

Brownfield Sites – The EU Angle



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Outline

- Proposed Soil Framework Directive
- Environmental Liability Directive
- Groundwater Daughter Directive
- National Grid revisited

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Thematic Strategy for Soil Protection

- Soil – why does it need protection?
 - a non-renewable resource (100s of years for a few centimetres)
 - performs many vital functions: food and other biomass production, storage, filtration and essential for biological cycles
 - socio-economic as well as environmental importance
- Threats to soil - erosion, loss of organic matter, compaction, salinisation, landslides, contamination, sealing and decline of biodiversity
- Only nine EU Member States have specific legislation on soil protection
- Policies on water, waste, chemicals, industrial pollution prevention, nature protection, pesticides, and agriculture assist but are not sufficient to ensure an adequate level of protection

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Draft Soil Directive

- The EU published its Thematic Strategy for soil protection in September 2006. This is, in effect, a draft directive
- Aims to be flexible and non-prescriptive – much of the detail up to Member States
- Potentially finalised in 2008
- Diversity of soils and threats hindering a uniform approach

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Key features 1

- Appropriate and proportionate measures to prevent contamination in the first place
- Identification of contaminated sites:
 - within 5 years to list sites where potential soil polluting activities have taken place
 - activities are defined in Annex II – IPPC sites, airports, ports, former military sites, COMAH sites, petrol filling stations, dry cleaners, certain mining installations, landfills, pipelines and waste water treatment plants
 - authorities to measure dangerous substances
 - 10% of sites within 5 years
 - 60% of sites within 15 years
 - 100% of sites within 25 years

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Key features 2

- Inventory of contaminated sites:
 - confirmed man-made presence of dangerous substances at such a level that they pose a significant risk to human health or the environment
 - to take account of current and approved future use
 - publicly available
- Remediation:
 - contaminated sites to be remediated by removal, control, containment or reduction
 - to take account of current and approved future use
 - orphan site mechanisms
 - National Strategy to detail prioritisation, targets, timetables and funding to be up and running after 8 years

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Key features 3

- Land sales where potentially polluting activities have taken place:
 - site owners to draw up soil status reports
 - includes site history, chemical analyses and trigger thresholds of substances linked to activities
 - provided to potential buyers and authorities
- Land owners to take precautionary measures to prevent and minimise adverse effects
- Minimise and mitigate soil sealing
- Soil degradation:
 - identify areas at risk within 5 years
 - draw up programme of measures within 7 years to include risk reduction targets and timescales

Issues to consider

- Part IIA — will the lists match up? **significant harm or significant possibility of harm**
- prescriptive nature of initial list - blight effect?
- approved future use – overlap with planning regime
- orphan sites (person responsible cannot be identified or held liable):
 - more use of insurance and other tools?
 - how will this effect Class B persons?
- soil status reports – brings everything out into the open
- what are the indicators and targets?

Indicators 1

- UK Soil Indicators Consortium (UK SIC):
 - in 2000, public bodies sought to identify and develop a set of national indicators for soil quality
 - the final report (2002) and set out an initial list of 67 indicators to be based on soil function (environmental interaction, food and fibre production, building platform, support for ecological habitat and biodiversity, the provision of raw materials and protection of cultural heritage)
 - the Consortium was formed in 2003 to take the scheme forward and develop appropriate indicators for each function group
 - for example, for environmental interaction, indicators are pH, Soil Organic Carbon, Bulk Density, Olsen P, Total Nitrogen, Copper, Cadmium, Zinc and Nickel
 - due to report in 2008

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Indicators 2

- ENVIRONMENTAL ASSESSMENT OF SOIL FOR MONITORING (ENVASSO):
 - seeks to create a single integrated EU-wide set of measurable criteria
 - due for completion January 2008
- Use of trigger values etc – will they avoid the problems with CLEA and existing SGVs and produce indicators and triggers that are realistic and proportionate

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Environmental Liability Directive

- Due in force 30 April 2007; 2 consultations (first consultation closed on 16/02/2007, second due Autumn 2007)
- ELD concerned with the prevention and remediation of environmental damage and follows “polluter pays” principle
- Strict liability for operators of Annex III activities (eg PPC activities) damaging species, habitats, water and land contamination affecting human health
- Fault based for other activities affecting species/habitats

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Environmental Liability Directive

- Remedial measures:
 - Species/Habitats - to return to baseline condition
 - Waters - to return to baseline condition
 - Land - to remove the risk to health
- When considering baseline remediation use the following
 - Primary - dealing with root cause; or
 - Complementary - enhance equivalents; or
 - Compensatory - pay for alternative
- Issues
 - Identifying the baseline
 - Insurance
 - Types of remedy

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Groundwater Daughter Directive

- Will replace existing Groundwater Directive (80/68/EEC) from 2013
- Introduced in accordance with Art 17 of the Water Framework Directive (2000/60/EC) to:
 - protect groundwater against pollution and deterioration
 - establish criteria for the assessment of good groundwater chemical status
 - establish criteria for the identification of significant and sustained upward trends of groundwater pollution
 - define starting points for the reversal of significant and sustained upward trends of groundwater pollution

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Groundwater Daughter Directive

- Monitoring and classification of groundwater will mean that the impact of contaminated land will be under greater scrutiny
- Will seek to prevent and limit inputs of pollutants into groundwater from indirect (diffuse) and direct sources
- Adopted December 2006

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National Grid revisited

- R (National Grid Gas plc) -v- EA (House of Lords, June 2007)
- Developer bought former town gas site in 1965 and remediation works were undertaken by EA in 2005 (£700,000)
- NG - the successor in title to a company which was held liable for a predecessor who (i) contaminated former gasworks and (ii) was responsible for inadequate decommissioning
- NG argued that it cannot be an “appropriate person” (s78F EPA 1990)
- High Court looked at the purpose behind Part IIA and the statutory transfer of assets and liabilities to NG meant that the original polluter could still be “found”

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National Grid revisited

- House of Lords overturned the decision:
 - Part IIA is clear - no need to look at parliamentary debates
 - Needs to be the actual polluter
 - Liability transfer under Gas Acts limited to those in existence at the time
 - Unfair to investors
- Where does the Government go from here?
- Detailed analysis of transfer schemes
 - Utilities - Water, Electricity, Gas
 - Industries - Coal, Nuclear, Rail
 - Local Authority reorganisations
- Potentially, a major hole has opened up in Part IIA

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