

THE NETHERLANDS

REPORT TO THE EUFJE QUESTIONNAIRE OF 2008 ON SOIL POLLUTION

I- Information on polluted soils:

1. Do you have a national inventory (or inventories) of polluted or contaminated soils?

After the first cases of soil pollution in the Netherlands became public in the second half of the seventies of the last century, several inventories of polluted places have been made successively. In 2004 it was estimated that in about 600.000 places in the Netherlands the soil was polluted. This number is based on archive-inventories made by local and provincial authorities under the Third National Environmental Plan. These inventories were related to business activities that may cause soil-pollution registered in former environmental licenses or in archives of the Chambers of Commerce. The results of these inventories were called the 'Overall Image'. This Overall Image is a collection of the total number of possibly polluted sites and already examined sites. The information of this Overall Image is made public by provincial and local governments. Of these 600.000 places about 10 % has to be decontaminated. This should be done before 2030. Estimation of costs (2004): € 20.000.000.000.

1. The ministry of the Environment is in charge of this Overall Image.
 2. The criteria are prior use and soil composition.
 3. The Overall Image is open for the public.
 4. The Overall Image is a first source of information. As soon as a private or public body considers the use of a site and deems it necessary to know whether the site is polluted, it will consult the Overall Image. There is, however, no certainty that all contaminated sites are included.
2. Are there any particular administrative or legal requirements to provide information?
 1. In several cases legal obligations to provide information are in force. E.g. part of the application for a building license is a report on the soil quality; often part of an application for an environmental license is a report on the condition of the soil at the moment of application. According to the Soil Protection Act (SPA), before any soil decontamination activity will be executed a soil examination

report and a sanitation plan should be handed over to the provincial board, while the plan has to be approved by this board before the sanitation activity is allowed to be started (par. 28).

2. In these cases information has to be given to the provincial board.
3. In cases of applications for licenses the application will not be decided upon as long as the required information is missing. Non observation of the requirements to inform the provincial board government, to provide them with a sanitation plan and to wait for their decision is an economic offence (crime or misdemeanour). Starting a sanitation operation before getting approval on the sanitation plan may also be sanctioned by administrative sanctions such as a penal sum.
4. We are not aware in public (administrative or criminal) law of specific cases of claims pertaining to the lack of information.

II- National legislation on soil pollution and enforcement

A- Does specific legislation exist on the subject of polluted soils?

1- What kind of legislation: civil, public or criminal law?

In the Netherlands the SPA is in force since 1987. Before this act the Interim-act on soil sanitation of 1983 specifically dealt with soil decontamination activities. In 1994 and 1995 the regulation of sanitation of the Interim-act was integrated on the SPA.

The SPA is a public law act. It contains a legal basis for governmental regulations on several activities that may harm the quality of the soil, a general duty of care related to soil protection, a regulation for the sanitation of polluted soils, financial provisions and enforcement provisions. A number of governmental regulations are based on the act related to the use of manure, the use of other organic manure substances, the discharge into the soil, the storing in underground tanks and the use of constructing-materials.

Non observation of many of the provisions in the SPA and the regulations has been designated as criminal offence (crime or misdemeanour) under the Economic Offences Act.

2- Have the provisions of directive 2004/35/CE on compensation for damage to soil been implemented in your national law and how.

Implementation of the directive by insertion of a new set of provisions into the Environment Act is well under way.

- B- Is there any specialized personnel to check the degree of respect of the regulations of polluted soil?

The answer is positive. First of all a Service centre on soil protection has been founded. This is a centre of expertise and advice on all matters related to soil protection and soil sanitation. Secondly the provincial boards and the boards of the bigger municipalities are responsible for the execution of the legal provisions on soil sanitation. According to the Netherlands system private bodies or persons are responsible for the cleaning up of polluted soils. Before starting a cleaning up operation they have to do investigations and to draft a sanitation plan that has to be approved by the provincial or municipal board. The sanitation has to be executed according to the plan. Provincial and municipal officials check the execution of the sanitation plan. Besides, normal environmental licenses for industries contain obligations related to prevention of soil pollution. The check and enforcement of these obligations is also done by provincial and municipal officials.

- C- Does the soil pollution fall under other legal disposition or other specific sector of environmental regulation?

Only sites with radio-active pollution that can be dealt with under the Nuclear Energy Act are exempted (par. 99, subpar. 3, SPA).

- D- Generally speaking, do you feel that rules on soil pollution are effectively applied and efficient?

