BALANCING OF INTERESTS AND COMPENSATION RULES IN ENVIRONMENT LAW

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1. INTRODUCTION

In general the term environment law (*miljörätt*) is used somewhat loosely in Sweden. Although there is thus no precise definition of environment law, most people think of it as consisting of rules of law which are particularly concerned with the external nature of the human environment—with people's living, working and recreational conditions.

The central Swedish statute in this area is the Environmental Protection Act (EPA) of 1969, which regulates "environmentally hazardous activities" (water pollution of various kinds, air pollution, noise and other nuisances). The more disturbing activities of this type require a licence from the appropriate authority, but the authorities can also intervene with prohibitions and injunctions against the activity in question; furthermore the person conducting the activity can be held strictly liable for damage which arises, even if the activity is conducted wholly in accordance with the directives of the authorities. The EPA is supplemented by the Water Act (WA), which is the earlier enactment of the two and has served as a model for some EPA rules—its provisions on, above all, such measures as building in water, water regulation and drainage concern environmental disturbances of a similar kind to those dealt with by the EPA. Another statute which belongs to the central areas of environment law is the Nature Conservation Act (NCA) of 1964. This Act is not concerned with disturbances to the environment in the strict sense; what it is directed against is such measures taken by real-estate owners on their own property as cause damage to nature (e.g. gravel pits) or restrict the general public's access to recreation (erecting buildings along the shore, fencing-in popular bathing beaches). The Act is, *inter alia*, intended to protect the right that all individuals in Sweden—both Swedes and aliens—are considered to possess to pass over and stay for a short period on other people's land, provided that this does not entail risk of damage or violation of privacy for those who live in the area. This "every man's right" (*allemansrätt*) is a characteristic feature of Swedish, Norwegian, Finnish and Icelandic law.

The NCA also gives the authorities a measure of control over the actions of real-estate owners; in certain cases permission is required to carry on an activity, in others the authorities can on their own initiative issue decisions

which restrict a landowner's control over his own property—e.g. by creating a nature reserve with accompanying prescriptions concerning the management of the land.

> There are, of course, other statutes which are of importance in the present connection. For example, the rules in the Building Act on the planning and control of settlement have, in addition to other functions, the aim of contributing to a good environment. The purposes behind this legislation are, however, so varied and it is so difficult to pinpoint the principal aim behind individual rules that the workings of this legislation will not be considered in this survey.

A distinguishing feature of the statutes in the area of environment law is that they attempt to solve conflicts of interest of a rather special type. To a considerable extent it is a matter of the familiar conflicts between, on the one hand, the desire of individual landowners to have free disposal over their property and, on the other hand, what for the sake of convenience may be called the environmental interest. Here several different kinds of considerations play a part: the health and comfort of people living nearby, adjacent properties, nature protection, recreational activities, etc. During the last few decades such public interests have steadily gained the ascendant; for landowners it has been a matter of continuous retreat from the strong positions they once occupied.

To speak only in terms of a conflict between the interests of landowners and of the environment would, however, be to oversimplify the situation. First of all, of course, the authorities' decisions on environmental matters are also concerned with traditional conflicts within the field of the law of adjoining properties, where individuals dispute concerning prohibitions or compensation on the ground of disturbances across property boundaries. For a long period it was mainly these aspects that received the attention of legal scholars.[1] Especially during the last few decades, however, public interests have played an increasingly large part in the resolution of such conflicts. Here it is not only a question of paying regard to housing environment, nature, and recreational activities. Property owners, too, have been able to invoke important social considerations when they have wished to carry on disturbing industrial and similar activities. Stress has been laid, for example, on the importance of maintaining the international competitiveness of Swedish industry and of alleviating unemployment, not

[1] Thus in the proposals of 1908 for the Real-Estate Code the problems of nuisance are essentially regarded as of private-law character, although the public-law aspects also receive attention; see *Lagberedningens förslag till JB*, 1908, pp. 170 ff. The development is described in more detail in Ljungman, *Om skada och olägenhet från grannfastighet* (1943). On the present legal position, see Westerlund, *Miljöfarlig verksamhet* (1975), where above all the rules of consent in the EPA are dealt with.

least in depopulation areas; in this way industrial promoters have been able to secure greater tolerance for disturbances. The development of motoring and aviation and the increased demand for scope for these activities have also been put forward as reasons why sensitive neighbours should scale down their demands for an undisturbed environment. A special consideration which is receiving ever-increasing attention is the need to bring about a rational management of the country's natural resources, a development which among other things has resulted in the programme of national planning whose guiding principles were drawn up by the Riksdag in 1972. The safeguarding of environmental interests is only a part of these management problems and is often overshadowed by socioeconomic considerations of various kinds.

Finally, a factor of the greatest importance has been the efforts of the legislator to curtail private ownership rights in order to increase public control of land use, efforts whose aim is not specifically connected with environmental protection. Since the end of the 1960s a deliberate offensive has been carried on against, among others, private land developers, and this campaign has indirectly been of importance for environmental protection as well.

All these considerations of various kinds play a part in the reform legislation in the area of special real-estate law which began with the EPA of 1969 and continued with the amendments that have been undertaken during the last few years in the legislation on expropriation, water, building and nature conservation, etc.

2. SURVEY OF COMPENSATION CASES

An important factor in these conflicts of interest is the possibility of granting compensation to persons who suffer damage through a decision on an environmental matter. In such decisions the compensation rules can act in two ways.

When a landowner is seeking permission for an activity which will disturb those living in the vicinity, one can take into account that he will in any case be *under a duty to indemnify damage caused by the activity*. As is well known, it is considered that what an individual property owner must put up with from a neighbour depends among other things on whether or not he has a right to claim damages for the disturbance.[2] The damages com-

[2] See Ljungman, *op. cit.*, *inter alia* pp. 130 ff., 253 ff.

pensate him for such infringements of his ownership right as are permitted on account of the socially useful effects of the disturbing activity. If the infringement goes so far that a property or part of a property becomes useless to the owner or "extreme inconvenience" arises in its use, the owner may demand that the area in question be purchased from him (sec. 32, EPA).

It is, furthermore, traditionally considered that a curtailment of a landowner's use of his own property, e.g. a prohibition against felling timber when the land is made a nature reserve, can be accepted provided that *the public authorities compensate him for his loss.* Here, too, the landowner can demand that the property be purchased where extreme inconvenience arises in its use (sec. 27, NCA).

