

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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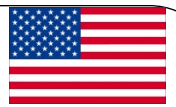
OVERVIEW

➤ Comparative Legal Overview: US Legal Approach and French Legal Approach

- Legal rights and responsibilities
- Remedial processes

➤ Comparing remediation risks at a hypothetical site

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

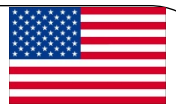


Who can require clean-up?

POWER & COST

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

SPEED & FLEXIBILITY



Who has liability?

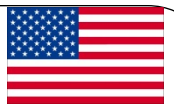
The Polluter Pays

Potentially Responsible Parties (PRPs) :

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

Joint and
Several
Liability

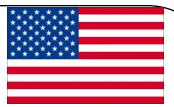
**STRATEGIC IMPLICATION:
BRING IN AS MANY PRPs AS POSSIBLE**



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**

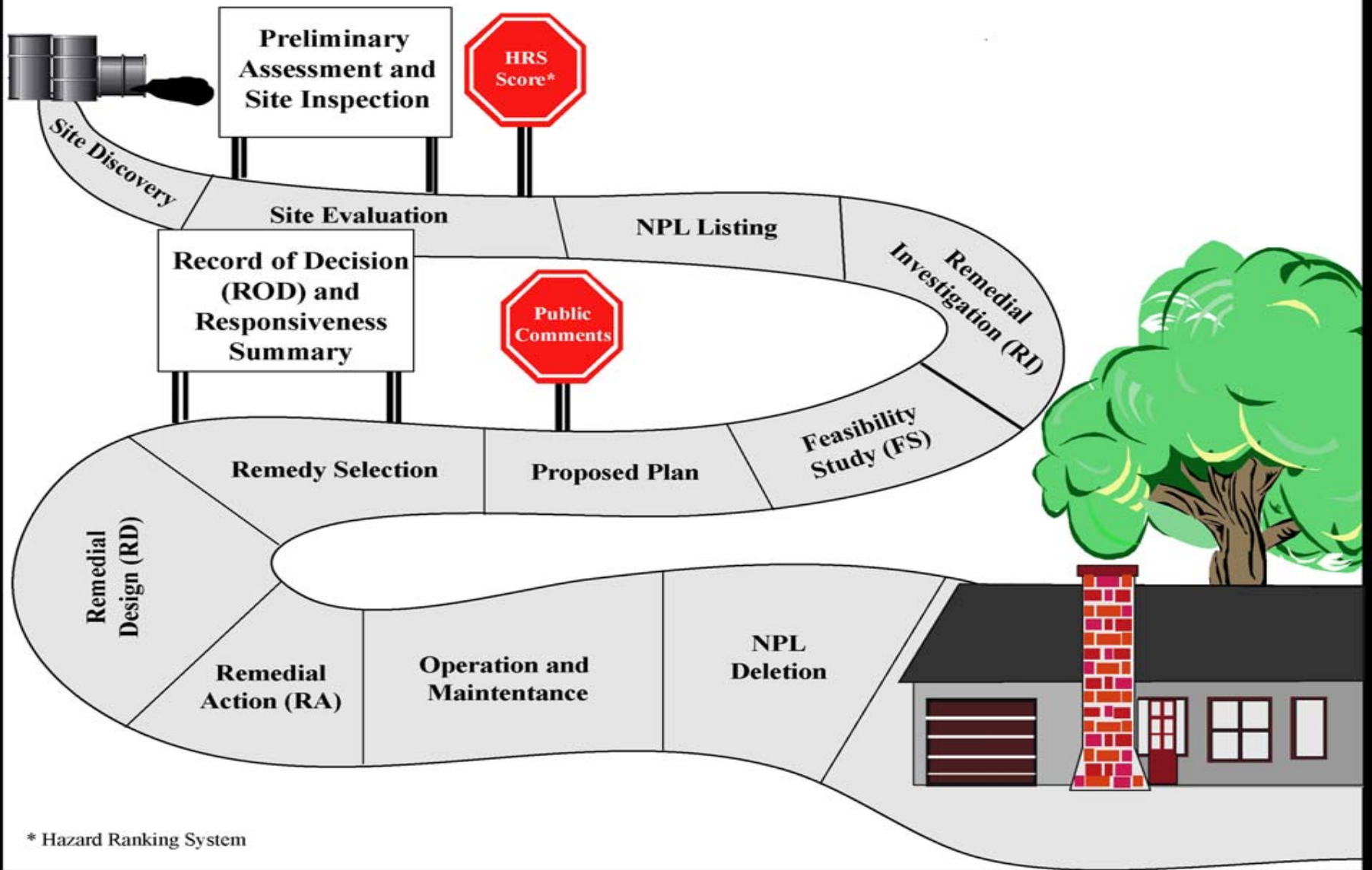


What are the stages of a remediation matter?

- 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 OF TIME AND MONEY

The Superfund Process



* Hazard Ranking System



Who can require clean-up?

POWER & COST

- 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
 - Lease
- LAND OWNER
 - Voluntary

SPEED & FLEXIBILITY



Who has liability?

