



## CIEH Position Statement Normal levels of contaminants in soil

In April 2012, the Department for Environment, Food and Rural Affairs published revised 'Contaminated Land Statutory Guidance'<sup>1</sup> under Part 2A of the Environmental Protection Act 1990<sup>2</sup> for England. Equivalent guidance was published shortly afterwards for Wales<sup>3</sup> Among the changes that made to previous Guidance was the addition in both versions of a section of six paragraphs<sup>4</sup> headed 'Normal presence of contaminants'.

Their rationale is set out in the opening statement which says '*The Part 2A regime was introduced to help identify and deal with land which poses unacceptable levels of risk (but that) It is not intended to apply to land with levels of contaminants in soil that are commonplace and widespread throughout England or parts of it...*'.

While, contrarily, the following paragraph introduces the caveat '*unless there is a particular reason to consider otherwise*', that is negated in the very next sentence: '*Therefore, if it is established that land is at or close to normal levels of particular contaminants, it should usually not be considered further...*'. and these statements raise several difficulties:

In the first place, whereas the fundamental purpose of Part 2A *is*, of course, to identify and remove unacceptable risks to human health, the definition of 'contaminated land' in s.78A(2) clearly *does* encompass ubiquitous contaminants, whether man-made or natural.

Secondly, given that, is how they equate ubiquity with 'normality', encouraged by a subsequent circular definition ('*...normal levels of contaminants exist...where: (a) those levels are not significantly different to those...typical or widespread in the authority's area, or in other similar areas; and/or...are common...in similar... situations across England...*')

Thirdly is the further inference that ubiquity means acceptable risk which is generally unfounded and has, in the case of Lead, for example, already proved to be wrong.

Not least, while it is fundamental that contaminants which appear to give rise to significant harm or a significant possibility of that<sup>5</sup> will cause land to qualify as 'contaminated land', what levels may be found widely is irrelevant – what matters is the risk posed by contaminants, alone or (which is overlooked) in combination, *on the land in question*. Though, in the final paragraph, the possibility that ubiquitous contaminants might contribute

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<sup>1</sup> Defra (2012). *Contaminated Land Statutory Guidance*. London: Defra at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/223705/pb13735cont-land-guidance.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/223705/pb13735cont-land-guidance.pdf)

<sup>2</sup> <http://www.legislation.gov.uk/ukpga/1990/43/contents>

<sup>3</sup> Welsh Govt (2012) *Contaminated Land Statutory Guidance – 2012*. Cardiff: Welsh Govt

<sup>4</sup> Paragraphs 3.21 – 3.26

<sup>5</sup> Or significant pollution of controlled waters or a significant possibility of that.

to an unacceptable risk is at last expressly acknowledged, authorities are extraordinarily warned to take particular care to justify and explain occurrences.

Removing such contamination from Part 2A has been proposed before by Defra and rejected on health protection grounds<sup>6</sup> but it is difficult to see the purpose of having revived the issue if it is not to `nudge` readers away from a policy problem (as it has been put, `to avoid digging-up the whole of Cornwall`) instead of addressing it proportionately and there is, in the CIEH`s view, a clear danger that local authorities might condone the presence of contaminants on land by reference simply to their `normality` rather than through a proper process of risk assessment. Similar concerns have been raised by other bodies too. A further risk arises that `normality` will be read-across to the planning function where it has no place.

We have told the Government that we believe the current Statutory Guidance is flawed and needs substantial revision; ideally, this section should be removed in the course of that. Meanwhile, we believe the notion of `normality` is a red herring – `contamination` should not be excused as `normal` in any event - and we see no reason why ubiquitous contaminants should be treated any differently for the purposes of a determination than `pepper-potted` ones.

In accordance with the Government`s own objective for contaminated land *`to identify and remove unacceptable risks to human health`*, what the CIEH believes should be done about them, if anything, should depend primarily on the threat they pose to health. Where in all the circumstances they pose no unacceptable risks, nothing need be done but where they do, it is unacceptable to ignore that simply because of these substances` origins or because they are widespread.

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<sup>6</sup> Defra (2006). *Contaminated Land Advice Note 6/06*. London: Defra. p11