Chapter One

THE REGULATION OF CONTAMINATED LAND IN THE UK IS PART IIA DELIVERING? -A REGULATOR'S PERSPECTIVE[1]

A. Introduction

The process of turning a government's aspiration to do something about contaminated land, into a fully functioning statutory regime is proving to be a convoluted one. The evolution of the idea and its transformation into statue was a tumultuous and slow process. It is too early to reach any firm conclusions about the regime's success, but after four years the foundations which have been laid can be examined, to see if and what it is delivering, and make some preliminary judgements about the pace at which it is progressing. Only time will tell whether the regime has fully fulfilled its originators' expectations, about its ability to tackle the legacy of contaminated land in the United Kingdom.

In the absence of a time machine, which sadly is not standard issue for environmental regulators in 2004 – (such a device would certainly remove the angst and often considerable leg work involved in determining who caused or knowingly permitted the presence of contaminating substances over the years) – I will be settling for a whistle stop tour round the United Kingdom. Stopping briefly in each country to confirm what legislation is in place, when it was enacted, and how it differs from the rest of the United Kingdom. Such statistics as I could glean will be referred to, as well as any other Part IIA milestones, in an attempt to try to gauge what impact Part IIA has had over the last four years.

History will eventually reveal whether the regulator's task of applying the Part IIA contaminated land regime is less daunting than the original drafting and passage of the legislation and Statutory Guidance through Parliament; or instead, the earlier legislative battles were just the "lull before the storm!" Whilst waiting for history to unfold, relax, find a comfortable seat, read on, and see what light one employee of the Environment Agency (England and Wales) can shed on this. I should point out at

this stage, that the views expressed in this paper are my own, and are not intended to be an expression of the Agency's own position on these matters). Also keep one eye on the weather, just in case there is a storm brewing!

B. Part IIA in the United Kingdom

UK Part IIA Regulators and Venues for Appeals against Remediation Notices

Country	**Ordinary Contaminated land**		**Special Sites**	
	Enforcing Authority	Remediation Notice Appeal Venue	Enforcing Authority	Remediation Notice Appeal Venue
England	Local authority*	Magistrates court	Environment Agency	Secretary of State for the Environment (DEFRA)
Wales	Local authority*	Magistrates court	Asiantaeth yr Amgylchedd****	National Assembly for Wales
Scotland	Local authority**	Sheriff	Scottish Environmental Protection Agency	Scottish Minister (Scottish Executive)
Northern Ireland	District Council	Court of summary jurisdiction	Department of the Environment****	Planning Appeals Commission

* any unitary authority; any district council, so far as it is not a unitary authority (and in England the Common Council of the City of London and, as respects the Temples, the Sub-Treasurer of the Inner Temple and the Under-Treasurer of the Middle Temple respectively).

** a council for an area constituted under section 2 of the Local Government etc (Scotland) Act 1994.

[1] Mary Thackray, Environment Agency

*** Environment Agency Wales

*** *Waste and Contaminated Land Inspectorate (WCLI) of the Environment and Heritage Service (EHS) an Executive Agency within the Department of the Environment for Northern Ireland.

1. England

1.1. Key Legislation Guidance and Implementation Dates

Part IIA was fully brought into force in England on 1st April 2000 by the Environment Act (Commencement No16 and Savings Provisions) (England) Order 2000, SI2000/1340. (I have never asked if there was a particular reason why that date was chosen, and only the fullness of time will reveal whether there was any hidden message!). The Contaminated Land (England) Regulations 2000, SI 2000/227,[2] providing more of the detail about Special Sites, appeals and public registers, were also brought into force on the same date. The Statutory Guidance for England is contained in Annex 3 to DETR Circular 02/2000[3] – Environmental Protection Act 1990: Part IIA Contaminated Land. The English Circular, like the Scottish one, contains not only the Statutory Guidance in Annex 3, but also 5 further annexes (i.e. 1- A statement of government policy; 2- A description of the New Regime; 3- The Statutory Guidance; 4- A guide to the regulations; 5- A guide to the Commencement Order; and 6- A glossary of terms). By comparison the Welsh Guidance limits itself to just the five chapters of Statutory Guidance, without the addition of any further policy or guidance).

1.2. English Contaminated Land Regulation under Part IIA as at 6th June 2004: Key Statistics

Local Authority Inspection Strategies Published	98% (5 outstanding)
Number of Sites Identified as Contaminated	67
Number of Special Sites	19

[2] http://www.hmso.gov.uk/si/si2000/20000227.htm
[3] *op. cit.*

Number of Remediation Statements	22 (9 are on Special Sites)
Number of Remediation Notices	3
Number of Remediation Declarations	0
Number of Inspections of Potential Special Sites	94

1.2.1. Local Authority Inspection Strategies.

In England, 98% of local authorities have published their inspection strategies, some of whom are working on revised and updated versions. The outstanding 5 authorities have all produced consultation strategies, but have not yet turned these into the final published versions. The strategies vary, in the level of detail they contain, but most have followed a broadly common approach, including:-

- Presenting strategic objectives
- Preparing a strategic overview
- Identifying priority areas for inspection
- Evaluating areas
- Identifying key activities and dates for progress
- Dealing with urgent sites, local authority owned sites and others outside the general prioritisation programme; and
- Setting a date or triggers for review of the strategy.[4]

Local Authority Inspection Strategies Published	98% (5 outstanding) at 6th June 2004 94% by 31st March 2002

Most local authorities began their strategic overviews in 2001. It was anticipated that these would be completed over a range of dates, spreading from 2002 – 2006. The majority of local authorities are expected to use the information gathered during this review to identify priority areas for inspection, enabling them to carry out detailed inspections of the highest-risk areas first, to identify priority sites where a significant

[4] The Environment Agency published the state of contaminated land report (section 78U) for England in September 2002 – 'Dealing with Contaminated Land in England' www.environment-agency.gov.uk/subjects/landquality/113813/356737

risk is thought to exist.[5] The points made about English inspection strategies should be equally applicable to those published for Wales and Scotland so will not be repeated when considering progress with Part IIA in those countries.

