LAWD30123

Introduction:

"Being at the forefront of an industrial revolution and two world wars has left the UK with a significant stock of land which contains a variety of substances which one could class as polluting, poisonous or dangerous in some sense" (Hellawell, 2000, 1). In response to the risks posed by this historic legacy, in 1995 Parliament inserted section 57 of the Environment Act 1995 into the Environmental Protection Act 1990 (hereafter EPA 1990), thereby creating a statutory regime for the identification and remediation of contaminated land.

Despite the seeming importance of the problem of contaminated land, "which can be a blight on communities and may present unacceptable risks to human health and the environment" (The Environment Agency Statutory Report, 2009, 1), the regime is universally held as complex, and "difficult to operate in practice" (Hellawell, 2000, 6), with Vaughan even going so far as to describe it as "horrendously complicated" (2010, 154). This may be in part due to the amount of law and guidance which "need to be read together to get a full picture of the way the...rules are expected to work" (Hellawell, 2000, 2). Part 2A of the EPA 1990 sets out the basic statutory framework, which is then consolidated by statutory guidance published by the Department for Environment, Food and Rural Affairs (hereafter DEFRA), as well as secondary legislation and various other non-statutory guidance and advice. As Tromans and Turrall-Clarke state, "if volume of legislative material is any indicator of complexity, then this is indeed a subject of substantial difficulty" (2000, v).

In 2012, in recognition of "flaws...which had undermined the effectiveness of the regime and created considerable regulatory uncertainty" (http://www.defra.gov.uk/environment/quality/land/), and following consultation, DEFRA published revised statutory guidance (DEFRA Contaminated Land Statutory Guidance, 2012) to replace its predecessor 'Circular 01/2006'. This essay will attempt to examine whether the changes implemented are likely to have made this area of the law any easier - in the sense that local authorities, as "the primary enforcing authorities" (Fogleman, 2013, 48) will find the contaminated land regime easier to understand and more importantly, to apply.

Categories 1-4:

Contaminated land, as defined in section 78A of the EPA 1990, is "any land which appears...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) pollution of controlled waters is being, or is likely to be, caused". Therefore, it is clear that not all land containing pollutants is 'contaminated land'. Section 78A states that in assessing whether land fulfils the above criteria, local authorities must act in accordance with the Statutory Guidance. However, one of the biggest causes of uncertainty in Circular 01/2006 was that it did "not adequately explain...how to decide when land [was] 'contaminated land'" (Defra, Impact

Assessment, 2011, 5). This uncertainty was thought to contribute to unnecessarily stringent remediation involving substantial costs. In fact, it was estimated that 20-40% of the remediation work that had taken place under the regime was "unnecessary and that the costs of such work could be avoided by 'clearer Guidance and new technical tools'" (Fogleman, 2013, 52, quoting Defra, Impact Assessment, 2011, 2).

The new guidance claims to have rectified this problem by giving "greater clarity to regulators as to how to decide when land is and is not actually contaminated land" (Statutory Guidance, 2012, 2). One of the ways this has been attempted is with the introduction of a new 'category 1-4 test', "with category 1 being the most problematic and category 4 being uncontaminated" (JPL Note, 2012, 550). The Statutory Guidance provides criteria against which land can be assessed in order to identify it as contaminated land, or not, as the case may be. This is intended to encourage prioritisation of the most serious sites, thereby reducing inconsistencies in the approaches of local authorities, and "a reduction in time spent by them on low risk sites" (Fogleman, 2013, 52). Reinforcing these aims, the new guidance also prescribes a presumption against designation of contaminated land.

Whilst the introduction of these categories certainly seems to make it clearer whether a site falls within category 1 or 4 (those being obviously contaminated and obviously uncontaminated sites), it is not obvious that the guidance makes it any easier to differentiate between borderline cases, for example, as between Category 2 cases, where "the site is capable of being determined as contaminated land" and Category 3 cases, where the site is "not capable of being determined as contaminated land" (Statutory Guidance, 2012, 21). According to the Chartered Institute of Environmental Health (CIEH),"changes in the new guidance appear collectively to raise the bar on what will qualify as 'contaminated' still without addressing the problem of making the line between that and 'not contaminated' any clearer" (CIEH, 2012, http://www.cieh.org/media/media3.aspx?id=40824). Indeed, whilst the guidance suggests factors which should and should not be taken into consideration, the process seems likely to be the same in practice as it was under Circular 01/2006. Therefore, it could be said that in this sense, the new guidance does not make this area of the law 'any easier' as there is still obvious doubt as to what actually constitutes contaminated land.

