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Response to the consultation on changes to the Contaminated Land Regime under Part IIA of the Environmental Protection Act 1990 from Environmental Protection UK

Environmental Protection UK (EPUK) has considered the proposals and welcomes the opportunity to comment.

1. About EPUK

EPUK is a national charity that provides expert policy analysis and advice on air quality, land quality, and noise and their effects on people and communities in terms of a wider range of issues including public health, planning, transport, ecosystem services and energy and climate.

We offer clear and critical analysis of UK government and European Union policy proposals, through a range of high-quality publications and expert-led events, as well as up-to-date regulatory information through Essential Environment, our comprehensive guide to UK and EU environment legislation.

We bring together policy makers, business, local authorities and academics to enable and foster successful partnerships for environmental action, and provide networking opportunities to support the careers of environmental professionals and allow them to share best practice.

Our structure enables us to take a progressive and pragmatic approach to the issues which concern us and, on behalf of our wide and extensive cross-sector membership, to promote integrated and effective policy making which supports sensible and workable solutions to pressing environmental challenges.

EPUK works with and for UK national and devolved governments, local authorities, business, academics and the general public, and with relevant EU institutions and NGOs.

2. Summary of Our Views

In considering the proposed revised statutory guidance, EPUK held four regional workshops to harness the views of over 130 practitioners. This response does not aim to summarise the

wide-ranging views of these members however, where clear concerns and consensual views arose, we have incorporated these in our views and recommendations.

A summary of the key issues raised by the proposals is presented in this section. The following section answers the consultation questions.

2.1 Progress under Part IIA

The contaminated land regime was introduced in 2000 in England and 2001 in Wales to identify and remove unacceptable risks to human health and the environment. The consultation document states that the Part IIA legislation itself remains fit for purpose¹; however, the most recent report on progress under the regime clearly stated that 45% of local authorities in England and Wales felt they had made little progress with their contaminated land inspection strategies². The consultation document recognises this slow progress, attributing it to factors such as a lack of skilled staff, insufficient prioritisation and uncertainty over what the regime expects of local authorities³. Throughout the consultation document, the blame for any lack of progress is summarised as being due to a lack of clarity as to what the regime seeks to deliver, resulting in an overly complex regime.

EPUK believes this overlooks a key factor that without a driver for action, progress under Part IIA is at the mercy of the contaminated land officer's ability to secure funding. EPUK has frequently stressed that the lack of a driver for action means that progress under the regime is inconsistent and that high risk sites could feasibly go undetected for some time. A primary school was recently determined as contaminated land⁴. We believe this site offers a timely demonstration that high risk sites still exist and are yet to be managed. There is no reason to expect that other similar sites do not exist and, where they exist in the 45% of areas where little or no progress has been made, there is reason to be concerned about the ability of the regime to deliver its primary aim: to identify and remove unacceptable risks to human health and the environment.

Local authorities have made clear that when compared to other areas of environmental protection work, such as air quality or noise which are covered by national targets and/or requirements under European Directives, land contamination work is deprioritised. Officers have reported an inability to access money from the revenue support grant in order to progress their inspection strategies. Whilst we understand that this review is taking place within the context of moving towards an increasingly localist approach, it is essential that central government supports local authorities to deliver their statutory duties and to protect the health of their communities and local environments. In light of both local authority budget cuts and the recent (and expected future) cuts to the capital grant funding for contaminated land, funding issues will only be exacerbated. In addition it is likely that the skills base within local authorities will be reduced. It needs to be understood that unless national targets and EU requirements are removed from the equation (not something EPUK advocates), the local authority will not be free to make its own priorities. For contaminated land work to progress, timescales are needed (as discussed in response to question 4). We appreciate the mention

¹ Public consultation on changes to the Contaminated Land Regime under Part 2A of the Environmental Protection Act 1990, Defra, 2010. Page 20

² Reporting the evidence. Dealing with contaminated land in England and Wales A review of progress from 2000-2007 with Part 2A of the Environmental Protection Act. The Environment Agency 2009. See <http://publications.environment-agency.gov.uk/pdf/GEHO0109BPHA-e-e.pdf>

³ Proposed New Contaminated Land statutory Guidance, Defra, 2010 version. Page 16

⁴ Colnbrook C of E School, High Street, Colnbrook, Slough was determined in January 2011 for concentrations of lead, total cyanide, free cyanide, PAHs (benz(a)anthracene, chrysene, benzo(a)pyrene and dibenz(ah)anthracene) and chrysotile asbestos which were identified within the area of the former gas works and are considered to represent a Significant Possibility of Significant Harm. See http://www.slough.gov.uk/documents/Colnbrook_Determination_final.pdf

in 3.15 of ensuring sufficient time and resources are put in – this needs to be further strengthened with additional references throughout the guidance.

We are concerned by the recent announcement to review all local authority statutory duties⁵. We trust that Defra and WAG will make strong and unequivocal representations to protect the statutory duties in respect of contaminated land.

2.2 A Stronger Focus on Human Health is Needed

The broad objectives of the regime state that it aims to ‘strike a reasonable balance between dealing with the risks raised by contaminants in land, and the potential impacts of regulatory intervention’. We do not believe this will be achieved with the guidance as drafted because it goes too far in requiring consideration of the financial and social impacts of intervention. Whilst we agree these should be managed and intervention should be appropriate, the regime must continue to take a precautionary approach. Given the many uncertainties underpinning the scientific understanding of cause and effect, to do otherwise would be unreasonable.

As the consultation document states on page 11, ‘the effectiveness of the whole regime depends on how the regulator decides what is, and is not, *contaminated land*’. However little is actually changed in terms of how the regulator goes about deciding this, and no additional tools or support are offered. Limit values for other risk factors involve a decision on acceptability of harm. EPUK accepts that the government will not deliver limit values for contaminants in soil however, we stress that Defra and WAG must not wash their hands of the regime once the guidance has been redrafted.

