

Summary of responses to the consultation on changes to the Contaminated Land Regime under Part 2A of the Environmental Protection Act 1990

21 December 2010 – 15 March 2011

February 2012



Llywodraeth Cymru
Welsh Government

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Introduction

1. In December 2010, Defra and the Welsh Government launched a joint consultation seeking views on proposals to update and revise the contaminated land regimes in England and Wales under Part 2A of the Environmental Protection Act 1990. Views were sought on revised Statutory Guidance (“the new Guidance”) which forms a key part of the regimes, and minor proposed amendments to the Contaminated Land (England) Regulations 2006 and the Contaminated Land (Wales) Regulations 2006.
2. The consultation ran for 12 weeks from 21 December 2010 to 15 March 2011 and was published on both the Defra and Welsh Government websites.

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3. This is the first time the regime (as it relates to non-radioactively contaminated land) has been revised since it was introduced in 2000, apart from a few relatively minor changes made in 2006. The regime was last subject to full public consultation and Parliamentary debate in 1995 and prior to the current statutory guidance being introduced in 2000.
4. The decision to launch a consultation on changes to the Statutory Guidance followed a series of over 25 informal discussions held with stakeholders from across the sector early in 2010. These discussions concluded that there is a widespread view within the sector that the regime should be updated. Many of the proposed changes were informed by ideas discussed in these meetings
5. The broad aim of the proposed changes is to produce a regime that is clearer, simpler and more in line with principles of good regulation. The aim is also to deliver a regime which is more effective at safeguarding human health and the environment, and more effective at prioritising higher risk sites. Clarity is needed on various aspects of the guidance, in particular as it relates to when land should (and should not) be considered to be “contaminated land” in the legal sense, and on the broad outcomes the regime seeks to achieve. The opportunity is also being taken to commence section 86 of the Water Act 2003 so far as it has not already been commenced which amends the Part 2A definition of “contaminated land” as it relates to the significant pollution of controlled waters and other related amendments to Part 2A.
6. Full information on the issues under consultation can be found in the consultation paper at <http://archive.defra.gov.uk/corporate/consult/contaminated-land/index.htm> . Sixteen specific issues were consulted on, and the consultation paper set out 27 questions to which consultees were asked to respond. The consultation summary below deals with each issue in the same order as the consultation paper. For each issue, this paper gives a summary of:
 - (i) the consultation proposal
 - (ii) the consultation response; and
 - (iii) Defra and Welsh Government’s response (i.e. how Defra and the Welsh Government have responded to consultation suggestions).
7. The consultation sought views from all interested parties, including members of the public. The responses received were overwhelmingly from specialists in the land contamination sector, industry, regulators in the form of Local Authorities, organisations who have an interest/membership in the sector, and other Government bodies and agencies with an interest in land contamination such as the Environment Agency.
8. The written consultation was enhanced by a series of meetings and workshops over the 12 week consultation period. This included four workshops organised by Environmental Protection UK (EPUK) with delegates drawn from local authority officers and others. It also included over 15 meetings with other key stakeholders in the land contamination sector. These meetings were attended by around 90 delegates and provided an opportunity for stakeholders to express their views and experiences on the proposed changes under consultation. These meetings also served to initiate discussion on how the benefits of the new Guidance could be realised post consultation, for example through research and development, the development of technical tools and training for the sector.
9. In June 2011, Defra and the Welsh Government also arranged for a near-final version of the new Guidance to be commented on by a group of 13 leading experts from across the land

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contamination sector, and the draft was amended further to take account of their comments. Defra and the Welsh Government extend their warm thanks to this group, who are listed in Annex 2 of this summary.

10. A complete set of responses to the written consultation (other than where respondents requested confidentiality) are available from the Defra Information Resource Centre and can be supplied in response to personal callers or in response to phone or e-mail requests. An administrative charge will be made to cover photocopying and postage costs. Where possible, personal callers should give at least 24 hours notice of their requirements.

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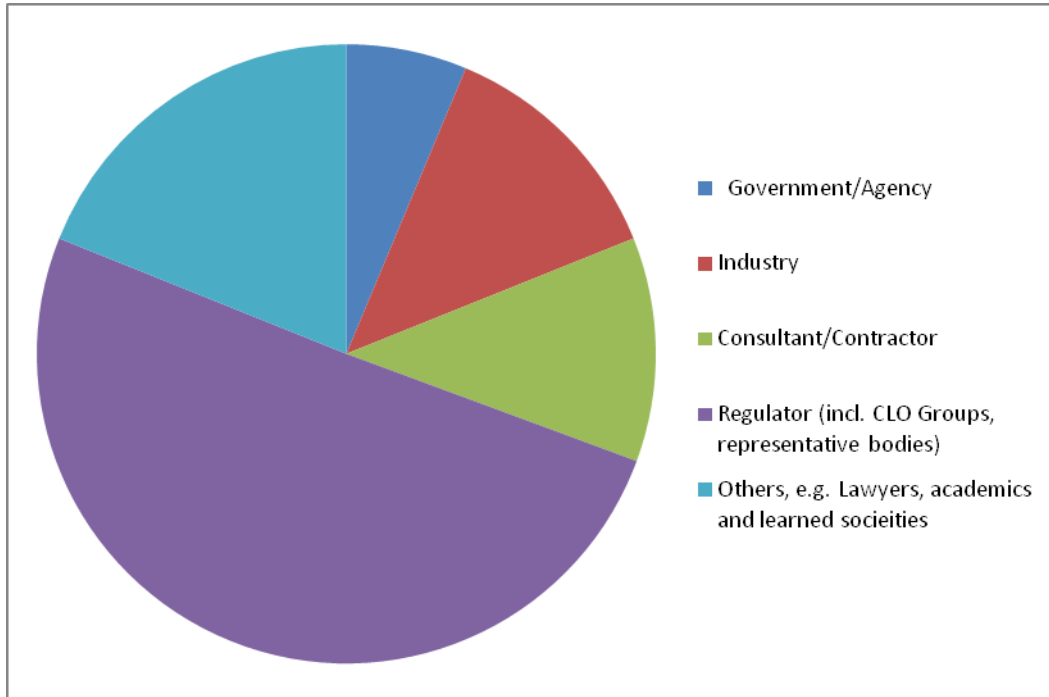
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Summary of Responses – group breakdown

