

Contaminated land: who pays?

The Environment Act is designed to identify which land is contaminated, who polluted it and then require them to clean it up. Although the principle of 'the polluter pays' is enshrined in the law, if the original polluter cannot be found, as they no longer exist or are insolvent, the current owner could be landed with the bill for the clean up, even if they did not cause the pollution

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Part II of the Environmental Protection Act 1990 sets out a complex statutory regime for dealing with the most seriously contaminated land in England and Wales. The regime came into force on April 1 2000. There has been much uncertainty over the application of the provisions of the Act and of the statutory guidance contained in Annex 3 of Circular 2/2000 Environmental Protection Act 1990: Part IIA – Contaminated Land, in particular the issues of apportioning liability and the application of the exclusion tests that determine who must undertake, or pay for, remediation of the contamination where more than one person is found to be liable to do so.

Part IIA EPA 1990, which was added to that Act by the Environment Act 1995, therefore focuses on the identification and remediation of contaminated land. It applies to 'contaminated land' which is defined in terms of 'significant harm' and 'significant possibility of such harm', or actual or likely water pollution.

The Environment Agency estimates that more than 300,000 hectares of land is polluted in the UK, covering between 5,000 and 20,000 sites, many of which are likely to be designated as contaminated under the regulations which can be applied retrospectively.

Consequently, landowners and developers face bills of thousands of pounds to clear up contaminated land, as local authority officers start checking

former industrial sites for pollution. In particular, the property and construction industry has been most affected by these regulations as until it is tested there is no way of knowing for certain if land is contaminated.

Liability is focused on each person who has caused or knowingly permitted the presence of contaminants. Those who 'inherit' contamination and knowingly leaves it unaddressed would not normally be thought of as a 'polluter', but – perhaps with good reason – they appear to face liability on this basis.

Furthermore, a series of 'Exclusion Tests' in the guidance tends to channel liability away from the original 'polluter' – for example, a subsequent 'knowing permitter' of the same contamination could 'step into the polluter's shoes' as a result of having bought the site knowing of the contamination (or, more controversially, having merely been given the opportunity to find out). Equally, developers who release the contamination could take on the original polluter's liability as well as their own.

In the case of R (on the application of National Grid Gas Plc (formerly Transco Plc) v. Environment Agency (2006) – the Court confirmed that Parliament's intention under the Environmental Protection Act 1990 Part IIA was that primary responsibility for the remediation of contaminated land should rest on the original polluter.

The term 'appropriate person' should be construed to include not just the original polluter, but also its statutory

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successors where there is a regime in place.

Finally, there are circumstances in which 'innocent' owners and occupiers could find themselves liable – the rationale appearing to be that they will benefit from increased site value, so why should the public purse bear the cost?

Landowner and developers are advised to ensure they are aware of the current and former uses of their land. The alternative is to risk clean up costs that could significantly affect the potential of site for development, reducing the developer's profit margin or effectively rendering building on the site impossible. If neighbouring land has been contaminated then the polluter or the owner, if the polluter cannot be found, is also liable to pay the clean up costs for that too. An alternative is to seek environmental insurance cover – for the protective liability.

More recent legislation such as the EU Environmental Liability Directive aims to ensure that businesses focus on the environmental effects of their activities by encouraging operators to avoid causing environmental damage, rather than gambling on regulatory action being taken once the damage occurs. It is based on the polluter pays principle: ensuring the original polluter pays for remediation and not the taxpayer. Furthermore, by establishing one environmental liability framework through the EU, businesses cannot take advantage of less stringent environmental protection legislation by relocating to another member state.

EU members have until May 2007 to implement the Directive.