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Le juge administratif
et
le droit communautaire
de l'environnement

National administrative courts
And
Community
Environmental law

Finlande-Finland

Réponse au questionnaire
Answer to
The questionnaire

National administrative courts and Community environmental law
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FINNISH RESPONSE TO THE QUESTIONNAIRE

by Justice *Kari Kuusiniemi*, the Supreme Administrative Court

1. Information and public participation in environmental issues

Directive 2003/4/EC on public access to environmental information and Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment as later amended have been tranposed to Finnish national legislation.

The first mentioned directive and the corresponding national legislation have very rarely been referred to in the decisions of the Finnish Supreme Administrative Court (later: SAC). As a rule, *all official documents are in the public domain*, as guaranteed in the Finnish Constitution (1999) and Act on the Openness of Government Activities (1999). Everyone has a right of access to these documents without being obliged to state any reasons for his or her request. E.g. in environmental cases, it is typically not an issue, whether the parties as well as the general public have access to the relevant information. One exceptional case (SAC 2003:64) concerning environmental permit for an existing reserve supply stock for fuel can be mentioned. The Court ruled that the permit authority could not legally disregard provisions in the Environmental Protection Act concerning e.g. publicizing the permit application and the permit decision. However, the Court did not in abstracto decide the issue, to what extent the

documents included in the permit application were secret according to the 1999 Act on Openness or section 109 of the Environmental Protection Act.[1]

I have found only one case where the Directive and parallelly the Aarhus Convention were mentioned. The applicant had been afforded hard (paper) copies of all Natura 2000 Standard Data Forms, excluding some information concerning sites of threatened species. The point of the applicant (and later appellant) was that he insisted to have a CD with an identical content of the Natura 2000 database, which had been sent to the Commission by the Finnish Government. The application and the appeal were rejected based on the national Act on the Openness of Government Activities. The Court did not find ground for the claim even in the Directive or the Convention.

The EIA Directive, or rather the corresponding national legislation, has been applied in numerous cases. However, I cannot recall one single case where the administration´s obligation to inform the citizens would have been questioned. In one case, a municipal environmental Board was the opinion that certain documents, reports on environmental effects etc., should have been translated also to Swedish, which besides Finnish is an official language in Finland. The appeal of the Board was not examined because the EIA procedure as such could not be subject to appeal before a permit decision was made on the basis of the assessment. This implies, as a response to question B, that failure to comply with obligations in the EIA procedure may lead to annulment of the permit. However, to my knowledge there have been no so aggravating failures that the permit would have been annulled. But, in principle, it is clear that if the EIA procedure according to an overall assessment has failed to meet the standards set by the national legislation and the Directive in such a way that

[1] Section 109 concerns confidentiality and provides i.a. that information on emissions, monitoring data and environmental status data are not confidential, even if certain information concerning the financial position of individuals and corporations, trade or professional secrets can be disclosed only exceptionally.

no proper assessment procedure has taken place, the permit shall be annulled by the Court.

2. Pollution law

The framework Directive 2006/12/EC on waste and the Directive 96/61/EC concerning integrated pollutuon prevention and control have been transposed into national law mostly by the Environmental Protection Act (2000) and the Waste Act (1993) and subordinated decrees and regulations.

In the Environmental Protection Act there is an explicit provision, based on the IPPC Directive, on *rehabilitation of the site once operating activities have been completed*. An environmental permit shall contain necessary provisions on e.g. measures to be taken after discontinuing activities, such as remediation of the area and prevention of emissions (section 43, subsection 1, nr 4). According to the Government Proposition (84/1999) provisions could be about e.g. restoration, such as changing or covering of polluted soil materials, and removing of constructions (e.g. infiltration installations, pipelines). The permit could also include an obligation to present a plan for approval of the supervising authority before the operation will be ceased. In practice, concrete provisions concerning measures after the operation of the activity has been completed have been directed to waste management activities. Provisions establishing a duty to draw up a plan for approval have been more numerous (e.g. in peat production sites and mining activities). Thus far, the SAC has decided no relevant cases concerning these types of provisions.

Restoration of polluted sites has caused several legal and factual problems in Finland, just like probably everywhere. Most problematic have been ”the old sins”, i.e. sites which have been contaminated before proper legislation had been issued and where the operator has ceased to exist e.g. after getting bankcrupt.

