ENVIRONMENTAL RULE-MAKING AND PUBLIC CONSULTATION: A CASE STUDY OF THE DEVELOPMENT OF A NEW LEGAL REGIME TO CLEAN UP CONTAMINATED LAND

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A Thesis submitted in partial fulfilment of the requirements of the Nottingham Trent University for the degree of Doctor of Philosophy

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Abstract

This Study identifies the challenges which face rule makers in the environmental context, by establishing a number of 'issues' which they must address. These issues are derived from the theoretical nature of environmental problems, the theory of (mainly administrative) rule making, and the subject matter of the case study selected (contaminated land). The Study then identifies how these issues have been addressed in the particular case of devising a new system of rules for dealing with the problem of contaminated land. The main focus of the analysis is the manner in which the issues arose and were dealt with during consultative processes and in the resultant rules. This includes analysing the theoretical foundations for public participation in the rule making process generally, and in the environmental context specifically, and identifying the participants in the contaminated land rule making process and their perspectives on the issues arising. The main findings of the Study are: that the nature of environmental issues is such that they present particular challenges to rule makers (primarily resulting from the physical nature of those issues); that the rule makers have used particular tools in (a) rule formulation (consultation) and (b) the resulting rules (mandatory guidance) as particular means of seeking to meet these challenges, but that these tools have had limited success, with the reasons for this including some which are specific to the environmental and contaminated land contexts, as well more general reasons. The contribution to knowledge comprises the theoretical analysis of environmental and contaminated land rule making issues, together with contextual evaluation of the new rule system and the consultation exercises leading to it. A further contribution comprises analysis of original material from interviews with administrative and legal rule makers, as well as quantitative and qualitative analysis of written responses to public consultation exercises.

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"Man has been endowed with reason, with the power to create, so that he can add to what he's been given. But up to now he hasn't been a creator, only a destroyer. Forests keep disappearing, rivers dry up, wild life's become extinct, the climate's ruined and the land grows poorer and uglier every day."

Anton Chekov: Uncle Vanya

"To waste, to destroy, our natural resources, to skin and exhaust the land instead of using it so as to increase its usefulness, will result in the undermining in the days of our children of the very prosperity which we ought by right to hand down to them amplified and developed."

Theodore Roosevelt: Message to Congress, 1905

"The true art of politics is to win people's support for a good cause, even when the pursuit of that cause may interfere with their own particular momentary interests."

Vaclav Havel

"Let us give our Republic not the best possible laws but the best which they will bear. This is the essence of politics; all the rest is speculation"

Sir William Harcourt: Letter to Charles Dilkes, 1870

Chapter One: Introduction

1.1 Preface

1.1.1 The Law and Environmental Problems

Public concern and governmental involvement in environmental issues has reached new heights in recent years; environmental considerations are high on the agenda of governments and large companies[1] and the sheer volume of legislative material which has been produced is remarkable, especially when set against government policies of de-regulating industry.[2] A figure of £500 billion per annum had been estimated for the world wide costs of compliance with environmental regulation by 2000.[3] Suggestions that environmental issues would fade away with a shift to the next fashionable cause have been proved hopelessly over-optimistic and it seems difficult to overestimate contemporary levels of concern about environmental problems.[4] This increasing concern, which has not only been identified by environmentalists,[5] is despite a healthy degree of scepticism, with a refusal to take ecological warnings at face value.[6] These concerns are such that some have doubted whether the conventional political processes, or the law which results from those processes, can play any meaningful rôle in finding solutions to the multiple environmental "crises" we face.[7] From the 1960's, eco-political thinking developed rapidly and by the 1980's the entire concepts of "industrialism" and "industrial growth" were being questioned, with the slowing or stopping of growth seen as an opportunity for emancipation of individuals from State

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[1] Royal Commission on Environmental Pollution 21st Report, " Setting Environmental Standards" ("R.C.E.P. 21st") p. 126.

[2] Macrory, R., "Environmental law: Shifting Discretions and the New Formalism", in: *Frontiers of Environmental Law*, Ed. O. Lomas, (Chancery Law Publishing, 1991).

[3] United Nations Development Programme, referred to in R.C.E.P. 21st, at p. 1.

[4] Howarth, W., "Poisonous, Noxious or Polluting: Contrasting Approaches to Environmental Regulation", [1992] 56 M.L.R. 171.

[5] In *An Introduction to Law*, 5th Edition (Butterworths, 1997), a general introduction to law, Harris, P. identifies concerns over pollution and environmental effects as "possibly one of the most significant developments over the past 20 years", at p. 121.

[6] Both Channel 4 and the BBC broadcast a series of programmes (including, for example "Scare Stories") in the first half of 1998 which put both sides of this argument but emphasised the failure of warnings of catastrophies to materialise or stand up under close scrutiny, seemingly in an attempt to 'balance' the information provided by environmental pressure groups.

and corporate domination and for maintaining cultural diversity.[8] Whilst some of the impetus for environmental legislation has come from the European Union and broader international influences,[9] there has been something of a culture shift domestically as well. The need to integrate environmental considerations into other policy areas is now widely recognised.[10] The present Government has an objective that environmental issues be considered and addressed across the board, with every Department of State required to incorporate them within their policy-making: the Environmental Audit Committee of the House of Commons providing an audit of each Department's environmental performance and, within government, co-ordination through the establishment of the Cabinet Committee on the Environment.[11]

This awareness of environmental problems, and the need for action in order to meet them, leads to questions as to the kinds of action which can and should be taken. Whilst the incorporation of environmental thinking into all policy-making may be laudable, there remains a need for concrete measures to be taken in order to implement the general policies. Of the variety of tools for implementation law is an important and flexible one. Issues which arise are the rôles which law can play and how those rôles are to be constructed.

Environmental law has been defined as " the law regulating the relationship of us to nature, understood both as the world around us *and* as the nature we carry within ourselves".[12] The breadth of this definition indicates that what can truly be considered as "environmental law" is open to various interpretations and attempts exhaustively to

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[7] Jones, B., "Environmental law – Too little, Too late" in: *Frontiers of Environmental Law, op cit.,* at p. 69.

[8] See Eckersley, R., *Environmentalism and Political Theory: Toward an Ecocentric Approach* (U.C.L. Press,1992), Chapter 1.

[9] For example, the United Nations Conference on Environment and Development, Rio de Janeiro, June 1992.

[10] R.C.E.P. 21st, *op cit.,* at p. 127.

[11] For a discussion of the rôle of these new bodies see Ross, A., "Monitoring environmental performance in government: the rôle of the new Environmental Audit Committee of the House of Commons" [1998] P.L. 190. Michael Meacher, Minister for the Environment, speaking on the "Today" programme, 4 September 29, 1998, stated that the Committee would be second only to the Public Accounts Committee in terms of power and influence.

[12] Winter, G., "Perspectives For Environmental Law - Entering The Fourth Phase" [1989] 1 J.E.L. 38 (original emphasis).

define its proper scope may be impossible.[13] Whilst the above definition assists in identifying the scope of the issues which environmental law seeks to deal with, it does not address the questions of what the "law" itself comprises and the rôle which it can play. Some argue that the "environmentally aware" public do not use the law, or even the traditional democratic processes; not simply through dissatisfaction, but through a belief that they are not capable of dealing with the issues involved.[14] In fact, this may reflect dissatisfaction with the present law and legal institutions rather than the ability of law to play a part in addressing environmental problems.

The traditional approach in the United Kingdom has been incremental, with the "borrowing" of legal tools from other areas of the law for environmental ends. A body of principles which underpin environmental policy and law has, however, evolved which may be distinguished from and supplement the general principles underlying these other legal "tools": concepts such as "sustainable development" and the "precautionary principle" may be used as guidance for evaluating policy and law. The last decade has seen a more "integrated" approach by the United Kingdom, with comprehensive legislative measures creating more holistic pollution control mechanisms[15] and single agencies responsible for leading environmental policies and enforcement.[16] Whilst it may be argued that a distinct conceptual apparatus is emerging which is applicable across the range of issues covered[17] and that in that sense UK environmental law is "coming of age", there is no grand jurisprudential

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[13]See Ball, S. and Bell, S., *Environmental Law* 5th Edition (Blackstone Press, 1997), at p. 4.

[14] Hammer, R., "Developing Critical Perspectives Within Environmental Law": Paper presented at the SPTL conference, University of Warwick, September 1997. Nonetheless, such persons appear to use the law as part of a wider campaign, even where this provides for little more than delay at best. See, for example, the Newbury By-pass cases: '*Secretary of State for Transport* v. *Haughian and Others*' [1997] Env. L.R. 44 (Divisional Court) and 59 (Court of Appeal); '*Secretary of State for Transport* v. *Fillingham and Others*'[1997] Env. L.R. 73; and '*R.* v. *Secretary of State for Transport and Secretary of State for the Environment ex p. Berkshire, Buckinghamshire and Oxfordshire Naturalists' Trust and Others*' [1997] Env. L.R. 80, and Kunzlik, P. "The Lawyers Assessment" in: Bryant, B. et al *Twyford Down: Roads, Campaigning and Environmental Law* (E & FN Spon, 1996) pp. 225-294, in particular at pp. 237-238: "... the making of the [E.C.] complaint and subsequent stages in the enforcement procedure were important elements of a campaign to recruit public opinion against the project and to make it politically difficult for the Government to proceed with it ...".

[15] For example, Part 1 of the Environmental Protection Act 1990 and the Pollution Prevention and Control Act 1999.

[16] The Environment Agency set up under Part I , and the Scottish Environment Protection Agency set up under Part II, of the Environment Act 1995. The extent to which such measures have been driven by domestic, rather than European Union, policy is a matter for debate.

theory which underpins its development and implementation.[18] Other jurisdictions do seem to have taken significant steps in developing a body of environmental jurisprudence.[19] Nonetheless, the relatively undeveloped nature of environmental law means that it is still possible to shape its evolution[20] and the lack of a single theory may mean that a complex approach can be taken to complex issues.[21] One essential task for the development of environmental law is to identify the characteristics and nature of the issues which the environmental context presents, consider how those challenges can be met and whether the use of existing legal and other policy implementation tools and structures is adequate. This may be a particular problem for the law in view of the culture which has pervaded British legal institutions and lawyers:

> "For 'environment' a traditional lawyer reads 'property': English law reduces environmental problems to questions of property...But the truth has to be faced...The challenge appears, at this moment of time, to be likely to overwhelm the law...the guarding of our environment has been found to require an activist, intrusive rôle to be played by the executive arm of government."[22]

The rôle of executive government, rather than the judiciary, as being the source of measures to meet the environmental challenges has more recently been identified by Lord Goff:

> "...given that so much well-informed and carefully structured legislation is now being put in place for this purpose, there is less need

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[17] See Ball, S. and Bell, S., *op cit.,* Chapter 1.
[18] McAuslan, P., "The Role of Courts and Other Judicial Type Bodies in Environmental Management" [1991] 3 J.E.L. 195.
[19] See, for example, Ruhl, J.B., "The Case of the Speluncean Polluters: Six Themes of Environmental Law, Policy, and Ethics", [1997] 27 Environmental Law (Oregon) 343.
[20] Elworthy, S. and Holder, J., *Environmental Protection Text and Materials*, (Butterworths, 1997), at p. 3.
[21] Hammer, R., *op cit.* For example, whilst Part I of the Environmental Protection Act 1990 provides for *Integrated* Pollution Control, this operates in conjunction with other control mechanisms such as the Town and Country Planning system and the Water Resources legislation.

for the courts to develop a common law principle to achieve the same end, and indeed it may well be undesirable that they should do so."[23]

As Howarth points out, even if this view is accepted, there remains the question as to precisely what is to be done; the task of translating broadly, and often imprecisely formulated environmental goals into the detail required for effective law; and of providing and maintaining appropriate authorities to oversee its adherence remains a fundamental challenge to law and legal systems.[24] It is, perhaps, in carrying out these tasks that lawyers can meet McAuslan's challenge to put the "flesh on the bones" of concepts such as "environmentalism" and "sustainability".[25] Whilst there may be a need to infuse all levels of decision-making with a recognition of ecological[26] interests - so that they are at least considered at the initial phase of policy-making (where they are not, in fact, the driving force behind policy), rather than being sacrificed to the one-dimensional pursuit of economic goals through cursory *ex post facto* consideration - there comes a point when specific measures must be developed and implemented.

1.1.2 The Nature of Environmental Issues

Environmental issues generally have at least two distinctive characteristics; first, they do not solely involve relations between human actors;[27] and, secondly, they are likely to focus upon the position of future generations at least as much as the present one.[28] Whilst many policy objectives may address human health and property rights, the major step in identifying the need to protect the environment has been a recognition of the effects of human activity on the wider environment and future generations. This has, in part, involved an awareness that human activity has long-term consequences which are not immediately apparent and are often complex. Activity may have an

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[22] Scarman, *English Law - The New Dimension* (1974), selected extract from quotation in; Howarth, W., *op cit.*, at p. 172.
[23] '*Cambridge Water Company Limited* v. *Eastern Counties Leather plc*' [1994] All E.R. 53, 76.
[24] Howarth, W., *op cit.*, at p. 172.
[25] McAuslan, P., *op cit.*, at p. 197.
[26] Winter, G., *op cit.*, at p. 46.
[27] See Winter, G. quoted below.
[28] See the analysis of sustainable development below.

adverse impact upon ecosystems which are locally, nationally or internationally important. The consumption of finite resources may also impact upon ecosystems and will also have long-term consequences for human life if no alternative resources can be found within their life span. Whether an "ecocentric" view is taken (that concern for whole ecosystems is an end in its own right regardless of the value to humans) or an "anthropocentric" view (that environmental protection is required to protect the immediate and long term interests of humans)[29] the need for some form of protection remains. For example, the need to protect the habitat of a rare bird may be justified on the basis of protecting the species itself (which may be on the basis that it has a "right" to exist or that some other intrinsic value not connected to human usefulness requires its in protection), the wider ecological effects of its demise, effects upon the food chain, its rôle in pest control, the loss of amenity to human ornithologists or on other grounds. These justifications are, however, still based upon human ethical and moral values. In relation to contaminated land they could include the aesthetics of a derelict site, the loss of a scarce resource – land, as well as harm to humans, ecosystems, flora or fauna. Whichever justification is adopted, however, one of the great difficulties is in anticipating the long term effects of activity and the relative costs and benefits of taking or not taking action. Such costs and benefits are not limited to economic costs and benefits. Cost/benefit analysis may, therefore, involve the taking into account of factors which are not (immediately) human. Traditional legal concepts based upon inter-human relations are, therefore, unlikely adequately to identify problems and solutions.[30] Within English law, as the interests which need to be protected and promoted are essentially non-human, or at least relate rarely to "legal persons", the State (in various forms) takes on the rôle of guardian of the unowned environment[31] and of future generations. This rôle is supplemented and checked by interested groups and individuals where they can show a sufficient proximity of interest to a certain issue.[32] These distinctive features can also lead to difficulties in applying traditional philosophical frameworks. One example is the "Utilitarian"

[29] For an introduction to the concepts of 'ecocentrism' and 'anthropocentrism', see Pepper, D., *Modern Environmentalism* (Routledge, 1996) p. 15.
[30] Although the exercise of private property and other rights may have the effect of providing some environmental protection, this is often unintended.
[31] For example, through the Environment Agency.

approach. Carr has examined how taking account of non-human interests and the quality of life of future generations may necessitate adjustments to the "Utility" principle.[33] In assessing the net utility of an action, wider interests than those of general human society must be considered[34] which leads to the obvious questions of "what interests?" and "how?" Equally problematic is the question as to how far in time this wider interest should be considered;[35]how many generations are to be included within the assessment exercise. Projecting a number of future outcomes and selecting the one likely to provide the greatest overall utility is a Herculean task in the normal context of human society. The greater uncertainties resulting from these additional factors seem to make the task an impossible one. Although it provides no answer to specific utility determination problems, one (largely anthropocentric) way forward is to make determinations on the basis of current human utility, but to consider within human happiness the desire to safeguard future generations and the desirability of maintaining the earth's eco-system(s) and ecological diversity for human well-being and pleasure.[36] It is doubtful whether a narrow anthropocentric approach such as this can philosophically underpin the action required to meet the environmental challenges faced. Indeed, viewing humans as the only reference point for value[37] may be a cause of problems rather than a solution to them; and so the problems which the environmental context provides seem to require more than a slight adjustment, or clarification, of existing conceptual frameworks.

Although one fertile area for debate has been how the State can best fulfil its rôle, by direct intervention (such as "command and control" regulatory measures) or less direct measures such as market mechanisms,[38] one essential difficulty remains how to represent wider environmental interests within a legal and policy system which consists solely of human and legal actors. Dissatisfaction with the State as "Guardian"

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[32] For a discussion of interest group *locus standi* in England and Wales, see Purdue, M., "A Harpoon for Greenpeace?: Judicial Review of Radioactive Substances [1994] 6 JEL 297.
[33] Carr, I.M., "Saving the environment - does utilitarianism provide a justification" [1992] 12 Legal Studies 92.
[34] *Ibid.*, at p. 95.
[35] *Ibid.*, at p. 96.
[36] *Ibid.*, at p. 101.
[37] Pepper, D., *op cit.*, at p. 35.
[38] See, for example, "Economic Instruments for Water Pollution", Department of the Environment, Transport and the Regions Consultation Paper 20/01/98.

has resulted in the suggestion of extending legal rights from humans, corporations and other "legal persons" to the natural environment.[39] The assumption of the rôle of Guardian by the State also sets up a conflict between it and private individuals. Where the State has this kind of relationship with individuals it is traditionally governed by administrative law. The wielding of the enormous power of the government machine against individuals has prompted the traditional administrative law focus on fairness and justice to the individual, and protection of private rights;[40] the assumption being that the collective good is protected by the power of government. Thus the law focuses upon social interactions as issues and in the administrative context the State is seen as pursuing wider social or political ends in conflict with private rights. Where environmental issues depart from this paradigm is that the environmental consequences of human activity involve physical as well as social issues and so there is a difference between the State acting as a distributer of human-based resources and as the protector, or manager, of the environment.[41] The concept of sustainable development is a recognition of the physical nature of the issues involved, both in terms of current effects on the world around us and the physical legacy of current action. This physical nature is a second reason for the use of administrative law as the primary tool for environmental law-makers. Whilst criminal law has a rôle as the ultimate sanction for non-compliance with environmental rules, and civil law has been used for some environmental ends, the basic requirement of many environmental rules is physical action of some sort. This may be the removal or reduction of pollutants from a variety of discharges, compliance with specific requirements as to the deposit of waste materials or physical clean up of controlled waters or contaminated land. Whilst injunctions are available (in certain circumstances) through the civil law, these are rarely granted where positive action is required, rather than to require a party to refrain from an activity.[42] Furthermore, the civil law's primary remedy is usually

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[39] Stone, C., *op cit.*

[40] See Harlow, C. & Rawlings, R., *Law and Administration*, 2nd Edition (Butterworths, 1997), Chapters 2-4.

[41] It may be true that other areas of the law address physical issues; personal injury can clearly be categorised as 'physical'. However, it could be argued that these are the exception, rather than the norm, and that, in any event, those issues are purely ones of inter-human relations.

[42] Whether the activities provided as examples of the physical nature of environmental issues could actually be adequately controlled by suitably worded negative injunctions is a matter for debate, however, it the substance rather than the form of an injunction which determines whether it will be granted, there are further problems such as the discretionary nature of the relief and the experience of

damages and the successful party is free to use these for any purpose, there being no requirement to apply them for physical remediation. There is no assurance, therefore, that success in a civil suit will cause any physical action to take place. Instead, the State uses administrative measures to secure and control action, with criminal sanctions and/or powers to take action and recover costs (or to seek injunctions where appropriate) in default.

Two elements of the rationale for the use of administrative law to deal with environmental issues specifically are, therefore, the lack of legal identity of the environment and the primarily physical nature of the issues presented. Further reasons for the use of administrative law systems generally, such as polycentricity or the fact that decision-making is substantively political, are discussed below.[43] A debate as to which issues are primarily physical could lead back to the question of defining "environmental law",[44] however, the subject of this study is the way in which rules to address environmental issues are developed, rather than seeking to redefine this concept itself.

So far as the framing of environmental rules is concerned, the environmental principles which have been developed[45] offer some guidance as to the values which must be incorporated within policy and legal strategies. Analysis of existing theoretical work in an environmental context may help to develop these principles, to identify the qualities of environmental issues which require a distinct theoretical approach, and to provide some suggestions as to how law and policy may better incorporate and implement the principles.

The use of rules as a means of implementing environmental principles has important consequences for our conceptions of environmental "harm". This is because, in order to implement strategies to tackle environmental harm, the rules must also define

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their use has suggested they are of limited use. 'Grampian conditions' are an example of how negative restrictions which require positive actions can be successfully usaed in the Planning context ('*Grampian Regional Council* v. *City of Aberdeen Distroct Council*' (1984) 47 P. & C.R. 633).

[43] See Chapter Two.

[44] For example, a 'test' for whether a particular rule forms part of 'environmental law' could be whether it fundamentally addresses issues beyond purely inter-human relations.

"harm" itself and thereby shape our perceptions of it. These do not necessarily correspond to actual, physical harm; and so "harm" becomes a legal and political construct with its definition influenced by a number of factors, including economic considerations. The type of rules which are used and the frameworks within which they are implemented have, in turn, significant impacts upon how these concepts are defined.[46] Furthermore, difficulties in defining "harm" or, more realistically, the *risk* of harm, come from a number of sources. These include; a lack of scientific knowledge as to the toxicity of the majority of chemicals used commercially; the effects of complex combinations of substances and effects of single and combined substances on complex ecosystems;[47] the uncertainty of much scientific data and knowledge – "Science is not a matter of certainties but of hypothesis and experiments";[48] and differing perceptions of the relevance or acceptability of risk.[49] The concept of "risk" in environmental protection emphasises the undesirability of an outcome and the aim of attaching a probability to such an outcome.[50] There are many approaches to considering risk, including actuarial, economic, epidemiological and cultural. [51] With the latter, the perception of a risk will depend upon the cultural background of the person assessing it. Thus a bureaucrat may consider risk acceptance in terms of the ability of institutions to control them by routines; the entrepreneur may see risks as offering opportunities; and the "atomised individual" may see life as a lottery, with risks impossible to control.[52] It is clear that conflicts may arise in the views of risks taken by the bureaucrat and the (fatalistic) atomised individual; and conflicts in the perceptions of risks are also likely to arise between bureaucrats, industrialists and environmentalists. Many factors which create risks are themselves uncertain and the lack of a single cultural perspective of risks (both as to the importance of particular risks and the ways in which to address them) exacerbates

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[45] See Chapter Two for a discussion of these.
[46] An example of such an impact is the use of policy and a discretionary decision-making system for the definition of 'harm' and 'significant' in relation to Contaminated Land.
[47] Ladeur, K.- H., "Coping with Uncertainty: Ecological Risks and the Proceduralization of Environmental Law", in: Teubner, G. et al Eds., *Environmental Law and Ecological Responsibility* (Wiley, 1994), pp.303-4.
[48] R.C.E.P. 21st, *op cit.*, at p. 28.
[49] See R.C.E.P. 21st, *op cit.*, Chapter 4 and Renn, O., "Concepts of Risk: a Classification", in: Krimsky, S. & Golding, A. Eds., *Social Theories of Risk* (Praeger, 1992) p. 53.
[50] R.C.E.P. 21st, *op cit.*, at p. 51.
[51] Renn, O., *op cit.*, at p. 56.

this risk uncertainty. These cultural perspectives of risk are important when seeking to interpret a principle such as the precautionary principle and to devise rules which implement it.[53] They may also lead to a range of perspectives as to the need for, and ability of, regulatory measures to control risk through environmental protection measures. The "fatalist" may perceive regulatory (or indeed any human) action to protect the environment as useless because of our inability to exert any degree of control over nature. Others may see such human activity as having a severe impact upon delicately balanced natural systems and will , therefore, be concerned that any action is clearly identified as having an overall benefit, without adversely disturbing those balances. A bureaucrat or technocentric may view environmental issues (and risks generally) as matters which can (and should) be controlled by administrative or technological means; and an industrialist, whilst accepting the need to address proven risks and not being averse to environmental protection *per se*, may be primarily concerned with minimising obstructions to the creation of wealth, which is seen as the as the source of measures for environmental protection.[54]

1.2 The Objectives, Approach and Significance of the Study

1.2.1 Objectives

One of the aims of this study is to identify the qualities of environmental issues which present particular challenges to the rule-maker and which may require a distinct approach, both in terms of the rules which are made and the process by which they are made.

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[52] *Ibid.,* at p. 74.

[53] Examples of divergent views of risks and the ways in which to tackle them are found in the responses to consultation on Contaminated Land in Chapter Six and differing perceptions of the risks posed by genetically modified crops are found in '*R.* v. *Secretary of State for the Environment, Transport and the Regions and Minister of Agriculture, Fisheries and Food, ex p. Watson'* QBD July 10, 1998.

[54] For a discussion of such perceptions see Adams, J., *Risk* (U.C.L. Press, 1995), Chapter 3 where four categories are identified for cultural theory of risk; individualists; egalitarians; hierarchists; and fatalists.

The primary aim of this study is to analyse the process of environmental rule-making, within the limited focus set out above. This will help to ascertain how environmental principles are implemented by the use of particular kinds of rules and to highlight the qualities of environmental issues which present particular challenges to the rule-maker. This primary objective has four main facets. First, analysis of the process whereby rules - and environmental law in particular - are developed, primarily with regard to public consultation. Secondly, to identify those involved in the rule-making process and how they participate. Thirdly, to identify the desires held by consultees, and the extent to which they are accommodated by the rule-makers. Fourthly, to identify and analyse the types of rules and rule-systems which have been developed and the factors which influenced this development. An important part of this final aspect is to consider the part which legal rules can, or are perceived as being able to, play in a new environmental decision-making system; and whether modification of traditional legal rule-types is required in order to meet the challenges faced. In view of the particular characteristics of contaminated land issues, it will also be necessary to consider whether the rule-making challenges are specific to, or exacerbated by, the contaminated land context and whether the nature of the consultation processes reflects contaminated land issues specifically or environmental issues more generally.

1.2.2 Approach

One of the greatest challenges to environmental lawyers is to put the "flesh on the bones" of environmental principles and concepts. One particular way in which lawyers and others can approach that challenge is by formulating rules. The process of rule-making, from the identification of particular issues or problems to the bringing into force, and finally the use of final rules is, however, lengthy and complex. The diagram illustrating the "Rule-making Process" (Figure 1.1 below) identifies six main stages of rule-making. The first stage is that where a problem and the need for some kind of action to deal with it (if possible) becomes apparent.[55] The second stage comprises (more or less) objective determination by some governmental or other

[55] This awareness may arise from consideration of related areas of policy, public opinion, campaigning by pressure groups, or a number of other sources.

body of whether any action is required; is possible; and, if so, the kind of action required.[56] The next stage is the formulation of some concrete ideas as to the approach which might be appropriate for dealing with the problem.[57] As with most of the other stages, "political will" is very important here, as a dissipation of public concern, for example, can result in the problem being forgotten; proposals not being formulated; or proposals being "shelved". If legal rules are considered necessary for addressing the problem, either by direct use such rules or through the need for legal powers to be provided in order for a different approach to be taken, the process for adopting those must be followed. At the fifth stage, the measures devised are implemented and individual decisions are made where they form part of the adopted approach to the problem. Finally, the implementation and decision making stage may identify defects or inefficiencies in the approach devised and, if these are sufficiently serious, they may result in political or legal challenges to the approach and to the rules which implement it. This may complete the cycle by identifying a problem requiring action (Stage 1).

The process also has many branches dealing with different rules, such as legal rules and scientific standards. Each stage of the rule-making process and each branch could form the basis of a study in its own right. It has, therefore, been necessary to select a particular stage of the process and, in order to restrict the study to manageable aims, to select a particular theoretical approach to it. In view of the distinguishing characteristics of environmental issues and the resulting primary legal tool for addressing them, the theory of administrative rule-making has been chosen as an appropriate approach.

A further reason for selecting this approach is that, to the author's knowledge, it has not been the subject of substantive published research in the area of environmental law. Other "views of the cathedral" would include; economic appraisal; science/risk assessment; philosophic consideration; policy analysis; and environmental ethics.

[56] The typical process within government might be consideration by a Select Committee, or consideration by Civil Servants under political guidance of Ministers and others.
[57] An example of this stage might be the publication of a Select Committee Report, a White Paper or other policy paper, or even a draft Bill.

Economic analysis has been the subject of a significant amount of recent legal research, including analysis in the environmental field.[58] Nonetheless, although these alternative approaches will provide the basis for some peripheral discussion, consideration of administrative rule-making theory is a large subject in itself and leaves limited scope for consideration of other approaches.

[58] See, for example, Richardson, G., Ogus, A. and Burrows, P., *Policing Pollution* (O.U.P., 1982) and Revesz, R., *Foundations of Environmental Law and Policy* (O.U.P., 1997), Chapter 1.

The Rule-making Process

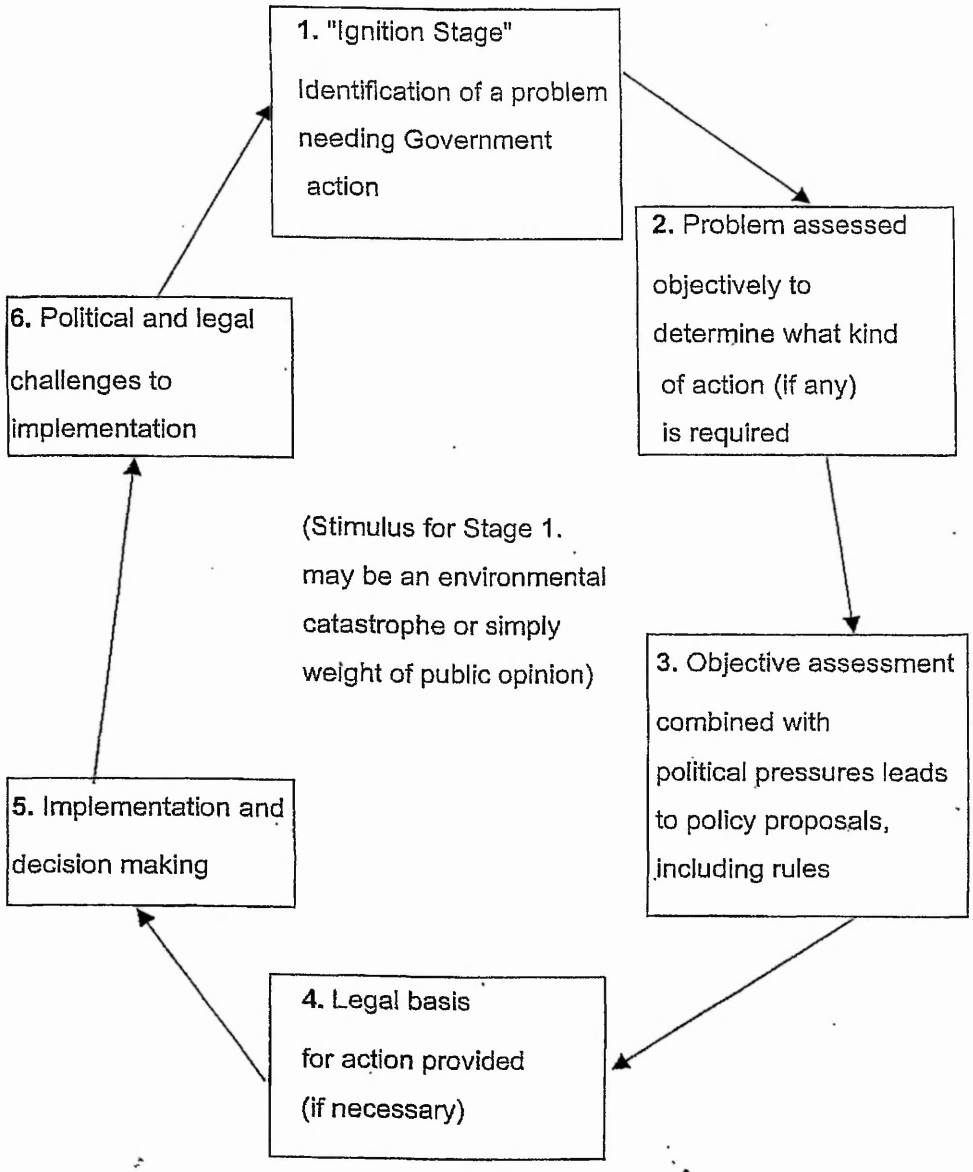

Figure 1.1

Diagram based upon "The Policy Cycle Model" in Le Seur, A. Sunkin, M., 'Public Law' (Longman, 1997) at p. 82, with additional material from RCEP 21st, op cit., p. 8.

Having established that the environmental context may provide particular challenges when devising and implementing rules and that there is a wide spectrum of views as to how to deal with the risks which might be faced, the issue of contaminated land has been selected as a suitable area for analysis and testing this hypothesis.[59] The fundamental reason for selecting it is that it has involved the development of a new and complex rule-system using a variety of rule-types and mechanisms in order to address the issues to which contaminated land gives rise.[60] The particular advantages of concentrating on contaminated land are that the new legal regime has been the culmination of a lengthy and open process of development[61] with a succession of legislative measures[62] and public consultation processes[63] all seeking to deal with contaminated land through legal and/or other rules. At the same time the appropriate approach to contaminated land has been the subject of much academic and professional consideration, from a wide variety of disciplines and professions.[64]Furthermore, contaminated land has been dealt with at a national level, thus avoiding the additional complexities involved in devising and implementing policy at a European Union or international level (and the resulting complexities in analysing such developments).[65] A "national" approach has been possible (although not necessarily ideal) because of the nature of the environmental medium involved. The clear trans-national considerations which arise when dealing with media such as water and air rarely arise with land pollution, so there is a limited scope for contamination to become an international issue for an island nation.[66] Great Britain is

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[59] The meaning of 'contaminated land' and the nature of the issues involved is discussed in Chapters Three & Four.

[60] See generally s.56 of the Environment Act 1995, inserting ss.78A to 78YC into the Environmental Protection Act 1990.

[61] See, for example, the House of Commons Environment Committee, First Report on *Contaminated Land*; Session 1989-90, HC Paper 170-I ("*House of Commons (1)*"); House of Commons Environment Committee Second Report on *Contaminated Land*, Session 1996-97, HC Paper 22-I ("*House of Commons (2)*"); Department of the Environment: *Paying for Our Past* (1994); and Department of the Environment: *Framework for Contaminated Land* (1994) ("*Framework*").

[62] Some of which were repealed without coming into force; Environmental Protection Act 1990 ss.61 & 143.

[63] Such as a Department of the Environment Consultation Paper on s.143 Registers (1991); *Paying for Our Past*, *op cit.*; and "Consultation on Draft Statutory Guidance on Contaminated Land" (1996).

[64] Many of these will be discussed in the analysis in Chapters Three & Four.

[65] National action has taken place in the context of policy discussions at a European level; see, for example, the EC Green Paper on Remedying Environmental Damage (COM (93) 47 final) and so national measures have not been devised completely in a vacuum.

[66] One likely source of international problems from 'migration' of contamination is radioactivity and, as is the norm in British environmental law, this area is dealt with in specific legislation and excluded

further insulated from migratory "trans-boundary" land pollution because of the direction of prevailing winds and the fact that no major international watercourse runs through the country.[67] At the same time, the core environmental principles apply to contaminated land and so the analysis made and conclusions drawn may be of general application. On the other hand, the major disadvantage of studying this area is that it is of largely historic effect (dealing with clean up of past pollution, rather than prevention of future pollution) and is atypical because (at least arguably) it concerns the introduction of retrospective liability. The Government considers that future contamination of land should be prevented by appropriate use of existing measures such as pollution control regimes[68] and so the primary focus of its policy in this area has been on the clean-up of past pollution. Although the imposition (or, the Government has claimed, mere clarification) of liability upon certain groups to clean-up past contamination was not the only option when seeking to address such issues,[69] the adoption of such an approach has drawn particular attention to that aspect of the new regime.[70]Although this helps to illustrate one of the central themes of the thesis - that the physical nature of environmental issues is the source of many difficulties in devising and implementing environmental policy - the retrospective nature of the liability system selected does provide a particular focus which is not generally present in environmental issues. On the other hand, it may be that retrospectivity is merely an acute example of the fact that environmental problems call for physical solutions. Retrospective legislation is required because of past failures to develop sustainably. These failures have had physical consequences and it is the fact that these past activities have contemporary physical consequences which are capable of remediation which makes retrospective, or retroactive, liability an attractive option, or, perhaps

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from the scope of the general measures; see the Environment Act s.78YC. A further basis for international action which is applicable to an island nation is the economic basis: differing environmental responsibilities and liabilities between nations meaning that the full costs of production are internalised to differing degrees. This has been an important argument for action at European Union level - the distortion of competition between member states.

[67] Macrory, R., "British Environmental Law: Major Strands and Characteristics", [1989] Connecticut Journal of International Law 287 at pp. 288-9.

[68] See para 2 of the "Statement of Government Policy" contained in the Draft DETR Circular: 'Environmental Protection Act 1990: Part IIA; Contaminated Land' (October 1999), although the new regime seems to cover current and future pollution if these 'other regimes' fail to prevent "harm" etc. (see ss.78A & 78B where there is a continuing duty on local authorities to identify sites and take action.

[69] Others including funds drawn from industry sectors or general taxation.

even an inevitable response for the rule-maker. Retrospective legislation is rarely necessary in other areas, such as commercial law, as past failures do not generally leave a physical legacy which is capable of remedial action.[71] Why contaminated land particularly requires retrospective liability remains an important question and the answer may have something to do with the nature of the medium affected. It may also serve to hint at the draconian measures which may be necessary if control of impacts on other environmental media are inadequate. A further problematic aspect of the new regime is that it has not yet been implemented and so it is not yet possible to study how it is working in practice.[72] Nonetheless, the positive aspects of the area of study outweigh this disadvantage, in particular, because this research focuses on the rule-making process, rather than upon questions of implementation. The use of environmental rules in practice has already been the subject of detailed research in a variety of areas[73] and the focus of this study is the development of rules rather than their use in practice. In such a context the existence of comprehensive and well-documented consultation processes; failed attempts to introduce differing rule-systems; the absence of the additional complexity which might have arisen had contaminated land been subject to international measures or produced trans-boundary effects; and the construction of a highly complex rule-system as the latest attempt to deal with the issues involved are of much greater use for analysis and evaluation than questions of implementation.[74] The fact that the new laws are not yet in operation does not detract from the value of examining how environmental rules come about; the processes and other influences which shape them and which identify what can and cannot, or ought not, to be addressed.

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[70] See, for example, Shelbourne, C., "Historic Pollution –Does the Polluter Pay?" [1995] J.P.E.L. 703.

[71] Though see the discussion of retrospective rules in Chapter Three, where reference is made the retrospective application of law in areas including commercial law.

[72] The Government intends that the legal regime will come into force in April 2000 (DETR News Release 981, 1999), and Regulations which bring the new regime into force have been laid before Parliament (together with draft statutory guidance which provides many of the detailed rule comprising the new regime) with a commencement date of April 1, 2000.

[73] See, for example, Hutter, B., *The Reasonable Arm of the Law* (Clarendon Press, 1988), Hawkins, K., *Environment and Enforcement* (Clarendon Press, 1984) and Richardson, G. et al, *Policing Pollution* (1982), *op cit.*

[74] Indeed, it is the failure of previous attempts (such as the use of Registers under s.143 of the Environmental Protection Act 1990 and the remediation of closed landfill sites and other land affected

Perhaps the most important reason for selecting the area of contaminated land as the focus of study is, however, the fact that a type of rule new to British environmental law has been devised in that area.[75] Questions which immediately arise upon the adoption of such a novel approach are: "what does it mean?" and "why has it been used?" The former question may be considered in the light of experience of the use of similar rules, albeit in different contexts, although the true impact may well only be revealed by practical use. It is the second question which provides most scope for analysis: in seeking to identify why the novel rule-type is needed a close examination of the nature of these issues and the way in which our rule-making processes operate leads to fundamental questions about the nature of many environmental issues and the ability of law and other instruments to deal with them.

The history of the development of a regime to deal with contaminated land helps to identify the key areas of the rule-making process which should be investigated. This has been characterised in particular by numerous and substantial consultation exercises and the use of a rule-type new to environmental law. Thus consultation and rule-making provide the focus of this investigation, forming part of Stages 3 and 4 in the rule-making process.[76] The consultation exercises appear to have been influential, with the abandonment of rule-systems following consultation on them. They also suggest that there was room for choice as to the types and content of the (legal) rules which could be used. In contrast, there has not been widespread consultation on the scientific rules which have been developed contemporaneously with the legal rules: these have been presented as a "given", as scientific fact rather than a matter for wide debate.[77] The consultation process provides an opportunity, therefore, to analyse the views and values of sectors of the "policy community"[78] with regard to environmental issues (having first identified that policy community), and to investigate how those

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by deposits of controlled waste under s.61 of the Environmental Protection Act 1990) to make it to the implementation stage which, in part, identifies the difficulty in dealing with environmental issues.

[75] The 'mandatory guidance' provided for in ss.78A(2) & (5), 78B(2), 78F(6) & (7), 78Q(6) and 78YA. Whether this is truly 'new' to environmental law is considered further in Chapter Four.

[76] As illustrated in Figure 1.1 above.

[77] The process for the setting of scientific and technical standards has been the subject of criticism: see R.C.E.P. 21st, *op cit.*, generally

[78] Those involved in the processes of policy-making and other kinds of rule-making. For a discussion, see Chapter Five.

views and values were dealt with by the rule-makers. This can then be considered in the wider context of rule-making and can help to identify the rôle that legal rules can play in addressing environmental issues.

1.2.3 Significance

This study comprises a review of the literature on rules and rule-making and the application of this to the environmental law-making process. The empirical work undertaken included securing access to responses to a number of consultation exercises which, although publicly available, are by virtue of their length and number not easily accessible. This was supplemented by two interviews with those involved in the environmental rule-making process. Although few in number, these interviews were lengthy and detailed and were with key personnel who worked very intensively on the contaminated land rule-making process and did so for a considerable period of time. These interviewees also had vast experience of other rule-making exercises, in both environmental and other areas. The question of how rule-making is undertaken in the field of environmental law, and the rôle of consultation in that process in particular, has not previously been the subject of substantive published research.[79]

Collation of material through the empirical research undertaken and analysis of that material against the conceptual framework adopted makes an original contribution to learning.

In addition, for the reasons described above, the contaminated land regime has its own significance and it is important that the regime, and the way in which it was developed, is studied.

[79] Studies have been carried out in the area of environmental policy making (for example with regard to the water industry: Maloney, W.A. & Richardson, J.J. *The Politics of Water* (Edinburgh University Press, 1995)), including at least one which considers contaminated land and consultation (Walton, W. "Bad land and bad law: the rôle of local authorities in the formulation of new legislation and guidance for contaminated land in the United Kingdom" [1997] 15 Environment and Planning C: Government and Policy 229). These have not, however, been conducted from the perspective of the environmental lawyer (having been conducted from those of the policy analyst and land economist, respectively), nor have they focused on legal issues.

1.3 The Structure of the Study

This study has briefly introduced the environmental issues with which it is concerned and will next consider some key underlying concepts. It will then (Chapter Two) analyse in detail the theoretical basis of rule-making, primarily in the administrative law context (that being the context for the Contaminated Land regime). This will include; the forms and functions of rules; the process of rule-making; and the rôle of rules in decision-making.

The specific nature of contaminated land issues will be further investigated in Chapter Three with particular reference to the application to this of the environmental principles and the particular nature of environmental issues (identified above). The early stages of the development of policy and of legal measures to address contaminated land issues will then be examined. Chapter Four will bring evaluation of policy and legal measures up to date by closely analysing the development and nature of the new legal regime for contaminated land.[80] Chapter Five will then focus on one particular area of rule-making which has been particularly important in the case of contaminated land: the consultation process. Consultation theory with regard to rule-making generally will be examined before we consider, in detail, the consultation process for Contaminated Land.[81]

The empirical part of this research is then set out in Chapter Six. The methodology for analysis of responses to the founding policy document of the new Contaminated Land regime will be set out, followed by presentation of the results of that analysis. General conclusions are then set out in Chapter Seven. These will consider some of the challenges faced by the environmental rule-maker, both in relation to contaminated land and generally, together with possible methods of meeting those challenges.

[80] Part IIA of the Environmental Protection Act 1990.

[81] Thus the detailed examination of the Contaminated Land consultation processes is conducted out of sequence chronologically. The reason for this is that it enables the resulting rules to be identified and analysed (in Chapter Four) and the process whereby these rules were arrived at to then be considered in detail. Examining the rules helps to establish some of the issues for investigation in the rule-making process.

1.4 Key Terms: Principles, Policies, Standards and Other Rules

1.4.1 Competing Theories and Approaches

In order to place later parts of this Thesis in a conceptual context, we must establish a clear terminology and clarify the concepts to which the terms "rules", "law", "principles", "policies" and "standards" are to be attached. The issues which underlie the development of these concepts can be viewed as a matter of legal philosophy and have been discussed in some of the most important works on this subject.[82] A comprehensive review of this area is, however, beyond the scope of this study although some analysis of the ideas expressed in the jurisprudential context will assist.[83] Such ideas have focused upon legal principles, policies and rules and, mostly, upon judicial decision-making. It is intended, however, to place the discussion and terminology outlined below in a more general, policy-centred context. To some extent this simplifies discussion of these issues as there is a more general consensus in the literature as to the application of the key concepts in the legislative sphere than in the realm of common law, the latter being the most contested.

One of the many ways in which human societies can be distinguished from animal groups is by reference to social rules.[84] Pound defines a rule as a "legal precept attaching a definite detailed legal consequence to a definite detailed state of fact".[85] Twining and Miers use the term "rule" to mean a general norm mandating or guiding conduct or action in given situations. They identify four particular aspects of this formulation: a rule is normative or prescriptive; has some generality of application rather than being prescriptive of a unique event; may guide and/or serve as a standard

[82] For example, Dworkin, R., *Taking Rights Seriously* (Duckworth, 1978) and Hart, H.L.A., *The Concept of Law* (Clarendon Press, 1961).
[83] See particularly Dworkin, R., *Taking Rights Seriously op cit.*, which includes response to the critique of Raz, J.
[84] Harris, P., *op cit.*, at p. 1 The line where animal instincts and social rules divide can be hard to draw and some animal groups, such as the higher primates, would appear to have quite complex systems of social behaviour.
[85] Pound, R., *Jurisprudence* (1959), quoted by Jowell, J. in "The Legal Control of Administrative Discretion" [1973] P.L. 179, at p. 201.

for behaviour; and may provide one kind of justification for a decision or action.[86] It was suggested earlier that a body of environmental "principles" had been (and is being) developed to underpin environmental policy and law. Dworkin seeks to distinguish legal principles from policies and (particularly) from legal rules. He describes "principles" as standards to be observed, not because they will advance a socially desirable situation, but because they are requirements of justice or some other dimension of morality.[87] He thinks of "policies" as standards which set out goals to be reached, such as some form of social improvement or protection from adverse change.[88] He distinguishes legal rules from legal principles by reference to the character of direction which they provide. Legal rules are applicable in an "all or nothing" fashion: although a rule may have exceptions, legal consequences automatically follow when all of the conditions of the rule are met. [89] By contrast, however, a legal principle may be in the form of a maxim, such as "like cases should receive like treatment"; a legal policy may be the desire to minimise water pollution; and a legal rule may be the imposition of criminal liability for exceeding discharge consents. Twining and Miers reject Dworkin's emphasis of the "all or nothing" nature of rules on the grounds that it obscures three separate ideas: the level of generality or particularity of a prescription; its precision or vagueness and its status or force in dictating, guiding or influencing a result.[90]

Whilst Dworkin talks of principles in a legal context and, therefore, focuses upon judicial principles, the distinctions can be applied in a non-judicial (and even non-legal context) as they are based mainly on the generality of the standard set. Thus Jowell (considering the distinctions in an administrative law context) sees principles as normative moral standards by which rules may be evaluated; policies as broad statements of general objectives; and rules as the most precise form of general direction, requiring no more for their application than the happening or non-happening

[86] Twining, W. and Miers, D., *How To Do Things With Rules,* 3rd Edition (Butterworths,1991), at p. 131.
[87] Dworkin, R., *op cit.,* at p. 22.
[88] *Ibid.*
[89] *Ibid.*
[90] Twining, W. and Miers, D., *op cit.,* at p. 133.

of a physical event.[91] Policies and principles are referred to as "non-rule standards" by Dworkin and have a dimension different to those of rules. Whereas rules have the dimension of "validity" and are determinative of issues, non-rule standards have the dimension of "weight" and so may be outweighed by other considerations.[92] Dworkin suggests that if it is debatable whether a legal rule applies to a particular case the rule is dropped and non-rule standards are applied which weighed together determine whether or not the rule ought to apply.[93] His critics argue, however, that in cases of uncertainty we revert to the principles/policies underlying the rule and that this "purposive" approach tells us whether the rule should apply.[94] It can be argued that what Dworkin sees as principles and policies are in fact either summarised restatements of the purposes enshrined in a number of rules or actually "large-scale" less specific rules.[95] Harris suggests that rules and other norms in fact belong to different systems, so that rules alone can properly be said to comprise a "momentary" system of law, i.e. what the law is at a given point in time, but that principles and policies belong to non-momentary systems which may indicate what the content of valid law may be in the future or summarise what it was in the past.[96] The reversion to non-rule standards (which include principles embedded in morality) in "hard cases" is Dworkin's justification for rejecting the positivist separation of law and morality.[97] Dworkin further distinguishes between principles and policy by arguing that the former justify political decisions on the basis that they respect or secure individual or group rights, whereas the latter justify decisions by advancing or protecting some collective good or aim.[98] He accepts, however, that a rule and a principle can play much the same rôle so that the difference between them is almost purely a matter of form.[99] This may arise from the use of terms such as "reasonable" within a rule. The distinction between rules and principles is, however, maintained by the restrictions which rules contain upon the kinds of principles and policies on which they

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[91] Jowell, J., *op cit.*, at p. 201.
[92] Dworkin, R., *op cit.*, at p. 26.
[93] *Ibid.*, at p. 27.
[94] Harris, J.W., *Legal Philosophies* (Butterworths, 1980) at p. 175.
[95] *Ibid.*
[96] Harris, J.W., *Law and Legal Science* (Clarendon Press, 1979) at pp. 66-67.
[97] *Ibid.*, at p. 177.
[98] Dworkin, R., *op cit.*, at p. 82.
[99] Harris, J.W. (1980), *op cit.*, at p. 27.

depend,[100] i.e. the considerations external to the rule which may be relevant. Both Jowell and Dworkin see principles primarily as "judicial" and as addressing themselves to issues of justice and fairness, rather than to economic, political or social criteria. Jowell also distinguishes "standards" as being more general in their direction than rules, specifying policies whilst obtaining the benefit of flexibility in application. More precision may be provided by incorporating criteria as reference points.[101] For standards to be of use, however, there must be some level of consensus as to the basis of the qualitative judgement. Matters which involve personal taste cannot, therefore, usefully be judged by reference to standards. An important feature of standards is their flexibility and susceptibility to change over time, without any express change. For example, the meaning of "immoral" may change drastically over a period of time (and may also be difficult to judge if there is some lack of general consensus).[102] Statutory language may provide standards which fall to be judged against the prevailing attitudes at the relevant time. In such a case, the "always speaking" principle of construction will apply.[103]

By contrast to the views of Dworkin and Jowell, Hughes considers that no precise distinctions can be made between rules, principles and maxims but that the terms serve to mark differences of degree in the precision of guides to decision-making. Again, where no concrete rule is present and relevant, a case must be decided by a direct application of a principle or maxim, whereas in marginal cases rules may be applied "in the light" of principles.[104] Where concrete rules conflict, one must prevail and the other must give way. On the other hand, conflicts may arise between principles and other non-rule standards in which, again, one must prevail but here the other does not fall and may be applicable elsewhere: the maxims "many hands make light work" and "too many cooks spoil the broth" are both valid in their proper context but conflict on their faces.[105] The concept of sustainable development presents such a conflict within a single principle. Harris suggests, however, that principles can

[100] *Ibid.*, at p. 28.
[101] Jowell, J. *op cit.*, at p. 203.
[102] *Ibid.*, at pp. 203-4.
[103] See, for example, '*R.* v. *City of Bristol, ex p. Everett*' QBD May 13, 1998.
[104] Hughes, G., "Rules, Policy and Decision-making" [1968] 77 Yale L.J. 411, at p. 419.

conflict but still guide decision-making.[106] In that sense they may differ from rules because their purpose may be to raise the relevant issues or considerations without providing a definitive answer. Hughes believes that even when principles cannot, because of their conflicts, resolve specific problems, they can still identify the issues which a decision-maker must consider and can thereby contribute to the process of rational decision-making.[107]

Whilst Hart implicitly denied that principles and policies are part of the "law", and saw the law as a system of rules alone,[108] he acknowledged that rules are limited as guiding norms, primarily as a result of their "open texture".[109] As humans have a relative ignorance of fact and relative indeterminacy of aim, we are unable unambiguously to regulate in advance.[110] This, according to Hart, leads to the "hard cases" which Dworkin seeks to deal with through non-rule standards.

