The law on mining and environmental protection in Sweden

Interactions between the Mining Act and the Environmental Code

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Introduction

1. Mining is obviously often in conflict with protection of the environment, including e.g. the risk for pollution of land and water, noise pollution and conservation of nature. While mining as an industry is regulated under the Minerals Act (1991:45), environmental aspects are foremost a matter to be considered under the Environmental Code (SFS 1998:808). The two acts are partly overlapping. This paper describes the basics of the two acts and indicates some environmental legal implications in connection with the licensing procedures.

2. Minerals are part of the estate; although it is legally unclear how far deep the estate stretches.¹ However, the question if deeply located mineral is part of land ownership (in principle) is of little practical importance. As mining is regarded as an “important public interest” (“angeläget allmänt intresse”),² there are no constitutional obstacles for the state to restrict the landowners access to minerals. The land owner is entitled to some compensation related to the value of the mineral (see below), but this right does not follow from any constitutional property right.

¹ See e.g. prop. 2004/05:40 p. 62 (Governmental bill, amendment of Minerals Act). Minerals located on the Continental shelf are declared by law to be state property.

² Constitution (Regeringsformen), chapter 2, section 18.
Minerals Act

*General*

3. The Minerals Act applies to a number of different minerals; e.g. lead, gold, copper, silver, uranium, oil, gaseous hydrocarbons and diamonds. It does not apply to minerals on “public waters” (e.g. the continental shelf), where instead the Continental Shelf Act (SFS 1966:314) applies. An important function of the act is to administer issues in connection with exploration permits and exploitation concessions. The Mining Inspectorate is normally the responsible authority for granting permits and concessions. The Mining Inspectorate shall submit concession trials to the Government in certain situations, e.g. if the “matter of concession is particularly important from public point of view”.

*Exploration Permit*

4. An exploration permit is needed if the activity interferes with the rights of a land owner, tenant etc. An exploration permit is granted for a specific area if there is reason to believe that the exploration in the area may lead to finding of concession mineral. The applicant must be competent to carry out the exploration. If there are several applications for which a permit can be granted) priority is in principle given to the person who first applied.

*Exploitation Concession*

5. A concession to exploit mineral is subject to several prerequisites.

- There must be found in the area a mineral deposit that probably can be exploited economically
- The “location and nature of the deposit must not make it inappropriate that the applicant is granted the concession” (e.g. with respect to political relations with foreign states).
- In the case of oil and gas, the applicant must be considered appropriate for the exploitation of the deposit.
- The exploitation cannot violate legally binding planning according to the Plan and Building Act (detail plans and area regulations).
- The exploitation must be in accordance with the provisions on efficient management of land and water in chapter 3 and 4 of the Environmental Code. These rather complex and partly very unclear provisions may hinder mining

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3. This act is not further analysed in this paper.
4. Investigations of land
5. Minerals Act, chapter 8 section 2 (1).
6. Certain investigations may be carried out on without an exploration permit, as part of the “public access to land” (“allemansrätt”).
7. Minerals Act, chapter 4, section 2. There are also certain provisions for solving situations where several applicants compete, chapter 4, sections 3–6, these are not analysed here.
foremost in areas of “national interest” for e.g. nature conservation or reindeer herding, but in cases of conflict, there is often a balancing against the mining interest. Certain areas are of “national interest” with respect to the mineral deposits.

6. The procedure is more detailed in connection with exploitation concessions compared to exploration permits. Not least important is the obligation for the applicant to carry out an Environmental Impact Assessment (EIA) according to the general EIA requirements in the Environmental Code. These are not identical, but to a great extent the same as in the EIA-directive.8

Compensation and fees

7. A land owner, or a person with limited right to an estate (e.g. tenant), is entitled to economic compensation for “damage and encroachments” (e.g. for cutting of trees). The compensation system, with roots in the Constitution, chapter 2, sec 18, is based upon the principle that no compensation is paid for increased value of the land which is due to “expectations”. Accordingly, a land owner has no right – according to general provisions (see also item 8) – to be compensated by the concession holder for the value of the mineral that the land owner “owns” according to general provisions in land property law. The argument behind is that the land owner has in these cases not contributed himself to the raised value of the land.

