

SAGTA COMMENTARY

SAGTA MEMBERS CONCERNS REGARDING THE IMPLEMENTATION OF THE WATER FRAMEWORK DIRECTIVE AND GROUNDWATER DAUGHTER DIRECTIVE IN THE UK

The introduction of the Water Framework Directive (WFD) and Groundwater Daughter Directive (GWDD) may result in owners of contaminated land being liable for remediation which would not have been considered reasonable under Part 2A legislation.

The WFD will modify the definition of Contaminated Land (“significant pollution of controlled waters is being caused or there is a significant possibility of such pollution being caused”) through the Water Act 2003. This will avoid determination based on very small amounts of contamination entering Controlled Waters. However, guidance on what is considered ‘significant’ has yet to be consulted on.

However, with regard to remediation, the economic tests under Part 2A differ from those of WFD, potentially leading to the more onerous liabilities as follows:

- Part 2A: remediation measures are assessed as being reasonable having regard to the cost which is likely to be involved and the seriousness of the pollution of controlled waters. Therefore, this is in general accordance with the BATNEEC (Best available technology not entailing excessive cost) principle and is based on affordability.
- WFD: remediation can only be waived where not technically possible, environmentally damaging or disproportionately expensive (as opposed to affordable, which is has a lower burden) and is thus contradictory to the BATNEEC principle within the Part IIA legislation. Provided the costs are not disproportionate in relation to benefits, remediation will be considered to be reasonable. There is, however, a caveat which allows less stringent water quality remedial objectives (i.e. not implement all necessary measures to achieve good status) for specific waters when they are so affected by human activity such that their condition is such that these objectives would be unfeasible or disproportionately expensive.

Other areas of potential concern from the WFD and GWDD for contaminated land holders are:

1. They bring in extension of control to all inputs of pollutants (i.e. there is no distinction between inputs from specific polluting activities and other more diffuse sources) and cumulative effects are now to be considered. This raises the following issues:
 - How to demonstrate cause & effect from diffuse sources, including contaminated land.
 - Aggregated effects of contaminated sites or contaminants may need to be addressed by remedial measures, even if risk assessments indicate individual inputs not significant.
2. The draft EQSs for dangerous substances in surface water are more onerous than existing EQSs. This may increase liabilities relating to historic contamination that has leached to ground and which could impact surface water.
3. With regard to monitored natural attenuation, the WFD and GWDD do not prohibit its use *providing there is no pollution*. But how will this be assessed?

4. The draft GWDD guidelines for assessment of direct and indirect inputs, led by NICOLE members, state that:

"It should be noted, however, that exceedance of quality standards [and threshold values] does not always imply (a risk of) adverse effects to human health or the environment. Quality standards are generic values applying to all groundwater [and threshold values may apply to a single groundwater body, to, or to all the groundwater within a Member State]. At a smaller scale than the scale at which the quality standards [or threshold values] apply, there can be exceedances of quality standards [or threshold values] while there is no risk of adverse effects. On the other hand, where no exceedance of quality standards [or threshold values] occurs there may still be pollutant concentrations that are too high for the local groundwater dependent ecosystems. In this case the maximum allowable concentration should be determined, and the input should be limited to such an extent that the maximum allowable concentration is not exceeded."

A number of areas of note with regard to assessment of inputs are as follows:

- Non-hazardous substances can be present in an aquifer as long as it is not in sufficient quantity to "impede use".
- A regulator/government may set the level of impedance for waters at a threshold value or a quality standard but it may be successfully argued that the level may not be appropriate for a particular groundwater resource and that a higher level will not affect the use of the groundwater, which will enable the published value to be relaxed.
- Conversely, a regulator may argue that the set threshold value or quality standard for a pollutant is too high in some cases where they consider that an end-use is particularly sensitive to that pollutant and therefore require more stringent standards on, effectively, an ad-hoc basis.
- Draft guidance refers to use of risk assessment and consideration of costs in definition of remedial targets, which potentially conflicts with the WFD stance that cost is only considered where disproportionate.
- The fear that threshold values for groundwater could become compliance values instead of risk based levels, similar to the way in which published human health SGVs have been used in certain circumstances.
- The need to ensure UK regulators will be amenable to risk-based arguments and not be reliant on "absolute" quality standards as a means for assessment.
- The number of contaminants subject to review and assessment may be significantly larger than currently required.
- Initial "thoughts" that the definition of "significant pollution" may be in line with Drinking Water Standards (which are used currently as generic screening values) would not be appropriate under the WFD as they are protective of human health only (i.e. they may not be protective of ecological status).