As a rule it is not possible to demand compensation if the authorities forbid a property owner to practise an activity which is harmful for the surroundings. Still at the time of the adoption of the Nuclear Energy Act in 1956 the question was raised whether an entrepreneur who for reasons of safety was called upon to curtail his activities should not in certain cases be compensated for his loss;[3] in the *travaux préparatoires* of the EPA, however, there is no serious discussion of any corresponding regulation, even in cases where an already licensed activity has to be curtailed.[4] In the supplementary nuclear energy legislation adopted in 1977, the operator of a nuclear reactor is, it is true, given the right to compensation by the state if he suffers a loss in consequence of a measure which by virtue of a previously obtained permission had been taken before the new statute entered into force (sec. 4 of the Act concerning special permission to supply nuclear fuel to nuclear reactors). This rule, however, must be viewed against the background of the fact that the legislation of 1977 involves a tightening up of the conditions for nuclear energy production which previously existed, a development due rather to a shift in the official attitude on energy policy following the change of government in 1976 than to the discovery of any new risks connected with nuclear power.[5]

But in the area of the NCA the situation is different. As mentioned, this Act is not aimed at preventing disturbances to the environment in the ordinary sense. In certain cases the use of the property which is forbidden by the authorities appears so harmless that the owner can demand compensation from them for the curtailment of his rights over the property.

The rules on compensation for curtailment of ownership rights and for

[3] *Prop.* 1956: 178, p. 28.
[4] Cf. secs. 24, 25; but see *SOU* 1966: 65, pp. 322 f. (revocation of licence).
[5] Cf. *Prop.* 1976/77: 53, pp. 19 f., and *Näringsutskottets betänkande* 1976/77: 23, pp. 15 ff., 23 f.

intrusion are therefore designed to influence the balancing of interests which takes place in environmental and nature conservation matters. Thanks to them the traditional concept of ownership has not blocked a use of properties which is desirable from the public point of view. The availability of compensation has been considered to justify the disturbance of an owner's enjoyment of his property, e.g. by noise from a socially important industrial activity on neighbouring land, or the curtailment of his rights in various ways, as for instance when he is refused permission to extract gravel from his land. When the owner's interest has been weighed against various societal considerations it has been possible to allow the latter to prevail precisely because the owner will at any rate not suffer economic loss in consequence of the authorities' decision.

Against the background of what has been said above, it is natural that the change in the attitude to land ownership in the last few years should also have affected the provisions on compensation. In so far as the owner's powers do not appear justifiable by present-day standards, there is no longer any need to compensate him for their disappearance. The owner's right not to have to endure genuinely troublesome disturbances from his neighbour is still accepted; but it is considered that he is not entitled to demand to be allowed to exploit his property in a way which would damage the natural environment or hinder recreational activities. The provision in the Instrument of Government that compensation shall be paid to private persons in the event of expropriation "or other such disposition" (ch. 2, sec. 18) does not apply to curtailments of owners' rights of this type.[6]

At the same time, however, it should be pointed out that it is by no means always the case that the possibilities of compensation may be of importance for the decisions of authorities on environmental protection matters. In the main compensation can only indemnify private interests which sustain damage as a result of the decisions. If in support of his standpoint a landowner can invoke *general community interests,* e.g. the protection of the natural environment, damage to these interests can seldom be indemnified in money under present legislation. Thus at present there are no environmental protection levies which can be applied to rectify or reduce environmental damage which does not afflict specific private persons.[7] It is true that the EPA authorizes the Government, in certain cases where the occurrence of a major nuisance has been submitted to it, to prescribe special conditions for permission; among other things

[6] Cf. *Prop.* 1973: 90, pp. 237.

[7] Up to 1969, on the other hand, fishery conservation levies of the same type as environmental protection levies were payable under the earlier ch. 8, sec. 34 WA. Cf. also ch. 4, sec. 14 WA on water regulation charges.

these can involve a duty to make grants in order to safeguard various local interests which suffer damage as a result of the environment-disturbing construction (see sec. 19).[8] And after the amendments of 1974 the NCA gives the authorities limited powers when granting a licence to an environment-disturbing enterprise to prescribe that the enterprise shall pay compensation for any infringement of nature-conservation interests (sec. 12, para. 2, and sec. 42, para. 2).[9] But what is here involved is only a non-mandatory right for the authorities, and it is moreover of limited practical importance; so far as is known no compensation rules in accordance with the EPA have yet been issued. The values which are threatened are largely of a non-economic nature, and even in so far as economic damage is concerned it is very difficult to assess this even approximately in money terms. For that matter it would in many cases be altogether impossible to rectify damage to the environment within a foreseeable period, even if the public authorities had greater resources at their disposal than they now possess—a circumstance which has been emphasized with regard to, *inter alia,* gravel extraction.

The interplay between the compensation rules and the principles for the balancing of interests is somewhat complicated. It is not possible to consider here the whole range of problems involved. I shall only attempt to throw some light on them by outlining the balancing of interests in accordance with the two central statutes which represent different types of environmental protection legislation—the EPA and the NCA.

3. THE ENVIRONMENTAL PROTECTION ACT

The importance which the EPA attaches to public interests is already evident in the discussion in the *travaux préparatoires* as to which authority should examine applications to carry on various environmentally hazardous activities. The discussion emphasized the role played by these interests, particularly in the case of activities carried on under a licence. This was regarded as a powerful argument for entrusting the granting of permits to special bodies (the Licensing Committee for Environmental Protection

[8] Cf. on this *Prop.* 1969: 28, pp. 250 f.

[9] The explanatory material indicates that no very burdensome liability for compensation is envisaged; cf. *Prop.* 1974: 166, p. 117 (arrangement of bathing, parking or camping facilities, etc., on nature reserves), pp. 121 f. (the value of sec. 42, para. 2, lies chiefly in the possibility of prescribing scientific investigation and documentation).

and, in less important cases, the Environmental Protection Board), where various community interests could be evaluated in an expert way. However, private interests, too, could be taken into account in the examination of applications; and where such interests were dominant, as in the case of ordinary conflicts between neighbours, the examination could be referred to the courts.[1] It seems to have been regarded as self-evident that these alone would decide questions concerning damages under the Act.

> In this way there was chosen a solution different from that obtaining under the WA, which otherwise concerns problems of a similar kind. Under that Act compensation, e.g. for an environment-disturbing power station construction, is in principle awarded by the same body that grants permission for the construction, and the extent of the damage caused by the enterprise is of considerable importance for the examination of the application for permission. The Act even provides a fixed formula for arriving at a balance between utility and economic damage (ch. 2, sec. 3, subsec. 1), in which, however, no regard is paid to the question whether the damage is eligible for compensation or not; the balancing against more general environmental interests, on the other hand, takes place on a more discretionary basis (ch. 2, sec. 3, subsec. 2). In the area of environmental protection legislation, where even the potential economic damage is more difficult to foresee and estimate, no corresponding formulae occur. However, according to the proposal of a recent report, the system of the WA should be brought into closer agreement with that of the EPA.

The EPA's provisions in this area are on the whole rather vaguely worded and leave the authorities considerable scope for a discretionary assessment. They do, however, give some guidance for the balancing of interests. Here we shall at first disregard the possibility of damages.

