

Introduction

The phrase '*what lies beneath*' may be familiar to people in the UK as being the title of a film starring Harrison Ford but it could have more meaning to those people than they might believe. This is because some of the land upon which people walk and live may be 'contaminated land'. Historically, the UK was a heavily industrialised country with activities ranging from mining to chemical-production. As Vaughan puts it: "we live in a land subject to centuries of industrial use" and "our green and pleasant land may be somewhat less green and less pleasant if we look at what lurks beneath" (2010, p.142). Despite the heavy industrial use of land since the mid-eighteenth century, environmental controls only emerged in the 1970s. Consequently, the land in the UK has suffered from around 200 years of activity where people could do as they please without environmental regulation. Contamination of land from historical sources therefore presents a significant challenge in environmental law (Bell and McGillivray, 2008, p.547). Increased concern during the early 1990s about the effects of historical land contamination (*ibid*, p.555) resulted in the introduction of the contaminated land regime which came into force in 2000 via Part 2A of the Environmental Protection Act 1990 (EPA). The contaminated land regime under Part 2A "provides a means of identifying and remediating land that poses a significant risk to health or the environment, where there is no alternative solution" (Defra, 2012, p.2).

Part 2A EPA concerns the identification of land that requires clean-up; deciding how to clean it; and deciding who is going to perform such clean-up (i.e. who will pay for it) (Bell and McGillivray, 2008, p.555). Previously, the Defra Circular 01/2006 contained the most important components of the contaminated land regime. In April 2012, the Defra Contaminated Land Statutory Guidance came into effect for Part 2A (the 2012 Guidance) and replaced the 2006 guidance. Although Part 2A sets the statutory footing for liability, the "day to day practice" of the regime is to be found in the statutory guidance (Samuels, 2012, p.1459). The 2012 Guidance was introduced in order to "simplify the former statutory guidance and to reflect experience in implementing the regime to remediate contaminated land" (Fogleman, 2013, p.47). It is "shorter, simpler and more focused to achieving optimum results" (Defra, 2012, p.2).

This essay will give a brief summary of Part 2A in order to demonstrate how the regulation of contaminated land under Part 2A is complex. Discussion will then consider some of the key changes made by the 2012 Guidance in order to establish whether it has made the law concerning contaminated land any easier. I will then conclude that the 2012 Guidance has not made the area of law any easier or simpler than it was previously under the 2006 Circular and Part 2A.

Review of Part 2A

A brief understanding of Part 2A is necessary to help demonstrate how the regulation of contaminated land via this regime is complex. Crucially important to the operation of Part 2A is the definition of 'contaminated land', as not all land that one may think of as being 'contaminated' falls under the scope of Part 2A. Moreover, the definition of 'contaminated land' is "the trigger for all other procedures to commence" under Part 2A (Bell and McGillivray, 2008, p.555). S.78A (2) EPA gives

discretion to local authorities to define contaminated land, in accordance with the guidance, as being:

“...In such a condition, by reason of substances in, on or under the land, that... significant harm is being caused or there is a significant possibility of such harm being caused...”

Despite being key to the operation of Part 2A, s.78A (2) is very vague. Consequently, the 2012 Guidance is crucial to Part 2A. The statutory definition of contaminated land and the enforcement of the regime would be “impossible without the guidance” (Fogleman, 2013, p.48) as it is required to “add flesh to the skeletal provisions of the statute” (*ibid*). Although one could therefore argue that the Guidance subsequently does make things easier under Part 2A by offering direction in the definition of ‘contaminated land’, such an argument would be very weak because the guidance is a bare necessity for the operation of Part 2A. Without the Guidance, the Act would fail to operate: it is a prerequisite rather than a convenience.

