

LAND REMEDIATION OBLIGATION FROM AN ENTITY-BASED PERSPECTIVE

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Abstract. The aim of the paper is to examine the issue of allocation of responsibility for conducting land remediation works, the aim of which is to return the land to its original state or some degree of its former baseline condition, understood as creation or restoration of utility or natural value for degraded land. Remediation is meant to stop or reverse environmental damage to soils, waters and air. The study seeks, in the first place, to determine how the obligation to remediate arises and the impacts it has. Secondly, it shall determine to what degree the obligation to remediate is allocated to a specific entity and whether it can be transferred to another entity. These considerations have been made on the grounds of applicable provisions of the Act of 3 February 1995 on the Protection of Agricultural and Forest Lands.

Keywords: use value of soil, degradation, personal responsibility, *ex lege*, transfer of responsibility

INTRODUCTION

The discussed issue (land remediation obligation from an entity-based perspective) belongs to the branches of administrative law and environmental protection law. Therefore, the analysis will take into account the specificity of both these branches of law.

Natural and technical sciences underline that “remediation and rehabilitation of degraded lands [...] is a significant and urgent task, since landscape, as physical space, is a limited resource that is being depleted. Land remediation is also an inseparable element of the transformation of the entire land development processes” [Gonda–Soroczyńska and Kubicka 2016, 163–75].¹ The importance of environmental remediation as actions that return land resources to their original state or as close to the original as possible, as part of environmental conservation efforts,² is acknowledged by the Polish legislator. This attitude is reflected in a number of regulations setting forth the obligation to remediate³ land and water resources.⁴

To clarify the terms used herein, let us start with the statutory understanding of the term “environmental remediation.” First, it must be noted that the definition

¹ More on environmental restoration from the perspective of technical and biological sciences in Hutniczak, Borowski, and Woźniak 2019, 14–20.

² For restoration and rehabilitation in the context of ecological safety see Korzeniowski 2012a, 230.

³ Cf., i.a., Article 244a(1)(2) of the Act of 14 December 2012, the Waste Law, Journal of Laws of 2020, item 797 as amended.

⁴ Restoration of waters is referred to in Article 389(4) of the Act of 20 July 2017, the Water Law, Journal of Laws of 2020, item 310 as amended.

of this term was removed from the Act of 27 April 2001, the Environmental Law,⁵ in result of which the Act on the Protection of Agricultural and Forrest Lands of 3 February 1995⁶ is the main legal act laying down the rules for remediation of natural resources. The significance of PAFL in the area of environmental remediation is enhanced by the fact that other acts of law directly refer to the PAFL provisions in this regard.⁷

It should also be noted that the regulations set out in PAFL, including the definition of “environmental remediation” is rather general, and thus, can be universally applied. This is in contrast to other legal acts that adapted such a narrow wording of the provisions on environmental remediation, that they can be applied only within the subject matter of the given act.⁸ Therefore, due to their universality, the PAFL provisions are applied to various aspects of environmental remediation, referred to in other acts of law, even if the provisions of these acts do not include any direct reference to PAFL.⁹

A legal definition of the umbrella term of “remediation” was provided in Article 4(18) PAFL. Pursuant to the provision, “land remediation” is defined as creation or restoration of utility or natural value for degraded lands through proper formation of the landscape, enhancements of physical and chemical properties, regulation of water conditions, and restoration of soil, reinforcement of banks and reconstruction or construction of indispensable roads. It must be noted that the above understanding of remediation is based on a number of indeterminate phrases¹⁰ and concepts defined in PAFL.¹¹

A comprehensive study of all the aspects covered by such a broad definition of remediation, far exceeds the scope of an academic paper.¹² Therefore, the author shall focus on only one legal aspect of environmental remediation regula-

⁵ Journal of Laws of 2020, item 1219 as amended [hereinafter: EL]. The change occurred in result of the implementation of the Act of 13 April 2007 on the Prevention and Remedying of Environmental Damage (Journal of Laws No 75, item 493), and in strict relation to Article 32(5) of the Act. On the basis of the said provision, Article 103(1) and (2) were removed from the EL which stipulated that restoration of natural landscape that was adversely impacted consists in restoring it to its original state, whereas remediation of degraded soil and land means returning it to the condition required by quality standards. Analysis of the legal state prior to the enforcement of the said amendment with regard to the definition of the term “restoration” [Barczak 2006].

