

clean up

Contaminated Land News February 2011

INTRODUCTION

As the [Decentralisation and Localism Bill](#) passes through its various stages in the House of Commons, the Government has set out its stall on how it expects local communities to have more of an involvement in the planning process on developments. It has been suggested that there will be a number of revisions to the planning policy statements and there is currently public consultation on the proposed revisions to the contaminated land statutory guidance.

The Environment Agency (EA) continues to publish guidance to assist in reducing the regulatory burden, for example it is expected that the EA will approve the release of Version 2 of the Definition of Waste: Code of Practice. The revisions in this guidance are expected to provide greater opportunities for the reuse of materials during site development including 'contaminated soils' where these are suitable and safe for use.

There are clearly some interesting times ahead regarding the development of contaminated land and even within the current economic climate there will continue to be opportunities particularly for informed developers and land owners.

MORE DEMOCRACY, LESS BUREAUCRACY

The rationale behind the government's proposed approach to the revision of the planning system is that the current system is too 'centralised and bureaucratic' and too remote from the communities it effects. The government wish to see greater participation of the local community through a process of consultation and agreement for certain new developments.

With the implementation of the Localism Bill it is expected that local communities will be able to have a greater involvement in planning and development issues by being provided with the opportunity to establish general policy to steer decisions on traditional planning applications.

This shift in balance between local communities and the planning authorities is summarised in the Department of Communities and Local Government '[Essential Guide](#)', in which the government's policy is set out in what is referred to as 'six essential actions', identified as: to lift the burden of bureaucracy; empower communities to do things their way; increase local control of public finance; diversify the supply of public services; open up government to public scrutiny, and strengthen accountability to local people.

The proposed process expects developers to hold informal pre-application discussions with the Local

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Planning Authority (LPA) who would be advised by relevant technical officers. It is also expected that local communities will have an input on new developments in their area and consequently this may involve members of the public being consulted on a whole range of technical matters. The Localism Bill places a duty on the Local Authority to support neighbourhood forums although it is unclear what this duty covers, for example whether this duty will extend to advising on technical and scientific matters.

Within the Local Authority technical officers in departments such as building control and environmental health have traditionally been the focal point for dealing with technical matters on potential pollution and land contamination issues associated with new developments. Planning policy guidance on how to assess potentially contaminated sites is set out in PPS 23: Planning and Pollution Control and assessment should be in accordance with the UK contaminated land framework detailed in The Model Procedures for the Management of Land Contamination, CLR 11 produced by Defra and the EA. Developers and land owners will continue to be responsible for assessing land condition matters and where necessary undertaking appropriate risk based remediation of land affected by contamination in order to secure the removal of 'unacceptable risk' thus rendering the site suitable for its intended use.

If it is the intention of this Bill to remove some of the regulatory burden associated with planning, it is not anticipated that it will reduce the level of assessment necessary or the timescales involved. Conversely the need for consultation with local communities is likely to result in an increase the amount of information needed as there will be greater importance placed on the communication of the potential risks involved. Contaminated land is an emotive and complex issue and to address the concerns of the local community will require comprehensive site assessment, robust risk assessment and good site management practices will be necessary as well as and producing supporting non-technical summaries explaining the science as simply as possible.

UPDATED STATUTORY GUIDANCE FOR 2011?

Defra has issued a public consultation document on changes to the [Contaminated Land Regime under Part 2A of the Environmental Protection Act 1990](#) statutory guidance. It is not the intention of this new guidance to bring in any major changes but to fine tune the existing regime, primarily to make the guidance simpler and shorter, somewhat reflecting the Government's view on policy across a number of sectors.

Whilst it is proposed that the basic structure will go unchanged, for example the concept of significant pollutant linkages will remain, the intention is to provide greater clarity on recognising and dealing with uncertainty through the key principles of risk assessment. Legal backing is proposed for the use of robust Generic Assessment Criteria (GAC) produced by reputable, non-governmental organisations within the sector. In situations where Local Authorities are likely to determine sites as 'contaminated land' there would be a new requirement for the authorities to produce risk summaries in a form that can be understood by non-experts.

It is proposed to address the issue of 'significant pollution' with respect to water resources and provide further definition of what constitutes a 'controlled water'. The statutory guidance would introduce the concept of 'significant possibility' of pollution with regard to controlled waters and as such this approach is more aligned to the existing contaminated land regulations. In reality this is perhaps a formal recognition of risk assessment for controlled waters which already takes place through consultation and agreement with the EA.

A new significant possibility of significant harm (SPOSH) test would be introduced through a traffic light based system applying four broad types of site: Red (Category 1) sites which clearly are high risk; Amber for sites where the answer is not immediately obvious but after due consideration the assessor decides the sites are either: Amber/Red (Category 2) in that they are contaminated land; or Amber/Green (Category 3) in that they are not contaminated. Green sites (Category 4) will be the clearly identifiable low risk sites. Supporting guidance is proposed on dealing with relevant issues on amber sites, possibly through further clarification on the application of risk assessment. The principle behind such an approach is to avoid the Local Authority spending too much time and resources on low risk Green sites.

