ANSWERS TO SOIL POLLUTION QUESTIONNAIRE: ENGLAND AND WALES

INTRODUCTION

The main features of the controls over historically polluted land

1. The Local Authority has the primary role in inspecting land within its area and identifying land which is deemed to be "contaminated" for the purposes of Part IIA of the Environmental Protection Act 1990 as amended.

2. The definition of "contaminated land" is narrow for the purposes of Part IIA and only covers situations where the contamination gives rise to significant harm, significant risk of significant harm or pollution of controlled waters.

3. Once "contaminated land" has been identified, responsibility is divided, with the Environment Agency (Central Government) taking control over sites where the risks from the contamination are perceived to be higher (known as "special sites") and all other sites remaining within the control of the Local Authority.

4. In the absence of an emergency, the appropriate enforcing authority is under a duty to ascertain the person or persons who/is are responsible for cleaning up the land.

5. In cases where there is an emergency, the enforcing authority can carry out the clean-up works and seek to recover the costs of doing so from the person or persons who would otherwise have had to carry out the work.

6. In cases where there is no emergency, the enforcing authority must identify all persons who might be affected by any requirement to carry

out clean-up work. This includes owners, occupiers and those responsible for the contamination.

7. The enforcing authority must produce a scheme for the clean-up of the land. Any scheme must take into account the costs and benefits of carrying out the work.

8. After the scheme has been drawn up, the enforcing authority must consult the potentially affected parties. Where voluntary works are agreed, no further action can be taken by the enforcing authority.

9. Responsibility for clean up works rests primarily with the original polluters and in cases where the original polluter cannot be found, responsibility is transferred to the owners or occupiers of the land. After identifying the person or persons who should pay for the clean up, the enforcing authorities must exclude less blameworthy persons in accordance with various tests set down in statutory guidance (known as “exclusion tests”). After these exclusion tests have been applied, the costs of carrying out the clean up works must be apportioned between the remaining responsible persons.

10. The enforcing authority is under a duty to serve a Notice setting out the details of the clean up scheme requiring the recipient of the Notice to comply with the Notice (known as a “remediation notice”) if it is able to do so. It cannot serve a remediation notice in certain circumstances (e.g. if any person would suffer “hardship” if the costs of carrying out the works would be recovered from them or where the responsible person agrees to carry out clean up works voluntarily). If the enforcing authority cannot serve a remediation notice, there is a power to carry out the works and to seek to recover all or any part of the costs in doing so.

11. There are rights of appeal against the service of a remediation notice. Appeals are made to the Magistrates Court or to the Secretary of State

(in relation to special sites only). A Notice is suspended until the appeal is finally determined or withdrawn.

12. It is an offence to fail to comply with the requirements of a remediation notice without reasonable excuse.

13. Each enforcing authority is required to maintain a system of public registers which should contain details of remediation notices and areas of contaminated land for which that authority is responsible.

14. The contaminated land regime is not the only regulatory regime dealing with contamination. Where land is proposed for development, conditions attached to planning permissions or agreements made with developments by local planning authorities are designed to ensure that land is remediated. Various statutory grants are available for such remediation. In practice, the planning system is a significant legal mechanism to ensure remediation, but is market-led in that it applies only where land is proposed for development.

The Questionnaire

I. Information on polluted soils:

1. Do you have a national inventory (or inventories) of polluted or contaminated soils?

Answer: There is no unified national inventory. Existing estimates of the extent of land contamination in England and Wales vary, but according to a 2002 Report of the Environment Agency, there may be up to 100,000 sites affected to some degree. It is also estimated that between 5 and 20 per cent of these may require action to ensure that unacceptable risks to human health and the environment are mitigated. A more recent report by the Environment Agency (Indicators for Land Contamination 2005) estimates 322,000 sites 332,000 ha that have

been subjected to industrial use; 37,000 sites 78,000 ha (identified as contaminated) and 18000 sites 32000 ha as remediated. These figures cannot however be treated with precision. As the Report notes, "[t]here is no established basis by which the extent of land affected by contamination on a regional or a national level is determined. Furthermore, many of the national data sets are inadequate and incompatible, as there are no commonly agreed definitions for land contamination and remediation and few established protocols for sharing data between government departments and different agencies.

