

Environment - Italy

Council of State decision could lower contaminated sites' remediation costs

Contributed by **B&P Avvocati**

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A recent decision of the Council of State could lower the costs of the emergency measures to be implemented in areas containing contaminated groundwater. Such measures can include hydraulic barriers (pump and treat systems) or physical barriers that completely isolate the source area to prevent the migration of contaminants and block any direct route of exposure to the source, thus reducing risk.

Although physical barriers are normally much more costly, they have been imposed in the past by public authorities in many contaminated areas. In one such case, the Council of State recently decided that the order to build a physical barrier was illegal (Decision 56, January 9 2013). According to the council, the order to install a physical barrier was not properly motivated, for three main reasons:

- The inefficiency of the existing pump and treat hydraulic barrier had not been demonstrated by the public authorities.
- The new and much more costly physical containment had not been evaluated in light of the principle of proportionality. Public bodies are urged to impose the less expensive measure where there is no clear evidence that the more expensive one is absolutely necessary.
- The wide margin of technical discretion given to the administrative authorities does not mean that they can ignore the outcome of scientific evidence; otherwise, according to the council, any judicial control over the coherence of the decisions adopted by the administrative authorities would be impossible.

Many remediation experts hope that this decision will help to reduce the consequences of the rigid approach taken by Italian public bodies when deciding which remediation and emergency measures are to be adopted in contaminated areas. This can apply to many situations, as when a site becomes legally 'contaminated', the implementation of preventive measures is mandatory under Italian law for both the polluter and the non-responsible site owner. Complete remediation is then mandatory only for the polluter and only if the risk threshold limits – identified by means of a site-specific risk analysis ⁽¹⁾ – are not met. If the contamination derives from the action of several polluters, each polluter must be held liable for the costs directly related to its specific role in the pollution.

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Endnotes

⁽¹⁾ Guidelines for the site-specific risk analysis are set forth in Legislative Decree 152/2006, Annex 1, Title 5, Part 4.

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