Under Part 2A, the primary obligations are held by local authorities (Vaughan, 2010, p.144) who are directed to inspect their areas and designate land that meets the s.78A (2) and guidance criteria as being ‘contaminated’. In making their determination, the authority must decide whether a significant contaminant linkage exists (there must be a contaminant, a receptor and a pathway) (2012 Guidance, paras 3.8-3.11). If the authority decides that a linkage does exist, then the question arises as to what level of harm is being caused (i.e. is the contaminant linkage a significant one?). S.78A (4) defines ‘harm’; with s.78A (5) adding that what ‘harm’ amounts to being significant and whether the possibility of significant harm being caused is ‘significant’ “shall be determined in accordance with the guidance”. So, again, the guidance is necessary to the operation of Part 2A (changes to the guidance in this area will be considered later). If a local authority makes the determination that land is contaminated, it must then establish responsibility for remediation of the land and in doing so must notify the appropriate persons in accordance with s.78B (3) EPA. ‘Appropriate persons’ may be either ‘Class A’ persons (those who cause or knowingly permit the pollution, s.78F (2) EPA) or ‘Class B’ persons (the owners or occupiers of the land, s.78F (4) EPA). The authority then decides what remedial actions are required against the appropriate persons and how to apportion the cost of remediation (Vaughan, 2010, p.145).

This brief review illustrates that the regulation of contaminated land under Part 2A may appear “to be a relatively simple regulatory regime” but “is, in fact, extremely complex” (*ibid*). The vague definition of ‘contaminated land’ in s.78A (2), the discretion given to local authorities, the question of who amounts to being an appropriate person, etc., all add up to create a complex system of regulation via Part 2A.

Has the 2012 Guidance made the law any easier?

The statutory guidance initially came in the form of the complex DETR Circular 02/2000 (Fogleman, 2013, p.49), followed by the 2006 Circular. The 2006 Circular is long, consisting of 190 pages of which 76 (Annex 3) are statutory guidance. The guidance was revised again, resulting in the 2012 Guidance, which, conforming to the government’s ‘red tape challenge’ (Cabinet Office, 2012), has been shortened to 67

pages and consists only of statutory guidance. The approach to regulating contaminated land is market-based, with the Coalition government aiming to reduce unnecessary regulations (Jowit, 2012). At first glance, therefore, one could assume that, as a result of the shortening of the guidance and the fact that it is purely *statutory* guidance, the regulation of contaminated land may now be easier. Nevertheless, this section of the essay considers selected elements of the 2012 Guidance in order to conclude that it has not made the area of law any easier.

2012 'Categories' Test

The function of the 2012 Guidance remains: to provide more detailed instructions for the interpretation and application of Part 2A (Lees, 2012, p.268). So the complexities of the Act remain. The issue is therefore whether or not the 2012 Guidance improves the ability to interpret and apply Part 2A. A 2011 Defra Impact Assessment found that since the contaminated land regime came into force there had been large uncertainty over when land would become 'contaminated' and how to decide when land meets the test of 'significant harm or possibility of significant harm' (Defra, 2011, p.5). Further, it added that the "trigger" of when land would pose a 'significant possibility of significant harm' had not been adequately explained in the Circular 01/2006 (*ibid*, p.6). The Circular had simply stated how a 'significant risk' would exist if human exposure to a contaminant "would represent an unacceptable intake or direct bodily contact" (Defra, 2006, p.88). The Circular, however, offered no explanation of what "unacceptable" was to mean. As explained in the Impact Assessment, this lack of clarity and the complexity of deciding when land would be contaminated resulted in "substantial regulatory uncertainty" (Defra, 2011, p.6). Following such uncertainty, the "main focus" (Fogleman, 2013, p.51) of the 2012 Guidance is the threshold of when land becomes 'contaminated' for the purpose of Part 2A (*ibid*). Under the 2012 Guidance, in deciding whether land is 'contaminated land' on the grounds of significant possibility of significant harm, the local authority is directed towards a new four-category test (Defra, 2012, p.20). As explained in para 4.17 of the 2012 Guidance, "Categories 1 and 2... encompass land which is capable of being determined as contaminated land on grounds of significant possibility of significant harm to human health. Categories 3 and 4... encompass land which is not capable of being determined on such grounds." Does this categorisation make the regulation of contaminated land any less complex? Under category 1, the "local authority should assume that a significant possibility of harm exists... where it considers there is an *unacceptably high probability*... that significant harm would occur" (Defra, 2012, p.20) [emphasis added]. The 2012 Guidance does not define what is to be an "unacceptably high probability" and so the threshold test is still a complex and uncertain mechanism with large discretion being left to the authority. Does the 2012 Guidance mean, for instance, that if the local authority considers there to be a *high* probability that significant harm may occur, rather than an "*unacceptably high* probability", that the land will not come under category 1? Such uncertainty could mean that local authorities still face difficulties in determining when land is capable of being brought within the definition of 'contaminated land' and so in this respect, the 2012 Guidance has not made the law any easier.