In relation to land which is 'contaminated' according to the legal definitions in the contaminated land regime, the Environment Agency is required to prepare and publish a report on the state of contaminated land in England and Wales from time to time or when required by Government (s 78U EPA 1990). As described above, relevant enforcing authorities must maintain registers with details of (among other things) remediation notices served and designation notices of land as a special site etc (s.78R Environmental Protection Act 1990). The register will also include information about the condition of the land in question, although it will only be comprehensive in so far as authorities have fulfilled their duty to carry out occasional inspections of their area to identified contaminated sites (78B(1)).

As described above, the responsibility is shared between local authorities (for contaminated land sites within their area) and the Environment Agency (for special sites). A local authority's register must be kept at its principal office, the Environment Agency register must be kept at the area office in which the land is situated.

1. <u>What are the criteria?</u>

Answer: Section 78A(2) of the Environmental Protection Act 1990 (as amended) provides that for the purposes of Part IIA (and those purposes alone) contaminated land is:

> “Any land which appears to the local authority in whose area it is situated to be in such a condition, by reason of substances in, or under land, that:
>
> (a) significant harm is being caused or there is a significant possibility of such harm being caused; or
>
> (b) significant pollution of controlled waters is being caused or there is a significant possibility of such pollution being caused.

Section 78(4) of the same Act defines harm as meaning:

> “Harm to the health of living organisms or other interference with the ecological systems of which they form part and, in the case of man, includes harm to his property.”

2. <u>Who has the access to it?</u>

Answer: By Section 78R(8) of the Environmental Protection Act 1990 as amended, each enforcing authority is required to keep a public register which is “available, at all reasonable times, for inspection by the public free of charge”.

There are exemptions to access for reasons of national security or commercial confidentiality. In Maile v Wigan Metropolitan Council (High Court (Queen's Bench Division) 27 May 1999) access was denied to a local authority’s register as it was work “still in the course of completion”.

Schedule 3 of the Contaminated Land (England) Regulations 2006 (SI2006/1380) sets out the details of the information which

is to be kept in the register. These include: particulars of remediation statements; declarations and notices; appeals; convictions; notices in relation to special sites; and information about remediation work notified to the authority, although there is no official guarantee of compliance with remediation notices: see Section 78R(3).

3. <u>What is your view on this course of information? What changes, amendments would you like to be made?</u>

Answer: Although there have been criticisms of the public register system, it is a system which is well entrenched in English planning and environmental law. Efforts have been made to advertise the existence of the registers, but ultimately their use depends on the energies of the individual.

There remain doubts as to how comprehensive the register can be without more express duties, while the Environment Agency estimates that over 300,000 hectares of land are affected by contamination. Kibblewhite notes:

> "[t]he amount of land identified as statutory contaminated land since 2000 [the start of the new regime] has been negligible and entirely non-representative of the actual extent of the contaminated land that has been informally identified and treated, or has otherwise managed to fall outside the statutory definition. Local authorities and developers have been cooperating under the planning regime to treat contaminated land without designating it as contaminated land." (19 ELM (2007) 229)

The pre-amended Environmental Protection Act 1990 had a provision for contaminated land registers (S.143.— Public registers of land which may be contaminated – now repealed),

this gave the Secretary of State power to prescribe the particulars to be included in registers, under which wide-ranging regulations were prepared, but scaled back later to just 10-15% of the sites originally proposed due to concerns over costs and the potential for blight. (211 ENDS (1992) 26)

2. <u>Are there any particular administrative or legal requirements to provide information?</u>

Answer: There is a duty on a local authority under S.78B(3) to give notice to the appropriate Agency, appropriate person and any owner/occupier upon identification of contaminated land.

