

## Part IIA – Cases on the Contaminated Land Regime, and Future Legislative Changes

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### Introductory Background

*“The regime places a duty on local authorities, as the primary regulators, to identify and secure the remediation of contaminated land in their respective areas. It was introduced to provide an improved system for the identification and remediation of land where historical contamination is causing unacceptable risks to human health or the wider environment, assessed in the context of the current use and circumstances of the land. Although the regime is based on the polluter pays principle, local authorities also have powers to carry out remediation work at their own hand where polluters/owners cannot be traced, cannot pay for remediation for reasons of hardship, or where the local authority owns the land.”<sup>1</sup>*

According to SEPA<sup>2</sup>, ten contaminated land sites have been identified in Scotland. Eight of these sites have been identified on the basis of water pollution alone and two of the sites have been identified due to risks to human health alone. Two of these have been designated as special sites. Where a contaminated land site is designated as a ‘special site’ In England, as at 1 July 2007, a total of 538 sites had been classed as contaminated, of which 29 have been designated as special sites. The following table is reproduced from the DEFRA website<sup>3</sup>.

#### How many sites have been determined as "contaminated land" under Part 2A?

Part 2A regulatory activity <sup>1</sup> - England <sup>2</sup>						
	LA determinations <sup>3</sup>	Special sites <sup>4</sup>	Remediation statements <sup>5</sup>	Remediation notices <sup>6</sup>	Remediation declarations <sup>7</sup>	Special site inspections <sup>8</sup>
2000/01	44	2	1	0	0	7
2001/02	19	11	38 (1 special)	2	0	22

<sup>1</sup> Environmental Protection Act 1990: Part IIA Contaminated Land Statutory Guidance: Edition 2 (Scottish Executive, June 2006).

<sup>2</sup> <http://www.sepa.org.uk/contaminated-land/extent/2.htm>.

<sup>3</sup> <http://www.defra.gov.uk/environment/land/contaminated/faq.htm>.

2002/03	38	2	12 (8 special)	1	0	28
2003/04	10	5	3	1	0	42
2004/05	223	1	17 (4 special)	0	1	26
2005/06	194	6	13 (6 special)	1 (1 special)	0	3
2006/07	10	2	105 (2 special)	0	0	N/A
2007/08 <sup>9</sup>	0	0	0	0	0	N/A
Totals	538	29	189 (21 special)	5 (1 special)	1 (0 special)	128

1. note that land is also investigated and remediated without the formal application of Part IIA.
2. figures may change from time to time to reflect new or updated information from local authorities, provided to the Environment Agency. They may also be amended by a formal quality assurance exercise by the Agency when compiling the next State of Contaminated Land Report in 2007.
3. formal determinations of particular land as "contaminated land" under Part 2A, following detailed investigation. A case may involve a number of determinations of separate plots or parcels of land. A single determination may result in a multiplicity of notices, statements and declarations.
4. special sites are "contaminated land" for which the Environment Agency, not the local authority, is the enforcing authority. This is therefore a subset of the sites determined by LAs.
5. "contaminated land" for which appropriate remediation has been formally secured by the LA or the Agency under Part 2A, without service of a remediation notice. Bracketed numbers indicate how many of the main figure concern special sites.
6. notices served by the enforcing authority requiring remediation. Bracketed numbers indicate how many of the main figure concern special sites.
7. declaration by the enforcing authority recording actions precluded from inclusion in any remediation notice. Bracketed numbers indicate how many concern special sites.
8. cases where the Environment Agency has agreed to inspect on behalf of the LA, with a view to possible determination of the site as "contaminated land" and designation as a special site.
9. as at 1 July 2007.

Apart from being more informative, the DEFRA published statistics suggest that it has only been in recent years that there has been any serious activity on the part of local authorities in

England to make detailed investigations of potential contaminated land sites. However these figures also have to be approached with a degree of caution. According to an ENDS Report in April 2006<sup>4</sup>, as at March 2006 there had been 576 determinations for England, Wales and Scotland (of which only 6 were Scottish), but these 576 notices only covered 89 different cases. That means that many of the cases give rise to more than one notice, and the same Report also noted that in one instance 110 notices had been served in respect of houses built on a 1930's housing estate. This suggests that within the UK as a whole local authorities are making very few determinations, and in Scotland a very low level of determinations are being made having regard to the country's industrial history. That is not necessarily indicative of a lack of interest or work by local authorities, because it could mean that other means are being employed to deal with contamination issues. The preferred option of the government in both Scotland and England has been for contaminated land to be dealt with as part of the planning and development process. However there are difficult issues which arise from cases of historic contamination. Because of these difficulties it would be surprising to find that the lack of local authority determinations is explained solely by the fact that historically contaminated land is being extensively cleaned up as part of the redevelopment of such sites.

### **Case Law Developments**

The most obvious problem associated with trying to remedy any harm caused by historic contamination is in deciding the nature and extent of any remediation works which might be required, the cost of such works and identifying how these should be paid for. There will be many occasions where remediation works are necessary and there is no development proposal in the offing which might allow for a clean up to be undertaken as part of the development process. In these circumstances the 1990 Act requires either that the necessary work is the responsibility of an 'appropriate person', or that the enforcing authority may do the work and recover the cost of doing so<sup>5</sup>.

An 'appropriate person' is defined as either being any person or persons who caused or knowingly permitted the substances giving rise to the contaminated land being in, on or under that land, or as the owner or occupier of the land in question<sup>6</sup>. In *Circular Facilities*

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<sup>4</sup> ENDS 2006, 375, 35-39.

<sup>5</sup> Environmental Protection Act 1990, sections 78E, 78N and 78P.

<sup>6</sup> Environmental Protection Act 1990, section 78F.

