

Soil Protection in French Environmental Law

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In France the absence of a comprehensive soil protection system was in part compensated by public policies issued by the Ministry for Environment and environmental authorities. The effect of these policies was to establish pollution prevention and monitoring criteria as well as public registers for (potentially) polluted industrial sites. The industrial regime (Installations Classées pour la Protection de l'Environnement, 'ICPE') has been a key instrument in the development of soil protection, not only in the context of prevention but also in terms of liability for soil contamination which, in the absence of specific legislation, has relied on other liability regimes. The last fifteen years has also seen a rash of often contradictory case law, in particular concerning the definitions of liable persons and remediation levels. However, these definitions, in particular concerning liable persons, appear to have been settled by recent case law.

I. Overview: the absence of a comprehensive soil protection system in France¹

France, like the EU, does not have a comprehensive soil protection system to tackle the various aspects of soil management such as pollution prevention, liability for soil contamination, definitions for the future use of contaminated land and the level of clean-up.

The absence of a comprehensive soil protection system in France has resulted, since the 1990s, in public authorities forming their own soil protection policies, developing not only management and monitoring tools but also liability guidelines and enforcement actions, without any clear supporting legal framework. At the same time, the largely uncoordinated legislative developments, which often derive from EU law, in various sector specific regulations (for example the industrial, waste, water and mining law regimes) have introduced explicit and/or implicit concurrent and sometimes conflicting legal basis that could be used by public authorities to tackle soil issues.

Over the last 15 years, this incoherent development of a soft law soil protection system has led to (i) the development of recognised soil contamination management tools (e.g. identification of orphan sites, development of pollution registers, development of a risk assessment approach to soil

decontamination), but also (ii) a disastrous set of conflicting court decisions considering the definition of the person liable and the level of remediation, resulting in discrimination, legal uncertainty and (sometimes) unfair decisions.

It was only in late 2004 and 2005 that the liability regime for former industrial sites was eventually settled by the French Administrative Supreme Court (Conseil d'Etat), and the Government put in place a legal framework for a new site closure regime, which included, to a certain extent, a definition of the level of remediation.

Public authorities are currently reviewing their risk assessment methods (which is a part of the soil contamination management tools) and new guidelines are expected to be issued in 2007.

Unfortunately, the implementation in France of Directive 2004/35/EC of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage is not being greeted as an opportunity to clarify the conflicting sector specific regulations nor to prepare a comprehensive soil prevention system.

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¹ This article is intended to provide the reader with an overview of the French law approach to soil protection. The article focuses on the most significant areas of policy, legislation and case law and highlights some of the recent developments in French law. However it is not intended to provide the reader with an exhaustive analysis of soil protection under French law.

II. National strategies and general objectives

The Ministry for Environment initiated its soil contamination and remediation policy in 1993 with a circular addressed to all local environmental authorities (Préfet) setting out the National soil remediation and clean-up policy. This circular was subsequently supplemented by two further circulars issued in 1996 and 1999.

Interestingly, despite the absence of a clear legal framework, this policy has developed by way of internal circulars. Such circulars do not constitute positive law² with the result that they do not generally bind third parties.

This section addresses the main focuses of the French National soil contamination and remediation policy.

1. Prevention of future contamination

In order to prevent future contamination, public authorities have first focused on the development of the French industrial regime³ to address the

potential contamination at its origin, i.e. by regulating and controlling pollution-related activities and installations.

The Ministry for Environment issued a ministerial order on 2 February 1998 which regulates all discharges (to air, water or soil) from existing and new installations/activities subject to prior authorisation obligations under the ICPE Regime and imposes emission value limits and monitoring requirements in addition to those set out in the applicable site specific operating permits. This ministerial order has been continuously updated in order to lower the permitted emission value limits of regulated activities, resulting in increased compliance costs for site operators. In addition, operators of installations/activities listed under Article 65 of this ministerial order must monitor the groundwater at least twice a year. The monitoring programme is based on the findings of an hydrogeological survey.

Further, the recent implementation under French law of the concept of Best Available Techniques, as defined under the IPPC Directive,⁴ has led to the requirement⁵ that site operators must submit on a regular basis an operating review document (bilan de fonctionnement), assessing the efficiency of the site installations/activities and any related environmental impacts.

