

Environment Newsletter - Winter 2014

In this edition, we take a comparative look at three environmental law questions across 10 jurisdictions:

- Do companies have to report information to the regulators and the public about environmental incidents (such as water pollution and soil contamination)? (*see page 1*)
- Do companies have to carry out environmental auditing or report information about environmental performance? (*see page 3*)
- Do regulators keep public registers of environmental information? (*see page 7*)

These questions and answers are extracted from a series of Q&A articles put together on a wide range of environmental law topics by Clifford Chance Environment lawyers in Australia, Belgium, Czech Republic, France, Germany, Italy, the Netherlands, Poland, Spain and the UK (England & Wales). They were first published by Practical Law Environment.

Question 1 - Do companies have to report information to the regulators and the public about environmental incidents (such as water pollution and soil contamination)?

Australia

The reporting requirements vary between jurisdictions in Australia. Generally, all unlicensed or emergency discharges to the environment must be reported as soon as possible to the regulator. In Western Australia, an owner or occupier of a contaminated site or a person who knows, or suspects, that he has caused, or contributed to, the contamination of that site, must report to the Department of Environmental Regulation (Contaminated Sites Act 2003).

Belgium

In all three regions, companies must report environmental incidents to the relevant authorities. Also, operators of environmental permits requiring installations must take all necessary measures to prevent accidents, damage or nuisance. If an accident occurs they must take all measures to limit the effects to the environment and public health as much as possible. This includes an obligation to report environmental incidents or important environmental risks to the authorities.

Czech Republic

There is no obligation on private entities to inform the public about environmental incidents. However, private entities are required to report environmental damage caused by them as operator of a facility under the Environmental Liability Directive. However, the Environmental Information Act places a relatively wide range of information duties on the authorities in relation to environmental matters and the public can therefore easily gain access to information about environmental incidents.

France

Under the environmental liability regime, if environmental damage occurs, the operator (public or private person having a professional economic activity) must inform the relevant authority without delay.

More specifically, the operator of a classified facility must notify, without delay, any incident or accident that can affect the environment or public health.

An incident or accident report is then sent by the operator to the classified facilities inspectorate. This report must comprise both the:

- Circumstances, causes and effects of the incident on the public and the environment.
- Measures taken or planned to avoid similar accidents or incidents.

Germany

There is no general obligation to notify the competent environmental authorities that an environmental incident has occurred, unless the facility is subject to the Seveso II Directive. Many federal states require reporting of soil contamination. However, obligations are usually incorporated in the relevant Emission Control Act permit to notify the environmental authorities of an incident. If the incident caused death, major injury or disease, the relevant workers' protection organisations (*Berufsgenossenschaftler*) must also be notified.

The Emission Control Act provides that an applicant for a new or modified permit for a plant that is subject to the Industrial Emission Directive and will be handling hazardous substances, must provide a report on the pre-existing condition of the site in relation to soil and ground water contamination.

Italy

It is obligatory to report knowledge of contaminated sites to the public authority.

In addition, information about all other types of environmental incidents causing harm to the environment must immediately be reported by the responsible entity to the municipality, province, region and the Ministry of Environment and Protection of Land and Sea.

The Netherlands

Generally, the conditions of an environmental permit require the holder to notify the competent authority if an environmental incident occurs. Notification of incidents that cause soil or surface or groundwater contamination is also required under the Act for Soil Protection and the Water Act 2009.

Poland

Companies must report information to the regulators and the public about environmental incidents involving water pollution and soil contamination. This obligation results from the Environmental Protection Act 2001, Waste Act 2012 and the Act on Preventing and Remedying Damage to the Environment 2007.

Spain

The owners of facilities must immediately inform the competent authority of any incident or accident that may affect the environment, and provide the necessary assistance and co-operation to those who perform monitoring, inspection and control functions.

Failure to inform the competent authority of any incident or accident, and the prevention, delay, or obstruction of inspection or monitoring are considered serious breaches of the law, and parties may be liable to:

- A fine ranging from EUR20,001 to EUR200,000.
- Temporary closure of the premises for a maximum of two years.
- Withdrawal of the authorisation for a maximum of one year.

Companies are not required to inform the public. However, where there is an imminent threat to human health or the environment caused by human activities or natural causes, public authorities must immediately and without delay communicate all information to the public.