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



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



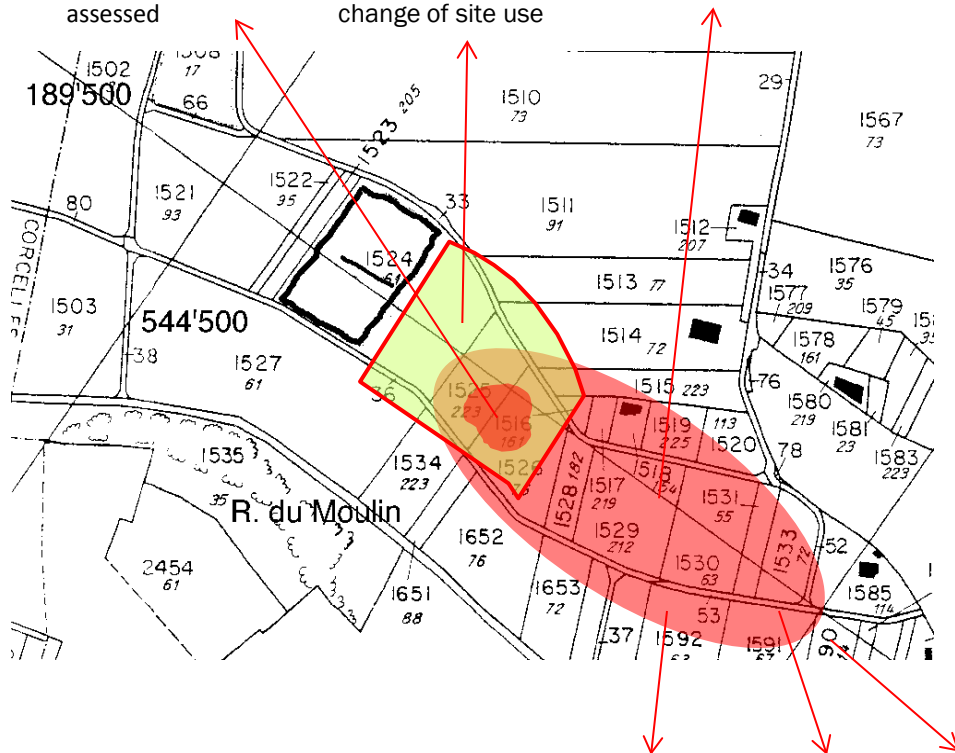
How does a remediation matter end?

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 (\neq quitus)
- Environmental Authority can return to the last operator within 30 years

Comparing Remediation Risks at a hypothetical site

- Hot Spots
 - Risks for human, health and environment to be assessed
- Former industrial site
ICPE (France) /
Superfund (USA) :
- A former operator
 - An owner who wants to sell the site with a change of site use
- Off-site impact in the groundwater (VOC)



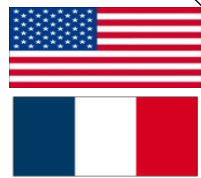
Residential area
= vapor intrusion
= private drinking water

Industrial area

Drinking water well



COMPARING REMEDIATION RISKS AT A HYPOTHETICAL SITE



	USA	FRANCE
WHO CAN REQUIRE CLEAN-UP?	<ul style="list-style-type: none"> • U.S. EPA • State Environmental Agency 	<ul style="list-style-type: none"> • Préfet (DREAL) // Last operator • Owner // Last operator (if he has not fulfilled its legal duties)
WHO HAS LIABILITY?	<ul style="list-style-type: none"> • Owner and Operator – Now and at time of release • Arranger for Disposal/Transport • Contractual Indemnitor 	<ul style="list-style-type: none"> • Last operator • Secondly : owner (under specific conditions : if there is a fault)
HOW DOES THE MATTER WOULD START?	<ul style="list-style-type: none"> • Awareness of contamination • Closure notification in some states 	<ul style="list-style-type: none"> • Closure notification • Or, during the operation of the facility, if significant pollution with a off-site impact
HOW DOES REMEDIATION END?	<ul style="list-style-type: none"> • Achieving goals of Record of Decision • Long-term monitoring 	<ul style="list-style-type: none"> • 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	<ul style="list-style-type: none"> • Define Nature and Extent • Identify contaminants of concern • Conduct Risk Assessment – Human health, and ecological risk • Use limited cost-benefit analysis 	<ul style="list-style-type: none"> • 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	<ul style="list-style-type: none"> • Address risk with detailed documents: <ul style="list-style-type: none"> - Scope of work documents (SOW) - Health & Safety Plans (HASP) - RI/FS, RD/RA 	<ul style="list-style-type: none"> • Manage carefully issues related to excavated contaminated soil • Often: monitoring and treatment of groundwater • Land-use restrictions
NEIGHBORS	<ul style="list-style-type: none"> • Beware private lawsuits • Protect drinking water • Get (pay for) access to property for investigation and/or remediation 	<ul style="list-style-type: none"> • 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	<ul style="list-style-type: none"> • Achieve drinking water standards <ul style="list-style-type: none"> - Pump & Treat - Monitored Natural Attenuation - In-situ treatment -Hydraulic barriers 	<ul style="list-style-type: none"> • Groundwater monitoring of drinking water wells • Remedies: hydraulic barriers/ groundwater treatment / natural attenuation • Municipality role : <ul style="list-style-type: none"> - As manager of the public water supply - As police authority restrict drinking water use • Litigation risk

MAIN ISSUES



	USA	FRANCE
RELATIONS BETWEEN OWNER AND OPERATOR	<ul style="list-style-type: none">• 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	<ul style="list-style-type: none">• 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:<ul style="list-style-type: none">- Delay in site remediation- Interference in proposed sale
SALE	<ul style="list-style-type: none">• Disclosure important• Due diligence critical• Contract terms subject to negotiation	<ul style="list-style-type: none">• The owner should<ul style="list-style-type: none">- Inform purchaser of contamination- Require the operator to remediate- Use care in drafting environmental clauses- Manage issues relating to excavated contaminated soils

CONCLUSION : ADVANTAGES AND DISADVANTAGES



• 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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