An Overview of Japan’s New Soil Contamination Control Law – Has Superfund Come to Japan?

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Introduction

Set forth below is an outline of Japan’s new Soil Contamination Control Law¹ (dagyonase-n-taisaku-bou, Law No. 53 of 2002, referred to hereafter as the “Law”), that was proclaimed on May 29, 2002 and will be effective on February 15, 2003. Prior to the enactment of the Law, Japan had no national law regulating soil contamination except that governing land for agricultural use. With the Law’s enactment, there has been a significant increase in the level of sensitivity to potential environmental liability within the Japanese real estate industry and the financial community.

Many important issues with respect to how the Law will be implemented and administered remain to be settled through the adoption of Cabinet Ordinances and promulgation of regulations by the Ministry of Environment. On August 7, 2002, the Ministry of Environment released a draft outline of the Cabinet Ordinance and the Ministry of Environment Ordinance implementing the Law (collectively “draft Ordinance”). The final version of the Cabinet Ordinance and the Ministry of Environment Ordinance will be proclaimed in late October or November 2002 and will facilitate a clearer understanding of the impact of the Law on real estate and corporate transactions and on the liability of site owners for the cleanup of contamination.

It is instructive to compare the Law to the United States’ Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986 and Small Business Liability Relief and Brownfields Revitalization Act of 2001 (42 U.S.C. §9601-9675, referred to hereafter as “CERCLA”). The basic policy behind both CERCLA and the Law is to protect and preserve public health and the environment. The remediation of contaminated property through a publicly transparent process is the noble goal embodied by both CERCLA and the Law. Moreover, both statutes employ the “polluter pays” concept of liability, where those presumably responsible for the contamination of property bear the cost of remediation. However, there are some important distinctions between the two statutes which are discussed herein.

Soil Contamination Control Law: Overview and Comparison to CERCLA

1. Framework of the Law

The basic policy of the Law is to protect human health by (a) identifying areas where soil contamination poses a risk to human health, and (b) requiring owners, administrators or occupiers of contaminated land (collectively “Owners”) to take necessary measures to mitigate the risk of harm to human health.

The Law requires the Owner of land with a potential risk of contamination to conduct an environmental investigation at its cost and report the results to the relevant prefectural governor. If this report indicates contamination in excess of the levels set forth in the Ministry of Environment Ordinance, the prefectural governor must register the contaminated land on the prefecture’s Designated Area Register, which is available for public inspection. Once the land is registered, the Owner is restricted from changing the physical nature of the land or removing the contaminated soil from the land.

If the prefectural governor determines that there is actual damage to human health from the contaminated soil in a Designated Area, the governor may order the Owner to take measures necessary to prevent the spreading of the pollution (e.g., encapsulation) or any other necessary mitigation measures at the Owner’s cost. However, if certain conditions specified in Article 7.1 of the Law (discussed in Section 5 hereunder) are met, the person who caused the contamination (“Polluter”), rather than the Owner, will be responsible for cleanup.

2. Applicability

The Law requires the Owner to investigate the existence of pollution of its land in the following two situations: (i) where a Registered Factory ceases its operation and (ii) where the pre-
fectoral governor determines there is a threat to human health from the contamination.

In the first case, the Law applies to land that has been used as a factory or work place registered under the Water Pollution Prevention Law where certain Specific Harmful Substances (e.g., lead, arsenic, hexavalent chromium and trichloroethylene) were produced, used or disposed (herein, “Registered Factory”). However, the Law only applies upon the termination of use of the Registered Factory. The definition of use termination has not yet been fully developed, but one guideline from the Ministry of Environment implies that any change in use from industrial to commercial, residential or recreational would qualify. The Law does provide an exemption for land that poses little risk to human health based on its planned use. For example, if the site will be used for a warehouse in which the risk can be managed under another law, the Owner may, upon the approval of the governor, be released from the responsibility to perform the investigation.

In the second case, the Law applies where the land is located in an area in which the prefectural governor has determined that there is a risk to human health as a result of contamination. There is no clear guidance for the governor to follow in determining risk to human health. However, the Ministry of Environment has indicated two criteria for this category in the released draft Ordinance. The first element is a strong probability of existing soil contamination of the land (e.g., existing soil contamination of adjacent land or groundwater near the land). The second element is a strong probability of risk to human health as a result of such contamination (e.g., use of land by the general public or use of groundwater as drinking water by nearby residents).

Both the Law and CERCLA can be invoked when the government deter-


dsines there is a risk to human health from contamination. However, the Law is also triggered by a change in land use (e.g., the termination of the property’s use as an industrial site), whereas CERCLA is triggered by the release of a hazardous substance into the environment. The differences between the statutes in this respect are striking, because the Law is silent on release reporting and CERCLA is silent on use changes.

