



Part IIA Contaminated Land

A Local Authority serving a contaminated land remediation notice is a rare event and then suddenly like buses, several arrive at once. A recent legal case (Jim 2) is only the second determination ruled on by the Secretary of State for the Environment since the contaminated land regime came into force in 2001.

There are important legal decisions made on two cases the subject of a remediation notice which highlight the complexity of using Part IIA of the Environmental Protection Act 1990 legislation (the contaminated land regulations) and it is hardly surprising that in the UK the clean up of contaminated land caused as a result of our industrial legacy is dealt with predominantly through the planning process during site redevelopment as this approach provides a simpler framework and often the financial means to do so.

Revised Contaminated Land Statutory Guidance was published by Defra in April 2012 which provides guidance to local authorities on implementing the contaminated land regulations and also introduced a category based system for dealing with the assessment of risks from contaminated land which is intended to provide greater clarity as to what is or is not Contaminated Land. Defra commissioned a series of science and research projects to provide technical information to support the assessment process including the project 'Development of Category 4 Screening Levels for the assessment of land affected by contamination'.

This revised Statutory Guidance together with the end of the funding from the Contaminated Land Capital Grants Scheme by Central Government and taking into account the recent legal rulings for the sites the subject of Remediation Notices means that there is likely to be even more reluctance by a Local Authority to make a determination of Contaminated Land in their area under Part IIA.

Part IIA - site 1

A judgment published by the Court of Appeal in July 2017 overturns a High Court ruling that the Powys County Council could be liable under legislation that was introduced after the council was established in April 1996. The appeal ruled that Part IIA of the Environmental Protection Act 1990 with regard to the contaminated land regime which was introduced in 2001 could not be applied retrospectively. In a previous High Court ruling, Powys County Council was identified as an Appropriate Person under Part IIA of the Environmental Protection Act 1990 despite the legislation not being in place when Powys County Council was established in 1996.

The site is a former landfill which had been operated by Builth Wells Urban District Council. Following government reorganisation of the local authorities in 1974 the council became the Borough of Brecknock who became responsible for the site. The landfill operations ceased in 1992 and in 1996 the Borough of Brecknock council and two other borough councils became part of Powys County Council (Powys CC). Originally Powys CC considered that it had assumed the liabilities of the landfill site, although they later changed their opinion on this matter.

It was accepted in the judgement that the contaminated land regime imposes liabilities

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Part IIA - Site 1 continued



for historical contamination caused by previous activities, although given that the transfer of the site occurred in 1996 and as such before the contaminated land regime came into effect, the key issue considered in the ruling was whether the liabilities could include liabilities under some future regime, given that the activities carried out historically may have been legal at the time.

Giving judgement Lord Justice Lloyd Jones said:

“Part IIA does not operate retroactively so as to deem a predecessor body to have been under a liability which only arose

under legislation which came into force after the predecessor body ceased to exist” and “Part IIA does not operate retrospectively to create a deemed liability prior to its commencement.”

The Court of Appeal accepted that the contaminated land regime was potentially ‘defective’ in that its provisions combined with those governing succession of liability “...may give rise to gaps in the scheme of responsibility”. As such this ruling could have national significance for other local authorities where there has been a transfer of administration.

Part IIA - Site 2

Walsall Metropolitan Borough Council (WMBC) served a Remediation Notice on a developer Jim 2 Limited as an Appropriate Person under Part IIA of the Environmental Protection Act 1990. The developer had redeveloped an old gas works site in the 1970s to build a housing development. In 2007, WMBC investigated the site and considered that part of the site was ‘Contaminated Land’ in accordance with Part IIA of the Environmental Protection Act 1990 and guidance that was relevant at the time. WMBC considered that the presence of benzo(a)pyrene, a polycyclic aromatic hydrocarbon (PAH) and a known carcinogen in the ground presented a health risk to some of the residents on the housing estate. WMBC served a Remediation Notice on Jim 2 in 2012 ordering them to pay the cost of the remediation works. It is understood that WMBC claimed that the cleanup costs on the housing estate could be as much as £2.5 million.

