

Department for Environment,
Food and Rural Affairs

Environmental Protection Act 1990: Part 2A

Contaminated Land Statutory Guidance

April 2012

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- 3.7 When considering risks in relation to any future use or development which falls within the description of a “current use”, the local authority should assume that the future use or development would be carried out in accordance with any existing planning permission. In particular, the authority should assume:
- (a) That any remediation which is the subject of a condition attached to that planning permission, or is the subject of any planning obligation, will be carried out in accordance with that permission or obligation.
 - (b) Where a planning permission has been given subject to conditions which require steps to be taken to prevent problems which might be caused by contamination, and those steps are to be approved by the local planning authority, that the local planning authority will ensure that those steps include adequate remediation.

Contaminant linkages

- 3.8 Under Part 2A, for a relevant risk to exist there needs to be one or more contaminant-pathway-receptor linkage – “contaminant linkage” – by which a relevant receptor might be affected by the contaminants in question. In other words, for a risk to exist there must be contaminants present in, on or under the land in a form and quantity that poses a hazard, and one or more pathways by which they might significantly harm people, the environment, or property; or significantly pollute controlled waters. For the purposes of this Guidance:
- (a) A “contaminant” is a substance which is in, on or under the land and which has the potential to cause significant harm to a relevant receptor, or to cause significant pollution of controlled waters.
 - (b) A “receptor” is something that could be adversely affected by a contaminant, for example a person, an organism, an ecosystem, property, or controlled waters. The various types of receptors that are relevant under the Part 2A regime are explained in later sections.
 - (c) A “pathway” is a route by which a receptor is or might be affected by a contaminant.
- 3.9 The term “contaminant linkage” means the relationship between a contaminant, a pathway and a receptor. All three elements of a contaminant linkage must exist in relation to particular land before the land can be considered potentially to be contaminated land under Part 2A, including evidence of the actual presence of contaminants. The term “significant contaminant linkage”, as used in this Guidance, means a contaminant linkage which gives rise to a level of risk sufficient to justify a piece of land being determined as contaminated land. The term “significant contaminant” means the contaminant which forms part of a significant contaminant linkage.

Section 4.4: Significant pollution of controlled waters and significant possibility of such pollution

- 4.34 This sub-section gives Guidance on how the local authority should go about deciding whether significant pollution of controlled waters is being caused, or whether there is a significant possibility of such pollution being caused. This sub-section deals with controlled waters as a receptor in contaminant linkages, and not as a pathway.
- 4.35 In establishing whether significant pollution of controlled waters is being caused, or whether there is a significant possibility of such pollution being caused, the local authority should have regard for any technical guidance issued by the Environment Agency to support this Guidance. If the authority considers it likely that land might be contaminated land on such grounds, it should consult the Agency and have strong regard to the Agency's advice.

Pollution of controlled waters

- 4.36 Under section 78A(9) of Part 2A the term "pollution of controlled waters" means the entry into controlled waters of any poisonous, noxious or polluting matter or any solid waste matter. The term "controlled waters" in relation to England has the same meaning as in Part 3 of the Water Resources Act 1991, except that "ground waters" does not include waters contained in underground strata but above the saturation zone.
- 4.37 Given that the Part 2A regime seeks to identify and deal with significant pollution (rather than lesser levels of pollution), the local authority should seek to focus on pollution which: (i) may be harmful to human health or the quality of aquatic ecosystems or terrestrial ecosystems directly depending on aquatic ecosystems; (ii) which may result in damage to material property; or (iii) which may impair or interfere with amenities and other legitimate uses of the environment.

Significant pollution of controlled waters

- 4.38 The following types of pollution should be considered to constitute significant pollution of controlled waters:
- (a) Pollution equivalent to "environmental damage" to surface water or groundwater as defined by The Environmental Damage (Prevention and Remediation) Regulations 2009, but which cannot be dealt with under those Regulations.
 - (b) Inputs resulting in deterioration of the quality of water abstracted, or intended to be used in the future, for human consumption such that additional treatment would be required to enable that use.
 - (c) A breach of a statutory surface water Environment Quality Standard, either directly or via a groundwater pathway.
 - (d) Input of a substance into groundwater resulting in a significant and sustained upward trend in concentration of contaminants (as defined in Article 2(3) of the Groundwater Daughter Directive (2006/118/EC)⁵).

5 Relating to paragraph 4.41(d), Article 2(3) says, "significant and sustained upward trend means any statistically and environmentally significant increase of concentration of a pollutant, group of pollutants, or indicator of pollution in groundwater for which trend reversal is identified as being necessary in accordance with Article 5."

- 4.39 In some circumstances, the local authority may consider that the following types of pollution may constitute significant pollution: (a) significant concentrations⁶ of hazardous substances or non-hazardous pollutants in groundwater; or (b) significant concentrations of priority hazardous substances, priority substances or other specific polluting substances in surface water; at an appropriate, risk-based compliance point⁷. The local authority should only conclude that pollution is significant if it considers that treating the land as contaminated land would be in accordance with the broad objectives of the regime as described in Section 1. This would normally mean that the authority should conclude that less serious forms of pollution are not significant. In such cases the authority should consult the Environment Agency.
- 4.40 The following types of circumstance should not be considered to be contaminated land on water pollution grounds:
- (a) The fact that substances are merely entering water and none of the conditions for considering that significant pollution is being caused set out in paragraphs 4.38 and 4.39 above are being met.
 - (b) The fact that land is causing a discharge that is not discernible at a location immediately downstream or down-gradient of the land (when compared to upstream or up-gradient concentrations).
 - (c) Substances entering water in compliance with a discharge authorised under the Environmental Permitting Regulations.

