The Contaminated Land Regime of England and Wales

By Linda Fletcher

Introduction

It is now nearly four years since the statutory regime (the Regime) for the identification and remediation of contaminated land came into force on 1 April 2000. The framework for the regime is set out in Part IIA of the Environmental Protection Act 1990 (“the Act”) and the legislative provisions have been supplemented by Statutory Guidance (“Guidance”) and regulations.

Local authorities were given a period of 15 months from 1 April 2000 to carry out a survey of the land in their areas, so as to identify contaminated sites and to publish a prioritised strategy for dealing with such sites. The Environment Agency’s (“the Agency”) statutory report published in September 2002 on the progress of the Regime states that local authorities have mostly concentrated on preparing a strategy for inspecting their land and that the vast majority of these strategies have now been published and for many, inspection is now under way. As of 31 March 2002, thirty-three sites had been identified as contaminated and eleven of these have been designated as special sites, i.e., the Agency became the enforcing authority. This number is expected to increase as the inspection process progresses. “Special sites” are those in which certain higher risk factors apply and where contamination could be most severe, i.e., sites that are affecting or could affect certain specified water bodies, Ministry of Defence land, and sites the Agency regulates under the IPC (Integrated Pollution Control) and PPC (Pollution Prevention and Control) Regimes.

Of the 33 sites so far which have been determined as contaminated land, most of these are relatively small (less than 5 hectares). Organic compounds and metals are the major contaminants of a large proportion of these sites. The fuel/oil storage construction and waste management industries are among those thought to be responsible for causing the contamination; people and controlled waters are most commonly quoted as the receptor at risk from the site. All of the 11 sites that have been designated as special sites have been so designated because controlled waters are being or are likely to be polluted. As of 31 March 2002, remediation had started at 7 of the 33 determined sites, and they are all being dealt with voluntarily under an agreed remediation statement. The remedial treatments used include in situ bioremediation, excavation and disposal at licensed landfills, and cover barrier.

The Agency has worked closely with local authorities and the Government to implement the Regime, to try to bring some consistency in the approach of the different local authorities, and to obtain data and information as to the extent of contaminated land that exists. There is no reliable estimate of the full extent of land affected by contamination, but English Partnerships has recently released details of the most comprehensive study undertaken so far, which identified 66,000 hectares of land as being brownfield.

The Government is encouraging the beneficial reuse of previously developed land and has set a national target for local planning authorities to increase the proportion of new homes built on previously developed brownfield land to 60% by 2008. In the past, the most common form of remediation had been to remove the contaminated soil and dispose of it at a licensed landfill site. Landfill tax is payable on such disposal, but under new regulations, where remediation takes place voluntarily and if certain conditions are met, e.g., the remediation is not carried out by the person who caused the contamination in the first place, the disposal of the contaminated soil at a licensed landfill may be exempt from the landfill tax. Other options for remediation include installing barriers to contain contamination or to separate the source of the contaminant from the receptor. There are also a number of process-based remediation technologies including: bioremediation, air sparging, soil vapour extraction, soil washing, thermal treatment and thermal reactive barriers. The new process-based technologies offer a more sustainable way of dealing with contaminants and soil. It is also worth noting that the remediation
activity itself may require planning permission. Contamination of the land is a material consideration under the Town and Country Planning Acts, and planning authorities must consider the possible implications of contamination when developing structural or local plans for their areas and when determining individual applications for planning permission.

One of the initiatives that has been undertaken by the Agency is to ensure effective and consistent implementation of the Regime. The Local Government Association and the Agency agreed upon a protocol for land contamination which identifies agreed roles and responsibilities, as well as processes for information exchange, formal and informal consultation, cooperation and transparency. The Agency provided all local authorities with a package of information to help them prepare their contaminated land inspection strategies which includes such items as: catchment plans showing the location of watercourses, licensed landfill sites, licensed water abstraction points, and information on river quality objectives. The majority of local authorities have established working groups which aim to develop consistent approaches to the Regime, share ideas and develop a common understanding. There has also been procedural guidance and training for local authorities.

Most local authorities will use the information gathered during their strategic overview to identify priority areas for inspections. Priority sites are those where significant risk is thought to exist and may need to be dealt with before the strategic overview is finished. It is proposed that local authorities will report their progress in identifying and remediating contaminated land to the Agency each year from April 2003 onward.