Since 1996,⁶ the authorities have focused their attention on a selection of installations/activities and required the relevant site operators to perform in-depth site review and risk assessment surveys⁷ in order to allow the authorities to identify contamination and related risks and, if need be, to impose remediation operations.⁸

Since September 2005, all environmental permits issued for new sites subject to the authorisation level under the ICPE Regime must determine ex ante the type of use of the site after site closure (and therefore the level of remediation which would be necessary upon site closure),⁹ even though the date of the site closure is unknown.

In addition, in order to ensure that the site operator maintains sufficient funds to cover any remediation obligations upon closure, Law 2003-669 of 30 July 2003¹⁰ paves the way for extension of the financial guarantee system that at present only covers waste landfill, quarries and Seveso High-level sites.

Under the present financial guarantee system, any operator of waste landfill, quarries and Seveso high-level sites must, under certain conditions, provide a bank guarantee to the environmental author-

2 In French law, administrative circulars are not a source of law in the same way as laws and regulations; they are only directed towards the civil servants, not the general public. Public authorities may not therefore enforce their terms as against the general public (including site operators) and may not use them as the basis for their decisions. Members of the public, on the other hand, may not themselves rely on the contents of such circulars or seek to have them annulled by the courts. Courts, when reaching judgments, may do so only by reference to substantive laws and regulations, and not the contents of circulars. This, at least, is the general rule. However, very limited circumstances do exist where members of the public may seek to enforce the contents of a circular or where a circular may be subject to judicial review.

3 Also referred to as the ICPE Regime; see section III.1 below.

4 Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control (the 'IPPC Directive').

5 See Article 17-2 of Decree 77-1133 and a ministerial order of 29 June 2004.

6 Circular of 3 April 1996.

7 For a description of these surveys, please refer to section II.3 below.

8 It is now accepted that Article L. 512-3 or L. 512-7 of the Environment Code together with Article 18 of Decree 77-1133 provide a legal basis for the authorities' request to perform such surveys. However, the authorities are required to provide justifications to explain the potential risks to the environment and to comply with procedural rules before issuing their request. Several operators have successfully challenged the decisions of the authorities to impose soil surveys and risk assessment surveys, based on the absence of any pre-existing proven risk to the environment.

9 Article L. 512-17 paragraph 4 of the Environment Code.

10 See Article L. 516-2 of the Environment Code.

ities (Préfet) in order to cover remediation costs upon site closure. The effect of the guarantee is that, in the event that the site operator does not perform the remediation operations or becomes insolvent; the Préfet can rely on the guarantee and commission the remediation operations at the operator's costs. The amount of the bank guarantee is determined by reference to a methodology prepared by the Ministry for Environment and must be updated on a regular basis.

The Ministry for Environment is currently preparing regulations that would extend the ambit of the financial guarantee system in order to cover many more installations and activities. In addition, new forms of financial guarantees are under review (such as insurance policies).

2. Public information on contaminated sites

In order to develop public awareness and to identify and keep records of contaminated land in France, the Ministry for Environment has been developing several databases containing information on potentially contaminated sites, including both existing contaminated sites and formerly contaminated sites. The two main pollution registers are Basol and Basias.

a. Basol – the national inventory database for contaminated sites

Initiated in 1993, Basol¹¹ contains information on all contaminated sites identified by the environmental authorities including the interested parties, site location, type of contamination, actions taken by the authorities, the type and techniques of remediation and the remediation status. Any new contamination identified is entered into the Basol database, including those identified from the surveys undertaken by the authorities since 1996 on existing industrial sites (see section II.1 above).

As of August 2005, Basol listed 3,717 sites as contaminated or potentially contaminated.

b. Basias – the national inventory for former industrial sites

Initiated in 1993, Basias is designed to keep track of past industrial activities which information may

then be used in particular in the context of proposed development.¹² It contains information on former industrial and pollution-related sites, gathered from existing archives and regional historic inventories commissioned for that purpose. In addition, since May 2005, sites that are listed under the Basol database and which are subsequently remediated and therefore no longer subject to monitoring requirements, are transferred from Basol to Basias.

