

From Brownfields ...

As a result of currently well-known regulations, regarding the prevention and reparation of damage to land, rehabilitation of polluted sites is an activity in which all of those designated as pollution managers are held accountable. There will be no question of applying the “Ostrich Principle”, as was the case in the relatively recent past.



Luc Depré, attorney at CMS DeBacker, specialising in environmental law and energy.

Rehabilitative obligations will no longer slip through the cracks, as measures have been tightened. The transfer of actual rights over land, even that presumed to be contaminated, the application for an environmental permit or the cessation of a risky activity are all events requiring management or remediation of polluted land, on pain of being unable to make the transfer.

Many people still do not realise, but it is incumbent upon any operator who controls or has controlled a hazardous activity or who has custody of polluted land, to notify the authorities of the existence of a problem with ground pollution. Refusal or deliberate omission to make such a declaration to the competent authorities is an offence punishable by criminal law. All relevant environmental managers are therefore obligated to provide full disclosure and transparency concerning the state of their business land. Furthermore, measures may be ordered ex officio by the authorities in the event of a serious threat to human health and the environment, with the designated responsible party reimbursing the clean-up costs incurred. In short, the time for passive behaviour is over.

To accomplish this, it is necessary to anticipate and organise all phases of a successful rehabilitation.

The first stage consists of more accurately identifying and quantifying the possible pollution of the site, particularly by a historical study and soil sample testing. The more detailed the definition of historical and chemical parameters, the closer the assessment of the cost of the clean-up will be close to actual costs, and the earlier future appropriations can be decided in the redevelopment process.

The ‘polluter pays’ principle

A second essential step, based upon the application of the ‘polluter pays’ principle, will help identify the true culprit of the pollution or note the absence of a responsible party so that pollution is considered to be an ‘orphan’ or even to exempt the responsible party from financial burden for reasons specified in the legislation.

The establishment of liability will allocate the financial burden to the sole responsible party or to the multiple liable parties or to the company in the event of ‘orphan pollution’ or exemption from responsibility. Oftentimes, land that was heavily polluted in the past contains pollution or ‘orphan pollution’ for which the current owner is not held responsible due to the will of the legislator. The cost of de-pollution therefore falls on public budgets. Public authorities have often granted subsidies or, in other words, state aid. Every beneficiary will ensure that the aid plan or individual aid complies with the April 2008 European Commission guidelines regarding state aid for environmental protection. Indeed, the granting of illegal aid is sanctioned by the obligation of repayment by the beneficiary of said aid. Once obtained on a regular basis, subsidies are highly valued for their positive impact on the profitability of the rehabilitation process. The granting of subsidies may also be, as provided by certain regulations, an opportunity to enter into a public-private partnership which will always be based upon the ‘polluter pays’ principle. Several Member States have therefore developed strategies approved by the European Commission and methods that have proven effective with all the necessary transparency.

Therefore, the Brussels-Capital Region has successfully launched its “Green Fields” program for polluted plots along the canal.

The determination of historical parameters, assigning the responsible party, allocating the financial responsibility, the granting of subsidies are all elements that will then guide future choices of polluted brownfield developers, including establishing the point of exit: either just after the ground cleanup, or after soil remediation and obtaining construction or operation rights, or after the industrial or real estate development. In the event of failing to exit, the redeveloped land will be retained.

to Green



A major challenge for those who undertake rehabilitation is to find a development commensurate with the financial clean-up efforts.

Relativity of de-pollution costs

Finally, a major challenge for those who undertake rehabilitation is to find a development commensurate with the financial clean-up efforts. Contrary to popular belief, the de-pollution costs, even when high, may ultimately prove to be “relative” compared with the development of the site. It is all a question of appropriately allocating the cleaned plots. Some specific administrative boundaries promote this approach as being pragmatic and realistic. This balance is thereby optimised if the party obliged to de-pollute is able to obtain developmental diversity. It would be useful

to organise a meeting place for manufacturers seeking newly cleared areas, property developers and those obliged to de-pollute. In Brussels-Capital, the movement has thus been initiated by creating an exchange for contaminated land.

Luc DEPRÉ ■
Partner at CMS DeBacker

C/M/S/ DeBacker