‘Normal levels’ of contaminants

The 2012 Guidance introduces to the risk assessment stage the concept of ‘normal levels of contaminants in soil’ which should not be considered to qualify as contaminated land (Defra, 2012, p.13). Para 3.23 defines what is meant by ‘normal’. Lees (2012, p.271) believes that this new feature of the Guidance should make the process of inspection of land more straightforward for local authorities. However, one disagrees and believes that it could encourage further complexity in the regime. Additional questions/problems may arise as a result of this change. For example, as Fogleman demonstrates (2013, p.54): if a large urban area is contaminated with lead, does the local authority only require remediation to the point where the contaminant reaches a ‘normal level’? And could a developer of such land be assured that if he remediated the land to the ‘normal’ level that it would never be designated as contaminated? Such questions and possible confusion demonstrate how new features of the 2012 Guidance have not necessarily made the law concerning the regulation of contaminated land any easier.

Complexity concerning liability

The 2012 Guidance has not made the complexities of liability under Part 2A any easier either. This concerns the question of when a party can be designated as an “appropriate person” under s.78B (3). S.78F (2) says that an ‘appropriate person’ is somebody that ‘causes or knowingly permits’ contaminants to be present in, on or under the land (“Class A persons”). However, what is meant by ‘cause or knowingly permit’ is unclear and there has been “little interpretation on what the test means” (Vaughan, 2010, p.148). Under the old guidance, there was no definition of either ‘cause’ or ‘knowingly permit’, adding to the complexity of the law. This is still the case under the 2012 Guidance. No definition has been added and so this complicated area of law has not been made any easier. In fact, one could argue that the position was slightly clearer under the 2006 Circular, which at least gave some direction on the test, albeit in a non-binding section, by commenting: “the test of cause ‘or knowingly permit’ has been used as a basis for establishing liability in environmental legislation for more than 100 years” (Defra, 2006, p.55). Nevertheless, as Lawrence and Lee explain (2003, p.263), even where there has been judicial interpretation on the test, this has been in the areas of water pollution and waste-related offences, not that of contaminated land, and so the meaning of the test in the context of Part 2A is unclear. A lack of judicial guidance adds to the complexity and uncertainty that surrounds the question of who an ‘appropriate person’ is. The cases of *Circular Facilities v Sevenoaks District Council* (2005) and *R (on the application of National Grid Gas, formerly Transco) v Environment Agency* (2007) added no real “meat” (Vaughan, 2010, p.154) to the regime and consequently there is little clear judicial guidance on these key terms (*ibid*). As a result of the lack of guidance in the 2006 Circular, coupled with the lack of clear judicial guidance, one would have hoped that the 2012 Guidance would have reduced the complexity of the regime by defining terms such as ‘cause or knowingly permit’; but this has not been the case and, accordingly, this area of law remains complicated.

Relationship with Other Regimes

Finally, it is worth noting that para 1.5 of the 2012 Guidance says that the Part 2A regime should only be used when ‘no appropriate alternative solution exists’. It is therefore a regime of “last resort” (Lees, 2012, p.276) where other regimes, such as the planning system, cannot be used. The guidance therefore seems to give preference to the use of regimes other than that of contaminated land. This seems strange, as regimes such as the planning system do not operate in order to combat contaminated land, and only become active when somebody wishes to alter the use of land. The 2012 Guidance therefore arguably adds to the complexity of the contaminated land regime, as it suggests that it should only be used where the use of other areas has been exhausted. The 2012 Guidance reduces the clarity of when Part 2A should be used, leading to increased complexity.