⁶ Journal of Laws of 2017, item 1161 as amended [hereinafter: PAFL].

⁷ Cf. Article 129(2) of the Act of 9 June 2011, the Geological and Mining Law, Journal of Laws of 2020, item 1064 as amended. More see Szalewska 2015; Walas 2016; Judecki 2018a, 22.

⁸ For the sake of comparison, the definition of environmental remediation set forth in Article 3(1)(11) of the Act of 10 July 2016 on Mining Waste, Journal of Laws of 2018 as amended is appropriate to the regulatory scope of the Act.

⁹ The reference here is to, i.a., Article 15(3)(3) of the Act of 27 March 2003 on Spatial Planning and Development, Journal of Laws of 2020, item 293 as amended. Cf. Plucińska-Filipowicz 2019.

¹⁰ For example, such phrases as “proper formation of the landscape.”

¹¹ Meaning degraded and devastated lands, the legal definition of which were provided in, respectively (Article 4(16) and (17) PAFL).

¹² More on the interpretation of the concept of remediation in Jerzmański 2007, 26–29; Radecki 2012a; Korzeniowski 2012b, 111–24.

tions, i.e. the obligation to remediate, i.e. to carry out remediation works, and approach it from the subject-matter perspective. The aim of the paper is to outline the principles of allocation of legal responsibility for carrying out remediation of land.

To avoid confusion created by a multitude of terms related to “environmental repair” which overlap and mean similar, but not the same things, often resulting from different typologies, the terms adopted in the paper were simplified. The terms “repair works” and “remediation works” were used with the meaning of remediation (embracing processes involved in restoring the soil to its natural, pollution-free state, such as rehabilitation, restoration and revegetation). Similarly, any reference to the perpetrator of land degradation, i.e. decline in the use value of land, shall mean the entity responsible for remediation.

1. OBLIGATION TO REMEDIATE LAND

Pursuant to Article 20(1) PAFL, the event that gives rise to the obligation to rehabilitate land is the loss or limitation of the use value of soil. Hence, the responsibility for decreased use value of land arises by reason of occurrence of specific circumstances, and thus, the land remediation obligation arises by operation of law.¹³

Environmental remediation liability is similar in nature to tax liability. The point here is that, as pursuant to the Article 4 of the Act of 29 August 1997, the Tax Ordinance,¹⁴ tax liability is defined as unspecified duty, resulting from the occurrence of an event specified by tax acts [Nowak and Nowak 2009, 47–70], similarly, to paraphrase the tax provision, environmental rehabilitation liability should be understood as unspecified duty to perform obligatory service in response to the occurrence of an event specified by PAFL. Therefore, just as the manifestation of circumstances giving rise to the tax liability is not tantamount to the obligation of taxpayers being liable to pay specific tax, causing of loss or limitation of the use value of soil resulting in land remediation obligation is not tantamount to the obligation to undertake land repair works.

The nature of the rehabilitation liability outlined hereinabove becomes clear upon comparison of Article 20 PAFL with other solutions of the said Act.

First, pursuant to Article 20(4) PAFL, remediation should be carried out when industry no longer needs a given piece of land, on its whole or part, or will not use it for a specified period of time. Hence, while the said industrial activity¹⁵

¹³ It was also the case during the period when regulations on remediation formulated under the Environmental Law were in effect, i.e. the obligation to remediate also arose by operation of law [Czech 2014, 195–204]. Under the current legal status, the thesis presented is supported by case law. Cf., i.a., judgment of the Voivodship Administrative Court in Rzeszów of 10 December 2015, ref. no. I SA/Rz 1027/15, <http://orzeczenia.nsa.gov.pl/doc/A8F03746E4> [accessed: 10.02.2021]; judgment of the Supreme Administrative Court of 14 March 2018, ref. no. II FSK 694/16, <http://orzeczenia.nsa.gov.pl/doc/0841147F57> [accessed: 10.02.2021].

