the four freedoms on the movement of goods, persons, services and capital. Switzerland has a separate agreement with the EU and the UK has a temporary withdrawal agreement with the Union which ends on 31 December 2020.

<sup>27</sup> Convention on the Conservation of European Wildlife and Natural Habitats, CETS 104 (19 Sept. 1979).

<sup>28</sup> The case C-261/18 Com v IE (2019) on breaches of the EIA Directive in Ireland serves well for illustration.

<sup>29</sup> In the cases C-607/10 (2012) and C-243/13 (2013), Sweden was found to be in breach of updating requirements for permits for industrial installation under the IPPC Directive (2008/1). When the case concerning fines arrived at the CJEU, there was still one installation without modern conditions in the permit. That omission cost Sweden the lump sum of €2M plus € 4,000 in daily fines for almost a month.

is generally reluctant to issue decisions apart from general recommendations. However, that does not prevent the Committee from occasionally taking a harder bite in issues concerning species protection, as happened concerning the Norwegian wind park at Smøla, widely known for causing serious damage to white-tailed eagle populations over the years.<sup>30</sup> But at the end of the day, the only sanction available if a Party neglect such findings is the possibility to report back to the Standing Committee and for the Committee to take a renewed stance on the alleged breaches of the obligations in the Convention.

In addition, also concerning those fields of law which are covered by the EEA Agreement, the system for implementation and enforcement is very different from the one within the EU. There is a supervisory body – the EFTA Surveillance Authority (ESA) – and a court, the EFTA Court.<sup>31</sup> The ESA has similar competence as the EU Commission to pursue infringement cases.<sup>32</sup>

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<sup>30</sup> Recommendation No. 144 (2009) of the Standing Committee, adopted on 26 November 2009, on the wind park in Smøla (Norway) and other windfarm developments in Norway. <https://wcd.coe.int/ViewDoc.jsp?id=1560617&Site>.

<sup>31</sup> Obviously, there are substantial differences between the two courts concerning the size and number of cases handled. Whereas the CJEU has 65 justices and 11 advocates-general, more than 20,000 employees and decides on about 1,500 cases each year, the corresponding figures for the EFTA Court are three justices, a staff of less than 20 persons, and rarely more than 15 cases a year.

<sup>32</sup> See for example the complaint from Renøy reindeer herding district about Norwegian implementation of the EIA Directive: <https://www.eftasurv.int/cms/sites/default/files/documents/gopro/4893-Request%20for%20information.pdf> It may be noted that most communications between the ESA and EFTA countries are openly published on the authorities' website – in stark contrast to the EU system, where all communications between the Commission and the Member States are kept secret. The reason for why we know about the infringement cases between the Commission and Sweden is because the Swedish government has a more open attitude when it comes to disclosing communications from the EU Pilot, Letter of Formal Notices and Reasoned Opinions.

However, the EFTA system is much weaker as regards implementation than that of the EU. To begin with, the national courts of Norway, Iceland and Liechtenstein may request a preliminary ruling from the EFTA Court, but they are not obliged to. Moreover, rulings of the EFTA Court in such cases are formally termed 'advisory opinions'. Although these judgements are binding under international law and must accordingly be taken into account by the national courts, the Norwegian Supreme Court (*Høyesterett*) has occasionally chosen to dissent.<sup>33</sup> Provisions in EU Directives under the EEA Agreement are used as 'interpretive factors' in the understanding of the implementing legislation in the EFTA countries, but are not awarded any 'direct effect'. In contrast, the principle of direct effect is of utmost importance in EU environmental law, as it obliges Member States' courts to give precedence to those provisions containing sufficiently precise and unconditional rights and obligations over any contrasting national law.<sup>34</sup> Finally, the EFTA Court is not empowered to impose fines on a country for breaches of the EEA Agreement.

### Norwegian environmental law

Environmental law in Norway is not contained in a single piece of legislation such as a Code, but divided according to the substance of regulation

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Also Finland has a similar attitude. In both countries, the transparency principle holds a strong position.

<sup>33</sup> The Høyesterett has, on the one hand, declared that rulings of the EFTA Court shall be accorded 'considerable weight' (*'vesentlig vekt'*) in national jurisprudence (see Rt. 2000 s. 1811 *Finanger I*). On the other hand, in EFTA correspondence on the *Laval case* about free movement of labour (C-341/05), Høyesterett chose not to abide to the ruling from the EFTA Court (Rt. 2013 p. 258, cf. E-2/11 *STX Norway offshore*), which led the ESA to open a new infringement case, see <http://www.eftasurv.int/press--publications/public-documents?ActionEvent=Search&casenr=74557>).

<sup>34</sup> The CJEU uses the expression 'to set aside' or to 'dis-apply' provisions in national legislation contravening EU law; see Darpö 'Pulling the trigger' (n.12 supra).

or sector in society. The most important pieces of legislation with general application are the Pollution Control Act (LOV-1981-03-13-6, FL), Nature Diversity Act (LOV-2009-06-19-100) and the Environmental Information Act (LOV-2003-05-09-31). The Nature Diversity Act is meant to implement the Convention on Biological Diversity (CBD)<sup>35</sup> and the Bern Convention. All these acts are under the responsibility of the Ministry of Climate and Environment (KLD). Also the Planning and Building Act (LOV-2008-06-27-71, PBL) has general application. Alongside with provisions on planning and building, it contains rules on environmental impact assessments. The PBL is under the Ministry of Local Government and Modernization (KMD). Decision-making under the PBL is mainly a responsibility of the municipalities, although regional and state bodies have legal means to intervene in order to protect higher-ranking interests.

