

## Commercial Property Environmental Risk in Property Transactions

Every property acquisition, leasehold or freehold, carries with it the possibility for some environmental liability to transfer to the buyer.

**Our job is to advise our clients of the potential issues; raise the relevant enquiries of sellers and other agencies and investigate matters as far as we are able to inform our clients. We are not qualified to advise on the implications of the content of the information we gather, but can help coordinate obtaining that advice.**

Sometimes it is appropriate to have a more detailed investigation of the site and to consider indemnities or insurance cover.

**If there is a possibility of future development or change of use it is highly advisable to have an environmental surveyor review the results of searches and enquiries to give an indication of what conditions might be attached to any planning permission required.**

There is no ‘environmental law’ as such, just a body of case law, statute, domestic and EU regulation that makes up a raft of considerations. These might be organised under the following headings:

### Statutory Nuisance

Statutory nuisance was initially introduced as a means of protecting public health and the relevant current law is set out in the Environmental Protection Act 1990 (“the EPA”).

Local authorities are responsible for enforcing the law relating to statutory nuisances and usually do so in response to a complaint from a member of the public,

Under section 79 of the EPA certain activities or matters will constitute a statutory nuisance if they are “prejudicial to health or a nuisance”.

These include:

- Smoke
- Fumes or gases
- Dust, steam, smells or “other effluvia”
- Noise

There are other categories listed in the legislation. However, statutory nuisance is usually used in relation to issues such as noise, smells and air pollution.

Local authorities enforce the law through the service of an abatement notice which requires the person responsible for the nuisance to stop it occurring or restrict its occurrence and carry out works necessary to comply with the abatement notice.

Failure to comply with an abatement notice, without reasonable excuse, is a criminal offence.

### Trade Effluent

Discharges to sewers of trade effluent are regulated by the statutory sewerage undertaker under the Water Industry Act 1991.

The 1991 Act makes it an offence to discharge any trade effluent from trade premises into sewers unless a trade effluent consent is obtained from the statutory sewerage undertaker.

Sewerage undertakers have a discretion as to whether to grant consent but usually do so subject to conditions which could relate to:

- The place of discharge
- Nature, temperature and composition of discharge
- The rate and timing of the discharges
- Payments for discharges

It is a criminal offence to discharge trade effluent into a sewer without consent or in breach of a condition in a consent.

### Water Pollution

The 1991 Act also contains a criminal offence relating to water pollution. Section 85(1) makes it an offence to: Cause or knowingly permit any poisonous, noxious or polluting matter or solid waste to enter controlled waters, such as rivers and streams.

It is also an offence to discharge trade or sewerage effluent to controlled waters without consent.

There are defences to these offences, which are enforced by the Environment Agency and in particular, the accused will not be guilty if they can show that the discharge was carried out in accordance with a discharge consent or other authorisation.

### IPPC: Integrated Pollution, Prevention and Control

Certain industrial processes, known as “prescribed processes” require the person carrying out the process to obtain a licence before carrying on the process.

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The system requires a permit to be obtained for emissions to air, water and land caused by the operation of the prescribed process.

The main offences that could be committed in relation to a permit relate to:

- Carrying on a process without an authorisation or in breach of a condition.
- Failing to comply with enforcement or prohibition notices served by the regulator. The law in this area is enforced either by the Environment Agency or the local authority depending on the process operated.

### Nuisance

The law of nuisance enables one private individual to sue another and obtain damages for harm caused by the other person's use of their land

For a nuisance to exist, someone must own or occupy land and use it in such a way that it causes damage to someone else's property. This could be the result of single incident which, for instance, causes pollution or a series of actions over a period of time which result in pollution.

A person who wants to sue someone else in nuisance must show that the land has been used in a non-natural or unreasonable way and that the harm that it would cause was reasonably foreseeable at the time the nuisance was created. So, if the damage was not foreseeable, there will be no liability in nuisance.

### Waste

The EPA sets out a number of offences with regard to waste. Under the EPA, it is an offence for a person to carry out certain activities in relation to waste without or in breach of a licence.

An example of this would be someone who runs a business that disposes of waste without a licence. The Waste Management Licensing regulations 1994 set out the considerations for the grant or refusal of a licence, powers of enforcement and the criminal penalties that can be imposed as a result of a breach.

