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Biodiversity Protection: An Environmental Issue? On Sweden's Implementation of EU Species Protection Laws in Environmental and Sectoral Legislation

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Abstract

A rich diversity of plant and animal life is one of the sixteen environmental goals Swedish environmental law and policy aims to achieve. The EU also seeks to protect biodiversity through its Biodiversity Strategy. To these shared ends, certain plant and animal species are protected by the Swedish Environmental Code and its pursuant Species Protection Regulation, as well as by EU directives. Dispensation allowing exceptions to this protection may be made in accordance with general rules of consideration of the Environmental Code and the dispensation provisions of the Species Protection Regulation, which in part implement the EU biodiversity directives. However, this article shows that a majority of the administrative decisions allowing dispensation to harm species that are strictly protected under both EU and Swedish law are made not under the protective legislation, but under other types of legislation such as the Hunting Act and Fishing Act, which do not have environmental protection as their primary goals. This article highlights the legal consequences of dispensation decisions that affect strictly protected species being made under these various laws.

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1. Biodiversity and the Law

Biodiversity loss is acknowledged to be an urgent threat. Scientists warn that if we do not change the current trajectory, mass extinctions will be inevitable by the end of the 21st century.[1] The problem is not one of lack of awareness at the political level; numerous international agreements, political targets and the national laws that implement them express ambitious goals to halt biodiversity loss. The 2010 Aichi Biodiversity Targets, a significant example adopted pursuant to the global Convention on Biological Diversity, aim to reverse this negative trend by 2020,[2] as does the EU Biodiversity Strategy. This is not expected to be achieved,[3] and the 2015 UN Agenda for Sustainable Development sets additional goals for 2030.[4] In Sweden, the Riksdag has adopted a number of environmental goals aimed at protecting biodiversity and meeting international agreements to do so, including A Balanced Marine Environment, Flourishing Coastal Areas

[1] William J Ripple et al., "World Scientists' Warning to Humanity: A Second Notice," *BioScience* 67, no. 12 (2017).

[2] Conference of the Parties of the Convention on Biological Diversity, Decision X/2.Strategic Plan for Biodiversity 2011-2020 (2010).

[3] Sandra Díaz, et al., "Summary for Policymakers of the Global Assessment Report on Biodiversity and Ecosystem Services of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services" (2019), 21-22.

[4] UN General Assembly, *Transforming our world : The 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1.

and Archipelagos, Thriving Wetlands, Sustainable Forests, A Varied Agricultural Landscape, A Magnificent Mountain Landscape and A Rich Diversity of Plant and Animal Life. These political goals are reflected in the Swedish Environmental Code, which states that its provisions shall be applied in such a way that the environment is protected and biological diversity preserved.[5]

Laws aimed at reducing biodiversity loss have had some successes, facilitating, for instance, a partial recovery of large carnivore populations in Europe.[6] However, it is clear that despite these limited successes and high aspirations, goals are not being met at the international level, or indeed at the Swedish level. The Swedish EPA's annual report for 2019 indicates that most of the national environmental goals, including those relating to biodiversity, are not met and cannot be met under current laws and policies. To the contrary, it reports, Swedish species' situations continue to worsen. In particular, environmental efforts have failed to meet the requirement of EU law that the favourable conservation status of listed species and habitats be achieved and maintained. Further, the loss of redlisted species continues largely unimpeded, though there has been some improvement reported for frogs and mammals.[7]

The fact that biodiversity loss continues despite laws intended to stop it suggests that there may be a failure within the legal system. Michanek, in his chapter "Artskyddet, politiken och juridiken", points to several aspects of the Environmental Code as well as other aspects of the Swedish legal system that may hinder the attainment of biodiversity goals. While acknowledging that his review is not exhaustive, he identifies problems within several parts of environmental and related laws.[8] These include provisions in hunting and fishing laws, as well as provisions in the Environmental Code concerning the direct protection of species and provisions relating to habitat protection, including protected areas and biotopes. Ultimately, he concludes that reforming these provisions would be insufficient; larger structural as well as legal changes are necessary to meet international and Swedish political goals.[9]

But despite his dismal assessment of the capacity of the Swedish legal system to adequately protect wildlife, Michanek notes that some positive developments have occurred. Swedish species protection law has been improved to comply with the EU Birds and Habitats Directives. For example, where it used to only regulate the behavior of individuals towards protected species; it now encompasses agricultural and business activities that harm these species' habitats, an important factor in the success of species.[10] Swedish environmental law has developed to afford a higher degree of protection in conjunction with EU species protection law.