1.2.2. Local Authority Identification of Contaminated land

	31 March 2002	6 June 2004
Number of Sites Identified as Contaminated	33	67
Number of Special Sites	11	19
Number of Inspections of Potential Special Sites	31	94

By 31st March 2002 the Environment Agency had been notified by local authorities about 33 sites which had been formally identified as Part IIA contaminated land, 11 of which had also been designated as Special Sites. By 6th June 2004 these figures had virtually doubled, to 64 sites, 19 of which are also Special Sites. Very few sites were identified in the first couple of years, as the local authorities were still producing their inspection strategies, and carrying out strategic inspections. The majority of the earliest sites to be identified were already known to the regulators, but there were still some "surprises".

It has not been possible to ascertain how many sites local authorities are in the middle of inspecting. It will be assumed, for the purposes of this paper, that the Agency's progress can be treated as indicative of a regulator-wide increase in the number of sites actively being investigated. We are currently inspecting a further 94 potential Special Sites, which is twice as many as we were working on two years ago. Site inspections can be complex and time-consuming. It is possible that the number of sites formally identified to date, is just the tip of the site identification iceberg.

Each stage of the Part IIA process takes time. Before deciding whether the numbers mentioned so far equate to "delivery" of Part IIA, it is worth recalling what is involved in inspection. Martha Grekos (also from the Environment Agency) will shortly be taking you through a case study of a hypothetical site, so I will not dwell on the actual

[5] *Ibid.*

process here. Save to spend a moment looking at what the identification of contaminated land requires. There will always be exceptional sites, which progress at an atypical pace. For the majority, assuming the local authorities are taking a strategic approach and inspecting and identifying the higher risk sites first, then these are likely to be more complex and consequently could easily take longer to identify.

Chapter B/2 of the Statutory Guidance contains detailed identification requirements. In addition, further non-statutory guidance has been provided for England and Scotland in Annex 2 the "Description of the new regime". As a bare minimum, there must be a significant pollution linkage (SPL). This is defined in paragraph 4.12 of Annex 2 and A/1.20. A *"significant pollutant linkage" means a pollutant linkage which forms the basis for a determination that a piece of land is contaminated land. A "significant pollutant" is a pollutant in a "significant pollutant linkage"*. This is built on by Annex 2, where paragraph 4.12 refers to the need to identify *"**any** significant pollutant linkage, thus determined that the land is contaminated land…"* and B.19, which requires evidence of the presence of **a** pollutant. This infers that it might be possible to identify land after just one SPL has been identified.

However, the Statutory Guidance then makes it explicitly clear that the task of searching for and finding SPLs is solely the responsibility of the regulators. In C/3.66 it reminds us that *"The enforcing authority should not require any assessment action to be carried out unless that action is needed to achieve one or more of the purposes set out in paragraph C.65 above, and it represents a reasonable means of doing so. In particular, no assessment action should be required for the purposes of determining whether or not the land in question is contaminated land."* However the guidance in Annex 2 later concedes that it may in all good faith not have been possible to identify every last SPL up front as part of the original identification. Paragraph 14.1 continues *"It may become apparent, whilst remediation actions are being carried out, that the overall remediation scheme for the relevant land or waters is no longer appropriate .for example: (a) further significant pollutant linkages may be identified, requiring further remediation actions to be carried out"*. Although late discovery is clearly lawful, it does not assist the remediation process; and the preferred course of action would be to take the time at the beginning, to ensure that all SPLs have been identified whenever possible. This does not make for fast and impressive statistics, but any delay or low numbers should not be assumed to equate to inactivity, they could just

reflect the careful following of all the regime's requirements.

Looking at the sites identified to date, there appears to be a fairly broad geographical spread. Some local authorities have more than one site (discounting adjoining sites, where for administrative ease, the land has been identified as more than one unit, following the Statutory Guidance in B/2.34). There are a few multiple sites, where up to five adjoining sites have been identified as contaminated land. It is anticipated that identification figures are likely to slow down in the near future, as more sites enter the remediation phase, which is likely to be more resource intensive.

1.2.3. Remediation of Part IIA Sites

	31 March 2002	6 June 2004
Number of Remediation Statements	7	22
Number of Remediation Notices	0	3
Number of Remediation Declarations	0	0

The vast majority of Part IIA sites in England are being remediated on a voluntary basis, which requires commitment from all the parties involved to successfully resolve the issues. It is too early to draw any real conclusions, but what follows is an attempt to provide an overview of the type of work that is being undertaken. Remediation is being carried out by the full range of parties, (Class A, Class B, and also the regulators (because there are orphan sites, the hardship provisions apply, or they are the appropriate persons for the site)). The remediation is a mixture of assessment actions, remedial treatment actions and monitoring actions. At the moment the assessment actions are the most prevalent, but there are also a substantial number of monitoring actions. It is anticipated that the majority of the assessment actions are likely to take less than 12 months to complete, the remedial actions have been estimated as taking on average a couple of years a piece – although the monitoring actions to date have been estimated as taking approximately 20 to 30 years. A variety of methods of remediating have been reported which include:-

- Excavation and disposal,
- In situ bio remediation,

- Ex situ chemical treatment,
- Geotechnical investigations and surface water analysis,
- Passive gas venting; and
- In situ physical treatment.

An overall remediation strategy for a site helps ensure all concerned have a realistic grasp of the different stages that need to be passed through. Also phasing the remediation has proved to be a helpful way of clarifying what needs to be done at the more complex sites. Regulators and appropriate persons have both been working hard to achieve this level of voluntary remediation. It has enabled those concerned to concentrate on resolving the contamination problems, without getting caught up in exhaustive legal arguments. It is hoped that as the regime progresses, the voluntary route will still be chosen for the majority of sites.

Three Remediation Notices have been served so far, all by local authorities. One was complied with, the local authority ended up carrying out the work detailed on the second notice, and the third was appealed. (The case *of Circular Facilities (London) Limited v Sevenoaks District Council* was heard before District Judge Kelly on 14-15 June 2004, by which time the local authority had undertaken the work itself. The Remediation Notice was upheld on appeal by the court, which is an encouraging result for the regulators of the regime, as Remediation Notices have frequently been referred to as invitations to appeal!

