Some 12 years after it first took effect, the Contaminated Land Regime under Part 2A of the Environmental Protection Act 1990 has been revised by the re-issue of the statutory guidance. If Part 2A forms the spine of the regime, then the guidance is its beating heart determining crucial issues of liability for contamination and obligations to remediate land.

This article reviews the level of regulatory activity and effectiveness since the regime came into force in 2000, the advances in contaminated land management since the introduction of the regime and offers guidance for owners and developers on reducing exposure to liability.

**Review of initial activity under Part 2A**

Estimates from the year 2000 of the number of sites needing remedial work to combat active contamination ranged between 5,000 and 33,500. We know from Environment Agency (EA) figures that, in England and Wales, more than 31,000 site inspections had taken place by the end of the financial year 2006-2007. This led to a much smaller number of sites (781) designated as contaminated land, the majority of which were threatening or causing significant harm to human health because of the vicinity of residential housing.

This suggests that of the species of harm covered by Part 2A (which also includes water and habitats), human health ranked most prominently in the mind of the 74 local authorities that had made a designation. By March 2007, 149 of the designated sites had been remediated. Even allowing for local authorities that may still be investigating land within their area (as is their duty under Part 2A), there is a sizeable gap between actual designations of contaminated sites and all estimates of their probability. This has led many to believe that Part 2A has been a
damp squib – a hugely complex body of regulation with little practical effect. In addition, with the extensive guidance, it was perceived as an example of overly-complicated regulation that was ripe for reform.

The revised guidance
Essentially, Part 2A provides for the identification and remediation of “high-risk” sites. The regime is based on the “polluter pays” principle, with the causer or knowing permitter of the contamination being the primary liable party in the first instance. The recent revision of the statutory guidance followed amendments to the definition of contaminated land under Part 2A. Contaminated land is defined with reference to two limbs, the second of which is amended to refer to significant pollution of controlled waters. The purpose of the revision to the guidance was to make it simpler (giving greater certainty to land owners and regulators). In particular, the revised guidance introduces four categories for the determination of the risk of contamination.

Part 2A began life as an idea to construct registers on contaminated land under section 143 of the 1990 Act. Ten years later, it had become a much more elaborate regulatory enterprise. The long lead-in time heightened awareness of the risks attaching to brownfield land and the regime itself. In particular, the risk transfer devices built into Part 2A to exclude parties from liability significantly changed the nature of transactions of brownfield land.

Real estate professionals may have heard their lawyers talk of “selling with information” or “agreements on liabilities”, which are two common examples of transferring contamination risks pursuant to Part 2A. Contamination problems on thousands of sites have been addressed during property transfers or redevelopment in the shadow of Part 2A. Sitting alongside other instruments, such as Planning Policy Statement 23 on the development of land affected by contamination, Part 2A has provided some regulatory backing to address historical problems of contamination through both the planning process and private contractual structures.

Initially, the regime was attacked as too woolly, lacking hard quantifiable standards of when land might be considered contaminated. Yet, over time, there has been a broad market acceptance with the pragmatic approach of Part 2A, which focuses on the objective of eliminating pollution linkages to ensure that there is no pathway through which a source of contamination can impact on a receptor.

The revised guidance has largely maintained, even emphasised, this approach. This has allowed a good deal of learning about how to manage land-based contamination, which a more prescriptive approach might have stifled. Along the way it has produced innovative approaches to land remediation. The revision of the guidance provides a good opportunity to take stock and consider the specific issues
that landowners and developers are faced with when dealing with contaminated sites.

**Most common contaminants**
The most common contaminants that are likely to be encountered on a brownfield site include:
- Asbestos in buildings and soils causing mesothelioma cancer. Removal from buildings, soil removal or encapsulation mitigates the risk.
- Ground gas causing asphyxiation and explosion, damaging property and threatening life. Gas protection measures (e.g., ventilation) minimise the risk.
- Heavy metals and polycyclic aromatic hydrocarbons are detrimental to human health, associated with cancer-related illnesses. The solution is to remove them or physically encapsulate impacted soil.
- Petroleum products in groundwater rendering water supplies unusable and causing vapours detrimental to human health. The solution is pumping to surface for disposal and/or treatment.

**Reducing the exposures faced by clients**
To be commercially meaningful, environmental exposures need to be monetised in monetary terms, rather than subjective or qualified terms. Hence, a consultant needs to be able to monetise environmental exposure — calculating at the outset how much it will cost the client to de-risk their sites.

