This translated ruling is provided for information purposes only. Only the Swedish-language versions are the official rulings.

_____

In cases no. 2764-22 and 2765-22, **Nature and Youth Sweden and others** (Applicants), the Supreme Administrative Court delivered the following judgment on 11 May 2023.

_____

RULING OF THE SUPREME ADMINISTRATIVE COURT

The Supreme Administrative Court finds that the decision by the Government shall be upheld.

BACKGROUND

Generally regarding management of nuclear waste and permit requirement

1. Since the beginning of the 1970's, nuclear power plants have produced electricity for commercial use in Sweden. The nuclear power plants are currently operated by a number of companies within the energy sector, the nuclear power companies. The operation generates high-level spent nuclear fuel and other types of radioactive waste. According to law, the nuclear power companies are obliged to deal with all radioactive waste from the Swedish nuclear power plants in order to protect human health and the environment. To fulfil this mission, the nuclear power companies have jointly formed Svensk Kärnbränslehantering AB, SKB.

2. SKB currently operates a final repository for so-called short-lived radioactive waste in Forsmark in the municipality of Östhammar. SKB also has an interim storage facility for other spent nuclear fuel in the municipality of Oskarshamn. Since the 1970's, the company has worked to develop a method for handling and final disposal also of this nuclear fuel. In its current design, the concept is referred to as the *KBS-3 method,* in which KBS refers to nuclear fuel safety.

3. The activities which constitute nuclear facilities carry out such environmentally hazardous activities as require a permit in accordance with the Environmental

Code. An application for a permit is to be made to a land and environment court but, prior to the court's permit application procedure, the Government shall consider whether the activity is to be permitted (consideration of permissibility). The Land and Environment Court prepares the matter regarding permissibility and submits the question with its own statement to the Government.

4. The consideration of permissibility has been submitted to the Government in order to achieve a comprehensive assessment with a balancing of, *inter alia*, issues of environmental protection, labour market policies and regional policies. Above all, it has been deemed important that decisions of the type in question are addressed by a body from which political accountability may be demanded. The examination by the Government proceeds on the basis of the Environmental Code's general rules of consideration and other permit rules, but it has been stated in the preparatory works that the Government's consideration of permissibility is an early and significant link in the chain of consideration and that the Government can thereby exercise political leadership in respect of certain decisions within the framework of applicable legal rules (Government Bill 1997/98:45, part 1, p. 435 f.).

5. In order to conduct nuclear activities, a permit is also required from the Government in accordance with a special nuclear activities act. Applications for such permits are submitted to the Swedish Radiation Safety Authority which prepares the matter and submits the documents with its own statement to the Government for decision. In conjunction with the consideration of an application, the provisions regarding radiation safety and radiation protection are applied together with certain provisions in the Environmental Code.

Facts in this case

6. In March 2011, SKB applied to the Land and Environment Court at Nacka District Court for a permit in accordance with the Environmental Code for facilities in a connected system for final disposal of spent nuclear fuel and nuclear

waste from the Swedish nuclear power programme. The application covered, *inter alia*, a permit to store, handle and process nuclear material and nuclear waste in an existing central interim storage facility in the municipality of Oskarshamn as well as to erect a facility component for encapsulation of nuclear material and nuclear waste therein. In addition, an application was made for a permit to be allowed to erect and operate a facility for the final disposal of nuclear materials and nuclear waste within the Östhammar Forsmark 3:32, 6:5 and 6:20 properties in the municipality of Östhammar.

7. According to the application, final disposal shall take place in accordance with the KBS-3 method. The method entails that the spent nuclear fuel is stored in copper cannisters which are deposited at approximately 500 metres depth in Forsmark's primary rock and which are surrounded by a buffer of bentonite clay. The cannister, clay and rock thereby constitute three safety barriers in order to prevent release of nuclear waste in such a manner as can harm human health or the environment. Establishment of the final repository until it is sealed is estimated to take approximately 70 years.

8. The Land and Environment Court, which submitted the matter to the Government in January 2018, determined that the activity as a whole is permissible provided that SKB, *inter alia*, reports data that shows that the final repository facility meets the requirements of the Environmental Code in the long term notwithstanding the uncertainties remaining as to the manner in which the copper cannister's ability to provide protection is affected by various corrosion processes, hydrogen embrittlement and the effect of radioactive radiation on these processes.