Jim 2 lodged an appeal with the Planning Inspectorate against the notice and following a public inquiry the Secretary of State accepted the recommendations by the Planning Inspectorate and the Remediation Notice served by WMBC was quashed.

The site was the Willenhall Town Gas Works owned by West Midlands Gas Board for the manufacture of town gas which ceased production in 1957 and the site was eventually purchased by WMBC. McClean Homes (now Jim 2) purchased the land and

redeveloped the site in the 1970s to build the Stonegate Housing Estate. At the time part of the site was sold by Jim 2 to another developer E. Fletcher Ltd. This company was dissolved following the initial issue of the Remediation Notice by WMBC identifying them as a potentially liable Appropriate Person. No remediation works were carried out at the site during the development for housing and subsequently the individual housing units were sold to homeowners who may not have been aware of the former use of the site.

The Secretary of State quashed the Remediation Notice on the grounds of failing to act in accordance with guidance issued by the Secretary of State and unreasonably identifying the land as contaminated.

The Secretary of State considered that WMBC had failed to follow contaminated land guidance which had been published in 2006 and which applied at the time WMBC made the determination of the site as Contaminated Land and as such their decision that the site was Contaminated Land was not made based on the principle of ‘sound science’. Although the Remediation Notice was quashed the Secretary of State took the opportunity to provide some further guidance on the matter. The following provides a summary of some of the key points made by the

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Part IIA - Site 2 continued

Secretary of State.

Jim 2 did not cause the contamination, although they knowingly permitted the contamination to be on the land as they had knowledge of the substances and a means to remove it. The Secretary of State concluded that it is only necessary for Jim 2 to know of the presence of the substances and not to know their harmful effects

Given that West Midlands Gas Board introduced the identified contaminant to the site during its operations it would be regarded as the polluter. As to whether the West

Midlands Gas Board should share liability with Jim 2 the inspector decided that West Midlands Gas Board (which no longer existed anyway) was not liable. WMBC also excluded itself and the West Midlands Gas Board as an Appropriate Person in the Remediation Notice applying 'Exclusion test 6' set out in the guidance. This excludes the original polluters where subsequent parties introduce new pathways or receptors. So by developing the land Jim 2 introduced receptors and enabled the West Midlands Gas Board and WMBC to be excluded from liability.

Working with asbestos in soil

CL:AIRE has published recently the Joint Industry Working Group (JIWG) Asbestos in Soil and Construction & Demolition (C&D) Materials guidance entitled "Control of Asbestos Regulations 2012: Interpretation for Managing and Working with Asbestos in Soil and Construction & Demolition materials: Industry Guidance" (CAR-SOILTM). The document has been prepared with the support of the Health and Safety Executive (HSE) and presents an explanation of how the legal requirements of the Control of Asbestos Regulations 2012 (CAR 2012) have been interpreted to apply to work with asbestos contaminated soil and C&D materials. A summary of this publication is presented in the MJCA Contaminated land newsletter dated March 2017 and the CL:AIRE document can be accessed [here](#).

The intention in setting up the JIWG with regard to the assessment and management of asbestos in soil was to bring together those working in contaminated land and those working in the asbestos sector and to help both sectors to understand how each sector operates, the main standard working practices and where possible to harmonise guidance. The Land Forum has decided that the next stage in this process is to help define the competencies for those working with the assessment and management of asbestos in soil and to ensure that suitable training across the contaminated land and the asbestos management sector are harmonised.