If the polluting activity has been going on *after the entry into force of the Waste Act* (i.e. 1 January 1994)[2], the situation is in principle clear. The polluter pays in the first place. If this is no possible, the present holder of the site may, under certain circumstances, have the secondary liability under public law. In the third place, if the two first mentioned cannot be obliged to restore the site, the municipality in question is liable to take care of the polluted site (see section 75 of the Environmental Protection Act, infra).

The Environmental Protection Act provides a ban on soil pollution (section 7).[3]

> Waste or other substances shall not be left or discharged on the ground or in the soil so as to result in such deterioration of soil quality as may endanger or harm health or the environment, substantially impair the amenity of the site or cause comparable violation of the public or private interest.

The Government may stipulate by Decree on the maximum content of harmful substances for different uses of soil, and on the maximum concentrations of harmful substances for the purpose of assessing level of contamination and need for treatment (see section 14 of the Environmental Protection Act, and the Government Decree 214/2007 on the assessment of the pollution and need for restoration of the soil).

Section 75 of the Environmental Protection Act reads as follows:

> Any party whose activities have caused the pollution of soil or groundwater is required to restore said soil or groundwater to a condition that will not cause harm to health or the environment or represent a hazard to the environment.
>
> If the party that has caused the pollution of soil cannot be established or reached, or cannot be prevailed upon to fulfil its treatment duty, and if the pollutuon has occurred with the consent of the holder of the area or the said holder has known, or should have known, the state of the area when it ws acquired, said holder of the area shall restore the soil in so far as this is not

[2] Already the Waste Act included similar provisions concerning contaminated soil as the present Environmental Protection Act. Hence, the present legislation instead of the repealed sections in the original Waste Act can be applied without any problems of retroactivity.

[3] See also the ban on groundwater pollution (sec. 8).

> manifestly unreasonable. The holder of the area is also responsible, on the same preconditions, for treating groundwater if the pollution has arisen from pollution of the soil in the area.
>
> In so far as the holder of the polluted area cannot be required to treat polluted soil, the local authority shall establish the need for and carry out soil treatment.

The procedure is based on the Environmental Protection Act. The restoration is subject to an environmental permit, or in certain cases, a notification (section 78 of the Environmental Protection Act). If the operator does not voluntarily apply for a permit (or notify) to restore, the supervisory authority may order the liable party to rectify the violation or negligence. The order may be intensified by using administrative force, i.e. injunctive measures, typically a threat of a (conditional) fine (sections 79, 84 and 88 of the Act).[4] Before an order to restore a site is issued, the party responsible for treatment can be obliged to investigate the site, which is manifestly polluted (section 77 of the Act). The authority responsible for permitting and supervising the restrotration of polluted soil is the Regional Environment Centre.

In some cases disputes about the duty to investigate and restore polluted soil have arisen. A typical case is that one operator has stored large quantities of gasoil on a real estate and later another company has acquired the site and lead some activity not so hazardous to the soil. The duty to investigate and restore must in situations like these be assessed case by case, taking into account of expert opinions, the nature of the activities, the respective time frames of holding the site etc. etc. One example is case SAC 2005:52. A company had acquired a lease on a real estate, where the previous holder – now bankcrupt – had stored 100 cubic metres of waste oil. The

[4] The complicated system is manifested in situations where the party responsible for restoration notifies the authority, but does not voluntarily rehabilitate the site in such a manner as the authority would deem necessary, or acquires a pemit or approval of the notification, but does not even intend to use the permit (i.e. neglects the ”right” to restore the site issued in the permit!). In case SAC 2.6.2006 nr. 1434 the relationships between permit/notification system and using of administrative injunctions to force the operator to restrore the site were clarified. The main rule is that the responsible operator may, in the first place, apply for a permit/notify the authority, and propose how and to what extent the site would be rehabilitated. Obviously, the permit/approval of notification may still be attached by provisions, according to which the operator is also obliged to utilise the permit/approval. Similarly, also provisions going further than the applicant wishes can be included in the permit or the decision to approve the notification.

containers were partly clearly visible, and in the agreement the company had declared that it is responsible for restoring the area and that the state of the real estate had affected the sum paid for the lease. The municipal Board had been entitled to order the leaseholder as a waste holder to restore the site. Sometimes the responsibility for costs can be shared according to the estimated liability of the respective real estate holders. It is up to the Regional Environment Centre in the first place to decide, to what extent every individual operator is responsible for investigating the polluted site and, afterwards, restoring the pollution (see SAC 2005:11).