9. SKB also applied for a permit for the activities in accordance with the Nuclear Activities Act. The Swedish Radiation Safety Authority, which submitted the matter to the Government in January 2018, recommended the grant of a permit to SKB.

10. On 27 January 2022, the Government decided to permit the activities in accordance with the Environmental Code and to grant a permit in accordance with the Nuclear Activities Act. In the decisions, the environmental impact assessment submitted by SKB was approved and certain conditions for the activities were decided. The Government was of the opinion that SKB had satisfactorily supplemented the matter with the information in question pertaining to uncertainties regarding the cannister's ability to provide protection in the long term requested by the Land and Environment Court in its opinion to the Government.

Generally regarding judicial review

11. At the end of the 1980's, the institution of judicial review was established to ensure that Swedish law lives up to the requirements of the European Convention – the European Convention for the Protection of Human Rights and Fundamental Freedoms – regarding access to judicial review. The now applicable Judicial Review of Certain Government Decisions Act (2006:304), the "Judicial Review Act," pertains only to decisions by the Government and the review is conducted by the Supreme Administrative Court.

12. The idea at the inception of the act was that, in the future, the institution of judicial review would only be applied in the event decisions have such political dimensions that a complete review with the possibility of amending the affected decision was not a possibility. This was determined to regularly be the case regarding decisions taken by the Government, even if such decisions also contained an examination of an individual's civil rights or duties. Decisions taken by an authority other than the Government should not, on the other hand, be afforded such a limited review but, rather, are to instead be appealed in the customary manner and be subject to thorough judicial proceedings (Government Bill 2005/06:56, p. 10 f.).

13. A judicial review is thus significantly more limited than the substantive review normally carried out by an administrative court. In principle, the review is limited to the reasons asserted by the applicant. Accordingly, pursuant to section 4, third paragraph of the Judicial Review Act, an application for judicial review must state the legal rule deemed by the applicant to be violated by the decision and the circumstances adduced in support thereof.

14. Furthermore, the judicial review has in view the questions regarding legality, i.e. whether the decision violates legal rules. Thus, pursuant to section 7, the Supreme Administrative Court must overturn the Government's decision if it violates any legal rule in the manner stated by the applicant or which is clear from the circumstances. However, this does not apply if it is obvious that the error is immaterial to the ruling.

15. Even if the review has in view issues regarding legality, it entails, in addition to pure legal interpretation, also the likes of the assessment of facts and evaluation of evidence, as well as whether the decision infracts the requirements of objectiveness, impartiality and the equality of everyone before the law. The review also covers errors in the procedure which may have influenced the outcome of the matter. In the event the applied legal rules are formulated such that there is a certain discretion in the decision-taking, the judicial review covers whether or not the decision falls within such discretion. Even if the judicial proceedings in principle apply to the full breadth of the administrative decision, the nature of the review is such that it takes place taking into account the fact that courts cannot be presumed to make determinations which are distinctly discretionary or political in character (*cf.* Government Bill 1987/88:69, pp. 23–25 and 234).

16. According to section 2 of the Judicial Review Act, certain types of environmental organisations may also apply for judicial review of such permit decisions taken by the Government as are covered by Article 9.2 of the UN Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, the so-called "Aarhus Convention".

CLAIMS, ETC.

17. The *Nature and Youth Sweden, Friends of the Earth Sweden, Swedish NGO Office for Nuclear Waste Review, Swedish Society for Nature Conservation in Uppsala County, Swedish Society for Nature Conservation* and the *Swedish Society for Nature Conservation in Östhammar* associations apply for judicial review of the Government's permissibility decision and permit decision and primarily claim that the decisions are to be overturned and, in the alternative, that the matters are to be remanded to the Government.

18. In summary, the applicants are of the position that the decisions of the Government violate the general rules of consideration in the Environmental Code, that the environmental impact assessment does not fulfil the requirements of the Environmental Code and that there has been an error in the procedure in which the Government took a decision regarding permissibility without a prior Natura 2000 assessment. In addition, the applicants state that, since the Government's permissibility decision is not compatible with the rules of the Environmental Code, a permit also cannot be granted in accordance with the Nuclear Activities Act.

REASONS FOR THE RULING

Do the Government's decisions violate the general rules of consideration of the Environmental Code?

