

Environment & Climate Regulation 2020

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Environment & Climate Regulation 2020

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**Carlos de Miguel Perales, Jesús Andrés Sedano Lorenzo
and Per Hemmer**

Uría Menéndez and Bech-Bruun

Lexology Getting The Deal Through is delighted to publish the fifth edition of *Environment & Climate Regulation*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on Belgium.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Carlos de Miguel Perales and Jesús Andrés Sedano Lorenzo of Uría Menéndez and Per Hemmer of Bech-Bruun, for their continued assistance with this volume.



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LEGISLATION

Main environmental regulations

1 | What are the main statutes and regulations relating to the environment?

The general basis of Swiss environmental law is stated in article 73 et seq of the Federal Constitution of the Swiss Confederation. These provisions define the applicable basic principles, such as:

- sustainable development;
- the protection of the environment;
- spatial planning;
- the protection of natural and cultural heritage; and
- the protection of water, forests, nature, fishing and wildlife.

Based on the constitutional provisions mentioned above, the primary environmental legislation is contained in the Federal Act on the Protection of the Environment and the corresponding implementing ordinances. Further, other important acts relate to specific environmental sectors – for example, the Waters Protection Act, the Chemicals Act, the Act on the Reduction of CO₂ and the Protection of Nature and Cultural Heritage Act. Some of the most important ordinances in this regard are the Ordinance on Water Protection, the Ordinance on the Avoidance and Disposal of Waste, the Ordinance on Contaminated Sites and the Ordinance on the Environmental Impact Assessment. A majority of special legislations gather not only administrative law, but also contain specific criminal regulations. In the penal code, however, the contamination of drinking water and the dangerous release of pathogenic or genetically modified organisms are reprimanded (the pollution of air and soil are not regulated by criminal law).

While the federation has comprehensive competences to legislate in environmental matters, the cantons are mainly responsible for implementing, monitoring and controlling environmental law. In addition, there is particular and independent cantonal law – for example, in the area of the protection of nature and cultural heritage.

Swiss environmental legislation is based on the following principles, which apply to any environmental matter:

- The 'sustainable development' principle states that the natural basis of life must be preserved undiminished for future generations.
- The 'precautionary' principle – and in particular the aspect of the abatement of pollution at its source – states that early preventive measures must be taken at the source in order to limit effects that could become harmful or a nuisance.
- The 'polluter-pays' principle states that anyone who causes measures to be taken due to polluting, causing damage to the environment or other negative external effects must bear the costs.

Integrated pollution prevention and control

2 | Is there a system of integrated control of pollution?

There is a system of integrated pollution control insofar as any building permit may only be issued together with all special permits required for the specific project, including permits on environmental matters. All required permits must be coordinated and issued together, so that legal remedy can address all relevant topics.

In addition, a system of integrated prevention and reduction of pollution has been implemented with respect to high-risk installations. Thereby, the permit to be delivered covers various environmental aspects, such as air, water, waste and noise requirements. However, the scope and severity of these requirements varies from canton to canton.

Soil pollution

3 | What are the main characteristics of the rules applicable to soil pollution?

Soil pollution is mainly governed by the Federal Act on the Protection of the Environment and the Federal Ordinance on Contaminated Sites.

As a core principle, the polluter-pays principle governs liability for soil pollution. The Federal Act on the Protection of the Environment provides for the following rules on the final allocation of investigation, monitoring and remediation costs (regarding possible cost advances see below): generally, the persons responsible bear the costs of the measures required to investigate, monitor and remediate polluted sites. If two or more persons are responsible, they bear the costs according to their share of the responsibility. The first to bear the costs is the person that caused the measures to be needed through its conduct. Anyone responsible simply as the proprietor of the site does not bear any costs if, by exercising the required care, it could not have had any knowledge of the pollution. The public authority concerned bears the share of the costs of responsible parties that cannot be identified or are unable to pay.

The authority issues a ruling on the allocation of costs if any person responsible so requests or if the authority is carrying out the measures itself. Such a ruling is subject to appeal.

If an investigation of a site entered in the register of contaminated sites or for which an entry is planned reveals that the site is not polluted, the public authority concerned bears the costs of the investigative measures required.

