COMPARISON BETWEEN THE US AND FRANCE: COMPARATIVE ANALYSIS OF THE APPLICATION OF THE SUPERFUND PROGRAM AND FRENCH REGULATIONS FOR THE MANAGEMENT OF POLLUTED SITES

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OVERVIEW

Comparative Legal Overview: US Legal Approach and French Legal Approach

- Legal rights and responsibilities
- Remedial processes

> Comparing remediation risks at a <u>hypothetical site</u>

- Who would be involved and what would be the main steps ?
- What would be the main technical and legal issues ?



Who can require clean-up?

- NATIONAL GOVERNMENT
 - Superfund law CERCLA ("Comprehensive Environmental Response Compensation and Liability Act")
 - Hazardous Waste law RCRA (Resource Conservation & Recovery Act)
- STATE GOVERNMENT
 - Mini-Superfund
 - Brownfields

COST

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POWER

- Voluntary Clean-up
- PRIVATE CONTRACT
 - Indemnities to pay
 - Agreements to perform work
- LAND OWNER
 - Voluntary

SPEED & FLEXIBILITY



Who has liability?

The Polluter Pays

Potentially Responsible Parties (PRPs) :

- Owner today
- Operator today
- Owner at time of contamination
- Operator at time of contamination
- Arranger for Disposal (Transporter)



STRATEGIC IMPLICATION: BRING IN AS MANY PRPS AS POSSIBLE



How does a matter start ?

- EPA's Request for Information
- Listing on the National Priorities List (NPL)
- Administrative Order,
 - May be negotiated, Administrative Order on Consent (AOC)
- Judicial Order Consent Decree
- TIPS:
 - Cooperate or EPA will do the work and bill you
 - Violations trigger penalties up to \$51,000/day/violation, sometimes tripled
 - Try to address at State level

STRATEGIC IMPLICATION: BE RESPONSIVE, ACCURATE, ALERT



What are the stages of a remediation matter?

- Remedial Investigation PRP(s) prepare drafts for EPA review and approval
- Feasibility Study PRP(s) draft an evaluation of alternative remedies
- Record of Decision (ROD) EPA selects remedy
- Remedial Design
- Remedial Action
- Private disputes and cost allocation beware of timing, statutes of limitation

A LOT OFTIME AND MONEY



FRENCH REMEDIATION BASICS

Who can require clean-up?

- FRENCH STATE (PRÉFET WITH DREAL)
 - ICPE Regulation
 - Chapter of the Environmental Code relating to contaminated sites and soils

 for the change of use and liabilities of stakeholders
- CONTRACTUAL COMMITMENT
 - Sale

COST

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POWER

- Lease
- LAND OWNER
 - Voluntary



Who has liability?

- Last operator under ICPE regulation → Most of the time : remediation for an industrial use of the site
- Owner \longrightarrow If the last operator is not solvent (under certain conditions)
- Project developer \rightarrow liable for the change of use

FRENCH REMEDIATION BASICS



How does a matter start?

- Closure notification by the last operator
 - → Subsequent administrative orders and → to require soil investigation and management plan and to regulate the remediation
 - → Penal and administrative sanctions risks if inaction of the last operator
- Sometimes : even if the plant is still operated
- Owner may ask the Environmental Authority to prescribe some studies or remediation measures to the last operator

FRENCH REMEDIATION BASICS



How does a remediation matter end?

If ICPE :

- Investigations (history of site ; nature and extent of contamination, horizontally and vertically ; contaminants of concern sampling and analysis)
- Risk Assessment / Management Plan : Risk-to-use approach / environmental approach with treatment of hot spots
- Prefectoral Order
- Remediation works
- Land-use restriction
- Often groundwater monitoring
- Verification Report (≠ quitus)
- Environmental Authority can return to the last operator within 30 years

Comparing Remediation Risks at a hypothetical site





COMPARING REMEDIATION RISKS AT A HYPOTHETICAL SITE



	USA	FRANCE
WHO CAN REQUIRE CLEAN-UP?	U.S. EPAState Environmental Agency	 Préfet (DREAL) // Last operator Owner // Last operator (if he has not fulfilled its legal duties)
WHO HAS LIABILITY?	 Owner and Operator – Now and at time of release Arranger for Disposal/Transport Contractual Indemnitor 	 Last operator Secondarily : owner (under specific conditions : if there is a fault)
How does the Matter would Start?	Awareness of contaminationClosure notification in some states	 Closure notification Or, during the operation of the facility, if significant pollution with a off-site impact
HOW DOES REMEDIATION END?	 Achieving goals of Record of Decision Long-term monitoring 	 Remediation works frequently regulated by the Environmental Authority A verification report should be drafted by the DREAL ≠ quitus

MAIN ISSUES



	USA	FRANCE
TECHNICAL ISSUES : RISKS ASSESSMENT HOT SPOTS	 Define Nature and Extent Identify contaminants of concern Conduct Risk Assessment – Human health, and ecological risk Use limited cost-benefit analysis 	 Take action if risk is unacceptable Hot spots treatment may be required (under conditions: cost-benefit balance) Possible re-use of contaminated soils on the site, very difficult off-site
OTHER MANAGEMENT MEASURES	 Address risk with detailed documents: Scope of work documents (SOW) Health & Safety Plans (HASP) RI/FS, RD/RA 	 Manage carefully issues related to excavated contaminated soil Often: monitoring and treatment of groundwater Land-use restrictions
NEIGHBORS	 Beware private lawsuits Protect drinking water Get (pay for) access to property for investigation and/or remediation 	 Possibility of monitoring measures for 4 years for ambient air and groundwater (if there is a well) Constructive measures or land-use restrictions Importance of communication with neighbors Litigation risk
WATER	 Achieve drinking water standards Pump & Treat Monitored Natural Attenuation In-situ treatment Hydraulic barriers 	 Groundwater monitoring of drinking water wells Remedies: hydraulic barriers/ groundwater treatment / natural attenuation Municipality role : As manager of the public water supply As police authority restrict drinking water use Litigation risk
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MAIN ISSUES



	USA	FRANCE
RELATIONS BETWEEN OWNER AND OPERATOR	 Responsibility for doing work can be independent of liability and costs. Lead PRP may seek costs from other PRPs Joint and several liability – Each PRP responsible for the entire site 	 Operator has to implement remediation measures required under ICPE regulation Most of time: previous operator will not liable for the future use Litigation likely if there is: Delay in site remediation Interference in proposed sale
SALE	 Disclosure important Due diligence critical Contract terms subject to negotiation 	 The owner should Inform purchaser of contamination Require the operator to remediate Use care in drafting environmental clauses Manage issues relating to excavated contaminated soils



• In the US?

Lots of cleaned-up sites Most sites still in the system, eternally Expensive, Slow, Complicated Few experts remain in the agencies with courage to be pragmatic

• In France?

- An increasingly complete regulation but also interpreting and interlinking difficulties between the different legal provisions
- Significant delay of the closure investigation : obstacle to the sale and redevelopment of sites
- Heterogeneous applications at the local level
- Unknown regarding to the subsidiary liability of the owner
- Circular economy to be strengthened (re-use of excavated, contaminated soils)

Thank you

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