

CONTAMINATED LAND

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1. This paper gives a brief overview of the contaminated land regime under Part 2A of the Environmental Protection Act 1990, as summarised in DEFRA Circular 1/2006, and looks at the two leading cases, *Circular Facilities (London) Ltd v. Sevenoaks DC* [2005] EWHC 865 (Admin) and *R (National Grid/Transco Plc) v. The Environment Agency* [2007] UKHL 30.

Circular 1/2006

2. As set out in the Circular, the main objective underlying the introduction of the Part 2A contaminated land regime is to provide an improved system for the identification and remediation of land where contamination is causing unacceptable risks to human health or the wider environment, assessed in the context of the current use and circumstances of the land.
3. It is to be noted that the regime was extended to cover land contaminated by radioactivity under Regulations made by the Secretary of State in 2006, ie the Radioactive Contaminated Land (Enabling Powers) (England) Regulations 2005 (S.I. 2005/3467) and the Radioactive Contaminated Land (Modification of Enactments) (England) Regulations 2006 (S.I. 2006/1379), although the focus of this paper is on non-radioactive contamination.
4. In outline, the role of local (“enforcing”) authorities under Part 2A are:
 - (a) to cause their areas to be inspected to identify contaminated land;
 - (b) to determine whether any particular site is contaminated land;
 - (c) to act as enforcing authority for all contaminated land which is not designated as a “special site” (the Environment Agency will be the enforcing authority for special sites).
5. Enforcing authorities (including the Environment Agency) have four main tasks:
 - (a) to establish who should bear responsibility for the remediation of the land (the “appropriate person” or persons);
 - (b) to decide, after consultation, what remediation is required in any individual case and to ensure that such remediation takes place, either through agreement with the appropriate person, or by serving a remediation notice on the appropriate person if agreement is not possible or, in certain circumstances, through carrying out the work themselves;
 - (c) where a remediation notice is served, or the authority itself carries out the work, to determine who should bear what proportion of the liability for meeting the costs of the work; and
 - (d) to record certain prescribed information about their regulatory actions on a public register.
6. “Contaminated land” is land which appears to the local authority 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 a significant possibility of such harm being caused, or that pollution of controlled waters is being, or is likely to be, caused. The definition is “modified” where harm is attributable to radioactivity. The definition is to be applied in accordance with other definitions in Part 2A and statutory guidance set out in the Circular. The definitions and the guidance are based on the assessment of unacceptable risks to human health and the environment in relation to the current use of the land. The regime thus reflects what the Circular calls the “suitable for use” approach (ie suitable for its use according to the circumstances of the case).

7. Under the provisions concerning liabilities, responsibility for paying for remediation will, where feasible, follow the “polluter pays” principle. In the first instance, any persons who caused or knowingly permitted the contaminating substances to be in, on or under the land will be the appropriate person(s) to undertake the remediation and meet its costs. However, if it is not possible to find any such person, responsibility will pass to the current owner or occupier of the land. (This latter step does not apply where the problem caused by the contamination is solely one of water pollution: this reflects the potential liabilities for water pollution as they existed prior to the introduction of Part 2A.) Responsibility will also be subject to limitations, for example where hardship might be caused; these limitations are set out in Part 2A and in the statutory guidance in the Circular.
8. The Environment Agency has four principal roles with respect to contaminated land under Part 2A. It will:
 - (a) assist local authorities in identifying contaminated land, particularly in cases where water pollution is involved;
 - (b) provide site-specific guidance to local authorities on contaminated land;
 - (c) act as the “enforcing authority” for any land designated as a “special site” (the descriptions of land which are required to be designated in this way are prescribed in the Contaminated Land Regulations); and
 - (d) publish periodic reports on contaminated land.
9. Part 2A provides a regulatory regime for the identification and remediation of contaminated land. In addition to the requirements contained in the primary legislation, operation of the regime is subject to regulations and statutory guidance (in Annex 3 to the Circular) under section 78YA of the Act.
10. Throughout the text of the Circular, various terms are used which have specific meanings under the Act or in the regulations or the statutory guidance. Where this is the case, the terms are printed in CAPITALS. The Glossary of Terms at Annex 6 to the Circular, which includes terms related to radioactivity, repeats the most important definitions, or shows where they can be found.
11. Section 78A(2) defines “contaminated land” for the purposes of Part 2A 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 –

“(a) SIGNIFICANT HARM [see Table A in Annex 3 to the Circular] is being caused or there is a SIGNIFICANT POSSIBILITY of such harm being caused [see para. A28 of Annex 3 and Table B]; or

“(b) POLLUTION OF CONTROLLED WATERS is being, or is likely to be, caused”.

