Proposed new contaminated land statutory guidance

Response to Defra's consultation

March 2011

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Proposed new contaminated land statutory guidance: response by the CIEH

Introduction

We refer to the above consultation paper published by the Department in December and, have, first of all, to regret that the minimum consultation period was effectively shortened by the inclusion of the Christmas holiday. That, apparently, time would not permit that short delay is a pity; the subject matter is complicated and the process could only have been improved with more opportunity for consideration. Though we acknowledge the Department held a round of informal consultation meetings during the period, those are likely to have been of more value in explaining its proposals than in gathering opinions on them while we know that, at the time, not all the participants were as familiar with the details as they might have been and (as in our case) their processes of opinion-forming were also incomplete.

For our part, nonetheless, that has been as thorough a process as possible including in particular a consultation with our Standing Conference on Land Contamination - the national network of more than 40 specialist contaminated land regulators' groups comprised of EHOs, scientific staff and managers – together with discussions with other interested groups in which we are represented and individuals from the academic and independent sectors. The Department will also be aware of our long involvement in this topic, providing professional representation of the local government regulatory community, preceding and including participation in the Cabinet Office's "SGV Taskforce" and, subsequently in support of the Department's policy and efforts to implement that effectively.

We still believe that the fundamental approach, i.e. of addressing unacceptable risks to human health remains sound, notwithstanding that identifying when those exist has for various reasons been a challenge. We have done what we have been able to do to meet that challenge, in the past in partnership with the Department but more recently, unfortunately not. As "unfinished business", the Department knows that remains our priority and to a large extent we regard the current exercise as a diversion from that; whereas its introduction claims widespread support for updating the Statutory Guidance, we would want to record that our impression is that there is widespread disquiet about it, we did not agree it was necessary, nor can we agree now that the proposed revisions are merely "a case of fine-tuning the existing regime". It is in that context that we offer the following answers to the consultation questions:

1. Shorter, simpler guidance: *Do you agree that shorter, simpler guidance will be an improvement? If not, please explain which areas need expanding and why.*

Simpler?
The whole topic of contaminated land is awash with guidance of different kinds, on different aspects and from different sources, some of it inevitably better than others. But for the inclusion of material on radioactively contaminated land some five years ago, we would have listed the Statutory Guidance among the better pieces. Little more than dissecting that out again would have restored it to that position. Though the Statutory Guidance as currently drafted may contain some repetition, we think that enhances its clarity and, if it is to be revised, we think "better" should be the goal, not "simpler".

Better?
Unfortunately we do not think the proposed text is better; in its informal style it lacks the precision we would expect from a document having its legal status, e.g. the difference between strategic inspection (i.e. of all land in a local authority's area) and detailed inspection (of 'particular land'); how to get from 'a contaminant' to 'a pollutant'; how it is possible to infer a pathway exists without necessarily having to observe it and, not least, the emphasis on having evidence of the actual presence of a pollutant have all been lost. Using the term 'site' throughout when what is really meant is 'land' and the dropping of various definitions are other examples and there are more.

This is not mere pedantry; it is important in order to relate the Statutory Guidance to the primary legislation, not least for those coming new to the topic. We have to say in addition that there are a number of examples of text which we do not believe are capable of being "Statutory Guidance" under the Act. These should either be clearly differentiated in the text or, preferably, withdrawn. There are various allusions in the consultation paper, e.g. in para 101, to claimed legal necessities as well; not least since we know the Department's legal advice has varied over the years, we would appreciate better explanations.

Shorter?
We would make these criticisms even were the proposed Guidance significantly shorter but it is not; once further Guidance on radioactively contaminated land is taken into account, there is little difference in length between the proposed text and Annex 3 of Circ 01/2006. In that case, the sacrifices highlighted above are even harder to justify and we would recommend retaining more of the overview of government policy and, in particular, of the description of the regulatory regime currently in Annexes 1 and 2 respectively, albeit perhaps, since as para 72 of the consultation notes they are non-statutory, in companion documents.

Providing messages to local authorities as much as to practitioners, we would also like to see prominent mention of the need for them to resource the regime adequately, that is to say with technical and legal expertise as well as funding, when some have clearly failed to do that to date and, indeed, we are hearing now of authorities which are telling their officers not to find any contaminated land. The consultation paper notes the problem in para 45 and such a message need not, in our view, conflict with local priority-setting.

2. Separation of guidance on radioactively contaminated land: *Do you agree with the proposed approach on radioactive contamination? If not, please explain why.*

Yes. Though the approach to radioactively contaminated land (RCL) is similar in its administrative features to that of chemically contaminated land, it is different in its technical features. Given the particular purpose of Statutory Guidance, it is not inappropriate that radioactively contaminated land should occupy a separate volume, notwithstanding that an over-arching statement of contaminated land policy and any description of the regulatory regime needs to refer to both and Guidance specifically on RCL will need to refer extensively to the Guidance on chemically contaminated land in the case of land (as it is may be) contaminated by both.

