

Contaminated Land News—Introduction

After much consultation two key Government documents that will have an impact on the way contaminated land is assessed and managed; the National Planning Policy Framework (NPPF) and the revision to the Statutory Guidance of Part 2A of the Environment Protection Act 1990 were published in late March and early April 2012 respectively. So will this new guidance change how contaminated sites are assessed?

The premise of the NPPF was more democracy, less bureaucracy. The new guidance has stripped away much of the supporting technical guidance by withdrawing the majority of the former Planning Policy Statements (PPS) for example PPS23 the guidance document on contaminated land. These documents have effectively been replaced with a handful of bullet points in the NPPF. The perceived aim may be that in the absence of prescriptive technical guidance the new planning process will lead to a stream-lined and

fast-track approach to development although it is likely that the Regulatory Authorities and the communities which they serve will still wish to see the relevant checks and balances in place, developers will still need to be responsible for the safe development use of land and landowners will still need to assess their potential environmental liabilities.

If it is unlikely there will be significant changes to the management of contaminated land through the planning process will the revised Part 2A guidance result in significant changes to the assessment process? Well some of the changes to the Statutory Guidance are nothing more than catching up with how the contaminated land regime has been regulated although there is new guidance on recognising and dealing with uncertainty through the key principles of risk assessment by implementing a category based system which may prove to lead to a more consistent approach to the technical process of determining contaminated land.

Contaminated land and planning, where are we now? -The National Planning Policy Framework

As part of the Government's objective to reduce the amount of planning guidance Planning Policy Statement 23 Planning and Pollution Control including Annex 2: Development on Land Affected by Contamination has been withdrawn. The new guidance in the [National Planning Policy Framework](#) (NPPF) which replaces this document has reduced the guidance to a few bullet points as follows:

- "the site is suitable for its new use taking account of ground conditions and land instability, including from natural hazards or former activities such as mining, pollution arising

from previous uses and any proposals for mitigation including land remediation or impacts on the natural environment arising from that remediation;

- *after remediation, as a minimum, land should not be capable of being determined as contaminated land under Part 2A of the Environmental Protection Act 1990; and*
- *adequate site investigation information, prepared by a competent person, is presented".*

One of the core planning principles in the NPPF is that planning policies and decisions should

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The National Planning Policy Framework - cont.



“A person with a recognised relevant qualification, sufficient experience in dealing with the type(s) of pollution or land instability, and membership of a relevant professional organisation”

encourage the effective use of land by reusing land that has been previously developed (brownfield land). The NPPF also suggests that Local Planning Authorities may continue to consider the case for setting locally appropriate targets for the use of brownfield land.

Land contamination remains a material planning consideration both in formulating the Local Development Framework documents and in development control, it also needs to be assessed for developments which require an Environmental Impact Assessment and it is stated in the NPPF that the development of any land should not result in it being capable of being determined as contaminated land under Part 2A of the Environmental Protection Act 1990. The NPPF may have reduced the amount of guidance associated with assessing contaminated land but it has not removed the need to investigate and assess contaminated land as part of a planning application.

It seems highly unlikely that the NPPF will lead to a dilution in the level of investigation necessary to assess land for development but the technical challenges which are likely to arise in assessing development sites may be driven by the need to prove that the land should not be capable of being determined as contaminated land under Part 2A. The revised Part 2A Statutory Guidance has a new category based system for dealing with risk assessment and the supporting technical guidance for the revised Part 2A Statutory Guidance makes reference to the category level which may be the

de facto minimum standards used by developers.

Currently the need for further assessment or remedial works for the safe development of land is assessed by comparison of site derived analytical data against Soil Guideline Values (SGV), published Generic Assessment Criteria (GAC) or GAC determined by consultancies, or where necessary by undertaking a Detailed Quantitative Risk Assessment (DQRA). The new Part 2A guidance identifies that the application of SGV and GAC should not be used as a “one size fits all” approach to setting remediation target and it is understood that new Category 4 Screening Levels (C4SL) will be published or that a model will be developed to allow the C4SL criteria to be determined. The use of C4SL is likely to become the generic standard for screening criteria for site development.

The NPPF makes reference to the need for a ‘competent person’ to prepare site investigation information and the NPPF provides the definition of a competent person as “...A person with a recognised relevant qualification, sufficient experience in dealing with the type(s) of pollution or land instability, and membership of a relevant professional organisation...”.

It will be interesting to see how this is managed by the Local Planning Authority, for example if the Local Planning Authority request that site investigation reports are signed off by a ‘competent person’ and if this principle is challenged in future planning submissions.



National Planning Policy Framework



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New Statutory Guidance for contaminated land

Section 57 of the Environment Act 1995 created Part 2A of the Environment Protection Act 1990 which is the principal legislation for the dealing with contaminated land in England. Part 2A has been in existence for over a decade although there have been few determination notices issued under the legislation during this period and even fewer remediation notices.