¹⁴ Journal of Laws of 2020, item 1325 as amended [hereinafter: TO].

¹⁵ As a side note, pursuant to Article 4(26) PAFL, industrial activity should be understood as non-

may, through degrading the quality of land, cause the remediation obligation to arise, pursuant to Article 20(4) PAFL, remediation works should be launched only after industrial operations are shut down in part or in whole on the degraded or devastated area, or else, are discontinued for some time. In other words, as the wording of the provision suggests, the legislator accepts temporary worsening of soil quality, simultaneously stating that the effects of land degradation or devastation must be remediated.

Secondly, in accordance with Article 22(1)(1–3) PAFL, both the extent of loss or decline in the use value of land, the person responsible for remediation, the direction and deadline for completion of remediation should be determined by administrative decisions.¹⁶ It can be thus stated that the launching of remediation works depends on the finality of administrative decisions.¹⁷ Coming back to the tax regulations mentioned above, it can be noted that just as tax obligation is defined as arising from taxpayer's tax liability to pay taxes for the benefit of the State Treasury, province, county and commune, in the amount, at the time and location stipulated in the provisions of tax law (Article 5 TO) [Dzwonkowski 1999, 21–35], the same can be said about the remediation obligation arising from the responsibility to carry out remediation in accordance with the said administrative decisions, by the person who caused loss or limitation of the use value of the land.

In the context of Article 22(2)(1–3) PAFL, it must be emphasized that neither of these provisions asserts the competence of public administrative authority to determine, through an administrative decision, the general or detailed scope of remediation works. Moreover, as outlined in the introductory part, the legal definition of remediation defines environmental repair works in very general terms, which were not made more precise within the body of the Act.¹⁸ In consequence, the entity obliged to perform remediation works is given free hand to choose actions to be carried out to mitigate land damage. Finally, the appropriateness of

agricultural and non-forest activity causing loss or decline in soil quality.

¹⁶ As a side note, it is worth to quote an apt remark made by W. Radecki: "A more careful analysis of the provisions of Article 22(1) PAFL reveals that there is no one, single decision on remediation, but rather a series of decisions which contain elements mentioned in the provision: 1) the extent of reduction or loss of soil value – reference is made to Article 28(5) PAFL, which means that the "extent" should be determined on the basis of two expert opinions prepared by two valuers; 2) the person liable; 3) initial strategy and deadline for completion of remediation; 4) decision confirming completion of land remediation works" [Radecki 2012b].

¹⁷ The same solutions were in force under the previous legal status, i.e. when regulations on remediation were part of the Environmental Law. It was emphasized by, i.a., W. Szczuka–Skarżyńska: "While the obligation to remediate arises from the operation of law, the process of remediation should be launched in accordance to the terms of the decision, which determines the scope, direction and deadline for completion of remediation, issued on the basis of Article 106(2) Environmental Law" [Szczuka–Skarżyńska 2003].

¹⁸ Remediation works, pursuant to Article 4(18) PAFL (i.e. providing a legal definition of remediation) consist in: "creation or restoration of utility or natural value for degraded or devastated land through proper formation of the landscape, enhancements of physical and chemical properties, regulation of water conditions, and restoration of soil, reinforcement of banks and reconstruction or construction of indispensable routes."

the method selected and the way remediation works are conducted are assessed by an administrative authority only after remediation has been completed, i.e. at the stage when the authority is about to issue a decision confirming completion of remediation works (Article 22(1)(4) PAFL).