19. The applicants claim that the Government's decisions violate the knowledge requirement, precautionary principle and localisation principle and state the following. The remaining uncertainties regarding the ability to protect the storage of nuclear fuel are considerable. There is much to suggest that the copper cannisters will be affected by corrosion processes, etc., to a significantly greater extent than that which has been assumed, with cannister breakage and inadequate

radiation protection as a consequence. As regards the bentonite clay, there is a major risk that it will not swell in the manner anticipated. The placement of the nuclear fuel repository is unsuitable, *inter alia*, due to the proximity to the Baltic Sea and that the area is positioned in a zone subject to a greater risk of earthquakes.

20. Chapter 2 of the Environmental Code contains provisions which impose general requirements such that the party who conducts or intends to conduct an activity must take into consideration human health and the environment, so-called general rules of consideration. The rules of consideration entail, *inter alia*, a knowledge requirement in section 2, a precautionary principle in section 3 and a localisation principle in section 6.

21. The knowledge requirement in section 2 entails that all persons who pursue an activity or take a measure or intend to do so must possess the knowledge necessary in view of the nature and scope of the activity or measure in order to protect human health and the environment against damage or detriment. The preparatory works relating to the provision note that the knowledge requirement is general and that the provision can rarely be expected to form the immediate basis of intervention by the supervisory authority, but it underscores the importance of having knowledge precede action (Government Bill 1997/98:45, part 2, p. 14).

22. The precautionary principle is stated in section 3. Persons who pursue an activity or take a measure, or intend to do so shall implement protective measures, comply with restrictions and take any other precautions that are necessary in order to prevent, hinder or combat damage or detriment to human health or the environment as a result of the activity or measure. For the same reason, the best possible technology shall be used in connection with professional activities. Such precautions shall be taken as soon as there is cause to assume that an activity or measure may cause damage or detriment to human health or the environment. The preparatory works state that what is needed varies depending on the danger and scope of the impact and the condition where the impact occurs. The assessment

must always be made individually in consideration of the circumstances present in each individual case (*ibid.*, Government Bill, part 2, p. 15).

23. According to the principle of localisation in section 6, first paragraph, in the case of activities and measures for whose purposes land or water areas are used, a suitable site shall be selected to make it possible to achieve their purpose with a minimum of damage or detriment to human health and the environment. The preparatory works provide that a certain possibility for a moderate approach must exist also in the application of the localisation provision (*id.*, Government Bill, part 1, p. 220).

24. The requirements enumerated in these provisions apply only to the extent that compliance cannot be deemed unreasonable. Particular importance shall be attached in this connection to the benefits of protective measures and other precautions in relation to their cost (Chapter 2, section 7, the so-called *reasonableness rule*).

25. It is apparent from the investigation in the case that SKB has conducted research regarding storage of nuclear waste since the 1970's and no practical alternative to the KBS-3 method is available today. During the administration of the matter, scientifically based objections to safety in the forecast regarding the copper cannisters has given rise to renewed analyses without change to the underlying conclusions regarding the safety of the method. However, the investigations continue and may continue for approximately the next 50 years during which the facility will receive cannisters. The placement of the final repository has, among other things, been prompted by virtue of the fact that the frequency of fissures in the rock there is quite low, as a consequence of which the risk for leakage is minimised.

26. The Supreme Administrative Court notes that the rules of consideration are general and that the application of them makes a relatively large amount of room for assessment. Against the background of what has come to light, the Court

cannot find that the decisions taken by the Government may be deemed to violate any legal rule in a manner asserted by the applicants or which is clearly apparent from the circumstances. Nor has anything come to light according to which the Government incorrectly assessed facts or exceeded the limit for the discretion which the rules of consideration provide.

Is the environmental impact assessment deficient?

27. The applicants further assert that the environmental impact assessment is deficient since the description of alternative designs of the final repository is insufficient, which they claim is in contravention of Chapter 6, section 7, second paragraph of the Environmental Code.

28. In 2017, a new Chapter 6 was added to the Environmental Code which entered into force 1 January 2018. According to the transitional provisions, the older provisions are applicable in this case.

29. According to Chapter 6, section 7, second paragraph (4), an environmental impact assessment shall, *inter alia*, contain a description of possible alternative designs together with a statement of the reasons why a specific alternative was chosen.

30. The requirement of a description of alternatives entails that the developer must provide an overall description of the principal alternatives contemplated by the developer and the most important reasons for the selected solution taking into account the environmental impacts. The environmental impact assessment must be able to be adapted to what is required in the individual case. The applicant need not enumerate alternatives which are unrealistic, and it is critical that the basis for decision-making is not weighed down by less meaningful information (see Government Bill 1990/91:90, p. 187; Government Bill 1997/98:45, part 1, p. 290; Government Bill 2004/05:129, p. 92; and case NJA 2009, p. 321).