11. The summary of responses by group breakdown gives an overview of the number of respondents from each category. These categories include regulators (the majority in the form of Local Authorities), affected businesses such as consultants and contractors, other Government bodies and agencies who have an interest in land contamination; and a category which encompasses other organisations who responded such as academics, lawyers, individuals and learned societies (such as British Geological Survey) who have experience and interest in this area. All these categories include responses from both individuals and groups of respondents as part of a consortium/group. There were a large number of responses received from Contaminated Land Officer groups and other organisations whose membership includes Local Authority officers in particular (as the largest group of respondents) and from representative bodies of professional groups (such as RICS, SoBRA). For the purposes of this summary, no distinction is made between group or singular responses; all responses count as one response. There were three responses from consultees in Wales, not including those from Wales who may have contributed to a response through their parent organisation (such as EPUK). It should be noted that only one member of the public provided a response in the form of a case study.
12. Two of the consultation questions asked respondents to indicate their preference for one of two options. The first of these, under Question 8 relates to the definition of significant harm to human health as the legal trigger point under Part 2A. The second, under Question 20 asked for views on two options on how the new Guidance would go about explaining how to apply the test in relation to controlled waters of “*the pollution of controlled waters is likely to be caused*”. The outcome of these two questions is illustrated respectively through *Figures 1 and 2* later in this document.
13. A total of 111 responses were received. A list of respondents to this consultation can be found at Annex 1 to this document. The 111 responses are broken down numerically as follows and illustrated through the pie chart at *Figure 1* below:

Government/Agency	7
Industry	14
Consultant/Contractor	13
Regulator (including CLO Groups and representative bodies)	56
Others (e.g. lawyers, academics and learned societies)	21

Figure 1: Group Breakdown



Terminology

14. Various consultation responses made comment about specific terms used in the proposed new Guidance, with many of those who commented stressing the importance of defining terms clearly and as far as possible not using terms interchangeably. For example:
- “Contaminant”/“pollutant”/“substance”: Some respondents asked for more clarity over the terms contaminant, pollutant and substance. Defra and Welsh Government response: words have been added at the start of the new Guidance to explain that these terms all means the same thing – i.e. a substance relevant to the contaminated land regime. The new Guidance now mainly uses the term “contaminant” and associated terms such as “contaminant linkage” to reflect the concerns on clarity expressed by respondents, and to ensure consistency throughout the document.
 - “Land”/“site”: Some respondents did not like the interchangeable use of the terms land and site in the consultation draft of the new Guidance. Defra and Welsh Government response: Defra and the Welsh Government have amended the new Guidance so that it now uses the term “land”.
 - “Unacceptably high risk”/“unacceptable risk”: A few respondents did not like use of the term unacceptably high risk (to describe a level of risk above which land would be contaminated land in the legal sense) in case it was mistakenly taken to imply that some high risk sites may not qualify as contaminated land – i.e. that there could be acceptably high risk land as well as unacceptably high risk land. Defra and Welsh Government response: For the sake of clarity the term “unacceptably high risk sites” has been removed from the new Guidance, and the term “unacceptable risk” is used instead.

Issue 1: Shorter, simpler guidance

15. Consultation proposal: Defra and the Welsh Government proposed that the 190-page current core guidance on contaminated land (Defra Circular 01/2006) should be substantially reduced in length, and that the statutory guidance should be separated from accompanying non-statutory guidance and written in an easier to read style. Consultees were asked whether they agreed that this would be an improvement.
16. Consultation response: There was general support for the idea of shorter, simpler guidance. However many responses, across the range of respondents, considered that the new Guidance should not become too short and that it should necessarily cover various complex issues due to the nature of the regime. Some respondents also thought that some of the content from the non-statutory annexes should be retained (e.g. the non-statutory guidance explaining how the contaminated land regime interacts with other regimes such as those on water, environmental permitting and planning). A few respondents disagreed with the proposal and thought the current statutory guidance was fit for purpose and should be left as it is.
17. Defra and Welsh Government response: Defra and the Welsh Government intend to proceed with the proposal. We recognise the widespread view that the guidance still needs to be detailed enough to provide guidance in a complex area, and at over 60 pages in length Defra and the Welsh Government feel the revised new Guidance will achieve this. We also

note the view that some parts of the old non-statutory guidance may be usefully updated and published, and we will consider doing this in due course.

Issue 2: Separation of guidance on radioactively contaminated land

18. Consultation proposal: Defra and the Welsh Government proposed the separation of statutory guidance on non-radioactive and radioactive contaminated land, so in future they would be dealt with in two different documents. Currently the two issues are dealt with in the same document, which is confusing because they have slightly different legal bases, meaning that some parts of the guidance relate only to one or other form of contamination while other parts relate to both. Consultees were asked whether they agreed with the proposal.
19. Consultation response: The large majority of respondents agreed with the proposal. A small number of respondents were concerned about consistency between the two pieces of guidance and on how each regime would correlate with the other.
20. Defra and Welsh Government response: Defra, the Welsh Government and the Department for Energy and Climate Change (DECC) (which is the lead government department for radioactive contamination) intend to proceed with the proposal.

Issue 3: Broad objectives of the regime

21. Consultation proposal: Defra and the Welsh Government proposed that the new Guidance should begin with a new section describing the broad outcomes the regime seeks to achieve. Among other things this included clarification that the regime should aim to strike a reasonable balance between identifying and removing unacceptable risks to human health and the environment whilst ensuring that the burdens faced by individuals, companies and society as a whole are proportionate, manageable and sustainable. There is no such description in the current statutory guidance. Consultees were asked whether the new Guidance should state the broad objectives of the regime, and whether they agreed with the objectives as stated.
22. Consultation response: A large majority of respondents supported the inclusion of a description of broad aims, and there was widespread support for the proposed objectives. There were various suggestions on how the wording might be improved, including:
 - (a) Several respondents asked for some scene-setting words to be included to explain that the regime aimed to focus on land where an unacceptable risk may be posed by land contamination (e.g. from some point source industrial pollution), and not the low background levels of contamination which exist in all land in England due to natural geology and diffuse pollution.
 - (b) Several respondents asked for the new section to mention (as is stated later on) that under Part 2A land is in effect “innocent until proven guilty”. In other words, the starting point of the regime is that land is not contaminated land in the legal sense unless there is reason to consider otherwise.

- (c) There were mixed views on the broad aim that in making decisions under Part 2A local authorities should aim to take a precautionary approach without being overly-precautionary. Many agreed with this aim but some (particularly some local authority officers) were unclear on precisely how they should achieve this balance, with some wondering whether this might mean that decisions could be legally challenged on grounds that the right balance was not achieved.
- (d) Some respondents, including many from Local Authorities, were concerned about the inclusion of specific wording to say that decision making should involve the weighing of social, economic and environmental costs and benefits of potential regulatory intervention in order to decide whether such intervention would produce a net benefit. Some felt there was an implication that authorities would be required to do elaborate cost-benefit analysis which would impose an undue burden on authorities. Others felt that allowing factors other than simply the primary risk to health or the environment to be considered might weaken the degree of protection afforded to health and the environment.
23. Defra and Welsh Government response: Defra and the Welsh Government welcome the clear support for including the broad objectives. Section 1 has been amended to take account of various suggestions, including new paragraphs to account for points (a) and (b) in the paragraph above. With regard to point (c) the wording has been amended in Section 1 and elsewhere to explain more clearly how the regulator should strike a balance between precaution and over-precaution. However it remains the case that the regulator is responsible for striking this balance to ensure that intervention is likely to achieve a net benefit. It is possible that decisions could be legally challenged, as is the case with all regulatory decisions, but decisions are likely to be legally robust provided they are reasonable and in accordance with the new Guidance. With regard to point (d) the text has been amended in Section 1 and Section 4 to make clear that the local authority is not required to produce overly elaborate cost-benefit analyses of social, economic and environmental factors – however they are required to take broad account of such factors where relevant in the interests of ensuring that decisions produce net benefits.

