



EU FORUM OF JUDGES FOR THE ENVIRONMENT
UE FORUM DES JUGES POUR L'ENVIRONNEMENT

EUFJE 2008
PARIS 7 et 8 October 2008

Soil Pollution - Danish report

Introduction to Danish Law on contaminated soil/polluted land

Leaving aside general farming legislation, the Danish legislation on protection of soil (land) against pollution and on contaminated soil has been made piecemeal and isn't coherent. The most important pieces of legislation are the Environmental Protection Act, The Contaminated Soil Act (also named as the Polluted Land Act), and the Drinking Water Supply Act, the Act on Compensation for Environmental Damage. In May 2008 the Danish Parliament did adopt the national legislation implementing the EC Directive 2004/35 on Environmental Liability.

The legislation can be divided in two categories: the proactive and the responsive part.

The proactive part:

The main proactive provision on protection of contamination of the soil is the Environmental Protection Act, section 19 (from 1974) requiring a public permit before storage, deposit or file of any material which could pollute the groundwater, the underground or the soil. Permits under section 19 can be withdrawn without compensation – but the relation between section 19 permits on one hand and on the other hand IPPC-permits, EIA-permits, permits under the Contaminated Soil Act and permits under the Drinking Water Supply Act are strongly disputed and not at all clear.

Under the Contaminated Soil Act from 1999 any movement of soil known to be polluted, soil from road areas or soil from sites registered as potential polluted under the Act are subject to a prior notification and permit scheme if the soil is moved outside the registered site. In 2006 this notification scheme was expanded to cover all soil from city areas.

Under the Environmental Protection Act section 21 owners and users of land are obliged to report to the local council if they have any knowledge about pollution of the land. It is then for the local authority to decide if and how the authority will respond to this information.

The responsive part

The responsive part can be divided into (1) registration of sites; (2) obligations if pollution is discovered), (3) liability for cleaning up.

1. Registration

The Contaminated Soil Act from 1999 established a scheme for registration and a national inventory of the polluted sites and sites which “may be” polluted. The registrations of the sites are made by the regions. The registration is supplemented by a designation of potential drinking water supply areas adopted under the Drinking Water Supply Act and the designation of sensible areas (housing, institutions public areas) under the Contaminated Soil Act. Designation as sensible areas depends only on actually use and is not effected by planning decision.

If a site is registered as polluted or may be polluted the legal implications can be divided into six:

- (1) Movement of soil outside the registered site is subject to a notification and permit scheme.
- (2) The change use of registered sites to sensible use requires a permit
- (3) If the registered site is placed in an area designated as potentially drinking water supply zone or the site actual use of the site is sensible, any construction activities including movement of bricks require a public permit
- (4) If private houses are registered as “may be” polluted – the owner has the right to claim further research on the site is polluted or not within two years
- (5) If private houses are registered as polluted the innocent owner has the right to be subject to a public cleaning system – depending on public funding (more than 10 years to wait ...)
- (6) The registration of sites intends to found the information for the public cleaning of polluted sites which depend on public funding (it will take more than 100 year).

2. Obligations if pollution is discovered

According to section 21 of the Environmental Protection Act 0 owners and users of the site is obliged to notify the local council about any knowledge of contamination of the soil. According to section 71 of the Soil Contamination Act construction activities must stop and the local council notified if pollution is discovered.

3. Liability for searching and remedying

In 1991 the Danish Supreme Court rejected land owner liability (Rockwool-case – UfR 1991.674). This position has been accepted by the later legislation on liability for environmental damage adopted by Parliament meaning, Danish Law does not include land owner liability.

Liability for searching and remedying contaminated soil are governed by different (not coherent regimes) – reflecting different legal perspectives:

3.1 Civil liability:

The operator/polluter is under Danish case law liable for any damage caused by polluting the soil (including remedying costs) if the pollution is caused by negligence of the polluter. If the polluter is a listed industrial installation subject to permits, the polluter is strictly liable for the damage according to section 3 of the Act on Compensation for Environmental Damage, provided that the pollution occurred after July 1994. Claim for damage under civil liability can be made by private parties as well as public authorities to the extent the pollution has caused the plaintiff damage.

3.2 Administrative liability

Administrative liability means the competent authority in public law is granted the power to administrative order searching or remedying the pollution. Administrative liability for searching and remedying contaminated soil is governed by the Contaminated Soil Act section 39-49. The legislative system distinguishes between pollution caused by oil tanks less than 5000 litres used for heating private homes and other causes of pollution.