The Ministry of Petroleum and Energy (OED) is in charge of the energy sector. Hydropower is regulated through the Act Relating to Regulation of Watercourses (LOV-1917-12-14-17) and the Water Resources Act (LOV-2000-11-24-82).<sup>36</sup> Provisions on windpower installations and issues related to electricity nets and grids are found in the Energy Act (LOV-1990-06-29-50, EL).

The Norwegian system for environmental decision-making concerning large-scale operations can be described as more centralised and politicized than in Sweden.<sup>37</sup> Permits for indus-

trial installations, hydropower and environmental hazardous activities are normally issued by state authorities in the regions (*fylkesmann*, County Governor) or at the national level, such as the Environment Agency (*Miljødirektoratet*) or the Norwegian Water Resources and Energy Directorate (*Norges vassdrags- og energidirektorat*, NVE). Decisions by the NVE can be appealed on the merits ('administrative appeal') to the OED. The definition of those who can appeal – the public concerned – is 'interest-based' and traditionally concerned individuals, ad hoc groups, local community groups and ENGOs all have standing. Judicial review of the decisions by the Ministry can be brought to court, but in contrast with Sweden, this rarely happens. Three factors may be relevant here. First, criteria for concessions are broadly formulated, leaving the administration considerable room for discretion to decide, for example, what is 'socio-economically effective'. In practice, the review in court will be confined to formal issues and other basic rules of good governance. Second, it is procedurally complicated to bring an action for judicial review in Norway, as one must bring the claim to the first level in the general court system, that is the District Court. Thereafter, the case must proceed over the Court of Appeal before arriving at the final instance, the Norwegian Supreme Court (*Høyesterett*). Third, the costs of bringing such a case may be considerable, as the loser-pays-principle applies in all instances.<sup>38</sup> There

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(although somewhat out-of-date) Pettersson, M & Ek, K & Söderholm, K & Söderholm, P: Windpower planning and permitting: Comparative perspectives from the Nordic countries, *Renewable and Sustainable Energy Review* 14 (2010) pp. 3116–3123.

<sup>38</sup> In 2018, when the WWF challenged the decision on hunting wolves, the litigation costs in Oslo District Court amounted to more than NOK 450,000 equivalent to €47,000. However, in cases concerning issues of principal interests, the claimants can be exempted from paying the opponent's costs. The latter happened when two ENGOs (*Natur og Ungdom* and *Föreningen Greenpeace Nor-*

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<sup>35</sup> The Convention on Biological Diversity of 5 June 1992 (1760 U.N.T.S. 69).

<sup>36</sup> Also relevant in this context is the Waterfall Rights Act (LOV-1917-12-14-16), according to which only public actors can purchase larger waterfalls in Norway.

<sup>37</sup> Rudberg, P & Weitz, N & Dalen, K & Kielland Haug, JJ: *Governing growing windpower: Policy coherence of windpower expansion and environmental considerations in Sweden, with comparative examples from Norway*. Stockholm Environment Institute (SEI), project report 2013-04, also

is still another phenomenon that differs in our two countries. Whereas ENGOs in Sweden are large, centralized and few, they are small, local and many in Norway. This may be one reason why the Swedish organizations seem to be more litigious. This may on the other hand be an oversimplification, as the Norwegian Trekking Association (DNT) – far bigger than any Swedish equivalent – has been very active in windpower cases. There may thus be other underlying factors for this difference in the willingness to go to court, which cannot be examined here.<sup>39</sup>

### Permit procedure for windpower installations

Also in Norway, the permit procedure for windpower installations was simplified in 2008. Before the reform, such installations required both municipal approval in the form of a regulation plan according to the PBL and a permit decision according to the EL. Today, for wind farms with capacity of more than 1 MW the developer only needs to apply for a permit from the NVE according to sections 3-1 and 3-2 EL.<sup>40</sup> The term ‘concessions’ (*konsesjoner*) is used here for those permit decisions, which in my view is accurate as they cover the windpower installation as such, the powerlines and connection to the elec-

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*den*) challenged the OED decision to open Barents Sea to oil extraction. The District Court awarded the OED the equivalent of €53,000, whereas the Court of Appeal exempted the ENGOs from all costs. As the ENGOs had lost the case in substance, they appealed to the Supreme Court, which granted leave to appeal in February 2020, see <http://climatecasechart.com/non-us-case/greenpeace-nordic-assn-and-nature-youth-v-norway-ministry-of-petroleum-and-energy/?cn-reloaded=1>.

<sup>39</sup> See Fauchald, OK: Environmental Justice in Courts – a Case Study from Norway. *Nordic Environmental Law Review* 2010 pp. 49-67, also Tegner Anker, H & Fauchald, OK & Nilsson, A & Suvantola, L: The Role of Courts in Environmental Law – a Nordic Comparative Study. *Nordic Environmental Law Journal* 2009 pp. 9-33.