As of August 2005, 67 départements (France administrative regions) out of 90 had completed their inventory. The remaining départements are expected to have finished by the end of 2006. Around 350,000 sites were listed in Basias as of August 2005.

3. A risk-based remediation policy

The French authorities have a site-specific pragmatic approach to soil and groundwater contamination. This means that, for each site, a risk assessment (which includes the potential impacts for human beings, water resources and, to a lesser extent, flora and fauna) is performed based on the precise identification of contamination sources, pathways and receptors, and in consideration of the proposed future use of the site. There is therefore no legal or regulatory definition of what is contamination and no legal or regulatory value limits for contaminants in soil or groundwater.¹³

The Ministry of Environment has issued several technical guidelines (without any supporting legal framework) to define this risk-based methodology and provide guidance for site operators and interested parties.¹⁴

11 <http://basol.ecologie.gouv.fr>.

12 Base de données des Anciens Sites Industriels et Activités de Services, <http://basias.brgm.fr>.

13 However, the guidelines from the Ministry for Environment contain indicative-only value limits to be used in the context of the site-specific risk assessment survey (ESR and EDR). These value limits derive either from French studies, studies commissioned in other EU countries or at WHO level. Two types of value limits are used: (i) when the VDSS (Valeur de définition de source sol) is exceeded there exists a potential risk of contamination, and (ii) when the VCI (Valeur de constat d'impact) is exceeded, there exists a risk that the contaminant may impact on human beings, water resources or flora and fauna. In addition, there are two sets of VCI values, one for sensitive use (e.g. housing) and another for non-sensitive use.

14 See in particular the Guide méthodologique: gestion des sites (potentiellement) pollués, BRGM Editions, Version 2, March 2000, as amended in December 2003 and September 2004.

The process generally involves the preparation of the following documents:

- (i) an in-depth site review (diagnostic approfondi) to identify any contamination sources and related environmental impacts;
- (ii) a simplified risk assessment survey (*évaluation simplifiée des risques*, ESR) which aims to quantify the risks to human beings, water resources and, to a lesser extent, flora and fauna, in consideration of the proposed future use of the site. In the ESR, each type of risk is graded using the following classifications: 'Class 3' (no significant risk identified, nothing to do), 'Class 2' (moderate risk – monitoring of the contamination is recommended) and 'Class 1' (potentially significant risk – perform additional surveys); and
- (iii) a detailed risk assessment survey (*évaluation détaillée des risques*, EDR) will refine the findings of the ESR and propose remediation measures to limit the significant risks identified.

These contamination management tools are generally recognised as good and efficient methods (although time consuming¹⁵) for tackling contamination and finding a balance between interested parties. In particular, major risks are circumvented and remediation costs may be less expensive and limited to the necessary prevention of risks, avoiding the potentially massive clean-up costs that would be faced with full remediation operations.

However, as the policy focuses on removing the risk of contamination rather than the contamination itself, it may be seen as leaving many sites with residual contamination, preventing potential future re-development and not addressing comprehensively damage to the environment per se.

These management tools are currently under review by the Ministry for Environment and new guidelines will be issued in the coming months with the new system expected to 'enter into force' (still without any legal framework) at the beginning of 2007¹⁶.

15 As a result of the different phases in the process and the involvement of various public authority departments, this process can, potentially, take several years to complete.

16 See Note SEI/BPSPR of 12 December 2005.

17 See Article 34-1 of Decree 77-1133 of 21 September 1977 as amended in 1994 which indicates that the site operator must restore the site upon closure. This legal basis for soil remediation was confirmed by the Supreme Court in 1997 (see CE, 8 September 1997, *Serachrom*, req. 121904).

III. Liability for soil contamination

In contrast to Germany and Italy, no specific soil liability law exists in France. The liability regimes that apply to soil contamination are contained in various legal and regulatory frameworks. These rarely address soil contamination directly and are often inconsistent. In addition, there may be overlap between some of these regimes, allowing public authorities to forum shop in their search for a solvent liable person.

