The City of London Law Society Response to the Consultation on the Proposed EU Soil Framework Directive and Initial Regulatory Impact Assessment of July 2007.

General Questions

Question A

What are your views on the current level of soil protection measures in the UK considering the risks and threats faced by soils, including those identified by the Commission?

The proposed Soil Framework Directive introduces requirements on Member States aimed at improving levels of soil protection and soil improvement. These aims should be achieved, through the adoption of measures including (i) the reduction of risks related to soil erosion, organic matter decline, compaction, salinisation, and landslides; (ii) prevention and inventory of soil contamination; and (iii) limitation of soil sealing.

These aims involve a multiplicity of provisions and statutes in many different areas (e.g. agriculture and forest use, chemicals and hazardous substances, contamination, planning, water, and waste to name a few). While English soil protection measures cover many of the risks identified by the Commission, existing legislation is more focused on soil use and remedial measures than on soil protection and preventive measures.

The interface with existing EC legislation transposed and under transposition should be considered.

Question B

If you consider these measures to be inadequate, do you believe that any gaps are best dealt with on a common basis across the EU, for example to avoid distortion in competition, or better dealt with at a domestic level?

The answer to this question relates firstly to the principle of subsidiarity. According to the Commission, action at the EU level is preferable because (i) the regulation of activities affecting soil may distort competition and (ii) soil degradation has transboundary effects. Despite the specific characteristics of the UK in respect of the second of these points distortion of competition, should be a sufficient reason to justify action by Commission. An adequate assessment of the principle of subsidiarity should nevertheless take place. Furthermore, it is believed that a coherent and comprehensive EU policy and legislative framework rather than national measures are preferable because of the interface of the Directive with multiple directives and regulations.

Question C

What, if any, gaps exist in terms of addressing soil protection at an EU level in particular the risks identified by the Commission?

The most important gap appears to be that currently there is no emphasis on soil functions but solely on soil use. Soil has not been perceived as an autonomous medium worthy of consideration. Remediation may even be contrary to the protection of soil functions.

Question D

Does the solution to these gaps lie in amending existing EU Directives, or in introducing a new overarching framework for soil protection?

If our previous assumption is correct, the introduction of a new overarching framework for soil protection will be required. Also for the purpose of one of the Commission's proposed key areas of action – awareness raising and exchanging of information - a framework for soil protection is preferable. Moreover, a framework approach promotes a more coherent and comprehensive soil policy. This approach does not exclude the need to amend legislation in force.

Question E

Are there an existing EU provisions that give some protection to soils which, in your view, do not work or which could do with simplification?

For example, Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources; and Council Directive 86/278/EEC of 12 June 1986 on the protection of the environment, and in particular of the soil, when sewage sludge is used in agriculture have been difficult to implement and enforce in the majority of Member States.

Question F

In terms of the risks and threats identified by the Commission, how urgent are these problems? Is there sufficient evidence to tackle them now?

No legal comment.

Question G

Who should bear the costs involved in any new obligations? Should we follow a polluter pays approach, a market-based system where, for example, a property developer pays the cost of remediation, or should these costs fall to taxpayers?

No legal comment.

Detailed Questions

Question 1

Article 1: *What are your views on the scope of the proposed Directive, in particular the definition of soil and the soil functions which are listed?*

The definition of soil should be made clearer. The Directive should probably be applicable to the soil of riverbanks and to coastal beaches, but should probably not be applicable to soil sediment on river beds when under water.

Question 2

Article 1: *Do you think the proposed Directive seeks the right level of protection for our soils?*

No legal comment.

Question 3

Article 1: *Do you think it is important for Member States to address natural degradation as well as that caused by human activity?*

Yes, but depending on the existence of a link with human activity.

Question 4

Article 2: *Do you have any comments on these definitions? Do you think it is important to clarify any other terms in the proposed Directive?*

Due to the legal implications resulting from these definitions, the definition of "sealing" should be made clearer. For example, the regulation of sealing is likely to have major implications for planning. In particular, the meaning of the expression "permanent covering" should be clarified.