3. Broad objectives of the regime: *Do you agree that the guidance should state the broad objectives of the regime? Do you agree with the objectives as stated, and do you have comments on what the section says?*

Yes; the government's policy provides the context for the regime as a whole and it is essential to ground the Statutory Guidance in that, nevertheless, we cannot help noticing the differences between para 7 of Annex 1 to Circ 01/2006 and the proposed text, i.e. that the former provides the government's objectives with respect to contaminated land (and not just Part 2A) and that the word "cost" has been deleted from sub-para (c) of para 1.2 (no doubt to facilitate the introduction of other considerations). Whereas we are not aware that the government's policy has indeed changed, we would like to see the original text restored. Since, notwithstanding, the Statutory Guidance is intended to augment Part 2A, it also needs to include the objectives previously set out for that, i.e. those in para 25 of Annex 1, among which we would underline "(b) to enable all problems resulting from contamination to be handled as part of the same process" and "(c) to increase the consistency of approach taken by different authorities". These are tests against which the proposed revision must, of course, be judged.

We would also like to see the phrase "unacceptably high risks" in para 1.3 at least qualified; what scale of risk might be unacceptable to the public at large, and in particular to a householder directly affected by contamination, may not be high in any objective sense (for example, an ELCR of 1 in 10,000) and it is important not inadvertently to "talk-up" the bar for intervention. We have concerns too about the new references to "social, environmental and economic costs" and to "net benefits" in para 1.5 which we will come to below.

4. Local authority inspection duties: *Do you have views on the proposed new Section 2 of the guidance? Should the guidance introduce a mandatory deadline by which authorities should update their strategies?*

This section reflects some confusion of terms as well as some significant changes. As to the first, para 2.7 should properly refer to "inspection" rather than "investigation" and "site inspection" in para 2.11 appears to be a completely new term which requires explanation. As to the second, there is, for example, no longer any reference to "information and complaints from members of the public etc" (hopefully not implying they should be ignored) but, more importantly, paras 2.8 – 2.9 appear to toughen the test for contemplating intrusive investigations by requiring the local authority to be satisfied of the possible existence of a *significant* pollutant linkage (currently, simply of a pollutant linkage) which, where evidence for that may depend on intrusive investigation, will be problematic. To the extent that para 2.9 purports to place the same restriction on the exercise of the power of entry under s.108 of the Environment Act 1995, however, we think it is ineffective since it cannot restrict that.

We think it is important both for accountability and in maintaining the profile of this work in local authorities that their contaminated land strategies are stand-alone documents and the changes being proposed (assuming they are confirmed) are sufficiently significant that we think that local authorities will need to revise their existing strategies. Other changes involving local authorities, for example the establishment of Health and Well-being Boards, would make that timely too and we suggest they might be allowed one year to do that. Thereafter, we would like to see a requirement on them to review their strategies at maximum intervals, perhaps five-yearly, giving clearer definition to the current phrase "keep...under periodic review" and underlining the need for authorities to maintain expert

capacity in this field. We would also like to see the reinstatement of at least some of the guidance on the content of local strategies so that they will be reasonably complete and comparable.

What really matters, nonetheless, is how local authorities implement their strategies and we would hope the Environment Agency repeats its "State of Contaminated Land" reports a little more often than in the past. We need to record here too our concern at the recently-announced review of local government statutory duties; were the duty on authorities to inspect their areas in s.78B to be repealed, the regime would, in our view, collapse.

5. Risk assessment – general: *Would the guidance be improved by making the changes relating to risk assessment and the new requirement for risk summaries, and do you have views on the proposed changes?*

This section of the proposed Guidance contains several examples, e.g. "pollutant", of where terms are included without definition together with a number of examples of drafting omissions, e.g. any explanation of the relationship between "contaminants" and "pollutants", that it is possible to infer the existence of a pathway without empirical evidence and that there may be valid scientific reasons for treating a group of related substances as a single entity. These are important for the Guidance to be comprehensive and comprehensible.

We are quite content that local authorities should take a strategic approach to risk assessment and that, in general, that should lead to dealing with the highest risk land first. Nevertheless, that cannot be identified confidently simply by looking at it and since such land may not prove quick or easy to deal with either, it would be unreasonable to delay action on lesser risk land in the meantime. There may also be more pragmatic or utilitarian reasons, as well as quite proper local political reasons for prioritising other sites which the Department should not interfere with.

"Dismissing" low-risk sites
While we would hope that local authorities would not spend unnecessary time and resources on the investigation of any parcel of land, we are uncomfortable at the encouragement to "dismiss" low risk sites as soon as possible, ostensibly to focus on others (para 81(a)), not least since as we have explained, action can proceed in tandem on both. Also, "low risk" does not necessarily mean "no risk" and, taken together with the proposal for risk summaries in the case of all "relevant regulatory decisions", the proposals imply a more formal process than is now always necessary, indeed authorities would be extremely unwise to declare sites to be "not contaminated" without appropriately thorough investigation. Moreover, running counter to the statutory duty to identify contaminated land (not "not-contaminated" land), this is an example of text which we do not believe can amount to "Statutory Guidance" and not least if householders come to see it as a means of having their land declared "safe", perhaps before a sale, this proposal threatens a significant and largely unproductive (if not counter-productive) increase in authorities' workload. We would urge the Department to think about it again.