It may therefore be argued that French law has as many soil contamination regimes as the different and contradictory regimes that address the issue directly or indirectly (or are used by public authorities to address the issue). These regimes include:

- the French industrial law regime, which only applies to sites subject to environmental permits. This is the main liability regime applicable to soil contamination and mainly targets the site operator;
- the Waste regime, which targets the waste producer and the waste holder;
- the Civil Law regime, which is the general tort system and targets any person who causes damage;
- the Water regime;
- other regimes or provisions contained in the Rural Code, the nuclear installations regime, or the mining regime.

This section addresses only the three first regimes which are most commonly used to identify the person liable for decontamination costs.

1. Liability under the French industrial law regime

The French 'contaminated land regime' (if such a regime can be said to exist) was developed through the installation-related regulations contained in the French industrial law regime, and primarily targets the industrial site operator.

In the absence of a specific liability regime for soil and groundwater contamination, the authorities have used the ICPE Regime to impose remedial action on site operators and, until September 2005, sometimes on site owners.

For years, liability for soil contamination derived only from the very limited provisions of a decree,¹⁷ the non-binding circulars issued by the authorities

and related conflicting case law. It was only when the industrial law regime was amended in 2003¹⁸ and implemented by Decree 2005-1170 of 13 September 2005¹⁹ that the soil contamination regime was fully incorporated into French law. Further, in 2004 and 2005, the French Administrative Supreme Court (Conseil d'État) eventually settled the liability regime.²⁰

a. The French industrial law regime

French environmental legislation imposes restrictions on certain activities/installations carried out on specific industrial or pollution-related sites and more generally on any activities/installations which may affect, *inter alia*, the environment, public health or the neighbourhood.²¹

A national list (Nomenclature des installations classées)²² sets out the pollution-related activities subject to this environmental legislation and whether an activity/installation requires a prior environmental permit issued by the environmental authorities (i.e. the Préfet who is the head of the public authority (Préfecture) that administers the relevant département (district) of France). Such environmental permits take the form of either (i) a prior authorisation (arrêté d'autorisation) or (ii) a receipt of declaration (récépissé de déclaration), depending on the nature of the activity/installation or the quantities used, stored or produced.

The ambit of the French ICPE Regime is much broader than that of the EU IPPC Regime²³ and encompasses more installations and activities. In 2004, 61,314 sites were regulated under the authorisation level (including 5,992 sites subject to the IPPC Directive, 23,029 farming sites and 599 Seveso high-level²⁴ sites).²⁵

The ICPE Regime applies mainly to site operators (rather than site owners²⁶). The environmental authorities therefore normally only deal with the site operator during the application process or the course of the site operation, and in relation to site closure or contamination issues.

b. Remedial action imposed on the site operator

Liability for the environmental clean-up costs of sites which are subject to the ICPE Regime is placed primarily on the current or last operator of the site.²⁷ An operator is defined as the person who

controls the activities and the site on a daily basis (and/or holds the environmental permit).²⁸

The last site operator is not only liable for contamination which it causes itself, but also for that caused by the installations/activities it has taken over from former site operators. Provided that the change of site operator is notified to the public authorities, the former site operator is no longer liable for remedial action imposed by the authorities.

Remedial action is primarily imposed in the context of a site closure.²⁹ Remedial actions are defined by the authorities further to site-specific risk assessment surveys.³⁰ After the completion of the remedial action, the public authorities do not issue a final clearance certificate acknowledging that the remedial action has been completed.

18 See in particular Article L. 512-17 of the Environment Code, created by Law 2003-699 of 30 July 2003.

19 Amending Decree 77-1133 and introducing a remediation procedure for soil contamination and future use issues.

20 See CE, 17 November 2004, société générale d'archives, req. 252514; CE, 10 January 2005, Sofiservice, req. 252307; CE, 8 July 2005, Alusuisse Lonza France, req. 247976.

21 The French industrial law regime is known as the ICPE Regime – where ICPE means Installations Classées pour la Protection de l'Environnement. The ICPE Regime is now partly codified in the French Environment Code under Articles L. 511-1 et seq.

22 See Decree 53-578 of 20 May 1953 (as amended).

23 Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control (the 'IPPC Directive').

24 I.e. sites considered as high-level installations/sites under Directive no. 96/82/EC of 9 December 1996 on the control of major-accident hazards involving dangerous substances.

