

## Environment & Sustainability Committee

3 November 2021



<b>Title</b>	Contaminated land site investigation at landfill to rear of Thameside
<b>Purpose of the report</b>	To note
<b>Report Author</b>	Tracey Willmott-French – Senior Environmental Health Manager Dr Claire Lucas – Principal Pollution Control Officer Karen Limmer – Principal Solicitor
<b>Ward(s) Affected</b>	Shepperton Town
<b>Exempt</b>	No
<b>Exemption Reason</b>	
<b>Corporate Priority</b>	Clean and Safe Environment
<b>Recommendations</b>	<b>Committee is asked to:</b> <b>1.</b> To note the actions taken to date and of the actions planned
<b>Reason for Recommendation</b>	Not applicable

### 1. Key issues

- 1.1 As members are aware following the tragic death of Zane Gbangbola, an Inquest was held which reported its findings in September 2016. Members are strongly advised to read the Coroner's Factual Findings and Conclusions which are attached at **Appendix 1**. This document sets out in detail all the relevant issues relating to the cause of Zane's death, including matters relating to land, the use of a petrol pump and the medical evidence. The Coroner concludes that the cause of death was carbon monoxide toxicity, as a result of inhaling toxic carbon monoxide fumes that had been generated by a petrol pump.
- 1.2 Since then, the family have continued to campaign on their son's behalf and have been in touch with the Chair of Environment and Sustainability, Cllr Beardsmore on a number of occasions.
- 1.3 Last year following consideration of a Notice of Motion at Full Council, a letter was written to the Government calling for an inquiry into the events. A response was received from the Department for Environment, Food and Rural Affairs ('DEFRA'). This is attached at **Appendix 2**. Members will recall that DEFRA advised that the correct course of action is for the family to apply to the Attorney General seeking to persuade her to issue a *fiat* and apply to the High Court to consider exercising its powers under s13 of the Coroners Act 1988. In this case, the provision of new material evidence is likely to be a

necessary pre-condition for a *fiat* to be issued and before the high court would consider ordering a fresh public inquiry. Even then, the high court will consider its powers in line with the statutory provisions under s.13 and the case law guidance of the courts. The court needs to be satisfied that it has to be necessary or desirable in the interests of justice that an investigation be (re)opened. (See e.g. *Farrell v HMC for North East Hampshire* [2021] EWHC 778 (Admin) - here a *fiat* granted by the Attorney General was robustly rejected by the divisional Court).

- 1.4 At the Environment and Sustainability Committee meeting of the 14 September 2021, the Chair circulated redacted extracts of Freedom of Information (FOI) requests to Public Health England relating to circumstances following the death of Zane Gbangbola obtained by his father, Kye Gbangbola.
- 1.5 At the meeting the Committee agreed that the issue should be considered at an extraordinary meeting as soon as possible and that a report was to be prepared to consider how a full investigation and examination of the site could be conducted by the Council as soon as possible.
- 1.6 The Committee resolved to note an item for a future meeting on the Forward Plan for a report proposing how the Council will respond to new evidence relating to Zane Gbangbola's death. The Committee required the report to be available for an extraordinary meeting of the Environment and Sustainability Committee to be held before 9 November 2021. The Committee did not decide that any particular steps were to be taken.
- 1.7 Steps have been taken to progress the request for consideration of how a full investigation and examination of the site could be conducted by the Council. However, until the outstanding information outlined within this report has been received and reviewed, no decision on next actions can be taken. Therefore, this report asks the Committee to note the background to the request, to remind members of the Coroner's Findings and Conclusions, and provide some background to the Contaminated Land regime, as provided for in the Environmental Protection Act 1990 and the statutory guidance which accompanies it.
- 1.8 It is this statute supplemented by guidance that sets out the duties and powers, which govern how a Council approaches issues of contaminated land within its borough. The report sets out the position since the Inquest, actions taken since, and the next steps, which must be in accordance with the Act and the statutory guidance.

## **2. Contaminated Land regime**

- 2.1 Further information on how the Council carries out its duties under the Environmental Protection Act 1990 are set out in Appendix 3 and 4, together with details of the Council's Contaminated Land Strategy.