Hughes sees policy as a fundamental part of the law, the purposes underlying the rules will be expressed in some form within the rules themselves though these expressions of policy need not be complete or consistent:[111]

> "..'law' and 'policy' are not contingent territories suitable for border raids and frontier violations. Policy is almost always to some extent articulated in law."[112]

He sees rules as fairly concrete guides for decision-making geared to narrow categories of behaviour and he regards principles as vaguer signals which draw attention to general considerations which are relevant in deciding disputes under rules.[113] Hughes rejects Hart's rule-centred model of law as not accounting for all of

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[105] *Ibid.*, at p. 424. Raz, J. argues that rules may also properly conflict each other and thus have 'weight'. See Dworkin's response to this in *Taking Rights Seriously, op cit,* at pp. 72-78.
[106] *Ibid.*, at p. 425.
[107] *Ibid.*
[108] See generally: Hart, H.L.A., *The Concept of Law, op cit.*.
[109] *Ibid.*, at p. 120.
[110] *Ibid.*, at p. 125.
[111] Hughes, G., *op cit.*, at p. 430.
[112] *Ibid.*, at p. 439.
[113] *Ibid.*, at p. 419.

the materials which we would wish to call "law" and as not including all of the materials actually used in legal reasoning.[114]

Richardson *et al* contrast "rules" and "standards" in terms of specificity and consider that the use of predetermined rules is traditionally believed to fulfil the demands of the "rule of law", that legal rights may be finally determined only through the application of previously established rules[115]in contrast with arbitrary or capricious discretion.

This study will adapt some of the above-mentioned concepts in order to set out an environmental rule-making delineation.[116] No attempt is made, however, to provide a normative exposition of rule-types and, indeed, Twining and Miers suggest that this could well prove a fruitless task:

> "The material of law is so rich, so complex and so shot through with fine gradations that we are sceptical of the value of attempting a comprehensive taxonomy of types of rules."[117]

The conceptual framework to be adapted for the study will be based, primarily, upon the degree of precision provided by guiding norms and upon their legal status/effect. This adopts the elements identified by Twining and Miers as comprising the "all or nothing" aspect of rules.

The term "principles" is, therefore, used to connote those fundamental concepts which help form the basis of environmental philosophy, comprising mainly; *sustainable development*; the *"polluter pays" principle*; and the *precautionary principle*.[118] The

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[114] *Ibid.*, at p. 424.
[115] Richardson, G., Ogus, A. and Burrows, P., *Policing Pollution* (O.U.P., 1982) at p. 22.
[116] A simple diagram which sets out the broader types of rules which are commonly devised in the environmental law context, together with identifying the sequence in which they are developed.
[117] Twining, W. and Miers, D., *op cit.*, at p. 135.
[118] The nature of these principles is discussed in Chapters Two and Three. Other concepts could be justified as fundamental to environmental philosophy. In particular, the *preventative principle* (that pollution should be prevented at source in preference to dealing with its consequences) is a significant concept at European Union level, though it is at least arguable that its content does not add anything to that of the precautionary principle (see Krämer, L. *EC Environmental Law* 4th Edition (Sweet & Maxwell, 2000) at p. 17. Selection of the contaminated land regime as the subject of this study means

most important feature of these principles which distinguishes them from those considered in the preceding section is that these principles are not judge-made and are directly addressed to political, economic and social objectives and criteria. Environmental principles can be distinguished from legal principles in at least two ways: First, they are not restricted to the legal field and are applicable in a range of other disciplines; secondly, they are not judge-made, a fact which might arise from the relative youthfulness of the environmental context and the fact that the judiciary appears to believe that it is beyond its competence to develop principles for environmental protection.[119] The term "Rules" is used in this study to refer, not only to legal rules, but also to policy and standards. "Policies" and "policy" refer to more specific objectives and to the written and unwritten guidance which directs how those objectives are to be achieved. "Standards" will be used where decision-making is to refer to scientific or technical criteria, which may, or may not, be required or set out in policy or law. "Law" is used in a highly formalistic sense and will relate only to the common law, Acts of Parliament and secondary legislation made by way of statutory instrument. The artificiality of these distinctions is readily acknowledged, as is the fact that policy and political decision-making may in fact have more direct and immediate importance than law and legal decisions, this being a particular feature of environmental decision-making.[120] The terminology adopted is useful, however, to construct an environmental rule-making delineation and to assist with the critical analysis of the Contaminated Land regime and rule-making theory.

1.4.2 The Conceptual Framework Adopted for this Study

As environmental principles provide guidance as to the political, social and economic objectives which environmental policy and law should seek to achieve (and so are not completely divorced from policy objectives), the environmental context allows a linear rule-making delineation to be constructed. Principles such as sustainable

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that detailed discussion of the preventative principle is not required because the regime deals with existing pollution and not prevention of future pollution. Where issues as to prevention of future land pollution arise, these are dealt with in the discussion of the other environmental principles.

[119] See Lord Goff's Comments in '*Cambridge Water Co.* v. *Eastern Counties Leather*' [1994] Env. L.R. 105 quoted above.

[120] Ball, S. & Bell, S., *op cit.*, at p. 28.

development and the precautionary principle, therefore, provide the imperative for rule-making (and thus contribute to the "Ignition Stage" of the Rule-making Process, set out at p. 12) as well as some level of guidance for its evaluation. Such guidance is limited due to the uncertainties inherent in those principles and the inherent conflict within sustainable development.[121] Policy then sets out more detailed objectives which, in some cases, are then further defined by law. Jowell identifies the transformation of policy into law as "legalism".[122] The delineation does not suggest that all rules do, or should, travel along its entire length, rather it identifies a point at which a particular rule may be placed. Policy may be implemented by a number of tools, of which law is only one.[123]

This simplistic picture becomes more complex because principles may be directly incorporated within policy and law. The precautionary and "polluter pays" principles are now included within Article 174 (ex 130r) E.C., and sustainable development within Article 2 E.C. Although this requires that European Union policy is based on the precautionary and "polluter pays" principles and that sustainable development is to be one of the tasks, or objectives, of the Community, this does not provide any direct legal rights or duties within the UK.[124] They are also unlikely to be sufficiently precise or unconditional to be of direct effect.[125] The legal effect of these principles is, therefore, on the development of policy, which must be based on them as a matter of law.[126] This supports (and could be argued to enshrine legally at the European level) the view that environmental principles are the first stage of the rule-making delineation. Although a principle that precautionary action should be taken in order to anticipate future problems, on the basis of possible, rather than proven, risks could be viewed as a standard with which policy and law should conform, it can also be viewed as one of the starting points and (perhaps more importantly) one of the imperatives for

[121] Discussed in Chapters Two and Three.
[122] Jowell, J., *op cit.*, at p. 183.
[123] For example, the new Contaminated Land regime is intended to operate through a variety of mechanisms, both market and legal, with direct legal enforcement viewed as the last resort.
[124] See '*R.* v. *Secretary of State for Trade and Industry, ex p. Duddridge*' [1996] Env L.R. 325.
[125] Krämer, L., *Focus on European Environmental Law*, 2nd Edition (Sweet & Maxwell, 1997) at pp. 91-92.

[126] Although it seems that the principles are 'semi'-justiciable: see Case C-284/95 '*Safety Hi-Tech*' [1998] E.C.R. I-4301.

environmental policy. A clearer example is perhaps that of sustainable development. Whilst this principle may be used to evaluate policy and law, it is also the *raison d'être* for environmental policy. An activity can be judged as to whether it is sustainable or not but the need to develop in a sustainable manner is the reason why the policy is formulated in the first place. The principle of sustainable development has to some extent been enshrined in domestic policy and law by Section 4 of the Environment Act 1995 which states that the principal aim of the Environment Agency is to discharge its functions "so to protect or enhance the environment, taken as a whole, as to make a contribution to the objective of attaining sustainable development". This legal aim identifies the principle as a policy objective and the meaning of the policy/principle and the methods by which it may be achieved are set out in policy guidance issued by the Secretary of State.[127]

This can be contrasted with legal maxims or principles, which may suggest how law should deal with issues on a procedural basis but do not provide any imperative for policy or law to be developed. Environmental principles may, therefore, more clearly accord with "foundational policy" than legal principles. On the other hand, the "polluter pays" principle is more in accordance with the concept of "principles" established in the judicial context; providing guidance as to how the policy should be formulated or interpreted, rather than providing the imperative for the policy itself. In this sense, the "polluter pays" principle can be distinguished from sustainable development and the precautionary principle, the latter two providing the basis for environmental policy whilst the "polluter pays" principle guides its development, although the precautionary principle also provides guidance as to the formulation and interpretation of rules.

The picture is further complicated by the use of policy within legal frameworks to provide greater detail whilst retaining flexibility. Policy may, therefore, state the general objectives which may lead to detailed law or may supplement law in the form of detailed guiding rules where it is felt that the use of law may be inflexible or

[127] s.4(2) Environment Act 1995.

otherwise inappropriate. The delineation may, therefore, be devised as follows (in Figure 1.2):

(General) Principles

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(Purposive) Policy

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(Detailed) Law

|

|

(Supplementary) Policy

Figure 1.2

The delineation forms part of the Rule-making Process, but there are also the additional stages including those where; the specific issue in need of action is identified; the policy to address it is developed - which will often encompass a number of political and administrative stages; and the policy implementation is challenged politically or legally.[128] Environmental principles, as discussed above, will, therefore, provide the imperative for action by identifying the fundamental need for it (Stage 1); provide some guidance as to how the means to address it should be devised (Stages 2 and 3); and may also provide the basis for a political (and possibly legal in the EU context) challenge to validity (Stage 6). The principles should, therefore, be influential at several stages; policy identification; rule development; rule validity; and rule interpretation.[129]

[128] See p. 12.
[129] Rule interpretation will be considered in the next chapter.

Chapter Two: Rules and Rule-making Theory

Chapter One identified and defined some key concepts for this study which included the term "rules". The definition arrived at was a wide one, encompassing law, policy and standards. This Chapter will explore this rather unsophisticated definition in more depth. The first section will consider the nature of rules and analyse the rationales for their use. The second section will analyse the procedure by which rules are devised.

2.1 Uses of Rules

Before examining the detail of differing types of rule, it is important to consider the uses for which rules are formed within the scope of this study: administrative law. The massive expansion in the use of rules of all kinds in modern society (and complex rules in particular) has been argued to result from the increase in the number of lawyers and in legal activity and from the increasing sophistication of society itself.[1] The wide definition of "rules" adopted in Chapter One includes not only rules which impose duties or prohibit certain actions but also those conferring powers (and discretion) or specifying conditions for certain consequences to follow.[2] They can provide the power to make discretionary decisions and also provide the limits upon such discretion. They can also set out the conditions precedent to the making of new rules or the alteration of existing ones.[3] Rules can be introduced by a variety of organisations and the source or legal status of a rule is no guarantee of its practical impact. Discretionary decision-makers often introduce policies or practices which may amend the effect of a rule through its implementation.[4] Rules may be obeyed, applied, wielded, relied upon as justification, evaded or ignored. They can be used in order to guide decision-making, as a way of predicting it, as a justification for the

[1] Harlow, C. & Rawlings, R., *op. cit.*, p. 163.
[2] Twining, W. & Miers, D., *op. cit.*, p. 131. Rules can therefore identify the basis on which decisions can and should be made and also construct the organisational framework for decision-making.
[3] For example, rules as to Parliamentary procedure for passing primary or secondary legislation or rules of judicial precedent; what Hart would term 'rules of change'.
[4] These policies or practices may be publicised or may be unofficial or even secret. To this extent, decision-makers may also become 'legislators'. A common example of such 'legislation' is the development of planning policies within Development Plans by local authorities.

decision, as a tool for persuading the decision-maker or as a basis for bargaining and negotiation.[5]

Rules form the basis for almost all types of Government action. Although a rule may be restrictive or prohibitive, stating that a particular activity is not allowed,[6] the rule making that provision is likely to form only a small part of a complex system of rules which are required for effective action. There will also be "empowering" rules which promote or demand action rather than prohibiting it. Merely making an activity unlawful or requiring a particular activity to be carried out is unlikely to be effective on its own. In order to provide some level of legitimacy and legal authority for persons or bodies concerned with progressing the desired action, rules will be devised in order to provide the legal basis for their activities. These may include rules to establish the general basis of the body or persons concerned;[7] mandatory duties to carry out certain activities in all circumstances;[8] discretionary powers to carry out activities if it is considered appropriate in the circumstances;[9] supplementary powers which are necessary for the effective carrying out of the primary activity;[10] sanctions and other powers through which to secure compliance by others;[11] and rules providing the procedure for dispute resolution between parties and the basis on which those disputes are to be decided.[12] Where technical issues are involved in the relevant activities, a variety of standards may be relevant and form part of the rule-system.[13] Where there are discretionary powers and/or complex matters are to be considered, there may be policy rules which are used to guide the exercise of powers or decisions

[5] Twining, W. & Miers, D., *op. cit.*, p. 184.
[6] Such as the prohibition on carrying out a prescribed process without an Integrated Pollution Control ("IPC")/ Local Authority Air Pollution Control ("LAAPC") authorisation under s.6 of the Environmental Protection Act 1990.
[7] See those establishing the Environment Agency in Part I of the Environment Act 1995.
[8] For example, the duty of enforcing authorities to maintain registers under s.20 of the Environmental Protection Act 1990.
[9] See the power to revoke authorisations under s.12 of the Environmental Protection Act 1990.
[10] For example, powers to require the provision of information in connection with an authorisation application under s.6 and Sch.1 Part I of the Environmental Protection Act 1990.
[11] See the criminal offences in relation to authorisations under s.23 of the Environmental Protection Act 1990.
[12] For example, the appeals system under s.15 of the Environmental Protection Act 1990 and the Environmental Protection (Applications, Appeals and Registers) Regulations 1991.
[13] See, for example, LAAPC Process Guidance Notes.

on complex matters.[14] It is, therefore, of limited value to view rules in isolation and to ignore the wider rule-system of which they form part. The use of a number of different rule-types, with different characteristics, within a single rule-system can make a comprehensive or deep understanding of it somewhat elusive: many problems of rule handling arise from the complexity of the interrelationships within a body of rules and between bodies of rules.[15] A useful starting point for examining a complex rule-system may be to consider the types of rules which are devised, their characteristics and the rationales for both the rules and the characteristics.[16]

2.2 The Legal Status of Rules

2.2.1 The Source of Legal Status

A wide spectrum of rule-types may be utilised within administrative law rule-systems. At one end of the spectrum is "Hard Law", comprising primary and secondary (mainly in the form of Statutory Instruments) legislation and the common law. At the other end is "policy", which has no other legal status than being a relevant consideration for administrative decision-makers. Between these two is an area inhabited by numerous rules with varying legal status and with varying "textures" of language used[17] which has been described as "quasi-legislation". [18] Those rules which have legal effect but which are not provided by Hard Law (and which comprise mainly policy and quasi-legislation) can be referred to as "Soft Law". The variety of rule-types reflects the complexity of decisions to be made and the various political influences and controls over them. Government Departments are specifically directed to consider a range of methods for securing policy objectives, with a range of possible

[14] See, for example, LAAPC General Guidance Notes.
[15] Twining, W. & Miers, D., *op cit.*, p. 148.
[16] Although it would be folly to attempt this comprehensively: "The material of law is so rich, so complex and so shot through with fine gradations that we are sceptical of the value of attempting a comprehensive taxonomy of types of rules." *Ibid.*, p. 135.
[17] This is not simply a matter of choice for the rule-maker. It is the 'open texture' of language and our inability to predict all future possibilities and events which prevents the use of 'mechanical' jurisprudence. See Hart, H.L.A. *The Concept of Law* (Clarendon Press, 1961).
[18] This phrase was first used by Megarry, R.E., see "Administrative Quasi-Legislation", [1944] L.Q.R. 125. For a more recent discussion, see Ganz, G., *Quasi Legislation: Recent Developments in Secondary Legislation* (Sweet & Maxwell, 1987).

rule-types suggested including; voluntary action; statutory codes of practice; economic incentives; as well as primary and secondary legislation.[19] The legal force of such rules cannot be identified on purely formal grounds: legally binding provisions can be contained in circulars or codes of practice.[20] Determining whether rules are classified as "legal" or not is a less fruitful exercise than assessing the part which they play in government.[21] Their use is often a political compromise between pressures to enact legal rules and pressures to do nothing.[22] General classifications of quasi-legislation have been attempted and a particularly useful aspect of these has been the identification of various rationales for the use of particular rule-types.[23] One practical reason propounded for the plethora of informal rules - "Government by Circular" - has been increased pressure on Parliamentary time. It has been suggested that there has been something of a Parliamentary "bottleneck" in the rule-making process for some time and that one method of relieving pressure has been to use rules which can be brought into force without primary, or other, legislation requiring Parliamentary debates and divisions.[24] One result of this has been the use of "Framework Acts" which provide the basis for the governmental action required whilst leaving the detail to the relevant government departments and ministers.[25] It follows that detailed provisions, including technical standards, can be scrutinised by specialists; some arguing that the technicality of much modern legislation makes itself unsuitable to parliamentary scrutiny and debate.[26] To the more cynical eye, this also provides an opportunity for politically sensitive issues to be postponed to a time when public attention may not be so clearly focused upon them, or even indefinitely. A further aspect of this practical rationale for the use of quasi-law generally is flexibility and the need to keep up with developments.[27] In a rapidly changing world, there may be a need to amend and replace technological and other rules at a pace which the primary

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[19] *The Better Regulation Guide*, The Better Regulation Unit (1998), pp. 6-7.
[20] *Ibid.*, p. 2.
[21] Baldwin, R., *Rules and Government* (O.U.P., 1995) p. 7.
[22] Ganz, G., *op cit.*, p. 2.
[23] See, particularly, Baldwin, R. & Houghton, J., "Circular Arguments: The Status and Legitimacy of Administrative Rules" [1986] P.L. 239.
[24] See, for example, Harlow, C. & Rawlings, R., *op cit.*, p. 168. The dangers of undermining traditional notions of representative democracy which may result from the use of this method are recognised.
[25] *Ibid.*, pp. 164-7.
[26] Joseph, P.A. "Delegated Legislation in New Zealand" [1997] 18 Statute L.R. 85, at p. 91..
[27] *Ibid.*

legislative process cannot maintain. The "quasi-statute book", on the other hand, can be updated fairly rapidly. Of course, such speedy review of important rules also allows for politically motivated change, arguably without an appropriate period of reflection and consideration.

Baldwin and Houghton identify eight (non-exhaustive and overlapping) rule function models for administrative rules which are not in the form of primary legislation or delegated legislation in the form of Statutory Instruments; procedural rules - such as in applications for authorisations; interpretative guides - explaining how other rules will be applied; instructions to officials - being internal to the decision-making body, rather than a guide to applicants; prescriptive/evidential rules - guides which will be persuasive in determining whether other rules have been complied with (such as the Highway Code); commendatory rules - which suggest how compliance with other rules may be achieved; voluntary codes; rules of practice, management or operation - such as enforcement practices; and consultative devices and administrative pronouncements - decisions or announcements which go beyond a single case.[28] The variety of rule-types used, including; Departmental Circulars; Guidance Notes; Codes of Practice; Agency policies; Practice Notes; Memoranda, etc. can lead to uncertainty, particularly when the legal form of a rule is not determinative as to its legal effect. A Statutory Instrument can be of no legal effect and a less formal document can be of legal effect.[29] There also appears to be a lack of rationality when allocating rule-types to particular matters.[30] It is even possible for a rule to be of binding legal effect in one context, such as for Immigration Officers and Tribunals, whilst not in others, those rules not being binding on the courts upon appeal.[31]

2.2.2 The Effects of Legal Status

Whilst these devices may offer useful structuring to the exercise of discretion, there are dangers; they may also be used to make law without resort to Parliament, or

[28] Baldwin, R. & Houghton, J., *op cit.*
[29] Ganz, G., *op cit., p. 4.*
[30] *Ibid.,* Chapter 6.

illegitimately to instruct the judiciary as to the meaning of statutes. Furthermore, they may not be generally available and their status and importance may be unclear.[32] This uncertainty has, in part, resulted from the judicial approach to legal effectiveness. In order to ascertain the precise legal effect of different types of rules, the courts have looked at legitimacy - the intention of Parliament as evidenced by the provisions under which the rule is made - and the language used in the rule - whether it is clear, precise and "justiciable".[33] Whether a rule has legal effect and the precise nature of any effect will, therefore, be decided on a case-by-case basis and, in that sense, each rule is potentially unique: many may fall within classes of rules but others may be *sui generis*. There may also be some circularity in that quasi-law may be used because the material included is not suited to reduction to legal language, it being better expressed in more open textured, non-technical language (and, as we have seen, this is a further reason why quasi-law is a useful tool for the legislator). Although the second judicial principle mentioned above would suggest that it could not then have legal effect, this can be overridden if the intention of Parliament is clear.[34] It seems, therefore, that it is possible to have "policy" or "standards" which are of legal effect, provided that there is strong legitimacy resulting from evidence as to the intended effect. An obvious difficulty may arise where, for example, a decision-maker has a legal duty to comply with a rule which is not in precise legal language and the nature of that duty is, therefore, unclear. Of course, a rule having legal status is something of a "double-edged sword" for the administrator: whilst this may prove effective in justifying a decision made in accordance with the rule and prevent a legal challenge, the administrator is required to abide by the rule. However, this is also variable depending upon the rule. Hard Law requires compliance with it, with no exceptions other than those provided by the rule (or wider rule-system). Policy is usually a material consideration which a decision-maker should take into account or risk a challenge that the decision was *'Wednesbury'* unreasonable through failure to take into account a relevant consideration. Other influences may outweigh the policy and the weight to be given to it is a matter for the decision-maker, there being no legal duty to follow it. As

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[31] The 'Immigration Rules' made under s.3(2) of the Immigration Act 1971. For a discussion see, for example, Legomsky, H. *Immigration and the Judiciary* (Clarendon Press, 1987).
[32] Baldwin, R. & Houghton, J., *op cit.*, p. 239.
[33] *Ibid.*, pp. 248-252.

identified above, there may be rules which are advisory only and of no significance in proceedings, save for any "legitimate expectation" which may arise that the rule will be followed.[35] Whilst most rules will fall within these categories, there are some which have greater effect than material considerations whilst not amounting to law.[36] These include; the elevation of a rule to a higher status than other material considerations, such as the requirement to make determinations "in accordance with the [development] plan unless material considerations indicate otherwise";[37] specific requirements to "have regard to" guidance; and a code of practice which, whilst not being conclusive, is admissible and relevant in proceedings as to breaches of the duty of care as respects waste.[38] It is not suggested that the influence of a rule is solely reliant upon its legal form and effect. There are much more complicated relationships between rules and their influence upon behaviour. However, the legal status and form of a rule will be of great importance in some contexts, particularly where someone seeks to legally challenge a rule or a decision made under it.[39]

2.3 Rule Dimensions and Characteristics

Whilst legal status is one dimension of a rule (and legal sanction is one aspect of that), Black identifies three others; substance - what it says; character - whether it is permissive or mandatory; and the structure of the rule - scope, precision/vagueness, simplicity/complexity and clarity/opacity.[40] It is perhaps the last of these, the level of generality with which to frame the rule - the precision and scope for exceptions - which is the most difficult for the rule-maker.[41] Diver identifies three qualities of rules (which he also refers to as "dimensions"), the most significant difference being that the dimension of "substance" specifically includes congruence with policy

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[34] *Ibid.*, p. 249.
[35] See, for example, Baldwin, R. & Houghton, J., *op cit.*, pp. 252-258 and Dotan, Y. "Why Administrators Should be Bound by their Policies" [1997] 17 O.J.L.S. 23.
[36] For a discussion of the various legal effects of codes of practice, see "Codes of Practice and Legislation", Samuels, A. [1986] 9 Statute L. R. 29.
[37] s.54A Town and Country Planning Act 1990.
[38] s.34 Environmental Protection Act 1990.
[39] This may arise at Stage 6 of the Rule-making Process: see Chapter One.
[40] Black, J.M., "'Which Arrow?': Rule-type and Regulatory Policy" [1995] P.L. 94.
[41] Twining, W. & Miers, D., *op cit.*, p. 202.

objectives.[42] Baldwin identifies five dimensions which are essentially the same as Black's four and suggests that the failure of rules to achieve their objectives is often due to a failure to adequately consider enforcement of them, thus failing to select suitable rule-types and dimensions for those who must enforce them.[43] Rule dimensions are important because the way in which a rule says something may be as important as what it actually says, even though this may not be immediately apparent.[44] Diver is concerned with the optimal precision of rules and suggests that the costs of complying with them would be reduced for both the regulator and regulatee if verbal clarity were increased.[45] The justification for this is efficiency. McBarnett and Whelan see problems with this approach, seeing the desire for "formalism" as one from the regulatees, who wish to avoid rules through "creative compliance" where the policy underlying them is not accepted.[46] They describe how a number of techniques are used to crystallise rules which are developed with the intention of using a purposive and flexible approach in order to circumvent them through avoidance mechanisms. Thus there may be formal compliance with the rule but not substantive compliance: the underlying objective may be frustrated. Black identifies the use of differing rule-types as constituting a means of balancing the competing demands for certainty and flexibility: for uniformity and individualisation.[47] The tension is between having sufficient clarity that the subjects of the rules know where they stand, whilst providing sufficient flexibility and discretion that fair decisions can be made which consider the circumstances of the individual case. The formalism or flexibility of a rule can be affected by; its legal status - it could be detailed and specific yet lacking in sanction; or its structure - it could refer to flexible (or uncertain) concepts such as "reasonable". In the latter case, the use of Hard Law may not actually provide certainty despite its legal status. The concept is itself uncertain, however, the use of other rule-types may provide some certainty by providing guidance as to what the concept means or providing some context for decisions as to its meaning. The legal

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[42] Diver, C.S., "The Optimal Precision of Administrative Rules" [1983] 93 Yale L.J. 65.
[43] Baldwin, R., "Why Rules Don't Work" [1990] 54 M.L.R. 409.
[44] Black, J.M., *op cit.*, p. 94.
[45] Diver, C.S., *op cit.*
[46] McBarnett, D. & Whelan, C., "The Elusive Spirit of the Law: Formalism and the Struggle for Legal Control" [1991] 54 M.L.R. 848.
[47] Black, J.M., *op cit.*, pp. 104-106.

status of the rules means that the Hard Law should prevail if the other rules appear to undermine or conflict with it.

2.4 Certainty v. Flexibility: Rules v. Discretion

This tension between certainty and flexibility is a key element in the analysis of the Contaminated Land rules which follows in later chapters. It has sometimes been considered as co-extensive with the tension between rules and discretion, although pure, unfettered discretion is rare[48] and has been identified as a great threat to the rule of law.[49] The certainty/flexibility tension can also be viewed as a balance between equality of treatment and individual justice. The optimal balance is a value judgement and, therefore, there is no "correct" answer.[50] Environmental issues present particular problems of uncertainty.[51] They are usually complex[52] and are often reliant upon scientific knowledge and standards which may also suffer from problems of uncertainty.[53] At the same time, the physical nature of the issues[54] leads to greater demands for certainty.[55] However, the differing physical characteristics of environmental media and of the same media in different areas of the country (as well as other factors, such as local economic conditions) can also lead to a need for flexibility in approach and discretionary decision-making. We have also seen that demands for certainty may be generated by a desire to avoid rules and their consequences and so it can be difficult to determine whether demands for certainty result from "genuine" concerns or are attempts to formalise in order to circumvent them. Davis recommended that all unnecessary discretion be eliminated and that any remaining should be structured through earlier and more elaborate rule-making and/or made subject to checking.[56] Baldwin and Hawkins revisited this work and found that

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[48] For a discussion of the three main types of discretion see Dworkin, R., *op cit.*,and for a discussion of the 'senses' of discretion, see Galligan, D., *Discretionary Powers* (1986, Clarendon Press), Chapter One.
[49] See particularly, Davis, K.C., *Discretionary Justice* (Chicago, 1969).
[50] Harlow, C. & Rawlings, R., *op cit.*, p. 79.
[51] These are analysed in the discussion of 'Environmental Principles', below.
[52] See the discussion of 'polycentricity' below.
[53] See, for example, R.C.E.P 21st, *op cit.*, Chapter 2.
[54] Which can include impacts upon human health.
[55] See the discussion in ChapterOne, above.
[56] Davis, K.C., *op cit.*

discretion was more complex issue.[57] Davis had been concerned with individual justice and this reflected Diceyan notions of the rule of law based upon the courts protecting individual rights.[58] This view did not allow much room for protection of public rights or collective interests and reflected a philosophy that the law should act to protect individuals from the abuse of power by the State.[59] Social justice may require different levels of discretion and the strengths and weaknesses of control mechanisms need to be assessed in order to determine whether a net benefit would result from their use.[60] The focus on social, rather than individual, justice and on the public interest reflects different philosophies; that that the law should act as a facilitator of Government action (to be taken in the public interest) and that the political process, rather than the court, should be the focus, or that some middle ground between the first two philosophies is appropriate.[61] The reality is that discretion exists in the context of rules and other restrictions on actions - it is the "hole in the doughnut" of rules and restrictions, of law and policy.[62] The difficulties of incorporating environmental concerns within traditional legal systems, with the resulting "Guardianship" of the State, were identified in Chapter One.[63] These problems reflect the need to consider the wider public interest in considering "justice" in the environmental context and it would seem that the political process is better able to facilitate this than the judicial one. Although it is the failure of even the political process to provide this which is at the root of many environmentalists' concerns, the judicial process appears even less suited, both structurally[64] and philosophically.[65] Jowell identifies law as one method of controlling discretion and two legal techniques for this: rules, which "legalise" decisions; and adjudication, which "judicialises"

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[57] Baldwin, R. & Hawkins, K. ,"Discretionary Justice: Davis Reconsidered" [1984] P.L. 570.
[58] See Baldwin, R., *Rules and Government*, *op cit.*
[59] 'Red Light Theory', see Harlow, C. & Rawlings, R., *op cit.*, Chapter 2.
[60] Baldwin, R. & Hawkins, K. , *op cit.*, p. 599.
[61] 'Green Light Theory' and 'Amber Light Theory', see Harlow, C. & Rawlings, R., *op cit.*, Chapters 3 & 4.
[62] Dworkin, R. M., "Is Law a System of Rules?", in: *Essays in Legal Philosophy*, Ed. Summers, R.S. (Blackwell, 1968) p. 45.
[63] In section 1.1.2.
[64] Because of the division between political decision-making on the merits of issues and judicial review on the basis of following the correct procedures for in making such decisions.
[65] See the quotations from Lord Goff and Lord Scarman in Chapter 1, section 1.1.1, suggesting that the traditional philosophy of the judiciary is inappropriate for meeting the needs of such 'environmental justice'.

decision-making.[66] Rules are applied prospectively and adjudication takes place retrospectively. Rules are also shaped by their application, including adjudication. In some cases they may be followed strictly on one level whilst commercial-type negotiations take place on another.[67] Uncertain rules and judicial approaches to them may provide an incentive for such negotiation and Black suggests that "conversations" between regulators and regulatees may provide a resolution of the conflict between certainty and flexibility, though these may give rise to concerns about transparency of, and participation in, decision-making.[68] The merits of rules are that they provide for like treatment of like cases and for the accountability of decision-makers as they provide standards against which decisions may be judged.[69] Both of these should make arbitrary or improper decision-making less likely. Rules may also provide support for the decision-maker, providing a justification for the decision.[70] Further merits of using rules are that; they may reduce costs by allowing some level of routinisation of case handing; they can deal with broader issues than particularised adjudication, allowing strategic planning; they allow accumulated wisdom and expertise to be distilled and used efficiently; they allow cases to be judged with relative detachment; and, perhaps most importantly, their development may allow for wider participation and consultation, particularly amongst expert opinion, than adjudication could.[71] This final merit may also provide the basis for legitimising a set of rules.[72] Difficulties caused by the use of rules include; fettering freedom to make the substantively correct decisions; and rule-based, rather than objective-based decision-making. Whilst rules may play an important rôle in controlling discretion, extraneous factors are also important, as in the case of bureaucratic objectives; restrictions on resources; and other social, economic and political pressures, including the philosophy and objectives of the bureaucracy itself.[73] The attitudes of potential interpreters may influence the style of drafting of rules including, *inter alia*, the

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[66] Jowell, J., *op cit.*, p. 180.
[67] Harlow, C. & Rawlings, R., *Law and Administration*, 1st Edition (Butterworths, 1984), p. 494.
[68] Black, J., "Talking about Regulation" [1998] P.L. 77, pp. 91-93.
[69] Jowell, J., *op cit.*, pp. 184-191.
[70] *Ibid.*
[71] Baldwin, R., *Rules and Government, op cit.*, p. 14.
[72] Discussed below.
[73] Baldwin, R., *Rules and Government, op cit.*, pp. 13 & 16 and Baldwin, R., *Regulating the Airlines* (Clarendon Press, 1985), p. 141.

degree of discretion left. Attitudes might reflect the relationship between the rule-maker and the decision-maker. For example, the relationship between central and local government, changed from one of consensus (where attitudes were similar) to one of law in the 1980's (where attitudes became more polarised).[74] A further example of the influence which extraneous factors may have on the rules used is where the rule-maker also has control over the decision-maker's budgets, so that there may be less need to rely upon rules.

2.5 The Limits of Legalism: Decision-making and Review Functions

2.5.1 Differing Perspectives

The attention given to rules by lawyers may result from a particular cultural perspective. Lacey argues that lawyers see problems arising from ambiguities or gaps in rules and that they see a corresponding need for more rules where problems arise.[75] The traditional view, influenced by Dicey and Davis, is that the world is essentially governable by rules. This, however, leads to a focus on fairness and formal justice to individuals rather than substantive and collective results.[76] This legal paradigm is reflected in Diver's view of the optimal precision of rules where more, or more comprehensive, rules providing greater clarity are thought to be needed.[77] The basis for this evaluation is improved efficiency in decision-making and reduced compliance costs. This argument may, however, be flawed, or at least its application in the environmental context may be inappropriate. It may be based on the same dubious underlying assumption upon which Davis' theory is based, i.e. that the decision-making process in a bureaucracy typically resembles a "transmission belt" and works at high volume: an idealised model of bureaucracy.[78] The legal paradigm also appears to assume that the decision-maker's main considerations are rules and legal rules in

[74] Ganz, G. *op cit.*, Chapter 5.
[75] Baldwin, R., *Rules and Government, op cit.*, p. 17.
[76] *Ibid.*, p. 19.
[77] See above.
[78] Even if it is correct that the majority of decision-making processes in other contexts are of this "transmission belt" type, application of these theoretical approaches to more complex decision-making processes is flawed. Environmental decision-making is typically infrequent and very complex, with processes which are correspondingly lengthy and complex (see the discussion below).

particular. It has been suggested that administrators actually view policy objectives as their mandate for action, rather than law; and that law is viewed negatively, as a hurdle to be jumped in order to implement the policy and to be evaded, or interpreted "creatively", where there is a conflict with it.[79] McBarnett and Whelan's recognition of the tendency of lawyers' to seek to formalise purposive approaches[80] suggests that rules and certainty are desired in order to satisfy lawyers' own needs: to advise clients and to set up avoidance schemes where possible. It seems that in some areas at least, lawyers' success in obtaining formalistic law has led to a failure of legal control.[81] In addition to issues of certainty, flexibility and fairness, "consumers" of rules may desire user-friendly rules and so demand qualities such as simplicity or intelligibility. Such demand may be heightened (but precluded) by the complexity of environmental issues.

It has been argued that government has assumed managerial responsibilities in areas of complexity as part of the move from the liberal to the welfare State.[82] Decision-making in these areas is more expert and technocentric and requires that decision-makers have a greater margin of appreciation, with a shift from formalistic to purposive reasoning.[83] This complexity is a major feature of environmental regulation:

> "The catchword for the study of environmental law is complexity...Environmental law arises in a world of many parties where issues are linked together in mysterious ways, and each 'definitive' resolution is but the prelude to future bargaining, compromise and defection..."[84]

Situations are less likely to recur in these contexts and so reference to standard reference points may be of limited value. Thus the nature of the decisions to be made

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[79] Harlow, C. and Rawlings, R., 1st Edition, *op cit.*, p. 45.
[80] McBarnett, D. & Whelan, C., *op cit.*
[81] *Ibid.*
[82] Baldwin, R., *Rules and Government, op cit.*, p. 28.
[83] *Ibid.*, p. 29.
[84] Rogers, W.H., quoted by Ruhl, J.B., "Complexity Theory as a Paradigm for the Dynamical Law-and-Society System: A Wake-Up Call for Legal Reductionism and the Modern Administrative State" [1996] 45 Duke L.J. 849, at p. 855.

may result in a bureaucracy which functions in a very different way from the idealised model. Both rules and adjudication are useful tools where issues are relatively self-confined, with limited scope for wider effects. Where decisions take place in a wider context, with a single decision affecting many others, legal control may be of limited use. Law is extremely useful for determining disputes between a small number of parties, primarily on the basis of "yes-no" and "more-less" questions.[85] Where decisions affect many people and are more like a strand of a spider's web,[86] legal processes cannot accommodate all of the interested parties and their views. The decision is essentially a political one and public representation is through the ballot box rather than through participation in the legal process. Fuller adopts the term "polycentric" to describe where the limits of legal control are reached. Polycentric problems have a complex network of relationships, with interacting points of influence. Each decision communicates itself to other centres of decision-making, changing the context so that a new basis for the next decision must be found. Fuller argues that all issues are polycentric to some extent, the question is whether the polycentric elements are so significant and predominant that the proper limits of adjudication have been reached. Generally, problems in the allocation of economic resources present too strong a polycentric pull to be suitable for adjudication.[87] A classic example of a polycentric issue is land-use planning, where each decision is interlocked with others and the reference points to which arguments are directed are open textured such as "the public interest" or "good planning principles".[88] Ganz suggests that the question as to who should make decisions and review them, the politicians or the lawyers, is really a question as to whose value judgements we wish to apply; and that the identity of the person who hears an appeal may be as important as the nature of the grounds for appeal used.[89] The allocation of decision-making and appeal functions could, therefore, depend upon whether the rules are open textured, leaving room for arguments as to policy; or involve questions as to the public interest

[85] Jowell, J. p. 213.
[86] Each decision affecting a complex network of other decisions.
[87] Fuller at pp. 398-400.
[88] Jowell, J., p. 214.
[89] Ganz, G. "Allocation of Decision-making Functions" Parts 1 and 2 [1972] P.L. 215 & 299.

(political); or merely require the application of facts to law (legal) but Ganz suggests that such allocation has not always been rational.[90]

2.5.2 Decision-makers and Review

Where issues are so strongly polycentric that they are deemed to be "non-justiciable" (and, therefore, matters for political rather than judicial control),[91] the response is to provide a legal framework for the political decision-making. This is both prospective, by setting up the procedure for decision-making and identifying relevant and irrelevant considerations, and retrospective, by providing for review of the way in which decisions are made, whilst not considering the substance of the decision.[92] In this situation, therefore, the legal control is procedural rather than substantive and questions the legality, rather than the merits, of a decision.[93] Such control operates in much the same way when challenges are made to policies or other rules devised by decision-makers, or to their interpretation.[94] These can be challenged on the basis that they were not properly made (in a procedural sense), or that the decision-maker's interpretation of them was not within the bounds of reasonableness; but not on the basis that they are incorrect in substance. This contrasts sharply with the situation in the United States where administrative rule-making is substantively reviewed by the courts.[95] However, in the context of analysis of justiciability, a significant point is that the courts in the United States are in a very different constitutional position to those in the United Kingdom,[96] where the "Queen in Parliament" is constitutionally supreme[97]

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[90] *Ibid.*

[91] See, for example, Marshall, G. "Justiciability ", in: *Oxford Essays in Jurisprudence*, ed. Guest, A.G. (Oxford University Press, 1961), where it is suggested that, although there are clear cases of 'political' and 'judicial' issues, the distinction is often unclear .

[92] It is at least arguable that substantive review of decision-making does take place under the guise of judicial review, however, in theory this should not take place.

[93] Ball, S. & Bell, S., *op cit.*, p. 36

[94] See *'R.* v *Derbyshire C.C., ex p. Woods'* [1998] Env. L.R. 277 for an example of the restrictions of judicial review of policy interpretation.

[95] Under the Administrative Procedure Act 1946.

[96] Asimov, M. "Delegated Legislation; the United States and the United Kingdom" [1984] Oxford Journal of Legal Studies 235, at p. 268.

[97] Bailey, S.H. & Gunn, M.J., *Smith & Bailey on the Modern English Legal System* (Sweet & Maxwell, 1996) 3rd Edition. Although the discussion of the use of "quasi-legislation" above identifies how this supremacy may be circumvented in certain circumstances, this does not alter the constitutional position of the courts, and the supremacy theory remains intact theoretically as the quasi-legislation must ultimately rely upon Parliamentary approval of its use in outline at least.

(though the constitutional position, and corresponding role, of the judiciary may require a radical review in the light of the Human Rights Act 1998). Thus, where decisions are of a sufficiently polycentric nature that control by legal rules is undesirable or impossible, legal rules are used in a limited way and other rules, such as open-textured policy guidance, may play a more significant part. Where decision-making is made by non-judicial means, two main problems may arise. If decision-makers lack the homogeneity of the judiciary, it may be difficult to ensure sufficient certainty in the interpretation and application of rules. In the polycentric context, rules are also likely to be open-textured - as the decisions made under them are unlikely to result in simple yes/no ("binary") answers - and so more flexibility in interpretation is likely to be possible. Where decision-makers are also open to influence from other factors, such as political or financial influences[98] (to which judicial decision-makers are not considered subject) additional uncertainty may result. The second problem is that of accountability. Although the judiciary is not immune from concerns as to accountability, its lack of accountability is a necessary consequence of its independence, which is one of the foundations of our constitution. Furthermore, in those cases in which it is politically inappropriate for non-accountable judges to deal with the particular issue in dispute, the case is excluded from judicial determination on the ground that it is non-justiciable, i.e. that it raises political questions which will be for political rather than judicial determination. Where decision-makers are local authorities, there is political accountability through the local electorate,[99] which may also be the source of many of the non-rule influences. This can provide its own problems in that a conflict between central and local government is also a conflict between central and local political mandates, the central mandate generally prevailing. Greater difficulties arise as to the accountability of a non-elected body, particularly where there is a significant level of independence from the relevant Minister and a resulting lack of accountability by the Minister for the body, as with the "Next Steps" agencies.[100] The changing nature of relations between central and local government has already been noted and, as well as using rules, central government may supervise

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[98] Ball, S. & Bell, S., *op cit.*, p. 57.
[99] Jones, B. l. & Thompson, K., *Garner's Administrative Law*, 8th Edition (Butterworths, 1996), p. 34.
[100] *Ibid.*, pp. 29-30, although Ministers do remain accountable for such agencies to some degree: see para 1(ii) of the *Ministerial Code* (Cabinet Office, July 1997).

local authority decision-making by hearing appeals, as well as by "calling-in" certain planning and other decisions.[101] These will usually comprise a hearing *de novo* and will, therefore, provide a substantive review, rather than the procedural review undertaken by the courts.

2.5.3 Decisions and Review in the Environmental Context

In the field of environmental law, both the political nature of the issues raised and their physical nature suggest that it is rational to include local authorities as decision-makers. The political reason is that the issues are generally polycentric, including local effects on industry and health; whilst differing physical circumstances around the country suggest that local knowledge and flexibility are required. However, the rôle of local authorities as decision-makers can also lead to significant differences, despite central control through rules and appeals, in approaches to decision-making and in levels of experience and/or expertise. At the central level, the need for consistency was one of the reasons for establishing a single Environment Agency for England and Wales,[102] amalgamating the functions of, *inter alia,* the National Rivers Authority, the Waste Regulation Authorities and Her Majesty's Inspectorate of Pollution.[103] Despite the "all pervading" nature of environmental considerations within central government, departmental control remains primarily within a single Department, the Department of the Environment, Transport and the Regions. Appeals are usually to the Secretary of State,[104] usually with provision for judicial review. The magistrates' court hears appeals on justiciable issues in a number of areas,[105] whilst criminal sanctions and civil remedies, are available in the appropriate higher courts. The environmental administrative decision-making and review system is, therefore, mainly political and local authorities are often the first instance decision-makers. The Environment Agency often has an input into the local authority decision-making

[101] Ball, S. & Bell, S., *op cit.,* p. 40.
[102] Under Part I of the Environment Act 1995.
[103] In order to provide a 'one-stop-shop' advocated by industry and environmentalists.
[104] Mostly delegated to an 'inspector', often of the planning inspectorate.
[105] Such as appeals against notices requiring abatement of Statutory Nuisances under Part III of the Environmental Protection Act 1990.

process[106] and in some cases is itself the first instance decision-maker, for example, where the nature of a project or decision requires specialist technical knowledge or was within the competence of the Agency's predecessors.[107] In terms of legitimacy, whilst local authorities have their political mandate, the Environment Agency seems to rely upon technical expertise, combined with some, limited, political accountability.[108]

As environmental issues are often the quintessence of polycentricity, environmental law has been characterised by discretion and political, rather than judicial, control.[109] Macrory has identified a shift from discretion to formalism in environmental law, with the increased use of Hard Law to express environmental standards and objectives.[110] This represented a shift from policy-based control towards legal constraint. It did not, however, represent a fundamental change in approach but merely a change of *emphasis*. Macrory has noted the phenomenon of "shifting discretions" so that, although the focus of discretion may have moved from standards, discretion itself still remains a powerful force (and provides flexibility) in the enforcement process. The "crystallisation" of standards within formal rules also leads to a need for additional layers of informal rules, or Soft Law, in order to put the "flesh on the bones" of the statutory standards. [111] Environmental rules remain primarily policy-based and subject to political control. Having policy-based discretionary rules which leave the question of exceptions open may also encourage higher standards than "harder" rules which my have to specify all exceptions in advance. Whilst the use of Hard Law may provide for some transparency and clarity regarding legal obligations, Macrory identifies a number of dangers which result; a lack of flexibility and ability to react to developments; a masking of scientific uncertainty; uncertainty resulting from

[106] For example, local authorities must consult with the Agency where determining planning applications *inter alia* where the development includes the use of land for waste disposal.
[107] For example, the system of waste management control (previously being controlled by the Waste Regulation Authorities) and controls over water pollution (previously undertaken by the National Rivers Authority).
[108] For example, the government has control over resources, appointment of Board members and the tenure of the Chief Executive.
[109] Ball, S. & Bell, S., *op cit.*, pp. 111-112 .
[110] See Macrory, R. "British Environmental Law: Major Strands and Characteristics", *op cit.*, and "Environmental Law: Shifting Discretions and the New Formalism", *op cit.*
[111] *Ibid.*

possibility of challenge to the legality of consents etc.; and the frustration of local public participation procedures. This is important because the more that fundamental policy questions and the setting of technical standards are predetermined by central government through statute, the more the expectations of public participation in individual administrative decisions will be marginalised.[112] Indeed Steele has noted that that, although the common law (and nuisance in particular) may provide some flexibility by providing standards which differ from regulatory standards, its use is severely limited by access restrictions, primarily *locus standi.*[113] The challenges of involving "the environment" in decision-making were set out in Chapter One[114] and it appears that, save for judicial review,[115] public participation in decision-making is mainly through general political processes at both local and central level. One result of this is that attention may be directed towards the rule-making stage, rather than decision-making, and focus particularly on central government rule-making. It follows from Macrory's thesis that public participation in the rule-making process is a key element in providing rule-making legitimacy.[116]

2.6 The Rule-making Process

In Chapter Five we will consider consultation theory and the rôle of public participation within the policy process. The empirical section of this study will then analyse the consultation process which was followed in the framing of the Contaminated Land regime. Firstly, however, we will consider the process by which rules are developed, the methods through which they are scrutinised in Parliament and the resulting claims for legitimacy. [117]

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[112] "Environmental Law: Shifting Discretions and the New Formalism", *op cit.*, pp. 19-21.
[113] Steele, J. "Private Law and the Environment: Nuisance in Context", [1995] Legal Issues 236.
[114] Section 1.1.2.
[115] See Chapter One.
[116] Whilst enhanced public participation in environmental decision-making may be required in order to fulfil obligations under the Aarhus Convention and as part of the implementation of the Human Rights Act 1998.
[117] The analysis of rules and rule-making which has been set out above and follows below has not specifically considered the influence of the European Union. In depth analysis of these particular issues is beyond the scope of this study, however, that is not to deny the importance or relevance of the European dimension. Where the European dimension is relevant to a specific area of the contaminated land rule-making analysis below it will be considered in that context. Rule-making in the European context has particular characteristics and presents particular challenges: see Snyder, F., "The

2.6.1 Policy Development

The first three stages identified in the Rule-making Process (set out in Chapter One, Figure 1.1) deal with the formulation of policy and policy implementation measures, including rules. The establishment of general policies is a necessary precondition for any system of environmental control.[118] Whilst some government action on environmental issues may originate from manifesto commitments, most does not.[119] It originates instead within government departments, with a significant amount being derived from recommendations made by Royal Commissions or Select Committees.[120] The impetus for some policy initiatives may be provided by a crisis or unexpected event, such as a catastrophe or scandal of some sort,[121] whilst for others it may be a problem of a recurring or systemic nature and problems needing attention may also be caused or highlighted by previous policy initiatives.[122] In short, by whatever means, an issue becomes politically significant to the extent that government action is considered desirable. Once the issue is identified, a decision-making procedure is initiated to assess how to address it. The decision will be made in the context of a number of procedural and substantive restrictions, both legal and political. These may include pre-existing rules and obligations (both procedural and substantive and derived form the domestic, European Community and International spheres) and political conventions and pressures.[123] The nature of the problem to be addressed will act as a guide to one of the first decisions which may be involved in policy-making, i.e. whether it will represent an "incremental" or "substantively rational" policy

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Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques" [1993] 56 M.L.R. 19 The transposition and implementation of European rules into domestic law also involves distinct issues and has been argued by Baldwin to have particular failings as regards claims for legitimacy (Baldwin, R., *Rules and Government, op cit.*). Finally, even where concrete rules do not emanate from Europe, discussions and deliberation of policy in areas which are the subject of domestic rule-making are likely to be significant considerations for the domestic rule-makers. These 'European' aspects may also be relevant, to a lesser degree, with other international bodies or groups.

[118] Ball, S. & Bell, S., *op cit.*, p. 96.

[119] Zander, M. *The Law-Making Process*, 4th Ed. (Butterworths, 1994) p. 3.

[120] *Ibid.*

[121] For example, the Flixborough explosion in Humberside, the "Seveso Barrels" hazardous waste scandal, the BSE crisis, and the examples relating to contaminated land provided in Chapter 3.

[122] Le Seur, A. & Sunkin, M., *op cit.*, p. 85.