However, as this article shows, a majority of the administrative decisions allowing dispensation to potentially harm species that are strictly protected under both EU and Swedish law are made not under species protection legislation, but under other types of legislation such as the Hunting Act and Fishing Act. These sector specific laws do not have environmental protection as their primary goals, though like the species protection legislation, they have provisions that implement the EU nature directives. In this article I examine three Swedish laws that implement

[5] 1 kap. 1 § *miljöbalken* (1998:808) (MB).
[6] Guillaume Chapron et al., "Recovery of Large Carnivores in Europe's Modern Human-Dominated Landscapes," *Science* 346, no. 6216 (2014).
[7] Naturvårdsverket, *Miljömålen: Årlig uppföljning av Sveriges nationella miljömål 2019* (Arkitektkopia AB, 2019), 371-95.
[8] Gabriel Michanek, "Artskyddet, Politiken och juridiken," in *Bertil Bengtsson 90 år* (Stockholm: Jure, 2016).
[9] Ibid., 389.
[10] See discussion in ibid., 378-9.

these EU directives and the exemptions to these laws reported by Swedish decision-making authorities. In section 2, I discuss the provisions of the Habitats Directive that prohibit harming species and the provisions that allow for limited exceptions from these prohibitions. I then describe and compare the Swedish legislation that implements them. In section 3, I review the dispensations from the Habitats Directive's prohibitions that were reported to the European Commission by decision makers in six Swedish counties and the Swedish Environmental Protection Agency. In section 4, I use the results of my empirical review to make inferences about which Swedish laws the decisions were made under, and analyze the legal consequences of dispensation decisions that affect strictly protected species being made under these various laws.

2. The EU Habitats Directive and Its Swedish Implementation

The Habitats Directive, along with the earlier Birds Directive, is the primary EU species protection law. Its principle aim is to "contribute towards ensuring biodiversity" by conserving natural habitats and wild plant and animal species.[11] To this end, it directs Member States to take measures to maintain or restore the "favourable conservation status" of species and habitats.[12] What measures Member States take to meet this goal are largely the discretion of the Member States.

However, for those species deemed "in need of strict protection" and listed in the Directive's Annex IV, Member States are required to "establish a system of strict protection".[13] This system of strict protection as it pertains to animal species is described in Article 12(1) and must include the prohibition of:

a) all forms of deliberate capture or killing of specimens of these species in the wild;
b) deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration;
c) deliberate destruction or taking of eggs from the wild;
d) deterioration or destruction of breeding sites or resting places.[14]

Similarly, Member States must, according to Article 13(1)(a), prohibit the "deliberate picking, collecting, cutting, uprooting or destruction" of Annex IV plants.[15] Additionally, Member States must prohibit the "keeping, transport and sale or exchange" of both Annex IV plants (Article 13(1)(b)) and animals (Article 12(2)).

Species that are listed in Annex V may be hunted or otherwise taken in the wild so long as "exploitation is compatible with their being maintained at favourable conservation status", according to Article 14, but their taking must comply with restrictions on the means of capture and killing and the modes of transport used.[16]

These prohibitions are, of course, not absolute. The conditions for dispensation, often called derogation in the context of the Directive, are enumerated in Article 16(1):

Provided that there is no satisfactory alternative and the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range, Member States may derogate...:

a) in the interest of protecting wild fauna and flora and conserving natural habitats;

[11] *Council Directive 92/43/Eec of 21 May 1992 on the Conservation of Natural Habitats and of Wild Fauna and Flora (Oj L 206, 22.7.1992, P. 7)*, Art. 2(1).
[12] Ibid., Art. 2(2).
[13] Ibid., Art. 12(1).
[14] Ibid.
[15] Ibid., Art. 13.
[16] Ibid., Art. 14 & 15.

b) to prevent serious damage, in particular to crops, livestock, forests, fisheries and water and other types of property;
c) in the interests of public health and public safety, or for other imperative reasons of overriding public interest, including those of a social or economic nature and beneficial consequences of primary importance for the environment;
d) for the purpose of research and education, of repopulating and re-introducing these species and for the breedings operations necessary for these purposes, including the artificial propagation of plants;
e) to allow, under strictly supervised conditions, on a selective basis and to a limited extent, the taking or keeping of certain specimens of the species listed in Annex IV in limited numbers specified by the competent national authorities.[17]

All dispensation decisions made under Article 16 must be reported to the European Commission every two years.

These prohibitions and conditions for dispensation are faithfully transposed into the Swedish Species Protection Regulation (Artskyddsförordning). Reflecting the prohibitions in the Habitats Directive, section 4 of the Artskyddsförordning pertains to animal species that are strictly protected in the Habitats Directive as well as additional species that are strictly protected under Swedish or other international law, and states that it is forbidden to:

1. deliberately capture or kill animals,
2. deliberately disturb animals, particularly during their breeding, rearing, hibernation and migration periods,
3. deliberately destroy or collect their eggs in nature, and
4. damage or destroy animals' breeding areas or resting places. [18]

The Artskyddsförordning also tracks Article 13 of the Habitats Directive with regards to strictly protected plants: it is illegal to pick, collect, cut, uproot, or destroy them when growing in their natural range.[19]

Like the Habitats Directive, the Artskyddsförordning allows for dispensation from strict protection in certain circumstances following a weighing of interests. Again closely transposing the language of the Habitats Directive, section 14 of the Artskyddsförordning states that County Administrative Boards may grant dispensation in individual cases, but only if:

1. there is no other satisfactory solution,
2. dispensation would not make more difficult the maintenance of the favourable conservation status of the species' populations in their natural range, and
3. dispensation is needed
   a) to protect wild animals or plants or conserve habitats for such animals or plants,
   b) to avoid serious damage, in particular to crops, livestock, forests, fisheries, water or other property.
   c) in the interests of public health and safety or for other compelling reasons of overriding public interest,
   d) for research or educational purposes,
   e) to repopulate or reintroduce species or for the breeding of an animal species or

[17] Ibid., Art. 16(1).