Issue 4: Local Authority inspection duties

24. Consultation proposal: Since 2000, local authorities have been required to have written contaminated land strategies, which they must review from time to time. The consultation proposed:
- giving authorities more flexibility in what their strategies contain by scrapping a lot of the detailed prescription in the current Guidance.
 - specifically allowing authorities to have stand-alone strategies and/or include their strategies as part of a wider strategy (such as an environmental protection strategy).
 - a requirement for authorities to update existing strategies to reflect the new guidance.

Consultees were asked whether they agreed with these proposals, and whether there should be a mandatory deadline by which authorities should update existing strategies.

25. Consultation response: This issue was primarily of interest to local authority responders. The main points raised were:

- (a) Increased flexibility on what to include in strategies: There was widespread approval for reducing the length of guidance on inspection duties and giving authorities more flexibility on what they included in their strategies. However, some local authority officers thought the new Guidance should be more prescriptive, and a few responses considered that the current text should be retained in full. Defra and Welsh Government response: We will proceed with the proposal for more flexibility.
- (b) Requirement for mandatory strategies: There was widespread support from across the range of consultees for continuing the requirement for authorities to have contaminated land strategies. Defra and Welsh Government response: the requirement to have strategies will stay.
- (c) What form should strategies take?: Most local authority officers preferred stand-alone strategies, rather than including contaminated land work in wider strategies. Defra and Welsh Government response: Defra and the Welsh Government consider it should be for authorities to decide whether to have a stand-alone strategy or include contaminated land as part of a wider strategy, and the new Guidance will allow this. However, it seems likely that most authorities will probably choose to keep stand-alone strategies because it will be easier for them simply to update their existing strategies.
- (d) Timescale for authorities to update existing strategies?: The large majority of local authority officers and many others thought there should be a mandatory deadline of say 1 or 2 years. Others thought there was no need for a mandatory timescale because it would be in authorities' own interests to update their strategies e.g. to avoid potential wasted costs and potential legal disputes. Others thought that authorities should be required to set their own timescales for updating. Defra and Welsh Government response: Defra and the Welsh Government recognise the widespread call for a mandatory deadline, but this needs to be balanced against the wider need to minimise burdens on authorities and to devolve decisions to the local level. Therefore the new statutory guidance will require authorities to set their own deadlines for updating their strategies, to give authorities flexibility and to recognise that this will be a different priority for different authorities.
- (e) Mandatory timescale for updating strategies in future?: Similar to the above point, there was a widespread view, particularly from local authority officers, that there should be a mandatory requirement for local authorities to review their strategies e.g. at least every five years. Defra and Welsh Government response: Similar to the point above, local authorities need flexibility. Therefore the new Guidance will not set a mandatory deadline, although it will advise that as good practice strategies should be updated at least every five years.
- (f) Strategic inspection vs. detailed inspection: Several responses asked for the statutory guidance to clarify the difference between: (i) "strategic inspection", involving making a broad assessment of land within an authority's area and identifying priority land for more detailed consideration; and (ii) "detailed inspection" of particular land. It was also suggested that the new Guidance should avoid using the terms "inspection" and "investigation" interchangeably. Defra and Welsh Government response: Defra and the Welsh Government agree and the draft new Guidance has been amended accordingly.

Issue 5: Risk Assessment

26. Consultation proposal: Defra and the Welsh Government proposed adding various new elements on risk assessment to reflect issues that have arisen over ten years of implementing the regime. This would include new subsections on: the process of risk assessment; using external expertise; use of generic assessment criteria; recognising and dealing with uncertainty; and a new requirement for authorities to produce risk summaries. The consultation asked for views on whether the guidance would be improved by making these changes.
27. Consultation response: There was widespread agreement that the proposals with regard to risk assessment were helpful, and there were various helpful suggestions on how the proposed text could be improved, many of which have been incorporated into the text. The main issues included:
- (a) The process of risk assessment: There was widespread agreement with this new subsection, and the general aim of trying to focus on higher risk land as a priority, while avoiding getting bogged down with lower risk land. However, there were some suggestions on specific wording. For example, many local authority responses did not like the term “dismiss” (to describe stopping investigating a site if initial investigation does not reveal sufficient evidence to suggest that land might be problematic) and wanted a different term to be used. Defra and Welsh Government response: Defra and the Welsh Government have removed the term “dismiss” and alternative wording has been used.
 - (b) Recognising and dealing with uncertainty: There was widespread approval that the new Guidance would (for the first time) explicitly recognise that all contaminated land risk assessments will involve uncertainty, and give broad advice on how regulators should accept and deal with this.
 - (c) Using External Expertise: There was widespread approval for the explicit recognition in the Guidance that, particularly in complex cases, it may be necessary for authorities to bring in external expertise.
 - (d) Use of Generic Assessment Criteria: Recognition in the guidance that the use of GAC’s is common practice in the sector as a tool for screening sites early in risk assessment is common practice in the sector was welcomed. Statutory backing for use of robust GACs produced by reputable, non-governmental organisations and clarity in the guidance on when and how to use these criteria was viewed favourably. There was widespread consultation opinion that further technical tools will be needed in the future to help practitioners categorise sites under the new Category 1-4 system. It was also felt that reference to the planning regime should not be made in the Part 2A Statutory Guidance, particularly as proposed changes to the planning framework have yet to be finalised. Defra and Welsh Government response: Defra and the Welsh Government welcome the general support for this new section of the Guidance. Some respondents felt there was a need to be explicit about the fact that SGVs and GACs were very conservative, i.e. minimal risk concentrations and text has been added to this section to reflect this. A paragraph has been added to the guidance to give legal backing to the development of new technical tools such as Category 4 Screening Levels. Reference to the planning regime in this section has been deleted.

