ACTION AGAINST CONTAMINATED LAND by Dr. Wendy Le-Las

Most people are grieved to see green fields go under concrete. However necessary the development one feels that it ought to be possible to site it on land that has already been despoiled. Recent targets set by the Government demand that 60% of all new houses should be built on "Brownfield" sites to relieve the pressure on virgin land in town or country. The trouble is that the latter are cheaper to develop.

All too often it is not just a question of removing the rubble: the greater expense comes with the decontamination of the site. During the last ten years the British Government's commitment to sustainable development has brought to the fore the need to recycle land which has already been degraded. Room for expansion and clean water would help both the human population and the natural world. How much land is involved? The Environment Agency's latest estimate is some 300,000+ hectares affected, covering between 5,000 and 20,000 problem sites, but the full extent of the problem - and the opportunities which could come from it - will be revealed in the next few years.

The Government's new contaminated land regime came into force on April 1st 2000. After a decade of wrangling over who is going to pay for the clean up, Part IIA is the 1990 Environmental Protection Act was finally put in place via s.57 of the 1995 Environment Act - if you get my drift. Even the relevant Circular (DETR 02/2000) is one of the better cures for insomnia encountered in recent months. For readers who want, or really need to understand the fine detail, the Regulations are the most readable literature on the subject (Statutory Instrument 2000, No.227).

The legislation focuses on land on which contamination is currently causing unacceptable risks to human health or the wider environment in its existing use. It does not include radioactive contamination: separate legislation will deal with that. Neither does it deal with the redevelopment of a site for a new use: it is up to the planning system to impose appropriate conditions if permission is granted.

Contaminated land is defined as follows:

"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, on or under the land, that -

(a) Significant harm is being caused or there is a significant possibility of such harm being caused; or

(b) Pollution of controlled waters is being, or is likely to be caused."

Before a local authority can make a judgement on whether land is contaminated, they have to be satisfied that there is a pathway between the contaminant and human beings, their property in terms of crops, livestock or buildings, or ecological systems. The Circular sets out in detail what is considered to be "*significant harm"* to these things. If all this sounds somewhat academic one only has to remember how the image of asbestos changed from insulator to the nation to lethal killer, based on epidemiological evidence. And then what are *"controlled waters"*? This is legalese for territorial and coastal waters, inland fresh waters, and ground

waters. The possible pollutants include "any poisonous, noxious or polluting matter or any solid waste matter."

Each local authority has a duty to inspect its area, from time to time, in order to identify the contaminated land in its patch. By July 2001 it has to publish a written strategy. This must reflect local circumstances: its industrial legacy; the nature and timing of redevelopment in different parts of the area; available evidence of contamination; the local geology and hydrology; and the distribution of "receptors" - people, their property, ecosystems and controlled waters. The folk memory of a community is invaluable in a situation like this. Maybe your local council will be able to help your local authority with their detective work.

The local authority will be working in conjunction with the Environment Agency, English Nature, MAFF, and English Heritage. Given the shortage of resources in local government, it will be essential to concentrate, in the first instance, on areas which are likely to constitute "contaminated land", as defined by the legislation. Next will come the detailed site investigations that may well include the drilling of boreholes.

Having determined that the land is contaminated, there is the question of whether it is a "Special Site". This is defined in the Regulations as land contaminated by:

¨ waste acid tars;

¨ oil refining;

¨ the manufacturing of explosives;

¨ a nuclear site affected by non radioactive contamination;

¨ the activities of the MOD, visiting forces or the Atomic Weapons Establishment;

¨ the manufacture of chemical or biological weapons;

¨ activities of industrial plants operating under the aegis of Part I of the Environmental Protection Act.

Special sites may include land adjacent to the above sites, and also controlled waters that are:

¨ to be used for drinking water or have to meet other criteria of water quality;

¨ polluted by poisons listed in Schedule 1, para.1;

¨ underground waters to be found in the chalk, limestone and sandstone strata listed in Schedule 1, para.2.

Special sites are the responsibility of the Environment Agency, and if it is obvious from the start that a given site will fall within the above categories, then the local authority will leave all investigations to them. Thus Newbury District Council will leave the Atomic Weapons Establishment at Aldermaston to the tender mercies of the Environment Agency. If there is any dispute between the local authority and the EA, it has to be referred to the Secretary of State. From the point of view of the owner or occupier the main procedural different would be that any appeal against a remediation notice would be to the Secretary of State, not the

magistrates court.

Whether the local authority or the Environment Agency is to play the enforcer, the next problem is to establish:

¨ who is the owner of the land;

¨ who appears to be in occupation of all or part of the land

¨ and. most importantly, who is to bear responsibility for the clean up.

