

Appendix G: Background to Welsh Legislation on Contaminated Land

Legislative Framework

The contaminated land regime in Part 2A of the Environment Protection Act 1990 was introduced to specifically address the historical legacy of land contamination. Part 2A of the Environmental Protection Act 1990 (Amended April 2012) has introduced the following statutory definition for “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 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.”*

Part 2A provides a means of dealing with unacceptable risks posed by land contamination to human health and the environment. Enforcing authorities are required to identify and deal with such land but Part 2A is only to be used by the Enforcing Authority where no appropriate alternative solution exists.

Statutory guidance on how local authorities should implement the Part 2A regime in Wales is detailed in the Welsh Government Guidance Document WG15450 “Contaminated Land Statutory Guidance – 2012”.

The Process of Risk Assessment

The assessment of contaminated land can be seen as a two phase risk based process, comprising:

- (1) A qualitative assessment of the likelihood of plausible contaminant linkages, i.e. there must not only be a source of contamination, but a pathway and a receptor; and
- (2) A quantitative element which will seek to determine the degree of harm and the significance of such harm on a receptor.

A “contaminant” is a substance which is in, on or under the land and which has the potential to cause significant harm to a receptor or to cause significant pollution of controlled waters.

A “pathway” is a route by which a receptor is or might be affected by a contaminant.

A “receptor” is something that could be adversely affected by a contaminant, for example a person, an organism, an ecosystem, property or controlled waters.

The term “contaminant linkage” indicates that all three elements (i.e. a contaminant, a pathway and a receptor) have been identified. The term “significant contaminant linkage” means a contaminant linkage which gives rise to a level of risk sufficient to justify a piece of land being determined as contaminated land (in other words, there is unacceptable risks posed by the land contamination to human health and or the environment). The term “significant contaminant” means the contaminant which forms part of a significant contaminant linkage.

Significant Harm to Human Health

The following health effects constitute significant harm: death, life threatening diseases (cancers), other diseases likely to have a serious impact on health, serious injury, birth defects and impairment of reproductive functions.

Significant Possibility of Significant Harm to Human Health

In deciding whether or not land is contaminated land on the grounds of significant possibility of significant harm to human health, the local authority use the following categorisations:

Category 1: Human Health

Land should be deemed to be a Category 1: Human Health case where:

- (a) the authority is aware that similar land or situations are known, or are strongly suspected on the basis of robust evidence, to have caused such harm before in the United Kingdom or elsewhere; or
- (b) the authority is aware that similar degrees of exposure (via any medium) to the contaminant(s) in question are known, or strongly suspected on the basis of robust evidence, to have caused such harm before in the United Kingdom, or elsewhere;
- (c) the authority considers that significant harm may already have been caused by contaminants in, on or under land, and that there is an unacceptable risk that it may continue or occur again if no action is taken.

Category 2: Human Health

Land should be placed into Category 2 if the authority concludes, on the basis that there is a strong case for considering that the risks from the land are of sufficient concern, that the land poses a significant possibility of significant harm. Category 2 may include land where there is little or no direct evidence that similar land, situations or levels of exposure have caused harm before, but nonetheless the authority considers on the basis of the available evidence, including expert opinion, that there is a strong case for taking action under Part 2A on a precautionary basis.

Category 3: Human Health

Land should be placed into Category 3 if the authority concludes that the strong case of Category 2 does not exist. Category 3 may include land where risks are not low, but nonetheless the authority considers that regulatory intervention under Part 2A is not warranted. This recognises that placing land in Category 3 would not stop others, such as the owner or occupier of the land, from taking action to reduce risks outside of the Part 2A regime if they choose.

Category 4: Human Health

The local authority should consider that the following types of land should be placed into Category 4: Human Health:

- (a) Land where no relevant contaminant linkage has been established.
- (b) Land where there are only normal levels of contaminants in the soil.
- (c) Land that has been excluded from the need for further inspection and assessment because contaminant levels do not exceed generic assessment criteria.
- (d) Land where estimated levels of exposure to contaminants in soil are likely to form only a small proportion of what a receptor might be exposed to anyway through other sources of environmental exposure (e.g. in relation to average estimated national levels of exposure to substances commonly found in the environment, to which receptors are likely to be exposed in the normal course of their lives).