Investigation, monitoring and remediation measures will be carried out by the holder (eg, owner or tenant) of the polluted site, which is not necessarily the polluter of the concerned site. If the authorities have reason to believe that the pollution of the site was caused by the action of third parties, the authorities may require these to carry out a preliminary investigation, monitoring measures or detailed investigation. If the pollution of the site was caused by the action of third parties, the authorities may require these, with the approval of the holder, to prepare the remediation project and perform the remediation measures.

To the extent that the holder of a polluted site or third parties pay for the investigation, monitoring and remediation measures, such payments are considered to be cost advances and may be refunded by the polluter in the final cost allocation pursuant to the polluter-pays principle.

If the shares in a company owning a contaminated site and being the polluter are sold, the environmental liability remains with the company pursuant to the polluter-pays principle. If a contaminated site is sold by its polluter, pursuant to the polluter-pays principle, the seller remains liable for the previous pollution, and the buyer will be liable for future pollution, if any. Nevertheless, the buyer as the new owner of the site can be asked to advance remediation costs for any pollution, including the one caused by the seller, so that it will have to take recourse against the seller based on the polluter-pays principle.

Generally, liabilities pursuant to environmental laws cannot be modified or excluded in agreements with the competent authorities. Among private parties, agreements on the allocation of environmental liabilities and related hold harmless obligations are possible and used in share purchase agreements and asset purchase agreements.

Failure to comply with soil pollution regulations may lead to administrative penalties such as monetary fines and custodial sentences.

Regulation of waste

4 | What types of waste are regulated and how?

The basis of waste regulation is included in the Federal Act on the Protection of the Environment, which provides the applicable principles. Waste legislation is further specified at the ordinance level in various ordinances: the Ordinance on the Prevention and Disposal of Waste, the Ordinance on the Transport of Waste, the Ordinances on Lists of Waste Transport, the Federal Technical Ordinance on Waste and the Federal Ordinance on the Return, the Tacking Back and the Disposal of Electrical and Electronic Devices.

The Federal Act on the Protection of the Environment defines 'waste' as any movable material that the holder disposes of or whose disposal is in the public interest. Pursuant to this Act, the disposal of waste includes its recovery or final storage as well as the preliminary stages of collection, transport, interim storage and treatment. Treatment refers to any physical, biological or chemical modification of waste. Use of waste refers to any operation, including its production, import, export, placing in trade, use, storage, transport and disposal.

The relevant regulations distinguish between municipal waste (household waste), special waste and other waste. 'Municipal waste' is defined as waste originating from households and waste of comparable composition from enterprises not exceeding a certain size. 'Special waste' is defined as waste whose environmentally compatible disposal requires special measures. Waste that is neither special waste nor municipal waste is defined as 'other waste'. The distinction is relevant for the obligations regarding the disposal of waste. Further, different requirements also apply to these types of waste with respect to the handling, the transport and the labels to be used. The applicable requirements must be determined on a case-by-case basis.

Regulation of air emissions

5 | What are the main features of the rules governing air emissions?

Air pollution is mainly governed by the Federal Act on the Protection of the Environment and the Federal Ordinance on Air Pollution Control.

Pursuant to the Federal Act on the Protection of the Environment, air pollution is limited by measures taken at its source (ie, by the limitation of emissions). Irrespective of the existing environmental pollution, as a precautionary measure, emissions must be limited as much as

technology and operating conditions allow, provided that this is economically acceptable. Emissions are limited more strictly if the effects are found or expected to be harmful or a nuisance, taking account of the existing level of environmental pollution.

Emissions are limited by the following:

- maximum emission values;
- regulations on construction and equipment;
- traffic or operating regulations;
- regulations on the heat insulation of buildings;
- regulations on thermal and motor fuels; and
- a plan of measures by the competent authorities if several sources cause harmful air pollution to reduce or eliminate these impacts within the set time limit (action plan).

