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Guidelines of the Soil Pollution Prevention Law to Industrial Facilities in China

1. Policy Background

In recent years, the environmental protection legislation is highly focused on in China. Upon the effectiveness of the <PRC Soil Pollution Prevention Law> on January 1st, 2019 (“New Law”), the legal framework on the various aspects of environmental protection has been fully established. Given the situation that soil pollution is elusive, hysteric and cumulative with high repair cost, the competent authorities in China tend to emphasize more on the prevention and monitoring of soil contamination, and on the strict punishment on the non-compliant behaviors. It is clear that the implementation of the New Law is going to pose significant impact on the industrial and manufacturing operations in China and as a result, additional legal issues specified below shall call for greater attention.

2. Highlights of the New Law

In the past decades, the responsibilities for industrial and manufacturing sites to clean up the contaminated soil are scattered and not specifically promulgated under the laws and regulations. The New Law is adding more responsibilities to Chinese companies for investigating soil contamination status, assessing and controlling soil pollution risks, and restoring polluted land.

2.1 Nationwide Database

According to the New Law, the Ministry of Environment and Ecology (“MEE”) is required to work with other competent authorities to establish a nationwide database of soil status accessible to the public (“**Nationwide Database**”). The main information to be maintained and disclosed in the Nationwide Database includes the catalog of poisonous and harmful soil substances, the supervision list of facilities for soil pollution, and the list of construction land subject to risk management, control and restoration, the soil pollution and remediation status and the particulars of the talks and corrective actions directed to the companies by the competent authorities.

Under the mechanism of the Nationwide Database, the following industrial facilities are at greatest risk:

- Industrial Facilities under the Supervision Lists for Soil Pollution

Local competent authorities are obligated to set the localized Supervision List for Soil Pollution according to <Circular on Issuing the Administrative Provisions on the Catalogs of Major Pollutant Discharge Entities (for Trial Implementation)> promulgated by the MEE (previously

the Ministry of Environmental Protection) on November 25, 2017 (“**Circular 2017**”). Basically under the Circular 2017, the industrial facilities shall be included under the Supervision List for Soil Pollution are:

- (1) All large and medium-sized enterprises that discharge pollutants and belong to industries subject to major monitoring for soil pollution i.e.: non-ferrous metal mining, non-ferrous metal smelting, oil exploration, petroleum processing, the chemical industry, coking, electroplating, leather making and other industrial areas added by the local competent authorities based upon real conditions;
- (2) Entities that generate over 100 tons of hazardous waste per year;
- (3) Entities that engage in the storage, disposal and utilization of hazardous waste on the strength of hazardous waste operation permits;
- (4) Entities that operate and maintain domestic garbage landfills or incineration plants, including garbage landfills that have been closed down;
- (5) Entities that cause a relatively large or more serious solid waste, hazardous waste, or groundwater environmental pollution incident or have material social impact due to soil environmental pollution problems within three years.

In Shanghai, as posted by the Environmental Protection Bureau of Shanghai (“**SH EPB**”), 397 enterprises are included under the Year 2018 Supervision List for Soil Pollution, roughly two-thirds of which are owned by foreign investors.

The facilities listed under the Supervision List bear more regulatory responsibilities to monitor and control soil contamination, i.e. implementing work plan for soil contamination prevention, and conducting investigation into the soil contamination status before the withdrawal and transfer of the land use right etc.

Where the investigation results identify soil contamination, the risk assessment is required to be conducted and the further development of the potentially polluted land is hindered before any remediation being undertaken.

● Industrial Facilities with Construction Land under the List Subject to Risk management, control and restoration

In case any land survey or inspection indicates potential pollution of a plot of construction land, the land use right owner (“**LUR Owner**”) shall inquire into the status of the soil pollution. If such inquiry reveals pollution exceeding the applicable standards, the responsible person (as described in the Section 2.2 below) and the LUR Owner shall prepare and file a risk assessment report to the competent Environmental Protection Bureau (“**EPB**”). Based on the review of the risk assessment report, the competent EPB may include the plot in the list of construction land subject to risk management, control and restoration.

The responsible person of the listed lands may be requested by the government to conduct corresponding risk management and restoration. In addition, in the case of transferring land use right, and rezoning, the lands under such list are not allowed for the use of residency, public management and public service, which would potentially hinder the transfer and undermine the evaluation of the land.

2.2 Responsible Person

The New Law sets up the principal to determine the entities liable for risk control and contamination remediation that the responsible party for soil pollution, the party entitled to land use right, and the local government shall bear the responsibility in order. However, the New Law does not clearly elaborate the concept of “the responsible party for soil pollution” but instead leave the discretion to the MEE. Nevertheless, under the legislation logic of the New Law, the “polluter pays” principal is still followed and the actual polluter is generally deemed as the ultimate payer for soil contamination currently.

2.3 More Severe Penalty

Bearing the incentives to penalize polluters and to encourage for remediation, fines have been significantly increased, with violations resulting in penalties of up to RMB 2 million and potential criminal liabilities.

3. **Suggestions**

In light of the New Law, DS recommends industrial facilities operating in China to:

- Explicitly establish liability for soil pollution in lease and/or land use transfer agreement.
- Undertake necessary soil investigation by the end of year 2018 so as to determine the potential pollution problems and estimate the possible legal risks before the competent authorities address the issue to them. Regardless of the investigation result, the facilities shall establish internal control system to timely monitor the status of soil contamination and crisis control mechanism. If contamination exists upon investigation, the facility shall take proactive measures to mitigate the contamination or even to remove the sources if possible.
- Place greater importance on conducting thorough due diligence for soil contamination in the case of M&A transaction and relocation.

LIU Yimin
Senior Associate – Shanghai Office
liuyimin@dsavocats.com

QIU Jin
Associate – Shanghai Office
jinqiu@dsavocats.com