<sup>40</sup> At sea, there is a permit requirement according to the Act on the production of renewable energy at sea (LOV-2010-06-04-21, *havenergilova*), which will not be dealt with here.

tricity grid, as well as any necessary expropriation of land.

The concessions procedure at the NVE is only partly regulated in the EL and the PBL and subordinate bylaws.<sup>41</sup> In addition, administrative practice plays an important role. For installations with capacity of more than 10 MW – some 90% of all applications at the NVE<sup>42</sup> – the process starts with a notification to the authority. An EIA according to Chapter 14 of PBL is mandatory for wind farms of that size. For smaller projects requiring a concession according to EL (1–10 MW), the authorities shall make an assessment according to Article 4.2 and Annex II of the EIA Directive: a screening evaluation and decision. After announcement and public consultation, the NVE communicates a first opinion to the developer, with advice on whether to proceed or not. Although this procedure is not regulated by law, one third of the applications are withdrawn already at this stage.<sup>43</sup> Common reasons are that the area is not suitable for wind farming due to conflicting interests, or that the authorities are currently not giving priority to applications in that particular region. If the applicant instead decides to proceed, an investigation programme is established in accordance with the EIA requirements. A consultation group is commonly created and at least three public hearings are held with representatives of the municipalities involved, the public concerned, societal groups and ENGOs, the County Council (regional par-

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<sup>41</sup> Guidelines from the KMD and OED, most importantly *Retningslinjer for planlegging og lokalisering av vindkraftverk* (T-1458, June 2007) and KE-notat 13/2014 *Rammer for NVEs behandling av vindkraftsaker og orientering om viktige vurderingstemaer* (NVE 2014).

<sup>42</sup> Fauchald, OK: *Konsesjonsprosessen for vindkraftutbygginger – juridiske rammer*. Fridtjof Nansens Institutt, FNI Report 1/2018, at p. 41 f.

<sup>43</sup> *Konsesjonsprosessen for vindkraft på land*. NVE rapport 3/20, section 1.2. For further reading, see Inderberg et al 2019 (n.8 supra).

liament), County Governor (representing the state), and, as applicable, *siidas* (traditional Sami villages) and the Sami Parliament, and others. After this, the application for concession can be formally submitted to the NVE, often including a request for the necessary permit for net connection and access to land. If agreement cannot be reached with the landowners, compensation issues are dealt with by the general courts. The NVE commonly holds hearings with the public concerned, has meetings with those authorities who have raised objections (see below) and makes site visits before reaching a conclusion concerning the concession. In its decision, the NVE balances various private and societal interests: on the one hand, the need for renewable energy, net security, financial issues and prospects for profit, added value to the community and region; and on the other, nature conservation and species protection according to the Nature Diversity Act, outdoor recreation and landscape protection, national defence, nuisance for local residents, reindeer herding interests, cultural heritage, etc.

In comparison with Sweden, the room for administrative discretion in Norwegian concession cases is very wide. Decisions under the EL are also quite different from the Swedish system, as they usually provide only a general framework for the windpower installation as regards capacity and localization. The placement and number of turbines are not clearly stated, but left for the operator to decide in cooperation with the supervisory department of the NVE later in the procedure.<sup>44</sup> The stated reason for this is to ensure that the solution chosen is most suitable from a technical and financial viewpoint.<sup>45</sup> Many

controversial issues are left for further investigation and/or decisions in the detailed plan for the installation, sometimes without public consultations. In recent years, however, the NVE has issued guidelines aimed at strengthening the involvement of the public concerned also in these stages of the procedure.<sup>46</sup> Even so, there is considerable flexibility as regards extension of time limits for windfarm construction and operation. Moreover, the NVE's decisions are formulated very briefly; most information can be found in the various background documents. Guidelines exist, but as they tend to be rather dated, most attention is given to appeals decisions from the Ministry (OED). Regional windpower plans use to exist, but was widely regarded as recommendations only. Some years ago, there are also existed schemes issued by the KLD for avoiding conflicts ('TKVs'), but they were not closely followed.<sup>47</sup>

Numerical comparisons on windfarm installations in Sweden and in Norway are not easy to perform, as the figures are not really compatible. Norwegian wind farms are commonly larger than Swedish ones; and due to the design of the concession, it is difficult to get information on the number of turbines per decision.<sup>48</sup> Moreover, the Norwegian procedure is divided into two stages: notification and application. Similar to the case in Sweden, most NVE decisions are

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No. 53708; TOSLO-2019-53708) at pp. 4 (on the scope of the concession) and 31 (on the detailed plan for the installation).

<sup>46</sup> See for example the NVE note on 'expectations to permit holders at the planning and building of windpower installations' (2019-07-04; 201835505-2).

<sup>47</sup> Fauchald (n.41 supra) at p. 38.

<sup>48</sup> Recent figures from the NVE (2020-02-06) show that 39 wind farms have been built with total effect 2,416 MW. The number of concessions granted are 86, concessions denied 46. Ongoing cases are 20, but there are still another 104 in the planning stage. Information about the number and type of turbines etc. can be found on; <https://www.nve.no/energiforsyning/kraftproduksjon/vindkraft/vindkraftdata/>.

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<sup>44</sup> *Vindkraft: Håndteringen av miljøhensyn i konsesjonsordningen – situasjonsbeskrivelse og anbefalinger*. Miljødirektoratet Rapport 2015-10-20, at p. 40.