The applicable restrictions are prescribed by ordinance or, in cases where an ordinance contains no such provision, by rulings based directly on the Federal Act on the Protection of the Environment. For example, the maximum emission values must

The Ordinance on Air Pollution Control defines the ambient limit values for assessing harmful effects or nuisances, also taking into account the effects of pollution levels on particularly sensitive groups such as children, the sick, the elderly and pregnant women. The ambient limit values for air pollution are set at a level so that, in the light of existing scientific knowledge and experience, ambient air pollution below these levels:

- does not endanger people, animals or plants, their biological communities and habitats;
- does not seriously affect the well-being of the population;
- does not damage buildings; and
- does not harm soil fertility, vegetation or waters.

Protection of fresh water and seawater

6 | How are fresh water and seawater, and their associated land, protected?

The protection of fresh water and seawater is ensured by the provisions of the Federal Act on the Protection of the Environment, the Federal Act on the Protection of Waters and the Federal Waters Protection Ordinance. In addition, cantonal implementation laws on water protection apply.

In Switzerland, groundwater protection zones serve to protect groundwater resources used for the supply of drinking water against all forms of pollution and to prevent groundwater flow from being adversely affected or obstructed. In groundwater protection zones, human activities are only permitted to a limited extent.

In this respect, two core principles of the Waters Protection Act are directly relevant for discharging wastewater and the protection of water resources:

- everyone is obliged to take all the care due in the circumstances to avoid any harmful effects to waters; and
- it is prohibited to introduce into a body of water, either directly or indirectly, any substances that may pollute it.

The infiltration of such substances – by storing or spreading of such substances outside a body of water – is prohibited if there is a genuine risk of water pollution.

Further, the Waters Protection Act and the Waters Protection Ordinance contain specific provisions on the disposal or discharge of wastewater. Polluted wastewater must be treated and may only be discharged or infiltrated into a body of water with the approval of the cantonal authority. Non-polluted wastewater must be discharged by infiltration according to the instructions of the cantonal authority. If local conditions do not permit this, such non-polluted water may be

discharged into surface waters. In this case, retention measures must be taken if possible so as to ensure a steady discharge in the event of high inflow. The discharge of water is not part of a communal drainage plan and requires a permission of the cantonal authority.

Protection of natural spaces and landscapes

7 | What are the main features of the rules protecting natural spaces and landscapes?

The basis of natural spaces and landscapes protection is contained in article 78 of the Swiss Constitution. According to this provision, the cantons have the sole responsibility for the protection of natural spaces and landscapes. Thereby, moors and wetlands of special beauty and national importance shall be preserved. No buildings may be built on them and no changes may be made to the land, except for the construction of facilities that serve the protection of the moors or wetlands or their continued use for agricultural purposes. Therefore, no construction work is allowed in these areas, which may have an impact on private rights.

Further, the Federal Act on the Protection of Nature and Cultural Heritage foresees different levels of protection and the different regulations applicable to each level. Each canton, however, is allowed to also regulate on this matter and to provide for a different classification. Moreover, some natural spaces have their own special legislation and are not subject to the said classification (this is, for example, the case of the Federal Act on Forests).

Protection of flora and fauna species

8 | What are the main features of the rules protecting flora and fauna species?

The Swiss landscape has changed radically over the last 100 years due to the spread of residential housing and the construction of infrastructure. As a result, habitats for plants and animals continue to be endangered and those remaining have been reduced in quality.

The protection and preservation of such habitats is a core objective of the Federal Act on the Protection of Nature and Cultural Heritage, the Federal Act on Hunting and the Federal Act on Fishing. These requirements are detailed in specific ordinances on the protection of flora and fauna species (ie, the Ordinance on the protection of water and migratory birds or the Ordinance on the protection of moors or wetlands). Further, the Federal Act on Forests aims specifically to maintain forests' biodiversity. The related federal ordinances as well as cantonal laws and ordinances provide the relevant legal framework.

Further, the BAFU defined a list currently including 3,665 species and 98 habitats as national priorities, which are to be promoted and maintained in the future. The kind of measures to be taken and the restrictions must be determined on a case-by-case basis.

Noise, odours and vibrations

9 | What are the main features of the rules governing noise, odours and vibrations?

The Federal Act on the Protection of the Environment provides that the pollution, for some matters, must be limited at its source. Emission protection refers to all measures aimed at limiting and combating one of the following: air pollution, noise, vibration and radiation.

