University of South Australia

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SITE CONTAMINATION LAW AND POLICY IN EUROPE, NORTH AMERICA AND AUSTRALIA - TRENDS AND CHALLENGES

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CRC CARE

- Established November 2005
- A$105m over 7 years ($35m grant from Australian government, balance from participants)
- 23 participants (13 core, 10 supporting)
- Includes 5 Universities
- Based at Uni of SA in Adelaide, Australia
- Web-site: www.crccare.com

CRC CARE REVIEW OF LAW AND POLICY – EUROPE, NORTH AMERICA & AUSTRALIA

- Aims
  - To enable comparisons of legal approaches to site contamination
  - To assist development of new or improved laws – particularly in Asia-Pacific region
- Outcomes
  - Surveys to be presented on web-site
  - Use hypertext links to access primary source documents
  - Need for regular updating/ ongoing expansion
  - Access to be provided by subscription

CRC CARE REVIEW OF LAW AND POLICY – EUROPE, NORTH AMERICA & AUSTRALIA

- USA
  - California
  - Massachusetts
  - New Jersey
- CANADA
  - Federal
  - Ontario
  - British Columbia
  - Alberta
- EUROPE
  - European Union
  - United Kingdom
  - Germany
  - Netherlands
  - Switzerland
  - Belgium (Flanders)
- AUSTRALIA
  - Federal
  - 6 States, 2 Territories

THE DEVELOPMENT OF SITE CONTAMINATION LAW AND POLICY

- USA
  - CERCLA (1980) ("Superfund")
  - Also RCRA (re "current" sites) + State Superfund laws
- EUROPE
  - Denmark/Netherlands (1983)
  - Switzerland (1987)
  - United Kingdom (1995)
  - Germany (1999)
- CANADA & AUSTRALIA
  - Provinces/States – since 1990's
- ASIA
  - Japan, South Korea, Taiwan, Singapore & Hong Kong
- INTERNATIONAL
  - Note: EU Draft Framework Directive on Soil Protection (2006)

THE NEED FOR SPECIFIC SITE CONTAMINATION LEGISLATION

- Driven by specific situations (e.g., Love Canal, Lekkerkerk, Fischer site)
- Also by growing awareness of magnitude of problem:
  - Europe: 250,000 sites, to increase by 50% by 2025 (EEA, 2007)
  - USA: 425,00 “brownfields” sites
  - Canada: 30,000 sites
  - Australia: 80,000 “potential” sites (at 1997)
- Reasons for specific legislation:
  - Retrospectivity
  - Provision of scientific/technical framework
  - Promotion of “brownfields” redevelopment

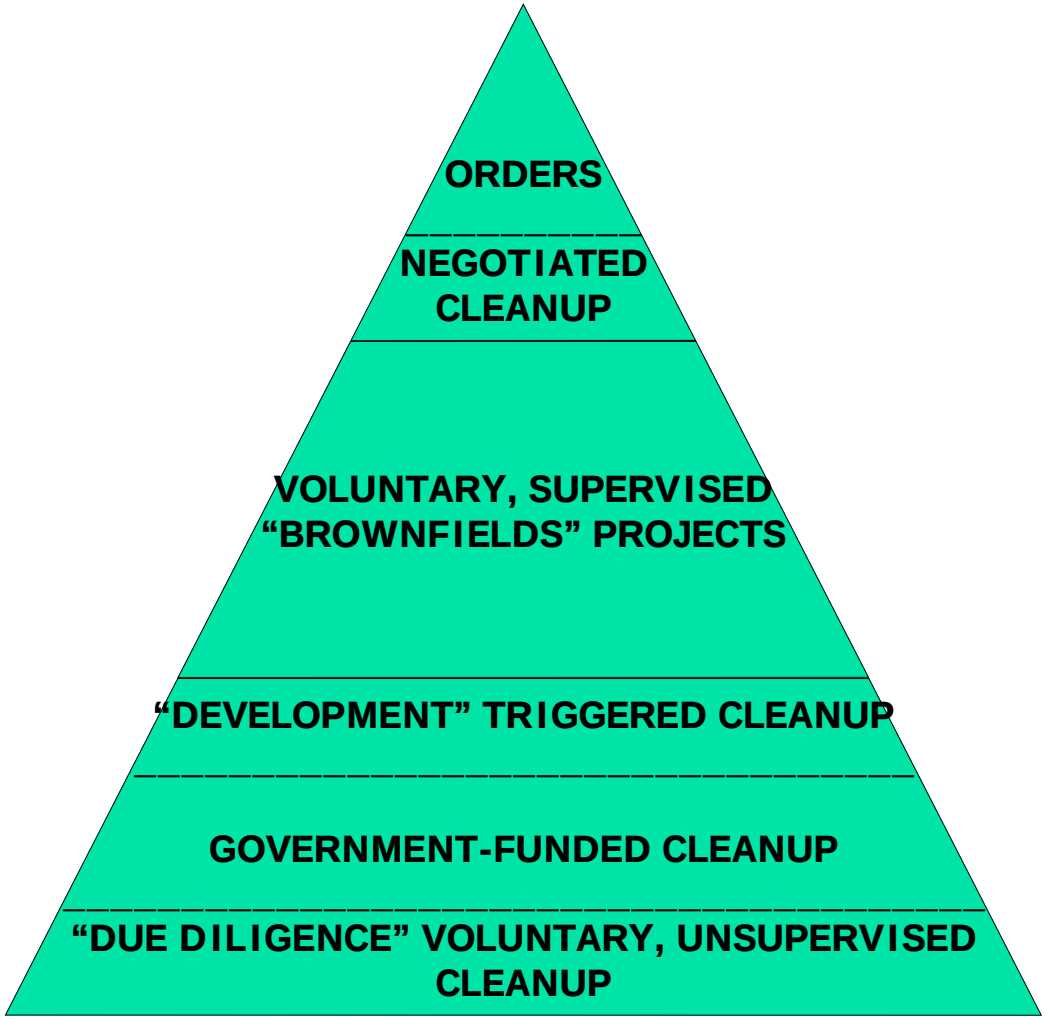
GENERAL CHARACTERISTICS OF SITE CONTAMINATION LEGISLATION

- **1ST generation legislation**:
  - Defined “potentially responsible parties”
  - Prescribed liability rules:
    - Retrospective
    - Strict
    - Joint and several
  - New regulatory mechanism: orders to assess and clean up
  - Public fund for “orphan sites”
- **2nd generation legislation**:
  - “Brownfields” measures