UK (England and Wales)

Operators must (*sections 13, 14 and 32, Environmental Damage (Prevention and Remediation) Regulations 2009*):

- Notify the relevant regulator of imminent threats of environmental damage.
- Notify the relevant regulator of an activity that has caused environmental damage.
- Provide information to regulators on request, to enable them to perform their duties.

In addition, there is an obligation to notify dangerous incidents. The Health and Safety Executive must be notified of an incident if it caused, or could have caused, death, major injury or disease (*Reporting of Injuries, Diseases and Dangerous Occurrences Regulations (1995)*). Early reporting and full co-operation with the relevant authorities may result in a lower enforcement response.

Question 2 - Do companies have to carry out environmental auditing or report information about environmental performance?

Australia

Environmental auditing

There are specific requirements in each jurisdiction for companies to carry out environmental auditing and public reporting about environmental performance.

Reporting requirements

In Western Australia, environment licences often include conditions requiring annual audits and reports, as well as requirements to report compliance with environmental standards and conditions to the Department of Environmental Regulation. Environmental licences generally contain a reporting requirement, particularly in the event of non-compliance

with the conditions of the environmental licence or the relevant legislation. Resource tenures also include specific environmental conditions such as environmental management plans and reporting obligations.

Companies that meet the threshold must report their greenhouse gas emissions, energy production and energy consumption (*National Greenhouse and Energy Reporting Act 2007*).

It is compulsory under Commonwealth legislation that all businesses report their emissions of certain substances to air and water, and the transfers of those substances in waste annually to the National Pollutant Inventory (NPI) provided they exceed reporting thresholds. The data is assessed and published on the NPI website (www.npi.gov.au).

Publicly listed corporations have reporting requirements pursuant to Stock Exchange Listing Rules and good governance rules.

Belgium

Environmental auditing

There is no general obligation to carry out environmental audits.

Reporting requirements

In all three regions, it is common for environmental permits to provide for control requirements, such as periodical emission measurements, and to provide for an obligation to report on these requirements to the authorities.

In the Flemish Region, operators of certain activities that require permits must provide an annual report (*milieujaarverslag*) regarding their environmental performance. This obligation is mainly limited to important or potentially polluting industrial activities.

Also, in the Flemish Region, operators of certain potentially polluting activities must perform periodical soil surveys, that is, every ten or 20 years, depending on the type of activity. They must provide the Flemish waste agency (OVAM) with the results of those surveys.

Czech Republic

Environmental auditing

Although there is no legal obligation to this effect, environmental auditing is common among companies adhering voluntarily to environmental quality standards and ethical codes, or internal corporate responsibility policies.

Reporting requirements

Publicly listed companies must report matters that may have an impact on their financial situations and business activities, which includes actual or potential environmental liabilities. Otherwise, there is no generally applicable legal obligation relating specifically to public disclosure of information.

France

Environmental auditing

Environmental auditing is not compulsory. However, many companies carry out an environmental audit (either internally or through external consultants), to satisfy demands of shareholders, customers and other stakeholders.

Reporting requirements

In accordance with the requirements of their environmental permit, operators must perform periodical analyses of air, water and noise emissions, and soil. These results must be sent to the regulatory authority.

Operators of the highest risk classified facilities must, at each material change in their operating conditions, issue an updated report on soil pollution at the facility. This report is sent to the *Préfet*, the mayor and the owner of the land on which the facility is located.

Germany

Environmental auditing

Environmental auditing is not compulsory. Establishing an environmental management system (*Umweltmanagementsystem*) is voluntary. However, the significance attached to proactive environmental management means that this system is already expected of many companies in Germany. Two types of environmental management systems dominate the market:

- The EC Eco-Audit Ordinance (EMAS), that was recently re-enacted and is implemented by the Environmental Audit Act (*Umweltauditgesetz*).
- The international environmental management systems standard, ISO 14001:1996.

The considerable initial differences between them have now been significantly reduced through EMAS II. Both systems have a common purpose in creating incentives for organisations to voluntarily undertake continual improvements in their contribution to environmental protection.

Reporting requirements

Environmental permits frequently contain a reporting condition. For example, Emission Control Act permits must contain a condition that emissions are monitored and results provided to the competent authorities. Public reports on environmental performance are only required from the few facilities subject to Directive 96/82/EC on the control of major accident hazards involving dangerous substances (Seveso II Directive) (implemented by the Major Hazard Ordinance (2000) (*Störfallverordnung*)). In addition, reporting can be required under contractual relationships or may be necessary in light of the increasing trend for corporate social responsibility.

