

Federal Supreme Court rules on allocation of clean-up costs for contaminated sites

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Introduction

The Federal Supreme Court recently ruled on the allocation of clean-up costs where certain polluters are exempt from liability.⁽¹⁾ For the first time, the court discussed the question of whether:

- a contaminated site owner's exemption from liability leads to a corresponding additional burden on the polluter which, through its own conduct, caused the clean-up measures; or
- the additional burden passes to the canton and the municipality.

Facts

In 2000 a cantonal authority determined that a landfill site required remediation because its chromate values exceeded the clean-up value for protecting the groundwater. The site's chemical waste – particularly its barium chromate – from on-site and third-party production were not properly disposed of, which endangered the groundwater and triggered the need to clean up the landfill. Various investigative and monitoring measures were carried out which, together with the remediation measures, generated costs approximating Sfr4 million.

The cantonal authority allocated the clean-up costs as follows:

- 75% to the landfill operator (disturber by conduct);
- 23.7% to the heirs of the former property owner (disturbers by maintaining the harmful condition); and
- 1.3% to the owner of the adjacent land parcels because the contaminated site also extended to these parcels (disturber by maintaining the harmful condition).

On request of the involved parties, the cantonal court reallocated the clean-up costs as follows:

- 76.3% to the landfill operator;
- 23.7% to the heirs of the former property owner; and
- 0% to the owner of the adjacent land parcels.

The landfill operator challenged the court's decision before the Federal Supreme Court and requested that its portion of the costs be reduced to 25% and the remaining 51.3% be imposed on the community. The landfill operator argued that a large part of the barium chromate deposited had not come from its own production, but rather was attributable to unknown third-party sources whose share of liability must be paid by the canton and the municipality.

Legal framework

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Polluter pays principle

Pursuant to the polluter pays principle, any legal person which causes measures to be taken under environmental law must bear the respective costs. This also applies to the costs of measures required to investigate, monitor and remediate polluted sites.

Under Swiss law, no joint and several liability applies to multiple polluters; rather, a limited liability applies with respect to each polluter's respective share. The first to bear the costs is the person which, through its own conduct, caused the measures to be required (disturber by conduct). Simply being the owner of a contaminated site (disturber by maintaining the harmful condition) bears no cost if, by exercising the required care, such a person could not have known about the pollution.

If a polluter cannot be identified or pay, the canton and the municipality must bear the respective costs (for further details please see "[Polluted sites – federal Environmental Protection Act amended](#)").

Polluters

In connection with the polluter pays principle, jurisprudence and prevailing legal doctrine apply the so-called 'disturber' concept pursuant to police law principles. Accordingly, disturbers are not only those persons which cause a disturbance by their own conduct (disturber by conduct), but also persons which control the source of a disturbance (disturber by maintaining the harmful condition), such as contaminated site owners (for further details please see "[Federal Supreme Court decision on 'polluter pays' principle and heirs' liability](#)").

Therefore, the owner of a site at the time of a clean-up is generally considered to be a polluter, even if they acquired the site with the contamination and without any possibility of avoiding the damage.

However, in such cases, the site owner may exempt itself from liability by providing evidence that they could not have known about the pollution by applying the necessary care (for further details please see "[Federal Supreme Court confirms scope of 'polluter pays' principle](#)").

Allocation of costs to different polluters

Under the polluter pays principle, the first to bear clean-up costs are disturbers by conduct. Disturbers by maintaining the harmful condition may be exempt from bearing costs under certain conditions.

The question arises whether such exemption from liability of a certain type of disturber (disturber by maintaining the harmful condition) leads to a corresponding additional burden on other disturbers (disturbers by conduct) or whether the concerned cost share is passed on to the community. This question was addressed in the case at hand.

Federal Supreme Court decision

The Federal Supreme Court held that the share of liability of the mere owner of the contaminated site (disturber by maintaining the harmful condition) had not been determined according to the usual criteria (eg, the type of causation, the fault, the weight of the causation contribution and the intensity of causality) because such disturbers had not contributed to the occurrence of the contamination.

The court decided that if a disturber is exempt from liability by maintaining the harmful condition, it is lawful to allocate the concerned costs among the disturbers by conduct. The court further held that allocating these costs to the canton and the municipality would be unlawful.

Accordingly, the court reallocated the clean-up costs as follows:

- 90% to the landfill operator (disturber by conduct); and
- 10% to the heirs of the initial property owner (disturbers by maintaining the harmful condition).

Comment

Responding to a question that has proved to be controversial in the past, the Federal Supreme Court's decision will be of great relevance for future disputes on how clean-up costs for contaminated sites are allocated.

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Endnotes

(1) Federal Supreme Court, 1C_533/2017, 11 June 2018.

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