12. Where HARM is attributable to radioactivity, the definition of CONTAMINATED LAND has been modified by regulation 4(a) of the Modification Regulations 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 (a) HARM is being caused, or (b) there is a SIGNIFICANT POSSIBILITY of such harm being caused”.
13. These definitions reflect the intended role of the Part 2A regime, which is to enable the identification and remediation of land on which contamination (other than where attributable to radioactivity) is causing unacceptable risks to human health or to the wider environment; or lasting exposure to radiation where action is likely to be justified. The definitions do not necessarily include all land where contamination is present, even though such contamination may be relevant in the context of other regimes. For example, contamination which might cause risks in the context of a new development of land could be a “material planning consideration” under the Town and Country Planning Act 1990.
14. The local authority is required to act in accordance with statutory guidance issued by the Secretary of State in determining whether land is contaminated land. This is set out at Chapter A of Annex 3 to this Circular. Before the local authority can make the judgement that any land appears to be contaminated land, the authority must satisfy itself that a POLLUTANT LINKAGE exists in relation to the land (paragraphs A.11 to A.18 of Annex 3). A POLLUTANT LINKAGE requires each of the following to be identified:
- (a) a CONTAMINANT;
 - (b) a RECEPTOR; and
 - (c) a PATHWAY CAPABLE of exposing a receptor to the contaminant.
15. The next step is for the local authority to satisfy itself that the POLLUTANT LINKAGE is a SIGNIFICANT POLLUTANT LINKAGE. To do this, the local authority must consider the degree of possibility or likelihood of one or more of the following, referring to the definition of contaminated land above:
- (a) SIGNIFICANT HARM,
 - (b) POLLUTION OF CONTROLLED WATERS, or
 - (c) HARM (where attributable to radioactivity).
16. The definition of contaminated land (other than where attributable to radioactivity) includes the notion of “SIGNIFICANT HARM” and the “SIGNIFICANT POSSIBILITY” of such HARM being caused. The local authority is required to act in accordance with statutory guidance issued by the SECRETARY OF STATE in determining what is “significant” in either context (section 78A(2) & (5)). This statutory guidance is set out at Chapter A of Annex 3 to this Circular.
17. The statutory guidance explains:
- (a) the types of RECEPTOR to which SIGNIFICANT HARM can be caused (HARM to any other type of RECEPTOR can never be regarded as SIGNIFICANT HARM);
 - (b) the degree or nature of HARM to each of these RECEPTORS which constitutes SIGNIFICANT HARM (Chapter A, Table A); and

- (c) for each RECEPTOR, the degree of possibility of the SIGNIFICANT HARM being caused which will amount to a SIGNIFICANT POSSIBILITY (Chapter A, Table B, & paragraphs A.27 to A.33).
18. Before the local authority can make the judgement that any land appears to be contaminated land on the basis that SIGNIFICANT HARM is being caused, or that there is a SIGNIFICANT POSSIBILITY of such harm being caused, the authority must therefore identify a SIGNIFICANT POLLUTANT LINKAGE. This means that each of the following has to be identified:
- (a) a CONTAMINANT;
 - (b) a relevant RECEPTOR; and
 - (c) a PATHWAY by means of which either:
 - (i) that CONTAMINANT is causing SIGNIFICANT HARM to that RECEPTOR, or
 - (ii) there is a SIGNIFICANT POSSIBILITY of such harm being caused by that CONTAMINANT to that RECEPTOR (paragraphs A.11 and A.19).
19. Each local authority has a duty to cause its area to be inspected from time to time for the purpose of identifying contaminated land (section 78B(1)) – other than so far as attributable to radioactivity. In doing so, it has to act in accordance with the statutory guidance issued by the Secretary of State.
20. The authority must then make a determination as to whether land is contaminated land (see above). Chapter B of Annex 3 provides statutory guidance on the manner in which the authority should make the determination.
21. For any piece of land identified as being contaminated land, the authority needs to establish:
- (a) who is the OWNER of the land (defined in section 78A(9));
 - (b) who appears to be in occupation of all or part of the land; and
 - (c) who appears to be an APPROPRIATE PERSON to bear responsibility for any REMEDIATION ACTION which might be necessary (defined in section 78F).
22. The authority must then notify those persons that the land has been identified as contaminated land, section 78B(3). Thereafter the authority is duty bound to require appropriate remediation action, including ASSESSMENT ACTION, REMEDIAL TREATMENT ACTION and MONITORING ACTION (and INTERVENTION action in the case of radioactive contamination), sections 78A(7) and 78E.
23. Where appropriate REMEDIATION is not carried out, or where agreement cannot be reached on the REMEDIATION ACTIONS required, the authority must serve a REMEDIATION NOTICE. Any such notice must specify particular REMEDIATION ACTIONS to be carried out and the times within which they must be carried out (section 78E(1)). This is subject to certain exceptions, such as where there is an overlap with other pollution control or waste regulation regimes or where the service of a notice would be unreasonable.
24. The authority next has to decide who such a notice should be served on. This involves the identification of who is the APPROPRIATE PERSON (or persons) on whom the notice should be served.

