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*The role of technical judges in Finnish administrative courts*

*Finnish environmental jurisdiction*

Emissions into the environment are regulated through the Environment Protection Act<sup>1</sup> and water construction and use through the Water Rights Act<sup>2</sup>. In both fields, numerous other pieces of legislation are to be observed, i.a. rules for nature conservation (NCA<sup>3</sup>) and for Environmental Impact Assessment<sup>4</sup> as well as legislation pertaining to the Water Rights Framework Directive<sup>5</sup>

*Permits* for operations affecting the environment are issued by administrative authorities, either municipal or regional state authorities. In the permit, conditions for operation, including emission limit values, are specified. Appeals against any decision by the administrative authorities are considered administrative matters and are, therefore, resolved by administrative courts. Appeals against permit decisions under the EPA or WRA are lodged with the administrative court in Vaasa, which serves as a national environmental court. In an administrative case, parties affected by the environmental impact of operation under the permit have legal standing. Upon appeal, the Court reviews the case and may revise the permit decision as such or change the provisions of the permit.

Operations in *breach of permit provisions* or of the law itself can be arrested by an intermediary order of the regional environmental authority or by an order of the regional permit agency. Coercive measures may include ceasing operation or remedying the damage done. Parties may appeal against the order for coercive measures to the Vaasa administrative court. Upon appeal, the Court reviews the order and may issue a temporary order for parties to comply with the original order until appeals are resolved.

In permit and breach cases, parties may appeal against the decision of the Vaasa Administrative Court (VAC) to the Supreme Administrative Court (SAC), provided the SAC admits the appeal. When the SAC hears a case, the Court may review the decision of the VAC as such or change provisions of the decision.

In environmental cases, the VAC bench consists of two jurist judges, one of them the chair, and one technical judge. As the case may be, the chamber may be extended<sup>6</sup> by additional jurist and technical judges. Cases are prepared for hearing by a jurist referendary, with technical judges assisting in their field of expertise. The SAC hears environmental cases in a bench of three jurist judges, of which one is the chair, and one or two technical judges. The case is prepared for hearing by a jurist referendary.

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1 Finnish Environment Protection Act 27.6.2014/527

2 Finnish Water Rights Act 27.5.2011/587

3 Finnish Nature Conservation Act 22.12.1996/1096

4 Finnish EIA Act, 5.5.2017/252

5 Water body and Marine Area Management Act 30.12.2014/1299

6 Finnish Administrative Courts Act 26.3.1999/430, Section 12 (amended 21.7.2006/675)

Criminal proceedings against operations in breach of permit provisions or of the law are brought before the general courts. Upon hearing, the court resolves whether requirements for environmental crime are fulfilled and may order a penalty (personal fine, company fine or, very rarely, imprisonment). Environmental crime cases are brought before the court by a prosecutor after police investigation and are resolved by the judges of the general court, who may hear technical or scientific witnesses for the respondent or the prosecutor. In crime cases, appeals are made to the Supreme Court.

### *Science and law – the enigma of environmental jurisdiction*

Article 11 of the Industrial Emissions Directive<sup>7</sup> on "General principles governing the basic obligations of the operator" states that Member States shall take the necessary measures to provide that installations are operated, among other requirements, so that no significant pollution is caused. The definition in Article 3 of the Directive tells us that 'pollution' means the direct or indirect introduction, as a result of human activity, of substances, vibrations, heat or noise into air, water or land which may be harmful to human health or the quality of the environment, result in damage to material property, or impair or interfere with amenities and other legitimate uses of the environment. The threshold of "significant pollution" is not defined.

Environmental law is at the crossroads between law and science with a well-trod side path to environmental politics. The notion of "significant pollution" or "significant adverse effects to the environment" is at the heart of national and EU environmental legislation, although efforts have been made to translate this into binding emission limits or, into environmental quality threshold values. Considering whether or not a permit may be granted for an activity or a construction, the authority or Court must decide how much pollution of the environment is acceptable. It is obvious that any industrial activity will cause emissions that change the environment to the worse. Up to a certain level, impact is tolerated. This level cannot be ascertained within the legal framework alone, nor, for that matter, by scientific study alone. Significant pollution is a political term.

