



Discussion Paper Concerning
European Commission Communication “Thematic Strategy for Soil Protection”
COM(2006)231 final (“strategy”)
&
Proposal for Directive of the European Parliament and of the Council establishing a
framework for the protection of soil and amending Directive 2004/35/EC (“directive”)

Dated: January 2007

Introduction

NICOLE is a network of representatives of industry, service providers and the scientific community. It was formed in 1996 with an aim to bring together professionals involved in the management of land and water contamination in the member states of the EU (see www.nicole.org).

In the draft version of the Soil Directive 7 themes are mentioned. In recognition of NICOLE’s area of expertise, this position paper focuses mainly on soil contamination aspects.

Main Comments

Article	Article Text	Comment and Recommendation
9	For the purposes of preserving the soil functions referred to in Article 1(1), Member States shall take appropriate and proportionate measures to limit the intentional or unintentional introduction of dangerous substances on or in the soil, excluding those due to air deposition and those due to a natural phenomenon of exceptional, inevitable and irresistible character, in order to avoid accumulation that would hamper soil functions or give rise to significant risks to human health or the environment.	NICOLE strongly supports the notion of contamination being related to the concept of significant risk to human health and/or the environment. NICOLE is of the view that a risk based management approach is the only sustainable way forward in dealing with contaminated sites and, if deemed necessary, their remediation.
9	See above	Soil functionality can vary enormously depending on the use to which it is put. For example, the ‘made ground’ which often forms the development platform for industry requires different functionality than an agricultural soil. It is recommended that it is made more clear in the Directive that the functionalities of soil in a defined location are those that are important for its fit-for-purpose use , rather than the full range listed.

<p>10.1</p>	<p>Member States shall, in accordance with the procedure laid down in Article 11, identify the sites in their national territory where there is a confirmed presence, caused by man, of dangerous substances of such a level that Member States consider they pose a significant risk to human health or the environment, hereinafter “contaminated sites”. That risk shall be evaluated taking into account current and approved future use of the land.</p>	<p>NICOLE recommends that the intentions regarding remediation to future use are clarified. It is suggested that this should consist of a use which has been planned and permitted (subject to the remediation) and that the site is only placed on an inventory if the developer does not deliver the site to the suitable condition agreed for the new use.</p>
<p>10.2</p>	<p>Member States shall establish a national inventory of contaminated sites, hereinafter “the inventory”. The inventory shall be made public and reviewed at least every five years.</p>	<p>NICOLE is concerned that automatically placing a site on an inventory when a risk assessment is completed will discourage voluntary action by owners and therefore slow the pace of remediation and, in particular, the reuse of brownfield sites. It is recommended that the Directive makes it clear that a site should only be placed on an inventory in circumstances where the responsible person is unwilling to remediate the site in a timescale that is acceptable to the competent authority. In this way, voluntary remediation and sharing of information is encouraged, with the stigma associated with the ‘contaminated site’ label being reserved for cases where remediation would not otherwise be delivered in a reasonable time. It is further recommended that it is explicitly stated in the Directive that once a site has been remediated to the agreed standard, then it should be removed from the inventory.</p>
<p>12.1</p>	<p>Where a site is to be sold on which a potentially polluting activity listed in Annex II is taking place, or for which the official records, such as national registers, show that it has taken place, Member States shall ensure that the owner of that site or the prospective buyer makes a soil status report available to the competent authority referred to in Article 11 and to the other party in the transaction.</p>	<p>NICOLE fully supports the principle that owners of the land should make prospective buyers aware of the soil status where this is appropriate. However, it is recommended that the Directive does not link release of this information to placing the site on an inventory as this could discourage transactions involving brownfield sites. The requirement to provide soil assessment data to authorities is better linked to either, (a) the point where an application for a change of use of the site is made, or, (b) where the authority, on</p>

		the balance of probabilities, has reason to believe that the site is causing significant harm or has the significant possibility to do so (i.e. significant risk). A combination of these two approaches would ensure that risks are controlled and managed in a timely and cost effective manner.
13.2	Remediation shall consist of actions on the soil aimed at the removal, control, containment or reduction of contaminants so that the contaminated site, taking account of its current use and approved future use, no longer poses any significant risk to human health or the environment.	NICOLE assumes that pathway management is considered an integrated part of the four remediation approaches mentioned in this article. In this context NICOLE wants to re-emphasize the need for incorporating the linkage of source, pathway and receptor into the directive in order to facilitate efficient risk assessment. It is suggested that the relationship between the Soil Directive and other directives that have relevance to risk based contaminated land management (e.g. the Groundwater Directive and the Environmental Liability Directive) are made more clear in order to encourage consistency of interpretation
13.3	Member States shall set up appropriate mechanisms to fund the remediation of the contaminated sites for which, subject to the polluter pays principle, the person responsible for the pollution cannot be identified or cannot be held liable under Community or national legislation or may not be made to bear the costs of remediation.	Whereas NICOLE strongly supports the concept of the “polluter pays” principle, it believes that more clarification is warranted with regard to obligations and liability of owners, operators and polluters, if these are all different. For example, who would be considered to be the polluter in a case where the original owner of the land (and operator of the ‘polluting’ process) sold it with full information to a purchaser who then exposed humans to the chemicals of concern by redevelopment of the site?

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