Operators of large-scale plants now have reporting obligations in relation to results of emission measurements, non-compliance with permit requirements and pollution incidents (unless such reporting is required under other legal provisions such as the Major Hazard Ordinance) (*section 31 Emission Control Act*).

The implementation of Directive 2003/51/EC on the annual and consolidated accounts of certain types of companies, banks and other financial institutions and insurance undertakings (Accounts Modernisation Directive) will require companies to report on environmental performance in a business review. To date, the directive has not been implemented into German law.

Italy

Environmental auditing

Environmental auditing is not compulsory. However, environmental auditing through the international environmental management systems standard ISO 14001 and recorded in the EU EMAS system may provide the following advantages:

- Simplifying the renewal process of authorisations (for example, the IPPC permit).
- Reducing the level of bank guarantees required for the disposal of waste.
- Replacing the renewal of authorisations for the operation of a waste plant with a self-certification procedure (under the EMAS system).

Whilst environmental auditing is voluntary, where an EMAS statement is prepared as part of an audit, it must be submitted to the relevant Member State under Regulation EC/2009/1211. All documents submitted to the authority for the issuance of the IPPC permit are available for inspection at the offices of the relevant competent authority.

Reporting requirements

In general, each authorisation contains an obligation to file all information with the public authorities concerning the emissions or discharges from the permitted plant. There are no other compulsory reporting requirements, but voluntary environmental reporting through an audit process may provide certain benefits (*see above, Environmental auditing*).

The Netherlands

Environmental auditing

Under Dutch law, environmental auditing is not compulsory. However, many companies consider it good practice to carry out environmental auditing, such as internal audits or audits carried out by external consultants. Many companies have opted to obtain certification under the international environmental management systems standard (ISO 14001).

Reporting requirements

Environmental permits frequently contain a reporting condition. An environmental permit usually requires emissions to be monitored and the results to be provided to the competent authorities. Aside from this, there are generally no specific requirements for companies to report on environmental performance to the public, although many companies carry out environmental auditing voluntarily (*see above, Environmental auditing*).

Poland

Environmental auditing

If an installation is likely to have a negative impact on the environment, an environmental authority can require an operator to carry out an environmental audit of its existing operation (*EPA*). The documentation from the audit is publicly available.

In privatisation transactions, the State Treasury must carry out an environmental health and safety audit, which forms part of the privatisation assessment by the State Treasury or delegated institutions. These are confidential to the State Treasury and are rarely disclosed.

Voluntary audits are often undertaken for certification under the international environmental management systems standard ISO 14000, or the European Eco- Management and Audit Scheme (EMAS). There is no obligation to provide the regulators with environmental audits conducted voluntarily.

Reporting requirements

Companies must report twice each year on their emissions levels. The data is made publicly available by the authorities. This reporting is connected with the obligation to pay fees for the use of the environment and is an important indication of a company's environmental performance. Various additional reporting requirements may apply under specific environmental protection regimes depending on the pattern of "use of the environment" by the company. This use determines the payment of so-called "Environmental Fees".

Spain

Environmental auditing

Environmental auditing is not compulsory. However, the voluntary EMAS European ecomanagement and eco-audit scheme has been implemented, and companies that join this European scheme obtain a series of benefits. Under this scheme companies must regularly provide environmental information through an Environmental Statement (a public document that is clear and concise and includes reliable, objectively verifiable information on the organisation's environmental performance).

Benefits for leadership and corporate image include:

- Support and improvement of the corporate image.

- Greater credibility and confidence for stakeholders, such as public authorities, the general public, shareholders, employees and other clients.
- Improved relations with the local community because of the public nature of the Environmental Statement.

Certain Autonomous Regions (*Comunidades Autónomas*) have also awarded grants to companies that have joined this scheme.

Reporting requirements

Companies subject to environmental authorisations must submit to inspections of their activities by public authorities and the provision of operational information (including for example, reporting data on emissions from their facilities). They also have obligations, for example in relation to changes to the facilities, which must be notified to the regulators.

Operators producing waste must provide the competent authority with information on the waste generated each year.

UK (England and Wales)

Environmental auditing

Environmental auditing is not compulsory. However, many companies carry out an environmental audit (either internally or through external consultants), to satisfy demands of shareholders, customers and other stakeholders.

Reporting requirements

Environmental permits frequently contain a reporting condition. Reporting can also be required under contractual relationships or be necessary in the light of increasing trends for corporate social responsibility.