25 Source: French Ministry for Environment.

26 With the exception of (i) waste landfill activities and quarries, which require the involvement of the site owner in addition to the site operator; and (ii) warehouses or other multi-user sites where the authorities may require the property owner be the operator.

27 The Supreme Court held that sites closed before 1976 (i.e. the date of the creation of the ICPE Regime) but which would have been regulated by the ICPE Regime after that date, are subject to the remediation regime, see CE, 20 March 1991, Rodanet, req. 83.776; CE, 16 November 1998, Compagnie des bases lubrifiantes, req. 182816).

28 The authorities will obviously first contact the *de jure* operator holding an environmental permit. In the event that no *de jure* operator is identified, the authorities will search for a *de facto* operator, i.e. an operator operating the installations/activities without holding a valid environmental permit.

29 Article L. 512-7 of the Environment Code now provides that the environmental authorities are entitled to require, even where there is no site closure, that the site operator performs risk assessment and remediation operations provided that a risk to the environment, public health or the neighbourhood exists. See section II.1 above.

30 See section II.3 above.

Further remedial action may therefore be imposed on the last site operator for a period of thirty years from the date on which the closure of the installation was properly notified to the authorities, unless any dangers or risks to the environment were deliberately concealed from the authorities.

Vis-à-vis the authorities, the last site operator is not entitled to claim that the former operator caused the pollution as a defence. However, the last site operator is free to commence civil proceedings against the former operator before the courts.

c. Site owner no longer liable

Until September 2005, where the former site operator failed to comply with the clean-up obligation, the environmental authorities attempted to impose the obligation on the 'site holder' (détenteur), i.e. in most instances, the site owner.

In the 1990s, the Administrative Courts of Appeal of Douai and Lyons commenced this trend by holding that the liability of the site operator should be transferred automatically to the site holder³¹ if the site operator became insolvent or ceased to exist from a legal perspective. According to a circular dated 1 September 1997, the site holder could be held liable for the clean-up obligation only where the site operator had ceased to exist, from a legal perspective.

However, after 15 years of conflicting court decisions, recent case law of the Administrative Supreme Court (Conseil d'État) has confirmed that the main and primary party liable is the site operator, and that a site owner cannot be charged for the clean-up obligations in his capacity as site owner.³²

This was confirmed by Article L 512-17³³ of the Environment Code and Decree 2005-1170 relating

to site closure and remediation requirements, which expressly targets only the site operator and no other entity.

Therefore, the authorities must demonstrate that the site owner is the successor of the site operator, i.e. he has behaved as the site operator, before a remediation order can be made against him. The potential liability of the site owner is therefore now limited.

Finally, no other entity may be held liable under the ICPE Regime unless it is also considered to be the site operator. As far as shareholders or group companies are concerned, they are regarded as being distinct from the company operating the site and cannot be held liable for contamination resulting from the activities of the operating company.³⁴ An exception is made in the case of material fraud, i.e. where the subsidiary is fictitious (all decisions being taken at parent company level) and was created only in order to prevent liability from falling on the parent company.

2. Liability under waste law

As the environmental authorities could not always successfully impose clean-up obligations on any person other than the last site operator, they recently tried to impose liability based on French waste law (i.e. Law no. 75-633 of 15 July 1975³⁵ on waste elimination (as amended)). In this sense waste law has the advantage that not only does it target the waste producer but also the waste holder. In the absence of a site operator, tenant or occupant, the site owner may be deemed to be the waste holder and therefore liable for waste disposal.

Waste is defined in Article L. 541-1 of the Environment Code as 'any residue resulting from the production, transformation or use of any substance, material, product, or movable asset that has been disposed of or is likely to be disposed of by its holder (détenteur)'.

Under French waste law (i) any person who produces or holds waste should dispose of it without any detrimental effects to flora and fauna, or which is likely to adversely affect natural sites and without producing air, water or noise pollution or affecting human health;³⁶ (ii) the person who created the waste is liable for damage resulting from the destruction or production of waste;³⁷ and (iii) the administration is entitled to commission waste dis-

31 CAA Lyons, 10 June 1997, M. Zoegger, req. 95LY01435.

32 See CE, 21 February 1997, SCI Les Peupliers, Req. 160250; CE, 21 February 1997, Wattelez, req. 160787; 8 July 2005, Aluisse Lonza France, req. 247976.