Sec. 4 of the EPA deals with the location of environment-disturbing enterprises and states that a location shall be chosen such that "the purpose can be attained with the least possible interference and nuisance, without unreasonable expense". The section gives expression to the idea that account should be taken of different locational possibilities when an enterprise wishes to start or expand its activities. If these activities can be expected to be less objectionable if the enterprise is located at another place, this may justify a rejection of the application for permission. It is clear from the section that in so deciding consideration must be given to the additional cost for relocation that would be incurred by the applicant; the balancing of interests emerges precisely in the assessment of the reasonableness of the additional cost. But the rule is so closely interwoven with the provisions on protective measures (sec. 5) and prohibitions (sec. 6)

[1] See on this *Prop.* 1969: 28, pp. 196, 218 f.

that it can scarcely be said to give expression to an independent principle of balancing of interests.

Of greater interest in the present context is sec. 5. A person carrying on an environmentally hazardous activity can be placed under a duty to observe such precautions as "may reasonably be demanded"; and in this connection regard must be paid—in addition to the technical feasibility of such measures—to both public and private interests. Particular regard must be paid, on the one hand, to "the nature of the area that may be subjected to interference and the importance of the effects of the interference", and, on the other hand, to "the usefulness of the activity as well as the cost of protective measures and the economic effects in general of precautionary measures that may be called for".

As far as the *first* element in the comparison is concerned, it is not particularly surprising that the sensitivity of the exposed area and the degree of severity of the interference should influence the authorities' decision. What, however, is relevant is whether the consent of those who represent private interests plays a part in the evaluation. This would by no means be in harmony with the attitude of the EPA, which is precisely that the perspective applied should take in more than the interests of the neighbours most closely concerned. In special cases it may well be supposed that the latter's acceptance plays a part in the balancing,[2] though this is scarcely likely to happen where the activity involves either risks to the health of those living in the vicinity or serious environmental damage.

The *second* element in the comparison comprises the reasons that can be adduced for not requiring such far-reaching protective measures in respect of the activity. The reference to utility is a direct invocation of economic arguments; but social considerations, e.g. the importance of the enterprise from the point of view of employment and for the provision of a good social service, must also be taken into account.[3] It is true that it is indicated that too much prominence should not be given to purely economic considerations,[4] but it is obvious that the legislator has been reluctant to put such severe pressure on individual enterprises that they are left with the choice between closing down altogether and adjusting their activities to the requirements of environmental protection. Here the possibility of state grants for purification measures comes into the picture. It is clear that in practice it is easier to take far-reaching measures of intervention against entrepreneurs if their costs are reduced in this way—a

[2] Cf. *SOU* 1966:65, p. 223.
[3] *SOU* 1966:65, p. 216.
[4] *Prop.* 1969:28, p. 215.

philosophy which has sometimes been reflected in the practice of the authorities concerned with environmental protection.[5]

Sec. 6 concerns the balancing after all reasonable precautions can be assumed to have been observed. If it can be feared that the disturbing activity would even then "cause a substantial nuisance", it may only be allowed if "special reasons" exist (see para. 1). Here, too, there is evidently a balancing between utility and damage on lines similar to those followed in the case of protective prescriptions. In para. 2, however, a new element enters: it is stated that certain environmental factors of particular importance—serious threats to health or living conditions in general and to nature and recreational interests—constitute in principle an obstacle to granting permission for the activity. But even then permission can be granted by the Government (not by any other environmental protection authority) if the activity is of "extreme importance for the economy or for the locality or otherwise from the point of view of the public interest". It is, however, understood that in such cases the Government has usually given advance permission for the activity at the special locational inquiry concerning large industries in accordance with sec. 136 a of the Building Act, where similar principles for the evaluation are applied. Both provisions can be said to mean that even very strong environmental interests can be outweighed by certain other public interests which are of particular importance. Ultimately the balancing will often be of a political nature. Here the environmental interest can easily be overshadowed by various public considerations; an example is the much discussed governmental decision which gave permission for an oil refinery in an area which was of importance for the open-air life of the country as a whole by reason of its suitability for, in particular, bathing and boating (Brofjorden on the West Coast), with extensive damage to nature and the landscape as the predictable consequence.

The question now is how the possibility of claiming *damages* from a nuisance-creating enterprise can influence the balancing of interests in the different cases.

Before the advent of the EPA, the idea of allowing a disturbing activity subject to a duty of compensation to the neighbours had been broached in legal writing and in several Government Bills.[6] Here parallels were drawn with the principles applied upon expropriation: a socially useful activity should be allowed even if it encroaches on the rights of individuals,

[5] See, *inter alia, Koncessionsnämndens beslut* (Decisions of the Licensing Committee for Environmental Protection) 14/73, 108/73. Cf. also Westerlund, *op. cit.*, pp. 162 ff.

[6] Cf. Ljungman, *op. cit.*, pp. 136 f., 254 ff., Undén, *Sakrätt* II: 1, sec. 9, and *SOU* 1947:38, p. 130.

provided that the economic damage caused by it is compensated. The Nuisance Law Committee, too, pointed out in the *travaux préparatoires* to the EPA that a close connection existed between permissibility and compensation, especially where the problem was whether a certain activity should be allowed despite the fact that it caused serious disturbances.[7] However, the liability for damages under the EPA depends on other criteria—among other things the degree to which the activity is usual in the locality or otherwise plays an important part (see below)—and the question is further examined by other authorities (contrary to the proposal of the Nuisance Law Committee, which was to the effect that the water rights courts should in both cases be the relevant instances). Nor is the possibility of damage discussed in any detail in the reasons given in the *travaux préparatoires* for the permissibility rules. The public interests came increasingly into the forefront in the treatment of the Bill; one explanation of this may be that attention was concentrated above all on serious nuisances, where the conflicts of individual neighbours play a subordinate role. It is, however, pointed out in the *travaux préparatoires* that in the balancing of interests in accordance with sec. 6, para. 1, between "substantial nuisance" and "special reasons" an important consideration was what claims for compensation could be occasioned by the nuisances in question and that the entrepreneur's position would be strengthened if he could show that agreement had been reached with particularly exposed property owners.[8]

The treatment of the question in the *travaux préparatoires* might indicate that the possibilities of compensation for those suffering damage would be assigned less importance where it was a matter of requirements for precautionary measures (sec. 5); the enterprise would not be allowed to buy its way out of its obligations to undertake purification measures and the like, whereas, on the other hand, according to sec. 6 an otherwise impermissible activity could be accepted if the parties affected were given compensation.