28. There was widespread support for **risk summaries** from industry, consultants, many local authorities and various others. Many local authorities said they already produced risk summaries voluntarily as part of good practice in decision making, and the new statutory guidance would make the practice mandatory. Many responses said that summaries would help increase transparency, consistency and make for more proportionate evidence based decisions; and that the summaries would make it considerably easier for senior managers, lawyers and elected councillors in authorities to be involved in the decision making process, and that this would help authorities strike the right balances particularly on more complex sites. However there was also some concern over detailed aspects of the proposed new risk summary requirements, including:

- (a) There was a common misperception, particularly among local authority responses, that risk summaries may be required for all sites identified as potential sites during strategic inspection and/or for any land on demand by members of the public, thereby creating an unmanageable new burden for local authorities. Defra and Welsh Government response: This was not the intention and the text has been amended to make clearer that risk summaries would only be required once land has been through detailed inspection and risk assessment is complete.
- (b) Many agreed with the idea of risk summaries for sites that go on to be determined as contaminated land, but they thought that summaries should not be required for non-contaminated land. This was because having risk summaries for low risk land might inadvertently blight the land even though it has been found not to be contaminated land, and it would be better simply to say that the land is not contaminated land. Defra and Welsh Government response: Defra and the Welsh Government agree this would be less burdensome, and the Guidance has been amended so that risk summaries would only be required for land that authorities consider is likely to be contaminated land. Land that will not be so determined will be subject to paragraphs 5.2 – 5.4 of the new Guidance, which requires a simple statement that land does not meet the definition of contaminated land.
- (c) Some local authorities wanted the new Guidance to make clear that risk summaries would not be required for land that was determined before the new Guidance comes into force. Defra and Welsh Government response: Defra and the Welsh Government agrees and the new Guidance now specifically mentions that this is the case.
- (d) Some asked for clarification over when and how risk summaries should be made accessible to the public. Defra and Welsh Government response: The summaries would in any case be available to the public on demand under Environmental Information/Freedom of Information legislation. However, the new Guidance will also contain a specific requirement for the risk summary to be one of the documents made available to the public when land is determined as contaminated land.

Issue 6: Background presence of contaminants

29. Consultation proposal: Defra and the Welsh Government proposed that the new Guidance should clarify that background levels of contaminants in soil should not be caught by the regime unless there was a specific reason to consider such land might be problematic. For example, the regime should not catch normal low levels of substances which could be called “contaminants” that are found in all soil (e.g. the result of natural soil formation processes and human diffuse pollution), or commonly found materials in properties such as the normal levels of historic ash in many gardens or ash used in historic construction techniques.

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Consultees were asked whether they agreed, and if they had views on how background/normal levels of contamination had been defined.

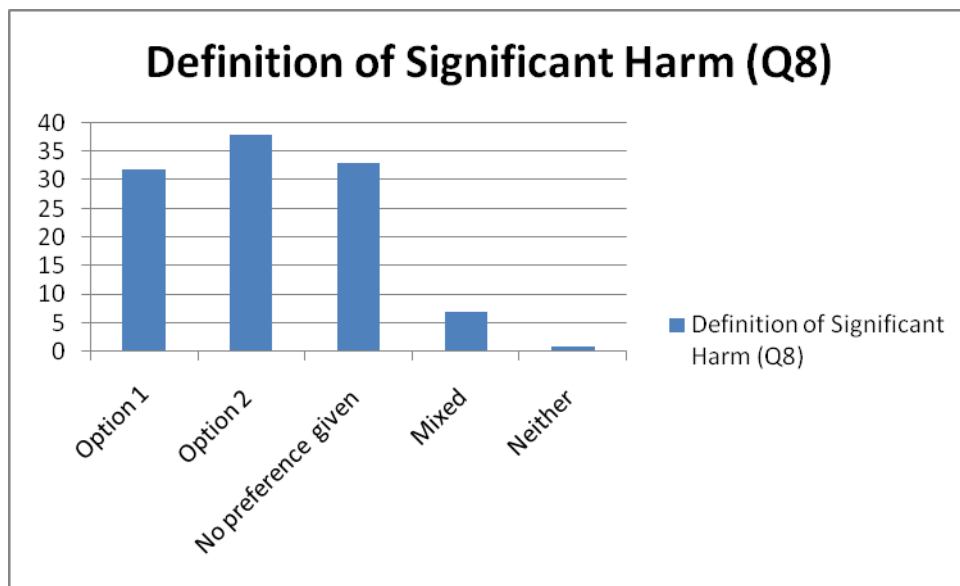
30. Consultation response: A large majority of respondents were in favour of this proposal, including businesses, consultants, many local authorities and many others. Specific suggestions included:
- (a) Some respondents thought that the wording of the background section needed to be tightened up, for example to clarify how terms such as “background”, “natural”, “normal”, “typical” and “widespread” should be interpreted by regulators.
 - (b) Some soil scientists pointed out that they would normally only use the term “background” to describe natural background levels of contamination and not human diffuse pollution.
 - (c) There was a widespread recognition that new technical guidance would be needed to help local authorities and others implement the new rules.
 - (d) Some respondents were opposed to the idea of excluding background levels. For example, some argued that such land could pose a theoretical risk and some background levels could pose a risk to human health. Many of these respondents felt that such land should be made subject to risk assessment.
31. Defra and Welsh Government response: Defra and the Welsh Government welcome the widespread recognition that it is sensible and pragmatic to clarify that normal/background levels of contamination are very unlikely to cause land to qualify as contaminated land in the legal sense. The intention is to help local authorities focus their efforts on higher risk land, and to reduce potential blight on land with only normal levels of contamination where in the vast majority of cases there is no evidence to suggest that significant harm has ever been caused. In response to point (a) and (b) above, Defra and the Welsh Government have revised the wording of the “background” section to take account of consultation points. In response to point (c), Defra and the Welsh Government recognise that there will be a need for technical guidance and will help ensure such guidance is produced. In response to point (d) Defra and the Welsh Government consider that this concern is sufficiently covered because the new Guidance makes clear that local authorities may conduct a risk assessment on land with background levels of contamination if there is some particular reason to consider that it might pose an unacceptable risk.

Issue 7: Significant harm to human health

32. Consultation proposal: Defra and the Welsh Government proposed to clarify the definition of the legal trigger of “*significant harm is being caused to human health*”. The existing definition was unclear over whether only serious harm would be caught or any harm at all. Defra and the Welsh Government proposed two text options that would clarify that serious harm should be caught while lesser harm should not, and leaving regulators with discretion to decide case-by-case. Consultees were asked for views on two options: Option 1 and Option 2. They were asked which option they preferred and why, and whether the options struck the right balance between protecting human health, whilst ensuring the regime does not catch minor health effects (where the impacts of regulatory intervention outweigh the benefits).

33. Consultation response: Overall, Option 2 was the preferred option receiving 54% of votes from those who expressed a preference. Reasons given for this preference were that Option 2 provided greater clarity for higher risk sites and allowed for flexibility and discretion for the Local Authority in the more unusual circumstances. It was generally agreed by those who favoured Option 2 that it would allow the regulator to strike the right balance between eliminating risk to human health and protecting against the impacts of intervention. Others thought that it was impossible to say whether the right balance had been struck because occurrence of significant harm was likely to be so site and person specific that it would depend how decisions were taken by local authorities. A minority of respondents preferred Option 1 e.g. because they thought it was clearer than Option 2. A small minority of respondents felt that there was no need to revise the current definition.

Figure 2: Indication of responses to Q8



1.

34. Defra and Welsh Government response: Defra and the Welsh Government will proceed with Option 2.

Issue 8: Significant possibility of significant harm to human health

35. The issue of how the new Guidance should deal with the key issue of the legal trigger point of when land would pose a “significant possibility of significant harm to human health”. The summary below discusses this in terms of (a) possibility of significant harm; and (b) significant possibility of significant harm.

