

# Contaminated Land FAQ's

## Introduction

The contaminated land regime set out in Part IIA of the Environmental Protection Act 1990, inserted by section 57 of the Environment Act 1995, was introduced in England on 1 April 2000. The primary legislation is implemented by the Contaminated Land (England) Regulations 2000 and by DETR Circular 02/2000 entitled "Contaminated Land", that includes Statutory Guidance for the regime.

For the most part, the regime is regulated by Local Authorities with the Environment Agency being responsible for what are termed "Special Sites".

These frequently asked questions (FAQs) and answers have been prepared to cover general matters regarding contaminated land and specific issues relevant to the Council's role and approach to the Part IIA regime. These FAQ's does not seek to comment on how the Environment Agency is approaching its responsibilities under the regime.

The FAQ document is available to download on this page.

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## Answers

### 1. What is the purpose of the new Contaminated Land regime?

The purpose of the regime is to deal with the legacy of contaminated land that has arisen from a wide range of industrial, mining and waste disposal activities. It allows local authorities and the Environment Agency to deal pro-actively with land that is posing unacceptable risks to humans, controlled waters or the wider environment, where the land is not suitable for its current use. The new legislation is consistent with the "polluter pays principle", and places the cost of dealing with contamination on the polluter (class A person) where they can be found, or the landowner/occupier (class B person) where the polluter no longer exists. (Except in the case of water pollution and where substances have escaped on to other land, where in both cases there are restrictions on the liability of the owner/occupier). Part IIA of the Environmental Protection Act 1990, which is introduced by Section 57 of the Environment Act 1995, requires an overall risk-based approach to dealing with contaminated sites, which is consistent with the general good practice approach to managing land contamination. The regulatory regime set out in Part IIA is based on the following activities:

- identification of (a) pollutant linkage(s);
- assessment of the risks;
- establishing who should pay for remediation (appropriate person(s));
- determination of the appropriate remediation requirements;
- consideration of the costs involved;
- implementation of remediation;
- validation that the remediation has been effective.

Part IIA provides a statutory definition of contaminated land that is applicable for sites in respect of their current condition and usage. Where a change in use of a site is planned, as for example during redevelopment, any necessary remedial action would be carried out under planning and development control rather than under the Part IIA regime. Where it is known or strongly suspected that a site is contaminated to an extent that would adversely effect the proposed development, an investigation of the risks by the developer and proposals for any necessary remedial measures will normally be required before the planning application is determined. Any subsequent grant of planning permission will include a condition requiring the remedial measures to be carried out in order to render the site suitable for its proposed use or any other use within the same use class.

Enforcement action under Part IIA may also not be applicable where authorisations are in place under other legislation, such as Integrated Pollution Control (Part I EPA), the Waste Management Licensing regime (Part II EPA), or where other legislation such as that to prevent pollution of controlled waters is relevant. However, it should be noted that in some circumstances the regime may also be used for a site in parallel with other environmental protection regimes. For example, the local authority may regulate a site under Part IIA, in parallel with the Agency enforcing the requirements of a waste management licence, if the contamination being addressed under Part IIA does not result from the licensed waste activities. For IPC sites the Agency will be the regulator under Part IIA if the contamination arises within the area identified by the authorisation, but this area may not be the same as the operating facility (e.g. the fenced boundary of the site).

## **2. When did the regime come into effect?**

The regime came into effect in England on 1 April 2000.

## **3. Who does what?**

The principal regulators for Part IIA are the Local Authorities. They are responsible for:

- preparing and publishing Inspection Strategies for their areas;
- inspecting individual areas of land to determine whether any meet the statutory definition of contaminated land;
- determine land as contaminated where there is a significant risk of significant harm to human health or the environment;
- agreeing with the Agency which areas of Contaminated Land should be designated as "Special Sites";
- enforcing remediation for those areas of Contaminated Land that are not designated as "Special Sites" and;
- maintaining public registers of land declared statutorily contaminated.