The Regime enables the enforcing authority, be it the local authority or the Agency, to require those who are responsible for contaminating land (“the polluter pays” principle) to ensure that the land is cleaned up, even if the contamination was lawful when it took place. Only if the original polluter cannot be found after “reasonable enquiry” will liability fall on the current innocent owner or occupier of the land. The Regime will address sites where there is an unacceptable risk to human health and the environment, and act to reduce and control those risks to an acceptable level so that the land is “suitable for use”.

1. **What is Contaminated Land?**

Not all land affected by contamination is “contaminated land” in the legal sense, i.e., as defined under the Regime. Land is only contaminated land under the Regime if it appears to the local authority, due to substances in, on or under the land (even if they originated elsewhere) that:

- **significant harm** is being caused or there is a **significant possibility** of significant harm being caused; or
- **significant pollution** of controlled waters is being caused or there is a significant possibility of such pollution being caused.

Land will only be defined as contaminated if there is evidence of the presence of a contaminant, i.e., a source (such as a leaking underground storage tank or pipework), a pathway by which the contaminant can reach the receptor (such as a service corridor or downward drainage gradient), and a receptor that might suffer significant harm (i.e., something which could be harmed by the contaminant).

This is known as a **significant pollution linkage** and requires a risk assessment approach to be taken in identifying the land as contaminated. Risks presented by any given level of contamination will be assessed for each site, along with regard for relevant site-specific factors, such as proximity to groundwater or surface water or receptors in adjacent habitats.

2. **Significant Harm**

Harm is defined in the Regime to mean “harm to the health of living organisms or other interference with the ecological systems of which these form part and, in the case of man, includes harm to his property”.

The DETR has provided statutory guidance (in Circular 2000b) as to what constitutes significant harm for a range of receptors, and the table below summarises this guidance. The enforcing authority should only regard as significant harm, harm which is both to a receptor of a type listed in the guidance and within the description of harm specified for that type of receptor.
Categories of Significant Harm

<table>
<thead>
<tr>
<th>Types of Receptor</th>
<th>Types of Harm which are to be regarded as significant</th>
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<tbody>
<tr>
<td>Human beings</td>
<td>Death, disease, serious injury, genetic mutation, birth defects or impairment of reproductive functions.</td>
</tr>
<tr>
<td>Ecological Systems e.g. SSSIs, nature reserves, etc.</td>
<td>Irreversible or other substantial adverse change; threat to long-term sustainability of populations of species of special interest.</td>
</tr>
<tr>
<td>Property other than buildings (i.e. crops, timber, livestock, game)</td>
<td>Substantial (20 per cent) loss or diminution in yield; substantial loss of value arising from death, serious disease or serious physical damage.</td>
</tr>
<tr>
<td>Property in the form of buildings</td>
<td>Structural failure, substantial damage or substantial interference with right of occupation. Damage to features of ancient monument.</td>
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In applying the above, the Guidance again emphasises the “suitable for use” approach i.e. the enforcing authority should disregard any receptors which are not likely to be present given the “current” use of the property. Current use means any use currently being made or likely to be made of the land which is consistent with any planning permission or is otherwise lawful under planning legislation (i.e., permitted development) in respect of that land. Hence, uses which would require any new or amended grant of planning permission will, in general, fall outside the definition of “current use”. The whole issue is effectively one of risk assessment and there are a number of publications and reports on this area, which is considerably complex.

Relevant standards that have been used in assessing harm include:

- ICRCL Guidelines;
- Dutch Standards;
- UK Environmental Quality Standards (EQSs);
- US EPA parameters;
- WHO guidelines.

However, in March 2002, DEFRA and the Agency published a series of reports that provided a scientific framework for the assessment of risks to human health from land contamination. The framework does not consider risks to other receptors such as plants and animals, buildings and controlled waters. These are known as the Contaminated Land Exposure Assessment (CLEA). The intention is that CLEA will assist in identifying sites that pose a risk to human health and in making decisions relating to brownfield and contaminated sites, so as to provide a consistent approach to risk assessment, and therefore, remove some of the doubt and potential blight from many sites. The CLEA and its supporting reports introduce new guidance values for 55 contaminants. If the guideline values are exceeded, that indicates that the site could pose an unacceptable health risk to the site user. The soil guidelines values have been set for three typical land uses, being: residential, allotments, and industrial/commercial.

The programme will continue to develop as CLEA evolves, further topological reviews are carried out, and the list of contaminants expands. The hope is that CLEA will provide greater certainty by setting objective determinable standards. DEFRA has now formally withdrawn its 1987 ICRCL guidance on health effects of contaminated land following the implementation of CLEA.

