

2008-08-20

## QUESTIONNAIRE ON SOIL POLLUTION; ANSWERS FROM SWEDEN

### I Information on polluted soils

#### A Do you have a national inventory (or inventories) of polluted or contaminated soils?

1. *Who is in charge of it: local, central authorities, professional bodies?*
2. *What are the criteria: soil composition, prior or present use, ownership, depollution in progress, planned use...?*
3. *Who has the access to it? Is it a data base?*
4. *What is your view on this source of information? What changes, amendments would you like to be made?*

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The National Environment Protection Agency (EPA) in Sweden and the regional authorities (21 in Sweden) have carried out an inventory of all polluted sites that might represent acute risks at direct exposure and polluted sites that today, or in a near future, might risk important water supplies or valuable natural areas. The regional authorities have reported sites where activities have been carried out that might have led to pollution to the EPA. The inventory which was completed in 2007 comprises about 80 000 sites. According to the risk, they have been classified in three classes. There are 1 500 sites in the class that is considered to mean the largest risk. Among them there are 38 sites that are considered to mean acute risks; they are in need of immediate measures.

Data on the inventory are published on the website of the EPA ([www.naturvardsverket.se](http://www.naturvardsverket.se)). There you can find lists of the 38 acute sites and of the ten sites of highest priority of each region (totally 210 sites).

The information is not of so much use for the environmental courts, but rather for the environmental authorities. Starting from the inventory they decide which sites to give priority and to investigate further. One of the first questions for the authorities is then if it is possible to find someone responsible for the pollution/the site. The next step is for the authority to demand investigations and measures from the responsible company or person. In this step disagreements often occur between the authority and the company that has been decided responsible by the authority. If the supervisory authority issues an injunction, it can be appealed to an environmental court. Each case is then regarded individually by the court, and the original inventory list is not of any importance.

#### B Are there any particular administrative or legal requirements to provide information?

1. *In which cases (sale, change of activity, etc.)?*
2. *To whom (public authority, private buyer, etc.)?*
3. *What, if any, are the legal sanctions in case of non observation of the requirement to inform? (specific sanctions such as: closure of the site, cancellation of sale, mandatory rehabilitation of the soil or general sanctions pertaining to common liability regulation)*

4. *What is the proportion of claims pertaining to the lack of information? (Please give examples).*

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According to the Swedish Environmental Code, the person that owns or uses a property shall immediately inform the supervisory authority if pollution is discovered that could mean harm to the environment or to human health. If there is an immediate risk that an activity could mean a severe damage to the environment, the supervisory authority should immediately be informed of this by the operator. If it is discovered that a severe damage to the environment has occurred, the supervisory authority should immediately be informed of this and of the measures taken and measures planned and needed by the operator.

Non observation of these regulations is criminal according to the Environmental Code and punished by fines or up to two years of prison.

Injunctions from the supervisory authority that refers to a certain real estate can be notified in the official register of real estates in Sweden.

The regional authorities can proclaim an area to be a site of environmental risk if the soil or water is so severely polluted that restrictions of the use of the area are needed. The authority decides on restrictions on the use of land, measures to be taken and/or obligation to report i.e. digging or building in the area. Non observation of regulations of this kind can result in fines.

## **II- National legislation on soil pollution and enforcement**

### **A Does specific legislation exist on the subject of polluted soils?**

- 1- *What kind of legislation: civil, public or criminal law?*
  - 2- *Have the provisions of directive 2004/35/CE on compensation for damage to soil (contamination) been implemented in your national law and how?*
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The Swedish Environmental Code was introduced in 1999 and consists of different kinds of environmental legislation; civil and public as well as criminal. It implements for example the European Union law on environmental impact statements and assessments, IPPC-industries, environmental quality standards, waste, chemicals and contains legislation on the protection of areas, animal and plant species. The Code involves general rules of consideration (such as the burden of proof principle, the precautionary principle, best possible technology and the polluter pays principle) basic rules concerning permit application procedures and supervision and rules concerning the consideration of cases and matters.