The Agency also has specific roles and responsibilities including:

- Providing information to Local Authorities;
- Responding to Local Authority consultation on their Inspection Strategies;
- Inspecting, on behalf of local authorities, potential Special Sites. However, it should be noted that this is subject to the Agency agreeing to take on that role at that specific time because it is satisfied that the relevant requirements of the Statutory Guidance are met, and will be subject to the availability of resource for the work;
- Enforcing remediation of "Special Sites";
- Maintaining Public Registers for "Special Sites";
- Providing site specific advice to local authorities on defined matters concerning water pollution;
- Where the Agency sees fit, using its powers under s78V to provide site specific guidance on Contaminated Land (non Special Sites) to local authorities, and;
- Preparing "State of Contaminated Land" reports.

Close co-operation and working between Agency staff and Local Authorities is vital to the successful operation of the Part IIA regime.

## **4. What is contaminated land?**

Contaminated land has been defined in the Part IIA legislation 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 - significant harm is being caused or there is a significant possibility of such harm being caused; or pollution of controlled waters is being, or is likely to be, caused".*

The definition reflects the intended role of the Part IIA regime, which is to enable the identification and remediation of land where contamination is causing unacceptable risks to human health or the wider environment.

This definition is underpinned by the concept of a source-pathway-receptor relationship, called a pollutant linkage. A pollutant linkage, therefore, must contain:

- a source of contamination (eg, heavy metals, oil, chemicals, etc.);
- a receptor that is likely to be affected by that source (eg, human receptors, ground water, rivers, etc.);
- a pathway or route by which the source of contamination can reach the identified receptor (eg, drinking water, ingestion of vegetables grown in contaminated soil, inhalation of dust, etc.)

For land to be contaminated land, a pollutant linkage must exist and the requirements of the Statutory Guidance in terms of what constitutes significant harm or pollution of controlled waters must be met. If this is the case, the pollutant linkage is called a significant pollutant linkage.

Local authorities and the Agency will hold environmental information relating to land that is contaminated, but which does not meet the definition of "contaminated land" as set out above. Requests for information regarding land contamination still need to be provided to those requiring it under the Environmental Information Regulations 2004.

Such information should be clear in making the above distinction.

#### **5. Is all derelict land contaminated land?**

No. Only land with at least one significant pollutant linkage can be defined as contaminated land for the purposes of Part IIA. Some derelict land will meet the Part IIA contaminated land definition. In addition, some derelict land may contain areas of land contamination, that do not meet the Part IIA definition.

When derelict land is redeveloped, contamination is a material consideration at the planning stage (as with all land). Therefore, it is likely that any contamination on derelict land would be dealt with, to ensure the land remains suitable for use, via the planning conditions. However, if derelict land is of such condition that the Part IIA definition of contaminated land is met, action can be taken under the Part IIA regime to deal with this, without the need to wait until redevelopment is proposed.

If re-development of land proceeds and any contamination is not adequately dealt with, for whatever reason, the introduction of new receptors associated with a new land use for example, may result in the redeveloped land subsequently being determined as contaminated land under Part IIA.

#### **6. What is a brownfield site?**

A site that has been previously used or developed and is not currently in full use, although it may be partially occupied or utilised. Therefore, a brownfield site is not necessarily available for immediate use without intervention. It may, or may not, have land contamination issues. Only brownfield sites with at least one significant pollutant linkage can be described as contaminated land under Part IIA.

#### **7. What is a Special Site?**

Land is a Special Site if it is designated as contaminated land, and in addition falls within a description prescribed in the Regulations (Regulations 2 and 3, with Schedule 1). Land can not be a Special Site if it has not first been determined by the local authority to be contaminated land.

Once the local authority has made the initial determination that the land is contaminated land, either the local authority or the Agency can decide that they believe a particular site should be designated as a Special Site. If the local authority and Agency disagree about this, the Secretary of State for England is required to make the decision.

#### **8. What is a potential Special Site?**

Local authorities have to inspect their areas to identify contaminated land. If the authority thinks that, if the land were to be determined to be contaminated land as a result of the inspection, it would be a Special Site, this type of site is called a potential Special Site. In these cases, the authority will ask the Agency to carry out inspection on its behalf. It should be noted that the process of inspection of a site does not automatically mean that it will finally be determined contaminated land.