3. Pollution of Controlled Waters

Controlled waters comprise groundwaters, inland waters, territorial and coastal waters. Land may, as we can see from the definition above, also be classified as “contaminated” where pollution of controlled waters is being caused or there is significant possibility of such pollution being caused as a result of the condition of that land. Land includes buildings or other structures. In addition, there are, of course, powers under the Water Resources Act 1991 to deal with water pollution and so the enforcing authority will consider which, or both, statutes under which it should proceed. Pollution is defined as “the entry into controlled waters of any poisonous, noxious or polluting matter or any solid waste matter”.
The question of whether pollution of controlled waters is being caused is to be determined in accordance with the Guidance. However, the Guidance is very brief, simply stating that the enforcing authority should be satisfied that a substance is continuing to enter controlled waters or is likely to do so. The Guidance states that land should not be designated as contaminated where a substance is already present in controlled waters; the contaminant is no longer entering the water; and the contamination is unlikely to be repeated. Hence, the Regime will not apply to land under which there is contaminated groundwater, unless the condition of the land is making, or is likely to make, that contamination worse. Here, the cleanup of the groundwater will be dealt with under the Water Resources Act 1991.

4. Who Pays for the Remediation?

Once a significant pollutant has been identified and the local authority has formally determined the site as contaminated land, the authority has a statutory duty to require its remediation. The enforcing authority needs to identify and consult with the people who may be responsible for remediating the site and has to then serve a remediation notice on each “Appropriate Person”, i.e., any person, and this includes a body of persons, corporate or unincorporate, who should bear responsibility for any thing which is to be done by way of remediation in relation to the land in question. The lack of funds of any person is to be disregarded in this identification process. If there is more than one Appropriate Person, then the enforcing authority has to apply the exclusion and apportionment rules which are discussed below.

4.1 Class A Appropriate Persons – Polluters

Primary responsibility falls on the original polluter, i.e., any person who \textit{caused} or \textit{knowingly permitted} the substances or any of the substances to be in, on or under that land.

- \textit{Causing} requires active involvement in the operation or chain of operations. This is merely a question of fact and culpability is not a consideration, e.g., owning the underground storage tank at the relevant time of the contamination is sufficient. The Government’s view of the test of “causing” requires that the person concerned was involved in some active operation, or series of operations, to which the presence of the pollutant is attributable, and that such involvement may also take the form of a failure to act in certain circumstances.

- \textit{Knowingly permitting} requires knowledge of the presence of substances in, on or under the land and the power to prevent such substances being present. Commentary during the passage of the Act suggests that the Government intended the words to have this wider effect – “\textit{we believe that it would be reasonable for somebody who has had active control over contamination on a site, for example, when redeveloping it, to become responsible for any harm to health or the environment that may result, even if he did not originally cause or knowingly permit the site to become contaminated.}”

A person identified in this category or tier is referred to as a “Class A Appropriate Person”.

Class A Appropriate Persons are liable for \textit{all} remediation required for the contaminants which they have caused or knowingly permitted to be in, on or under the land. They are also liable for the remediation of other land in the vicinity to which the contaminants may have migrated and for the remediation of controlled waters.

4.2 Class B Appropriate Persons - Owner/Occupiers

Only where no Class A Appropriate Person can be “found” after reasonable enquiry, will the owner or occupier of the land for the time being be liable for remediation. Such second tier persons are known as “Class B Appropriate Person”. Class A Appropriate Persons who are natural persons can not be “found” if they have died; companies can not be “found” if they have been dissolved or struck off the Companies Register. An owner is defined as being \textit{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 let}”. “Rack rent” is a market rent.

Class B Appropriate Persons can only be liable for the remediation of the land which they own or occupy and not for other land in the vicinity or controlled waters even if that other land is contaminated by significant pollutant linkages originating on their land.
4.3 **Orphan Sites**

Orphan sites are those where no Appropriate Person can be found. In this case, the enforcing authority is entitled to use its powers to carry out remediation. The supplementary credit approval scheme (SCA) is available for local authorities to fund such work. The scheme is managed by the Agency on behalf of DEFRA. Most current SCA sites are closed landfills and they are owned mainly by local authorities as a result of their historic responsibilities for providing waste disposal facilities. Before the Regime was introduced, the SCA scheme funded remediation of old landfill sites only where landfill gas was an issue. SCA support is not available for work needed to facilitate the development, redevelopment or sale of land, although funding may be available from other sources. An orphan site will also arise where those who would otherwise be liable are exempted by one of the statutory provisions on exclusion or apportionment. For example, if only a Class B Appropriate Person can be identified and the remediation relates solely to water pollution for which a Class B Appropriate Person cannot be held liable, or where a Class A Appropriate Person has been found, but they can successfully argue on hardship grounds that a remediation notice may not be served on them.