The chair of JIWG and the secretariat (CL:AIRE) have discussed asbestos training and suitable qualification schemes for the assessment and management of asbestos in soil

with the UK Asbestos Training Association (UKATA) and the British Occupational Hygiene Society (BOHS). UKATA has recently launched two new courses for asbestos assessment and management in soil in April 2017, which cover an awareness of the nature and properties of asbestos in soils, the effects of asbestos on health and how to avoid the risks from soils and made ground containing asbestos. BOHS are also preparing training courses for asbestos in soils. The Land Forum is to set up a working group to develop industry agreed competencies for working with asbestos in soil to make sure training and guidance are harmonised across the wider industry. The Land Forum consider that it is important for those working in the contaminated land sector to track their competencies for working with asbestos in soils against the National Brownfield Skills Framework (NBSF). The NBSF is developed by the Specialist in Land Condition (SiLC) Register and it is a framework intended to define the capabilities pertinent to practitioners operating within the brownfield, reclamation and regeneration industry. Capabilities are high level descriptions of key behaviours, skills and knowledge that underpin effective performance. These define what effective performers actually understand, apply or demonstrate in most situations, most of the time, to achieve the best results. The capabilities within the framework are pertinent to all those working in the industry, encompassing private and public sectors. This framework will promote development of capability within industry by engaging individuals and organisations in

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Working with asbestos in soil continued

proactive and progressive skills development. In support of the NBSF, the SiLC Register has developed a skills framework tool to assist individuals and organisations to record and monitor capabilities which can be used as part of a

performance review and/or appraisal processes and to drive improvements in the performance of individuals. Further details of the current framework can be found [here](#).

New British Standard

The British Standards Institution has recently adopted the European Standard EN ISO 11504:2017, prepared by Technical Committee ISO/TC 190 "Soil quality" in collaboration with Technical Committee CEN/TC 345 "Characterization of soils". The document is entitled 'Soil quality - Assessment of impact from soil contaminated with petroleum hydrocarbons'. The document can be purchased from the British Standards Institution, access [here](#).

The purpose of the British Standards document is to provide recommendations with respect to the choice of relevant hydrocarbon fractions and individual organic compounds in the assessment of impacts from soil contamination and to give guidance on the appropriate use of the analytical data. Decisions on which analytical methods to use are based primarily on the need to provide suitable data and how best to use hydrocarbon fractions in exposure models and in risk assessments.

Petroleum hydrocarbons are common pollutants in the environment. They are associated with industrial facilities in the oil sector such as refining, distribution and sales, but also present on many sites where petroleum hydrocarbons are used in manufacturing and where fuel or lubricants are stored. Their occurrence as a pollutant in soils is from operational activities, spills and leaks generally.

Petroleum hydrocarbons can be present in soils at concentrations which can result in unacceptable risks to human health, ecological systems, surface water and groundwater resources and to structures and building materials. The measurement by analytical methods of the concentrations of total petroleum hydrocarbons (TPH) in soil does not provide all the information necessary to evaluate the potential risks to human health and the environment as there exist a variety of physico-chemical properties

for the range of compounds found in petroleum hydrocarbons each with differences in the migration and fate of individual compounds in the environment and the toxicity and carcinogenicity of different fractions and compounds in hydrocarbons. A petroleum hydrocarbon product typically consists of a mixture of a large number of individual compounds. When assessing exposure and risk related to a mixture of compounds, such as in a petroleum hydrocarbon product, evaluation has to be made with respect to the migration, fate and toxicity of the different compounds in the mixture as well as the toxicity of the overall mixture. Petroleum hydrocarbons which enter the ground will also change composition over time for example from biodegradation activity, thus the toxicity of the resulting mixture may vary with both time and distance from the source zone. Given that only a limited number of individual compounds can be routinely identified and quantified, it is important that methods of analysis are used which provide information about the type and amount of different hydrocarbon fractions and the concentrations of individual compounds which may be the contaminants of concern with respect to the potential human health and environmental risks that they pose.

The British Standards document also addresses some of the issues in relation to site investigation and sampling, highlighting variations in the ground conditions and suitable handling practices as well as the variation in the analysis of TPH and the need for other more detailed analysis where necessary. There are some helpful summary tables in the standard providing information physico-chemical properties of different petroleum hydrocarbons.

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Environment Agency Vulnerability Maps

The Environment Agency are updating their groundwater vulnerability maps to reflect improvements in data mapping and understanding of the factors affecting vulnerability. They have published a report entitled 'New groundwater vulnerability mapping methodology' which provides technical information about how the new maps have been created and outlines the kinds of activities the new maps can be used for. A summary guide has also been published which can be viewed [here](#).

