

CONSULTATION RESPONSE



EU Soil Framework Directive & Initial Regulatory Impact Assessment

18 October 2007

Consultation on the proposed EU Soil Framework Directive and initial Regulatory Impact Assessment

The Home Builders Federation (HBF) is the trade association representing the interests of private house builders in England and Wales. Our members, who include all of the major homebuilders, are responsible for more than 80% of the new homes built every year.

We have not responded in detail to all 46 questions of the consultation, as many are not pertinent to the housebuilding industry, though we have commented where the issues appear to be of wider significance.

Soil, in its widest definition, varies widely across Europe and it is difficult to envisage regulation that could be practically applied across the continent. We note also that the proposals concentrate on anthropogenic environmental issues, ignoring naturally occurring pollutants and seismological activity. We would also suggest that the resource implications cannot be overestimated.

Essentially, in spite of the proposed amendments that have been suggested since the consultation was originally published, HBF doubts that there is any benefit to EU member states of imposing further legislation in areas that are already heavily regulated in much of Europe and where there can be only limited conditions in common.

HBF has previously submitted detailed proposals for using the existing UK regulatory framework to deal with regeneration and construction processes. While the National Brownfield Strategy appears to have stalled in recent months, the UK has comprehensive legislation albeit with certain anomalies that HBF has been at pains to discuss with Government.

We would stress that there are two crucial issues that, while they remain unresolved, will adversely affect the Government's asserted targets for the delivery of new housing. These are:

- The lack of progress in delivering a schedule of SGVs for both Part IIA determinations and the remediation of contaminated land.
- An sensible and practical definition of waste

Both these factors are a crucial barrier to any guidelines on protecting soil since without an agreed definition of waste and of what constitutes pollution there can be no measurable criteria for protecting soil.

The British Geological Survey (BGS) spent several years trying to determine the geochemistry of all UK soils in order to provide a database for the UK planning system that is not duplicated in other member states. Previous attempts to compile a UK register of contaminated land have proven unsuccessful and the wording of the current proposals to impose remediation targets on member states demonstrates a lack of understanding of the nature of contamination issues.

Initial Questions

- 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?

Generally we believe that these are sufficient. PPS 23 provides an effective regulatory mechanism for the redevelopment of contaminated land.

- 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?

As stated above, we do not believe that it is feasible to achieve a common basis across Europe.

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

See previous replies.

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

If Europe is to address the issue at all it is necessary that there be no confusion/overlap of differing Directives. We consider that the present proposals could conflict with several related 'directives' and create both confusion and frustration. There is an obvious conflict with the UK's present Part IIA legislative framework.

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

We are not aware of any but would reiterate that the continued application of the Waste Directive to construction activities is inappropriate.

- 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?

Does the Commission believe that there are issues that urgently need to be addressed in terms of soil protection? The perception of risk and threat is subjective – each EC Member State will have its own agenda in this respect and a pan-European approach may be far from being an effective means of tackling what could be nothing more than a particular geographical issue.

- 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?

The polluter pays principle works where the polluter can be identified. In many cases this is not possible. In the event that a property developer pays the costs this would affect the price paid for the land and would in certain circumstances render that development unviable. If the Government wishes certain Brownfield sites to be remediated it is likely that the taxpayer will have to bear the brunt of such costs.

Specific Questions

Q.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' is considered inadequate. To suggest that this relates to all intervening soils from ground level to bedrock clearly demonstrates a lack of understanding. Different sectors of the economy would have differing definitions, some of them geotechnical. For construction the bearing capacity of soils remains a fundamental component in the design of foundations. The wording of the Directive appears to suggest that soil must be protected as an eco-systems at the expense of all other considerations?

Q.2 Article 1: Do you think the proposed Directive seeks the right level of protection for our soils?

No. We are concerned about the proposal that sealing soil would be resisted without clarification of how this could work in practice. All development involves some sealing of soils and while e.g. permeable paving can be seen as alleviating such sealing there are difficulties in proving a balance in favour of the soil. In the UK cap and cover systems are a sustainable form of construction commonly used in the remediation of contaminated land. In addition, many Brownfield sites being redeveloped on soils of poor bearing capacity require the construction of a piling platform before piling commences. This is a vital health and safety requirement and the outcome is often that a site is effectively sealed at ground level. Are we now saying that these sites are not suitable for development?

Q.3 Article 1: Do you think it is important for Member States to address natural degradation as well as that caused by human activity?

In theory, yes, but natural degradation can be a far greater problem than anthropogenic. We are concerned about the proposal that sealing soil would be resisted without clarification of how this could work in practice. All development involves some sealing of soils and while e.g. permeable paving can be seen as alleviating such sealing there are difficulties in proving a balance in favour of the soil.

Q.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?

Yes. The definition of 'sealing' needs far greater consideration. At present it is too restrictive and fails to take account of engineering aspects.

Q.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. At present a UK developer undertakes a robust risk assessment for any proposed development and there is legislation to ensure that unacceptable harm does not ensue to the occupiers. The UK does not need a further tier of regulation.

Q.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?

See previous reply.

Q.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 land users 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?

Option 2 is preferred.

Q.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?

None.

Q.9 Article 4: Do you have any comments on the issues we have raised, and on our initial analysis of costs and benefits?

It is quite clear that there are benefits to increasing the amount of permeable surfaces, notably in terms of flood mitigation, however before the cost/benefits can be accurately analysed there must be recognition of the fact that Brownfield regeneration can make significant improvements, particularly where the proposals significantly reduce the historic impermeability of a site and provide the means of introducing green space and gardens.

Q.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. The UK already has the capacity to install sustainable drainage systems. It is the reluctance of any statutory body to adopt SuDS that is preventing the housebuilding industry from using more sustainable forms of construction. This ongoing resistance is particularly disappointing when the housebuilding industry is actually providing an asset free of charge.