3. The Investigation of Land

Both CERCLA and the Law require that some inquiry be made into a property’s use, location and possible impacts to human health and the environment. To become eligible for certain liability defenses, CERCLA requires those seeking an ownership interest in property to conduct detailed non-invasive inquiries about the property and prepare written reports in accordance with national standards (i.e., Phase I Environmental Site Assessments). Further invasive sampling may be required to maintain the defense (i.e., Phase II Environmental Site Assessments).

The Environmental Site Assessments (both non-invasive and invasive) are generally not publicly available documents. Although common in property transactions, such assessments are not affirmatively required by CERCLA for any property; the assessments are only required if potential owners wish to preserve the liability defenses.

On the other hand, the Law requires a perfunctory analysis to determine its applicability. No detailed inquiry into site specific conditions regarding historic, off-site, or operational environmental concerns is required unless the owner seeks to have the prefectural governor narrow or waive the required soil investigation (discussed below). If it is determined to apply to a property, the Law mandates invasive soil sampling, the results of which become publicly available. This invasive soil sampling is required for all properties to which the Law applies.

Under both CERCLA and the Law, properties that present possible threats to human health and the environment must undergo invasive sampling to delineate the nature and extent of contamination, if any. CERCLA allows investigations of any media which may be impacted by suspected contamination (e.g., soil, groundwater, surface water, sediment). Sampling locations are tailored to site-specific areas of concerns and contaminants identified during the Environmental Site Assessments. CERCLA requires documented technical studies to assess the most appropriate remedial technologies for a given property, one of which could be land use restrictions. The government and the public may actively participate in the selection of remedial action for the property.

Although the Law suggests that the entire property of the Registered Factory should be investigated upon its termination of use, the draft Ordinance allows the prefectural governor to change or omit the investigation requirements. This determination is to be based on the risk of contamination, historical use and other information. Thus, the Owner can narrow its investigation or, where appropriate, avoid conducting an investigation altogether, if it has the written permission of the prefectural governor.

The standard investigation required under the Law consists of sampling the soil (and, in certain hydrogeological conditions, the soil gas and groundwater) for volatile organic compounds and/or heavy metals on the predetermined grid pattern of every 100 square meters by a grid square. This is a much more detailed and costly investigation that the methods generally used. Where permission is obtained from the prefectural governor, the investigation may be less extensive (e.g., sampling on a 900
square meters by a grid square method) or may be omitted in part or in whole. The Owner has to conduct the investigation at its cost pursuant to the regulations by the Ministry of Environment and report the results to the prefectural governor. The Law automatically imposes land use restrictions once the contamination is confirmed. It is not yet clear how Owners or the Government will evaluate remedial options other than land use restrictions and whether public participation will be required or allowed.

4. Public Registration or Listing of the Contaminated Land

To the extent the contamination identified pursuant to the investigation exceeds the levels set forth in Ministry of Environment Ordinances, the prefectural governor is required under the Law to register the contaminated land area as a “Designated Area” on a Designated Area Register which is available for public inspection. In this Designated Area Register, the location of the land, the status of the contamination and the date of the investigation will be listed. If the remediation measures are conducted and the level of contamination is reduced below the permissible level, the land will be deleted from the Register. Even if the Owner takes the measures ordered by the government (described in Section 5), the land will remain on the Register until the level of contamination is reduced to permissible levels.

If a property is identified as a “Designated Area”, the Owner of the land will be prohibited from changing the physical nature of land (e.g., removing contaminated soil) without giving at least 14 days prior notification to the prefectural governor of the various details concerning the scheduled work. If the governor determines that the Owner’s plan is not appropriate, the governor can order the Owner to change such plan within 14 days after receiving the notification.

Analogous to the Law’s Designates Area Register are CERCLA’s institutional controls, which include land use restrictions that prohibit specific changes to the physical nature or use of the land and are recorded on the property’s deed. CERCLA implements land use restrictions as a remedy used in conjunction with engineering methods (e.g., contamination removal, treatment or containment). CERCLA’s institutional controls and its deed restrictions contrast with the Law’s prefecture-wide Designated Area Register in several ways. First, the remedial timeframe in which the land use controls are employed is different. CERCLA’s controls are typically implemented at the end of the remediation after the engineering controls have been implemented, whereas the Law’s controls are implemented as soon as the investigation has confirmed the presence of contamination and then lifted once remedial goals are achieved. Also, CERCLA’s institutional controls are not necessarily recorded in federal- or state-wide lists. (CERCLA does mandate a nationwide list of contaminated properties called the National Priorities List. However, the National Priorities List is only informational and does not require any action or land use restrictions.) Unlike the Law’s prefecture-wide lists, CERCLA results in a relatively ad hoc system that varies by state and municipality depending on zoning restrictions, local ordinances, and building permits.