3.2.1 Pollution caused by oil tanks less than 5000 litres – section 48 and section 49

If pollution is caused by oil tanks less than 5000 litres used for heating private homes and the pollution is discovered after 1 March 2000, the local authority has under section 48 the power to administrative order the owner of the oil tank to search and clean up the pollution irrespective of any negligence of the tank owner. It requires that the oil tank is active and is still used for heating.

According to section 49, insurance of such damage is compulsory, meaning the insurance company will pay the costs up to 2 million DKK (280.000 EUR). However, tank owners have not themselves made insurance contract – instead the oil companies supply oil in Denmark has made an agreement with one private insurance company, meaning that all private families receiving oil from the Danish oil companies automatically has the compulsory insurance. It is questionable whether the Danish system is in accordance with competition law.

3.2.2 Other pollutions under the Contaminated Soil Act

Administrative liability for the pollution of soil falling outside the scope of section 48 is governed by section 40 to 46 of the Contaminated Soil Act to the extent this is not prevented by retroactive effect. The regime is rather complex and is mainly distinguishing between search (section 40) and remedying (section 41).

Under section 40 the competent authority has the power to administrative order the polluter as defined in section 41 to make search and risk assessment of pollution discovered or suspected – provided the pollution is caused after 1992 – and maybe after 1999 (the

retroactive part of the provision is strongly disputed). The polluter is obliged to comply with the order even if the pollution is caused by third parties.

Under section 41 the competent authority has the power to administrative order the polluter to take necessary remedying action in case of pollution caused after 1 January 2001, unless the pollution is caused by third parties and this causation cannot be blamed the polluter.

The liable party(ies) under the scheme are the polluter(s) as this is defined in section 41(3). Under this provision the polluter is defined as the operator of any commercial or public installation causing the pollution and anyone liable for the damage. If an entrepreneur excavating for constructing cause a leak of a cable installations because of negligence, the entrepreneur as well as the operator of the cable are considered polluters and therefore subject to administrative liability under the act.

If the pollution is caused by more than one polluter section 43 of the Act establish a combined prorated and joint and several liability scheme which is so complex than it has never been used. If pollution is caused by more than one polluter, the polluter has a strong defends because of this complex system.

In case the polluter doesn't (anymore) own or lease the polluted site section 44 provide a special regime on how to administrative order the polluter to act on foreign land.

If the polluting installation has been sold after the administrative order has been given, the new operator under section 45 could be liable to comply with the administrative order given to the previous operator – but only if the new operator is in bad faith about the administrative order before the contract is made – and only if the new operator continue with the same industrial operations.

3.2.3 Pollutions outside the scope of the Contaminated Soil Act

If the pollution falls outside the scope of the Contaminated Soil Act because it occur at a time when the provisions of this act don't apply, the competent authority has the power to order the polluter to take remedying actions under section 19 and section 69 of the Environmental Protection Act provided - that the pollution is caused by negligence of the polluter and liability is not time barred (obsolete).

4 Contract liability

If the owner of a polluted property sells the property and doesn't inform the buyer of the pollution before making the contract, the seller will be liable for the economic loss caused by the pollution to the new owner, if the seller did know about the pollution before the contract was made, provided that the buyer was in good faith. If neither the seller nor the buyer knew about the pollution (both in good faith), the seller could be obliged to pay partly compensation for substantial economic loss.

Short answers to the listed questions:

I: Information on polluted soils :

1. Do you have a national inventory of polluted or contaminated soils?

Under the Contaminated Soil Act a national inventory on polluted sites has been established.

1.1 Who is in charge of it: local, central authorities, professional bodies?

It is the Regions which have the responsibility of the registration of contaminated sites. The Region is obliged to report any registration to the Ministry of the Environment which is responsible for the inventory. When a contaminated sites has been fully cleaned up it is the responsibility of the Regions to ensure the registration in the inventory is deleted.

1.2 What are the criteria: soil composition, prior or present use, ownership, depollution in progress, planned use...?

The only criteria for registration in the inventory is if the site is polluted or “might be” polluted according to sections 4 and 5 of the Contaminated Soil Act. The registration however must contain information on: (1) the site is placed in an area with groundwater designated as priority for drinking water supply; (2) whether the use of the contaminated site is sensible (private houses, playgrounds for children etc.); (3) whether there is knowledge which ensure that the contamination is not dangerous to public health – so called “nuanced registration” which is a supplementary scheme to the Act adopted in 2006.