In general, we do. But one has to take into account that the problem of soil pollution is taken less seriously nowadays than some twenty years ago. At the end of the seventies, beginning of the eighties of the twentieth century soil pollution was considered to be a very serious environmental problem in the Netherlands. The governmental policy aimed to clean up polluted sites completely in the sense that decontaminated soil should be made fit for all kinds of use. This policy turned out to be over ambitious and utterly expensive. So, although the SPA was still based on this official governmental policy, big cities started to execute more simple sanitation plans by not removing but just covering the polluted soil with clean layer.

Nowadays the requirements on soil protection for environmental licenses are rather strict. The enforcement of these requirements has improved a lot. The process of decontamination of polluted sites is still

going on. Already a great number of sites have been cleaned up, but another great number is still waiting.

E- And if not, please explain the main reasons.

The main reason for cases in which sanitation has not been executed is just lack of funds. In general we do have the expertise and the skills to decontaminate polluted sites. Generally, private bodies and persons – normally the owners – are responsible to do so. But often they lack funds to clean up sites that have been heavily polluted in the past. As long as there is no direct danger e.g. for groundwater or for health, there is no urgent need to spend a lot of money for a great sanitation operation.

F- How would you evaluate your country's legislation on the subject?

In general this legislation is modern and efficient. However, there is an ongoing tendency in the Netherlands to enact legislation that is too detailed and too ambitious. This is also the case for the legislation on soil protection. As a result, this legislation has been modified and simplified time after time. The process of ongoing adaptation and modification of legislation negatively influences an effective execution and enforcement of the legal provisions.

III- Soil pollution and liability

A- What is the proportion of soil pollution claims on environmental law suits pertaining tot environmental issues?

There is no registration of soil pollution claims, nor is there a registration of liability claims in general or of environmental liability claims. Therefore a percentage cannot be given. In a computer search on the item soil pollution, 83 Supreme Court judgements in civil law cases show up, dating from 1986 to 2008. Nevertheless it can be stated that the number of civil law cases dealing with claims based on the existence of soil pollution and/or with the recovery of soil cleaning costs is considerable.

B- What are the types of liability?

Liability primarily rests with the polluter. On the basis of civil law, the liability of the polluter is based on fault. According to the case law, the

liability of the polluter for the costs of cleaning operations depends on whether or not his act causing the pollution, at that moment would be deemed a breach of the law. Whether or not the government is entitled to recover the costs of cleaning operations from the polluter depends on whether or not the polluter should have been aware, at the moment of pollution, of the future involvement of the government in cleaning operations. (Supreme Court, 09-02-1990, LJM AC0747, State vs. Van Amersfoort). For reasons of legal certainty, the Supreme Court, after thorough scrutiny of government policy documents, has decided that January 1st 1975 is the date at which polluting enterprises should have been aware of this future government involvement, unless the government can prove specific circumstances which point to an earlier date (Supreme Court 24-04-1992, LJM ZC0576, State vs. Van Wijngaarden; Supreme Court 24-04-1992, LJM AD1660, State vs. AKZO Resins).

If fault can be established in a case of environmental (soil, water or air) pollution, the Civil Code contains an extinctive prescription period for any recovery action of damages of 30 years from the end of the polluting activity (par. 3:310 (2)).

C- Who can be held responsible?

The SPA contains a differentiated system of distribution of the responsibility for the preparation and the execution of soil cleaning operations in cases in which the provincial government decide that a case of soil pollution is serious and that cleaning is urgent. These obligations can be laid on the polluter, the owner or lessee of the soil, the person who discovers the soil pollution whilst undertaking certain activities upon or in the soil, the provincial (or, in certain municipalities, the local) government and, in cases of underwater soil pollution, the water boards or the Ministry of Transport and Water Management (see under IV).

The Netherlands civil code does not contain any specific provision on the responsibility for giving information in cases of selling and buying real estate. Nevertheless, an obligation of the seller to transfer known information about soil pollution to the buyer is nowadays generally accepted. Also, information about possible pollution or possible causes of pollution such as underground domestic and other fuel tanks should be communicated. On the other hand the buyer also has to inform himself. The more professional the seller and the buyer are the greater is their responsibility to transfer information or to investigate. We do know a great number of cases about lack of information. The subject of these

cases of buying and selling real estate is mostly whether or not compensation has to be paid.

For the transport of real property a notarial deed is required. Nowadays notarial deeds always contain a paragraph about the risk of soil pollution.

- D- Practical examples and specification of the situation regarding contaminated sites where the owner or the user disappeared.