There are different separate federal ordinances on noise, air pollution and on non-ionising radiation, which regulate these matters in detail. Annexes to those ordinances define certain emission limits. However, as not all cases of pollution are foreseeable, local authorities have the power to fix a limit of emission if a specific case has not been already regulated. Moreover, the applicable emission limit depends on when the

concerned construction was built. In that way, all of the constructions after 1985 (the year of the Ordinance) – the new constructions – are subject to stricter rules than the older constructions.

The ordinances may also provide for other manners to prevent pollution, as there is, for example, the cadastre of noise that indicates places with important and dangerous noise pollution.

Liability for damage to the environment

10 | Is there a general regime on liability for environmental damage?

There is no general regime on liability for environmental damages. Rather, there are different types of liability, which depend on the damage caused:

- civil law liability for unlawful damages and landowner's liability;
- public law liability pursuant to the Federal Act on the Protection of the Environment and other specific laws governing environmental matters; and
- administrative sanctions and penalties.

Civil law liability is governed by the general rules of the Swiss Civil Code and the Swiss Code of Obligations. Anyone who unlawfully causes loss or damage to another, whether wilfully or negligently, must provide compensation. If environmental damage is caused by the owner of a building or of a plot of land, the landowner's liability pursuant to the Swiss Civil Code may apply.

Further, pursuant to the Federal Act on the Protection of the Environment, the operator of an establishment or an installation that represents a special threat to the environment is liable for the loss or damage arising from effects that occur when this threat becomes reality. Liability pursuant to the Federal Act on the Protection of the Environment is a strict liability. Therefore, a polluter is held responsible for the damage regardless of its culpability, with the exception of force majeure and liability of a third party or of the damaged party itself.

In general, the polluter-pays principle applies to environmental damages. Accordingly, the polluter is held liable for damages and costs caused by its behaviour. The Environment Protection Act includes special liability clauses for other specific operations, such as the handling of pathogenic or genetically modified organisms.

Finally, a number of special laws governing environmental matters contain provisions on liabilities in specific cases.

Environmental taxes

11 | Is there any type of environmental tax?

Several environment-related taxes and duties are levied on the federal and cantonal level.

On the federal level, a key instrument of the current environmental and climate policy is the carbon dioxide (CO₂) tax. With the goal to achieve CO₂ emission targets, the Federal Act on the Reduction of CO₂ Emissions imposes a levy on fossil fuels, such as heating oil and natural gas. Further, the CO₂ Act obliges distributors of fossil motor fuels and operators of fossil-thermal energy plants to CO₂ compensation.

CO₂-intensive companies can be exempted from the CO₂ tax if they voluntarily commit to reducing their emissions in return. In addition, in the case of participation in emissions trading, companies are entitled to a refund of the CO₂ tax.

Other environment-related taxes and duties on the federal level are energy taxes, transportation taxes, emissions levies and disposal fees and taxes on mineral oil, crude oil, natural gas and products derived from their processing and fuels, as well as a mineral oil surcharge on fuels.

On the cantonal level, environment-related taxes and duties concern motor vehicles, waste, wastewater and energy consumption.

HAZARDOUS ACTIVITIES AND SUBSTANCES

Regulation of hazardous activities

12 | Are there specific rules governing hazardous activities?

The Federal Act on the Protection of the Environment regulates the inspection, the obligations, the information requirements and the general due diligence requirements for the handling of particularly dangerous substances. These obligations are specified in the Federal Act on Protection against Dangerous Substances and Preparations and the corresponding ordinance as well as in the Ordinance on the Reduction of Risks relating to the Use of Certain Particularly Dangerous Substances, Preparations and Articles.

The specific rules governing activities related to particularly dangerous substances must be analysed on a case-by-case basis.

Regulation of hazardous products and substances

13 | What are the main features of the rules governing hazardous products and substances?

As a general principle, manufacturers and importers of hazardous substances must ensure that these substances do not endanger human life and health or the environment when brought on the market. This duty of care applies to anyone handling or implementing such substances and to all activities relating to the substances, namely their production, introduction, export, placing on the market, use, storage, transport or disposal.

