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Environment & Climate Change - Switzerland



Polluted sites – federal Environmental Protection Act amended

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Background

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Pursuant to a recent amendment to the federal Environmental Protection Act,⁽¹⁾ polluters may be required to provide appropriate security for the costs of cleaning up a contaminated site. Since July 1 2014, the sale or parcelling of certain contaminated sites is subject to approval by the competent cantonal or federal authority.

Background

As many other countries, Switzerland has a considerable number of polluted sites. The Federal Council plans to investigate, monitor and remediate these sites until 2025, at a cost of around Sfr5 billion.

According to the act, the responsible person (ie, the polluter) must bear the costs of the measures required to investigate, monitor and remediate polluted sites. If two or more persons are responsible, they must bear the costs according to their share of responsibility. The first to bear the costs is the person that, through its conduct, caused the measures to be required. Anyone that is responsible simply as the proprietor of the site bears no costs if, by exercising the required care, that person could not have had any knowledge of the pollution. However, if a polluter cannot be identified or cannot pay, the authority concerned must bear the costs.⁽²⁾

In 2009 a parliamentary initiative was filed to tighten up the liability for polluted sites. In particular, there were criticisms that legal entities could easily escape legal responsibility and clean-up costs, and consequently the authorities concerned had to bear such costs. To address this issue, two amendments have been made to the federal Environmental Protection Act.

New security for clean-up costs

Since November 1 2013 the act stipulates that the competent authority may request the polluter to provide appropriate security to cover its probable share of costs for investigation, monitoring and remediation, if the site is expected to cause harmful effects or nuisances.⁽³⁾

The obligation to provide security for probable clean-up costs applies to any polluter, not only the current owner of the property. Also, the property need not be listed in the Register of Contaminated Sites. If a property is listed as a contaminated site, this does not automatically trigger the obligation to provide security.

The amount of the security is determined on the basis of the extent, nature and intensity of the pollution. It is adjusted from time to time as knowledge of the situation improves.⁽⁴⁾

The act does not specify the form of security – insurance policies, bank guarantees and other equivalent forms of security (eg, cash deposits) are acceptable.

New approval requirement

Since July 1 2014 a sale or parcelling of a site that is listed in the Register of Contaminated Sites is subject to approval by the competent authority. Without such approval, the new owner or the parcelled plots may not be registered in the Land Register. In view of planned transactions, it is advisable to check the publicly available Register of Contaminated Sites in a timely manner.

Generally, the cantonal authorities are competent to enforce regulations regarding polluted sites and will grant the required approvals. In specific cases, and based on special legislation, a federal authority is competent (eg, the Federal Office of Transport, the Federal Office of Civil Aviation or the Federal Department of Defence, Civil Protection and Sport).

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The competent authority may approve the sale or parcelling of a polluted site only if one of the following conditions⁽⁵⁾ is met:

- The concerned site is not expected to cause harmful effects or nuisances;
- Security for the investigation, monitoring and remediation has been provided for; or
- There is a prevailing public interest in the sale or parcelling.

If the site is not expected to cause harmful effects or nuisances, the applicant has a right to obtain approval. In this case, the competent authority has no discretion and must grant approval. However, if the land is expected to cause harmful effects or nuisances, approval may be granted only if appropriate security has been provided for or a prevailing public interest in the sale or parcelling exists.

The amount of costs to be secured is estimated based on available knowledge and is adjusted periodically. Since the act does not follow the principle of joint and several liability regarding polluted sites, it seems questionable whether a site owner, which is not the sole polluter, may generally be obliged to secure the total amount of the clean-up costs. Rather, in view of the purpose of the new provision – to prevent the owner from avoiding liability by selling or parcelling the site – the owner may be obliged to secure only its probable final share of the costs. The approval requirement for the sale or parcelling of the site would be an inappropriate means to oblige the site owner to secure the total amount of clean-up costs (ie, including the shares of other polluters).⁽⁶⁾

A prevailing public interest exists if, for instance, a project enabled by the sale or parcelling of a polluted site is of strong public interest (eg, the construction of public infrastructure). A prevailing public interest can also exist if the sale itself will be used to fund environmental remediation measures.