Question 5

Article 3: *Do you consider there is a significant benefit in expanding the duty, as provided by the proposed Directive, to carry out an environmental assessment in so far as soil is concerned, so that it covers all other sectoral policies which may have a significant impact on soil? If so, which particular sectors of policy do you think impact on soil and need to be covered? And what are your views on leaving out the duty to consult in relation to these additional sectors?*

No legal comment.

Question 6

Article 3: *What are your views on how this provision could be improved, for example, should it instead only refer to the SEA Directive in the recitals and include this additional duty in respect of soils only in respect of policies not already covered by the SEA Directive?*

This provision should be implemented in co-ordination with existing legislation on Strategic Environmental Assessment. The suggestion presented in the question seems to be the one that offers more certainty and promotes the effectiveness of existing legislation.

Question 7

Article 4: *There are a number of ways in which this proposed Article could be adapted. Please let us have your views on how this provision could be amended. Some possibilities you may wish to consider are:*

- *inclusion of an appropriate de minimis threshold, in terms of area of land affected.*
- *leaving it to individual Member States to decide which land-users are covered and which activities should be regarded as likely to result in significant harm. This may mean differing levels of care in different Member States but with more flexibility to deal with relevant local issues that may change with time.*
- *leaving this outcome to be achieved by the EIA and other Directives, and simply requiring Member States to encourage action by landusers more generally to minimise their impact on soil functions.*
- *exceptions or limits to the duty to prevent or minimise, for example, because some uses serve important social or economic needs, and minimising adverse effects may be technically infeasible or involve excessive cost?*

This provision is too broad. The use of the word precautionary should be avoided. An appropriate *de minimis* threshold could be considered in terms of area and land. Types of activities could also be listed and exceptions provided.

Question 8

Article 4: *What activities, which are not already regulated in the UK, if any, do you consider may have a significant adverse impact on soils?*

For example, carbon capture and storage.

Question 9

Article 4: *Do you have any comments on the issues we have raised, and on our initial analysis of costs and benefits?*

We agree with the issues raised.

Question 10

Article 5: *Do you consider there to be significant benefits in having new EC legislation that deals with soil sealing? If so, what are the benefits and do they in your view exceed the potential costs?*

No legal comment.

Question 11

Article 5: *Do you think there would be value in amending the draft Directive, for example, to:*

a) make it clear that Member States in considering the need to limit soil sealing should do this as part of their overall consideration of a proposed development's environmental, social and economic impacts;

b) provide for exceptions to the requirement to limit sealing, for example, where the proposed development/sealing serves an overriding public interest;

c) insert de minimis provisions in line with the thresholds in the Environmental Impact Assessment Directive?

All the proposals presented in the Consultation would contribute to the clarity, applicability and enforceability of the provision.

Question 12

Article 5: *What are your views on amending this provision so that it only requires mitigation of new soil sealing through use of permeable construction materials?*

No legal comment.

Question 13

Article 5: Do you agree with our concerns and our assessment of the costs and benefits as set out in our initial RIA?

No legal comment.

Question 14

Articles 6-7: *Do you consider that this risk area/ programme of measures approach is appropriate? How do you consider that this provision could be improved, for example, what are your views on requiring Member States to put in place programmes of measures to address degradation processes with an adequate focus on higher risk areas and higher risk activities (but without requiring formal identification of risk areas) or requiring more clearly harmonised standards?*

No legal comment.

Question 15

Articles 6-7: *Is there a significant benefit, in your view, in having a common EU-wide framework in place?*

Please see our general question B above.

Question 16

Articles 6-7: *Do you consider that the correct degradation processes have been listed for the purpose of identifying risk areas? What are your views on seeking to have compaction removed from this list so that it is dealt with only under the proposed Article 4?*

No legal comment.

Question 17

Articles 6-7: *Do you consider that the definitions of soil erosion, soil carbon and the other degradation processes are correct considering the range of soil functions which the proposed Directive seeks to protect?*

No legal comment.

Question 18

Articles 6-7: *What are your views on the inclusion of salinisation as a threat – do you consider that it should be defined to exclude managed retreat?*

No legal comment.

