

**A Legal Practitioner's View
on
The Revised Part 2A Statutory
Guidance and Controlled Waters**

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Overview

1. Overview of legislation concerning contaminated land
2. Overview of Part 2A Regime and statutory guidance
3. Legal position regarding controlled waters
4. Anti Pollution Works Notices
5. Concluding comments

Principle Legislation for Contaminated Land in England (1)

- Part 2A Environmental Protection Act 1990
- Environmental Permitting (England and Wales) Regulations 2010
- Environmental Damage (Prevention and Remediation) Regulations 2009
- Water Resources Act 1991
- Common law – nuisance/negligence/Rylands v Fletcher
- Planning regime and building regulations

Principle Legislation for Contaminated Land in England (2)

- Environment is a devolved matter. Different legislation in England, Wales and Scotland
- Section 85 of Water Resources Act 1991 repealed
- Water pollution offences under Environmental Permitting Regime
- Part 2A has mainly had an indirect rather than a direct effect

Part 2A Regime

- **Part 2A Environmental Protection Act 1990 (Inserted by Environment Act 1995 section 57)**
- **Definition of “Contaminated Land” :-**

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:-

- (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***

Controlled Waters

- Section 78A(8) of Part 2A:
controlled waters are “affected by” contaminated land if (and only if) it appears to the enforcing authority that the contaminated land is .. in such a condition, by reason of substances in, on or under the land, that significant pollution of those waters is being caused or there is a significant possibility of such pollution being caused
- Section 78A(9) “controlled waters” has the same meaning as in Part III of Water Resources Act 1991
“references to waters of any of the following classes - relevant territorial waters, coastal waters, inland freshwaters and groundwaters”

Except that “groundwaters” does not include waters contained in underground strata but above the saturation zone

Test to Determine Contaminated Land

- Local Authorities must satisfy themselves of the following:-
 - there is a “**contaminant leakage**” (a contaminant, receptor and pathway)
 - the linkage is a “**significant contaminant linkage**” giving rise to a level of risk sufficient to justify a piece of land being determined as contaminated land
 - One of the following must exist:-
 - a. Significant harm is being caused to a human, or relevant non-human, receptor
 - b. There is a significant possibility of significant harm being caused to a human, or relevant non-human, receptor
 - c. Significant pollution of controlled waters is being caused
 - d. There is a significant possibility of significant pollution of controlled waters being caused

Statutory Guidance (1)

DEFRA - Contaminated Land Statutory Guidance (April 2012)

DECC - Radioactive Contaminated Land Statutory Guidance (April 2012)

- Statutory Guidance is legally binding and must be followed by the regulator
- Main role to explain legal tests for when land is considered contaminated
- Also elaborates on how local authorities should implement regime, explains goals of remediation and how the regulator ensures remediation is reasonable and explains specific aspects of liability arrangements and cost recovery

Statutory Guidance (2)

- States at Section 1.5 of Guidance that:-
*“Enforcing authorities should seek to use Part 2A **only where no appropriate alternative solution exists**”*
- There is no longer an order of priority for enforcement
- The regulator is free to use other legal regimes if more appropriate

Anti-Pollution Works Notices (1)

- EA power to serve a works notice under s161A to D of WRA 1991 on the person responsible for:-
 - any poisonous, noxious or polluting matter or any waste - being, having been or likely to be in controlled waters
 - any harm or likely harm to controlled waters
- “responsible person” is the person who caused or knowingly permitted the matter (a) to be present in controlled waters; or (b) to be at a place from which .. it was likely to enter the controlled waters
- EA can recover costs of its investigations to find out who is the responsible person
- Anti-pollution works powers don't require works under s161 to 162 of WRA 1991 to achieve a specific standard

Anti-Pollution Works Notices (2)

- An anti-pollution works notice can be used when contamination has already passed from soil to controlled waters
- Can be more attractive in certain situations than Part 2A
- Legislation brief
- No provisions on allocation and apportionment of liability
- No detailed Government guidance
- However, liable party can only be required to carry out works or operations in respect of polluting “matter” which they caused or knowingly permitted to be present

Why is Part 2A Important?

- The “polluter pays principle” does not always apply
- A Class A person (causer/knowning permitter) can be responsible for contamination after land is sold (therefore it is important how companies dispose of businesses and land)
- Also possible to inherit responsibility for historic contamination when buying contaminated land (therefore important to conduct due diligence)

Options for dealing with Contaminated Land on Acquisition

- Price and accept risk
- Remediate before sale
- Remediate post sale (financial provision for this can be various e.g. escrow accounts, plus tax benefits)
- Vendor indemnifies (caps, limitations, disputes, control)
NB: Be careful just using Part 2A drafting
- Insurance
- High risk property removed from transaction or freehold transferred out prior to acquisition and leased back

Issues for Consideration

- Purchase price
- Cost of remediation and funding
- Timing
- Long term liability and risk
- Corporate image, social responsibility
- Control over remediation/standard of remediation
- Reliance on reports/appointments/collateral warranties
- Adequacy of information/due diligence
- Future change of use/redevelopment costs
- Management time and commitment

Outcomes

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Shameless Advert !!

- Regional UKELA Seminars
 - Handling requests for Environmental Information
Manchester ,16 July 2013
 - Enforcement undertakings and sentencing of
environmental offenders
Leeds (and Manchester by videolink), 24 July 2013

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