

# National Assembly for Wales

## Environment and Sustainability Committee

### Draft Contaminated Land Statutory Guidance – 2012

#### E&S(4)–09–12 paper 5

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#### **1. Purpose**

- 1.1 To provide the Environment and Sustainability with an overview of the process for considering the *Draft Contaminated Land Statutory Guidance – 2012* ('the draft guidance') and to set out the concerns that have been raised by the Chartered Institute for Environmental Health Cymru–Wales in relation to the draft guidance.

#### **2. Background**

- 2.1 On 7 February 2012, the Welsh Government laid the *Contaminated Land (Wales) (Amendment) Regulations 2012* ('the Regulations').
- 2.2 The Welsh Government laid the draft guidance alongside the Regulations. The Constitutional and Legislative Affairs Committee is required to consider the Regulations in the usual way, but it is not required to consider the draft guidance.
- 2.3 The Environment and Sustainability Committee is the most appropriate Assembly Committee for considering the draft guidance as contaminated land is a policy area that falls within its remit.

#### **3. The concerns that have been raised**

- 3.1 The Chartered Institute for Environmental Health Cymru–Wales has raised a range of concerns in relation to the draft guidance.
- 3.2 The Research Service has analysed these concerns and compared them with what the Welsh Government has set out in its explanatory notes to the draft guidance. This has been done to assist Members in considering these concerns. This detailed analysis, prepared by the Research Service, is annexed to this covering paper.

#### **4. The procedure that applies to this draft statutory guidance**

- 4.1 The draft guidance cannot be issued by the Welsh Ministers until 40 days (beginning on 7 February) have passed. If during that period the National Assembly for Wales resolves that the draft guidance should not be issued then the Welsh Ministers may not issue it.

- 4.2 The deadline for a motion being considered is 24 March 2012.
- 4.3 In practical terms, this means that an Assembly Member, who wished to table a motion that the guidance should not be issued, would need to do so by 13 March 2012 (allowing the motion to be considered in Plenary on 20 March).
- 4.4 Should the Environment and Sustainability Committee wish to consider and report on the guidance, then it would need to report in sufficient time for it to inform Assembly Members' decisions as to whether they wished to table a motion that the guidance should not be issued.
- 4.5 In practical terms, this suggests reporting no later than Friday 9 March.

## 5. Options for the Committee

In deciding how to proceed, Members may wish to consider one of the following options:

1. Writing to the Minister for Environment and Sustainable Development to set out the concerns that have been raised and copying this letter to all Assembly Members so that they are also aware of the concerns.
2. Issuing a report to the Assembly identifying the concerns that have been raised in relation to the draft guidance (thus leaving it to individual Assembly Members to decide whether they wish to table a motion).
3. Issuing a report to the Assembly identifying the concerns that have been raised in relation to the draft guidance and recommending that the Assembly resolves that it should not be issued. In this circumstance, the Chair might wish to consider tabling the necessary motion.

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## Annex – Draft Contaminated Land Statutory Guidance

### 1. Introduction

In December 2010, DEFRA and the Welsh Government launched a joint consultation seeking views on proposals to update and revise the contaminated land regimes in England and Wales under Part 2A of the *Environmental Protection Act 1990*.<sup>1</sup>

Responsibility for issuing statutory guidance on contaminated land in Wales under the 1990 Act lies with the Welsh Ministers.

A draft of the Contaminated Land Statutory Guidance for Wales 2012 was laid before the Assembly by the Minister for Environment and Sustainable development on 7 February 2012.<sup>2</sup> It has been prepared in the most part by DEFRA and almost identical draft statutory guidance for England was laid before the UK Parliament on the same day. The guidance does not relate to radioactively contaminated land which is covered by separate statutory guidance.

### 2. Draft guidance

According to the draft guidance “Wales has a considerable legacy of historical land contamination involving a very wide range of substances.”

It proposes a change in the methods used for the risk assessment of contaminated land by local authorities in Wales. Under Part 2A of the 1990 Act, local authorities have a duty to inspect their areas to detect any land which ought to be determined as 'contaminated'. This process is led by local knowledge of previous contaminative land uses and once such land is discovered, in the absence of a suitable proposal by the owner, their job is then to require its remediation.

The cost of remediation is borne under a hierarchy of liability, ideally, by the original polluter but where they cannot be found, by the current owner or, in default (e.g. where that would cause undue hardship), by the local authority using public funds under a scheme administered by the Environment Agency. The Environment Agency acts as a secondary regulator responsible for “special sites” (e.g. relating to specified types of water pollution).

According to the Welsh Government:

The current Statutory Guidance fails to give an adequate explanation, particularly on the key legal trigger of when land would pose a “significant possibility of significant harm to human health”. It merely says that a “significant” risk would exist if human exposure to a contaminant would *represent an unacceptable intake or direct bodily contact, assessed on the basis of relevant information on the toxicological properties of that pollutant*. But it does not explain how to decide what “unacceptable” means.