Para 3.11 *et seq* set out the Department's view of the process of risk assessment but initially they arguably misrepresent what a conceptual site model (CSM) is and go on to confuse the components of that and the practical activities typically carried out to characterise the condition of land. In the first place, as CLR11 explains, a CSM is not just a depiction of risks but rather a dynamic representation of all the identified pollutant linkages. Thus, a model is

developed *and refined* through various stages of risk assessment, *typically* informed by a desk-study, site reconnaissance, and generic *or detailed* quantitative risk assessment *informed by site data obtained through intrusive and other site investigations.* Whereas, then, the paragraph says that the process "should continue until...(a) there is insufficient evidence that the land might be contaminated land", we have to disagree: since a site is under investigation in the first place, the presumption must be that there is (albeit perhaps only desktop) evidence of contamination and it follows (and the scientific method requires) that there should be positive evidence to rebut that. The Department needs to understand that absence of evidence is not the same as absence of risk and may simply be the result of a poor investigation. Given the public's demand to know that land is "safe", authorities need to guard against potential claims of negligent "under-investigation".

A new obligation to dismiss low-risk sites is also likely to result in fewer land-owners coming forward with their own evidence of (not-contaminated) land condition. It has also to be said that dismissing lower-risk sites does not in any event necessarily lead to making more progress with higher-risk ones, particularly where, without the impetus of targets, the resources for site investigation have been sharply reduced and regulatory expertise is being lost.

What is nonetheless still conspicuously missing are national benchmarks for what are unacceptable risks in a societal sense; we have said repeatedly (and in its "Way Forward" paper the Department implicitly agreed) that it is quite unsatisfactory to leave that to the whims of individual regulators. The government supports such benchmarks in relation to food standards and air and water quality and we cannot understand why it still refuses to do so in this case.

The use of experts

While we agree with para 3.16 – no-one in our acquaintance is equally competent across the whole range of contaminated land expertise – we think the advice in para 3.17 goes too far, both in suggesting that local authorities should routinely seek advice from others and in listing other groups of professionals whom it certainly cannot be assumed are all experts. Whereas standards among the commercial community continue to cause concern, there is, however, now a great deal of expertise within local authorities (which we have helped to build and which they are very willing to share, formally and informally, when necessary) and occasions on which they might be expected to need specialist help should be unusual. Some statement acknowledging that and encouraging local authorities to retain and maintain the in-house capacity they need in their development control roles too would be welcome here instead.

Use of generic assessment criteria

In particular since we understand they will not be withdrawn, for completeness, the paragraphs on the use of GACs should acknowledge the government's own SGVs alongside the two other compatible series expressly noted.

"Some" GACs at the beginning of para 3.24 needs some explanation; a few, e.g. arsenic, are not based on HCVs representing minimal/no appreciable risk. More explanation is also needed, and care taken in particular so not to inhibit the possible future development of less conservative values. Similarly, reference to "reasonable worst case" in 3.24(a) could be unhelpful if GACs are developed with less conservative tox and exposure assumptions as is the description "direct indicators" in 3.24(c) which should, for clarity, read "definitive

indicators" (since there is nothing wrong with indicative values so long as they are not taken as "trigger" values).

Reference to the use of GACs in the planning system in para 3.24(c) is perhaps inappropriate here.

Dealing with uncertainty
What paragraphs 3.25-3.26 say about uncertainty is correct though there are, of course, more sources of uncertainty than they mention, for example in sampling and the analysis of the results of that. Some of those moreover compound one-another, but it is as important accordingly to encourage the adoption of appropriate methods here as to make a sensible assessment of the results. Notwithstanding, it is inherently impossible either to eliminate uncertainty or even to quantify it accurately and what is conspicuously missing here is to repeat (from para 1.5) that assessors should always err on the side of reasonable precaution.

Risk summaries
This is another example of text which we do not think can be "Statutory Guidance", not least in respect of decisions *not* to determine land as contaminated. That said, we have no disagreement in principle with decision summaries; it is only good practice to give reasons for decisions that affect people and good discipline to explain why a file is being closed with no further action. Such summaries will necessarily be publicly available, however, and coupled with the new Guidance on "dismissing" lower-risk sites (which will often still exhibit some contamination) we would be concerned that, collectively, they could amount to the sort of Register, with its attendant blight, amendments to the draft regime sought to avoid 16 years ago. We also have to say that the justification offered on page 30 of the consultation paper does not reflect the way most local authorities function.