Before these new federal-level regulations, the prohibition to parcel sites registered as polluted sites already existed in several cantons.⁽⁷⁾ With the amendment of the act, the approval requirement for selling or parcelling polluted sites now applies in all cantons. This allows the competent authorities in all cantons and the federal authorities to prevent the owner of a polluted site from avoiding liability by selling or parcelling the concerned site.

Implementation by cantons

The implementation of the act's new provisions lies with the cantons. Cantonal laws determine the competent authorities and the details for the implementation. Unless the cantonal laws provide for different rules (eg, the Canton of Zurich), specific approval is required for the sale of any site listed in the Register of Contaminated Sites.

In the Canton of Zurich, the competent authority (the Office of Waste, Water, Energy and Air) issued a general ruling and a circular letter on the implementation of the new federal approval requirement.⁽⁸⁾ The Zurich cantonal rules can be summarised as follows:

- The ruling contains general approval for the sale and parceling of certain sites subject to approval. The general approval covers sites which are registered as polluted sites but that are not expected to cause harmful effects or nuisances and are not subject to monitoring or clean-up. Thus, general approval of the ruling is limited to sites pursuant to Article 5(4)(a) and Article 8(2)(c) of the Federal Contaminated Sites Ordinance.
- For all other sites that may cause harmful effects or nuisances, or that qualify as requiring assessment, monitoring or remediation, individual approval is required for each sale and parcelling.
- If in a particular case individual approval is required, it must be available when the transaction is registered in the Land Register, not when the public deed for selling or parcelling the property is signed. Nevertheless, the notary involved must check the Register of Contaminated Sites and, if the concerned property is listed, inform the parties and include appropriate wording in the public deed.

Further, the Office of Waste, Water, Energy and Air clarifies that not only sale and purchase, but all transactions leading to a change of ownership,⁽⁹⁾ as well as transactions fundamentally diminishing the value of a site,⁽¹⁰⁾ are subject to approval. In contrast, the establishment of a right of pre-emption, purchase or repurchase is not subject to approval. However, the subsequent exercise of a right of pre-emption, purchase or repurchase is subject to approval.

Comment

The new approval requirement for the sale or parcelling of a contaminated site can considerably delay a transaction. It is therefore advisable to check the Register of Contaminated Sites and to involve the competent authority in good time.

Buyers should pay attention to the seller's obligation to provide security for probable clean-up costs. If a seller has provided such security, this may reduce the buyer's risk to bear clean-up costs, especially by advancing costs under the preliminary cost allocation.

For further information on this topic, please contact [Anne-C Imhoff](mailto:anne-c.imhoff@pestalozzilaw.com) or [Michael Lips](mailto:michael.lips@pestalozzilaw.com) at Pestalozzi Attorneys at Law by telephone (+41 44 217 91 11), fax (+41 44 217 92 17) or email (anne-c.imhoff@pestalozzilaw.com or michael.lips@pestalozzilaw.com). The Pestalozzi Attorneys at Law website can be accessed at www.pestalozzilaw.com.

Endnotes

- (1) Environmental Protection Act, SR 814.01.
- (2) Article 32d(1) to (3) of the Federal Environmental Protection Act.
- (3) Article 32d**bis**(1).
- (4) Article 32d**bis**(2).
- (5) Article 32d**bis**(3).
- (6) However, in specific cases and in the sense of a preliminary cost allocation, it may be appropriate to oblige the owner under Article 32d**bis**(3)(b) to provide security for advance payments exceeding its probable final cost share (ie, advance payments covering remediation measures). This is in view of the purpose of the new regulation (reducing the state liability) and in the context of the two-stage cost allocation that Swiss environmental laws provide for in order to ensure a timely clean-up procedure. First, and as a preliminary cost allocation only, the possessor (eg, a tenant or leaseholder) must usually bear the costs of assessing, monitoring and cleaning up a site (Article 20(1) of the Federal Contaminated Sites Ordinance). Second, in the final cost allocation, the polluter-pays principle applies (Article 32d).
- (7) Cantons of Solothurn, Thurgau, Schaffhausen and Valais.
- (8) The Office of Waste, Water, Energy and Air, General Ruling 0945, June 18 2014, and Circular Letter 400, June 18 2014, issued by the office and the Zurich notary inspectorate.
- (9) The general ruling explicitly mentions the exchanges, gifts, assignments by division of an estate and transfers of assets pursuant to the Federal Merger Act.
- (10) Creation and sale of a building lease.

Comment or question for author

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