2.3 Tools for Delivery

As discussed above, central government have made clear that they have no intention of providing number-based thresholds. The consultation document explains that such values cannot be produced because risk is based on many more factors than the amount in soil. Also there are many thousands of potential contaminants and billions of potential combinations. If the CLEA model can model these other factors as it does for minimal risks levels, it should be feasible to develop the model into one that would allow these other factors to be considered e.g. so parameters such as soil organic matter could be changed according to the site. In addition, whilst there are a large number of potential contaminants, there are arguably a more manageable number of ubiquitous contaminants which, if thresholds were produced, could provide a faster assessment of a significant proportion of potentially contaminated sites. This would enable a great deal of sites to be dealt with quickly and increase consistency.

The argument that they cannot be provided because of uncertainties underlying the risk assessment meaning they will not be legally robust leads us to question how robust locally made decisions will be, particularly if they are based to some extent on questionable considerations such as what might happen in the future, a broad assessment of what remediation might entail, or how remediation might affect the stress level of residents. For other regimes e.g. air quality, a decision is made and limit values are set with acknowledgement that the underlying health evidence is not conclusive. While we support site specific assessment, it is our firm belief that there is still a clear role for central government in this regime to fund and ensure the development of toxicological research. By expanding the considerations of the regime (e.g. socio-economic factors), central government will also need to provide training and support to local authorities to enable them to carry out the assessments.

⁵ See

<http://www.communities.gov.uk/localgovernment/decentralisation/tacklingburdens/reviewstatutoryduties/>

Further recommendations in this respect are made in our responses to specific questions.

2.4 Planning and Part IIA

A number of members have stated that it is inappropriate for the Part IIA guidance to consistently refer to the planning regime, as the proposals do. These are separate (albeit complementary) regimes and the references do risk causing confusion.

EPUK is concerned about plans to consolidate the National Planning Framework because if it fails to provide sufficient information to ensure parties understand what is required of them, it risks further undermining the safe and appropriate development of land affected by contamination. References to the requirements under the planning regime could well prove useful should planning policy be scaled back beyond usability. In light of this we support references to planning policy providing the wording makes clear that these are separate regimes.

The fact that planning policy is currently being reviewed does raise questions about whether now is the appropriate time to amend this guidance. Table 1 on page 23 for example, refers to Planning Policy Statement 9 which is unlikely to exist in the near future. Of potentially greater concern, the Department for Communities and Local Government (DCLG) has recently consulted on proposals to extended permitted development rights to the change of use of a building to a school⁶, which included a proposal to extend permitted development rights to change of use from all current use categories. This would mean sensitive receptors could be introduced onto any site without the need for planning permission. Concern over these proposals is further exacerbated by the existence of campaigns to get all schools growing food⁷ and thereby increasing direct contact with soil. Defra and WAG need to ensure they clearly state the unsuitability of these proposals and any future similar proposals. In addition we stress that a reference must be made in section 3.8(b) to the need to consider permitted development rights.

Bold claims are made throughout the consultation document and in the impact assessment of the clear and unequivocal success of the planning regime. We question the evidence for these claims. We are beginning to see examples of poorly managed contaminated sites under planning such as St Leonard's Court in St Albans and Lennox Mews in Worthing. Painting a picture of a 'highly successful' market based approach as per paragraph 42 of the consultation document is arguably irresponsible. Success should not be a foregone conclusion. EPUK supports the premise that much potentially contaminated land has been developed under the planning regime however, given the lack of requirement for verification report to be produced and logged, arguably little detail is known about its actual success. The impending review of the National Planning Framework provides an opportunity to rectify this shortfall, EPUK calls on Defra and WAG to recommend the introduction of mandatory verification reports to DCLG.

2.5 Terminology

EPUK believes a definition of key terms would be an extremely useful addition to the guidance in order to reduce confusion and inconsistency that will result from the use of ambiguous terms. Terminology is briefly addressed in paragraph 16 of the consultation document however the revised statutory guidance needs to be fit for purpose as a stand alone document without the need to refer to additional documents to clarify meaning.

The terminology section of the consultation document clarifies that where the guidance uses the term 'contaminated land' this means land that meets the statutory definition. The

⁶ See <http://www.communities.gov.uk/publications/planningandbuilding/planningschoolsconsultation>

⁷ For an example see <http://www.getschoolsrowing.co.uk/>

guidance however uses the phrase both in italics and not in italics⁸. For clarity and consistency we suggest the use of italics should be avoided. It is important that the guidance chooses a term to represent land where contaminants are thought to be present but where the nature of the risk is not yet known. In addition a term should be selected for land where contaminants are present but where it has been assessed and is thought not to meet the statutory definition. Once these terms have been selected they must be defined within the guidance and used appropriately throughout in order to ensure the revisions provide greater clarity. We suggest that the chosen terms should be consistent with those used under the planning regime.

A connected but minor point is the use of the term 'contaminated land professionals'. We suggest a better phrase would be land contamination professionals.

It is claimed throughout the consultation document that the changes will enable faster dismissal of low risk sites and the statutory guidance frequently uses the term 'dismiss low risk sites'. Regulators have noted that in many cases they would be unable to fully 'dismiss' a site without carrying out an investigation. Others have been confused by the claims that the revisions will enable faster dismissal, interpreting the changes to mean they would be required to focus resources on investigating and then dismissing low risks sites. EPUK believe this confusion could be rectified by rewording the term 'dismissing' to 'deprioritising' or 'dismissing from further investigation at this time'. We would also note that as currently drafted this could result in numerous requests for sites to be declared 'safe'. This will cause an undue burden on local authorities and take much needed resources away from high risk sites.

'Part 2A' and 'Part IIA' are used interchangeably. One should be selected and used consistently throughout the document. We suggest the use of Part IIA because this is used in the Act⁹.

