Spotlight falls on contaminated land liabilities

May 10, 2016

Summary

The Environment Agency reports periodically on progress made by local authorities under the Part 2A contaminated land regime in identifying and securing the remediation of contaminated land. The latest such report, issued by the Environment Agency in April 2016, makes for interesting reading.

Part 2A of the Environmental Protection Act 1990, together with its supporting statutory Guidance, sets out a regime for the remediation of historically contaminated land.

The regime, which came into operation in 2000, is administered primarily by local authorities, with the Environment Agency taking over the administration role in relation to a limited group of “special sites”.

In essence, the regime requires that local authorities inspect their areas for contaminated land in accordance with an inspection strategy. If they find land that satisfies the legal definition of “contaminated land”, they have to take the necessary steps to have it remediated. They also have to decide who is to pay. This is usually the polluter if it can be found. Failing that, it is the current owner or, in some circumstances, the local authority or Environment Agency.

Overall levels of enforcement

From the data collected for the purposes of the Environment Agency’s report (which covers...
the period 2000-2013), it is confirmed that:

- Around 11,000 sites have been the subject of detailed inspections since 2000, and at least 10,000 more sites merit a detailed inspection in the future.
- 511 contaminated land determinations (involving 1087 individual properties) have been made in England since 2000. In the main, the determinations were made due to risks to human health from metals/metalloids and hydrocarbons.

The data collected is far from comprehensive, however. Only just over half of local authorities responded to the Environment Agency’s request for data, and not all of those gave full responses. The headline figures above are unlikely to represent the true position across England. Actual levels of regulatory activity are likely to be very much higher than the headline figures indicate.

**How was liability enforced?**

Only in about one third of instances was remediation secured by force via the issue of a remediation notice. Most of the time, remediation was secured by the party responsible volunteering to take remediation action.

**Who paid?**

At the great majority of the sites, although the local authorities and Environment Agency set out to pursue polluters in the main followed by current owners, remediation fell to either the Local Authority or the Environment Agency. This is most likely to be due to a combination of (i) not being able to find the polluter, and (ii) high numbers of cases of “hardship”.

**Part 2A in the future**

Local authorities still have many thousands of sites to inspect, and a reasonable percentage of these will need to be remediated by someone. The threat of liability under Part 2A remains for current property owners and former polluters.

Central funding, which used to be available to finance local authorities’ and the Environment Agency’s inspection and remediation activities, has been severely curtailed since 2013. Whilst lack of funds might slow the remaining inspection process, it might also mean that local authorities and the Environment Agency will start to look harder for polluters than they have in the past and take a more robust approach when “hardship” is claimed.
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