ARTICLE
ENVIRONMENTAL LAW

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Rehabilitation of polluted sites and soils: liabilities are becoming clearer

Whereas urban land is becoming rarer and dearer, industrial wasteland conversion operations are continually increasing, through public and private initiatives (the State, local authorities, real-estate operators).

Regarding such operations which imply heavy investments, it is important to clearly define the liabilities of each of the players involved in the rehabilitation of polluted sites and soils: former industrial operator, owner, developer…

The legal framework is not that simple as several public authorities are likely to play a part: the prefect, in accordance with the policy on facilities classified for environmental protection ("installations classées pour la protection de l'environnement", hereafter ICPE); the mayor, in accordance with the waste or town planning policy. On the land, the situations also vary a lot: waste on the surface and/or polluted soils; the last industrial operator, whether known or not, or whether solvent or not; the owner, more or less implicated in the pollution; "orphan" sites, etc.

With regard to the similitude of the recent decisions handed down by the Conseil d'Etat (French Council of State) and the Cour de cassation (French Supreme Court), it is possible to establish a typology of the liabilities according to the situations. This is where we notice that the polluter-payer principle constitutes the main thread.

First, we will speak of the classical case of an operator who definitively puts an end to its industrial activities **(1)**. Then, we will see in what cases people other than the last operator are required by the public authorities to fulfill obligations, and which ones **(2)**.

1. In the event of the closing down of an industrial site: the operator's liability

The rule is simple: when an ICPE is definitively closed down, the rehabilitation cost lies with the **last operator** or, if the latter has passed away, with its **assign**, throughout the duration of the common law prescription: thirty years . The operator naturally refers to the holder of the authorization to operate and not to shareholders of the company holding such authorization.

The rehabilitation aims at preventing all environmental risks, whether they are related to waste or to the polluted soil. The required level of decontamination depends on the future use of the site, determined jointly with the mayor (or the president of the combined district councils) and, if it is not the operator, with the land owner. If an agreement fails to be reached, the decontamination is calibrated on the basis of a use which is comparable with the last industrial use. However, if such use is incompatible with the land planning documents in force, the prefect may require the last operator to carry out more restrictive rehabilitation measures.

These rules apply for the ICPE subject to authorization or recording ("enregistrement"). By way of exception, for the facilities subject to declaration (those that pollute the less), the only reference chosen is the use that is comparable with the last industrial use.
In the event of default, the administration can stand in, as of right and at its expense, for the debtor of the obligation.
In the event of the last operator's insolvency, its **parent company** is likely to be sought, but under very special conditions: a judicial insolvency procedure must be initiated against the latter and it must be proven that the parent company committed "gross negligence" ("faute caractérisée") contributing to the subsidiary's asset insufficiency.

In the event of subsequent change to the distribution of the lands, any additional decontamination measures lie with the person who was at the origin thereof (owner, developer, public authority, etc.).

Lastly, when the polluted site never contained a classified facility, which is frequent, the public authorities are relatively destitute. In addition to the waste policy (see below), the mayor can invoke its powers as regards town planning: it can grant the requested building permit by means of special prescriptions aiming at reducing sanitary risks for future occupants . But such framework can remain precarious and poorly adapted to complex situations.

2. In the event of waste abandonment on the site: the waste producer or holder's liability

Alongside the competent prefect as regards classified facilities, the mayor is competent as regards waste policy. A such, it can serve a formal notice on the waste producer or holder to evacuate and see to it that such waste has been disposed or upcycled under conditions that are environmentally friendly . Failing that, the mayor can stand in for the debtor of the obligation, as of right and at its expense.

The question here is to know (i) who can be targeted through said policy powers (former operator, owner, developer?) and (ii) what can be targeted (movable waste, polluted soil?).

(i) Who is the waste producer or holder?

According to Article L. 541-1-1 of the French Environment Code, the waste producer is the person who produces or treats waste; the waste holder as for him is defined as the “the producer of the waste or any other person who is in possession of the waste”.
The operator of an ICPE may therefore be qualified as a waste producer, as can be the former operator . However, the former holder who does not have the capacity of producer cannot be sought by the mayor as such former holder is no longer in possession of the waste . The latter’s civil liability may however be incurred if it has contributed to the damage caused .
Due to the power of control that it exercises over the land and its waste, the promoter, the public or private developer, or the occupant of a piece of land is likely to be regarded as the holder of such waste and, in that capacity, required to dispose of it .
Lastly, the owner, in that sole capacity, may be sought as the holder, but subsidiarily only. For the Council of State, “the owner of the land on which the waste was stored may, in the absence of a known holder of such waste, be considered as the holder within the meaning of Article L.541-2 of the French Environment Code, namely if such owner disregards waste abandonment on the land”.

In these cases, as the last operator was known (but not necessarily solvent), the mayor could not serve a formal notice on the non-negligent owner. Such additional condition related to the owner’s negligence must be underlined, even if the use of the term "namely" raises a slight legal doubt as to the motives which could justify the owner’s liability.

The Cour de cassation’s position seems similar: “in the absence of any other liable person, the owner of a piece of land where the waste was stored is, in that capacity only, the holder thereof within the meaning of Article L.541-1 et seq. of the Environment Code (…) unless such owner proves that it is unconcerned by the abandonment of the waste and did not authorize or facilitate it due to negligence or indulgence”.

The Court however seems to protect the owner less insofar as, given the facts in this case, “the absence of any other liable person” must be understood in absolute terms (absence of known holder as for the Council of State), but also in relative terms (as the holder is known but insolvent, there is no other liable person).

In practice, in doubt as to the solvency of any other holder, it is therefore recommended that the owner of a site on which waste has been abandoned do all that is possible to prove on the one hand that it had absolutely no control over the land in general and over the waste in particular, and that on the other hand, it has not been negligent regarding the abandoned waste (it may for example file a complaint against the former operator or serve a summons on the latter and then inform the mayor thereof by specifying that it is has nothing to do with such waste abandonment).

It is not unuseful to also warn the prefect as the latter can intervene on the basis of the waste policy in case the mayor fails to act.
Furthermore, if the waste producer or holder cannot be identified or is insolvent (“orphan” site), the State may entrust waste management and the polluted site rehabilitated to the Environment and Energy Management Agency (“Agence de l’environnement et de la maîtrise de l’énergie”, ADEME).

(ii) Polluted soil is no longer qualified as waste

The scope of the obligation to rehabilitate a polluted site under the waste policy is assessed predictably enough in light of what is and is not waste.

The definition of waste has changed as time has gone by and according to very fluctuating case law . Even though the CJEC or the Conseil d’Etat deemed that the non-excavated polluted soil could be qualified as waste , Directive 2008/98 expressly excluded this. Since December 2010, the French Environment Code provides that “non-excavated soil, including non-excavated polluted soil and buildings permanently bound to the soil” are excluded from legislation relating to waste.

The “rehabilitation of the site” prescribed on the basis of the waste policy can therefore only apply to movable property which has been abandoned on the land (chemical products in barrels, surface tanks, tires, etc.) excluding polluted soils. This is the fundamental difference between the mayor’s powers and that of the prefect.

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