These changes are unlikely to lead to more sites being identified as contaminated land, not least because the Local Authorities may have fewer resources to address such matters and the government has already cut £7.5 million (40%) from the contaminated land capital grant budget for 2010/11. However, ensuring that a site is not defined as 'contaminated land' is expected to remain the minimum baseline criterion for the safe and suitable development of contaminated land.

FLAT OUT!

The Environment Agency (EA) has been busy publishing the guidance document "[Horizontal Guidance Note H1 - Environmental risk assessment for permits](#)". These are intended to assist in the assessment of risks to the environment and human health when applying for a new permit (or varying an existing one) under the Environmental Permitting Regulations. The intention is that by following the guidance the applicant considers the necessary measures to protect the environment and determines that the regulated activity will not pose an unacceptable risk and screens out those activities that are insignificant and don't need detailed assessment

The document has four key steps:

1. identify risks from the activity
2. assess the risks and check that they are acceptable
3. justify appropriate measures to control the risks, if necessary
4. present the assessment.

Every applicant needs to complete at least steps 1 and 2.

The guidance includes the key activities such as the operation of landfills, permitted installations and discharges to surface and groundwater but also covers issues such as accidents, air emissions, and site waste, each activity has its own separate annex document with specific detail on identifying and assessing risks.

The assessment begins with screening steps to make sure that there is no unnecessary detailed assessment of risk. There is reference to identifying only the potential receptors that could reasonably be harmed by the activity. A list is provided to assist in this task which includes receptors that would typically be identified during an environmental desk study such as water abstractions, ecologically sensitive areas, neighbouring land use such as housing and schools, along with suggestions on where to find such information. Once these have been compiled, the next step is to assess each risk from the activity. So for example if it was necessary to assess the risks from accidents, the types of situations could include transferring substances (e.g. loading or unloading vessels), plant, equipment or containment failure (e.g. blocked drains), incompatible substances and unwanted reactions, vandalism or flooding. Clearly along with generic risks, there are also likely to be specific risks associated with the individual facility that needs to be assessed.

There is clearly a subjective element in assessing risk and the probability of an incident occurring, although it would be possible to apply some general rules. For example, a leak from waste oil storage tanks with secondary containment should be 'very unlikely', but spills from damaged drums which are regularly transported around a site could be regarded as 'likely'.

In submitting the permit application it will be necessary for the applicant to demonstrate they have worked through the guidance and identified and assessed the risk properly. MJCA are already assisting our clients on new applications and revisions to existing permits to comply with the guidance in accordance with the Regulations.

DEFINITION OF WASTE – VERSION 2



The Definition of Waste: Development Industry Code of Practice (CoP) is a voluntary code that was launched by CL:AIRE at the end of 2008. It was developed in order to provide a pragmatic solution to the use of excavated materials including contaminated soils and made ground on development sites in a sustainable manner without involving waste legislation, thus simplifying the process. The approach has been developed in agreement with and accepted by the EA. The EA accept that the scheme has been satisfactory and the intention is to expand the role of the scheme to cover other similar activities such as the reuse of materials on other development sites. In 2010 CL:AIRE released Version 2 of the CoP for consultation and this new version is due for release shortly. It is understood that the EA expect that the procedures set out Version 2 shall be implemented on all future developments where the reuse of materials is proposed. Version 2 includes a number of changes to the CoP including clarification of the expected level



How to comply with your environmental permit
additional guidance for
Horizontal Guidance Note
H1 - Environmental risk
assessment
for permits



of information and the role of the Qualified Person (QP) as well as broadening the options for the reuse of materials.

The Code of Practice procedures for the re-use of materials on site specifies the characterisation of materials and the production of a Remedial Strategy or Design Statement which has at its core the Materials Management Plan (MMP). Subject to confirming the nature of the material, it may then be reused or treated in order that it is suitable for reuse or if it is surplus to needs or cannot be reused then it shall be disposed of to landfill. Under Version 2 of the CoP it is also possible in certain circumstances to remove materials from the subject site for use on other development sites without the need for waste exemptions and environmental permits.

Where it is proposed to re-use materials which are not considered to be a 'waste' there is still a duty to ensure that the aims of the Waste Framework Directive are not undermined. It must be confirmed that :

- The materials are suitable for its intended purpose in both in terms of chemical and engineering properties.
- The material will actually be used and that the use is not just a probability, but a certainty.
- The materials will be used in the quantities necessary for that use, and no more.
- The use of the material will not pollute the environment or cause harm to human health,

Records must be kept to provide an auditable trail of the activities and on completion of the project a verification report must be prepared. The process specifies an independent review of documentation and the submission of a declaration to the EA by a QP. Version 2 recommends that the ongoing assessment of the project works and Verification Report is undertaken by the QP.


Senior MJCA personnel have significant experience in the production and implementation MMP which predates the CoP guidance. MJCA has a number of registered QPs and our senior personnel have submitted declarations under the QP system and are experienced in waste and permitting matters, developing and implementing remedial strategies and have considerable experience in producing relevant decision support tools and documents such as quantitative risk assessment.

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.

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

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