6. Background presence of contaminants: *Do you agree that the revised guidance should make clear that "normal" background levels of contamination are not caught by the regime, unless there is particular reason to think otherwise? If not, please explain why.*

This proposal has been made before, of course, and rejected by the Department but the current position is, in our view, ambiguous anyway: notwithstanding that Part 2A refers to "any natural...substance", it is a question of construction whether such substances in their natural geological state can properly be encompassed by the term "contamination" which is, of course, not a term of art under the Act. If not, which we think is the case, and the Guidance can refer properly only to anthropogenic contamination, the question above takes on a different perspective, the proposal behind it stemming from the need, as it has been put, "to avoid digging-up the whole of Cornwall"(if that was what remediation always meant anyway).

That no longer being possible, "normality" seems to us to be a red herring – "contamination" should never be excused as "normal" in any event - and we see no reason why ubiquitous anthropogenic contaminants should be treated any differently for the purposes of a determination than "pepper-potted" ones. In accordance with the objective "to enable *all* problems resulting from contamination to be handled as part of the same process", that is to say that what, if anything, should be done about them should depend primarily on the threat they pose to health and we cannot accept the Department's equation of ubiquity with safety. Where in all the circumstances they pose no unacceptable risks, nothing need be done but where they do, it is unacceptable (and, in fact, contrary to the government's own objectives)

to ignore that simply because of these substances' origins or because they are widespread and the question of whether they are present in only "normal" amounts, as well as those of what (qualitatively and quantitatively) that means anyway, along with such complications as whether "background" should be a legitimate remediation target etc. become irrelevant. The acknowledgement in para 3.21 that sites may still be determinable on "background levels" only underlines that. We do not, accordingly, agree with this proposal.

Do you have any views on how background/normal levels of contamination has been defined in paragraph 3.20 of the proposed new Statutory Guidance?

Notwithstanding our objection to this proposal *in toto*, the Guidance in para 3.20 seems to us somewhat circular, i.e. (to paraphrase) "'background levels' are those (give or take, wherever you choose to make a comparison that favours your prejudice) that might be considered normal".

7. Significant harm to human health: *Do you have any views on the proposed clarification of the statutory guidance on significant harm? Which option do you prefer and why?*

We have not been aware of any practical difficulty arising from the wording of Table A and to the extent that such may arise from the Department's construction of it, we would challenge that now: the attachment of "serious" to "injury" but not to "disease" indicates clearly to us that Parliament did not intend the latter to be restricted in the same way. That is elementary. Similarly, while it may be that contaminant-induced genetic mutations may only be detected in their pathological expression, we (and we suspect the wider public) would find it hard to say that such mutations, as unnatural changes, do not in themselves represent "harm". The Department's proposals accordingly represent not just a "simple clarification" but a significant change to what harm is to be regarded as significant and, ultimately to what "contaminated land" means. The consequence is a lessening of health protection. The claim that the changes would bring increased proportionality supports that conclusion and that the Department intends the regime should in future condone an increased risk of disease and other harm.

Do the options on significant harm strike the right balance between protecting against unacceptable harm to human health, whilst ensuring the regime does not unnecessarily catch less serious health effects (where the impacts of regulatory intervention would probably outweigh the benefits)?

No; it is a false assumption that disease which is not serious in the sense of being life-threatening is necessarily trivial, in particular if replicated in many receptors, and the requirement under either option to engage expert medical opinion is an unwelcome addition to the process. It is a further unwarranted assumption that in such cases the impacts of regulatory intervention would *probably* outweigh the benefits. We cannot support either option for change.

In the middle of this text, para 4.4 describes conditions for the first ground for determining land as contaminated land on health grounds (i.e. that harm is being caused); as such, it would sit better after the paragraphs explaining the meaning of "significant harm" since that applies equally to this ground and to the "SPOSH" ground.

8a. Possibility of significant harm (human health): *Do you agree that the new guidance should clarify that possibility of significant harm should be considered before moving on to decide whether or not a significant possibility of such harm exists? If not, please explain why.*

No; that this is a sequential process is already perfectly plain from Part 3 of the current Statutory Guidance, not least in the way that is punctuated by Tables A and B, and we do not think any clarification of that is required. In its enthusiasm to do so, however, the Department's draft corrupts what the "possibility of significant harm" means by including consideration of the impact of the harm which properly goes instead to the significance of the possibility.

Paragraph 4.13 needs amending accordingly, including by the removal of sub-para (b), which raises a further point of its own, namely the reference to the number of people who might be affected by any harm in para 4.13(b). Table B currently expressly says that judgement should be independent of the number of people affected. This change, not noted in the consultation paper, can only be intended to down-play the significance of harm to individuals.

At the same time, we do not understand why the forms of significant harm, i.e. those currently listed in Table A, need to be qualified by the word "potential" in paras 4.13 and 4.14 unless the intention is to suggest that the likelihood of such harm is remote and we suggest that word should be deleted.