(a) Possibility of significant harm (human health)

36. Consultation proposal: Defra and the Welsh Government proposed that the new Guidance should make clear that the regulator should first understand the possibility of significant harm (POSH) before it goes on to decide whether or not there is a significant possibility of significant harm (SPOSH). In other words, the authority needs to understand the risk

(primarily a technical operation) before it decides whether action needs to be taken to address the risk (primarily a policy decision taken in light of the relevant evidence). Defra and the Welsh Government also proposed a non-legally binding Annex 1 of the new Guidance that would indicate the sort of issues authorities should consider when producing risk summaries (discussed in Issue 5 above) that relate SPOSH to human health. Consultees were asked whether they agreed that the guidance should include clarification that *possibility* of significant harm should be considered before moving on to decide whether *significant* possibility of such harm exists. They were also asked whether they had comments on the proposed new Annex 1.

37. Consultation response: There was general agreement that authorities should understand POSH before deciding SPOSH, and many local authorities confirmed this was already something they did in practice (with some saying it was good that the new Guidance would reflect this). There was widespread agreement with Annex 1, although: (i) there were various comments on specific wording; and (ii) some questioned whether the new statutory Guidance should contain a non-statutory annex, suggesting it might be better to produce separate and more comprehensive technical guidance instead. A small minority of respondents felt there was no need to change the current guidance, and that there should be no changes made.
38. Defra and Welsh Government response: Defra and the Welsh Government welcome the general support for the proposal. In light of consultation views Defra and the Welsh Government have decided not to include Annex 1 (of the consultation draft).

(b) Significant possibility of significant harm (human health)

39. Consultation proposal: The consultation paper explained that the current version of the Statutory Guidance did not explain how local authorities should go about deciding whether a significant possibility of significant harm (SPOSH) to human health existed. This had caused considerable confusion, and it provided no firm legal basis on which technical guidance could be developed.
40. Defra and the Welsh Government proposed a new four category test (which had been developed in discussion with experts from the sector) to help decide when land is and is not contaminated land. The new test would introduce broad categories to describe areas on the broad spectrum of risk encountered by assessors. The new Categories were intended, among other things, to offer a legal framework against which the sector can benchmark technical tools which describe certain categories or indicate the boundaries between categories, with regard to specific substances/situations. In the consultation paper, the proposed new test was explained using a traffic light analogy, under which:
- Category 1 (red) would describe land which is clearly problematic for example because similar sites are known to have caused a significant problem in the past.
 - Categories 2 and 3 (amber) cover the less straightforward land where detailed consideration is needed before deciding whether it is contaminated land. The test would rest on whether or not the local authority believed there was a strong case for regulatory action - and thus whether it should be placed into Category 2 (contaminated land) or Category 3 (not contaminated land). The authority would start by considering health risks alone, and if this leads the authority to consider that land is clearly problematic or non problematic the decision could be taken at this point. However, if this does not lead

to a decision (e.g. because of uncertainty over the risks), the authority would consider wider socio-economic factors (such as cost, views of local people etc) before deciding. If the LA still could not decide, the default decision would be that the positive legal test for contaminated land had not been met and the site should therefore go into Category 3 (not contaminated land).

- Category 4 (green) would describe land that is clearly not contaminated land, for example because there were only “normal” background levels of contamination, or because the land could be screened out using generic assessment criteria. The new Category 4 test would be particularly important in terms of reducing uncertainty over when land is clearly not contaminated land in the legal sense, and thus provide reassurance from the potential land blight that had in some cases been caused by uncertainty in the past.

41. Consultees were asked for their views on the proposed “red-amber-green” test and whether it would improve the regime; and whether the new test would strike the right balance between establishing a legal framework, whilst giving authorities sufficient flexibility to take proportionate decisions in the interests of local communities. They were also asked whether they had views on the descriptions of the categories and whether these could improve. Views were also sought on whether the health benefits of intervention should be considered against the health risks and whether Local Authorities should consider wider factors such as social, economic and environmental impacts of the remediation, and whether the benefits of remediation would outweigh the impacts before taking SPOSH decisions on “amber sites”.

Consultation response:

- There was general support for the proposals from industry, consultants, academics, lawyers and government agencies.
- Several responses from industry and others said that it may still be challenging for local authorities to apply the new test relating to Category 2/3 sites, especially in the early stages of implementing the new test. It would be important to get the new test off to a good start and spread emerging good practice. Several suggested the idea of forming a panel of experts to help local authorities take the first ten or so Category 2/3 decisions under the new Guidance, and write up the process and results so this could be disseminated to other authorities. Defra and Welsh Government response: Defra and the Welsh Government agree this would be a good idea and will seek to ensure that this happens, working in conjunction with the Land Forum and others.
- Many responses said the new Category 1-4 system would need to be fleshed-out with technical guidance if it were to work properly on the ground. Defra and Welsh Government response: Defra and the Welsh Government agree, and one of the main reasons for introducing the new system is to provide a legal basis from which to create such technical guidance. Work is already on hand on the first tranche of such guidance (e.g. the British Geological Survey is producing technical guidance on “normal” levels of contamination to help support application of the new Category 4 test).
- Several respondents found the “red-amber-green” analogy confusing, and suggested that the Statutory Guidance should choose either “red-amber-green” or “Category 1-4” to describe the new Categories, with a general preference for the latter. Defra and Welsh Government response: Defra and the Welsh Government agree and the “Category 1-4” terminology will be used in the new Guidance.

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- The Environmental Industries Commission (which was broadly in favour of the proposals and helped develop them) suggested an amendment to the description of Category 4 to allow for sites that may exceed generic screening test but which had undergone detailed expert assessment, and had been confirmed to pose a low risk, could also be included in Category 4 (provided the local authority agreed) in order to minimise the chance that such land may be blighted by being placed in Category 3. Defra and Welsh Government response: Defra and the Welsh Government agree that this would be sensible and the wording has been amended as suggested.
 - Many responses (especially from local authorities) said the new test as drafted in the proposed new Guidance was not sufficiently clear – e.g. on how and when socio-economic factors should be taken into account). This needed to be amended to make it easier for local authorities to implement the regime. Defra and Welsh Government response: Defra and the Welsh Government agree that clarity is very important. The wording of the new test has been re-worded (in consultation with the small group of stakeholders referred to in paragraph 9) to make the process for applying the test clearer.
 - Some responses thought that decisions on SPOSH should continue to be taken purely on grounds of health risk, and that local authorities should not be allowed to take wider socio-economic factors into account. Defra and Welsh Government response: Defra and the Welsh Government agree that health risks should be the primary consideration, and the new test for Category 1 makes clear that land must be considered to be contaminated land if there is sufficient evidence that similar sites have caused harm in the past. Also, the new test for Category 2/3 makes it clear that decisions should be taken purely on health grounds whenever it is possible to do so. However, in some cases it is not possible to determine whether or not SPOSH exists purely on health grounds because of scientific uncertainty. In such cases the regulator needs to be able to consider the wider local circumstances to decide whether or not regulatory intervention is justified.
 - Some responses (mainly from some local authority officers) were strongly negative, with a common theme being that there was no need to revise the Statutory Guidance and that the Government should go back to the original plan of producing number-based “guideline values”. Defra and Welsh Government response: Defra and the Welsh Government recognise this view, but the reasons for not following this approach are explained in the consultation paper and in the Impact Assessment which accompanies the new Guidance.
 - Some responses (mainly from local authority officers) were concerned that the new test would place undue burden on them by making them do a “sustainability assessment” before each decision is made. Defra and Welsh Government response: Defra and the Welsh Government have amended the wording to make clear that this is not required.
42. Overall Defra and Welsh Government response: Defra and the Welsh Government plan to proceed with introducing the new Category 1-4 system (subject to the specific changes and responses detailed above). A summary of the way in which the Category 1-4 system is intended to operate is in the Impact Assessment.