In addition to the general practice outlined below, under Reg 8(k) Home Information Pack (No. 2) Regulations 2007/1667, pack documents must include a search report including the following inquiry:

> "Do any of the following apply (including any relating to land adjacent to or adjoining the property which has been identified as contaminated land because it is in such a condition that harm or pollution of controlled waters might be caused on the property)—
>
> (a) a contaminated land notice;
>
> (b) in relation to a register maintained under section 78R of the Environmental Protection Act 1990[92] —
> (i) a decision to make an entry; or
> (ii) an entry; or
>
> (c) consultation with the owner or occupier of the property conducted under section 78G(3) of the

> Environmental Protection Act 1990[93] before the service of a remediation notice? (Schedule 7(17))”

Since 14 December 2007 every home put on the market, must have a Home Information Pack. Contaminated land is only one part of a vast array of information that must be included in the pack. The HIPS requirement does not go beyond the public registry, except subsection (c) which seems to be a requirement even where no remediation notice has been served, and would not necessarily be registered.

1. In which cases (sale, change of activity, etc)?

2. To whom (public authority, private buyer, etc)?

3. What, if any, are the legal sanctions in case of non observation of the requirement to inform?

4. What are the proportion of claims pertaining to the lack of information?

General answer: The introduction of Part IIA of the Environmental Protection Act 1990 as amended has had a significant impact on the way property transactions are conducted since its implementation in 2000. It is now commonplace for some form of contaminated land survey to be undertaken, whether the transaction involves domestic or commercial property, although this is usually confined to the commissioning of desktop surveys with their obvious limitations. The possibility or reality of land being contaminated, whether or not Part II applies, may impact upon property transactions in various ways. The fitness of the land for its current or intended purpose may be affected, requiring expenditure to rectify the problem: how much expenditure depends on the applicable

remediation standards for its current or proposed use at the time remediation is to be carried out. In the absence of regulatory intervention under Part IIA, or any contractual provision to the contrary, such a problem will lie where it falls, with the current owner. Contaminated land may also involve actual or contingent liabilities. Faster transfer of the ownership or occupation of contaminated land will not rid the transferor of any liability which he has already accrued, for example in respect of water pollution, the transferee may find himself liable for the future as owner or occupier. Part IIA adds another level of complexity in whether the transferor or transferee are within the exclusions. Finally, the potential problems of fitness for purpose and liability may be subject to market perception in such a way as to have a serious blighting effect on a property and its value, irrespective of the actual scale of the risks.

The questions in this Section raise issues such as:

(a) a solicitor's (lawyer's) duty of care to his/her client;

(b) the need to make enquiries of the local authority;

(c) the need to search various public registers of other governmental bodies;

(d) the need to check the disclosure of information by the seller;

(e) the need to check the answers to preliminary enquiries made by the prospective purchaser before contract;

(f) in the case of residential conveyancing, the information now required under the Home Information Pack (No. 2) Regulations 2007 (SI2007/1667);

(g) the wording of the standard form contracts of sale (which in England follow the doctrine of caveat emptor and are not helpful in providing the purchaser of contaminated land with any redress);

(h) the need to ensure and examine any warranties and indemnities in the contract of sale;

(i) whether it is desirable to have an agreement between the parties as to who should be responsible for liability for clean up;

(j) whether it is desirable to use a conditional contract so that there is a full contamination survey prior to exchange.

This question appears to be directed to private sales. Although the same principles apply where the sale is of land by a public authority, English law does not make a distinction between the two. In essence, any remedy is a contractual one. There is no information readily available about the proportion of claims relating from the sale of land which relate to the lack of information.

II. National legislation on soil pollution and enforcement

A. Does specific legislation exist on the subject of polluted soils?

1. What kind of legislation: civil, public or criminal law?

Answer: The contaminated land regime and town and country planning controls are essentially public law regimes. Within each regime however the legislation prescribes various criminal

offences. For example, failure to comply with a remediation notice served by a local authority or the Environment Agency under the contaminated land regime is a criminal offence. Where an authority carries out remediation itself, it may seek to recover costs from the responsible person using the civil courts and with powers to impose charges on the land. In relation to pure civil remedies between private parties, there are no specific provisions concerning soil pollution and cases must fall within general principles such as negligence or nuisance (see further below).

2. <u>Have the provisions of directive 2004/35/EC on compensation for damage to soil (contamination) been implemented in your national law and how?</u>

Answer: The deadline date for putting in place national legislation was April 30 2007, the consultation process for the draft regulations to implement Directive 2004/35 closed on 28th May 2008 and it is expected that the draft Regulations published for the consultation documents will become law by the end of 2008.