*(London) Limited v Sevenoaks District Council*<sup>7</sup>, it was held that it was possible for a developer who had knowledge of contamination having taken place prior to their ownership to be an ‘appropriate person’. The court also made the obiter comment that under Section 78F(9) of the 1990 Act it did not matter that the person who had caused or knowingly permitted a substance (‘Substance A’) to be in or under that land was unaware of the potential for a chemical reaction or biological process to take place which would affect Substance A. If the enforcing authority carries out the work it has to decide whether to recover the reasonable cost of doing so from an appropriate person. In deciding that question it has to have regard to any hardship which might be caused to that person as a result of the decision, and to any guidance issued on that subject<sup>8</sup>.

The potential cost of remediation has long been recognised as an issue which was likely to cause problems. In *X v A and others*<sup>9</sup> a trustee under a will applied to the court for directions because of concerns about the potential liability for remediation costs which might arise under Part IIA. At the time of the application the land had not actually been identified as being contaminated, and Part IIA had not even been brought into force. The court decided in that case that the trustee had a lien over the trust funds, and that this lien extended to contingent liabilities, including those which might arise after commencement of the legislation. In *Environment Agency v Hillridge Limited*<sup>10</sup>, the Environment Agency sought to recover its expenses from funds which were held in trust by a local authority to pay for site restoration and aftercare in respect of conditions attached to what had started off as a waste disposal licence under the Control of Pollution Act 1974. The licence holder and its parent company both went into voluntary liquidation, and the Agency applied to the court for recourse to the trust funds. The court held that the trust funds did not belong to the liquidators because they had declaimed the waste management licence as an onerous asset, and so could not benefit from funds held to fulfil the obligations under the licence. However, the Agency had no right to these funds either because the provisions of the trust deed were

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<sup>7</sup> [2005] Env LR 35. On the facts of that case it had not been established whether or not the company or its controlling mind actually had that knowledge at the time. Because of the lack of clarity in the judgement the court ordered a re-trial. Faced with either appealing the High Court’s decision to the Court of Appeal, or the cost of a retrial (neither of which contained any certainty of outcome for either party) the Council reached a settlement with the developer under which it withdrew the remediation notice and sought to recover some of the remediation costs from the Environment Department’s contaminated land capital support fund. These costs were however a ‘drop in the ocean’ compared to the council’s legal bills, Source: ENDS 2006, 375, 17.

<sup>8</sup> Environmental Protection Act 1990, section 78P(2).

<sup>9</sup> [2000] Env LR 104.

<sup>10</sup> [2004] Env LR 32.

not directed to any liability under Part IIA of the 1990 Act and only allowed the Agency to have use of the funds in certain limited circumstances as provided for in Section 42 of the 1990 Act. These provisions concerning waste management licences did not include a power to carry out works to remediate contaminated land and to recover the cost. The result was that the trust funds vested in the Crown as *bona vacantia*.

### **The National Grid Gas Case**

The most recent case concerning liabilities for contaminated land is *R (on the application of National Grid Gas Plc (formerly Transco Plc)) v Environment Agency*<sup>11</sup>, a decision of the House of Lords on appeal from an earlier decision by Mr. Justice Forbes<sup>12</sup>. The case has also been referred to as ‘the Bawtry case’, and as ‘the Transco case’.

The background to the case is that in the late 1960’s 11 houses were built on a brownfield site in Bawtry, Doncaster. That site had previously been owned by the Bawtry and District Gas Company (B&DGC), which had acquired it in 1912 and built on it a gas works which became operational in 1915. In 1931 the B&DGC merged with the South Yorkshire and Derbyshire Gas Company and the amalgamated company continued gas production at the Bawtry site. The gas industry was nationalised by the Gas Act 1948, after which the site was owned and controlled by the East Midlands Gas Board. However gas production at the site was discontinued shortly after nationalisation and in 1965 the site was sold to a housing developer. Seven of the houses were, for a time, owned by the Secretary of State for Defence but subsequently all 11 passed into private ownership. While the site was owned by the private gas companies coal tar residue, a by product of the gas manufacturing process, was buried on site, and this may have continued for a short time after nationalisation. At that time it was not considered dangerous to leave coal tar residues in the ground provided that they were properly contained. The Gas Act 1948 had provided that on the vesting date the property, rights, liabilities and obligations of a private undertaker which existed immediately before that date vested in Area Gas Board. By the Gas Act 1972 the Area Gas Boards were abolished and any existing property, rights, liabilities and obligations were transferred to the British Gas Corporation (‘the BGC’) which remained in state ownership. The Gas Act 1986 created British Gas plc, and all the property, rights and liabilities to which BGC had been

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<sup>11</sup> [2007] 1 WLR 1780.

<sup>12</sup> [2006] 1 W.L.R. 3041.

entitled or were liable immediately before that date became the property, rights and liabilities of British Gas plc.

After a series of corporate re-organisations in the 1990s, the part of British Gas plc's undertaking concerned with the transportation and storage of gas devolved on Transco. At the time of the privatisation of British Gas plc the Bawtry site had been sold for housing over 20 years earlier and was not transferred to British Gas. It should also be noted that any liabilities created by the Environmental Protection Act 1990 did not exist in 1986 when British Gas plc was floated. Furthermore the contaminated land regime set out in the 1990 Act was not introduced until the Environment Act 1995.

The main issue underlying the case came to be who should be considered to be the 'appropriate person' under Section 78F to bear the responsibility for remediation of the Bawtry site. The estimated cost of the remediation works was in the range of £400,000 - £700,000. The pre-nationalisation gas companies, and the East Midlands Gas Board were all involved in creating the contamination, but each of these had been dissolved. The house building companies had been aware of the presence of the coal tar in the ground and had allowed it to remain in place. Arguably they might have been liable for knowingly permitting the coal tar to remain under the land in question. However both house building companies involved had also been dissolved before the 1995 Act. There was not enough information to suggest that the Ministry of Defence had any knowledge of the presence of contamination. Nor was there evidence to suggest that the local planning authority had sufficient information about the presence of contaminants as to be considered liable for 'knowingly permitting'. The Environment Agency decided that it was not appropriate to look to the present house owners themselves having regard to the fact that they had bought the properties in good faith and without notice of the contaminated condition of the land. In addition any liability for the owners would cause considerable hardship. Apart from paying for the cost out of public funds, the only alternative remaining was to find Transco, as it then was, responsible as the successors to the liabilities of the pre-1980's gas companies. In 2005 they made a decision to that effect. Transco then applied for an order to have that decision quashed.