Issue 9: Significant harm and significant possibility of significant harm (SPOSH) to non-human receptors?

43. Consultation proposal: Defra and the Welsh Government proposed that the regime would remain substantively the same in respect of the legal trigger of significant harm and SPOSH to non-human receptors (such as environment and buildings), although the wording has been revised to make it slightly more concise. Consultees were asked whether they had view on the proposal not to amend the substantive nature of the guidance as it relates to non-human receptors.
44. Consultation response: There was widespread support for the proposal. Many respondents did not include any comment on this issue, but among those who did it was widely recognised that there had been only a very few determinations made on risk to non-human receptors since the implementation of the Part 2A regime in 2000.
45. Defra and Welsh Government response: Defra and the Welsh Government will proceed as proposed, although the text has been amended slightly to draw attention to the fact that local authorities should only determine land on these grounds if they are confident that the broad aims set out in Section 1 of the new Guidance are met.

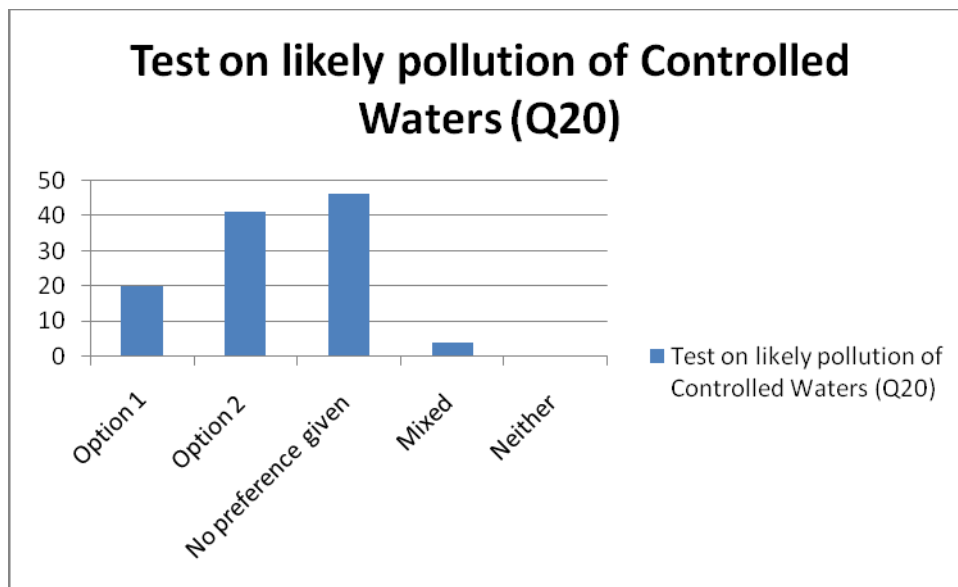
Issue 10: Significant pollution of controlled waters and significant possibility of such pollution

46. Consultation proposal: Defra and the Welsh Government proposed that section 86 of the Water Act 2003 so far as it is not already in force, should be commenced to amend the Part 2A legal test for land being contaminated land on grounds of water pollution. The change would be that whereas currently *any* such pollution or possibility of such pollution would (in theory) meet the test, after full commencement of s.86 this would only be the case if there were *significant* pollution or a *significant* possibility of such pollution. Defra and the Welsh Government also proposed text in the draft new Guidance to explain broadly how to decide when pollution, or possibility of such pollution, would be significant. The new test would be based on a Category 1-4 system similar to the test for SPOSH as covered in Issue 8 above – the broad idea being to ensure that serious pollution is always caught, minor pollution is not, and that regulators should have discretion to decide in more complex cases. Among other things, the intention would be for the Environment Agency to issue non-statutory technical guidance to flesh out what was said in the new Guidance. Consultees were asked:

- whether they agreed;
- for their views on the proposed new Guidance including whether the Category 1-4 test was the right approach and whether the categories had been described.
- for their views on two options for how the new Guidance should deal with deciding what constitutes significant possibility of significant pollution (in essence, whether it should be a simple “greater than 50% chance of pollution” test, or whether it should be more sophisticated similar to the proposed new test for SPOSH to human health).

47. Consultation response: There was general agreement among those that responded that section 86 should be fully commenced, and among those who offered a view there was widespread support for the proposed approach in the new Guidance. Many recognised that while the new Guidance would set the broad rules, a lot would depend on the detail in technical guidance to be produced by the Environment Agency – and many local authorities gave no specific comment on this section, saying they would always defer to the Agency on sites where pollution of controlled waters was the determining factor. Some respondents said they found the detailed wording of the proposed new Guidance confusing and suggested various improvements including not having a Category 1-4 structure for cases where significant harm is (or is not) being caused to controlled waters.

Figure 3: Indication of responses to Q20



48. Defra and Welsh Government response: Defra and the Welsh Government welcome the broad support for this proposal. The text has been shortened and amended in line with consultation suggestions (in particular, the new Category 1-4 system will only apply to significant possibility of significant pollution, and not to cases where the significant pollution is (or is not) being caused).

Issue 11: Determining whether land appears to be contaminated land

49. Consultation proposal: Defra and the Welsh Government proposed clarifying various issues that have arisen over 11 years of implementing the regime on how Local Authorities should go about determining land as contaminated land. This included giving advice for the first time on how and when to go about deciding that land is not contaminated land; and how and when to reconsider determinations that land is contaminated land. There were also clarifications on informing affected persons (e.g. landowners) prior to determination; and on postponing the determination of land. Consultees were asked whether they agreed with the proposed changes and whether they had views on any of the specific changes.

50. Consultation response: There was widespread approval for the proposed changes, with some suggestions for improvements, including:

- (a) Deciding that land is not contaminated land: There was widespread support for the new Guidance explaining how to decide that land is not contaminated land in the legal sense (i.e. rather than there being no formal decision if, following investigation, a local authority considers this to be the case). Some local authority responses were concerned e.g. that it was impossible to say with absolute certainty that land definitely does not pose a significant risk. Defra and Welsh Government response: Defra and the Welsh Government welcome the support for this proposal. We recognise that (theoretically) it is never possible to say with absolute certainty that land does not pose a significant risk.