8. However, the land owner is, since 2005,9 compensated in terms of other provisions. A miner must pay an annual minerals fee of 2 per thousand of the average value of the concession minerals mined. 1.5 per thousand is paid to the landowners, distributed in proportion to their share of the concession area. The remaining 0.5 per thousand is paid to the state to be used for research and development in the field of sustainable development of mineral resources.

Environmental Code

Overview of the Environmental Code

9. The Environmental Code is the chief environmental statute in Sweden. The overall objective is to promote a “sustainable development”, including not only protection against pollution of different kinds and nature conservation, but also efficient management of land and water areas, natural resources and energy.10 The Code includes certain substantial environmental requirements in, first, the “general rules of consideration” (chapter 2, see below, these are based upon the precautionary principle) and secondly, the “provisions on efficient management of land and water areas”

8 The Mining Inspectorate shall consult with the County Board in matters related to the EIA.
9 SFS 2005:161; amendment of the Minerals Act, chapter 7, section 7.
10 Environmental Code, chapter 1, section 1.
(Chapters 3 and 4). The Code provides a number of legal instruments to implement the objectives and substantial requirements, e.g. environmental quality standards, licensing of certain activities, EIA, protection of areas (national parks, nature reserves, Natura 2000 etc.), remediation of contaminated areas, sanctions and enforcement tools.

**Exploration of minerals – the Code**

10. The Environmental Code applies to both exploration and exploitation of minerals. A permit is normally not required for exploring activities,\(^1\) but there is a general obligation to consult with the County Board if any activity may significantly alter the nature environment.\(^2\) In addition, a supervising authority may always serve an order on a non-licensed activity that interferes with the “general rules of consideration”.

**Exploitation of minerals – permit for “Environmental Hazardous Activity” and Water Operations**

11. A permit from the Environmental Court is required for exploitation of oil, gas and minerals. These activities are defined as “environmental hazardous activities” (risk for all kinds of pollution and other nuisances) and the obligation to apply for a permit follows from regulations subordinated the Code, chapter 9.\(^3\) A separate permit is required for water operations related to the mining (e.g. changing the level of groundwater), according to chapter 11. The permitting according to chapter 9 and 11 are normally coordinated into one legal process.

12. The general rules of consideration are applied in the permitting. The main issue is normally to determine permit conditions related to e.g. discharges and other emissions, managing waste material (including reuse and recycling where possible), measures to prevent and manage contaminated areas and to the setting of acceptable ground water levels. All these issues are determined according to the general rules of consideration in chapter 2 (first of all). There is a general obligation to take precautionary measures as long as they are possible to carry out practically (not just on “research stage”) and with regard to the assessed economic capacity in a *typical* company within that branch (an objective assessment). This is the normal requirement. However, more lenient requirements are accepted if the applicant can prove in the individual case that the “normal” requirements are “unreasonable”, a balancing operation where you first of all compare what may be accomplished environmentally with the costs of the

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\(^1\) A permit may be required if the activity interferes with a Natura 2000 area or with specific regulations related to a nature reserve or other protected area.

\(^2\) Environmental Code, chapter 12, section 6.