Annex II(2) of Directive 2004/35 (on remedies for contaminated land) is largely transposed verbatim by Schedule 4(9) of the proposed Regulations. Two minor differences are (i) that the term “contaminated land” is dropped, in favour of the “damage to land” – perhaps distancing the provision from Part IIA and (ii) the duty to consider a natural recovery option in the EC Directive becomes “[n]atural recovery is a permitted form of remediation in appropriate cases” in the draft Regulations.

The draft Regulations make use of the optional “permit” and “state of the art” exemptions (Regs, Cl.14(4)) in the Directive - which can be criticised as undermining the “polluter pays” principle.

Generally, the Government's approach to implementing the Environmental Liability Directive has been to go no further than is absolutely necessary – this reflects a general policy at present against 'gold plating' of Directives. Existing liability regimes (such as contaminated land) will co-exist with the provisions implementing the Directive, and where stricter will supersede it.

B. Are there any specialised personnel to check the degree of respect of the regulations on polluted soil?

Answer: This will be carried out by officers from the local authorities, Natural England or the Environment Agency, depending on which is the permitting authority and the nature of the pollution. The Environment Agency (and Scottish Environmental Protection Agency) employ generally trained Environment Officers as well as Technical Officers with expertise on groundwater and contaminated land issues.

C. Does the soil pollution fall under any other legal disposition, or other specific sector of environmental regulation?

Answer: Yes - see the attached diagram: "Powers to control current contamination".

Key areas of significance are:

- Pollution Prevention and Control Regulations: providing a licensing system for current activities which have the potential to cause pollution, and including clean-up mechanisms for new contamination, and a requirement to leave sites in a "satisfactory state" at the end of authorised activity;

- Water Framework Directive (WFD): including measures to maintain good soil conditions and prevent erosion. The Environment Agency has general powers under s 161A-D Water Resources Act to require the removal of polluting matter from land which is likely to enter waters such as rivers or groundwater. Although these powers are designed primarily to prevent water pollution, they may indirectly deal with soil contamination. Powers under Groundwater Regulations (implementing the EC Directive on the subject) are designed to prevent the disposal of substances on land which might lead direct or indirectly to the contamination of groundwater;

- The Town and Country Planning system: providing national planning policy that requires Local Planning Authorities to continue to make effective use of previously developed land, with a national target of at least 60% of new housing to be provided on previously developed land. Food and fibre functions of soils and wider soil impacts should be taken account of in EIA and SEA/Sustainability Appraisal requirements together with risks from contamination by ensuring that development is safe and "suitable for use";

- CAP - Cross Compliance: All UK farmers in receipt of the Single Farm Payment must meet standards of Good Agricultural and Environmental Condition (GAEC) relating to soil erosion, soil structure and organic matter. All farmers in receipt of the single payment may be subject to a Cross Compliance

inspection, including inspections on the soil measures;

- CAP - Agri-environment Schemes: The UK has developed a range of options under agri-environment schemes to encourage farmers to address any threats to soil that demand more specific management than complying with the GAEC standards;

D. Generally speaking, do you feel that rules on soil pollution are effectively applied and efficient?

Answer: Part IIA of the Environmental Protection Act 1990 as amended sets out very narrow parameters and the element of risk assessment involved in the formal determination of where the land is contaminated or not means that a definitive figure for the number of contaminated sites is unclear. Individual assessment is lengthy and complicated and it will be many years – if ever – that we will get a totally accurate figure for the amount of contaminated land in the UK. Continuing controls on the redevelopment of contaminated land are the obvious mechanisms for dealing with contamination and these are not fully reflected in the figures dealing with determinations and remediation notices. Thus between April 2000 and July 2007, there were 538 determinations of contaminated land by Local Authorities and 29 special sites designated. These figures are somewhat misleading in that they include multiple determinations in relation to single sites. In fact, Local Authorities have only identified about 15 sites per annum. In total only five remediation notices have been served.

Many have criticised the contaminated land regime as unduly legally complex which may account for the apparently low

figures. However, it needs to be remembered that much remediation is achieved through the planning system rather than these specialised controls. As indicated above, it is not easy to obtain any precise figures on the state of contamination and remediation in general terms.

