



PINS NOTE 12/2012

To: All Inspectors

Date of issue: 18 May 2012

Currency: Review at 6 months after issue

Environmental Protection Act 1990: Part 2A – Revised Contaminated Land Statutory Guidance

Background

1. Defra published revised statutory guidance on contaminated land¹ (CL), which replaces Annex 3 of Defra Circular 1/2006 in relation to non-radioactive CL. The related statutory guidance on radioactive CL² has been issued by DECC, which replaces the relevant parts of Annex 3 of Circular 1/2006. The revised guidance, which is legally binding on enforcing authorities from 06 April 2012, follows the recent review of the CL regime under Part 2A of the 1990 Act³ and the related consultations and responses⁴. The Welsh Government has published their own guidance⁵ following the CL review.
2. The previous guidance was found to have flaws and did not adequately explain how to determine if land was contaminated or not. The flaws in the guidance did not apply to radioactive CL, so the guidance on radioactive CL has not been changed, but has been re-issued by DECC as a separate document.
3. The revised Defra Statutory Guidance on non-radioactive CL sets out a four-category framework (see Annex below and Section 4 of the guidance) for deciding when land is contaminated:

Category 1 - Land capable of being determined as CL

Category 2 - Land capable of being determined as CL

¹ Environmental Protection Act 1990: Part 2A – Contaminated Land Statutory Guidance (Defra, April 2012).

² Environmental Protection Act 1990: Part 2A – Radioactive Contaminated Land Statutory Guidance (DECC, April 2012).

³ Environmental Protection Act 1990 (ch. 43) – Part 2A (as amended)

⁴ [Consultation](#): Changes to the contaminated land regime under Part 2A of the EPA1990 (Defra/WG, Dec 2010) and Summary of Responses (Defra, Feb 2012)

⁵ Contaminated Land Statutory Guidance – 2012 (WG, April 2012)

Category 3 - Land not capable of being determined as CL

Category 4 - Land not capable of being determined as CL

The category of the land under assessment is determined on grounds of the level of significant possibility of significant harm (SPOSH) to human health and/or significant possibility of significant pollution of controlled waters. The guidance states that the starting assumption of Part 2A is that land is not CL unless there is reason to consider otherwise. However, where clear-cut decisions are not possible land should be designated as either Category 2 (contaminated) or Category 3 (not contaminated). The Environment Agency should undertake detailed site inspection where land is assessed as likely to be a 'Special site' by the Local Authority.

4. This approach should allow regulators to make decisions on CL designation more quickly, whilst still taking a precautionary approach. This may prevent costly remediation being undertaken unnecessarily. The guidance itself is shorter, simpler and more focussed towards dealing with the higher risk sites. Local Authorities will need to update their CL strategies in light of the new guidance. There are various other improvements drawn out of experiences of operating the Part 2A regime over the last 11 years.
5. Sections 3, 4 & 6 of both guidance documents – Risk Assessment, Definition of CL and Remediation of Contaminated land respectively are particularly relevant when considering development proposals. The revised statutory guidance should be considered alongside the relevant parts of the NPPF⁶ and the principles of sustainable development when assessing development proposals that may be affected by CL, as PPS23 (including the Annexes) have been replaced by the framework. Additional guidance on land contamination issues in relation to consideration of NSIP proposals may be found in the relevant National Policy Statement.
6. The other substantive changes to the CL regime from 06 April 2012 include:
 - i) Changes in definition of CL, through Water Act 2003 Commencement Order No.11⁷ – s86 of the Act makes amendments to Part 2A definition of CL in s78A of EPA 1990 in relation to the pollution of controlled waters, whereby for land to be determined as CL, it must cause significant pollution or the significant possibility of such pollution of controlled waters.
 - ii) Repeal of regulation 11 of the 2006 Regulations⁸ through amendment Regulations⁹ permitting further representations

⁶ National Planning Policy Framework - Paragraphs 109 & 121 (DCLG, Mar 2012)

⁷ The Water Act 2003 (Commencement No. 11) Order 2012, SI 2012 No. 264 (C. 8)

⁸ The Contaminated Land (England) Regulations 2006, SI 2006 No. 1380 (as amended)

⁹ [The Contaminated Land \(England\) \(Amendment\) Regulations 2012, SI 2012 No. 263](#)

where modifying a Remediation Notice (RN) would result in a less favourable outcome – this will now only apply to appeals under s78L of EPA 1990 commenced before 06 April 2012. After this date further challenges should be dealt with through judicial review proceedings.

Action

7. Inspectors should be aware that the revised Defra and DECC statutory guidance has been published and the changes in approach to dealing with both development proposals affected by CL and how this will affect appeals against Remediation Notices under s78L of EPA 1990, coupled with the relevant amendments to the 2006 Regulations – this will apply to casework dealt with under the T&CPA 1990¹⁰ and NSIP casework under the PA 2008¹¹ dealt with by the National Infrastructure Directorate (NID).
8. It should be noted that Defra Circular 01/2006 is now cancelled and should not be referred to in casework where it relates to land that has been determined as CL after the revised guidance came into force. Contaminated Land Advice Note (CL01) is hereby cancelled.
9. Please contact XXXX if you have any queries on this Note.

XXXX

Director of Legal and Quality

¹⁰ Town and Country Planning Act 1990 (ch. 8) (as amended)

¹¹ Planning Act 2008 (ch. 29) (as amended)

Contaminated Land four-category framework

(a) Land capable of being determined as Contaminated Land:

Category 1:

Human Health - where there is substantial evidence that there is an unacceptably high probability that significant harm to human health would occur if no action was taken to stop it.

Water - where there is a compelling case for considering that a significant possibility of significant pollution of controlled waters exists.

Category 2:

Human Health - where 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 to human health.

Water - where on the basis of available evidence 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.

(b) Land not capable of being determined as Contaminated Land:

Category 3:

Human Health - Where there is not a strong case for the land to be placed into category 2 and the legal test for significant possibility of significant harm is not met.

Water - Where it is concluded that the risks are such that the tests set out in Categories 1 and 2 are not met i.e. it is very unlikely that serious pollution would occur or low likelihood that less serious types of significant pollution would occur.

Category 4:

Human Health - Where it is concluded that the land poses no risk or the risk is low i.e. land where there is 'normal' levels of contaminants present or where no relevant contaminant linkage has been established.

Water - Where it is concluded that there is no risk, or the level of risk posed is low, i.e. where no contaminant linkage has been established in which controlled waters are the receptor or the possibility of pollution of controlled waters is similar to that which might be caused by 'background' contamination.