Question 19

Articles 6-7: *If the proposed Directive were to require detailed risk-mapping, is it important for it to require Member States to use all the Annex I factors or could the methodology be left to individual Member States?*

No legal comment.

Question 20

Articles 6-7: *Do you agree with our concerns and our estimate of the costs and benefits of this provision?*

No legal comment.

Question 21

Article 8: *How important do you think it is for us to be permitted to continue to use existing CAP measures (cross-compliance and agri-environment) to deliver the required Programme of Measures? Do you think such existing measures in their current form are adequate for addressing soils issues in high risk areas?*

It is important to consolidate existing measures to reduce regulatory burden and in accordance with the better regulation drive. The Directive ought to recognise and work around and where appropriate within measures that are already in place.

Question 22

Article 8: *Would you like the Government to be able to use a range of measures, from guidance and codes of practice to regulations, to implement this proposed Article?*

Yes. In order to implement, the necessary level of detail can only be provided in the form of guidance and codes of practice (e.g. using worked examples as far as possible). These should be conformed (as far as possible) across the EU to ensure a level playing field e.g. like the BREF notes under the IPPC regime.

Question 23

Article 8: *Do you agree with our concerns and our estimate of costs and benefits?*

No legal comment.

Question 24

Article 9: *Are there any benefits in having this provision?*

As currently drafted, there do not seem to be any clear benefits in having this provision. There is considerable crossover with other existing legislation.

This provision lacks clarity and clearly attainable targets. Clearer guidance should be given on what constitutes a *hamper to soil functions* and what is considered "proportionate" and “appropriate”. There is no guidance on acceptable levels of risk/costs.

Question 25

Article 9: *How do you think this proposed Article could be amended to improve it? Examples include:*

- *So the proposed Directive states that full implementation of existing pollution prevention and waste legislation might be sufficient for implementation.*

- *So the proposed Directive states specifically what risks or activities must be addressed.*

There is no acknowledgement of crossover with existing legislation. This Article ought only to address any gaps. Examples could be provided of what is required to be done to prevent

hampering soil functions and guidance could be given on how to interpret terms such as "appropriate" and "proportionate".

Both suggestions provided in question 25 above would be helpful.

Question 26

Articles 10-11: *Do you agree with the costs and benefits identified in our preliminary analysis? How do you think the proposed Directive could be amended to reduce the costs involved whilst achieving the same benefits?*

We believe that the considerable costs involved mean that it may not be worth the expense for the mere production of an inventory of contaminated sites without a more detailed risk assessment (e.g. impacted receptors) with soil itself being the receptor. Furthermore, only the levels of dangerous substances in soils are considered with soil itself being the receptor. This is not the only threat to human health/environment.

Under Article 11, moving directly to an invasive procedure to measure contaminants should only take place once a site specific desk based risk assessment has been carried out and identified receptors (e.g. soils of quality or value, groundwater-resources).

Question 27

Articles 10-11: *Should the proposed Directive enable Member States to retain their existing national approaches to the identification of contaminated land, provided these deliver some basic common requirements, or should they be required to follow a common detailed procedure? If so, what are the basic common requirements that can in your view reasonably be included in the proposed Directive?*

Yes. The proposed Directive should enable Member States to retain their existing national approaches to the identification of contamination so long as they achieve important common requirements. Do not want to make the current system unnecessarily more onerous. Basic common requirements (e.g. suitable investigation methods, quality control) should be established.

Question 28

Articles 10-11: *What are your views on the Commission's definition of contaminated sites? Is it appropriate?*

The definition is narrower than existing UK definitions as it focuses on contamination caused by man and only considers dangerous substances. Further discretion is given to Member States in deciding the levels of dangerous substances which should be regarded as causing a significant risk. This is probably appropriate.

The definition of contamination focuses on soil contamination without overtly considering water contamination. The overlap with WFD is complex.

While implementation discretion should be left to individual Member States there should be community agreed targets/thresholds/limits of what level of impact/risk is acceptable and

what is not. However this is a hugely technical and difficult area, as evidenced by the SGV furore.