No Remediaton Declarations had been published when this paper was written. Declarations (section 78H(6)) are only used, to record any particular thing by way of remediation, which the regulator is precluded from undertaking, because of its cost or reasonableness (as defined in section 78E(4) or (5)). As local authorities are generally concentrating on identifying sites where there is a significant risk, it is not anticipated that there will be a lot of scope for Remediation Declarations in the early years of the regime. (However after 14 years with the Agency and its predecessor, I have learnt that very few things are impossible!).

1.3. State of Contaminated Land report for England; "Dealing with Contaminated Land in England"

The Environment Agency published the state of contaminated land report (section 78U) for England in September 2002 - "Dealing with Contaminated Land in England".[6] The report provides an overview of progress made in identifying and remediating contaminated land, since Part IIA was introduced. As well as reporting on the statutory regime, it assesses the potential information sources about land affected by contamination. It concludes that over the next five years more sites will be identified and remediated, but remediation can be a time-consuming process. The Agency is now working with DEFRA and the National Assembly for Wales to develop a set of national indicators to measure progress in dealing with land affected by contamination. It is hoped that once they are in place, it will be easier to gauge what effect Part IIA is having. The Local Authority inspection strategies and results of the sites identified to March 2002 are also considered by the report. Current proposals are that the next English report is likely to be produced in 2007.

In England there is a steady progression of sites into the regime. The majority are being remediated on a voluntary basis, and there is good evidence to indicate that the regulators are involved with the inspection of a significant number of additional sites. Now that the majority of local authorities have published their inspection strategies, they will have more time to identify contaminated land, and push existing sites through the process. All this leads to the tentative conclusion, that Part IIA in England is delivering, albeit slowly; but there are good reasons to help explain why progress has not been any faster.

2. Wales

In Wales Part IIA was brought into force on 15th September 2001 by the Environment Act 1995 (Commencement No17 and Savings and Provisions) (Wales) Order 2001, SI 2001/3211. The Contaminated Land (Wales) Regulations 2001, SI 2001/2197[7] came

[6] www.environment-agency.gov.uk/subjects/landquality/113813/356737
[7] www.hmso.gove.uk/legislaiont/wales/wsi2001/20012197e.htm?lang=e

into force on 1st July 2001), and the Statutory Guidance for Wales was issued by the National Assembly for Wales in November 2001.[8]

2.1. Statutory Guidance and Regulations

The Statutory Guidance for England and Wales are virtually identical. The few minor differences are referred to below.

2.1.1 Lack of Additional Guidance – There are just the five chapters of Statutory Guidance, with none of the additional explanatory and policy annexes that the English and Scottish documents contain.

2.1.2. Numbering and Language - The five chapters for the English Statutory Guidance are labelled A – E, in Wales they are numbered 1-5. As the order of the paragraphs within the chapters is identical, it is a simple matter to transpose an English reference into a Welsh one and vice versa. The Welsh Guidance has been issued in both the Welsh and English languages.

2.1.3. Statutory Guidance – The National Assembly for Wales carried out two formal consultations in September 1996 and February 2000 before the final version of their Statutory Guidance was issued. The earliest draft was a bold attempt to streamline and condense the additional annexes. There was also a fair bit of cutting, pasting and tweaking within the body of the Statutory Guidance itself. Gradually the draft was revised; the additional guidance dropped, and the main text of the Statutory Guidance grew ever closer to the English version. In the end, I have only been able to trace one outstanding minuscule difference! This is in Chapter 4 paragraph 4.44 – which in the Welsh version has the additional words "*or were at the relevant date*" inserted. As this reference to the relevant date is remade in the English and Welsh Guidance in paragraph 4/D.46 there is no material difference, save that the Welsh version enables its reader to make sense of paragraph 44 a moment or two quicker!

[8] http://www.wales.gov.uk/subienvironment/content/guidance/contamlanddoc-e.doc

2.1.4. The regulations are all but identical. Appeals for Special Sites are to the National Assembly for Wales, which also issues the Statutory Guidance, and the regimes come into force on different dates in the different countries. The categories of Special Sites (regulation 2) do not contain the reference to the Section 30 of the Armed Forces Act 1996 relating to Greenwich hospital – (English Regulation 2(i)) as it is only applicable in England. (The extra category of Special Sites for England means that there is an extra foot note in the English Regulations, so care needs to be taken if these are ever referred to, to ensure the correct numbers are used for each country). Otherwise the regulations are identical.

2.2. Welsh Contaminated Land Regulation under Part IIA as at 6th June 2004

Local Authority Inspection Strategies Published	100%
Number of Sites Identified as Contaminated	6
Number of Special Sites	1
Number of Remediation Statements	1
Number of Remediation Notices	0
Number of Remediation Declarations	0
Number of Inspections of Potential Special Sites	6

All Welsh Local Authority inspection strategies have been published. In Wales the regime was brought into force just over 17 months later than it was in England (1st April 2000 - 15th September 2001). At first glance the figures for Wales are significantly lower than in England. There are however a number of reasons, which could account for this.

- Firstly there are significantly less local authorities in Wales. (Approximately one order of magnitude – which if applied to the above numbers makes the "Welsh results" more impressive than the English ones, especially when the time delay is also taken into account!).

- There are considerable differences in geographical composition and population densities in England and Wales. Wales has fewer large cities, and historically has not had the same level of industrialisation that occurred in England, so correspondingly its level of inherited contamination should be lower.

- The effect of a 17 month time lag between the two countries should not be underestimated. (When considering remediation in England, it was noted above, how there had been a significant increase in the commencement of inspections over the last two years, which in turn has a knock on effect on the number of sites being identified as contaminated).

2.3. Wales's State of Contaminated Land Report

So far no "State of contaminated land report" has been published for Wales. The Environment Agency-Wales[9] is in discussion with the National Assembly for Wales, about the date such a report should be published, and what the report will contain. So far no provisional publication date has been agreed.