## **3. Legal considerations**

- 3.1 The Council must comply with its statutory duties and lawfully exercise its powers under the Environmental Protection Act 1990 and the associated statutory guidance. The Statutory Guidance in respect of Part 2A of the Environmental Protection Act 1990 explains at paragraph 1.3 as follows:

*“Part 2A provides a means of dealing with unacceptable risks posed by land contamination to human health and the environment, and enforcing authorities should seek to find and deal with such land. Under Part 2A the starting point should be that land is not contaminated land unless there is reason to consider otherwise. Only land where unacceptable risks are clearly identified, after a risk assessment has been undertaken in accordance with this Guidance, should be considered as meeting the Part 2A definition of contaminated land.”*

- 3.2 Specialist legal advice has been sought to review the Council’s powers in respect of the land contamination regime and to advise on the legal position in respect of options available to meet the Committee’s request. As explained in the text below, further information, including regarding the environmental permit/licence arrangements at the site, is required in order to progress this advice.
- 3.3 In terms of general liabilities for contaminated land, the responsibilities for the land and any remediation are set out in the Statutory Guidance. In general terms, remediation is very expensive.

#### **4. Actions taken, next steps and timetable for implementation**

- 4.1 At the time of the Inquest, the then Principal Pollution Control Officer carried out a detailed Desk Study in accordance with the Statutory Guidance which addressed the question of potential contamination of the site owned by Brett Aggregates, to the rear of the Gbangbola family’s property. It concluded that the risk profile at the site did not meet the criteria to either proceed to further even more detailed assessment or for the site to be categorised as ‘contaminated land’ under Part 2A of the Environmental Protection Act 1990. The statutory definition of Contaminated Land requires that there must be a significant possibility of significant harm to human health or non-human receptors or significant possibility of significant pollution of controlled waters.
- 4.2 Details of the work already undertaken and the prioritisation of the site both before and following the tragedy are set out more fully at **Appendix 5**. In the absence of this tragedy, the detailed Desk Study would almost certainly not have been undertaken as the site was not assessed as being at the top of, or even high up on, the Council’s prioritisation list in respect of its Contaminated Land Strategy.
- 4.3 This Study was presented to the Inquest. The Phase 1 Desk Study files relating to the history and characterisation of the site are currently being reviewed, as are the files associated with the Coroner’s Inquest. Files associated with the Inquest include previous site investigation data presented to the Inquest by the Environment Agency, and the landowner, Brett Aggregates, and a site investigation at the property on behalf the insurers of the Gbangbola family.
- 4.4 The Inquest was also presented with an independent report commissioned by the Council and compiled by landfill gas and risk assessment experts, to consider the chemistry of cyanide compounds and how such compounds may migrate into buildings, if present; this report was accepted by the Coroner. In summary, there has already been considerable investigation of the site in

response to the tragedy and that data does include testing for cyanide compounds, as was presented to the Inquest. In the Coroner's Conclusions, he stated at paragraph 95 that "none of the land/soil or water testing conducted at the house or the land behind it (as set out above) found any evidence of a source of HCN (or any other toxic gases)". The Coroner also found it to be "very unlikely that a source of HCN had found a pathway to enter the house on the 7 February at a harmful or lethal level, whether by means of a one-off toxic plume triggered by the flooding (as suggested by Mr Roberts) or otherwise, and was then gone by the time the water was tested on the 8 February".

- 4.5 A fundamental issue that has arisen relates to the status and extent of permits and/or waste management licences applicable to the land that may have been issued by the Environment Agency. This alone may alter the statutory position of the Council, in that Part 2A is considered the mechanism of last resort to deal with land contamination and it does not apply in certain situations for example where the contamination is attributable to the operation of a facility regulated by the Environment Agency. Where there is an active permit or un-surrendered waste management licence the environmental permitting regime is likely to take precedence and the Part 2A powers of the Council may not apply.
- 4.6 In order to resolve this issue, on the 6 October 2021, a Freedom of Information (FOI) request was submitted to the Environment Agency by the Council asking for details about the permits/waste management licences associated with the site. This request was necessary because the Inquest evidence is unclear as to the status and extent of extant permits/licences.
- 4.7 The Environment Agency has provided confirmation that the status of the Waste Management Licence (WML) covering the former Lavenders landfill, including the land to the south of the M3 behind Thameside under WML 83099 has not changed since the Inquest. The land to the north of the M3 is subject to a PPC Environmental Permit RP3233LJ from 2006 onwards which superseded the Waste Management Licence on that area of the original landfill site, but not the area to the south of the M3 which remains subject to WML 83099.
- 4.8 The permit RP3233LJ allows tipping in accordance with the Landfill Directive although no waste has ever been disposed of under it. As a requirement of the PPC permit, Brett Aggregates sample a borehole in the northwest corner of the lake to the north of the M3 and at 3 other locations near the western boundary of the permit quarterly for landfill gas. There is an Environmental Permit for discharges to water reference TH/CNTM.2074/001 in place which allows the discharge of only trade effluent comprising dewatering water and wheel wash water via an outlet to the River Thames.
- 4.9 The 2006 permit RP3233LJ covering the land to the north of the M3 states that *'The Laleham Landfill is an existing inert landfill site, operated by Brett Aggregates Ltd. Only the future tipping areas have been included within the permit. Other areas remain under the existing waste management licence.'* A description of the land subject to the permit is given as follows regarding its relationship with land to the south. *'The north of the site is bounded by Littleton Lane Landfill that is restored and now agricultural land. It is bounded to the south by the M3 motorway, beyond which lies the South Lake into which the installation lake drains from the southeast corner'*. The permit