[18] 4 § *artskyddsförordningen (2007:845)*. Translation my own.

[19] Ibid., 7 §.

the artificial propagation of a plant species that is required for this, or

f) to, under strictly controlled conditions, selectively and in a small extent allow the collection and keeping of a small number of certain specimens.

This language follows that of Article 16 of the Habitats Directive, and in some respects may be stricter. Particularly the final dispensation ground appears to be stricter than the English language version of the Habitats Directive, which allows "taking or keeping" of limited numbers of certain specimens. However, it should be noted that the Swedish regulation more closely tracks the Swedish language version of the Habitats Directive, which also uses the word "collection" rather than "taking". Since the Habitats Directive is equally valid, and interpreted uniformly, in all languages, it cannot be said that the Swedish version, and possibly its implementation in Swedish law, is "stricter", even if the words used seem more restrictive.

Additional provisions of the Artskyddsförordning implement the Habitats Directive's ban on the keeping, transport and sale or exchange of strictly protected species of plants and animals.[20] Exemptions from these provisions are made through a system of permitting.

The prohibitions in section 4 of the Artskyddsförordning do not apply to hunting or fishing, which are instead governed by the Hunting Act and its pursuant Hunting Regulation and Fishing Act and its pursuant Regulation on Fishing, Aquaculture, and the Fishing Industry (Fishing Regulation).[21] Hunting and fishing are defined very broadly.

According to the Hunting Act, hunting means to capture or kill wild birds or mammals, or to search for, track, or pursue wildlife with the intention of capturing or killing them. Hunting also includes interference with wildlife's dens and the taking or destruction of birds' eggs.[22] This means that decisions concerning most types of direct interference with mammals are not made under the Artskyddsförordning.

The provisions in the Hunting Regulation which allow the killing or capture of strictly protected species despite the EU ban echo those in the Habitats Directive and related Birds Directive, but less closely than those in the Artskyddsförordning, particularly with respect to the final derogation ground. According to section 23 of the Hunting Regulation, there are two kinds of hunting: protective hunting and license hunting.

Protective hunting can be allowed:

> If there is no other satisfactory solution, and if it would not make more difficult the maintenance of favourable conservation status of populations of the species' populations in their natural range…
>
> 1. in the interest of public health and safety and other compelling reasons of overriding public interest, including reasons of a social or economic character and meaningfully positive consequences for the environment,
> 2. in the interest of air safety,
> 3. to prevent serious damage, in particular to crops, livestock, forests, fisheries, water or other property, or
> 4. to protect wild animals or plants or conserve habitats for such animals or plants.[23]

License hunting can be allowed if there is no other satisfactory solution and if it would not make more difficult the maintenance of favourable conservation status of populations of the species' populations in their natural range. The hunting

[20] Eg., 16 §, 23 § and 25 §.
[21] 4 § *artskyddsförordningen*.
[22] 2 § *jaktlagen (Hunting Act) (1978:259)*.
[23] 23 a § *jaktförordningen (Hunting Regulation) (1987:905)*.

must also be "appropriate with regards to the population's size and composition, and occur selectively under strictly controlled circumstances".[24]

Fishing includes any activity that aims to capture or kill free living fish, mollusks or crustaceans.[25] The Fishing Regulation prohibits the fishing of any species that is strictly protected under the Habitats Directive.[26] It additionally prohibits non-selective fishing that can cause local populations of strictly protected species to disappear or suffer a serious disturbance.[27] It states that dispensation from its prohibitions relating to strictly protected species can only be granted if the conditions in section 14 of the Artskyddsförordning are fulfilled.[28] While fishing is not directly covered by the Artskyddsförordning, dispensations from restrictions on fishing EU strictly protected species therefore have a closer connection to that regulation than do dispensations from restrictions on hunting.

3. Dispensation decisions concerning species protected by the Habitats Directive

As explained in the previous section, dispensation to derogate from EU species protection law may be granted under the rules in the Environmental Code and pursuant Artskyddsförordningen, the Hunting Act and Hunting Regulation, or the Fishing Act and Fishing Regulation, depending on the category of species impacted and the type of harm allowed. In this study, I aimed to find out what proportion of dispensation decisions concerning species protected by the Habitats Directive are made under each of these three sets of rules by examining whether the impacted species were mammals, to which the hunting laws likely applied, fish/aquatic crustaceans/aquatic molluscs, to which the fishing laws likely applied, or another type of species, to which the species protection laws applied. Six counties with varying biogeographical features in different regions of Sweden were selected, Gävleborg, Kalmar, Norrbotten, Skåne, Stockholm, and Västra Götaland.

