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Planning and Environmental Law Committee response to Defra consultation on changes to the Contaminated Land Regime under Part 2A of the Environmental Protection Act 1990

The City of London Law Society (ñCLLSò) represents approximately 14,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi jurisdictional legal issues.

The CLLS responds to a variety of consultations on issues of importance to its members through its 17 specialist committees. This response in respect of the Defra consultation on changes to the Contaminated Land Regime under Part 2A of the Environmental Protection Act 1990 has been prepared by the CLLS Planning and Environmental Law Committee.

General Comments

We agree that the statutory guidance to Part 2A of the Environmental Protection Act 1990 (ñPart 2Aò) is in need of revision and welcome Defraôs Consultation and the invitation to comment on it. We also agree with the goal of simplification and clarity.

We question, however, Defraôs conclusion that Part 2A ñremains fit for purposeò (Consultation, para 56),[1] especially in view of the following.

- The Consultation states that there ñmay have been insufficient targeting of higher-risk sitesò (para 51(c)) and that Defra ñwant[s] the regime to focus on finding the highest risk sites and dealing with them firstò (para 58). The current system of requiring each local authority to prioritise land to be remediated in its area (see para 51(c)), however, necessarily results in lower risk sites in some areas having a higher priority than higher risk sites in other areas. We consider that a nationwide prioritisation system should be introduced with enforcement action focused on the most contaminated sites in that system.

- The Consultation further states that Defra ñalso want[s] to increase the chance that polluters will pay where possible; and that landowners pay (all or part of the costs) particularly where they stand to benefit financially from remediationò (para 58). This objective cannot be achieved, however, unless the overly complex liability system is revised and enforcement of the regime is adequately funded. In

[1] All references are to the Consultation document, unless otherwise stated.

this respect, we note that Part 2A is "enforcement unfriendly" and also that a substantial number of Part 2A sites (including Helpston, Cambridgeshire, houses at Leigh, Sevenoaks, and Manywells, West Yorkshire), are being, or have been, remediated at taxpayers' expense.

- We also consider that the Environment Agency should be the sole enforcing authority for Part 2A for various reasons including the following.

    - The current liability system requires a large number of local authorities, many of which do not have adequate manpower and/or funding, to understand a multitude of issues in a legally, scientifically and technically complex regime; many authorities do not have this expertise and are unable to develop it because they encounter only a few contaminated sites in their areas.

    - More crucially, it would save money and manpower to concentrate enforcement powers in a single enforcement authority.

    - Having the Environment Agency as the sole enforcing authority would resolve the conflicts that have emerged due to local authorities often having the role of both enforcer and enforcee. Experience has shown that this is a major issue due to the historical role of local authorities as waste authorities, landowners and developers, especially in legacy town centre industrial sites, World War II bomb sites and for affordable housing sites.

    - Having the Environment Agency as the sole enforcing authority would also eliminate the drag placed on enforcement of the regime due to local authorities frequently having to be seen to remediate sites for which they are liable before they pursue appropriate persons for other sites, many of which may be much more seriously contaminated than the local authority sites.

    - Further, it would eliminate the political factor of the local influence of large local employers and industrial sectors when such employers / sectors are potential or actual appropriate persons.

    - The argument that has been made that local authorities have better knowledge of their areas than the Environment Agency does not take into account the Agency's area offices having detailed knowledge of local areas.

    - Still further, we consider that the liaison that Defra is proposing between local authorities and the Environment Agency in respect of the new identification of significant water pollution and the significant possibility of significant water pollution (see, eg, paras 135(a), 145(a)) would not be required if the Environment Agency was the sole enforcing authority. To require an increase in duplicative tasks in these days of budget cuts is wasteful.

    - The Environment Agency would, of course, need additional funding if it was to be the sole enforcing authority for Part 2A. This amount of funding should, however, be substantially less than each local authority being, in theory at least, adequately staffed to enforce Part 2A. The additional funding to the Agency would also have the additional benefit of less taxpayers' money having to be spent on remediating contaminated sites due to the more experienced and, thus more cost-effective and time-efficient, role of the Environment Agency.