<sup>45</sup> See the NVE's position in the *Sandhaugen* case in the District Court of Oslo (Oslo tingrett 2020-02-21 in case

appealed to the ministry (OED), but the success rate is rather low.<sup>49</sup> However, some figures may be indicative. Research at the Fridtjof Nansen Institute has shown that, out of 195 notifications to the NVE in the period 1999–2019, 82 were dismissed or withdrawn at the first stage of the proceedings.<sup>50</sup> Out of the remaining 113 cases, concessions were granted by the NVE in 75 instances, and 38 rejected. As of June 2018, 79 decisions were appealed to the OED, out of which 64 were upheld by the Ministry. In the end, 48 applications for concession out of 113 were denied – or 43%. In addition, a further 82 were dismissed or withdrawn at the notification stage. Finally, my impression is that the grounds for denial are broader than in Sweden, as landscape protection, outdoor recreation and cultural heritage are specifically mentioned as barriers to windpower development.

As noted, administrative decisions can be subjected to judicial review in the general courts of Norway. However, such court decisions concerning wind farms are almost non-existent. A simple search resulted in 15 judgements, most of which dealt with compensation issues.<sup>51</sup> Only two of the cases shed some light on the concession process, albeit indirectly. These cases concerned two landowners living on estates bordering an area where a concession for a windpower installation had been granted. They sued the developer for compensation for breach of due consideration according to neighbourhood law and respect of property rights under the European Convention on Human Rights (ECHR). They claimed that, as the closest wind turbine would

be placed no more than a few metres from their properties, economic damage had been inflicted because of the loss of opportunity to establish a windpower station on their own land, in addition to loss of property value. One of the cases went all the way to the Supreme Court, which dismissed the claims;<sup>52</sup> the other failed for similar reasons at the Court of Appeal.<sup>53</sup> To these two cases can be added a recent judgement from the District Court of Oslo, where a developer was granted compensation due to maladministration at the OED when the Ministry unlawfully revoked a given concession.<sup>54</sup> However, there are no reported cases where the public concerned or ENGOs have challenged a court decision on a windpower installation concession.<sup>55</sup>

### **Influence of the municipalities**

With the 2008 reform, Norwegian municipalities lost much of their possibilities for influencing the development of windpower installations through planning. The municipalities are still important regarding communications with the developer and the NVE, but their formal decision-making power has been effectively removed. The NVE regards region plans as recommendations only; and if a municipal plan is incompatible with windpower development in the area, the national authorities can award the concession the status of a state area plan, which

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<sup>52</sup> Høyesterett 2011-05-27 in case No. 2011/60 (Rt 2011 s. 780, *Helland*).

<sup>53</sup> Gulating lagmannsrett 2014-10-15 in case No. 89583 (LG-2013-89583, *Undheim*).

<sup>54</sup> Oslo tingrett 2020-02-21 in case No. 53708 (TOS-LO-2019-53708, *Sandhaugen*).

<sup>55</sup> Norwegian court cases are reported in Lovdata (<https://lovdata.no/>), but the coverage of judgements from the District Courts is meagre. However, according to recent media reports, the ad hoc group 'Motvind' initiated one court case in May 2020 concerning a windfarm development, and has eight more upcoming, involving requests for injunctive relief. All cases concern installations in the coastal areas: <https://www.nrk.no/vestland/motvind-vil-ta-atte-vindkraftverk-for-retten-1.15033299>.

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<sup>49</sup> Fauchald (n.41 supra) at p. 15.

<sup>50</sup> Gulbrandsen, LH & Inderberg, THJ & Jevnaker; T: Political decisions gone with the wind? Windpower politics and administration in Norway. Forthcoming 2020.

<sup>51</sup> I am grateful to Professor Ole Kristian Fauchald at the Faculty of Law, the University of Oslo and the Fridtjof Nansen Institute, for assistance here.

takes precedence. Further, if the local authorities adopt any new plan in breach of a concession, the developer may appeal that decision to the Ministry of Local Government and Modernization (KMD), within the same government that decided on the installation to begin with. Thus, in formal terms, Sweden and Norway differ considerably as regards local influence on decision-making on windpower installations.

However, this picture can be nuanced. In practice, municipalities exercise influence mainly through the administrative instrument of *innsigelse* ('objection'), which has been developed under planning law as a means for regional and state influence on local decision-making. According to the PBL, certain state authorities, the Sami Parliament, the County Council and the County Governor, as well as neighbouring municipalities may raise objections to a local plan – if the plan concerns an issue of fundamental importance to that entity's area of responsibility or interest.<sup>56</sup> The objection must be made during the consultation stage of the proceedings, after which the municipality is required to initiate negotiations performed by the County Governor.<sup>57</sup> If agreement cannot be reached and the authority that raised the objection persists, decision-making on the controversial plan is raised from the municipal level to the KMD.

This system has been transferred to the EL. Reference is made to the provisions in the PBL which shall be applied 'as far as suitable', thus enabling the NVE to adapt the system to the concessions procedure (section 2-1 EL). First of all, the hosting municipality where the windpower installation is planned is accorded compe-

tence to raise objections. An objection results in compulsory mediation, to which the developer is invited. If the objection is upheld, the objection-raising body may develop its arguments, after which the NVE issues a decision in the case. This decision is thereafter remitted to the Ministry (OED), which handles the objections together with the appeals made against the NVE decision.