However, under Part 2A land is in effect “innocent until proven guilty” – i.e. the starting assumption is that is not contaminated land unless there is reason to consider otherwise – and to avoid unjustified blight it is very important that this is applied. The wording of this part of the new Guidance has been amended slightly to make this point even clearer.

- (b) **Reconsideration of determinations:** This change would state specifically that local authorities can and should revisit determinations if new information comes to light which changes the basis on which land was determined as contaminated land. This was particularly welcomed by regulators because in the past it has not been clear that this is possible and advisable. There was some confusion over whether a site can be undetermined once remedial work has been carried out. Defra and Welsh Government response: Defra and the Welsh Government welcome the support for this proposal. The text has been amended slightly to clarify that once remediation of contaminated land has been carried out the authority should issue a statement to this effect rather than undetermine the land as such.
- (c) **Informing affected persons prior to determinations:** The Guidance that local authorities should consider informing affected persons (particularly land owners/occupiers) prior to determination of land as contaminated land was strongly supported. However, most including industry and many local authorities thought the new Guidance should go further and make it a statutory requirement that affected persons should be informed. It is current good practice currently employed by many local authorities, not least because early engagement with landowners makes the whole process simpler. Defra and Welsh Government response: Defra and the Welsh Government agree with this suggested improvement and the text has been amended accordingly.
- (d) **Postponing determination of land:** There was broad support for the new Guidance specifically saying that regulators can postpone determination of land in certain circumstances (e.g. if the land owner undertakes to resolve problematic land without the need for determination). It was recognised, particularly among regulators, that there would be notable benefits from clarification in the guidance that authorities may postpone determination of land in certain circumstances. Defra and Welsh Government response: Defra and the Welsh Government welcome the broad support for this proposal.

Issue 12: Remediation (Section 6)

- 51. Consultation proposal: Defra and the Welsh Government proposed reducing and simplifying this section to reflect the fact that, over 10 years of the regime, the current detailed and prescriptive guidance has become standard practice. It should not be necessary to include detail on matters considered conventional today in a legally binding document. The revised section would now include greater emphasis on consideration of sustainable remediation and a specific requirement to consider potential health impacts of remediation.
- 52. Consultation response: Respondents generally welcomed less prescriptive guidance in this section and increased focus on sustainable remediation. Suggestions for improvement to the text were given and included (a) reference to the health benefits of remediating or not remediating land; (b) the removal of the paragraphs on novel or untested remediation techniques; and (c) reference to additional benefits of remediation including increased land value.

53. Defra and Welsh Government response: Defra and the Welsh Government intend to proceed with the proposal along with the addition of small changes to the text to account for consultee suggestions on, for example, health benefits.

Issue 13: Liability (Section 7)

54. Consultation proposal: Defra and the Welsh Government proposed leaving the liability section substantively the same as in the previous statutory guidance, apart from the addition of a new summary of the liability rules at the beginning of this section. Some minor changes were also proposed for the body of the text to bring it in line with the style of the new Guidance. The summary aims to provide a broad overview of the rest of the section, which is complex rules, the details of which can seem too complicated to comprehend at first sight. Consultees were asked for their comments on these proposed changes.
55. Consultation response: There was universal agreement that the summary was useful and gave a quick, broad overview of the rules. The changes in text style were also supported.
56. Defra and Welsh Government response: Defra and the Welsh Government intend to proceed with the proposal.

Issue 14: Recovery of the costs of remediation (Section 8)

57. Consultation proposal: Defra and the Welsh Government proposed amending this section slightly to clarify the “hardship” test so that it would no longer be interpreted as an “all or nothing” test, i.e. it may be reasonable for a person to pay for part (not all) of the cost of remediation. Some minor changes were also proposed for the body of the text to bring it in line with the style of the new Guidance. Consultees were asked for their comments on this section as a whole.
58. Consultation response: The majority of respondents were in favour of the inclusion of clarification on the hardship test. Further clarifications in the guidance on part charging, deferring charging and charging against the property were considered helpful. Some concerns were raised by a few regulators on for example difficulties in enforcing liability provisions applicable to Class B persons (i.e. land owners and occupiers) and how the hardship policy should apply, along with a suggestion for a national method for dealing with cost recovery and hardship to ensure a consistent and proportionate approach.
59. Defra and Welsh Government response: Defra and the Welsh Government intend to proceed with the proposal.

Issue 15: Appeals procedures: proposed changes

60. Consultation proposal: Defra and the Welsh Government proposed that regulation 11 of the Contaminated Land (England) Regulations 2006 and the Contaminated Land (Wales) Regulations 2006 be revoked, to bring procedures for appeal against remediation notices in line with similar law in other areas. Following an appeal, where the Secretary of State (in respect of England) or Welsh Ministers (in respect of Wales) decision involves modifying a notice in a way that would make it is less favourable to the appellant or any other person served with the notice, regulation 11 requires the Secretary of State or Welsh Ministers to (i) notify the parties; and (ii) permit further representations and hearings. Defra and Welsh Government’s proposal would remove the unnecessary repetition/burden and time delays

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generated by the provision of this additional stage of appeal. Defra and the Welsh Government would retain one stage of appeal against the notice, reflecting the fact that any further challenge to the Secretary of State or Welsh Minister's decision could be achieved by means of judicial review against the appeal decision rather than the launch of a further statutory appeal. Consultees were asked for their views on the removal of regulation 11.

61. Consultation response: Few respondents commented on this particular aspect of the proposed changes but those who did were on the whole supportive of the proposal. Some local authorities were particularly supportive as the potential for long periods of uncertainty due to multiple successive appeals would be minimised.
62. A few respondents expressed support for the retention of regulation 11 on the basis that its removal would make inappropriate modification of remediation notices less open to challenge and that it was unnecessary to close off the chance for further representations given that there have only been two instances of such appeals.
63. Defra and Welsh Government response: Defra and the Welsh Government intend to proceed with the proposal. A statutory right to appeal to the Secretary of State or Welsh Ministers will be retained in the Regulations, but further challenge to the Secretary of State or Welsh Minister's decisions would more appropriately be dealt with through the available mechanism of judicial review proceedings.