- We question the meaning of Defraôs key assumption in the Impact Assessment (p. 2) that enforcing authorities will ñput similar effort into contaminated land work as currentlyò. The Environment Agencyôs report, Dealing with Contaminated Land in England and Wales (January 2009) states that, as of the end of March 2007, most local authorities in England and Wales had inspected less than 10% of their areas for contaminated land. If, as appears to be the case, the inspections have not increased substantially since 2007, it would appear that the Consultation is based on an exceedingly low level of activity by local authorities. It would also seem that it will take far more than the changes proposed in the Consultation to result in any real progress being made in the implementation of Part 2A.

- The Consultation states that Part 2A ñhas played a very important role in underpinning the wider (market-based) system for dealing with land contamination. é [I]t supports the planning system and acts as a driver to encourage polluters and landowners to clean-up their own landò (para 15).

  First, the Framework for Contaminated Land (24 November 1994) stated, among other things, that the contaminated land regime would deal with hazards posed by contamination at sites that were not being developed by the private sector (Framework, para 2.6). That is, Part 2A was introduced to remove hazards from contaminated land that was not being developed. The planning system was already effective at cleaning up contaminated sites that are being developed and has become even more effective since that time. Part 2A does not, and was not intended to, underpin that system; there is simply no need for it to do so.

  Second, we agree that Part 2A acts as a driver to encourage polluters and landowners to clean up their own land ï but so does any liability system for cleaning up contamination whatever its details. The effect of the driver has been gradually reduced as companies and others have seen that relatively few contaminated sites have been determined and that service of a remediation notice will rarely occur. The effect of this driver will continue to deteriorate unless the liability system in Part 2A is substantially revised and its enforcement is adequately funded. A few more high profile Part 2A cases would help to reverse the current trend of enforcement action being an insignificant influence or risk factor due to the very few instances of enforcing action.

The following are our comments to specific paragraphs. We have focused the comments on legal issues and have not included Defraôs questions when we do not have a response to a specific question.

Issue 1: Shorter, simpler guidance (paragraphs 60-63)

Do you agree that shorter, simpler guidance will be an improvement (as set out above)? If not, please explain which areas need expanding and why.

Whilst we agree that shorter, simpler guidance is an improvement, it cannot achieve the objective of ñprotect[ing] health and the environment from significant risks and bring[ing] damaged land back into productive use, whilst avoiding disproportionate impacts on society and businessesò (para 53) unless it is accompanied by a shorter, simpler liability system instead of the current overly complex system.

In this respect, we note that the scope of the Consultation does not include any changes to the liability system set out in Part 2A and the statutory guidance. Whilst

we recognise that only Parliament can amend Part 2A, we consider that the detailed liability regime comprising exclusion test and apportionment and attribution criteria set out in Chapter D of the statutory guidance, which Defra can change, is overly complex. We consider that Defra should have included that detailed liability system in the scope of the Consultation.

Issue 2: Separation of guidance on radioactively contaminated land (paragraphs 64-71)

Do you agree with the proposed approach on radioactive contamination? If not, please explain why.

We do not agree with the proposed approach and question the benefits of providing two different sets of statutory guidance for radioactive and non-radioactive contamination. For example, having two sets of guidance would mean having to revise each set in the future, with the risk that unintended differences may arise between them. We also question whether it is worth Defraôs time to prepare and publish guidance for radioactive contaminated land when there has not, to date, been a single case that would fall under them.

Still further, the current trend in environmental law and enforcement is to take a holistic approach. That is to devise and/or aggregate regimes holistically so that they do not apply to individual media (eg, air, water, land) and individual pollutants. Defraôs suggestion would reverse this trend in a key area of English environmental liability law.

Issue 3: Broad objectives of the regime (paragraphs 72-74)

Do you agree that the guidance should state the broad objectives of the regime? Do you agree with the objectives as stated, and do you have comments on what the section says?

We agree that the guidance should state the broad objectives of the regime.

In respect of the objectives as stated, we question whether a ñburdenòcan ï or should ï be ñsustainableò(Draft Annex A, para 1.2(c)). Surely the ñburdens faced by individuals, companies and societies as a wholeòshould not continue over a long time when there is no need for them to do so.

We welcome Defraôs statement that Part 2A should be enforced only when there is no appropriate alternative solution (Draft Annex A, para 1.4).

In respect of the Environmental Damage Regulations 2009,[2] we respectfully suggest that the UK Government revises them to clarify, in accordance with EU law, that they are applicable to environmental damage (including land damage) after 30 April 2007 instead of only after 1 March 2009.[3] This would make it clear that Part 2A does not need to be applied to post-30 April 2007 and pre-1 March 2009 contaminated land if the Environmental Damage Regulations 2009 may be used.