#### **9. Where controlled waters are the receptor at risk, the enforcing authority may be the Agency or the local authority. Which sites fall to which regulator?**

Where the site meets the definition of a Special Site, the Environment Agency becomes the enforcing authority. There are three categories of Special Site under Regulation 3 dealing with cases where contaminated land is affecting controlled waters and their quality. The Environment Agency will also have concerns regarding these conditions under other legislation. The categories are broadly as follows:

a) Wholesomeness of drinking water - Controlled waters that are used, or intended to be used, for drinking must be affected by the land in such a way that a treatment process or a change in treatment process is needed in order for such water to satisfy wholesomeness requirements, as currently set out in the Water Supply (water quality) Regulations 1989, and the Private Water Supplies Regulations 1991. (Controlled waters are "affected by" contaminated land if it appears.... that the contaminated land is in such a condition by reason of substances in, on or under the land that pollution of those waters is being, or is likely to be caused). An intention to use water for the supply of drinking water would be demonstrated by the existence of a water abstraction licence for that purpose, or an application for such a licence.

b) Where controlled waters are being affected so that those waters do not meet or are not likely to meet relevant surface water criteria, in particular regulations made under section 82 of the Water Resources Act 1991. It is necessary to demonstrate that the water quality objective specified in the Regulations are breached or are at risk of being breached as a result of pollution arising from contaminated land.

c) Designated formations (most Major Aquifers). This category comprises land where particularly difficult pollutants are affecting a sub-section of Major Aquifers.

There may be other contaminated land sites where the significant pollutant linkage involves pollution of controlled waters, and which do not meet the above criteria, but nevertheless are Special Sites. These are sites where the land use is such that it falls within the other relevant definitions of a Special Site, e.g. MOD land, land authorised for a prescribed process under Agency control, etc.

The local authority will be the enforcing authority for any site which does not meet the definition of a Special Site, but is contaminated land by virtue of pollution of controlled waters.

#### **10. Who does Part IIA affect?**

Everyone who owns, occupies, leases or may have polluted land such that it can be determined to be contaminated land under Part IIA may be affected, potentially as an "appropriate person", with responsibility for remediation. This may include a variety of groups including industry, landowners, business, public bodies, regulators, government departments, professional advisors, home-owners etc. A wide variety of people may be interested or affected by individual cases. Neighbours of land determined to be Contaminated Land may be affected indirectly by remediation activities.

**11. How do I find out the status of a site?**

The local authority has sole responsibility for determination of land as contaminated land. This responsibility cannot be delegated to any other person or body. Therefore, if you wish to know if a site has been identified as contaminated land then the relevant local authority should be consulted. Where the site is designated a Special Site, then the Agency will take the regulatory lead and will endeavour to inform all relevant and interested parties of the status of the site. Information on the remediation of Special Sites will be held on Public Register, unless excluded on the grounds of national security or if the Agency accepts that the relevant information is commercially confidential. If the site is a potential Special Site, the Agency will carry out inspection on behalf of the local authority. It should be noted that the process of inspection of a site does not automatically mean that it will finally be determined contaminated land.

**12. Do owners / occupiers of contaminated land need to apply to the regulators for any reason?**

There is no compulsion to contact the regulatory authorities, but voluntary action is encouraged.

**13. How does the regime interact with planning and development controls?**

The intention of the Part IIA regime is that it shall be used to deal with existing contamination problems, that are not being dealt with under other regimes. Part IIA controls would not normally be used for sites that are the subject of planning and development control legislation because of proposed changes in use or construction works. Planning Policy Statement PPS 23 defines the local authority's responsibilities with respect to contamination in the context of the planning process. Contamination is a material consideration under the planning process. The Agency is a statutory consultee and can offer advice and information through consultation responses to local authority planning departments on development applications where contaminated land is an issue because of its potential to pollute controlled waters, or under a General Development Planning Order (Town and Country Planning General Development Order 1988) where it is located in the vicinity of a closed or active landfill site.

**14. How competent in dealing and advising on contaminated land are local authorities - what relevant experience do they have?**

Whilst the Part IIA regime itself is fairly new, local authorities have been dealing with contamination issues through the planning system and statutory nuisance provisions for many years and as such have considerable experience in this field.

**15. What is the economic impact of this regime?**

The regime is intended to facilitate the release of contaminated land into productive use. In the longer term, the supply of land assets should rise as liabilities are reduced. However, given the pro-active nature of the regime previously unknown areas of contamination will come to light, and there may be shorter term impacts on land values. Costs will certainly be incurred by appropriate persons in dealing with sites for which they are responsible.

