

Advice Note 3 – Environmental Protection Act 1990: Part IIA Contaminated Land Regime

Introduction

The Environment Act 1995 (the Act) has established a regime for the identification and remediation of Contaminated Land. The provisions are set out in Section 57 of the Act, which inserts Part IIA into the Environmental Protection Act 1990. In addition to these requirements the operation of the regime is subject to regulation and statutory guidance. These provisions came into force on 1st April 2000. Further to this, in August 2006 the regime was extended by new regulations to include land that is contaminated land by virtue of radioactivity.

When is Land Contamination?

The intended function of the legislation is to enable the identification and remediation of land on which contamination is causing unacceptable risks to human health or the wider environment. It does not necessarily include all land where contamination is present, but very much depends on the use to which it is put. This "suitable for use" standard for remediation takes account of the actual or lawful use of the site. Total restoration of Contaminated Land to an "unpolluted state" is rarely achievable and is, in most cases, unnecessary. Instead, a remedial approach tailored to the intensity and extent of the contamination found and the end use of the site is adopted. In order to determine that a site is contaminated, the Local Authority, must establish that there is a significant pollutant linkage. A pollutant linkage consists of three elements, all of which must be present before land can be considered being contaminated. These are:



SOURCE – The contaminating substance or pollutant

PATHWAY – A means for the source to reach a receptor

RECEPTOR – Something that can be harmed by the source

Section 78A(2) of the Act defines **Contaminated Land** as:

"any land which appears to the Local Authority in whose area it is situated to be in such a condition, by reason of substances in, on or under the land, that:

- significant harm is being caused or there is significant possibility of such harm being caused; or
- pollution of controlled water is being, or is likely to be, caused".

Statutory guidance provides a description of **significant harm** applicable to each of the main receptors (human beings, living organisms, ecological systems and property) and what harm should be regarded as significant.

The definitions of **controlled waters** and what constitutes **pollution** of such waters is defined in section 78A(9) of the Act and is based on those used in Part III of the Water Resources Act 1991. In simple terms, controlled waters includes groundwater, coastal water and water in surface water courses, river and lakes etc.

Radioactivity

In August 2006 the Part IIA regime was extended by new regulations to include land that is Contaminated Land by virtue of radioactivity.

Where harm is attributed to radioactivity, the definition of **Contaminated Land** has been modified under the regulations as:

- "harm is being caused, or
- there is significant possibility of such harm being caused".

The definition of **harm** attributed to radioactivity in respect of human beings is based upon the wording of the Directive, and harm is defined as "lasting exposure to any person resulting from the after-effects of a radiological emergency, past practice or past work activity".

How is Contaminated Land Identified?

The Local Authority may identify a particular area of land where it is possible that a pollutant linkage exists. The Authority may need to carry out a detailed site inspection to establish whether there is a significant pollutant linkage and hence Contaminated Land under the Act. In cases of potential Special Sites (see below), the inspection may be carried out by the Environment Agency. In either case, the appropriate enforcing authority will give those with an interest in the land advance notice of the inspection unless urgent reasons to carry out the inspection prevent them giving adequate notice. Such reasons would include an immediate risk of serious pollution of the environment or serious harm to human health or where life or health is in danger. In any case, the local authority will consider any claims for compensation for disturbance caused by an inspection using its statutory powers of entry. Having decided the land is Contaminated Land, the Local Authority will prepare a written record of its determination. This will include a description of the pollutant linkage and the summary of the evidence on which the determination is made. Further, the site may be designated a **Special Site, depending** on whether the land falls into any of three prescribed groups:

- Water-pollution cases – there are three types of case where, if the land is Contaminated Land, the Environment Agency is best placed to be the regulator. These are where the controlled wastes are used, or intended to be used, for the supply of drinking water; where controlled waters are being affected so that they do not meet relevant surface water quality criteria; and scheduled aquifers affected by List 1 substances.
- Industrial cases comprising activities in respect of waste acid tar lagoons; oil refining; explosives; sites authorised for Integrated Pollution Control (IPC or IPPC) and nuclear sites.
- Defence cases – where the land involves the Ministry of Defence estate.

In these cases, following determination as Contaminated Land and designation as a Special Site the enforcing authority is the Environment Agency.

Who cleans up the land?

For each significant pollutant linkage the Local Authority needs to identify those who are the appropriate persons for any remediation action relating to that pollutant. All those appropriate persons are a liability group, of which there are two levels of liability:

Class A – those who know of knowingly permitted the contamination.