33 As enacted pursuant to Law 2003-699.

34 CAA Paris, 17 October 2003, Fayolles et Fils, req. 99PA03797.

35 Law No. 75-633 of 15 July 1975 on waste (as amended), and incorporated into the Environment Code, Part V Section IV (Articles L. 541-1 et seq.).

36 See Article L. 541-2 of the Environment Code.

37 See Article L. 541-4 of the Environment Code.

posal at the expense of the person liable for the waste when it has been abandoned or not treated in compliance with the legal requirements of the Environment Code.³⁸

In most instances case law held that where a site is regulated under the ICPE Regime, the authorities may only use the remediation procedures set out under the ICPE Regime and could not use those available under general waste law.

In November 2004,³⁹ the Administrative Supreme Court clarified the issue and held that the environmental authorities (the Préfet) could no longer use the waste law regulations to impose remediation obligations as waste law did not fall under the jurisdiction of the environmental authorities but rather under the jurisdiction of the Mayor.

Since July 2003, Article L. 541-3 of the Environment Code was extended to cover not only abandoned waste but also 'soil contamination or risk of soil contamination'.⁴⁰ The Mayor is therefore entitled to impose remediation operation obligations on the 'liable person' in the event of soil contamination.

Therefore, whilst the Supreme Court has clearly forbidden the environmental authorities (Préfet) from intervening in waste regulations, the new wording of Article L. 541-3 explicitly allows the Mayor to intervene in soil contamination matters and target not only the site operator but also the waste holder or any other liable person.

It is now for courts to address this potential conflicts issue between the ICPE Regime and the Waste regime.

3. Civil Law Liability

General liability to third parties for damage

In addition to the liability imposed by the ICPE Regime and whether or not the ICPE Regime applies to the site in question, a person (including a site operator or a site owner) can be held liable to third parties if it is considered to be responsible for the damage (including environmental damage such as a site contamination) under the general provisions of French Civil Law.

The legal grounds for a party being held liable under Civil Law are Articles 1382 to 1384 of the French Civil Code. Under these articles, the owner and controller of a site can be held liable for damage caused to third parties on account of such site,

for example personal injury. Articles 1382 and 1383 of the Civil Code provide that a person is responsible for any damage caused to another person as a result of his fault or negligence. In addition, under Article 1384 of the Civil Code, a person will be held liable for any damage caused by anything over which that person has control ('garde de la chose'). The concept of 'garde' is linked to the power of use, direction and control ('usage, direction, contrôle'). The owner of an asset is deemed to have control over that asset unless he can demonstrate that the control has been transferred to another person. This would be the case for example for the owner of an industrial site who has entered into a leasing contract with a licensed operator operating the site.

For instance, case law states that a site owner could be held liable in the event that: (i) the site operator no longer exists and the site owner is considered to have the site under its control and is therefore liable for pollution found on site under Article 1384 of the French Civil Code, (ii) the site owner has let the site operator operate without the required site permit, (iii) the site was closed down without the site operator fully complying with the clean-up requirements, or (iv) the site owner has not efficiently controlled the remedial actions performed on site by the site operator.

Under the French Civil Code, those entitled to file proceedings and claim for damages are those harmed in some way by the pollution found on a site, including recognised environment protection NGOs. Claimants must provide evidence of wrongful conduct, damage and causation. This is often difficult to establish and claimants often lobby public authorities to pressure them to act under other legal regimes. The claim must be brought within 10 years from the date when the damage was discovered.

IV. Soil remediation

This section addresses soil and groundwater remediation issues in France and focuses on the remediation obligations imposed by the environmental authorities (the Préfet) under the ICPE regime.

³⁸ See Article L. 541-3 of the Environment Code.

³⁹ CE, 17 November 2004, Société générale d'archives, Req. 252414.

⁴⁰ See Article L. 541-3 in fine of the Environment Code, as amended by Law 2003-699 of 30 July 2003.

