Part 2a: a review of the research thus far

The IES is continuing to investigate attitudes to Part 2a of the Environmental Protection Act and how local authorities use this legislation. This article summarises the opinions that have been voiced thus far.

When the IES initially undertook the survey of local authorities to establish the number and location of Part 2a 'contaminated' sites we did not expect to unearth the level of dissatisfaction that seems to prevail among those who use the legislation.

The Part 2a landscape

128 out of 384 (33%) local authorities have determined sites under Part 2a of the EPA. Within those authorities, 70% of sites have now been remediated. The distribution of these sites across Britain does not appear to reflect historic land use and therefore presumed sites of contamination.

The Local Authority view

We have assembled the following list summaris the reasons that authorities across England, Scotland and Wales have given as to why they are not able, or in some cases willing, to apply Part2a:

Part 2a outcomes: Some local authorities prefer not to act under Part 2a as it is not as "strong" as acting under the planning regulations - in order to consider a site remediated all you have to do is break the pollutant linkage. For example - if it were determined that a children's playground were deemed 'contaminated' under Part 2a, for the site to be considered remediated it would be enough for the local authority to change the land use and say that it could no longer be used as a playground. Thus the pollutant linkage would be broken under Part 2a but the pollution would remain. If the same site were remediated under the planning regulations, the source of the contaminant would have to be identified and removed.

Public registers: Under Part 2a local authorities are currently required to ensure sites that have been determined under Part 2a are included on a Public Register of contaminated land. Some local authorities have indicated that they do not want to list sites on their register for fear of negative comparisons with other authorities. Furthermore, sites remain on the register even once they have been remediated and some local authorities have expressed concern that these sites could be misinterpreted as remaining contaminated.

'Special Site' treatment: Some local authorities expressed concern that, were a site to be determined under Part 2a and subsequently identified as a 'Special Site' the responsibility for the remediation of that site is transferred to the Environment Agency. It was suggested that the EA would not act as rapidly as the local authorities would like. Therefore some local authorities are reluctant to investigate under Part 2a for fear that they would be unable to carry out the remediation efforts and thus the sites would remain on the public register for longer than the authority would like.

Cross-jurisdictional contamination: One local authority expressed concern about the lack of provisions under Part 2a for sites that were contaminated by a polluting agent outside of the authority's jurisdictional boundaries. There appears to be little guidance as to where the remediating responsibility lies in incidents such as this.

Cost: Some local authorities are complying with their statutory Part 2A duty in light of reduced funding for investigations and a vastly reduced pot of money at Defra for detailed investigations. Supplementary credit approval may be one way forward if authorities cannot meet their obligations from their own resources. However this is impractical in the long term as authorities will have to repay the money from somewhere. One authority gave an example of investigations of two sites that cost £26k and £76k respectively. The authority is now currently having to review their strategy to ensure that they remain compliant with their duty as well as ensuring that limited resources are targeted appropriately and on sound and robust evidence.

Views of practioners...

Christopher Taylor: Enforcement Officer, Brent Council

"According to the Part 2A legislation, the duties that fall to Local Authorities are:

(1) Every local authority shall cause its area to be inspected from time to time for the purpose of —

(a) identifying contaminated land; and

(b) enabling the authority to decide whether any such land is land which is required to be designated as a special site.

- In my opinion, this is the reason why determinations are inconsistent around the country. There are no guidelines as to what "from time to time" is. Does that mean have a look once every 10 years?
- As a result of there being no National Indicator, and no statutory timeframes for inspection, Local Authorities put their resources into other services where those guidelines exist. Some authorities have not determined sites because they have not proactively inspected land, and rely on it being dealt with through the planning regime. For example, if there is no money in the budget to investigate land, nothing can be determined.
- The Defra Capital Grant conditions require evidence in the form of initial investigation results to fund detailed investigations, but some local authorities can't even afford this. A lot also depends on the political agenda of the council and how high a priority contaminated land remediation is.
- There is also the consideration that many historic industrial areas have not been investigated because they are still

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industrial, or do not have a "sensitive end use" that bumps them up the prioritisation list. This is the case for Brent. where areas that were industrial 100 years ago, are still industrial estates today, and we focus on investigating the residential/allotment areas first.

In summary I feel that looking at the legislation pertaining to the determination process will not demonstrate why determinations are not "uniform" around the country. The problem in fact lies earlier on in the process."

John Barber: Technical Specialist in Land Contamination, Environment Agency

"Part 2A determination history is quite a complex issue; a simple pattern might be expected with more contaminated land determinations in urban/industrial areas than rural ones.

"The engagement of authorities with Part 2A is variable. Some have engaged more than others and have the staff and financial resources to do so. Some authorities have rejected it altogether."

However, using local authority boundaries might not reflect this pattern. Some authorities are entirely rural, some mostly urban/industrial, but many have a highly variable mix of both.
"By now, most but not all, authorities have inspected their patch, prioritised and many have started investigations of their highest priority sites.
The engagement of authorities with Part 2A is also variable, some have engaged with it more than others and the have staff and financial resources to do so - some authorities have rejected Part 2A altogether.

A largely rural local authority might determine their top site, but this site might be low down the priority list in a more urban/industrial local authority. The current method of funding allocation by the EA ought to smooth this anomaly out, but I don't think that was necessarily the case early on. The P2A determination process has evolved significantly since 2000, so the dates of determination would be worth consideration."

A anonymous consultant's view

"There are quite a few aspects of Part 2a that are important in context:

1. Local authorities cannot be reimbursed for their activities when they are doing the determination work, therefore the cost must be borne up front, which is significant.
2. The reason Part 2a was introduced was because the existing regulatory system for contaminated land did not specify liability when it came to remediation. This became a deterrent for land being bought and sold in the UK as interested parties were unsure of where responsibility lay. The commercial context strongly influenced the drafting of this legislation in order to facilitate commercial transactions.
3. The language that the regime is written in, both in the primary legislation and the secondary statutory guidance utilises the language of risk or significant harm rather than hazard. This means that even if contamination has been identified, if it does not pose a risk of significant harm, Part 2a does not require remediation. This lends the legislation a veneer of environmental concern but the primary focus was never about environmental issues.
4. Part 2a was intended to be used as a last resort to galvanise polluters into action, so local authorities may 'use' it by threatening determination which is sufficient to cause polluters to act, rather than using it in an official capacity to register a determination.

These reasons, amongst others, are in my experience why Part 2a appears to be applied non-uniformly across local authorities."

In summary

The opinions that have been voiced so far indicate that, as a legislative tool, Part 2a is not wholly fit for purpose and authorities prefer to use other legislative avenues to remediate land within their jurisdictions.

However, the issue is complex and the situation for each local authority is unique, owing to ambiguity both in the legislation and recently updated statutory guidance and also in individual authority policies. There is also the suggestion that mapping Part 2A would not necessarily follow historical industrial land use as often that land is still industrial and does not have 'sensitive end-use' and therefore is not covered under part 2a.

The IES will continue to explore the confusion around the application of Part 2a and welcomes any comments or questions about the research.

Please send any comments to emma@ies-uk.org.uk.

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