Significant pollution of controlled waters is being caused

- 4.41 In deciding whether significant pollution of controlled waters is being caused, the local authority should consider that this test is only met where it is satisfied that the substances in question are continuing to enter controlled waters; or that they have already entered the waters and are likely to do so again in such a manner that past and likely future entry in effect constitutes ongoing pollution. For these purposes, the local authority should:
- (a) Regard substances as having entered controlled waters where they are dissolved or suspended in those waters, or (if they are immiscible with water) they have direct contact with those waters on or beneath the surface of the water.
 - (b) Take the term “continuing to enter” to mean any measurable entry of the substance(s) into controlled waters additional to any which has already occurred.
 - (c) Take the term “likely to do so again” to mean more likely than not to occur again.
- 4.42 Land should not be determined as contaminated land on grounds that significant pollution of controlled waters is being caused where: (a) the relevant substance(s) are already present in controlled waters; (b) entry into controlled waters of the substance(s) from land has ceased; and (c) it is not likely that further entry will take place.

6 Significant concentrations must be determined on a site and substance specific basis.

7 Appropriate compliance points must be determined on a site and substance specific basis.

Significant possibility of significant pollution of controlled waters

- 4.43 In deciding whether or not a significant possibility of significant pollution of controlled waters exists, the local authority should first understand the possibility of significant pollution of controlled waters posed by the land, and the levels of certainty/uncertainty attached to that understanding, before it goes on to decide whether or not that possibility is significant. The term “possibility of significant pollution of controlled waters” means the estimated likelihood that significant pollution of controlled waters might occur. In assessing the possibility of significant pollution of controlled waters from land, the local authority should act in accordance with the advice on risk assessment in Section 3 and the guidance in this sub-section.
- 4.44 In deciding whether the possibility of significant pollution of controlled waters is significant the local authority should bear in mind that Part 2A makes the decision a positive legal test. In other words, for particular land to meet the test the authority needs reasonably to believe that there is a significant possibility of such pollution, rather than to demonstrate that there is not.
- 4.45 Before making its decision on whether a given possibility of significant pollution of controlled waters is significant, the local authority should consider:
- (a) The estimated likelihood that the potential significant pollution of controlled waters would become manifest; the strength of evidence underlying the estimate; and the level of uncertainty underlying the estimate.
 - (b) The estimated impact of the potential significant pollution if it did occur. This should include consideration of whether the pollution would be likely to cause a breach of European water legislation, or make a major contribution to such a breach.
 - (c) The estimated timescale over which the significant pollution might become manifest.
 - (d) The authority’s initial estimate of whether remediation is feasible, and if so what it would involve and the extent to which it might provide a solution to the problem; how long it would take; what benefit it would be likely to bring; and whether the benefits would outweigh the costs and any impacts on local society or the environment from taking action.
- 4.46 The local authority should consider these factors in the context of the broad objectives of the regime as set out in Section 1. It should also consider how the factors interrelate (e.g. likelihood relative to impact). The authority should then decide which of the following categories the land falls into. Categories 1 and 2 would comprise cases where the authority considers that a significant possibility of significant pollution of controlled waters exists. Categories 3 and 4 would comprise cases where the authority considers that a significant possibility of such pollution does not exist.
- (a) **Category 1 (Water):** This covers land where the authority considers that there is a strong and compelling case for considering that a significant possibility of significant pollution of controlled waters exists. In particular this would include cases where there is robust science-based evidence for considering that it is likely that high impact pollution (such as the pollution described in paragraph 4.38) would occur if nothing were done to stop it.

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- (b) **Category 2 (Water):** This covers land where: (i) the authority considers that the strength of evidence to put the land into Category 1 does not exist; but (ii) nonetheless, on the basis of the available scientific evidence and expert opinion, the authority considers that the risks posed by the land are of sufficient concern that the land should be considered to pose a significant possibility of significant pollution of controlled waters on a precautionary basis, with all that this might involve (e.g. likely remediation requirements, and the benefits, costs and other impacts of regulatory intervention). Among other things, this category might include land where there is a relatively low likelihood that the most serious types of significant pollution might occur.
- (c) **Category 3 (Water):** This covers land where the authority concludes that the risks are such that (whilst the authority and others might prefer they did not exist) the tests set out in Categories 1 and 2 above are not met, and therefore regulatory intervention under Part 2A is not warranted. This category should include land where the authority considers that it is very unlikely that serious pollution would occur; or where there is a low likelihood that less serious types of significant pollution might occur.
- (d) **Category 4 (Water):** This covers land where the authority concludes that there is no risk, or that the level of risk posed is low. In particular, the authority should consider that this is the case where: (a) no contaminant linkage has been established in which controlled waters are the receptor in the linkage; or (b) the possibility only relates to types of pollution described in paragraph 4.40 above (i.e. types of pollution that should not be considered to be significant pollution); or (c) the possibility of water pollution similar to that which might be caused by “background” contamination as explained in Section 3.