During this period there have been significant advances in remediation technology, the demise of 'dig and dump' as a commercially viable remediation option, the publication of soil assessment criteria and the wider application of risk assessment as a means of determining risk to human health and the environment. The way we investigate contaminated land has not changed significantly over this period but the way that we assess the risks and manage contaminated land has. In response to these developments particularly the principles of risk assessment Defra has updated and issued new legally binding Statutory Guidance.

Although the basic structure of the Part 2A legislation is unchanged, for example the concept of significant pollutant linkages remains, the new guidance provides greater clarity on recognising and dealing with uncertainty through the key principles of risk assessment. Since the contaminated land regime came into force there has been substantial uncertainty over how to decide when land is and is not "contaminated land" and in particular over how to decide when land meets the legal test of significant possibility of significant harm (SPOSH) to human health. Whilst the new Statutory Guidance sets out the policy on this, the supporting technical guidance presented in the Impact Assessment document is perhaps of more interest to those practitioners who will need to apply a technical assessment.

The revised [Statutory Guidance](#) introduces a new category based system for dealing with risk assessment including the assessment of SPOSH. Under this new system Category 1 sites are clearly contaminated and represent a high risk and Category 4 site are clearly identifiable as low risk and not contaminated land. Category 2 and 3

sites are less straightforward and require greater assessment and detailed consideration is needed before deciding whether it is contaminated land (Category 2) or not (Category 3). The guidance makes it clear that contamination recorded at or below Soil Guideline Values (SGV) and Generic Assessment Criteria (GAC) levels is likely to be well below the Category 4 level. Defra are to commission a project to develop either the Category 4 Screening Levels (C4SL) or to develop a methodology to allow practitioners to determine these levels. It is likely that it will be at least a further year before the publication of this guidance document.

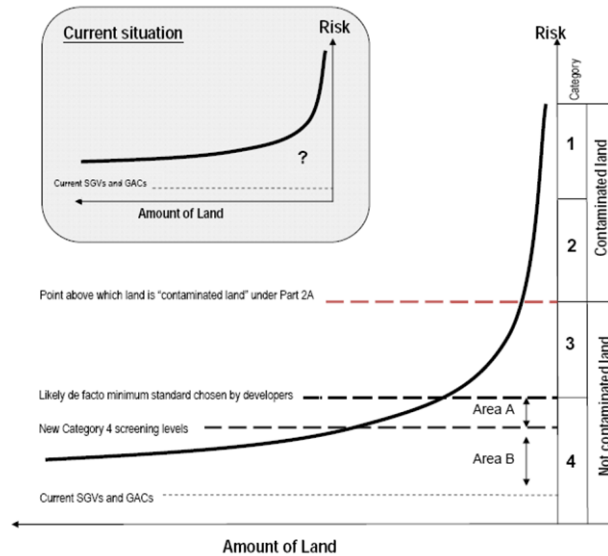
For this assessment process the Local Authority would start by considering health risks alone, and if this leads the Local Authority to consider that land is clearly problematic or non-problematic the decision could be taken at this point. However, if there is still uncertainty and a decision cannot be made only on the risk to human health the Local Authority will consider wider socio-economic factors including the cost and the views of local people before deciding. If at this point the Local Authority still cannot decide, the default decision is that the positive legal test for contaminated land has not been met and the site should therefore go into Category 3 and therefore is not contaminated land. Category 4 describes land that is clearly identifiable as low risk and not contaminated land. Category 4 land will also include land where there are only normal background levels of contamination unless there is some exceptional reason to consider there may be a problem.

The following diagram is taken from the Statutory Guidance and illustrates the Category 1 to 4 system compared to the current system. Perhaps of key interest in assessing sites for development is the boundary between Category 2 and 3 identified in the guidance document as being the "...likely de facto minimum standard chosen by developers...". In all likelihood when the C4SL are published these will become the default soil assessment criteria for

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New Statutory Guidance for contaminated land - cont.



The guidance sets out the types of pollution which should be considered to constitute significant pollution of controlled waters. For example, a breach of a statutory surface water Environment Quality Standard, either directly or via a groundwater pathway. There is guidance on what constitutes ‘significant pollution of controlled waters is being caused’ and ‘significant possibility of significant pollution of controlled waters’ and a four stage category system is introduced in the guidance similar to the category system for soil.

It will take some time for this guidance to bed in and until further technical guidance is provided for C4SL or C4SL are published it is unlikely that the approach to the assessment of contaminated land will change significantly.

In situations where the Local Authority is to determine a site as ‘contaminated land’ there is a requirement for the Local Authority to produce a risk summary in a form that can be understood by non-experts including Local Authority councillors so that they can be more easily involved in the decision making process.

The Statutory Guidance introduces the concept of ‘significant possibility’ of pollution with regard to controlled waters and as such this approach is more aligned to the approach applied in assessing contaminated soil. This approach of risk assessment for controlled waters has been applied in practice for many years through the consultation and agreement process with the EA.

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Sink or swim?