The Environment Agency's had argued successfully before Forbes J that in construing who was to be an 'appropriate person', person did not just mean the original polluter but it also included any other legal person that had succeeded to the liabilities of the original polluter.

Forbes J also accepted that the liabilities could arise under the 1995 amendments to the 1990 Act in respect of events which had taken place long before that legislation had been enacted, and that the liabilities that Transco succeeded to included potential liabilities which arose under future legislation. Transco appealed against the dismissal of their application, and the appeal leapfrogged the Court of Appeal and went straight to the House of Lords.

In the Lords the decision of Forbes J was reversed on the unanimous views of all 5 Law Lords. There are three reasoned speeches – given by Lord Hoffman, Lord Scott of Foscote, and Lord Neuberger of Abbotsbury. None of the speeches are particularly long, but Lord Hoffman is the most succinct. Dealing with the issue of the statutory interpretation of ‘appropriate person’ in Section 78F(2) of the 1990 Act he points out that as a matter of fact National Grid Gas did not cause or knowingly permit any substances to be in, on or under the land, and that the Gas Board and its predecessors had been those responsible. The Act did not make any deeming provision to include persons other than those actually involved, and therefore National Grid Gas ‘is plainly not an appropriate person’<sup>13</sup>. As for the argument that the liabilities of inherited by Transco included a contingent liability under future legislative provisions, it was impossible to say that this was a liability which had existed immediately before any of the transfers that had taken place in 1948, 1972 or 1986. There was nothing in the 1995 Act to create a deemed past liability for the actions or inactions of other persons. Lord Scott and Lord Neuberger delivered speeches to same effect, although a bit lengthier and emphasising even more the requirement for clear and careful language before a statute would be considered to impose a liability on an innocent party for the actions of its guilty predecessors. British Gas plc in 1986 could not be considered to be liable for something which did not exist as a liability until after 1995, it had no involvement in the site at all, and its predecessor’s had had no involvement in the site since 1965.

### **Consequences of the *National Grid Gas* case?**

The most immediate clear consequence of the House of Lords decision is that what the statutory guidelines describe as a Class A ‘appropriate person’ (that is the person who actually causes or knowingly permits the contamination to be present per Section 78F(3)) is limited to the person who actually caused or knowingly permitted the contamination. Where

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<sup>13</sup> Lord Hoffman, [2007] 1 WLR 1780 @1781, paragraph 2.

the original polluter has ceased to exist it will become much harder to establish that any successor to that polluter's business has any future liability for carrying out remediation works, or for paying for such works.

For site owners and developers little has changed. Those who were actually responsible for any historic contamination or who knowingly allowed the substance to be in on or under the land will be liable under Section 78F(2) of the 1990 Act. Those who become owners or occupiers after the event may become liable under Section 78F(4) or (5)<sup>14</sup>. Developers will require to ensure that appropriate investigations are carried out and that development proposals make adequate provision for potential environmental liabilities. The need for careful investigation beforehand of potential liabilities when acquiring brownfield sites or already developed sites, and to take these fully into account when preparing missives, already existed. What the House of Lords decision does is underline the need for thorough and robust 'due diligence' checks in commercial property transactions, and also in non-commercial property transactions.

For local authorities the position is not so clear because of the multiple hats they wear in respect of the issues involved. Many local authorities in their Victorian guises were the operators of gas, electricity and water companies. These companies were responsible for a lot of historic polluting activities. As a result of the House of Lords decision, it is less likely that that they will be looking to themselves as a Class A appropriate person. But local authorities as a planning authority might have knowledge of historic contamination. In the *National Grid Gas* case the Environment Agency had decided on the facts that the planning authority did not in fact have sufficient knowledge for them to be liable for having knowingly permitted the contamination. In different factual circumstances there could be a different conclusion.

Local authorities are also the principal regulator under the 1990 Act, and they will have to decide who should be served with a remediation notice, or who has to contribute to the clean-up costs – this may be an innocent owner or occupier, or they may want to look to central government funding. This funding is likely to come under more pressure as a result of the House of Lords decision. Some £44 million was distributed to local authorities in Scotland

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<sup>14</sup> A 'Class B' appropriate person – see Chapter D of Annex 3 to Environmental Protection Act 1990: Part IIA Contaminated Land, Statutory Guidance: Edition 2 (2006).

for the investigation of sites, enforcement action and remediation work over the years 2000-2001 to 2006-2007, including two tranches of End Year Flexibility funding of £3.9 million and £10.7 million in December 2002 and December 2004 respectively for dealing with contamination at specific sites causing public health risks or blighting communities. £18.2 million is being made available to local authorities in 2007-08 for Contaminated Land work. This includes £13.2 million announced in December for specific remediation projects. The remaining funds will help local authorities to investigate sites, take forward enforcement action and, if they are unable to identify those responsible for the contamination, to make a start on remediation<sup>15</sup>.

### **What does the future hold?**

It would be fair to say that not everyone is happy about the final outcome of the case. There has been some criticism of the rejection of what was argued as being a purposive interpretation of the legislation, and a concentration on the interests of the investors in British Gas at the time of privatisation. The rejection of the Environment Agency's case has been said to be at odds with the philosophy behind Part IIA of the 1990 Act. Despite those criticisms, there has been no indication given of any legislative changes directly arising from the *National Grid Gas* case. However a number of legislative initiatives are in train. The most imminent is the Soil Framework Directive. As this is to be covered by Antje Branding in the presentation immediately following on from this, then I will not say any more about it.

Consultation on options for implementing the Environmental Liability Directive have also taken place. This subject has been covered by Vincent Brown and Alison McKay in their presentation earlier this morning, and I will not say anything about it.