Chapter 10 was earlier named “Polluted areas” and regulated in particular contamination of soil (public law). Now the directive 2004/35/CE has been implemented in this chapter, and thus it has been somewhat widened and renamed “Activities that causes damage to the environment”. The chapters 29 and 30 of the Environmental Code concerns sanctions, and pollution of soil is included in the regulation in these chapters (criminal law). Chapter 32 of the Code regulates compensation for environmental damages, which also includes soil pollution (civil law).

**B Is there any specialized personnel to check the degree of respect of the regulations on polluted soil?**

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On the regional authorities in Sweden, on the EPA and on some local authorities there is personnel specialized in polluted areas. They work for example with inventories, technical investigations and investigations of liability, supervision and finance of projects concerning polluted sites. Most of them are technicians, but they also have knowledge of the regulation and access to legal experts within the authorities.

**C Does the soil pollution fall under any other legal disposition, or other specific sector of environment regulation? (for example: water regulations, waste, industrial facilities, town planning, etc.)**

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Matters concerning soil pollution fall under the Swedish Environmental Code as a whole. Of the answer to question A above follows that chapter 10 is the most important part of the legislation when it concerns soils that have already been polluted. However, demands on permits and conditions for permits (the regulation of environmental impact assessments) for environmentally hazardous activities of course are most important when it comes to the prevention of soil pollution.

**D Generally speaking, do you feel that rules on soil pollution are effectively applied and efficient?**

**E And if not, please explain what are the main reasons in your view? (too complex, few and far between, unknown, unsuited, lack of means, etc.)**

**F How would you evaluate your country's legislation on the subject?**

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On one hand, there has been a regulation of polluted soil for a long time in Sweden (since 1969); on the other hand, the regulation has been subject to several major changes (the latest when the directive 2004/35/CE was implemented in 2007). Since the rules have been changing and the latest rules hardly have been used yet by the court, it is hard to have a specified opinion on them. As a general observation however it has been - and still is – a long process to get a practice in matters concerning soil pollution. The first more important cases on the depollution of sites in Sweden appeared during the 1980: s. The question then was who was liable to take measures against the pollution in cases like pulp- and paper industries where owners had succeeded each other, or where banks of wood fibre had appeared above the waterline and started to smell after the ending of the operation of the plant.

The question in court is to a great extent still the same – who is liable? Late examples of questions (2008) concern the liability in cases of bankruptcy and the liability of an industry that put waste in an unofficial landfill in the late 1960:s. (Further explications in answer III D below!) The courts have still not reached far beyond the questions of liability. There have been a few cases in the Environmental Court of Appeal that concerns the extent of the investigations that a polluter or an owner of a property has to make, but hardly any cases concerning the actual measures, how far they should reach and the reasonable costs of them.

There are many different situations and it takes a long time to get the answer from the courts on each question that might be raised – every question of principle is appealed to perhaps three instances. To some extent the authorities has adapted themselves to this and prefer to drive the cases where governmental financing is possible, or where it is possible to reach an agreement with the operator or landowner, often in cases when he is interested to get a fast exploitation of the polluted area.

### **III- Soil pollution and liability**

#### **A What is the proportion of soil pollution claims on environmental law suits pertaining to environmental issues?**

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The proportion is small; maybe some percent of the total amount of environmental cases in the Swedish Environmental Court of Appeal.

#### **B What are the types of liability: subjective liability - polluter pays, establishment fault, or objective liability - mere ownership or occupancy?**

#### **C Who can be held responsible: the state, user, owner?**

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In the first place it is the polluter that is responsible, irrespective of intent and negligence, and to whom the authorities should direct their demands on investigations and measures. The problem is often that there are many polluters that have contributed, and a question is how far back in time the responsibility reaches. In Sweden the legislation makes it possible to go as far back as to at least 1969 to find polluters that might have a liability.

If there is no polluter that still exists, or if he cannot afford the investigations and measures, the landowner may be responsible.

The government (EPA) has also got some possibilities to finance investigations and measures where the polluter is unknown or by other reasons cannot be held responsible. The government subsidy for 2007 was just over 50 million €.