As noted above, the Habitats Directive requires dispensation made in accordance with its Article 16 to be reported to the European Commission every two years. I reviewed the two most recent reporting periods for which reports were available in the European Environment Agency's online portal Eionet. For the years 2013-2014, Sweden reported a total of 326 dispensation decisions, and for the years 2015-2016, Sweden reported a total of 530 dispensation decisions. All reports to the Commission from the six selected counties during the study period were examined, as were the reports made by the Swedish Environmental Protection Agency.

Some of the reported dispensation decisions concerned multiple, even hundreds of, individual animals, and not all decisions were carried out, so the number of decisions does not correspond to the number of animals actually affected by dispensation. Only the number of decisions, not the actual number of animals impacted, are accounted for in this study. The scope of this study was limited to the Habitats Directive; it did not include dispensations from protection of species protected by the Birds Directive, and therefore excludes all decisions relating to birds. Another limitation of this study is that only the reports to the European Commission are examined and not the Swedish administrative decisions that are being reported on. As a consequence, it is not shown which national laws and rules were considered by the decision maker. Instead, the

[24] Ibid., 23 c §. Translation my own.
[25] 4 and 5 §§ *fiskelagen (Fishing Act) (1993:787)*.
[26] 2 kap. 5 § *förordningen (1994:1716) om fisket, vattenbruket och fiskerinäringen (Fishing Regulation)*.
[27] Ibid., 2 kap. 6 §.
[28] Ibid., 2 kap. 22 §.

study provides information necessary to make inferences about which national laws and rules should have been applied.

	2013–2014	2015–2016
Total Sweden	326	530
SEPA	23	237
Gävleborg	18	12
Kalmar	0	28
Norrbotten	65	64
Skåne	24	25
Stockholm	35	32
Västra Götaland	26	27

Number of Habitats Directive Article 16 dispensation decisions reported to European Commission

a. SEPA

SEPA reported 23 dispensations for the reporting period 2013-2014. All of these decisions allowed the killing of mammals to prevent serious damage under Article 16(1)(b) of the Habitats Directive. This includes 3 reported decisions pertaining to wolverines (*Gulo gulo*), which are not listed in Annex IV or Annex V of the Habitats Directive are therefore not subject to the reporting requirements.

SEPA reported 237 dispensations for the reporting period 2015-2016. All of them involved the capture or killing of mammals. The great majority allowed the capture and release of bats for the purposes of research and education or repopulation and reintroduction under Article 16(1)(d). Nine decisions allowed the capture and release of marine mammals and seven allowed their killing. Six decisions allowed the killing of mice. All these decisions were for the purpose of research and education under Article 16(1)(d).

	Mammals	Fish/Crustaceans/ Molluscs	Plants/ Insects/ Reptiles/ Amphibians
2013-2014	23	0	0
2015-2016	237	0	0

SEPA reported dispensation decisions: Species affected

b. Gävleborg

Gävleborg reported 18 dispensation decisions for the reporting period 2013-2014. Twelve of these involved mammals: five pertained to large carnivores (*Canis lupus* and *Ursus artctos*), four to beaver (*Castor fiber*), two to moose (*Alces alces*) (which are not protected by the Habitats Directive, and one to red deer (*Cerbus elaphus*) (which are also not protected by the Habitats Directive). All of the dispensations involving mammals allowed killing to prevent serious damage under Article 16(1)(b). Six dispensations concerned other species; three concerned amphibians and three concerned insects. Of these, five allowed catch and release for the purpose of species identification under 16(1)(a). The sixth allowed the destruction or taking of eggs for the purposes of research under Article 16(1)(d).

Gävleborg reported twelve dispensation decisions for the reporting period 2015-2016. Seven of the dispensations concerned large carnivores, including two larger bear hunts. Six out of the seven decisions were justified under Article 16(1)(c), and the seventh was justified under Article 16(1)(b). Two of the decisions allowed homeowners to keep bats away from their houses to avoid damage under Article 16(1)(b). The other three derogations concerned mussels (*Margaritifera margaritifera*) and were justified under Article 16(1)(d); two allowed their catch and release for an inventory and one allowed their killing.

	Mammals	Fish/Crustaceans/ Molluscs	Plants/ Insects/ Reptiles/ Amphibians
2013-2014	12	0	6
2015-2016	9	3	0

Gävleborg reported dispensation decisions: Species affected

c. Kalmar

Kalmar did not appear to have reported any dispensations for the reporting period 2013–2014.

