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## Environment - Switzerland

### Clean-up of polluted sites: relative and absolute time limitation

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The 'polluter pays' principle states that anyone who causes measures to be taken under the Environmental Protection Law<sup>(1)</sup> must bear the related costs. However, with regard to sites that were polluted a long time ago, the issue arises of how long the polluter is exposed to potential liability for clean-up costs.

#### Clean-up of polluted sites

Pursuant to the Environmental Protection Law, polluted sites (eg, landfills and other sites contaminated by waste) must be remediated if they lead to harmful effects or nuisances, or if there is a concrete risk that such effects may arise.<sup>(2)</sup>

#### Preliminary and final cost allocation

In order to implement efficiently the environmental laws and to ensure a timely clean-up procedure, the law provides for a two-stage cost allocation.

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, Section 1 of the ordinance). In other words, the possessor must make advance payments.

Second, within the final cost allocation, the 'polluter pays' principle applies (Article 32d of the law).

#### 'Polluter pays' principle

The Environmental Protection Law determines that the polluter must bear the costs of the measures required to assess, monitor and clean up a polluted site (Article 32d, Section 1). The same provision also governs liability where two or more persons are involved: they bear the costs according to their share of the responsibility, as follows:

- The first to bear costs is the person who caused the measures through his or her conduct.
- Anyone who is responsible simply as the possessor of the concerned site bears no costs if, by exercising the required care, he or she could have had no knowledge of the pollution (Section 2).
- The relevant public authority bears the share of the costs of any responsible person who cannot be identified or is unable to pay (Section 3).

These detailed rules are complemented by provisions regarding the possibility of requesting a ruling on the cost allocation from the authority (Section 4), and the examination cost allocation in case an examination shows that a site is not contaminated.

The law contains no provision on whether the obligations to bear costs become time barred at some point. Therefore, if the pollution occurred a long time ago, the question is for how long the polluter and subsequent possessors are exposed to a potential liability for clean-up costs.

From the plain wording of the law, however, it might be thought that no limitation of time applies to the relevant obligations. The Federal Supreme Court has yet to answer this question. In late 2010 a cantonal court issued a relevant judgment; since the decision was not appealed, it may be considered as a leading judgment.

#### Time limitation

In general, there is a distinction between the relative and the absolute time limitation. Whereas the period of a relative time limitation usually begins when a specific claim is raised or a specific liability is claimed, the period of the absolute time limitation begins with the occurrence of the underlying incident (eg, with the

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pollution of a site).

As mentioned above, Swiss environmental laws contain no explicit provision on the time limitation of the obligations to bear costs. Nevertheless, there is a high degree of legal certainty with regard to the relative time limitation. Pursuant to the prevailing literature<sup>(3)</sup> and case law,<sup>(4)</sup> claims regarding clean-up costs prescribe a five-year period after the relevant measures have been taken and the costs are known.

In contrast, the situation is less clear with regard to the absolute time limitation. Legal scholars are divided on this issue: while some believe that an absolute time limitation of 30 years applies, others think that no absolute time limitation applies to clean-up costs as long as there is a need to remediate the concerned site. There is also the view that the clean-up obligation itself is not subject to a time limitation, but rather such a limitation applies to the obligation to bear costs.<sup>(5)</sup> The first view (ie, that a time limitation of 30 years applies) is mainly based on rule of law principles and follows the adverse possession of land rule, which is also subject to a 30-year period (Article 662 of the Civil Code<sup>(6)</sup>).<sup>(7)</sup> The second view (ie, that no absolute time limitation applies) holds that, from the outset, all claims relating to goods protected by the public order are excluded from any time limitation.<sup>(8)</sup>

In November 2010 the Jura Cantonal Court decided a case concerning an industrial site which had been contaminated 62 years earlier. It ruled that as long as a site needs remediation, no time limitation applies to claims relating to the obligation to bear the related clean-up costs.<sup>(9)</sup> The court argued that Article 32d of the Environmental Protection Law was enacted against the background of the practice set out under Article 8 of the former Water Protection Law and that, therefore, it must be read in relation with that provision and the relevant case law. According to a decision of the Federal Supreme Court on Article 8, the obligation to provide remediation does not prescribe as long as the contamination exists and the need for remediation persists.<sup>(10)</sup> According to the Jura Cantonal Court, the same principle governs the time limitation of claims regarding the violation of fundamental public goods. Thus, the court concluded that the obligation to bear clean-up costs according to Article 32d of the Environmental Protection Law is not subject to any time limitation as long as the polluter is still obliged to remediate the concerned site. According to the court, this understanding is justified in view of the possibility that the pollution of a site is discovered a long time after the pollution occurred. In addition, in such cases, the risk that the polluter must bear the related costs is an instrument to protect nature, and thus requires the broadest possible interpretation.

#### Comment

The decision of the Jura Cantonal Court is final and the Federal Supreme Court will not rule on this particular case. However, the Federal Supreme Court has previously confirmed a decision concerning sites that had been polluted over 30 years ago, without discussing the time limitation.<sup>(11)</sup> Therefore, and in view of the above-mentioned previous decisions of the Federal Supreme Court on claims relating to fundamental public goods, it would be unsurprising if the court, once deciding on this question, confirms that no absolute time limitation applies to the obligation to bear clean-up costs related to contaminated sites.

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](mailto:anne-c.imhoff@pestalozzilaw.com) or [michael.lips@pestalozzilaw.com](mailto:michael.lips@pestalozzilaw.com)).

Noëmi Erig assisted in the preparation of this update.

#### Endnotes

(1) *Umweltschutzgesetz* (SR 814.01).

(2) Article 32c, Section 1 of the Environmental Protection Law; Article 2, Section 2 of the Contaminated Sites Ordinance (*Altlastenverordnung* (SR 814.680)).

(3) ZUFFEREY, DC 2011, page 152, with further references; CUMMINS, *Kostenverteilung bei der Altlastensanierung*, page 295. ROMY, URP 2011, page 632.

(4) BGE 126 II 54 E 7; BGE 122 II 26 E 5.

(5) WAGNER PFEIFER, ZBI 105/2004, page 148.

(6) *Zivilgesetzbuch* (SR 210).

(7) NEF, in: *Das Recht in Raum und Zeit, Festschrift für Martin Lendi*, page 404; see also ROMY, URP 2011, page 631 with further references in footnote 55.

(8) BGE 114 I b 44 E 4.

(9) Chambre Administrative du Canton de Jura, arrêt du 29 novembre 2010 (ADM 20/2010) = RJJ 2010, pages 232-238, *définitif*.

(10) BGE 114 Ib 44 E 4.

(11) Federal Supreme Court Decision 1A\_250/2005, December 14 2006 (RDAF 2007, page 307).

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#### Comment or question for author

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