4.4 **Exclusion and Apportionment Rules**

Given the ability of the enforcing authority to look back in time indefinitely, the likelihood of a series of different persons operating at the site and so the presence of many contaminants, there will be many circumstances in which more than one person will be identified as the Appropriate Person and as a result, there will be a liability group for the site in question.

Where this is the case, i.e., there are two or more persons, the Guidance allows certain persons to be excluded from liability. Once the exclusion tests have been applied, it is then necessary to apportion liability for remediation costs between the remaining members of the liability group, again in accordance with the Guidance. The general rule is that liability should reflect the relative responsibility of the members of the group.

There are several tests which can lead to exclusion from liability, although the tests which are applied vary depending on whether the liability group in question consists of Class A Appropriate Persons (polluters) for which there are six tests or Class B Appropriate Persons (owners/occupiers) for which there is a single test. The enforcing authority must apply the exclusions tests in the order set out in the Guidance to each group of persons for each significant pollution linkage. The application of the tests may reduce the number of potential Appropriate Persons, but cannot be used to exclude all potential Appropriate Persons. There should always be at least one member of a liability group to bear responsibility for the remediation.

In applying the exclusion and apportionment tests, the financial circumstances of individual members of the liability groups should have no bearing on the application of the tests and procedures involved. The intention of course is to avoid a “deep pocket” approach of making those with substantial resources responsible for a proportionately greater responsibility for remediation.

After the exclusion and apportionment tests have been applied, in any decision concerning the recovery of costs from the members of the liability group, the enforcing authority will then consider hardship and other criteria (e.g., the threat of business closure or the nature of the person, such as a charity) and may decide to reduce or waive an Appropriate Person’s share of the costs. In considering whether to reduce or waive costs, however, the enforcing authority must consider the fairness and equitability of its decision to local and national taxpayers.

The Guidance also provides that where the application of an exclusion test involves the relationship between “related companies,” it should not apply a test so as to exclude any of the related companies.
4.5 **Class A Appropriate Person Exclusions**

(i) **Excluded Activities**

The Government set out certain activities which are to be disregarded in identifying whether a person carrying on such an activity is a Class A person. The activities listed are:

- providing financial assistance to another person, for example, lending money, making a grant, underwriting, guaranteeing performance, etc.;
- insuring the polluting activity;
- consigning the substance to another person as waste, whereby that person takes over responsibility for its disposal and care;
- creating a tenancy or licence to occupy over the land in question in favour of another person who subsequently caused or knowingly permitted contamination (whether or not they can now be found). Note this does not include where the person granting the licence operated the land as a site for waste disposal or storage at the time of the grant of the licence;
- granting a statutory license or permit for the polluting activity or taking or refraining from taking enforcement action over it;
- performing any contract where the contract is made with another member of the liability group. This exclusion does not apply if the activity falls within another part of this test or if the act or omission in question was not in accordance with the terms of the contract.

(ii) **Payments Made for Remediation**

This test excludes from liability those who have already effectively met their clean-up responsibility by having made a payment for the remediation to some other member of the liability group. The paying party should then be excluded from the group, provided that:

- the payment would have been adequate to pay for the remediation at the date of payment; and
- if the remediation has been done, the land would not now be determined as contaminated land; and
- the remediation has not been carried out or has not been carried out effectively.

The payments have to be made with some remediation plan in mind, so only payments made in response to a claim for the cost of remediation in the course of civil proceedings or arbitration or as part of a contract for the transfer of the land which is either specifically provided for in the contract to meet such cost or is a reduction in the purchase price and explicitly states it is for that purpose will satisfy this test.

Note, however, that this test cannot be applied where the person making the payment retains any subsequent control over the condition of the land although this does not include the reversion expectant on a lease or rights to ensure the proper carrying out of the remediation for which the payment was made. Step in and supervision rights would, however, defeat this.

(iii) **Selling with Information**

This is very important test. A seller should be excluded from the class of Appropriate Persons where disposal (includes sale or grant of a lease exceeding 21 years) of land takes place at an arm’s length to another member of the liability group and where the buyer had sufficient information which would reasonably allow it to be aware of the “broad measure” of the contamination present and the seller retains no interest in the land.

In the case of contaminated sites that have been sold since 1990 to a large commercial organisation or a public body, then the Guidance provides that it will be considered that sufficient information as required by the test has been supplied if the buyer was provided with the opportunity to conduct its own investigation of the condition of the site.