2. SUBJECTIVE ASPECT OF THE LAND REMEDIATION OBLIGATION

The starting point for determining the rules by which responsibility for remediation is allocated is Article 20(1) PAFL, which provides that the person who causes loss or limitation of the use value of land is obliged to remediate that piece of land at their own expense. This provision is supplemented by Article 20(5) PAFL, which provides that in case a number of persons contribute to the degradation of land, each of them shall bear the obligation for its remediation proportionally to the impact their activity had on the land. It should be underlined that the rules of assigning responsibility for remediation of land are limited to the two provisions. The wording of the provisions of Article 20(1) and (5) PAFL demonstrates that for the legislator the only attribute of the entity obliged to remediate is their negative impact on the use value of land. In effect, the establishment of the remediation obligation is not linked to the attributes of the perpetrator of land degradation, nor to the nature of the event that contributed to land degradation or devastation. In this context, J. Bieluk aptly remarked that the provisions of Article 20(1) and (5) PAFL are the case of “liability based on risk as set forth in the Polish Civil Code” [Bieluk 2015a]. It also implies that the responsibility to remediate examined herein, corresponds directly to the overarching principle of environmental law (the so-called “polluter pays principle”) [Kuraś 2012, 215–38; Gruszecki 2016] requiring that the costs of pollution and pollution prevention measures be borne by those who caused damage to the environment.

Therefore, the stand taken in the legal doctrine and case law stating that for the identification of the entity obligated to carry out repair works “it is not important [...] who is the owner of the devastated or degraded lands subject to restoration.”¹⁹ In other words, the lack of a legal title to the devastated or degraded land on the part of the perpetrator of environmental damage does not release them from the obligation to carry out remediation works.

Hence, if the event when people responsible for decline in land and soil quality cannot be identified, the provision of Article 20(2) or (2a) PAFL applies, which provides that, by principle, the costs of remediation of land devastated or degraded by unidentifiable persons are covered from the state budget. Moreover,

¹⁹ Cf. judgment of the Voivodship Administrative Court in Lublin of 23 October 2008, ref. no. II SA/Lu 511/08, *Legalis* no. 239264. The statement and judgment cited in literature and case law: Bieluk 2015a. See judgment of the Voivodship Administrative Court in Bydgoszcz of 03 February 2015, ref. no. II SA/Bd 1309/14, <http://orzeczenia.nsa.gov.pl/doc/E4F7B4DAF9> [accessed: 10.02.2021]; judgment of the Voivodship Administrative Court in Bydgoszcz of 03 February 2015, ref. no. II SA/Bd 1310/14, <http://orzeczenia.nsa.gov.pl/doc/0FB5E05EF2> [accessed: 10.02.2021].

release of the owner of degraded or devastated land from the obligation to carry out remediation by a third party results from normative changes that shifted the burden of regulation of environmental remediation from EL to PAFL.²⁰ One should remember that under the previous regulation, remediation duty was assigned to the land-holder [Lipiński 2001]. The land-holder could be released from this liability upon proving that reduced use value of land was the result of third party's actions [Radziszewski 2003]. Therefore, since the legislator did not include the said rules in PAFL, it may well be assumed that the principle of liability presumption of the land-holder was dismissed.

In consequence, “decisions issued on the basis of Article 22(1) PAFL²¹ are addressed to the perpetrator of damage, who doesn't necessarily have to be, and often is not, the land holder” [Zieliński 2010, 497–510]. In this context it must be emphasized that at least three of the procedures leading to the issuance of decisions specified in Article 22(1) PAFL have direct impact on the execution of landholder rights²² in relation to the remediated land. This particularly relates to procedures with regard to the direction and deadline for remediation works, and decision confirming completion of remediation works. It may be safely assumed that the decision determining the entity responsible for remediation is also important for the landholder. For on the grounds of this decision, the holder of degraded or devastated site is obligated to ensure access for a given entity (i.e. liable for remediation of the site) to conduct the said works. To recapitulate, in case of procedures that end in the issuance of decision referred to in Article 22(1) PAFL, the land-holder is entitled to be treated as the party to the proceedings²³ also in the event when the land-holder is not the perpetrator of land degradation.