Kalmar reported 28 dispensation decisions for the reporting period 2015-2016. One allowed the killing of a lynx justified by Article 16(1)(b) and two allowed the killing of an unnamed mammal justified by 16(1)(c). Another six decisions also pertained to unnamed mammals, probably bats, and allowed their deliberate disturbance or the deterioration or destruction of breeding sites or resting places under Article 16(1)(b) or 16(1)(c). Three decisions pertained to the capture and release of aquatic molluscs (*Unio crassus*) justified by Article 16(1)(a) or 16(1)(d). Sixteen pertained to other species; three allowed the deterioration or destruction of breeding sites or resting places of snakes (*Coronella austriaca*) justified by Article 16(1)(c) and the rest allowed capture justified by Article 16(1)(a) or 16(1)(d).

	Mammals	Fish/Crustaceans/ Molluscs	Plants/ Insects/ Reptiles/ Amphibians
2013-2014	0	0	0
2015-2016	9	3	16

Kalmar reported dispensation decisions: Species affected

d. Norrbotten

Norrbotten reported 65 dispensation decisions for the reporting period 2013-2014. 53 concerned large carnivores, including 19 decisions concerning wolverine (*Gulo gulo*), which are not listed in Annex IV or V of the Habitats Directive. All of these decisions allowed killing justified by Article 16(1)(b), including single decisions allowing the killing of 90 bears, 67 bears, 25 lynx and 11 lynx. One decision allowed the collection of frog (*Rana arvalis*) eggs, nine allowed the collection of plant seed heads, and one allowed the deliberate picking, collecting, uprooting or destruction of a plant when a bridge was dug. All these decisions were justified under Article 16(1)(d).

Norrbotten reported 64 dispensation decisions for the reporting period 2015-2016. Of these, 52 concerned the killing of lynx and bears justified by Article 16(1)(b). Six allowed the catch and release of mussels (*Margaritifera margaritifera* and *Anodonta anatine*) for the purpose of research and education, Article 16(1)(d). Four allowed the catch and release of frogs, toads and dragonflies justified by Article 16(1)(b) or 16(1)(d). One allowed the killing of butterflies (*Boloria improba*) (not listed in Annex IV or V the Habitats Directive) for the purposes of research and education, Article 16(1)(d).

	Mammals	Fish/Crustaceans/ Molluscs	Plants/ Insects/ Reptiles/ Amphibians
2013-2014	54	0	11
2015-2016	53	6	5

Norrbotten reported dispensation decisions: Species affected

e. Skåne

Skåne reported 24 dispensation decisions for the reporting period 2013-2014. Seventeen concerned mussels: eight allowed catch and release, three allowed capture and keeping, one allowed deterioration or destruction of breeding sites or resting areas, and five allowed deliberate disturbance. Justifications for these dispensations ranged from prevention of serious damage (16(1)(b)), infrastructure projects and bridge repair (Article 16(1)(c)) to conservation actions (Article 16(1)(a)). Two decisions concerned bats and allowed their deliberate disturbance under Article 16(1)(b) to fix a roof and chimney.

Skåne reported 25 dispensation decisions for the reporting period 2015-2016. One dispensation decision concerned a mammal, a dispensation for the deterioration or destruction of a breeding site or resting place justified by Article 16(1)(b). Ten decisions pertained to molluscs; one of these allowed capture and release for an inventory (Article 16(1)(a)), three allowed deliberate killing justified by 16(1)(a), another allowed catch and release for the same reason, and the rest allowed catch and release justified by 16(1)(d). The other 14 dispensations concerned insects, amphibians and reptiles and were justified under Article 16(1)(e) and 16(1)(d).

	Mammals	**Fish/Crustaceans/ Molluscs**	**Plants/ Insects/ Reptiles/ Amphibians**
2013-2014	2	17	5
2015-2016	1	10	14

Skåne reported dispensation decisions: Species affected

f. Stockholm

Stockholm County reported 35 dispensation decisions for the reporting period 2013-2014. Four decisions concerned excluding bats from buildings; two allowed repairs to prevent serious damage (Article 16(1)(b)), and two allowed removing buildings that posed a threat to public safety (Article 16(1)(c)). The rest of the decisions concerned amphibians and reptiles. Many of these decisions allowed catch and release justified by 16(1)(d), though several allowed killing for research purposes under the same derogation ground. Eleven decisions allowed deterioration or destruction of breeding sites and resting places under Article 16(1)(c) through the filling of unauthorized ponds near playgrounds.

Stockholm County reported 32 dispensation decisions for the reporting period 2015-2016. Five of these allowed the killing of wolves justified by Article 16(1)(b). Four concerned the deliberate disturbance (2) or deterioration or destruction of breeding site or resting places (2) of an unnamed mammal, probably bats, justified by Article 16(1)(b). An additional two decisions specified bats and allowed their deliberate disturbance also justified by Article 16(1)(b). The rest of the decisions concerned plants, amphibians, snakes and insects and were justified under Article 16(1)(d).