1.3 Who has the access to it? Is it a data base?

The inventory is a data base with free public access.

1.4 What is your view on this source of information? What changes, amendments would you like to be made?

In my opinion the problem is not the inventory, but that the threshold for registration sites as polluted under Danish Law have been extremely low in fact including almost all areas of cities. To reduce this problem, the Parliament in 2006 amended the act establishing a new regime which stated that all land in the cities are considered polluted to a lower degree unless the opposite has been documented. This does however not solve the problem, that under Danish Law a very big part of the territory is considered polluted although the soil doesn't present any danger to public health, the water or eco systems.

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

The owner and the user of the site is obliged to report any knowledge of pollution of soil to the local authorities according to section 21 of the Environmental Protection Act.

2.1 In which cases (sale, change of activity, etc.)?

Beside the general obligation of owners and users to inform the local authorities about knowledge of pollution, the owner is obliged to inform about such knowledge to the buyer in case of sale according to general private law principles in Denmark

2.2 To whom (public authority, private buyer, etc.)?

- see above under 2.1.

2.3 What, if any, are the legal sanctions in case of non observation of the requirement to inform?

If the owner doesn't inform the local authority about his knowledge of pollution the owner is subject to criminal sanctions (fine). However, until now not one case has been published in which such sanctions were used although the obligation has been in force for more than 30 years.

If the seller doesn't inform the buyer of pollution he knows or should have known, the seller will be liable for any damage caused by the missing information including remedying and cleaning up the pollution.

2.4 What is the proportion of claims pertaining to the lack of information?

While sanctions haven't been applied regarding the administrative obligation, civil sanctions are common in cases where polluted sites have been sold without informing the buyer of the pollution.

II National legislation on soil pollution and enforcement

3. Does specific legislation exist on the subject of polluted soils?

Yes, in 1999 the Parliament adopted the Act on Contaminated Soil which

- (1) Established a strict liability regime for soil pollution caused after the Act went into force (no retroactive liability) based on administrative order; and
- (2) Made the Regions responsible for the registration and cleaning up the old polluted sites and polluted sites in case no one can be held liable for the pollution.

The Act is supplemented by the Environmental Protection Act, the Drinking Water Supply Act, the Act on Compensation for Environmental Damage and after the implementation of the Directive on environmental liability by the Act on Environmental Damage.

3.1 What kind of legislation: civil, public or criminal law?

The Act on Contaminated Soil is an administrative legislation making liability depending on the administrative order of the local authorities. If no administrative order has been issued the polluter will not be liable under this legislation.

3.2 Have the provisions of directive 2004/35/CE on compensation for damage to soil (contamination) been implemented in your national law and how?

The Directive was implemented one year too late by the Act on Environmental Damage. In contrast to the Directive the Danish implementation of the strict liability regime for polluted soil is not restricted to the activities listed in annex III of the Directive but include all commercial and public activities. Moreover, since the threshold for “damage to soil” under the Directive is much higher than the threshold for liability under the Contaminated Soil Act, the Danish implementation implies that the regime for liability under the Directive is only applied when the pollution cross the threshold under the Directive. The implication is that when a pollution of soil falls is subject to the Directive, it is the Environmental Protection Agency and not the local authorities which have the responsibility for issuing the administrative order. The interrelationship between the new and the old regime is expected to cause considerable doubt on competence since it might often be rather later that the seriousness of the pollution is known and competence depends on this.

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

It is the local councils which have the responsibility for inspection of sites in corporation with the Regions. The Regions and partly the local councils employs personal specialised in polluted soil.

5. Does the soil pollution fall under any other legal disposition, or other specific sector of environment regulation?

Polluted soil is considered subject to waste legislation. Moreover, the operation of any facility receiving polluted soil is subject to an IPPC permit under the Environmental Protection Act section 33 (or section 39 for old facilities) as well as this permit can only be granted after an environmental impact assessment and public hearing has been made under the Planning Act. The relationship between IPPC-.permit and the requirement for a permit under section 19 of the Environmental Protection Act is strongly disputed and not clear.

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

Generally, the legislation on soil pollution is effectively applied regarding registration and issuing administrative order to the polluter. However, two major problems should be emphasised. First, the administrative liability regime under the Act on Contaminated Soil only makes the polluter strictly liable for remedying the environmental damage, while damage to private parties caused by the pollution is not subject to strict liability. For such damage to private parties, the polluter is liable only in case of negligence (culpa-liability). Second, the legislation on issuing administrative order is not fit to deal with complex questions of liability and because the liability is based on administrative law it often happens that the regime fails to make the polluter liable because of administrative order.