25. Part 2A defines two different categories of APPROPRIATE PERSON, and sets out the circumstances in which persons in these categories might be liable for REMEDIATION.
26. The first category is created by section 78F(2), which states that:
“...any person, or any of the persons, who caused or knowingly permitted the substances, or any of the substances, by reason of which the CONTAMINATED LAND in question is such land to be in, on or under that land is an APPROPRIATE PERSON.”
27. Such a person (referred to in the statutory guidance as a “CLASS A” PERSON) will be the APPROPRIATE PERSON only in respect of any REMEDIATION which is referable to the particular substances which he caused or knowingly permitted to be in, on or under the land (section 78F(3)). This means that the question of liability has to be considered separately for each SIGNIFICANT POLLUTANT LINKAGE identified on the land.
28. The second category arises in cases where it is not possible to find a CLASS A PERSON, either for all of the SIGNIFICANT POLLUTANT LINKAGES identified on the land, or for a particular SIGNIFICANT POLLUTANT LINKAGE. These circumstances are addressed in section 78F(4) and (5), which provide that:
“(4) If no person has, after reasonable inquiry, been found who is by virtue of subsection (2) above an appropriate person to bear responsibility for the things which are to be done by way of REMEDIATION, the OWNER or occupier for the time being of the land in question is an APPROPRIATE PERSON.

“(5) If, in consequence of subsection (3) above, there are things which are to be done by way of REMEDIATION in relation to which no person has, after reasonable inquiry, been found who is an APPROPRIATE PERSON by virtue of subsection (2) above, the OWNER or occupier for the time being of the CONTAMINATED LAND in question is an APPROPRIATE PERSON in relation to those things.”
29. A person who is an APPROPRIATE PERSON under sections 78F(4) or (5) is referred to in the statutory guidance as a “CLASS B” PERSON.
30. The test of “causing or knowingly permitting” has been used as a basis for establishing liability in environmental legislation for more than 100 years. In the context of Part 2A, what is “caused or knowingly permitted” is the presence of a POLLUTANT in, on or under the land.
31. In the Government’s view, the test of “causing” will require that the person concerned was involved in some active operation, or series of operations, to which the presence of the pollutant is attributable. Such involvement may also take the form of a failure to act in certain circumstances.
32. The meaning of the term “knowingly permit” was considered during the debate on Lords’ Consideration of Commons’ Amendments to the then Environment Bill on 11 July 1995. The then Minister for the Environment, the Earl Ferrers, stated on behalf of the Government that:

“The test of “knowingly permitting” would require both knowledge that the substances in question were in, on or under the land and the possession of the power to prevent such a substance being there.” (House of Lords Hansard [11 July 1995], col 1497)

33. Some commentators have questioned the extent to which this test might apply with respect to banks or other lenders, where their clients have themselves caused or knowingly permitted the presence of pollutants. With respect to that question, Earl Ferrers said:
- “I am advised that there is no judicial decision which supports the contention that a lender, by virtue of the act of lending the money only, could be said to have “knowingly permitted” the substances to be in, on or under the land such that it is contaminated land. This would be the case if for no other reason than the lender, irrespective of any covenants it may have required from the polluter as to its environmental behaviour, would have no permissive rights over the land in question to prevent contamination occurring or continuing.” (House of Lords Hansard [11 July 1995], col 1497)
34. It is also relevant to consider the stage at which a person who is informed of the presence of a pollutant might be considered to have knowingly permitted that presence, where he had not done so previously. In the Government’s view, the test would be met only where the person had the ability to take steps to prevent or remove that presence and had a reasonable opportunity to do so.
35. As noted in the Circular, some commentators have, in particular, questioned the position of a person who, in his capacity as OWNER or occupier of land, is notified by the local authority about the identification of that land as being contaminated land under section 78B(3). They have asked whether the resulting “knowledge” would trigger the “knowingly permit” test. In the Government’s view, it would not. The legislation clearly distinguishes between those who cause or knowingly permit the presence of pollutants and those who are simply owners or occupiers of the land. In particular, this is evident in sections 78F, 78J and 78K which all relate to the different potential liabilities of OWNERS or occupiers as opposed to persons who have “caused or knowingly permitted” the presence of the POLLUTANTS.
36. Similarly, section 78H(1) requires consultation with OWNERS and occupiers for the specific purpose of determining “what shall be done by way of REMEDIATION” and not for the purpose of determining liability. In the Government’s view, this implies that a person who merely owns or occupies the land in question cannot be held to have “knowingly permitted” as a consequence of that consultation alone.
37. Only where no CLASS A PERSON can be found who is responsible for any particular REMEDIATION ACTION will the OWNER or occupier be liable for REMEDIATION by virtue solely of that ownership or occupation. However, OWNERS and occupiers may, of course, be CLASS A PERSONS because of their own past actions or omissions.
38. The recipient of a notice may appeal against it on the grounds prescribed in regulation 7 of the Contaminated Land Regulations, ie on grounds such as whether the land was properly identified as being contaminated; whether the requirements for remediation

