clean up

MJCA
Technical advisers on environmental issues

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Contaminated Land News—Introduction

It is the Government's objective to simplify a range of policy and guidance including guidance on the way contaminated land is assessed, through changes to the planning system, most notably through National Planning Policy Framework and changes to Part 2A of the statutory guidance on contaminated land. Following a process of public consultation the revised draft statutory guidance has been laid in Parliament and an update issued on the Defra website.

During a review of the tax regime last year the government looked like it was going get rid of Land Remediation Tax relief, however, following a period of consultation it has been decided that there are benefits to the property development sector by retaining this tax relief.

Last year the Environment Agency were granted new powers under civil sanctions and by the end of the year the Environment Agency imposed the first civil sanction for breach of environmental legislation associated with pollution of a watercourse. It is expected that civil sanctions will be introduced for all offences under the Environmental Permitting regime from April 2012.

It is unlikely that a change on how contaminated land is assessed in the planning regime or in statutory guidance is going to change how contaminated land is assessed technically. However, such changes may open up possibilities and opportunities for developing sites that had little economical value previously.

Reprieve for Land Remediation Tax Relief

The Government is committed to simplifying the tax system and recently carried out a consultation process with those individuals and organisations that may be affected by abolition of certain tax reliefs. As a result of this consultation Government has announced that the Land Remediation Tax Relief (LRTR) will not be abolished.

Respondents to the consultation argued that *"....removing this relief would affect the regeneration of uneconomic brownfield sites. Several companies claimed that they take land remediation relief into account when considering sites and that removal of this relief would make a significant number of their planned projects financially unviable. Information was also presented that suggested abolishing this relief would exacerbate financial pressures on this*

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- Environmental planning
- Contaminated land and remediation
- Geotechnical, ground and landfill engineering
- Waste process management solutions
- expert witness services

Land Remediation Tax Relief — cont.

"The Finance Act 2001 introduced up to a 150% tax relief for companies incurring expenditure on the investigation and remediation of contaminated land"

sector resulting from the removal of the exemption from landfill tax for soils and waste from contaminated sites...."

The Government has decided that removal of the LRTR would risk undermining the Government's plans to support the housing and construction sectors through the proposed planning reforms and the release of large areas of publicly owned land for development.

The Finance Act 2001 introduced up to a 150% tax relief for companies incurring expenditure on the investigation and remediation of contaminated land with further changes made in April 2009 to extend tax relief and encourage the development of Brownfield land.

This legislation states that contamination must be present as a result of industrial activity in order for the remediation works to qualify for tax relief. This also includes Japanese knotweed and contaminants that may be naturally occurring such as a radon, arsenic and arsenical compounds. Under the definition in the Finance Act land is in a contaminated state only if in such a condition that "*...relevant harm is being caused or there is a serious possibility that relevant harm will be caused...*" In addition to potential impacts to living organisms and significant pollution to controlled waters, the tax relief may be available where there is significant adverse impact on the ecosystem, structural or other significant damage to buildings or other structures that significantly compromises their use.

The legislation has a provision for derelict land remediation which may also qualify for the relief, providing that certain conditions are met. The land must have been in a derelict state since April 1st 1998 or earlier, and land is defined as derelict if it is not in a productive state and cannot be put into a productive state without the removal of specific types of buildings or other structures including, building foundations, machinery bases, reinforced concrete pile caps and basements, and below ground redundant services.

LRTR can provide significant tax savings against the expenditure incurred upon the development of brownfield sites. Working alongside specialist tax advisors MJCA can develop remedial strategies and budget estimates for assisting with tax claims, and consequently there may significant potential savings by bringing derelict land back into productive use.

Update on the new contaminated land regime

Last year the government issued updated guidance to support implementation of Part 2A of the Environment Protection Act for consultation. A total of 111 responses were received and MJCA were one of 13 consultancies/contractors to provide a response. The following update is an extract from the DEFRA web-site.

Following the review of the contaminated land regime and public consultation, revised draft statutory guidance has been laid in Parliament today – Tuesday 7th February 2012 – with associated regulations. The revised guidance cannot be issued until after 40 days has elapsed, and is subject to there not having been a resolution of either House that the guidance should not be issued. The revised regulations will come into force on the Common Commencement Date of 6th April and it is hoped that the new guidance will be available to be issued on or soon after that date.

Update on the new contaminated land regime - cont.