The terms 'site' and 'land' appear to be used interchangeably throughout the document, care should be taken to ensure these are used correctly and deliberately.

The terms 'site inspection' and 'site investigation' also need to be looked at to ensure they are used appropriately.

The phrases 'contaminant-pathway-receptor' and 'source-pathway-receptor' are used interchangeably throughout the guidance – again it would be helpful if the authors could select one and use it consistently in order to avoid confusion. This is an important feature of the risk-based approach used in the UK and care should be taken to ensure terms are used correctly.

The phrase 'no market solution' is used twice on page nine¹⁰. This needs to be amended to read 'no timely market solution'. Arguably a market solution could always reasonably be expected to exist at some point in the future. The important factor is whether it is likely to present itself in a suitable timeframe according to the risks at hand. Minor changes like this are important to ensure that the requirements of the regime are clear and that it is not possible for the wording to be used to undermine regulatory decisions.

⁸ This occurs throughout the proposed revised statutory guidance. Examples can be found on pages 11, 33 and 35.

⁹ Part II A of The Environmental Protection Act 1990

¹⁰ See paragraphs 26 and 29 of the proposed revised statutory guidance.

Paragraph 2.10¹¹ requires that the local authority should carry out the investigation in accordance with appropriate good practice. Paragraph 2.9b) requires that the local authority should let the land owner provide samples if appropriate – however no requirement to act in accordance with good practice is extended to this landowner. This is clearly inappropriate given the landowner’s vested interest in the findings of the investigation. The procedures followed during the investigation are critical to the validity of the assessment. We suggest amending the words ‘local authority’ in 2.10 to ‘person carrying out the inspection’ to ensure the paragraph covers all parties who could potentially carry out the investigation.

Given the groundswell of popularity and the extent to which this would affect the potential risks, 3.8d) should include the example of using the land to grow food.

Paragraph 6.4 states that remediation should ‘disrupt’ identified significant pollution linkages. EPUK would ask that an alternative term is found for ‘disrupt’, which is considered inappropriate because it implies an impermanent and casual solution when in fact something reliable and valid is required.

Paragraph 8.19 should read ‘its’ not ‘your’ for consistency with neighbouring paragraphs.

We support the desire to ensure the regime is proportionate; however, we believe the changes have gone too far to encourage a focus on social and economic impacts to the detriment of the protection of human health and the environment. An example of this is paragraph 1.5 where all the examples given of the potential impacts of regulatory intervention are negative. Burdens must be balanced with examples of benefits, such as increased land value, in order to avoid distorting the regime. This focus on ‘burdens’ is reflected throughout the guidance and must be addressed.

3. Answers to Selected Consultation Questions

Issue 1 - Shorter, simpler guidance

Question 1

Do you agree that shorter, simpler guidance will be an improvement (as set out above)? If not, please explain which areas need expanding and why.

The length of the guidance is of little significance. The key question should be whether the guidance provides sufficient and clear guidance to support practitioners in delivering their statutory duties under the regime. It needs to be fit for purpose; the Act requires the regulators act in ‘accordance with’ the guidance produced, which means that the exact wording will be subject to scrutiny. Ambiguity will lead to confusion and regulators are concerned that this may leave them vulnerable to legal challenge.

Essentially, this is a complex regime and the guidance needs to reflect that; the process should not be undermined by an ambition to deliver shorter and simpler guidance.

Our answers to the individual consultation questions indicate the areas that need redrafting.

Issue 2 - Separation of guidance on radioactively contaminated land

Question 2

Do you agree with the proposed approach on radioactive contamination? If not, please explain why.

The inclusion of the radioactive contaminated land guidance within the same document is thought to be unnecessarily confusing and therefore we support this approach. Paragraph 5

¹¹ See page 6 of the proposed revised statutory guidance.

of the proposed guidance states that if *'a site is affected by both radioactive and non-radioactive contaminants both sets of statutory guidance will apply'*. In light of this it is important that the two documents do not conflict in anyway and therefore we recommend that some form of consultation on the proposed revised guidance for radioactively contaminated land takes place. This does not need to constitute a full statutory consultation but at a minimum practitioners (specifically regulators) should be involved in a review process.

Issue 3 - Broad objectives of the regime

Question 3

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?

We agree that the guidance should state the broad objectives of the regime but we do not support the objectives as currently drafted. We note these have been taken from page 6 of Annex 1 of Defra Circular 01/2006¹² which lays out government's objectives with respect to contaminated land. It is our interpretation that these are given in a more general sense (i.e. planning and Part IIA) and are not specific to the Part IIA regime. Taking these verbatim to be the objectives of Part IIA is not appropriate. We recommend clarity is provided by stating in 1.2 that these are the objectives of the government in relation to the management of land contamination in its broader sense not the specific objectives of Part IIA.

We are concerned that 1.2c) could be interpreted to mean that unacceptable risks should not be dealt with because it could result in the financial position of the polluter becoming unsustainable. This would be inappropriate, local authorities should not be encouraged to leave people exposed to significant risks because remediation is expensive. The regime exists to identify and remove unacceptable risks to human health and the environment. It also aims to enforce the polluter pays principle. It requires that remediation is proportionate and sustainable. 1.2 c) needs to be removed or redrafted so that it is clear that the primary focus is the protection of human health and the environment. The requirements of 1.2c) must not undermine the objective 1.2a).

We believe this sentence should be rewritten for clarification *'The regime is not intended to be used on sites where some contaminants may be present but there are lower levels of risk'*. Arguably the regime is intended to be used on these sites in so far as it may be appropriate to use the regime to inspect these sites and dismiss (or deprioritise) them accordingly. This suggests that it will always be possible to ascertain whether the level of risk is high or 'lower' before using the regime when in fact it is the processes of risk prioritisation and/or risk assessment that will enable a judgement of the level of risk to be taken. The proposed revised guidance provides clarity throughout that 'low' risk sites should not be the focus of the regime and should not be determined. In addition the preceding sentence in paragraph 1.3 makes clear that the regime seeks to deal with high risk sites; in light of this we believe this sentence is superfluous and should be deleted. By leaving this sentence in place it is possible that landowners or other affected parties may challenge the right of the regulator to carry out initial investigation work because they are unable to prove that the risks are not 'lower levels' and land is 'innocent until proven guilty'.