Annex 1: List of Respondents

(1) = Government/Agency

(2) = Industry

(3) = Consultant/Contractor

(4) = Regulator (inc. contaminated land officer groups, representative bodies)

(5) = Others, e.g. lawyers, academics and learned societies

1. London Borough of Hackney Council (4)
2. Bill Baker, Consultant (3)
3. Environmental Industries Commission (EIC) (3)
4. Contaminated Land Group of the North East Regions (CLANNERS) Group (4)
5. Environmental Protection UK (EP(UK)) (4)
6. National Grid (2)
7. Dartford Borough Council (4)
8. Non-Ferrous Alliance (2)
9. Midland Joint Advisory Council for Environmental Protection (4)
10. Tonbridge and Malling Borough Council/Gravesham Borough Council (4)
11. Contaminated Land: Applications in the Real Environment (CL:AIRE) (5)
12. Geowater Ltd (3)
13. Pollution Control Team, London Borough of Newham (4)
14. MJCA (4)
15. The City of London Law Society (5)
16. Landmark Information Group Ltd and Argyll Environmental Ltd (3)
17. LexisPSL, Environment – LexisNexis (5)
18. Lancashire Contaminated Land Officer Group (4)
19. Institute of Historic Building Conservation (IHBC) (5)
20. Cheshire and Merseyside Contaminated Land Officers Group (4)
21. Society of Brownfield Risk Assessment (SoBRA) (5)
22. Shell UK (2)

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23. British Waterways (5)
24. Healthy Cities Community Interest Company (5)
25. Christopher Fry, Karen Thornton, Christopher Swainston and the West Midlands Division of EP(UK) (4)
26. Leeds City Council (4)
27. London Borough of Tower Hamlets (4)
28. Charles Ruxton, Geowater Ltd.(3)
29. National House Building Council (NHBC) (2)
30. NERC Centre for Ecology and Hydrology (1)
31. Gateshead Council (4)
32. Scottish and Southern Energy plc (2)
33. North Somerset Council (4)
34. Dr Francis Obale, Soil Scientist (5)
35. Cardiff Council (4)
36. British Geological Survey (5)
37. Association of Geotechnical and Geoenvironmental Scientists (AGS) (3)
38. Swindon Borough Council (4)
39. Subsurface Consultants Ltd (3)
40. Essex Contaminated Land Consortium (4)
41. Scottish Environmental Protection Agency (SEPA) (1)
42. Harrow Estates plc (2)
43. Local Government Regulation (1)
44. Norfolk Contaminated Land Group (4)
45. London Borough of Brent (4)
46. Dover District Council (4)
47. Taunton Deane Borough Council (4)
48. Exeter City Council (4)
49. London Borough of Lewisham Council (4)
50. Mendip District Council (4)
51. North Wessex Contaminated Land Officers Group (4)

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52. Bristol, Gloucestershire, Somerset and Wiltshire Environmental Protection Group (4)
53. Northamptonshire Contaminated Land Group (4)
54. Cumbria Contaminated Land Group (4)
55. Bristol City Council (4)
56. Hampshire and Isle of Wight EA/LA Contaminated Land Liaison Group (4)
57. Environment Agency (1)
58. The Chartered Institute of Environmental Health (CIEH) (5)
59. The Geological Society of London (5)
60. London Borough of Havering (4)
61. Royal Institution of Chartered Surveyors (RICS) (2)
62. Inter Industry Group on Contaminated Land Management and Site Restoration Issues (IIG-CL) (2)
63. Devon Contaminated Land Officers Group (4)
64. United Kingdom Environmental Law Association (5)
65. Buckinghamshire Land Quality Forum (4)
66. Rhondda Cynon Taff County Borough Council (4)
67. Thames Water (2)
68. Soil and Groundwater Technicians Association (SAGTA) (5)
69. RSK STATS Geoconsult Ltd and Home Builders Federation (3), (2)
70. Taylor Wimpey (2)
71. Milton Keynes Council (4)
72. Jane Light, Member of the Chartered Institute of Environmental Health (5)
73. Geoconservation Commission (5)
74. Specialists in Land Contamination (SiLC) Professional and Technical Panel (2)
75. National Farmers Union (2)
76. Geoconservation UK, East Midlands Geodiversity Partnership, Leicestershire and Rutland Wildlife Trust Geological Subcommittee (5)
77. Lancaster City Council (4)
78. Jacobs Engineering UK Ltd (3)
79. Jacobs Engineering UK Ltd (3)

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80. Environmental Hazards and Emergencies Department, Centre for Radiation, Chemical and Environmental Hazards, Health Protection Agency (1)
81. The Law Society (5)
82. Dudley Metropolitan Borough Council (4)
83. Medway Council (4)
84. Mr Jeffrey Downing (5)
85. West London Contaminated Land Cluster Group (4)
86. The Chartered Institution of Water and Environmental Management (CIWEM) (5)
87. The Contaminated Land Advisory Group (Scotland) (1)
88. URS/Scott Wilson (3)
89. Wolverhampton City Council (4)
90. Yorkshire and Humberside Pollution Advisory Group (4)
91. Greater Manchester Pollution Prevention Partnership Land and Water Group (4)
92. Yorkshire Water Services and Keyland Developments Ltd (2)
93. Hertfordshire and Bedfordshire Contaminated Land Sub Group (4)
94. Surrey Contaminated Land Officers Group (4)
95. Basildon Borough Council (4)
96. Northumberland County Council (4)
97. Erewash Borough Council (4)
98. Mr E W Hunt (5)
99. Ashford Borough Council (4)
100. Derbyshire Dales District Council (4)
101. East Cambridgeshire District Council (4)
102. Karen Thornton, Specialist Environmental Engineer (3)
103. Tunbridge Wells Borough Council (4)
104. Boston Borough Council (4)
105. Canterbury City Council (4)
106. WISER Environment Ltd (3)
107. Conwy County Borough Council (4)
108. Soil Research Centre, University of Reading (5)

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109. Defence Infrastructure Organisation, Ministry of Defence (1)

110. Dr Cheryl Davies (5)

111. Herefordshire Council Public Health Department (4)

Annex 2: Group of experts consulted on near final draft of Statutory Guidance

As mentioned in paragraph 9 of this summary Document, Defra and the Welsh Government also arranged for a near final version of the new Guidance to be commented on by a group of 13 leading experts from across the land contamination sector. Details of these experts are listed below:

- **Ann Barker:** Bradford City Council and Chair of Environmental Protection UK (EPUK) Land Quality Committee
- **Dr Richard Boyle:** Brownfield Technical Consultant to the Homes and Communities Agency and Chair of the Soil and Groundwater Technical Association (SAGTA)
- **Phil Crowcroft:** Partner, Environmental Resources Management Ltd, Chair of the Specialist in Land Condition (SiLC) Register and Chair of the Land Forum
- **Simon Firth:** Firth Consultants and Member of the Environmental Industries Commission (EIC)'s Land Remediation Committee
- **Dr Mary Harris:** MRH Consultants and Chair of the Society of Brownfield Risk Assessment (2009-2011)
- **Rob Ivens:** Mole Valley Council and member of the Society for Brownfield Risk Assessment
- **Seamus Lefroy-Brooks:** LBH Wembley Geotechnical and Environmental Chairman of the AGS (Association of Geotechnical and Geoenvironmental Specialists) Contaminated Land Working Group
- **Jonquil Maudlin:** Bristol City Council
- **Steve Moreby:** Gloucester City Council and holder of various roles in Contaminated Land Officer groups in the South West of England and nationally
- **Professor Paul Nathanail:** Professor of Engineering Geology, University of Nottingham
- **Dr Kevin Privett:** Member of the Environmental Industries Commission (EIC)'s Contaminated Land Group
- **Mike Quint:** Director, Environmental Health Sciences Ltd and Chair of the Society of Brownfield Risk Assessment (2011-)
- **Andrew Wiseman:** Head of Environmental Law at Stephenson Harwood