Class B – the current owner or occupier of the land.

In the first instance Class A persons are the appropriate persons (the **polluter – pays** principal), but if none can be found then Class B persons are the appropriate persons and are responsible for the remediation. There are a number of tests for excluding persons from liability, and for apportioning liability with others, and these are explained in 'Advice Note 4 – Environmental Protection Act 1990: Part IIA Apportioning Liability for Contaminated Land'.

What is Remediation?

Section 78A(7) defines remediation as:

- the doing of anything for the purpose of assessing the condition of –
 - The Contaminated Land in question;
 - Any controlled waters affected by that land; or

- Any land adjoining or adjacent to that land;
- b) the doing of any works, the carrying out of any operations or taking any steps in relation to any such land and waters for the purpose –
- of preventing or minimising, or remedying or minimising, or remedying or mitigating the effects of, any significant harm, or any pollution of controlled waters, by reason of which the Contaminated Land is such land; or
 - of restoring the land or waters to their former state; or
- c) the making of subsequent inspections from time to time for the purpose of keeping land under review the condition of the land or waters

This definition has a wider meaning than it has under its common usage and includes obtaining information on the condition of the land or waters in order to characterise in detail the pollutant linkage and establishing the technical specification or design of any particular remedial treatment.

Voluntary Remediation

The regime encourages voluntary remediation, which is preferable not only from the regulator's point of view, but also that of the appropriate persons, who may prefer to undertake remediation on their own terms. Where the appropriate persons are to undertake voluntary remediation, the Local Authority need not serve a remediation notice, provided it is satisfied that the proposed remediation meets the required standard. However, those persons undertaking the remediation must prepare a **remediation statement**. Where the appropriate persons do not do so, the Local Authority may prepare the statement itself and recover the costs that it incurs in its preparation.

The **remediation statement** must include the following information:

- a) the things which are being, have been, or are expected to be, done by way of remediation in the particular case;
- b) the name and address of the person who is doing, has done, or is expected to do, each of those things; and
- c) the periods within which each of those things is being, or is expected to be, done.

The enforcing authority has the duty to require appropriate remediation.

What happens if the land is not remediated voluntarily?

Before the enforcing authority takes any enforcement action they must consult with those persons who were notified that the land is contaminated. The aim of this consultation is twofold:

- to encourage voluntary remediation; and
- by gathering information, and providing the interested parties with information, to reduce the possibility that there will be an appeal against a remediation notice.

Where it appears that remediation is not being carried out voluntarily, the Local Authority will serve a remediation notice on all the appropriate persons. The notice will specify the necessary works to be undertaken and the time limits for their completion.

Any person served with a remediation notice has the right to appeal to the Secretary of State.

Where remediation has not taken place within the time specified in the remediation notice, the enforcing authority may prosecute those served with the notice. Before bringing a prosecution, the enforcing authority will notify the appropriate person that it intends to take such action and give the person the opportunity to avoid prosecution by carrying out actions to meet the notice. Those found guilty of this offence are liable to a fine of up to £5,000, plus an additional fine of £500 for each day after conviction that the action is not carried out and before the Local Authority starts to carry out

the remediation itself. The level of the fine increases to £20,000 and £2,000 per day where the site is an industrial, trade or business premises. The enforcing authority also has the power to undertake the works specified in the remediation notice itself and recover the costs from the appropriate person.

Contacts

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Guidance and References

A list of reference material and further reading is presented below. Parties involved in site investigations are encouraged to have regards to their contents and make use of the sources of information during their work. The list is not exhaustive and is current at the time of writing.

- DEFRA (2006). Circular 01/2006 Environmental Protection Act 1990: Part IIA. DEFRA London
- DEFRA and Environment Agency (2004). CLR11: Model Procedures for the Management for the Management of Land Contamination. EA Bristol
- OPSI (1995). Environment Act 1995 – Part IIA Contaminated Land. OPSI London

Disclaimer

This note is intended to serve as an informative and helpful source of advice. However, readers must not that legislation, guidance and practical methods are inevitability subject to change. This note should therefore be read in conjunction with prevailing legislation and guidance. Ultimately it is the responsibility of the person/company involved in the development or assessment of potentially contaminated land to apply up to date working practices and to determine the contamination status of a site and the remediation requirements.

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