The government's intention was to implement a regime, which identifies contaminated land. Implementation is taking place. The process of identification is underway. Without a clearer idea of how much contaminated land there is in each country, it is difficult to make comparisons on progress. The secondary expectation was that there would be an increase in voluntary remediation. I have not been able to obtain any meaningful figures for measuring this in either country. Anecdotally, information from Environment Agency employees across England and Wales supports the contention that there has been an increase. Some sites are being remediated, so that they will not fall within Part IIA; others were probably due for redevelopment, irrespective of the implementation of this regime. Whatever the reason, there is a groundswell of opinion that there has been an increase in the redevelopment of such sites, and so it can be argued that Part IIA is delivering.

[9] www.environment-agency.wales.gov.uk

3. Scotland

In Scotland Part IIA was brought into force on the 14th July 2000, by the Environment Act 1995 (Commencement No 17 and Savings Provisions) (Scotland) Order 2000, SI 2000/180. Section 78S was brought into force on the same date by the Environment Act 1995 (Commencement No 18) (Scotland) Order 2000, SI 2000/1896. The Scottish Regulations are to be found in The Contaminated Land (Scotland) Regulations 2000, SI 2000/178.[10] The Statutory Guidance was produced by the Scottish Executive and is to be found in Scottish Executive Circular 1/2000 Environmental Protection Act 1990: "Contaminated Land".[11]

Responsibility for Site Inspection

There are a few key differences between Part IIA in Scotland, England and Wales. In Scotland the local authorities are totally responsible for site inspections. The Scottish Environmental Protection Agency (SEPA) only has an **informal** role to play during the inspection of potential Special Sites (B.26). If the local authority considers the site, if found to be contaminated, would meet the special site requirements, it should seek advice from SEPA (B.27). If there is a reasonable possibility that a particular pollutant linkage, if found on the site, would lead to it being a Special Site, then again SEPA's advice should be sought (B.29). Paragraph B.30 comes closest to the English and Welsh system. *"In some limited cases SEPA may agree after discussion with the local authority, that it is appropriate for SEPA to carry out the inspection on behalf of the local authority. In such cases the local authority would remain responsible for any costs incurred by SEPA.*"

This is very different from the situation south of the boarder, where the Environment Agency has a **formal** role at inspection (B/2.26). Here the local authority considers whether potentially contaminated land would meet any descriptions of Special Sites. (B/2.27). *"If…. this would be the case, the authority should always seek to make arrangements with the Environment Agency for that Agency to carry out the*

[10] www.hmso.gov.uk/legislation/scotland/ssi2000/200000178.htm
[11] www.Scotland.gov.uk/library3/environment/clc-00

inspection of the land on behalf of the local authority." (B/2.28). There is no mention of responsibility for costs, but it is commonly understood that the Environment Agency will not recover such inspection costs from the local authorities. Some additional funding is provided by DEFRA to the Agency to cover the costs of contractors etc. However the routine costs of Agency officers involved in inspection, are borne by the Agency.

3.1. The Scottish Statutory Guidance

The Scottish Statutory Guidance in principle quite closely resembles the English Circular. However there has been a fair amount of cutting, pasting (sometimes over several pages) and re-phrasing, such that any reference to an English/Welsh paragraph will need careful checking to ascertain which paragraph(s) it relates to in the Scottish text.

3.2. The Scottish Regulations

It will be important to understand the nuances in the different ways Part IIA is to be applied North and South of the Boarder, before entering in to any judgements on its overall ability to deliver! So there follows a note of the key differences between the English and Scottish Regulations.

3.2.1. Implementation - Scotland brought the regime into force on 14 July 2000.

3.2.2. Section 78B(3) Notices, identifying contaminated land – One of the more significant difference is that the Scottish regulations (Schedule 4 paragraph 1) require the section 78B(3) notices, identifying land as contaminated land, to be recorded on the register. Such notices are not recorded on the English and Welsh Registers. Although section 78B(3) notices would normally be accessible under Environmental Information Regulations 1992, SI 1992/3240, their exclusion from the statutory register complicates the task of gaining an overall picture of progress with the regime. (However since these registers are individually held by each local authority, and they only relate to their own district (section 78R) - it will be a difficult task to collate and maintain an

accurate idea of the national picture!) The Environment Agency's and SEPA's registers are only required to contain entries for special sites.

3.2.3. Remediation Notice - The Scottish regulations refer in regulation 4 and Schedule 2 to a draft Remediation Notice. Scottish Remediation Notices are required to be "*in the form set out in Schedule 2 to [the] regulations or as near as may be to that form and shall contain the information prescribed therein*." The English and Welsh regulations at regulation 4 list the matters to be contained in the regulations, in addition to the matters required by section 78E(1) and (3). Paragraph 20 of Annex 4 to the English Circular notes that the DETR and the Environment Agency would draw up a model form of Remediation Notice which all enforcing authorities can use. One has been produced and will shortly be available on the Agency's web site.[12] It should be noted that as with all Agency publications it will be subject to review and it is anticipated that it may be revised, as we gain greater experience of the regime in action.

3.2.4. Appeals Against Remediation Notices. For ordinary sites, appeals against a Scottish Local Authority's Remediation Notice will be to the Sheriff (magistrates' court in England and Wales). Unlike the English and Welsh regulations (regulation 8), the Scottish regulations do not prescribe additional requirements for appeals to the Sheriff against Remediation Notices. Conversely both countries have included further requirements in their regulations concerning appeals against Special Site Remediation Notices (regulation 8 in Scotland, and regulation 9 in England and Wales).

3.2.5. Action by Scottish Ministers on Receipt of an Appeal - The Scottish regulations include a unique regulation, which sets out what action the Scottish Ministers will take upon receipt of a notice of appeal (regulation 9). - Within 14 days they will notify all those involved that representations may be made to the Scottish Ministers in writing (or electronic format). They will also send copies of any representations to the other parties, who will all also be

[12] www.environmnet-agency.gov

informed about the hearing of the appeal, if it is to be held wholly or partially in public.