However, in contention with the above argument, there is reason to suggest that whilst this new approach may not make the law any easier to understand, it does, in one sense, make the task of local authorities easier. This view rests on the argument that in line with the presumption against designation, if the a site does not *obviously* fall within category 1, then it does not warrant designation under the new guidance, as it is not high-risk enough. In effect, "with less statutory and technical guidance [to aid local authorities in their identification], local authorities are even less likely to focus on Category 2 land, even though on the balance of probabilites...that land may be 'contaminated land'" (Practical Law Company Note, 2012, http://privateclient.practicallaw.com/4-518-0367). Whilst this is clearly an unsatisfactory result, which could potentially expose the public to environmental and physical harm, local authorities now need not agonise over sites where the contamination, or harm thereby caused, is in doubt, with the result that their job in applying the regime is, arguably, 'easier'.

Policy objectives:

Another significant change to the new guidance is the fact that it contains a new section that lays down for the first time the policy objectives of the contaminated land regime. Stated at para 1.2, these are, firstly, "to identify and remove unacceptable risks to human health and the environment", secondly, "to seek to ensure that contaminated land is made suitable for its current use" and finally, "to ensure that the burdens faced by individuals, companies and society as a whole are proportionate, manageable and compatible with the principles of sustainable development" (Statutory Guidance, 2012, para 1.4).

It could be argued that this addition is a positive step in attempting to clarify the contaminated land regime, as it allows local authorities to act in a purposive manner. For example, the third aim clearly demonstrates to local authorities that they should attempt to "strike a fair balance between identifying and removing unacceptable risks to human health and the environment, whilst ensuring that the burdens faced by individuals, companies and society as a whole are proportionate, manageable and sustainable" (JPL Note, 2012, 550) and therefore that not all sites should be targeted or designated.

However, whilst this addition may give local authorities a greater understanding of the aims to be achieved, it remains to be seen, however, whether their inclusion makes the local authorities' task of implementing the regime any easier. In the first place, they are "phrased in very general and ambiguous terms" (Lees, 2012, 269), meaning that there is potential scope for uncertainty as to how they should be applied in reality. This could consequently undermine the very certainty the new guidance is attempting to import and therefore would not make the regime any 'easier' for local authorities to understand or implement.

In addition, the fact that these aims have been included in *statutory* guidance means that they are binding requirements with which local authorities must comply in their decision-making, not simply guidelines to be followed (Lees, 2012, 268). This "will have a substantive effect at...local authority level in terms of interpretation" (ibid.) as local authorities may adopt a more tentative approach to the designation of contaminated land for fear of becoming embroiled in expensive judicial review proceedings. Indeed, not only are local authorities compelled to act in accordance with these aims, but so too are the courts. This, according to Lees, means that the new guidance "certainly takes steps" towards the view that the courts will have to adopt a teleological approach - "more akin to an EU-approach" (ibid.) – towards interpretation in cases involving contaminated land. This is not welcomed by Lees, who notes that "there are significant problems of interpretation at EU level with regard to environmental legislation" and therefore "it certainly ought not to be universally accepted that a purposive approach...is likely to provide a more consistent and uniform approach across enforcing authorities" (ibid., 269).

Furthermore, the act of weighing up social, environmental and economic costs "could cause regulators significant difficulty and uncertainty" (UKELA Response to Consultation Form, 2011, 2), which, by virtue of the statutory nature of these policy objectives, local authorities cannot avoid. This may also result in the regime being applied inconsistently, as local authorities may place more or less emphasis on economic considerations, depending, for example, on their budgetary constraints.

Therefore, whilst local authorities may derive some benefit from the aims now included in the statutory guidance, this seems likely to be negated by the uncertainty they create on account of their vagueness and the difficulties associated with balancing competing considerations. The aims therefore cannot be said to make the contaminated land regime any 'easier' either to understand or to apply. Given the fact that these aims are likely to result in local authorities designating less sites, it could therefore be questioned whether the inclusion of these aims is worth the potentially grave environmental consequences that this approach could produce.