#### **D Please give practical examples (if any) and specify the situation regarding contaminated sites where the owner or the user disappeared.**

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There have been two cases in the Swedish Environmental Court of Appeal in spring 2008, where companies had gone bankrupt. They left behind waste deposits that were leaching pollutions to surrounding soil and waters and the soil was thought to be contaminated. The regional authorities had in both cases issued injunctions directed to the bankrupt's estate and demanded the estate to make investigations. When the estates appealed the injunctions to the environmental court the court rejected the demands of the authorities since the estate in neither case had control of or any connection to the waste deposits. Otherwise in Sweden, bankrupt's estates have liability if they have continued, after the bankruptcy, the activity that has caused the pollution. This was not the case here.

In another case a forest company found a waste deposit in one of their forests. This deposit too was leaching pollutants to the soil. The forest company had not given any form of permission to the deposit and the polluters – the people that had brought the waste to the deposit – were unknown. The authorities had demanded the forest company – as the landowner – to take measures, but the court found that the waste was illegally put in the forest by unknown polluters and that the company could not be held responsible.

It is often a difficult task to decide if a company is responsible or not; if the original polluter has disappeared or if he still exists.

In a recent case a company that produces wooden floors and carpeting had put waste – pieces of carpets, plastics and other materials that had accidentally taken fire and was partially burnt - in an unofficial landfill in the late 1960:s. No one else had put waste in the landfill. There was no waste put in the landfill since that time, and now the soil and the groundwater (the well of a neighbour) was polluted by metals and organic matters. The question here for the court was if the landfill should be regarded as an activity of its own, with a nonexistent polluter to demand investigations and measures from, or if the still existing carpet company should be held responsible. The court found that the company was responsible and demanded it – in a first step - to make investigations.

Another case where it was difficult to decide whether the polluter still existed or not, concerned a pulp- and paper plant that had been using mercury in its processes during the 1970:s. In a river downstream this plant – where a rather big industrial town also is situated – sediments (fibre banks) were found to be contaminated by mercury. The use of mercury in the company had ended before 1980. The production of pulp and paper had ended sometimes during the 1990: s. A company merger had taken place and the company thus formed was now a building company. Was that company responsible for the mercury contaminated fibre banks, or had the polluter disappeared? The court found that the company was responsible and demanded it in this case to make investigations in a first step.

**E Do you meet difficulties in reconciling special soil regulation and other regulations such as property laws, private contractual provisions? Please give examples.**

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No, we have not met that kind of difficulties yet. Most of the relevant legislation is compiled in the Swedish Environmental Code.

**F Are there penalties? Are they inflicted? If not, why? Please give examples.**

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There are penalties in Sweden (see the answer to question II A 1 above). There are only a few cases concerning penalties when it regards polluted soil. Normally the pollution of the soil is not made by intent and negligence and then the criminal law is not applicable. The public and civil laws are of greater importance in these cases.

#### **IV- Care and rehabilitation of polluted soils**

**A Is there mandatory care or obligation to rehabilitate polluted soils (civil or public obligation)?**

**B By whom? (the state, owner, user, etc.)**

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Se III A och B above.

**C What are the criteria of rehabilitation: prevention of harm to environment and health, restoration of soil to its previous state, preparation of soil for future use, or taking into account its environmental potential?**

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The Swedish EPA has published guidelines on how far the rehabilitation shall reach. It contains three levels – classes – each with a set of data on which concentrations of different pollutants that should not be exceeded. The three levels are “sensitive land use”, “less sensitive land use with protection of ground water” and “less sensitive land use”. Which level to reach is decided in each case individually. The overall aim is to prevent harm to environment and health.

This kind of questions – how far should a rehabilitation reach; are the guidelines reasonable – has not yet been tried in court.

**D Who implements it and who controls it?**

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It is the responsible polluter that has to follow injunctions given by the supervisory authority. The supervisory authority bases normally its injunctions on guidelines published by the Swedish EPA. It is also the supervisory authority that controls that the injunctions are followed. The injunctions can be appealed to environmental courts that try them on their own merits. The courts do not only make legal reviews.

#### **CONCLUSION**

The answer under question II D, E and F contains the main conclusions on the Swedish legislation. It is difficult to have an opinion on the needs of European legislation since there are still so many questions that have not yet got their answers, applying the existing legislation.