The requirement in para 4.16 is also new to the extent that authorities are told to consider the likelihood of foreseeable changes. The example given is of a change in the vulnerability of a receptor. Whereas, currently, and to use the example of housing, some future changes in occupation are clearly foreseeable, whether those may result in greater vulnerability is not. Currently, that is catered-for in the assumption for risk assessment purposes that the most vulnerable potential receptor will always be present and the change - another not noted in the consultation paper – not only undermines that assumption, again reducing health protection, but would require authorities to monitor the use of all their land indefinitely. That, really, is an impossible burden.

Do you have comments on Annex 1 of the proposed new guidance?

We suggest that a little more "context" might be included, e.g. planning status, past contaminative uses, and there seems to be some effective duplication between material suggested under "Contaminants" and "Potential Impact" which could be removed. While they seem more concerned with impacts than benefits, answering many of the proposed questions in any meaningful way would also be challenging, and this format (which is a considerable expansion of that suggested in para B.52 currently) appears to represent a significant regulatory burden on authorities for little tangible benefit.

8b. Significant possibility of significant harm (human health): *Do you have views on the proposed new "red-amber-green" clarification of how SPOSH should be decided would improve the Part 2A regime? Does the new test strike the right balance between establishing a legal framework, whilst giving local authorities sufficient flexibility to take proportionate decisions in the interest of local communities?*

To begin, we cannot agree with the Department's analysis of the "SPOSH" issue. From our (regulatory) perspective, the failure to provide the promised guidance on this pivotal point, now 11 years on, is the single reason why local authorities in the beginning made some inappropriate determinations, and why both they and developers remain in their different ways more cautious in their respective judgements than they might be. As we and others have said repeatedly, the deficiency does not lie with the current Statutory Guidance and it is quite untrue that local authorities "are unclear about what decisions the regime expects them to make" or what outcomes the regime seeks to achieve, nor can we accept that the legal and scientific difficulties of providing that guidance (though the latter may be considerable) are "insuperable"; but for the unwillingness of the Environment Agency to co-operate, it would have been done by now and, indeed, unfunded efforts to produce it are still going on outside government for which the Department's qualitative approach is no substitute.

Para 4.19 is incorrect inasmuch as at the point of decision, the authority is deciding whether any action is required to reduce the risk; that need not be regulatory action since a landowner may yet come forward with a proposal of his own, nor, for that reason and others, is the authority concerned at this stage with "all that would entail".

Para 4.21 says, correctly, that the decision whether land is "contaminated land" is a positive one and that the "default" position, where a local authority lacks a reasonable belief that significant harm is being caused or there is a significant possibility of that, is that the land is not "contaminated". That is another reason why it is unnecessary to require authorities formally to "dismiss" low-risk sites, nevertheless this paragraph omits to add that the standard to be applied is one of the balance of probabilities. For completeness it should do so.

Do you have views on the description of the "red", "amber/red", amber/green" and "green" categories? Do you have suggestions on how the categories could be improved?

The first thing then to note is that the traffic light classification of the consultation paper is not reflected in the draft Statutory Guidance itself. Whether coloured bands or categories, however, they have no intrinsic significance; if they had not been invented, there would be no need to complicate the picture by trying to define them, notwithstanding, the grounds for assigning land to both Category 1 (= red) given in para 4.22(a) and (b) and to Category 4 (= green) in paras 4.23-4.25 are so straightforward they hardly need stating. The difficulties do not arise at the extremes of what is, in reality, a continuous spectrum of risk, however, and it is difficult to see the point of these two Categories (or indeed of assigning land *ex post facto* to any of them at all) while the question still arises of where local authorities are to find the evidence to support any criteria and reach the positive decision (somewhere in the amber zone) that land is "contaminated", given the department's own research which suggests that, for the most part, the evidence to link contaminants in soil to ill health is inadequate. There are clearly considerable difficulties with collecting epidemiological evidence of cause and effect in environmental situations, nevertheless a lack of evidence of adverse effects does not mean that some degree of harm, which may or may not prove to be unacceptable, may not be accumulating in the population at large. It is precisely for this

reason that some national consensus on appropriate toxicological benchmarks for exposure to soil contaminants is still needed. The artificial categorisation of sites only serves to cloud that.

Do you agree that local authorities should consider whether the health benefits of intervention would outweigh the health risks of carrying out remediation on "amber sites"? If not, please explain why.

No. Quite apart from the speculation that this would necessarily involve, the determination of land as "contaminated land" should be driven by an assessment of the present risks; those risks will not disappear if nothing is done about them and it would in our view be at least unethical to pretend they do not exist (not to say futile when they would be noted for the world to see in risk summaries). They cannot be off-set against possible future risks in some sort of "net risk" calculation. The process of remediation may or may not bring significant additional risks but the time to consider those, and how to minimise them, comes only later.

Do you agree that local authorities should consider wider factors such as social, economic and environmental impacts of the remediation, and whether the benefits of remediation would outweigh the impacts before taking SPOSH decisions on "amber sites"? If not, please explain why.

