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The owner of a former classified facility site may be held liable for the waste materials abandoned thereon by the site operator

When a classified facility ("CF")[1] is definitively shut down, it is primarily up to the operator, i.e. the entity that controls and manages the activity and the site on an everyday basis, to comply with all applicable provisions related to site rehabilitation.

A difficulty arises when it is not possible to impose the obligation to eliminate the waste materials on the company that has been carrying out the waste-generating activity on the polluted site, either because said company is insolvent or nor longer exists.

It is tempting, in such a case, to apply waste regulations instead of CF regulations since waste regulations have the advantage of targeting not only the waste producer (usually the site operator) but also the waste holder (Article L. 541-2 of the French Environmental Code, "FEC").

This option is all the more interesting since, according to applicable waste regulations (Article L. 541-3 of the FEC), administrative authorities are entitled to commission waste elimination operations at the expense of the person liable for the waste materials abandoned in breach of the French environmental law requirements.

The following question then arises: can the owner of the site be considered as "holder" of the waste materials within the meaning of Article L. 541-2 of the FEC and, as a consequence, be held liable for the waste disposal?

Following the example of the *Conseil d'Etat* (Highest Administrative Court) in 2011, the *Cour de Cassation* (French Supreme Court) ruled in a judgment dated July 11, 2012 that the owner of the site could be, under certain conditions, liable for the rehabilitation works[2].

In this case adjudicated by the *Cour de Cassation*, two owners leased to an operator a piece of land to set up a business activity that consisted in the packaging and sale of chemical products, i.e. an activity covered by the legislation on classified facilities and subject to the declaration administrative regime.

The lease was then terminated and the compulsory liquidation of the operator ordered by court due to an asset

shortfall.

As chemical products had been abandoned on the site that the owners had repossessed, the *Préfet* (local arm of the government) entrusted the French Environment and Energy Management Agency ("ADEME") with the rehabilitation works[3].

Once the rehabilitation of the site was achieved, the ADEME sued the owners and sought the reimbursement of the cost of the works, pursuant to Article L. 541-2 of FEC.

According to the version of this Article that was in force at the time, "*Any person who produces or holds waste materials under conditions likely to produce harmful effects on soils, flora and fauna, to damage sites or landscapes, to pollute the air or water, to cause noise and odors and, in general, to harm human health or the environment, is obliged to dispose of it or have it disposed of in accordance with the provisions of this Chapter, under the conditions required to avoid the above effects*[4]».

To dismiss the ADEME's claim for reimbursement, the Toulouse Court of Appeals stated that the owners of the site could not be considered as "holders", within the meaning of the above-mentioned Article L541-2, of waste materials that were on site at the time they repossessed it, and consequently, could not be considered as liable for the disposal of such waste materials, on the ground that they had not engaged into any wrongful conduct.[5]

In its decision, the *Cour de Cassation* confirmed the Court of Appeals' rationale: as a principle, "*in the absence of any other liable person, the owner of the land where waste materials have been stored is, for this reason alone, the holder within the meaning of Article L.541-1 et seq. of the FEC insofar as these provisions in their current version, as clarified by the provisions of applicable EEC 75-442 Directive dated July 15, 1975*."

With this decision, the *Cour de Cassation* is coming round to the position adopted by the *Conseil d'Etat* in a decision issued one year before.

In the so-called WATTELEZ decision dated July 26, 2011[6], the *Conseil d'Etat* had indeed already expressed its opinion on this issue "*considering that the owner of the land where waste materials have been stored may, in the absence of a known holder of these materials, be considered as the holder within the meaning of Article L.541-2 of the FEC, in particular if it has been negligent with respect to materials abandoned on the land*."

The *Cour de Cassation*, however, provided an exception to this principle of owner's liability: the owner will be held liable "*unless he proves that he is not involved in the abandonment of the relevant waste materials and that he did not allow or facilitate such abandonment by negligence or indulgence*."

In doing so, the *Cour de Cassation* confirmed not only the *Conseil d'Etat*'s approach (which, in its decision, referred to negligence), but also the approach of the Court of Appeals that described the rightful conduct of the owners:

- the abandonment of the waste materials was due to the closure of a classified facility;

- this abandonment took place while the owners had no authority or control over the facility and the products that were stored in it;
- the obligation of waste disposal falls on the last operator or on its successor in title; and
- the owners did not, by their own activity, contribute to creating a pollution risk.

The judgment rendered by the Bordeaux Administrative Court of Appeals[7], on remand from the *Conseil d'Etat* in the WATTELEZ case, also provides useful indications on the elements that will be examined by the judge:

- the WATTELEZ company itself had been in charge, for some years, of the on-site activity that generated waste;
- the WATTELEZ company had taken back possession of the site in 1991, when the compulsory liquidation of the tenant was ordered;
- the polluted site constituted a serious risk for the environment and public safety;
- the WATTELEZ company had tried to make the waste materials "vanish", by commissioning works to bury such materials on site, without authorization; and
- no maintenance, development or monitoring had been implemented by the owners (who even refused access to the site to the ADEME).

These elements, taken into account by the judge to determine whether or not the owner was liable, are similar to those considered under tort liability rules. As a reminder, Articles 1382 et seq. of the French Civil Code provide that a person is liable for any damage caused to another person as a result of a fault or negligence.

In the light of the above-mentioned recent decisions, and considering the classic tort liability principles, it is likely that henceforth a pro-active role will be expected from the site owner: did he recover control of the site when the site operator ceased to exist (in which case, he would have become the "steward" of the site and of the waste materials abandoned thereon)? Was he aware that the classified facility was shut down without the operator having complied with all the rehabilitation requirements? Did he supervise the actions taken by the operator to comply with such requirements?

It is on a case-by-case basis that the judge will check the conduct of the polluted site owner and decide whether or not he should be held liable for abandoned waste materials.

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[1] A classified facility for the protection of the environment is an industrial or agricultural facility that is likely to present a risk or cause pollution or nuisance, especially for the safety or health of local residents. The activities covered by the legislation on classified facilities are set forth in a list that indicates whether they are subject to the authorization or administrative declaration regime, depending on the level of risks or inconveniences they present.

[2] Civ. 3rd, July 11, 2012, n°11-10478.

[3] Article L. 541-3 of the Environment Code precisely provides that *"in cases where waste is abandoned (…) contrary to the provisions of this Law, the authority vested with law enforcement powers may, after a summons has been issued, carry out the necessary works at the expense of the person liable."*

[4] Amended by Order n°2010-1579 that came into force on December 19, 2010, Article L541-2 now stipulates: *"Any person who produces or holds waste materials is obliged to dispose of it or have it disposed of in accordance with the provisions of this Chapter.*
Any person who produces or holds waste materials is liable for the management of such materials until its elimination or final recovery, even if waste has been transferred to another person for treatment off-site.
Any person who produces or holds waste materials must ensure that the person to which is transferred such materials is entitled to treat waste."

[5] Toulouse Court of Appeals, October 18, 2010, n°09-03811.

[6] Conseil d'Etat, July 26, 2011, Commune de Palais-sur-Vienne v. WATTELEZ company, n°328651.

[7] Bordeaux Administrative Court of Appeals, March 1, 2012, WATTELEZ company v. Commune de Palais-sur-Vienne, n°11BX01933.