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<sup>1</sup> Welsh Government and DEFRA, [Public consultation on changes to the Statutory Guidance under Part 2A of the Environmental Protection Act 1990](#), December 2010

<sup>2</sup> Welsh Government, [Contaminated land statutory guidance for Wales 2012–draft](#). [accessed on 22 February 2012]

And

The reason why the current Statutory Guidance does not explain how to decide when land is contaminated land is that it was published on the assumption that (non-statutory) “guideline values” would be produced that would describe levels of contamination above which there could be assumed to be a significant risk. However, to date (despite various attempts) it has not been possible to publish satisfactory guideline values.<sup>3</sup>

The Welsh Government explains the reasons why these ‘guideline values’ have not been produced is partly because the current statutory guidance does not explain what they should aim to achieve and in particular it gives no indication of where they should seek to draw the line on a sliding scale of risk to describe whether or not land should be considered to be contaminated land. For this reason it states that there is no firm statutory basis on which to set the ‘guideline values’ and this would have raised issues over the legal robustness of any such values that might have been produced.

There are also a number of other technical reasons that are set out in an Annex to the Explanatory Memorandum.<sup>4</sup>

The Welsh Government considers that the lack of clarity stemming from the current statutory guidance has led to very substantial “regulatory creep”. To address this, it says that the guidance has been revised in order to achieve the intention of the Part 2A legislation when it was introduced – i.e. to protect human health and the environment from significant risks, whilst avoiding disproportionate impacts on society and businesses.

The draft guidance proposes a **new four category test to help decide when land is, and is not contaminated land**: The new test will introduce broad categories to describe areas on the broad spectrum of risk encountered by assessors. The categories are as follows:

**Category 1** describes land which is clearly problematic for example because similar sites are known to have caused a significant problem in the past.

**Categories 2 and 3** cover the less straightforward land where detailed consideration is needed before deciding whether it is contaminated land. The test rests on whether or not the Local Authority believes there is a strong case for regulatory action – and thus whether it should be placed into Category 2 (contaminated land) or Category 3 (not contaminated land). The authority would start by considering health risks alone, and if this leads it to consider that land is clearly problematic or non-problematic the decision could be taken at this point. However, if this does not lead to a decision (e.g. because of uncertainty over the risks), the authority would consider wider socio-economic factors (e.g. cost, views of local people, etc) before deciding. If the authority still cannot decide, the default decision is that the positive legal test for contaminated land has not been met and the site should therefore go into Category 3 (not contaminated land).

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<sup>3</sup> Welsh Government, [Explanatory Memorandum to the Contaminated Land \(Wales\) \(Amendment\) Regulations 2012 and the draft Contaminated Land Statutory Guidance 2012](#)

<sup>4</sup> *ibid*

**Category 4** describes land that is clearly not contaminated land. The new Category 4 test is particularly important in terms of reducing uncertainty over when land is clearly not contaminated land in the legal sense. For example, it would clarify that Category 4 land would include land where there are only normal background levels of contamination (unless there is some exceptional reason to consider there may be a problem).

### 3. Concerns about the new guidance

The **Chartered Institute for Environmental Health Cymru–Wales** has raised concerns about the proposed changes to the guidance for Wales.<sup>5</sup> In particular it is concerned that the new four category approach will ‘water-down’ the need for science in favour of a more qualitative approach to risk assessment and the identification of contaminated land. It considers that the proposed changes will relax the standard for what is contaminated land, reducing the number of sites requiring remediation and as a result will reduce the level of health protection to land users. It believes that the changes will have the effect of raising the threshold for what local authorities will regard as ‘contaminated’, to the benefit of developers (to whom almost all the monetised benefits are assigned in the Regulatory Impact Assessment), but to the detriment of health protection.

The institute considers that it is the lack of further technical guidance on ‘guidance values’, rather than shortcomings with the current statutory guidance, that has caused uncertainty, slowed decision making and led to some poor decisions. Instead of a risk assessment based on toxicology, the CIEH Cymru–Wales believes that the new approach will require local authorities to ask if anyone knows of land in a similar state that has caused harm in the past. In its view this is a poor test because “the absence of evidence of risk is not the same as the evidence of the absence of risk.”

It is also concerned that where it is not easy to reach a decision on whether or not to determine land as contaminated, local authorities will also have to consider the socio-economic costs and benefits of carrying out remediation work for that site. The present guidance introduces socio-economic factors only at the stage of remediation after a site has already been identified as contaminated. The CIEH Cymru–Wales view is that not only will it be difficult to quantify such costs, but they cannot cancel out the risks inherent from the contamination. It is concerned that decisions will no longer be made on health grounds alone. The Society of Brownfield Risk-assessors, the UK Environmental Law Association, the Environmental Protection Group, and the Chartered Institute of Water and Environmental Management have also said they consider that including socio-economic factors could lead to uncertainty and complications.

The Institute also considers that through the draft guidance, local authorities are being encouraged to condone what is called ‘normal’ contamination. The definition of ‘normal’ is to be determined by what is widespread locally or regionally or nationally in similar circumstances. It considers that this approach maintains the same lack of clarity and predictability that the Welsh Government says is the main criticism of the current

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<sup>5</sup> The CIEH has raised similar concerns in England: Chartered Institute for Environmental Health Press Release: [New contaminated land guidance putting public health at risk, claims CIEH](#), 7 February 2012

guidance. The UK Environmental Law Association, Environmental Protection UK, and Specialists in Land Condition have also suggested that the new proposed definition of 'normal' contamination may cause problems with risk assessment.