(iv) **Changes to Substances**

Where a substance has only given rise to a significant pollution linkage because it has interacted with other substances which were introduced into the land later by another Appropriate Person and the first
person could not reasonably have foreseen this introduction, the person responsible for the presence of the first substance may be excluded.

(v) **Escaped Substances**

Where a person is responsible for the presence of a substance on land, but that substance has only given rise to a significant pollution linkage because another Appropriate Person allowed it to escape, the first person may be excluded. In this test, there is no qualification as to foreseeability of the escape.

(vi) **Introduction of Pathways or Receptors**

This test excludes from liability those who would otherwise be liable solely because of the subsequent introduction of the relevant pathways or receptors. The circumstances to be considered under this test are:

- a member of the liability group has carried out a relevant action or made a relevant omission (“the later actions”) which resulted in their being a Class A person;
- the effect of these later actions was to introduce the pathway or receptor forming part of the pollutant linkage; and
- if these later actions had not occurred, there would have been no significant pollutant linkage.

A “relevant action” is the carrying out of building, mining, engineering or other operations at the land in question or making a material change in use for which planning permission was required.

A “relevant omission” is failing to take a step in the carrying out of the relevant action which would have ensured that the pollutant linkage did not come into being or failing to operate or maintain a system installed for the purpose of reducing or managing the contamination, e.g., gas venting systems.

4.6 **Class B Exclusions**

There is only a single test for this group and the purpose of the test is to exclude from liability those who do not have an interest in the capital value of the land in question. So, where the Class B group comprises two or more people, the following are excluded:

- A person who occupies under a licence which has no market value or which cannot be legally transferred to another person; and
- A person paying a full market rent and who holds no beneficial interest other than the tenancy.

The effect, therefore, in general, is to shift liability from the tenant to the owner of the land. However, it must be noted that the contractual relationship between the tenant and the landlord may impose liability upon the tenant for the clean-up of the contaminated land, e.g., a provision in the lease requiring the tenant to comply with and indemnify the landlord from any breach of legislation.

4.7 **Agreement on Liabilities**

The provisions in the Guidance relating to agreements on liabilities again can only apply where there are two or more persons in the liability group in the first place. The precise wording states that in any case where two or more persons are Appropriate Persons and so responsible for all or part of the costs of a remediation action, they agree or have agreed the basis on which they wish to divide their responsibility and a copy of the agreement is provided to the enforcing authority and none of the parties to the agreement informs the authority that it challenges the application of the agreement, then the enforcing authority should generally make such determination on exclusion and apportionment as are needed to give effect to the agreement and should not apply the remainder of the Guidance for exclusion and apportionment between the parties to the agreement.

One important point to note is that such agreements should not be allowed to be used for the purpose of evading liabilities. So, where giving effect to such an agreement would increase the share of the costs by a person who would be able to claim the benefit of the hardship provisions of the Act and the Guidance, the authority should disregard the agreement.
4.8  Apportionment Rules

The general principal of the Act is one of joint and several liability modified by the requirement of apportionment. Where two or more persons are Appropriate Persons in relation to any particular remediation action, they should be liable to bear the cost in doing so in proportions determined by the enforcing authority in accordance with the Guidance. The Guidance itself deals with three separate issues: apportionment within a Class A liability group; apportionment within a Class B liability group; and attribution of the responsibility between different liability groups, i.e., where there is more than one significant pollutant linkage in relation to the land. The apportionment tests are, however, only applied after the application of the exclusion tests and only if there are then two or more people left within the liability group. Basically, the authority will look at the circumstances of the case and apply the principles of fairness.

(i)  Class A Liability Group

In relation to Class A groups, the authority is required to follow the general principle that liability should be apportioned to reflect the relative responsibility of each member of the Class A group for creating or continuing the relevant risks. If appropriate information is not available or cannot reasonably be obtained to allow enforcement based on individual responsibility, then liability should be apportioned in equal shares, subject to a special rule for companies and their officers.

Where a Class A liability group, after the application of all the relevant exclusion tests, includes a company and one or more of its officers, then the Guidance provides that the authority should treat the company and its officers as a single unit for the purpose of applying the principles of responsibility and apportionment in equal shares. Having determined the aggregate share of the responsibility of the company and officers together, that share should then be apportioned between them on a basis which takes into account the degree of personal responsibility of those directors and the relative levels of resources which may be available to them and to the company to meet the liability, i.e., the hardship consideration will apply at this stage for individual directors so potentially increasing the share of liability of the company or vice-versa, where there is a wealthy director of a struggling company.