It then takes specialist expertise to achieve the lowest possible value for the residual risk (thus saving client money). Independent contamination advisers are well placed to provide this advice and substantial savings can be made by obviating the need for remediation, minimising remediation costs and pinpointing site investigation work at the areas of greatest concern.

**Case study**
An example of this approach in action involved a landowner who had let a light industrial property to a tenant. Unknown to tenant and landlord, heating oil had been leaking slowly from underground pipes beneath the property for many years. In the course of time, oil entered the drainage system. It then polluted a watercourse several hundred metres from the site.

The EA traced the source of the contaminant back to the property and sought to hold both the landlord and its directors liable (regardless of fault or negligence) under (among other things) Part 2A. Reputations were at stake.

However, through working closely with the landlord’s lawyers, an action plan was developed, which, after careful negotiation, lead to a “win-win” for the landlord and the environment. A programme of cost-effective works were implemented to replace pipework, impacted soils and drains.

As a result, legal proceedings were dropped by the EA and the property was not blighted by regulatory action.

**Impact of changes to guidance**
In the short term, it does not appear that the changes will significantly impact on decision making as regards remediation (such as in the case study above) or whether to develop sites or not. It is more likely that the economic situation and the planning regime will continue to be the most material factors.

It is possible that contractual negotiations will initially be more drawn out as parties seek to establish the implications of the changes. Whether technical guidance, in the long term, provides greater certainty for the development of brownfield land remains to be seen.

**The future for contamination disputes**
Disputes regarding contamination appear to be on the increase. Although the case study is an example of where regulatory pressure was important, it does not appear that the increase is significantly driven by either regulation or enforcement (for example, of Part 2A).

In previous years, the increase in the value of assets meant that contamination issues were often not considered sufficiently material to litigate. Now, companies and investors are looking to “sweat” their assets. This includes seeking recourse to counterparts in contracts, original polluters and insurance companies for contributions to remediation costs.

Usually these disputes are settled in private, which explains why we have a limited number of court decisions. To complicate matters further, the handful of court decisions are regarded as unhelpful; they provide little assistance in understanding the complexities of Part 2A.

**Further legal changes**
Aside from Part 2A and the associated guidance, there are other changes in law which landowners and developers should have on their radar. The changes to the planning regime must be considered as one of the most significant developments. However, these changes have been well documented and discussed elsewhere.

From an environmental perspective, clients need to be aware of the increasing focus on the energy efficiency of new builds, but also the redevelopment of existing buildings.

As regards brownfield land specifically, the government recently saved Land Remediation Tax Relief from abolition. This is a very generous and under-used tax relief that can make the returns on brownfield land very attractive and in our experience is often a critical factor in determining the viability of brownfield redevelopment.

Professor Robert Lee is co-director, ESRC Centre for Business Relationships, Accountability, Sustainability and Society, Stephen Sykes is chairman and Andrew Pullman is managing director of Ashfield and Paul Davies is a partner and Michael Green a senior solicitor at Macfarlanes LLP.

---

**Top tips for owners and developers of a contaminated site**
- Do not be frightened by contaminated land exposures. With good advice you will be able to make the right decisions.
- Appoint an independent environmental adviser with hands-on experience of managing environmental risks and achieving clean exits from difficult sites.
- Obtain as much information as possible regarding the environmental position. Information gathering will have to be undertaken at some point (whether on the purchase, development or sale of the site) and failure to obtain adequate information commonly gives rise to concerns and problems.
- Make sense of the information that is collected, ensure you have a strong professional team on board who can translate those long, complicated consultant’s reports.
- Define an early derisk cost and develop a road map to lower it/provide certainty around the figure. This can then be used with confidence as a basis to put together overall costs of development and/or remediation.
- Insist on your adviser providing monetised estimates of environmental exposure – for example, “there is a 10% probability of a £250k loss” – rather than a subjective view such as “this is a ‘medium risk’ site”. Dependable, clear advice upon which to base financial decisions is essential.
- Challenge your adviser to back up their opinions and estimations. Put your adviser to the test. If you are not convinced by their arguments, look elsewhere.
- Be very clear about your future plans for the site. The proposed use of the site is essential for defining the standard of remediation and limiting legal exposure under Part 2A.