One further area of interest to note is a change in the Landfill Tax regime and the ending of the exemption for waste arising from the clearing of contaminated land. This proposal was set out in a Consultation Paper from HM Treasury in 2007<sup>16</sup>. The consultation suggested ending this exemption to encourage on-site or off-site remediation. It also asked whether Government support for the clean up of contaminated land would be more effectively

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<sup>15</sup> Source: <http://www.scotland.gov.uk/Topics/Environment/Pollution/17314/8939>.

<sup>16</sup> *Tax Incentives for development of brownfield land: a consultation*, H M Treasury, March 2007.

delivered through enhancements to land remediation relief rather than the existing exemption from Landfill Tax for waste from contaminated land. The Treasury's response to the consultation exercise was published in December 2007<sup>17</sup>. This indicates that there is a majority of industry support for this change, arguing that land remediation relief would be a better form of support. The response document stated that if the Government decide to proceed with the abolition of the landfill tax exemption it will do so by secondary legislation and is minded to make transitional arrangements. These are:

- A deadline of 30 November 2008 for receipt of applications for exemption certificates;
- All certificates granted after a Budget 2008 announcement would have an end date of 31 March 2010 recorded on them and legislation laid in Autumn 2008 would ensure that all certificates, including those issued prior to the Budget 2008 announcement would cease to have effect after 31 March 2010; and
- Waste disposed of to landfill on or after 1 April 2010 would not be entitled to the contaminated land tax exemption.

These proposals are to be the subject of further discussion with interested parties. The response document also states that the Government remains committed to ensuring that the overall support for the remediation of hard to remediate sites is not less after reform than it is at present.

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<sup>17</sup> Available at [http://www.hm-treasury.gov.uk./media/6/9/consult\\_brownfieldresponse141207.pdf](http://www.hm-treasury.gov.uk./media/6/9/consult_brownfieldresponse141207.pdf).

## Extracts from Environmental Protection Act 1990, Part IIA

### 78A.— Preliminary.

(1) The following provisions have effect for the interpretation of this Part.

(2) “Contaminated land” is any land which appears to the local authority in whose area it is situated to be in such a condition, by reason of substances in, on or under the land, that—

- (a) significant harm is being caused or there is a significant possibility of such harm being caused; or
- (b) significant pollution of the water environment is being caused or there is a significant possibility of such pollution being caused.

and, in determining whether any land appears to be such land, a local authority shall, subject to subsection (5) below, act in accordance with guidance issued by the Secretary of State in accordance with section 78YA below with respect to the manner in which that determination is to be made.

(3) A “special site” is any contaminated land—

- (a) which has been designated as such a site by virtue of section 78C(7) or 78D(6) below; and
- (b) whose designation as such has not been terminated by the appropriate Agency under section 78Q(4) below.

(4) Subject to subsection (4A), “harm” means harm to the health of living organisms or other interference with the ecological systems of which they form part and, in the case of man, includes harm to his property.

(4A) “Harm”, in relation to the water environment has the same meaning as in section 20(6) of the Water Environment and Water Services (Scotland) Act 2003.

(5) The questions—

- (a) what harm or pollution of the water environment is to be regarded as “significant”,
- (b) whether the possibility of significant harm or of significant pollution of the water environment being caused is “significant”,

shall be determined in accordance with guidance issued for the purpose by the Secretary of State in accordance with section 78YA below.

(6) Without prejudice to the guidance that may be issued under subsection (5) above, guidance under paragraph

(a) of that subsection may make provision for different degrees of importance to be assigned to, or for the disregard of,—

- (a) different descriptions of living organisms or ecological systems or substances which may give rise to pollution;
  - (b) different descriptions of places or of the water environment, or different degrees of pollution; or
  - (c) different descriptions of harm to health or property, or other interference;
- and guidance under paragraph (b) of that subsection may make provision for different degrees of possibility to be regarded as “significant” (or as not being “significant”) in relation to different descriptions of significant harm or of significant pollution.

(7) “Remediation” means —

(a) the doing of anything for the purpose of assessing the condition of—

- (i) the contaminated land in question;
- (ii) the water environment affected by that land; or
- (iii) any land adjoining or adjacent to that land;

(b) the doing of any works, the carrying out of any operations or the taking of any steps in relation to any such land or the water environment for the purpose—

- (i) of preventing or minimising, or remedying or mitigating the effects of, any significant harm, or any significant pollution of the water environment, by reason of which the contaminated land is such land; or
- (ii) of restoring the land or water environment to its former state; or

(c) the making of subsequent inspections from time to time for the purpose of keeping under review the condition of the land or the water environment;

and cognate expressions shall be construed accordingly.

(8) The water environment is “affected by” contaminated land if (and only if) it appears to the enforcing authority that the contaminated land in question is, for the purposes of subsection (2) above, in such a condition, by reason of substances in, on or under the land, that significant pollution of the water environment is being caused or there is a significant possibility of such pollution being caused.

(9) The following expressions have the meaning respectively assigned to them—

“the appropriate Agency” means —

- (a) in relation to England and Wales, the Environment Agency;
- (b) in relation to Scotland, the Scottish Environment Protection Agency;

“appropriate person” means any person who is an appropriate person, determined in accordance with section 78F below, to bear responsibility for any thing which is to be done by way of remediation in any particular case;

“charging notice” has the meaning given by section 78P(3)(b) below;

“creditor” has the same meaning as in the Conveyancing and Feudal Reform (Scotland) Act 1970; “enforcing authority” means —

(a) in relation to a special site, the appropriate Agency;

(b) in relation to contaminated land other than a special site, the local authority in whose area the land is situated;

“heritable security” has the same meaning as in the Conveyancing and Feudal Reform (Scotland) Act 1970;

“local authority” in relation to England and Wales means —

(a) any unitary authority;

(b) any district council, so far as it is not a unitary authority;

(c) the Common Council of the City of London and, as respects the Temples, the Sub-Treasurer of the Inner Temple and the Under-Treasurer of the Middle Temple respectively;

[(d) the Council of the Isles of Scilly;

and in relation to Scotland means a council for an area constituted under section 2 of the Local Government etc. (Scotland) Act 1994;

“notice” means notice in writing;