The case law is dominated by the approach that, despite the personal nature of the rehabilitation obligation, the perpetrator of environmental damage is not obligated to execute repair works on their own.²⁴ And yet, the argument that is supposed to speak in favour of such approach is the absence of statutory liability of the

²⁰ The change was brought by the entry into force on 30 April 2007 of the Act of 13 April 2007 on prevention of environmental damage and its remediation (Journal of Laws No 75, item 493) [Rudnicki and Zacharczuk 2014, 377–91].

²¹ It refers to Article 22(1–4) PAFL, which provides that decisions on remediation and development shall determine: 1) the extent of reduction or loss of the use value of land and soil, as specified in the appraisal mentioned in Article 28(5); 2) the person responsible for remediation of land; 3) direction and deadline for completion of remediation works; 4) decision confirming completion of land remediation works.

²² The term “landholder rights” was used in the context analyzed to facilitate understanding. It should be read as any title to the degraded or devastated land.

²³ Pursuant to Article 28 Code of Administrative Procedure, a party is any participant in legal proceeding whose legal interest or obligation is the subject matter of the proceeding, or anyone who demands enforcement of action by the authority on account of their legal interest or obligation [Kmieciak 2013, 19–35].

²⁴ Cf. judgment in Rzeszów of 19 April 2018, ref. no. II SA/Rz 1356/17, Legalis no. 1777085; judgment of the Voivodship Administrative Court in Łódź of 22 June 2018, ref. no. II SA/Łd 15/18, Legalis no. 1818480. Similar arguments as presented in the judgments are invoked by J. Bieluk [Bieluk 2015b].

perpetrator to remediate damage to the environment in person.²⁵

Without denying the rationale of the above presumption, it seems that the argument cited does not suffice to accept the stand that despite the private and public nature of the obligation to remediate, and due to the mere absence of a different statutory provision, it can be assumed that remediation does not have to be carried out by the perpetrator of land damage. However, attributes of specific obligations (i.e. their public and private nature) provide the basis for exclusion of the possibility to transfer the obligation to conduct remediation works to other entities than the entities liable.²⁶ Moreover, contrary to the premises underlying the above thesis, the provisions of PAFL contain arguments favouring execution of rehabilitation works by the damage perpetrator himself. Article 20(1) PAFL, crucial to the subject obligation, provides that “A person causing loss or limitation of the use value of land is obligated to remediate the site.” It seems that the wording of this provision leaves no room for doubt as to who is responsible for the execution of remediation works.

In view of the above, it should be underlined that the provisions of PAFL do not stipulate precisely how land remediation should be carried out. Likewise, competent authorities have not been vested with authority to specify how exactly site remediation works should be carried out. This seems to imply that for the legislator, the methods and measures of land restoration are a secondary issue, and the entire focus is on achieving the goal, i.e. rehabilitating or restoring the use value or natural value to degraded or devastated lands [Kuc 2014]. On the other hand, in criminal law terminology, the act described in Article 20(1) PAFL is a common law administrative tort,²⁷ hence liability should be borne by everyone, regardless of their competence. Moreover, it can be reasonably assumed that the vast majority of perpetrators of land degradation shall not have the competence required to conduct remediation works. Therefore, presupposing that the remediation obligation has to be carried out literally in person may, at the very least, hinder the achievement of the goal in question.

The arguments presented above suggest that a literal interpretation of Article 20(1) PAFL should be refrained from, and favour the approach that a perpetrator of environmental damage is not obligated to carry out remediation works personally, by themselves. Hence, what Article 20(1) and (3) PAFL actually refer to is

²⁵ Cf. judgment of the Voivodship Administrative Court in Łódź of 22 June 2018, ref. no. II SA/Łd 15/18, Legalis no. 1818480.