[123] *Ibid.*, pp. 86-92.

change.[124] "Incrementalism" is an "organic" system of change, so that policy development takes place by a dynamic series of small adjustments (each change being restricted in scope) after consideration of a limited number of options, in a decentralised context which may often be reactive. "Substantive rationality" requires the consideration of goals, the identification and assessment of every possible method of dealing with them and the selection of the most suitable system.[125] It, therefore, requires open-minded and comprehensive solutions, that all values are expressly articulated, and that choices are rationally justified. An important feature of this is that issues cannot be left open or ignored, and that goals have to be clearly specified in order for the consideration process to be undertaken. The most demanding aspect of this approach is, however, that the consequences of each policy option must be considered, which may involve risk assessment or cost-benefit analysis.[126] Public participation can play an important part in assisting rational choices and, if of sufficient scope, may help to prevent "agency-capture" which can be a problem where a limited number of interests are involved in considering limited changes to policy.[127] Van Meter and Van Horn suggest that where there is a major (comprehensively rational), rather than incremental, change to policy, there is a reduced likelihood of consensus as to the desired goals amongst the participants in the policy-making process.[128] This may result from the fact that such a policy shift is likely to be controversial or from the fact that there is greater room for dispute where there are a greater number of policy options and, therefore, a wider range of issues involved. Because of its characteristics, the adoption of a "substantively rational" approach is expensive and demands a great deal of time. This, and the impossibility of meeting its requirements completely mean that a compromise with incrementalism is probably the most appropriate methodology,[129] although comprehensive rationality is desirable

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[124] For a discussion of these concepts, see Diver, C. "Policymaking Paradigms in Administrative Law" [1981] 95 Harvard L.R. 393.
[125] *Ibid.*, pp. 396-401. Substantive rationality is, obviously, a goal at best for mere mortals.
[126] *Ibid.*, p. 416.
[127] *Ibid.*, p. 424. However, in any system of participation there are dangers of undue influence. Public participation also performs important legitimation functions. See below.
[128] Van Meter, D.S. & Van Horn, C.E., "The Policy Implementation Process: A Conceptual Framework" [1975] 6 Administration and Society 445, at p. 460.
[129] Although some argue that the whole debate between which methodology to use is artificial in that all decisions will be comprehensively rational at the micro level and incremental at a macro level, the apparent method resulting from the position of the observer, i.e. a series of incremental steps, when

where even small errors in policy may have severely harmful or irreversible effects.[130] The legal and political constraints on policy-makers mean, however, that comprehensive rationality is unlikely to ever be fully achieved. A practical way forward for issues considered significant enough for an broad approach is to adopt a two-stage procedure involving an initial wide sweep of options, followed by a detailed consideration of a more limited range of options.[131] In any event, policy development is unlikely to be treading new ground as there are few areas where the government is not already actively involved and so there will be a process of "policy succession"[132] even where a "comprehensively rational" approach is taken: policy is constantly re-made rather than newly invented. New policy is, therefore, likely to be developed because of problems with existing measures. It is more likely to be prompted by the lack of existing measures.[133] Of course, one outcome of the policy-making process will be to decide whether a complete departure from existing policy measures is required (thus entailing a substantively rational consideration of potential new rule-systems), or whether existing measures are sufficiently adequate that the problem in question can be addressed by an incremental change to the existing rule. If Van Meter and Van Horn are correct, there may be an incentive for policy-makers, and particularly those who will be consulting interest groups, to develop policy in incremental steps, or at least to present policy measures as incremental changes rather than new rule-systems, as incremental policy changes are more likely to retain a consensus among the "policy community".[134]

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viewed as a whole, can amount to a substantively rational shift: see Smith, G. & May, D. "The Artificial debate Between Rationalist and Incrementalist Models of Decision-making" [1980] 8 Policy and Politics 147. However, incremental steps do not take as broad a view as comprehensive rationality, nor do they 'rock the boat' with such major shifts and changes.

[130] Diver, C. "Policymaking Paradigms in Administrative Law", *op cit.*, p. 432.

[131] See Etzioni, A. "Mixed Scanning: A Third Approach to Decision-making" [1967] 27 Public Administration Review 385.

[132] Where the new initiative takes place in the context of existing policy measures: see Maloney, W.A. & Richardson, J.J. *The Politics of Water* (Edinburgh University Press, 1995) p.9.

[133] *Ibid.*

[134] *Ibid,*. p. 10. Whether presentation can actually address the consensus problem, which results from substantive differences of view, is another question. As stated in Chapter One, "policy community"

2.6.2 Policy Objectives

It seems that the clear identification of policy objectives is a pre-requisite for successful rule-making. It is clear that rational decisions as to rule-making issues are hindered by a lack of clarity as to the fundamental purpose of the rules. Whilst Diver identified congruence with policy objectives as one of his dimensions of rules,[135] this seems to take clear objectives as a given. It assumes that the optimal precision of rules cannot be identified without clear purposes.[136] The government sees identification of the exact policy objectives underlying legislation as an essential first step in developing regulation.[137] Lindblom suggests that comprehensive rationality relies upon the clarification of values and objectives and on the selection of the means to achieve defined ends. The result of this, it is argued, is that the more complex an issue, the less useful such an approach is, and the more there is a need for an incremental approach, despite its inherent flaws.[138] Twining and Miers identify the lack of clear policy objectives, or competing or inconsistent objectives, as one of the "common conditions of doubt" when interpreting rules.[139] The issue is, therefore, relevant to the interpreters and users of rules as well as to rule-makers. Whilst a lack of clarity of policy objectives is possible with most issues, there are particular problems in the environmental context. These stem in part from the uncertainties inherent in the "environmental principles". A key point about these principles is that, although they are important in shaping the overall pattern of the law, they can only provide the most general of guidance as to particular decisions.[140] However, they do comprise the "foundational policy" on which environmental law is based[141] and are likely to be considered in formulating environmental policy. A brief discussion of the principles and of the uncertainties which are inherent in them should help to identify

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refers to those involved in the processes of policy-making and other kinds of rule-making. For a discussion, see Chapter Five.

[135] Diver, C.S., "The Optimal Precision of Administrative Rules", *op cit.*

[136] Whilst Diver does not specifically discuss the problems of establishing clear policy objectives this is likely to be due to his focus on other aspects of rules, rather than a belief that the issue was not a problematic one.

[137] *The Better Regulation Guide, op cit.*, pp. 6 & 11.

[138] Referred to by Baldwin, R., in: *Regulating the Airlines,* op cit., at p. 202.

[139] Twining & Miers, p. 230.

[140] Reid, C. "Trends in Environmental Law: Shifting Through the Rubbish" [1997] Autumn Environmental Law (U.K.E.L.A. Journal).

some of the difficulties faced by environmental policy-makers in seeking to establish clear policy objectives.

2.7 Environmental Principles

Although the current body of laws and other rules which govern our relationship with the environment on a day-to-day basis are disparate and subject to frequent change a dynamic relationship exists between the principles which underpin environmental law and rules (both as to formulation of the law and as to its implementation and enforcement).[142] The need for principles to underpin environmental policy and law was recognised by the Government in "This Common Inheritance":

> "The Government needs to ensure that its policies fit together in every sector; that we are not undoing in one area what we are trying to do in another; and that policies are based on a harmonious set of principles rather than a clutter of expedients"[143]

2.7.1 Sustainable Development

The concept of "sustainable development" has become the guiding philosophy which has shaped environmental thinking and law in recent years. It is accepted as an article of faith internationally and is capable of subsuming all other principles,[144] although its content is not yet fully developed.[145] It has also been suggested that that the principle clarifies existing philosophies underpinning the system of planning decision-making, rather than being something radical and new.[146] The classic definition of sustainable development was provided by the Bruntland Commission:

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[141] See Chapter One.
[142] Hughes, D., *Environmental Law* (Butterworths, 1996), at p. 15,
[143] *This Common Inheritance* (1990) Cm 1200, para 1.6.
[144] Tromans, S., "High Talk and Low Cunning: Putting Environmental Principles into Legal Practice" [1995] J.P.L. 779, at p. 791.
[145] Winter, P., "Planning and Sustainability: An Examination of the Role of the Planning System as an Instrument for the Delivery of Sustainable Development" [1995] J.P.E.L. 883, at p. 899.
[146] Millichap, D., "Sustainability: A long established concern of planning" [1993] J.P.E.L. 1111.

> "Development that meets the needs of today without affecting the ability of future generations to meet their own needs"[147]

In order for development to be "sustainable", it must not compromise the economic and environmental options open to future generations; and all development must be "sustainable" in this sense.[148] The concept of sustainable development nevertheless suggests a commitment to continued economic growth and can be distinguished from the concept of "sustainability", which merely reflects the state of something being sustainable in the long term.[149] Sustainable development has been argued to imply a number of specific goals: conserving finite resources; maintaining a balance between development and nature; pollution control; and public involvement.[150] It requires the measurement of global assets and consideration of whether substitution of assets is permissible.[151] Although these issues are difficult enough in their own right, perhaps the most important issue raised by sustainable development is the need to identify the actions required in order to achieve sustainable development in practice.[152] It is here that the major difficulties arise for there is an internal conflict within the concept which requires that difficult judgements be made, balancing competing interests and values. One source for this conflict is the use of the term "needs". Precisely what these needs encompass and which needs must take priority where they mutually compete is highly contentious.[153] In many cases there is not a simple choice between a sustainable option and a non-sustainable option, but options which both claim sustainability, the question being which option is the more sustainable in the long run.[154] Then there is the inclusion of economic development within the definition. Many argue that it is the economic achievements of capitalist society which place us in the fortunate position where we can afford to give priority to environmental issues

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[147] *Our Common Future*: The Bruntland Commission (World Commission on Environment and Development) (1987).
[148] Pepper, D., *Modern Environmentalism*, *op cit.*, p. 16.
[149] Ball, S. & Bell, S., *op cit.*, at, p. 15.
[150] Winter, P., *op cit.*, at p. 884.
[151] Ball, S. & Bell, S., *op cit.*, at p. 15.
[152] Conroy, C. & Litvinoff, M., "Sustainable Development" from *The Greening of Aid* (1988) extracted in Dobson, A., *The Green Reader* (Andre Deutsch, 1991).
[153] Stone, C., *Should Trees Have Standing? and other essays on Law, Morals and the Environment* (Oceana, 1996), at p. 102.
[154] *Ibid.*, at p. 101.

and that continued wealth creation through economic growth is required in order to permit sustainable action to be taken.[155] Environmentalists of a "deeper green" philosophy would argue that the current state of the earth's resources is a result of the consumer society and that sustainable development requires that fewer demands be made of the earth's resources. They would, therefore, reject materialism and consumerism and argue that improved quality of life would be a part compensation for lower material standards for the wealthy.[156] Thus there are diverging views even as to where consideration of the question of achieving sustainable development should start. There are those, therefore, who would give priority to "development" in order to provide the resources for environmental action; and there are those who see emphasis on development as the source of the problem. A faith that future technological advances will solve problems for future generations may salve some consciences but some believe that such "technocentric" faith in man's ability to control natural processes for the benefit of future generations is misplaced.[157] Others, though appreciating the dangers of over-reliance on technology, see it as a vital part of achieving sustainable development.[158] The principle of sustainable development is, therefore, a somewhat amorphous concept which raises a number of uncertainties. These include: which actions will help and which will adversely affect the achievement of sustainable development; what will be the long term-effects of actions on the local and global environment and the effects on economic performance; and which of the earth's resources are "critical" in that they cannot be substituted.[159] There is also the uncertainty of attempting to "weigh", through cost-benefit calculations, competing choices where, despite the best efforts of environmental economists, only one side is often measurable in monetary terms.[160] Tromans describes sustainable development as the "most wonderfully wide principle of them all"[161] and suggests that the political will to address problems is probably a function of the degree of certainty

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[155] See, for example, *This Common Inheritance, op cit.*, at para 1.5 : "Growth is a necessary, though not a sufficient condition for achieving the higher quality of life that the world wants".
[156] Pepper, D., *op cit.*, at p. 16.
[157] See generally O'Riordan, T., *Environmentalism* (Psion, 1976) at pp. 11-19.
[158] R.C.E.P. 21st, *op cit.*, at p. 35.
[159] Tromans, S., "High Talk and Low Cunning: Putting Environmental Principles into Legal Practice" *op cit.*, at p. 791.
[160] For a discussion of the problems with cost-benefit analysis, see R.C.E.P. 21st Chapter 5.
[161] Tromans, S., "High Talk and Low Cunning: Putting Environmental Principles into Legal Practice" *op cit.*, at p. 791.

as to adverse effects and their seriousness and the availability of solutions to them.[162] This desire for certainty is not only relevant to political will. The intangible nature of sustainable development makes it problematic in a general sense as "knowing what sustainable development means is one thing; applying it to specific facts is another".[163] Thus the general principle is well settled but its breadth and internal conflict suggests that there will be a lack of consensus in developing clear policy objectives in order to implement it in specific cases. It would also appear likely that any rules seeking to implement the principle will need to leave some flexibility for the decision-maker who is likely to be balancing a number of, often sharply conflicting, considerations.

2.7.2 The Precautionary Principle

Analysis of the principle of sustainable development identified a number of tensions which are rooted in uncertainty and the precautionary principle is similarly afflicted. At the heart of the principle is the idea that a lack of knowledge as to the future environmental consequences of an action requires some level of caution in progressing such actions until greater knowledge of the consequences has been acquired.[164] In the absence of clear scientific evidence as to the effects of an action, environmental protection should be the first concern: the environment receives the "benefit of the doubt".[165] When "harm" becomes apparent, law traditionally looks at a past action and then seeks to apportion blame retrospectively, looking for causal links between the activity and the harm. As this is often more difficult in the environmental context, with the lack of scientific certainty making the legal construction of causal chains very difficult, an emerging feature of environmental law is an attempt to prevent harm before it arises. This approach also reflects the irreversible nature of much environmental damage, which compromises the

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[162] *Ibid.*
[163] *Ibid.*, at p. 793.
[164] Hughes, D., *op cit.*, at p. 20.
[165] Wolf, S & White, A., *Principles of Environmental Law* 2nd Edition (Cavendish, 1997) at p. 17.

pursuit of sustainable development.[166] The Government has accepted the potentially catastrophic environmental consequences of actions and the resulting need for caution:

> "Where the state of our planet is at stake, the risks can be so high and the costs of corrective action so great, that prevention is better and cheaper than cure."[167]

The precautionary principle has its origins in the German concept of "Vorsorge": preparing for a future which is expected to be difficult.[168] Having identified that some caution must be taken in order to prepare for such a future, one question is the level of caution to be exercised. Whilst a strict interpretation of the precautionary principle could demand that no action be taken until strong scientific evidence suggested (or even proved on some test of probability) that it was acceptable in environmental terms, crystallisation of the principle into policy has taken a more restrictive view, both nationally and internationally.[169] Such policies heavily qualify the approach to be taken by referring to "....*serious or irreversible* damage....*cost-effective* measures"[170] and "*significant risks* of damage....if the *balance of likely costs and benefits justifies* it."[171] This type of wording reflects the principle of "proportionality" which acts as a counter-balance to the precautionary principle. Proportionality requires that the costs of any action or restriction must not be wholly disproportionate to the beneficial effects.[172] Such a mitigation of a strict precautionary approach requires a consideration of the likely costs and benefits and this "cost-benefit" approach mirrors the tension within the concept of sustainable development; the desire for economic growth whilst protecting the environment. The fear appears to be that an unmodified precautionary approach might unnecessarily prevent economic development (which may itself be

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[166] Elworthy, S. & Holder, J., *op cit.*, at p. 15.
[167] *This Common Inheritance, op cit.*, at para 1.18 .
[168] Tromans, S., "High Talk and Low Cunning: Putting Environmental Principles into Legal Practice" *op cit.*, at p. 780.
[169] Hughes, D., *op cit.*, at p. 20, referring to *This Common Inheritance* and *The Rio Declaration* (1992).
[170] Rio Declaration on Environment and Development of 13 June 1992, UNCED, A/Conf 151/4, quoted in Elworthy, S. & Holder, J., *op cit.*, at p. 154 (emphasis added).
[171] *This Common Inheritance, op cit.*, at para 1.18 (emphasis added).
[172] R.C.E.P. 21st, *op cit.*, at p. 72.

necessary for sustainable action) through an overly-cautious approach. Once the principle is analysed, it becomes clear that its specific application imposes financial costs and involves issues of resource allocation and risk acceptance.[173] In view of such significant economic implications it is no surprise that there has been something of a cautious approach in applying the principle of precaution and that the courts have been reluctant to overrule political decisions as to the scope and status of the principle.[174]

2.7.3 The "polluter pays" principle

> "If Governments want to stop something happening, or make something happen in a different way, they have broadly two choices...Whichever course they choose, the objective is to make those who cause environmental damage face the costs of control in full, without subsidy. That is called the "polluter pays" principle which the Government, in common with many other Governments, adopts."[175]

The basic meaning of the "polluter pays" principle is that the producer of goods or other items should be responsible for the costs of preventing or dealing with any pollution which the process causes, which includes environmental costs as well as direct costs.[176] One important result of this is that the taxpayer should not normally bear the burden of these costs. In economic terms, the essence is to "internalise" "externalities" so that the costs of production include indirect costs such as those to the environment.[177] Externalities may be generated by human activities amongst contemporaries (through space) and between generations (through time).[178] The idea is to allow the market to produce sustainable consumption by identifying and passing on

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[173] Tromans, S., "High Talk and Low Cunning: Putting Environmental Principles into Legal Practice" *op cit.*, at p. 781.
[174] See '*R.* v. *Secretary of State for Trade and Industry, ex p. Duddridge'* [1996] Env. L.R. 325.
[175] *This Common Inheritance, op cit.*, at para 1.25.
[176] Ball, S. & Bell, S., *op cit.*, at p. 124.
[177] Pearce, D. et al, *Blueprint for a Green Economy* (Earthscan, 1989) p. 158.
[178] Stone, C., *op cit.*, at p. 76.

to the consumer the full costs of production through prices.[179] The purpose of the principle, in an economic context, is to correct market failure.[180] The economic foundation for the principle has allowed its implementation to be justified in terms of market competition generally, as well as environmental protection: the elimination of hidden subsidies is a necessary part of providing for free trade between countries.[181] Addressing environmental issues through market mechanisms may provide for a wider justification of policy measures within free trade organisations. In the case of the European Union, there has been a gradual shift from policy measures based purely on the international trade factors to environmental protection *per se*[182] as the organisation developed from being simply a free trade organisation.[183] Difficulties arise in trying to ensure that externalities are actually internalised. There are great difficulties in determining exactly what costs must be internalised. This depends upon what definition of "pollution" is taken; where to draw the line as to what is acceptable and what is not (and must, therefore, be internalised as a cost).[184] Further analysis of this question leads to the complex debate as to what kind of standards can and should be set and at what levels.[185] Another difficulty is in finding the mechanisms for ensuring that costs are internalised.[186] The economic basis of the principle also leads towards a focus on the economic aspects, rather than environmental protection which

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[179] *Ibid.*

[180] Meli, M., "The polluter pays: some conceptual problems" [1992] Water Law 79.

[181] Birnie, P. & Boyle, A., *International Law and the Environment* (Clarendon Press, 1992). Operation of the principle has been criticised on the basis that by passing on costs to the consumer the 'polluter' is not actually paying (See, for example, Wolf, S. & White, A., *op cit.,* at p. 16). This is based on a misunderstanding of the market function of the principle. The idea is not to reduce the profits that a polluter makes but to ensure that all costs are included. This may take the form of requiring the costs of pollution abatement equipment to be borne by the producer, or by increasing the price to the consumer, providing an incentive to make sustainable consumption selections (Pearce, D. et al, *op cit.,* at p. 158). In practice, where there is competition within a market the polluter will not be able to pass on all of the externalities to the consumer and so the extent to which the polluter's profits are reduced depends upon the level of competition within the particular market (*Ibid., at* p. 159).

[182] Meli, M., *op cit.,* at p. 80.

[183] One result of this development, which highlights the economic and social nature of environmental policy, is that there have been divergent views as to the limits of measures which can truly be considered as necessary for a "single market" whilst also providing environmental benefits. These differences of opinion have sometimes resulted in disputes as to the correct legal basis for action at EU level: see, for example, *'Parliament* v. *Council'* [1999] Env. L.R. 604.

[184] *The "polluter pays" principle:* 10th Report from the Select Committee on the European Communities: House of Lords Session 1982-83 Paper 131, pp. ix -xi.

[185] *Ibid.*

[186] Methods include fiscal measures, such as a carbon tax (Pearce, D. et al, *op cit.,* at pp. 162-5); tradable permits (*Ibid.,* at pp. 165-6); and liability mechanisms (See, for example, Meli, M., *op cit.,* at p. 80).

has even been used to justify interpretations that paying for pollution allows for the right to pollute to be purchased.[187] Despite the relatively clear and unequivocal principle which, in contrast with policy wording as to sustainable development and the precautionary principle, the government has felt able to set down,[188] the "polluter pays" principle can actually be extremely problematic in application.[189] Many polluting activities involve a number of potential "polluters", including consumers, and deciding exactly who should pay and in what proportions is a daunting task. Although allocation of costs in a particular case may be justified in an objective economic sense, policy-makers also have to consider factors such as "fairness" and "legitimacy" when seeking to allocate costs, working as they do within a wider political context and, as with the other environmental principles, there is scientific uncertainty as to causal connections between activities and harm.[190]

2.8 Rule-making and Legitimacy

2.8.1 Legislative Mandate and Scrutiny

If rules are to be implemented in one form or another, there must be some method for their being publicly "accepted", or legitimated.[191] A useful starting point, particularly for lawyers, is legislative process and mandate.[192] Under this method of legitimation, Acts of Parliament will have strong claims due to constitutional supremacy and connection with democratically elected representatives. Save for any grave procedural defect, such rules will be supreme and are legitimated by the highest form of political mandate. That is not to say that the legislative process is without criticism;[193] scrutiny

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[187] Such a view, that it is acceptable to pollute provided that this is paid for, is an abuse of the imprecise meaning of the principle; see Ball, S. & Bell, S., *op cit.*, at p. 124.
[188] See the quote from *This Common Inheritance* above.
[189] Tromans, S., "High Talk and Low Cunning: Putting Environmental Principles into Legal Practice" *op cit.*, at p. 785.
[190] Elworthy, S. & Holder, J., *op cit.*, at p. 15.
[191] Baldwin, R., *Rules and Government, op cit.*, p. 40.
[192] Baldwin identifies five rationales for legitimacy claims, of which 'legislative mandate' is one, and uses these to test the overall legitimacy of a variety of rules: *Ibid.*, p. 41-49.
[193] Le Seur, A. & Sunkin, M., *op cit.*, p. 92. A discussion of the failings of Parliamentary scrutiny of primary legislation is beyond the scope of this Study. Particular issues will be addressed where these are relevant to specific rule-types. The system of representative democracy can also be criticised and may be critically compared to participatory democracy.

methods are often weak and the "elected dictatorship" of the executive, which often maintains a tight control, can leave Parliament as little more than a "rubber stamp". With delegated legislation, some level of Parliamentary control generally exists,[194] though this may be minimal and the form of the legislation is no guide to the extent to which it has, in fact, been subject to Parliamentary control.[195] In fact, there appears to be a lack of rational criteria for selecting the control procedures in Parliament, the political judgement of the relevant Minister tending to prevail.[196] Statutory Instruments are also subject to scrutiny, on limited grounds, by the Joint Select Committee on Statutory Instruments which does not consider the merits of such instruments.[197] The Parliamentary scrutiny of "quasi-legislation" is even more haphazard than that for Statutory instruments and other delegated legislation. The applicable scrutiny mechanisms are almost wholly as provided by the relevant enabling powers, just as the legal effect of quasi-legislation depends upon the particular statutory provision upon which it is based. Where the scrutiny of quasi-legislation is required by the primary legislation, Baldwin suggests that a balance is provided: avoiding the rigidity and delay of legislation, but allowing the debate of major policy issues.[198] However, if this is correct, it could only apply where such scrutiny is significant, such as under the "Positive Resolution" procedure. One important aspect of Parliamentary control and scrutiny of delegated and quasi legislation is that it takes place *ex post facto*: administrators have already drafted the rules and decided upon the policies which they implement by the time that Parliament considers them (if such consideration takes place to any meaningful extent). Thus control is weakened as it is generally a greater task to convince administrators to

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[194] For example, the House of Lords Select Committee on Delegated Powers and Deregulation. This Committee has as its chief concern the extent of legislative powers proposed to be delegated to Ministers, although its rôle is limited to writing reports, rather than directly amending legislative proposals, etc. For an example of its involvement in the rule-making process, see the criticisms which it made with regard to the extensive powers to make Regulations granted to Ministers under the Pollution Prevention and Control Bill, during the passage of that Bill.

[195] For example, a Statutory Instrument may be subject to a 'positive resolution' procedure in the Houses of Parliament where the measure must be positively approved by the requisite number of Members of each House, a 'negative resolution' where Members can seek to prevent approval which is otherwise automatic, or merely be laid before Parliament with no further specific control measures. See, for example, Zander, M., *op cit.*, chapter 2.

[196] Beatson, J. "Legislative Control of Administrative Rulemaking: Lessons From the British Experience" [1979] Cornell International Law Journal 199, pp. 210-211.

[197] *Ibid.* Only Statutory Instruments subject to the Positive Resolution procedure are scrutinised. Merits may be considered by the appropriate standing committees, however, these procedures are limited.

amend their views when the policy objectives have already "crystallised" into draft rules.[199]

2.8.2 *Alternative Sources of Legitimacy and Control*

Further controls over delegated legislation are exercised by the judiciary. Such legislation will be invalid if it is *ultra vires* either because of a failure to comply with procedural requirements or because it purports to legislate beyond the substantive scope of the powers conferred by the enabling statute.[200] As with judicial review of decisions, review is formal rather than substantive and, provided that the rules are *intra vires*, their merits are not examined although this jurisdiction does extend to considering whether rules are so unreasonable that Parliament could not have possibly intended to authorise them under the enabling Act.[201] The lack of substantive judicial review of instruments and the "grip" of the Executive, which includes the ability to control the procedure for making (including the scrutiny of) subordinate legislation (through control of the enabling legislation) is one of the main factors leading to unease about some delegated legislation: the doctrine of Parliamentary supremacy coupled with Executive dominance of Parliament.[202] Where secondary and quasi legislation has dealt with technical matters, or points of detail which flesh out principles clearly established in the primary legislation, there are grounds for claiming legitimacy on the basis of "expertise" or "efficiency",[203] however, these grounds are insufficient where the rules are being used to deal with policy objectives rather than just means.[204] The use of Soft Law to establish policy objectives and points of principle appears an abuse of the constitutional rule-making process and may give rise to dangers such as; a lack of adequate scrutiny; a further concentration of power within the Executive; and a danger that confused and over-complex rules will be

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[198] Baldwin, R., *Regulating the Airlines, op cit.*, p. 260.
[199] Beatson, J., *op cit.*, at pp. 211-212.
[200] Jones, B.L. & Thompson, K., *op cit.*, pp. 94-99.
[201] Bates, T., St. John N., "Parliament, Policy and Delegated Power" [1986] Statute L.R. 114, at p. 119.
[202] *Ibid.*, p. 115.
[203] Two more of Baldwin's rationales for legitimacy claims, see *Rules and Government, op cit., pp.* 41-49.
[204] Bates, T., St. John N., *op cit.*, p. 115, considering Statutory Instruments. The point applies to an even greater degree to quasi legislation.

developed because of a lack of clear guiding principles and objectives. Furthermore, where these rules are used to effect an essentially legislative function, the ultimate problem is to control and validate them as they do not have the formal legitimation of consideration by elected representatives.[205]

2.8.3 Consultation

One method which is often used, and which may also claim some legitimacy on the grounds of "expertise" and/or wider public participation, is the use of consultative processes.[206] Indeed, one of the attractions of using secondary and quasi legislation, is the possibility of wider public consultation than is generally possible with primary legislation.[207] Once again, form is no guide to the applicable process. There is no set procedure for formal consultation on instruments although there is a well established custom[208] and unofficial and informal consultation takes place at the Department's discretion. Consultation procedures for quasi-legislation are often superior to those for Statutory Instruments.[209] Consultation is not, however, a "cure-all" and there are dangers of consulting with groups which may already exert an undue influence over policy, though consultation on a more formal basis may reach a wider range of interests and establish systems for more efficient consideration of the interests involved and for the use of expertise.[210] Provided that the consultation process involves a wide spectrum of interest groups and opinions, it provides some measure of public participation and so provides a closer substitute for (or even an improvement upon) political accountability, the lack, and failings, of which are the cause of some disquiet.[211]

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[205] Stewart, R., "The Reformation of American Administrative Law" [1975] 88 Harvard L.R. 1669, at p. 1672. Again, the legitimacy of the representative democracy system is not immune to criticism.
[206] As the empirical part of this Study mainly consists of analysis of a consultation process and a major aim is to evaluate the use of such processes, the broader issues of consultation and interest group representation are dealt with in depth in Chapters Five & Six. The purpose of this Section is merely to establish consultation as a method of legitimising rules.
[207] Bates, T., St. John N., *op cit.*, p. 114, together with relieving Parliamentary time pressures etc.
[208] Asimow, M., *op cit.*, p. 261.
[209] Bates, T., St. John N., *op cit.*, p. 122.
[210] *Ibid.*, p. 267.
[211] See Chapter Five.

Consultation prior to the enactment of primary legislation may take many forms and may include intra-Departmental and extra-Departmental consultees. There are no formal, set requirements.[212] However, public debate of regulatory proposals is now viewed by the Government as the "key" to determining the correct balance between costs and benefits and improving regulation generally.[213] Where consultation takes place with regard to pre-legislative policy formulation, the public participation rationale may conflict with the system of Parliamentary representation (with its traditional high status), particularly where rules result which are subject to (traditional) political legitimation in one form or another through the legislative process. However, the failings of representative democracy may result in some need for wider public participation at this stage.[214] Although the bringing together of expertise and experience may provide a legitimate rationale, there may be wider motivations for consulting at this stage, where points of principle and policy objectives may still be shaped. One such aim may be to seek acceptance for a proposal from a limited number of interest groups, rather than from the general electorate.[215] Although pre-legislative consultation appears to be an increasingly common element of the legislative process,[216] the question as to why consultation is felt necessary, or appropriate, on particular issues remains an important one; together with questions as to the identity of chosen consultees; the stage at which, and the manner in which, consultation is to take place.

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[212] Miers, D. & Page, A., *Legislation* (Sweet & Maxwell, 1990), pp. 39-43.
[213] "The Better Regulation Guide", The Better Regulation Unit (1998), p. 1.
[214] See Chapter Five.
[215] See Chapter Five.
[216] And has become a requirement for most regulation: "The Better Regulation Guide", *op cit.*, pp. 8-10.

2.9 Rule-making Issues

It seems (from the discussion of the nature of environmental issues in Chapter One, and from the above analysis of the nature of rules that at least 14 issues arise when developing rules in the environmental context. These relate to:

i Clarification of policy objectives;

ii whether a substantively new rule-system or type of system is required;

iii the rôles of central and local government and other bodies;[217]

iv whether issues are polycentric or justiciable;

v The need to implement the environmental principles;

vi The need to deal with the physical nature of environmental issues;

vii selection of rule-types and of qualities of rules;

viii The need to legitimise the resulting rules, through public participation or other means;

ix the levels of certainty and flexibility (discretion and fairness) which are possible and appropriate;

x the rôle of scientific standards;

xi prevention of avoidance practices;

xii identification of the appropriate decision-makers;

xiii identification of the other participants in the decision-making process; and

xiv Identification of appropriate appeal/review bodies.

These factors may mutually conflict. There is, for example, tension between certainty and flexibility (if one is to be achieved that will usually be at the expense of the other); and, as we have seen, there is an internal conflict within "sustainable development". The factors are, however, also inter-related so that, for example, the physical nature of environmental issues affects the other factors. This in turn suggests that environmental issues are polycentric in nature; it also influences the nature of the appropriate decision-maker, has an impact upon the optimal levels of certainty and flexibility, and is likely to influence the types of rules which are desirable. A need for

[217] As rule-makers, decision-makers, etc.

increased flexibility is in turn likely to affect the rule-type selected, may have implications for avoidance, and is likely to influence the choice of decision-maker. Similarly, the nature of the environmental principles is such as to lead to increased demands for certainty and will mean that decision-making is likely to be polycentric (with all that follows from this). Thus there are complex, interlocking relationships between the factors, which will influence the rule-making process.

Chapter Three: Contaminated Land Policy Issues and Legal Context

We have now considered the nature of environmental policy and the theoretical challenges of rule-making in general. It is now time to turn to the particular context with which this Thesis will focus; contaminated land.

3.1 What is "contaminated land"?

3.1.1 Some Problems with Definition

There is no simple answer to the question of what "contaminated land" is. Whilst in other areas of pollution control there is a clear scientific distinction between "contamination", which describes the mere presence of a foreign substance (which may be harmless) and "pollution", which poses a threat of, or causes, harm, the term "contamination" is used loosely with reference to land.[1] In fact a variety of definitions have been provided for "contaminated land"[2] which differ mainly as regards the level of harm, or threat of harm, which may be caused and as to the identity of the "receptor" which may be harmed. These differences may reflect a variety of perceptions of the risks posed by different levels of contamination. The Government considers that providing an exact definition of contaminated land would be unsuitable and that what is needed is "some yardstick" for measuring hazards to health and the environment so that the significance of contamination can be assessed.[3] This also reflects that fact that the way in which "contaminated land" is defined will raise questions of economics as well as of risk assessment. In that sense, the question whether land is "contaminated" sufficiently to warrant remedial action requires consideration as to the level of contamination that can justify the cost of remediation. Thus the question of definition itself is one of economic and social construction as

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[1] *House of Commons (1)* para 13.

[2] See, for example, *House of Commons (1)*, para 14, s.78A(2) Environmental Protection Act 1990 and NATO Committee on Challenges to Modern Society. These differences in definition reflect different approaches and provide different answers to questions such as the costs of cleaning up 'contaminated land'.

[3] The Government's Response to the First Report of the House of Commons Environment Committee; First Report 'Contaminated Land'; July 1990; Cm 1161 ("*Government Response (1)*"), para 1.1.

well as scientific assessment.[4] Given the industrial history of the United Kingdom, it is no surprise that large areas of land are "contaminated" to a significant extent. Although many of the problems faced in relation to land contamination have arisen from activities which took place during and since the industrial revolution, this legacy can be traced back at least as far as lead and copper mining during the Roman occupation.[5] Although problems of land contamination can arise through the presence of naturally occurring "foreign" substances,[6] a wide variety of human activities commonly have the potential to contaminate. Categorisation of these activities varies,[7] Nineteen categories were, however, identified by the House of Commons Environment Committee in its First Report on Contaminated Land. These are indicated in Figure 3.1 below.

[4] The legal/political definition of concepts such as 'harm' was outlined in Chapter One. In this Study, 'contaminated land' is used where land is contaminated by foreign substances to an extent which may be significant and is, therefore, a vague term. Where 'Contaminated Land' is used, this refers to land which is or would be within the definition provided by s.78A(2) of the Environment Act 1995.

[5] Parliamentary Office of Science and Technology, *Contaminated Land* (October 1993) ("*POST*"), p. 1.

[6] Such as radon gas or substances present due to volcanic or mineralisation activity.

[7] For example, in the consultation paper *Public Registers of Land Which May Be Contaminated* (Department of the Environment, May 1991), the Department of the Environment identified 16 categories and 42 contaminative uses of land and revised this to eight contaminative uses in amended proposals issued in May 1992 (*Environmental Protection Act 1990: section 143 Registers* (DoE, 1992)).

	Potentially Contaminating Activities[8]
1.	Waste Disposal Sites
2.	Gas Works
3.	Oil Refineries and Petrol Stations
4.	Petroleum Refineries
5.	Iron & Steel Works
6.	Power Stations
7.	Metal Products Fabrication and Metal Finishing
8.	Chemical Works
9.	Textile Plants
10.	Leather Tanning Works
11.	Timber Treatment Works
12.	Non-Ferrous Metals Processing
13.	Manufacture of Integrated Circuits and Semi-conductors
14.	Sewage Works
15.	Asbestos Works
16.	Docks and Railway Land
17.	Paper and Printing Works
18.	Heavy Engineering Installations
19.	Installations Processing Radioactive Materials

Figure 3.1

Although it may not be fully apparent from this table, contaminated land is not found only in urban areas. Whilst the listed categories do not appear explicitly to recognise it, contamination may result from agriculture as well as from more obviously "dirty" industries; typically from the over-use of fertilisers, pesticides, herbicides and fungicides, as well as from sewage sludge spreading.[9]

Obviously it does not follow that land will be "contaminated" simply because it has been subject to a potentially contaminative activity. There will be occasions, however,

[8] *House of Commons (1), op cit.*, para 12.

where the presence of substances either requires active control over land or places serious limitations on the potential uses of the land.[10] In practice, land in potentially contaminative use becomes contaminated through a variety of mechanisms including; leakage during storage or transport of materials (which may go undetected for a long time); accidents, such as spillage; airborne emissions settling back to earth; waste disposal in otherwise "clean" sites; and demolition, resulting in the release of substances.[11] It follows that, although the deposit or release of contaminative substances may be deliberate (as in the case of landfill waste disposal, effluent lagoons and sewage sludge spreading[12]), it will often be accidental and may even have been unforeseeable. The damage caused by such releases may also be indirect and/or not obvious in that it may "migrate" great distances before a negative impact arises or is identified. For example, chemical spillages may leach a significant distance through soil before reaching groundwater and may then be carried many miles before an impact (such as the impact on drinking water quality) arises. Even where the initial release or escape of a substance was deliberate or foreseeable, the effects of that substance or its "migration" off site may not have been. There is also the possibility that the levels of contamination which may result may not be "significant". Even heavy metals, which are very harmful in high concentrations, are essential nutrients at lower concentrations.[13] Thus, as suggested above, "significance" is not simply a question of measuring the presence of contaminants.[14] It involves questions as to the harm posed or threatened, the effective use of scarce resources to minimise harm; and the identification of appropriate and effective methods of remediation. Contemporary methods of risk identification are based upon identifying: a "Source" or "Hazard", being the substance(s) presenting the risk; a "Receptor" or "Target", being the thing at risk; and a "Pathway", being the method by which the Receptor may be exposed to and harmed by the Source.[15] The types of harmful effects which may arise from

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[9] *POST, op cit.,* p. 5.
[10] Harris, M.R. "Recognition of the problem", in; Ed. Cairney, T., *Reclaiming Contaminated Land* (Blackie, 1987), p. 1.
[11] *POST, op cit.,* p. 3.
[12] Tromans, S. & Turrall-Clarke, R., *Contaminated Land* (Sweet & Maxwell, 1994) p. 7.
[13] *Ibid.,* p. 16.
[14] Although this is not unproblematic in itself. For example, there may be a very large area of land with small 'hot spots' of contamination randomly scattered and, therefore, difficult to find.
[15] See, for example, Department of the Environment, *Consultation Draft Statutory Guidance on Contaminated Land*, September 1996, Syms, P., *The Redevelopment of Contaminated Land for*

contaminating substances include; toxicity (to humans, other animals and plants); carcinogenicity and mutagenicity (including substances which are teratogenic – i.e. have the potential to cause birth defects); corrosivity (which may be harmful to living things and/or to building structures); and combustibility (which may present dangers from toxic or asphysixant gases as well as fire).[16] Thus environmental risk assessments consider threats to the well being or safety of humans, animals, plants, ecosytems and buildings or other property. On the other hand, one of the great difficulties in the context of contaminated land is the lack of knowledge as to the effects of substances on potential Receptors.[17] This is exacerbated by the potential for reactions between substances and the possibility that they might migrate onto other sites, or into the water supply. These are some of the characteristic uncertainties of environmental regulation.[18] They are, however, compounded in the contaminated land context by the complex nature of the medium - soil.[19] The relative simplicity of the "cause and effect" situations which can be observed in water or air is usually unattainable.[20]

3.1.2 Hazards

So far as land is concerned, commonly encountered contaminants which may present hazards include those set out in Figure 3.2 below:[21]

Housing Use (Sheffield Hallam University, 1997) and Royal Commission on Environmental Pollution, 19th Report, *Sustainable Use of Soil*, February 1996, Cm 3165 ("R.C.E.P. 19th"), p. 117.

[16] *POST, op cit.*, p. 16.

[17] See, for example, Ferguson, C., "Assessing Human Health Risks from Exposure to Contaminated Land: A Review of Recent Research" [1996] Land Contamination and Reclamation 159.

[18] Scientific uncertainty was identified as an important factor in addressing environmental issues in Chapter One.

[19] As to environmental protection and soil, see generally Royal Commission on Environmental Pollution 19th Report: *The Sustainable Use of Soil*: February 1996; Cm 3165.

[20] Cairney, T., in *Contaminated Land Problems and Solutions*, ed. Cairney, T. (Blackie, 1993) p. 3.

[21] Table based upon *POST, op cit.*, p. 17.

	General Category	Specific Examples	Potential Hazards
1.	Toxic Metals	Cadmium, Copper, Iron, Lead, Mercury & Nickel	Toxic to humans by inhalation, ingestion or skin contact. Irritants & carcinogens. Groundwater Pollution.
2.	Phytotoxic Metals	Chromium, Lead, Nickel & Zinc	Prevents or inhibits plant growth. Other effects as 1.
3.	Aggressive Substances	Acids & Alkalis	Corrosive to humans & attack building materials.
4.	Other Toxic Substances	Cyanides & Sulphur Compounds	As 1., 2. & 3.
5.	Finely Divided Materials	Asbestos	Carcinogenic & irritant.
6.	Coal Tar	Coal Tar, Benzene & Toluene	Toxic, irritant, combustion risk & carcinogenic.
7.	Phenols	A number of compunds	Toxic, corrosive & attack building materials. Groundwater Pollution.
8.	Petroleum Products	Benzene, Toluene, Carbon Dioxide & Monoxide	Combustion risks & carcinogenic. Groundwater Pollution.

9.	Solvents	Hydrocarbons & Alcohols	Toxic & combustion risk. Groundwater Pollution.
10.	Chlorinated Compounds	Polychlorinated Biphenyls & Dioxins	Toxic & (possibly) carcinogenic.
11.	Landfill Gas	Methane, Carbon Dioxide & Landfill Gas	Combustion risks.
12.	Combustible Substances	Coal & Coke Dust, Coal Tar & Refuse	Combustion Risks.
13.	Micro-organisms	Bacteria	Disease.

Figure 3.2

3.1.3 Pathways

Typical Pathways by which Receptors may be exposed to Hazards include; deliberate soil ingestion (usually by children); inadvertant ingestion (such as soil load on vegetables, or contaminant uptake by them); skin contact with soil and dust; ingress of contaminated vapours into buildings;[22] and fire or explosive contact (as, for example, in the case of methane gas). A further important Pathway is through contamination of water (often groundwater).

3.1.4 Perspectives of Risk

The problems involved in making an assessment of risk on the basis of existing knowledge often result in differing views as to the significance of the risk in question. This may also arise from differing cultural perspectives as to risk.[23] There also appears to be an inherent lack of public trust in risk analysis techniques and their use,[24] particularly where powerful interests and government wish to maintain public confidence in a product or system. In reality, however, the difference between a real risk and a theoretical risk is likely to depend upon the characteristics of the

[22] Ferguson, C., *op cit.*
[23] See the discussion of risk perceptions in Chapter One.

contaminating substance, the amount of the substance present and the conditions of the contaminated site (whether there is an actual or potential Pathway present).[25]

3.1.5 The Extent of Contaminated Land - The Size of the Problem

As we have seen, the extent to which land is regarded as contaminated will depend upon the definition chosen. A number of estimates have, however, been suggested and the sometimes large differences between them probably reflects the different definitions used, which in turn reflect the perspectives taken on the significance of given risks. Thus, if a strict definition of "contamination" was adopted virtually all land in the United Kingdom would come within it. In its evidence to the Environment Committee, however, the Environment Agency estimated that between 5,000 and 20,000 sites in England and Wales will fall within the definition of Contaminated Land provided by the Environment Act 1995.[26] On the other hand, estimates of land presenting an actual or potential threat to health or the environment as a result of current or previous land use range up to 200,000 hectares (by the CBI).[27] Earlier figures included 27,000 hectares,[28] up to 50,000 hectares[29] and between 100,000 and 200,000 hectares.[30] Whatever the definition developed, it is widely considered that clean up costs are likely to be the greatest burden inherent in the projected changes to environmental liability in the UK.[31] As well as the differing definitions used, a further important explanation of the differing figures is that there has never been a comprehensive survey of the extent of land contamination in the United Kingdom.

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[24] Ferguson, C., *op cit.*, p. 167.

[25] *POST, op cit.*, p. 16. As to risk assessment generally, see *A Guide To Risk Assessment & Risk Management for Environmental Protection* (DoE, June 1995) and Revesz, R. *Foundations of Environmental Law and Policy* (O.U.P., 1997), Chapter 3.

[26] House of Commons Environment Committee; Second Report 'Contaminated Land'; Session 1996-97: 22-I ("*House of Commons (2)*"), at para 136, although worst case estimates based upon a different definition of 'contaminated land' estimate 100,000 sites (*House of Commons (1)*, p.2).
Not all of this land will necessarily fall within the definition of "Contaminated Land" and, in any event, these estimates represent little more than 'best guesses'

[27] C.B.I., *Firm Foundations* (October 1993), para 24.

[28] The Department of the Environment in evidence to *House of Commons (1)*, *op cit.*, at para 23.

[29] Environmental Resources Limited, *Ibid.*, at para 24.

[30] *POST, op cit.*, p. 11.

[31] A rough estimate of around £1.5 billion per annum in perpetuity has been suggested: see Heyes, A.G. "The Possible Cost to British Industry of EU Environmental Liability Reform" European Environmental Law Review February 1996, p. 54.

The base data used, therefore, has often arisen from pilot studies.[32] Accordingly, there has been room for variation in the data used and in extrapolating it to estimate levels of contamination countrywide. Although one might anticipate that an organisation representing business interests would seek to minimise the perceived extent of a problem for which liability may be imposed upon its members, the "discourse of resistance" from the CBI to proposals for Government intervention was more sophisticated than that. It firstly sought to minimise the "real" problem by suggesting that there were few sites which posed real risks and then sought to scare off intervention by identifying huge costs which could arise if a perspective of risk was taken which differed from its own. The very large area of land suggested was, therefore, identified in order to increase concerns regarding the potential impacts on industry and wealth creation which might result both from increasing the regulatory burden on industry generally and from taking an "uneconomical" view of risk in particular.[33] In the light of such lobbying, it is not surprising that one of the first duties which the new legal regime will impose upon local authorities is to inspect their areas, and identify contaminated sites therein. Some clarification of the extent of contaminated land should, therefore, result in the period following commencement.[34]

3.2 Dealing with Contaminated Land

3.2.1 Standards for Remediation

Having identified land as contaminated to an extent that the risks posed require remedial action to be taken, there remain the questions of what action should be taken and to what level the land should be cleaned up. This question in part involves consideration of the use for which land should be suitable upon completion of remedial works. The main policy decision here is whether land should be cleaned up so that it is suitable for its current or anticipated (with planning permission already

[32] Notably in Cheshire and Wales.
[33] See *Firm Foundations, op cit.*, generally and *Tackling Contamination* (CBI, May 1994).
[34] See s.78B. The inspection and identification of land will be based on a single definition: the one provided in the legislation.

held) use ("suitable for use"), or should be fit for any possible use ("multifunctionality").[35]

The "multifunctional" approach has often been associated with the Netherlands, where the object of contaminated land policy has been to clean up sites in such a way that any end use is possible, including use in agriculture, or as playing fields, etc.[36] However, the Dutch have recently abandoned the multifunctional approach after annual clean up costs rose to US$500 million and the estimated total costs rose to $50 billion.[37] In the earlier years of the Dutch strategy, these costs were also increased by the definition of contaminated land used. Soils which had levels of substances in excess of "natural" levels were regarded as contaminated and remediation methods were often required to return land back to "natural" levels of substances, irrespective of the actual risks posed[38] (a "polished earth" strategy). Whilst there are differences in the hydrogeological make up of the Netherlands and the United Kingdom,[39] the fact that we have always worked on the basis of "suitable for use" standards may reflect the use of the planning system as a method of control, the development/market-led approach to contaminated land[40] and the pragmatic approach taken to environmental issues generally.[41] Despite the Dutch abandonment of multifunctionality, there is still considerable debate about the standards to which land should be cleaned up and there is room for techniques and standards which fall between the two extremes.

3.2.2 Remediation Techniques

It is clear that the technique for remediation will vary with the use for which the land must be suitable: "capping" of land by using an impermeable layer may be perfectly suitable for building a car park (providing that contamination is not migrating or

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[35] This question will be considered in more detail below.
[36] Under the Soil Protection Act 1987. See *House of Commons (1), op cit.*, p. 27.
[37] ENDS Report 269, June 1997, p. 46.
[38] *POST, op cit.*, p. 54.
[39] *House of Commons (1), op cit.*, p. 27 and population density in the Netherlands (being even higher than that in the UK) may result in greater pressures on land.
[40] The idea that the market should be the main determinant of when and how contaminated land is remediated, with the result that the main focus for remediation should be through development projects.
[41] See Chapter One.

entering groundwater) but would be insufficient for many other uses. Thus the selection of remediation technique will often be influenced by the (actual or proposed) use of the land and, perhaps to a lesser degree, the use for which the land may be made available will be influenced by the cost of remediation required for that use. These costs will vary greatly according to the techniques used.[42] There are three main methodologies for soil remediation: removal; rendering harmless; and containment.[43] Specific examples of these methodologies include those in Figure 3.3 below:[44]

[42] For example, the removal, chemical dechlorination and return of soil is likely to cost many times more than its encapsulation.
[43] Smith, M.A., "Available Reclamation Methods", in; *Reclaiming Contaminated Land* (1987), *op cit.*, p. 115.

	Method	Description/Examples
1.	Isolation or Encapsulation	e.g. covering with impermeable material
2.	Off-Site Disposal	e.g. excavation and disposal at landfill
3.	Soil Vapour Extraction	generation of air flow through soil to remove Volatile Organic Compounds
4.	Bioremediation	use of micro organisms to degrade contaminants[45]
5.	Soil Washing	excavation followed by separation and disposal of smaller particles, which have contaminants concentrated in them
6.	Electro-Kinetic Techniques	passing electrical current through soil, which attracts contaminants to the source of the current
7.	In-Situ Vitrification	electrical current, generating heat sufficient to convert soil into chemically inert, stable glass & crystalline material
8.	Thermal Methods	desorbtion, where contaminants are driven off by relatively low temperatures, or incineration, using very high temperatures
9.	Stabilisation and Solidification	addition of materials,[46] to make soil more chemically stable or physically solid
10.	Chemical Treatment	e.g. in-situ leaching, or ex-situ de-chlorination
11.	Groundwater Treatment	methods are similar to those for soil,[47] however, differences in the nature of the media present specific problems

Figure 3.3

[44] Table loosely based upon Tromans, S. and Turrall-Clarke, R., *op cit.*, Chapter 7.

[45] Some species of plants absorb certain contaminants from soil and so can be used as a method of remediation. The plants (containing concentrations of the contaminant) are 'harvested' for further treatment off-site, such as incineration. This method highlights how plants can increase dangers from exposure by increasing contamination levels in the Pathway which they provide.

[46] Such as cement lime, or thermoplastics.

[47] With the additional possibility of "pump and treat".

3.3 Contaminated Land and the Environmental Principles

3.3.1 Sustainable Development

Whilst contaminated land obviously raises physical issues, it is not as clear that the paradigm encapsulated within the environmental principles is applicable without some adjustment, or at least further consideration. With regard to the principle of sustainable development, land is a scarce resource, particularly in countries or areas with a high population density. The "inter-generational equity" aspect of the principle of sustainable development would, therefore, suggest that we should not reduce the amount of that natural resource which we can pass on to future generations. As a part of this aim the quality of that resource (land) should be protected or enhanced where possible. If the condition of land presents risks to other environmental resources or humans, that should also be dealt with where possible. Some of the threats to the amount of land and other environmental capital which is available to future generations will come from development (and the impact of off-site development) on land previously undeveloped or significantly affected by human development ("greenfield land"). The acknowledged need to recycle "brownfield" land[48] for new uses, and to protect the public and others from dangers presented by contaminated land, can be clearly traced back to the principle of sustainable development. This is both prospective, in the sense that recycling is required in order to relieve pressure on greenfield land and thus facilitate future sustainable development, and retrospective in the sense that the need to take remedial action identifies past unsustainable activity, the need to deal with the consequences of such activity and the need to avoid such activity in the future.[49] Dealing with issues arising from contaminated land can, therefore, contribute to sustainable development in two distinct ways: by increasing the availability and quality of our "environmental capital" through remediation (as well as identifying the threats to it and so helping to identify the measures required to avoid future losses to such capital); and by reducing the threats posed by the condition

[48] A suitable definition for brownfield land may be; "any areas of land which have previously been the subject of a man-made or non-agricultural use of any type"; Syms, P., *op cit.*, p. 1.
[49] "Local Authorities or Property Developers - Who Bears the Regulatory Burden for Dealing With Contaminated Land?, Keeping, M., Oxford Brookes University, Conference Paper 1997.

of land to other resources. The contribution which the recycling of contaminated land can make to sustainable development has been explicitly recognised by the Government: Planning Policy Guidance note 23 states that:

> "The principle of sustainable development means that, where practicable, brownfield sites, including those affected by contamination, should be recycled into new uses and the pressures thereby reduced for greenfield sites to be converted to urban, industrial or commercial uses".[50]

Not all brownfield land will be regarded as contaminated. Nonetheless, contamination represents one of the main disincentives for developing brownfield sites and so any successful policy for recycling land will have to address contamination issues.[51] It should be apparent here that there are dual objectives within this "sustainable" approach to contaminated land: protection of the environment (including human health) and releasing previously developed land for re-development. Although aspects of these objectives may be mutually supportive (e.g. the need to ensure that land is cleaned up to a satisfactory level in environmental protection terms is consistent with the need to remediate land for development), they may also conflict. If a finite level of resources is assumed, and there is a general correlation between higher standards and higher costs of remediation, it seems that the higher the contribution to sustainable development through environmentally sustainable development standards, the lower the contribution in terms of the amount of land released. A key aspect of sustainable development in the context of contaminated land is, therefore, to establish remediation standards which will maximise the amount of land released for development, whilst ensuring that the development is sustainable. It also suggests that the development-led approach may satisfy one of these objectives (if guided by

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[50] Para 4.1.