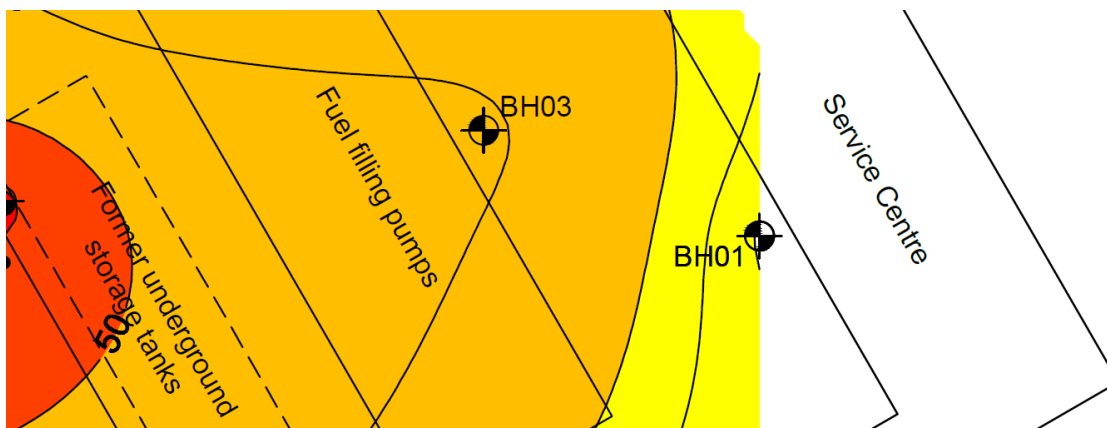
The report has been published in advance of the release of the new maps to provide an opportunity for the sector to understand the new approach and how this differs from the previous groundwater vulnerability maps. The maps will provide key evidence for the Environment Agency's assessment of the exposure of groundwater to a pollution hazard from a given activity as part of its permitting activity work. They form part of a suite of tools developed by the Environment Agency for groundwater protection, including source protection zones and position statements. Further information on groundwater protection can be found in the Environment Agency's document Groundwater Protection: principles and practice (GP3) guidance, which can be viewed at this [link](#).

The main changes between the old and new maps are as follows:

- The new maps provide a separate assessment of vulnerability of the groundwater in bedrock and the groundwater in the overlying superficial strata
- The vulnerability assessment is carried out at a 1km square resolution using the dominant hydrological, geological, hydrogeological and soils data within the 1km square area
- The aquifer designation classifications of some rock types have been changed from non-aquifers to secondary aquifers in recognition of their importance for local water supplies and base flows to rivers.
- The changes have resulted in an increase in the area of land that is more vulnerable and which it is considered may need protection of the aquifers. This is a precautionary approach to the assessment of a potential risk to groundwater within each 1km square and may not reflect the actual ground conditions at a specific site

The new maps for England can be viewed at this [link](#). They will be freely available for non-commercial users from the Environment Agency and will be available for viewing on the Environment Agency's website. The British Geological Survey will provide the data for a fee for commercial users. The new groundwater vulnerability maps for Wales have been developed by Natural Resources Wales using the same methods.

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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 enables 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.



Sustainable remediation

The International Organization for Standardization (ISO) has published ISO 18504:2017 which provides procedures on sustainable remediation and in particular:

Standard methodology, terminology and information about the key components and aspects of sustainable remediation assessment;

Informative advice on the assessment of the relative sustainability of alternative remediation strategies.

ISO 18504:2017 will be adopted as a British Standard. ISO 18504:2017 is intended to inform practitioners about contemporary understanding of sustainable remediation. It is not intended to prescribe which methods of assessment, indicators or weights to use, rather, it is intended to inform consideration of the concept of sustainable remediation at local legal

and policy level and in a socio-economic and environmental context.

The scope of ISO 18504:2017 is restricted to sustainable remediation that can demonstrate breaking the source-pathway-receptor linkages and in a manner that has been shown on a site-specific basis under a specific legal context to be sustainable.