The focus on elements that stem from the principles of better regulation do not need to be repeated throughout this guidance. These are set out in separate documents and are guidelines by which local authorities must already adhere. It is unnecessary to include them here and many practitioners have reported that they find them inappropriate. Statements such as 'The aim should be to consider the various social, environmental and economic

¹² Defra Circular 01/2006. Environmental Protection Act 1990: Part 2A Contaminated Land. September 2006

costs and benefits of intervention, with a view to ensuring that the regime produces net benefits, taking account of local circumstances' falls under the principle of better regulation and need not be included here. They risk undermining the primary objective to protect human health and the environment and are therefore out of place within the broad objectives of the regime. We would also stress that you cannot know these impacts when initially deciding whether to intervene on a site.

To expand on the above, 1.2b) is not an objective of Part IIA. By definition land dealt with under Part IIA will already have a 'use'. Part IIA assesses land under its current use. If it is felt necessary to retain this reference, EPUK recommend providing clarity by amending 1.2b) to read 'To support the planning regime to bring damaged land back into beneficial use'.

We do not support the extensive reference to socio-economic factors within these broad objectives. The examples given are biased against action under the regime and undermine the primary aim of the regime which must be to protect human health and the environment. 1.5 seems out of step with the requirements of the Act and causes confusion. Defra have informed us during this consultation exercise that socio-economic factors are only meant to be considered for borderline cases where the decision cannot be made on the basis of the scientific evidence of harm to human health. There has been much confusion amongst practitioners reading these proposals as to whether consideration of socio-economic factors should be carried out during all assessments or just for those where the science is not clear. The reason for this confusion is evident given the requirement to consider these factors within the section on broad objectives. This must be addressed. Local authorities are already required to consider sustainability and the remediation section requires them to ensure any burdens faced are proportionate and, again, discusses sustainability, and thus does not need to be contained in the broad objectives.

The term 'burden' is unnecessarily negative. 'Impacts' is preferable and in keeping with the terminology of sustainable development. It must be recognised that action under the regime may also bring benefits (aside from the mitigation of risks to human health or the environment). In paragraph 1.5 examples given are 'financial costs, health and environmental impacts of intervention, property blight, and burdens on affected people'. These are clearly unnecessarily negative. Dealing with a contaminated site may help reduce blight in the local area bringing financial benefits to the wider community. Remediation measures to manage landfill gas could bring financial benefits by producing energy. We believe the examples are superfluous and should be removed; if it is decided that they should stay, they must paint a balanced picture.

We question the need for the sentence '*The authority should take a precautionary approach to risks raised by contamination, but it should avoid taking an overly-precautionary approach.*' Without definition of the terms it is meaningless and comes across as patronising.

Issue 4 - Local authority inspection duties

Question 4

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?

EPUK is of the view that strategies should remain as separate documents. We believe that it is of fundamental importance that central government set out, at least in broad terms, what should be included in the strategy. This is because it is often the case that the harder the local authority looks, the more potentially contaminated land they will find. It must be remembered that a primary school situated on a gasworks has just been determined – this should be seen as evidence that high risk sites still exist. These must be addressed. It is imperative that the guidance ensures that local authorities are sufficiently driven and resourced to find these sites.

We question the claim that inclusion in a wider strategy will make contaminated land issues more transparent; officers have reported that they are likely to be required to produce simplified, shorter strategies that will be unable to contain the necessary details to be informative. By including the information in a wider strategy, it could be argued that it is more likely to bury the issues than to illuminate them. A stand-alone document is more transparent and accessible. We fail to understand why it is thought that more people will read the contaminated land strategy if it is included in a wider document. Few people are likely to read the full strategy in detail and will instead focus on the areas of interest to them. Furthermore the strategy is often requested by interested parties and therefore it is important that it is available and accessible.

There is nothing to prevent local authorities from including the key issues in a wider strategy and many local authorities have reported that they do this already. The guidance could suggest including the issues in a wider strategy in order to help increase awareness of them.

In removing the prescription over what should be included, Defra and WAG will increase inconsistency between the approaches of different local authorities, thereby negating the benefits detailed in the impact assessment of increased certainty of regulator expectations. This issue is of particular importance for national landowners managing the prioritisation of their own estates.

We fully accept that there is significant variation between local authorities in terms of how much of an issue contaminated land is in their areas; because of this we feel it is short sighted of Defra and WAG to remove much of the prescription over what should be included in the strategies. Outlining the core considerations is thought to be important for increasing consistency. We would point out that clarity over regulator expectations is stated as one of the main drivers for revising the guidance and is a key premise upon which the savings in 'over-remediation' of the impact assessment is based. We believe the proposed revision here will result in less clarity and less consistency. There is also a risk that this could encourage local authorities not located within areas of former heavy industry to prepare a short and vague strategy and to do little in the way of taking a proactive approach because the guidance would appear to suggest that land contamination is only a problem in large pre-industrial areas¹³. Authorities without much historic industrial activity will naturally produce shorter strategies so there is no need for this 'get off lightly approach' to be written into the statutory guidance.

We believe that important opportunities have been missed to improve the regime by supporting officers in justifying the need to resource land contamination work. This relates to the points made in section 2.1 of this response.

The key opportunity is to define what is meant by from 'time to time'. We wholeheartedly support the introduction of a mandatory deadline by which authorities should update their strategies. We believe this should go further to require the review and reporting of progress. This does not need to be a detailed review (but should include progress made under planning or voluntary schemes) and needs to be sufficient to provide the much needed visibility over progress under the regime. As discussed in 2.1 there is no driver for action under the regime and in the face of the many competing priorities of a local authority and the ever shrinking budgets, urgent changes are needed to ensure the regime is able to function at all.