“notification” means notification in writing

“owner”, in relation to any land in England and Wales, means a person (other than a mortgagee not in possession) who, whether in his own right or as trustee for any other person, is entitled to receive the rack rent of the land, or, where the land is not let at a rack rent, would be so entitled if it were so let;

“owner”, in relation to any land in Scotland, means a person (other than a creditor in a heritable security not in possession of the security subjects) for the time being entitled to receive or who would, if the land were let, be entitled to receive, the rents of the land in connection with which the word is used and includes a trustee, factor, guardian or curator and in the case of public or municipal land includes the persons to whom the management of the land is entrusted;

“pollution”, in relation to the water environment, means the direct or indirect introduction, as a result of human activity, of substances into the water environment, or any part of it, which may give rise to any harm;

“prescribed” means prescribed by regulations;

“regulations” means regulations made by the Secretary of State;

“remediation declaration” has the meaning given by section 78H(6) below;

“remediation notice” has the meaning given by section 78E(1) below; “remediation statement” has the meaning given by section 78H(7) below;

“required to be designated as a special site” shall be construed in accordance with section 78C(8) below;

“substance” means any natural or artificial substance, whether in solid or liquid form or in the form of a gas or vapour;

“unitary authority” means —

(a) the council of a county, so far as it is the council of an area for which there are no district councils;

(b) the council of any district comprised in an area for which there is no county council;

(c) the council of a London borough;

(d) the council of a county borough in Wales.

“the water environment” has the same meaning as in section 3 of the Water Environment and Water Services (Scotland) Act 2003;

### **78B.— Identification of contaminated land.**

(1) Every local authority shall cause its area to be inspected from time to time for the purpose—

(a) of identifying contaminated land; and

(b) of enabling the authority to decide whether any such land is land which is required to be designated as a special site.

(2) In performing its functions under subsection (1) above a local authority shall act in accordance with any guidance issued for the purpose by the Secretary of State in accordance with section 78YA below.

(3) If a local authority identifies any contaminated land in its area, it shall give notice of that fact to—

(a) the appropriate Agency;

(b) the owner of the land;

(c) any person who appears to the authority to be in occupation of the whole or any part of the land; and

(d) each person who appears to the authority to be an appropriate person;

and any notice given under this subsection shall state by virtue of which of paragraphs (a) to (d) above it is given.

(4) If, at any time after a local authority has given any person a notice pursuant to subsection (3)(d) above in respect of any land, it appears to the enforcing authority that another person is an appropriate person, the enforcing authority shall give notice to that other person—

- (a) of the fact that the local authority has identified the land in question as contaminated land; and
- (b) that he appears to the enforcing authority to be an appropriate person.[...]

**78C.— Identification and designation of special sites.**

(1) If at any time it appears to a local authority that any contaminated land in its area might be land which is required to be designated as a special site, the authority—

- (a) shall decide whether or not the land is land which is required to be so designated; and
- (b) if the authority decides that the land is land which is required to be so designated, shall give notice of that decision to the relevant persons.

(2) For the purposes of this section, “the relevant persons” at any time in the case of any land are the persons who at that time fall within paragraphs (a) to (d) below, that is to say—

- (a) the appropriate Agency;
- (b) the owner of the land;
- (c) any person who appears to the local authority concerned to be in occupation of the whole or any part of the land; and
- (d) each person who appears to that authority to be an appropriate person.

(3) Before making a decision under paragraph (a) of subsection (1) above in any particular case, a local authority shall request the advice of the appropriate Agency, and in making its decision shall have regard to any advice given by that Agency in response to the request.

(4) If at any time the appropriate Agency considers that any contaminated land is land which is required to be designated as a special site, that Agency may give notice of that fact to the local authority in whose area the land is situated.

(5) Where notice under subsection (4) above is given to a local authority, the authority shall decide whether the land in question—

- (a) is land which is required to be designated as a special site, or
- (b) is not land which is required to be so designated, and shall give notice of that decision to the relevant persons.

(6) Where a local authority makes a decision falling within subsection (1)(b) or (5)(a) above, the decision shall, subject to section 78D below, take effect on the day after whichever of the following events first occurs, that is to say—

- (a) the expiration of the period of twenty-one days beginning with the day on which the notice required by virtue of subsection (1)(b) or, as the case may be, (5)(a) above is given to the appropriate Agency; or
  - (b) if the appropriate Agency gives notification to the local authority in question that it agrees with the decision, the giving of that notification;
- and where a decision takes effect by virtue of this subsection, the local authority shall give notice of that fact to the relevant persons.

(7) Where a decision that any land is land which is required to be designated as a special site takes effect in accordance with subsection (6) above, the notice given under subsection (1)(b) or, as the case may be, (5)(a) above shall have effect, as from the time when the decision takes effect, as the designation of that land as such a site.

(8) For the purposes of this Part, land is required to be designated as a special site if, and only if, it is land of a description prescribed for the purposes of this subsection.

(9) Regulations under subsection (8) above may make different provision for different cases or circumstances or different areas or localities and may, in particular, describe land by reference to the area or locality in which it is situated.

(10) Without prejudice to the generality of his power to prescribe any description of land for the purposes of subsection (8) above, the Secretary of State, in deciding whether to prescribe a particular description of contaminated land for those purposes, may, in particular, have regard to—

- (a) whether land of the description in question appears to him to be land which is likely to be in such a condition, by reason of substances in, on or under the land that—
  - (i) serious harm would or might be caused, or
  - (ii) serious pollution of the water environment would or might be caused;
- (b) whether the appropriate Agency is likely to have expertise in dealing with the kind of significant harm, or significant pollution of [the water environment]<sup>2</sup>, by reason of which land of the description in question is contaminated land.

