

Newsletter

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Soil Contamination Prevention Law amendments – Do they solve the brownfield problem in real estate transactions?

Background

The main statute in Japan relating to land contamination is the *Soil Contamination Prevention Law 2002* (“**SCPL**”). The SCPL was recently amended with a majority of the new amendments to come into effect on April 1, 2010 (“**Amended SCPL**”).

Summary of the amendments

The SCPL sets out specific statutory limits for 25¹ specified harmful substances. Under the pre-April 1 SCPL, if any of these substances were found in concentrations exceeding the relevant limits, and there was a human health risk, then land will be classified as a designated area (“Designated Area”).

The Amended SCPL includes in Designated Areas land which contains one or more of the specified substances in excess of the statutory contamination threshold. Designated Areas are divided into two sub-classifications, depending on the existence or likelihood of a risk of harm to human health (i.e., risk of inhalation of the contaminated soil or the substance, or ingestion e.g. by drinking contaminated groundwater). More specifically, under the Amended SCPL, the Designated Areas are sub-classified into (i) areas requiring remediation; and (ii) areas where authorities must be notified when the area is developed, and registered accordingly. Additionally, the amendments provide for remediation measures that must be implemented for each sub-classification.

- **Areas requiring remediation**

Land is placed in this sub-category where:

- the soil contains one or more of the 25 specified substances at levels above the statutory threshold in the Amended SCPL; and
- this contamination causes, or will likely lead to, damage to human health either by inhalation, ingestion, bodily contact or as a result of drinking groundwater contaminated with the substance in question.

¹ The 25 substances include both total and alkyl mercury, which together have been counted as one substance.

For these areas, the prefectural governor requires any persons, who own, administer or occupy the land (“**Landowners etc.**”) to implement measures, such as raising the ground level or containing the contamination, and any other implementation measure specifically required, including monitoring the contaminated groundwater. Further, any other changes to the land itself for development or other reasons are, as a general rule, prohibited.

- **Areas where authorities must be notified on development**

This designation applies to land which contains one or more of the 25 specified substances at levels above the statutory threshold, but where contamination does not cause, or is unlikely to cause, damage to human health. For land in this category, remediation is not required until the land is to be developed, at which time the Landowner etc. is required to give prior notification to the prefectural governor and the area must be remediated in accordance with the stipulations of the relevant Ministerial Ordinance.

If this newly created sub-classification of land becomes quite common and well accepted in real estate transactions, then it is possible that brownfield issues in Japan may be resolved to some extent. However, because the new amendments also further regulate excavation and removal of contaminated soil, and will increase excavation and removal costs, Landowners etc. may refuse to take remedial measures. Instead, Landowners etc. may abandon contaminated land as unsellable and/or not worth developing if remediation is required, thus resulting in an expanded number of designated brownfields, but no improvement in brownfield remediation.

The Amended SCPL also:

- Includes provisions that trigger a soil investigation whenever changes are made to an area of land over 3,000 square meters in size (see further discussion below);
- Aims to make soil contamination reporting and investigations an expected component of real estate transactions. The success of these new measures will depend on the level of public awareness of soil contamination;
- Enables Landowners etc. to identify the existence of soil contamination from a voluntary investigation, and request the prefectural governor to categorize the land as a Designated Area if necessary based on the results of the voluntary investigation; and
- Strictly regulates the disposal of any contaminated soil by requiring that (i) the level of contamination of the 25 substances must be checked before any soil is excavated and removed from the site, (ii) the removed soil must be treated by a licensed factory or plant, (iii) a license will now be required in order to remove/transport, dispose of and treat the contaminated soil, (iv) a manifest system has been adopted.

Current issues that the Amended SCPL seeks to address

The Amended SCPL seeks to address the following issues:

- Relatively few site investigations were being implemented under pre-Amended SCPL legal requirements. Where an investigation was compulsory by law, the prefectural governor was entitled to, and often did, waive such an investigation. Investigations were thus usually only triggered when the land's use as a factory site or the like was discontinued;
- To date, over 80% of Landowners carried out greater excavation of contaminated soil than was required by the law, because of real estate market demands. This was also exacerbated by the fact that the label "Designated Area" is only removed when excavation has been implemented, regardless of other measures taken by Landowners etc. Where excavation costs are prohibitive, this resulted in brownfields issues, as remediation was abandoned due to the cost considerations; and
- Previously, no specific regulations existed regarding the disposal of contaminated soil.

Amended SCPL provides greater opportunities to investigate soil contamination

From April 1, 2010, any Landowner etc., who plans to develop a site in excess of 3,000 square meters, must investigate such site if, based on the past use of such site, there is a risk of contamination, and inform the authorities accordingly. If contamination and a risk of damage to human health are found, the Landowner must take remedial action.

More specifically, the Amended SCPL provides that:

- Landowners etc. must give 30 days' prior notice to the prefectural governor whenever changes are made to an area of land over 3,000 square meters in size. The prefectural governor may then order the Landowners etc. to investigate the possibility of soil contamination where he/she believes that there is a risk of contamination to the land; and
- Where Landowners etc. identify soil contamination through voluntary investigation, they may request that the prefectural governor mark the land as a Designated Area.

Likely impact on future real estate transactions

The changes brought in by the Amended SCPL will affect real estate transactions by:

- Requiring Landowners etc. to take into account the possibility of a soil investigation period when attempting to undertake a quick property settlement and to be aware of the potential delays any discovered contamination could cause;
- The Amended SCPL will also cover any soil contamination caused by natural phenomenon (e.g. volcano), not only man-made contamination.

The amendments to the SCPL also seek to reduce brownfield issues in real estate transactions, although as discussed below, it is questionable whether the SCPL as amended will be successful in achieving the aim of reducing brownfields.

Under the amendments, all “areas where authorities must be notified on development” must be disclosed to the public. The way this disclosure is communicated to the public will be important to ensure potential buyers have appropriate information regarding the maintenance of contaminated land disclosed to them.

By the above information being made publicly available, buyers may be able to reduce their risks and exposure to liability arising from contamination. However, buyers may demand for example that sellers excavate the contaminated soil and remove it from the site, in spite of the high costs. This may have serious impacts on real estate transactions, including in areas with high contamination levels due to natural causes. The result may be that transactions involving such land are avoided or become prohibitively expensive, resulting in a greater (rather than lesser) number of recognized but un-remediated brownfields.

Proper disposal of contaminated soil from Designated Area

Under the Amended SCPL, Landowners etc. must take responsibility for properly disposing of contaminated soil.

The Amended SCPL provides for three new regulations, dealing with:

- The transportation of contaminated soil from a Designated Area;
- The delivery and storage of transported contaminated soil; and
- The treatment of contaminated soil.

Under these new regulations, the above processes will be subject to “licensing” and “manifest” systems.

Conclusion

In summary, the new amendments to the SCPL are likely to increase the impact this law has on real estate transactions in Japan, in terms of investigation of contamination, costs of real estate transactions, and accordingly on the planning for and timing of real estate transactions. In addition, by creating a new sub-classification under the title of “Designated Area”, the law has expanded this category from only those sites which pose a risk to human health, to now include sites where the 25 regulated substances are found at levels in excess of the statutory threshold, stipulating differing remediation and reporting requirements for each category. Finally, the amendments will impose some preliminary investigation of possible land contamination for all sites over 3000m² which are to be developed. The amendments also aim to reduce the spread of contamination, by more strictly regulating (i.e., requiring a license for) the transportation, delivery, storage and disposal of contaminated soil, although the actual result may be to increase the number of recognized yet unused and un-remediated brownfields.

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