\(^3\) Regulations on Environmental Hazardous Activities and Health Protection (SFS 1998:899). Test exploitation of minerals requires a permit from the County Board, not the Court (in first instance).
precautionary measures. The basic idea is to avoid requirements that are not proportional (“do not throw money into the sea”!).\textsuperscript{14}

13. It is also possible that a mining activity is not accepted when assessed according to the general rules of consideration, even where an exploitation concession is already issued according to the Minerals Act. First, it is required to choose a site with the least risks for damages or detriments to health and the environment, in other words, the best place from environmental point of view (again within the economic frames indicated in item 12). Alternative sites for mining are probably very few, or none, in most cases, but the requirement may occasionally be crucial.\textsuperscript{15} Secondly, there are certain “stop provisions”. If the exploitation may cause “significant detriment to health or the environment”, despite precautionary measures, the activity may be allowed only if the positive results from public point of view outbalance the risks. However, the Government may never permit an activity that “is likely to be detrimental to public health”.\textsuperscript{16}

14. The permit procedure is anticipated by an EIA–procedure, including consultations with expert authorities and the public. The idea is that the same EIA is used as in the concession procedure according to the Minerals Act. The permit process includes an open public hearing, normally performed at the site of the proposed project.

\textit{Governmental Decisions on “Permissibility”}

15. In certain, in practice very occasional cases, the Government initially considers the “permissibility” of the project (whether it at all may be carried out at the proposed site) according to Environmental Code, chapter 17. This is always done in cases of exploitation of uranium. In other mining cases the Government may reserve the right to consider the permissibility under certain preconditions. A Governmental decision on permissibility is binding for subsequent licensing procedure, e.g. according to Environmental Code, chapter 9 and 11. Consequently, an Environmental Court may not prohibit the activity in the licensing.

16. When considering the “permissibility”, the Government shall apply the “general rules of consideration” (see above, items 12–13) and also the “provisions on efficient management of land and water areas” (above, item 5).\textsuperscript{17}

17. The Government may not permit the activity unless approved by the municipal parliament. This “municipal veto” is vested in the municipality or municipalities

\textsuperscript{14} See first of all Environmental Code, chapter 2, sections 3 and 7.

\textsuperscript{15} Environmental Code, chapter 2, section 6.

\textsuperscript{16} Environmental Code, Chapter 2, sections 9 and 10.

\textsuperscript{17} Environmental Code, Chapters 3–4. These provisions are not applied in licensing of exploitation of minerals according to chapter 9 and 11, see below #.
where the mine is planned to be located, not municipalities possibly affected by its emissions. The veto has been used once in connection with mining; an application to exploit uranium in south west of Sweden (Billingen).

18. When mining is subject to permissibility trial by the Government, the case is prepared by the licensing authority (in these cases normally the Mining Inspectorate as the process usually initiates with an application according to the Minerals Act) and thereafter submitted to the Government.

Other permits according to the Code

19. In individual cases in may be necessary to apply for other permits according to the Code. This is so if the activity interferes with an areas designated as special protection area or special conservation area (Natura 2000) or breaching regulations related to a nature reserve or other protected areas.

Other legislation related to mining

20. The Plan and Building Act (SFS 1987:10) regulates physical planning. Very briefly, physical plans do have an important impact on the preconditions for mining in an area. Detail plans and Area regulations are formal legal obstacles if the mining activity interferes with what the plan prescribes. Overview plans (and also regional plans) are not legally binding but they have in practice often a great impact on the subsequent licensing. It is in this connection important to point out that the Plan-and Building Act is based on a municipal planning monopoly. Thus, the attitude in the Municipal parliament as regards a future mining project is of great significance. The state has limited legal possibilities to set aside municipal plans and to enforce planning in case the municipality is passive.

21. Construction permits are also required according to the Plan- and Building Act, e.g. in connection with buildings in the mining area.

22. The Nuclear Technology Act (SFS 1984:3; safety issues) and the Radiation Protection Act (SFS 1988:20; radiation protection in general) apply in case of mining for uranium. Permit is required according to first act.

23. The Act concerning Ancient Cultural Finds (SFS1988:950) requires a permit for interfering with ancient graves etc. It also enforces the exploiter to cover costs for archaeological investigations in the area.

Some Environmental Legal Implications

Exploration – the first step to exploitation?