E-F. **Answer:** See above.

III. Soil pollution and liability

A. What is the proportion of soil pollution claims on environmental law suits pertaining to environmental issues?

Answer: There are no specific figures for this, but the answer will be relatively few. Most reported cases relating to environmental issues concern matters such as noise pollution, water pollution or air pollution, and no reported cases concerning soil pollution per se can be found.

A search on Westlaw UK electronic database (which covers almost all reported cases in England and Wales) gives 17 different instances where "contaminated land" is subject/keyword of the litigation, a similar search under "environment" produces nearly 500, "soil pollution" brings up just 1 case ([2008] Env. L.R. 15 – actually on waste management). This is the roughest of guidance.

B. What are the types of liability?

Answer: Public law liability (under permits/notices), criminal liability (for failure to comply with remediation notice etc), civil liability (under nuisance or negligence if third party damage). According to DETR Circular 2/2000 (Annex 1, para 38) "responsibility for paying for remediation will, where feasible, follow the 'polluter pays' principle" – which translates into a priority for liability to rest with the original polluter (as discussed below).

In relation to civil liability, claims in relation to soil pollution are likely to fall under the general principles of negligence or nuisance. Following the decision of the House of Lords in Cambridge Water (1994) where spilt industrial solvents dripped onto through concrete, and travelled some 1.3 miles through land into groundwater supplies, it was held that to recover damages in nuisance the claimant must establish that the pollution was reasonably foreseeable at the time of the actions giving rise to it. In that case, no liability was imposed because at the time of the spillages in the 1970s no-one would have reasonably foreseen that groundwater could be affected. With greater awareness and knowledge, the position would no doubt be different today.

C. Who can be held responsible?

Answer*:* Under the contaminated land regime, the original polluter; where they cannot be found the (potentially innocent) owner/occupier, and where this would impose undue financial hardship, the State.

Under civil law claims, liability can extend to any party who caused (or continued to cause) the harm – given foreseeability and any other conditions.

The allocation of liability under the contaminated land regime – who is liable:

(a) The "appropriate person"

The "appropriate person" is the person on whom the remediation notice is served. In accordance with the "polluter pays" principle, the appropriate person is defined by Section 78F(2) of the 1990 Act as the person, or any of the persons, who caused or knowingly permitted the substances, or any of the substances, which have been the cause of the contamination to

be in or under the land. In addition to contamination on the site where it was originally present, the appropriate person can be responsible for contamination which has escaped on to other land: Section 78K. Within the statutory guidance those appropriate persons who have caused or knowingly permitted the presence of the substances are known as “Class A persons”.

(b) “Caused”

Whether a person has “caused” the presence of contamination is a matter of fact in each case. Liability is strict (i.e. fault, negligence, or knowledge are not required). Causation can be direct (e.g. the person was responsible for placing pollutants in the ground) or indirect (e.g. through leaks from equipment). In addition, more than one person may be said to have caused the presence of the contaminant (e.g. a contractor dumping the operator’s waste contaminants on the operator’s site – both parties would be appropriate persons).

(c) “Knowingly permitted”

This raises difficult questions. First is the extent of the required knowledge. There is a difference between knowing that a substance is present in, on or under land and knowing that it has the potential to be present in such a way as to render the land as contaminated for the purposes of Part IIA. Second, the standard of the knowledge. The word “knowingly” can be narrowly construed to be natural knowledge of the presence of the substance. Alternatively, knowledge can be implied from the factual circumstances. It is suggested that the latter is a more realistic interpretation.

(d) “Permitting”

Again, this raises the difficulties of interpretation. In the case of one-off incidents, permission is generally a positive act in the sense in that involves some form of explicit or implied consent for the thing to be done. Where, however, the presence of substances in the land is a continuing state of affairs, permission may be assumed from a failure to address the presence of the pollutant.

(e) “Owners and occupiers”

Where the owner or occupier of the land is not a Class A person, there can only be the appropriate person where no Class A person can be found after reasonable enquiry: s. 78F(4). In these circumstances, owners and occupiers are known as Class B persons for the purposes of the statutory guidance.