Expert opinions by authorities and also privately initiated (paid!) opinions of professors etc. acquired by the parties are typically included in the files of the case. The (administrative) Court considers on the basis of all relevant documents, who is responsible for investigating, and later, restoring the site. The Court may also *ex officio* acquire additional reports to solve the case or ask a party to supply any missing documents; naturally, the parties shall be heard about the additional material. The system of *amicus curiae* does not exist in Finland.

The competence of an administrative Court is wide. The Court may, besides annulling a permit decision, attach new provisions to the permit or amend or revoke provisions set by the permit authority. However, the Court may not act as a permit authority. If the authority has rejected the permit application, a Court cannot grant the permit – in this case the negative decision will be repealed and the case remanded back to the competent administrative authority. Nevertheless, minor adjustments are made on a daily basis. One explanation may be found in the next passage.

One peculiar feature in the Finnish administrative Courts when applying the Environmental Protection Act may be pointed out. At the SAC, two (part-time) expert judges having training in technology or natural sciences sit on the bench side by side with the five ordinary judges who have training in law (one of our present

judges, by chance, holds a degree also in limnology). Vaasa Administrative Court, which is the only competent administrative Court in cases concerning the Environmental Protection Act, has permanent judges with technical and scientific training. In these cases, no specific rules of evidence are applied. Even if these expert judges may not be aware of all types of different activities, they tend to have a sound "scientific literacy". They can assess, often much more reliably than their lawyer colleagues, which are the weak points in reports concerning different environmental impacts and which documents are valid enough to form the basis to solve the case.

In the case law of the SAC, however, the cases based on the present legislation have been a minority as compared to the old sins.

If the polluting activity has *ceased before 1 January 1994*, the public law liability can be based only on interpretation of the repealed Waste Management Act (1978) or, in some cases, the Water Act (1961). The variation of different situations is so great that it is out of the frame of this presentation to descibe them thoroughly. Sometimes the liability of the polluter can be based on the ban on littering. One paradigm case is SAC 2006:30:

> A sawmill had been operated for years before the Waste Management Act had enetered into force. The company claimed that the ban on littering in the said Act could not be applied to polluting of soil with liquids, such as chlorfenols used to protect timber, before the provision concerning the ban on littering was widened in 1987. After 1987, no such chemicals were used in the sawmill, the operator insisted. The SAC held, however, that already before the amendment of the Act, the ban on littering had (in the absence of proper legislation concerning soil pollution) had a very wide interpretation. Taking into account that the same industrial activity was still in operation on the same sites and that the use of chlorfenols had continued after the Waste Management Act had entered into force, the SAC considered that the Regional Environment Centre was in principle entitled to give orders concerning rehabilitation of soil pollution, even if chlorfenols had not been used after the 1987 amendment.

If the soil polluting activity has completely ceased before 1 January 1979 (the day of entering into force of the Waste Management Act), it is not easy to find any responsible party to restore the site. Even if the company or its successor would exist, it cannot normally be obliged to treat the property on the basis of the ban on littering (see SAC 12.6.2001 nr. 1414). In some cases one instrument found in the repealed Waste Management Act can still have relevance according to case law. If the holder of the property had been obliged to submit a property waste management plan for approval, the property holder may in some cases be ordered to restore the site. Obviously, this cannot be the case if a house owner has acquired his residential estate in good faith.

Even if the instruments of the Waste Management Act can sometimes be used as bases of an obligation to restore the site, the procedure is always based on the present Environmental Protection Act. However, it has not been politically realistic to settle the substantive liability for historic soil pollution even if the new set of legislation has been passed. The rehabilitation of old sins has remained to be based on the ancient stipulations of law, enacted at a time when soil pollution was not yet understood to be a major problem.

Certain projects and programmes have been launched to assist the rehabilitation of polluted soils (e.g. state waste management works and the so called SOILI programme for polluted sites of gasoline stations).

To my knowledge, no such cases exist, where the supervising authority explicitly would have been considered responsible for neglecting its supervisory task. In principle, an authority (or more correctly: the State or a municipality) might be liable to compensate a damage caused by negligence in exercising supervisory powers according to the private law (the Damages Act). These cases are dealt by Ordinary

Courts, not Administrative Courts, but they have not been frequent. Sometimes a municipality as the holder of land use planning powers has been claimed to be liable for damage, when a polluted site has been zoned e.g. for residential area without investigating properly the quality of the soil. In practice, in some cases the municipality and the previous holder (e.g. an industrial company) have voluntarily shared the cost of restoring the soil, and hence, the present property owners, have been able to continue living in the area.