[51] The Government has recognised the need to locate the majority of new housing on brownfield land: See; Department of the Environment Green Paper; *Household Growth: Where Shall We Live?* (1996, Cm 3471) and the White Paper *Planning for Communities of the Future* (1998, Cm 3885), although the exact proportion appears to fluctuate.

appropriate planning policies and funding) but will seek to minimise environmental protection standards in order to maximise development and development profits.[52]

3.3.2 The "Polluter Pays" Principle

A further issue which is relevant to both sustainable development and to the "polluter pays" principle is the encouragement of sustainable activity. Although environmental economists have identified methods by which a "carrot" can be provided in order to encourage sustainable activity (e.g. cost savings as an incentive to reduce energy consumption).[53] This postulates a "win-win" possibility which does not arise in the case of contaminated land. Indeed, the very shortfall between the cost of remediation and any increase in the value of land resulting from the remedial works has in part defined the problem.[54] However, in many cases, contaminated land can be physically remedied, rather than merely being the subject of financial compensation, by the expenditure of resources.[55] If a "carrot" is to be provided to complement the "stick" of liability, then broader issues may have to be brought into the remediation strategy. Thus the polycentric nature of the issues may be intensified. Ball suggested that the real question concerns the level of resources which should be committed to remediation and by whom they should be provided.[56] This may have some bearing upon the appropriateness of adjudicative decision-making as it leads towards Fuller's view that the allocation of economic resources is not amenable to adjudication. It also suggests that the "stick" inherent in the "polluter pays" principle may have an important rôle to play but that a variety of approaches providing incentives may also have to be adopted. A further aspect of this problem is that the development-led approach may not direct resources to the most pressing problems. The shortfall

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[52] This is not to suggest that developers will fail to comply with standards for environmental protection, however, even if full compliance is possible and desirable to them, there remains an incentive to seek such standards being set at a low level, provided that compliance with them will avoid future liability.
[53] *Blueprint for a Green Economy* (Earthscan, 1989).
[54] For a discussion of the effect of differing types of contamination and the hazards posed by them on land values, see Crowcroft, P. "Contaminative Use of Land - The Implications for the Future" [1992] Environmental Policy and Practice 25.
[55] For a discussion of the distinction between remediation and compensation in an environmental context, see Steele, J., "Remedies and Remediation: Foundational Issues in Environmental Law" [1995] M.L.R. 615.
[56] Ball, S. "Liability for Environmental Harm" [1995] Contemporary Issues in Law 69.

between the cost of remediation and enhancement of land value due to remediation may be at its greatest in the very situations where risks to the environment mean that the need for remediation is most pressing. Indeed, although the value of a site may be influenced by its location as much or more than its physical condition, nonetheless, all being equal in terms of location, a heavily contaminated site posing severe risks will tend to create a greater funding gap than a less contaminated site.

As the need to remediate contaminated land results from past human activity, the "polluter pays" principle has been one of the guiding factors in developing modern contaminated land policy. However, as the House of Lords Select Committee on the European Communities identified:

> "It is quickly apparent that the precautionary principle and the "polluter pays" principle provide no more than general indications as to what might be desirable policy and practice. In formulating public policy on environmental damage a balance has to be struck between the financial, social and environmental costs and benefits of prevention, remediation and non-intervention. Difficult political judgements need to be made about where, in equity, these costs and benefits should fall as between the actual or potential polluter, his financial backers and insurers, the industrial sector to which his activities belong and – inevitably – the taxpayer."[57]

In the contaminated land context there is a modification to the general application of this principle which is important: the principle will generally have to be applied retrospectively.[58] The potential need for retrospective liability is, therefore, an important consideration when analysing the rôle of both the "polluter pays" principle and the precautionary principle in respect of contaminated land as retrospective

[57] House of Lords Select Committee on the European Communities: Session 1993-94: 3rd Report *Remedying Environmental Damage* (HL Paper 10), at para 4.
[58] For a discussion of some of the issues relating to historic pollution and the "polluter pays" principle, see Shelbourne, C. "Historic Pollution - Does The Polluter Pay?" [1995] J.P.E.L. 703.

liability is generally repugnant to lawyers.[59] By contrast, the concept of legal certainty is influential, although retrospective laws are accepted by the judiciary where the intention of the legislator is clear.[60] In the case on contaminated land liability is mainly imposed in respect of past actions, rather than to modify future conduct.[61] The main objective of imposing liability is to secure remediation funds.[62] As well as retrospective liability, further problems arise from the historic context; for example, difficulties in securing evidence as to who carried out exactly which activities, which may have lead to exactly what contaminative effect, over a long period during which sites may have had a number of occupiers and operators. Problems of causation and proof may also arise from the nature of the environmental media involved, with the complexities of migration of contaminants and of the reactions which may have occurred between the contaminant and soil or other substances. The extent of liability will also depend upon the standard to which the land must be cleaned up and the levels of contamination which will "trigger" liability. Such problems arise even where

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[59] For a discussion of the legitimacy of retroactive law see Fuller L.L. *The Morality of Law* 2nd Edition (1969) pp.51-62 where in abstract terms retroactive legislation may be felt to be a "monstrosity" and although arguments are accepted for its legitimate use in certain scenarios and the difficulty of analysis is acknowledged, non-retrospectivity is identified as one of the principles of legality which comprise the 'internal morality of law'. Although there is a principle of legal certainty in European law, this does not operate as a bar on retrospective or retroactive rule-making (which may, in part, result from it being enshrined as a principle only - see the discussion in Chapter One), and will not, for example, allow for the non-implementation of EU obligations where to do so would conflict with national law preventing legislation with retrospective effect (at least where the retrospective effect resulted from a failure to transpose obligations within the relevant time limits): see *'Commission v. Portugal'* ECJ January 21, 1999. The constitutional position of retrospectiove legislation in Great Britain is considered (albeit briefly) in Dickinson "Retrospective Legislation and the British Constitution" [1974] Scots Law Times 25.

[60] For a recent example see '*Moore* v. *Pirretta Pta Limited*', High Court of Justice, Queen's Bench Division, 25 February 1998. Retrospective criminal liability has been stated to be more objectionable in principle than civil liability (See, for example, *Remedying Environmental Damage*, *op cit.*, para 41 and *The Morality of Law*, *op cit.*) and retrospective penal legislation may be contrary to the European Convention on Human Rights (see *'Waddington* v. *Miah'* [1974] 1 WLR 683), however, many statutory liability systems may ultimately result in criminal liability if not complied with and in many circumstances, particularly regarding corporate crime where the threat of custodial sentences for individual company officers may not be great, the effects of significant financial liability or adverse publicity may be at least as significant as a fine.

[61] Of course, the knowledge that liability may be retrospectively imposed may have a significanct effect upon future polluting activities.

[62] To the extent that future contamination is avoided by liability based upon the "polluter pays" principle, the behaviour modification rôle will apply, however, the main focus is on cleaning up the legacy of the past and the prevention of future contamination may be dealt with by other, more general, measures. With regard to the new regime, it is the Government's view that future Contaminated Land will not arise due to other control systems, such as the waste management licensing and Integrated Pollution Control regimes. See para 5 of the Introduction to the Consultation Draft Statutory Guidance (DETR, September, 1996).

a "polluter" is clearly identifiable. It is also inevitable in the case of historic liability that some polluters may not be around to meet their liabilities (having died, been liquidated, etc.), will not be traceable, or will no longer have the resources required.[63] The question as to who should meet the costs of remediating "orphan sites", or the costs which would otherwise be carried by an impecunious "polluter" raises difficult issues. Even the concept of the "polluter" is problematic as to whether it should include those who have directly benefited from the polluting activity, such as lenders and shareholders, or indirectly, such as the general public through lower prices.[64] Many of these issues arise from the application of the principle in most contexts. Some, however, result from, or are exacerbated by, its application in the contaminated land context. It is these characteristics which have increased demands for fairness in the application of the principle and which raise questions as to how the principle is to be applied in "hard cases".

A further important aspect of "paying for pollution" is the use of funds. Funds, or joint compensation schemes, are a method of providing finance for remediation works.[65] They can be viewed as a kind of collective insurance[66] funded by the economic sectors most closely connected to the damage requiring remediation: industry sectoral funds. Through such schemes, operators in the sectors concerned can share the risk or burden of remediation costs. Such funds have, however, been criticised on the basis that they impose unreasonable burdens on particular industry sectors[67] and that they penalise responsible operators whilst allowing the irresponsible to avoid being held to account. [68] The latter may come about as a result of the less responsible failing to meet their responsibilities to the fund and regulators being primarily interested in securing funds from the scheme, rather than ensuring equitable contribution to it. In any event, unless contributions are made on a very sophisticated

[63] See Kunzlik, P. *Environmental Policy* (Longman, 1994) pp. 27-28.
[64] Through a failure to internalise the environmental costs of production. For an outline of the problems of applying the "polluter pays" principle in such contexts, see *Remedying Environmental Damage, op cit.*, para 3.
[65] For a discussion, see EC Green Paper, *op cit.* and *Remedying Environmental Damage, op cit.*, generally.
[66] EC Green Paper, *op cit.*, para 3.0.
[67] *Remedying Environmental Damage, op cit.*,para 12.
[68] Government Response (2), para 3.26.

basis, those who operate in an environmentally sound manner will subsidise those who do not, thus weakening the application of the "polluter pays" principle. Schemes may cover all liability, apply when a "ceiling" of liability has been reached by a particular member, or may cover only "orphan sites": such a scheme acts as a kind of self-insurance for the industry sector. The idea of voluntary schemes is fairly well accepted, although the danger that the irresponsible will be subsidised by the responsible is greater if the scheme is voluntary as it is likely that only the responsible will contribute. The idea of compulsory funds (to ensure that remediation funds are available in the future) is, however, highly contentious (although the House of Lords Select Committee thought them appropriate regarding damage caused by waste, provided that the liability was insurable),[69] particularly as the availability of insurance to cover past actions, latent damage and gradual pollution damage is negligible or uneconomic because of uncertainty as to the risks covered.[70] The use of funds has also been somewhat stigmatised by the experience and perceived failures of the US Superfund regime, which include: that it has achieved relatively few clean ups at a high cost; has involved lengthy and expensive litigation; and has influenced insurers who have curtailed insurance cover available for environmental damage.[71] These negative perceptions may not be an accurate reflection of the true picture, however, and the Superfund system has been considered a success by many.

3.3.3 The Precautionary Principle

The discussion of risks, standards and the appropriate level of remediation is also relevant to the precautionary principle. Whilst the principle requires caution in undertaking future actions and thus seems at first sight to be inapplicable to an area where the focus is upon cleaning up the results of past activities, those results are on-going and the way in which they are dealt with has implications for the present and future. The principle would suggest that high standards should be imposed both in terms of the risks which trigger remediation requirements and the standards of remediation to protect the environment, particularly where there is a lack of

[69] *Paying For Pollution, op cit.*, para 152.
[70] Government Response (2), *op cit.*, para 3.23.

knowledge as to the effects of substances and the condition of land on human health and the environment generally. At a macro-policy level, it would also suggest that the level of remediation should be nearer to the "multifunctional" standard, rather than merely "suitable for use". Where land is remedied to a standard fit for only one or a limited number of uses, it may lead to the need for further remediation in the future in order to meet society's needs. As land is a scarce resource, a precautionary approach to it suggests we should seek to maximise its availability. One aspect of this is seeking to maximise flexibility, in terms of possible uses.[72] Thus the precautionary principle could be viewed as requiring that the resource is not allowed to deteriorate, or remain, in a condition which limits its potential value as a resource. On the other hand, the proportionality principle militates against remediating beyond that which is required to address realistic risks and its application is required in order to achieve the necessary balance between the available quantity and quality of land as required by the principle of sustainable development.

3.3.4 Standard Setting

It is clear from this discussion of the Environmental Principles that the setting of and use of standards for contaminated land is very important and is relevant to remediation as well as to the definition of "contaminated land". The standards which have been applied until relatively recently have, however, had problems of their own, including; their not being comprehensive (both in terms of the range of contaminants covered and the risks posed to many Receptors through many Pathways);[73] and the need for flexibility in setting and using them.[74] With regard to the latter, as well as differences in conditions between individual sites, there are differences at national levels (such as the hydrogeological differences between the UK and the Netherlands) which make the "importation" of standards from abroad difficult, even when used

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[71] *Remedying Environmental Damage, op cit,* para 29.

[72] In many cases it will also make economic sense to take remedial action to a higher level as the marginal costs may increase greatly over time or where more than one remediation programme is required.

[73] See the discussion of weaknesses in the standards produced by the ICRCL in *POST, op cit.,* p. 21, which also includes a general lack of consistency in methodology.

[74] Which leads to subjective judgements: see Langham, R. "Contaminated Land - The Legal Aspect" [1993] J.P.E.L. 807, at p. 808.

merely as a "starting point" before taking account of economic considerations.[75] Standards, as we have seen, reflect both scientific knowledge and perceptions of risk. Although the purely scientific elements could possibly be viewed as objective and value-free, their incorporation within meaningful standards and their application in actual situations require value judgements. Although it may be possible to measure some "dose-response" correlations[76] and the like in a fairly objective manner, the crucial questions arise in determining when such correlations present a risk that is sufficiently significant for some kind of action to be considered or required. Decisions such as these require value-judgements and consideration of a range of factors including economics as well as scientific data. The setting of standards is, therefore, a social and political issue as much, if not more, than a scientific one.[77]

3.4 Contaminated Land Policy and Legal Measures

This section outlines the policy and legal measures developed or adapted for use in addressing contaminated land issues prior to elucidation of the new regime in the policy document *Paying for Our Past*.[78] It is, however, beyond the scope of this Thesis to provide a comprehensive description of these matters. The aim is instead to outline the principal measures, identify the areas where they have been criticised and then to analyse them in the context of rule-making. Two main topics are discussed: the approach of the common law; and the rôle of government intervention. The impact of European policy and law will be briefly considered.

3.5 The Common Law and Private Arrangements

The common law has a continuing relevance to issues of contaminated land. Whilst at times it has been the only or main legal tool for seeking to deal with the problems presented, it will remain of importance when the new legal regime is commenced and

[75] The lack of suitable UK standards in many areas has, however, resulted in resort to 'foreign' standards with some adaptation to meet differences in the UK: an unsatisfactory approach. *Ibid.*
[76] Where a specified result can be anticipated from specified circumstances.
[77] For a discussion of standard setting generally see Royal Commission on Environmental Pollution, 21st Report: *Setting Environmental Standards* (1998, Cm 4053) ("R.C.E.P. 21st"), and for a discussion of the wider considerations particularly, Chapters 4, 5, 8 & 9 particularly.

the possibility of resort to the common law is unaffected. Indeed, the common law context has been an influential factor in development of the new legal regime[79] and it comprises an important part of the bundle of rules that are relevant to contaminated land: the Government considers that the common law rules may make a regulatory regime operate more fairly and may enlarge the resource base for funding remediation works.[80] The new legal regime was developed at the same time that the law of nuisance and the rule in *Rylands v. Fletcher*[81] was being re-considered and re-stated, ultimately in the House of Lords, in the *Cambridge Water* case. The task of integrating new rules with existing common law liabilities is, however, something of an onerous task as "any attempt to extract clear principles from the common law relating to environmental problems will lead to frustration".[82] It is also worth mentioning here that as well as the common law rules which may deal with primary liability for loss or damage caused by land contamination, the wider common law and other legal rules will also be relevant. This is because the primary liabilities imposed by both the common law and statute (including the new rules) may be re-allocated by the common law.[83] Before considering the problems with common law liability, some analysis of the use of private arrangements (supported by the common law) may also be useful.

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[78] *Op cit.*

[79] For example, the implications of the House of Lords' decision in '*Cambridge Water* v. *Eastern Counties Leather*', *op cit.* and the need to dovetail any new regime within the existing common law were explicitly considered in *Paying for Our Past*, *op cit.*

[80] *Paying for Our Past, op cit.*, para. 2.32. This would result from common law actions against others by persons facing regulatory obligations.

[81] (1868) L.R. 3 H.L. 330. This rule had its origins in nuisance and whether it has developed into a distinct principle is unclear (particularly following the House of Lords decision in the *Cambridge Water* Case). The rule provides that a person bringing onto his land, for his own purposes, something likely to do mischief if it escapes, is *prima facie* answerable in law for all of the damage which is the natural consequence of any escape.

[82] Tromans, S. and Turrall-Clarke, R., *op cit.*, p. 32. The reasons for this are considered in the analysis of contaminated land and the common law below.

[83] As an example, whilst a landowner may be primarily liable under either common law or statute, that liability may be passed on to, or shared by, the previous landowners, tenants, professional advisors, or others through tort or contract law. It is partly his aspect of the operation of the common law which the Government thought would make regulation operate more 'fairly' and widen the resource base.

3.5.1 Land Transfers - Investigations, Warranties and Indemnities

Contract law has been used as the main method of dealing with of the uncertainties of both the common law and regulation in land transactions. On sale of land (in the corporate context) where there is concern over contamination, the purchaser is likely; (i) to require disclosure of information by the vendor as to potentially contaminating activities (together with warranties where appropriate); (ii) to carry out site surveys and investigations; and (iii) to seek indemnities regarding specific facts (the indemnity often being limited to a stated ceiling). When the transfer of land is completed, exactly which liabilities the purchaser will take on will depend on a number of factors (such as whether it has purchased shares or assets) but the risk of liability will have been largely ascertained, minimised, capped, and/or allocated by means of investigation, warranty, and/or indemnity. Residual uncertainties will be reflected in the purchase price, as will the precise nature of the indemnities and warranties. The result of all of this is to carry through the principle of *caveat emptor* but with the purchaser collecting and analysing as much information as is reasonably practicable.[84] It is clear that if liabilities are already apportioned in this manner, changes to the law may create difficulties and retrospective changes may undermine the entire methodology. Prices were, after all, agreed in the light of the legal position at the relevant time and are unlikely to be open to re-negotiation, although careful drafting of agreements may overcome many difficulties.[85]

The system whereby market operators allocate environmental liabilities has been respected in the Government's approach to contaminated land.[86] This reflects a market philosophy that the greatest efficiency will result from leaving decisions as to remedial works to the market (through development projects), with government power being held in reserve to deal with market failure. The rôle of government is, therefore, seen as being to provide guidance in order to assist market operation. One of the

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[84] For a detailed account of sale and purchase involving contaminated land, together with methods of addressing the issues, see Tromans, S. and Turrall-Clarke, R., *op cit.,* Chapters 11 & 12, and Tromans, S. & Turrall-Clarke, R. *Contaminated Land: First Supplement* (Sweet & Maxwell, 1998) ("Tromans, S. & Turrall-Clarke, R. (2)") Chapters 11 & 12.

[85] See, for example, Tromans, S. and Turrall-Clarke, R., *op cit.* ,p. 473.

[86] Indeed, the 'sanctity' of private agreements is enshrined in the new legal regime: see Chapter Four.

weaknesses of common law liability as an instrument of environmental protection is that it can create uncertainty.[87] This had a negative effect on market operation; the lack of clarity in the operation of the common law rules providing, at best, no incentive to take action, and, at worst, a dis-incentive for taking action, even when the level of environmental awareness had increased within the market.

3.5.2 Leasehold Covenants

This lack of stimulation and (originally) of awareness was also a feature of another area of private law which had great potential for securing remedial works: landlord and tenant agreements. As the landlord has superior title to the tenant, she will generally anticipate taking possession of the property at some stage (e.g. on expiry of the lease), and may be liable for the state of the property. She will, therefore, have an interest in ensuring that activities on the property are not causing damage or likely to lead to liability. Covenants within the lease might, therefore, provide financial security for the landlord and provide for periodic inspection etc.[88] Even before awareness of contaminated land issues became widespread, leases commonly included covenants which could be used to secure clean up of contamination in certain circumstances.[89] The fact that the landlord was not potentially liable for environmental degradation of the land meant that such clauses were rarely tested in order to see whether they could secure clean up of contamination in particular cases. Of course, as awareness of environmental risk (and particularly of potential liabilities) grew, specific clauses were inserted into leases in order to protect the value of the reversion for the landlord and to avoid liabilities arising.[90]

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[87] See section 3.5.7.4, below.

[88] For example, by imposing duties on tenants as to the condition of premises, providing rights of entry for the landlord to ensure that such duties are being carried out, and by imposing financial requirements so that the landlord has some security in the event of default (and the tenant a direct financial incentive to comply).

[89] Such as repairing covenants, if contamination was such that it left the property in a state of 'disrepair' and covenants to comply with statutory and common law provisions: see Tromans, S. and Turrall-Clarke, R., *op cit.*, p. 458-60.

[90] For a discussion of private leasehold provisions and contaminated land, see Tromans, S. and Turrall-Clarke, R., *op cit.*, p. 457-463.

These two areas of private law highlight the importance of private rules in dealing with environmental problems. The application of the common law did, however, have weaknesses which led to a need for intervention in order to secure remedial action (albeit within the framework of the market and such private arrangements). These weaknesses arose from the fact that: (i) the general law provided insufficient incentive to adopt appropriate private arrangements; and (ii) common law liabilities were not easily quantifiable. It is also noteworthy that in the market context, common law and other liabilities are generally lower in the hierarchy of rules than private contractual arrangements which decide what to do with those liabilities if they arise. As private rules exist within the market, the market would decide when remedial action was appropriate - on the basis of economic criteria. As noted above[91] it is the funding gap between remediation costs and return from development investment which leads to many contaminated land problems. Thus private contractual arrangements were likely to take effect in a positive way (by securing action rather than simply allocating liability) where the gap between return and expenditure was smallest, which was not necessarily where remedial action was most required. Where action was most required (land being heavily contaminated and development return low) because of environmental risks, private arrangements would merely allocate potential liability whilst seeking not to trigger liability and so incur clean-up costs.[92]

3.5.3 Tort

Although one must be cautious about generalising about the way in which the common law operates in the environmental context (since it depends upon the precise facts of each case, including rights and obligations under property and contract law),[93] three distinct areas of liability can be identified in connection with contaminated land: civil; criminal; and (administrative) "clean-up" cost liability.[94] The common law

[91] In the discussion of sustainable development and contaminated land.
[92] For a discussion of how modern pressures on funding institutions may lead to lenders acting as 'environmental regulators' by imposing contractual requirements on their borrowers as a result of concerns over lender liability for environmental damage, see Rowan-Robinson, J. *et al* "Policing the Environment: Private Regulation and the Role of Lenders" [1996] Environmental Liability 114.
[93] *Paying for Our Past, op cit.*, p. 14.
[94] Edwards, M., "Contaminated Land and the Common Law: The Current Position" [1995] 4 Environmental Policy and Practice 171, at p. 171.

mainly operates through the first of these, primarily through the "tort" system. Within that field, there are five relevant categories of tort:[95] nuisance;[96] negligence;[97] the rule in *Rylands v. Fletcher*;[98] trespass;[99] and breach of statutory duty.[100] Nuisance comprises two separate categories; public and private, and has been commonly perceived as the tort which is most relevant to environmental issues.[101]

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[95] *Ibid.*, p. 172 and Tromans, S. and Turrall-Clarke, R., *op cit.*, Chapter 2.

[96] A 'nuisance' is the unlawful interference with a person's use or enjoyment of their land or some right over or in connection with it. The basis for a claim in nuisance is a balancing exercise between the reasonableness of the defendant's use of land and its impact upon the plaintiff's proprietary rights (Ball, S. and Bell, S., *op cit.*, p. 183). A public nuisance arises when a sufficiently large class of persons is affected by the nuisance and creating a public nuisance is a crime. An individual can sue for damages suffered as a result of public nuisance only if they have suffered special damage over that suffered by the public generally, however, unlike private nuisance, actions are not restricted to injury which interferes with the enjoyment or occupation of land (Page, R.A. "Legal Redress for Damage caused by Contaminated Land" [1986] J.P.E.L. 20, at p. 23).

[97] Negligence is the breach of a legal duty (owed by the defendant to the plaintiff) to take care, which results in damage to the plaintiff. Negligence is fault-based, so that there must be some fault on the part of the defendant (which will be judged against the prevailing state of knowledge at the time of the relevant activity) and the type of damage which results must have been foreseeable at the time (Ball, S. and Bell, S., *op cit.*, p. 198). Although an occupier of contaminated land does not owe a general common law duty of care to trespassers on the property, a duty of care will arise when the occupier is aware that a trespasser is likely to come onto land where there is danger, such as an undeveloped site (Occupiers Liability Act 1984 s.1(1)). A general duty is owed to persons lawfully visiting a site (Under the Occupiers Liability Act 1957).

[98] This principle provides for strict liability where a person brings onto their land (for their own purposes) something likely to do 'mischief' if it escapes. Liability is for the damage which is the 'natural consequence' of the escape. The most important restriction on the operation of the rule is that where a substance is kept on land, it must have been kept by means of a 'non-natural user', which the courts have developed to mean some kind of abnormal or unusually hazardous use of the land (Ball. S. and Bell, S., *op cit.*, p. 199).

[99] Trespass consists of unjustifiable intrusion by one person upon land belonging to another. It differs from nuisance in that it is a direct, rather than consequential, injury, is actionable without proof of damage and appears to require a physical act by the defendant directly upon the plaintiff's land (Edwards, M., *op cit.*, p. 176).

[100] A number of statutes impose duties on the public which, if breached, will give rise to an action or damages. However, such an action will only be possible if it was Parliament's intention that such a remedy should be provided and whether this is the case will usually depend upon statutory construction (Edwards, M., *op cit.*, p. 176).

[101] See, for example, Steele, J. "Private Law and the Environment: Nuisance in Context" [1995] Legal Issues 236. For a discussion of the rôle of the common law in protecting the environment, see generally; Ladeur, K.-H., "Coping with Uncertainty: Ecological Risks and the Proceduralization of Environmental Law", in: Teubner, G. et al Eds., *Environmental Law and Ecological Responsibility* (Wiley, 1994); Steele, J. "Assessing the Past: Tort Law and Environmental Risk", in Jewell, T. & Steele, J. *Law in Environmental Decision-Making* (Clarendon Press, 1998); Elworthy, S. and Holder, J., *Environmental Protection Text and Materials*, (Butterworths, 1997) Chapter 2; Ogus, A. & Richardson, G. "Economics and the Environment: A Study of Private Nuisance" 36 [1977] CLJ 284; Shelbourne, C. *op cit.*; and Driscoll, J. "Environmental Protection and the Common Law" [1994] NLJ 64.

3.5.4 Problems with the Common Law

Although these five torts are presented as distinct areas (which have variations as to the extent to which they are fault-based or provide for strict liability and which are subject to differing defences), they actually interrelate in practice. The extent to which they do so and the extent to which their requirements differ, however, is far from clear.[102] As the law has developed, it seems that the boundaries between the torts have shifted so that foreseeability of the specific type of harm suffered now seems to be a component of nuisance law[103] and the Rule in *Rylands* v. *Fletcher*, just as it has in negligence.[104] Uncertainty as to the principles underlying each category of tort has led to confusion over which torts found causes of action for environmental damage.[105] There are, furthermore, major limitations on the usefulness of each of the torts. The context of a landlord and tenant relationship can also give rise to particular problems regarding common law liabilities, as the precise nature and scope of liabilities and duties is influenced by express and implied provisions within the lease.[106]

3.5.5 Trespass, Rylands v. Fletcher Liability and Nuisance

Trespass is unlikely to be of use where contamination has been indirect and damage consequential, as in the case of gradual migration of substances from one site to another over a period of time.[107]

In the rule in *Rylands v. Fletcher*, the requirement of "non-natural user" can present difficulties and there have been a variety of opinions as to whether the character of the location of the activity is relevant to this question.[108] Foreseeability of the particular type of harm suffered is now clearly a necessary ingredient both of nuisance and

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[102] Tromans, S. and Turrall-Clarke, R., *op cit.*, p. 32.
[103] Following *Cambridge Water, op cit.*,, Rogers, W.V.H. *Winfield & Jolowicz on Tort*, 15th Edition (Sweet & Maxwell, 1998), p. 508.
[104] Following *Cambridge Water, op cit.*.
[105] Tromans, S. and Turrall-Clarke, R., *op cit.*, p. 33.
[106] See, for example, Edwards, M., *op cit.*, p. 173-4.
[107] *Ibid.*, p. 34.
[108] See Kennedy, J. in '*Cambridge Water*', Queen's Bench Division [1992] Env. L.R. 116, and a very different approach in the House of Lords.

Rylands v. Fletcher;[109] although liability may be strict, damage will relate only to foreseeable damage. A further impact of the *Cambridge Water* Case has been that substances which have contaminated land and which present a continuing threat to neighbouring land and water supplies may not provide the basis for an actionable nuisance despite the fact that continuing harm is now clearly foreseeable; the substance may be considered to have been "irretrievably lost" and to have passed beyond the control of the originator.[110] Liability in nuisance may, of course, fall on current owners/occupiers as well as upon those whose activities gave rise to the nuisance. This is because it is possible to "adopt" a nuisance created by a predecessor in title if its existence was known, or ought to have been known. Nonetheless, the originator of a nuisance remains liable for it after parting with the relevant land, despite the fact he is no longer able to abate it.[111]

There some defences to nuisance actions, notably that of "regulatory authority" where the activity alleged to have given rise to the nuisance has been specifically authorised by statute (although a grant of planning permission is not normally sufficient unless it changes the character of an area).[112]

3.5.6 Negligence and Breach of Statutory Duty

The potential usefulness of breach of statutory duty to secure clean-up of contaminated land is greatly limited by the requirement that Parliament must have intended breach of the particular statutory measure to result in civil liability, and to have imposed the statutory obligation for the benefit of a particular class of persons (or created a public right and the plaintiff has suffered "particular, direct and substantial damage"[113]). In most cases, Statutes are silent as to this issue, and the

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[109] Tromans, S. and Turrall-Clarke, R., *op cit.*, p. 41.
[110] Ibid., p. 52-53.
[111] Ibid., p. 45-47.
[112] A number of cases have considered and refined this concept, though not in an entirely logical fashion, see the commentary to '*Blackburn v. ARC Limited*' [1998] Env. L.R. 469, at pp. 540-544.
[113] '*Lonrho* v. *Shell Petroleum Co. Ltd (No. 2)* [1982] A.C. 173, cited in *Winfield and Jolowicz on Tort, op cit.*, at p. 258.

nature of most environmental legislation is such that identifying "personal" damage as a result of a breach is difficult.[114]

The most significant difficulties with using negligence to secure remediation of contaminated land are: (i) the need to establish a duty of care owed to the plaintiff by the defendant; and; (ii) the need to establish a failure to meet the required standards of care (i.e. fault on the part of the defendant).[115] As with negligence and *Rylands v. Fletcher* liability, of course, the specific type of damage resulting from the negligent action must also have been reasonably foreseeable, or the damage will be too "remote" to be actionable. Whilst there may be many circumstances in which these obstacles are not too difficult to overcome, proving negligence regarding past activities is particularly onerous, as the relevant duties, and standards, of care are those prevailing at the time of the relevant activity. In these circumstances, simply identifying the prevailing standards can be immensely difficult.[116]

3.5.7 Generic Problems with the Common Law

3.5.7.1 Causation

There are problems with common law actions which are common to all of the torts. The first of these is the need to provide sufficient proof to bring an action. It can be extremely difficult to establish a causal link between the acts or omissions of the defendant and the harm alleged to have resulted.[117] We have already seen (in Chapter One) that the question of causation is a contentious and difficult area in the environmental context generally. Scientific uncertainty can often undermine proof of causation. We have also seen that the nature of the environmental media involved

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[114] Tromans, S. and Turrall-Clarke, R., *op cit.*, p. 57.
[115] Tromans, S. and Turrall-Clarke, R., *op cit.*, pp. 55-56.
[116] This may be less onerous where the failure to deal with past contamination in the light of current standards of care is the source of the plaintiff's complaint (provided that the defendant remains responsible for management of the site). For example, disposal of putrescible waste in a manner considered unacceptable now may not have been negligent at the time of disposal. If the subject of the plaintiff's action is a failure to deal appropriately with methane gas generated by the earlier "deposit", however, current standards of care will be applicable.
[117] Tromans, S. and Turrall-Clarke, R., *op cit.*, p. 60.

presents even greater difficulties in the context of contaminated land. There may be a number of possible causes of damage and it may be impossible to establish either that a given substance (or source of that substance) contributed to the damage at all, or the extent to which it was responsible.[118] Even where it can be established that a particular substance caused the damage it may still be difficult to prove that the defendant was responsible for the substance being on the land in a way in which the damage might arise. In addition, it may often be difficult to prove that the defendant should reasonably have foreseen the particular type of damage suffered. Standards can be influential here: if standards are established for air quality, water quality, etc., then escapes of substances which will lead to a breach of those standards should be more likely to result in common law liability as the particular type of harm which results should ordinarily be foreseeable. Of course this only relates to future escapes. In the *Cambridge Water* Case, it was precisely because standards had changed after the escape of solvents (in such a way as subsequently to result in water being regarded as unfit for consumption) which led the House of Lords to hold that the particular type of damage was not foreseeable. Furthermore, the common law uses imprecise concepts such as "interference" and "reasonableness" as standards, in contrast with the relatively precise standards which are provided by statute.[119] This provides flexibility in application, but at the expense of certainty as the standards essentially require subjective judgements, though they will often refer to precise standards or criteria where these are relevant.[120] Although strict (as opposed to fault-based) liability[121] can assist in securing clean up, causation problems will remain, even with statutory liability.

3.5.7.2 Remedies

The question of remedies is also difficult. Damages are the primary remedy in tort but identifying the damage for which such compensation can be awarded is a complicated task. Damage may be "latent" in that its existence or extent may only be realised at a

[118] Tromans, S. and Turrall-Clarke, R., *op cit.*, p. 61.
[119] Ball. S. and Bell, S., *op cit.*, p. 178.
[120] Which standards are chosen as suitable and how they are used in common law actions remains a separate question.

much later date, or may only arise upon the introduction of higher statutory standards.[122] Some torts, such as trespass or nuisance comprising interference with property rights, are, of course, actionable without proof of damage but negligence and *Rylands v. Fletcher* liability clearly require material damage in order to be actionable.[123] The vexed issue of when contamination is sufficient to cause harm or a serious risk of harm will also be relevant. The quantum of damages may also be difficult to predict. Furthermore, although civil liability may have a potential deterrent effect on polluters, it is nonetheless the case that a successful plaintiff is not required to use the damages that she obtains in a civil action to remediate the site which the polluting defendant's wrongful conduct may have contaminated. The successful plaintiff may indeed have many priorities other than remediation of the contaminated land or there may be limits to the extent that measures may be taken to mitigate the effects of activities which are continuing to contaminate land. There is, therefore, no guarantee that a successful private action will provide any environmental benefit at all. If damages are used for remedial works, these are likely to be carried out by means of the least expensive methods, with the aim of protecting the plaintiff and his property only (rather than neighbouring land generally) and so remediation is likely to be carried out by a process of isolation of contaminants within a limited area of land.[124] For these reasons, it is often preferable (from the perspective of environmental protection) that an injunction be granted and this is (in theory at least) the primary remedy for nuisance actions. A restrictive injunction may be appropriate where activities are continuing. In relation to past activities, however, there is no avoiding injunctions which are essentially mandatory.[125] Injunctions are discretionary remedies and the courts have stated that a defendant must know exactly what is required to comply with a mandatory injunction.[126] The important point is that the physical nature of environmental (and contaminated land) problems requires physical action: the only

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[121] As in Nuisance and *Rylands v. Fletcher* liability.
[122] As with the *Cambridge Water* case.
[123] Tromans, S. and Turrall-Clarke, R., *op cit.*, p. 62-3.
[124] Hawkins, S. "Clean-up of Contaminated Land: An Assessment of the Mechanisms Available" [1992] J.P.E.L. 1119, at p. 1124.
[125] Tromans, S. and Turrall-Clarke, R., *op cit.*, p. 65.
[126] Ball. S. and Bell, S., *op cit.*, p. 203.

real test for the effectiveness of the law is whether it secures, or contributes to, protection of the environment - by repair or prevention.[127]

3.5.7.3 Joint & Several Liability, Limitation, and Locus Standi

Defendants may be "jointly and severally" liable if two or more of them have together committed a tort.[128] The vital point here is whether their actions have caused or contributed to the same damage to the plaintiff, where the plaintiff may recover the entire loss from one tortfeasor and leave apportionment to them, or their actions have caused different damage, where the plaintiff may only recover for the particular type of damage which was caused.[129] There are also time limitations on the bringing of tort actions provided by the Limitation Act 1980 and the Latent Damage Act 1986, the precise effect of which depends upon the nature of the damage suffered.

As well as the usual barriers to using the law (such as litigation costs) there is one further, important limitation to the bringing of tort actions: *locus standi.* An action may only be brought if a plaintiff has sufficient interest in the matter and in the case of nuisance, trespass and *Rylands v. Fletcher* liability this means a proprietary interest in land affected by contaminated land. The common law has developed as a means of balancing competing individual, not collective, rights and is firmly rooted in the protection of private property.[130] Indeed, the scope of nuisance is defined by property rights. Despite the suggestion by some that development of the law of nuisance may represent the way forward for environmental protection under the common law,[131] its usefulness will be restricted by the fact that nuisance has not developed specifically for the purpose of environmental protection, and recently there have been clear re-statements of the proprietary nature of standing required in order to bring a nuisance

[127] Ball, S. "Liability for Environmental Harm" , *op cit.* In addition to damages and injunctions, there are certain limited circumstances where plaintiffs can resort to self-help and abate the activity causing damage.
[128] For a discussion of the position at common law, see Rogers, W.V.H. *Winfield & Jolowicz on Tort*, 15th Edition (Sweet & Maxwell, 1998) at pp. 731-3.
[129] Tromans, S. and Turrall-Clarke, R., *op cit.*, p. 68.
[130] Ball. S. and Bell, S., *op cit.*, p. 178-179.
[131] Steele, J. "Private Law and the Environment: Nuisance in Context", *op cit.*

action.[132] Whilst negligence is not as restrictive in terms of standing, the difficulties in using this tort are outlined above.

3.5.7.4 Complexity and Uncertainty

Perhaps the greatest problem with the system of common law liability in the contaminated land context is the complexity and uncertainty[133] of the interrelating liability rules. This is compounded by the subjective nature of the standards used. The lack of case-law developed in the contaminated land context may reflect a consequent level of uncertainty and a resulting reluctance to risk time and money in testing common law principles in order to further environmental objectives.[134] Indeed, although many principles were tested in the *Cambridge Water* case, and some of the uncertainties removed, the need for precise criteria for establishing strict liability under a statutory scheme for environmental liability (which would presumably include the more serious cases of contaminated land at least) was explicitly recognised by Lord Goff.[135] In *Cambridge Water* there were both positive outcomes for environmental protection (such as the House of Lords' conclusion that the principle of non-natural user encompassed the storage of substantial quantities of chemicals on industrial premises) and negative aspects (such as the House's decision as to the foreseeability requirements applicable to both *Rylands v. Fletcher* and nuisance liability).[136] The negative aspects of the Case are most likely to be felt when seeking to establish liability for historic pollution; passing the foreseeability test being a more realistic possibility with regard to recent and continuing contamination. Reform of the law concerning liability for historic pollution was, therefore, regarded by the House as being the responsibility of Parliament, rather than the courts, particularly where strict liability is involved.[137]

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[132] See *'Hunter & Others* v. *Canary Wharf Ltd & London Docklands Development Corporation'* (House of Lords) [1997] 2 WLR 684. This point was recognised by Steele.
[133] See *House of Commons (1)*, para 135.
[134] Rather than reflecting a lack of problems with the law: *Ibid.*, para 136.
[135] *'Cambridge Water Company Limited v. Eastern Counties Leather plc'* HL [1994] 1 All ER 53, at p. 76.
[136] Ball, S. "Liability for Environmental Harm" , *op cit.*
[137] *Ibid.*

3.6 Government Intervention and Legislative Measures

3.6.1 The Need for Government Intervention

Whilst the common law itself has a long history of intervention in the market,[138] supporting it through a legal framework, one of the main approaches to and justifications for regulatory intervention has been functionalist analysis which suggests that the State acts in the public interest to tackle market imperfections.[139] The possible forms of market correction vary greatly and include, notably: (i) the need to "internalise" all costs of production, including environmental costs, so that they are reflected in price and thus in market behaviour;[140] and (ii) the need to prevent regulatory competition which might arise if autonomous geographical areas were entitled to compete for investors by offering low environmental standards.[141] A further aspect, discussed in more detail below in relation to Registers of contaminated land, is the provision of information for the market whereby Government intervention is intended to provide such information in order to increase the market's efficiency. The reasons for market failure and the failure of the common law to address them do, of course, vary. Market information failure arises because operators have an economic incentive to operate in an inefficient manner when seen from the perspective of the market as a whole (i.e., when it is in their interests to refuse to provide the information which others require). Similarly, the need for regulatory intervention may arise from the fact that each operator has an economic incentive to increase its polluting activities even though the aggregate effect is to produce excessive pollution levels. Here coercive powers may be required to prevent excessive exploitation.[142] Because such direct intervention will often have the effect of allocating resources - by determining who may produce what levels of pollution, or may carry out production at

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[138] Baldwin, *et al A Reader on Regulation* (O.U.P., 1998), p. 5-6.

[139] *Ibid.*, p. 9. Whilst there are other approaches to regulation, there seems little doubt that one of the most important purposes is to correct market failure.

[140] See the discussion of the "polluter pays" principle in Chapter Two and Steele, J. "Remedies and Remediation: Foundational Issues in Environmental Liability" [1995] M.L.R. 615.

[141] See, for example, Revesz, R. "Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation", in Revesz, R., *op cit.* and the discussion of local authority responses to proposals for Registers, below.

[142] Garrett Hardins "The Tragedy of the Commons", extracted in Revesz, R. at p. 5.

what levels[143] - it is perhaps not surprising that the common law has failed to intervene on anything other than the most general of levels. Direct and specific intervention has been left to the Government.

The UK is one of the few countries not to have developed its policy for waste management in the wake of an environmental disaster.[144] In most countries where there has been comprehensive intervention by the Government to deal with contaminated land issues, this has been primarily aimed at (and been a response to) waste disposal issues. Although there have, indeed, been serious incidents concerning contaminated land in the UK,[145] these do not appear to have prompted rule-making to the same extent that legislation in the United States and the Netherlands was prompted by a wave of public concern over serious consequences from failures to control waste.[146] Indeed, until 1990, there does not appear to have been any serious consideration of the possible need for comprehensive governmental intervention to deal with contaminated land issues in the UK.[147] Measures had, of course, been introduced which could prevent land contamination or assist with clean up but these were piecemeal and part of a more general set of policy objectives, including the recycling of derelict (though not necessarily contaminated) land, and general environmental protection. These governmental interventions and the measures introduced post-1990 (other than the new legal regime) will be outlined below where they have had the potential to address historic contamination. In addition, some general discussion of government intervention is included in order to provide the context for consideration of the need for specific intervention and the means that

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[143] The allocation of economic resources being 'polycentric'.

[144] Department of the Environment: *The Government's Reply to the Second Report of the House of Commons Environment Committee: Toxic Waste* (DoE, 1989) Cm 679.

[145] For example: escapes of landfill gas causing an explosion at Loscoe in Derbyshire (1986); Housing estate development on sites previously used for landfill leading to monitoring of methane levels and re-housing (Kenilworth and Sittingbourne); and the acquisition of the Chemstar site at Thameside by the local authority for remediation and control following a solvent works explosion (1981-3) - See *POST*, p. 6. Serious incidents involving contaminated land continue to date; for example, 16 families have been evacuated from Weston in Cheshire, near to an ICI manufacturing complex, as a result of the dumping of toxic chemicals more than 50 years ago. The legal implications for the company and severe (ENDS Report February 2000, p. 4).

[146] The Comprehensive Environmental Response, Compensation, and Liability Act 1980 resulted from events at Love Canal in New Jersey and the Soil Clean Up (Interim) Act 1983 in the Netherlands followed an incident in Lekkerkerk.

[147] At Government level at least.

might be employed. This will also assist with the identification of the issues which rule-makers must address with contaminated land, together with some analysis of the types of rules and rule-making processes which have been used.

3.6.2 Statutory Nuisance

The statutory nuisance legislation will briefly be dealt with first, as it provides the template upon which the new legal regime is based.[148] In fact statutory nuisance legislation has a long history going back to the Public Health Act of 1936 and the control of public nuisances can be traced back beyond that to the 19th Century.[149] The present legislation is found in Part III of the Environmental Protection Act 1990. Local authorities have a duty to inspect their areas for statutory nuisances[150] which includes "any premises in such state as to be prejudicial to health or a nuisance" and "any accumulation or deposit which is prejudicial to health or a nuisance".[151] If a statutory nuisance is found to exist or to be likely to occur or recur, an abatement notice may be served requiring abatement, the execution of works or the taking of other steps.[152] A defence is available in many cases of having used the "Best Practicable Means" to prevent the nuisance or counteract its effects.[153] Failure to comply with an abatement notice without a reasonable excuse is a summary offence[154] and the local authority may also take steps to abate the nuisance and recover the costs of doing so.[155] A "person aggrieved" by a statutory nuisance may seek an abatement order in the magistrates' court.[156] Abatement notices may be served on the person(s) responsible for the nuisance, or, where such person(s) cannot be found (or the nuisance arises from a structural defect), on the owner or occupier of relevant premises.[157]

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[148] Further analysis will be provided in Chapter Four.
[149] See, for example: the Nuisance Removal and Diseases Prevention Act 1848; the Nuisances Removal Act 1855; and the Public Health Act 1875.
[150] S.79(1).
[151] S.79.
[152] S.80.
[153] S.80(7).
[154] S.80(4)-(6).
[155] S.81.
[156] S.82.
[157] S.80.

Part III of the Environmental Protection Act 1990 did consolidate some of the public health legislation and provide for the prevention of statutory nuisances[158] but there was a great deal of uncertainty as to when the powers provided could be used and as to whether the duties provided applied in the context of contaminated land. Some of the reasons for uncertainty arose because the legislation laid down subjective standards,[159] whereas standards for land contamination tend to be more technical.[160] This was exacerbated by differing levels of expertise amongst the regulators (i.e. local authorities) as to land contamination issues. Again, the nature of land contamination is such that technical expertise is usually required. These uncertainties and the lack of technical expertise seems to have made many local authorities reluctant to expend their scarce resources on seeking abatement of statutory nuisances resulting from contaminated land; and the fact that provisions may be in the form of duties, rather than discretionary powers, has not guaranteed that they will be carried out.[161]

3.6.3 Pre-1990 Policy and Intervention

One of the more significant interventions prior to the House of Commons' First Report on Contaminated Land was through the planning system. This could be both preventative;[162] and remedial.[163] The existence of contaminated land was also clearly established as a material consideration to be taken into account by planning authorities.[164] However, this could not (and cannot) effect control retrospectively because, by definition, planning control is only effective where planning permission is required. Contaminated land issues were, therefore, usually dealt with indirectly, often as part of schemes to reclaim derelict land and the legislative provisions reflected

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[158] Rather than requiring a nuisance to exist before action was possible.
[159] "... prejudicial to health ... " and "... a nuisance ..." (section 79 (1) of the Environmental Protection Act 1990), the former defined in section 79(7) as "... injurious, or likely to cause injury to, health ...".
[160] For example, guideline values for concentrations of specific contaminants.
[161] Hawkins, S., *op cit.,* p. 1120.
[162] By the use of development control to prevent potentially contaminative activities (ensuring that development did not provide a pathway between hazards and receptors), or by the use conditions to avoid contamination resulting from such activities.
[163] By requiring adequate clean up of sites as part of development programmes.
[164] Department of the Environment Circular 21/87.

these primary objectives.[165] The question of contaminated land was dealt with directly in DoE Circular 21/87 *Development and Contaminated Land* although the advice was basically that: "Each site must be considered on its merits and if necessary treated with caution".

With regard to legislation on environmental protection, the Deposit of Poisonous Waste Act 1972 and then Part I of the Control of Pollution Act 1974 provided a system of control for the management of waste which sought to prevent environmental hazards resulting from such management. These included the creation of express civil causes of action where damage resulted from the unlawful deposit of waste,[166] but, crucially, did not provide measures regarding the condition of a waste disposal site after its closure and the surrender of licences.

With regard to emissions to air, control had been provided through a number of statutory measures based upon the Alkali, &tc., Works Regulation Act 1906 for industrial processes and clean air legislation generally. Water was protected by the system of discharge consents with a long history.[167] None of these controls were directed specifically at cleaning up contaminated land, although they had clear potential benefits in terms of prevention.

3.6.4 The House of Commons' First Report

Arising out of an earlier Report into "Toxic Waste",[168] the House of Commons Environment Committee reported on issues relating to contaminated land in 1990.[169] The findings of this report included the conclusions; that there had been a lack of policy development on the issues concerning contaminated land;[170] that various pieces

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[165] See, for example, s.10(3) of the Town and Country Planning Act 1944 which empowered local authorities to acquire land with a view to securing that it was brought into use.
[166] Deposit of Poisonous Waste Act 1972, s.2 and Control of Pollution Act 1974, s.88.
[167] Dating from the Rivers Pollution Prevention Act 1876 and including measures under the Rivers (Prevention of Pollution) Act 1951, Water Resources Act 1963, Control of Pollution Act 1974 and Water Act 1989.
[168] House of Commons Environment Committee Second Report: *Toxic Waste*; 1988-89 HC 22-I.
[169] *House of Commons (1), op cit.*
[170] *Ibid.*, para 8.

of legislation and Government grants touched on the problem but that these were directed primarily at other issues;[171] that little thought had been given to central issues - including issues as to who should pay for remediation; the applicable clean up standards and the appropriate remediation techniques;[172] and that there was a need for clear guidance in the form of legally binding science-based standards and legislation.[173] The Committee also clearly rejected a policy of multifunctionality.[174] The way forward was viewed primarily as involving the provision of information to allow the market to operate more effectively. The main recommendation of the report regarding remediation was that local authorities should be placed under a legal duty to ensure that registers of contaminated land were developed[175] and that the rule of *caveat emptor* in property transactions could then be abolished so that there was a duty on vendors to disclose information as to contamination.[176] A more direct intervention into the market was recommended in the form of proposed statutory liability for damage caused by contaminated land. The rationale for these proposals was to provide clarity in this area.[177] As well as welcoming specific measures to prevent contamination and clarification of statutory nuisance powers in the then Environment Bill,[178] the report recommended that a general requirement to discontinue contaminating activities and to clean up sites should be imposed.[179] This was to be in the form of a Code of Practice developed by the relevant industries in conjunction with the DoE. In default of agreement, however, it would be imposed by legislation. A new Planning Policy Guidance Note was also recommended,[180] together with an enhanced rôle for the National Rivers Authority (enhanced both in terms of consultation in planning matters and the use of powers to prosecute for water

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[171] *Ibid.*, although a co-ordinating committee in Government had been set up to co-ordinate policy development between Departments - The Interdepartmental Committee on the Redevelopment of Contaminated Land ("ICRCL"). Grants included Derelict Land Grant, City Grant, the Urban Programme and Urban Development Corporation expenditure (see para 50) and are now provided through the single regeneration budget or under the programmes of English Partnerships, or the Regional Development Agencies.
[172] *Ibid.*
[173] *Ibid.*, para 9.
[174] *Ibid.*, para 71.
[175] *Ibid.*, para 85, whilst recognising dangers such as 'blight'.
[176] *Ibid.*, para 95.
[177] *Ibid.*, para 137. The difficulties in developing such legislation (such as dealing with the issues of retrospection, limitation and the availability of insurance) were recognised.
[178] Enacted as the Environmental Protection Act 1990.
[179] *House of Commons (1)*, para 111.

pollution).[181] The Committee had examined the regimes in place in other countries and was "mindful of the bureaucracy and waste of resources which has characterised the US Superfund and [was] anxious not to replicate a similar system in the UK"[182] and viewed the Superfund concept as a complex method of identifying contamination, involving endless expensive litigation.