[2] Not 2008; see Draft Annex A, para 1.4(b).

[3] See *Raffinerie Mediterranee (ERG) SpA v Ministero dello Sviluppo economico* (Case No C-378/08) (9 March 2010); *Raffinerie Mediterranee (ERG) SpA v Ministero dello Sviluppo economico* (Cases Nos C-379/08 and C-380/08) (9 March 2010).

Issue 4: Local authority inspection duties (paragraphs 75-79)

Do you have views on the proposed new Section 2 of the guidance? Should the guidance introduce a mandatory deadline by which authorities should update their strategies?

We welcome Defraôs decision to scrap a lot of the detailed prescription.

We question, however, Defraôs statement that the flexibility is ñintended to help the profile of Part 2A work in local authoritiesò(para 79) and consider that the reverse will occur.

That is, whilst we consider, as stated above, that the Environment Agency should be the sole enforcing authority for Part 2A in lieu of requiring each local authority to enforce it regardless of the amount of contaminated land in their area, we consider that the flexibility given to local authorities in these times of reduced budgets may simply mean that many will reduce their programmes to inspect contaminated land and take any enforcement action in respect of it.

We also consider that the lack of a mandatory deadline by which local authorities should update their strategies will mean that many authorities will not carry out any updating in the foreseeable future. We further consider that some authorities may use the lack of an updated strategy as a reason to postpone further inspections indefinitely.

Issue 6: Background presence of contaminants (paragraphs 82-87)

Do you agree that the revised guidance should make clear that "normal" background levels of contamination are not caught by the regime, unless there is particular reason to think otherwise? If not, please explain why.

Do you have any views on how background/normal levels of contamination has been defined in paragraph 3.20 of the proposed new Statutory Guidance?

Some advice about naturally occurring background levels would be helpful. As a minimum, the guidance should say that regard should be had to locally occurring situations.

Issue 7: Significant harm to human health (paragraphs 88-93)

Do you have any views on the proposed clarification of the statutory guidance on significant harm? Which option do you prefer and why?

Do the options on significant harm strike the right balance between protecting against unacceptable harm to human health, whilst ensuring the regime does not unnecessarily catch less serious health effects (where the impacts of regulatory intervention would probably outweigh the benefits)?

The downside of the proposed changes is, of course, that accumulated case law will be lost so initially there will be uncertainty until new case law is made. However, due to there being so little case law, this does not appear to be a significant factor.

Issue 8(b): Significant possibility of significant harm (human health) (paragraphs 106-117)

Do you have views on the proposed new "red-amber-green" clarification of how SPOSH should be decided would improve the Part 2A regime? Does the new test strike the right balance between establishing a legal framework, whilst giving local authorities sufficient flexibility to take proportionate decisions in the interest of local communities?

Do you have views on the description of the "red", "amber/red", amber/green" and "green" categories? Do you have suggestions on how the categories could be improved?

The proposed traffic light system could possibly be useful if it does not lead to confusion. The current approach to the regime, however, is flawed in application rather than principle or drafting.

Issue 12: Remediation (paragraphs 148-151)

Do you have any comments on Section 6 (remediation)?

We welcome the clarification that local authorities should consider informing affected persons before determining that land is contaminated and giving them a chance to comment.

We consider, however, that the result of postponing a determination of land as contaminated land if a liable person agrees to remediate it without the need for formal determination may, as a practical matter, postpone its remediation indefinitely. For example, other than emergency works, remediation has not yet begun at some sites that were designated as special sites nearly 10 years ago. Even with the insertion of language stating that the authority must be satisfied that remediation will occur to an appropriate timescale (Draft Annex A, para 5.13), the introduction of a further postponement period for contaminated sites seems likely to result in further delays with the resulting detrimental effect on human health and the environment, and the blighting effect.

Issue 13: Liability (paragraphs 152-155)

Do you have any comments on Section 7 on liability? Is the new summary at paragraph 7.3 helpful?

As noted above, the liability provisions are overly complex. Unless there are substantive, rather than simply procedural, changes, this situation will not change.

The individuals (and their respective firms) who were involved in preparing this response are as follows:

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