Many civil law cases deal with soil pollution from former or existing petrol stations, former official or unofficial waste dumps, former gas plants, and (leaking) underground domestic fuel oil tanks. Often, the original polluter cannot be retrieved any more. Cases often deal with the question whether or not the buyer for the polluted site can recover the sanitation costs or the value loss of the site from the seller.

- E- Do you meet difficulties in reconciling special soil regulation and other regulations such as property laws, private contractual provisions?

No serious difficulties as mentioned in the questionnaire can be reported.

- F- Are there penalties? Are they inflicted? If not, why? Please give examples.

Trespassing of all general and specific regulations in and under the SPA, have been designated as economic offences under the Economic offences act (crimes if committed intentionally, otherwise misdemeanours). These regulations include:

- the general obligation to prevent soil pollution as much as possible and to restrict and/or clean up such a pollution if it nevertheless occurs (par. 13 of the SPA);
- the obligation to carry out a soil cleaning operation as effectively as possible.

Most cases deal with either par. 13 or trespassing specific regulations, e.g. irregular spreading of manure.

IV- Care and rehabilitation of polluted soils

- A- Is there mandatory care or obligation to rehabilitate polluted soils (civil or public obligation)?

According to Netherlands law there is no general mandatory care or obligation to rehabilitate. The SPA only contains provisions to prevent soil pollution and a procedural regulation for cases in which an owner or somebody else is willing to decontaminate a polluted site. Owners are not under a legal obligation to rehabilitate polluted sites. As mentioned under III C, if a case of soil pollution has been reported to the provincial board, this board can decide that this case is a case of serious soil pollution and that the actual or intended use of the site or the possible spreading of the pollution lead to such hazards for man, plant or animal that decontamination is urgently needed. In this case the provincial board can oblige, under specific conditions, the polluter or the owner or lessee of the site to implement a decontamination plan accorded by the board (par 43 SPA). If in such urgent situations the obligation cannot be laid on the polluter, the owner or the lessee, according to the SPA the decontamination obligation rests with a government body (province, municipality, ministry or water board).

- B- By whom?

See IV-A

- C- What are the criteria of rehabilitation, prevention of harm to the environment and health, restoration of soil to its previous state, preparation of soil for future use, or taken into account its environmental potential?

The legal criteria depend on hazards for man, plant and animal in the light of the actual or the intended use of the polluted site or the possible spreading of the pollution. These criteria are important to decide about the urgency of decontamination and about the measures to be taken. The policy and legal emphasis have shifted over the years from next-to-zero residual pollution as the goal of decontamination (multifunctionality) to decontamination as far as necessary in the light of the actual or intended function of the site and the containment of the pollution, taking into account future developments (functional decontamination). In most cases mobile pollution will be sanitized by removing the polluted soil and/or pumping up the groundwater and cleaning it, while immobile pollution will be covered by a clean layer. The depth of this layer

depends of the future use. It will be deeper under gardens and public green space and less deep under buildings, roads etc.

D- Who implements it and who controls it?

As stated above, according to the SPA a decontamination plan containing the criteria for a rehabilitation operation has to be approved by the provincial board. See for the responsibility for the implementation IV-A. The factual rehabilitation operation is implemented by private enterprises under supervision of the provincial authorities (with help of experts).

Conclusion

Soil pollution in the Netherlands is a serious environmental problem, but perhaps rather overestimated. On a relatively small scale sources of groundwater are at risk, mostly by a high deposition of nitrates. Getting the manure problem under control is the only feasible approach of this problem. In a limited number of cases of serious soil pollution public health problems are reported. It is hard to establish a direct link between these public health problems and the soil pollution. The Dutch ministry of the Environment has caused a lot of attention to soil pollution and by that a lot of public concern.

The existing soil legislation in the Netherlands will do. As far as we are concerned no additional legislation is needed.

We do not have specific expectations of European legislation. From the Netherlands experience we tend to warn against overambitious European legislation on soil pollution. What is needed are rules that prevent soil pollution by hazardous activities and gradual deposition of (persistent) hazardous compounds; manure and nitrate deposition are at this moment probably the most serious problems. The nitrate directive is already covering this problem. Secondly an approach and procedure is needed for the rehabilitation of polluted sites. This is in the first place a matter of funding and allocation of responsibility. Leaving the whole responsibility with private parties will not help as long as they are not willing or able to allocate funds to decontamination. Leaving the full responsibility with governmental bodies will prove to be expensive tot the tax payer. So a kind of common approach has to be developed. The details of this common approach may differ from member state to member state and within member states. Exchange of information will be perhaps more relevant than community legislation.

Th.G. Drupsteen & A.V. van den Berg
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