²⁶ Just for the sake of analogy, subjective criteria for tax payment were made clear as late as 2015. Nonetheless, the Supreme Administrative Court (SAC) passed a resolution, based on i.a. the public legal and personal nature of tax obligation, providing that “payment [...] made by another entity on behalf of a taxpayer does not release the tax payer of their tax liability,” see the resolution of the SAC of 26 May 2008, ref. no. I FPS 8/07, Legalis no. 104986. It can be thus assumed that the mere absence of specification of subjective criteria for execution of remediation works, in the light of the public legal and personal nature of the remediation obligation, is not a sufficient argument to imply that this obligation does not have to be fulfilled in person.

²⁷ Cf. terminology of crimes in Gardocki 2013, 29–40.

not the obligation to remediate *per se*, but rather the liability to remediate for the loss or decline in the use value of land.

3. RULES FOR TRANSFERRING REMEDIATION OBLIGATIONS

First, it must be emphasized that in view of its public nature, the transfer of the obligation to remediate on the basis of private law (i.e. in particular, civil law contracts) should be deemed unacceptable [Judecki 2018b, 37]. Consequently, transfer of the obligation to remediate on the grounds of a civil law agreement is tainted with invalidity. Hence, it can be implied that the authority supervising the execution of remediation works is obligated to ensure that restoration works are conducted properly by the damage perpetrator, rather than the entity that was supposed to take over the remediation duty based on a contractual agreement.

In this context, let us remember that land remediation works embrace a number of factual acts, the purpose of which is to restore land and soil quality [Korzeniowski 2012b, 111–24]. Thus, in contrast to e.g. the performance of public obligation such as payment of tax by an unauthorized entity [Goettel 2016], it would be rather difficult to return a site to the condition predating rehabilitation performed by an entity who is not legally liable, and secondly, it would also be difficult to establish follow-up liability of the damage perpetrator to carry out remediation works again, for the second time. Above all, reversal of the effects of the remediation would be contradictory to the provisions of PAFL or, in broader terms, environmental law. Reversal of restoration works would, *de facto*, be tantamount to re-degradation or re-devastation of land.

What should not be overlooked is that the legislator does not foresee sanctions for restoring the land to its best condition by an entity not liable for land remediation in the meaning of Article 20(1) and (5) PAFL, which implies that the effect achieved is not unwished for by the legislator even if it results from remediation works performed by an inappropriate entity. Hence, it may be presumed that proper execution of restoration works by a person who is not statutorily liable, releases the perpetrator of land damage from their liability for remediation. To be consistent, one should also assume that in such case, the decision confirming completion of remediation is addressed at the entity liable, and not the entity onto whom the obligation was to be passed on the basis of a private law contract.

Moreover, Article 20(6) PAFL also speaks against the possibility of transferring land remediation duty on the basis of private law actions. Pursuant to the said provision, transfer of rights and obligations arising from decisions pertaining to remediation that have already been issued requires a separate administrative decision. Therefore, since the legislator has foreseen an option to transfer the remediation obligation, it can be assumed that an alternative solution (e.g. agreement), would also have been provided in PAFL if it were admissible.

It should be noted that the abovementioned Article 20(6) PAFL does not expressly stipulate the criteria for the transfer of rehabilitation obligations. Despite

this silence on the part of the legislator, the concept of an entity's freedom with regard to the subsequent assignee of the remediation obligation is commonly rejected. One of the arguments in favour of this stand is the opinion that the possibility of transferring the said obligation onto arbitrary entities "would release entities whose actions resulted in degradation of agricultural lands from their obligation to remediate by means of a civil law contract, following which a poviats staroste could transfer the obligation onto other entities, including natural or legal persons, that may potentially play the role of a dummy company, a bogus entity, lacking the capacity to ever meet the obligation. In consequence, remediation costs would have to be paid by the Agricultural Land Protection Fund or the state."²⁸ Importantly, assigning the remediation obligation solely to the entity that caused land degradation does not guarantee that remediation will be carried out properly. Secondly, there might be other obstacles, e.g. the entity liable may simply lack financial means to conduct proper remediation works. Hence, the above argumentation is not very convincing. Nonetheless, ultimately, it seems that the legislator did not intend to authorize administrative authorities, on the grounds of Article 20(6) PAFL, to transfer the said obligation to arbitrarily chosen entities. As per the case law, "proceedings pertaining to land remediation and management are initiated *ex officio* in case any incidence of degradation or devastation of agricultural or forest land is revealed by a competent authority."²⁹ And so, if we assume that from the point of view of Article 20(6) PAFL no criteria have been provided that could serve as grounds for the competent authority to make a decision about the transfer of obligations, we would have to accept the arbitrariness of the authority with regard to decisions on who should carry out remediation. Doubtlessly, such conclusion is unacceptable as it would breach the principle of predictability of the state's actions, and, in particular, constitute abuse of administrative authority by imposing obligations on an individual.

