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Rt. Hon Mr Richard Benyon MP
Parliamentary Under-Secretary for Natural
Environment and Fisheries
DEFRA
Nobel House
Smith Square
London
SW1P 3JR

9th August 2010

Dear Rt. Hon Mr Benyon MP

Feedback from SAGTA regarding the Part IIA Statutory Guidance review

I write on behalf of SAGTA to congratulate you on becoming the DEFRA Minister responsible for soils and contaminated land. We very much look forward to working with you and the DEFRA contaminated land team over the coming years on this important and challenging issue. In recent years the issue has been hampered by inconsistency and uncertainty in application of the legal processes, which in turn has caused unnecessary stresses on members of the public whose homes have been blighted as well as unnecessary costs on business.

SAGTA is a members association of several respected UK companies who own and responsibly manage contaminated land. We commented on the original Part IIA Statutory Guidance draft and have remained an ever-present sounding board for Environment Agency and DEFRA, including regular meetings with Tom Coles, Head of Contaminated Land. Building on more than a decade of experience, SAGTA is the authoritative voice of industrially contaminated land from a land holder's perspective. SAGTA is also proud to have been at the forefront of working with regulators to deliver better regulation within our sector. Therefore, we welcome the review of the Statutory Guidance (SG) for Part IIA of the Environmental Protection Act 1990 (the "contaminated land regime" or "the Act"). The contaminated land regime has a considerable "knock-on" effect for the planning regime, so we also copy this to your colleagues at CLG.

General comments

We seek regulations that provide certainty and support proportionate action without compromising the protection of human health and the environment. This letter seeks to summarise and present the view of member companies for your consideration. SAGTA is supportive of what the Statutory Guidance seeks to do in providing a legal framework that encourages voluntary and responsible remediation action. In particular, the liability transfer mechanisms have been an important factor in making the UK the leading country in Europe in developing its brownfield sites.

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Defining Contaminated Land

Notwithstanding the above, the existing Statutory Guidance is considered to have been ineffective as a legal process because too much uncertainty and inconsistency exists when regulators seek to follow the process. Most notably when defining 'contaminated land', as defined by land that may present a 'Significant Possibility of Significant Harm' or 'SPOSH'. Part IIA is implemented by local authorities, of which there are over 350. In the absence of centralised regulator guidance on the question of SPOSH, individual local authorities are essentially acting alone with differing levels of knowledge and interpretation of how to follow the process.

As a consequence, in the absence of SPOSH guidance there is tendency to use lower thresholds of risk as the basis for defining 'contaminated land'. Whilst not always the case, such super-conservative assessment can lead to unnecessary stress for the public and homeowners alike and can be disproportionately costly to UK plc.

Preventing Brownfield Development

Brownfield sites cause a social blight on local communities, as well as having an economic impact on the area in which they live. Brownfield sites lead to poor perceptions of an area by attracting antisocial behaviour, which can prevent investment, so areas cannot escape deprivation. SAGTA members consider that improving the Part IIA regime will have considerable supplementary affects on the planning system when redeveloping sites, since the latter is ultimately dependent on the successful understanding and regulation of Part IIA.

Stakeholder engagement

An effective legal process requires consistent early engagement with landowners. It must allow ownership to be confirmed, historical information to be shared, and proactive risk management arrangements to be recognised. This does not consistently happen – at worst it can cause local communities to be misinformed about risks and responsibilities creating unnecessary stresses on members of the public whose homes have been blighted.

Landowners have a responsibility to challenge legal processes that are applied incorrectly. Responsible landowners also have reputations to manage. Landowners, local authorities and their advisors have the technical knowledge to foresee potential impacts on local communities and home-owners and work together to develop management plans and contingency arrangement to minimise this impact.

Site Assessment and Data Quality

An effective legal process requires good quality data and high standards of site assessment. Unfortunately, the standard of work is inconsistent and all too often is inadequate. Where this is the case landowners have a responsibility to challenge the data.

We believe this is due to a combination of insufficient resources being funded to carry out the work to an adequate standard; and the individuals carrying out the investigations not possessing adequate skills to do the job and are not aware of the errors they are making.



Controlled waters

Under certain circumstances, the legal process identifies 'Special Sites' and makes the Environment Agency the lead regulator as opposed to the Local Authority. The experience of SAGTA members is that this handover or interface is often unclear leading to uncertainty about who is regulating the site. Members consider that it would be better for the Environment Agency to be the sole regulator when issues relate to controlled waters as, particularly in respect of River Basin Management areas, controlled waters often cross Local Authority jurisdiction boundaries.

The "significance" element is still waiting to be introduced, several years after it could have been following the Water Act 2003. This issue is now resolved in Scotland, via guidance on the implementation of the Groundwater Daughter Directive. This is considered to be an urgently needed addition for the rest of the UK as it has major implications for all organisations when considering what is or is not pollution. However, it is particularly acute to members listed on the London Stock Exchange, as they have to declare all possible liabilities; this has significant effects on a company's perceived profitability. This means members have to cost for total clean-up on the 'books', although, in reality, they know that not all of this is not going to be required. If these estimated costs can be reduced to what would be a more realistic figure, members would become more attractive investment opportunities, particularly to foreign investors. This would not only assist UK Plc in its economic recovery, but it would inject more financial resource to directly address land contamination issues.

Remediation

The two stage process of the current legal process – to determine a site and then issue a remediation notice – works if both steps are taken. However it is not in the best interests of local communities to determine a site as contaminated land and then not follow up with active remediation at the site on the grounds of cost-benefit or sustainability. It creates an unnecessary blight on land.