In cases concerning windpower installations, objections are often raised from the hosting municipalities.<sup>58</sup> As they also have standing to appeal, the difference under the EL between the two possibilities is slim, although an objection may be regarded as more serious.<sup>59</sup> Although the NVE on its website states that those bodies having competence both to raise objections and to appeal 'shall' use the former possibility,<sup>60</sup> it is not obvious from studying OED decisions on appeals that all municipalities have read those instructions. In general, the NVE has proven very reluctant to go against the opinion of an objecting municipality. Already in 2007, the authority declared that acceptance from the hosting municipality was of utmost importance when deciding on windpower installations.<sup>61</sup> In fact, in only six cases has the NVE overruled a protesting local community.<sup>62</sup> Moreover, con-

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<sup>56</sup> Information from the KLDs website: <https://www.regjeringen.no/no/tema/plan-bygg-og-eiendom/plan--og-bygningsloven/plan/kommunal-planlegging/innsigelsessaker/id2008038/>.

<sup>57</sup> *Retningslinjer for innsigelse i plansaker etter plan- og bygningsloven*. Rundskriv H-2/14 2014-02-17.

<sup>58</sup> *Vindkraft: Håndteringen av miljøhensyn i konsesjonsordningen – situasjonsbeskrivelse og anbefalinger*. Miljødirektoratet Rapport 2015-10-20, pp. 43 ff.

<sup>59</sup> Telephone interview with NVE senior adviser Erlend Bjerkestrand, 13 May 2020.

<sup>60</sup> NVE: *Innsigelse till konsesjonssaker – praktiske rutiner*; <https://www.nve.no/flaum-og-skred/arealplanlegging/energianlegg-i-arealplanlegging/innsigelse-til-konsesjonssaker-praktiske-rutiner/>.

<sup>61</sup> See the *Kvalvåg* decision below.

<sup>62</sup> Concession cases concerning *Kvalvåg vindkraftverk* (Austevoll), NVE 2007-02-19 (NVE 200700069 mfl), OED 2009-01-12 (08/00903-1), *Selbjørn vindkraftverk* (Austevoll), NVE 2007-02-19 (NVE 200301593 mfl), OED 2009-02-06 (08/00903-1), *Haram vindkraftverk* (Ålesund), NVE 2008-06-23 (NVE 200708130-5), OED 2009-12-14 (08/02489-21), *Raudfjell vindkraftverk* (Tromsø), NVE vedtak 2012-05-11

cerning appeals, the OED has been even more reluctant and in one case only – *Raudfjell* (NVE 2012, OED 2015) – has the concession been granted despite the opposition from the hosting municipality. Thus, although they lack formal decision-making possibilities, Norwegian municipalities have an informal ‘veto power’ on windpower installations, at least before the concession is granted. However, the municipality and the public concerned are excluded from the ensuing stages: decision-making on major issues such as the design of the wind farm, the type, height and position of the turbines, the localization of roads etc. have basically become matters to be decided between the developer and the NVE.<sup>63</sup>

#### **Norwegian debate on local influence and windpower installations**

Local opposition to windpower installations has been growing in Norway recent years. The protests have focused especially on the weak involvement of the public concerned in the stages after the concession has been granted; between the initial decision and the actual construction, many years can pass, during which the basic design of the installation and the necessary infrastructure may be altered in important aspects. Many critics note what the municipalities once

agreed on is not what emerges when the wind farm is built.<sup>64</sup>

In response to such criticism, while also taking a holistic approach to the development of renewable energy, in early 2017 the government entasked the NVE with drawing up a national plan for windpower. After comprehensive communications with stakeholders and in-depth analysis of relevant international literature, the NVE presented its report in April 2019.<sup>65</sup> As guidance for developers and authorities, 13 areas were designated as the most suitable for windpower development. The criteria for choosing were as follows: evaluation of local wind resources, the need for power supply taking into account the existing electricity net, balanced against conflicting environmental and social interests. However, at the remit of the report, there was a public outcry against the national plan with more than 5,000 responses to the OED.<sup>66</sup> The Government felt the pressure and gave in later that year. The latest plan is to issue a report to the Parliament (Storting) before the summer, presenting the government’s analysis, plans and ambitions in the matter. No concessions will be granted in the meantime.

As part of this work, the NVE in early 2020 published a report on the concession procedure and the main issues that have been raised by the municipalities and other stakeholders.<sup>67</sup> According to the report, many actors express mistrust with the concession process and the authorities involved. Viewpoints here concern the lack of

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(NVE 200701246-89), OED 2015-05-26 (08/1567-), *Skveneheii vindkraftverk* (Åseral), NVE vedtak 2014-06-27 (NVE 201004523-85), OED 2017-02-03 (16/385-), and *Bukkanibba vindkraftverk* (Vindafjord), NVE vedtak 2014-07-01 (NVE 201004370-74), OED 2016-06-13 (10/1759-). Concerning *Haram vindkraftverk* (2008), the OED granted the concession as they concluded that the municipality had changed their mind and was in favour of the project.

<sup>63</sup> Inderberg et al (n.8 supra); also Inderberg, THJ & Theisen, OM & Flåm, KH: What influences windpower decisions? A statistical analysis of licensing in Norway, *Journal of Cleaner Production* (forthcoming 2020).