Question 29

Articles 10-11: *What are your views on the list of potentially polluting activities set out in Annex II?*

As noted in the DEFRA response, under this article it seems that testing for *all* "dangerous substances" would be carried out where Annex II activities are concerned. However for many Annex II activities only a small number of substances are normally associated with any particular potentially polluting activities.

Consideration should be given to adding other locations which have underground storage tanks present (in addition to Annex II (6) petrol + Annex II (11) pipelines) potentially to be included in Annex II.

Question 30

Articles 10-11: *Do you consider that it is necessary to test for dangerous substances at all sites on which potentially polluting activities have taken place or do you think testing should be targeted based on a risk assessment?*

Testing should be based on risk-assessment. It appears too prescriptive and may be excessively labour/cost intensive to carry out invasive tests for all dangerous substances at all sites. Risk based assessment would take account of the likelihood of risks occurring and invasive tests should be tailored to take account of the specific risks posed at the specific site.

Question 31

Articles 10-11: *Do you think the timescales given in the draft Directive for compiling and reviewing the inventory are reasonable?*

Five years is a long time to remain on the inventory and therefore presumably be considered “blighted land”, especially if remediation is carried out. Is it intended that a remediated site will be removed from register and if so what would be the mechanism?

There would be unfair compliance costs/administrative disadvantage to sites tested earlier as opposed to later. There is currently no procedure proposed for targeting the most high risk sites first.

We note that as with energy performance certificates, a lack of skilled resources (i.e. a lack of trained assessors or drill rigs) could be an obstacle to implementation.

Question 32

Articles 10-11: *How do you think this requirement will affect land values?*

It may be difficult to sell sites which are on the contamination inventory and will be likely to have a negative impact on land value.

Question 33

Article 12: *How do you think this provision could best be amended to minimise any possible negative impacts that this proposed Article may have in Great Britain?*

We note and agree with the following points raised in other's consultation response on issues raised by Article 12:

It's important not to disincentivise voluntary clean up driven by market factors where remediation is led by developers in order to unlock sites for development. It seems that discretion is given to Member States as to whether obligation should be on the owner of the site or the prospective buyer. Clarification is required. As the costs of complying with this requirement are likely to be very high, it will add additional cost to land transactions and property prices if it is passed onto the prospective buyer.

No unified agreement on what concentration levels pose significant risk to human health or to the environment. Witness current problems with SGV roll out.

No *de minimis* – triggered by sale of site. Is that cost effective for very small sites?

Consistency in chemical analysis and reporting across providers would be desirable – how will this be guaranteed? Some approved scope of works, along lines of ASTM in the US, may be appropriate.

Question 34

Article 12: *What are your views on the costs and benefits of this provision? What effect do you think this will have on land prices?*

Presumably the vendor will want to offset any cost incurred in the production of this report and will therefore increase the sale price accordingly.

Would the system operate such that once a Soil Status Report is produced, the sale may be delayed pending analysis (e.g. from competent authority) as to whether remediation is required (pursuant to Article 12).

If a site has been required to produce a Soil Status Report then depending on the results this could have a negative impact on the price of the land and/or will probably make the land harder to sell.

Question 35

Article 12: *What do you think are the public health/environmental benefits of the requirement to produce Soil Status Reports? Do you consider that they will benefit business activity?*

Public health/environmental benefits include:

(1) that use of the Soil Status Report on transactions would speed up assessments required by Article 11 so hidden/latent problems are identified earlier and appropriate remediation is implemented with consequent benefits; and

(2) benefit to business activity to the extent that buyer would be aware of the risks/liabilities of taking on contaminated land risk, in a transactional context more widely than under current procedures. This may reduce the likelihood that there would be a later dispute on responsibility (e.g. because price paid will probably reflect the contamination).

Question 36

Articles 13-14: *Do you agree that contaminated sites as defined should be remediated? Do you think these provisions could be amended to make them more proportionate? If so, how?*

This is a political question. In principle we agree with the Directive that contaminated sites arising as a result of human activity should be remediated where they give risk to significant harm to human health or the environment. We refer you to earlier responses to questions 28 and 30 regarding the definition and investigation of contaminated land and the preference for the current UK risk based approach to remain in force.