GENERAL APPROACH: REGULATED V MARKET-BASED CLEANUP

- **"command & control" approach (orders)**
  - In practice, limited to large, high-risk sites
  - Long lists of sites awaiting remediation
- **Voluntary, supervised approach (market driven)**
  - "brownfields" redevelopment
  - "development" of land as a trigger for cleanup
- **Other avenues to clean-up:**
  - Government-funded cleanup ("Superfund" schemes)
  - Voluntary, unsupervised cleanup as part of "due diligence" audits re:
    - **Corporate reporting of environmental liabilities**
    - **Lender requirements for sale and transfer of businesses and properties**

THE CLEANUP PYRAMID



BROWNFIELDS MEASURES

- Definition
  - Areas of unused land often contributing to urban blight;
  - Usually contaminated, but not to the extent that regulatory action is required
- Essential features (US EPA, 1994)
  - Financial incentives (grants, loans, tax relief)
  - Legal immunity from future liability
  - Voluntary, supervised cleanup

BROWNFIELDS MEASURES (cont.)

- Brownfields policy in other countries:
  - Canada – focus on immunity from liability, few incentives
  - Europe – strong uptake in UK, less elsewhere
  - Australia – no interest to date

- USA experience:
  - Significant reduction in lists of contaminated sites
  - Substantial increase in number of voluntary cleanups
  - Revitalization of numerous inner-city areas
  - But ?
    - **Some poorly-designed projects**
    - **Accusations of lowering of clean-up standards**
    - **Lack of take-up by large corporations**
    - **Issue of “finality”**

TECHNICAL APPROACHES TO ASSESSMENT & REMEDIATION

- Evolution from reliance on generic standards to use of site-based risk assessment
- Lack of connection between technical criteria and legislation
- Need for clearer remediation criteria:
  - Improper use of screening/investigation levels
  - Clearer provision for in situ retention
    - Wide acceptance in many countries
    - Need for more specific criteria re acceptability
    - Challenge of community acceptance: better risk communication
    - Problem of interface with waste management laws
    - Relationship with sustainability principles

INSTITUTIONAL CONTROLS – LONG TERM STEWARDSHIP

- Institutional controls relate to:
  - Monitoring and reporting obligations
  - Restrictions on immediate development of site
  - Constraints re future land-uses
- Limits of traditional property law mechanisms
- USA : *Uniform Environmental Covenants Act*
  - *Able to be registered on title to land*
  - *Enforceability*
  - *Adopted in over half of USA States by mid-2007*
- Need to consider similar mechanism in other countries?

"PRIVATIZED' SUPERVISION OF SITE CONTAMINATION LAW

- Environmental auditor system in Australia
- Adopted in Canada (BC, Ontario and Alberta
- Also in USA (Massachusetts)
- Canada/Mass. approach based on membership of professional organizations rather than examination & accreditation
- Oversight via random audits in Canada/Mass:
  - Disciplinary action
  - Independent body to oversee system
- Need for greater oversight of environmental auditors in Australia?

LIABILITY RULES: TRADITIONAL APPROACH

- Strict liability
- Retrospective application (to ‘historic’ pollution)
- Joint and several liability (“deep pocket” approach)
- Broad definitions of “potentially responsible parties”
- Provision for PRP’s to “join” other parties

LIABILITY RULES: DEVELOPMENTS

- Natural resources damages (US Superfund)
- Liability for change of use (Alberta)
- Transfer of responsibility (CCME, Canada)
- Exemptions:
  - Local government
  - Lenders
  - Down-gradient owners
  - Innocent purchasers
- Special rules re insolvency (USA)
- Forfeit of property to the Crown by liquidator
  - Note: Australian Corporations Law, s. 568

FEDERAL JURISDICTIONS

- Often leave detailed regulation to States:
  - No legislation at Federal level in Canada or Australia
  - Framework law in Germany
  - But see USA :RCRA/CERCLA
- Funding for cleanup of Federal sites:
  - Canada: Federal funding of C$3.5 bn over 10 years
- Australia?

CONCLUSIONS

TRENDS

- Negotiation widely preferred to regulation
- Shift towards market-driven “brownfields” schemes that:
  - Utilize economic and legal incentives
  - Encourage voluntary cleanups
- Shift in scientific/technical approach towards “fitness for purpose” rather than multifunctional use via:
  - Site-based risk assessment approach
  - Promotion of in situ retention
- Shift in some jurisdictions to “privatized” supervision of cleanups

CONCLUSIONS (cont.)

CHALLENGES

- To ensure specific legislation is adopted in more countries (particularly in developing world)
- To ensure recent trends deliver sound, long-term outcomes consistent with sustainability principles:
  - need for effective institutional controls
  - ensure accountability for “privatized” schemes
  - develop closer links between science and law
  - Review role of land-use planning (local) authorities
- THE BOTTOM LINE: LONG-TERM SOLUTIONS V SHORT-TERM EXPEDIENCY