**16. What is the social impact of the regime?**

Any impact will be site specific. The regime should, however, reduce uncertainty for communities about the possibilities of harm to health or the environment from contamination of land. The regime will ensure that appropriate remediation takes place.

**17. What about homes that are built on contaminated land - are there any risks associated with living in these homes?**

If a housing site has been identified as contaminated land, then it is expected that the enforcing authority will be dealing with any identified risks, by ensuring that appropriate action is taken. If the risk represents one of imminent danger of serious harm, the enforcing authority is empowered to take immediate action itself and to recover costs where appropriate. It should be noted that local authorities have had powers to take action under statutory nuisance for many years, where contamination is prejudicial to health. In addition, contamination has been a material consideration under the planning process for the last two decades.

**18. Who is liable for property value losses or damage to health?**

This is outside the scope of the regime. Any claims in this respect would be a matter for the civil courts.

**19. Will living on previously contaminated land damage an adult's health? And what about children and OAPs, aren't they more vulnerable?**

The objective of the Part IIA regime is that once land has been remediated, there should be no significant possibility of significant harm to the health of any of the people who utilise that land. Defra have developed, in conjunction with the Environment Agency, a model for assessing the long term risks to human health. This exposure assessment model (called CLEA) takes the most "at risk" population group present, for example children, to determine the level of risk at an individual site. Information based on this would then be used to establish the most appropriate standard of remediation for each site, where human health is of concern. Such decisions must always be made on a site specific basis. Whether or not a child or an OAP is more vulnerable to living on a contaminated land site will depend upon the access each of these particular groups have to potential exposure pathways present on that particular site. For example if there is no possibility that anybody may ingest contaminated soils on a site due to, for example an appropriately installed capping layer of clean material, a child may not be any more vulnerable to the effects of ingestion of soil than an adult member of the population present. If the hypothetical capping layer is not present, a child may be more vulnerable, which is why the impacts upon their health would form the basis for any minimum required standard of remediation in these circumstances. However, such issues require site specific considerations and generalisations about whether one receptor is more at risk than another can be misleading.

**20. How will the public know what sites are determined to be contaminated land?**

The local authority will hold records, including a public register. This will contain details of all sites determined to be contaminated land, and the remediation carried out. In addition, the Agency will hold its own register containing information about Special Sites. This information will also be held by the local authority on its register.

**21. Will the Council listen to the concerns of the local community? If so, how?**

Yes. The Council will listen to any concerns the local community may have and try to act on, or allay those fears using its best technical knowledge of the situation. The Council's officers will be aware of community concerns through their normal day-to-day regulatory contacts, and through receiving phone calls and letters etc.

**22. How will the Council incorporate concerns into the regulatory process?**

The Council will ensure that the regulatory decisions are made taking account of all concerns and will seek to re-assure the community using its best technical judgement.

**23. How do the public know that a site has been 'cleaned-up'?**

The local authority will maintain public remediation registers and the Agency will hold a similar register for Special Sites. These registers can be accessed by the public in the same way as existing public registers on other matters. However, it should be noted that the registers will also contain information provided by appropriate persons detailing what they claim has been done by way of remediation.

**24. Who pays for the investigations to enable the local authority to determine whether land is contaminated land?**

Each local authority will pay for investigation of sites in their area that are likely to be contaminated land. However, in accordance with Statutory Guidance, the local authority will normally request the Agency to carry out the detailed inspection of potential special sites on its behalf.

**25. Who will be responsible for the cost of cleaning up land which is declared contaminated?**

Whilst the Council will not seek to recover the cost of any site investigation it carries out in the course of determining whether a particular piece of land is contaminated, the cost of any further assessments with respect to additional pollutant linkages and for any remediation will be the responsibility of any "appropriate person(s)" identified by the Council.

In cases where there is a single pollutant linkage the process of determining liability will, normally, consist of identifying an individual or a corporation who has caused or knowingly permitted the pollutant to be present. The succession of different occupiers or industries may have contributed to the contamination of the site, either contributing to a single pollutant linkage or resulting in multiple pollutant linkages being identified. In such cases the Council will, in accordance with statutory guidance, approach the apportionment of liabilities as follows.

