

Soil decontamination and restoration policy of
the Port of Amsterdam (Havenbedrijf
Amsterdam N.V.)

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Summary

The Port of Amsterdam (Havenbedrijf Amsterdam N.V.) revised its soil decontamination and restoration policy, last adopted in 2005, in 2019. The policy is intended to create clarity and facilitate a consistent and transparent approach with respect to the users of the Amsterdam port area.

The general guiding principle for the soil policy is 'the polluter pays'. This principle is implemented by the fact that at the end of the use (end of rental or leasehold), the soil, including its contents, must be of at least the same quality as it was at the commencement of the use by the client. The same principles apply to buildings, paving and other objects installed by the client (restoration obligation). On departure, the client surrenders the site to the Port of Amsterdam in the same condition as it was received.

If the decontamination obligation lies in the future, the risk that the costs cannot be paid will be covered as far as possible through the provision of sureties. In order to keep sites marketable and to prevent the destruction of capital, the Port of Amsterdam can offer its client the opportunity to commute the remaining 'loss' if it changes, suspends or transfers its activities.

1. Introduction

The Port of Amsterdam has a long history of activity. The commercial activities in the current managed area date back to around 1870 in some places. This long history means that there is soil contamination present in various locations within the port.

Users of the port are required to decontaminate the soil with respect to the public authorities under the *Wet bodembescherming* (Soil Protection Act - hereinafter **Wbb**)¹. Companies are legally obliged to entirely remove soil contamination caused after 1 January 1987.²

This policy focuses on the contractual soil decontamination and restoration obligations of users of the port with respect to the Port of Amsterdam or the Amsterdam City Council. In drafting the contracts for the use of the port area, the Port of Amsterdam tries to ensure as far as possible that neither it nor the Amsterdam City Council suffer a loss as a result of soil contamination or other objects that are left behind. In the case of soil contamination, the contractual obligation to surrender sites in the condition in which they were originally released often goes beyond the obligations with respect to the competent authority (represented by the *Omgevingsdienst Noordzeekanaalgebied* (Noordzeekanaal Region Environmental Service)) under the Wbb. The Port of Amsterdam assumes the (potential) loss that the Port of Amsterdam as the economic owner of the land will suffer as a result of contamination.

¹ The rules relating to soil protection will be included in the *Omgevingwet* (Environment Act), which is expected to come into force in 2021.

² The *Wet Milieubeheer* (Environmental Management Act), the *Regeling Bodemkwaliteit* (Soil Quality Regulations), the *Besluit Bodemkwaliteit* (Soil Quality Decree) and Amsterdam City Council's *Nota bodembeheer* (Soil management memorandum), including a soil quality map (including port area in zones), are also relevant. However, this policy does not include any further discussion of these statutory obligations on the part of users.

2. Role of the Port of Amsterdam

The Amsterdam City Council owns the land in the port area. When the Port of Amsterdam was privatised on 1 April 2013, the City Council assigned the leasehold for the land to the Port of Amsterdam. The Port of Amsterdam in turn sub-leases or rents the land to others.

The guiding principle in issuing land is that an empty construction-ready site is released for use and that the Port of Amsterdam records the environmental quality of the soil (including groundwater) in a baseline measurement report. This report is prepared by certified environmental consultants. The condition of the soil as described in the baseline measurement is the contractual starting point for the Port of Amsterdam and the client.

The client is required to return the soil in the same condition at the end of the contractual term. For a site that was clean at the start of the use, the client will be required to reduce the contaminants to below the background values as specified in the Amsterdam Soil Quality Map attached to the Amsterdam City Council's *Nota bodembeheer* (Soil management memorandum).

The general terms also stipulate that soil contamination must be prevented (duty of care) and that if contamination occurs during the term, the client is liable and must report and remove the contamination. If this is not done immediately, the Port of Amsterdam is entitled to demand sureties in the form a bank guarantee or security deposit to cover the risk.

3. Restoration obligation

The Port of Amsterdam includes a restoration obligation in all contracts with clients. This means that sites must be surrendered free of structures, paving, foundations, infrastructure, etc. This applies not only to the site itself, but also to infrastructure that is located outside the site boundaries. These may have been constructed at the client's request, such as a rail link and nautical facilities. Contracts have been concluded for this that generally also terminate at the end of the contract. For a new user who acquires these objects, the new contract will stipulate that these are deemed to have been constructed by the new user itself. As a result, the restoration obligation is transferred to this new contracting party.

4. Financial risks

The presence of soil contamination in the port area poses a potential financial risk for the Port of Amsterdam. In order to cover this risk, the Port of Amsterdam demand sureties for the decontamination costs for the existing soil contamination. Under its general terms for rental and sub-leasehold, the Port of Amsterdam has the right to request sureties in the form of a security deposit or bank guarantee for each contamination scenario. The Port of Amsterdam can also request sureties for buildings or infrastructure of which the sale value in the event of bankruptcy is less than the removal costs.

5. The provision of sureties

In the event of a transfer, change of use or any form of extension of rental or (sub-)leasehold, sureties will always be requested for the client's decontamination obligations. That surety can be issued in the form of bank guarantee or by depositing a security deposit with a notary. A surety in the form of a group guarantee can be an acceptable alternative to a bank guarantee or security deposit if the guarantor meets criteria to be determined by the Port of Amsterdam.

6. Commuting latent loss

At the end of transfer of the rental or leasehold, companies may not be able to fully comply with the soil decontamination or restoration obligation, or decontamination or restoration at that time would lead to a disproportionate destruction of capital. The Port of Amsterdam can make a proposal to its clients who have a soil decontamination or restoration obligation to commute the remaining decontamination and/or demolition obligations. An offer to commute can be initiated by the Port of Amsterdam, but can also be requested by the client. In the latter case, the Port of Amsterdam is not obliged to agree to the client's request.

Commutation relates to liability for soil contamination, foundations and other underground infrastructure. An offer to commute can also be made when the decontamination or demolition obligation relates to buildings, paving, jetties, etc., which the Port of Amsterdam believes might be useful in the future.

One important aim of this option to commute is to prevent stagnation and keep sites marketable. The level of the commutation payment is based on the possible future costs for the Port of Amsterdam supplemented with a risk component for contingencies. The additional costs that the Port of Amsterdam incurs as a result of contamination being left in situ must be covered by the commutation payment. This also includes compensation for the lower ground rent and operational costs that may result from usage restrictions. The commuting party is then indemnified by the Port of Amsterdam against further liability for the commuted loss.

7. Composition of commutation payment

The decontamination costs are ideally calculated by officially certified environmental consultants commissioned jointly by the Port of Amsterdam and the client. The Port of Amsterdam adopts the background value as the decontamination target when determining the level of the commutation payment for soil damage. If the baseline investigation shows that there was already contamination present at the start of the contract, that is incorporated based on this principle. The calculated decontamination costs are then supplemented with a market-based percentage in order to cover the uncertainties of taking on a future obligation. After all, the Port of Amsterdam is taking on the risk that the decontamination costs at the time of decontamination will be higher than anticipated at the time of commutation.³ A future decontamination obligation must also be discounted on the basis of the European Central Bank's target inflation rate and current interest rates in the European bond market.

³ This might be due to changed laws and regulations and changed insights into decontamination or contaminants, as has been the case in recent years with asbestos and PFAS. These risks need to be costed and added to the calculated decontamination costs.