24. From a legal point of view exploring is judged upon its own merits. If the exploration works do not interfere with environmental (and other) requirements, the exploration is
permitted. This has in several cases proved to be a controversial legal construction. The public is often negative to future mining, especially in areas where no mining exists before. The protests often begin already when a company intends to explore the area as the exploration is seen as an activity paving the way for exploitation. Exploration activities are especially controversial when carried out in nature reserves or other protected areas or in areas being of “national interest” for conservation purposes or reindeer herding. It is then argued that an exploration should not be permitted as the area anyhow should be protected against exploitation.

25. It is of interest here that no EIA is required in connection with explorations and also that permitting according to Minerals act lack environmental considerations. There is normally no obligation to apply for a permit according to the Environmental Code. This lack of “environmental influence” on the exploration stage is probably encouraging public opposition.

What should come first? Mining Concession or Mining (Environmental Code) Permits?

26. As indicated above, exploitation of minerals requires concession according to the Minerals Act and permits according to the Environmental Code. A developer may choose to apply for the Code permits first and thereafter for a mineral exploitation concession. However, the opposite order is (as far as I know) always applied practice.

27. From a strictly legal point of view the choice could be crucial. If the application for exploitation concession precedes the Code permitting, the “provisions on efficient management of land and water” in the Environmental Code, chapters 3–4 are applied only by the Mineral Inspectorate (which however has to consult with the County Board). Even though the Environmental Court, in the permitting according to chapter 9 and 11 in the Code, may find obvious mistakes in the interpretation of the general rules of consideration, the ruling of the Mining Inspectorate prevails. This legal position is unique for the Mining Inspectorate and the Minerals Act; there are several other “sector acts” overlapping the Code, where the “provisions on efficient management of land and water” are applied, but then in both procedures and without legally binding effect on subsequent licensing. It is in this connection important to say that the Mining Inspectorate does not dot possess the same competence in environmental sciences as the Environmental Court and it is not unlikely that the Court could interpret the provisions differently in an individual case.

28. From a practical point of view it is sometimes argued that an already granted mining concession psychologically may influence the subsequent permitting according to the Code so that it would rather interpret the Code provisions in a way that at least not halts the project entirely.
29. It could also be argued that the order or “Minerals Act first” is outdated; “sustainable development” is a primary political goal which is best reflected in the environmental Code and this issue should be decided upon first before the more technical mining matters are judged upon.

**Politicians or judges (or at least civil servants) as decision makers**

30. Politicians are involved in some of the legal decisions related to mining (and also many other forms of land use). This is so foremost in connection with

- Municipal parliaments decisions on physical plans
- Governmental decisions on the permissibility (Environmental Code, chapter 17)
- The municipal veto (Environmental Code, chapter 17)
- Governmental decisions according to the “stop provisions” (Environmental Code, chapter 2)
- Governmental decisions on exploitation concessions where the “matter of concession is particularly important from public point of view” (Minerals Act, chapter 8 section 2 (1)).

29. It is a never ending discussion on the appropriateness of a governmental influence on the application of environmental law provisions. Although the government is obliged to apply the same provisions as an Environmental Court (or even the Supreme Court), the risk is that Government would take other concerns than a court, especially if the legal process is anticipated by parliamentary policy decisions on the project or an international agreement with another state (where mining would take place on both side of e.g. the Swedish – Finnish border). Generally, the trend in Sweden during the last years has been to diminish the governmental decision making in environmental law cases.

30. The municipal veto in decision making according to Environmental Code chapter 17 is important. As said, the Government can never permit mining project that is not approved by concerned municipalities. This legal power may lead to negative economic consequences for the mining industry and the state, but also to decisions that are not optimal from environmental point of view. Indirectly, a veto may lead to exploitation of minerals in areas more sensitive to emissions (where the municipal parliament is positive to job opportunities) than others. The developer may at an early stage of the project select such municipalities where there is a small risk for not approving the project in a subsequent legal process.