Shorter length:

One significant change to the new guidance is that it is considerably shorter in length. Whereas its predecessor consisted of 190 pages of both statutory and non-statutory guidance (JPL Note, 2012, 550), the 2012 guidance is only 67 pages long. It seems clear that the shortening of the guidance was an attempt to make it more easily digestible and more "user-friendly" (Barlow and Tilling, 2012, 11) "in line with the ongoing 'red tape challenge'" (Lees, 2012, 267) which aims at reducing "the overall burden of regulation" so as to increase its efficiency and to promote economic growth (http://www.redtapechallenge.cabinetoffice.gov.uk/about/).

There are several reasons for the new guidance being markedly shorter. One is that it has dispensed with the non-statutory guidance previously contained in Circular 01/2006. The abandonment of this guidance not only considerably shortens the length of the 2012 guidance, but, as Lees claims, also "represents an improvement since the status and usefulness of this [non-statutory] guidance is unclear" (2012, 268). This is therefore an attempt to streamline the guidance and to make it more concise. Another reason for the reduced length is that the new guidance excludes guidance relating to radioactive contamination previously included in Circular 01/2006. This seems to be in recognition of the fact that radioactive contamination is rare and will not concern the vast majority of local authorities. It therefore seems to be a logical improvement.

In addition, some effort has been made to simplify the guidance, for example, by removing repetitions. However, it is not clear that this has necessarily resulted in the new guidance being easier to follow. The CIEH, in its Response to DEFRA's Consultation complained that attempts to shorten the guidance have come "at the expense of omitting valuable material including useful cross-references to the Act and the definitions of key terms" (2011, 17). This could therefore have the effect of making the guidance less user-friendly – the opposite of what was intended. In addition, the CIEH contests the fact that

the new statutory guidance is really much shorter than Circular 01/2006 when compared like-for-like (a view shared by UKELA in its Consultation Response Form, 2011, 2). Of the 190 pages of Circular 01/2006, only 76 were statutory guidance (Fogleman, 2013, 50), which means that the new guidance is only 9 pages shorter. When the exclusion of the guidance on radioactive contamination is taken into account, this figure will be even lower still. Given this fact, the CIEH claim that "the sacrifices highlighted above are even harder to justify" (Response to DEFRA's Consultation, 2011, 4).

Therefore, whilst the new guidance seems at first glance to be much shorter than Circular 01/2006, this is arguably as a result of the (admittedly welcomed) removal of the non-statutory guidance and the guidance relating to radioactive contamination, as opposed to being as a result of a concerted effort to make the guidance any more concise. Even when there is evidence of an effort to simplify and shorten the substance of the new guidance, this has not necessarily made the new guidance easier to understand. If this is the case, then it cannot be said that these changes will make the new guidance any easier to implement either.

'Normal' levels of contamination:

Another novel feature is that the new guidance introduces the notion of "normal levels of contamination" which should "not be considered to cause land to qualify as contaminated land, unless there is a particular reason to consider otherwise" (Statutory Guidance, 2012, 13). Whilst this is "intended to ensure local authorities focus on higher risk land, and to reduce potential blight on land with only normal levels of contamination" (JPL Note, 2012, 550), the introduction of this concept could have several unwelcome consequences in relation to remediation standards. For example, Fogleman questions whether "if large parts of an urban area are contaminated with lead, should a local authority require remediation of a particularly contaminated site only to these 'normal' levels?" (2013, 53). The new guidance does not appear to answer this question, and therefore local authorities could still be faced with uncertainty over important issues related to this concept. Introducing a new concept in the guidance, without addressing the practical questions that it raises, cannot be said to improve the understanding, nor the ability of local authorities to implement the regime with ease.

Conclusion:

Therefore, there are strong arguments for asserting that the contaminated land regime, despite the recent publication of new guidance, remains as complex as ever. The 2012 guidance clearly attempts to remedy some of the criticism advanced against Circular 01/2006, for example by trying to clarify the instances when land should be designated as 'contaminated land', as well as by attempting to shorten the length of the guidance. However, whilst some of these measures, such as the exclusion of the non-statutory guidance and the guidance relating to radioactive contamination, have been welcomed, other changes have not made the guidance any clearer, or have in fact, created

new problems of their own. It is clear that a large degree of uncertainty still pervades the guidance, and therefore it seems evident that the new guidance has not, in real terms, made the regime any easier to understand or implement. The only way in which the regime could be 'easier' to implement is, perversely, as a result of the new presumption against designation, which, in effect narrows local authorities focus to the most 'high-risk' sites, thereby, perhaps, reducing their workload.

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