“Normal” Presence of Contaminants

“Normal” levels of contaminants in soils should not be considered to cause land to qualify as contaminated land, unless there is particular reason to consider otherwise. “Normal” levels of contaminants in soils may result from:

- (a) The natural presence of contaminants (e.g. caused by underlying geology) at levels that might reasonably be considered typical in an area and have not been shown to pose an unacceptable risk.
- (b) The presence of contaminants caused by low level diffuse pollution, and common human activity. For example, this would include diffuse pollution from historic use of leaded petrol and the presence of benzo(a)pyrene from vehicle exhausts and the spreading of domestic ash in gardens that might reasonably be considered typical.

Significant Pollution of Controlled Waters

Pollution of controlled water means the entry into controlled waters of any poisonous, noxious or polluting matter or any solid waste matter. The term “controlled water” is as defined in Part 3 of the Water Resources Act 1991, except that ground waters does not include waters contained in underground strata but above the saturation zone (i.e. perched water).

The following criteria are used to establish whether significant pollution of controlled waters has occurred:

- (a) Pollution equivalent to “environmental damage” to surface water or groundwater as defined by The Environmental Damage (Prevention and Remediation) Regulations 2009 but cannot be dealt with under those regulations.
- (b) Inputs resulting in the deterioration of the quality of water abstracted, or intended to be used in the future.
- (c) A breach of a statutory surface water Environmental Quality Standard, either directly or via a groundwater pathway.
- (d) Input of a substance into groundwater resulting in a significant and sustained upward trend in concentration of contaminants.

The following categories are adopted in relation to determining the significant possibility of significant pollution of controlled waters.

Category 1: Water

This covers land where the authority considers that there is a strong and compelling case for considering that a significant possibility of significant pollution of controlled waters exists. In particular, this would include cases where there is robust science-based evidence for considering that it is likely that high impact pollution would occur if nothing were done to stop it.

Category 2: Water

This covers land where:

- (a) The authority considers the strength of evidence to put the land into Category 1 does not exist; but
- (b) Nonetheless, on the basis of the available scientific evidence and expert opinion, the authority considers that the risks posed by the land are of sufficient concern that the land should be considered to pose a significant possibility of significant pollution of controlled waters on a precautionary basis, with all that this might involve (e.g. likely remediation requirements, and the benefits, costs and other impacts of regulatory intervention). Among other things, this category might include land where there is a relatively low likelihood that the most serious types of significant pollution might occur.

Category 3: Water

This covers land where the authority concludes that the risks are such that (whilst the authority and others might prefer they did not exist) the tests set out in Categories 1 and 2 are not met, and therefore regulatory intervention under Part 2A is not warranted. This category should include land where the authority considers that it is very unlikely that serious pollution would occur; or where there is a low likelihood that less serious types of significant pollution might occur.

Category 4: Water

This covers land where the authority concludes that there is no risk, or that the level of risk posed is low. In particular, the authority should consider that this is the case where:

- (a) No contaminant linkage has been established in which controlled waters are the receptor in the linkage; or
- (b) the possibility only relates to type of pollution that should not be considered to be significant pollution; or
- (c) The possibility of water pollution similar to that which might be caused by “background” contamination.

Terminology

The term ‘Contaminated Land’ is used to mean land which meets the Part 2A definition. Other terms, such as ‘land affected by contamination’ or ‘land contamination’ are used to describe much broader categories of land where contaminants are present but usually not at sufficient level of risk to be Contaminated Land.

Historical contamination (resulting from activities or releases that are historical and have ceased) may present a risk to controlled waters. In England and Wales, The Water Resources Act 1991 (amended 2003) gives the Environment Agency (EA) / Natural Resources Wales powers and duties to prevent or remedy the pollution of controlled waters. Under this act it is a criminal offence if a person causes or knowingly permits pollution of controlled water.

Environmental Liability

The Environmental Damage (Prevention and Remediation) (Wales) Regulations 2009 transpose the EU Environmental Liability Directive (2004/35/EC) into law in Wales.

These regulations give the relevant authorities (in Wales: Natural Resources Wales and Local Council) powers to take action when there is an imminent threat or where actual environmental damage has occurred.

Under the regulations, environmental damage is defined as:

- serious damage to surface or ground water;
- contamination of land where there is a significant risk to human health; and
- serious damage to EU protected natural habitats and species or damage to Sites of Special Scientific Interest (SSSIs) or Areas of Special Scientific Interest (ASSIs) in Northern Ireland.

The regulations only apply to damage, incidents, emission or activities that have occurred subsequent to its “Coming into Force” (CIF) date, which for Wales is the 6th May 2009.

Planning Policy and Land Contamination

Under the Part 2A Statutory Guidance the planning system is highlighted as one of the other ways in which land contamination can be addressed. The land use planning policies of the Welsh Government are presented in the Planning Policy Wales (PPW) document.