It is, however, uncertain whether this really is the intention of the Act. The possibility of compensation is an argument of doubtful validity where public interests are threatened by the activity or where it involves a risk of other than purely economic damage within a limited circle. The public as a whole derives no benefit from the damages, which go only to those persons who own or have a particular right to use neighbouring property and consequently are entitled to compensation.[9] And even in their case proof of a causal connection between the activity and the damage is required. A

[7] *SOU* 1966: 65, p. 201.
[8] *SOU* 1966: 65, p. 223 (where the purchase of properties in the vicinity is mentioned as an example of such an agreement).
[9] Cf. on this *Prop.* 1969: 28, pp. 375 f., 396.

danger of considerable non-economic damage and inconveniences of different kinds cannot be counterbalanced by the possibility of damages. The fact that non-economic damage is not compensated under the expropriation rules is scarcely a valid argument in this connection. The instances of non-economic damage there discussed are, in general, loss of sentimental value and similar infringements of interests of a purely subjective nature which are difficult to assess in concrete terms. The fact that permission for expropriation has been granted, moreover, does not mean that an examination of the matter has taken place in accordance with the principles of the EPA; it is a separate question to what extent the activity is to be permitted under this Act and damages may possibly be payable. Furthermore, in the case of an environmentally hazardous activity it is often a matter of risks to health or the natural environment which are difficult to evaluate and which may seem to be small but must nevertheless be taken into account in the consideration of permissibility; it is difficult to weigh such risks against a possibility of compensation.

Even in cases where the enterprise can be expected to cause more concrete damage of an economic nature the liability for comparison seems unlikely to influence the balancing between utility and damage, in so far as utility is taken to mean the economic interest of the enterprise in the activity. The economic advantages must, of course, diminish correspondingly as the enterprise has to pay damages for its activities: the liability for damages reduces both of the elements in the comparison, not only the damage but also the utility. As in the case of ch. 2 of the WA, it seems natural to concentrate on the actual harmful consequences, irrespective of whether they are compensated or not.

There are thus good reasons for not attaching any considerable importance to the pronouncements in the *travaux préparatoires* which have been touched upon here. In the practice of the Licensing Committee and the Nature Conservation Board it is very seldom that the liability for damages has been expressly invoked in the balancing of interests; where such instances occur, they mainly concern nuisances of limited scope affecting a restricted circle, e.g. by reducing the value of neighbouring properties.[1] On the whole it is mainly with regard to special types of nuisances that individual neighbours have shown any considerable activity—above all where bad smells are concerned, e.g. in connection with permits for large-scale pigsties or dumping of waste and also, *inter alia,* in certain matters concerning particularly noisy activities. The usual situation, however, seems to be that the conflict in an examination of permissi-

[1] See *Koncessionsnämndens beslut* 68/75 and 30/76.

bility is essentially one between the interests of the entrepreneur and the public or between different kinds of public interests.

In this connection it should also be noted that the damage and inconvenience caused to individual neighbours are often so limited that they cannot furnish grounds for liability to damages; they do not reach above what has been called the tolerance point.[2] Sec. 30 of the EPA sets forth certain limitations of strict liability: damage is indemnified, *inter alia*, only if the nuisance is "of some importance" and, moreover, only "in so far as it could not reasonably be deemed to be tolerable having regard to the circumstances in the locality or to its general occurrence in comparable circumstances". It is rather difficult to keep the requirements separate.[3] At any rate aesthetic disturbances, e.g. those affecting the landscape, will not normally be grounds for liability towards neighbours, nor will traffic noise except in particularly serious cases.[4] It is somewhat unclear what consideration is given to the type of damage whereby a neighbour is prevented from making lucrative use of his property; the *travaux préparatoires* show, however, that even purely financial loss is indemnified in this situation, where it consists of a reduced profit on business activities of different kinds.[5] It should be noted that the above-mentioned limitations under sec. 30 do not apply if the liability for compensation is grounded on negligence; in such cases even minor nuisances or nuisances common in the locality can presumably be indemnified. If the disturbances really prevent the normal use of a property, e.g. when a motorway is constructed just outside the house or pronounced noise disturbances of other kinds make it difficult for a dwelling-house to be used for its purpose, compensation should be payable for the inconvenience suffered by the owner.[6] But this is not to say that the action causing the nuisance is permitted subject to compensation, at any rate not unless purchase of the property or part of the property occurs in accordance with sec. 32 of the EPA.

In addition to this there are certain limitations of the possibility of compensation which are a natural consequence of the fact that general indemnity principles are applied. Owing to the requirement of proven causality between the environmentally hazardous activity and the damage,

[2] Cf. on this Ljungman, *op. cit.*, pp. 78, 85 ff., 190 ff.

[3] Cf., on the relationship between these requirements, Ljungman, *op. cit.*, pp. 202 ff., 229 f., and in *SvJT* 1951, pp. 765 f., as well as *SOU* 1966: 65, pp. 280 ff.

[4] Cf. *The Waterfall Board* v. *Naeslund and others*, *NJA* 1960, p. 726 (disturbance of the appearance of the landscape), Ljungman in *Rättsvetenskapliga studier ägnade minnet av Ph. Hult*, pp. 315 ff., and *SOU* 1966: 65, pp. 282 with references, as well as *Larsson and others* v. *The Road Board* (judgment of Supreme Court of June 30, 1977).

[5] *SOU* 1966: 65, p. 288, *Prop.* 1969: 28, pp. 378, 396 f., cf. p. 242.

[6] Cf. *Larsson and others* v. *The Road Board*, judgment of the Supreme Court of June 30, 1977.

it is to be expected that in many cases the claim for damages will be rejected. A substance emanating from several sources may have contributed to the damage in a way which cannot be established in detail. If it is established from what enterprises the substance emanates—e.g. mercury from certain factories—it is, of course, not out of the question that joint and several liability will be imposed on these enterprises.[7] But often there exists such a degree of uncertainty about the connection between an instance of damage and the spreading of a substance that the evidence offered is not sufficient for establishing liability for damages, *inter alia* in the not unusual situation where several types of substances can be suspected of having caused the damage, either jointly or separately, in a way which cannot be clearly established. In other cases it may of course be possible to establish with certainty that the damage is caused by a certain substance, but it is not possible to point to the enterprise or enterprises from which the substance has emanated; it may be a matter of protracted, insidious damage which is very difficult to investigate after the event. Moreover, the contingency must be reckoned with that the liability for damages may have come under the statute of limitations before it has been possible to establish the damage and the causal sequence with any degree of certainty. All this has to be taken into account when considering whether the possibility of damages is to be brought into the balancing of interests.

The upshot is that the importance of the compensation rules for permissibility decisions is rather unclear; however, there seems little support for the view that the rules in practice substantially influence the limit for environmental disturbances which the authorities accept. It would seem that in the balancing of interests under the EPA the rules play a much more subordinate role than was envisaged in the earlier phase of the legislative work. Incidentally, a somewhat similar state of affairs also applies in, *inter alia*, Danish and Norwegian law.[8]

4. THE NATURE CONSERVATION ACT

As has already been pointed out, the rules of the NCA have a different orientation. The measures by landowners which they aim to prevent are

[7] Cf. *Prop.* 1973: 140, pp. 54, 134.