Once the liable person has been identified (see section III.2 above), the authorities will most likely impose site surveys and risk assessment surveys (see section II.3 above) in order to determine the remediation measures necessary in light of the envisaged 'future use' of the site.

This section addresses the question of the level of remediation required, focusing on the determination of the 'future use' of the site and on the financing of the remediation operations.

1. Level of remediation and future use issues

As mentioned above (see section II.3), the French authorities have a site-specific pragmatic approach to soil and groundwater contamination and only impose remediation obligations on site operators after a risk assessment (including the potential impacts for human beings, water resources and, to a lesser extent, flora and fauna) has been performed based on the precise identification of contamination sources, pathways and receptors, and in consideration of the proposed future use of the site.

Decree 2005-1170 of 13 September 2005 establishes a new regime for industrial site closure, which specifically addresses the question of the definition of the future use of the site. The decree clearly targets the site operator as the person liable to pay for any clean up required.

Decree 2005-1170⁴¹ provides that the 'future use' is the use (i) which is discussed and agreed between the site operator, the site owner and the local government or, (ii) in the event that no agreement can be reached, the use imposed by the environmental authorities. Although the discussion process and applicable timeframe is clearly settled, Decree 2005-1170 does not provide any definition of what the 'future use' is. Case law, influenced by

technical experts, environmental consultants and lawyers, will need to address the issue in the coming months by building up on past and current practical examples.

Where the 'future use' of the site is imposed by the environmental authorities, the authorities must take into account the location of the site and the type of use around the site deriving from the local planning scheme at the date of the site closure. Accordingly, where the site is located in an industrial area (with no conflicting local planning schemes/documents), the authorities must define the future use as identical to the last use (eg. industrial in the case of closure of an industrial site). However, where the site is in an urban area with local planning schemes covering sensitive areas in the vicinity of the closed site (e.g. housing), the authorities are free to decide on the future use and are entitled to define a 'future use' which permits housing, retail or commercial use, thereby making any remediation works required more extensive and more expensive.

Change of use in the future and subsequent clean-up operations

The 'future use' process described above does not prevent a change of use in the future (after the completion of the closure process and the related remediation operations). It explicitly allows future use changes in the future provided that the person responsible for the change of use will bear the necessary additional remedial costs, where required.⁴² For instance, if the future use is determined as being 'industrial' and subsequently the property owner decides to develop housing, the property owner and the authorities could not go back to the site operator originally responsible for the remediation works to request additional remediation, rather the current property owner would have to meet those costs.

However, the Decree does not regulate such future changes in terms of the competent authority or process.

2. Financing of soil remediation operations

The financing of the remediation operations differs depending on whether the authority could identify a liable person or not.

41 Articles 34-1 to 34-5 of Decree 77-1133 as amended by Decree 2005-1170 and implementing Article L. 512-17 of the Environment Code. The development in this section only concerns sites in existence in September 2005 and closed after 1 October 2005. Please note that new sites created after September 2005 are not regulated under these articles and that the 'future use' of new sites is ex ante provided for in the site-operating permit. Furthermore, sites closed before 1 October 2005 do not need to go through the discussion process as, under the Decree, their 'future use' is automatically similar to the use in effect at the end of operations.

42 Article 34-4 paragraph 2 of Decree 77-1133

a. Financing by the liable person

Where a solvent person is identified as being liable, that person will be responsible for the remediation costs. A very limited number of subsidies from different public agencies or authorities are available; however, these are highly unlikely to cover the full cost of the remediation. Potential subsidies include:

- Regional Authorities and the French Environment Agency, ADEME, may take responsibility for part of the costs incurred for the identification of the contamination (technical audits).
- Water Agencies may decide to take responsibility for part of the costs or grant loans for the remediation of surface water or groundwater resources.

b. Financing through use of public funds

Orphan sites are remediated by the French State through the French Environment Agency, ADEME. The French State can require the ADEME to carry out audits and remediation operations only where no liable solvent person could be identified. The Préfet is entitled to impose on the property owner a right of way over his property so as to allow the ADEME access to the property to carry out the remediation for a period of up to 20 years.⁴³ In 2004, the ADEME was present at 55 different sites under this procedure.

⁴³ Article L. 514-1 of the Environment Code.

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