Further, certain hazardous chemical substances must be listed in the Swiss product register of chemicals and require a special authorisation and special personal and professional skills for their handling. Certain hazardous chemicals may also not be sold to private users. Others may be sold to private users, but only if the buyers have been informed about the dangers of the concerned substance (information duties).

As to the disposal of hazardous substances, anyone who supplies such substances or preparations must accept them when returned by non-commercial users for appropriate disposal.

Industrial accidents

14 | What are the regulatory requirements regarding the prevention of industrial accidents?

From a general perspective, major industrial facilities are subject to the Ordinance on Protection against Major Accidents, providing for specific obligations of the owner to reduce the risks from the facility (eg, the obligation to take safety measures and certain reporting obligations towards authorities).

From an environmental perspective, the Federal Act on the Protection of the Environment provides a requirement to conduct a comprehensive environmental impact assessment to larger installations that could cause severe pollution to environmental areas. The environmental impact assessment shall provide – to the extent that it is probable – that compliance with ordinances of environmental protection can be secured through measures that specifically apply to the project or site, such as the disposal of water from construction sites, the disposal of waste and traffic management.

ENVIRONMENTAL ASPECTS IN TRANSACTIONS AND PUBLIC PROCUREMENT

Environmental aspects in M&A transactions

15 | What are the main environmental aspects to consider in M&A transactions?

Generally, the scope of recommended environmental aspects to be considered depends on the previous use and the planned future use of the concerned property, as well as the age, previous use and planned future use of buildings that are part of the transaction.

Before concluding property transactions in the scope of an M&A transaction, a general inquiry as to the location should take place and the planned use or project should be assessed with regard to potential restrictions from environmental laws, such as traffic restrictions, groundwater protection zones or wildlife protection zones.

Further, the cantonal register of contaminated sites should be consulted. This register is limited to sites whose pollution originates from waste and that are restricted in area – namely, waste disposal sites, industrial sites and accident sites. It is therefore important to also consult any other available public register containing information about the soil and potential contaminations, such as the register of movements of polluted soil and registers showing pollution from traffic, farming and special cultures.

In the case of existing buildings on the concerned land, an examination of the building materials is recommended, especially if the buildings were constructed at a time when the use of hazardous materials (eg, asbestos) was allowed and common. In this regard, no public registers are available.

To cover risks arising from environmental issues, it is standard practice to include representation and warranty clauses in share or asset purchase agreements.

Environmental aspects in other transactions

16 | What are the main environmental aspects to consider in other transactions?

See question 15. The same aspects must be considered in other transactions, with appropriate contractual arrangements in order to protect financing parties, investors and creditors, as applicable.

Environmental aspects in public procurement

17 | Is environmental protection taken into consideration by public procurement regulations?

The Federal Act on Public Procurement provides that one of the criteria to be evaluated by the awarding authority at the stage of evaluating the tenders and awarding the contract is the ecological aspect of the services or goods provided. This aspect is an 'award criterion', which may be used by the awarding authority to define the most economically advantageous offer.

ENVIRONMENTAL ASSESSMENT

Activities subject to environmental assessment

18 | Which types of activities are subject to environmental assessment?

Environmental impact assessments are mainly governed by the Federal Act on the Protection of the Environment and the Federal Ordinance on the Environmental Impact Assessment.

The environmental impact assessment does not relate to specific activities, but rather to the planning, construction and modification of

certain major projects. Pursuant to the Federal Act on the Protection of the Environment, the requirement to conduct a comprehensive environmental impact assessment applies to installations that could cause severe pollution to environmental areas to the extent that it is probable that compliance with ordinances on environmental protection can be ensured only through measures specifically applied to the project or site.

The Ordinance on the Environmental Impact Assessment defines the types of installations that are subject to an environmental impact assessment. For instance, this applies to railways, national roadways, harbour constructions, airports, nuclear installations, stadiums with a capacity of more than 20,000 spectators and gravel and sand pits.

Environmental assessment process

19 | What are the main steps of the environmental assessment process?