The Directive could be made more proportionate through the application of a common risk based approach across Europe. Such an approach would be inherently flexible to take account of regional issues.

Question 37

Articles 13-14: *Should this provision be aligned with existing European Directives (as outlined in paragraph 5.2), so that where they apply, those Directives' arrangements concerning remedies will operate as now?*

Articles 13-14 deal with the identification and management of old and new contamination. The Directives outlined in paragraph 5.2 primarily deal with limiting new contamination arising from human activity and may therefore only have a partial application. It is considered that the Directives outlined in paragraph 5.2 in addition to other UK legislation including PartIIA of the Environmental Protection Act 1990 and the Water Resources Act 1991 would be sufficient to manage the requirement for remediation in the UK save that modification would be required to target clean-up where soil itself was the key receptor at risk.

Question 38

Articles 13-14: *Do you agree with the costs and benefits identified in our preliminary analysis? How do you consider these costs could be reduced whilst achieving the same or similar benefits?*

No legal comment.

Question 39

Articles 13-14: *What are your views on requiring Member States to put in place appropriate mechanisms to fund remediation of orphan sites?*

The requirement for Member States to fund remediation of orphan sites is considered a necessary and appropriate obligation under European environmental policy.

Funding remediation of contaminated land projects (likely to include orphan sites) has been carried out using Government funding through the former supplementary credit approval loans and now the Supported Capital Expenditure (Revenue) scheme. The Directive appears to legislate for the current situation. This is an acceptable position.

Question 40

Articles 13-14: *What are your views on requiring Member States to have a public 'National Remediation Strategy' in place? Do you think this will affect existing national measures such as remediation by developers?*

Per the response to question 33 above the implementation of the Directive should not disincentivise voluntary clean up driven by market factors where remediation is led by developers in order to unlock sites for development.

It is agreed that there is a possibility of developers being deterred from voluntary remediation, although it is unlikely that the extent will be as significant as DEFRA suggest:

(a) the timelines involved for the Government or Local Authority to take action is unlikely to be commercially acceptable for developers in relation to a typical transaction and redevelopment of a site; and

(b) a provision for the potential claw back of costs from a developer where the Government or Local Authority have remediated a site which is later granted planning permission for development could be included. Further, as a general rule developers will generally find it of better commercial sense to be involved upfront in a remediation project managing the level of remediation, the costs etc, than have a regulator taking a lead.

Question 41

Article 15: *Do you agree with our concerns and the costs and benefits identified?*

No legal comment.

Question 42

Article 15: *What are your views on this provision and how could it could be improved?*

Raising awareness with regard to Art 8 erosion, organic matter decline, compaction, salinisation is important although in the UK will be limited to certain interested parties and therefore a wide dissemination of information is not such an important issue.

Landslides is a more important issue and information regarding this should be prioritised.

Disseminating information regarding the National Remediation Strategy should be prioritised.

Question 43

Article 16: *What are your views on this provision and how could it be improved?*

No legal comment

Question 44

Article 17: *Do you consider that this platform for the exchange of information would be useful for the Government and stakeholders?*

Yes (see answer 45 below)

Question 45

Article 17: *Is this too narrow a range of information? If so, what else should be included?*

Exchange of information regarding risk assessment methodologies is considered very important as it is not addressed in earlier articles and the definition of contaminated sites allows Member States discretion as to what level of dangerous substance should be regarded as causing a significant risk [para 5.8] Maximum uniformity across EU should be a key goal.

Question 46

Articles 18-24: *What are your views on these provisions?*

Art 18 – Agreed it would be beneficial to adopt a common approach to soil contamination risk assessment if possible to be included in Annex I. DEFRA raises concerns about delegating this power to a committee if a near consensus is reached. From the text it appears that there is a backstop: if no consensus is reached at the committee level it can be referred to the Council.

Art 22 – The requirement for penalties to be effective, proportionate and dissuasive seem to be appropriate and consistent with the Directive and other EU legislation.

Art 23 – The transposition of the ELD is already behind schedule. This may allow time for a further amendment.

Art 24 – As DEFRA argues experience shows that implementation of Environmental Directives would be best served over a longer time frame of say 3-4 years.