Strategies are required to be 'rational, ordered and efficient'. We think this should be amended to add 'sufficiently informed' in order to clearly indicate the need for information to

¹³ See paragraph 78 of the consultation document.

inform the prioritisation. Ideally we would like to see guidance setting out the type of information required because many local authorities have reported a difficulty getting sign off to purchase the necessary maps to accurately assess their areas. The entire strategies will only ever be as good as the information upon which they are based. Perhaps the reason that council owned land and landfill sites have been given the most attention to date is influenced by the fact that this tends to be information that the local authority officer can easily access.

Pursuance of contaminated land strategies will often make the local authority unpopular; few residents welcome the knowledge that their most valuable possession may be situated on potentially contaminated land. This means that local political support to investigate a site can be hard to come by. This review provides the perfect opportunity to introduce a greater driver for action into the regime, even a loose one such as this to demonstrate that this is a pro-active regime and does not just exist as a backstop to use should a problem come to light.

EPUK believes there is scope for improvement in the way land is used and reused across local authorities. Land contamination can affect public health, as can the availability of open green spaces and the quality of the local environment. In light of this, EPUK will be calling for the introduction of a land quality related indicator under the proposed Public Health Indicators Framework¹⁴. We call on Defra and WAG to support this.

Issue 5 - Risk assessment – general

Question 5

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?

We welcome the acknowledgement that there may be a need to bring in external expertise. Paragraphs 3.25-3.26 on uncertainty are also welcomed.

Section 3.22-3.24 discusses the use of generic assessment criteria (GACs). While clarity on the use of GACs is welcomed, it seems to us that this section is out of step with the rest of the proposals because it restricts rather than extends local flexibility. Whilst we agree that GACs should not be used as remediation standards without some form of site specific consideration as to whether they are appropriate, local authorities should have the flexibility to use them where they consider them appropriate.

Sections 3.27-3.29 on risk summaries present problems. The proposals have generated a great deal of confusion as to when these will be required (for what categories of sites), what happens to them (are they made publicly available) and whether they are part of the decision making process or simply a record of the decision post-decision. Annex 1 states that *'Section 4(2) of the Guidance requires that the local authority should produce a summary of its understanding of the possibility of significant harm and other relevant factors before it decides whether the site should be determined. In preparing such a summary, the local authority should consider the following factors.'* By requiring this summary before the local authority decides whether a significant possibility of significant harm (SPOSH) exists, it is implied that these factors should be part of the decision. We appreciate that Annex 1 is non-statutory however it will inevitably carry weight as an Annex to the statutory guidance. We discuss this in more detail in response to question 11.

Clarity is needed as to when risk summaries would need to be produced. Many members have interpreted the guidance to mean they would be required on all sites, potentially meaning they will have to produce them for over 1000 category 4 sites. In addition it is not clear what is done with these. A requirement to log them would be useful in terms of improving reporting and documentation under the regime. Given that Annex 1 suggests a

¹⁴ See http://www.dh.gov.uk/en/Consultations/Liveconsultations/DH_122962

broad range of factors be considered in deciding the significance of the risk posed, the number of underlying assumptions becomes much more complicated. This means that the local authority might need to keep abreast of a broad range of factors in order to ascertain whether the basis for the decision has changed. For example if the decision has been influenced by a broad assessment of whether it will be feasible to remediate a site, the local authority should presumably revisit the assessment should new remediation techniques become available. It would seem wise, therefore, to include a requirement to log the risk summaries and reconsider them should any changes to the underlying assumptions occur. In addition it could be argued that the risk summaries should be publicly available so that records for sites going through, e.g. permitted development or wishing to be used to grow food, can be accessed and the suitability of the site for the proposed use checked. As noted earlier, planning is moving towards increasing permitted development and 'community planning' – this means people must have access to the information that is necessary to plan properly whilst safeguarding their health and that of the environment.

While producing these summaries could present an additional burden on the local authority, it is considered good practice to record decisions taken. It must be noted that these summaries will be publicly available under the Environmental Information Regulations - the impact of these on blight is of concern to some members and needs to be considered.

3.29 c) and d) are inappropriate. We question whether it is possible or desirable to set risks in context, particularly given the potential uncertainties in science. We fail to understand why it would be appropriate to broadly consider what remediation might entail and the likely impacts on workers. This is the domain of a remediation options appraisal and health and safety. Unless this assessment is made properly, feasible remediation options could easily not be considered. It is inappropriate for broad assessments to be factored in to important decisions and we question how robust and reasonable the resulting decision would be. These issues are repeated in section 4.27. The Act requires local authorities to identify and manage unacceptable risks, not to decide it is too difficult or expensive to manage them.

Issue 6 - Background presence of contaminants

Question 6

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 section has caused endless discussion and confusion throughout the consultation period. It ranked within the top four key issues for discussion at each of the workshops. There is clear and unequivocal need for Defra and WAG to revise this section and to ensure that tools are developed to support local authorities to define background levels.

The consultation document states on page 31 that Defra and WAG are not aware of any evidence where background levels of contamination have caused harm in the past and therefore it would be grossly disproportionate for such land to be determined. We note two points here: firstly members have reported that on multiple occasions advice from the Health Protection Agency has been that background concentrations could cause significant harm depending on the site specific circumstances. Secondly, the current definition risks extending itself to cover polluting activities because it is not clear what is and is not within the scope of an 'historical activity' or a 'common human activity'. The wording posed in the statutory guidance takes no account of the level of risk posed by a site. The risk must be the key consideration, not whether the presence of contamination is 'significantly different' or whether it could be said to have been caused by an 'historical activity' or 'common human activity'. In general there is support and agreement with the premise that naturally occurring background levels should not be determined but we cannot support this section unless it undergoes a thorough redraft.