This blight issue also has the potential to remain following active remediation because a remediated site remains registered with the local authority. Mechanisms should be sought to de-register responsibly remediated sites.

SAGTA is also conscious that members regularly comment that where provisions under Part IIA may prompt requirements for planning consent, the outcome can result in the authorities utilising the process to seek added stringency factors to site remediation. SAGTA believes this form of "project creep" was never intended to be a factor within Part IIA and as such would support the review to include assessment of related interfaces with planning to gain clarity and direction on the interactions.

Appeals

The view of SAGTA members is that potential Class A and Class B Persons presently have insufficient time to react to any unexpected determination notices. Furthermore, there is no legal route to over-turning a determination once it has been made, even if the basis on which the determination has been made is not well founded. Only if a remediation notice is subsequently served (which can be many months or years later) does the right to challenge the designation arise. This is a weakness in the current legal process. Engagement with potential Class A and B parties at the earliest stages of determination would produce a more robust analysis of whether a site meets the statutory tests for designation.



Because determinations are complex and typically not conducted comprehensively or, on occasions, not to an appropriate standard, SAGTA members have needed to spend significant sums on specialists - not only to gain a better level of understanding of a site legally and technically, but also to analyse how the local authority has reached their decision. The resulting correspondence inevitably extends resolution timeframes and further increases expenditure. One SAGTA member has incurred costs of between £50,000 and £100,000 each time a piece of their land has been determined, despite the determinations not being sufficiently robust to require the member to contribute to remediation. Clear, correct and unequivocal determinations on genuine Part IIA sites would reduce such unnecessary expenditure.

Exclusion Tests

The exclusion tests contained in the statutory guidance creates uncertainty for parties when dealing with sales of land. The tests allow exclusion of Class A parties from liability if certain criteria are met. However, the exclusions only apply if there is more than one Class A party in the liability group. We consider it would be more certain to operate the exclusions on the basis that if a Class A party can satisfy the test, then it is excluded regardless of whether other Class A parties in the liability member group are still in existence.

Proposals to consider as part of the Review

In the interests of all stakeholders in the contaminated land process, SAGTA members would encourage the Part IIA Statutory Guidance review to consider the following improvements:

- A re-emphasis of the intent of the guidance so proportionate levels of regulatory action take place;
- Clearer direction on how local authorities should prioritise sites with due recognition of national programmes towards which a number of major landowners are working;
- Encourage a clearer phased approach to site assessment that means lower risk sites are not subject to disproportionate levels of regulatory interest;
- Develop a formal pre-determination process that allows technical data and basis for a proposed determination to be shared ahead of commencing the formal legal process. This should include a lines of evidence approach;
- Avoid determination of sites where active on-site remediation action will not follow on grounds of cost benefit or sustainability;
- Mechanisms should be sought to de-register responsibly remediated sites;
- Fix a timeframe and deadline by when a determined site will be subject to remediation, such that homeowner and community expectations can be managed and personal stresses reduced;
- Create a mechanism for inappropriate determinations to be withdrawn without causing potential land blight.
- Establish a clear process and set of responsibilities for managing Special Sites;
- Provide the Environment Agency with a responsibility for Controlled Waters matters;
- Setting of adequacy of skills' requirements of those who may be involved in the process; and
- Provide clear direction on the 'significance' issue with respect to Controlled Waters.
- Review the basis on which Class A parties are excluded using the Exclusion Tests.

On an associated note, there is an urgent need to support work to practically define 'what constitutes POSH (Possibility of Significant Harm)?' SAGTA members believe this could go a long way in helping answer the more complex question of how to define contaminated



land in terms of SPOSH. The funding for this could be “top-sliced” from the Capital Grants for Contaminated Land, since all sites are affected by this issue

We also recommend that a dedicated national advisory team is established to manage the Part IIA process; it is an ineffective use of governmental resources to expect each local authority to employ suitably-trained legal and technical persons in-house to follow the process with the required discipline. Furthermore, an advisory team would only be needed for the medium term if combined with the aforementioned POSH support work. Its funding could also be “top-sliced” from the Capital Grants.

Closure

SAGTA members consider that the new Coalition Government have the ability to address the issues addressed herein, which will not only begin to bring about the proper implementation of Part IIA, but will also help stimulate brownfield development and address issues in the Planning system relating to land contamination. It will continue to enhance better regulation. However, although SAGTA members consider that the review of the Statutory Guidance is a crucial first step, which should be carried out as soon as possible, there are other issues that the sector faces, many of which are discussed above. These require new science, addressing skills within both the private and public sector, and extra support for the regulators, especially in local authorities.

We hope that you find the above information useful and that you seek to incorporate the issues into the new revision of the Statutory Guidance, which we see is the crucial place to address many of the points. We also hope to see the extra issues implemented as soon as practicably feasible. In the meantime, if you would like to discuss any of the issues, or talk about any other ideas that you may have, SAGTA would, as always, be very enthusiastic to assist.

Yours sincerely

For and on behalf of SAGTA

Dr Richard Boyle
SAGTA Chairman

Frank Evans
SAGTA Deputy Chairman

CC Rt. Hon Mrs Caroline Spelman MP, Secretary of State for the Environment
Rt. Hon Mr Eric Pickles MP, Secretary of State for Communities and Local Government
Rt. Hon Mr Grant Shapps MP, Minister for Housing and Local Government
Rt. Hon Mr Greg Clark MP, Minister for Decentralisation
Mr Tom Coles, Head of Contaminated Land, DEFRA
Mr Mark Plummer, Head of Planning, CLG