No. Para 4.27 represents what we can only describe as a corruption of the current scientifically-based regime and we have particular objections to the addition of sub-paras (b) and (d). Those are that they bring forward considerations which, insofar as they are relevant at all to any land in question, are not relevant to the decision whether the condition of that land presents an unacceptable risk to likely receptors. As such, we think this section of the Guidance goes beyond what is relevant to the definition of "contaminated land" and the manner in which that is to be identified while extraneous considerations necessarily, again, load decisions against the considerations of health which head the list of the regime's objectives. While at the same time adding complication and uncertainty, we also fail to see the logic in the suggestion that those other considerations are relevant only to marginal decisions when, if the Department believes they are relevant at all, the greater their magnitude, surely the wider the range of circumstances they might affect and should be considered within.

While there is, in fact, no need to consider the health impacts of any activities requiring Environmental Permits (since they will be dealt with in that process) (sub-para (b)), we note especially that the current Statutory Guidance makes no requirement for the consideration of any socio-economic impacts of remediation (sub-para (d)) at this juncture in the process. Though it was originally intended that such factors would play a role at a strategic level through the recommendation of toxicological benchmarks for unacceptable intakes, such benchmarks would have reflected consensual decisions about levels of health protection to be provided at a societal level and consistent with similar decisions in other areas of public policy. The proposal now to introduce a site-specific test only complicates the key decision on the probability of significant harm occurring while it will lead to inconsistency in decision-making and unjustified variations in health protection, influenced by highly speculative estimates of costs (and, in the case of orphan sites no doubt, how they will be met). At the same time they will make predictions by third parties of their potential liability (for example as part of a due diligence exercise) almost impossible.

Local authorities' proposed role, comparing chalk and cheese, is then made all the harder by the advice that "[these considerations] should not necessarily involve quantification of the impacts...if the authority consider it not reasonable", not least since their reasonableness falls ultimately (and uncertainly) to the Courts to decide. Though, admittedly, para 4.29 suggests the emphasis ought to be on the authority's assessment of the probability of the harm occurring, that only tends to reinforce the argument above, i.e. that some consensus on the policy and toxicological elements of what constitutes unacceptable health risks is still required. That is underlined by the equation in that paragraph of high and low degrees of risk - descriptions used in previous paragraphs to assign sites to Categories 1 and 4 - this time with Categories 2 and 3, illustrating that without a numerical component those terms are almost meaningless.

We think the advice in para 4.30 is simply wrong: uncertainty is no ground for concluding the legal test has not been met. Local authorities must make up their minds on the available evidence, if necessary seeking more.

Implications for CLEA
Though the consultation paper poses no specific question on it (and it is not reflected in the draft Guidance), it is impossible to pass on without commenting on paras 118-124 of the consultation paper. Contrary to what para 123 says, CLEA was designed precisely to help risk assessors decide whether there is a significant possibility of significant harm at a particular site but it has never been possible to base such decisions on CLEA alone.

9. Significant harm and significant possibility of significant harm (SPOSH) to non-human receptors?: *Do you have any views on the proposal not to amend the substantive nature of the statutory guidance on significant harm and SPOSH to non-human receptors?*

Para 125 of the consultation paper says that these" provisions remain substantially the same..." yet we note that the property category has been expanded by the addition of buried services. The reason and consequences of that ought to be explained.

10a. Significant pollution of controlled waters: *Do you have views on the proposed new guidance on how to decide what constitutes significant pollution of controlled waters?*

We welcome the imminent implementation of s.86 of the Water Act. Though local authorities' attention has been (and will continue to be) focussed on human health, knowing that Pt2A would be modified at some time, yet not knowing when or how, has inhibited them from taking the possibility of the pollution of controlled waters into proper consideration. The amendments proposed to the Statutory Guidance still do not provide all the advice needed, however, and we look forward to that gap being filled by the Environment Agency as soon as possible. The sections on controlled waters also show up the lack of any overview of the regulatory landscape, for example to set out the relationship between Pt2A and the Environmental Damage Regulations.

In respect of those amendments, however, we found the structure of this part of the Guidance confusing in that it does not clearly separate the description of what constitutes "significant pollution of controlled waters" from the two possible grounds for determination (i.e. pollution being caused and the possibility that it will be caused). Some other detail of the current Guidance has also been lost, for example, in relation to the circumstances when it would not be appropriate to use Pt2A because pollutants have already entered controlled

waters and there is no longer a direct relationship between contaminants in unsaturated soils and in saturated ground. Another example occurs in para 4.40(a) and (b) which correspond to the provisions currently in paras A.36 and A.38 but the key provisions in A.37, which not only sets out the circumstances in which land should not be determined on any ground but goes some way to explain why the other two provisions were made, have been omitted. Somewhere, probably in section 4d, it would be helpful to draw attention to the revised definition of "controlled waters", i.e. "that 'ground waters' does not include waters contained in underground strata but above the saturation zone" (see s.86(2)(f)).

There are other textual difficulties in these sections too: in para 4.37, "investigating" should properly be "inspecting"; para 4.38 uses the terminology for Ground 1 whereas the text relates to both possible grounds; para 4.40 appears to relate in part to the meaning of "significant pollution" but mainly, in fact, to Ground 1 and, in general, we suggest that text on the meaning of "significant pollution" should come first (together with any other text relating to both POCW Grounds), to be followed by clearly-marked text on Ground 1 etc.