[8] See *Nordisk miljörätt. En översikt. Utarbetad av professor Bertil Bengtsson* (*NU* 1976: 25) p. 60; cf. also pp. 62 f.

usually such as harm general environmental interests, not individual neighbours or other specific persons. If anyone belonging to the latter category should suffer inconvenience from a measure for which permission has been given, the landowner will as a rule not be liable to pay compensation. If a neighbour's view has been spoilt by a gravel pit or a stone quarry, this as has been said falls within the limits of tolerance; and if the neighbour is prevented from exercising his "every man's right", e.g. on the landowner's bathing beach, because access to it has been fenced off, this by no means constitutes damage entitling to compensation.[9] On the other hand, the question of compensation does arise where the landowner is not allowed to use his property in the way he wishes. As under the EPA, it is only a court that can pronounce on a claim for compensation. Sometimes the claim may be based on the ground that the landowner is prevented from disposing freely over his property, e.g. from selling gravel from a gravel ridge; it is therefore a matter of a more or less extensive *prohibition of exploitation.* But the compensation can also relate to *encroachments of another kind,* e.g. where the public is allowed to pass close to the owner's residence or where his enjoyment of the property is disturbed in some other way.

The conflicts which are of most importance in decisions under the NCA are those between the landowner's interests, on the one hand, and environmental considerations of various kinds, on the other—e.g. considerations concerning the value of keeping vegetation undisturbed or preserving a landscape or safeguarding the interests of open-air life. It is true that sec. 3 of the NCA contains the vague proviso that in examining nature conservation questions regard shall also be paid to public and private interests which are affected—a clear reminder that the problems must be seen in a wider perspective. But it is not usually the case that the landowner can invoke public interests of substantial importance for his standpoint in this situation, except perhaps in certain matters concerning gravel extraction;[1] and conflicts between neighbours in the ordinary sense are probably rare in this context.

On the other hand, certain public interests may come into conflict with one another: it is not always easy to reconcile the needs of open-air life ("social nature conservation") with those of nature conservation in the narrower sense ("cultural nature conservation"). One example of this is the tourist invasion of certain sensitive and unique, steppe-like areas on the

[9] Cf. Ljungman in *Rättsvetenskapliga studier ägnade minnet av Ph. Hult,* pp. 302 ff., Ljungman-Stjernquist, *Den rättsliga kontrollen över mark och vatten,* II (1968), p. 90 with references, and also *Andersson,* v. *The Road Board.*

[1] Cf. *NJA* II 1965, p. 234, *Civilutskottet* 1973: 21, p. 3.

island of Öland in the Baltic Sea; another is the question whether the public should be fenced off from bathing areas on the shores of a lake noted for its bird life. If the interests of open-air life are safeguarded, this generally leads to interference with the landowner's enjoyment of his property; on the other hand, nature-conservation interests are as a rule taken care of by more or less extensive prohibitions of exploitation, and intrusion on the part of the public may appear almost as undesirable to the representatives of these interests as it does to the landowner. There may here arise a triangular conflict between landowner, open-air and nature-conservation interests which may become increasingly acute with the public's ever-growing appreciation of undisturbed or otherwise distinctive natural features. The rules in sec. 10 of the NCA concerning regulations for nature reserves evidently presuppose such a conflict: "every man's right" can be curtailed in order to safeguard the purpose of the reserve. Certain statements made when the NCA came into being indicate that considerations of "cultural" nature conservation would have priority in this connection.[2] It is not, however, possible to make any definite pronouncements on this matter.

When the authorities are considering whether the landowner's right should be curtailed in order to promote environmental interests, they must also take into account the question of compensation. If it is only the owner's individual interests that are affected by the decision, he can be compensated by a payment of money: provided there is enough money to pay him compensation, a far-reaching encroachment on his rights can be undertaken. If the encroachment is within the limits of what he is obliged to tolerate without compensation, it will cost nothing at all. On the other hand, a decision which serves the interests of recreation may at the same time be an infringement not only of the landowner's right but also of the interest that nature should be protected; or, conversely, the banning of access to a nature reserve may hit not only the landowner but also the general public in search of recreation. Then the right to compensation does not play a determinative role; it is necessary also to balance the opposing public interests against one another before the intervention is decided upon.

The evaluation is still further complicated by the development, already indicated above, which has occurred since the advent of the rules in the NCA on curtailments of the rights of landowners. Because the right of

[2] Cf. *NJA* II 1965, pp. 219 f., and also *Prop.* 1972: 111, app. 2, p. 15, where it is emphasized that in conflicts between scientific nature conservation and the requirements of open-air life the former interest must sometimes be given preference.

compensation has been restricted, these rules are now based on *other considerations than previously,* even there formally they may seem to be the same.

An example is provided by the rules in the NCA on *nature reserves.* Under sec. 7 an area can be declared a reserve even against the owner's will if "it is considered that it should be subjected to special protection or care by reason of its importance for knowledge concerning the Swedish landscape, of its beauty or of its noteworthy character in other respects" (i.e. with cultural nature conservation in mind) or if it is "of essential importance for the recreational activities of the public" (i.e. for social nature conservation). As the wording of the Act indicates, the authorities are here given considerable freedom in evaluating the question of reserves. This also applies to the regulations which can be issued for the use of the area; the Act merely states that these must be necessary in order to safeguard the purpose of the reserve (sec. 8). It does not emerge to what extent regard must be paid to the landowner's interests in decisions of these kinds. According to the Nature Conservation Law Committee this is in principle a question of compensation, the determinative consideration being whether the needs of nature conservation were sufficiently urgent, in which case the landowner should be compensated for the meeting of the needs.[3] So far it seems to be only considerations of public finance which determine how far the intervention shall extend.