In addition, the consultation document recognises on page 32 that it may be necessary to develop technical tools and the evidence base in terms of background levels. We stress that this is absolutely necessary and must be driven by central government for best use of limited resources. The National Soil Resources Institute at Cranfield University and The British Geological Survey both have information that should be taken account of and made available to local authorities.

Question 7

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

Yes. These definitions need serious consideration to ensure they are fit for purpose.

What are 'normal' levels for any modern town or city and what bearing does this have on the level of risk posed? A particular concentration of a contaminant may well be common in a certain area, e.g. on the land next to a busy road, but this does not of itself mean it could not represent SPOSH if, for example, the local community decided to grow food for regular consumption on this land. The risks posed by a site are not necessarily right or acceptable simply because they are common. Lead paint and asbestos containing building materials are clear evidence of this point.

There are so many ambiguous terms used in this section. For example how should the authority decide what is 'likely to be widespread within a local authority's area, or in other similar areas'? What is a 'similar area' – one with similar number of inhabitants? Similar underlying geology? Similar historical activity? What is 'significantly different'? What constitutes a 'normal activity'? Disposal of waste in unlined landfill sites was once normal practice – is it therefore a 'normal activity'? Different areas will be similar for different reasons – it is not clear which aspects should or should not be considered relevant.

If significant harm could be caused then the investigation should be pursued regardless of whether or not it results from a normal or common activity. Just because the spreading of domestic ash was once common, it does not mean that the levels cannot pose SPOSH. We are not denying that these sites are unlikely to be Category 1 or even Category 2 sites, however the current drafting is not in keeping with a risk-based approach.

A number of members have raised concern that different levels of total exposure will be acceptable (or otherwise) in different areas because in some cases the 'background' or 'normal' concentrations will be subtracted. It could be argued that where the levels of protection differ between rural and urban areas, this is in keeping with exposure to other environmental pollutants such as noise levels or air pollution and is a trade-off that people accept as part of living in an urban area (and vice versa). However, questions of social equity become more apparent when we consider the difference within an urban context. Houses near or adjacent to busy roads tend to command a lower value than those in more desirable areas. Does it follow therefore that people who can only afford to live in the 'cheaper' areas should accept that their gardens have higher levels of, for example, benzo(a)pyrene from vehicle exhausts, regardless of whether this could cause harm to their health? Given they are likely also to be exposed to higher levels of pollutants from other sources such as airborne pollutants, this could conflict with the aims of the draft Public Health White Paper¹⁵.

¹⁵ 'Healthy Lives, Healthy People. Our strategy for public health in England' Crown Copyright 2010. http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/@ps/documents/digitalasset/dh_122347.pdf

In a similar vein to the rationale for not producing threshold based concentrations, it is not the concentrations of the contaminants or the source of them that, on their own, define the risk. Many other factors could affect the level of exposure and the local authority must be helped to factor these in where appropriate, not hindered by the use of ambiguous terms. The solution is either to define these terms (in consultation with primary regulators) or to remove most of this section and simply note that background levels are unlikely to constitute SPOSH or cause significant harm, and that some human activities have resulted in elevated diffuse levels of contaminants. The detailed prescription as currently drafted is against the spirit of localism and is likely to cause a great deal of confusion. Paragraphs 3.19 and 3.20 need a full rewrite, taking into account the points raised above. Paragraph 3.21 should be softened by removing 'exceptionally' and 'particular' from the third line.

Issue 7 - Significant harm to human health

Question 8

Do you have any views on the proposed clarification of the statutory guidance on significant harm? Which option do you prefer and why?

Responses from members are split as to which definition is preferable.

Question 9

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)?

The options allow for the right balance to be found, however other aspects of the proposed revised guidance do not. It should also be noted that the Act does not require the local authority to balance action and inaction. If significant harm or SPOSH exists the authority needs to act. Minimisation of impacts is relevant to how they act to manage the risks, not whether they act. This is not made clear in the document and must be spelt out if the references to socio-economic factors are to remain in the guidance.

Issue 8 (a) - Possibility of significant harm (human health)

Question 10

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.

This appears to be a logical separation however this is arguably more a consideration of risk prioritisation rather than risk assessment.

Question 11

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

Yes we believe it is inappropriate. It encourages a focus on the burdens rather than the benefits and we fail to understand how it is appropriate to consider, particularly 'in broad terms' what the impacts of intervention might be. The assessment should focus on the risk posed, not who might have to pay for the work or the nuisance potentially caused by remediation. Detailed consideration and full cost benefit analysis needs to be given for this assessment to be of any use and to be a reasonable and good regulatory decision. Unless expert consideration is given plausible remediation options could be missed which could undermine the regulatory decision. It may well be that the only plausible remediation option is to restrict access to the site but the site should still be determined. As drafted this could be interpreted to mean it is acceptable to leave unacceptable risks in place because a broad assessment concludes that remediation is not possible.

We note that a problem does not cease to be a problem just because no easy solution exists. Determining the site in itself reduces risks because it raises awareness of the presence of contamination thereby protecting site users. Risk is risk regardless of sustainability of remedying the risk; the situation must be managed.

We fail to understand the relevance of 'who is likely to have to pay for the works' at this stage? The identification of potentially appropriate persons and liability groups can be a lengthy and difficult process. Whether significant risks exist should be an objective decision based as much as possible on the science. It should not be possible to use the statutory guidance to dismiss a site because it is too pricey or that the inconvenience of remediation could make the council unpopular with residents.

Examples of risk summaries could be developed as additional non-statutory guidance. This should be done in collaboration with regulators following assessments on real sites, not as an annex to the statutory guidance.

We note that according to the Act, if the site fulfils the test of S78A (2) then the authority must act in accordance with the Act regardless of these impacts. Arguably the guidance conflicts with the Act which will inevitably cause inconsistencies, delays, legal uncertainties etc. thereby undermining the objectives for reviewing this guidance.