	Mammals	**Fish/Crustaceans/ Molluscs**	**Plants/ Insects/ Reptiles/ Amphibians**
2013-2014	4	0	31
2015-2016	11	0	21

Stockholm reported dispensation decisions: Species affected

g. Västra Götaland

Västra Götaland reported 26 dispensation decisions for the reporting period 2013-2014. Three allowed the killing of large carnivores justified by Article 16(1)(b). Twelve concerned bats. The majority of these allowed deliberate disturbance justified under Article 16(1)(d), allowed deterioration or destruction of breeding sites or resting places justified under Article 16(1)(b). Eleven decisions concerned amphibians or reptiles and were granted either under Article 16(1)(d), or 16(1)(c). The latter group included capture and deterioration or destruction of breeding sites and resting places in connection with infrastructure projects.

Västra Götaland reported 27 dispensation decisions for the reporting period 2015-2016. An additional two decisions were reported in conjunction with Örebro County; those are not counted here. Three decisions allowed the killing of large carnivores justified under 16(1)(b). Two allowed the deliberate disturbance of bats under 16(1)(d). One allowed the deliberate disturbance of an unnamed mammal for an inventory also under 16(1)(d). The other 21 decisions concerned insects, amphibians, and reptiles and allowed capture, deliberate disturbance, or the deterioration or destruction of breeding sites and resting places.

	Mammals	**Fish/Crustaceans/ Molluscs**	**Plants/ Insects/ Reptiles/ Amphibians**
2013-2014	15	0	11
2015-2016	6	0	21

Västra Götaland reported dispensation decisions: Species affected

4. Discussion and Analysis

The number of dispensation decisions Sweden reported to the European Commission increased between reporting period 2013-2014 and 2015-2016 from 326 to 530. However, the seemingly large increase in dispensations granted can largely be explained by a bat study authorized by SEPA during the second reporting period. If SEPA's dispensation decisions are excluded, the number of dispensation decisions is 303 during 2013-2014 and 293 during 2015-2016. If only SEPA's bat decisions are excluded, the number of dispensation decisions is 326 during 2013-2014 and 315 during 2015-2016. So, if the large bat study is discounted, there was actually a small decrease in dispensation decisions between the two periods. It should again be noted that these numbers refer to number of decisions taken and not number of animals affected. A single decision can pertain to many individuals of a species, for example a single decision to allow the hunting of bears in Gävleborg in 2016 permitted the killing of 25 bears.

All dispensation decisions by SEPA concerned mammals. The majority of Habitats Directive protected species impacted by dispensation decisions were mammals. Even excluding SEPA's decisions, mammals were the largest category of Habitats Directive protected species impacted by dispensation decisions. While I did not examine reporting of dispensation decisions pertaining to the Birds Directive, I note that Sweden reported 218, 213, and 491 dispensation decisions under the Birds Directive in 2014, 2015, and 2016 respectively. I was unable to access Sweden's Birds Directive reporting from 2013. Since decisions relating to the capture or killing of birds and mammals fall under the Hunting Act/Regulation rather than the Artskyddsförordning, had the Birds Directive dispensations been included, the conclusion that most dispensation

decisions impacting species protected under EU law are made under the Hunting or Fishing laws rather than species protection laws would most likely be even stronger.

It must also be restated that not all dispensations involving mammals and fish would be made under the Hunting or Fishing Acts. While the definitions of hunting and fishing are very broad, they do not include all dispensations concerning hunted and fished species. Many dispensation decisions, for example, concerned bats. Capturing bats or interfering with their dens falls within the legal definition of hunting, even though these activities are not hunting in the vernacular sense. However, other types of disturbance to bats that would be required to be reported to the European Commission may not fall within the definition of hunting, and therefore decisions to allow it would be properly made under the Artskyddsförordning.

	Mammals	**Fish/Crustaceans/ Molluscs**	**Plants/ Insects/ Reptiles/ Amphibians**
2013-2014	110	17	64
2015-2015	326	22	77

All dispensation decisions in studied counties and SEPA: Species affected

	Mammals	**Fish/Crustaceans/ Molluscs**	**Plants/ Insects/ Reptiles/ Amphibians**
2013-2014	87	17	64
2015-2015	89	22	77

All dispensation decisions in studied counties, without SEPA excluded: Species affected.

Three laws, three dispensation rules

Member States must establish a system of strict protection for species included in Annex IV of the Habitats Directive regardless of whether those species are fish, mammals, plants or other types of species. Since the Habitats Directive establishes a minimum level of protection rather than a ceiling,[29] it is not per se a problem if species receive different levels of protection, so long as a strict system of protection is in place to achieve and maintain favourable conservation status.

The Artskyddsförordning, not surprisingly perhaps, contains the highest level of species protection of the three. It faithfully replicates the provisions of the Habitats Directive pertaining to the strict protection of species. In contrast to Sweden's pre-accession species protection legislation, which applied only to the activities of individuals in nature, prohibitions on harming protected species and their breeding and resting places also applies to economic activities such as construction or power generation that harm species.[30] Following the Habitats Directive, most types of harm must be intentional in order to be prohibited, but as the EU court has clarified, activities that harm species may be considered intentional if the actor was aware of the possibility of harm to the species when doing the activity.[31] The Artskyddsförordning provisions on dispensation are also transposed in language that closely mirrors that in the Habitats Directive.

