

Recent European Developments in the Management of Contaminated Land- A Legal Perspective

Aoife Shields¹

¹Law Faculty/Environmental Research Institute, University College Cork, Ireland E-mail: aoifeshields@hotmail.com

Purpose & Scope

Soil Framework Directive Proposal "SFD"

Content

1. Protect & Remediate Soil

- N.B. Natural Resource
- Threat – Contamination



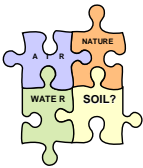
2. Economic Competitiveness

- contamination costs the EU approximately €2.4-17.3 billion per annum. (Commission Communications and Impact Assessment SEC (2006) 620)

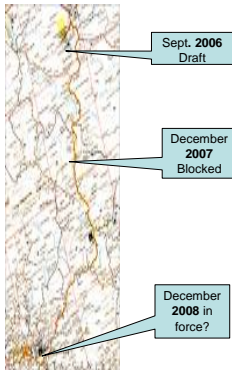


3. Fill Gap in EC Environmental Protection Legislation

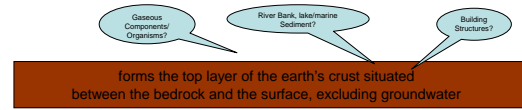
- Direct regulation of protection of soil
- Minimise adverse Cross-border impacts on soil



STATUS



Soil Definition

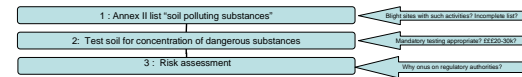


Contaminated sites



Presence of dangerous substances at a level that poses significant risk to human health or the environment, taking into account current and future use

Identifying and assess



Inventory



How to remove from inventory? Mechanism for prioritising high risk sites?

Remediation of Inventory sites



- Standard of remediation: no significant risk to human health or environment ;having regard to current/future use of site
- Responsibility: polluter & State (inhibit voluntary clean up?)
- State funding – orphan sites (public purse burden?)
- National Remediation Strategy : roadmap : timeline, funding allocation.

Soil Status Reports

- Buyer beware/ feed into inventory
- Onerous - €€€ time :when conveyancing land
- Far-reaching – potential to apply to most land transactions

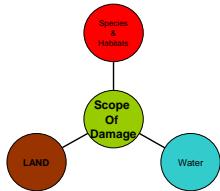
Purpose & Scope

Environmental Liability Directive "ELD"

Land Damage Provisions

What is ELD?

- adopted 2004, must be implemented in Member States by 30 April 2007
- EU Environmental Liability Regime for the prevention and remediation of environmental damage
- at a reasonable cost to society
- based on the polluter pay principle
- largely an administrative tool – enforced by regulatory authorities



Land Damage Article 2.1 (c)

"is any land contamination that creates a significant risk of human health being adversely affected as a result of the direct or indirect introduction, in, on or under land, of substances, preparations, organisms or micro-organisms"

Risk Assessment

Annex II.2: Risk assessment taking account of (a) characteristics and function of the soil; (b) type and concentration of the harmful substances, preparations, organisms, or micro-organisms; (c) their risk and the possibility of their dispersion.

Remediation

Who responsible? (1) Operator (polluter) whose activities (Annex III) cause damage (2) option to make other persons responsible (e.g. owner/occupier) (3) State option to remediate - a "last resort"
Type of liability: Strict + Defences - 3rd party; permit (optional); state of art (optional)
Standard of remediation: land no longer poses significant adverse risk to human health, having regard to current/future approved use
Temporal limit on liability for remediation: not retrospective, not cover damage after 30 years from date of contamination incident.

Operator/Polluter Duties

- Notify authorities of land damage
- Submit remedial plan to authority for approval : in accordance with Annex II.2 & in consultation with authority/public
- Remediate : preliminary (self-executing) and long-term measures (as agreed with authority)
- pay remedial costs (assessment, legal, enforcement, supervision etc)

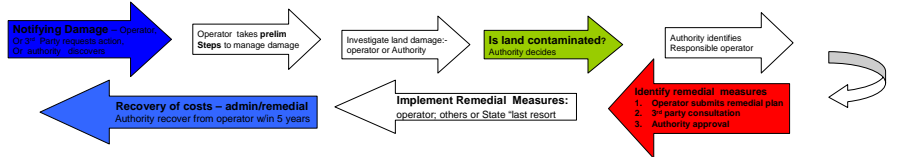
Regulatory Authority Powers & Duties

Power: inquiry, require /take remedial action, carry out risk assessment; issue necessary instructions.
Duty : identify responsible person; assess/approve remedial plan, order responsible operator to remediate, recover costs (via financial guarantees)

Public Role

- Pushing regulatory authority action – notify possible contamination; request action; seek review of their decisions.
- Participation in decision-making process e.g. appropriate remedial plan

Remediation Procedure

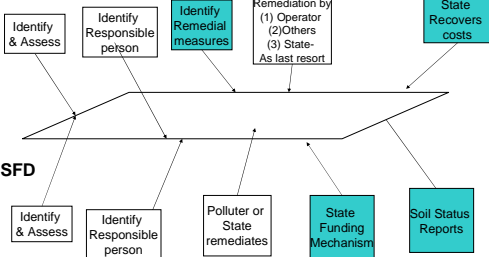


How do they interact

Interaction & Conclusion

Conclusion

ELD



- Id & Assess: SFD more prescriptive, SFD no notification requirement
- ELD detailed procedure for identifying remedial measures – SFD omits this
- Responsible person: ELD more flexibility
- ELD no state funding mechanism, no provision for soil status report.
- SFD : no provision for recover of costs by State

Soil Framework Directive – Proposal Contaminated Soil provisions

Pros

- aims - towards more effective soil protection and remediation across the EU
- Identification procedure and inventory system
- Imposes remediation requirement on polluter
- Requires adoption of national soil remediation strategy
- Requires est. of system for soil status reports "innovative"

Cons

- A moderate concretisation of the overall objective and guiding principles of the *Thematic Strategy on Soil Protection*
- Too prescriptive?
- Expensive to implement – cost outweigh benefit?
- Some provisions lack clarity as to extent envisage e.g. scope of definitions
- Uncertainty- practicable workability e.g. identification procedure
- Uncertainty as to its relationship with other regimes e.g. ELD.

Environmental Liability Directive

Pro

- Compliments other regulatory regimes to ensure compliance with environmental law , by establishing a system of liability for contaminated soil
- Member States must ensure it has in place more comprehensive & uniform duties and powers ,in respect of land damage e.g.
 - positive duty on operator/polluter to notify & remediate land damage.
 - Regulatory authority duty to recover costs
 - Public role in pushing regulatory authority action.

Con

- Gaps in application: not cover contamination predating 31 April 2007; nor where causal link between operator activity (Annex III) and contamination cannot be clearly est., or where contamination is a result of armed conflict, nuclear etc. No remediation action for "orphan" damage
- Scope of land damage limited : to human health risk.
- Where operator fails to remediate, there is no obligation on regulatory authority to take remedial action- only a power.