With the above in mind, it must be emphasized that the provision of Article 20(6) PAFL mentions explicitly that the person liable for land remediation can be substituted. This provision foresees that it may be necessary to replace one person liable for remediation with another one, responsible for the same. To be more precise, in the proposed interpretation of Article 20(6) PAFL, the subsequent assignee of responsibility to remediate (successor body) may only be an entity obligated to carry out remediation as at the date on which the decision on transferring the obligation to remediate was issued. In turn, in view of the fact that the only premise to allocate responsibility to remediate is contribution to land degradation, one should agree with the thesis that the normative meaning of Article 20(6) is to be sought in relation, and inclusive of, to Article 20(1) PAFL.³⁰ In conclusion, it

²⁸ Cf. judgment of the Voivodship Administrative Court of 07 November 2013, ref. no. II SA/GI 980/13, Legalis no. 863275.

²⁹ Cf. judgment of the Voivodship Administrative Court in Gdańsk of 15 June 2011, ref. no. II SA/Gd 250/11.

³⁰ Cf. Judgment of the Supreme Administrative Court of 24 November 2015, ref. no. II OSK 701/14,

can be implied that solely the entity that caused or contributed to the loss or limitation of the use value of land can be the addressee of the decision transferring the responsibility to remediate.³¹

In view of the above, a reservation needs to be made that the provision of Article 20(6) PAFL should not serve as means to modify the original decision ordering remediation in case it had misidentified the addressee (i.e. was addressed at a person who did not contribute to land degradation). In the light of Article 156(1)(4) Code of Administrative Procedure, such incorrect identification is sufficient grounds to invalidate the administrative decision [Kielkowski 2015].

It should also be assumed that the decision referred to in Article 20(6) PAFL should not constitute grounds for transferring responsibility to remediate to an entity whose activity contributed to deterioration of land quality on their own or in collaboration with the entity originally burdened with the remediation duty. If this is the case, a decision with regard to the new perpetrator should be issued based on the above cited Article 20(5) PAFL.

It seems thus that the necessity to transfer the remediation obligation arises when there is another entity that damages or pollutes the same land that had already been damaged by another entity, originally bound to carry out remediation works, which ceased its activity.

What transpires in this context is that both in the doctrine and case law, the possibility to transfer the responsibility to remediate is made conditional on a simultaneous “takeover by the new entity of the land damage perpetrator’s activity (in particular, their industrial activity) which led to the degradation or devastation of land in the first place.”³² However, such approach is not reflected in the provisions of PAFL since the only thing that connects the two entities, primarily and secondarily liable, is their negative impact on the quality of land. At the same time, the source of the negative impact, i.e. the identity of the two perpetrators, does not seem very important from the point of view of the goal, which is successful restoration and remediation of land.

In the light of Article 20(6) PAFL, the decision transferring the responsibility to remediate results in the transfer of rights and obligations arising from the previously issued decisions (i.e. decisions establishing the extent of limitation or loss of the use value of land, the person responsible for remediation, direction and deadline for completion of land remediation). Aside from appointing a successor body liable for remediation, Article 20(6) does not stipulate other elements of the decision transferring liability. In the absence of separate provisions to the contrary, it is understood that identification of the scope of repair works carried out

<http://orzeczenia.nsa.gov.pl/doc/209B333B41> [accessed: 31.08.2018].