3.2.6. Categories of Special Sites - Two types of special sites referred to in the English Regulations are not repeated in the Scottish ones. This is because regulations 2(h)(land designated under the Atomic Weapons Establishment Act 1991) and regulation 2(i) (land held for the benefit of Greenwich hospital) are not applicable to Scotland.

3.2.7. Special Sites-Water - Regulation 3 and Schedule 1 provide details of the watery special sites. For regulation 3(c) there is still the two fold requirements of substance and waters. For England and Wales the details of these are to be found in Schedule one. The Scottish Schedule 1 substances are the same. However as the regulations in Scotland are only concerned with two types of strata (Devonian Sandstones and Permo-Triasssic Sandstone), there is no second part to Schedule 1 (unlike Wales and England where 13 different rock formations are listed).

3.2.8. Charging Notice – As has already been mentioned the statutory provisions relating to charging notices do not apply in Scotland, so accordingly neither do the Scottish regulations refer to charging notices.

3.2.9. Modification of a Remediation Notice following an Appeal. Regulation 12 refers to the appellate authority's ability to *"modify a remediation notice…in any respect which would be less favourable to the appellant*.". The English and Welsh regulations continue *"…or any other person on whom the notice was served."* (It therefore appears that in Scotland the only appropriate person whose position could be worse after an appeal is the appellant. But in England and Wales, everyone upon whom the Remediation Notice was served runs this risk, if there is an appeal. It is far to early to try to guess what effect this difference might have!)

The Part IIA regime which applies in Scotland is slightly different to that in England and Wales, so those involved in remediation north and south of that border need to

remain awake to these differences. They will also need to be adept at equating the references in one set of Statutory Guidance to the corresponding paragraphs in the other. However at this stage these differences do not look like they should present insurmountable barriers to Part IIA delivery, or account for any fundamental differences in delivery in Scotland and England.

3.3. Scottish Contaminated Land Regulation under Part IIA as at 6th June 2004

Local Authority Inspection Strategies Published	100%
Number of Sites Identified as Contaminated	2
Number of Special Sites	0
Number of Remediation Statements	0
Number of Remediation Notices	0
Number of Remediation Declarations	0

All the Scottish Local Authority inspection strategies have been published. Some authorities are now working on, or have produced revised strategies. The Local Authorities are now prioritising potentially contaminated sites, as they undertaking the inspection process. At the beginning of June 2004 two sites had been formally identified as contaminated land.

Before jumping to any swift, but potentially erroneous conclusions based on a bare comparison of the statistics referred to, it is worth recalling that Scotland covers a significantly larger area than Wales, but does not have the same ratio of local authorities per hectare as there are in England. Furthermore, although the regime in Scotland is only running about three months behind the English one, similar reasons exist to the ones put forward as respects Welsh progress, to explain the lack of hard statistics to date. Also because ALL inspections are carried out by the local authorities it has not been possible to obtain a clear picture of the number of sites being inspected. However as all the inspection strategies have now been written, Scottish Local Authorities like their counter parts in England and Wales are free to concentrate on inspecting sites, and progressing them through the regime. The difficulty in collating information about the number of sites in progress makes it

virtually impossible to make any informed comment about how the regime is delivering in Scotland. However the foundations are there for the delivery of a regime to identify contaminated land.

3.4. Voluntary remediation of land affected by Contamination

It is probably possible to be more confident about the second limb of government aspiration, that voluntary remediation is being encouraged. Recent conversations with employees of SEPA and the Scottish Executive, reveal a strong impression that the number of contaminated land sites being dealt with through the planning system has increased over the last few years. (However it has not been possible to track down any official statistics which address this premise, so it has not been possible to verify whether this "gut feeling" is correct).

Land contaminated is a material planning consideration, and is addressed by planning authorities when determining planning applications. The planning authority may consult with SEPA, particularly when drafting planning conditions covering areas for which SEPA has regulatory responsibility. The Scottish Executive has issued advice to planning authorities on the development of contaminated land, in Planning Advice Note 33.[13] Again there is an absence of data, but as referred to before, the "gut feeling" of those involved with this work, is that more contaminated land sites appear to be being addressed via the Scottish planning system, than was the case prior to Part IIA being introduced. In addition contamination as a planning consideration now has a stronger profile, and as a consequence officers at Local Authorities are spending a lot more time dealing with applications for sites affected by contamination. This might go part way to explaining why so few sites have been formally identified in Scotland, if there has been a significant increase in those going through the planning process.

3.5. Scottish State of Contaminated Land Report

[13] Advice Note PAN 33 revised October 2000.
www.Scotland.gov.uk/about/Planning/paqn_33_contamlanddev.aspx

No state of contaminated land report has been produced by SEPA for Scotland. However SEPA's web site[14] contains detailed information on what they anticipate their report will cover, when it is produced.

"The aims of the [Scottish State of contaminated land] report are to

- *To compile information on the general nature, extent and distribution of land identified as contaminated under Part IIA*
- *To assess the scale of environmental impact of contaminated land and highlight where Part IIA is reducing this impact*
- *To summarise regulatory activity under Part IIA, in particular identification and remediation of contaminated land*
- *To assess the effectiveness of Part IIA in addressing contaminated land, in particular the impact of the reasonableness and hardship provisions on remediation.*

The report will focus on the three key stages of Part IIA; inspection strategies; the identification of contaminated land; and the remediation of contaminated land. The emphasis on each stage will obviously vary for each report issued. No date for publication of the first report has been established."

What is clear is that once there is a complete set of "The State of Contaminated Land Reports" for each country, the process of quantifying whether and what Part IIA has delivered will be considerably simplified!