If, for any member of the Class A liability group, the circumstances set out in one or more of the exclusion tests applied to some extent but not sufficiently to allow the test to apply, the authority should assess the person’s degree of responsibility as being reduced to the extent to which is appropriate in the light of all the circumstances and the purpose of the exclusion test in question.

The Guidance also looks at the situation in which the Class A liability group comprises the person who caused or knowingly permitted the initial entry of the contaminant onto the land and one or more other persons who knowingly permitted its continued presence. The Guidance requires the authority when assessing their relative responsibility to consider the extent to which the latter person has the means and reasonable opportunity to deal with the presence or reduce the seriousness of the pollutant in question.

The Guidance also deals with the position in which within the liability group there are a number of persons who all caused or knowingly permitted the entry of the pollutant into the land. The starting point is to consider whether the nature of the remediation action required points clearly to different members being responsible for particular circumstances. If this does not apply but the quantity of the pollutant is the major influence on the cost of remediation, then the authorities should have regard to the relative amounts of the pollutant involved as an appropriate basis for apportionment. If none of the above applies, then the authorities should consider the nature of the activities involved and if they are broadly similar, then responsibility should be apportioned on the basis of the relative periods of time that the different persons were in control of the land.

In relation to apportionment between persons who have knowingly permitted the continued presence of the contaminant over a period of time, then apportionment should be in proportion to the length of time each controlled the land, the area that they controlled, and the extent to which each had the means and the reasonable opportunity to deal with the problem.

(ii)  Class B Liability Group

In relation to members of a Class B liability group, the Guidance states that where the whole or part of a remediation action for which a Class B liability group is responsible clearly relates to a particular area of land within the larger area of that pollutant linkage, then liability for the remediation action should be apportioned among those owning or occupying that area of land. The authorities have to consider
the relationship between the remediation action and the area of land. Where these circumstances do not apply, then the authority should apportion liability for all the actions relating to the significant pollutant linkage amongst all members of the liability group.

The Guidance goes on to state that in so doing it should do so in proportion to capital values, including those of buildings and structures on the land. Where different areas of the land are in different occupation or ownership, the apportionment is on the basis of the respective capital value of the various areas relative to the aggregate of all such values. The date for valuation is the date immediately before the notice identifying the land as contaminated is served. Where no owner or occupier can be found for part of the land, i.e., an *orphan site*, then the authorities should deduct from the overall costs the sum reflecting the apportioned share for that land based on its relative capital value before apportioning between those owners or occupiers who can be found.

(iii) Attribution of Responsibility

The Guidance also deals with the apportionment in a situation where one remediation action is referable to two or more significant pollutant linkages. Such remediation action is referred to as a shared action and can arise either where the linkages require the same action or where a particular action is part of the best combined remediation scheme for two or more linkages. This process of apportionment is called “attrition of responsibility”. The authority has to consider whether the shared action is a common action or a collective action. A common action is one which addresses together all of the relevant pollution linkages and would still have been part of the remediation package for each of those linkages if each had been addressed separately. A collective action is one which addresses together all of the relevant pollutant linkages but which would not have been part of the remediation package for each of them if they had been addressed separately.

Applying all of these principals is not straightforward or simple and involves an assimilation of numerous facts and exercise of judgement by the authorities.

4.9 Hardship

Once the enforcing authority has apportioned the cost of each remediation action between the various Appropriate Persons and before serving any remediation notice on that basis, the authority has to consider whether there are any reasons why any of those Appropriate Persons should not be required to meet in full their share of the costs of carrying out the remediation actions. In making its decision, the authority must have regard to any hardship which may be caused to the person in question and, in addition, consider the terms of Chapter 3 of the Guidance. Chapter 3 provides guidance on the extent to which the enforcing authority in seeking to recover the costs of remediation which is to be carried out by itself is entitled to recover from the Appropriate Persons.

The term “hardship” is not defined but there is a certain amount of case law on the expression, and from this it appears that the word will cover any matter of appreciable detriment, whether financial, personal or otherwise. It also seems that the test is an objective one, that is based on what a reasonable person would view as hardship. As hardship is essentially a personal issue, the onus is on the person seeking the reduction in cost recovery on hardship grounds to present any information to the authority that they need to support that request.

The Guidance sets out a number of general principles which the authority must have regard to, rather than detailed rules. The authority should aim for an overall result which is as just fair and equitable as possible to all of those who are to meet the costs of the remediation.