7. And if not, please explain what are the main reasons in your view?

- see above under 6.

8. How would you evaluate your country's legislation on the subject?

- see above under 6.

III: Soil pollution and liability

9. What is the proportion of soil pollution claims on environmental law suits pertaining to environmental issues?

During the 1990'ties the legal actions on soil pollution at courts were more than 50% of all environmental cases. Most of the legal actions were against a public authority concerning the validity of the administrative order issued – and in most cases the public authorities lost. Since the Act on Contaminated Soil went into force the cases on polluted soil at national courts did decline dramatically. For the last years the average of cases on polluted soil at national courts is about 1 case on administrative liability and about 5 cases on private liability (cases between buyer and seller of contaminated land).

The disputes on the validity of administrative order in stead have been pleading before the Environmental Appeal Board which has reported about 20 cases the last two years. But compared to the other environmental case the cases on polluted soil has a small share (less than 10%).

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

The Contaminated Act identifies the polluter – not the landowner - as the liable party and makes the polluter strictly liable, if the soil pollution is caused by commercial or public activities with very few defences. The Parliament as well as the Supreme Court (the Rocwool-case, U 1991.674H) has expressly rejected landowner liability.

11. Who can be held responsible: the state, user, owner?

The owner or the user of the polluted site can be held liable only if the owner or the user is polluter as this is defined in section 41(3) of the Contaminated Soil Act. According to this provision the polluter is either the physical/legal person who operates the facility which cause the pollution (fx. operates the leaking pipe) or the physical/legal person who cause the leak by an act which is subject to civil liability under Danish Law.

In case the polluter doesn't own the land, the authority is under section 44 of the Act entitle to issue an order to the polluter to clean up foreign land and to order the landowner to accept this. The last will however require that the landowner accept the clean up due to the constitutional protection of private property as emphasised in the preparatory work.

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

The liability of the polluter does not depend on whether the owner or user of the land has disappeared.

13. Do you meet difficulties in reconciling special soil regulation and other regulations such as property laws, private contractual provisions?

- see comment under 11 regarding section 44 of the Contaminated Soil Act

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

The sanctions for not complying with an administrative order under the Contaminated Soil Act to remedying polluted soil is divided into two part: - administrative sanctions and criminal sanctions. *Administrative*: If the polluter doesn't comply with the administrative order, the local authority is entitled to take the necessary effort to comply with the administrative order on the expenses of the polluter. *Criminal*: If the polluter doesn't comply with the administrative order he is subject to criminal sanctions which goes from fine to imprisonment. It should however be noted that until now not one case has been reported on such sanctions.

IV: Care and rehabilitation of polluted soils

15. Is there mandatory care or obligation to rehabilitate polluted soils?

The Contaminated Soil Act distinguish between polluted soil which is caused after the Act went into force and which could be subject to an administrative order to remedying the environmental damage on one hand – and on the other hand all other polluted sites.

For the first part, the local council is obliged to issue an administrative order to clean up to the extent the polluter could be held liable. If the local council refuses to do so, it is subject to administrative appeal to the Environmental Appeal Board which has held that the administrative order is an obligation on the local council, provided that the condition for an administrative order is met. The criteria for rehabilitation is fully restoration of the environment to the extent that the clean up doesn't conflict with the principle of proportionality. In this regard the Supreme Court in U 2005.2923 H held that if the polluter by a risk assessment has demonstrated that the efforts proposed by the polluter sufficiently prevent further damage, the local authority is not entitle to require further clean up, unless such claim is supported by another risk assessment demonstrating that the first risk assessment was insufficient.

For other polluted sites, it is the responsibility of the Regions to clean up – but the obligation is restricted in two ways. First, the Regions should only clean up to the extent the pollution is a treat to public health or drinking water supply. Second, the obligations rely on the financial resources yearly allocated to the Regions for the purpose by the State. Since the financial resources pr. year is between 50 million and 100 million DKK (7 – 14 million EUR) and since that all shall cover the cost for search the formal obligation is modified so much that it is only theoretical.

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

- see above.

15.2 What are the criteria of rehabilitation?

- see above.

15.3 Who implements it and who controls it?

- see above.