

Contaminated Land News – April 2000

By the time you read this, either Part IIa will have been implemented on 1 April or you can skip to the next item that catches your fancy. The version of the Statutory Guidance that was laid before Parliament in February is available from www.detr.gov.uk/contaminated/land. The text differs from the last consultation draft of autumn 1999 in several substantial ways and I summarise below those of most relevance to the ground engineering profession. The description follows the sequence of presentation in the DETR documentation. I have assumed that the reader is familiar with the Environment Act 1995 and the draft Guidance as issued in October 1999 – or has access to appropriate advisers with such knowledge. I have deliberately not drawn any inferences from or made any conclusions about the consequences of the changes or their positive or negative ramifications.

The different roles of Statutory Nuisance and Part IIa have been clarified (Annex A s59-63). Land in a contaminated state is excluded from the statutory nuisance provisions. Such land contains substances ‘in on or under the land which are causing harm or where there is a possibility of harm being caused. The Statutory Nuisance regime continues to apply to cases where land is giving an ‘offence to human senses (such as stench).

Under the description of other regimes, the Control of Major Accident Hazards Regulations 1999 (SI 1999/743) (COMAH) have been added (Annex 1 s71d). They require emergency plans to provide for the restoration and clean-up of the environment after a major accident.

The discussion on ‘Very Slight Levels of Water Pollution’ (Annex 2 s6.30-6.32) introduces the concept of pollution of controlled waters which is ‘minor in terms of its seriousness’ and goes on to suggest that remediation of land causing such pollution should only result in a correspondingly low level of expenditure.

The potential liabilities of owners and occupiers (Annex 2 s9.16-9.20), who are potential Class B Appropriate Persons, confirms that dead individuals or dissolved companies who are potential Class A Appropriate Persons cannot be ‘found’. The enforcing authority (Local Authority or Environment Agency) can apply for the dissolution of a company to be annulled or can take action against the estate of a deceased person in some cases.

The definition of significant harm with respect to ecological receptors (Annex 2 Table A) has been expanded to include ‘harm which affects any species of special interest within that location and which endangers the long-term maintenance of the population of that species’ at a protected location. Candidate Special Areas of Conservation or potential Special Protection Areas have been added to the definition of included locations. The definition of a building has been clarified to include any part below ground level.

The definition of ‘current use’ (Annex 3 s A.26) has been clarified to include any use which is currently being made, or is likely to be made, of the land and which is consistent with any existing planning permission (or is otherwise lawful under town and country planning legislation).

The conditions for significant possibility of significant harm (Annex 3 Table B) have been extended to point out that the number of people who might be exposed to a substance is not relevant. Harm that would damage features of 'special interest' is considered significant and explicitly protects the reasons for an area's protected ecological status (Annex 3 sA.34).

Before an intrusive investigation on an area of special scientific interest (SSSI), the local authority should consult English Nature on any action which, if carried out by the owner or occupier, would require English Nature's consent under s28 of the Wildlife and Countryside Act 1981 (Annex 3 s B24).

Under the excluded activities test for Class A Persons, carrying out a Site Investigation that is itself a cause of the existence, nature or continuance of the significant pollutant linkage in question is not an excluded activity (Annex 3 D.48c, d & k).

The description of how orphan linkages arise has been extended (Annex 3 D.103). Pollutant linkages relating to controlled water where no class A person can be found are orphan linkages. Other orphan linkages are those where no Class A or Class B person is found. In the case of shared actions, Class A persons for other linkages can end up bearing the costs for orphan linkages as well.

Finally in the Glossary of Terms (Annex 6) the definition of current use has been considerably expanded principally to include uses consistent with any existing planning permission.

As we all strive to come to terms with the new regime, our best course of action is to ensure we have read the primary legislation and published version of the Statutory Guidance and make sure we have those documents to hand when assessing contaminated land liabilities.

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