If the enforcing authority decides after such consideration that it would seek to recover from each Appropriate Person all of the share of the costs apportioned to that person, then the authority can serve the remediation notice on the basis of that apportionment.

5. Standard of Remediation

The enforcing authority is required to have regard to the Guidance in relation to the standard of remediation that is required. The intention of remediation is that the land should be brought into such a condition that in its current use it is no longer regarded as “contaminated land”. That is, remediation should result in the land being “suitable for use”, i.e., for its current land use or any other likely use which complies with the planning system, and for which no change of use consent is required. There is no equivalent of the “suitable for use” requirement in some legal systems where contamination must be reduced to background or “virgin site” levels to permit multifunctionality.
The authority has to determine what measures comprise the best practicable techniques for remediation of the particular pollutant linkage. This will be a balancing exercise and must be reasonable, practical, effective and durable and there will, of course, be cost differences for various solutions. Different solutions are also likely to have different impacts in terms of disruption to various owners and occupiers of the land in question. The Guidance states that the authority should work on the basis of authoritative scientific and technical advice. Where there is established good practice for the particular type of remediation, this should, in general, be assumed to be the best practicable technique. Where there is more than one pollutant linkage for a site, which may often be the case, then the authority needs to consider whether, instead of individual measures for each linkage, an alternative scheme dealing with all the linkages together would be cheaper or more practicable to implement, and if so, such scheme should be preferred. In some instances, the process of remediation may itself require a permit, e.g., a waste management licence.

The authority should also satisfy itself that the costs are reasonable having regard to the seriousness of the relevant harm, i.e., there should be a cost benefit analysis. What is not relevant to the issue of reasonableness of costs is the identity or financial standing of the person responsible for remediation. This may, however, be relevant at the stage of considering hardship, which is discussed earlier.

6. Enforcement

6.1 Consultation

Following an authority’s survey of land in its area and, on the basis of the evidence available, the authority must make a determination as to whether the land is contaminated as defined under the Regime. For each site it must then identify each significant pollutant linkage and all possible Appropriate Persons.

The authority must then notify the owner, any occupiers, all potential Appropriate Persons and the Agency, the latter in order that the Agency may provide site-specific guidance if it wishes to do so. The authority will advise each person in what capacity he/she is being notified and advise that a consultation process will now commence. A period of three months should then follow to allow time for consultation, which will hopefully lead to a binding agreement as to what remedial action should be taken. No remediation notice can be served in this three-month period, save for cases of imminent danger of serious harm.

The authority is required by the Guidance to prepare a written record of any determination that land in its area is “contaminated land”. The determination should include a description of the particular significant pollutant linkage, a summary of the evidence on which the determination is based, a summary of the relevant assessment of the evidence, and a summary of the way in which the authority considers that the relevant level of requirements of the Guidance in determining the land as being contaminated have been satisfied.

6.2 Remediation Notice

The enforcing authority is then under a statutory duty to require the appropriate remediation of a contaminated site. It shall serve on each person who is an Appropriate Person a remediation notice. A remediation notice will not be required to be served where either: (a) the authority is satisfied that there is nothing by way of a remediation that they could specify in a notice; (b) the authority is satisfied that appropriate things are or will be done by way of remediation without the service of a notice; (c) the authority is itself the Appropriate Person; or (d) the authority is able to exercise its powers to take action so as to prevent serious harm or pollution of which there is imminent danger or the site is an “orphan site” or where the authority would not seek to recover all the costs on the grounds of hardship if it were to carry out the remediation itself.

This process therefore enables those who would be the Appropriate Persons to give undertakings to carry out remediation as part of the consultation process preceding the service of the remediation notice. In this circumstance, a remediation statement would be prepared and published. The person who publishes it will be the responsible person, i.e., the person who is responsible for carrying out the relevant work. A remediation statement will also be published where the authority itself is the Appropriate Person. This statement will be placed on the public register.
However, if the remediation notice cannot be served as the circumstances detailed at (a) above apply, then the authority must serve a remediation declaration stating why there is nothing by way of remediation that they could specify in a remediation notice. Again, the declaration must be placed on the public register. The problem that may arise in this situation is that the declaration will make it clear but for considerations of cost or the Guidance, remediation would have been required, and so may lead to blight of the land in question.