Para 4.42 gives rise to a number of further issues: in <u>what</u> circumstances may a local authority consider ...etc?; and what are "hazardous substances", "priority hazardous substances" and "priority substances"? Similar practical difficulties arise from the cost-benefit analysis required by para 4.43 as in the case of human health (above) while showing a material difference between upstream and downstream water quality (para 4.44(b)) will be difficult unless the substances concerned are routinely monitored over a long period.

Do you agree that a broad "red-amber-green" test in the Statutory Guidance is the right approach, and do you have views on how the red, amber and green categories have been described?

Hardly meeting the goal of simplifying the current Guidance, para 4.45 introduces four possible Categories into which pollution under Ground 1 can be assigned and we have similar reservations about applying this approach to controlled waters as we do to human health.

10b. Significant possibility of significant pollution of controlled waters: *Do you have views on the proposed new guidance on how to decide what constitutes significant possibility of significant pollution of controlled waters?*

While this section ought to note that the local authority needs to show a) that a significant pollutant is present, and b) that a pathway by which it might enter the controlled water exists, we have similar objections to the introduction of cost-benefit considerations under Option 2 as we have in relation to human health. The introduction of four Categories for pollution under Ground 2 is also best avoided.

Do you prefer Option 1 or Option 2, and why? Can you suggest ways in which your preferred option could be improved?

With the addition of the words "that there is a" between "basis" and "significant" in line 2, we prefer the simplicity of Option 1.

11. Determining whether land appears to be contaminated land: *Do you agree that these changes will improve the statutory guidance? Do you have views on any specific changes, and should there be additional clarifications?*

Section 5 begins appositely with a recitation of the appropriate basis for Statutory Guidance but note that does not say "...in determining whether any land appears to be contaminated land or not", nor, consequently, does the Act authorise Guidance on "the manner in which that determination is to be made or not" and what follows in paras 5.2 and 5.3 cannot, therefore amount to "Statutory Guidance". Whereas, notwithstanding, para 5.3 suggests local authorities should consider whether to inform "affected persons" of any conclusion, we have already cautioned that any documentation will be publicly available and could become an inadvertent cause of blight.

The advice in para 5.7 that a local authority should not determine any site likely to qualify as a Special Site "without the agreement and approval of the Environment Agency" is another, particularly blatant, example of non-statutory guidance which should be removed.

Para 5.8 might benefit from a reminder that the extent of any contaminated land is limited by the need to demonstrate the presence of a significant pollutant. The Guidance currently in para B.41 is also worth repeating here.

The relationship between para 5.12 (which is new to the Statutory Guidance) and s.78B(3) (and, arguably, s.78H(1) too) needs to be clarified; they appear to have similar intent yet the latter is not discretionary and they use different terms ("affected persons" and "appropriate person"). The advice in 5.12, notwithstanding, contains a potential legal trap, namely the creation of an expectation that informal representations will become part of the authority's formal consideration, and we think it is unwise.

Postponing determination
Para 5.13 ought to be referenced to s.78H(5)(b).

Para 5.14 makes no sense to us; land cannot be determined as "contaminated land" unless a significant pollutant linkage is present but local authorities are not clairvoyant and that should be established on the basis of the most vulnerable potential receptor. This is a further change, not noted in the consultation paper, to which we cannot agree.

Record of the determination
Paras 5.15-5.17 ought to be referenced back to the Act.

Reconsideration, revocation and variation
The legal basis for revoking a determination properly made ought to be explained.

12. Remediation: *Do you have any comments on Section 6 (remediation)?*

Novel techniques
While we have no wish to stifle innovation, and we think local authorities should be prepared to allow the use of untested methods brought forward by landowners at their risk, we would be concerned at the potential liability of those which required such methods to be employed but which then failed, at least where alternative proven methods had been available.

Elsewhere, for example in paras 6.13 and 6.25, we think there is too much emphasis on the cost of remediation; while that is, of course, important, it is only one component of the "sustainable" mix.

13. Liability: *Do you have any comments on Section 7 on liability? Is the new summary at paragraph 7.3 helpful?*

The summary in para 7.3 is helpful.

14. Recovery of the costs of remediation: *Do you have any comments on Section 8 (cost recovery) of the proposed new guidance?*

Insurance Recovery
In situations where the appropriate person has been identified and claims not to have sufficient resources to cover the costs of remediation for which he is judged to be liable, before consideration is given to granting "hardship" concessions, it could be helpful to suggest that an assessment should be made to determine whether circumstances exist to allow the application of the "Insurance Recovery" process.

As the Department knows, this allows for a claim to be made to recover the costs of "environmental damage" (including contamination of land or groundwater) against the old public liability insurance policies which were in place during the period when the contaminative process which led to the current contaminated condition of the site were being operated. We understand this approach has been adopted with considerable success by the USEPA in dealing with the parallel situation for those responsible for the contamination of sites under the US "Superfund" regulatory regime."