D <u>Please give practical examples (if any) and specify the situation regarding contaminated sites where the owner or the user disappeared.</u>

Answer: In R. (on the application of National Grid Gas Plc (formerly Transco Plc)) v Environment Agency House of Lords 1 W.L.R. 1780; [2007], gardens in an existing domestic housing site were found to be heavily contaminated. The housing had been built on former gas-works operating in the 1920’s. The land had been de-contaminated in the 1960s according to current practice (essentially sealing heavy contaminants within the earth) before land was sold to a developer. It seems likely that the developer broke the seals during construction. On the facts, the Environment Agency found that both the original gas-works company and the developer could be said in law to have caused the contamination with a 50/50 split of responsibility. The

developer no longer existed as a company. The actual Gas Company which had operated the gas-works had also ceased to exist, and had been subsumed in various statutory reconstructions including post-War nationalisation and then privatisation in the 1980s. The Agency argued that the current successors in title, Transco, (who had never actually occupied the land, it being sold by predecessors) should be treated in law as one and the same company on the polluter pays principle, or in the alternative that various transfer of liability provisions under previous statutory reorganisations should be interpreted to refer not only to liabilities at the date of transfer to future liabilities under the contaminated land regime. The argument won in the lower Court, but in a robust decision the House of Lords it was held that, where dealing with essentially retrospective liability, the legislature must be absolutely clear if a successor in title is to be held liable. Here the legislation referred only to the person who caused or permitted the pollution. Similarly references to transfer of liabilities under previous legislation could refer only to liabilities at the time rather than future unknown liabilities. Given that on that interpretation there was no person to be held originally responsible, the Agency could have imposed liability on the current owners or occupiers of the houses, but decided that this would impose undue financial hardship and did not to so. Remediation costs were picked up by the Agency. The decision has caused considerable controversy – some arguing that the Government at the time of the passing of the contaminated land regime had ducked the question of successors in title, and chickens were now coming home to roost; others have argued that current utility companies and industries who have profited from the activities of their predecessors should bear the financial responsibility for remediation even where they do not currently own the land itself.

E Do you meet difficulties in reconciling special soil regulation and other regulations such as property laws, private contractual provisions? Please give examples.

Answer: There is a tension between environmental protection law and private land ownership, which applies to contaminated land and soil regulation. For soil there is also the specific issue of inherited contamination, which can cause difficulties (see the answer to the previous question), otherwise there do not seem to be particular difficulties. It is perhaps worth noting that the cost recovery process where the public authority carries out remediation of contaminated land is fully integrated into private property law (under 78P(11) EPA 1990) that the authority can act as mortgagee or appoint a receiver etc.

F Are there penalties? Are they inflicted? If not, why? Please give examples.

Answer: Failure to comply with a remediation notice is a criminal offence under S.78M (usually resulting on conviction to a fine not exceeding £20,000). Where a fine is deemed ineffectual, the enforcing authority can seek specific performance of the remediation notice in the courts, or if necessary carry out the work themselves and recover costs.

IV. Care and rehabilitation of polluted soils

A. Is there a mandatory care or obligation to rehabilitate polluted soils?

Answer: Once the liability for remediation has been completed, the enforcing authority must determine how much of a cost of carrying out the remedial works should be apportioned to each appropriate person. In general terms, the starting point is that liability should be apportioned on the basis of relative responsibility of each of the group members for creating or

continuing the risk caused by the pollutants. This might be related to the extent of time of occupation of the land, or the use of a substance. In the absence of reasonable information upon which to base such an assessment of responsibility, the enforcing authority should apportion the costs equally between the group members. As indicated earlier, between April 2000 and July 2007, Local Authorities have only identified about 15 sites per annum. In total only five remediation notices have been served. It should be noted that conditions in planning permissions that require the developer of land to remediate contamination are more common (especially given the Government's 60% target for new housing on brownfield sites).

B. By whom?

Answer: See above.

C. What are the criteria of rehabilitation?

Answer: See above.

D. Who implements it and who controls it?

Answer: The appropriate Local Authority or, in the case of special sites, the Environment Agency.

