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Environmental law faces major change

The EU's new emissions directive involves changes to Swedish law. The changes will have wide-ranging consequences for Swedish industry. Erica Nobel and AnnaMalin Petré report on the starting point for Swedish implementation.

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A fundament of Swedish environmental law is that a permit to carry on environmentally hazardous activities under Chapter 24, Section 1 of the Environmental Code applies to everyone. The provisions give expression to the so-called legal validity of the permit. Legal validity means that everyone who was able to bring action to the court will be bound by the permit. The legal validity thus also encompasses those parties that did not participate in the permit proceedings but for whom it was possible to do so. Legal validity covers the matters that have been tried in the case. A permit for an environmentally hazardous activity often contains "general terms and conditions", the permit therefore covers the circumstances set forth in the application and delimitation of the legal validity can therefore be problematic. It is clear, however, that the permit imposes not only a responsibility for the business operator to carry on activities in accordance with the terms and conditions of the permit. It also conveys a right and a protection for the business operator. Today, it is rare that a permit is reassessed or that the terms of the permit are amended or revoked. The European Union has recently passed a new directive, the Industrial Emissions Directive (IED). The Directive provides considerably greater opportunities for continual reassessment of permits and terms than is afforded under current Swedish legislation. The continual reassessment is to apply both to new and existing permits for environmentally hazardous activities. The IED is to replace the old IPPC directive and a number of other environmental directives in order to coordinate measures to limit and prevent pollution. The new directive means that the BREF documents, which state and identify the best available technology, will acquire greater significance than they have today. The conclusions in the documents are called BAT (Best Available Technique) conclusions. The BREF documents are to be updated every eighth year and BAT conclusions will provide the foundation for determination of the new terms of the environmental permit to guarantee that the best available technology is used in the activities which are carried on in Europe. This means that permits for environmentally hazardous activities, pursuant to Article 21 of IED, in the EU are to be reassessed every eighth year. The Directive is estimated to affect 52 000 businesses.

The system for regular reconsideration of the permit requires considerable resources to be made available by public authorities. When the IED is to be transposed into Swedish law, there must be a system which will make possible the frequency of reconsideration which the Directive requires. Reconsideration of the terms and conditions and the permit namely comprises existing activities i.e. activities which received a permit to carry on environmentally hazardous activities before the Directive came into force. In addition to this, the IED contains new rules for contamination to soil and groundwater, which are substantially further reaching than the previous IPPC directive's rules concerning contamination. The new provisions mean

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that each permit must include provisions on regular inspection of the soil and groundwater in the question of hazardous material which can be found on the site and lead to contamination within the area of the installation. Where activities can lead to contamination, the business operator must submit a baseline report before the installation is taken into production or a permit is updated for the first time after the effective date of the directive. Thus, these rules apply to both new and existing activities. When an activity has ceased, the business operator must assess the situation in terms of contamination and whether the installation has caused significant environmental damage compared with the situation in the baseline report. The business operator is then responsible for restoring the quality of soil and groundwater in such a manner as is described in the baseline report. The responsibility to remedy contamination is to be determined under current Swedish law by application of the test of reasonableness set out in Chapter 10, Section 4 of the Environmental Code. The test of reasonableness may involve taking into consideration, whether the activity was carried on in accordance with the rules applicable at that time; the period which has elapsed since the contamination occurred; the opportunities the person responsible had to prevent the future effect of damage; and circumstances otherwise. The IED provides no opportunities for such a test of reasonableness, which is a fundamental difference from the current rules in Chapter 10 of the Environmental Code. The Directive does not, however, regulate contamination which occurred before the Directive came into force.

How the rules concerning reconsideration of permits and changes to the rules on remedial liability in Chapter 10 of the Environmental Code are to be transposed into Swedish law remains to be seen. The commission is to be presented to the Ministry of the Environment on 31 December 2011. However one thing is clear, Swedish environmental law faces major change and there is good reason for companies holding permits for environmentally hazardous activities to take note at this stage of the BREF documents which may concern their business areas and thus impact on their future permits.

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