Q.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;

Yes.

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

Yes, particularly for sustainable forms of construction.

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

No.

Q.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?

See response to question 10.

Q.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. Much more research is required.

Q.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 – the identification of risk areas and strategies for dealing with them is not effectively addressed.

Q.15 Articles 6-7: Is there a significant benefit, in your view, in having a common EU-wide framework in place?

No.

Q.16 Articles 6-7: Do you consider that the correct 28 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?

This question is confusing. Compaction is a technique used in construction to improve the bearing capacity of certain soils. Are we again saying that such sites could not be developed? It is clear that there is a lack of understanding of how these proposals, if

implemented, could have a seriously detrimental impact on the UK's new housing provision.

Q.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.

Q.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.

Q.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?

We have reservations about the effectiveness of such an approach, however, the work of the BGS mentioned earlier could be useful in this context.

Q.20 Articles 6-7: Do you agree with our concerns and our estimate of the costs and benefits of this provision?

No – we believe that it will be considerably more expensive with little benefit accruing.

Q.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?

Unable to comment on this question.

Q.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?

No – this is not a consistent approach and is unacceptable.

Q.23 Article 8: Do you agree with our concerns and our estimate of costs and benefits?

We agree with some of the concerns but would suggest that an accurate cost/benefit analysis is not possible with such limited information and an absence of any scientific rigour.

Q.24 Article 9: Are there any benefits in having this provision?

See earlier comments on naturally occurring contaminants.

Q.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.

Assuming a definitive list of dangerous substances could be identified (and surely this would be subject to change) it would be necessary to identify the risks/hazards and this is proving difficult in the UK. Any definitions would need to be consistent across other Directives..

Q.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?

No - it is unlikely that these provisions could ever be properly implemented (the UK has already tried) - the idea that a fixed inventory could exist for all contaminated sites is unworkable. By its very nature the inventory would be constantly changing. While it is desirable that member states identify contamination where possible and remediate where practicable, it is unlikely that a systematic elimination of all such sites will ever be feasible. Moreover, what is proposed would conflict with the Present Part IIA legislative framework and might well lead to unnecessary duplication.

Q.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?

Member States should be allowed to retain their existing approaches. Moreover, we are firmly of the opinion that the present legislative framework in the UK is more than adequate.

Q.28 Articles 10-11: What are your views on the Commission's definition of contaminated sites? Is it appropriate?

No - what about levels of contamination not caused by man?

Q.29 Articles 10-11: What are your views on the list of potentially polluting activities set out in Annex II?

We do not believe that it is possible to encompass all potentially polluting activities. Moreover, to rely exclusively on a list of dangerous substances and polluting processes would conflict with the use of risk-based identification, which is far more appropriate.

Q.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?

This is exactly what happens now in the UK. The processes are effectively covered by PPS23.

Q.31 Articles 10-11: Do you think the timescales given in the draft Directive for compiling and reviewing the inventory are reasonable?

No. But the concept is in itself flawed.

Q.32 Articles 10-11: How do you think this requirement will affect land values?

There would be significant blighting (Defra published a report in February 2003, Disamenity of Landfill Sites, which clearly identified a significant diminution in property values (up to 40%) for those properties located on, or in close proximity to licensed landfill facilities.

Q.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?

Limit its scope - it is absurd and unworkable to suggest that every homebuyer needs a dedicated soil report.

Q.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?

Costs will be significant, benefits marginal.

Q.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?

There are no perceived benefits. Indeed there is significant risk that they would inhibit the regeneration of Brownfield sites.

Q.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?

Only as part of the development/regeneration process. Generally, unless an overriding public health risk is identified under the UK's Part IIA provisions – no.

Q.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?

Yes.

Q.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. The costs are totally unpredictable.

Q.39 Articles 13-14: What are your views on requiring Member States to put in place appropriate mechanisms to fund remediation of orphan sites?

What is deemed to constitute 'appropriate mechanisms'? What is being proposed would have considerable and potentially inequitable cost implications.

Q.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?

Such an approach would have enormous resource implications for the UK. The present approach under Part IIA and planning should be allowed to continue.

Q.41 Article 15: Do you agree with our concerns and the costs and benefits identified?

See previous response.

Q.42 Article 15: What are your views on this provision and how could it be improved?

It is difficult to respond to this question as the provision is too vague.

Q.43 Article 16: What are your views on this provision and how could it be improved?

Unsure at this stage.

Q.44 Article 17: Do you consider that this platform for the exchange of information would be useful for the Government and stakeholders?

It could be a means of comparing best practice but we would question its effectiveness.

Q.45 Article 17: Is this too narrow a range of information? If so, what else should be included?

No comment.

Q.46 Articles 18-24: What are your views on these provisions?

We can see no material benefit.

Conclusion

We see very little to persuade us of the need for a Soil Directive. While some member states might consider that their own regulatory regime is inadequate, there seems little point in trying to design pan European legislation to cover such environmental diversity, particularly when the UK already has a more than adequate regulatory system.

The UK already has legislation based on established and effective risk-based assessment criteria that addresses many of the issues identified in the consultation. We believe that the imposition of further tiers of legislation, particularly of the restrictive nature proposed, would have seriously impede the industry's ability to meet the Government's ambitious targets for housing provision.

We note that there have been recent MEP discussions, which seem to be suggesting a similar system to the doomed Section 143 Registers that the UK attempted some years ago. We believe that renewed efforts to achieve such a system would be similarly doomed to failure and would suggest that Defra should maintain the eminent suitability of the existing UK legislation, albeit that HBF could (and has repeatedly) suggested improvements.

D F Mitchell
Technical Director