are reasonable; whether the appellant is the appropriate person to bear responsibility for the remediation; whether there is any informality defect or error in the notice etc.

39. It is a criminal offence not to comply with a remediation notice, see section 78M.
40. Before leaving this summary of the contaminated land regime, it is to be noted that there are emergency powers for authorities to undertake remediation action themselves where there is an urgent need to do so, ie where the authority considers it necessary to do so for the purpose of preventing the occurrence of any serious harm, or serious pollution of controlled waters, of which there is imminent danger, section 78N(3)(a). An enforcing authority can also recover the costs of any remediation action undertaken (urgently or otherwise) by the authority, section 78P. There are detailed mechanisms for apportioning liability between appropriate persons, section 78F(7).

Circular Facilities – (see attached case study)

41. I have attached as an Annex to this paper, a case study analysing the various issues in the *Circular Facilities* case. The case is an example of the courts failing to apply the “polluter pays” principle effectively so as to impose liability on a party who was evidently responsible for causing the pollution/contamination although there were difficulties in attributing knowledge to the company in question who had employed an agent who submitted a report to the Council identifying the contamination. (The court nevertheless did hold that reference in the report to the existence of the materials which caused the contamination – “organic matter” – would have been sufficient to attribute knowledge even though the company denied it would have known the materials were capable of causing contamination, and see s. 78F(9)).

The National Grid/Transco case

42. This case is another example of the courts’ hesitancy to apply the “polluter pays” principle effectively or “purposively”.
43. Land at Bawtry in Doncaster was developed residentially in the mid 1960s. The site was a former gas works which had been operated by two different companies which were amalgamated and then became the East Midlands Gas Board on nationalisation of the gas industry in 1948. All “property, rights, liabilities and obligations” which “immediately before [the appointed vesting date]” vested in the new Gas Board on nationalisation.
44. Coal tar from the operation of the site was buried underneath it in sealed containers. Gas production was discontinued two or three years after nationalisation and the land was sold to housebuilders in 1965 who then sold it to another company in 1966. 11 dwellings were built on the land.
45. Gas Boards were abolished by the Gas Act 1972 which created the British Gas Corporation. Once again, rights, liabilities etc. which existed “immediately before” the creation of the new Corporation vested in it. The same thing occurred on privatisation of the gas industry under the Gas Act 1986 which created British Gas Plc. British Gas was reorganised in the 1990s and the company’s responsibilities for

transportation and storage of gas devolved onto Transco Plc. Transco was subsequently acquired by National Grid Plc.

46. The site was identified as contaminated land in the early 2000s and the Environment Agency carried out the remediation itself and then tried to claim the costs back from Transco (who then became National Grid) as being an “appropriate person” under section 78F, ie someone who had “caused or knowingly permitted” the contamination of the land. The housebuilder companies had both been dissolved and there was no evidence that the home owners had any knowledge of the contamination and so Transco was the only “person” identified as bearing any liability. This was largely on the basis that they had acquired the “rights and liabilities” of the former gas companies.
47. Transco/National Grid challenged the Environment Agency’s determination that they were an appropriate person by way of judicial review. Their claim was unsuccessful at first instance, see [2006] EWHC 1083 Admin.
48. On a “leapfrog” appeal to the House of Lords, the decision of the court below was reversed. The House of Lords held, first, that Transco/National Grid could not have been an “appropriate person” who had “caused or knowingly permitted” the contamination because they did not exist when the East Midlands Gas Board or its predecessor companies operated (and contaminated) the site. The former gas companies would no doubt have been “appropriate persons” and so were the housebuilders, but all of those companies had ceased to exist.
49. Secondly, the House of Lords held that the “rights and liabilities”, including the liability in respect of contamination could not have been transferred to Transco because no liability under Part 2A could have existed “immediately before” the transfer of the undertakings, given that Part 2A only came into force on 1 April 2000.
50. Even though one can see the logic of the Lords’ decision in terms of their analysis of legal “personality”, the outcome of the case is surprising in that the people who ultimately paid to clear up the pollution were not the original polluters or their successors, but the public.

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November 2009

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