5. Government Order

To the extent the prefectural governor determines that there is actual risk of damage occurring to human health from contamination of the land in a Designated Area, the governor may order the Owner to take immediate measures necessary to prevent the damage or to take measures necessary to remove and prevent the spread of the pollution. In general, the remediation order will be issued to the Owner. However, the governor may order the Polluter to take such measures if (a) the Polluter of the land is identified, (b) it is reasonable to require the Polluter to take such measures, and (c) the Owner has no objection. Under the Law the prefectural governor can perform the investigation and remediation itself and is most likely to do so when the Owner or Polluter has not been identified. In that event, the governor may sue the Owner or Polluter (once identified) under the Law to recover the investigation and cleanup cost. However, the governor can only recover the actual damages and no punitive damages. The Law can only be used by government; it does not provide Owners any independent cause of action.

According to the released draft Ordinance, the remedial measures may be specified in the governor’s order depending on the usage of the land and the level of contamination. The measures mentioned in the draft Ordinance include access restrictions, capping, soil removal, containment and in situ remediation. The Ministry of Environment indicates that capping may be ordered in principle and that the remediation of site soils may be ordered in special cases. One special case suggested in the draft Ordinance is the anticipated use of the land by children (for example, a playground or an amusement park). Another special case would be where the Owner and the Polluter desire to remediate the land.

Although both the Law and CERCLA employ government orders, CERCLA’s orders have more serious consequences. Under CERCLA, the Environmental Protection Agency can order the owner/polluter to perform the cleanup, or it can perform the cleanup itself and recover its costs and punitive damages from the
owner/polluter. The punitive damages available when the government conducts the cleanup can be up to three times the actual cost of the cleanup. This threat of treble damages is a major incentive for owners and polluters to assume responsibility for cleanup, even if it means determining liability among themselves. CERCLA also creates a private right of action in the owner, allowing owners to assume the lead in investigations and remediation. That owner right is combined with a private right of action against the polluter for cost recovery or contribution, provided the cleanup follows the investigatory and remedial procedures described in the National Contingency Plan.

Thus, the owner can clean up the site and get reimbursed for its costs without any need for a government order.

6. Liability & Contribution

Under both statutes, Owners or Polluters are required to pay for remediation of contamination. Likewise, both statutes allow Owners to make a contribution claim against Polluters to defray the costs of performing remediation pursuant to governmental orders. Aside from some very narrow exceptions, CERCLA holds past and present owners, operators, and managers all strictly, jointly and severally liable. Thus, under CERCLA, owners with or without a government order can seek contribution from any or all current or historic owners and polluters. Moreover, under CERCLA the government can seek cost recovery from any and all current or historic owners or polluters associated with the property and force them to pay for the entire cleanup – with punitive damages as appropriate. CERCLA is often characterized as Draconian because of this liability scheme.

The Law, on the other hand, limits liability to current Owners, except where it is “reasonable” to hold Polluters liable. In such cases, the Polluter’s corporate successors (including mergers and spin-offs) may be liable to the Owners, but only if the Owners were conducting a cleanup pursuant to a government order.

7. Designated Assistance Corporation & Funding

The Law provides for designation of a “Designated Assistance Corporation” to provide subsidies to local governments and otherwise further the Law’s purposes. It is contemplated that this entity will assist Owners who cannot afford the cost of investigation or cleanup. The Japanese government has budgeted 125,000,000JPY for January to March of 2003 and 500,000,000JPY for April of 2003 to March of 2004 for the Designated Assistance Corporation. Theoretically, additional funds are to be supplied by industry; however, the mechanism by which this is to occur has not yet been finalized.

In contrast, CERCLA created a government fund, the Superfund, to advance its remedial goals. Originally, the Superfund was financed by taxes on the chemical and petroleum industries and used to pay for the cleanup of abandoned or uncontrolled hazardous waste sites. Even though those taxes have expired, Superfund is constantly being reimbursed though cost recovery from owners/polluters. The 2001 amendments to CERCLA also created a brownfields grant program that funds Assessment and Cleanup Grants (to inventory, characterize, investigate and remediate contaminated sites) and Revolving Loan Fund grants (to allow state and local governments to capitalize a revolving loan fund for cleanup activities at contaminated sites, no-interest or low-interest loans for cleanup activities and job training).