The Council will make reasonable enquiries in order to identify all of the appropriate persons to pay for any remediation action with respect to each pollutant linkage. These persons constitute the liability group for that linkage. Thus for each pollutant linkage there may be identified either a Class A liability group comprising persons who caused or knowingly permitted the pollutant to be present, or a Class B liability group comprising persons who are the current owners of the land.

If the Council are unable to identify any Class A or Class B persons in respect of a pollutant linkage, it will be treated as an orphan site which will be adopted by the Council who will then meet the cost of remediation.

Liability for remediation is explained in more detail in the Council's Contaminated Land Inspection Strategy.

**26. Who is liable if treatment fails - is it the Council?**

Normally the Council would not be liable for this. Commercial liability will rest with the site owner, polluter or their contractors. If the land is still found to be contaminated land after remediation works have been carried out, the appropriate persons are still liable for the necessary work.

**27. Who is responsible for the clean up of neighbouring land affected by pollutant migration from a contaminated land site?**

Cases may arise where substances migrate from one area of land to adjacent areas of land causing them to be contaminated land. In such cases the person who originally caused or knowingly permitted the first area of land to be contaminated (the Class A person) will also be liable for the remediation of the adjacent land.

Where no Class A person can be identified, the owners or occupiers of the adjacent areas of land will be separately liable for the remediation of their own land.

Subsequent owners or occupiers of land from which substances have migrated (the Class B persons) will not be liable for the remediation of adjacent land.

In assessing whether adjacent land is contaminated the Council will only consider the current use of the site. A person will not be liable for the remediation of adjacent land which would only become contaminated land as the result of a change of use for which planning permission is required.

**28. Can a remediation notice be served with respect to any contaminated land to secure its remediation?**

Regulators are under a duty to enforce remediation for all contaminated land. However, the regime includes a number of restrictions on serving a remediation notice, both in terms of when and under what circumstances and these are described in the legislation. One key circumstance where a remediation notice should not be served, is where voluntary action is proposed by the appropriate persons. In this case, the appropriate person should produce a remediation statement setting out what they intend to do.

**29. How soon after the determination will I get a Remediation Notice?**

It is an important principle of the Part IIA regime that remediation will be undertaken only after consultation with interested person(s). This is to encourage that as much remediation as possible is carried out on a voluntary basis rather than through the Council serving of a remediation notice or carrying out the works itself. It is also to encourage a consensus amongst stakeholders on what needs to be done by way of remediation.

Should this consensus not be achieved, or voluntary action not be forthcoming, the enforcing authority is not permitted to serve a remediation notice for a period of three months from the day that the appropriate person was notified in writing by the local authority that the land in question is contaminated land.

**30. What do I do when I receive a remediation notice?**

Details of the actions required will be provided in the remediation notice and accompanying documentation. These should be read carefully and promptly. Recipients of a remediation notice may wish to seek independent advice to assist them.

**31. Can I appeal against service of a remediation notice, or the requirements within it?**

Yes. The Regulations set out the permissible grounds for appeal.

**32. What is the level of 'clean-up'?**

A site may not be totally 'clean', even after remediation, but a site will be remediated such that it is "suitable for use". The actual standard of remediation for a particular site will be decided by the enforcing authority (where the work is to be done voluntarily, in conjunction with the appropriate persons), taking into account the individual circumstances, but to ensure that the significant pollutant linkage is no longer operational. This may be done by reducing the concentration of contaminants, by breaking the pathway, or by altering the receptor behaviour such that the receptor can not come into contact with the contaminants. The enforcing authority is responsible for checking that any remediation carried out has significantly reduced the level of risk, given the current use of the land.

**33. What regulatory mechanisms are available to ensure remediation is carried out?**

The serving of a remediation notice. Non-compliance with the requirements of the notice is an offence. Where remediation is being carried out as part of redevelopment, planning conditions will be enforced by the Planning Authority.

**34. Where can I get hold of a copy of the Council's Contaminated Land Inspection Strategy?**

The Contaminated Land Strategy is available for download on this website or copies on CD can be made available on request.

**35. How can I find out if my land is likely to be affected by contamination and other environmental considerations?**

The Council makes information regarding specific sites available through its Environmental Enquiry Service. Information is provided in line with the Environmental Information Regulations 2004.