### Clean Up

The relevant regulatory body will often have an overall power to carry out clean up works where the person who caused the problem does not do so and can then recover the costs from that person.

### Contaminated Land

The basic structure of the regime is:

- EPA 1990 Part IIA
- Contaminated Land (England) Regulations 2006
- DEFRA Circular 1/2006

The purpose of Part IIA of the EPA is to:

- Identify which land needs cleaning up
- Decide how to clean it up
- Determine who is going to do this (or pay for it to be done by the regulators)

Part IIA sets out the overall structure of the system to deal with contaminated land.

The Contaminated Land (England) Regulations deal with certain aspects of the contaminated land regime including the detailed arrangements for remediation notices including content, services and appeals. Equivalent regulations exist for Scotland and Wales.

The detail of the regime is set out in the statutory guidance issued in DEFRA Circular 1/2006. The Circular sets out the context for Part IIA and describes how the system works. It provides details guidance on risk assessment, how liability is allocated and apportioned and how contaminated sites are to be identified.

### The Definition of Contaminated Land

Contaminated land is defined in the EPA as: "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:

- Significant harm is being caused or there is a significant possibility of such harm being caused; or
- Pollution of controlled waters is being, or is likely to be caused."

Serious harm includes serious injury, birth defects and impairment of reproductive functions. Regarding nature conservation, it refers to harm resulting in irreversible or substantial adverse change to the function of ecosystems and in relation to the property the definition includes substantial damage to buildings.

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### The Pollutant Linkage; Source, Pathway and Receptor

A pollutant linkage is formed when there is a link between a pollutant and a receptor or target, such as humans or property, through a pathway, such as soil to ground water.

If one of these aspects is missing no pollutant linkage is formed and so the land cannot be categorized as contaminated land within the meaning of the regime.

The pollution linkage must also be “significant”. This means that an assessment needs to be made of the types of targets that could be harmed, the degree or nature of the harm and how likely it is that the harm will actually be caused.

### Identification of Contaminated Land

Local authorities have primary responsibility for the identification of contaminated land and must go through the following steps:

- Prepare strategy
- Inspection
- Determination
- Consultation
- Exclusion
- Apportionment
- Service
- Appeal
- Registers

Once land has been identified as contaminated, responsibility splits between the local authority and the Environment Agency with the Environment Agency taking responsibility for “special sites”.

Special sites are those where the risks associated with the sites are perceived to be higher – other sites remain under the control of the local authorities.

The enforcing authority should identify all persons who might be required to carry out clean up works. This list could include current owners and occupiers and those responsible for the cause of the contamination.

Having identified those persons who could be required to clean up the land, the enforcing authority must produce a scheme for the clean up of the land, taking into account the costs and benefits of carrying out the works.

After drawing up the scheme, the local authority will then consult the parties who could be affected by it. Frequently, at this stage, an agreement may be reached for the land to be cleared up on a voluntary basis.

As a general principle, responsibility for clean up will rest with the original polluter. In cases where the original polluter cannot be found, responsibility is then shifted to the owners or occupiers of the land.

Once the enforcing agency has identified the persons who should pay for clean up, it should then apply “exclusion tests” which are set out in the statutory guidance. The broad purpose of these tests is to exclude from liability those who are less blameworthy.

Once the exclusion tests have been applied the costs of carrying out the clean up are split between the remaining persons.

### The Law Society’s Contamination Land Warning Card

The Law Society’s Warning Card on Contaminated Land states: “The advice contained on this Card is not intended to be a professional requirement for solicitors. Solicitors should be aware of the requirements of Part IIA of the Environmental Protection Act 1990 but they themselves cannot provide their clients with conclusive answers. They must exercise their professional judgment to determine the applicability of this advice to each matter in which they are involved and, where necessary, they should suggest to the client obtaining specialist advice. In the view of the Law Society they advice contained in this Card conforms to current best practice.

Solicitors should be aware that environmental liabilities may arise and consider what further enquiries and specialist assistance the client should be advised to obtain.”

The following 6 steps are recommended:

- Advise the client
- Enquire of the seller
- Enquire of statutory and regulatory bodies
- Obtain independent information (Phase I desk-study), and interpret it with client, referring to other specialists as required.
- Undertake site investigation (Phase II/III)
- Make contractual (or other) provisions (eg. Insurance)

**In every business or property transaction we will consider the Environmental issues and carry out the necessary due diligence.**