The PPW expresses a preference for the reuse of previously developed (or brownfield) land¹ over greenfield sites, particularly those of high agricultural or ecological value, although it recognises for sites like these it may be appropriate to secure remediation to reduce risks to human health.

The key parts of the policy specifically relating to contaminated land are presented below (taken from PPW, Edition 5, Chapter 13 – Minimising and Managing Environmental Risks and Pollution):

13.5 Dealing with unstable and contaminated land

13.5.1 The planning system should guide development to lessen the risk from natural or human-made hazards, including risk from land instability and land contamination. The aim is not to prevent the development of such land, though in some cases that may be the appropriate response. Rather it is to ensure that development is suitable and that the physical constraints on the land, including the anticipated impacts of climate change, are taken into account at all stages of the planning process. However, responsibility for determining the extent and effects of instability or other risk remains that of the developer. It is for the developer to ensure that the land is suitable for the development proposed, as a planning authority does not have a duty of care to landowners.

13.5.2 The current regime for contaminated land was introduced under the provisions of Part IIA of the Environmental Protection Act 1990. Local planning authorities should be aware of the requirements of Part IIA and ensure that their policies and decisions are consistent with it. Guidance on the Part IIA regime has been issued by the Welsh Government. The main issues relating to the interface between the planning system and the contaminated land regime are:

- *where land is designated as contaminated land under Part IIA and the owner wishes subsequently to develop the land;*
- and*

where the future use or development of land means that the land will be designated as contaminated land under Part IIA. 13.6 *Development plans and contaminated land*

13.6.3 Plans may indicate that the local planning authority will need to be satisfied that any actual or potential contamination can reasonably be overcome. Policies for the rehabilitation and development of existing polluted land and derelict sites should also be included).

13.7 Development management and contaminated land

13.7.1 Planning decisions need to take into account:

- *the potential hazard that contamination presents to the development itself, its occupants and the local environment; and*
- *the results of a specialist investigation and assessment by the developer to determine the contamination of the ground and to identify any remedial measures required to deal with any contamination.*

13.7.2 Where significant contamination issues arise, the local planning authority will require evidence of a detailed investigation and risk assessment prior to the determination of the application to enable beneficial use of land.² Where acceptable remedial measures can overcome such contamination, planning permission may be granted subject to conditions specifying the necessary measures. If contamination cannot be overcome satisfactorily, the authority may refuse planning permission.

13.7.3 Undertaking development on land designated as contaminated land for the purposes of Part IIA may provide a net cost benefit, by way of taking land from a perceived negative value to a positive value, necessary to fund the required remediation of contaminated land. If remediation required under Part IIA is to commence via the planning process it will be the responsibility of the local planning authority to ensure that the land is suitable for its proposed use. The developer will need to provide sufficient information to both the local planning authority and the enforcing authority under Part IIA. In such cases remediation will be enforced through planning permission. However, in the absence of a definite timetable for implementing planning permission the option should remain for the enforcing authority under Part IIA to require the necessary remediation and to do so under the 'polluter pays' principle.

13.7.4 A development proposal may introduce changes to a site which may result in land being designated as contaminated under Part IIA, where such land would not be considered contaminated in its existing state under the provision of the regime. The onus will remain with the developer to ensure that the development of the site will not result in designation as contaminated land under Part IIA. The local planning authority will need to ensure that the land is suitable for its proposed use.³

13.7.5 When planning permission is granted, a notice should be issued to inform the applicant that the responsibility and subsequent liability for safe development and secure occupancy of the site rests with the developer and/or landowner. It should also advise the applicant that, although the local planning authority has used its best endeavours to determine the application on the basis of the information available to it, this does not mean that the land is free from contamination.

Guidance Notes

1. Previous developed land is defined in Figure 4.3 of the PPW as “..that which is or was occupied by a permanent structure (excluding agricultural or forestry buildings) and associated fixed surface infrastructure.”
2. All investigations of land potentially affected by contamination should be carried out in accordance with established procedures (such as (2004) Model Procedures for the Management of Contaminated Land; BS10175 (2001) Investigation of potentially contaminated sites – Code of Practice and the Environment Agency (2010) Guiding Principles for Land Contamination). This would comprise an initial site evaluation which will be a non-intrusive desk study review of existing data, followed by the design and procurement of a targeted intrusive investigation to help clarify specific geotechnical and geo-environmental issues. The minimum information that should be provided by an applicant is a desk study and site reconnaissance report.
3. For a site undergoing development or redevelopment it is anticipated that that upon completion of remedial work the site should sit within Category 4 in respect of all receptors.