8. Criminal Sanctions

The Law provides various criminal sanctions, ranging from a fine not exceeding 200,000JPY (approximately US$1,650) for failure to notify the prefectural governor of intent to change the physical nature of land within a Designated Area, to imprisonment not exceeding one year or a fine not exceeding one million yen (approximately US$8,250) for violation of governmental orders to investigate or remediate soil contamination.

In contrast, CERCLA is fundamentally a civil remedial statute; however, even its civil fines are significantly greater than the Law’s criminal fines. For failure to conduct a cleanup, to provide information or access, or to report a release, the federal Environmental Protection Agency can seek statutory penalties of up to US$25,000 (approximately 3,120,000JPY) per day of noncompliance, but no imprisonment. CERCLA provides criminal penalties only for failure to report a release, submitting false information or destroying evidence. Those criminal penalties include possible fines of up to US$250,000 (approximately 31,200,000JPY) and up to 3 years imprisonment for the first offence by individuals and possible fines of up to US$500,000 (approximately 62,400,000JPY) for organizations. Criminal sanctions for the improper release and handling of hazardous substances are found in other environmental laws (e.g., the Resource Conservation and Recovery Act).

9. Lender’s Exemption Clause

The Law does not address the responsibility of a person who provides financing to the Owner and has a security interest in the contaminated land (“Lender”) or a person who happens to hold the title of the land through exercise of rights such as foreclosure. In this respect, the Law differs significantly from CERCLA; CERCLA specifically excludes non-operator owners who hold an indicia of ownership merely to protect their
security interest from the definition of “owners”, thereby allowing them to avoid liability.

Whether or not the Lender is to be included in the definition of the Owner has been a significant issue for the Japanese financial community. In a report regarding the Environmental Responsibility of Financial Institutions published in March 2002, the Ministry of Environment clearly takes the position that a finance provider with only a security interest (and not title) is not considered an Owner for purposes of the Law.

The issue of the responsibility of a Lender who takes title is addressed by the draft Cabinet Ordinance, which provides that a Lender will not be held liable if it meets the criteria set forth below:

(i) the Lender acquired the title to the contaminated land as exercise of security right; or

(ii) the Lender acquired the title to the contaminated land from another Lender described in (i) above through the bulk purchase of loans secured by the security interest on the contaminated land.

(iii) the Lender’s intent to dispose of the land is apparent; and

(iv) the Lender disposes of the land within one year after it becomes the Owner, unless there is a special difficulty in selling the land. (Note, however, that it now appears that the one year time limit proposed in the draft Ordinance may be relaxed or removed in the final Ordinance.)

Such a Lender is still responsible for investigating and reporting contamination of the land but would not be responsible for cleanup. However, the prefectural governor may order the Lender either to declare the land off limits or to investigate the status of groundwater at its expense.

Conversely, CERCLA allows the federal Environmental Protection Agency enforcement discretion, and it has used that discretion where hazardous substances from off-site sources are found on or in the land solely as the result of migration of groundwater. Under the so-called “aquifer policy”, if the owner/lender did not cause, contribute to, or exacerbate the release or threat of release of the hazardous substances, that owner/lender will not likely be required to investigate or remediate the groundwater.

**Conclusion**

The Law is modeled after CERCLA in certain ways, namely its (a) goal of protecting human health and the environment, (b) function to remediate contaminated properties, and (c) polluter pays liability structure.

However, there are very significant distinctions between these laws. The Law has a more narrow liability scheme that is not joint and several. The Law also has a “top-down” structure that, unlike CERCLA, depends solely upon government enforcement. The Law offers Owners no self-help opportunities, whereas private actions have dominated CERCLA jurisprudence. There are no spill reporting requirements under the Law. Investigations and remediations under the Law are more government-directed and yet, more mysterious given the absence of nationwide investigation and cleanup procedures like CERCLA’s National Contingency Plan. Certain types of properties notorious for their soil contamination, including government owned properties and landfills, are not covered by the Law. The procedures implementing the Law are not yet well developed, which is to be expected with any new law. However, it is still possible that the Law may be interpreted similarly to CERCLA.

Those involved in property transactions who are legitimately wary of CERCLA’s liability scheme may find a modicum of relief in the Law’s more narrow liability focus. However, this is balanced by the breadth of properties that will require intrusive investigation and listing under the Law, as well as the land use restrictions and possible stigma associated with the public listing of such properties. As CERCLA indelibly changed the face of real property and corporate transactions in the United States, the Law will certainly do so for transactions in Japan.

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1 Also known as the Soil Contamination Prevention Law.