4. Northern Ireland

4.1. Existing Legislation

At the moment there is no fully functioning dedicated regime for tackling contaminated land in Northern Ireland. The majority of work being undertaken on contaminated land is as a result of development, and so is regulated via the planning system. The Environment and Heritage Service (an Executive Agency within the

[14] www.sepa.org.uk/contaminated-land/partii

Department of Environment for Northern Ireland) carries out a wide range of work relating to land contamination. At one end this involves acting in an advisory capacity, in relation to planning consultations and also in direct response to queries raised by landowners, developers and solicitors. And at the other, it is working to produce a land quality database. This currently contains approximately 12,000 unverified sites. Each entry notes whether the land may/may not have low/medium/high risks of contamination. Land use maps dating back to 1830 have been the primary source for this work. It was commissioned in 1997, but has not yet been verified. It is anticipated that it will be linked into the inspection strategies, when a dedicated contaminated land regime is brought into force. This database will provide a useful tool for measuring progress.

In the absence of a contaminated land regime, other Statues could be used to deal with land contamination, such as the Public Health Acts, and the Health and Safety legislation (but this is limited to situations where there is a perceived or actual risk to health and safety). The watery aspects of contaminated land can, to a limited extent, be tackled by the Water (Northern Ireland) Order 1999 Number 662 (N.I.6).[15] This Order has been brought fully into force, and is applied by a different arm of the Environment and Heritage Service. Articles 16-19 contain provisions virtually identical to the English and Welsh Works Notices provisions in Sections 161, 161A, 161B, and 161D of the Water Resources Act 1991. There is no equivalent Article for Section 161C (which details the English and Welsh appeal procedure). However article 17(7) provides that *"A person on whom a works notice is served may, within a period of 21 days beginning with the day on which the notice is served, appeal against the notice to the Appeals Commission."* A generic section on appeals is also contained in the Order. There are a few other minor differences. The Northern Ireland definition of polluting matter, unlike the one used for England and Wales does not include a reference to "*solid waste matter"*. Controlled waters are defined differently. Article 16 notices relate to *"any waterway or water contained in underground strata*". These terms are further refined in Article 2. The result is a slight variation in the waters covered in Northern Ireland, compared to those covered in England and Wales as per the definition contained in the Water Resources Act

[15] www.northernireland-legislation.hmso.gov.uk/legislation/northernireland/nisr

1991, which defines controlled waters for Part IIA purposes, as amended by the Water Act 2003. Finally, and possibly the most fundamental difference, concerns the person upon whom the notice can be served. In England and Wales we have the familiar "*caused or knowingly permitted*", in Northern Ireland this is expressed slightly differently as those who "*caused or permitted, whether knowingly or otherwise*". It remains to be seen what impact this broader definition of knowingly permitting will have.

4.2. Embryonic Dedicated Regime -Part III of the Waste and Contaminated Land (Northern Ireland) Order 1997

Although no regime for tackling contaminated land is currently in force, an embryonic system, very similar to Part IIA, is to be found in Part III of the Waste and Contaminated Land (Northern Ireland) Order 1997 (1997 No, 2778 (N.I.19)).[16] Part III - dealing with contaminated land has not been brought into force, even though the remainder of the Order is in force.

Part III of the Waste and Contaminated Land (Northern Ireland) Order 1997 is very similar to Part IIA of the Environmental Protection Act 1990. The few small differences are referred to below. Interestingly, although there is a difference in the way knowingly permitting is dealt with in the Works Notice provisions ("*permitted, whether knowingly or otherwise*"), Class A persons for Northern Ireland will be those who "*caused or knowingly permitted*" as is the case through out the Untied Kingdom.

4.2.1. Definition of controlled waters – As has been noted whilst comparing Works Notice provisions, this is defined slightly differently in Northern Ireland. Instead of the English and Welsh reference to "*controlled waters*" and Part III of the Water Resources Act 1991, or section 30A of the Control of Pollution Act 1974 for Scotland; there is a reference to "*the pollution of waterways or underground strata*". The reader is referred again to Article 2(2) of the Water (Northern Ireland) Order 1999, for a fuller explanation of these terms. As yet there has been no movement to update this definition to "*significant*

[16] www.northernireland-legislation.hmso.gov.uk/legislation/northernireland/nisr

pollution" which change has taken place in Great Britain via the Water Act 2003, but which as mentioned earlier, has not yet been brought into force. It is anticipated that Northern Ireland will wait to see how this change progresses, before contemplating changes to their own legislation.

4.2.2. No statutory definition of harm - Unlike section 78A(4) of Part IIA, Article 49 does contain a definition of harm. It is possible that this will be relegated to the regulations or Statutory Guidance, but as these have yet to be drafted, it is fruitless to speculate further on the effect this might have.

4.2.3. Enforcing Body for Special Sites - The Department of the Environment (DoE), through the waste and contaminated land section of the Environment and Heritage Service will be the enforcing body for special sites. The DoE will also be responsible for producing the Statutory Guidance and drafting regulations etc.

4.2.4. Inspection Requirements - Article 50(1) states "*Every District council shall cause its district to be inspected….*" Unlike Part IIA, there is no explicit requirement to carry out this inspection "*from time to time*". It is possible that land in Northern Ireland may not be subject to the ongoing inspection requirement that is present in mainland U.K. Again this may be a matter that will be covered by the regulations and Statutory Guidance.

4.2.5. Statements of Reasons - There is an explicit requirement in Article 51(1)(ii) to send to the DoE a statement of reasons for the district council's decision, that any contaminated land should be designated as a Special Site. On the mainland, Part IIA merely requires the other parties to be told that the local authority decided that the land should be designated as a Special Site. There is no explicit requirement for it to share the reasons behind such a decision. A similar requirement to provide a statement of reasons is also imposed by Article 51(5) when a district council decides whether to agree to a DoE request to designate contaminated land as a Special Site.

4.2.6. Remediation Notice Appeals -Article 58 concerning appeals against Remediation Notices contain some differences. There is no explicit requirement for the regulations to make provision for what is to be in a notice, whom it is to be served on, or the abandonment of an appeal (as are to be found in section 78L(5)(e)). Neither is there a power enabling regulations to contain provisions comparable to section 290 of the Public Health Act 1936. (Perhaps this is because on the mainland, where this was an option, none of the countries have exercised it, so it might have been deemed to be otiose? (At this stage I should mention that I have not spoken to, or discussed these ideas with those responsible for drafting this Order. Therefore my comments should be treated as my own speculations, rather than informed opinion!)).