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<sup>64</sup> The criticism was recently voiced in a debate in Norwegian television, see NRK TV 4 June 2020; Stormfullt om vindkraft; <https://tv.nrk.no/serie/debatten/202006/NNFA51060420>.

<sup>65</sup> *Forslag til nasjonal ramme for vindkraft*. NVE rapport 12-2019 (2019-04-01); [http://publikasjoner.nve.no/rapport/2019/rapport2019\\_12.pdf](http://publikasjoner.nve.no/rapport/2019/rapport2019_12.pdf).

<sup>66</sup> Vasstrøm & Lysgård (n. 10 supra) at p. 11.

<sup>67</sup> *Konsesjonsprosessen for vindkraft på land*. NVE rapport 3/20.



public involvement, undemocratic procedures, vague basis for the decision-making and insufficient considerations to local interests and the environment. Against this backdrop, NVE concludes that it is vital to strengthen the trust from the public concerned. When it comes to ideas and proposals on how to improve the concession procedure in this respect, the NVE discusses better information and guidance, swifter handling of the cases, stricter requirements for prolongation of time limits for the construction and operation of the installations. According to the report, the decision-making should continue to be held at national level and under a single piece of energy legislation, although the steering effect of regional regulation plans for windpower installations may be further developed. Maximum heights shall be decided in the concessions and the conditions for the operation stated more clearly. As for the after stage with detailed planning of the development, shorter time limits will be discussed, as well as requirements for EIA and public hearing. On a general level, the communication with local stakeholders should be improved, measures to compensate for loss of outdoor recreation possibilities discussed, as well as schemes for economic compensation to the local society.

What will come out of the OED report to the Storting remains to be seen.<sup>68</sup> However, judging

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<sup>68</sup> The report to the Storting actually came on 19 June 2020, after this article was submitted for publishing; *Stortingsmelding OED 2020-06-19 Meld.St.28 Vindkraft på land. Endringer i kosesjonsbehandlingen*; <https://www.regjeringen.no/contentassets/b5f9e2ddc8dc45c58c06b12d-956fe875/stm201920200028000dddpdfs.pdf> In the report, the OED announces that the local influence will be strengthened by earlier involvement and an improved dialogue between the NVE and the municipalities and regions. Concessions for wind farming will be dealt with region by region in order to find the most suitable places with as little negative impact as possible on the environment, social interests and reindeer herding. A legal basis for early refusals will be introduced, as well as shorter timeframes for all parts of the process, including

from the recent debate in Norwegian media it is not evident that these proposals from the NVE will mollify the opposition to windpower development. From a Swedish perspective, the debate on the other side of the border seems fierce, and a bit strange. Arguments about lack of democratic procedure and insufficient protection of outdoor recreation areas, cultural heritage and the environment are mixed with voices against colonization of Norwegian nature to profit foreign investors and risk capitalists. In an article in *Welt am Sonntag*, the ENGO *La naturen leve* ('Let nature live') urged for support for the resistance to Stadtwerk München's investments in Norwegian windpower.<sup>69</sup> According to the article, the reason for these investments is that the distance criterion which applies in Bayern makes it impossible to develop windpower in that region. Further, a highly reputed Norwegian newspaper reported on new studies on carbon leakage from windfarm construction.<sup>70</sup> Another article noted local opinion in Agder, which has gone from quite positive to very negative towards windpower, which in turn led the operator to request the OED to award the concession status

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the after stages and the detailed plans for the permitted installations. Moreover, the concessions will contain stricter conditions for the localization and heights of the turbines, and the system for balancing different interests pro and con will be clarified. The OED report will be discussed in the Storting after the summer break and it is too early to give a prognosis on the outcome, especially since the Norwegian Association of Local and Regional Authorities (KS) already has announced its opposition, see; <https://tv.nrk.no/serie/dagsnytt-atten-tv/202006/NNFA56062220/avspiller>.

<sup>69</sup> *Welt am Sonntag* 2019-02-17: Windkraft zerstört Wildnis, also reported in Norwegian national radio; <https://www.nrk.no/trondelag/tysk-utbygger-er-overrasket-over-norsk-vindkraftmotstand-1.14510926>.

<sup>70</sup> *Aftenposten* 2020-04-26: *Karbon slipper fri ved graving i urørt natur. Et argument for å droppe store vindparker, mener naturvernere*.

as a state plan.<sup>71</sup> Also frequently mentioned are the differences in economic gain for local society in comparison with hydropower, as compensation granted for windpower installations tends to be meagre. Clearly, the debate on windpower investments in Norway has become national, with clear divides in society. Continuing reports of incidents involving civil disobedience against windpower development, even sabotage, have led some major investors to declare that they will drop the business due to lack of public support.<sup>72</sup>

Any discussion of local opinion in Sweden and in Norway should take into consideration the clear differences in national cultures. The perception of natural resources as something belonging to all – to society as a whole and the people – is very strong in Norway, as illustrated by the situation in hydropower, where most operators have been state-owned or public corporations. Also the Norwegian lifestyle of outdoor recreation is distinctly different – as any Swede working in Oslo who tries to arrange a meeting with colleagues during weekends can report. In addition, Norway has an immense richness of natural resources.<sup>73</sup> All this has consequences for the public debate on renewable energy and the balancing of interests when planning and deciding on such issues. But even so, we all can learn about the growing resistance to windpower installations in Norway, to which I now turn.