Conclusion

The regulation of contaminated land via Part 2A is undoubtedly complex: s.78A (2) is very vague; a lot of discretion is left to local authorities; and there is a lack of clear definition of important terms. The aim of the 2012 Guidance was to simplify and clarify the contaminated land regime (Lees, 2012, p.267). The 2012 Guidance is shorter, conforming with the red tape challenge, but this has not necessarily made the regulation of contaminated land easier. On closer inspection the 2012 Guidance “is not as simple as drafters might have hoped” (*ibid*, p.278). It would be fair to say that the guidance does not go far enough in simplifying the regime and, consequently, local authorities may continue to find the regulation complex. Particularly, the new four-category test is not clear enough; the issue of defining ‘cause or knowingly permit’ remains; and the new risk-based approach in relation to ‘normal levels of contaminants’ may lead to further issues and complexities where ‘*what lies beneath*’ is considered to be ‘normal’. Contaminants, by their nature, are not ‘normal’. Such issues add up to illustrate that, despite the 2012 Guidance, the regime remains complex. Further, as the regime is now only to be used where “there is no alternative solution” (Defra, 2012, p.2), it will be interesting to see how much the regime is used in the future.

Word count: 2594

Bibliography

Bell, S. and McGillivray, D., (2008). *Environmental Law*. 7th edition. Oxford: Oxford University Press.

Fogleman, V., (2013). The New Statutory Guidance; Simplification or Reducing the Application of Part 2A of the Environmental Protection Act 1990? *Environmental Law Review*, 15 (1), pp.47-54.

Journal of Planning and Environment Law, (2012). Contaminated land: changes to the statutory guidance. *Journal of Planning and Environment Law*, 5, pp.549-551.

Jowit, J., (2012). Defra to issue new guidelines for building on polluted land. *The Guardian*, [online]. Available at:
<<http://www.guardian.co.uk/society/2012/feb/07/defra-building-polluted-land-guidelines>> [Last accessed 27/04/13].

Lawrence, D. and Lee, R., (2003). Permitting Uncertainty: Owners, Occupiers and Responsibility for Remediation. *Modern Law Review*, 66, pp.261-276.

Lees, E., (2012). The contaminated land regime – new guidance and a new philosophy?. *Environmental Law Review*, 14 (4), pp.267-278.

Samuels, A., (2012). A review of the law and practice on contaminated land. *Journal of Planning and Environment Law*, 12, pp.1459-1465.

Vaughan, S., (2011). The contaminated land regime: still suitable for use? *Journal of Planning and Environment Law*, 2, pp.142-156.

Law, Policy and Guidance

Defra, (2006). Circular 01/2006, *Part 2A Environmental Protection Act 1990: Contaminated Land*. London: Defra. Available at:
<<http://archive.defra.gov.uk/environment/quality/land/contaminated/documents/circular01-2006.pdf>> [Last accessed 27/04/13].

Defra, (2012). Environmental Protection Act 1990 Part 2A: Contaminated Land Statutory Guidance. London: TSO. Available at:
<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/69538/pb13735cont-land-guidance.pdf> [Last accessed 27/04/13].

Environmental Protection Act 1990, Part IIA. Available at:
<<http://www.legislation.gov.uk/ukpga/1990/43/part/IIA/data.pdf>> [Last accessed 27/04/13].

Case Law

Circular Industries (London) Ltd v Sevenoaks District Council [2005] EWHC 865 (Admin)

R (on the application of National Grid Gas plc, formerly Transco) v Environment Agency [2007] UKHL 30

Other

Cabinet Office, (2012). *Red Tape Challenge*. [Online] Cabinet Office. Available at <<http://www.redtapechallenge.cabinetoffice.gov.uk/privacy-policy/>> [Last accessed 27/04/13].

Defra, (2011). *Impact Assessment: Simplification of the contaminated land regime (IA No: Defra 1133)*. [Online] Available at: <<http://archive.defra.gov.uk/environment/quality/land/contaminated/documents/contaminated-land-ia.pdf>> [Last accessed 27/04/13].