

## COUNCILLOR BRIEFING ON LAND CONTAMINATION

All land contains background levels of substances that are naturally present as a result of its geology. It can also contain substances resulting from human activities. Some land will have greater concentrations of substances and this is often associated with industrial use and waste disposal.

In a minority of cases the degree of substance present may give rise to sufficient risk to human health or the environment that such land meets the definition of 'contaminated land'.

### Legal definition of contaminated land

In April 2000, Part 2A of the Environmental Protection Act (EPA) 1990 introduced a regime for the regulation of contaminated land in England. Its main purpose is to provide a system for identifying land that could pose unacceptable risks to health or the environment given the *current use and circumstances of the land*, and for securing remediation where such risks cannot be controlled by other means.

Under Part 2A, the starting point should be that land is not contaminated land unless there is reason to consider otherwise. Land can only be considered as meeting the legal definition of 'contaminated land' where unacceptable risks have been clearly identified in accordance with Statutory Guidance.

### Relationship between Part 2A and Other Controls

The Part 2A regime is one of several ways in which land contamination can be addressed. However, Part 2A should only be used where no other appropriate solution exists.

- Land Use Planning & Building Control Regulation

Land contamination can be addressed when land is developed (or redeveloped) under the planning system and also during the building control process.

For new developments, the Local Planning Authority needs to make sure that the developer will deal appropriately with land contamination which may affect the development. Typically, this is done by attaching conditions to the planning consent.

Building Control officers can require measures to be taken to protect any buildings, and future occupants, against contamination.

The overall aim of the planning system as it relates to contamination is to ensure that the land is suitable for the proposed development and its use. Once land has been correctly redeveloped through the planning regime it should not be possible for it to be determined as 'contaminated land' under Part 2A.

Other legislation may also be used to deal with land contamination issues, including those for waste, water, and environmental permitting; and the Environmental Damage (Prevention and Remediation) Regulations 2009.

Land owners can also deal with contamination issues associated with their own land.

### **Structure of the Part 2A Regime**

The primary legislation of the Part 2A regime is set out in Part 2a of the Environmental Protection Act 1990 and the Statutory Guidance made under that Act.

- The Act contains the main legal framework of powers, duties, definitions and procedures, and
- The Statutory Guidance has a legal basis and forms an integral and often technical guide to the proper use of the legislation.

### **Key Responsibilities of Local Authorities under Part 2A**

Local Authorities are the main regulators for Part 2A. They are responsible for identifying and remediating contaminated land. The Environment Agency has a complementary role in identifying contaminated land as the enforcing authority for remediating Special Sites.

The Council's key responsibilities under Part 2A are to:

1. Prepare an inspection strategy setting out how the Council intends to inspect its area in order to identify contaminated land
2. Determine whether particular areas of land are contaminated land in accordance with the Guidance
3. Decide whether any contaminated land should also be designated as a Special Site in consultation with the Environment Agency as appropriate.
4. Identify and notify owners and occupiers of the land, those who may be liable and the Environment Agency that the land is contaminated land and whether it is a Special Site.
5. Undertake urgent remediation where there is imminent danger of serious harm.
6. Determine who may be liable for remediation of contaminated land and what proportion of the costs they should bear.
7. Ensure that appropriate remediation takes place, either by encouraging voluntary action or, unless restrictions apply, by serving a remediation notice on those responsible.
8. Maintain a public register containing details of regulatory action taken under Part 2A and through other means.

### **The definition of Contaminated Land (under Part 2A)**

The Act provides the legal definition of '*contaminated land*' as being:-

“land which appears to the local authority whose area it is situated to be in such a condition, by reason of substances in, on or under the land, that –

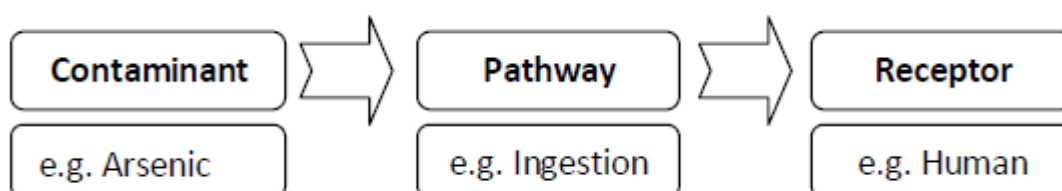
(a) significant harm is being caused or there is a significant possibility of such harm being caused, or

(b) significant pollution of controlled waters is being caused or there is a significant possibility of such pollution being caused.”