31. In the decision regarding the consideration of permissibility, the Government has concurred with the assessment of the Land and Environment Court that the environmental impact assessment fulfils the requirements of the Environmental Code and thereby decided to approve the same. As regards the requirement of alternative designs in the environmental impact assessment, the Land and Environment Court has stated the following.

32. SKB has applied for a permit for the KBS-3 method. However, the environmental impact assessment contains an overall description of other methods. According to SKB, none of the described methods, including deep bore holes, fulfil the requirements and starting points established for final disposal and handling of spent nuclear fuel. It is common ground that there is research and development to be done before it is possible to test any other method. No sufficiently developed, comparable design has come to light which may constitute a concrete alternative in the currently relevant consideration.

33. The Government has been of the opinion also in the decision regarding a permit in accordance with the Nuclear Activities Act that the environmental impact assessment, with the supplementations provided, meets the requirements imposed in accordance with the Nuclear Activities Act and Environmental Code.

34. The Supreme Administrative Court can note that the alternatives to the KBS-3 method which have been reported in the environmental impact assessment have not been deemed to constitute any realistic alternatives by either SKB, the Land and Environment Court or the Government. The investigation in the case further shows that there is currently no practical executable alternative to the method. As has come to light, under such circumstances, no more thorough description of these alternatives is necessary. Against this background, the Government’s decision to approve the environmental impact assessment may not be deemed to violate any legal rule.

Question regarding Natura 2000 assessment

35. Finally, the applicants have claimed that the Government should have examined the issue regarding Natura 2000 permits not later than in conjunction with the permissibility decision in accordance with the Environmental Code. The lack of such an assessment constitutes, according to the applicants, an error in the procedure which has had an effect on the outcome in the matter.

36. According to Chapter 7, section 28 (a) of the Environmental Code, a permit is necessary in order to conduct an activity which can, in a significant way, affect the environment in a Natura 2000 area.

37. Chapter 4, section 8 of the Environmental Code states that the use of land and water which may affect a Natura 2000 area and which covers activities or measures which require a permit in accordance with Chapter 7, section 28 (a) may only be carried out provided such a permit has been granted. The Environmental Code does not state at which stage of the process a Natura 2000 assessment is to take place. However, an assessment must be carried out before a permit is granted (*cf*. HFD 2016 reported case no. 21).

38. It is apparent from case law that the permit application procedure is to cover all of the effects which the activity applied for may have on a Natura 2000 area. An overall assessment is to be carried out at some stage in the examination, and this assessment shall be complete, exact and final (case NJA 2013, p. 613, para. 13).

39. The applicants have adduced HFD 2016 reported case no. 21 in support of the notion that the Natura 2000 assessment is to be carried out as early in the process as possible. The case pertained to a permit for an exploitation concession in accordance with the Minerals Act (1991:45). The act contains a provision in which it is stated that Chapters 3 and 4 of the Environmental Code shall be applied “only” in conjunction with the examination which takes place in a matter regarding a concession which pertains to an activity which is to be subsequently

assessed in accordance with the Environmental Code or other acts. The Supreme Administrative Court found in the case that the Minerals Act is intended to achieve an assessment in accordance with Chapters 3 and 4 of the Environmental Code as early as possible and on one occasion only.

40. The Supreme Administrative Court notes that no comparable limitation of when the Natura 2000 assessment is to be carried out subsists in the current regulatory framework. The case accordingly also does not provide support for the notion that such an assessment must take place as early as the consideration of permissibility. Against this background, there is no cause to overturn the Government's permissibility decision for the reason that the Government should have examined the question regarding a Natura 2000 permit.

Outcome of the judicial review

41. In summary, the objections of the applicants have not entailed that the Government's permissibility decision in accordance with the Environmental Code or the permit decision in accordance with the Nuclear Activities Act violates any legal rule and thus do not constitute grounds for overturning the decisions. Nor is it apparent from the circumstances that the decisions in any other manner violate any legal rule. Accordingly, the decisions of the Government shall be upheld.

_____

Justices Henrik Jermsten, Thomas Bull, Marie Jönsson, Linda Haggren and Martin Nilsson have participated in the ruling.

Judge Referee: Max Uhmeier and Helen Lidö.