Here, however, it is also necessary to take into account that from the very outset the NCA's rules concerning restrictions of the landowner's freedom were based on the idea that nobody had the right to deal as he wished with natural amenities; people other than the owner might have justifiable claims of access to such amenities. In the *travaux préparatoires* it was emphasized that the right to compensation in these and certain other similar cases rested on considerations of justice and equity; in this connection the protective value of the opposing public interests might also play a part. In "more far-reaching curtailments" of a private owner's right of disposal, compensation should be payable after a "reasonable balancing" between the public interests and the interests of private persons.[4]

In accordance with this, the NCA provided, somewhat similarly to the corresponding rules in the Nature Protection Act of 1952, that compensation should be paid if after a decision involving curtailment of an owner's rights the property can be used only in a way which is in "obvious incongruence with its previous value"—this applied mainly to a prohibition

[3] *SOU* 1962: 36, pp. 163, 201.
[4] *NJA* II 1965, p. 245.

against exploiting the property in a certain way—or if the owner was otherwise subjected to "substantial inconvenience";[5] in both cases, however, full compensation would be paid. In neither case was it possible to fix a definite limit to what was eligible for compensation. In legal writing it has been assumed that damage amounting to a trivial sum would not be indemnified.[6]

A similar restriction of the right of compensation to cases of "obvious incongruence" between the value before and after the decision was laid down in the NCA in three other cases: where permission for building on a protected shore area had been refused under sec. 16; where permission to extract gravel, etc., for commercial purposes had been refused under sec. 18; and where permission to erect new buildings and to undertake certain other measures deemed to detract from the natural beauty of the area had been refused under sec. 19 (in its previous wording, which related to proclamations of landscape protection).[7] It was thus a matter of prohibition of exploitation. Particularly in the reasons given for the rule on gravel extraction it was emphasized that a determinative consideration was what compensation the community would pay the landowner in such cases; on this would depend the possibility of refusing permission.[8] However, the restrictions for the landowner could go quite a long way before "obvious incongruence" with the previous value existed; reference was made to the general principle in sec. 1 of the NCA that in the case of enterprises operating in natural surroundings reasonable measures should be taken to restrict or counteract damage which could not be avoided.[9]

This, therefore, was the starting point for the NCA rules on curtailments of the landowner's freedom; as a main rule compensation would be paid in the event both of prohibition of exploitation and of other encroachments of a substantial kind, and the nature conservation authorities had to take this into account in reaching a decision. In both these respects, however, the situation has changed following the reform of the NCA rules which have taken place during the last few years.

First, the compensation rules were changed in several stages. The starting point was the already mentioned general considerations, which emerged as early as the expropriation legislation of 1971: the interests of

[5] See sec. 25 of the NCA in its original wording; cf. sec. 7 of the Nature Protection Act and *NJA* II 1953, pp. 168 f.

[6] See Hillert, "Ersättningsreglerna i naturvårdslagen" (*Expropriationsteknik*, 1968), pp. 183 ff. (where the unclear demarcation between damage eligible and not eligible for compensation is emphasized).

[7] Cf. secs. 28 and 29 of the NCA in its original wording.

[8] *SOU* 1962: 36, p. 292, cf. p. 333.

[9] Cf. *NJA* II 1965, p. 248.

society were to be strengthened in relation to speculative interests and, in accordance with this principle, compensation would not be paid for values which depended solely on anticipations of the expected use of land.[1] This approach also acquired importance in decisions under the NCA: the real-estate owner must always reckon with the possibility that the requisite permission for various measures in connection with his property would be refused, and consequently any such refusal would affect only the values based on expectation. So far, therefore, the issue would be mainly determined by the political considerations which lay behind the 1971 reforms. But it was further pointed out that the compensation rules hitherto in force prevented the effective implementation of, *inter alia,* the NCA.

The upshot was the general principle that compensation should be payable where a normal and natural development of the previous use of the land had been terminated but not where a new kind of use had been prevented through a decision or the issuing of regulations.[2] The right to compensation was thus confined to cases where an ongoing use of land had been "materially hampered". By this was meant, according to the explanatory material, a fairly substantial interference; everyone, on the other hand, must be ready to submit to a trivial interference made in the public interest.[3] Similar points of view came to the fore when the rules on compensation for refusal of permission for gravel extraction and the like were repealed in 1973[4] and when in 1974 a special Act on the protection of beechwoods made it in principle compulsory to obtain permission for the felling of beechwoods and provided that compensation would not normally be payable in the event of permission being refused.[5]

As a result of the new principles on compensation for expropriation, the landowner's position was also worsened in connection with the compulsory purchase of the property; the rules of the Expropriation Act became directly applicable (sec. 25, para. 2, NCA). Among other things this means that in principle compensation will not be paid in respect of such anticipatory values as rest on hopes of developing an area of natural beauty by erecting leisure-time dwellings.

[1] Cf. *Prop.* 1972: 111, app. 2, p. 328.
[2] See on this *op. cit.,* pp. 329 ff.
[3] *Op. cit.,* p. 335.
[4] In the explanatory material it was pointed out that—quite apart from the need for improved protection for the country's natural resources—it was not in harmony with present-day conceptions of law that a landowner should claim compensation from the community because he was not allowed to use his property to the detriment of other people and the community as a whole. The basic assumption in the cases here in question was also that a landowner was under a duty to pay regard to essential community interests without special compensation. (*Prop.* 1973: 101, pp. 26 ff.)
[5] See sec. 6 of the 1974 Act, cf. *Prop.* 1974: 73, p. 26.

These statutory amendments clearly meant that the public interests were considered to weigh considerably more heavily than before. It was above all the possibility of compensation for prohibition of exploitation that was hit by the legislation. It is natural that a compensation rule which at first was said to rest on considerations of justice and equity should be changed when it happens to be in the focus of political interest during a period of transition. But the change is also directly due in part to a different evaluation of the environmental interest; thus in the *travaux préparatoires* of the Beechwoods Act it is emphasized that the interpretation of the term "ongoing use of land" should be undertaken with due regard to the consideration that the community must have considerably enhanced possibilities of preserving beech forest land that is of inestimable importance from a nature conservation point of view.[6]

The most recent stage in the development consists of the 1974 amendments of the NCA. The *travaux préparatoires* emphasize that the reforms are based on an ecological approach: the conception of nature as a fundamental part of the human environment is assigned central importance and in principle any activity conflicting with the requirements implicit in a proper concern for natural resources and the natural environment is not permissible.[7] These ideas find expression *inter alia* in the dropping of a condition in certain enactments (among others the provision on gravel extraction, etc., in sec. 18) to the effect that prescriptions for the protection of the natural environment must not be unduly onerous.[8] Further there has been introduced the already-mentioned possibility of obliging certain enterprises to compensate infringements of the nature conservation interest when receiving permission to carry out measures that will damage the natural environment,[9] and in sec. 1, subsec. 3, there has been an amendment of the requirement already referred to of "reasonable" measures against damage to nature in connection with activities endangering the environment; the provision now states that all measures "which are needed" shall be taken in order to limit or counteract the damage. All these changes clearly indicate that the balancing of interests will be different from what it was previously. There still remains, however, a provision in

[6] See *Prop.* 1974: 73, p. 26.

[7] See the committee report *Naturvård* 1 (Ds Jo 1974: 1), pp. 95 ff. and *Prop.* 1974: 166, pp. 90 ff. An ecological approach was advocated in principle by the responsible minister in connection with the national planning legislation of 1972, although it was not considered possible to apply it to the full (see *Prop.* 1972: 111, app. 2, pp. 130 ff.).