The existing statutory guidance remains in force until any new guidance has been issued.

The new statutory guidance is intended to be more usable for those that deal with land contamination and remediation. In particular, a new four category test is intended to clarify when land does and does not need to be remediated. By reducing regulatory uncertainty, this policy aims to make the regime target higher risk land more efficiently. The changes will be supported by technical tools, which will be developed by the land contamination sector to increase consistency over time.

The new regime will still be highly precautionary but will be better at focussing efforts on finding high risk sites and dealing with them first, and at speeding up Local Authority decision-making by helping them dismiss low risk sites more easily. This means that the regime will, through being more targeted and efficient, offer better protection against health impacts.

A early draft of the new guidance can be found here, but the post-consultation version has not been released yet publically.

Civil sanctions

The Regulatory Enforcement and Sanctions Act 2008 introduced a new range of alternative civil sanctions that could be provided to regulators, instead of pursuing all environmental offences in the criminal courts. The Environment Agency (EA) and Natural England were given the power to enforce these sanctions in England in April 2010 by the Environmental and Civil Sanctions (England) Order 2010.

The Civil Sanctions are applicable to offences under regulations associated with the hazardous waste, packaging waste and harm to water resources cases. Under the sanctions the regulator can issue:

A compliance notice – a requirement to take specified steps within a set timeframe to prevent an offence from continuing or recurring.

A restoration notice – a requirement to take specified steps within a set timeframe to restore the pre-offence position.

A stop notice – a requirement to immediately halt the activity until steps are taken to ensure compliance.

The fines range from a modest Fixed Monetary Penalty (FMP) to a Variable Monetary Penalty (VMP) which is a proportionate penalty that may be imposed for a moderate to serious offence where the regulator decides that prosecution is not in the public interest. However, the polluter can also enter into an Enforcement Undertaking to avoid criminal prosecution. This is a voluntary agreement for business who wish to repair any environmental damage they may have caused and to return to compliance, in both the immediate and long term. It can also include providing compensation for the local community.

The main aims of the sanctions are to improve compliance, prevent harm and reduce risks to the environment, ensure any damage is restored and provide restitution to local communities. Essentially it is to uphold the principle of the polluter pays but ensure that the punishment is in proportion to the offence committed.

On 22 July 2011, the EA announced that it had imposed the first civil sanction for breach of environmental legislation by the company Invensys PLC and the company entered into an Enforcement Undertaking. This initial case and 25 subsequent cases where Enforcement Undertakings have been accepted by the EA are associated with offences under the Producer Responsibility Obligations Packaging Waste Regulations 2007 which require businesses that handle packaging to take responsibility for it

"...within 6 months Ornamental Plants Ltd based in Lancashire became the first company under the Environmental and Civil Sanctions Order for a pollution offence to water..."

Civil sanctions - cont.

when it becomes waste. However within 6 months Ornamental Plants Ltd based in Lancashire became the first company under the Environmental and Civil Sanctions Order for a pollution offence to water for a breach under the Control of Pollution Oil Storage England Regulations 2001. The company entered into an Enforcement Undertaking making improvements to their fuel storage infrastructure, implementing maintenance and monitoring checks and the provision of response measures for pollution incidents. In addition they made voluntary contribution of £100 to Martin Mere Wildfowl Trust

It is expected that civil sanctions will be introduced for all offences under the Environmental Permitting regime from April 2012.

Unlocking landfill!

"The removal of recovered materials may generate extra valuable landfill void space and the landfill could be reengineered and restored to higher standards..."

The concept of landfill mining is nothing new although its practical application to date has been limited. From past experience this has largely involved the reclamation of small historical landfills sites or made ground as part of brownfield remediation for site development. In such circumstances the main driver is the restoration of a site to increase land value or to ensure that it is suitable for the proposed development use by undertaking remedial works to reduce the potential risks to future site users and improve ground conditions through engineering solutions, thereby removing a constraint which would otherwise have prevented redevelopment of the land.

Many old landfills were filled prior to licensing controls and as such it is unknown what may lie within them and if they represent a risk to the wider environment. Taking on a landfill for development is a risky business although with robust assessment could prove commercially viable.