As can be imagined, given the possible cost of remediation, there will be many people and institutions anxious to wriggle out of being designated as the appropriate person. There are two categories of the latter. The first is those who caused or knowingly permitted the land to become contaminated. In practice this will mean that the person is only liable for the clean up of their "own" pollutant, in keeping with the polluters pays principle. Thus the culprit has to be identified for each pollutant linkage on site. Clearly those who caused the pollution may be the existing and/or past owners or occupiers

The second category is where the original culprits cannot be brought to book: the owner then becomes the appropriate person. Not surprisingly, this has been one of the delicate political matters which have delayed the insertion of this part of the Act, for a decade. The tricky issues involved with either definition, and determining the nature and extent of their liability, will keep the lawyers in pocket money for years to come.

The next question is the standard to which the land should be remediated. There are those who take the view that land should be reinstated to the standards required for agricultural use, however defined. However, the realpolitik of the situation is that land only has to be restored to a state suitable for its current use: clearly this will be cheaper for those having to pick up the tab. If the land has to be upgraded for another use in the future, then the developer will have to pay for it.

Having found the appropriate persons, and apportioned the costs between them, the enforcing authority has to consider whether there is any reason why those identified should not have to bear all or part of the cost. This has proved to be another wicked issue in the evolution of the legislation. Basically the enforcing authority may waive all or part of the cost of remediation if it would inflict hardship on the appropriate person, whether they be the culprit, or the unfortunate owner of the land when the contamination was unearthed. Factors, which may have a bearing on the situation, include:

¨ the threat of business closure or insolvency;

¨ the appropriate person is a trust, charity or social housing landlord;

¨ the disappearance of another appropriate person with whom joint responsibility is shared;

¨ the cost of remediation exceeding the value of the land;

¨ the genuine ignorance of a house owner at the time when the property was purchased.

Accountants, surveyors and even the police could be playing a role at this stage.

The enforcing authority has the powers to undertake the clean-up itself if: ¨ the matter is urgent; ¨ it cannot find the culprit;

¨ all or part of the costs have to be waived;

¨ in specified cases, the pollution involves adjacent land or controlled waters;

¨ there is a failure to remediate the land.

Unless it is really urgent it is essential that the enforcing authority embark on consultation with the owner, occupier and/or whoever will be paying the bill, about the appropriate remediation package. In the last few years research into cleaning up contaminated land and water has received a boost from an unexpected quarter. NATO has sponsored research internationally on the science and technology of the subject: a classic case of "swords into ploughshares"? In any given case it is a question of finding the most cost-effective way of achieving the desired result, and possibly getting the job done without the rigmarole of serving a remediation notice.

However, if such a notice has to be served, the enforcing authority has to give three months notice to the appropriate person, or it may be longer if a special site is involved. A remediation notice has to include information about the parties involved, the land, the contamination, the clean-up package, the penalties for non-compliance and the rights of appeal. Copies have to be sent to the Environment Agency, or the relevant local authority, depending on which is the enforcing authority.

In some cases, as the clean-up proceeds, it may become apparent that the original remediation package will not achieve the desired result, or further pollution linkages may come to light. The programme may have to be adjusted and new notices served. A complex situation may involve a whole series of assessment actions that set out the nature of the problem, the means of treating it, and the procedure for monitoring the situation and verifying the results.

Remediation notices have to be entered on a register open to public scrutiny. These are to be found in the offices of the local authority or the Environment Agency office nearest to the land in question. That said, not all the gory details may be put on the register. Information may be excluded if:

¨ the Secretary of State considers it involves matters of national security;

¨ the enforcing authority or the Secretary of State is convinced of the need for commercial confidentially - and this does not include hood winking prospective buyers!

Once the site has been cleaned up, the owner may notify the enforcing authority, and details of what has been done will be entered on the register. However, the Circular has the following words of warning:

"Part IIA provides that the inclusion of an entry of this kind on the REGISTER is not to be taken as a representation by the authority, maintaining the REGISTER, that the entry is accurate with respect of what is claimed to have been done, or the manner in which in may have been done."Para.15.5

Curiously there is no formal "signing off" procedure. It is a matter of the enforcing authority being satisfied with the result, and maybe an exchange of letters. On the other hand, the failure to comply with a remediation notice within the time required, may result in a prosecution. If found guilty, an individual could be fined £5,000 plus daily fines of £500, and a company £20,000 with daily fines of £2,000. If the enforcing authority has to do the job itself, then it is entitled to extract the cost from the culprit.

Clearly this new contaminated land regime will be a job creation scheme for a whole raft of different experts, and the system will cost money to administer. Originally the government hoped to get away with its usual ploy of saying that there would be no financial nor manpower implications because the regime just restated the existing responsibilities of local authorities and the Environment Agency. The 1996 consultation paper met with such a furore that the incoming administration found an additional £50m to help local authorities set up the system, and £45m plus other funds to help with land inspection and remediation. The Environment Agency has also received extra funding.

DETR will be developing performance indicators to assess the overall progress in the task of identifying and cleaning up our inherited legacy of contaminated land. The Environment Agency will be keeping records of the scale of its own activities in this field, and those of the local authorities, and whether land was remediated voluntarily or under duress. One suspects that a large percentage of the cost will have to be met from the public purse, but then we, as a nation, have prospered from the mess. "Where there's muck, there's brass", as they used to say. It is a matter of recycling the brass. That's true sustainable development