Issue 8 (b) - Significant possibility of significant harm (human health)

Question 12

Do you have views on the proposed new "red-amber-green" clarification of how SPOSH should be decided would improve the Part IIA 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?

The majority of members have stated that this 'red-amber-green' clarification does not really add anything to the process. At the 'red' and 'green' end of the spectrum the decision is relatively straightforward anyway. The 'amber' sites have always caused the problem. Essentially what is proposed is that socio-economic factors can be considered for amber sites, we cover this in response to question 14.

The consultation document explains in paragraph 109 that the amber test rests on whether or not the authority believes there is a strong case for regulatory action. This doesn't come across in the draft proposals. Clarity is needed as to when other factors, beyond health, come into play and a stronger emphasis is needed that health is the overriding consideration in all cases.

Question 13

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?

These terms are not used in the statutory guidance. Reference to colours should not be made, this can be particularly difficult for people who are colour blind. In addition the mismatch between the use of colours in the consultation document and categories in the actual guidance has caused confusion.

Question 14

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.

We agree that local authorities should consider whether the health benefits of intervention would outweigh the health risks of carrying out remediation on 'amber sites' but we do not agree that this should influence the decision as to whether or not the site is Category 2 or Category 3. We note the wording of the question in this consultation does not ask whether respondents believe it should affect the decision as to whether or not to determine and therefore answers to this question must be interpreted with care to avoid misrepresenting people's views. This point is also relevant to the responses to question 15 because the same wording is used in the consultation question.

Health impacts and health benefits of intervention should be considered in the context of making a reasonable regulatory decision. This has no bearing on the risks posed by the site and therefore should have no bearing on the category of the site. Health impacts of remediation will be considered during appraisal of remediation options. They may also be relevant to the decision to delay or postpone a determination but under no circumstances can it be an option to dismiss health risks on this basis.

Question 15

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 we do not. Wider factors such as social, economic and environmental impacts of the remediation, and whether the benefits of remediation would outweigh the impacts have no place in the consideration of whether SPOSH exists beyond the extent to which they affect the scientific assessment itself such as the exposure of the receptor. Local authorities are well practised in making reasonable regulatory decisions and will strive to manage these impacts to the best of their abilities. By writing this into the guidance as drafted, the proposals serve merely to complicate and overburden local authorities with convoluted assessments and will undermine the protection of human health. Members have stressed that they are not sociologists or economists and by requiring that they consider these issues, valuable and limited resources might need to be expended on such expertise.

Paragraph 4.27 lists the various factors that the local authority should consider before making its decision on whether or not SPOSH exists; we consider this section to be inappropriate. These considerations do not need to be spelt out in this manner in the statutory guidance. These factors are largely immeasurable and incomparable and will cause confusion, delays and increase the likelihood of inconsistency.

We are concerned that potentially high risk sites could end up not on the public register in order to avoid 'undue stress' to the resident. How would the regulator ensure the risks are managed in this instance? Moreover would this not be in conflict with their statutory duties to identify and manage these risks? Given that regulators may postpone, revoke, delay, and vary determinations and may accept voluntary schemes, we fail to understand why this flexibility is needed.

Much of our concern is rooted in the fact that much of what is being taken into consideration is not easily measurable. No guidance is offered as to how the local authority should consider the myriad of possible factors. What if they consider risks to be really rather high but cost of remediation initially appears to be very high; what is too high? How much is it worth to avoid those risks?

If these likely direct or indirect impacts are also merely guestimates then using them to answer such a difficult and crucial question seems wholly inappropriate. These questions

cannot be easily answered and practitioners have informed us that they do not feel at all comfortable with the requirement to do so.

The consultation documents claim these changes will increase protection for human health; we disagree because this change could easily decrease the protection as science and health based decisions become blurred by social or economic considerations.

If these concerns are ignored, it must at the very least be better enshrined that risk to health is the primary consideration and that others are always secondary. We note that paragraph 4.29 helps to put health considerations above other considerations but this is really only in the context of what should be a category 1 or category 4 site - the importance of health considerations needs to be enshrined throughout the document.

Paragraph 4.28 a) gives some welcome backing for local authorities wanting to determine a site because they believe there is a strong case for taking precautionary action. This is supported.

This section, however, does not appear to sufficiently consider the benefits of determining a site, such as the fact that by simply entering details of it onto a public register it ensures that future users of the site will have access to information. With planning currently taking a more laissez-faire approach and an increase in permitted development rights more development will occur without due scrutiny from environmental health. If a site is not determined how will the assessment information be visible to someone wishing to exercise their permitted development rights, to e.g. turn the site into a school? Whilst blight should obviously be avoided where possible, it needs to be remembered that it is the presence of contaminants on a site and the risks posed, that blight a site, not simply the label it is given.

Issue 9 - Significant harm and significant possibility of significant harm (SPOSH) to non-human receptors?

Question 16

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?

We have no specific concerns; however we note that there has been less experience of using the regime for non-human receptors and therefore less opportunity to evaluate its effectiveness.

Issue 10 (a) - Significant pollution of controlled waters

Question 17

Do you have views on the proposed new guidance on how to decide what constitutes significant pollution of controlled waters?

The reference in 4.42 of 'appropriate compliance points' (sampling) needs to be expanded, to ensure clarity of expectations.

Further guidance on the role of Environmental Quality Standards (EQS) and similar criteria in determining likely significant harm is needed.

The term 'immediately' in paragraph 4.44 needs to be defined. Does this mean immediately beyond the boundary of the site?

Question 18

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?

We note that socio-economic factors are not brought into the equation to the same extent as they are in respect of human health.

Issue 10 (b) - Significant possibility of significant pollution of controlled waters

Question 19

Do you have views on the proposed new guidance on how to decide what constitutes significant possibility of significant pollution of controlled waters?