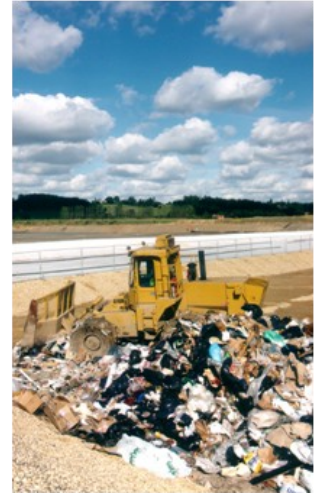
The recovery of value from materials excavated during development works is often a secondary consideration although with careful evaluation and characterisation prior to and during the works it is possible to sort and segregate materials to generate recycled aggregates or recover metals and other products with resale value. However it is the low commodity value of materials such as plastics and glass or combustible materials, or importantly hazardous waste that will determine the economic viability of a specific site. There have been advances in technology that can address some of these challenges. For example a project in Belgium is expected to recycle up to half of all the materials recovered with the remainder used for renewable energy as refuse derived fuel (RDF).

In terms of the concept of landfill mining at historical landfills that may have no development opportunity, there are further technical and legislative constraints that may create significant commercial challenges. The Environment Agency's remediation statements make it clear that the excavation of materials from non-permitted sites is not itself a waste activity but it is the further storage, treatment, disposal and the recovery of materials that are classified as waste activities and as such fall under the Environmental Permitting Regulations. A further

Unlocking landfill! - cont.

consideration is to bring part of the landfill back into use. The removal of recovered materials may generate extra valuable landfill void space and the landfill could be reengineered and restored to higher standards, thereby potentially shortening the period and costs for aftercare.

This concept of landfill mining is relatively new for the UK market and there remain some significant challenges ahead not least how the Planning Authorities and Environment Agency will manage applications for these operations. However, MJCA are well placed to provide practical pragmatic advice on such matters. We have nearly 30 years of experience of working with the waste sector and our expertise extends across the range of technical disciplines necessary to deliver such schemes, for example environmental planning and permitting matters, the characterisation of ground conditions and waste materials and designing landfill engineering solutions and sustainable strategies.



New qualitative risk assessment guidance

The Nuclear Decommissioning Authority commissioned recently the production of a guidance document entitled "Qualitative Risk Assessment for Land Contamination, including Radioactive Contamination" dated December 2011. The guidance is aimed at land quality management practitioners in the nuclear industry but may also be applicable to potentially contaminated site in other contexts.

The guidance follows the structure of previous UK guidance on assessing contaminated land including applying a tiered approach as set out in CLR-11 to assess the severity (magnitude) of potential consequences for receptors from exposure to contaminants which are combined with qualitative and semi-quantitative assessments of likelihood (probability) of such consequences in order to arrive at a description of the relative significance of the risk posed by the contamination.

There is a section in the document on the conceptual site model and this provides a useful and comprehensive checklist for the environmental context of the site, contaminant definition, receptors, pathways and source-pathways-receptors linkages.

The methodology in the document follows the Preliminary Risk Assessment methodology and terminology in CLR-11: hazard identification, hazard assessment to assess the consequences, risk estimation to determine the probabilities of the consequences and risk evaluation to characterise the risk. For radioactive contaminants there is a further step in the methodology to asses whether the risks are As Low As Reasonably Practicable (ALARP) and the report concludes with a re-assessment of the qualitative risk assessment after the implementation of additional controls or future changes in site conditions.

Following the methodology and procedures set out in the documents the significance of the risk is assessed qualitatively by evaluating the potential severity of the conse-

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ABOUT MJCA

MJCA provides independent advice on environmental issues to the public and private sectors. Delivering our services to high technical standards and commercial awareness enable us to provide practical, cost effective advice and sustainable solutions. Further information regarding our services can be found on our website www.mjca.co.uk

CONTACT US

Please contact Kevin Eaton for more information on any of the issues raised in this newsletter, or on any other Contaminated Land issues.

New qualitative risk assessment guidance - cont.

quence (negligible, mild, moderate, severe) against the probability of occurrence (certain, likely, unlikely, very unlikely, extremely unlikely and no pollutant linkage) to provided an estimation of the significance of risk (very high, high, medium, low, very low, trivial). There is a useful table in the document setting out the descriptors for potential severity of consequence including what constitutes negligible, mild, moderate and severe under certain exposures to receptors such as the exposure duration and exposure levels to employees and the public to radiation, exposure to humans by non-radioactive contaminants, harm to flora, forna, property, and buildings together with pollution of the water environment.

There is a cautionary note that the guidance has not been endorsed by regulators.