The scientist may confirm that, given a certain impact on the environment, there will be changes in some aspect of the ecosystem. The scientist may, given the appropriate resources, describe the change as, e.g., an increase in phosphorous content of surface water from 18 to 22 ug/l and estimate that this will lead to a chain of events from increased algal biomass to increased sedimentation onto the sea or lake bottom, decreased oxygen content and increased leaching of phosphorous from bottom sediment into the water, leading to aggravated eutrophication affecting higher plant vegetation, fish fauna and bird life. The scientist may offer his opinion on the graveness of the change, but deciding whether the change is "significant" in the legal sense lies outside his field.

Once the scientist has come thus far, the matter of "significance" is to be resolved by legal means. "Significant pollution" is what society considers significant. The meaning of the term changes over time, but, with the aid of available legal instruments, the Court will interpret the term into a legal decision allowing or arresting certain operations.

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<sup>7</sup> Directive 2010/75/EU on industrial emissions

## *Scientific lawyers or legal scientists?*

The question about technical judges is about how scientific (non-legal) knowledge is introduced into the legal decision process. There are two ways: expert opinions submitted to the Court or experts seated in the Court.

In Finland and Sweden, science is brought into Court by technical judges on the bench who participate in the preparation, resolution and wording of the case. This eliminates the difficulty of translation from scientific language into legalese, as technical judges soon learn both. It also causes interesting meetings between cultures. The drawback of expert opinions is that you must be an expert to understand what the expert says and, especially, what he chooses not to say. The drawback of experts is that, usually, they are not legally trained and have difficulties in understanding the processual restraints on a case.

In the VAC, technical judges are full-time judges, equal with the jurist judges, and they participate in all stages of the hearing and preparation of the case. At present, there are about 30 judges with the Court, of which nine are technical judges. Their specialist fields include water construction engineering (3), biology or ecology (4), chemistry (1), and geology (1). In the SAC, the technical judges work part-time and are assigned certain cases where their expertise is deemed necessary.

Training of both law students and science students is central. In Finnish universities, a course in environmental law is obligatory for the Master's degree in Law. In view of the vast and complex field of environmental law, this is not much. After graduating and after an obligatory period of general court training, the young Master of Law may take up a position as refendary preparing environmental cases for hearing. Law students are trained to have a firm opinion on any legal question arising but are not, generally, trained in science nor specifically in environmental law. Students of biology and other scientific disciplines are not trained in environmental law. Instead, they are trained to say "It is too early to say, we need more measurements", which is the essence of the scientific method. In practice, however, technical judges are recruited from the environmental administration, where they learn environmental law by trial and error.

Jurists and scientists alike fail to realize how different their culture and language are and tend to overlook the knowledge offered by members of the other group, as it is not worded in their own idiom. This is not a question of words only, but of different ways of thinking. Nonscientists often find it hard to accept that scientific knowledge, essentially, is uncertain: based on present knowledge and the data at hand the scientist predicts that things go a certain way with a probability of, say, 70 or 95%. The jurist, on the other hand, likes to say that, by section 82b of the Act and with reference to the judgement of the Court in 1985, the question shall be resolved as follows.

The meeting between cultures may result in open-mouthed wonder – that person cannot be serious? - or in new insights. The difficulty is not easily overcome, as it is deeply rooted in training and scientific tradition. In my experience, the meeting of jurists and scientists in the Court chamber is fruitful. As an example, I offer you a pollution case where my learned jurist colleague voted against me on emission limits. I thought no significant pollution would follow from the 1<sup>st</sup> instance

decision and he thought it would. On the other hand, in the same case, I voted against him on a question of standing, where he thought a certain party did not have standing and I thought that party did. I cannot say whether that case was solved in the best possible way but I do know that the discussion did improve both of us.