Environment - Switzerland

Jurisdiction under the Federal Water Protection Statute

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Polluted Rainwater

Facts

The Swiss Federal Court was asked to determine whether rainwater draining off the large copper-covered roof of the Lucerne Culture and Convention Centre (approximately 9,400 square metres) was considered to be polluted.(1) The level of pollution is crucial since the water is discharged into the nearby lake. After the building was finished, the Swiss Federal Laboratories for Materials Testing and Research (EMPA) and the Swiss Federal Institute of Aquatic Science and Technology (EAWAG) considered the amount of copper in the rainwater to be substantial (approximately 11 kilograms a year). In addition, the court had to decide whether the local authorities could ask the polluter to issue a feasibility study with regard to remediation measures.

Legal position

According to Article 3 of the Federal Water Protection Statute, everyone is obliged to exercise due care in order to prevent water from adverse external hazards (the precautionary principle). Furthermore, Article 6 prohibits the direct or indirect discharge into a water body of any substance that endangers that water body. Accordingly, any kind of pollution which is not explicitly allowed is prohibited (the principle of pollution control).

The Federal Court based its decision not only on laws and ordinances, but also on the guidelines regarding the seepage, retention and introduction of rainwater in settlement areas. These guidelines were issued by the Swiss Organization of Experts of Waste Water and Water Protection. According to longstanding practice, such guidelines reflect the knowledge and experience of professionals and a court must consider them, even if they are not formal laws in a strict sense. According to these guidelines, the rainwater from copper-covered roofs exceeding 500 square metres is considered to be heavily loaded. To protect the soil and bodies of water from such heavily loaded water, the guidelines require special measures such as the previous treatment of the water to be discharged (eg, through the installation of an absorber).

Consequences

Based on the findings of EAWAG and EMPA, and in line with the guidelines, the local authorities considered the water draining off the roof to be polluted. Therefore, they requested its special treatment before being discharged into the lake. The federal court confirmed this order.

Although the original construction permit did not consider the roofwater to be polluted and allowed the discharge of such water into the lake, the Federal Court held that it could revoke the original permit as all the preconditions for revocation of the permit had been fulfilled; in particular, the public interest in protecting the water prevailed over the appellant's interest in keeping the original permit.

Furthermore, the appellant refused to prepare a feasibility study on the reduction of copper in the water draining off the roof. The Federal Court dismissed this point based on the Federal Environmental Protection Statute. Article 16 of that statute requires the renovation of buildings that are not in line with any applicable environmental law or regulation. Further, the same provision states that before ordering substantial renovation measures, the authority should ask the owner for proposals as to how to renovate the building. Therefore, there was no doubt that the local authorities are entitled to request renovation proposals from the owners of buildings that do not comply with environmental law.

Finally, following the 'polluter pays' principle set out in Article 2 of the Environmental Protection Statute and Article 3a of the Water Protection Statute, the Federal Court held that the appellant, as the producer of the polluted water, must bear the cost of the necessary measures.

Fees for Connecting to Canal System

Facts
In this case(2) the Federal Court considered the assessment of fees for connecting to the canal system. In the course of constructing an apartment building, the appellant was obliged to build a holding basin for rainwater. Based on Articles 8 and 9 of the Federal Constitution (the principles of equal treatment and the prohibition of arbitrariness), the appellant asked the authorities for reimbursement of the costs of the basin. When the building permit was issued the canal system in the concerned area was not widespread enough to be used. For this reason the appellant was obliged to build the holding basin. Nevertheless, the municipality refused his claim, arguing that the appellant was directly required to build the holding basin under Article 7 of the Water Protection Statute.

Legal position
Article 7 of the Water Protection Statute governs the seepage of non-polluted water. If no seepage is possible due to the local conditions, the law allows the discharge of water into surface water. In such circumstances, measures (eg, building a holding basin) must be taken to allow large quantities of water to drain off constantly.

According to the court, retention measures may be based directly on Article 7 of the Water Protection Statute provided that the local drainage plan does not yet meet the latest requirements. Nevertheless, this provision does not provide grounds to justify particular retention measures for the whole of a municipality. Therefore, the local authorities must, based on specific planning criteria, justify the particular areas for which and the particular circumstances under which certain measures are required.

Consequences
In the case at hand a local drainage plan had been issued only after the building permit had been granted to the appellant. Furthermore, before the drainage plan was issued the municipality did not set out the criteria under which it would order retention measures in the relevant area.

According to the Federal Court, there are no indications that when the building permit was issued, the municipality would have ordered retention measures if the canal system had been sufficiently widespread at that time. If the municipality had ordered the retention measures only because of the insufficient dimensions of the public pipeline network, then the costs of the retention measures had to be borne by the municipality. Therefore, the appellant's claim was justified.

Assessment of Sewage Fees

In order to define sewage fees, the cantons must consider the type and amount of sewage produced (Article 60a(1) of the Water Protection Statute). According to the Berne Administrative Court(3) the authorities infringe this provision if the assessment of the periodical fee is based only on the building volume (in cubic metres). Rather, in order to assess such fees the authorities must consider the actual amount of sewage.

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Endnotes

(1) Decision 1C_43/2007 of the Swiss Federal Court dated April 9 2008 (see also BGE 134 II 142).

(2) Decision 2C_283/2008 of the Swiss Federal Court dated August 11 2008.

(3) Decision of the Administrative Court of the Canton of Berne of February 11 2008, VGE 22911.

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