RP3233LJ makes reference to the presence of source protection zones as follows. *'Source protection zones 1 to 3 for the Abbey Mead public water supply on the opposite side of the River Thames encompass the site. Engineering and waste acceptance procedures have been designed to prevent contamination of groundwater.'*

- 4.10 In terms of potential new information since the inquest, the BBC has reported on a former Ministry of Defence (MoD) engineer, who wishes to remain anonymous, stating that he believes sub-contractors working for a tank-research facility dumped waste chemicals, which he believed could produce cyanide, into the gravel pits behind the Gbangbola's home. A link to the article is provided at **Appendix 6**. A request for information regarding this claim will be submitted to the MoD the week commencing 8 November 2021. It has been necessary to do a substantial amount of research prior to writing the letter in order to ascertain the nature of the facility and its historic names, as the facility published in the article was only in operation under the given name from 1995 to 2001, when the site behind Thameside was already landscaped. At this point in time the anonymous individual who had contact with the BBC has not contacted the Council.
- 4.11 As information continues to be received and reviewed, additional information and FOI requests may be made to various organisations, as necessary.
- 4.12 Once the information has been received and all necessary information reviewed by officers, a report will be brought to Environment and Sustainability Committee, to advise on potential next steps.
- 4.13 The next steps that could be taken, subject to further legal opinion most specifically in relation to the applicability and scope of the Council's statutory powers under Part 2A, include:
  - (a) Consideration will be made as to whether an update of the Phase 1 Desk Top Study would be an appropriate course of action under Part 2A once the Council has received and reviewed responses to its requests for further information, for example, responses from the MOD the responses of the Environment Agency. Any such updates may require external resources.
  - (b) Further to (A) above, should an update to the Phase 1 desk study identify the need for an intrusive site investigation, then organisational jurisdiction would need to be considered to determine which organisation would legally be able to undertake such an investigation. [If Part 2A, the statutory guidance requires that other parties with legal interest over the land are given the opportunity to undertake their own investigations or present relevant information, which may negate the need for intrusive investigations (see **Appendix 5**). In this context, it should be noted that site investigation data from the landowner and the Environment Agency was presented to the inquest.
- 4.14 In the light of the above, no decision can yet be taken as to whether the Council should enter land and carry out site investigations and officers are currently not in a position to advise on this until the information outlined above is received and reviewed, and until further legal advice is taken.
- 4.15 If officers consider that external support is needed to carry out this work, appropriate professionals will be engaged to do so, but this cannot be decided

yet. There will be a cost associated with this. The timescales would be dependent on information being received from other organisations, and the availability of external resources should this be required.

## **5. Financial Implications**

- 5.1 It should be noted that there is no specific budget provision to cover the potential cost of additional advice or assessment, both scientific and/or legal.
- 5.2 There are no grant funding streams available to mitigation costs associated with intrusive site investigation or remediation so could require borrowing by the Council to finance which in turn has a revenue budget impact. This will be flagged as a potential risk within the Outline Budget report going to Corporate Policy and Resources Committee on 29 November.

## **6. Other considerations**

- 6.1 Section 17 Crime and Disorder Act 1998: Duty to consider crime and disorder implications. There are no implications from this report.

## **7. Equality and Diversity**

- 7.1 There are no equality and diversity implications from this report.

## **8. Sustainability/Climate Change Implications**

- 8.1 There are no sustainability implications from this report.

## **9. Timetable for implementation**

- 9.1 The timescales would be dependent on information being received from other organisations, the availability of external resource should this be required, as well as ensuring that legal procedures are followed. This will include those associated with financial regulations in respect of procurement should an intrusive investigation be determined as being necessary and within Spelthorne Borough Council's legal jurisdiction.

**Background papers:** There are none

### **Appendices:**

- Appendix 1 - Coroner's Findings and Conclusions
- Appendix 2 - Previous Correspondence with DEFRA
- Appendix 3 - Contaminated Land Strategy
- Appendix 4 - Land Contamination in Spelthorne dealt with through the Planning and Building Control regimes
- Appendix 5 - Details of work already undertaken
- Appendix 6 - BBC Article Referring to MOD Waste