

Proposed changes to the Contaminated Land Regime

In December 2010 DEFRA published its long awaited proposals for amendments to the Contaminated Land Regime in England and Wales under Part 2A Environmental Protection Act (CLR). The consultation has followed a series of informal discussions with over 150 stakeholders, which according to Government has revealed a widespread view within the sector that the statutory guidance which underpins the regime needed to be updated. The result is a consultation paper which proposes a number of changes and fine tunings to the existing regime which will be important for those involved in brownfield land or potentially associated with historic contaminated land to consider.

Why change?

It is estimated that there are around 300,000 hectares of land in England and Wales where past activities could have led to contamination. Remediating land is expensive, with costs averaging around £250,000 per hectare. The consultation recognises immediately that, although there is a formal CLR in place, more than 90% of contaminated land work is taking place through the redevelopment and planning system as opposed to formal action under the CLR.

Between 2000 and early 2007 there had only been around 800 determinations of sites that could be deemed as contaminated land. Slow progress is largely thought to have been caused by factors such as lack of skilled staff within the regulators, insufficient prioritisation by local authorities and uncertainty over what local authorities should be doing to implement the CLR. The fact that the legislation is complex and provides ample opportunity for argument and delay must also deter authorities from action.

Despite the legislation being complex however, the main focus of the consultation is the statutory guidance issued with the CLR. There are few proposals to amend the legislation itself. In particular, discussions with stakeholders have revealed that the guidance does not adequately explain how a local authority decides if land is contaminated which immediately causes uncertainty at the heart of the CLR. Add to that the issue of what standard of remediation is required to stop the land being deemed contaminated and it is a severe disincentive to regulators using the powers they have.

The changes

The key aspects of the consultation are as follows:

- Part 2A's provisions on remediation and liability will remain unchanged, i.e. the legislation itself is still fit for purpose.
- There will be shorter simpler statutory guidance. The main guidance will now only deal with non-radioactive contamination and there will be separate statutory guidance dealing with radioactive contamination.
- It is intended to include a section at the front of the statutory guidance with a description of the broad outcomes that the CLR is seeking to achieve and it is these broad outcomes and objectives which can be referred to throughout the whole process when deciding courses of action.
- Local authority inspection duties will be simplified. A lot of the detailed prescription will be scrapped. There will be more discretion for authorities over what to include in their contaminated land strategies. This is an important point and could lead to local authorities spending less time and resources by ensuring that their strategy means that they only have to identify and inspect sites in extreme circumstances.
- The guidance on risk assessment to identify whether a site is contaminated and what significant pollution linkages there will be is going to be revamped. The guidance will recognise the use of generic assessment criteria and the key principles of risk assessment to give the regulator a better guide.
- There will be further guidance on what constitutes significant harm to human health. This is a trigger under which land is deemed as contaminated and the consultation paper presents a number of options, including the use of so called "red, amber, green" tests.
- The definition of contaminated land as it relates to controlled waters will also be amended. This is an important amendment eventually bringing in the changes that were proposed way back in 2003 under Section 86 of the Water Act. The intention of the change is to clarify that when looking at water the CLR should only be used in cases where significant pollution or the risk of significant pollution to controlled waters is occurring. The commencement of Section 86 of the Water Act will amend this. This is an

important change and will bring the legislation and definition of contaminated land on water into line with the remainder of the CLR and will also help simplify the potential overlap with water pollution and works notices powers under Section 161 of the Water Resources Act 1991.

- Another change brought in is the ability on the part of the authority to postpone the determination of the classification of contaminated land in their areas. It is intended to allow the authorities to do so in certain circumstances if they consider it reasonable. This could help the regulators pressurise voluntary clean up with the carrot that unless a party does so the site will be formally designated as contaminated. (In reality this usually happens anyway).
- The appeals process for contaminated land will also be simplified.

Conclusion

These changes to the CLR and this consultation have been debated and flagged for a significant period of time and the release of the information to help quell uncertainty is welcome. It is interesting that there are few amendments proposed to the actual mechanisms of the CLR itself and particularly the liability regime under which people can fall in or fall out of the liability groups responsible for the contaminated land clean up. In that sense there is no particular good news for companies and businesses with legacy contamination issues. This consultation appears much more to be tinkering around the edges and helping local authorities in understanding when they should determine contaminated land and what level of clean up should apply. It will be important for companies and businesses who own, occupy or use brownfield land (or have in the past) to watch this consultation closely and to factor in any amendments there may be.

Contact

If you require further information, please contact:



Ross Fairley
Partner

+44 (0) 117 902 6351
ross.fairley@burbges-salmon.com



Ian Salter
Partner

+44 (0) 117 939 2225
ian.salter@burbges-salmon.com



Georgie Messent
Partner

+44 (0) 117 902 7732
goergie.messent@burbges-salmon.com



Michael Barlow
Partner

+44 (0) 117 902 7708
michael.barlow@burbges-salmon.com