3.6.5 The Response to the House of Commons' First Report

In the Government's response to the House of Commons Report,[183] the idea of registers was accepted. In order to reduce the dangers of "blight", however, an internal DoE Working Party recommended that registers be of *potentially* contaminative *uses*, rather than of *actually* contaminated *sites*.[184] Blight has been a major consideration in contaminated land policy development. It is the stigma which may result from identification of land as "contaminated" or potentially contaminated. Although the most obvious result of blight is a (quite often drastic) reduction in land value, it may even lead to stress-related illness arising from fears as to the value of the home or the risks to occupants resulting from contamination.[185] Contrary to the view of the House of Commons Environment Committee, a Law Commission Standing Committee on Conveyancing had recommended that the *caveat emptor* rule be retained[186] and this was accepted by the Government.[187] Multifunctionality was rejected on the basis that costs would outweigh benefits[188] The possibility of creating a system of statutory clean up standards/objectives was also rejected; and the focus was to remain on the development of "trigger values" in Guidance Notes in order to indicate when action should be taken.[189] The view that the polluter should pay for clean up was endorsed but it was considered that there was no need to create a general duty in the light of the

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[180] *Ibid.*, para 118
[181] *Ibid.*, paras 123 and 127.
[182] *Ibid.*, conclusion (9).
[183] *Government Response (1), op cit.*
[184] *Ibid.*, para 2.3.
[185] For a discussion of blight and its effects in the contaminated land context, see Petts, J. "Contaminated Sites: Blight, Public Concerns and Communication" [1994] Land Contamination and Reclamation 171.
[186] *Let the Buyer be Well Informed* (December 1989).
[187] *Ibid.*, para 2.9.
[188] *Ibid.*, para 3.1.

specific provision s contained in the Environment Bill,[190] although there was some agreement with the proposal for a Code of Practice.[191] Furthermore, the uncertainty surrounding the application of common law principles was not seen as a justification in itself for creating statutory liabilities and the question was postponed until the common law principles were tested in the courts and European Community developments had progressed.[192]

3.6.6 Post-1990 Intervention

The Environmental Protection Act 1990 contained a number of measures which addressed contaminated land issues, both directly and indirectly. The impact of most of the relevant provisions was preventative,[193] although the powers of local authorities in respect of statutory nuisance were consolidated and developed in Part III. In relation to waste, the Act contained provisions which could address problems of historic contamination. Powers to require removal of unlawfully deposited waste were provided by s.59, civil liability for damage caused by unlawfully deposited waste was imposed by s.73 and a duty to inspect land and powers to require removal of harmful waste deposits (together with costs recovery powers) were to have been provided in s.61. The impact of sections 59 and 73[194] upon historic contamination was unclear but appeared to be limited in scope as the activity resulting in contamination (the depositing of waste) would have to have been in breach of provisions provided elsewhere in the relevant Act.[195] In a similar vein, breach of the "duty of care" imposed on those producing, or having control of, waste by s.34 could lead to liability

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[189] *Ibid.*, para 3.8.

[190] The Bill was subsequently enacted as the "Environmental Protection Act 1990". The provisions included the (ill-fated) s.143 (to establish a system of registers of contaminated land) and s.61 (regarding the clean-up of harmful deposits of waste) .

[191] *Ibid.*, 4.8-11.

[192] *Ibid.*, p. 22.

[193] Part I provided for a system of Integrated Pollution Control ("IPC") which regulated many polluting activities and was directly addressed at *inter alia* prevention of contamination of land: the definition of the "environment" (which is protected by several measures) including "land": s.1; and controls on waste were consolidated and developed in Part II. Continuing controls through licence conditions could assist with prevention of contamination.

[194] Like earlier provisions: the Deposit of Poisonous Waste Act 1972, s.2 and Control of Pollution Act 1974, s.88.

[195] For example, it would appear that s.59 could not be used for activities which had taken place before 1990.

for damage caused by breach of that duty but only from the date when the duty itself was imposed. Section 61 would have provided for historic clean up but was limited in scope and repealed without ever being brought into force. The Act's most direct intervention into the market, therefore, was s.143 which for the compiling of registers of land which "may" be contaminated and this would clearly have a significant impact on historic contamination policy.

The question of registers had, in fact, already been raised before publication of the House of Commons report: the Royal Commission on Environmental Pollution had recommended that the Government should consider whether contamination should be entered as a local land charge;[196] the Government was, therefore, already considering the question of whether to have registers;[197] and registers had been used in a number of other countries.[198]

Section 143 imposed a duty on local authorities to maintain registers of the land in their areas which had been put to a contaminative use (as specified in regulations). Sixteen categories and 42 sub-groups of "contaminative uses" were initially proposed.[199] Following consultation (many responses to which severely criticised the approach taken) the number of contaminative uses was reduced to eight (from 42) and some changes were made as to the registration of remedial actions taken on sites. The idea of registers was abandoned.[200] The main criticisms of the proposals were that; it focused on *potentially* contaminated, rather than *actually* contaminated, sites,[201] it would lead to the inclusion (and potential blight) of sites which were not in fact contaminated and to the exclusion of sites which were; there was no provision for removing sites from the registers following the execution of remediation works; and that the proposed regime would only identify sites and not assist with their

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[196] In its 11th report: *Managing Waste: The Duty of Care* (HMSO, 1985)
[197] *Public Registers of Land Which May Be Contaminated: A Consultation Paper* (DoE, May 1991) para 2.1.
[198] Tromans, S. & Turrall-Clarke, R., *op cit.*, p. 117.
[199] *Public Registers of Land Which May Be Contaminated, op cit.*
[200] And s.143 was eventually repealed without having commenced. For a view that panic amongst property professionals was based upon the fear of the unknown and that registers would, in reality, have probably not been a problem, see Chakravorty, S. "Commercial Aspects of s.143 of the Environmental Protection Act 1990" [1992] J.P.E.L. 624.
[201] A specific policy decision: see above.

remediation, for example, by clarifying what remedial action would be required, paid for by whom, and involving which regulatory agencies.[202] This lack of clarity or certainty as to remediation requirements also increased the effects of blight: potential purchasers would be more averse to the risks of unquantifiable liability and homeowners would be more anxious regarding risks where remedial actions and liability for them was uncertain. The consultation on s.143 registers also highlighted the concerns of local authorities as to the costs of implementing the proposals and, perhaps more significantly, the fact that the impact of blight would fall disproportionately upon those very local authorities which faced the greatest socio-economic challenges when competing for inward investment against neighbouring authorities (offering Greenfield sites)[203] thus undermining regeneration programmes. This reinforces the idea that blight can create very real fears and that contaminated land rules need to combine with wider measures, such as those which might restrict Greenfield development in order to meet policy objectives. When abandoning the s.143 proposals, the then Secretary of State announced that there would be a comprehensive review of regulation and contaminated land.[204] The outcome of that review was the consultation document "*Paying for Our Past*"; and the consultation process and legislation which resulted provides the focus of Chapters Four, Five and Six. Other developments in policy and law which took place in parallel with consultation on *Paying for Our Past* and the continuing rule-making process are outlined in the next section.

3.6.7 Parallel Policy and Legal Measures

Protection of water resources has continued to assist in addressing some contaminated land issues. As well as consolidating, updating and improving upon existing provisions generally, the Water Resources Act provided for the carrying out of works

[202] Tromans, S. & Turrall-Clarke, R., *op cit.*, p. 119. There were further practical problems, such as the lack of an appeal mechanism.
[203] Walton, W. "Bad land and bad law: the rôle of local authorities in the formulation of new legislation and guidance for contaminated land in the United Kingdom" [1997] 15 Environment and Planning C: Government and Policy, p. 229, at p. 235.
[204] DoE News Release 1993, No. 209.

by the Environment Agency to prevent or clean up water pollution.[205] This provision was later extended by introducing a system of "Works Notices" whereby polluters could be required to carry out works themselves. This avoided the problem of the regulator having to carry the risk of undertaking significant works at its own expense in the hope that the costs would actually be recovered from the polluter.[206] These provisions are very important and clearly provide a useful tool for cleaning up historic contamination, within the context of water pollution. Furthermore, regulations to protect groundwater have been recently introduced to comply with European Community law,[207] although it appears that these may only be of use in respect of historic contamination where a *current* activity may result in that contamination entering groundwater. Much more generally the National Rivers Authority has provided guidance on the issues of contaminated land in the water environment in 1994.[208]

Further legislative and policy measures, directly or indirectly relevant to dealing with contaminated land, include:

- The Town and Country Planning Act 1990, s.215, which provides local authorities with the power to serve notices requiring remediation of the condition of land if it appears that the amenity of the area is adversely affected by condition of the land. This could possibly be used to assist with historic clean up but is actually very limited in its effect.[209]

- The Environmental Information Regulations 1992, through which information relating to contaminated land may now be available.[210] This may include the

[205] S.161.
[206] s.161A-D. Works Notices will be analysed as part of the analysis of the new legal regime.
[207] The Groundwater Regulations SI 1998 No. 2746: implementing Directive 80/68.
[208] *Contaminated Land and the Water Environment* (N.R.A., 1994) Water Quality Series, No. 15.
[209] As it cannot be enforced where the condition of the land results from, or has resulted from, the ordinary use of the land for a permitted use: see s.217.
[210] SI 1992/3240, as well as under specific register provisions forming parts of environmental protection systems (see, for example, registers to be maintained for LAAPC and IPC under ss.20-22 of the Environmental Protection Act 1990).

information collected by local authorities in preparation for meeting their duties under s.143.

- Planning controls, which include Planning Policy Note 23: *Planning and Pollution Control.* This provides advice on applications to develop contaminated land.[211]

- Economic approaches, including a fiscal mechanism for correcting some of the externalities of landfilling waste in the form of the Landfill Tax.[212] The tax seeks to apply the "polluter pays" principle and may act as a deterrence to landfilling generally, which is a major cause of contaminated land problems, however, it does nothing to address historic contamination issues.

- Financial support, through which remediation of contaminated land receives continued encouragement. Derelict Land Grant and related programmes have been replaced with the English Partnerships Investment Fund and with a focus on that Government Agency as the grant provider for land reclamation schemes.[213] It has been suggested that this has resulted in a preference for private sector-led schemes,[214] which would be consistent to the Government's market approach. Local Authorities may also seek funds through the Supplementary Credits Approval system.

Integrated Pollution Prevention and Control ("IPPC") is, perhaps, the most significant recent statutory provision.[215] It will, in particular, require the return of sites (where "authorised operations" have been carried out) to a "satisfactory state" on cessation of the operation. Draft national provisions[216]will, furthermore, require an operator to

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[211] For a critique, see Graham, T. "Contaminated Land Investigations - How Will They Work Under PPG23?" [1996] J.P.E.L. 547.
[212] Introduced by the Finance Act 1996 and subsequently fleshed out by a number of Regulations and Orders.
[213] Morris, D. & Jeavons, I. "The Role of Local Authorities in Land Reclamation" [1996] Environmental Policy and Practice 17.
[214] *Ibid.*
[215] The Pollution Prevention and Control Act 1999, together with Regulations to be made under it.
[216] Transposing Directive 96/61.

report on the state of land when applying for an authorisation. They will also allow conditions to be imposed preventing contamination and will provide powers to require clean up of the relevant sites prior to cessation. The effect regarding historic contamination seems marginal (the IPPC clean-up provisions applying to *future* breaches of conditions, etc.) and the new legal regime appears to apply in such cases. The provisions requiring operators to report on the state of sites may, however, act as a useful source of information and help to trigger the use of other legislative measures.[217]

3.6.8 The Philosophy Underlying Government Intervention

The intendeded use of registers represented the Government's preferred approach in addressing contaminated land problems. It was a means of providing information to the market (as well as collating information for use by local planning authorities).[218] Registers were also intended to help to identify the extent of land contamination problems nationally.[219] These methods of intervention reflected the underlying philosophy which was that problems would be best addressed through the process of development.[220] The greatest problems were perceived to result from imperfections in the contaminated land market in the form of insufficient or inadequate information as to the condition of land.[221] Registers, however, aspired to do no more than secure that the flow of information as to the potential for land contamination was improved, though this would include dissemination of information to the general public and would provide material which could improve planning decisions. The underlying belief appears to have been that market uncertainties resulting from such lack of information and inadequate scientific standards were acting as fetters on the development process which would otherwise have provided for the necessary remediation through the operation of market forces. There could, of course, also be a need for financial or other incentives (such as planning) in order to bridge the

[217] Tromans, S. & Turrall-Clarke, R. (2), *op cit.*, p. 26. The likely measures being Part IIA of the Environmental Protection Act 1990.
[218] *House of Commons (1)*, para 78. Other measures mooted in the report reflected the same approach, for example, requiring the vendor to disclose information pertinent to contamination on sale of land.
[219] Which was generally welcomed by respondents to the consultation: *POST*, *op cit.*, p. 48.
[220] 'Working with the grain of the market': *Paying for Our Past, op cit.*, para 2.3.

"funding gap", however, the Government's belief was that the market would provide what was necessary if corrected.

Two issues arise out of this approach: First, whether a market-led approach was the optimal one and was likely to meet the stated objectives (including environmental protection generally); and, secondly, whether market information had to be improved (through some other method if registers remained unacceptable). Following the outcome of the consultation on registers it seemed clear that, even with a market-led approach, uncertainties stemmed from the rules on liability as well as from a lack of information. Perfecting the market would, therefore, have required clarification of liability rules - thus the significant problems inherent in those liability rules could not be avoided. A further question was whether market imperfections could be addressed without causing blight, i.e. whether the certainty as to liability would outweigh the problems resulting from improved information.[222] The increased awareness of land contamination issues around the time of (and partially as a result of) the registers debate may itself have done much to address the blight issue as purchasers were now likely to be aware of the potential for contamination and would probably have been extremely cautious where there was a risk of liability.[223] One result of this may have been that in order to meet concerns as to blight, the focus shifted from the dangers of incorrectly identifying sites as contaminated (or as possibly contaminated) to the desire to clarify liability issues, as it was uncertainty as to these which unacceptably blighted land.

3.7 The European Dimension

Despite the fact that European Community policy and legislation on contaminated land is "extremely rudimentary" in comparison with many other areas of environmental protection, keeping an eye on European developments and paying

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[221] See, for example, *Paying for Our Past, op cit.,* para 4F.7.
[222] One way of alleviating blight problems may have been to ensure that information was at least accurate, so that land was not blighted unnecessarily.
[223] Sir Hugh Rossi "Paying For Our Past – Will We?" [1995] 7 J.E.L. 1, at p. 6.

close attention to underlying policy and law remain essential.[224] Many of the developments in domestic legislation which have indirectly addressed contaminated land issues have resulted from implementation of EC legislation.[225] The Environmental Principles are themselves enshrined as "foundational policy" in the EC Treaty[226] and the Community has produced policy proposals for civil liability which would have a direct impact on contaminated land problems. Indeed, a proposed Directive on liability for damage caused by waste[227] was withdrawn in favour of a general proposal for a scheme of environmental liability as set out in the Green Paper; *Remedying Environmental Damage*.[228] The Green Paper considered many relevant issues, such as strict liability, who should pay for remediation and the concept of environmental "rights". The UK Government opposed the introduction of a Directive on the grounds of "subsidiarity" and the "fact" that "most environmental damage is contained within the boundaries of individual member states".[229] Furthermore, although the Green Paper suggested a system of strict liability this would not cover historic pollution, although the House of Lords Report was not completely averse to the imposition of liability for historic pollution (provided it was not strict).[230] The debate as to policy at Community level also addressed the important question of the source of funding for remediation. Options included funding from: the market; civil liability (probably assisted by regulation); industry or other sector compensation funds (including insurance); or a combination of these. Progress on specific measures appeared to stall. Nonetheless, the Green Paper appeared to prompt debate at EC and member state level and many of the issues discussed are relevant to the question as to how to address the problem of contaminated land domestically. Experience of member states' domestic legislation may also assist with the eventual development of EU-wide provisions.[231] Nonetheless, the fact that EC policy has encompassed

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[224] Tromans, S. & Turrall-Clarke, R., *op cit.*, p. 127.
[225] For example, the Waste Directives, the Groundwater and other water pollution Directives and, less directly, the Integrated Pollution Prevention and Control and Industrial Air Pollution Directives.
[226] See Chapter One.
[227] COM (91) 219 Final-Syn 217; OJ C 192/6. See also *Paying For Pollution*: the House of Lords Select Committee on the European Communities 25th Report; 1989-90 (HL 84).
[228] COM (93) 47 Final ("EC Green Paper"). See also *Remedying Environmental Damage, op cit.*
[229] *The Government's Response to "Remedying Environmental Damage"*: (May 4, 1995).
[230] *Remedying Environmental Damage, op cit.*, para 40.
[231] In addition to Europe, international conventions cover some of the issues but are not considered in this Study. See, for example, *Remedying Environmental Damage, op cit.*, para 21-22.

environmental protection for over 25 years and has provided comprehensive legislation in many areas, there is still no piece of European legislation which principally deals with environmental liability.[232] There appear to be two main reasons why a European-wide liability regime is seemingly unattainable.[233] Firstly, environmental damage results more from gradual and long term impacts than from one-off accidents (whereas the latter lend themselves more easily to the creation of legal liability) so that the focus of protection has been upon minimising the levels of legal emissions etc. Secondly, although national legal systems cope reasonably well with liability for environmental disasters, additional complication arises from attempting to harmonise such systems, particularly in determining the value of the unowned environment damaged, establishing rules for *locus standi* and securing access to justice. The result appears to be that the problems of harmonising national laws which are not entirely defective would use up a significant amount of resources which may be better directed towards tackling the more important problem of gradual and legal pollution.[234] The fact that problems stem mainly from the process of harmonisation of rules rather than from inherent difficulties in the problems which they address may explain why, although there are comprehensive national rules on environmental liability generally (and upon liability specifically for contaminated land in many other jurisdictions, including member states of the EC),[235] a Community-wide regime may be unlikely. The subsidiarity principle may justify a decision not to take matters any further. In spite of these problems, however, a White Paper on environmental liability has recently been published and the European Commission appears determined to develop a liability Directive. The proposed rules are unlikely to

[232] Krämer, L. *Focus on European Environmental Law*, 2nd Edition (Sweet & Maxwell, 1997).
[233] *Ibid.*, p. 149-153.
[234] *Ibid.*, p. 153.
[235] See, for example, Tromans, S. & Turrall-Clarke, R., *op cit.*, Chapter 13; Meyer, P.B. *et al* *Contaminated Land: Reclamation, Redevlopment & Reuse in the US and EU* (Edward Elgar, 1995); London, C. & Thire, V. "Contaminated Land in France: Administrative Sanctions and Environmental Liability" [1996] Environmental Liability p. 55; Martin, I. *et al* "Contaminated Land Policy: A Review of the Papers Presented to the NATO/CCMS Pilot Study" [1997] Land Contamination and Reclamation p. 11; and Ford, M. & Rowley, P. "Liabilities for Contaminated Sites in Western Europe: The Development and Implementation of Remedial Standards" [1994] Environmental Liability p. 42.

affect liability for historic land contamination as the Commission seems clear that "past pollution" will not be covered by European legislation.[236]

3.8 Rule-making Issues and Contaminated Land

3.8.1 Making Contaminated Land Rules

The history of the development of contaminated land policy reflects the increasing awareness of the importance of environmental issues and the specific difficulties in seeking to protect the environment described in Chapter One. It also highlights difficulties as to the legal and political construction of definitions such as "harm". As we have seen, however, even prior to *Paying for Our Past*, there had been some clarification of policy, in that the issues inherent in contaminated land were at least recognised; the need for some kind of intervention to address them was acknowledged; and specific measures (although ultimately abortive) were proposed. Nonetheless, the fundamental issues of; who should fund remediation works; what works were required; what level of contamination was acceptable; and what kind of rule-system should be used to facilitate action, remained unclear. This lack of clarity reflected the difficulties in implementing the Environmental Principles and those which arose specifically in the contaminated land context, which were reflected in the debates as to standards for clean up and remediation methodologies.[237] More fundamentally, it remained unclear whether a substantively new rule-system was required: there had been developments in general environmental policy which might assist in tackling contaminated land but the need for specific government measures was under review. An "incremental" approach had been used and the introduction of registers would have acted only as a supplement to existing provisions (merely providing information to improve their operation), rather than resulting from a process of "comprehensively rational" policy deliberation. Nonetheless, the comprehensive review undertaken following the withdrawal of the registers was probably as close to a

[236] Though precisely where the line is drawn with regard, for example, to continuing water pollution which results from a contaminated site, is far from clear (ENDS Report February 2000, p. 41). Thus it is possible that there could be some overlap with the matters addressed by the new Contaminated Land regime in the UK.

process of comprehensive rationality as a government department was realistically likely to get. A wide variety of rule-types had been used in the measures indirectly dealing with contaminated land issues: primary and secondary legislation and a wide range of policy rules provided by way of circular, statutory guidance and informal guidance. Many rules, such as planning policies and agency guidance, were promulgated by local government or agencies, rather than central government.[238] One aspect of the policy review had to be consideration of the various rules already in existence. Another, of course, had to be consideration of whether further rules were required and, if so, what types of rules.

As a result of the policy review, the future rôles of central and local government and other bodies were unclear, although local authorities appeared to be the lead agency, given their existing powers regarding statutory nuisances and as Waste Regulation Authorities. Other agencies, such as Her Majesty's Inspectorate of Pollution and the National Rivers Authority, also had important functions (primarily in relation to prevention). The House of Commons Environment Committee had suggested that a single Environmental Protection Agency be created as early as 1989[239] and, after initial resistance, the Government accepted this suggestion, although it was not implemented before the legislation providing for the new legal regime for contaminated land had been devised.[240] Thus the question of which regulatory bodies should play a part in dealing with contaminated land issues was considered in the context of much wider deliberations as to the future of environmental regulation agencies generally.[241]

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[237] I.e. multifunctionality or suitable for use - see section 3.2.1, above.
[238] See, for example, *Policy and Practice for the Protection of Groundwater*, (NRA, 1992) *Contaminated Land and the Water Environment* NRA, *op cit*, HMIP Process Guidance Notes for IPC, and local authority development plan policies generally.
[239] House of Commons Environment Committee Second Report: *Toxic Waste, op cit.*, para 29.
[240] The Environment Agency was created by Part I of the Environment Act 1995.

3.8.2 Using Contaminated Land Rules

We have already seen that contaminated land issues will generally be polycentric in nature.[242] This leads to a number of points; that the rôle of the judiciary should probably be restricted to *procedural* review of decision-making, rather than extend to review of *substantive* decisions (which should be undertaken by a "politically accountable" body, if at all) ; that legal rules are likely to provide the framework for decision-making but that a variety of other rules are likely to play important parts in substantive decision-making; that decision-makers are likely to require some degree of discretion (implying an increased need for flexibility whilst retaining maximum certainty for those affected by decisions); and that the discretionary nature of decision-making will mean that the nature of the decision-maker may be as important as the rule-making structure.

With regard to avoidance practices, retrospective liability may prompt the adoption of avoidance strategies, since this may be perceived as "unfair": the perceived injustice may act as a strong disincentive to comply with rules, irrespective of economic considerations. This could be exacerbated if liability were not based upon fault or if defences were limited or not provided for at all. Where liability is perceived as "unfair" there is also likely to be greater demand for certainty as to the exact circumstances in which it could arise.[243] On the other hand, flexibility in decision-making may often be justified on the basis that is "fair" in that it allows individual circumstances to be taken into account.[244] The rule-maker should be aware of this additional factor and should consider techniques for preventing avoidance when devising rule-types generally. As mentioned above, there is likely to be a complex system of decision-making and so a variety of rule-types may need to be used in order to provide the necessary balance between certainty and flexibility. A significant issue in respect of the clean-up of contaminated land concerns the level of "transaction costs" - the costs which relate to administration, legal advice and process and other

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[241] This issue will be considered in more depth in Chapter Five.
[242] See section 3.3, above.
[243] Although this may also reflect a desire to avoid liability.
[244] See Chapter Two.

costs which are not directly incurred through remediation - arising from programmes designed to secure remedial works. A major criticism of the US "Superfund" system has been the huge transaction costs compared to the overall costs of the system.[245] The extent of uncertainty (often arising from complexity) within a legal regime may be a crucial factor influencing the extent of the transaction costs which will arise.[246] Certainty, therefore, in contaminated land rule-making may have important economic consequences (influencing the level of costs diverted from the purpose of the scheme of rules and assisting business to plan its affairs efficiently).

3.8.3 Public Participation in Contaminated Land Rule-making

We have already seen that the common law tends to protect private property and that access to common law remedies has been restricted on the basis of proprietary interest. Although local authorities were under duties to use their powers to deal with statutory nuisances[247] and "persons aggrieved" had powers to seek abatement, these powers were not often used regarding contaminated land, particularly by the public. Instead, public participation took place primarily in the form of representative participation through the election of local councils and governments which had responsibility for central agencies -[248] whose decision-making, as, for example, when dealing with applications for IPC authorisations, did not generally involve a direct input from the general public.[249] On the other hand, however, the development of specific measures for contaminated land necessarily involved public participation on a large scale beyond that involved in the general political process. Prior to *Paying for Our Past*, two public consultation exercises had been carried out with regard to the register proposals: the first had been followed by changes to the proposals and the

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[245] Heyes estimates these at around 30% under the US "Superfund" legislation, with legal costs making up 75% of these costs: Heyes, A. G. , *op cit*, p. 53.

[246] *Ibid.* These costs are further increased where the number of responsible persons per site increases, so that there are legal disputes between a greater number of parties and issues such as causation may become more complex. As to transaction costs and rule-making, see Diver, C, "The Optimal Precision Rules", *op cit.*

[247] See, for example, '*R.* v. *Carrick D.C., ex p. Shelley*' [1996] Env. L.R. D25.

[248] For example, Her Majesty's Inspectorate of Pollution and the National Rivers Association.

[249] This has been altered more recently with some specific provisions for public consultation: see, for example, Reg. 5 of the Environmental Protection (Applications, Appeals and Registers) Regulations SI 1991/507.

second by their abandonment. Although there was not necessarily any direct correlation between the responses to the consultation exercises and the actions which followed they did, at the very least, form part of widespread criticism. The fact that the proposals became established policy to the extent that they found their way onto the statute book, but were then abandoned after the two consultation exercises, suggests that the consultation had sufficient impact to help reverse a firm Government policy. The decisiveness of consultation in this regard has been confirmed by the rule-makers themselves:

> "... the nature of the response to Section 143 was such that Ministers judged the proposals untenable, and so you know the consultation was decisive."[250]

Whether those conducting consultation exercises really desire to involve the wider public, or whether the exercises are undertaken for other reasons will be considered in depth in Chapter Five.

3.9 Rule-making and Contaminated Land Issues

Having identified in Chapters One and Two the issues which the rule-maker must face generally, and those which arise in the environmental context generally, this Chapter has introduced and discussed the issues which *specifically* arise from contaminated land. Figure 3.4 below draws together all of these issues and categorises them according to their source and the stage within the rule-making and rule application processes at which they are relevant. The following Chapters will analyse the development of the new legal regime in detail and consider how, if at all, these issues have been considered.

[250] Interview with Dr Neil Jackson, ex DoE civil servant, May 13, 1999..

1.	*General*
1 (a)	The Rôles of Central and Local Government and Other Bodies
1 (b)	The Need for a New Rule-system
1 (c)	Levels of Certainty and Flexibility
1 (d)	Whether Issues are Polycentric or Justiciable
2.	*Environmental*
2 (a)	Implementation of the Environmental Principles
2 (b)	The Rôle of Scientific Standards
2 (c)	Dealing with the Physical Nature of Environmental Issues
3.	*Contaminated Land*
3 (a)	Clarification of Policy Objectives
3 (b)	Re-use of Brownfield Land/Relieving Pressure on Greenfield Sites
3 (c)	Identification of Sites/Dissemination of Information - Registers
3 (d)	Who Pays and For What? - (i) Joint & Several Liability (ii) "Innocent" Owner Liability (iii) "Deep Pockets"/Lender Liability (iv) "Orphan Sites"/Funds (v) Strict or Fault Liability (vi) When Should The Public Pay
3 (e)	Historic contamination: Retrospective/Retroactive Liability dealing with past and future differently
3 (f)	Remediation Levels: Multifunctionality or Suitable for Use
3 (g)	Blight
3 (h)	Providing Incentives for Remediation
3 (i)	Use of a Market-led Approach
3 (j)	Interaction/Overlap with Other Controls (inc. planning & common law)
4.	*Policy/Rule-making*
4 (a)	Legitimising the Rules, Through Public Participation or Other Means
4 (b)	EU and International Developments

5.	*Rule Characteristics*
5 (a)	Selection of Rule-types and of Qualities of Rules
5 (b)	Desired Features of Rule-system - simplicity, intelligibility, etc.
6.	*Decision-making/Use of Rules*
6 (a)	Identifying Appropriate Decision-makers
6 (b)	Determining Other Participants in the Decision-making Process
6 (c)	Identifying Appropriate Appeal/Review Bodies
6 (d)	Prevention of Avoidance Practices

Figure 3.4

Chapter Four: The New Legal Regime for Contaminated Land: Contextual Analysis

This chapter outlines the new legal regime developed to deal with contaminated land and briefly summarises its main provisions.[1] The aim of the chapter is to identify and analyse how the new regime addresses the Contaminated Land Rule-making Issues identified in the earlier chapters and to consider how this approach was shaped during the development of the regime. This will not include the consultation exercise based on the policy document "*Paying for Our Past*"[2] but considers development from the outcome of that consultation exercise[3] to date. Although this approach does not follow the chronological sequence of events through which the Contaminated Land rules were developed, it is a logical one bearing in mind the nature of the thesis. Having identified the issues which Contaminated Land Rule-makers must address in the preceding chapters, the rules which have emerged are considered in the light of those issues (as well as more generally) here. This allows us to then focus in later chapters on one particular aspect of the Rule-making process – consultation - and to consider in detail how it has influenced the resulting rules. The structure adopted for this chapter is to take each issue, examine how it is dealt with by the legal and other rules which comprise the new regime, and trace the development of the approach taken.[4] This evaluation will also draw out the more contentious aspects of the regime and identify any further emerging issues.

[1] Rather than paraphrasing the detailed provisions, the whole of the relevant legislation is attached as an appendix: Appendix One; together with the draft Statutory Guidance: Appendix Two.
[2] *Op cit.*, which is, instead, examined in detail in the following chapters.
[3] The policy document "Framework for Contaminated Land", *op cit.* ("*Framework*"). *Framework* was the outcome of the government review and consultation exercise (*Paying for Our Past*) following the abandonment of proposals for registers.

4.1 The New Legal Regime

4.1.1 Outline of the New Legal Regime

Section 57 of the Environment Act, 1995[5] will introduce a regime of strict historic liability for the remediation of Contaminated Land by inserting new sections 78A to 78YC into the Environmental Protection Act, 1990.[6] The Act, as supplemented by the draft Guidance,[7] imposes duties upon local authorities to inspect the land in their areas and identify land which falls within the Act's definition of "Contaminated Land".[8] This is land which is in such a condition by reason of substances in, on or under it that significant harm is being caused or there is a significant possibility of such harm being caused, or pollution of controlled waters is being or is likely to be caused.[9] Certain sites are to be designated as "Special Sites"[10] where the enforcing agency will be the Environment Agency rather than the local authority. Enforcing agencies are under a duty to serve "remediation notices"[11] on "appropriate persons" once the appropriate remediation actions have been determined, although the appropriate person may instead issue a "remediation statement"[12] if it voluntarily agrees to take the appropriate action. There are certain limitations on the service of remediation notices[13] and on the remediation actions which may be required.[14]

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[4] Mainly by analysing the relevant Parliamentary Debates and official papers.
[5] In this Chapter, the phrase "the Act" is used with regard to the whole system of primary, secondary and tertiary legislation which comprises, or is made under powers provided in, this legislation.
[6] The Act, together with Regulations and guidance, are to come into force on April 1, 200 (see The Environment Act 1995 (Commencement No. 16 and Saving Provisions) (England) Order 2000, SI 2000 No. 340 and the Contaminated Land (England) Regulations 2000, SI 2000 No. 227). Although the Act applies to Scotland and Wales as well (with the Scottish Environment Protection Agency performing the rôles of the Environment Agency in Scotland), this Study only considers its operation with regard to England.
[7] The references to 'draft guidance' in the footnotes to this chapter referring to the draft issued for consultation in October 1999. The guidance and the Regulations laid before Parliament in February 2000 include only very minor amendments to the October 1999 drafts.
[8] Environment Act 1995 s.78B.
[9] S.78A(2)
[10] Ss.78B(1) and 78C
[11] S.78E
[12] S.78H
[13] *Ibid*
[14] S.78E which requires a cost-benefit analysis

"Appropriate persons" are those who have "caused" or "knowingly permitted"[15] the presence of the substances by reason of which the land is contaminated (and in certain circumstances the current owners/occupiers of the land).[16] Liability is imposed in relation to a "significant pollutant linkage" which consists of a source (pollutant substance), pathway (e.g. inhalation) and receptor (e.g. humans) and there may be several significant pollutant linkages relating to a single site for which different groups of appropriate persons may be liable.[17] The Act distinguishes between those appropriate persons who have caused or knowingly permitted the presence of the relevant substance (to whom the draft Guidance refers as "Class A") and those who are the current owners and occupiers of the site and have not caused or knowingly permitted the presence of the substance (to whom the draft Guidance refers as "Class B"). The system for establishing liability is to regard all Class A persons as forming a liability group relating to a significant pollutant linkage and then to apply exclusionary tests (which are set out in the Statutory Guidance) in order to remove from the group those whom it is intended to relieve from liability on policy grounds.[18] Where Class A appropriate persons cannot be "found", Class B persons may be liable, although not in relation to pollution of controlled waters.[19] Class B persons themselves form a liability group and (different) exclusionary tests are applied.

The structure of the new Contaminated Land regime requires the following steps to be taken; namely, steps to identify land where remediation action is required; to establish what action is required; and then to identify those who are to pay for the works to be carried out. If the appropriate persons refuse to carry out the remediation works, the enforcing authority may seek to enforce the remediation notice in the magistrates' court (where one-off and daily fines may be imposed[20]) or through injunctive relief in the High Court.[21] Alternatively, the enforcing authority may carry out the works itself[22] and then seek to recover its costs, although there are limitations on cost

[15] The meaning of this phrase and its implications are considered below.
[16] S.78F
[17] See Chapter A of the draft Statutory Guidance.
[18] See Chapter D of the draft Guidance.
[19] Environment Act 1995 s.78J.
[20] S.78M.
[21] S.78M(5).
[22] S.78N.

recovery.[23] Appeal against remediation notices is to the magistrates' court (in cases where the notice was served by the local authority) and to the Secretary of State (in cases where the notice was served by the Environment Agency).[24] There is a 21 day time limit for appeals and Regulations are to be made by Statutory Instrument to flesh out the appeal structure and grounds of appeal.[25]

The flow chart which follows on the next page (Figure 4.1) illustrates (in outline) the general pattern of, and method for allocating, liability under the new legal regime.

[23] S.78P.

[24] S.78L.

[25] The draft Regulations produced for consultation with the draft guidance in October 1999 (which are very similar to those produced in November 1996) include fairly wide grounds for appeal. Examples are; failure to act in accordance with the Guidance in determining liability, that the remediation actions required are not reasonable (which requires a cost-benefit judgement) and that some other person should have been served with a remediation notice as an appropriate person. Most draft grounds of appeal are based upon compliance with one or another of the rules forming the new regime and so their respective legal form is highly relevant.

General Liability Under Part IIA of the Environmental Protection Act 1990

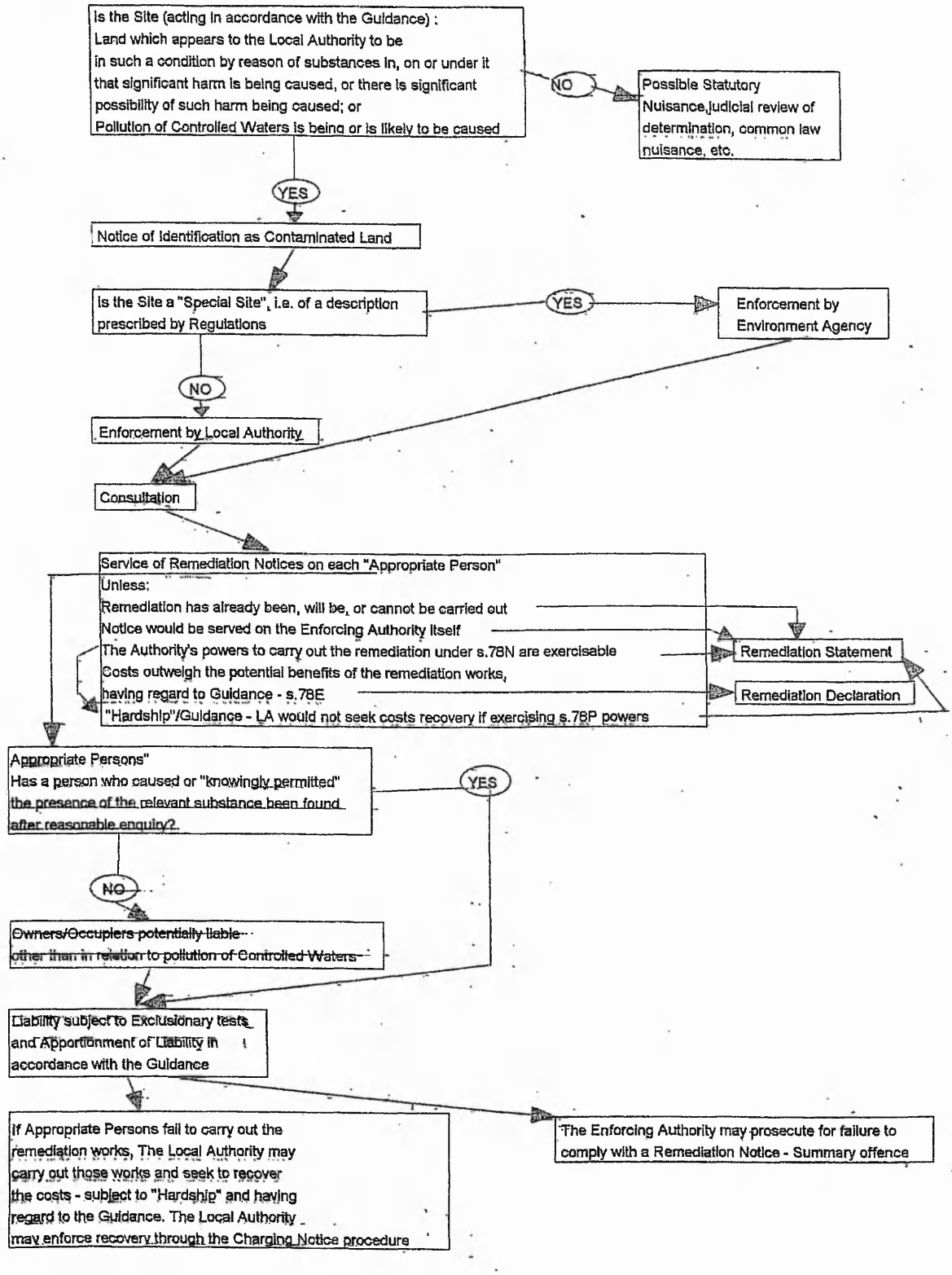

Figure 4.1

4.1.2 Relationship with the Statutory Nuisance Regime

It is clear from the face of the legislation that it is based upon the Statutory Nuisance regime[26] (and the Government has argued that it is simply a clarification of existing liabilities, largely under that regime[27]). Under both regimes, local authorities have statutory duties to inspect their areas and, where a problem which is the subject of the legislation is identified,[28] are obliged to require remediation or abatement. In the case of statutory nuisance, authorities have powers to execute works and recover the costs of these where an abatement notice has not been complied with.[29] The similarity of the regimes is also evidenced by the fact that any potential overlap between them is specifically avoided. Indeed, this objective - of avoiding overlap - has provided one of the most controversial aspects of the new regime, the so-called "statutory gap". The effect of the provisions is that Part III of the Environmental Protection Act 1990 is not to apply where there is Contaminated Land within the meaning of the Environment Act 1995. Unfortunately, the definition of "contaminated land" used in the section disapplying Part III[30] is broader than the definition of Contaminated Land which brings land within the scope of the 1995 Act.[31] The result is that there may be situations where land is contaminated and, although an abatement notice may previously have been served under the statutory nuisance provisions, it is not possible

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[26] For an outline of the Statutory Nuisance regime, see Chapter Three.

[27] See Hansard, H.L. Vol. 560, col. 1461 & Vol. 562, col. 1054. The CBI was sufficiently concerned on this matter that it sought Counsel's Opinion on whether there had been any extension of liability and was advised that, apart from some minor extensions, the Act was essentially consistent with existing legislation: Lewis, R. "Contaminated Land: The New Regime of the Environment Act 1995" [1995] J.P.E.L. 1087, at p. 1096. An Opinion provided for the Association of British Insurers had suggested that there was an extension of liability, however, that was before the significant amendments made to the original Bill, see: *Hansard* HC, June 28, 1995, Vol. 258 col. 962. (Counsel's Opinion can be an important factor in the rule-making (and amending) process and can even form a part of the rule-system as actors using the system may sometimes rely upon such Opinions to provide certainty where this is lacking in the rules themselves: see McBarnet, D. & Whelan, C., "The Elusive Spirit of the Law: Formalism and the Struggle For Legal Control" [1991] M.L.R. 848, where this activity is identified as one of the methods used to secure formalism in order to facilitate avoidance ("creative compliance".) If it is correct that the new regime is merely a clarification or extension of the statutory nuisance regime, it is odd that the new regime is inserted as 'Part IIA' of the Environmental Protection Act 1990, when Part II deals with waste management issues and Part III comprises the statutory nuisance regime (Part IIIA would seem more appropriate, despite awareness of contaminated land issues first arising in the waste management context).

[28] or is likely to occur or recur in the case of statutory nuisance.

[29] Environmental Protection Act 1990, s.81(3)-(4).

[30] Environmental Protection Act 1990, s.79 (1A) & (1B), to be inserted by the Environment Act 1995, Sched. 2, para 89(3).

to serve an abatement notice or a remediation notice. The source of the "gap" is the use of the term "significant" in relation to harm, or the possibility of harm, in the definition of Contaminated Land: the disapplication provisions do not qualify harm and risk in that way. There appears, however, to be a clear rationale for this gap:[32] the Government has stated[33] that the purpose is to ensure that land which is less seriously contaminated (or presents less serious risks) is not subject to powers (under the statutory nuisance regime) which actually provide greater scope for regulatory action under the Contaminated Land regime as they do not include requirements upon the regulator to take a strategic approach to contaminated sites; to take account of risks within a statutory structure; or to consider issues such as hardship. Thus without the "disapplication" provisions , statutory nuisance powers could have been used to circumvent the risk-based, suitable-for-use approach of the new regime.[34] The way in which those who wish to close the gap have suggested that this may be done provides an excellent example of both the confusion which complex rules can produce and the misunderstanding which may arise from the use of different rule-types (and which may lead to inappropriate use of rules). Although the House of Commons Environment Committee recommended that the position regarding amendment of the primary legislation be reviewed after three years of the regime's operation,[35] it also recommended that amendments be made to the guidance on the meaning of "significant harm" in order to narrow the gap; and that the amendments be such that

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[31] Environment Act, s.78B.

[32] An alternative possibility is simply that there was an error in the drafting. The original definition of Contaminated Land for the new regime had not included the term 'significant' (which had been added during the passage of the Bill in order to dilute potential liabilities which were considered unduly harsh: see *Hansard* March 7, 1995, Vol. 562 cols. 136-144) and it may be that this amendment was not picked up when drafting the disapplication provisions. The Government's rationale was certainly not made explicit during the Bill's passage and during one discussion of the overlap with statutory nuisance, the Government spokesperson in the House of Lords stated that that the intention was that only one regulatory system could apply to any given problem, but that there would not be any gap between the two systems and that this potential problem was being looked at see: *Hansard* HL, March 9, 1995, Vol. 562 col. 538-9. There appears to be no particular reason why a simple error should be denied, however, the room for manoeuvre provided by the structure of the rule-system (or possibly erroneously thought to exist) does help to gloss over an error if there was one.

[33] Para 60 of the *Statement of Government Policy* in the draft DETR Circular which introduces the draft guidance issued for consultation in 1999 ("Draft Circular"), which states that the gap is 'deliberate'.

[34] See House of Commons Environment Committee: Second Report "Contaminated Land"; Session 1996-97, 22-I, December 11, 1996 ("*House of Commons (2)*"), para 42 and Commentary to the Environmental Protection Act 1990 Part III, Encyclopedia of Environmental Law (Ed. Tromans, S. & Grant, M.) (Sweet & Maxwell) ("Encyclopedia Commentary") D590.

they bring within the scope of that guidance all types of harm which would have been considered "prejudicial to health or a nuisance" (so as to bring within the scope of the new Contaminated Land regime all of the contaminated land which could have been dealt with under the Statutory Nuisance regime).[36] In fact, however, whilst local authorities are to "act in accordance" with the relevant guidance as to what harm and possibility of harm is to be regarded as significant,[37] such guidance cannot broaden the scope of what is provided by the primary legislation and can only clarify what is, and is not, included within the primary legislation. The guidance provided under the new regime, in fact, provides much of the detail missing from the primary legislation and, perhaps properly, has become the focus of much academic and professional scrutiny. One attractive feature may be the more realistic possibility of amending guidance (as opposed to seeking to amend primary legislation). Furthermore, it may be that what the Environment Committee has suggested is merely that the guidance should make it clear that all types of harm which would have been considered "prejudicial to health or a nuisance" are within the meaning of "significant harm" as a matter of fact. However, the general tenor of the relevant section of the Report seems to be a consideration of how to close the "gap" and that cannot be done by circumventing the clear distinctions set out in the legislation.[38] There was no mention in the Report of any debate or consideration as to whether the proposed solution actually reflected the definitions in the legislation.

4.2 Contaminated Land Rule-making Issues and Part IIA of the Environment Act 1995 ("the Act")

The rules comprising the new legal regime are analysed in the context of the Contaminated Land Rule-making Issues identified in the preceding chapters.

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[35] *House of Commons (2), op cit.,* para 47.
[36] *Ibid.*, paras 45 & 46.
[37] S.78A(1) & (5).
[38] In fact, the recommendations relating to 'blight' (see below) make it plain that 'significant harm' and 'prejudicial to health or a nuisance' are separate categories and so the latter does not form part of the

4.2.1 Issue 1(a): The Rôles of Central and Local Government and Other Bodies

The Act provides for three main governmental organisations to play a part in developing and using its rule-system: central government, local authorities and the Environment Agency.[39] The rôle of central government can be further divided between a number of different actors: Parliament - through approving the secondary legislation[40] and Statutory Guidance;[41] Government Departments - through devising the rules for Parliamentary consideration; and the Secretary of State - through producing the Statutory Guidance, Regulations and Orders and through having powers; to hear appeals against the decisions of enforcing authorities;[42] to make decisions where there are disputes as to whether a site is a special site;[43] and to make Orders[44] and Directions.[45]

Thus it is the Executive, through the Secretary of State's own powers and through Parliamentary majority and discipline, which has primary control over the rule-system comprising the Act.[46] This is effected in two main ways; prospectively - by having control over the rules themselves; and retrospectively - by making decisions as to how they are to be used in some cases.[47] Even if the number of appeals made is low in

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former: See *House of Commons (2), op cit.*, para 66. Widening the Hard Guidance beyond 'significant harm' would, therefore, be *ultra vires*. See *House of Commons (2), op cit.*, para 66.

[39] These rôles are considered in outline only this section. They are considered in more detail under other headings. The rôles played by non-governmental organisations in developing the rules and using them are analysed under the relevant headings - "Legitimising the rules, through public participation or other means" and "Other participants in the decision-making process". A further rôle of the State, review/hearing appeals, is performed in part by the Courts and that rôle is considered under "Identifying appropriate appeal/review bodies".

[40] Having already approved the primary legislation.

[41] As well as scrutinising and passing the primary legislation.

[42] Made under s.78L and the (draft) Contaminated Land (England) Regulations.

[43] Under s.78D.

[44] Such as to increase the maximum fine payable with regard to certain offences (s.78M(4)).

[45] Such as to exclude certain information from the registers (s.78S(2)).

[46] The dangers of giving too many powers and unaccountable discretion to Ministers were mentioned by the opposition during the early stages of the Bill: see *Hansard* HL, December 15, 1994: Vol. 559, col. 1384.

[47] Hearing appeals against decisions by the Environment Agency. Such decisions should relate to the most 'seriously' contaminated, and technically difficult, sites: 'Special Sites'. This system of control may be contrasted with that over planning decisions, where more appeals are heard by the Secretary of State, but there is less control through rules: local planning authorities having more discretion in their decision-making.

proportion to the number of decisions, the appeal decisions are likely to have a much wider influence as they will provide clear indications as to how the Secretary of State is likely to approach issues in other cases. These decisions can, therefore, build up into a body of further "rules" which may be relevant to contaminated land.[48]

Local authorities have the rôles of inspecting their areas and identifying Contaminated Land, as well as acting as "enforcing authority" where sites are not Special Sites.

The Environment Agency is enforcing authority for Special Sites and also has the power to issue guidance to local authorities, and to which they must have regard, in relation to specific sites which are not Special Sites.[49]

Finally, in addition to their other rôles, both central government and the Environment Agency appear to be providers of technical guidance[50] and should be consulted by local authorities where there are water pollution issues.[51] Thus there appears to be a hierarchy of governmental organisations which play a part in the operation of the regime, with central government (and the Secretary of State in particular) at the top and the Environment Agency and local authorities below with, significantly, the Environment Agency appearing to have superiority over local authorities, at least with regard to matters of technical expertise.[52] In the Government review, the Environment Agency had been intended to be the centre of technical expertise and to provide a framework of guidance and priorities[53] (the provision of guidance, other than on technical matters, shifting to the Secretary of State under the Act). It was also

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[48] The problems of having a 'split' appeal system are discussed below under "Identifying appropriate appeal/review bodies". A further problem is that it is not clear whether appeal decisions will be published or otherwise made publicly available, which may contrast with Planning Appeal Decisions. If appeal decisions are not disseminated, then their value in structuring discretion and otherwise improving rule-making through learning from experience of implementation will be significantly impaired. Such a failure also has implications regarding the legitimacy of decision-making under the rules and, ultimately, the legitimacy of the rules themselves if they cannot be improved through an 'iterative' process.

[49] S.78V.

[50] See the heading "The rôle of scientific standards", below.

[51] Draft Guidance, Chapter B, para 43.

[52] Another view could be that the Environment Agency supports local authorities by providing them with assistance, however, the particular provision that local authorities are to have regard to guidance issued under s.78V suggests that there is some form of hierarchical structure.

[53] *Framework, op cit.,* para 4.2.1., though exactly how far this 'guidance' would go was unclear.

intended to have an overview of contaminated land issues and to monitor and report on these.[54] The Government's intention was that local authorities would identify and act on Contaminated Land (following the Environment Agency's guidance)[55] and that they should be the "primary regulators" under the Act.[56] A crucial aspect of the rôles of the various bodies and the relationships between them is, however, that of resources. As well as the resources required for the development of the new rules (which have been allocated from central Government in the main), the various bodies involved in implementation face very important resource implications. The cost for local authorities of preparing their inspection strategies alone will be a significant burden upon very tight budgets.[57]

4.2.2 Issue 1(b): The Need for a New Rule-system

As discussed above, the Government has presented this specific contaminated land regime as simply reflecting the pattern of powers and duties under previous law and clarifying liabilities, rather than imposing new ones. This view is not totally credible as the Act provides specific duties and powers to identify Contaminated Land, prioritise sites and secure remedial works in relation to them and failures to perform these may provide the basis for judicial review proceedings.[58] The first duty to be carried out is for local authorities to draw up strategies for inspection of their areas,[59] and definite (although not always clear) lines of obligations then follow. The stated intention of the Government has been not to "increase the burden of regulation".[60] This appears to have been considered particularly in terms of not increasing the

[54] *Ibid.*, para 4.5.6. and the Environment Agency has a specific duty to prepare national reports on the state of contaminated land (s.78U).
[55] *Framework, op cit.*, para 4.3.1.
[56] Para 34 of the *Statement of Government Policy* in the Draft Circular.
[57] It is interesting that the recognition of the financial burden that the new regime will impose on regulators was one of the most noticeable departures from previous policy which resulted from the review by the incoming Labour administration. Local Authorities are now allowed to raise funds (up to limits set centrally for each Authority) through Supplementary Credit Approvals. There are also limited grants which may be available for remediation works (see Chapter Three). It does seem clear, however, that the Treasury is not prepared to allocate central funds to assist with inspection or other enforcement costs, other than allowing local authorities to borrow up to the prescribed limits.
[58] Encyclopedia Commentary, *op cit.*, D584/12.
[59] Draft guidance, Chapter B, para 12.
[60] See *Framework, op cit.*, para 4.1.1.

extent, nor changing the pattern, of existing liabilities,[61] although a different view could limit this to meaning that there should be no increase in the amount of "red-tape" which business has to deal with: the weight of the regulatory compliance material, or rules. Whilst the Government's claims as to patterns and extent of liability may be justifiable there are, however, further factors which may increase the regulatory burden: increased enforcement or other use of regulation may increase the burden in fact, though not as an abstract idea; and the "burden" of regulation may comprise "transaction" costs as well as direct liabilities.[62] Although increased use of regulation need not require anything other than a change in the use of discretion,[63] the Act establishes rules which both ease the use of powers[64] and require them to be used.[65] An unintended way in which the "burden" may have been increased is through the use of a highly complex rule-system, with some uncertainties, which may prove expensive for business to deal with.[66] Whether the process by which the Act has been developed could be categorised as comprehensively rational, with a number of different consultation exercises and rule-systems enacted which suggests a wide number of policy options being considered,[67] or incremental, with the resulting rule-system looking very similar to pre-existing provisions and being presented as no more than an incremental change, may depend upon where one is standing.[68] The impact of the Act on the regulatory burden would appear likely to be far greater than simply to "improve clarity and consistency",[69] and achieving these aims through "replacement powers"[70] is likely to have the reasonably foreseeable effect of increasing their use.