4.2.7. Charging Notice - In common with England and Wales it will be possible in Northern Ireland to charge contaminated land owned by the Class A appropriate person (Article 61(3)-(13)).

4.2.8. Drafting Preferences - The remainder of Part III of the Order has been drafted using virtually the same words. Only time will tell, whether the draftsmen's preference, for the occasional marginally different phrase, will have any noticeable effect.

4.3. Statutory Guidance and Regulations

Draft Statutory Guidance and regulations have yet to be produced. It is anticipated that this could be carried out as a two-stage process. Firstly establishing the resources needed to prepare the documentation, and secondly those needed to implement the regime in Northern Ireland. It could easily be at least two years before the regime is brought into force. Much of operational and policy detail for Part IIA implementation and regulation is contained in the Statutory Guidance for mainland U.K. It will be interesting to watch how the Statutory Guidance for Northern Ireland evolves.

5. Republic of Ireland

Although the Republic of Ireland is not part of the United Kingdom, I thought that my trip round the British Isles would not be complete without one final brief stop here. There is no formal regime to deal with contaminated land, nor are there any plans to create one. As Malcolm Doak et al have written *"The number of brownfield sites or facilities with contaminated land problems are significantly less in Ireland than those of most other European countries, due to Ireland's late arrival into the industrial age. Ireland's approach to contaminated land has evolved to encompass pollution prevention, the polluter pays principle, and the precautionary principle."*[17] They also produced a table estimating the likely extent of land contamination in Ireland, which has been duplicated below.

Estimates of the Number of industrial activities that may pose a risk to soil and groundwater in Ireland[a]

IRELAND	Industrial activities that may pose a risk to soil and groundwater	Estimated number of activities
Historical Sites	Disused Gasworks Sites[b]	50-80
	Closed non hazardous waste disposal sites Pre 1984 1984-1995 1995-1998	 58 124 21
	Closed mining sites[18]	128
	Fertiliser plants (manufacturing and blending)	4-6
	Closed Tanneries	10-12

[17] Doak, M. *et al* 'The Remediation of Contaminated Land in the Republic of Ireland'. Sardinia 2003, Ninth International Waste Management and Landfill Symposium.

a The Table is from 'The Remediation of Contaminated Land in the Republic of Ireland' by Doak, M *et al*. Sardinia, 2003 Ninth International Waste Management and landfill symposium

b In 1987 there were 114 gas companies in existence. In 1932 there were 76 gasworks in existence, 27 in Northern Ireland and 49 in the Republic.

c 38 of those sites have tailing ponds. Of the sites identified in this survey it was estimated that 11 of theses (generally large and recently closed) would be considered to have the greatest potential to pollute.

Current operational sites	Local authority landfills which are unlined or partially lined (Does not include private landfills) under EPA Waste licensing control. On-site landfill sites under IPC control[19]	74 10
	Mining sites in operation	4
	Chemical Industry	150-160
	Petroleum Import Terminals (IPIA)[20] Petroleum retail stations with underground storage tanks(USTs)[21] (an average of 3-5 USTs per station)	22 900-1200
	Tanneries	2
	Timber Treatment yards	150
	Dockyards	14-16
	Military Sites	1
	Railway Depots (freight and passenger)	80-100
	Scrap yards and dismantlers	180-200
	Airports with maintenance facilities	2
	Total number of industrial activities that may pose a risk to soil and groundwater	**1985-2371**

For historical sites this estimate was based upon the number of sites at which activities likely to give rise to soil or groundwater contamination took place, such as gasworks sites or mines. For existing activities the estimates were based on, *inter alia*, existing knowledge of land contamination in industrial and waste management activities licensed by the Irish Environmental Protection Agency and permitted by Local Authorities. Where such activities are properly managed, as is the case with many existing activities, the risks to soil and groundwater are greatly reduced.

5.1. Voluntary Remediation

[d] Integrated Pollution Control Licence, EPA

[e] Total refers to oil companies affiliated to Irish Petroleum Industries Association (IPIA). These figures do not include on-site large industrial storage facilities.

The majority of remediation is developer driven. Although there are no statistics readily available to indicate whether there has been an increase in the remediation of land affected by contamination in the Republic, officers of the Irish Environmental Protection Agency[22] have noticed an increase in remediation over the last 5-10 years. Also the way remediation is carried out has been changing. The recent, FIRSTFARADAY Research Report[23] mirrors what has been taking place in Ireland.

To date (June 2004), seven waste licences have been issued by the Irish EPA for brownfield remediation. There are four facilities in Dublin, two landfills in County Wicklow, and a gasworks in Waterford. Each facility[24] has a remediation strategy based on a quantified, site specific risk assessment.

5.2. Existing legislation that could be used to tackle land contamination

Ireland lacks specific legislation for dealing with contaminated land. At the time of preparing this paper, the Minister for the Environment (Martin Cullen) had not expressed any interest in creating either a contaminated land register in Ireland, or a dedicated regime to deal with land contamination.

The Environmental Protection Agency in Ireland has no powers to clean up water pollution. Local Authorities however have certain powers under the Water Pollution Acts. Cleanup can only be required in the context of pollution if the beneficial user is being affected (Water Pollution Act 1977[25] sections 3, 12 and 13 offer scope for cleanup); or if environmental pollution is being caused by waste (Waste Management Act 1996[26] section 55). Section 55 was amended by the Protection of the Environment Act 2003 (section 55A) which grants the Irish EPA similar powers to those enjoyed by the local authority. In addition the Building Control Act 1990[27]

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[f] Of the 3000 to 3500 existing petroleum retail stations, 30- 35% were constructed prior to the 1979 Dangerous Substances Retail and Private Petroleum Stores Regulations (SI No 311 of 1979).
[22] www.epa.ie
[23] FIRSTFARADAY Research Report No. 1 Review of Remediation Practice in the UK during 2001 ISBN: 095330907X
[24] Waste Licence Register Nos. 80-1, 100-1, 108-1, 137-1, 164-1, 181-1, & 190-1
[25] The link to all acts and regulations to 2002 is: http://www.irishstatutebook
[26] *Ibid.*
[27] *Ibid.*

(and arising Building Regulations), the Derelict Sites Act 1990[28], the Waste Management Act 1996[29] (and arising Regulations), and the Protection of Environment Act 2003 can all be used to a limited extent to tackle land affected by contamination. There are no provisions to create a contaminated land database, but there are powers to compile a waste register (Waste Management Act 1996[30] (WMA) sections 22(7)(h) and 26(2)(c)).