In applying the definition and determining whether land is contaminated land the Council must act in accordance with statutory guidance. The definition does not necessarily include all land where contamination is present.

### **Risk assessment and the concept of the ‘contaminant linkage’**

The definition of contaminated land is based upon the principles of risk assessment and relies heavily on the concept of the ‘contaminant linkage’, i.e. the presence of a contaminant which has the potential to impact on a receptor by means of a pathway (see Figure below).



**Figure 2. The concept of a contaminant linkage.**

For the purposes of Part 2A:

- A contaminant is a substance which is in, on or under the land and which has the potential to cause harm or to cause pollution to controlled waters. Substance is defined as "any natural or artificial substance whether in solid or liquid form or in the form of gas or vapour".
- The statutory guidance limits what can be considered as a receptor to the following: human beings; certain designated ecosystems or living organisms; property including crops, livestock, pets and buildings; and controlled waters.
- A pathway is the route or means by, or through, which a receptor is being exposed to, or affected by, a contaminant (e.g. ingestion or skin contact).

All three elements of a contaminant linkage must exist before any particular land can be considered to be potentially contaminated land under Part 2A.

### **Contaminated Land Inspection Strategy**

The Council must take a strategic approach to the inspection of its area and set out this approach as a written strategy. The Strategy also sets out the Council's priorities, characteristics of the area, prioritisation process and programme for inspection.

Spelthorne Borough Council published its Contaminated Land Inspection Strategy in 2001. The Council has now undertaken a re-write of the strategy with the aim of bringing the original strategy document up to date by:

- Reporting on amendments to legislation and statutory guidance;
- Reviewing progress being made with the implementation of the 2001 Strategy;
- Reporting on change made to the approach, procedures and methodologies for implementing the Strategy; and
- Revising the review mechanisms.

The new Strategy looks forward at the next five year period to 2021, setting out the Council's new strategic approach and priorities for action under Part 2A. The Council's main approach to identifying and remedying potentially contaminated land will be via the planning process, but there is still a need to comply and enforce Part 2A through both desk-based and detailed inspection including intrusive investigation where necessary.

A new work programme and timescales have been developed for the 2016 – 2021 period. The Council must take a rational and ordered approach to assessing sites and therefore an initial prioritisation of sites has been developed based on historical and current use. Over 1,100 parcels of land have been identified as having the potential to have been impacted by their past or current use. Only a very small number are likely to potentially meet the definitions of Part 2A Contaminated Land. Obviously it is not possible to investigate all these sites at once.

The 2016 – 2021 period will involve a more in-depth review of desk-top information for the sites most likely to meet the legal definition of Contaminated Land under Part 2A. We will also be looking to improve existing datasets to refine and adjust the whole priority list. The Council aims to produce five Strategic Preliminary Risk Assessments (desktop studies) between 2015 and 2020. Achieving this target will depend on the complexity of the sites being assessed and the extent of available information. Progression to detailed inspection (site investigation and risk assessment) will only be made if there is sufficient evidence (and secure funding) to justify the further work. This could include where there is strong evidence of the possibility of imminent significant harm to health (or significant pollution of controlled waters). Dealing with any urgent unforeseen sites would take priority over the scheduled programme of work for 2016 – 2021.

### **Who is responsible for the cost of remediation?**

Responsibility for paying for remediation will, where feasible, follow the 'polluter pays' principle.

In the first instance, those people who caused or knowingly permitted a substance to be in, on or under the land are responsible for paying for remediation. Where these people cannot be found, responsibility passes to the current owner or occupier of the land. There are certain limitations regarding responsibility, such as when hardship might be caused.

Where responsible persons cannot be found, the enforcing authority has powers to remediate the land.

### **Record of determinations and written statements**

The Council must prepare a written record of determination land that meets the definition of contaminated land and this should be made publicly available. A determination that land meets the definition may be reconsidered, revoked or varied should circumstances change and significantly alter the basis for the original decision.

Where, on the basis of its assessment, the Council is satisfied that land does not meet the definition of contaminated land the Council is required to issue a written statement to this effect.

### **The Public Register**

The Council must maintain a public register containing information relating to sites identified as contaminated land under Part 2A. The register is intended to act as a full and permanent record of all the action taken by the enforcing authority in relation to the remediation of the land under Part 2A

The register is not a list of sites that might be contaminated.