15. Appeals Procedures: proposed changes: *Do you have views on the proposed removal of Regulation 11?*

It is not clear that O.53 proceedings can be instigated on as wide grounds as Reg.11 permits further representations to be made, moreover it surely must be faster to convene a further hearing by the Secretary of State's representative than to seek leave, wait for a listing etc. and there is no cost barrier to the appellant. On balance, we think Reg.11 should remain.

16. Impact Assessment – consultation questions: *Do you have views on the baseline assessment (Option Zero)?*

As will be apparent from the above, we do not agree with the Department's assessment of the need for change, in particular that the current Statutory Guidance contains "major flaws" or that they have undermined the effectiveness of the regime and created considerable regulatory uncertainty. Even if we did agree with that, the revision goes beyond the correction of any flaws and its own description of "fine-tuning" to make several significant changes to the operation of the regime and its effect while providing no more certainty either for regulators or the regulated. If the Guidance has been simplified at all, that has been at the expense of omitting valuable material including the definition of key terms while the regulatory burden on local authorities (and thus, indirectly on taxpayers) has been increased.

Do you have any views on the assessment of Option 1?

We understand that the monetised benefits are predicted to come almost entirely from a different approach to remediation by developers on the basis that they currently mis-use generic assessment criteria as over-conservative remediation targets. Whereas the basis for those GACs is quite transparent in the first place (so they can readily be modified), and our understanding is that developers are driven not by numbers but by a desire to avoid any future risk of liability, we do not expect them to change their behaviour as a result of revised Guidance and the claimed savings will not be realised as a consequence. We do not believe either that any measureable saving will flow to regulators from "shorter, easier to read guidance" nor especially that the revision offers any increased protection of public health, indeed the opposite. The underlying assumption that enforcing authorities will put similar effort into contaminated land work over the next 10 years as currently is also challenged.

Conclusion

Contrary to its description, it is clear that the revision goes further than mere "fine-tuning" and contains significant changes which alter its balance. Though many of them are not noted in the consultation paper and some that are lack sufficient explanation, taken together their scheme seems deliberately to raise the bar on what is "contaminated", facilitating development at the expense (for example in the changes to the definition of "significant harm") of health protection, and to place obstacles (such as by introducing cost-benefit assessments of remediation in determinations) in the way of regulators making their legitimate decisions. That is not least through the inclusion of material (for example in respect of "risk summaries" and the designation of Special Sites) which we do not believe qualifies as "Statutory Guidance".

While regulators are reminded they should base their conclusions on science, the Department's repeated reliance on lack of evidence to justify its recommendations runs quite contrary though it is, of course, its failure to stimulate the necessary science base (along with wavering legal opinions) which is at the centre of the regime's difficulties. Further, the "traffic lights / categorisation" of sites is an unnecessary elaboration of the Guidance and a distraction from the real issue. At the centre of the revision, these proposals moreover "put the cart before the horse"; as para 4.26 illustrates, they do nothing to guide regulators towards the best decision, rather they seem mere labels to be applied pointlessly only afterwards, while in the scope and reasonableness of decisions on "SPOSH", potential new grounds for legal challenge are opened-up.

Finally, considering whether the objectives set out in para 58 of the consultation have been achieved, we conclude:

Simpler (shorter) ?
No; any greater simplicity comes at the expense of omitting valuable material including useful cross-references to the Act and the definitions of key terms. The result, taking into account the separate guidance to come on radioactively-contaminated land will not be significantly shorter either.

Outcome-focused ?
No; the lack of clarity in the current regime lies not in <u>what</u> it seeks to achieve but in <u>how</u> to achieve it; the solution for that lies largely elsewhere than the Statutory Guidance,

nevertheless, in rejecting science for a qualitative approach, the revision fails to address that.

More targeted, better at protecting people's health and the environment ?
No; in our view, various changes combine actually to shift the balance of the Guidance in favour of easier development and reduce the health protection offered by the regime.

Reduced regulatory burden for businesses ?
No; the alleged burden of over-remediation is not one imposed by regulation but one chosen by business for reasons of long-term risk avoidance. The revision will not change that.

More transparent?
No; qualitative approaches to risk assessment are inevitably less transparent (and less defensible) than quantitative ones.

More proportionate?
No; the notion of "net" benefit is misconceived; though intervention may have its own impacts, those of not intervening will not disappear.

More consistent?
No; while the Department continues to reject the need for national benchmarks, the principal cause of inconsistency will remain, moreover that appears to be condoned when it writes "we want to leave room for local authorities to make judgements that reflect local circumstances and priorities." Authorities do not need flexibility to make local decisions; they need the tools to make the right decisions.

More accountable?
Good decision-making will continue to be hampered by the lack of complementary technical guidance on unacceptable intakes while any increased chance that polluters will pay seems to come from making action on sites most likely to be orphan sites harder.