Since October 2007, companies (except for some small companies) must prepare a business review in their annual report with information on environmental matters, including the impact of the company's business on the environment (*Companies Act 2006*). For financial years ending on or after 30 September 2013:

- The business review is replaced with a new standalone strategic report.
- Quoted companies have new obligations regarding greenhouse gas emissions in their directors' report.

In principle, aside from any permit requirements, reports of intrusive soil investigations do not have to be reported to the authorities. However, if they identify environmental damage (or an imminent risk of such damage), relevant information may have to be provided to the authorities (*see Question 1*).

Question 3 - Do regulators keep public registers of environmental information?

Australia

Public registers

Each jurisdiction maintains several public registers of environmental information. These are generally maintained by the relevant government department.

In Western Australia, the Department of Environmental Regulation maintains, among others, a contaminated sites register and a register of all current licences and works approvals granted under Part V of the Environmental Protection Act 1986.

The Commonwealth government also maintains public registers, including a native title application register, a register of approvals under the Environmental Protection and Biodiversity Conservation Act 1999 and a register of Indigenous Land Use Agreements.

Third party procedures

Most registers are free to search and are available on the relevant department's website. Some registers can only be searched in person at the relevant department, or on payment of a specified fee.

Belgium

Public registers

Authorities keep registers of all permits issued regarding a certain site and all related correspondence.

Third party procedures

The permits issued can be consulted by every interested party at the local authorities' office. In practice, authorities require a proxy from the property's owner before granting access to this information or before providing any copies of the documents. However, this is not in line with the regulatory framework regarding access to environmental information.

The Brussels and Flemish authorities keep a register listing all contaminated or potentially contaminated land, which can be accessed by any interested party by applying for a soil certificate regarding the relevant land.

Czech Republic

Public registers

The Ministry of the Environment maintains a publicly accessible register of facility operators to whom integrated permits have been granted. There is also a public real estate register, which, among other things, contains information on the classification (purpose) of each plot of land (for example, farm land, industrial land or built-up area). From this information, it can sometimes be inferred indirectly whether there is an increased risk of existing pollution and, in particular, whether there is a risk of so-called "old ecological burdens" (certain historical contamination for which the State or privatised entities or their successors are liable).

Third party procedures

The above register of facilities operating under an integrated permit is publicly accessible on the website of the Ministry of the Environment (www.mzp.cz/en/).

France

Public registers

Environmental information can be accessed from a number of website sources:

- The Ministry of Environment manages several environmental information databases in the "risk prevention/classified facility inspection" section at www.developpement-durable.gouv.fr.
- French registry of polluting emissions (www.pollutionsindustrielles.ecologie.gouv.fr).
- Inventory and summary of industrial accidents that have occurred since 1998 (<http://aria.ecologie.gouv.fr>).
- Basias (<http://basias.brgm.fr>) and Basol (<http://basol.environnement.gouv.fr>) websites contain information about:
 - former industrial sites and/or potential contaminated sites; and
 - list of sites requiring preventive or remediation works.

Third party procedures

Every Direction Régionale de l'Environnement, de l'Aménagement et du Logement (*Regional Department of the Environment, Planning and Housing*) has a website that grants access to:

- General and specific information.
- Permits.
- Environmental reports in relation to various sites.

Germany

Every person has the right to obtain environmental information from the environmental authorities provided an application is filed (*section 3, paragraph 1, Environmental Information Act (Umweltinformationsgesetz)*). It is not necessary for the applicant to have any legal or other interest worthy of protection to apply. Information can only be obtained if it is contained in information carriers such as files, data files, maps, plans, videos, pictures or sound storage mediums.

Public registers

There are no public registers aimed at comprehensively collecting environmental permits and/or contamination relating to a property.

Mid-level authorities operate contaminated land registers. However, these collect only the data the soil protection authorities have become aware of. A "clean" result of an enquiry to the contaminated land register therefore means that there is no information known to the authorities, it does not mean that the property is not contaminated.

Third party procedures

There is no comprehensive registers of third party procedures.

Italy

Public registers

In general, each competent authority holds public registers recording the emissions of plants subject to IPPC permits.

In addition:

- The National Agency for the Protection of the Environment and the Technical Services (APAT) keeps the register of waste, which is publically available.
- Each region holds a specific list of areas where clean-up works have occurred and this list must be reflected in the town plan issued by each municipality.

Third party procedures

In general, the relevant registers are available for inspection by any interested party.

