

# ENVIRONET NEWS

*The electronic newsletter for improved environmental performance*

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## **CONTAMINATED LAND LEGISLATION – THE UPDATE**

On April 1 2000 the Environment Act 1995 introduced a new and improved statutory regime for the identification and remediation of contaminated land which is to be inserted as a new Part IIA of the Environmental Protection Act 1990. The statutory guidance underpinning Part IIA was published in Circular 02/2000, March 2000, as were the Contaminated Land (England) Regulations 2000 which provide for certain aspects and procedures of the new scheme. The regime adopts a broadly similar approach to that already in place under the statutory nuisance regime and Part VII of the Water Resources Act 1991. Below we summarize the provisions of the new regime....

The definition of "contaminated land" is contained in section 78A, and means land which appears to the authority to be in such a condition, by reason of substances in, or under it that either:

- (a) significant harm is being caused or there is a significant possibility of such harm being caused; or
- (b) pollution of controlled waters is being caused or is likely to be caused.



Unless of a special nature, the Local Authority is responsible for regulating the relevant provisions of the Environment Act 1995. Where in their opinion a site is contaminated, they are empowered to serve a Remediation Notice (clean up notice) to the 'Appropriate Person'. Non compliance can result in significant fines of

up to £20,000 and £2,000 per day thereafter until the Notice has been complied with.

Determining who is the appropriate person is a highly complex process. Environmental law is framed to ensure that someone is responsible for whatever environmental damage may have occurred. The 'polluter pays principle' prevails

and primary responsibility rests with what the guidance calls the "Class A liability group": every person who caused or knowingly permitted the contaminating substances to be in, on or under the land. If after reasonable inquiry no Class A person has been found, then the current owners(s) and occupier(s) of the contaminated land may be liable (the "Class B liability group"), even though by definition they have not caused or knowingly permitted the substances to be in, on or under the land. The implications of this are immense, particularly as remediation costs can be a significant proportion of a site's value.

If a site is bought with the knowledge, or the purchaser should have had the knowledge that the site is potentially contaminated then the liability is likely to fall on the new owner, as the associated clean up costs are deemed reflected within the purchase price.

The Contaminated Land (England) Regulations provide aspects and procedures on designation of special sites, enforcing authorities, serving remediation notices, particulars with public registers, appeals and compensation with regards to remediation work.

**WHEN TO COMMISSION A CONTAMINATED LAND ASSESSMENT?**

*Many property professionals have asked us "Should all properties have an environmental assessment carried out prior to acquisition and re-development, and if not, how should we determine which sites warrant them?" Below,*

*we offer guidance to surveyors, developers and owners of property.*

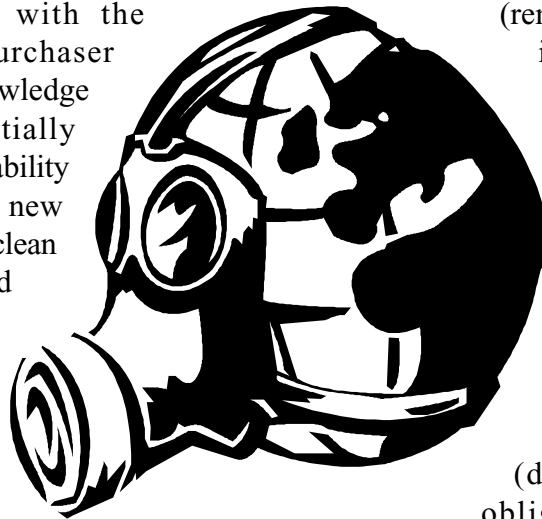
The new contaminated land regime has introduced considerable liabilities to both polluters and owners of contaminated sites.

These risks are summarised as:

- (a) potential civil liability for damage caused by pollution migrating off-site
- (b) potential remediation costs pursuant to the service of a statutory notice by the Local Authority or Environment Agency (remediation costs can include investigation, clean-up and follow up costs);
- (c) potential criminal liability for breaches of legislation (especially in relation to water pollution) resulting from pollution migrating off-site;
- (d) planning condition or obligations associated with redevelopment requiring investigation, restoration or aftercare which act as a constraint on the scope of development or involve expenditure;
- (e) valuation issues i.e. it may reduce the open-market value of the property

These liabilities can represent a significant proportion of the site value and in extreme cases can exceed it.