³¹ Cf. judgment of the Voivodship Administrative Court of 23 June 2016, ref. no. VIII SA/Wa 1005/15, <http://orzeczenia.nsa.gov.pl/doc/91969FAD95> [accessed: 31.08.2018].

³² Cf. decision of the Self-Government Appeal Court in Wrocław of 16 January 2018, SKO 4201/33/17, OwSS 2018, No. 2, items 46–54, <https://sip.lex.pl/#/jurisprudence/539379616/1/sko-4201-33-17-przeslanki-przejscia-publicznoprawnych-obowiazkow-rekultywacji-i-zagospodarowania...?cm=URELATIONS> [accessed: 21.01.2021].

by the primary polluter is beyond the subject matter of administrative proceedings leading to the decision on transferring the obligation to remediate. Here, it is important to note that the Act does not contain provisions that would specify how to appraise remediation works performed by the primary polluter (predecessor body). Hence, the decision referred to in Article 22(1)(4) PAFL would not be appropriate in relation to the predecessor body since it can be issued only after all remediation works, subject to the obligation, are completed. In contrast, the decision issued on the basis of Article 20(6) PAFL refers to cases when remediation has not yet been completed. Moreover, it is important to note that PAFL does not contain regulations that would be equivalent to art. 55⁴ Civil Code³³ or Article 112(1) TO.³⁴ Therefore, on the basis of information presented herein, it can be concluded that the successor body, i.e. the entity secondarily liable for remediation, is liable for the decline in the use value of land resulting from both their own activity, and the activity of their predecessor, and is held liable for overall remediation of land.

In view of the above it can be reasonably assumed that an administrative decision pursuant to Article 20(6) PAFL cannot be issued after the decision affirming completion of land remediation is deemed final.

CONCLUSIONS

The analysis allowed the author to formulate a thesis that in the light of provisions of PAFL, the establishment of the obligation to remediate is not tantamount to the order to initiate remediation works. The point here is that the obligation to remediate arises by operation of law following the occurrence of factual circumstances specified in the Act (i.e. degradation or devastation of land). In contrast, the obligation to start remediation works arises in consequence of an administrative decision issued by a competent authority. Therefore, by analogy to tax law regulations, the author suggested to use the term “obligation to remediate” with reference to the former case, and “responsibility for remediation” in the latter case.

The obligation to remediate arises when one premise is present, i.e. land and soil degradation. In other words, anyone, regardless of how they contributed to land degradation or devastation, may be obliged to carry out remediation works.

³³ Pursuant to Article 55⁴ of the Civil Code: “The acquirer of an enterprise or an agricultural farm is liable jointly and severally with the transferor for the transferor’s obligations related to running the enterprise or agricultural farm unless, at the time of acquisition, the acquirer was not aware of those obligations despite having used due care. The acquirer’s liability is limited to the value of the acquired enterprise or farm as at the moment of acquisition and according to the prices as at the time the creditor is satisfied. This liability cannot be excluded or limited without the creditor’s consent.”

³⁴ Pursuant to Article 112(1) TO: “The acquirer of an enterprise or an organized part of the enterprise shall be jointly and severally liable with the taxpayer, with all his or her assets, for tax arrears connected with the pursued economic activity that arose before the day of purchase, unless, despite exercising due diligence, he or she could not have known about these arrears.”

At the same time, although the obligation to remediate is bound to a specific person, they do not have to carry out remediation works by themselves, in person.

The obligation to remediate has a public law nature. Therefore, it can be transferred solely on the basis of an administrative decision of a competent authority, and not on the basis of a civil law contract. In turn, under administrative law, the grounds for transferring the obligation to remediate onto another entity is their secondary contribution to land degradation, i.e. subsequent to the decline in the use value of land caused by entity primarily liable for the degradation. It should be noted that in result of transferring the obligation to remediate, the primarily liable entity, the perpetrator of original land degradation or devastation, is released from responsibility for the completion of remediation works, including land degradation they themselves caused.

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