CONCLUSION

The UK Government are sceptical about the benefits of an EU Soil Framework Directive – "our initial analysis has led us to conclude that the Commission's proposed measures would be disproportionately expensive to implement and would cause difficulties due to considerable overlap with other EU legislation" (Hansard, 23 July 2007, 4.30pm, Column 5 per Jonathan Shaw). DEFRA's Initial Regulatory Impact Assessment (RIA)claims that the

Commission's RIA "not only significantly over-estimates the costs attributed to soil degradation, but in so doing, also over-estimates the benefits that the proposed Directive can deliver" and argues that current laws (including Part IIA EPA 1990) provide an adequate basis for soil protection. At para 13:

> "The UK believes itself to be ahead of many Member States in addressing soil problems. We already have an extensive range of measures in place, from cross-compliance and agri-environment measures to measures under the Strategic Environmental Assessment Directive and a legal framework for dealing with contaminated land, which address the threats to the UK's soils, including the threats outlined in the Soil Framework Directive. These measures are described in Annex II. Our preliminary view is that additional EC legislation is most probably not required to enable the UK to take appropriate measures to address risks to its soils."

<u>LORD JUSTICE CARNWATH</u>

<u>JUDGE WILLIAM BIRTLES</u>

<u>MR NED WESTAWAY</u>

POWERS TO CONTROL CURRENT CONTAMINATION

Overlapping power	Powers available to deal with contamination	Relevant statutory provisions	Who is responsible for clean-up?	Can a remediation notice be served?	Is contamination a criminal offence?	Other comments
Environmental Permitting (IPPC industrial installations, waste sites etc.)	Remedy contamination or harm caused by a breach of an environmental permit related to activities carried on at 'regulated facilities' including installations and waste operations	Environmental Permitting (England and Wales) Regulations 2007	The holder of the permit.	No. (s.78YB(1))	Yes, where contamination is caused by a breach of a condition of a permit or the implied BAT condition.	Additional powers available to vary, and enforce against conditions of permits, see regs 36, 37 and 432 EP Regs 2007
Unlawfully deposited waste	Require the removal of illegally deposited waste or to remove waste and remedy harm caused	EPA 1990, ss. 59 and 59ZA	The owner or occupier of the land on which waste is unlawfully deposited	No (s.78YB(3))	Yes, because the waste will have been deposited without a waste management licence (see s.33, EPA 1990)	Arguably, this only applies to waste deposited after 1 April 1994 (i.e. the implementation of the waste management licensing regime). The decision in *Van de Walle* suggests that inadvertent deposits of material (e.g. from leaking

						pipes) is waste and should therefore be cleaned up under this power (see p.651)
Water pollution	Powers to serve a works notice to prevent or clean up contamination if there is or is likely to be pollution of controlled waters	WRA 1991, s. 161-161D	Any person who caused or knowingly permitted the pollution of the controlled waters	Yes	Yes, because it will be causing or knowingly permitting polluting matter to enter controlled waters (see s.85, WRA 1991)	The powers to serve a works notice and a remediation notice are concurrent. Additional powers available to enforce against breaches of and vary existing discharge consents.
Statutory nuisances	Power to abate a statutory nuisance as defined	EPA 1990, ss. 80-81	Any person responsible for the nuisance	Yes	No, only if abatement notice is not complied with within the time limit specified (see s.80(4), EPA 1990)	If land is in a 'contaminated state', it is excluded from the definition of a statutory nuisance and thus an abatement notice cannot be served.
Town and country planning	Power to impose planning conditions to clean up contamination prior to carrying out development. Also breach of condition notice	TCPA 1990, ss. 71(9), 187A	The person responsible for the breach	Yes	Yes, if there has been a breach of a planning condition (e.g. in relation to places of storage). Breach of condition is a criminal offence (see s.187A, TCPA 1990).	The use of conditions to address contamination and the role of the planning system in helping to clean up contaminated sites is dealt with in Circular 2/2000 and PPS 23.

Amenity Notices	Power to require steps to be taken to remedy the condition of land that adversely affects the amenity of its area by serving an appropriate notice on the owner or occupier of the land	TCPA 1990, s.215	Owner/occupier of the land	Yes	No, only if the amenity notice is not complied with (see s.215, TCPA 1990).	Tends to be used in respect of visual disamenity.