**78D.— Referral of special site decisions to the Secretary of State.**

- (1) In any case where—
- (a) a local authority gives notice of a decision to the appropriate Agency pursuant to subsection (1)(b) or (5)(b) of section 78C above, but
- (b) before the expiration of the period of twenty-one days beginning with the day on which that notice is so given, that Agency gives the local authority notice that it disagrees with the decision, together with a statement of its reasons for disagreeing,
- the authority shall refer the decision to the Secretary of State and shall send to him a statement of its reasons for reaching the decision.
- (2) Where the appropriate Agency gives notice to a local authority under paragraph (b) of subsection (1) above, it shall also send to the Secretary of State a copy of the notice and of the statement given under that paragraph.
- (3) Where a local authority refers a decision to the Secretary of State under subsection (1) above, it shall give notice of that fact to the relevant persons.
- (4) Where a decision of a local authority is referred to the Secretary of State under subsection (1) above, he—
- (a) may confirm or reverse the decision with respect to the whole or any part of the land to which it relates; and
- (b) shall give notice of his decision on the referral—
- (i) to the relevant persons; and
- (ii) to the local authority.
- (5) Where a decision of a local authority is referred to the Secretary of State under subsection (1) above, the decision shall not take effect until the day after that on which the Secretary of State gives the notice required by subsection (4) above to the persons there mentioned and shall then take effect as confirmed or reversed by him.
- (6) Where a decision which takes effect in accordance with subsection (5) above is to the effect that at least some land is land which is required to be designated as a special site, the notice given under subsection (4)(b) above shall have effect, as from the time when the decision takes effect, as the designation of that land as such a site.
- (7) In this section “the relevant persons” has the same meaning as in section 78C above.[...]

**78E.— Duty of enforcing authority to require remediation of contaminated land etc.**

- (1) In any case where—
- (a) any land has been designated as a special site by virtue of section 78C(7) or 78D(6) above, or
- (b) a local authority has identified any contaminated land (other than a special site) in its area,
- the enforcing authority shall, in accordance with such procedure as may be prescribed and subject to the following provisions of this Part, serve on each person who is an appropriate person a notice (in this Part referred to as a “remediation notice”) specifying what that person is to do by way of remediation and the periods within which he is required to do each of the things so specified.
- (2) Different remediation notices requiring the doing of different things by way of remediation may be served on different persons in consequence of the presence of different substances in, on or under any land or the water environment.
- (3) Where two or more persons are appropriate persons in relation to any particular thing which is to be done by way of remediation, the remediation notice served on each of them shall state the proportion, determined under section 78F(7) below, of the cost of doing that thing which each of them respectively is liable to bear.
- (4) The only things by way of remediation which the enforcing authority may do, or require to be done, under or by virtue of this Part are things which it considers reasonable, having regard to—
- (a) the cost which is likely to be involved; and
- (b) the seriousness of the harm, or of the pollution of [the water environment]<sup>2</sup>, in question.
- (5) In determining for any purpose of this Part—
- (a) what is to be done (whether by an appropriate person, the enforcing authority or any other person) by way of remediation in any particular case,
- (b) the standard to which any land, or the water environment is, to be remediated pursuant to the notice, or
- (c) what is, or is not, to be regarded as reasonable for the purposes of subsection (4) above,
- the enforcing authority shall have regard to any guidance issued for the purpose by the Secretary of State.
- (6) Regulations may make provision for or in connection with—
- (a) the form or content of remediation notices; or
- (b) any steps of a procedural nature which are to be taken in connection with, or in consequence of, the service of a remediation notice.

**78F.— Determination of the appropriate person to bear responsibility for remediation.**

- (1) This section has effect for the purpose of determining who is the appropriate person to bear responsibility for any particular thing which the enforcing authority determines is to be done by way of remediation in any particular case.
- (2) Subject to the following provisions of this section, any person, or any of the persons, who caused or knowingly permitted the substances, or any of the substances, by reason of which the contaminated land in question is such land to be in, on or under that land is an appropriate person.
- (3) A person shall only be an appropriate person by virtue of subsection (2) above in relation to things which are to be done by way of remediation which are to any extent referable to substances which he caused or knowingly permitted to be present in, on or under the contaminated land in question.
- (4) If no person has, after reasonable inquiry, been found who is by virtue of subsection (2) above an appropriate person to bear responsibility for the things which are to be done by way of remediation, the owner or occupier for the time being of the contaminated land in question is an appropriate person.
- (5) If, in consequence of subsection (3) above, there are things which are to be done by way of remediation in relation to which no person has, after reasonable inquiry, been found who is an appropriate person by virtue of subsection (2) above, the owner or occupier for the time being of the contaminated land in question is an appropriate person in relation to those things.
- (6) Where two or more persons would, apart from this subsection, be appropriate persons in relation to any particular thing which is to be done by way of remediation, the enforcing authority shall determine in accordance with guidance issued for the purpose by the Secretary of State whether any, and if so which, of them is to be treated as not being an appropriate person in relation to that thing.
- (7) Where two or more persons are appropriate persons in relation to any particular thing which is to be done by way of remediation, they shall be liable to bear the cost of doing that thing in proportions determined by the enforcing authority in accordance with guidance issued for the purpose by the Secretary of State.
- (8) Any guidance issued for the purposes of subsection (6) or (7) shall be issued in accordance with section 78YA below.
- (9) A person who has caused or knowingly permitted any substance (“substance A”) to be in, on or under any land shall also be taken for the purposes of this section to have caused or knowingly permitted there to be in, on or under that land any substance which is there as a result of a chemical reaction or biological process affecting substance A.
- (10) A thing which is to be done by way of remediation may be regarded for the purposes of this Part as referable to the presence of any substance notwithstanding that the thing in question would not have to be done—
- (a) in consequence only of the presence of that substance in any quantity; or
- (b) in consequence only of the quantity of that substance which any particular person caused or knowingly permitted to be present.[...]