As a first step, anyone who wishes to plan, construct or modify an installation that is subject to an environmental impact assessment must submit an environmental impact report to the competent authority. The Federal Office for the Environment (FOEN) is the specialist agency on the federal level, whereas the cantons set up specialist agencies for environmental impact assessments and assess other environmental questions on the cantonal level.

The environmental impact report forms the basis of the environmental impact assessment and must include:

- the existing conditions;
- the project, including proposed measures for the protection of the environment and in the event of disaster, and an outline of the main alternatives evaluated by the applicant, if any; and
- the foreseeable residual environmental impact.

The environmental impact report and the environmental impact assessment are prepared and conducted according to the requirements and specifications of the Federal Act on the Protection of the Environment and the Ordinance on the Environmental Impact Assessment.

After submission of all required documents and information, the competent authority will carry out the environmental assessment of the project itself and then submits its application to the approval authority for a decision on the merits. The building permit authority will then base its decision on the environmental impact report and the assessment by the competent authority.

The results of an environmental impact assessment are published, usually together with the building permit request of the concerned project. Anyone may inspect the published report and the results of the environmental impact assessment within 30 days, unless overriding public or private interests require confidentiality. Trade and business secrets must be preserved in all cases.

An environmental impact report and the result of an environmental impact assessment itself cannot be contested by specific legal remedies. However, an appeal is possible against the building permit decision for the concerned project.

Appeals against decisions of cantonal or communal authorities, such as building permits, are governed by cantonal law on the administrative procedure and decided by the higher administration instance and then, if further appealed, by the competent cantonal administrative court. Appeals against decisions of federal authorities are governed by the Federal Administrative Procedure Act and decided by the Federal Administrative Court. Decisions by the cantonal administrative courts as well as decisions by the Federal Administrative Court may be appealed at the Federal Supreme Court if the prerequisites set out in the Federal Act on the Federal Supreme Court are met.

REGULATORY AUTHORITIES

Regulatory authorities

20 | Which authorities are responsible for the environment and what is the scope of each regulator's authority?

On the federal level, the Department of Environment, Transport, Energy and Communication (DETEC) is primarily responsible for environmental matters. It is divided into numerous offices, whereby the FOEN is mainly in charge of environmental issues. In particular, the FOEN prepares implementing ordinances to be enacted by the government and implements such ordinances through directives, circulars and guidelines. Besides the FOEN, other federal offices have certain competences in specific areas of environment law – for example, the Federal Office of Civil Aviation.

Since the cantons are mainly responsible for implementing, monitoring and controlling environmental law, numerous cantonal and communal offices and authorities are in charge of environmental issues. Each of the 26 cantons designates and organises such offices and authorities. The cantons and communities must ensure that the protection of the environment as a cross-sectional task is implemented in all relevant areas, such as traffic, trade and commerce, construction and housing.

Among other measures, government bodies can:

- conduct inspections;
- demand the disclosure of information regarding environmental issues; and
- revoke environmental permits.

The environmental permits are issued by the authority in charge of the relevant matter. As per the applicable laws and ordinances, this may be a federal, cantonal or communal authority.

Investigation

21 | What are the typical steps in an investigation?

Investigations and inspections may be conducted by government bodies. Usually, they will first demand the disclosure of information regarding the relevant environmental issues. Secondly, they will conduct on-the-spot inspections and involve technical experts and analysts. Furthermore, they may take samples and analyse them. To challenge such investigations, it will be usually necessary to ask for a formal decision that could be submitted to the next instance.

Administrative decisions

22 | What is the procedure for making administrative decisions?

As a general principle, the relevant facts of the case are investigated by the competent authority or court, but the parties have a duty to cooperate. In the determination and assessment of the parties' points of view, the parties have the right to be heard and to inspect the documents and information available to the authority or the court.

Further, the relevant law is applied *ex officio* by the competent authority or court (ie, the parties may submit legal observations, but they do not have to).

As a second core principle, the authority or court must hear the parties before taking any decision. A prior hearing may only be waived in exceptional cases (eg, in the cases of particular urgency, and in cases expressly mentioned by law). However, Swiss law does not allow for an appeal during the decision-making process. Rather, the parties must wait for the final decision and challenge it.