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[61] *Ibid.*

[62] See the discussion of 'transaction costs' in Chapter Three. The Government suggests that transaction costs will be reduced by the Act providing greater certainty: the DoE stated in its *Preliminary Compliance Cost Assessment* annexed to the Consultation Draft Regulations (November 1996), that the Statutory Guidance should provide greater certainty and clarity, thus reducing transaction costs (para 13).

[63] The decision to use powers more frequently.

[64] By clarifying technically difficult areas.

[65] By making provisions in the form of duties.

[66] Thus running counter to even the more limited view of 'regulatory burdens'. See further below, although the Government did consider the economic impacts of various regulatory options and considered the scope and content of the Statutory Guidance to be optimal: *Preliminary Compliance Cost Assessment, op cit.*

[67] Though not necessarily commenced.

[68] See the 'artificial debate between comprehensive rationality and incrementalism' discussed in Chapter Two.

[69] *Framework, op cit.* para 3.4.4.

[70] Considered necessary by the Government: *Framework, Ibid.*

4.2.3 Issue 1(c): Levels of Certainty and Flexibility

Identifying how certainty, flexibility and fairness have been provided for, and evaluating how they have been balanced, is something of a subjective exercise. The terms are relatively loose ones and depend upon subjective views to some extent.[71] However, there are provisions which, accepting the problems of categorisation and evaluation, can be identified as promoting one or more of the key values. There is perhaps less subjectivity with regard to analysis of the form of rules (rather than their substance) and that will, therefore, be the main focus of the analysis. The importance of these values in the shaping of the rules is evidenced by the Government's statement that the objective of the Statutory Guidance is to provide the basis for the application of the new regime "... fairly, justly and equitably ... [and] to provide flexibility while enabling technical and other judgements to be made in a consistent and predictable manner."[72]

4.2.3.1 Flexibility and Certainty

One way in which the legislation itself deals with certainty and flexibility is by framing measures as imposing duties (providing certainty, on the one hand) or as conferring powers (providing for discretion and flexibility).[73] Perhaps the most striking example of rules striving to meet the needs of these partially conflicting values is the use of Statutory Guidance with which enforcing authorities must "act in accordance"[74] (sometimes referred to as "Hard Guidance" in this Study). What "act in accordance with" means is not entirely clear. It is, however, clear that it provides a greater level of prescription than guidance which is merely a "material consideration".[75] Leaving aside the substantive content of the guidance for the

[71] What is 'fair' being the most obvious example. It is unlikely that any Government would accept that its provisions are 'unfair'.
[72] DETR *The Contaminated Land Regulations and Statutory Guidance: Draft Regulatory Impact Assessment* (October 1999), para 3.
[73] Examples are the duties to inspect land and identify Contaminated Land (s.78B) and to require remedial works (s.78E) and powers to carry out remedial works (s.78N) and recover the costs of them (s.78P).
[74] See ss.78A(2) & (8), 78B(2), 78F(6) & (7) and 78Q(6).
[75] For a discussion of the form and status of this guidance, see "Rule-types", below.

moment, one important question is why, if this level of prescription was thought necessary in order to provide certainty, the rules were produced in the form of guidance rather than legislation of one form or another?[76] The rationale would appear to be that some flexibility was required in order to meet the needs of the subject matter of the rules.[77] This flexibility is afforded by Statutory Guidance in two ways. First, it allows the use of "open-textured" language and does not require the precision and legalistic language used in secondary legislation.[78] Secondly, it allows the rules to be amended or replaced without the procedural restrictions of legislation. This latter point is largely a theoretical one only, because of the nature of the procedure used for introducing Hard Guidance under the Act.[79] Thus we have a set of Statutory Guidance rules which are binding in their nature (and so provide certainty) whilst often being permissive and open-textured in their form (providing a balance of flexibility). It should be stressed, however, that certainty is the overriding feature of the Hard Guidance. Although the wording provides some room for manoeuvre for enforcing authorities, it would be a brave regulator which would radically depart from it, particularly as a failure to act in accordance with the Hard Guidance when making decisions forms the basis of many of the grounds of appeal.[80] Before producing the Hard Guidance the Government had signalled its intent specifically to "publish guidance which enforcing authorities will be required to follow", which was to deal

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[76] The importance of the guidance can be identified from the fact that a draft of it was provided to address some concerns during the passage of the Environment Bill (See ENDS Report May 1995, No. 244 "Draft DoE Guidance on Identifying Contaminated Land"), though this draft was partial only (it only covered identification and definition) and has since been significantly amended and extended: see *Hansard* March 7, 1995, Vol. 562 cols. 136-144. The rationale given was the need to ensure that local authorities acted in a technically sound way, whilst recognising the impossibility of prescribing for all possible circumstances.

[77] The relative balances between certainty, flexibility and other factors in addressing risk were expressly considered by the Government: see the 'Preliminary Risk Assessment for the Implementation of Part IIA of the Environmental Protection Act 1990', Appendix D to the Consultation Draft Regulations and Regulatory Assessment (November 1996). The need for flexibility in the legal framework was identified as a result of the policy underlying the legislation dealing with protection of different elements and uses of the environment and being driven by risk assessment. In addition, flexibility was required as recognition of the wider number of 'polluters' and the need for costs imposed to be commensurate with the benefits derived and equitably distributed. In that sense, policy itself had to be 'sustainable' and flexibility was required in order to pursue sustainable practices: see *Hansard* HL, December 15, 1994: Vol. 559, col. 1425-7.

[78] See the discussion of rule-types in Chapter Two.

[79] This results from legitimacy issues and is considered under that heading.

[80] See, for example (draft) The Contaminated Land (England) Regulations 1999, regs. 7(1)(a)(i), 7(1)(e) and 7(1)(f)(i).

with identifying "polluters"[81] and with costs recovery.[82] It, therefore, seems that the needs of flexibility and (particularly) certainty were in the mind of the rule-makers at an early stage and this has been carried through to the rules: the purpose of the Statutory Guidance being to assist the regime to be applied fairly and flexibly, but consistently.[83]

4.2.3.2 Hard Guidance and the Need for Certainty

In at least one respect the particular way in which Hard Guidance has been used undermines the aim of providing certainty. Whilst some aspects of the new regime are such that the need for guidance to provide some flexibility may easily be justified,[84] there is no apparent need for questions such as who should pay for remedial works to be approached with more flexibility than the approach in the legislation itself; and, indeed, there is a strong argument that rules which establish legal liability should be provided in legislative form.[85] Introducing important provisions via Hard Guidance regarding such fundamental aspects of the new regime as who should pay for remedial works where there is more than one "appropriate person";[86] and as to how the costs of remedial works should be apportioned where more than one appropriate person is to be liable,[87] may actually increase transaction costs as there may be uncertainty as to how the various levels of rules interrelate and will be applied in practice. Having "layers" of rules also provides the potential for heightening uncertainty through the possibility of "mis-match" between the provisions in the various layers.[88] Uncertainty arises where it is not clear which rules have legal precedence and which will be followed in practice. It is this factor: the sheer complexity (in terms of both form and

[81] See *Framework, op cit.*, para 4.4.5.
[82] *Ibid.*, para 4.4.6.
[83] See the Consultation Draft Statutory Guidance (1996), Introduction, para 15, and paras 26-27 of the *Statement of Government Policy* (1999).
[84] Such as identifying Contaminated Land and establishing the specific requirements for remedial works (which might be viewed as technical/scientific matters to some degree).
[85] The provision of detailed rules as to liability through guidance (see s.78F(6) & (7)) seems to be more easily explained by a lack of clear and detailed policy objectives and so could be viewed as an inappropriate use of such rule-types.
[86] See Chapter D of the draft guidance.
[87] *Ibid.*
[88] Something which was not really considered in relation to the 'Statutory Gap' (see above) and, if it was, seemed to be actively encouraged.

substance)[89] of the rules (including the differing status of the levels of guidance) which most undermines the objective of providing certainty. Simply wading through the scheme of the regime and trying to apply it to practical cases appears a daunting prospect and this complexity has been the subject of criticism from many quarters, including the Secretary of State responsible for its introduction.[90] This may prove a particular failing as the intention is that remedial works be carried out on a voluntary basis and that legal powers are only to be exercised where the market fails to stimulate the appropriate remedial works.[91] A very important consideration for those operating within the market is, however, the clarity of legal liability and the "reach" of regulatory powers. It is only if these are sufficiently certain that risks as to legal liability can be adequately identified and managed or allocated. In the absence of such clarity the market is unlikely to take voluntary action and a fundamental objective of the rules will not be achieved.[92]

From the perspective of those charged with enforcing the new regime, the use of Hard Guidance may also provide an undesirable element of uncertainty. One problem for enforcing authorities results from using rules which allow relatively "open language" to be used, and thus flexibility to be provided, when failure to "act in accordance" with those rules provides a number of grounds of appeal against decisions.[93] Thus the consequences for a failure to follow the letter of the rules may be a successful appeal, but the rules are generally drafted in far more open terms than would be the case with secondary legislation, or other more formal rules.

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[89] The RICS evidence to the Select Committee on the Environment, October 1996, stated that the Guidance was widely seen as complex and difficult to understand and that there would be problems of interpretation and practical implementation (p. 1) and that this complexity, together with the uncharted nature of contaminated land issues generally, required a commitment to regular review of the Guidance (p. 2). The 'Byzantine' complexity of the system was identified in the House of Lords: see *Hansard* HL, December 15, 1994: Vol. 559, col. 1402 & 1452.

[90] "... even more regulations on contaminated land are due to kick in which will make remediation more difficult ... What is needed is some real simplification." Planning, July 10, 1998, p. 5. Mr Gummer also expressed concern over the lack of urgency in dealing with matters such as contaminated land: "We should waste no more time but get on with it." Planning January 30, 1998, p. 11.

[91] See *Framework, op cit.*, para 3.1.1.

[92] *Ibid.*, para 3.1.2

4.2.3.3 Soft Guidance

Differing balances between certainty and flexibility are provided by the different rule-types. Guidance, therefore, to which enforcing authorities "must have regard"[94] ("Soft Guidance") provides greater flexibility and, correspondingly, less certainty. Whilst this guidance may, generally, be distinguishable on the basis that it is of a more technical or scientific nature than the Hard Guidance, this is clearly not the case regarding guidance on whether to recover costs incurred by the enforcing authority, in relation to remedial works, from appropriate persons.[95] Such decisions are potentially as significant as the decisions identifying an appropriate person in the first place. It, therefore, appears odd that Hard Guidance is not used in order to provide certainty. However, the use of this more flexible guidance may be justified on a different basis: that it is the enforcing authority which is underwriting the decision not to recover costs. It will have used their own resources and so, it could be argued, it should have a wide discretion as to when to forego recovery. This may be unsatisfactory, however, for an appropriate person who thinks that the authority has unreasonably refused to forego recovery and who finds that the rules for making the decision do not provide a great degree of certainty because they are no more than factors to be balanced against others.[96] In fact, it may be the *very* nature of the decisions being taken, and the need to balance competing factors, which make the use of Hard Guidance inappropriate and which provides the rationale for using Soft Guidance.[97] Important considerations will include the effect of costs recovery on the financial situation of the appropriate person and the possible threat to (local) jobs.[98] One potential difficulty with the approach is,

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[93] See, for example (draft) The Contaminated Land (England) Regulations 1999, regs. 7(1)(a)(i), 7(1)(e) and 7(1)(f)(i).

[94] Made under s.78E(5), 78P(2), 78V(1) & (2) and 78W(1).

[95] Made under s.78P(2). See generally, draft guidance Chapter E.

[96] The relevant appeal grounds include where the enforcing authority has failed to have regard to the guidance and so the scrutiny by the courts will be similar to that in judicial review - there remains the ability to take other factors into account which might outweigh the guidance. Where an authority must 'have regard to' rules, they must consider them but need not 'slavishly adhere' to them and are not obliged to follow them (provided that there are reasonable grounds for this): *Simpson* v. *Edinburgh Corporation* [1961] SLT 17 and *Enfield LBC* v. *Secretary of State for the Environment* [1975] J.P.L. 155.

[97] See generally, draft guidance Chapter E, Parts 5 & 6.

[98] See draft guidance Chapter E, para 27. Such decisions are towards the 'polycentric' end of the spectrum and, jurisprudence would suggest, unsuitable for judicial-type decision-making. See below for further analysis.

however, that an enforcing authority cannot require remedial works by serving a remediation notice where it would not recover the costs of remedial works if it had carried out the works itself[99] The effect of this on other appropriate persons could be to increase the share of liability which they bear, by removing the only other member of a "liability group" and so disapplying the operation of the exclusionary tests.[100] At present this is not the case as the Statutory Guidance operates in such a way that the enforcing authority "steps into the shoes" of the person excused from liability because of "hardship". Thus the member of the "liability group" is replaced by the enforcing authority so that the exclusionary tests continue to be applicable. Accordingly, decisions on the basis of Soft Guidance do not go directly to liability other than to the enforcing authority's own.[101] However, these provisions are included in the guidance *only* and there is nothing in the primary legislation which requires, or even suggests, that decisions based on Soft Guidance do not directly affect third party liability.

4.2.3.4 Attempts to ensure "fairness"

A wide variety of provisions could be considered to have the objective of ensuring fairness. Problems in identifying these include identifying to whom the rules should be fair: taxpayers; those adversely affected by contaminated land; business; enforcing authorities, etc. Any attempt to categorise provisions as ensuring "fairness" is, therefore, open to criticism.[102] There are, however, a number of provisions which appear to include this as one of their more important objectives. The detailed provisions regarding apportionment of liability where there is more than one appropriate person[103] provided by Hard Guidance could be considered as striving to provide fairness as they primarily seek to apportion on the basis of relative responsibility for the contamination.[104] Section 78F(3) of the Act provides that

[99] See the effect of s.78H(5)(d) and s.78N(3)(e).
[100] By reducing the numbers of appropriate persons amongst whom liability is shared.
[101] Draft guidance, Chapter D, para 35.
[102] And it could be argued that all of the provisions are designed to provide fairness to some degree or another - it is unlikely that any would be introduced which were designed to be 'unfair'.
[103] Under s.78E(3).
[104] Although the lack of any provision allowing recovery by appropriate persons from a third party who could not be 'found', or was not identified as being an appropriate person, until after remedial works have been carried out, could be viewed as missing an opportunity to provide additional elements of fairness: see Lewis, R. *op cit.*, p. 1095, although this may have been omitted in order to provide some

liability for Class A appropriate persons will only arise to the extent that a person has caused, or knowingly permitted, the substances to be in, on or under the land in question. Again, the liability accords (to some extent at least) with responsibility. Similarly, the provisions regarding costs recovery and "hardship"[105] clearly seek to mitigate potential harshness or unfairness from the operation of the Act (as well as preventing business closure, etc.) and the overall aim in costs recovery decisions is to be "fairness" to all parties, including taxpayers.[106] A number of further provisions relating to liability[107] could also be viewed as providing for fairness within the operation of the Act and, in particular, there is a specific defence of "reasonable excuse" for failure to comply with a remediation notice.[108] The operation of the "exclusionary tests" also allows for the provision of some fairness but this is, however, reliant upon the Hard Guidance and so is easily amended if the Secretary of State's view of what is "fair" changes. Furthermore, the nature of the tests and the importance of their order, as well as content, may be criticised as unfair, with parties' liabilities being dependent upon whether other parties can fit themselves within one of the tests and so pass on their liability to others. In addition to liability, the extent of the remedial works required is to be reasonable and based upon cost-benefit analysis.[109]

4.2.3.5 Potential Sources of Unfairness

A number of aspects of the new legal regime are potential sources of unfairness. These include the use of the concepts "causing" and "knowingly permitting", and the imposition of landowner liability.

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certainty through finality and to avoid the problems of endless, expensive litigation which have dogged the operation of the US Superfund regime. For a discussion of problems of the Superfund regime, see "Revesz, R.L., *Foundations of Environmental Law and Policy, op cit.,* Chapter 10, and for a comparison with the British approach, see McCarron, S. "Contaminated Land Regulation in Britain and the US: Different Approaches?" Property Review July/August 1995 p. 188.

[105] Under ss.78H, 78N and 78P and discussed above.

[106] Draft guidance, Chapter E, para 11.

[107] Such as those under s.78M regarding liability for migrating substances and under s.78X(3) regarding exemption from liability for those responsible only in a 'professional' capacity.

[108] S.78M(1).

[109] Draft guidance, Chapter C, Part 5.

4.2.3.5.1 "Causing" and "Knowingly Permitting"

The potential for unfairness is perhaps increased by the concept which underlies the primary test of Contaminated Land liability: whether a person "caused or knowingly permitted" the presence of contaminating substances.[110] "Causing" is generally a question of fact: a result has either been caused or it has not.[111] Causation may be attributable to an operation or chain of operations, with each person in the chain "causing" the resulting event[112] and more than one person may have caused the same event.[113] The causal link may be broken by intervening forces such as natural forces or act of god[114] and foreseeability may be a relevant consideration in determining causation.[115] If someone has been completely passive regarding the chain of events, this may be a factor to be taken into account,[116] although a positive act is not necessarily required and the question of "knowingly permitting" may become relevant regarding such passive participants. The leading case on causation[117] now provides that the starting point is to ask if a person did anything to cause the pollution.[118] If the escape of a substance results from a more immediate event, such as the act of a third party, the causal link established by the original act will only be broken where the further event is "abnormal or extraordinary", rather than "a normal and familiar fact of life".[119]

"Knowingly permitting" is a more complex concept than "causing". It requires knowledge of the presence of substances and a failure to take steps which were reasonably possible to prevent or terminate their presence. It could comprise

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[110] Which is found in s.85 Water Resources Act 1991 and has a long history of case law under that Act and its antecedents. For a discussion of these concepts in the water pollution context, see Howarth, B. "Regulating Water Pollution: the Legacy of the Authority and the Prospects for the Agency" [1996] Environmental Policy and Practice 55.
[111] *Alphacell* v. *Woodward* [1972] AC 824 (HL).
[112] *NRA* v. *Yorkshire Water Services Ltd* [1994] 3 WLR 1202 (HL).
[113] *Attorney-General's Reference (No. 1) of 1994* 2 All ER 1007.
[114] See, for example *Impress (Worcester) Ltd* v. *Rees* [1971] 2 All ER 357.
[115] *NRA* v. *Wright Engineering* [1994] Env LR 186, for example, the acts of trespassers.
[116] See *Price* v. *Cromack* [1975] 2 All ER 113 and *Wychavon DC* v. *NRA* [1993] 1 WLR 125.
[117] Knowledge, fault or some other particular state of mind is not required: *Empress Car Company (Abertillery) Ltd* v. *National Rivers Authority* [1998] 1 All ER 481.
[118] Which must be a positive act which was the immediate cause of the pollution, though this may include holding dangerous substances where a further act (such as that of a third party) is a more immediate cause.

permitting an event,[120] or permitting the presence of the contaminating substance.[121] The Government has taken a "hard line" approach to the concept and suggests that it covers both of these situations,[122] however, the precise scope is a matter for the courts.[123] It is possible that constructive knowledge is sufficient to amount to "knowledge"[124] and likely that "wilful blindness" will amount to implied knowledge.[125] It is the Government's view that lenders will not be knowing permitters by virtue only of the act of lending.[126]

The result of adopting the concepts "causing" and "knowingly permitting", together with the case law which has shaped their definition in the context of water pollution offences, is a very strict approach to responsibility for contamination, which can lead to liability as a "Class A" appropriate person. The concepts of "causing" and "knowingly permitting" have been developed in this way through case law over the years in the context of criminal liability. That context allows the potential harshness of its operation to be mitigated by discretion over sentencing. Thus the severity of the concept establishing liability can be mitigated at a later stage.[127] This must be contrasted, however, with the operation of the Act, under which a person is treated as any other who is primarily liable and is subject to the same exclusionary tests, etc.[128] Thus in the Contaminated Land context, the extent of responsibility is not really

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[119] And so the foreseeability of the intervening act may be the dividing line.

[120] Such as knowingly allowing the carrying out of contaminating activity on land owned by the person.

[121] For example, becoming aware of contaminants in land owned and failing to carry out remedial works when it was reasonable to have done so.

[122] See the *Description of the New Regime* (comprising part of the Draft Circular, *op cit.*) at paras 9.10-12.

[123] There are several areas of doubt as to the precise meaning of the concept, however, it does appear clear that actions taken under the Act (such as consultation with, or service of remediation notices on, landowners) will not provide the requisite knowledge so that they become 'knowing permitters' and so Class A appropriate persons, rather than Class B. Further areas of doubt include those regarding the extent of knowledge required which could be the mere presence of the substances, that the substances are contaminative or have particularly harmful effects, or even that their presence brings the land within the Act's definition of Contaminated Land.

[124] *Schulmans Incorporated Ltd* v. *NRA* [1993] Env LR D1.

[125] See *Wing* v. *Nuttall* (The Times April 30, 1997), a 'tachograph' case.

[126] Draft Circular *Description of the New Regime*, para 9.11.

[127] For an example, see *R.* v. *CPC (UK) Ltd* [1995] Env LR 131 where the appellant had been convicted at first instance, but given an absolute discharge. The problem was, however, that an order for costs in the sum of £200, 000 had been made against it.

considered and no distinction made between, on the one hand, those who have clearly and blatantly been responsible for contamination of land and, on the other, those who have had much less direct involvement in the chain of events leading to, and following, land contamination. Although the operation of the exclusionary tests may provide some mitigation of potential harshness, this is quite limited and is reliant upon having the good fortune of other potentially "appropriate persons" being in a worse position. The nature of the environmental medium may also be distinguished from the water pollution context. As many contamination problems have resulted from the introduction to and presence of substances in land over a long period of time, there may be many "causers" of that presence and many persons who are, or have been, "knowing permitters". Although the Government refers directly to case law and provides its "view" of certain matters in that context, it is not clear that the case law is directly transferable from the water pollution context to the contaminated land context.[129] It is clear, however, that if the case law is closely followed, or found applicable, then its strictness may open up the Act to criticisms of unfairness, even though it might have benefits as regards certainty.

Why the concepts of "causing" and "knowingly permitting" have been used is not clear. However, it does seem to amount to an avoidance of responsibility by the Government, leaving as it does a vital task of defining the ingredient of liability under the Act to the Courts. Having adopted the pre-existing case law, however, the Government will face a problem in seeking to amend any unacceptable results arising from its application in the Contaminated Land context because any change would have to be effected through primary legislation.[130] Therefore, use of the more flexible method of changing the rules on liability would have to be through the less direct method of amending the apportionment and exclusion Statutory Guidance, which is likely to create further complexity. It may be that this restriction reflects the correct use of rule-types in the sense that it would be inappropriate for Government to have

[128] There is the possibility of some mitigation through the apportionment system and the provisions relating to costs recovery and hardship, however, these are limited, particularly where there is no other potentially appropriate person.

[129] Expressing the Government's 'view' of matters in the *Description of the New Regime, op cit.,* seems inappropriate in many cases, particularly as selected extracts from speeches in Parliament may not provide the whole picture regarding Parliamentary intention.

powers to change such fundamental concepts without primary legislation. However, the degree to which secondary and tertiary rules are required in order to vary the effect of the primary rule may suggest that the primary rule has not been optimally selected in terms of its content, rather than form, and the fact that the infrastructure for complex systems of secondary and tertiary rules was put in place by the primary rules may suggest a lack of confidence that the primary rules were absolutely correct.[131]

4.2.3.5.2 Landowner Liability

A more direct source of potential unfairness is the inclusion of owners and occupiers of Contaminated Land as those potentially liable where no causers/knowing permitters can be found. Such landowners are by definition unlikely to have had significant knowledge regarding the substances contaminating the land (as such knowledge would usually make them knowing permitters). Class B appropriate persons are, therefore, usually "innocent" owners/occupiers. Although there may, undeniably, be claims of unfairness here, the effect of this provision is mitigated in a number of ways. These include: the fact that where there are Class A persons who can be made liable, Class B persons may be excused; and that Class B persons will not be liable for works in relation to pollution of controlled waters.[132] However, it does suggest that where the Government had to choose between being exposed to complaints of unfairness, on the one hand, or facing the risk of exposure of the public purse, the latter was felt the less acceptable.

4.2.3.6 The Impact of Complexity

As we have seen, the pattern of liability under the Act is to identify a very wide pool of potentially appropriate persons and then to introduce some element of fairness by excluding certain categories[133] and then seeking to apportion liability on an

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[130] There being no powers to provide Statutory Guidance under s.78F.
[131] Though that does not necessarily mean that those rules were not the best which could be selected and devised in the circumstances: for example, the lack of agreement amongst the 'policy community' (see Chapter Six).
[132] S.78J(2), which brings liability under the Act in line with water pollution legislation.
[133] For example, through the 'exclusionary tests'.

"equitable" basis.[134] However, in order to provide some certainty, prescriptive guidance is used to shape decision-making quite closely in many areas. The complexity of this guidance is such that the purpose of each part is stated at its beginning, in order to explain what it actually means.[135] This added level of guidance (which does necessarily add certainty because the additional complexity may militate against this) may reflect the fact that decision-making under the Act by administrative bodies amounts to the imposition of legal liabilities, which are potentially significant both in terms of financial resources and of possible criminal sanctions. What is not so clear is why the Government sought to ensure certainty through such a complex method, which appears to undermine the objective to a large extent. One argument which appears to have some force is that it is the very need to provide fairness in a regime (which often seems inherently unfair), which in fact results in this complexity.[136] This is particularly so as there is a clear desire to avoid burdening taxpayers - which is viewed as one element of fairness.[137] Thus there is a desire to appear to allocate liability fairly whilst ensuring that there is someone (other than the taxpayer) to fund works wherever possible. The danger of striving to provide both fairness and certainty is that neither results.

Complex rules are not only found in the Statutory Guidance. A good example of complexity in the primary legislation is the section dealing with escape of substances to other land.[138] As well as increasing transaction costs for developers and other appropriate persons, which may frustrate the objective of voluntary action and be economically inefficient, complex regulation can also increase transaction costs for

[134] See the Statutory Guidance on apportionment of liability in Chapter D.
[135] See, for example, paras 47, 51 & 57 of draft guidance Chapter D.
[136] It has been suggested that the process of consultation has made the guidance more complex as consultees have thought through its implications and demanded clarification on many issues: see Grant, M. "New Liabilities for Contaminated Land" Keynote address at ARC Conference September 26, 1996, para 16. In its evidence to the House of Commons Select Committee on the Environment, the United Kingdom Environmental Law Association suggested that the 'enormous complexity' had resulted from attempts to make the system fairer, primarily by mitigating the harshness of joint and several liability, and to avoid the perceived problems with the US Superfund system (which was stated to now operate without the initial problems of extensive litigation): see *House of Commons (2), op cit.*, 22-II, Minutes of Evidence and Appendices, Oral Evidence, p. 37, para 105.
[137] See the discussion of costs recovery, above.
[138] S.78K, even referring to "land A" and "land B" and to "person A" and "person B".

regulators, which may result in defensive or weak enforcement and waste valuable resources.[139]

4.2.3.7 The Impact of the Physical Nature of Contaminated Land on Certainty and Fairness

The problems which the contaminated land rule-maker seems to have sought to address do appear to reflect the specific nature of environmental problems identified in the preceding chapters: those stemming from the physical nature of the issues. The lack of scientific certainty as to the need for remedial works and how to carry these out would suggest that there is a corresponding need for flexibility in the rules providing for this.[140] The rules allocating and apportioning liability are not so technical and so can be cast in more certain terms.[141] This is also required in order to meet the needs of the market in identifying quantifiable risks/liabilities.[142] However, the inherent (or at least perceived) unfairness of imposing historic liability stimulates strong demands for fairness and so some element of flexibility has had to be introduced to mitigate potentially harsh results. Further factors which have increased concerns over fairness and which have resulted from the physical nature of contaminated land are; the fact that substances may migrate from an owner or operator's site; that they may cause damage or create risk of harm in unforeseeable ways; and that the risk may arise from substances combining or reacting with other substances already within, or later introduced into the land, again with unforeseeable consequences. Seeking to guide flexible decision-making by using rules with a high legal status in such a context results in demands that all eventualities should be covered. The problem for a regime seeking to meet concerns over an inherent lack of certainty and an inherent (perceived) element of unfairness is that flexibility in rules

[139] The DoE stated in its *Preliminary Compliance Cost Assessment* annexed to the Consultation Draft Regulations (November 1996), that the Statutory Guidance should provide greater certainty and clarity, thus reducing transaction costs (para 13).
[140] And the guidance which deals with the subject of remediation requirements comprises Soft Guidance.
[141] Hard Guidance.
[142] The regulatory proposals in *Framework* were intended to provide greater clarity and certainty which "should of itself assist in the development of an efficient market in both contaminated land and land on which remedial works have been undertaken." *Framework, op cit.,* para 3.1.4.

introduced in order to provide fairness in the operation of the regime is open to criticism as introducing uncertainty, whilst the introduction of certain rules is open to criticism as being unfair. Rules which seek to find a "middle way" between flexibility and certainty may provide elements of both but will also be open to criticism as being both uncertain and unfair .[143] The theoretical work analysed in Chapter Two suggests that this tension is a common one in the field of environmental protection and in administrative law generally (although the fairness aspect is exacerbated in the case of historic liability), and that a satisfactory solution has not as yet been identified. Using an unusual form of rule may not prove to be the solution. It does, however, seem to establish clearly the problems which environmental issues throw up for rule-makers: the lack of scientific certainty and the potential unfairness resulting from the physical nature of liability. Unfortunately, this analysis does not completely fit the pattern of rule-types. Inspection of land and identification of Contaminated Land appears to require the same kind of technical judgements as are necessary when establishing remediation requirements and yet the bulk of the rules relating to this duty are provided in the form of Hard Guidance. A further problem is that the extent of liability may be as important as its allocation and the establishment of remediation requirements comprises an important factor in establishing liability. The lack of technical certainty is both an argument for providing additional certainty through choice of rule-types and a reason why this may not be possible. Yet if it is possible in respect of the identification of Contaminated Land,[144] then why not in respect of remediation requirements? The answer may be that identifying the relevant land is considered to be a more significant decision than establishing the precise works required to deal with it,[145] whilst flexibility may be required for remedial works in order to allow room for some technological innovation. It is permissible, furthermore, because, controversially, the failure of one set of remediation requirements does not preclude further requirements being made of the same appropriate persons.[146]

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[143] The Government claimed that the proposals set out in *Framework, op cit.,* were fair, robust and should lead to greater certainty: para 7.1.
[144] At least as problematic in technical terms as establishing appropriate remedial works.
[145] Despite the extent of liability being as important as its existence *per se*.

4.2.4 Issue 1(d): Whether Issues are Polycentric or Justiciable

The nature of decisions in connection with hardship and costs recovery has been discussed above, where it was suggested that those decisions are of a sufficiently polycentric nature that they are not justiciable. Instead, the political nature of the decision-makers (the local authorities and the Environment Agency) suggests that they are appropriate bodies for polycentric decision-making.[147] The question remains whether decisions other than those relating to costs recovery are generally polycentric or justiciable. Two particular elements suggest polycentricity: the wider impact of, and influences upon, decisions generally (including broader economic impacts); and the overlap with the planning system which results from the market approach to tackling contaminated land.

4.2.4.1 The Wider Impact of Decisions

There is no doubt that the liabilities which may be allocated and apportioned under the Act can be highly significant ones. The potential for wider economic impact is explicitly recognised by the costs recovery provisions. Those wider impacts do not, however, only arise in the most severe cases (such as where there may be a direct threat to jobs). The same implications may arise in any decision and may (and probably ought to) be a consideration for the enforcing authority in every decision. Indeed, to some extent, the enforcing authority is directly required to undertake a balancing exercise through the requirement of cost-benefit calculations when establishing remedial works to be carried out:[148] the enforcing authority may only require works to be carried out which it considers reasonable having regard to the

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[146] See Issue 2(c), below.

[147] See the discussion in Chapter Two.

[148] For the Environment Agency, this is in addition to its general duty to take costs and benefits into account when considering whether to exercise its powers (Environment Act 1995, s.39). This general duty only relates to the exercise of powers, the discharge of duties being expressly excluded (s.39(2)) and so it would appear to only be relevant to a limited number of provisions, the most significant being the provisions relating to criminal and other sanctions under s.78M and carrying out remedial works and recovering costs (under ss78N & 78P). Others include the power to provide local authorities with site-specific guidance under s.78V. For a discussion of the general aims and duties imposed on the Environment Agency, see Jewell, T. & Steele, J. "UK Regulatory Reform and the Pursuit of Sustainable Development: The Environment Act 1995" [1996] J.E.L. 283

costs and to the seriousness of the harm or pollution of controlled waters.[149] Soft Guidance is provided[150] on the approach to be taken to such determinations.[151] Not only does this kind of balancing exercise require a high degree of technical knowledge,[152] it requires consideration of the wider environmental impacts which may be attributable to the remedial works.[153] As well as considering the wider effects upon appropriate persons and the environment, however, there will be cases where the impact upon the resources of the enforcing authority may be an important factor to be considered. If an authority is considering whether to carry out works itself it may be aware that the costs recovery powers cannot, or will not, be exercised and so the effect of the cost of the remedial works upon the authority's budgets may be a determining factor.[154] A further factor in decision-making may be the implications for the authority with regard to the "duty"[155] to deal with "orphan sites" itself, whereby decision-making as to the liabilities of third parties may directly result in the assumption of "liability" by the authority. This combination of the wider impacts and the need for technical expertise seems to make such determinations inappropriate for judicial decision-making.

4.2.4.2 The Market Approach to Remediation

The objective of securing most remediation through the operation of the market, with regulatory powers being held in reserve, has already been considered.[156] The majority of this remediation will be as part of the development of land.[157] By focusing upon the market and development of land as the means of securing remedial works, the Act

[149] S.78E(4)
[150] Under s.78E(5)(c).
[151] Draft guidance Chapter C, Part 5.
[152] As the reasonableness of various remedial techniques may have to be considered.
[153] Environmental disbenefits being expressly included as relevant factors in decision-making on remediation requirements (see draft guidance Chapter C, paras 51-57), such disbenefits having previously being expressly excluded from consideration as 'costs' (see Consultation Draft Guidance (1996), Chapter III, para 28).
[154] Although the authority may consider itself under pressure to carry out works (having identified land as posing an unacceptable risk), this will have to be balanced against the need to perform other statutory duties (relating to the authority's many other functions), rather than exercise discretionary powers, and the need to prioritise action on Contaminated Land.
[155] See the discussion above in Issue 1(c). Similar pressures to those outlined in relation to the exercise of powers under s.78N are likely to arise (see previous footnote).
[156] See Issue 1(c)., above.

brings into play wider considerations for decision-makers, primarily in the nature of planning issues. Whilst contaminated land remains a relevant consideration for planning decisions generally,[158] and many local authorities have policies relating to it in their Development Plans, it is likely that local authorities will need to consider their planning powers when seeking creatively to generate funding for developers to carry out remedial works; [159] for funding the remediation of orphan sites; and, more generally, as securing remediation and compliance with the duties imposed by the Act will be part of a package of benefits resulting from development. In such a context, it is impossible for decisions under the Act to be discrete since they actually arise as part of the planning process,[160] although this is not expressly mentioned in the Act or the Statutory Guidance.[161] Thus, in many cases, the close connection with planning considerations suggests that their polycentric nature is enhanced, making decisions to be made under the Act even more unsuitable for judicial decision-making.

The question of polycentricity is also relevant to the appeals structure and is considered further in that context below.[162] A further important point is that the use of "enabling development" as a method of funding remedial works is only available to the planning authorities. Thus the Environment Agency must rely upon the local planning authority (or, perhaps more significantly, the Secretary of State on appeal) to consider the merits of development packages which help to secure remediation and provide permission for them to be implemented.[163]

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[157] See, Draft Circular, *Statement of Government Policy*, para 16.
[158] Under Planning Policy Guidance Note 23 (DoE, 1994). See also *Framework, op cit.*, para 3.3.1.
[159] 'Enabling development' can be a material planning consideration: *R.* v. *Westminster City Council, ex parte Monahan* [1988] J.P.L. 557.
[160] The rôle of planning authorities in respect of contaminated land is intended to "complement rather than duplicate" the statutory rôles of other authorities, including the non-planning functions of local authorities: *Framework, op cit.*, para 3.3.2.
[161] The importance of regeneration activities by public authorities in tackling contamination was, however, recognised by the Government in *Framework, op cit.*, paras 3.2.1 & 3.2.2.
[162] See section 4.2.24.
[163] Whilst there is no reason to suggest that the merits of planning decisions will be unduly influenced by the impact of those decisions on the local authority's resources, it is hard to see how this could not be in the mind of the decision-maker where a possibility and, with regard to the planning system generally, it appears realistic that the passage of proposals will be smoother where the sponsor of the development and the decision-maker are the same (albeit perhaps wearing different 'hats').

4.2.5 Issue 2(a): Implementation of the Environmental Principles

Prior to the Act, the Government stated that it was committed to sustainable development and the "polluter pays" principle.[164] That commitment was renewed in the earlier drafts of the Statutory Guidance, together with a commitment to "have regard to" the precautionary principle.[165] The Government also claims that future pollution will be dealt with on "a precautionary and preventative basis".[166]

4.2.5.1 Proportionailty

As might be expected, the clearest implementation of the environmental principles has been that of proportionality. This is perhaps the easiest to incorporate into the rules as it can be no more or less than the weighing of the relevant costs and benefits. All that the rules can do is to impose such a duty, identify the factors to be considered and the approach to be taken to the calculation, as well as identifying the bodies to carry it out. The Government intends that action should be proportional and only taken where cost-effective[167] with a gradual and orderly approach[168] and the proportionality principle has been incorporated in the Act through s.78E(4) and the Soft Guidance supplementing it.[169]

4.2.5.2 Sustainable Development

Sustainable development is a much more difficult concept to implement. Whereas proportionality can be assessed in relation to each decision, the amorphous nature of sustainable development is such that a set of rules can only really be assessed by reference to the contribution which they make, or do not make, to sustainable

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[164] *Framework, op cit.,* para 2.1.
[165] Consultation Draft Statutory Guidance (September, 1996), Introduction, para 4. A description of the precautionary principle was provided which was taken from "This Common Inheritance", *op cit.,* and which stated that precautionary action would be taken where the balance of likely costs and benefits justified it (even where scientific knowledge is not conclusive). This section is not included in the later draft guidance or Circular
[166] *Framework, op cit.,* para 2.2.
[167] *Ibid.,* para 2.4.
[168] *Ibid.,* para 2.6.
[169] See the discussion above, regarding Issue 2(a).

development. This can be attempted at a number of levels, ultimately being assessed at a macro-economic and global level. Whilst rules may, or may not, contribute to "sustainable" action, it is the policy underlying those rules which must be evaluated, the rules themselves only being relevant to the extent that they contribute to or undermine those policies.[170] A clear example is the policy of remediation to a "suitable for use" standard. The "suitable for use" policy, which underpins the whole Act (and the approach in planning control),[171] is claimed to support sustainable development by reducing the damage from past activities and minimising pressure on greenfield development.[172] An assessment of the rules indicates that they appear to further the "suitable for use" policy quite satisfactorily: the question is whether that policy itself furthers sustainable development.[173] Within the limited context of the establishment of remediation requirements, the explicit obligation to consider wider environmental costs[174] may also be viewed as an attempt to implement the sustainable development principle.

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[170] And the nature of the environmental principles is such that they can be used to support both sides of many arguments as to the correct policy approach.

[171] Draft Circular, *Statement of Government Policy*, paras 44-49. For a discussion of the overlap between planning and the Act and how contaminated land considerations will be taken into account in planning, see Hughes, D. *Environmental Law, op cit.,* pp.441-3.

[172] *Framework, op cit.,* para 2.3. How this claim is justified in comparison with other approaches to remediation standards is presumably on the basis of giving equal weight to 'development' in furthering sustainable development and by maximising the number of sites to be recycled.

[173] There is at least one aspect of the guidance which, arguably, detracts from the contribution made to sustainable development: the requirement that a 'receptor' be present in order for land to be identified as Contaminated Land (draft guidance, Chapter A, para 11). This may act to deter, rather than to encourage, recycling of land as the introduction of a receptor through redevelopment may trigger liability which did not arise when the land was unused: see Kellett, P. & Hughes, D. "Contaminated Land and the Environment Act 1995: 'Working Draft Guidance' Part I: The Germ of the Idea" [1996] Environmental Law and Management 217, at p. 219, although this does not necessarily mean that the suitable for use policy is not sustainable, as the lower remediation requirements than those for multifunctionality may encourage remediation of a wider number of sites and this facilitate recycling of a larger number: see Chapter Three.

[174] Originally environmental costs were explicitly excluded from the costs to be considered in deciding what was reasonable (see Issue 2(a), above), however, the Labour Government considered that this was wrong and amended the position: see the letter from Michael Meacher, Minister for the Environment, to Mr Andrew Bennett MP, Chair of the House of Commons Select Committee on the Environment, Transport and the Regions, dated December 22, 1997. Such costs can be extremely difficult to calculate in a satisfactory way, however.

4.2.5.3 The Precautionary Principle

The precautionary principle, again, involves a question of approach. It does not, however, have the "internal conflict" which is found in sustainable development.[175] Rules can, therefore, be more clearly identified as promoting, or implementing, the principle. Duties are either imposed to take precautionary measures or they are not. The difficulty arises through the counterbalance of proportionality, which results in cost-benefit and risk assessment determinations being made to ensure that any action is proportionate to the risks faced. Underlying policies can, again, be of great importance: "suitable for use" being open to criticism as not being sufficiently precautionary whilst, on the other hand, it could be justified as a pragmatic compromise between precautionary and proportional action. Perhaps the most direct implementation of the precautionary principle is the inclusion in the definition of Contaminated Land of a "significant possibility" of significant harm[176] and the supplementary provisions which expand on this definition in the Statutory Guidance.[177] Here the counter-balancing effect of proportionality (or the use which commercial, or other, interests can make of such a principle) is starkly evident as the original Environment Bill did not qualify the definition by using the word "significant" and this highly important word was inserted (in two places; before "possibility" and before "harm") by amendment at the Bill's Committee stage. Thus the precautionary principle was diluted (if one takes a robust view of it) by the requirement for proportionality in the identification of the land regarding which decisions were to be made. The obvious argument to the contrary is that there is no need to include land where the possibility of significant harm is not itself significant. Of course, proportionality also provides the approach for the making of decisions as to remediation requirements.[178]

[175] See Chapter Two.
[176] s.78A(2).
[177] Draft guidance, Chapter A, Part 3.

4.2.5.4 The "Polluter Pays" Principle

Primary responsibility was intended to be borne on the basis of the "polluter pays" principle, liability resting on those who had caused or knowingly permitted the contamination to occur,[179] though this was to be supplemented by giving landowners ultimate responsibility for the state of their land[180] and by provisions to take account of transfers of land.[181] The Act was developed on the basis that liability follows the "polluter pays" principle, whilst trying to avoid "unfairness",[182] and with the making of provision regarding landowner liability where this was not possible. From the outset, however, the difficulties in implementing the "polluter pays" principle through rules (particularly when trying to maintain a reasonable degree of fairness) appear to have been recognised. Indeed, it was stated that the Government would publish guidance regarding the positions of polluters and owners, which enforcing authorities would be required to follow.[183] The result has been that whilst the primary legislation takes a wide view of "polluters",[184] this approach is mitigated (to some extent) by the exclusionary tests provided in the Statutory Guidance and the hardship and costs recovery provisions provided in both the primary legislation and the Statutory Guidance.[185] The operation of the exclusionary rules ensures that there is generally always at least one "polluter" to pay for remedial works. The operation of the exclusionary tests is complicated but absolves certain "polluters" of responsibility where possible. (i.e. they do not apply if the result would be to exclude all of the members of a "liability group")[186] How the position of other polluters affects someone's responsibility for clean-up costs on equitable grounds is not entirely

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[178] Proportionality also being ensured by requiring the enforcing authorities to demonstrate that the actions required were reasonable, on a cost-benefit basis.
[179] *Framework, op cit.*, para 4.4.1.
[180] *Ibid.*, para 4.4.2.
[181] *Ibid.*, para 4.4.4.
[182] Draft Circular, *Description of the New Regime*, para 9.23
[183] Which was produced in the form of Hard Guidance under s.78F(6) & (7).
[184] Particularly if the case law on water pollution is followed in its interpretation.
[185] Although the "polluter pays" principle is expressly stated to be one of the two 'general principles' which enforcing authorities should have regard to when making costs recovery decisions: draft guidance Chapter E, para 11.
[186] Identifying that they are at the fringes of those considered to be truly 'polluters' or culpable in some way.

clear.[187] It is also out of step with the economic and moral rationales for having the "polluter pays" principle. If costs of production are to be internalised, the fact that it is still possible to impose liability on someone else who shares responsibility for contamination is irrelevant. That liabilities are apportioned (possibly even allowing for a "nil contribution" from certain parties) is one thing, but to have all-or-nothing liability potentially turning upon the fortuitous fact that third parties are still in existence, etc. cannot be justified by reference to the "polluter pays" principle and actually undermines it. It may, however, be that concerns over appearing to impose liability on an equitable basis require a pragmatic approach to be taken. That should not, necessarily, be criticised. What can be criticised, however, is further complicating an issue which is sufficiently complex in itself. There is a lack of certainty over the very concept of the "polluter".[188] Introducing a further factor, in the form of the existence (or non-existence) of third parties does nothing to assist the development of a principled approach to the issue. Similarly it is impossible to justify the inclusion of current owners and occupiers of land as the secondary tier of "appropriate persons" on the basis of the "polluter pays" principle and the Government was clear that this was not the basis for their inclusion.[189] Again, this may be a pragmatic solution to the problem of polluters' funds not being available and this at least has the benefit of not undermining the principle, though it does highlight its limitations. Evidence of the kinds of influences upon the development of the rules and the concerns of the rule-makers, which were ostensibly seeking to implement the "polluter pays" principle, is provided by the amount of attention given to the issue of lender liability.[190]

4.2.6 Issue 2(b): The Rôle of Scientific Standards

The Governments' proposals for the new regime included a commitment to continue technical research[191] and stated that the provision of guideline values was a priority[192] and that these would be provided by the (then projected) Environment Agency

[187] i.e., it is not fair to impose liability unless no-one else can be found to impose it on.
[188] See Chapter Two.
[189] Consultation Draft Statutory Guidance (1996), Introduction, para 11: which stated that this reflected the landowners 'general responsibility' for the state of his/her land.
[190] Considered below.
[191] *Framework, op cit.,* para 3.1.3.

(assisted by industry and others in the private and public sectors).[193] The question of the setting of scientific standards is not, however, dealt with directly at all by the primary legislation. Nonetheless, the various duties to "have regard to", or "act in accordance with", guidance indirectly impose requirements with regard to scientific standards because the Statutory Guidance includes a number of references and other provisions relating to such standards. The Statutory Guidance particularly provides the framework for the implementation of those parts of the regime requiring technical judgements and reflects the complexities of risk assessment and management (as well as apportionment of liability). [194] It does not purport to set out detailed technical procedures or working methods.[195] The Hard Guidance relating to Inspection requires local authorities to use appropriate scientific assessments for determining whether land is "Contaminated Land".[196] Guidance is also provided as to when and how to use Guideline Values.[197] Failure to act in accordance with this guidance is a ground of appeal if it leads to an unreasonable determination that land is Contaminated Land.[198] These approaches and methodologies must, therefore, be strictly adhered to (the primary legislation again becoming indirectly relevant). Similarly, with regard to remediation requirements, the Soft Guidance requires changes in scientific and technical knowledge and understanding to be taken into account in assessing the "best practicable technique" of remediation[199] and requiring that consideration should be on the basis of appropriate and authoritative scientific and technical advice.[200] Again, an appeal may be made if the enforcing authority failed to have regard to the Statutory Guidance when establishing remediation requirements.[201] The guidance on scientific matters is fairly open-textured and does not provide authoritative standards.[202] As we

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[192] To use as 'triggers' in risk assessment: *Ibid.*, para 4.5.2.
[193] Taking over responsibility from the Department of the Environment: *Ibid.*, paras 3.1.3 & 4.5.1.
[194] Consultation Draft Statutory Guidance (1996), Introduction, para 14.
[195] *Ibid.*, para 18. Information on these matters is provided via technical documents prepared under the Department of the Environment, Transport and the Regions' Contaminated Land Research Programme and by other professional bodies (A Bibliography was included as an Appendix to the 1996 Draft Statutory Guidance). How this fits in with Environment Agency's proposed duty to provide technical guidance is not clear.
[196] Draft Guidance, Chapter B, para 39.
[197] *Ibid.*, paras 47-49.
[198] (Draft) Contaminated Land (England) Regulations, reg. 7(1)(a)(i).
[199] Draft Guidance, Chapter C, para 21.
[200] *Ibid.*
[201] (Draft) Contaminated Land (England) Regulations, reg. 7(1)(b).
[202] Which itself acknowledges by referring to other technical documents.

have seen there is, however, a clear sanction for failure to comply with its requirements. This may seem harsh in the light of their rather "woolly" nature. On the other hand, the discretion afforded by this "woollyness" may assist enforcing authorities in justifying their technical decisions as it seems that in order to make out proper grounds for appeal it would be necessary to establish a clear methodological flaw.[203] Whether an assessment of these matters is within the competence of the appeal bodies is another matter.[204]

Thus the setting of scientific standards and the use of scientific approaches are central to the (risk-assessment based) operation of the Act, but are still at a developmental stage. The rules comprising the Act guide approaches to their use (which are mainly common sense) without providing any substantive standards.[205]

4.2.7 Issue 2(c): Dealing with the Physical Nature of Environmental Issues

The clearest recognition of the physical nature of Contaminated Land regulation is the fact that the Act requires that remedial works be carried out, rather than merely requiring for the payment of compensation.[206] The fundamental nature of this approach was clear from Government proposals from the outset[207] and even indirect contributions to physical works play no part.[208] Although the making of financial contributions may be compelled through the costs recovery process, these are only made to recover the costs of works which have actually been carried out: no provisions require financial provision to be made for prospective works or

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[203] Though the result does appear to impose requirements to keep up-to-date with scientific developments as to risk assessment and remediation techniques and a failure to do this may prove a likely ground for appeal.

[204] See 'Identifying appropriate appeal/review bodies', below.

[205] The lack of accepted standards and methodologies is a continuing feature of contaminated land remediation programmes and continues to lead to widely diverging views (as well as bitter disagreements at times) between regulators and between regulators and developers: see, for example, ENDS Report January 2000, p.25, which describes how a local authority refused to accept the Environment Agency's concerns over acceptable clean-up standards for a brownfield housing development project.

[206] For an examination of the importance of distinguishing physical remediation from other remedies, see Steele, J. "Remedies and Remediation: Foundational Issues in Environmental Liability" [1995] M.L.R. 615.