[8] Similar amendments were made in sec. 20 (on industrial enterprises which substantially change the natural environment) and sec. 21 (on derelict buildings which spoil the natural environment).

[9] See NCA sec. 12, para. 2, and sec. 42, para. 2, on which see note 9 above.

sec. 3 that in examining any question concerning nature conservation "proper regard" shall be paid to "other public and private interests which are affected by the question". This is considered to mean, among other things, that even where the interests of nature conservation are paramount a measure must be carried out with the least possible inconvenience to the landowner. It is, however, probable that in this case, too, the landowner's interest weighs less heavily than before.[1]

Special attention is merited by the new concept *nature conservation area*, which denotes that the area, "having regard to the limited extent of the measures or other circumstances, is not suitable for scheduling as a nature reserve"; if, however, such far-reaching measures are required that the present use of the land will be materially hampered, it should instead be scheduled as a reserve (sec. 19, subsec. 1). The aim of this concept is akin to the idea that previously lay behind the rules on landscape protection, according to the same section: it was desired to preserve a valuable natural environment without going to the length of establishing a nature reserve.

In comparison with the previous regulation, the 1974 amendments, however, resulted in a further reinforcement of the position of the environmental interest at the expense of the landowner. Landscape protection meant only that compulsory licensing existed with regard to activities which might "substantially damage the appearance of the landscape". In a nature conservation area the possibility arises of prescriptions which to a considerably larger extent curtail the landowner's freedom of action. In sec. 19, subsec. 2, there are mentioned, among other things, prohibitions against or prescriptions concerning building, storage, excavation, planting and felling. It is true that in some cases such prohibitions of exploitation relate mainly to a redeployment of the land use, but in other cases it is undoubtedly a matter of interference with the ongoing land use; *inter alia*, certain measures within forestry can be forbidden if they will damage the appearance of the landscape, so long as the prohibition does not materially interfere with rational use.[2] The landowner is also under a duty to tolerate such measures as clearing, planting, refuse disposal, etc., which contribute to the conservation of the natural environment.[3] And such prescriptions are not considered to mean that ongoing land use will be materially hampered; according to the above-mentioned general principle no compensation will be payable to the landowner in these cases. As a result the

[1] Cf. Jonzon–Delin–Bengtsson, *Naturvårdslagen* (1976), pp. 51 f.
[2] Cf. *Prop.* 1974: 166, pp. 108 f. Connected with what has been said is an amendment made at the same time in sec. 1 of the Forest Conservation Act to the effect that in forestry management regard must be paid to the interests of nature conservation.
[3] Cf. *Prop.* 1974: 166, pp. 37, 107.

rules on nature conservation areas differ from what used to apply in connection both with the scheduling of reserves and the proclamation of landscape protection.

It is clear that this legislation has further increased the possibility for the authorities to decide upon such curtailments of the property owner's freedom of action as he must tolerate without compensation; it applies not only to prohibition of development but also to quite far-reaching encroachments of other kinds. So far as can be gathered from the text of the Act, the landowner is deprived altogether of the possibility of having a court examine whether the prescriptions involve such interference with his farming or forestry as entitles him to compensation;[4] the determinative factor would be how the area is to be classified—whether as a nature reserve or as a nature conservation area—and this is decided by an administrative body, in the first place the appropriate county administrative board.[5] Sec. 28 of the NCA, which dealt with liability to pay compensation in connection with decisions under sec. 19, has been revoked. Appeals against decisions of the county administrative board lie, despite their element of implementation of the law, with the Government (sec. 49); in the explanatory material, however, it is emphasized that the question is above all one of purpose and suitability.[6] This arrangement undoubtedly appears as a departure from the principle hitherto applied that the courts should have the right of determination at any rate with regard to compensation for encroachments on the rights of the landowner.

It may be asked what practical changes may have resulted from these successive modifications of the prerequisites for nature conservation decisions. The changes evidently aim at bringing about greater activity on the part of the nature-conservation authorities than earlier. It is natural to suppose that the authorities would feel that they were free to carry out the intentions of the NCA without being inhibited by financial considerations: they can decide on far-reaching curtailments of owners' freedom of action and refuse permits of different kinds in all cases where this seems to be called for from a nature conservation point of view, without having to trouble about the consequences for the landowners. Among other things,

[4] Whether the landowner can nevertheless in certain cases demand damages on the grounds of expropriation-law principles or the like is a question that must be left open here; cf. on this sec. 1: 7 of the Expropriation Act, *NJA* II 1918, pp. 252 ff., *NJA* II 1950, pp. 268 ff., *NJA* II 1965, p. 254, Bengtsson, *Skadestånd vid myndighetsutövning*, II (1978), 12.8 with further references. It is understood that an evident error on the part of the public authorities in the scheduling of a nature conservation area or decision on a regulation will in all circumstances be grounds for claiming damages under the Tort Liability Act.

[5] Cf. *Prop.* 1974: 166, p. 106.

[6] *Prop.* 1974: 166, pp. 109 f.

the explanatory statements cited above concerning nature reserves and the *travaux préparatoires* of the Beechwoods Act might provide support for this.[7] In practice, however, other considerations also play a part: the authorities do not wish to act too harshly towards the individual. Not least in order to retain the willingness of individual landowners to cooperate, a certain understanding for their situation is shown.[8]

5. SUMMARY

This survey will have shown that public interests carry ever-increasing weight in environmental and nature-conservation questions—a natural consequence of the direction taken by the debate on environmental issues in recent years. In the implementation of the EPA, community considerations often overshadow the private interests which are at stake; in the balancing of interests in accordance with the NCA such considerations dominate even more. As a whole, one can observe, especially in the area of the NCA, a clear tendency to curtail private ownership rights step by step. According to the explanatory material of the 1972 amendment the central expression "ongoing use of land" was to have a "relatively generous" application in relation to the landowner,[9] but in the 1974 legislation on beechwoods and nature conservation some of this generosity seems already to have disappeared. The private property owner must tolerate quite far-reaching encroachments on his powers without compensation. It is true that it is still a matter of a balancing of interests, but the implications are different from what they were previously; if an intervention is deemed necessary, less importance is attached to whether or not it appears reasonable from the landowner's point of view.[1] In the area of the NCA the landowner can also seldom cite such public considerations in his favour as are sometimes invoked where decisions according to the EPA are con-

[7] See above at pp. 28, 31.

[8] This is confirmed by the replies to a questionnaire which the author sent in the autumn of 1974 to the country's county administrative boards and the Nature Conservation Board concerning the effect of the reforms on the application of the above-mentioned four rules in the NCA on prohibition of exploitation: on the establishment of nature reserves; on refusal of permission to build on protected beach areas; on scheduling concerning landscape protection (before the 1974 amendments of sec. 19); and on refusal of permission to extract gravel. At that time, however, in many quarters no clear tendencies in practice had yet emerged following the amendments. The results are reported in *Svensk rätt i omvandling,* pp. 58 ff.