## 5. What can we learn from the comparison?

When I first began studying the Norwegian windpower concession system, I noticed that there was quite some media attention to municipalities where opposition to windpower installations was strong. Especially one point was highlighted: that the municipality had been positive when the concession was granted, but that local opinion had turned in the course of time. As noted above, one reason seemed to be that the project had originally a certain design that was subsequently altered in scale and size, resulting in something quite different. From this, I drew the premature conclusion that Norwegian municipalities have little to say about windpower installations. Instead, the explanation proved to lie in the concession system. In reality, local influence in the procedure leading to the concession decision is quite similar in Sweden and in Norway. What differs is mainly what happens next. Whereas the municipalities and the public concerned in Norway have little to say about the final design of the wind farm and the infrastructure needed, the Swedish courts have found that this ‘box’ model for windpower installations is incompatible with the EIA Directive, unless all alternative positioning of the turbines can be accepted from the point of view of opposing interests – in practical terms, species protection, reindeer herding and aviation security (MÖD 2017:27 *Kölvallen*). The Swedish Land and Environmental Courts are also sensitive to the development of EU law, where it is clarified that prolongation and changes in given concessions for in-stallation with environmental impact requires may require renewed EIAs or even per-

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<sup>71</sup> *Morgenbladet* no. 16 2020 (24–30 April), pp. 10–17: *Vinden har snudd. Kommuner på Agder drømte om miljøvennlig energi. Ti år senere føler tidligere vindmølletilhengere seg lurt.*

<sup>72</sup> TU Energi 2019-03-30; *Stakraft frykter folkelig motstand og dårlig omdømme*; <https://www.tu.no/artikler/stakraft-frykter-folkelig-motstand-og-darlig-omdomme/461685> Svenska läsare bör observera att omdømme inte betyder omdöme, utan rykte eller goodwill.

<sup>73</sup> The Norwegian Pension Fund (the ‘Oil Fund’) is among the largest in the world; [https://en.wikipedia.org/wiki/Government\\_Pension\\_Fund\\_of\\_Norway](https://en.wikipedia.org/wiki/Government_Pension_Fund_of_Norway).

mits.<sup>74</sup> It is also interesting to note that there is today a difference in attitudes in our societies: the tendency in Norway seems to be to formalize and strengthen the municipalities' possibilities to have a say in the matter, whereas Sweden – so far at least – appears to be headed the other way. Obviously the starting points are very different, but even so, it is worrying that the voices heard in the Swedish debate rarely mention the need for local acceptance. In particular, the opinion from the Swedish windpower industry as such appears surprising, as the general attitude among developers seems to be that positive municipalities is a necessary prerequisite when deciding on investments in windpower.

My conclusion from this study is that Sweden and Norway have something to learn from each other regarding windpower development. If we further broaden the perspective to several other countries in Europe, it should be possible to agree on some starting points for future expansion. It has now become clear that, even if windpower has developed rapidly in recent years, if we are to meet the climate targets for the future – whether 'zero net greenhouse gas emissions by 2045' (Sweden) or 'emission neutrality by 2030' (Norway) – the need for renewable energy will be immense. On the other hand, the development of renewable energy sources is dependent upon public acceptance. The change in opinion is not a Norwegian phenomenon, quite the opposite. The above-mentioned distance criterion in Bayern is a result of local opinion that sees windpower turbines in the landscape as being in breach of 'German values'.<sup>75</sup> A similar

development can be seen in Denmark, Belgium, the Netherlands and elsewhere.<sup>76</sup> If windpower is to have any future at all, we will have to deal with local opinion, lest it be kidnapped by populist movements.

In order to achieve this goal, some starting points may need to be emphasized. First of all: the arguments pro and con must be straightforward, clear and honest, to prevent conflicting interests from becoming contentious. Second, we must reject any romantic ideas about a wind farm as something you can have in your own backyard producing household electricity. We must recognize that we are dealing with large-scale industrial installations, whether in the forest or mountains or at sea, with major impacts on the local area – indeed on the environment as a whole. And third, we must recognize that there is a genuine conflict between municipal interests in local land-use planning and the national – or even global – interest in providing renewable energy.

There is little room here to do more than just point at possible directions for solutions of this dilemma. I think that the most obvious instrument for future windpower development is planning on various levels. Obviously, there is a need for some kind of framework on the national level for balancing different state interests,

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inhabited areas. However, the proposal created debate, why this competence was transferred to regional level. If applied, such a distance criterion would effectively rule out the possibility to further develop windpower installations in Länder such as Nordrhein-Westfalen and Hessen; <https://www.euractiv.com/section/energy/news/planned-turbine-free-zones-could-halve-germanys-wind-energy-potential/>.

<sup>76</sup> See the country reports in the study *Renewable energy projects and species protection. A comparison into the application of the EU species protection regulation with respect to renewable energy projects in the Netherlands, United Kingdom, Belgium, Denmark and Germany*. Utrecht Centre for Water, Ocean and Sustainability Law, 28 May 2018. Eds. Backes, C & Ackerboom, S.; [https://www.uu.nl/sites/default/files/res\\_biodiversity\\_a\\_comparison.pdf](https://www.uu.nl/sites/default/files/res_biodiversity_a_comparison.pdf).