**78H.— Restrictions and prohibitions on serving remediation notices.**

- (1) Before serving a remediation notice, the enforcing authority shall reasonably endeavour to consult—
- (a) the person on whom the notice is to be served,
- (b) the owner of any land to which the notice relates,
- (c) any person who appears to that authority to be in occupation of the whole or any part of the land, and
- (d) any person of such other description as may be prescribed,
- concerning what is to be done by way of remediation.
- (2) Regulations may make provision for, or in connection with, steps to be taken for the purposes of subsection (1) above.
- (3) No remediation notice shall be served on any person by reference to any contaminated land during any of the following periods, that is to say—
- (a) the period—
- (i) beginning with the identification of the contaminated land in question pursuant to section 78B(1) above, and
- (ii) ending with the expiration of the period of three months beginning with the day on which the notice required by subsection (3)(d) or, as the case may be, (4) of section 78B above is given to that person in respect of that land;
- (b) if a decision falling within paragraph (b) of section 78C(1) above is made in relation to the contaminated land in question, the period beginning with the making of the decision and ending with the expiration of the period of three months beginning with—
- (i) in a case where the decision is not referred to the Secretary of State under section 78D above, the day on which the notice required by section 78C(6) above is given, or

(ii) in a case where the decision is referred to the Secretary of State under section 78D above, the day on which he gives the notice required by subsection (4)(b) of that section;

(c) if the appropriate Agency gives a notice under subsection (4) of section 78C above to a local authority in relation to the contaminated land in question, the period beginning with the day on which that notice is given and ending with the expiration of the period of three months beginning with—

(i) in a case where notice is given under subsection (6) of that section, the day on which that notice is given;

(ii) in a case where the authority makes a decision falling within subsection (5)(b) of that section and the appropriate Agency fails to give notice under paragraph (b) of section 78D(1) above, the day following the expiration of the period of twenty-one days mentioned in that paragraph; or

(iii) in a case where the authority makes a decision falling within section 78C(5)(b) above which is referred to the Secretary of State under section 78D above, the day on which the Secretary of State gives the notice required by subsection (4)(b) of that section.

(4) Neither subsection (1) nor subsection (3) above shall preclude the service of a remediation notice in any case where it appears to the enforcing authority that the land in question is in such a condition, by reason of substances in, on or under the land, that there is imminent danger of serious harm, or serious pollution of the water environment, being caused.

(5) The enforcing authority shall not serve a remediation notice on a person if and so long as any one or more of the following conditions is for the time being satisfied in the particular case, that is to say—

(a) the authority is satisfied, in consequence of section 78E(4) and (5) above, that there is nothing by way of remediation which could be specified in a remediation notice served on that person;

(b) the authority is satisfied that appropriate things are being, or will be, done by way of remediation without the service of a remediation notice on that person;

(c) it appears to the authority that the person on whom the notice would be served is the authority itself; or

(d) the authority is satisfied that the powers conferred on it by section 78N below to do what is appropriate by way of remediation are exercisable.

(6) Where the enforcing authority is precluded by virtue of section 78E(4) or (5) above from specifying in a remediation notice any particular thing by way of remediation which it would otherwise have specified in such a notice, the authority shall prepare and publish a document (in this Part referred to as a “remediation declaration”) which shall record—

(a) the reasons why the authority would have specified that thing; and

(b) the grounds on which the authority is satisfied that it is precluded from specifying that thing in such a notice.

(7) In any case where the enforcing authority is precluded, by virtue of paragraph (b), (c) or (d) of subsection (5) above, from serving a remediation notice, the responsible person shall prepare and publish a document (in this Part referred to as a “remediation statement”) which shall record—

(a) the things which are being, have been, or are expected to be, done by way of remediation in the particular case;

(b) the name and address of the person who is doing, has done, or is expected to do, each of those things; and

(c) the periods within which each of those things is being, or is expected to be, done.

(8) For the purposes of subsection (7) above, the “responsible person” is—

(a) in a case where the condition in paragraph (b) of subsection (5) above is satisfied, the person who is doing or has done, or who the enforcing authority is satisfied will do, the things there mentioned; or

(b) in a case where the condition in paragraph (c) or (d) of that subsection is satisfied, the enforcing authority.

(9) If a person who is required by virtue of subsection (8)(a) above to prepare and publish a remediation statement fails to do so within a reasonable time after the date on which a remediation notice specifying the things there mentioned could, apart from subsection (5) above, have been served, the enforcing authority may itself prepare and publish the statement and may recover its reasonable costs of doing so from that person.

(10) Where the enforcing authority has been precluded by virtue only of subsection (5) above from serving a remediation notice on an appropriate person but—

(a) none of the conditions in that subsection is for the time being satisfied in the particular case, and

(b) the authority is not precluded by any other provision of this Part from serving a remediation notice on that appropriate person,

the authority shall serve a remediation notice on that person; and any such notice may be so served without any further endeavours by the authority to consult persons pursuant to subsection (1) above, if and to the extent that that person has been consulted pursuant to that subsection concerning the things which will be specified in the notice.

**78L.— Appeals against remediation notices.**

- (1) A person on whom a remediation notice is served may, within the period of twenty-one days beginning with the day on which the notice is served, appeal against the notice—
- (a) if it was served by a local authority, to a magistrates' court or, in Scotland, to the sheriff by way of summary application; or
- (b) if it was served by the appropriate Agency, to the Secretary of State;
- and in the following provisions of this section “the appellate authority” means the magistrates' court, the sheriff or the Secretary of State, as the case may be.
- (2) On any appeal under subsection (1) above the appellate authority—
- (a) shall quash the notice, if it is satisfied that there is a material defect in the notice; but
- (b) subject to that, may confirm the remediation notice, with or without modification, or quash it.
- (3) Where an appellate authority confirms a remediation notice, with or without modification, it may extend the period specified in the notice for doing what the notice requires to be done.
- (4) Regulations may make provision with respect to—
- (a) the grounds on which appeals under subsection (1) above may be made;
- (b) the cases in which, grounds on which, court or tribunal to which, or person at whose instance, an appeal against a decision of a magistrates' court or sheriff court in pursuance of an appeal under subsection (1) above shall lie; or
- (c) the procedure on an appeal under subsection (1) above or on an appeal by virtue of paragraph (b) above.
- (5) Regulations under subsection (4) above may (among other things)—
- (a) include provisions comparable to those in section 290 of the Public Health Act 1936 (appeals against notices requiring the execution of works);
- (b) prescribe the cases in which a remediation notice is, or is not, to be suspended until the appeal is decided, or until some other stage in the proceedings;
- (c) prescribe the cases in which the decision on an appeal may in some respects be less favourable to the appellant than the remediation notice against which he is appealing;
- (d) prescribe the cases in which the appellant may claim that a remediation notice should have been served on some other person and prescribe the procedure to be followed in those cases;
- (e) make provision as respects—
- (i) the particulars to be included in the notice of appeal;
- (ii) the persons on whom notice of appeal is to be served and the particulars, if any, which are to accompany the notice; and
- (iii) the abandonment of an appeal;
- (f) make different provision for different cases or classes of case.
- (6) This section, so far as relating to appeals to the Secretary of State, is subject to section 114 of the Environment Act 1995 (delegation or reference of appeals etc).