The term 'serious impact' needs a legal definition.

Further guidance from the Environment Agency regarding pollution of controlled waters, as promised by the consultation document, is essential.

Question 20

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

Option 2 is preferable because it considers likelihood and severity and is more scientific and logical. It helps to reduce the 'grey area' and so should be clearer to all parties.

Issue 11 - Determining whether land appears to be contaminated land

Question 21

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?

We support paragraph 5.3.

If the focus on socio-economic factors is to remain, clarification is needed as to how local authorities will be expected to track and respond should information come to light that any of the socio-economic factors have changed. Safeguards are needed to ensure that the site is determined (if appropriate) when these factors change. A preferable process would be to simply delay the determination for these cases. To illustrate this point consider the elderly couple who have been living in the same house for 40 years whose back garden is built on a former gasworks. The regulator might reasonably consider that remediating the site would cause undue stress to the residents and that because they have already been exposed for a number of years, the additional exposure is not significant. If the regulator puts the site in a category 2, what safeguards are in place to avoid a young family with children moving in when the couple move on? Postponing the determination would ensure the regulator keeps the status under review and that reasonable measures are taken. This is our recommended approach.

The previous statutory guidance called for consideration of 'synergistic effects between potential pollutants' at paragraph B.41(a). This does not appear in the revised guidance. We strongly believe this needs to be reincorporated in order to protect human health.

Issue 12 - Remediation

Question 22

Do you have any comments on Section 6 (remediation)?

Paragraph 6.13 is long-winded and focuses more heavily on negative factors such as costs. This section could undermine the sustainability of remediation because it could give rise to claims that the approach is unreasonable because a cheaper option exists. Section 6.25 is similar – it states 'whilst imposing the least cost on the person who will pay for the remediation'. We do not feel this encourages sustainability. If the best practical, most

sustainable, most effective and least impacting technique happens to be the most expensive, this should not preclude it from being chosen. An example of this can be found in paragraphs 6.34-6.35 which underplay the benefits whilst the cost section is far more comprehensive. Benefits such as increased land value need to be included.

Section 6 (b) must include some requirement (or at a minimum recommendation) to verify that remediation has actually happened. What if the proposed action is not carried out or the work turns out to be insufficient to deal with the reason land was determined?

6.29 states 'Some other future action'. We consider this too vague and request clarity that the future action should be soon and likely to occur.

6.37 it should be noted that leaving risks in situ can also cause stress. For the landowner, knowing that POSH might exist on their land but that the local authority doesn't consider it significant enough could well cause significant stress. This should be reflected in the guidance, given it is felt appropriate to include the stress of digging up gardens. Health impacts of not remediating a site need to be included.

6.38 states *'With regard to environmental impacts of remediation, the enforcing authority should consider whether remediation can be carried out without damaging the environment.... Without causing a nuisance through noise or odours...'*. This needs to be amended to 'undue damage'; it is unrealistic to think that no such impacts will be caused.

We acknowledge and strongly support Section 6 f) on verification. It is of crucial importance to the effectiveness of the regime and of reporting under the regime that this is done. We believe it is imperative that it is also noted in the guidance that the verification report should be logged in a place that will be accessible to e.g. planning departments.

Issue 13 - Liability

Question 23

Do you have any comments on Section 7 on liability? Is the new summary at paragraph 7.3 helpful?

The word 'significant' needs to be removed from 7.5.

We support paragraph 7.28.

Issue 14 - Recovery of the costs of remediation

Question 24

Do you have any comments on Section 8 (cost recovery) of the proposed new guidance?

No.

Issue 15 - Appeals Procedures: proposed changes

Question 25

Do you have views on the proposed removal of Regulation 11?

We support the removal of Regulation 11.

Issue 16 - Impact Assessment – consultation questions

Question 26

Do you have views on the baseline assessment (Option Zero)?

Question 27

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

We are not convinced that on their own, the proposed changes will deliver 'reduced regulatory uncertainty on when land is not 'contaminated land' in the legal sense' thereby reducing excessive remediation of land. Defra and WAG need to commit to measures to develop the evidence base. The successor to the National Brownfield Forum could take a lead in evaluating the needs and ensuring tools get developed.

One impact that appears to be overlooked throughout is the costs to ecosystem services of increased soil sealing. Defra are committed to embedding an ecosystem services approach¹⁶, this should be taken into account during revisions of the guidance by referring to impacts such as soil sealing and soil functions throughout the document when other impacts (such as the cost of remediation) are discussed. This will help encourage a move away from dig and dump and also help avoid a situation where covering a site with concrete becomes common place.

Paragraph 24 states 'We want to improve the regime's ability to bring health and environmental benefits'. We stress that as drafted the guidance risks undermining the regime's ability to deliver health benefits because it weakens the position of the local authority by introducing large areas of ambiguity and allowing social and economic factors to take precedence over health factors. The current definition of 'normal' and 'background' also contributes to this. These aspects must be addressed.

The so called benefits of increased health benefits are arguably nonsense unless a stronger driver is developed to ensure that the 45% of local authorities that have made little or no progress under the regime are encouraged to make progress.

The impact assessment unfairly suggests that the majority of 'unnecessary remediation' is caused by regulators. This is based on anecdotal evidence and fails to take into account the reams of anecdotal evidence that it is landowners and developers that have driven 'over remediation'. The assessment should not seek to level this blame at any particular stakeholder but should simply reflect the uncertainty inherent in the risk assessment of land contamination.

The commitment made on Page 29 to undertake a policy review in 5 years from publication is welcomed.

4. Contact Us

If you require any further information on the views expressed in this response please contact:

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¹⁶ What nature can do for you. A practical introduction to making the most of natural services, assets and resources in policy and decision making, Defra, October 2010
<http://www.defra.gov.uk/environment/policy/natural-environ/documents/nature-do-for-you.pdf>