There is no dedicated regime to tackle land contamination. However, due to the comparatively small legacy of contamination that Ireland has inherited, the existence of other powers which could be used to tackle some of the problems, and the voluntary redevelopment of many of the contaminated sites; it appears that land contamination is being addressed in the Republic of Ireland, without a Part IIA type regime.

What I have not been able to uncover, in the short time available to produce this paper, is whether this level of voluntary remediation would still be taking place, if Part IIA had not been implemented on the other side of the Irish Sea. So it is not possible to conclude whether the absence of an actual or potential contaminated land regime in the Republic of Ireland, and the increase in contaminated sites being dealt with, is co-incidental or correlates to and has been in/directly influenced by what is happening in Great Britain, where Part IIA is alive and kicking!

D. Conclusion

1. No clear picture of the extent of land contamination in the United Kingdom

In the absence of a definitive understanding about the extent of land affected by contamination in the United Kingdom, both now and before Part IIA was introduced, it is difficult to draw any firm conclusions about whether Part IIA of the Environmental Protection Act 1990 is delivering. Work on the "Indicators" project is in hand. Once this is completed, a clearer picture of the likely base level of

[28] *Ibid.*
[29] *Ibid.*
[30] *Ibid.*

contamination should emerge, facilitating the future measurement of Part IIA's delivery. However, the question still remains – is Part IIA delivering the Government's objectives of introducing an improved system for the identification and remediation of land contamination, and encouraging voluntary remediation?

2. There is an improved system for identifying and remediating contamination

Has Part IIA introduced an improved system for the identification and remediation of contamination? Before it was brought into force, there was no real system for identifying contaminated land, and requiring its remediation. The limited tools that existed to tackle this problem were infrequently used and unlikely to have any significant impact. Since Part IIA's introduction local authorities have been under a duty to inspect their areas, for the purpose of identifying contaminated land (Section 78B(1)). As already noted in this paper, the inspection process is underway throughout mainland U.K. The speed with which this inspection and identification is progressing varies from country to country and authority to authority. Nevertheless the process has started. The few statistics that are available show a steady increase in the number of sites that are being identified. The majority of these are now being remediated on a voluntary basis, due in no small part to the efforts of all parties involved, to achieve this end.

This brief tour around mainland U.K. has proved that Part IIA is being implemented, and is starting to deliver an improved system for the identification and remediation of contaminated land. After four years the identification stage is under way, and some remediation has started. Even at this early stage it is clear that there are tangible benefits to be gained from carrying out the remediation on a voluntary basis. It is far too early to draw any overall conclusions about the effectiveness of this fledgling regime, save that it has taken the first steps, in what I am sure will turn out to be a long, and probably eventful journey.

3. Part IIA alone can not address ALL land contamination

Before moving on to the second part of the objective, to answer the question on delivery, it is important not to forget, when answering this question, that Part IIA is

limited to dealing with land that meets the statutory definition of contaminated land, contained in section 78A. The regulator's ability to require any such land to be remediated is then further constrained not only by the requirements in Part IIA, but also the Statutory Guidance. Therefore, no matter how well it is implemented, Part IIA alone could never address the full extent of land affected by contamination in the U.K, some of which is bound to fall outside Part IIA's remit.

If the question is refined to merely asking about the delivery of a regime to address Part IIA type contamination, then I would argue, that yes, after 4 years such a regulatory regime is being delivered throughout mainland U.K. As no such regimes are in force in Ireland, there can be no delivery there at this time. However, Northern Ireland now has Part III of the Waste and Contaminated Land (Northern Ireland) Order 1997 on its statue books. It is too early to forecast how this will perform when it is brought into force. However based on what is happening over here, there is every reason to believe it has the potential to be just as successful in Northern Ireland – possibly more so, if there is smaller legacy of contamination. We wish them every success for the safe "delivery" of this "gestating" regime.

4. Part IIA is encouraging voluntary remediation

Turning now to the second part of the objective, and the broader aspiration of encouraging voluntary remediation. As has been noted there is no definitive system in place for assessing how much voluntary remediation takes place. Despite planners collecting a myriad of statistics, none of them have revealed with any certainty, what effect (if any) Part IIA is having. However as Steve Griffiths reported earlier this morning, the annual figures for the amounts of money being spent on site investigation and remediation, show a steady increase. It is predicted that this rise will continue. Adding this to anecdotal information about an increase in the number of contaminated sites being dealt with through the planning process, makes it reasonably safe to conclude, that there is an increase in the amount of voluntary remediation taking place. So in the absence of hard facts (either for or against my contention), I will reaffirm my earlier tentative conclusion that Part IIA is also delivering this second limb of the Government's expectations.

5. Some final thoughts

O the basis of the information referred to in this paper; the answer to the question about delivery must be a resounding yes. A regime to identify contaminated land is being delivered, and the slow process of requiring its remediation process has started. What is only now becoming apparent is the time and money that will be required to complete the long-term remediation actions. Delivery of these may to a certain extent be dependent on the provision of sufficient funds, to enable the regulators to continue to discharge their statutory duty under section 78E, to require the remediation of contaminated land.

It is clear today that Part IIA should be treated as delivering. So far, it may not have been the speediest of regimes – but, as Aesop noted long ago, it is not necessarily the speedy hare who wins the race. Sometimes the slow but steady tortoise gains first prize!