There is no *numerus clausus* of admissible evidence in public law proceedings. However, according to jurisdiction, the formal

interrogation of parties is not admissible as evidence. Against this background, the parties may submit, for example, the following evidence: documents, information from the parties, information or testimony from third parties, and inspection and reports by experts.

Sanctions and remedies

23 | What are the sanctions and remedies that may be imposed by the regulator for violations?

The imposable sanctions and remedies depend on the violations and the applicable laws. Administrative sanctions are, for example, the order to establish lawful conditions or the revocation of a permit. Administrative penalties are usually monetary fines, but can also be custodial sentences.

Appeal of regulators' decisions

24 | To what extent may decisions of the regulators be appealed, and to whom?

Administrative decisions on environmental matters are subject to appeal pursuant to the specific provisions of the applicable laws and ordinances and pursuant to general principles of administrative law. The usual appeal period is 20 or 30 days.

The procedure depends on the authority, which issued the decision, and the applicable laws:

- Appeals against decisions of cantonal or communal authorities are governed by cantonal law with respect to the applicable administrative procedure. As a general principle, the decision of a cantonal or communal authority can be appealed at the competent cantonal administrative court. Certain cantons also have two instances for appeal (eg, Canton of Zurich, where a building permit must be appealed first at the building appeal court and then to the administrative court).
- Appeals against decisions of federal authorities are governed by the Federal Administrative Procedure Act and decided by the Federal Administrative Court.

Decisions by the cantonal administrative courts as well as decisions by the Federal Administrative Court may be appealed at the Federal Supreme Court if the prerequisites set out in the Federal Act on the Federal Supreme Court are met.

Both the person requesting a permit and third parties that have a particular interest in the matter are entitled to appeal against a permit decision. Based on the Federal Act on the Protection of the Environment and the Protection of Nature and Cultural Heritage Act, environmental protection organisations that fulfil certain criteria, have a right to appeal as well.

If provided by cantonal law, certain environmental protection organisations acting on a cantonal level have a right to appeal before cantonal instances and the Federal Supreme Court.

The system of grounds of appeal follows the principle of procedural unity (ie, the grounds of appeal may narrow in the course of the appeal, but they may not widen). The grounds of appeal therefore vary from instance to instance:

- Cantonal instances and the Federal Administrative Court examine infringement of rights, incorrect investigation of the facts and appropriateness of the contested decision.
- The Federal Supreme Court only examines infringements of the law as a matter of principle. In the case of appeals against decisions on precautionary measures and within the framework of the subsidiary constitutional complaint, only the violation of constitutional rights can be reprimanded. The review of facts is only very limited and the review of adequacy is not possible at all.

JUDICIAL PROCEEDINGS

Judicial proceedings

25 | Are environmental law proceedings in court civil, criminal or both?

Since environmental law is part of the public law in Switzerland, most of the court proceedings are conducted before administrative courts. This covers all environmental issues with respect to environmental permits, inspections, obligations to remediate polluted sites and costs related to such issues.

However, environmental law proceedings may also be brought before a civil law court when it concerns liability issues. For example, an operator of an installation that represents a special threat to the environment or caused damages by handling hazardous substances may be liable vis-à-vis third parties or the state (based on substantive law). In this case, a civil court will decide about the liability and the compensation for damages based on civil law principles. Such cases are, however, rather rare.

Finally, there are also criminal sanctions for misdemeanours in relation to environmental law issues (eg, if a person wilfully or negligently puts substances into circulation that they know or must assume may present a danger to the environment or indirectly endanger people when used in a certain manner). In such a case, a criminal court can impose a custodial sentence up to three years or a monetary penalty. Furthermore, contraventions to legal duties (eg, failure to comply with remediation orders) are punishable with a fine not exceeding 20,000 Swiss francs.

Powers of courts

26 | What are the powers of courts in relation to infringements of environmental law?

The power of courts with respect to infringements of environmental laws depends on the applicable law and the proceeding. Administrative courts may, for example, impose an order to establish lawful conditions, revoke a permit or order monetary fines or custodial sentences.

Further, in the case of imminent disadvantages, the competent court can also order precautionary measures in order to take interim measures until a decision on the merits is reached.