[9] *Prop.* 1972: 111, app. 2, p. 334.

[1] Cf., *inter alia,* above at p. 31 concerning onerous prescriptions for the protection of the natural environment.

cerned. It is for the most part only his own individual interests which are at stake.[2]

It is natural that as private interests fade into the background the compensation rules should also lose some of their importance. For permissibility decisions under the EPA these rules seem to play only an insignificant part; the fact that compensation questions are assigned such importance in the nuclear energy legislation of 1977 is, has been mentioned, due to altogether special circumstances.[3] Further, as has also been said, in the examination of matters by the nature-conservation authorities in accordance with the NCA the primary consideration seems to be what appears appropriate from the environmental and nature conservation points of view. This development has meant that the question of the public resources available to safeguard the environmental interest plays an increasingly minor role; it no longer costs so much as it did to rescue natural amenities and to preserve recreational areas. Even the compulsory purchase of properties is not so onerous as it was earlier. In this way the basic conditions for the balancing between opposing interests which the legislation was intended to establish have been radically altered.

It is undeniable that the last decade has seen a legislative breakthrough for the environmental interests which was scarcely foreseen at the time when the NCA came into being in 1964. The reason for this, however, is not solely the inherent strength of the environmental protection arguments and the recently adopted ecological approach which lies behind the latest reforms in nature conservation legislation. By a fortunate accident for nature conservation, at the same time as the interest in preserving nature has become increasingly widespread in Sweden, the legislator, mainly for reasons of principle and under the influence of political considerations, has mounted an energetic attack against the interests of private owners. Here nature conservation arguments have served as a battering-ram in the use of which, it has been considered, the majority of the population would concur.[4]

The value from the point of view of environmental protection of this politicization will no doubt have emerged from the foregoing. Mainly as a

[2] Notice, however, the possibility of conflict between the interests of cultural and social nature conservation (above at p. 26 f.).

[3] See above at p. 16.

[4] An example of the use of nature conservation considerations for political purposes is provided by the pronouncement 1971: 16 of the Agricultural Parliamentary Committee, where such considerations were cited in support of a request to the Nature Conservation Committee to examine the question of public ownership rights to natural resources below ground—an investigation which could result in far-reaching changes of principle in the contents of the law of land ownership.

by-product of the Social Democratic Government's offensive against private land speculators and developers, possibilities have been opened up of rescuing from destruction at the eleventh hour a large proportion of the country's gravel ridges, of securing "every man's rights" on the beaches, of preserving our beech forests and protecting important nature areas from development for housebuilding and other activities endangering the environment. But there is nothing to guarantee that environmental interests will continue to hold their own equally well in competition with other public interests, above all socioeconomic considerations. Some of the decisions in the area of the EPA—especially where large industries are concerned—may seem rather ominous from the perspective of nature conservation. Here it is clear that the need to protect the natural environment has not been considered to carry special weight. The ground gained during the last few years for the environmental interest cannot be regarded as having been made secure. There is only one group of opponents, the private developers, who appear to be definitely on the retreat—unless the public authorities alter their attitude following the change of government in 1976. It is still too early to express any opinion on that matter.

On the contrary, if the economic situation permits it is not impossible that we shall see reforms which will lay the risks arising from environmentally hazardous activities on entrepreneurs and property owners to a greater extent than is the case at present. In recent years this question has been debated in Sweden as well as other countries. It will have been seen from the foregoing that an entrepreneur whose application for a *change* in his activities is refused normally has to bear the risk of this, however burdensome such a defeat may be for his financial position. On the other hand, he has certain possibilities of compensation where he has to curtail an *ongoing* activity because of the hazards which it involves for the environment. Where the activity is hazardous for the surroundings in general—not only for the environment on the owner's property—he will, however, in general have to manage without compensation. Thus far the rules can be said to be an application of the principle "the pollutor pays", even apart from pollution cases in the strict sense. The entrepreneur will, moreover, have to pay for any substantial economic losses which he causes other persons, even in cases where he has obtained permission for an environmentally hazardous activity. He escapes altogether having to pay for damage which cannot be valued in terms of money, for example damage to the appearance of the landscape or destruction of natural resources in the long run; here it is mainly the public authorities who have to bear the risk. As has been pointed out above, the owner also as a rule escapes responsibility for such risks to people's health and property as are remote and difficult to assess.

In these respects the principle "the pollutor pays" has not been put into practice.

In itself it may well seem natural that the citizens in general should have to tolerate without compensation such minor economic and non-economic damage as arises owing to industrial and similar activities which are so useful that the authorities permit them. On the other hand, where more extensive environmental damage is involved this legal position may appear difficult to reconcile with the ideas behind the NCA rules: the NCA forces the landowner into a situation where even useful activities are restricted in the interests of the environment, but if he obtains permission under the EPA he is not as a rule obliged to pay compensation for damage to the environment. That an entrepreneur should, owing to the difficulty of furnishing proof, escape having to carry the risk for the hazards which he creates may also seem to accord ill with the idea behind the EPA's strict liability. It is evident that the linkage with the traditional law of damages, with its basic requirements of economically assessable damage and proven causal connection, is not particularly well adapted to these compensation cases.

Various ways of resolving these problems have been discussed. In Finland a proposal has been made involving the payment of compensation to the state which would cover general damage to the environment,[5] while elsewhere there has been discussion of the desirability of introducing some sort of environmental levy for polluting activities—possibly as a basis for a fund out of which compensation would be paid for damage to health and the environment even where no demonstrably responsible enterprise can be pointed to.[6] Such a system might also to some extent induce enterprises to organize their production in such a way that it would cause less hazardous side-effects in the long run. Reforms of this kind, however, involve a number of practical problems and it is uncertain whether, and in that case when, they can be carried through.

It should in any case be emphasized that it would not accord well with the attitude hitherto prevailing within environment law if a system of levies of one kind or another were allowed to exert any substantial influence on the balancing of interests by licensing authorities. To license environmentally hazardous activities to any wide extent on the ground that the enterprise will pay for the harmful effects through levies would in the long run involve considerable risks for the environment. The argument may at its best appear justified where the harmful effects for the environment are

[5] *NU* 1976: 25, pp. 73 f.
[6] Bengtsson, in *T.f.R.*, 1976, pp. 75 ff. with references.

not extensive and can be wholly eliminated through restoration measures of various kinds. In general there should be no departure from the standpoint that compensation to private persons—or to public authorities—can never compensate either for health risks or lasting environmental damage. The fact that the compensation system is being developed and refined does not mean that economic questions should be assigned greater importance than they have now for the determinative balancing between environmental considerations and opposing interests.