The majority of dispensation decisions concerning species that are strictly protected by EU law are, however, made under sector specific hunting and fishing laws. These implement the Habitats Directive in different ways. For dispen-

[29] Jan H Jans and Hans Vedder, *European Environmental Law: After Lisbon* (Apollo Books, 2012), 113-21.
[30] Michanek, "Artskyddet, politiken och juridiken," 380.
[31] Ibid.; C-221/04 Commission v Spain (2006), para. 71.

sations from the prohibitions on fishing species protected by the Habitats Directive, the Fishing Regulation refers decision makers to the rules in the Artskyddsförordning, meaning that decisions to grant dispensations concerning strictly protected fish should be made as stringently as those concerning other strictly protected species.

The Hunting Regulation has its own provisions guiding decisions about dispensation. Those pertaining to protective hunting largely faithfully implement the Habitats Directive's dispensation justifications having to do with the protection of species, the public interest, and the prevention of serious damage. The Hunting Regulation's provisions on license hunting, which implement Habitats Directive's. 16(1)(e) have, on the other hand, been widely criticized as insufficient both in terms of their formal transposition and in their application. For example, scholars including Michanek, Darpö and myself as well as the European Commission have criticized the Swedish regulation because its text does not limit dispensation to a "limited extent" or to "certain specimens in limited numbers" as does the corresponding provision of the Habitats Directive.[32] Further, the requirements that dispensations made under Habitats Directive 16(1)(e) apply only to "certain specimens" and "on a selective basis", which seems to indicate that the individuals to be targeted must be identified with some precision, may make this dispensation ground particularly unsuitable for allowing license hunting, which typically allows the hunting of a certain number of individuals in a particular area during a particular time period.[33] For these reasons, dispensations made under the corresponding dispensation ground of the Swedish Hunting Regulation, 23(c), may be particularly problematic.

Oddly however, this study of dispensations reported to the European Commission by six counties and the Swedish EPA found that reports of dispensations made under 16(1)(e) were extremely rare. None of the studied legal entities reported using this dispensation ground when allowing the killing of mammals during the four year study period. This is true even for decisions that, in the Swedish decision making, explicitly allowed license hunting under Hunting Regulation 23(c).[34] Instead, these decisions were most frequently reported as having been made pursuant to Habitats Directive 16(1)(b), the prevention of serious damage, and sometimes pursuant to Habitats Directive 16(1)(c), the overriding public interest. It is possible that decision makers sometimes fulfill the formal requirements of the Habitats Directive even when applying insufficient Swedish legal instruments, for instance by ensuring that all the requirements of 16(1)(b) are complied with even when making decisions under a provision of Swedish law that corresponds to a different dispensation ground, or by interpreting the Swedish provision on license hunting to properly transpose 16(1)(e). In at least some instances of license hunting however, it seems that the requirements of the Habitats Directive have not been met[35] regardless of how the dispensa-

[32] "Strictly Protected European Wolf Meets Swedish Hunter with License to Kill," in *Pro Natura: Festskrift till Hans Christian Bugge*, eds. Ole Kristian Fauchald Inge Lorange Backer, Christina Voigt (Oslo Universitetsforlaget, 2012), 340-41.; Jan Darpö and Yaffa Epstein, "Under Fire from All Directions: Swedish Wolf Management Hunting Scrutinized by Brussels and at Home," in *The Habitats Directive in Its EU Environmental Law Context*, eds. Charles-Hubert Born et al. (Routledge, 2014).

[33] Michanek, "Strictly Protected European Wolf Meets Swedish Hunter with License to Kill," 339-40; Yaffa Epstein et al., "When Is It Legal to Hunt Strictly Protected Species in the European Union?," *Conservation Science and Practice* 1, no. 3 (2019).

[34] E.g., Beslut om licensjakt på lodjur i Norrbottens län 2016, diary number 218-2590-2016 (2016).

[35] Jan Darpö, "Gabriel och vargen – Om genomförandet av internationella och EU-rättsliga förpliktelser om artskydd i Sverige," in *Miljörätten och den förhandlingsovil-*

tion is reported to the European Commission. It should also be stated that while it is required that national legislation implementing EU directives must be interpreted in light of those directives,[36] directives must also be implemented accurately in national law.[37] Correct interpretation by administrative decision makers alone would be insufficient to fulfil EU obligations.

The general rules of consideration

The faithful implementation of the Habitats Directive in the Artskyddsförordning is made stronger by the status of that regulation as environmental law. Because this regulation was enacted pursuant to the Environmental Code, the general provisions of that code apply. For example, the Code states that it shall be applied in such a way as to ensure that biodiversity is protected.[38] The general rules of consideration require that persons undertaking an activity or who intend to do so must acquire the knowledge needed to protect human health and the environment from harm.[39] If the prohibition on intentional harm is interpreted in light of these provisions, anyone undertaking an activity would have an obligation to investigate whether that activity would harm strictly protected species or their habitats, and an obligation to refrain from any activity that did cause such harm. These and additional provisions would be also implicated when decisions to allow dispensation are made, for example the precautionary principle and the obligation to choose a site that minimizes environmental damage. If these provisions were applied and interpreted strictly, biodiversity would be protected.