Where agreement cannot be reached, then the enforcing authority must then issue a “remediation notice” requiring the Appropriate Persons to carry out the necessary remedial actions. The notice must specify what the recipient is to do by way of remediation and the period within which such works are to be carried out. The notice must make it clear to which land it relates and there are specific regulations which deal with the drafting of the notice. As discussed already, the authority may not require more than it considers reasonable having regard to the costs likely to be involved and the seriousness of the harm or pollution involved. The regulations also require that reasons are given as to the remediation action required, the allocation of liability, and the apportionment of costs. There is no provision in either the Act or the regulations to withdraw a remediation notice. Again, a remediation notice must appear on the public register.

6.3 Appeals

The remediation notice is subject to an appeals process (which must be commenced within 21 days of receipt of a notice) which has the effect of suspending the remediation notice. The grounds of appeal are set out in the regulations. There are 19 grounds of appeal including a catch all ground. Only the person on whom the notice is served can appeal. Apart from this appeal system, there may be the possibility of challenging a remediation notice by judicial review proceedings or by way of defence to a criminal prosecution for alleged non-compliance with the notice. Failure to comply with a remediation notice without reasonable excuse is a criminal offence which can attract a fine of up to £20,000 and a daily fine of £2,000 until the remediation takes place.

Other options open to the enforcing authority, as well as to the prosecution, include the use of civil proceedings, the carrying out of the remediation itself, and exercising its powers of cost recovery and putting in place charging orders. In seeking to recover its costs, the authority must take into account the Guidance on the issue of hardship to the Appropriate Persons concerned. Civil proceedings, where available, will be through the High Court and will take the form of a mandatory injunction, but the authority will have to prove that adequate protection cannot be obtained in any other way.

Alternatively, the enforcing authority can exercise its powers of remediation and then recover the reasonable costs incurred from the Appropriate Persons. Where the relevant costs are recoverable from a person who is the owner of the contaminated land in question and who caused or knowingly permitted the substance or any of the substances to be in the land concerned, then the Act allows the authority to impose a charging notice on the land concerned. Thus, the scope to use such a charging notice is limited to only the current owner who also caused or knowingly permitted the pollution. The charge itself will take effect at the end of the period of 21 days from service of such notice unless an appeal is made. The enforcing authority has the same powers and remedies under the Law of Property Act 1925 as a bank, i.e., the power of sale, the power to grant leases and to appoint receivers. The legislation does not specify whether such a charge has priority over prior mortgages and other interests in the site, but the potential exists for it doing so.

6.4 “Sign Off”

There is no formal “signing off” procedure under the Regime once the clean-up set out in the remediation notice has been completed. The Guidance does, however, allude to a possible procedure whereby the authority writes to the person concerned, stating that it currently sees no grounds on the basis of available information for further enforcement action. Obviously, such a letter will not be binding, but it may well be reassuring to any future buyer of the site.

7. Other Regimes

When dealing with situations involving contaminated land, there are a number of other regimes under which liability could also arise, although generally they deal with ongoing, rather than historic pollution, and prevention rather than cure.
Such regimes include:

- **Liability under the Water Resources Act 1991**, in particular through “Works Notices,” which will be used to prevent pollution or cleanup of controlled waters by allowing recovery of the costs reasonably incurred in taking such action from the person who caused or knowingly permitted the polluting matter to be present in the controlled waters or to be present at the place from which it is likely to enter such waters;

- **Integrated Pollution Prevention and Control** (IPPC). This regime of licensing industrial operations includes a requirement for a baseline site assessment to be carried out, which will often include intrusive investigations, as part of the application process. The assessment may then be used by the authorities in determining whether remediation is required under the Regime. Note that the site assessment report is a public document and may also lead to liability from any affected third parties;

- **Planning and Development Control**. Contamination is a material planning consideration in any planning application and it is envisaged that clean-up will be achieved during development by way of planning conditions or planning agreements. Planning law is concerned with ensuring that the risks consequent on development and the change of use of the contaminated land are identified and properly addressed;

- **Statutory Nuisance** procedures had, until the Regime came into force, been the main weapon for dealing with contaminated land. The Act, in fact, states that no matter shall constitute a statutory nuisance to the extent that it consists of, or is caused by, any land being in a contaminated state. The main areas that will now be covered by statutory nuisance are odours and noise;

- **Common Law** remedies including negligence, tort and the rule in Rylands -v- Fletcher, which can all lead to actions from third parties who suffer as a result of contamination. Mandatory injunctive relief, whilst rare, can be sought to prevent contamination.

The information contained and the expression of any opinion in this summary are not intended to be a comprehensive review and should not be treated as a substitute for specific advice concerning individual circumstances. For more information on the Regime or any UK or European environmental matters, please contact Linda Fletcher on +44 20 7710 2040 or at lindafletcher@paulhastings.com.