*"Enough of the scare tactics - we need a sensible approach that is an effective first order screening tool, and not a license for environmental consultants to print money"*



Phase 1 Assessments, which aim to identify the risks of historical contamination, receptors and pathway linkages, typically costing £1000 to £1500 are clearly not justified for every property transaction. Wherever there is the slightest concern that pollutants may be present, a Phase 1 Assessment should be carried out by the prospective purchaser. It is becoming more common for vendors to commission the assessment, to prevent duplication of effort and to remove a potential barrier to the property transaction. Purchasers should ensure that the report is assigned to them, so that they have redress upon the environmental consultant.

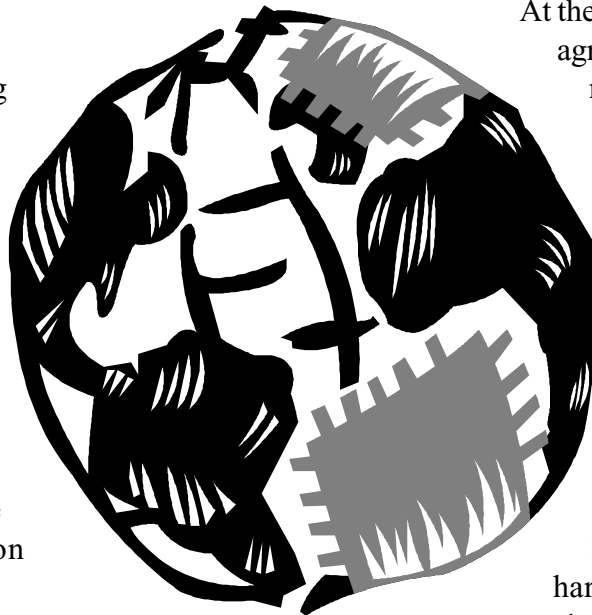
Wherever a site is being redeveloped, particular care should be taken. The demolition and construction processes can create new pathway linkages that unlock historical contamination and make receptors such as ground water, surface water and construction workers at risk.

At the end of a lease, pollution liabilities may easily be overlooked during preparation of Dilapidation Schedules. Any sign of poor hazardous material storage or handling may justify the expense of an environmental investigation, so that the liabilities caused by the tenant can be offset by the landlord.

Financial institutions are becoming increasingly aware of the liabilities and may not lend on the security of property with a liability of unknown quantity. They may therefore insist on an environmental assessment, prior to giving finance.

*"Can you give examples where there may be the chance of historical contamination?"*

Any site with current or past industrial land use should be considered for a Phase 1 Assessment. Some industrial uses clearly have greater potential to contaminate than others - however the effects of illicit disposal or accidental spillage are the same. For example, the storage of fuel (for heating or transport) is a potential source of contamination. Tanks that have leaked over time can create considerable liabilities that are excluded by normal Public Liability insurance policies.



At the other end of the scale is agricultural land. There are many examples of illegal dumps on farms, containing amongst other things hazardous materials. In particular, fragments of asbestos cement may be present in hardcore dumped on tracks.

In summary, there are no hard and fast rules. Each case should be evaluated on its merits - if you need an independent view on whether an assessment is required please contact us for a no obligation consultation.

**ENVIRONMENTAL IMPACT ASSESSMENT (HABITAT SURVEYS)**

Environet has recently carried out a Phase 1 Habitat Survey for a proposed 400 acre golf course development.

Planning applications for development proposals requiring Environmental Impact Assessment can include the requirement for

habitat surveys particularly where green field sites are involved. They enable County Councils, via their Wildlife Trusts, to set conditions for planning permission in accordance with nationally accepted mitigation and management procedures for particular habitats and the species they contain.

Requirements for protected species can be pre-empted, thereby reducing the chance of costly delays in the planning process.

### **ENVIRONMENTAL IMPACT ASSESSMENT (NOISE)**

Planning authorities are increasingly requiring noise assessments to be carried out prior to granting planning consent. These assessments

usually consist of background surveys to determine existing noise levels, followed by an evaluation of the likely noise sources associated with the development. Often planning conditions are imposed, to reduce risk of nuisance complaints from neighbours.

In certain circumstances, these conditions can be extremely costly to meet. It pays therefore to evaluate whether the likely noise sources will exceed the conditions (for example at the site boundary), so that more reasonable conditions can be negotiated at the planning stage.

Environet have assisted a number of clients on noise control issues and planning and are currently advising on acoustics and noise control for a new Music School in Bristol.



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