It is not clear to what extent the general rules apply to decisions to allow the hunting or fishing of strictly protected species, as hunting and fishing are explicitly named as exempt from the rules on strict protection in the Artskyddsförordning. However, a similar level of protection potentially applies. It seems particularly likely that the general provisions should apply to decisions to allow fishing, because that regulation states that exceptions pertaining to strictly protected fish can be made only when the conditions for allowing dispensation from the strict protection of species in section 14 of the Artskyddsförordning are met. The Fishing Regulation only refers to the Artskyddsförordning's specific provisions on dispensation, and not to the Environmental Code or its general provisions. It might be argued however that these are an integral consideration in determining whether the conditions of the Artskyddsförordning are met.

The analyses of scholars Christiernsson and Michanek provide additional support for the argument that general provisions of the Environmental Code apply to decisions made under both the hunting and fishing laws.[40] They note that according to the Environmental Code, the Code applies to activities that impact the environment even when those activities are separately regu-

liga naturen: Vämbok till Gabriel Michanek, ed. Jan Darpö, et al. (Iustus Förlag, 2019), 183-84; Anna Christiernsson, "Managing Strictly Protected Species with Favourable Conservation Status—the Case of the Swedish Brown Bear (*Ursus arctos*),"(2018).

[36] Jonathan Verschuuren, "Effectiveness of Nature Protection Legislation in the European Union and the United States: The Habitats Directive and the Endangered Species Act," in *Cultural Landscapes and Land Use* (Springer, 2004), 42.

[37] Hendrik Schoukens and Kees Bastmeijer, "Species Protection in the European Union: How Strict Is Strict?," in *The Habitats Directive in Its EU Environmental Law Context*, eds. Charles-Hubert Born et al.: 134-35.

[38] 1 kap. 1 § 3 st. MB.

[39] Ibid., 2 kap. 2 §.

[40] Anna Christiernsson and Gabriel Michanek, "Miljöbalken och fisket," *Nordisk miljörättslig tidskrift*, no. 1 (2016): 15-16; Anna Christiernsson, "Rättens förhållande till komplexa och dynamiska ekosystem: En studie om rättsliga förutsättningar för adaptiv och ekosystembaserad reglering och planering för bevarandet av biologisk mångfald vid jakt" (Luleå tekniska universitet, 2011), 142-45.

lated by sector specific laws. While hunting and fishing are explicitly excluded from the Artskyddsförordning's specific provisions that prohibit harm to EU strictly protected species, and therefore also from the provisions on dispensation from those prohibitions, they are not exempted from the provisions of the Environmental Code that pertain to environmentally damaging activities. Therefore, according to Christiernsson and Michanek, to the extent hunting and fishing might be considered to damage the environment, the general rules of consideration and other relevant provisions of the Environmental Code should apply.[41]

But even if the hunting and fishing of species that are strictly protected under EU nature protection law is not considered an environmental issue according to Swedish law, the implementation of the Habitats Directive (and Birds Directive) remains an environmental issue under EU law. Therefore EU environmental law principles, such as the precautionary principle, must be adhered to when making decisions that impact protected species, including those decisions made under sector specific Swedish laws. Further, the EU imposes a special duty to ensure the faithful implementation of EU environmental laws "in which the management of the common heritage is entrusted to the Member States in their respective territories."[42] Additionally, the dispensation provisions of the Habitats Directive, and other EU laws, must be interpreted particularly strictly.[43] These principles of EU law are true regardless of how the Habitats Directive is implemented in Swedish legislation.

5. Conclusion

This study has shown that, in the studied counties, a minority of Swedish decisions to allow dispensation from EU species protection laws are made under Swedish species protection laws. These decisions are instead made according to hunting or fishing laws, which do not have environmental protection as their primary goals. Nevertheless, if properly adhered to, these sector specific rules understood in concert with the general provisions of the Environmental Code and in light of the Habitats Directive may provide a similar level of protection as those in the Swedish species protection laws. On the other hand, the fact that so many more decisions allow the harm to fish and mammals than other species may indicate that different standards are in fact adhered to. Even so, mammals are one of the few categories of species for which Sweden has reported an improvement in conservation status, though it is unclear how much of this success can be attributed to the law and its implementation.

There is a need for further research to closely examine what factors are actually considered in granting dispensations under the three different Swedish legal regimes, and in particular the role played by the general provisions of the Environmental Code, as well as the extent to which EU laws and principles impact this decision making. Such research would help clarify whether all types of EU protected species are appropriately protected under Swedish law.

[41] For example, besides the general rules of consideration, 12 kap. 6 § MB allows for the prohibition of activities that damage the natural environment.

[42] Case C-252/85, Commission v France (1988), ECLI:EU:C:1988:202.

[43] Case C-342/05, Commission v Finland (2007), ECLI:EU:C2007:341, para. 25.