**78N.— Powers of the enforcing authority to carry out remediation.**

- (1) Where this section applies, the enforcing authority shall itself have power, in a case falling within paragraph (a) or (b) of section 78E(1) above, to do what is appropriate by way of remediation to the relevant land or the water environment.
- (2) Subsection (1) above shall not confer power on the enforcing authority to do anything by way of remediation if the authority would, in the particular case, be precluded by section 78YB below from serving a remediation notice requiring that thing to be done.
- (3) This section applies in each of the following cases, that is to say—
- (a) where the enforcing authority considers it necessary to do anything itself by way of remediation for the purpose of preventing the occurrence of any serious harm, or serious pollution of [the water environment]<sup>2</sup>, of which there is imminent danger;
- (b) where an appropriate person has entered into a written agreement with the enforcing authority for that authority to do, at the cost of that person, that which he would otherwise be required to do under this Part by way of remediation;
- (c) where a person on whom the enforcing authority serves a remediation notice fails to comply with any of the requirements of the notice;
- (d) where the enforcing authority is precluded by section 78J or 78K above from including something by way of remediation in a remediation notice;
- (e) where the enforcing authority considers that, were it to do some particular thing by way of remediation, it would decide, by virtue of subsection (2) of section 78P below or any guidance issued under that subsection,—
- (i) not to seek to recover under subsection (1) of that section any of the reasonable cost incurred by it in doing that thing; or

- (ii) to seek so to recover only a portion of that cost;
- (f) where no person has, after reasonable inquiry, been found who is an appropriate person in relation to any particular thing.
- (4) Subject to section 78E(4) and (5) above, for the purposes of this section, the things which it is appropriate for the enforcing authority to do by way of remediation are—
  - (a) in a case falling within paragraph (a) of subsection (3) above, anything by way of remediation which the enforcing authority considers necessary for the purpose mentioned in that paragraph;
  - (b) in a case falling within paragraph (b) of that subsection, anything specified in, or determined under, the agreement mentioned in that paragraph;
  - (c) in a case falling within paragraph (c) of that subsection, anything which the person mentioned in that paragraph was required to do by virtue of the remediation notice;
  - (d) in a case falling within paragraph (d) of that subsection, anything by way of remediation which the enforcing authority is precluded by section 78J or 78K above from including in a remediation notice;
  - (e) in a case falling within paragraph (e) or (f) of that subsection, the particular thing mentioned in the paragraph in question.
- (5) In this section “relevant land or water environment” means—
  - (a) the contaminated land in question;
  - (b) the water environment affected by that land; or
  - (c) any land adjoining or adjacent to that land or that water environment.

**78P.— Recovery of, and security for, the cost of remediation by the enforcing authority.**

- (1) Where, by virtue of section 78N(3)(a), (c), (e) or (f) above, the enforcing authority does any particular thing by way of remediation, it shall be entitled, subject to sections 78J(7) and 78K(6) above, to recover the reasonable cost incurred in doing it from the appropriate person or, if there are two or more appropriate persons in relation to the thing in question, from those persons in proportions determined pursuant to section 78F(7) above.
- (2) In deciding whether to recover the cost, and, if so, how much of the cost, which it is entitled to recover under subsection (1) above, the enforcing authority shall have regard—
  - (a) to any hardship which the recovery may cause to the person from whom the cost is recoverable; and
  - (b) to any guidance issued by the Secretary of State for the purposes of this subsection.
- .....
- (14) Subsections (3) to (13) above do not extend to Scotland.[...]

**78Q.— Special sites.**

- (1) If, in a case where a local authority has served a remediation notice, the contaminated land in question becomes a special site, the appropriate Agency may adopt the remediation notice and, if it does so,—
  - (a) it shall give notice of its decision to adopt the remediation notice to the appropriate person and to the local authority;
  - (b) the remediation notice shall have effect, as from the time at which the appropriate Agency decides to adopt it, as a remediation notice given by that Agency; and
  - (c) the validity of the remediation notice shall not be affected by—
    - (i) the contaminated land having become a special site;
    - (ii) the adoption of the remediation notice by the appropriate Agency; or
    - (iii) anything in paragraph (b) above.
- (2) Where a local authority has, by virtue of section 78N above, begun to do anything, or any series of things, by way of remediation—
  - (a) the authority may continue doing that thing, or that series of things, by virtue of that section, notwithstanding that the contaminated land in question becomes a special site; and
  - (b) section 78P above shall apply in relation to the reasonable cost incurred by the authority in doing that thing or those things as if that authority were the enforcing authority.
- (3) If and so long as any land is a special site, the appropriate Agency may from time to time inspect that land for the purpose of keeping its condition under review.
- (4) If it appears to the appropriate Agency that a special site is no longer land which is required to be designated as such a site, the appropriate Agency may give notice—
  - (a) to the Secretary of State, and
  - (b) to the local authority in whose area the site is situated,

terminating the designation of the land in question as a special site as from such date as may be specified in the notice.

(5) A notice under subsection (4) above shall not prevent the land, or any of the land, to which the notice relates being designated as a special site on a subsequent occasion.

(6) In exercising its functions under subsection (3) or (4) above, the appropriate Agency shall act in accordance with any guidance given for the purpose by the Secretary of State.[...]