Whilst most of the Planning Policy Statements (PPS) have been given the axe under the Government’s recently published NPPF including PPS 25: Development and Flood Risk, new technical guidance has been published to assist in the decision making process for planning applications in flood risk areas. The intention of Government’s planning policy is that inappropriate development in areas at risk of flooding should be avoided by directing development away from areas at highest risk, but where development is necessary, making it safe without increasing flood risk elsewhere.

When assessing development sites using the

guidance the proposed type of development is assigned a flood risk vulnerability classification and subject to the classification may have restrictions associated with the type of development allowed in a particular flood risk zone. For example flood risk zones which have a high risk of flooding such as Zone 3 and on a functional floodplain will have planning restrictions limited to the development of only water-compatible and essential infrastructure uses only if the Exception Test is passed.

Where a site specific flood risk assessment (FRA) is necessary this should identify and assess the risks of all forms of flooding to and from the



Sink or swim? - cont.

development and demonstrate how these flood risks will be managed so that the development remains safe throughout its lifetime and taking climate change into account. It is the responsibility of those planning development to fully assess flood risk, propose measures to mitigate it and demonstrate that any residual risks can be managed safely although the guidance states that flood resistance and resilience measures should not be used to justify development in inappropriate locations.

The Environment Agency has provided further guidance on the information which will be expected to be included in a FRA for different development scenarios, based on the size of the development and the location within the flood plain. This includes developments for non-domestic extensions with a footprint of less than 250 sq. metres and all domestic extensions.

Further guidance for local authorities on planning in flood risk areas has been published by the Association of British Insurers (ABI) and the National Flood Forum with the aim of complementing the NPPF guidance. ABI consider it necessary to issue this guidance as insurance covering flooding may not apply to developments built after 1 January 2009 and that if climate change is not considered regarding flood risk assessments this could affect insuring properties in the future. One of the key recommendations is to “...Ensure strong relationships with technical experts on flood risk, within the Local Authority and further afield...”.

Technical experts will not only be necessary in assessing the likelihood and consequences of flooding but providing engineering solutions to these challenges. Surface water drainage methods that take account of water quantity and quality and amenity issues are collectively referred to as Sustainable Drainage Systems (SuDS). Where practical and affordable, SuDS should be constructed to manage water at source and on the surface with the aim of reducing damage from flooding, improving water quality, protecting and improving the environment, protecting health and safety, and ensuring the stability and durabil-

ity of drainage systems.

The National Standards for SuDS form part of a programme of measures set out in the Flood and Water Management Act 2010 to improve the way that surface water is managed. In Schedule 3 of the Flood and Water Management Act 2010 proposals are set out to establish a SuDS Approving Body (SAB) in unitary or county councils with the sewerage undertakers, Environment Agency, Internal Drainage Boards, British Waterways and Highway Authorities as statutory consultees to the SAB. Drainage systems for new developments and redevelopments must be approved by the SAB before construction begins and these drainage systems will need to be designed to meet the National Standards for the design, construction, operation and maintenance of SuDS. The National Standards are yet to be published although they are likely to be set as mandatory standards for the run-off destination, peak flow rates, volume, and water quality. Discretionary standards may also be set by the Local Planning Authority for biodiversity and amenity.

The approval process for SuDS will run alongside the planning application process although there is also an option for submitting a stand-alone application in advance of a planning application or where planning permission is not necessary for the development.

There are proposals set out in recent government consultation documents to phase-in the provisions with respect to approval by the SAB including potentially limiting the requirement for SAB approval to larger developments in the first 3 years of implementation and that SAB approval will not be required for the first 12 months for developments that have already been granted planning permission or have a valid planning application submitted before commencement of the legislation or where the development has one or more reserved matters. It is also understood that for developments where drainage requirements are agreed in a Neighbourhood Plan and through a Neighbourhood Development Order it will not be neces-



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

Geochemical data for soils

The British Geological Survey (BGS) has published recently an e-book of soil geochemistry for England and Wales. Geochemistry of the soil has implications for both human and animal health, and understanding the natural concentrations of elements in the soil can help determine the extent to which soil may have been contaminated by anthropogenic activities. The analyses presented in this advanced atlas are for those soil samples collected for the National Soil Inventory by the Soil Survey of England and Wales (now the National Soil Resources Institute, Cranfield University) in the original *Soil Geochemical Atlas of England*

and Wales. The advanced atlas presents analyses and geochemical maps for a total of 53 elements.

On behalf of Defra the BGS are currently carrying out a project that will define the typical background concentrations (TBCs) for soil contaminants to support the simplification and updating of the contaminated land Statutory Guidance. The Geochemical Baseline Survey of the Environment ([G-BASE](#)) forms part of this research along with chemical results from other regional soil surveys. The intention of this research is that by understanding normal background data of the geo-

chemistry of soil which vary across the country, this will help to more clearly define soils that are not contaminated and provide a greater understanding the potential risk to human health and clarity to the contaminated land regime regarding contaminants which are present at normal background concentration in soil. It is understood that this project is nearing completion and will be published in the near future. The [soil geochemical atlas of England and Wales](#) is available for download from the BGS website.