In particular, environmental information held by each regulatory authority must be available to the public for viewing in their offices.

Article 5 of Legislative Decree No. 195/2005 specifies the circumstances under which information is not available to the public and includes circumstances where the information relates to trade secrets or confidential industrial information, tax forms, IP rights or personal data.

The Netherlands

Public registers

Companies must submit annual environmental reports to the authority that granted the environmental permit and the Ministry of Infrastructure and Environment, if the threshold value of a substance from the substances list of the Pollutant Release and Transfer Register (PRTR) Regulation is exceeded (*PRTR-regulation and Title 12.3 Wet milieubeheer*) (the implementation in The Netherlands of Regulation (EC) No. 166/2006 concerning the establishment of a European Pollutant Release and Transfer Register).

The report must contain information on:

- The amounts of pollutant released to the air, water and land.
- Off-site transfers of waste and of pollutants in waste water including heavy metals, pesticides, greenhouse gases and dioxins.
- Energy efficiency.
- Fine dust.

In the case of oil, gas and intensive livestock companies more details are required.

Under the PRTR-reports, the national government checks compliance with international agreements and where a company exceeds the rules an environmental permit may be changed or withheld. Companies and local authorities must report and review their emission details in electronic form (www.e-mjv.nl). Specific rules are set out in the Environmental Reporting Guidelines (*Leidraad Milieurapportages*).

After registration, all relevant public information on the reports is available online (www.emissieregistratie.nl).

Compulsory information required by the European PRTR-regulation is publicised in the European PRTR-registration. A company must report data under European PRTR if it fulfils the following criteria:

- The company falls under at least one of the 65 European PRTR economic activities. These activities are also reported using a statistical classification (NACE rev2).
- The company has a capacity exceeding at least one of the European PRTR capacity thresholds.
- The company releases pollutants or transfers waste off-site which exceeds specific thresholds set out in Article 5 of the European PRTR-regulation. These release thresholds are specified for each media (air, water and land) in Annex II of the European PRTR-regulation.

Soil contamination

It is mandatory to register soil contamination in the Land Registry under the Immovable Property (Disclosure of Restrictions under Public Law) Act (*Wet kenbaarheid publiekrechtelijke beperkingen*) (Article 55, ASP). These details are accessible to the public.

Environmental permits

Environmental permits may require operators to report environmental details to the authorities. The environmental permits and required reports are publicly available from the competent authority that issues the permits. An overview (including a map, diagram and table) of all contaminated properties is publicly available in all provinces.

Poland

Public registers

As required by EU law, environmental information, such as environmental permits or data on contaminated land, is publicly available in Poland, with very limited exceptions.

Third party procedures

Public authorities must provide access to environmental information without undue delay. Access is free of charge, however, research and copying, of documents by public authorities is chargeable. The rejection of an application for access to environmental information must be issued in the form of a decision, which can be appealed.

Spain

Public registers

Public authorities must keep public registers of environmental information, such as pending authorisation procedures, declared contaminated land, and so on. These registers can be inspected by any member of the public. More generally, public authorities must take the necessary steps to ensure that environmental information progressively becomes available in electronic databases that are easily accessible to the public (including by easy access online). Most of the Autonomous Regions (*Comunidades Autónomas*) publish the grant of environmental authorisations or other relevant environmental documents on their websites.

Third party procedures

Anyone can request environmental information from the relevant public authorities, without the need to prove an interest. The public authority will provide the requested information within one month, unless any of the exceptional circumstances apply that allow the public authority to refuse the request. These include when the provision of such information may negatively affect international relationships, national defence, public security, confidentiality of commercial or industrial data, or confidentiality of personal data.

UK (England and Wales)

Public registers

The Environment Agency/National Resources Wales and local authorities must keep public registers of environmental information (that is, details of permits issued under the environmental permitting regime and of contaminated land). These registers are available for inspection by any member of the public.

Some companies specialise in investigating these registers, as well as other publicly available information, such as historical maps. These investigations are called desktop assessments and are relatively inexpensive. If potential concerns are revealed, more detailed environmental assessments can be undertaken, which contain a more thorough analysis of the potential for liabilities to arise.

Third party procedures

The public can request environmental information from public authorities and bodies carrying out a public function (such as utility companies), subject to various exceptions, including commercial confidentiality (*Environmental Information Regulations 2004*). As a result, local authorities are under increasing pressure to make environmental information available whether or not contained on formal registers.

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