Civil claims

27 | Are civil claims allowed regarding infringements of environmental law?

Yes, environmental law proceedings may also be brought before a civil law court when it concerns unlawful damages and liability issues. This applies to both contractual and non-contractual claims. Civil law liability is governed by the general rules of the Swiss Civil Code and the Swiss Code of Obligations. Anyone who unlawfully causes loss or damage to another, whether wilfully or negligently, must provide compensation. Such cases are, however, rather rare.

Defences and indemnities

28 | What defences or indemnities are available?

Because environmental liability is strict liability, only limited defences are available to environmental offenders – namely, if the damages are caused by force majeure or gross negligence by a third party or by the damaged party itself.

In the case of general civil law liability, pursuant to the Swiss Code of Obligations, the offender may argue that it acted neither wilfully nor negligently.

Directors' or officers' defences

29 | Are there specific defences in the case of directors' or officers' liability?

In the first instance, a company is responsible for the wrongdoings of its corporate bodies. Directors and officers are not subject to civil law liability for environmental misconduct caused by the company itself.

However, if a director or officer commits an intentional or negligent breach of their environmentally induced duties, he or she may become personally liable for any damages or losses arising therefrom. If this is the case, there are no specific defences with respect to such liability.

In practice, the personal liability of directors or officers is often covered by a liability insurance, if no limitation or exclusion applies (ie, no insurance coverage in the case of damages resulting from wilful intent, gross negligence and criminal liability).

Finally, personal liability of directors and officers may also be mitigated through contractual indemnification arrangements with the company. However, these contractual arrangements do not have any effect vis-à-vis the state or third parties.

Appeal process

30 | What is the appeal process from trials?

See question 24. The applicable appeal process depends on the authority that issues the decision and the applicable procedural law. For decisions of cantonal and communal authorities, the decision may be appealed at the competent cantonal administrative court. Decisions of federal authorities may be appealed at the Federal Administrative Court.

Both the decision of the cantonal administrative court and the Federal Administrative Court may then be appealed at the Federal Supreme Court.

INTERNATIONAL TREATIES AND INSTITUTIONS

International treaties

31 | Is your country a contracting state to any international environmental treaties, or similar agreements?

Switzerland has ratified numerous treaties that pursue the protection of the environment. For example, Switzerland ratified the following international environmental agreements:

- the Montreal Protocol on Substances that Deplete the Ozone Layer in 1988;
- the Stockholm Convention on Persistent Organic Pollutants in 2003;
- the Paris Climate Agreement in 2017;
- the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal in 1990; and
- the Aarhus Convention on access to information, public participation in decision-making processes and access to justice in environmental matters in 2014.

International treaties and regulatory policy

32 | To what extent is regulatory policy affected by these treaties?

Most of the international agreements on environmental matters do not contain self-executing provisions. Therefore, after ratifying such agreements, Switzerland amends its national legislation in order to comply with the international requirements. The regulatory policy in Switzerland is very reactive to international agreements and constantly amending its national legislation in this respect. Further, Swiss legislation is considering the international amendments when enacting new laws and ordinances in these areas.



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UPDATE AND TRENDS

Key developments of the past year

33 | Are there any emerging trends or hot topics in environment law in your jurisdiction?

In Switzerland, the current debate on environment and climate change is intensive. In the past few months, different climate strikes took place in the biggest cities in Switzerland. Activists require the proclamation of a 'climate emergency'. However, the Swiss legal system – compared to other countries – does not have provisions for declaring a climate emergency. Hence, such a proclamation would not be of any legal value. The only instrument with respect to environmental concerns is the possibility to introduce an 'emergency law' in areas, where an amendment of law must happen as quickly as possible. However, emergency law with respect to climate issues seems rather unrealistic at this stage.

Another recent topic relates to the current sanction system for environmental offences and damages in Switzerland. In a recent report, the FOEN analysed whether the current sanction system and procedural instruments are effective. The FOEN concluded that the sanctions and penalties – with a few exceptions – are high enough and that the prosecutors and the court do apply these frameworks. However, the FOEN also observed that the penalty range is only rarely exhausted.

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