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Environment & Climate Change - Switzerland



Federal Supreme Court decision on subsidies to remediate polluted sites

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[Subsidies for remediation measures](#)
[Facts](#)
[Decision](#)
[Comment](#)

The Federal Supreme Court recently had to decide whether a canton is entitled to federal subsidies for remediation measures in connection with a project on a site that, without the building project, would not be in need of remediation.⁽¹⁾

Subsidies for remediation measures

Article 32e of the Environmental Protection Act⁽²⁾ forms the cornerstone for levying charges for the deposit of waste in landfill, the export of waste and the use of this charge. Through the Ordinance on the Charge for the Remediation of Contaminated Sites,⁽³⁾ the Federal Council has regulated the charge and its use in greater detail.

According to the ordinance, the charge shall be used to provide payments to the cantons for costs in connection with contaminated sites which the cantons cannot collect from a polluter, including costs for:

- the investigation, monitoring and remediation of polluted sites where a polluter is unknown or insolvent; and
- the investigation of sites that turn out not to be polluted.

To obtain such payments, the cantons must file a request with the Federal Office for the Environment.

Facts

In a landfill in the Canton of Aargau, approximately 120,000 cubic metres of excavation materials, residential and commercial waste were deposited between 1955 and 1975. Due to its use as landfill, the site has been registered in the register of contaminated sites as in need of monitoring, but not remediation.

The owner of the landfill intended to build a cold storage house on the site. By way of preliminary investigation, an excessive amount of methane and carbon dioxide in the interstitial air was detected. In order to protect those working in the cold storage house, an appropriate protection system for gas extraction and exhaust air purification was to be installed.

With regard to the costs, the canton submitted a subsidy request to the Federal Office for the Environment, which was rejected. The canton filed a first appeal with the Federal Administrative Court, which was rejected. The canton then filed a second appeal with the Federal Supreme Court, which was also rejected.

Decision

In the case at hand, it was undisputed that before the cold storage house was built, the site was polluted but did not qualify as in need of remediation, because without the cold storage house the toxic emissions did not reach any area or room where people were present regularly for a certain time. However, it was nevertheless disputed whether a subsidy had to be paid by the confederation to the canton, given that the need to remediate the site was caused by the building project.

Based mainly on the legislative materials, the Federal Supreme Court held that subsidies pursuant to Article 32e of the Environmental Protection Act should guarantee that sites in need of remediation are cleaned up as necessary. In contrast, subsidies are not intended for remedies caused by building projects if the relevant sites are not in need of remediation without such projects.

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In this case, the respective site was in need of remediation only because of the building project. Therefore, Article 3(a) of the Contaminated Sites Ordinance⁽⁴⁾ was relevant. Article 3(a) governs whether construction activities are allowed on polluted sites. A building project on a polluted site is permissible if the site is not in need of remediation and if the building project does not make remediation necessary.

In order to comply with Article 3(a), the site will not qualify as in need of remediation either before or after construction activities. Hence, measures necessary to comply with Article 3(a) are not aimed at cleaning up a site in need of remediation. Rather, such measures prevent the creation of a new site which will be in need of remediation. Such measures are not covered by the subsidies.

The Federal Supreme Court held that there is no legal ground obliging the confederation to subsidise remediation measures on sites that are not generally in need of it and that require remediation due only to a particular construction project.

Comment

In respect of the use of funds generated from charges according to Article 32e, the Federal Supreme Court limits the scope of subsidies to sites that need such remediation. If the need for remediation is generated only by a particular construction project, then the confederation is not obliged to subsidise the remediation costs.

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Endnotes

- (1) Federal Supreme Court, 1C_414/2014, March 2 2015.
- (2) Environmental Protection Act, SR 814.01.
- (3) Ordinance on the Charge for the Remediation of Contaminated Sites, SR 814.681.
- (4) Contaminated Sites Ordinance, SR 814.680.

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