[207] See, for example, *Framework*, *op cit.*, paras 2.4, 2.5, 2.7 & 4.3.3-5.

contributions to be made into a general fund.[209] As well as the Act's general provisions: defining "Contaminated Land";[210] requiring physical inspection of land;[211] requiring remediation;[212] powers to carry out remedial works and recover costs;[213] and provisions relating to access to land,[214] there are further measures which address specific issues arising out of the physical nature of contaminated land. These include the limitation of liability for "Class A appropriate persons" to works which are to any extent referable to substances which had been caused, or knowingly permitted, to be present in, on or under the land in question.[215] This physical connection of liability to actual and individual substances is enhanced by specifically addressing the possibility that substances may undergo changes after their deposit (etc.) in land as a result of a chemical reaction or biological process affecting the substance.[216] A further provision which directly addresses the kinds of issues resulting from the physical nature of contaminated land problems, is that dealing with liability where substances escape from land to contaminate other land.[217] A more indirect (and controversial) aspect of the legislation which acknowledges the physical nature of the problem, is the lack of any provision which precludes further requirements for remedial works should the works which were initially required not be wholly successful, or should further problems arise in the future.[218] In this regard it is interesting that the Statutory

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[208] Financial penalties can result from a failure to comply with remediation notices (see s.78M), however, these are as a means for securing, not an alternative to, remedial works.
[209] The Act may work differently in practice, with the costs of works to be carried out possibly being paid in advance to enforcing authorities, however, there is no provision for this in the rules themselves.
[210] S.78A.
[211] S.78B.
[212] S.78E.
[213] Ss.78N & P.
[214] See s.78G.
[215] S.78F(3). The fact that only a small amount of the substance was the responsibility of the appropriate person does not limit liability to that amount, if others have also introduced the same substance there may be liability for all of it, subject to exclusion and apportionment: see: s.78F(10); Hughes, D. *Environmental Law, op cit.,* p. 434; and Encyclopedia Commentary, *op cit.,* D584/40-41.
[216] S.78F(9).
[217] S.78K.
[218] The lack of so-called 'completion certificates' certifying that works have been properly been carried out and barring further requirements of that appropriate person in relation to the matters which they address. Demands for these from the business community were rejected by the Government during the passage of the Bill: Lewis, R. *op cit.,* p. 1094 (see: *Hansard* HL, March 7, 1995, Vol. 562 col. 184). One way to circumvent the problem is the development of "Land Guarantee Certificates" by insurance companies which underwrite further regulatory requirements following the completion of satisfactory remedial works: see ENDS Report September 1997, No. 272 "Insurance Venture Introduces Certification for Land Clean-Ups". The Labour Party had initially accepted the use of completion certificates but changed its mind on the grounds that it did not want public authorities (and the public

Guidance specifically includes "durability" of remedial works as an important factor in determining them[219] and provides for requirements as to the monitoring of the future condition of land.[220]

The scope of the Act's provisions covers wider physical impacts, including non-human impacts.[221] Indeed, the definition of Contaminated Land[222] includes "harm to the health of living organisms or other interference with the ecological systems of which they form part",[223] as well as human impacts, and pollution of controlled waters is a separate factor which can identify land as "Contaminated Land" within the meaning of the Act.[224] This recognition of the wider impacts of and concerns caused by Contaminated Land is expanded upon in the Statutory Guidance where a list of receptors sets out those which may be considered in addition to humans and the types of harm which may be "significant" (including harm to "ecological systems").[225] Despite this, the perspective of "harm" remains largely anthropocentric in that the concern is usually based upon the well-being of humans, albeit in an indirect manner. Certainly, the scope of the guidance on other receptors is fairly restrictive in its width (and often considers other species in terms of their commercial value), and it is expressly provided that harm to any other types of receptors is to be disregarded.[226]

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purse) to act as guarantor of the adequacy of remedial works: see ENDS Report May 1997, No. 268 "Hold-Up on Contaminated Land". The Royal Commission on Environmental Pollution had recommended the use of such certificates: see Royal Commission on Environmental Pollution 19th Report: The Sustainable Use of Soil: Cm 3165: February 1996, para 11.26, however, the House of Commons Select Committee on the Environment did not believe that it was possible to devise a satisfactory scheme and suggested insurance as an alternative: *House of Commons (2), op cit.*, para 30. The latest position is that enforcing authorities are 'allowed' to provide written confirmation that they do not currently consider that any remedial works are required (see para 15.6 of the *Description of the New Regime, op cit.*), although this falls well short of providing comfort that further works will not be required in the future without a change of use.

[219] Draft guidance, Chapter C, Part 6.

[220] Draft guidance, Chapter C, paras 68-69, which is limited to monitoring changes to the 'pollutant linkage' and is not to be used to identify new linkages.

[221] Thus the Act recognises the non-human impacts of environmental issues discussed in Chapter One.

[222] In s.78A.

[223] S.78A(4).

[224] S.78A(2)(b).

[225] 'Table A' in draft guidance, Chapter A, para 23.

4.2.8 Issue 3(a): Clarification of Policy Objectives

A theme running through this thesis has been that the principle of sustainable development, perhaps better stated as the foundational policy objective, includes an internal conflict[227] which makes it hard (if not impossible) to develop the principle to the extent of providing clear legal guidance of general application. It is possible to give guidance as to approach, but it appears to be difficult to establish clear substantive rules. Within this foundational policy objective, choices can be made as to methods of furthering it, which themselves are developed as policy objectives. With the Contaminated Land regime, these have been: to provide for action only where there are unacceptable risks and appropriate and cost-effective means of tackling them;[228] to tackle hazards through a mix of private and public sector action; to encourage an efficient market in contaminated land and development of it; and to remove unnecessary financial and regulatory burdens.[229] The approach to meeting these is to use voluntary action where possible but to tackle problems in an orderly and prioritised fashion, at a rate at which the economy can cope,[230] including the adoption of a "suitable for use" approach. The main method for meeting the objectives has been the introduction of regulation which seeks to provide greater certainty, to be fair yet robust and effective.[231] Bearing in mind the political nature of most contaminated land issues,[232] the policy objectives underpinning the Act seem to have been clarified to some extent, especially considering the (possibly insurmountable) difficulties in identifying clear objectives within the principle of sustainable development itself. It is difficult to criticise objectives such as taking a risk-based approach to problems. One possible criticism is that such objectives are somewhat banal, and that it is this banality which prevents close analysis.[233]

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[226] Draft guidance, Chapter A, para 24. In addition, only the types of harm set out in Table A are to be regarded as 'significant' and so the scope for including consideration of the impacts on the wider, non-human, environment is limited both by the type of organisms and the effects on them.
[227] That between environmental protection and economic development.
[228] *Framework, op cit.*, 2.4.
[229] *Ibid.*, para 2.5.
[230] *Ibid.*, paras 2.6 & 3.1.
[231] *Ibid.*, para 7.1.
[232] Requiring the balancing of many diverse considerations.
[233] See the findings in Chapter Five.

4.2.9 Issue 3(b): Re-use of Brownfield Land/Relieving Pressure on Greenfield Sites

Whilst it was intended that the need to recycle brownfield sites should continue as a planning consideration[234] (and some rules have been developed regarding this[235]), the Act does not directly make any provision for brownfield recycling. However the Act is predicated upon the desire to stimulate a market in contaminated land and to facilitate and encourage brownfield development. Relieving development pressure on greenfield sites and promoting recycling of brownfield sites is a clear example of a policy objective which strives to be sustainable: it aims to make a contribution to sustainable development. The rules comprising the Act do not, however, directly address, or even mention, this objective and yet it is one of the driving forces behind the development of the rules and the contribution which they make to achieving, or frustrating, it will be one of the key tests for establishing whether they have been "effective". In considering the probable effectiveness, a useful guide may be to consider how well the rules achieve the conditions necessary to meet the objective: i.e. the provision of certainty, etc. in order to create an effective market.[236]

4.2.10 Issue 3(c): Identification of Sites/Dissemination of Information - Registers

In its review of contaminated land issues, the Government rejected the need for a national survey of land.[237] Section 143 was repealed[238] and information collection and dissemination was dealt with as part of the comprehensive system of regulation. The inspection duties of local authorities[239] require the collection and evaluation of information as to land contamination in order to facilitate an ordered and prioritised approach to dealing with it. This information is not itself to be made public, although

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[234] *Framework, op cit.,* para 3.3.1 and Consultation Draft Statutory Guidance (1996), Introduction, para 19(i).
[235] PPG 23, *op cit.*
[236] See the analysis of Issue 1(c)., above.
[237] *Framework, op cit.,* para 4.5.7. Such a survey was not considered to be cost-effective and a 'snapshot' of contaminated land was not felt necessary.
[238] See Environment Act 1995, Schedule 2, the intent stated in *Framework, op cit.,* para 4.5.8.
[239] Under s.78B, supplemented by draft guidance, Chapter B.

it may be obtainable, upon specific request, by the public under other legislation.[240] The use of registers as a regulatory tool remains, however, as there are new provisions which require the keeping of certain public registers.[241] The most significant difference is that the registers relate to "actual", as opposed to potential contamination, with a determination that contamination poses sufficient risks to require remedial works as a pre-requisite.[242] The replacement provisions may be further distinguished from those under section 143 because they allow the inclusion of information as to remedial works carried out[243] and are part of the comprehensive regulatory system which clarifies (to some extent at least) liability issues.[244]

4.2.11 Issue 3(d): Who Pays and For What?

The general provisions regarding liability for funding remedial works have been considered in the preceding sections. We can now consider provisions which relate to specific Contaminated Land Rule-making Issues.

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[240] The Environmental Information Regulations SI 1992 No.1711 (as amended). The whole debate of contaminated land issues means that interested parties such as prospective purchasers are much more likely to take steps to obtain their own information on contamination.

[241] See s.78R and the (draft) Contaminated Land (England) Regulations, generally, which include provisions regarding the keeping of public registers of remediation notices served, actions carried out, appeals made and a number of other relevant activities.

[242] Although a catch-all provision allowing Regulations to include the keeping of other information could be used to include information relating to land which was not 'Contaminated Land' within the meaning of the Act (and, therefore, did not pose significant risks following a risk assessment), see s.78R(1)(l).

[243] Although there are no provisions allowing removal of information.

[244] Thus the main criticisms of s.143 registers are dealt with, other than removal of 'remediated' sites. Restrictions on the inclusion of certain information are made: on the grounds of national security (s.78S) and commercial confidentiality (s.78T). There are also provisions whereby information is made publicly available in circumstances where the enforcing authority itself is the appropriate person (s.78H(5)(c) and a remediation statement is issued under s.78H(6)) and where a remediation notice cannot be served on others, due to costs recovery considerations (s.78H(5)(d)), the impossibility of remedial works (s78H(5)(a), the appropriate person voluntarily carrying out works (s.78H(5)(b), etc. (such as where a remediation statement is issued under s.78H(6), save for impossibility of remedial

(i) Joint & Several Liability

Liability under the Act is based upon there being a form of joint and several liability (for "Class A appropriate persons").[245] This is then mitigated by limitations which restrict liability so that it only extends to the carrying out of works to the extent that they are referable to substances which the appropriate person caused or knowingly permitted to be present.[246] Liability may be further mitigated by application of the exclusionary tests and the apportionment methodology in accordance with the relevant Statutory Guidance,[247] if another "Class A appropriate person" can be found.[248] The provisions as to "hardship" operate so as to avoid the imposition of joint and several liability, by not increasing the proportion of costs borne by other parties where one party is relieved from liability.[249] It is partly through these attempts to mitigate the harshness of joint and several liability that such complexity has arisen: different approaches having been adopted within the primary and tertiary rules. Again, this can be traced back to the physical nature of the problem, and arises both from a desire not to add to the unavoidable unfairness perceived to result from historic liability and from concerns over the additional potential for unfairness which might result from the introduction of joint and several liability within that context.

(ii) "Innocent" Owner Liability

The Government's intention, following its review, was that owners would be liable where the polluter could not be "found", as they were ultimately responsible for the state of their own land.[250] There were to be limits regarding migration of contaminants

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works (i.e. the costs outweigh the potential benefits, as determined under s.78E(4) & (5)) where a remediation declaration is made under s.78(7)).

[245] S.78F(2) including as an appropriate person to require to carry out particular works 'any person', 'or any of the persons' who caused or knowingly permitted the presence of 'the substances, or any of the substances'.

[246] S.78F(3) & (10). See above (Issue 2(c)), although this limitation may be largely ineffectual in practice: see Lewis, R., *op cit.*, p. 1094.

[247] See draft Guidance, Chapter D.

[248] For example, one member of a liability group is not generally liable for the apportioned share of remediation costs owed by another member who refuses to pay.

[249] See draft guidance, Chapter D, para 35.

[250] *Framework, op cit.*, para 4.4.2.

to other land[251] and the purchaser was to be primarily liable where responsibility had been legally transferred.[252] These intentions were implemented in the main,[253] although the Act takes a firmer view of owner liability following purchase because the concept of "knowing permitter" imposes primary liability[254] upon a much wider group than those who have had liability legally transferred to them. In one respect, however, owner liability is far narrower than that for those primarily liable; owners are excluded from liability relating to pollution of controlled waters.[255] The Act is quite clear in its imposition of liability upon "innocent" owners: those less innocent (as a result of their activities on, or knowledge about, the land) are likely to fall within the scope of the primary liability provisions. The clear imposition of secondary liability upon "innocent" owners might be viewed as elevating the needs of effectiveness and protection of the public purse over those of fairness. The breadth of primary liability and the provisions as to migratory substances are, however, supplemented by the provisions as to hardship and costs recovery[256] in order to avoid the imposition of completely unreasonable burdens.

(iii) "Deep Pockets"/Lender Liability

Lender liability was obviously regarded as a significant issue by the Government as it was dealt with in some depth by the review paper.[257] Lenders were not to be treated as "deep pockets" but were to be made liable where "responsible",[258] the proper balance in determining this being the test of "causing/knowingly permitting".[259] Whilst this may have provided a balance regarding primary liability, there remained the possibility of lenders liability as "owners" or "occupiers". The proposed solution was

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[251] *Ibid.*, para 4.4.3.
[252] *Ibid.*, para 4.4.4.
[253] Owners and occupiers having 'secondary' liability as Class B appropriate persons where Class A persons cannot be 'found' (s78F(4)) or where works cannot be found to be 'referable' to them under s.78F(3) (s.78F(5)) and the migratory substances provisions in s.78K.
[254] As Class A appropriate persons.
[255] S.78J(2).
[256] See ss.78N & P and draft guidance, Chapter E.
[257] *Framework, op cit.*, 4.4.9-12.
[258] And, therefore, would not enjoy the exclusion from liability afforded to certain persons, such as receivers and other insolvency practitioners(s.78X(3)).
[259] *Framework, op cit.*, 4.4.9-12.

to exclude mortgagees not in possession from the definitions of these terms,[260] although lenders remained concerned by the position in relation to steps taken to protect or enhance security which fell short of possession and the diminution or extinction of the value of the security generally,[261] as well as by the scope of primary liability.[262] With regard to the position of those which could be viewed as "deep pockets"[263] generally, the liability provisions were intended to provide reasonable limits and the Hard Guidance provides that the financial circumstances of appropriate persons are irrelevant regarding exclusion and apportionment.[264] Thus the relative wealth of the appropriate person should not be relevant (other than in relation to the question of "hardship"). With regard to lenders specifically, the first of the exclusionary tests provides that certain activities, including many related to lending and other forms of financial assistance, are "excluded activities".[265] The result of this is that there are additional rules which may exclude liability in the (unlikely) event that the primary rules encompass these activities.

(iv) "Orphan Sites"/Funds

The provisions imposing liability have a direct effect upon the existence and number of Orphan Sites. The Government wished to keep these to a minimum, though not by pursuing those with "deep pockets" beyond their true responsibility.[266] Any idea of industry sectoral or other funds was abandoned.[267] Although it leaves the possibility of Orphan Sites a very real one (by defining the scope of liabilities so that Orphan Sites may arise and relating liability to separate remedial works, rather than sites[268]), the

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[260] S.78A(9).
[261] The approach taken to the question of lender liability in the United States being a source of concern for lenders in the UK, see, for example: Jeffrey, M. "Environmental Liability: A Continuing Source of Concern for Lenders" [1994] Environmental Policy and Practice 17.
[262] Despite the Draft Circular setting out the Government's view that the act of lending only could not bring a lender within the concept: *Description of the New Regime*, para 9.11..
[263] For example, lenders and insurance companies.
[264] Both for deep pockets and the impecunious: see draft guidance, Chapter D, para 35.
[265] *Ibid.*, paras 47-50.
[266] *Framework, op cit.*, para 4.4.8.
[267] Their not even being mentioned in *Framework* and not being included, in any form, in the Act. This may be as a result of extremely negative perceptions generally about the US 'Superfund' regime. (See Chapter Six for responses to this issue (and others) in the consultation exercise).
[268] Allowing the draft guidance to create the concept of 'orphan linkages', see Chapter D, paras 103.

primary legislation does not deal with the remediation of Orphan Sites at all.[269] The way in which the Statutory Guidance and other rules deal with this issue is to require enforcing authorities to treat themselves as if they were Class B appropriate persons if they *choose* to exercise their *powers* to carry out remedial works. [270] This leaves something of a gap in that there is no duty on anyone to carry out remedial works regarding 'linkages' which may be causing significant harm. The enforcing authority responsible for securing remediation is itself the potential funder, and so it has an incentive not to exercise its discretionary powers. This may be thought an unfortunate state of affairs and it would seem that (in addition to the authority's own desire to clean up Orphan Sites) the only factors which may persuade the enforcing authorities to remediate Orphan Sites are political pressures which may be exerted (for example, by the local electorate, or the channels of influence upon the Environment Agency).

(v) Strict or Fault-based Liability

The Act creates a system of strict liability (or at least clarifies that one already exists). There are no fault-based defences to liability, other than "reasonable excuse"[271] and the failure of other parties to pay their proportions in relation to shared works[272] which are defences to criminal proceedings for failure to comply with a remediation notice.[273] Other suggested defences, such as regulatory compliance, were specifically rejected in the review document[274] and not included in the Act other than where contamination results from an activity authorised by a waste management licence.[275]

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[269] And this was identified in the House of Lords: see *Hansard* HL, December 15, 1994: Vol. 559, col. 1401.
[270] See draft guidance, Chapter D, para 103.
[271] S.78M(1).
[272] S.78M(2).
[273] In the Consultation Draft Statutory Guidance (1996) (Chapter V, para 22), the question of foreseeability became relevant in 'exceptional' cases where the application of other considerations set out in Soft Guidance was not sufficient to determine whether or not to recover costs, in which case it could be considered, together with the use of 'best practicable means' and compliance with regulatory consents could have been particularly relevant. This was removed from the 'Round Table Draft Guidance' (interim draft guidance produced for a consultation exercise carried out with selected groups in late 1998 - see Chapter Five for details) following concerns expressed in the consultation exercise: see the letter from Micheal Meacher, Minister for the Environment, to Mr Andrew Bennett MP, Chair of the House of Commons Select Committee on the Environment, Transport and the Regions, dated December 22, 1997, and is not now included in the draft guidance.
[274] *Framework, op cit.,* para 4.4.14.
[275] Whether or not there has been a breach of the licence conditions: s.78YB(2).

The requirements of reasonableness and cost effectiveness regarding remedial works provide important, and enforceable, rights for appropriate persons regarding the extent of liability, despite not affecting its existence.

(vi) When Should The Public Pay

The scheme of the whole Act seeks to require polluters or landowners to pay for clean-up except where this would be completely unreasonable.[276] In a clear policy choice, the Government preferred to impose liability upon "innocent" landowners where polluters could not be made liable, rather than place the burden upon taxpayers.[277] Exposure of the public purse is, therefore, kept to a minimum, although, where it might arise, the provisions are unclear (though they clearly put any burden on local, rather than central, funds).[278]

4.2.12 Issue 3(e): Historic Contamination:

(i) Retrospective/Retroactive Liability

The Act deals only with land contamination where there are no continuing controls over the relevant contaminating activities. There is no limitation period with regard to regulatory action and enforcement and the Statutory Guidance recognises that sites may have complex histories as regards site operation and ownership.[279] Difficulties arising from the long periods over which activities may have been carried out through which land may have become contaminated, and through which liability may arise, are recognised by the inclusion of liability for owners where these polluters cannot be "found".[280] The rules of limitation of common law actions remain unchanged.[281] The

[276] And when making costs recovery and hardship determinations enforcing authorities are required to bear in mind the interests of the public purse: draft guidance, Chapter E, para 11.
[277] Other than in relation to water pollution where consistency with other legislation was considered more important.
[278] The 'Orphan Sites' situation.
[279] See draft guidance, Chapter D generally.
[280] S.78F(4) & (5). Examples of appropriate persons not being 'found' include where they are dead or companies have been liquidated.
[281] The Government rejecting the need for this: *Framework, op cit.,* para 6.1.9.

possibility of passing on liabilities through common law actions[282] may, therefore, be more limited than the liability which is created by the regime. Whether true retrospective liability has been created is a matter of some dispute,[283] but there seems little doubt that it is the potentially retrospective elements of the Act (which directly result from the physical nature of contaminated land) which inescapably lead to problems of (perceived at least) injustice, particularly where combined with policies intended to protect public funds.[284]

(ii) Dealing with Past and Future Differently

The review paper dealt with clean-up of past contamination and prevention of future contamination as completely distinct matters and focused upon the former. However, the duty to inspect land[285] is a continuing duty and so future contamination which is not capable of clean-up through other measures may be dealt with under the Act, albeit on a, by then, historic basis. The Act is disapplied to the extent that certain powers to control land contamination may be used[286] and it is anticipated by the Government that the protection of the environment from current and future polluting activity will be provided by means of the exercise of these and other statutory powers.[287] Future activities may, of course, later trigger liability under the Act, despite the fact that there may be no further contamination. This is because a change of use

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[282] Which was intended to be a method of spreading the load and providing greater fairness.

[283] See the comparative analysis with Statutory Nuisance, above. Even if the pattern of liabilities is broadly the same as previously, there does seem to be some conflict with the idea that the law should be prospective and should not "...change the character of past transactions carried on upon the faith of the then existing law...", per Willes, J. in *Phillips* v. *Eyre* (1870) L.R. 6 Q.B. 1, 23. However, as discussed in Chapter Three, this presumption against retrospective legislation may be overridden by clear legislative intent (save for retrospective penal legislation, where Article 7 of the European Convention on Human Rights may now apply, following the Human Rights Act 1998).

[284] Lewis, R., *op cit.*, p. 1096.

[285] S.78B.

[286] For example, under the Integrated Pollution Control regime in Part I of the Environmental Protection Act 1990 (remediation notices may not be served where it appears to the enforcing authority that the power in s.27 to remedy harm caused by a breach of IPC controls under s.23(1) or (c) is exercisable), where waste management licences are in force under Part II of the Environmental Protection Act 1990, or where there are powers to deal with waste under s.59 of the Environmental Protection Act 1990: s.78YB.

[287] See Draft Circular, *Statement of Government Policy*, para 2. The overlap between powers and duties is considered in relation to Issue 3(j), below.

may lead to the creation of new "pollution linkages" which may require remedial works to deal with them.[288]

4.2.13 Issue 3(f): Remediation Levels: Multifunctionality or Suitable for Use

The approach selected in the review paper is remediation to a "suitable for use" standard.[289] Although there is no specific provision in the Act, the Draft Circular makes it clear that this is the approach to be adopted and on which the regime is based;[290] and the Statutory Guidance provides that enforcing authorities may not require remedial works which make the land suitable for other uses than its current use.[291] The Government seems to clearly distinguish between historic contamination and contamination resulting from a failure to comply with modern standards, with higher clean-up levels being appropriate in the latter case (apparently, in part, on the basis of "culpability").[292] As well as dictating the nature of works which may be required, the approach provides one of the most significant factors to be taken into account in the risk assessment required to determine that land is Contaminated Land within the meaning of the Act.[293]

4.2.14 Issue 3(g): Blight

The issue of blight is not touched upon anywhere in the review paper or the Act. This may be because the clarification of liability for, and of the existence of, significant

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[288] For example, there may be no significant risks to receptors from a derelict industrial site which is not open to the public, however, the development of that site for housing could trigger liability in the event that planning requirements did not deal adequately with the contamination.
[289] Stated to support the principle of sustainable development: framework, *op cit.,* para 2.3 and to be used for planning control as well: see para 3.3.2 and PPG 23.
[290] *Statement of Government Policy*, paras 9-15.
[291] Draft guidance, Chapter C, para 70(b). What level of remediation is provided by voluntary works is, of course, not a matter for the Act. There is some scope for requiring higher standards in particular cases, however, as the guidance is 'soft' guidance and so is only a material consideration and there is scope for arguing that higher standards should be imposed in certain cases by the definition of 'remediation' used in the Act (s.78A(7)) which includes 'the restoring of land to its former state: Lewis, R., *op cit.,* p. 1089.
[292] See, for example, ENDS August 1999, p. 36 discussing the restoration standard of "satisfactory state" for IPPC site restoration. It also seems that the Government considers that using the "suitable for use" standard in IPPC and other contexts would be to accept further significant degradation of land.
[293] One result of this approach is that contamination will be dealt with primarily through the planning system where there is a proposed change of use: see Jewell, T. & Steele, J., *op cit.,* p. 297.

land contamination were, in part, intended to overcome blight problems. Certainly the objective of creating a market in contaminated land would be greatly hampered by significant and unwarranted blight of land. It may, therefore, be that blight has been indirectly addressed by focusing upon the market generally, rather than upon blight of particular areas, or types, of land. Some concerns regarding blight do, however, remain.[294]

4.2.15 Issue 3(h): Providing Incentives for Remediation

As the Act introduces a system of liability for clean-up it is perhaps not surprising that it does not also introduce incentives.[295] The review concluded that public sector finance would, however, continue to play a key rôle[296] and that supplementary credit approval would provide funds for local authorities.[297] One incentive for voluntary remediation is provided by the operation of the Landfill Levy. Material is only exempt from the levy if it results from voluntary action, rather than from works carried out as a result of regulatory action.[298]

4.2.16 Issue 3(i): Use of a Market-led Approach

The objective of creating the conditions which will encourage an efficient market in contaminated land was recognised as a priority in the review paper.[299] As well as creating a contaminated land market, the Act works with, rather than against, the principles underpinning the property market generally. Thus, private contractual

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[294] The House of Commons Select Committee on the Environment recommended that a deadline of one year from the adoption of inspection strategies be set for the carrying out of inspection, in order to avoid blight: *House of Commons (2)*, *op cit.*, para 66. It seems, therefore, that the identification or non-identification of land as 'Contaminated Land' under the Act is anticipated to deal satisfactorily with blight problems, provided that there is not undue delay.

[295] Other than in the sense that it provides disincentives for not cleaning up.

[296] Particularly through English Partnerships and the Welsh Development Agency: *Framework*, *op cit.*, para 3.2.

[297] *Ibid.* Supplementary Credit Approvals have been issued to local authorities to help them deal with contaminated land problems: see ENDS Report July 1996, No. 258 "Funds for Contaminated Land Clean-Up" and June 1997, No. 269 "Councils, Agency Get Help With Contaminated Land".

[298] A good example of a fiscal measure designed to stimulate voluntary action and steer market activity towards environmentally responsible behaviour. This could be viewed as a 'carrot' in contrast with the 'stick' of regulatory action, or as a further stick, depending on whether the focus is the imposition of the levy or the exemption from it.

provisions take priority over the rules wherever possible, so that private agreements as to liabilities are respected where this will not increase the exposure of public funds;[300] and the exclusionary tests seek to exclude liability, where possible, where land has been sold "sold with information" as to contamination,[301] or where there have been "payments made for remediation".[302] The desire not to undermine (but rather to support) the market is also reflected by the high priority given to protecting lenders by the application of the exclusionary tests. This seems to be based upon concerns over possible development of the concepts of "causing" and "knowingly permitting" by the courts, rather than upon the present position regarding lender liability. This approach is also reflected in the fact that the Government chose not to make suggested changes to certain rules, such as to the principle of *caveat emptor*, upon which the market is based[303] The market approach to Contaminated Land problems provides an excellent example of an attempt to assimilate environmental considerations into commercial decisions, although there are problems with such an approach.[304]

4.2.17 Issue 3(j): Interaction/Overlap with Other Controls

There is a rather complex system of interaction with other controls. Whilst the common law remains unaffected by the Act;[305] the unsatisfactory position regarding the overlap with statutory nuisance powers; the overlap with planning controls; the relationship with the Landfill Tax; and the overlap with controls under the Integrated Pollution Control and Waste Management regimes have been discussed in preceding sections. Furthermore, harm or pollution resulting from radioactivity is not covered by

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[299] *Framework, op cit.*, para 2.5.
[300] See the provisions regarding 'Agreements on liabilities' in draft guidance, Chapter D, paras 38-39.
[301] and, therefore, had the opportunity to take it into account in negotiating the purchase price: draft guidance, Chapter D, paras 57-61.
[302] Draft guidance, Chapter D, paras 51-56. These provisions may be viewed as simply providing an element of fairness in liability allocation, however, they are founded in the context of the operation of the property market.
[303] Although this would affect future transactions and is addressed (perhaps not completely satisfactorily) through public and private requirements for the provision of information .
[304] Resulting from the dominance of a particular (market) philosophy, such as excluding the participation of interests from outside the regulated 'constituency' (identified in section 4.2.23, below) and failing to change patterns of wealth creation to any significant extent: see Jewell, T. & Steele, J., *op cit.*, p. 300.
[305] As there was felt to be a reasonable balance between the interests of plaintiffs and defendants: *Framework, op cit.*, para 6.1.

the Act[306] and remediation notices cannot require action which would impede or prevent discharges pursuant to consents.[307] Requirements as to statutory consents or licences which may be required for the carrying out of remedial works are, however, unaffected by the Act and must be complied with independently.[308] One uncertain area of overlap is that with the "works notices" provisions of the Water Resources Act 1991.[309] The potential overlap with the Act is obvious: land contaminated so that it has caused water pollution. An example would be petrol which has polluted controlled waters following the seeping through land, after escape from defective storage tanks. There are significant differences between the powers under the Act and under the works notices provisions,[310] even where the Environment Agency is the enforcing authority for the purposes of the Act.[311] The Secretary of State has the power to direct the Environment Agency as to how to exercise its works notices powers,[312] however, to date that power has not been used.[313] The matter has been addressed through the issuing of a policy statement by the Environment Agency which provides that Contaminated Land powers will normally be used where there is any overlap, since there is a duty to use these, whereas there is only a power to use works notices.[314] The problems which arise from a lack of clarity as to the overlap between these provisions

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[306] Although Regulations (under s.78YC) are being developed to apply it with some modifications: see the Consultation Paper "Control and Remediation of Radioactively Contaminated Land" published by the DETR on February 26, 1998.

[307] Under Part III of the Water Resources Act 1991: s.78YB.

[308] See, for example, Draft Circular, *Statement of Government Policy*, para 52 (referring to IPC authorisations). Paras 44-69 provide useful information as to the interaction of the Act with other controls generally.

[309] Ss.161A-D. These provide powers to the Environment Agency to require anti-pollution works and operations of persons who have caused or knowingly permitted poisonous, noxious, polluting, or solid waste matter to enter, or to be likely to enter, controlled waters, together with powers to carry out works and recover the costs of these (under s.161).

[310] For example, in relation to method by which the Secretary of State controls decision-making (there being no powers to provide statutory guidance under the Works Notices provisions), the lack of guidance as to clean up standards, lack of provisions as to allocation and apportionment of liability, the lack of a 'reasonable excuse' defence for non-compliance with Works Notices, and consultation requirements.

[311] i.e. in the case Special Sites. For a discussion of the overlap position, see Howarth, B. & Bell, S. "Defining the Boundaries - The Draft Guidance on Contaminated Land and the Implications for Water Law" [1997] Water Law 31.

[312] S.161A(12).

[313] It appears that the Government is considering amending the primary legislation to refine the wording of the definition of Contaminated Land with regard to pollution of controlled waters: *Description of the New Regime,* para 2.10.

[314] See *Environment Agency Policy and Guidance on the Use of Anti-Pollution Works Notices,* para 64 of the *Statement of Government Policy* in the draft Circular, and para 8.16 of the *Description of the New Regime.*

include difficulties in allocating liabilities in business transactions. In order to allocate liability accurately, the full pattern and extent of this will need to be ascertained. In structuring such allocation, the exclusion and apportionment provisions in the Statutory Guidance could be influential.[315] Liability under the works notices provisions is, however, determined on a different basis, where those provisions are irrelevant.[316] Thus the "commercial legislator" operates with uncertainty as to important areas of potential liability.

4.2.18 Issue 4(a): Legitimising the Rules, Through Public Participation or Other Means

Whilst not considering how the primary and secondary legislation might be developed,[317] the review paper had devised a system whereby other rules might be formulated. The Environment Agency was to draw up a strategic framework for contaminated land[318] and provide a framework comprising guidance[319] as well as standards,[320] whilst the Government was to provide "mandatory" guidance on the meaning of the term "polluters".[321] The Environment Agency was to consult the Development Agencies and local authorities regarding the strategic framework and was to "consult widely" before providing the guidance.[322] Although it was not mentioned, the basis on which it was thought legitimate for the Environment Agency to be given powers to make rules was, presumably, expertise and public participation through consultation; whilst the Secretary of State enjoyed the usual parliamentary legitimacy.[323] In the Act, the powers to make rules vary from those considered in the review, with centralisation of powers in favour of the Secretary of State. Although the

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[315] Which include matters such as 'payments made for remediation': draft guidance, Chapter D paras 51-56.
[316] Tromans, S. & Turrall-Clarke, R., *Contaminated Land: First Supplement* (Sweet & Maxwell, 1999) ("Contaminated Land Supplement"), p.24-25.
[317] Which is perhaps not surprising with the assumption that it would be developed in the usual fashion, although this approach is open to criticism and is considered in Chapter Seven.
[318] *Framework, op cit.*, para 3.2.2.
[319] *Ibid.*, para 4.2.1.
[320] *Ibid.*, para 4.5.1.
[321] *Ibid., para* 4.4.5.
[322] *Ibid.*, para 4.2.2.
[323] Which would depend upon the precise nature of the rule-making process decided upon.

Environment Agency has developed a draft strategy for contaminated land[324] and may provide site specific guidance to local authorities[325] (both of which may be justified on the basis of expertise), general powers to make guidance are conferred upon the Secretary of State.

The Soft Guidance can only be made after consultation with the Environment Agency and such other bodies as are considered appropriate.[326] Thus "expertise" forms an additional claim for legitimacy to that of the usual processes of public participation/political representation. Whether any further claims for legitimacy can be made for this guidance depends upon the bodies consulted and the method of consultation. The way in which the Secretary of State has carried out the duty to consult thus far could be viewed as strengthening legitimacy claims as the exercises have been conducted on the basis of general consultation with the public.[327] This is also partially undermined, however, by restrictive consultation processes where the rule-makers have consulted with a small number of groups, both before and after the general consultation processes.[328]

For the Hard Guidance, there is the same additional claim for legitimacy (wider public consultation),[329] however, there is a further claim which is even stronger than those for much secondary legislation. The "negative resolution" procedure applies to Hard Guidance,[330] with the exception of that relating to the Environment Agency's handling of Special Sites.[331] Thus, whilst it is difficult to use the negative resolution procedure to challenge rules,[332] the guidance has the political legitimacy of having been open to

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[324] The Environment Agency's *Strategy for Contaminated Land* issued as a draft in December 1996 and reissued as *An Action Plan for Land Quality* in February 1998
[325] Under s.78V.
[326] S.78YA(1).
[327] Though see the findings and critique in Chapter Six.
[328] The circulating of 'Working Drafts' of the Guidance before the official Consultation Draft was consulted on in November/December 1996 and the 'Round Table' discussion with certain groups following limited circulation of a revised draft in December 1998.
[329] S.78YA(1) applying here as well.
[330] Whereby a draft of the guidance must be laid before both Houses of Parliament and may not be issued until 40 days have passed without a resolution that it should not be issued.
[331] Issued under s.78Q(6).
[332] The securing of a resolution to effect this being rare in either House. For an outline of the limited effectiveness of such measures, see Hayhurst, J.D. and Wallington, P. "The Parliamentary Scrutiny of Delegated Legislation" [1988] P.L. 547.

Parliamentary challenge in theory at least.[333] This superior claim for legitimacy may reflect concern felt over the use of such rules to deal with substantively important issues; or that felt over the use of prescriptive guidance for matters of substance.[334] Whatever the rationale, such legitimacy is undermined by the fact that the same requirements are not present for Special Sites guidance. No logical basis has been articulated for this distinction.[335]

The issue of the legitimacy of certain rules was considered in some detail by the Standing Committee during the passage of the Bill, though not in relation to Part IIA. In what was a somewhat prophetic exchange[336] between opposition MPs and the Government's representative, there was great disquiet about the introduction of guidance to the Environment Agency on the meaning of "sustainable development" under powers provided by Part I of the Environment Act via the negative resolution procedure, rather than the "positive" resolution procedure.[337] Concerns included the fact that the rules were being made in haste and made, or amended, as a result of pressure from outside interests whilst by-passing proper accountability through Parliament. Members of the Committee clearly felt that the use of only the negative resolution for guidance of such importance was inappropriate and that greater Parliamentary scrutiny should be possible. The Environment Agency need only "have

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[333] Which is something denied to most Statutory Instruments, which are generally merely laid before Parliament for information.

[334] The requirement of the negative resolution procedure does, at the least, seem to recognise the centrality and importance of the Hard Guidance in the scheme of the Act: Lewis, R., *op cit.,* p. 1089.

[335] Although there may be one; for example, the Special Sites Guidance is the only Hard Guidance which does not apply to local authorities.

[336] Mr Andrew Bennett MP, stating that the Government would soon be sitting on the opposition benches and criticising measures used to by-pass Parliamentary scrutiny by giving sweeping powers to Ministers: *Parliamentary Debates; Standing Committee B*; House of Commons, May 9, 1995, cols.142-143. Concerns as to the procedure for approving this guidance were also expressed in the House of Lords see: *Hansard* HL, March 20, 1995, Vol. 562 cols. 1018-23. Here, the use of the affirmative resolution procedure was considered to not be the optimal use of Parliamentary time and the negative resolution procedure was considered appropriate (see also: *Parliamentary Debates; Standing Committee B*; House of Commons, May 23, 1995, cols. 351-2).

[337] *Ibid,* cols.141-143. General concerns over the use of Ministerial guidance to direct bodies as to how to achieve aims and objectives set out in legislation were expressed in Parliament with, again, the guidance to be given to the Environment Agency a particular concern. Concerns were also expressed in the House of Lords: see, for example, *Hansard* HL, December 15, 1994: Vol. 559, col. 1393 and 1399 (where there were particular concerns over guidance on the meaning of 'sustainable development') and January 17, 1995, Vol. 560 cols. 555-578.

regard to" that guidance[338] (rather than "act in accordance with it") and so it is perhaps surprising that the matter was not pursued more vigorously with regard to the provisions for introducing Hard Guidance under the Contaminated Land powers,[339] where the degree of prescription is greater than that in the guidance to the Environment Agency on "sustainable development". Thus, there seems to have been an attempt to provide an additional basis of legitimacy for certain rules. This has not, however, been without criticism and appears flawed in its execution.

One further form of participation which may support claims for legitimacy, or derogate from them, depending upon one's view of such activities has been the lobbying of MPs and Lords through the usual channels[340] and the representation of interests directly by them.[341] The power to make Regulations in the form of Statutory Instruments has the usual claims for legitimacy and it was not considered necessary to add to these.[342]

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[338] S.4(4) Environment Act 1995.

[339] Or with guidance relating to producer responsibility under s.94(4) which gives the power to the Environment Agency to make guidance with which persons issuing 'certificates' must act in accordance, with no provisions as to further legitimacy whatsoever.

[340] There was fierce lobbying by business prior to the passing of the Act: see ENDS Report February 1995, No. 241 "Agencies' Duties and Contaminated Land Dominate Early Stage of Environment Bill". The Opposition felt that pressure from commercial interests had lead to the watering down of the Bill (see: *Hansard* HC, June 28, 1995, Vol. 262 col. 1054) and commercial (such as the Association of British Insurers, National Farmers Union and Country Landowners Association, see: *Hansard* HC, June 28, 1995, Vol. 258 cols. 962) and other organisations (local authority associations, conservation groups and green organisations, see: *Hansard* HC, June 28, 1995, Vol. 262 col. 1054) had communicated their views to Parliamentarians and had them presented to Parliament. Ministers had also been discussing matters with constituency business community representtives, see: *Hansard* HC, June 28, 1995, Vol. 258 cols. 964.

[341] Including business and landowners: see ENDS Report April 1995, No. 243 "Cost/Benefit Duty, Contaminated Land Remain Leading Issues in Environment Bill". For an example, see: *Hansard* HC, June 28, 1995, Vol. 258 cols. 964, where Mr Greenway MP was identified as parliamentary advisor to the Institute of Insurance Brokers (although that interest was claimed not to be relevant due to that body not having expressed an opinion on Part IIA). At Standing Committee Stage, organisations including the British Bankers Association, Lloyds of London, the Association of British Insurers, the Country Landowners Association and the Association of County Councils had 'assisted' with the tabling of amendments and/or had members sitting as MPs on the committee, see: *Parliamentary Debates; Standing Committee B*; House of Commons, May 23, 1995, col. 311. It also appears that the CBI and others had been consulted on, and approved of, the Guidance before the Committee had seen it, see col. 314.

[342] In contrast with Regulations regarding producer responsibility made under s.93 of the Environment Act, which are required to go through the positive resolution procedure (s.93(10)).

4.2.19 Issue 4(b): EC and International Developments

Neither the review nor the Act deal with European and International developments regarding liability. The need for national action seems to have overidden any concerns as to the need for harmonisation; and there appears to be sufficient flexibility in the rules system to allow the incorporation of any developments at an international level regarding issues such as technical standards (though perhaps not to implement substantive developments as to liability, etc.). The only direct impact of EC law appears to be the inclusion of specific rules identifying habitats and species protected under EC law within the "Categories of Significant Harm" relevant to the new regime.[343]

4.2.20 Issue 5(a): Selection of Rule-types and of Qualities of Rules

At least 10 rule-types can be identified which are directly relevant to the operation of the Act (see Figure 4.2 below).[344]

[343] See Part 2 of "Table A", set out in Chapter A, para.23.

[344] And further rules may be less directly relevant, such as the Environment Agency's *Strategy for Contaminated Land* issued as a draft in December 1996 and reissued as *An Action Plan for Land Quality* in February 1998, enforcing authorities' general policies developed to assist with implementation of the Act's provisions, and more directly relevant 'voluntary rules' such as local authority Cost Recovery policies (see draft guidance, Chapter E, paras 17-18.

	Table of Rule-types under the Act
1.	Primary Legislation
2.	Regulations in the form of Statutory Instruments
3.	Hard Guidance
4.	Soft Guidance
5.	Site Specific Guidance from the Environment Agency
6.	The Draft Circular accompanying the Statutory Guidance
7.	Orders made by the Secretary of State[345]
8.	Directions given by the Secretary of State[346]
9.	Local Authorities' Inspection Strategies[347]
10.	Scientific and Technical Standards[348]

Figure 4.2

The complexity of such a system of rule-types has been discussed above[349] (and a further system is constituted by private agreements which are afforded special status so that they are the most important rules in many situations[350]). The structure of the rules in term of sanctions follows the pattern generally used for environmental

[345] Powers exist to make Orders relating to the level of fines (s.78M(4)) which is subject to the positive resolution procedure) and to extend the operation of the Act to the Scilly Isles (s.78Y).
[346] Dealing with national and commercial confidentiality matters and registers (ss.78S(2) and 78T(7)).
[347] Required to be developed within 15 months of the Act commencing: draft guidance, Chapter B, para 12. Quite how strategic the actual approach to inspection is or whether there will be more of an *ad hoc* approach, based on complaints, is uncertain: Lewis, R., *op cit.*, p. 1092.
[348] Such as Guideline Values.
[349] And the hierarchy of the rules is 'central to the operation of the new contaminated land regime', see: *Hansard* HC, June 28, 1995, Vol. 258 cols. 966. A further interesting feature of this complexity was the system used in earlier drafts of the Statutory Guidance for identifying the different levels of guidance (which was more complex at that time as there was a further type of guidance provided: 'Background Guidance', which was stated to have no legal weight at all and to be purely for the purposes of information only). All three levels of guidance were provided in single Chapters, so that a system had to be used for identifying which paragraphs related to which types of guidance: *Italics* for *Background Guidance*; Normal Type for Soft Guidance; and **Bold** for **Hard Guidance**. As each chapter of guidance contains more than one level of guidance, separate paragraphs had to have different typefaces. One result of this method of presentation was that it was extremely important to match the correct typeface with the correct text. For example, the Consultation Draft Guidance included sections from the Act in Normal or **Bold** type. The implication of this was that some sections were only material considerations. This was obviously not the case or effect, however, it did identify how using different typefaces to attach differing legal status to provisions could lead to confusion, complexity and a failure to correctly match status with provision. It may be that problems such as this, as well as some concerns over the use of 'Background' guidance generally, which led to its abandonment (fairly late in the day) with the 1999 Consultation Draft Guidance, which is probably significantly clearer (as well as a little more compact) as a result of this

issues.[351] Administrative law provisions deal with matters substantively, imposing duties upon the enforcing authorities and providing them with powers to require remedial works to be carried out. If these requirements are not complied with, there are criminal law procedures and sanctions,[352] as well as administrative powers to carry out works and civil law remedies to secure repayment for them,[353] or to secure compliance with requirements.[354]

Many of the most important features of these rule-types have been considered in the preceding sections.[355] The use of "act in accordance with guidance",[356] however, requires further analysis, although the concept is not completely new to environmental law.[357] A particular question concerns the legal status of these rules.[358] Although it may not be clear what their precise legal status is, what is clear is that this guidance is more than a mere material consideration.[359] In the planning field local planning authorities are required to make determinations "*in accordance with*" Development Plans under The Town and Country Planning Act 1990 "... unless material

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[350] See Issue 3(i), above.
[351] See Chapter One
[352] S.78M.
[353] Including the securing of statutory charges against property (under s.78P).
[354] S.78M(5).
[355] Particularly the balance between certainty and flexibility in the analysis of Issue 1(c), above.
[356] The phrase "act in accordance with guidance" has been used in previous legislation: see, for example, s.27AB Housing Act 1985 and ss.26(8) & 34(2) Fire Safety and Safety of Sports Grounds Act 1987, section 34(6) of the Teaching and Higher Education Act 1998, and Sch. 5, para 6 to the Local Government Act 1985. However, detailed prescriptive guidance of the type provided under the Contaminated Land regime has never been previously introduced, at least in the field of Environmental law (see the footnote below). The guidance with which the relevant authorities are required to 'act in accordance' under the Housing Act 1985 merely requires them to 'have regard' to further guidance and does not provide substantive guidance itself. The Environment Act also requires persons issuing certificates of compliance with the producer responsibility requirements relating to packaging waste to act in accordance with guidance issued by the appropriate agency (the Environment Agency in England and Wales), see s.94(4).
[357] See section 43(1A) and (1B) of the Wildlife and Countryside Act 1981 (inserted in 1985), which require local planning authorities to "act in accordance with guidelines" issued by the (then) Countryside Commission, and require the latter body to issue such guidelines, with regard to consideration of whether an area is one whose natural beauty it is particularly important to conserve. Again, the substantive nature of the Contaminated Land guidance sets it apart from this type of guidance and concept.
[358] The use of administrative guidance instead of legislation for the imposition of onerous liabilities was argued to be 'unconstitutional' in the House of Lords, see: *Hansard* HL, January 31, 1995, Vol. 560 col. 1462.
[359] The stronger requirement of 'acting in accordance with', rather than 'having regard to' guidance was stated to be 'the exception, and not the rule' and was to be 'applied to the key functions' under the Act, see: *Hansard* HC, June 28, 1995, Vol. 258 cols. 965-6.

considerations indicate otherwise".[360] This suggests that the Development Plan is to be treated as prescriptive, save where other relevant considerations suggest that it should not be followed. Discretion is provided by the possibility that other factors may influence the decision (provided that they are legally material) and so the local authorities' discretion is not completely fettered. Whilst the Hard Guidance appears to provide no discretion in that no other factors are explicitly allowed to be taken into account,[361] its wording appears to provide scope for discretionary decision-making as it is not itself worded in absolute terms.[362] Analysis of rules devised with similar features to those of the Hard Guidance[363] - the "Immigration Rules"[364] - may assist in determining the legal status of the Hard Guidance, which does have important consequences. Whilst the structure of the legislative provisions within which the Immigration Rules are applicable means that there cannot be a direct comparison with the Hard Guidance,[365] there can be some comparison regarding legal status. Case law on the Immigration Rules appears to have settled that they do not constitute "delegated legislation" but are in a category of their own,[366] despite earlier findings that they were delegated legislation and had the same legal status as the primary legislation.[367] A particular concern was that a Minister could restrict, as well as enlarge upon, the legal rights of subjects through such informal rules. This is possibly less of a concern with the Hard Guidance as it would have to remain *intra vires* the primary legislation. Nonetheless, there is clearly scope for abuse regarding guidance on such matters as the meaning of "appropriate person" and the definition of

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[360] S.54A.

[361] Other than the primary and secondary legislation.

[362] This can be contrasted with earlier 'Working Drafts' of the Statutory Guidance, where terms such as 'must' were used. These were replaced by 'should' and 'ought to' in the Consultation Drafts (1996 - 1999).

[363] Subject to the negative resolution procedure and providing that appeals may be made on the grounds that a decision violated the rules (ss.19 & 20 Immigration Act 1971).

[364] A statement of the rules laid down by the Secretary of State for the Home Office as to the practice to be followed in the administration of the Immigration Act 1971.

[365] The fact that the Immigration Rules bound only appellate bodies means that the judicial decisions as to decision-makers at first instance having flexibility to depart from them in certain circumstances are not directly relevant to the Hard Guidance: see, for example *R.* v. *Home Secretary, ex p. Bibi* [1976] 1 WLR 979 and *R.* v. *Chief Immigration Officer, Gatwick Airport, ex p. Kharrazi* [1980] 3 All ER 373.

[366] See *R.* v. *Home Secretary, ex p. Hosenball* [1977] 1 WLR 766, *Patel* v. *Chief Immigration Officer, Heathrow* [1977] Imm AR 116 and *Singh* v. *Immigration Appeal Tribunal* [1986] 2 All ER and Legomsky, H. *Immigration and the Judiciary* (Clarendon Press, 1987).

[367] *R.* v. *Home Secretary, ex p. Bibi.* Roskill, L.J. was given the opportunity to reconsider his view in *'Bibi'* in *'Patel'* and decided that the Immigration were not, in fact, delegated legislation.

"Contaminated Land".[368] If the prescriptive effect of the Hard Guidance was complete, then judicial concern expressed in the Immigration Rules cases would have been realised in respect of Contaminated Land regulation. Although the residual discretion left through the present wording of the Statutory Guidance ensures that the Hard Guidance is not completely prescriptive, there is no requirement that the language used be open-textured. Indeed this was not always the case.[369] The open texture of the language used in the Immigration Rules was one of the factors taken into account by the courts in (eventually) finding that did not constitute delegated legislation;[370] and there remains the possibility that the use of prescriptive language within the Contaminated Land rules may, therefore, result in their being considered delegated legislation. If one considers the position in terms of Parliamentary pedigree, whether the rules contained in the Hard Guidance are introduced by Hard Guidance or by Statutory Instrument is not really an issue.[371] Two issues, however, are important. First, there is the question as to whether it is appropriate to provide open-textured rules which are binding in the same way as legislation. This question arises whether the rules constitute delegated legislation or not, so long as they are completely binding in effect. A more tangible issue is that of interpretation. If the rules are not "legislation" their interpretation is a matter for the decision-maker and the Secretary of State in appeals from Environment Agency decisions. If they constitute legislation, however, they are to be interpreted substantively by the courts. This is a very different practical and constitutional position from the courts merely having jurisdiction to review interpretations of the rules by others, on *Wednesbury* grounds.[372] In the first

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[368] A particular example of how the Hard Guidance restricts the meaning of the primary legislation is the way in which it greatly limits the types of 'harm' which may be considered 'significant' in identifying land as Contaminated Land. See Jewell, T. & Steele, J., *op cit.,* p. 298, although that could be argued to be whole purpose of the guidance on that point and it has been argued that the purpose of inserting the term 'significant' (as an amendment to the original Bill, made following representations from the business community) was to allow central control as to the approach taken to considering 'harm', mainly through the issuing of guidance: Lewis, R, *op cit.,* at p.1088.

[369] See the prescriptive language used in much of the Working Draft Statutory Guidance.

[370] See, for example, Lord Bridge in *'Singh'*.

[371] The negative resolution giving the Hard Guidance a pedigree not afforded to many Statutory Instruments, although it will probably avoid scrutiny by the Joint Committee on Statutory Instruments, which considers only Statutory Instruments, and other measures requiring positive resolution or special parliamentary procedure.

[372] For a discussion of the rôle of the courts in reviewing interpretation of policy, see: *Virgin Cinema Properties Limted & Others* v. *Secretary of State for the Environment & Others* October 9, 1997, although the rationale for interpretation of policy not being a question of law appears to be that a

case, the courts determine the correct interpretation of the relevant wording and that interpretation may be binding on other courts. In the second case, the courts simply decide whether the decision-maker's interpretation was a reasonable one. If one follows the approach of the "Immigration cases", one result of amending the wording of the Hard Guidance between the Working Draft and Consultation Draft stages may have been to clarify that those rules are not delegated legislation and that their interpretation is a not a matter for the courts.[373] If this is not the case, the unfortunate situation may arise whereby the courts are required to provide judicial interpretations of wording which is not amenable to this. If, on the other hand, this is the case, there is just as much (if not more) room for dispute over varying approaches to some of the fundamental concepts in the rules[374] in a policy orientated context, so that whatever the position, the provision of flexibility may have been at the expense of the desire to provide certainty. Whatever the position regarding the legal status of the Hard Guidance, there remains the problem that the rule-type does not appear to fit comfortably within existing "rules of recognition"[375] and so an important section of the Act is subject to elements of doubt.