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<sup>74</sup> See AG Kokott's opinion in C-254-19 *River Shannon* (2020). In her opinion, she also analyses the concept "legitimate expectations" (Vertrauensschutz) in relation to given permits (paras 43-44), as well as the meaning of "direct effect" in environmental law (paras 65-66).

<sup>75</sup> In late 2019, the German Minister of Economic Affairs and Energy, Peter Altmaier, proposed a 1km distance criterion between windpower installation and

but any such instrument should be combined with possibilities for the municipalities to have a say as regards implementation. This may be achieved through binding 'windfarm plans' at local level, to enable the municipality to balance the different land-use interests against each other. In addition to such planning on several levels, an individual evaluation must be made in a permit procedure in order to ensure species protection, reindeer herding interests and consideration for neighbours, etc. Obviously, not all 'most suitable' areas for windpower will be exploited, but that may be worth the price. If one opts for a more 'Swedish' solution, awarding the municipalities veto power at least in certain areas in the community, then the requirements for proportionality and foreseeability in the EU Renewable Energy Directive will have to be solved. If a request for a preliminary ruling is launched to the CJEU from a national court, I doubt that the former would find it problematic that decision-making competence lies on the local level, as this is a very common situation in many EU Member States. Probably the CJEU would even accept a veto power, at least if it meets basic criteria of the principles of good governance in EU law. In that context, I suspect that the Court would find a system where a local decision can be altered any time during the process to be in breach of those principles. On the other hand, if the municipal decision is required to be binding, the authorities must have, at that point, all information on the case. This conflict is not an easy one to solve.

Then after all, perhaps the solution does not lie in law. Instead, it may be found in economic issues, such as the contribution to the local economy. Sweden is the only Nordic country where property taxes go to the state budget.<sup>77</sup> Indeed, there have been efforts to gain local support

through various financial arrangements. For example, in a two-year period (2017–18), the Swedish Energy Agency was assigned to distribute €7M in 'windpower premiums' to the municipalities, based on how much windpower production became operative each year. Under that scheme, in one year the southerly municipality of Mariestad introduced 14 turbines with capacity of 44 MW, thus gaining about €2M. By contrast, in Finland and Norway, the municipalities are beneficiaries of the property tax. However, not all Norwegian municipalities have introduced property tax and it may vary from one community to another due to political decisions. Even so, an example shows that a municipality with 1,000 inhabitants and many windpower installations gains as much as €2M per year in property tax.<sup>78</sup> Be that as it may, it is also said that in Finland the municipalities are fighting to get windpower investments, for economic reasons. In Denmark, there is no property tax on windpower installations, but operators are required to contribute a certain fee per MW to a 'green fund' that the municipalities are obliged to establish. Local acceptance is here emphasized as the key factor for the future development of the windpower industry.

Throughout the Nordic countries, windpower developers contribute to the local economy in one way or the other. In Sweden, there is an old tradition of paying a 'countryside fee' more or less voluntarily, although this can be regarded as 'pocket money' in a wider context.<sup>79</sup> For example: for a wind park with 100 turbines producing 1 TWh, a countryside fee of say €1,000 per turbine will contribute €100,000 to

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<sup>78</sup> Saglie & Inderberg & Rognstad at p. 153.

<sup>79</sup> *Kommunal tillstyrkan av vindkraft – hur fungerar det idag?* Geijer, E & Lundmark Essen, A. Naturvårdsverket Rapport 6769, June 2017, English summary at page 10; <https://www.naturvardsverket.se/Documents/publikationer6400/978-91-620-6769-4.pdf?pid=20835>.

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<sup>77</sup> Information from Svensk Vindenergi 2020-05-18.

the local economy, whereas a property tax at the rate 0.161 cent/kWh will yield an annual income of €1.61M! Surely, a reasonable conclusion to be drawn from this is that a formalized scheme for financial contribution to the local economy may be a key factor for acceptance in hosting municipalities. Not only would such a system bring financial support to those communities, it would also promote a general feeling of fairness in the distribution of burdens – a factor not to be ignored.<sup>80</sup>

## 6. Concluding remarks

To study another country's legal regime in a given field is to travel. This has become evident in my efforts to understand Norwegian environmental legislation and administration, first in 2016 on hydropower<sup>81</sup> and now on windpow-

er installations. Sweden and Norway are very close, but also so different in many ways. It has been fascinating to learn more about Norway and the encounter between the attitude 'we are building the country', said to characterize Norwegian regulation and administration on the utilization of nature resources, and the strong outdoor recreation culture and traditional perceptions of national values. I have tried to draw a picture of this specific area of law in our two countries in order to perform some comparisons, but as I alerted the reader in the very beginning, my perspectives remain fundamentally Swedish. I therefore invite the readers – Norwegians in particular – to correct any misconceptions presented in this text. Surely, the debate on the development of windpower in our countries will continue.

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<sup>80</sup> Inderberg et al 2019 (n. 8 supra).

<sup>81</sup> Darpö, J: *Så nära, och ändå så långt bort! En svensk betraktelse av norsk vattenrätt och frågan om tillstånds rättskraft*. Report in the research programme SPEQS, Working Paper 2016:1, Faculty of Law/Uppsala University. Available in Swedish only.