The widespread use of guidance to flesh out matters of detail can be a problematic method of rule-making, particularly where the guidance deals with matters of

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planning policy does not confer rights or impose duties which are legally enforceable, whereas the Statutory Guidance does appear to confer legally enforceable rights.

[373] Whether this would have been intended (or indeed whether it has had this effect) is a matter of speculation, however, it is likely that the separation of prescriptive guidance from general, explanatory and broad guidance is one factor which could lead to a conclusion that the guidance is delegated legislation, if one follows the logic of the Immigration Rules cases.

[374] Ball, S. & Bell, S., *op cit.*, p. 411.

[375] The term 'rule of recognition' is loosely based upon H.L.A. Hart's theory set out in *The Concept of Law* (Clarendon, 1961). Whilst Hart was primarily concerned with the identification of the legitimacy of rules, the term as used here also refers to the identification of the legal status of rules and the way in which they are correspondingly implemented by decision-makers. Administrators are well used to identifying policy rules and there are relatively well settled rules as to how these are to be taken into consideration in decision-making. Administrators are also able to recognise rules of law, with their higher legal status and there are, again, well settled rules as to complying with them in the decision-making process. There does not appear to be a settled rule for dealing with policy guidance with which decision-makers must 'act in accordance'. This clearly has a higher legal status than policy yet it is provided in loose textual terms and explicitly provides for discretion. Thus there is lack of a rule of recognition both in the sense of recognising the constitutional legitimacy of the rules (in a wider sense than merely the *vires* of rules, as it is hard to identify legitimacy when it is not clear exactly what is required) and in the sense of recognising how the rules are to be applied.

principle as well as detail.[376] The negative impact that this may have upon the rule-making process was identified by concerns that the Bill was being scrutinised by Parliament without the guidance (being an integral part of the rule-system) being available.[377]

4.2.21 Issue 5(b): Desired Features of Rule-system - simplicity, intelligibility, etc.

We have already noted the Government's desire to introduce a system of rules which is fair and provides clarity, certainty ,[378] and flexibility.[379] Some of the desires of those using, and affected by, the rules are, however, identified in Chapter Six, below.[380]

4.2.22 Issue 6(a): Identifying Appropriate Decision-makers

Allocation of decision-making functions ought to involve the matching of abilities with the demands of the decisions being made. Decision-makers are required by the Act to be multi-skilled, with decisions requiring surveying skills,[381] technical expertise,[382] legal skills,[383] investigative skills,[384] administrative skills[385] and political skills.[386] The introduction of a new, single Environment Agency was an important

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[376] See, for example, the concerns expressed in the House of Lords: *Hansard* HL, July 11, 1995, Vol. 565 col. 1493.

[377] See, for example: *Hansard* HC, June 28, 1995, Vol. 258 cols. 960-1. Concerns over the mis-use of rule-types have also arisen with a more recent piece of environmental legislation: the Pollution Prevention and Control Act 1999, which is very much in the form of a 'framework' with most of the detailed provisions made by Regulations. This use of 'Henry VIII' clauses to provide Ministers with the powers required to implement the legislation mainly through secondary legislation was the source of great criticism during the passage of the Bill: see, for example, ENDS Report march 1999, No. 290, p. 36.

[378] In the discussion of Issue 1(c). See *Framework, op cit.,* paras 3.1.4 & 7.1 particularly.

[379] The success in meeting these desires is analysed in the relevant sections and in the conclusions below.

[380] Although these were not readily distingushable from those relating to certainty, flexibility and fairness.

[381] Inspecting land.

[382] Identifying Contaminated Land and establishing remediation requirements.

[383] Working within and applying a complex set of legal, and other, rules.

[384] Investigating site history and ownership and 'finding' appropriate persons.

[385] Establishing and implementing a number of administrative procedures.

[386] Dealing with the public and other agencies and with political issues, such as costs recovery and the wider impact of many decisions on the economy and the environment.

factor in the allocation of decision-making functions[387] under the Act.[388] The Agency was seen as being able to improve the operation of regimes to prevent future contamination[389] and, in addition to the provision of guidance, was to have an advisory/executive rôle regarding closed landfill sites.[390] Local authorities were to remain the primary regulators[391] though they were to seek the advice of the Environment Agency regarding pollution of controlled waters[392] and closed landfills.[393] The allocation of decision-making functions by the Act has been based upon the various skills and areas of expertise of the regulators concerned. Local authorities have the duty to inspect land and identify sites comprising Contaminated Land[394] and are the enforcing authorities regarding most sites. Together with its general functions to report on Contaminated Land,[395] the Environment Agency is the enforcing authority for Special Sites,[396] which are sites where problems are likely to fall within the Agency's areas of expertise[397] or where there may be serious pollution or harm.[398] "Expertise" is again the rationale for the Environment Agency's powers to influence local authority decision-making for non-special sites through site-specific guidance.[399] The Environment Agency may also exert its influence through a less formal process as local authorities have a duty to respond to information provided by

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[387] The allocation of decision-making functions in the field of environmental protection is a vital factor within a regulatory system as the decision-maker's perceptions of risks will influence decisions, together with other factors, such as rules, resources and political pressures. Although a rule-system may guide decision-making (with varying degrees of specificity), these other factors may actually be more important.
[388] The Environment Agency being created by Part I of the Environment Act 1995.
[389] *Framework, op cit.,* para 2.2.
[390] *Ibid.,* para 4.3.7.: to ensure that the expertise inherited from the Waste Regulation Authorities was best utilised.
[391] 4 .3.1.: continuing their rôles with regard to statutory nuisance.
[392] *Ibid.,* para 4.3.2.
[393] *Ibid.,* para 4.3.7.
[394] S.78B.
[395] S.78U.
[396] S.78A(9).
[397] Technical and engineering expertise being put forward as one rationale for the Environment Agency having responsibility for Special Sites: see *Hansard* March 7, 1995, Vol. 560 col. 156.
[398] Such as contamination from operations which are subject to IPC and contamination of water. See s.78C(10) and the (draft) Contaminated Land (England) Regulations 1999. The concept of Special Sites was introduced in order to bring closed landfill sites (only) under Environment Agency control, however, following representations from the CBI, the Government accepted that the Agency's expertise may be demanded for other categories of sites: Lewis, R., *op cit.,* p. 1092.
[399] S.78V.

the Agency in inspecting land[400] and to consult with it where there may be pollution of controlled waters.[401] The Act, therefore, creates a hierarchy in which local authorities are the primary regulators, having made the determination whether land is Contaminated Land or not; with an expert agency regulating the most difficult and sensitive[402] sites and directing the local authorities regarding other sites where necessary. Of course, expertise is the not the only possible rationale for allocating certain decisions to a centrally controlled agency, particularly where issues such as national security are involved.[403] Equally the hierarchy does seem to reflect a method of centralising control (although not, perhaps, responsibility), through the use of an agency which is quasi-autonomous in nature,[404] rather than more obvious methods of central direction.[405] For the majority of contaminated sites, there will be a reasonably clear system of local accountability,[406] whilst the line of accountability and responsibility for decisions by the Environment Agency is less clear.[407] In terms of claims to legitimacy for decision-making, therefore, those regarding special sites have stronger claims for expertise, whilst for other sites, the claims for (local) political accountability are stronger.

4.2.23 Issue 6(b): Other Participants in the Decision-making Process

Apart from decision-makers and those directly affected by their decisions, there is limited scope for involvement in the decision-making process by other bodies.[408]

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[400] Draft guidance, Chapter B, para 15(d)(v), as well as consulting when devising the inspection strategy (para 11).
[401] *Ibid.*, paras 17 and 43.
[402] e.g. Ministry of Defence sites.
[403] Such as Ministry of Defence land and nuclear sites. See the (draft) Contaminated Land (England) Regulations 1999.
[404] See Chapter Two for a discussion of the position of the Environment Agency.
[405] Such as the Secretary of State hearing appeals, or issuing guidance.
[406] Whatever its defects.
[407] And has been viewed by some as resistant to external scrutiny: see ENDS Report September 1998, No. 284 "The Environment Agency's Yawning Accountability Gap". Concerns about the Agency's lack of accountability and transparency (particularly with Board appointments at the gift of Ministers) were also expressed in the House of Lords: see *Hansard* January 17, 1995, Vol. 560 cols. 578-84 and (particularly as the Agency was taking over some functions of democratically elected local authorities) *Parliamentary Debates; Standing Committee B*; House of Commons, April 27, 1995, cols. 3-4.
[408] Amendments proposing that persons affected by land contamination should have similar rights to take enforcement action to 'persons aggrieved' by a statutory nuisance, were rejected: see *Hansard* HL, March 7, 1995, Vol. 562 cols. 216-7 and *Parliamentary Debates; Standing Committee B*; House

Where remediation projects involve funding from development agencies, those bodies will, however, have an indirect involvement in the decision-making process. Furthermore, there are requirements as to consultation with the recipients of notices, owners and occupiers before serving remediation notices[409] and a period from the identification of land as Contaminated Land during which a notice may not be served[410] provides an opportunity for consultation, as well as for determinations to be made as to remediation requirements, etc. and for negotiation which may lead to voluntary action. In addition, Regulations may also identify other descriptions of persons who must be consulted,[411] although there has not been any indication whether or how these powers will be used. Local authorities are required to involve others in limited ways under the Statutory Guidance: ensuring that systems to deal with information as to the condition of land from private individuals, business and other statutory bodies are included in strategies for inspection.[412] Local authorities must also consult with English Nature when making a determination as to whether land is Contaminated Land which relates to an "ecological system effect".[413] The only situation in which third parties may become directly involved in appeal processes is where there is an appeal which relates to a "Special Site" and the Secretary of State decides that a hearing or local public inquiry is desirable.[414] Other than this, wider participation is only likely through the indirect route of local and national political processes, or through judicial review so far as this is possible.[415]

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of Commons, May 23, 1995, cols. 324-6 (where the primary concern was avoiding 'vexatious litigation' clogging up the courts).

[409] S.78H(1), the enforcing authorities being required to use reasonable endeavours to consult.

[410] S.78H(3).

[411] S.78H(1)(d) and (2).

[412] See draft guidance, Chapter B, paras 15(d)(vi)&(vii).

[413] *Ibid.*, para 42.

[414] With hearings, third parties may only be heard at the discretion of the Planning Inspector (Contaminated Land (England) Regulations 2000, reg. 10), although the presumption is that proceedings will be held in public. With local public inquiries, third parties have certain rights to be heard (the proceedings are to be conducted in accordance with the Town and Country Planning (Inquiries Procedures) Rules 1992), such inquiries to be held where cases are particularly complex or locally controversial.

[415] Access to the Common Law remains on the basis of proprietary rights: see *Hunter & Others* v. *Canary Wharf* [1997] Env LR 488.

4.2.24 Issue 6(c): Identifying Appropriate Appeal/Review Bodies

4.2.24.1 The Structure of the Appeal System

The Act provides for a number of appeal/review processes. These are:

1. Appeals against decisions as to whether sites are Special Sites - determined by the Secretary of State where enforcing authorities cannot agree;[416]

2. appeals against remediation notices - heard by the Secretary of State where the enforcing authority is the Environment Agency[417] and by the magistrates' court it is a local authority;[418]

3. appeals against decisions that information is not commercially confidential - heard by the Secretary of State;[419] and

4. appeals against Charging Notices - heard by the County Court.[420]

Perhaps the most striking feature of the appeals structure is the allocation of the same appeal functions (appeals against remediation notices) to both a judicial decision-maker (the magistrates' court) and a political one (the Secretary of State).[421] Conventional theory suggests that decisions are either suitable for judicial decision-making or political/administrative decisions, dependent upon the extent of their polycentric elements.[422] The same principle should apply to review of such decisions. Although political decisions may be amenable to procedural review through judicial review-type proceedings, they are not thought amenable to substantive judicial

[416] S.78D. Thus the Secretary of State has the power to make the final decision as to whether a site falls within his own appellate jurisdiction by virtue of being a Special Site.
[417] i.e., there is a Special Site: s.78L(1)(b). Such appeals are to be in the form of Public Inquiries where cases are particularly or locally controversial.
[418] S.78L(1)(a).
[419] S.78T(3).
[420] S.78P(8).
[421] Exactly the same appeal grounds exist for appeals to these bodies.
[422] See Chapter Two.

decision-making. By the same token, where appeals are amenable to judicial processes, the particular skills of administrative/political review bodies are not relevant, whereas those of the judiciary are.

4.2.24.2 The Rationale for Allocating Appellate Functions

The reasons for allocating appeal functions under the Contaminated Land regime in this unusual manner have not been articulated but one might speculate as to why this approach may have been taken. The two grounds on which *political* review may be thought to be justified are that the polycentric "pull" of the matters at issue is sufficient to warrant this,[423] or that scientific or technical matters are sufficiently complex that expertise is required in order to review decisions.[424] The problem with both of these grounds is that the same may apply to other sites; Special Sites not necessarily being the most complex or involving the most polycentric issues. The expertise ground does seem to have greater merit.[425] There remains, however, the problem inherent in either having judicial functions exercised by political review bodies, or political functions exercised by judicial review bodies. The grounds of appeal include some matters which appear justiciable,[426] some which appear to involve polycentric issues,[427] and some which involve technical issues.[428] The grounds are drafted in terms which appear to make them justiciable, being framed in a *form* which relates to failures to follow guidance etc. It is, however, a quite different

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[423] This ground could also encompass matters which are politically sensitive, such as Ministry of Defence, or nuclear sites and these are included in the list of Special Sites.

[424] Further explanations are that magistrates already act as the appeal body for statutory nuisance and that the Secretary of State wished to retain control over Special Sites, without thought being given to the implications of this approach and/or that magistrates' courts were the only bodies capable of dealing with the bulk of an anticipated high number of appeals reasonably quickly and cheaply (though see the reference to Burnett-Hall's article below). Following concerns expressed during consultation on the Draft Statutory Guidance, the Government suggested that the expertise difficulty may be assisted by using Stipendiary Magistrates (though there are obvious resource problems with this) and that in the longer term the primary legislation may be amended to direct all appeals to either the Secretary of State or the proposed Environment Division of the High Court: see the letter from Micheal Meacher, Minister for the Environment, to Mr Andrew Bennett MP, Chair of the House of Commons Select Committee on the Environment, Transport and the Regions, dated December 22, 1997. For an insight into the way in which the appeal body was actually determined, see the Conclusions to this Study.

[425] The list of Special Sites including those where processes which would be subject to IPC have been carried out, etc.

[426] Such as determination of appropriate persons - whether they are 'causers' or ' knowing permitters'.

[427] Such as decisions relating to hardship and requiring a cost/benefit calculation.

[428] Such as those relating to the reasonableness of remediation requirements.

question to ask whether as a matter of *substance* the issues underlying the appeal grounds are truly justiciable. Furthermore, practical problems include the difficulty in building up further guidance for decision-makers and those affected by decisions as to the approach to be taken to the rules and their meaning. Decisions by magistrates are not binding[429] and so any case law built up will be reliant upon further appeals to the High Court, where they will be determined on *Wednesbury* principles, which often provide little guidance beyond the case in question. Decisions by the Secretary of State may provide a form of "flexible authority" for other cases but how these will be used outside that specific jurisdiction is problematic (as it is even within that jurisdiction if decisions are not made publicly available). There is also the problem of magistrates dealing with matters which may be tremendously complex in technical and scientific terms as well as coping with a very complex set of rules.[430]

The difficulty with regard to justiciability may also be applicable to charging notice appeals as applicants may seek to challenge the validity of the notice on which the order was based, although it unlikely that such arguments will be allowed when there has been a failure to use the appeal mechanism provided.

4.2.24.2 Judicial Review

Judicial review may play an important part in providing a mechanism for use by third parties to influence decisions and for appropriate persons to make challenges to matters which are not covered by the grounds of appeal.[431] In the former case, although there is the advantage of many of the more likely grounds for review being

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[429] And are unlikely to be recorded, yet alone reported.

[430] Lack of consistency and doubts over magistrates' competence regarding technical issues have been matters of some concern, as have the delays which can result from these courts: see Burnett-Hall, R. "The Clean-Up Clause" Law Society Gazette, April 26, 1995. For an example of the scientific and technical complexity of issues which may arise in contaminated land cases, see *Lidl Properties* v. *Clarke Bond Partnership* [1998] Env LR 662. Earl Ferrers suggested that provisions allowing for the making of Regulations on the issue of appeals could be used to allow appeals against decisions by magistrates, the rationale being the complex legal issues and technical evidence which would be involved in some cases, see: *Hansard* HL, July 11, 1995, Vol. 565 cols. 1491-2; however, this has not been followed through in the (draft) Contaminated Land (England) Regulations themselves.

[431] Together with complaints to the relevant authority and to the Parliamentary Commissioner where there has been maladministration which causes injustice to the applicant, see Hughes, D. *Environmental Law, op cit.*, pp. 432-3 and Kellett, P. & Hughes, D., *op cit.*, at p. 218.

provided as duties rather than powers,[432] there remains the problem of establishing a sufficient interest for *locus standi*,[433] which the Government considered should remain a matter for the courts.[434] Areas which are not covered by the appeal grounds (and which may, therefore, only be appealed by way of judicial review, if at all) include:

1. Failure to designate land as Contaminated Land;

2. failure to serve remediation notices;[435]

3. designating as Contaminated Land (without serving a remediation notice);[436]

4. failure to adopt a written strategy for identifying Contaminated Land within the appropriate period;

5. failure to carry out inspection duties;

6. failure to set up or maintain registers; and

7. failure to carry out remediation actions in relation to "orphan linkages".[437]

4.2.24.3 Physical Problems and Appellate Jurisdiction

It is clear that the difficulties which the appeal structure have thrown up have their roots in the nature of environmental problems. At their heart is the uncertainty, and scientific uncertainty and complexity in particular, which is a part of the risk assessment required for contaminated land decision-making. The physical nature of

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[432] Such as those relating to inspection, identification of Contaminated Land and requirement of remedial action.
[433] The situation with regard to environmental issues remains uncertain: see, for example, *R.* v. *North Somerset DC & Another, ex p. Garnett & Another* [1998] Env LR 91 and *R.* v. *Somerset CC & Another, ex p. Dixon* [1998] Env LR 111. This uncertainty may itself deter many potential applicants.
[434] For private law (and presumably public law), see *Framework, op cit.,* para 6.1.7.
[435] Other than where using the argument that other appropriate persons should have been served with remediation notices as the basis for an appeal against a remediation notice.
[436] Which might blight land.
[437] Although there is no clear duty regarding these, see above.

contaminated land problems may increase public concerns and demands for involvement in decision-making, however, if that is the case, then these have largely been ignored. It is possible that these difficulties in establishing appropriate review bodies reflect a more general problem with decision-making on environmental issues.[438]

4.2.25 Issue 6(d): Prevention of Avoidance Practices

The issue of avoidance has been dealt with explicitly, but also by more subtle means.[439] Explicit recognition of the issue is found in the Hard Guidance relating to exclusionary tests, where provisions are made seeking to address situations involving "related companies".[440] More subtle is the fact that the "causing and knowingly permitting" test, which triggers liability, has sufficient conceptual breadth to deal with many attempts to avoid liability through corporate restructuring, etc.[441] The fall-back position (of imposing liability on owners) also ensures that successful avoidance will not lead to exposure of the public purse if possible.[442]

4.3 Conclusions

4.3.1 Further Problems with Complexity

The most immediate feature of this rule-system is probably its complexity. The reasons for this have been identified in the preceding sections, however, a further example of how the different layers of rules may make matters more complex and allow for inconsistency is provided by the relationship between the duties to identify Contaminated Land and to require remedial works. Local authorities are required to

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[438] The suggestion that there is a need for an 'environmental court' is outlined in Chapter Seven.
[439] Avoidance through company structuring and other uses of company law was a concern in the House of Lords during the passage of the Bill, see, for example: *Hansard* HL, January 31, 1995, Vol. 560 col. 1465.
[440] Draft guidance, Chapter D, para 44-46.
[441] Concerns that the consultation period generally required prior to service of a remediation notice would facilitate avoidance in some cases were dismissed as unfounded by the Government, see: *Parliamentary Debates; Standing Committee B*; House of Commons, May 23, 1995, cols. 342-3.
[442] The provisions where persons are not 'found' being most relevant.

inspect their areas and to identify Contaminated Land,[443] acting in accordance with guidance which suggests that sites posing the greatest threat be identified first.[444] This accords with the policy of prioritising sites and taking a gradual approach to clean up. The problem is that once a site is identified as Contaminated Land, there is a duty to serve a remediation notice in respect of it[445] and there does not appear to be any discretion to delay this in order to provide for prioritisation.[446] Although the Hard Guidance on the duty to inspect directs local authorities towards inspecting areas where more serious contamination is anticipated and provides for prioritisation to this extent, it is submitted that this does not specifically allow sites to be chosen as "identified" on an individual basis and the duty to inspect and identify is a fundamental one. Thus, there appears to be a lack of consistency between the duties, bearing in mind the policy of gradualism and prioritisation and the only way around this appears to be for local authorities not to properly carry out their inspection and identification duties, or for enforcing authorities to delay carrying out their enforcement duties to an unacceptable degree.[447] Whilst the Hard Guidance seeks to implement the policies identified, it does not seem to take sufficient account of the duties in the primary legislation, which, in turn, does not seem to have been drafted to fully implement the underlying policies.[448] To some extent, the secondary and tertiary rules subvert the meaning of the primary rules. This may reflect a lack of realism in some of the duties and liabilities imposed, but may also reflect a more general point that the more specific which rule-making gets, the more that practical implementation issues have to be considered. As with the problems with selecting "causing/knowingly permitting" as the triggers for liability,[449] the fact that the complex secondary and tertiary rule-making was put in place suggests that the rule-makers were aware of the problems which would be faced when getting closer to implementation (though this does not necessarily mean that this method was the best one to use).

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[443] S.78B.
[444] Consultation Draft Guidance, Chapter B.
[445] S.78E.
[446] In the case of statutory nuisance, it has been held that there is a duty, not a discretion, to serve an abatement notice once it has been found that a statutory nuisance exists: see *R.* v. *Carrick DC, ex p. Shelley & Another* [1996] Env LR 273.
[447] Performance of both of these duties is, of course, potentially open to judicial review.
[448] For example, the use of powers to require remediation coupled with Hard Guidance may have more closely met these policy objectives.
[449] See the discussion in the analysis of Issue 1(c), above.

4.3.2 Progress Through the Rule-making Process

In terms of the rule-making process identified in Chapter One;[450] Stages 1 and 2 (the identification of problems and consideration of policy options) seem to have been successfully achieved (albeit rather slowly). Stage 3, proposing methods of implementation (including rules) made fairly swift progress (despite concerted efforts by powerful interests to dilute the proposals[451]); and Stage 4 was reached, with the enactment of the primary legislation. However, the nature of the Environmental Rule-making Delineation[452] is such that supplementary policy plays such an important part in the rule-system that the opportunity to challenge and shape rules prior to their implementation can arise at this stage as well.[453] Devising this supplementary policy may also help to identify any failures to deal with matters of principle in the primary legislation. Thus the opportunity to express concerns as to certainty and fairness arose in the context of the Statutory Guidance as well as the primary legislation; and the existence of this Guidance actually allowed a smoother passage for the legislation, as many concerns were deferred. It is clear, however, that these concerns did not diminish and were merely postponed.

4.3.3 Attempts to Address the Tension Between Certainty and Flexibility

Examples of how the structure, as well as the substance, of the rules comprising the new regime reflects the physical nature of environmental problems and the scientific and technical uncertainty which exists have also been provided in the relevant sections. Primary legislation dealing with environmental protection usually restricts itself to qualitative objectives, such as "damage" or "impairment"[454] and the prevention or reduction of these. More explicit standards may be embodied in law

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[450] Figure 1.1.
[451] The success of which may actually have facilitated the fairly swift progress of controversial proposals.
[452] Identified in Chapter One.
[453] As well as providing temptation to use inappropriate methods of dealing with problems identified: see the 'Statutory Gap' issue, above.
[454] Denner, J. "Contaminated Land: A Framework for Risk Assessment" (included as Annex C to the *NATO/CCMS Pilot Study: Demonstration of Remedial Action Technologies for Contaminated Land and Groundwater* Phase II, September 1994 Meeting. Oxford: UK Tour de Table Paper), para 9.6.

through secondary or tertiary legislation, however, they cannot guarantee that the primary objectives will be met, due mainly to the difficulties in assessing the risks posed and designing standards to meet them.[455] The problem is exacerbated in the field of contaminated land as the assessment of risks is particularly complex.[456] One source of further uncertainty is the varying views which different decision-makers may take. It is perhaps unsurprising, therefore, that the Act seeks to address some of these problems by using a novel type of rule which aims to combine the flexibility required for the use of standards with prescriptiveness more usually associated with primary legislation. The problem appears to be that the scrutiny of such rules is such that demands for certainty and clarification lead to greater complexity (due to the prescriptive nature of the rule) and so the flexibility becomes a focus for concerns over uncertainty.[457] The problem is trying to introduce the force of primary legislation without providing the clarity and certainty which is required and this is further exacerbated by the structure of the appeals system under the Act which does not appear likely to provide future clarification of these matters of concern to any meaningful extent. The fact that the need for a new rule-type results (at least in part) from the particular characteristics of environmental issues is suggested by the early stage at which the need for "mandatory" guidance was recognised.[458] This may also reflect the lack of satisfaction (from commercial interests at least) regarding the decision-makers.

The "new" rule-type (i.e. Hard Guidance) which plays such an important part in the Act appears an attempt to provide both certainty and flexibility within a rule-system but has had limited success. Although this may have started out as a method of providing the flexibility required to deal with environmental issues at a substantive level through rules, it seems that the added element of certainty became the focus of attention and this, combined with the open process for developing those rules, opened the door for demands which resulted in great complexity (and ensuing dissatisfaction).

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[455] *Ibid.*, para 9.7.
[456] *Ibid.*, para 10.1.
[457] Although it must be said that the use of rules such as the 'exclusionary tests' provides an unnecessary added level of complexity, even within the context of striving for fairness within an inherently unfair system whilst wishing to protect the public purse.
[458] In *Framework*, *op cit.*, see above.

The result has been that the rules have not been legitimised in the sense of being generally "accepted" as appropriate or workable. That the business community should seek to maximise certainty is not surprising in an area of much uncertainty and the incentive of attaining, or achieving, "formalism" in order to facilitate "creative compliance" has already been identified.[459] One question which arises is whether these negative features identify the limit of the ability of rules to deal with environmental issues, or the limit to which powerful interest groups are willing to accept rules which leave discretionary decision-making for legal liability.[460] Whilst all decisions involve some element of discretion, it may be the decision-maker which causes such concerns. If the decision-maker's identity is different (and is considered to have some empathy with the powerful interests), the rules may not be considered such an important aspect and the form and content of legal rules may become less important.[461] Concern over disparities between the risk perspectives of business and regulators may lead to further demands for certainty through rules, as the process of risk assessment is one which takes socio-economic factors into account as well as scientific standards. Even if these standards are clarified they only make up one element within the risk assessment exercise and it is the balance with socio-economic factors which may provide the focal point for disputes. The problem with this is identifying a decision-maker (and/or review body) which will satisfy all parties to decisions, including the wider community affected by them and meeting the demands which polycentric decisions make of decision-makers. Two further important issues are: how such a complex rule-system is arrived at; and whether the rule-making process can be improved in some way. These two questions will be re-visited in the concluding chapter.

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[459] See McBarnet, D. & Whelan, C. "The Elusive Spirit of the Law: Formalism and the Struggle For Legal Control" [1991] M.L.R. 848, considered in Chapter Two.
[460] The major changes to the legislation being evidence of the influence of such groups.
[461] The decision-maker, or appellate body, being entrusted to imbue decisions with equity.

Chapter Five: Consultation Theory and the Contaminated Land Consultation Process

Having identified and analysed the issues which the contaminated land rule-maker must address and having analysed the approach taken in the new legal regime, Chapters Five and Six will now focus upon the rôle that consultation has played in rule development in the contaminated land field. The first section of this chapter will consider the theory underlying consultation during rule-making; the second will analyse the consultation processes which have been carried out in relation to contaminated land rules; and the third will consider the way in which contaminated land rule-making issues were dealt with in the most wide ranging consultation exercise: *Paying for Our Past.*[1] Chapter Six then provides quantitative analysis of the responses to *Paying for Our Past*, together with qualitative analysis. The conclusions on consultation and the contaminated land rule-making process are then expanded upon and developed as part of the concluding Chapter.

5.1 Theoretical Foundations of Consultation

Before moving on to analyse the consultation exercise on *Paying for Our Past*, two important questions must be considered: "why consult?" and "how is consultation to be conducted?" The first of these is perhaps the more complex as it requires some consideration of normative and descriptive models of participation in rule-making processes.[2]

[1] *Op cit.* This document is provided as an Appendix to this Study: Appendix Three.
[2] Increasing public participation in rule use (i.e. decisions) being possible through other mechanisms, for example, extending *locus standi* in judicial review (see, for example, Stewart. R.B. "The Reformation of American Administrative Law", *op cit.*, at p. 1723.

5.1.1 Models of Participation in Rule-making

5.1.1.1 Parliamentary Representation

There are a number of models of participation in political (including rule-making) processes.[3] Probably the most obvious is our system of representative democracy, whereby the people exercise their political choices through their elected representatives in national and local government. The need for alternative forms of public involvement in rule-making stems from a number of sources.[4] These include: the increased strength of the Executive (together with rigid party discipline) and corresponding reduction of influence by individual MPs;[5] decreasing levels of participation in the electoral process;[6] a realisation that, even if Parliamentary democracy operates at an optimal level, there are more policy decisions to be made than can be included in election manifestos, and that votes reflect an overall decision as to the merits of manifestos (which are offered as a package, rather than individual items);[7] and a recognition that the business of Government is influenced by organised interests which operate outside the electoral process and, in some cases, may have a greater influence than the general electorate. Thus there are claims that the legitimacy and accountability provided by Parliamentary democracy has been undermined[8] and

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[3] This issue was introduced in Chapter Two and is expanded upon here in order to establish the context for discussing the rôle of consultation in environmental rule-making.

[4] Government by consent has always depended, to an extent, on direct consultation, as well as on the more indirect consultation through Parliamentary representatives: Griffiths, J.A.G. & Street, H. *The Principles of Administrative Law* (London, 1973)., p. 118.

[5] Craig, P.P. *Public Law and Democracy in the United Kingdom and the United States of America* (Clarendon, 1990), p. 168. The weakness of scrutiny methods for secondary and tertiary legislation was considered in Chapters Two and Four and, although measures (such as Compliance Cost Assessments and Regulatory Appraisals) have been introduced, little more attention is paid to these documents than to the rules themselves: Wilson, W. *Making Environmental Laws Work* (Hart, 1999) p 46.

[6] Recently evinced by the turn-out rates for elections to the European Parliament.

[7] People vote on an overall view of a party and policies and, traditionally, the only way of the electorate expressing a clear view on a particular policy is where the main parties disagree on a major manifesto issue (and presumably where this issue is elevated to the primary issue for that voter at that election), see Wilson, W. *Making Environmental Laws Work* (Hart, 1999), p. 38. Wilson suggests that this leads to a need to look for interest groups to act as a conduit for representation.

[8] See, for example, Hudson-Phillips, K.T. "A Case for Greater Public Participation in the Legislative Process" [1987] Statute Law Review 76: "The representative form of government in no way ensures, as it should, that a mandate exists for the enactment of laws in a representative Parliament." (at p. 77).

that this theoretical view of government (and rule-making) does not reflect the true position in any event. Whilst the electoral system and representative participation retains a significant rôle, persons and groups outside Parliament (including civil servants and interest groups) are now argued to be much more important than individual MPs in the process of policy and legislation shaping[9] and interest groups to be a more important channel of communication for the transmission of political ideas from the public to the Government than political parties.[10] The traditional model of policy-making in this country has been the "public interest" model, whereby the State acts in the public interest to address issues which arise or become apparent (usually identified in economic views of regulation as market imperfections), interest groups and others influencing rule-making are considered as acting as agents for the public good.[11] One of the central criticisms of this model is that underestimates the extent to which rules are the product of conflicts between the differing interests of various groups and the degree of influence exerted by the (economically) powerful.[12] The key questions are, therefore, how these interests are in fact engaged, and how they should be engaged?

5.1.1.2 Pluralist, Corporatist and Hybrid Approaches

The involvement of organised interests in rule-making is generally referred to as "pluralism", although there are a number of variations of this concept, the one most generally used for contrast being "corporatism" (discussed further below). As well as being descriptive of participation in rule-making, pluralism has also been offered as an alternative method of providing legitimation where Parliamentary control of the use of public power in society, and, therefore, its legitimation, is ineffective.[13] Before considering the problems with pluralism which may challenge its normative value, the concept and how it operates will be considered in more detail.

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[9] Cane, P. *Introduction to Administrative Law* 2nd Edition (Clarendon, 1992).
[10] Turpin, C. *British Government and the Constitution* 3rd Edition (Butterworths, 1995) p. 463.
[11] *A Reader in Regulation*, Eds. Baldwin, R. et al (O.U.P., 1998), p. 9.
[12] *A Reader in Regulation*, Eds. Baldwin, R. et al (O.U.P., 1998), p. 9. For a discussion of the economic rationales underlying interest groups' influence on environmental rule-making, see Revesz, R.L. *Foundations of Environmental Law and Policy, op cit.*, Chapter Seven.

The crucial elements of a pluralist system of interest group representation are: a large number of voluntary and non-hierarchically ordered groups which compete with each other for influence over government policy, with the government remaining independent of them:[14] a neutral umpire. By contrast, under corporatism the process changes to one of negotiation and bargaining between government and interest group(s), which can only take place where the number of groups involved is limited.[15] A further contrast may be between pluralism as the reconciling of competing and conflicting interests, and corporatism as a method for the government to further its own objectives by engaging only with those interests which it thinks can assist with this.[16] The key determinant in identifying corporatism is the level of institutionalism and interdependence "locking in" public and private actors,[17] so that the rôle of a limited number of hierarchically structured groups, with leaders able to "deliver" the membership is emphasised.[18]

Neither the pluralist nor corporatist model of policy-making is particularly realistic, however, as the relationship between government and interest varies in different policy areas[19] and it is common to find both styles of political behaviour within the same functional state activity.[20] It is probable that certain groups, particularly sectional/producer groups such as the CBI, National Farmers Union and TUC, will be consulted by government to a far greater degree than other groups, so that they have direct and permanent access to government.[21] This may be the case across all areas of policy, so that there is a corporatist relationship with such groups, whilst others may have a less direct influence, so that they work within a pluralist system. Particular groups may gain privileged access to government and may be "licensed" to represent other, less powerful, groups, at the cost that they must accept certain constraints upon

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[13] Craig, P.P. *Administrative Law* 3rd Edition (Sweet & Maxwell, 1994), p. 26.
[14] Marsh, D. & Rhodes, R.A.W. *Policy Networks in British Government* (Clarendon, 1992), p. 2.
[15] Cane, P. *Introduction to Administrative law* 2nd Edition, *op cit.*, p. 165.
[16] Cane, P. *Introduction to Administrative law* 2nd Edition, *op cit.*, p. 357. Sometimes referred to as 'peak' organisations: such as the CBI and TUC, see Turpin, C. *British Government and the Constitution* 3rd Edition (Butterworths, 1995) p. 463.
[17] Lewis, N., "Corporatism and Accountability: The Democratic Dilemma", in Eds. Crouch, C. & Dore, R. *Corporatism and Accountability* (Clarendon, 1990), p. 64.
[18] Marsh, D. & Rhodes, R.A.W., *op cit.*, p. 3.
[19] *Ibid.*, p. 4.
[20] Lewis, N., *op cit.*, p.64.

the range of demands which they make.[22] Thus the price for access to the system may be acceptance of the values of the system and of the dominant player(s) within it. Some have even suggested that the business interest group, rather than competing with other interests or even with a limited number of other more powerful interests, is actually the dominant force in control of large sectors of economic and political life, so that it is able to define the political agenda and maintain a grip on many other aspects of society.[23] The implication is that there are a number of "policy communities" which exist in different areas of policy-making and that the extent to which any, or all, of the members of them have established corporatist relations with government will vary.[24] They may also vary as the level of policy detail differs, with many groups interested at "macro" policy level, such as transport strategy, but fewer, or different, actors involved in the rule-making process as the issues become more specific.[25] Although it has been argued that consultation[26] introduces a significant element of participation into our law making system (which traditionally is primarily representative),[27] pluralist and corporatist systems are really alternative forms of representation, rather than true participation, [28] as individuals gather together in the hope that their representation as a mass will give weight to their opinions,[29] although they are more participatory in the sense of the number of opportunities to influence representatives.[30] Of course, many of the most powerful interests (particularly in the

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[21] Miers, D.R. & Page, A.C. *Legislation* 2nd Edition (Sweet & Maxwell, 1990), p. 40.
[22] Craig, P.P. *Administrative Law* 3rd Edition, *op cit.,* p. 27.
[23] See Blowers, A., "Masters of fate or victims of circumstance: The exercise of corporate power in environmental policy-making", in: Hill, M. *The Policy Process: A reader* (Harvester Wheatsheaf, 1993). Blowers suggests that business may be at its strongest when it appears most weak - being able to play the 'jobs card', etc.
[24] For example, the NFU is thought to have an institutional (and even symbiotic) relationship with the Ministry of Agriculture and Foods (Marsh, D. & Rhodes, R.A.W., *op cit.,* p. 25), however, it has a less well-established or entrenched relationship with other Government Departments.
[25] How the groups of policy actors changed at the differing stages of consultation will be considered in Chapter Six.
[26] Whilst 'consultation', which merely provides an opportunity for the expression of views on a matter, can be distinguished from 'participation', which suggests an active rôle in all stages of a process (see McAuslan, P. *The Ideologies of Planning Law* (Pergamon Press, 1980) p. 16.), this study focuses upon traditional consultation processes as a method of providing some element of participation and then looks at some other forms of participation to see how the consultation process could be improved.
[27] Cane, P. *Introduction to Administrative law* 2nd Edition, *op cit.,* p. 376.
[28] Indeed, an interest group may acquire substantial independence from its rank-and-file members: Galligan, D.J. *Discretionary Powers* (Clarendon, 1986), p. 78.
[29] Of course, where consultation engages individuals, this could be viewed as participatory, however, most consultees are representative groups, so that they act as alternative conduits to MPs.
[30] Turpin, C. *British Government and the Constitution* 3rd Edition (Butterworths, 1995) p. 467.

economic sense) are corporate entities, which have the advantages of size and organisation, and may develop greater power through aligning with other corporate bodies. One problem with this is that a large representative group is unlikely to have a homogenous view of all policy issues (within a particular policy "area") amongst its membership, although broad opinions and desires may be very similar (and this may be an advantage for the "corporate groupings" which have generally arisen through common economic interests). One great advantage of the pluralist approach over Parliamentary representation is that an individual can be a member of a number of groups, each of which reflects general policy preferences in a specific area.[31] The attraction of the representative aspect in a pluralist conception of democracy is that it facilitates group bargaining. As a result it places a stress upon procedural considerations:[32] focusing upon a "level playing field" for such bargains.

5.1.2 The Advantages and Disadvantages of Interest Group Representation in Rule-making

The incentives for interest groups to secure access to government decision-making are obvious, however, there may be less obvious advantages for government itself. Obtaining expertise is clearly an advantage, particularly in areas of technical complexity, but in terms of efficiency there is also the advantage of establishing relationships with those interested in the policy area and in establishing rules for communication. It is easier for government to deal with small numbers of groups and so there may be a tendency towards corporatist relationships, which may also assist in achieving the goal of ensuring that an agreed policy can be promoted amongst the "constituencies" of the interest groups involved.[33] Thus favourable policies may be traded for co-operation and expertise.[34] Even if co-operation cannot be secured,[35] the

[31] There is high level of public involvement in 'pressure groups', with approximately half of the electorate belonging to one or more: Turpin, C. *British Government and the Constitution* 3rd Edition (Butterworths, 1995) p. 463.
[32] Craig, P.P. *Public Law and Democracy in the United Kingdom and the United States of America* (Clarendon, 1990), p. 117.
[33] Craig, P.P. *Administrative Law* 3rd Edition, *op cit.*, p. 27.
[34] Craig, P.P. *Public Law and Democracy in the United Kingdom and the United States of America* (Clarendon, 1990), p. 150.
[35] Although it may be practically impossible to implement policy in some areas without the co-operation of certain groups, such as in the field of health care without the co-operation of the British

government may obtain an insight into the types of measure which may be acceptable within the policy community,[36] and disseminate information about policy proposals.[37] One effect of this may be a tendency to confine rule-making to incremental changes, as these will be based upon a pre-existing equilibrium, presupposed to be just or good.[38] Another is that policy is often made by a limited number of actors who interact frequently and share common values, which may exclude "unrecognised" groups, or individuals, from the process.[39] Even where there is no institutionalised or conscious favouritism, interest groups representing particular sectors are likely to be over-represented and the general public under-represented, as the latter suffer more from lethargy and a lack of clear incentives to become involved, with the task of making representations, or otherwise exerting influence, often left to others.[40] These effects themselves indicate that there are problems with interest group representation and with perceiving pluralist systems as a method of legitimising governmental action where Parliamentary representative democracy has weakened.

Whilst one advantage of interest group influence is that such groups can represent preferences in specific policy areas, or even on specific policies, an obvious danger is that such systems are, or become, elitist; excluding the general public from the process. This is particularly problematic where corporate tendencies exist, so that rule-making is subject only to a limited number of powerful interests, which can be exacerbated by the relative impotence of Parliament, with the result that Parliament is by-passed, or acts as a rubber stamp once the Executive has accepted a "deal".[41] Thus interest group involvement can, if it takes place on an elitist and restricted basis, undermine an already weak democracy. This involvement can take place through the direct lobbying of government (including the lobbying or sponsoring of individual

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Medical association: see Turpin, C. *British Government and the Constitution* 3rd Edition (Butterworths, 1995) p. 465.

[36]Miers, D.R. & Page, A.C. *Legislation op cit.*, p. 41.

[37] Cane, P. *An Introduction to Administrative Law, op cit.*, p. 195.

[38] Craig, P.P. *Public Law and Democracy in the United Kingdom and the United States of America* (Clarendon, 1990), p. 90 and the scope of policy choices being shaped by external 'client' groups: *Ibid.*, p. 157.

[39] Marsh, D. & Rhodes, R.A.W., *op cit.*, pp. 8-9.

[40] Elliot, E.D., et al, "Toward a Theory of Statutory Evolution: The Federalisation of Environmental Law" in: Revesz, R.L. *Foundations of Environmental Law and Policy, op cit.*, p. 186.

MPs),[42] through public consultation exercises and through more direct involvement in rule-making. Evidence of the first of these is found in the representation of certain interests by some MPs during the passage of the Environment Bill,[43] whilst evidence of the last is found in the consultation paper *Paying for Our Past* itself, which refers in a number of places to a Report of the Advisory Committee on Business and the Environment[44] and to meeting interested individuals and organisations during the course of the policy review which preceded the consultation paper. It is the goal of most interest groups to achieve the "insider" status which comes from establishing lines of direct communication with government, and the closer this comes to being realised, the less important other methods of influence become.[45] The primary concern is that some groups exert undue influence over Governmental decision-making and that the process of rule-making is neither open nor accountable. As Lewis states:

"Policy-making is the great accountability desert of British public law".[46]

As well as inviting "insiders" to consider policy, and excluding "outsiders", the agenda and limits of the policy debate itself are also determined by government, influenced by a small number of groups.[47] These influential groups are not themselves necessarily accountable and are unlikely to be accountable to the general public, which begs the question of whether there should be public or judicial control over their funding, organisation and access to Government.[48] They may represent significant proportions of the population, or may merely provide a further channel for "loud voices" at the expense of ordinary, unorganised people.[49] The lack of

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[41] Craig, P.P. *Public Law and Democracy in the United Kingdom and the United States of America, op cit.*, p. 151.
[42] The relationship between professional lobbyists and the Labour Government, as well as party funding and political influence, having been the subject of some concern recently.
[43] Identified in Chapter Four; see Section 4.2.18.
[44] *Report of the Financial Sector Working Group of the Advisory Committee on Business and the Environment* (Department of Trade and Industry/Department of the Environment, February 1993).
[45] Craig, P.P. *Public Law and Democracy in the United Kingdom and the United States of America, op cit.*, p. 152.
[46] Lewis, N., "Corporatism and Accountability: The Democratic Dilemma", *op cit.*, p. 95.
[47] *Ibid.*, p. 96.
[48] Cane, P. *Introduction to Administrative Law, op cit.*, p. 43, though anything which smacks of State control, as opposed to ensuring transparency in relationships and communication, is likely to prove unpalatable.
[49] *Ibid.*, p. 356.

accountability of powerful groups such as these is exacerbated by the ability of the Executive to then force changes through Parliament. The latter undermines traditional notions of Parliamentary accountability,[50] based upon inadequate Diceyan conceptions of the constitution, with the premise that Parliament is the initiator or controller of all formal legislation.[51] Government departments and political parties are heavily reliant on pressure groups for the identification of issues requiring attention and the development of policies to address them[52] and, although government retains control of the legislative process, policy-making generally resides within a triumvirate of the Executive, government departments and pressure groups.[53] However, accepting that participation is not (and cannot be) perfect is no reason for abandoning it as a desirable objective, as this merely leaves the way clear for powerful interests to control rule-making even more effectively.[54] In this light, it may be desirable that interest group influence should be as transparent as possible, so that the prospect of undue influence is reduced by outside scrutiny. This would tend to support participation through public consultative devices[55] over other methods, such as private lobbying and discussions.

5.1.3 Legitimacy Claims for Interest Group Participation in Rule-making

The recognition of the influence which participation affords to interest groups also highlights the need, as well as means, to reinvigorate the rule-making system with democratic values: through wider public participation,[56] as the pluralist system of participation (even if it exists beyond corporatist influences) is imperfect.[57] It may be

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[50] Craig, P.P., *Administrative Law, op cit.*, p. 29.
[51] Craig, P.P. *Public Law and Democracy in the United Kingdom and the United States of America, op cit.*, p. 166.
[52] Miers, D.R. & Page, A.C. *Legislation op cit.*, p. 22.
[53] Craig, P.P. *Public Law and Democracy in the United Kingdom and the United States of America, op cit.*, p. 157, rather than the traditional triumvirate of Parliament, the Executive and the Electorate.
[54] Craig, P.P. *Public Law and Democracy in the United Kingdom and the United States of America op cit.*, p. 131.
[55] For a sceptical view of the representativeness and efficiency of consultation in the context of law reform, however, see Zander, M. *The Law Making Process* 4th Edition (Butterworths, 1994), pp. 414-18.
[56] Craig, P.P. *Public Law and Democracy in the United Kingdom and the United States of America, op cit.*, p. 166.
[57] Craig, P.P. *Public Law and Democracy in the United Kingdom and the United States of America, op cit.*, p. 165.

possible, therefore to establish some legitimacy claims for having participatory systems, and these could be used as justification for consultation procedures. As well as the advantages for government mentioned above (obtaining expertise and co-operation), other advantages include: the articulation of public and individual values and preferences (thus facilitating responsive government); increasing public scrutiny through involvement in governmental processes; and facilitating the development of individuals to enable them to play a greater rôle in democratic processes.[58] The perceived advantages of consultation, more specifically, are that it: improves the "quality" of rules (providing a check on its technical adequacy); lightens the burden on Parliament (by providing expertise and scrutiny); implements the principles of open government; can identify the views of all interested parties;[59] informs a potentially ignorant and inflexible government and bureaucracy;[60] and can provide a direct input to legitimate rule-making where the accountability of government is under attack.[61] The dangers inherent in consultation include; not listening to less powerful and less well-connected groups; and becoming reliant upon or otherwise "captured" by the group(s) which are habitually consulted.[62] A less obvious danger is that the influence exerted by powerful groups can manifest itself in less open forms, such as through allocation of resources and the use of wider discretionary powers, rather than through rules.

5.1.4 Requirements of Consultation

Having established that public participation through consultation[63] in the process of rule-making is desirable,[64] the question of how it is effected in this country must now

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[58] Craig, P.P. *Public Law and Democracy in the United Kingdom and the United States of America, op cit.*, pp. 178-79. The development of a culture of participation and actual participation by individuals would appear a pre-requisite for any political system which aspired towards Habermas' Utopian ideal of a "fully democratic State", where policies and institutions "would meet with the unforced agreement of all those involved, if they could participate, as free and equal, in discursive will-formation." Habermas, J. *Communication and the Evolution of Society* (Heinemann, 1979), cited in Harlow & Rawlings, *op cit.*, p. 201.

[59] The Hansard Society Commission on The Legislative Process *Making the Law op cit.*, p. 17.

[60] Miers, D.R. & Page, A.C. *Legislation op cit.*, p. 41.

[61] Cane, P.P. *Administrative Law, op cit.*, p. 31.

[62] Garner, J.F. "Consultation in Subordinate Legislation", [1964] P.L. 105, at p. 121-3.

[64] Which builds upon the discussion in Chapter Two.

be considered. Chapter Two identified the haphazard nature of public consultation regarding legislation in England. One of the advantages of using delegated powers, as opposed to primary legislation, is that this allows time for the detail of implementation of policies to be worked out and for further consultation to take place, following consultation on primary legislation.[65] The objective of the rule-maker when consulting is to avoid too many technical and political mistakes.[66] However, we have seen that consultation outside government is discretionary,[67] though discussion with other departments, such as the Treasury, may be mandatory.[68] The important distinctions appear to be that the framing of policy, in the sense of "specific" policy,[69] is not subject to any legal requirements as to consultation, and neither is primary legislation. Consultation at this level will often be informal and not open to public scrutiny (although it is true that formal consultation can take place, such as on Green papers, where proposals are fairly unformulated, and White papers, where policy is more developed[70]). Although consultation which is informal may be an on-going process and more likely to result in informed comment and to build stronger relationships between rule-makers and the public,[71] the are potential problems of openness and accountability as it may be very easy to slip into the habitat of regularly informally consulting the "usual suspects", whilst missing others through the lack of a structured approach. For delegated and quasi legislation, any legal requirements as to consultation must be provided in the enabling legislation[72] and this provides the basis for the legal rules which will be applied to the consultation process.[73] For example, the Minister consulting may be given an absolute discretion regarding who is to be

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[65]Miers, D.R. & Page, A.C. *Legislation op cit.*, p. 107.

[66] Garner, J.F. "Consultation in Subordinate Legislation" *op cit.*, p. 106.

[67] The Government Department with responsibility for the legislative project deciding how much, if at all, to consult during the gestation of a bill: Zander, M *The Law Making Process op cit.*, p. 8.

[68]Miers, D.R. & Page, A.C. *Legislation op cit.*, p. 40. *The Better Regulation Guide , op cit.,* states that all affected groups should be consulted on an informal basis before any firm regulatory recommendations are made to Ministers. This should then be followed by full and formal consultation at a later stage: p. 8.

[69] See Chapter One, Section 1.4.2.

[70]Miers, D.R. & Page, A.C. *Legislation op cit.*, p. 41.

[71] Robinson, D. "Regulatory Evolution in Pollution Control" in: Jewell, T. & Steele, J. *Law in Environmental Decision-Making, op cit.,* p. 54. The example given there is the consultation on 'Working Drafts' of the Contaminated Land Statutory Guidance (see further below).

[72] There being no common requirement to consult: *Bates* v. *Lord Hailsham* [1972] 1 WLR 1373.

[73] The importance of consultative practices is greater in the context of secondary and tertiary legislation, as parliamentary consideration will not automatically follow: Griffiths, J.A.G. & Street, H. *The Principles of Administrative Law, op cit.,* p. 123.

consulted, and how consultation is to be carried out. If this is the case, the procedure may only be open to judicial challenge if no-one was consulted at all.[74] However, any requirements which are imposed should be scrupulously followed in order to avoid challenge to the *vires* of the resulting rules,[75] though the courts retain a discretion to refuse to strike down delegated legislation even where mandatory consultation requirements have been breached.[76] Where consultation is mandatory (so that there is a duty to consult certain groups), the consultation process must include all of those entitled to be consulted; must be meaningful (i.e. it must cover all of the relevant issues, and must include provision of adequate information regarding proposals and the reasons for them to consultees); and must provide consultees with sufficient time in which to respond.[77]

5.1.5 Improving Consultation

We have already considered the advantages and dangers inherent in using consultation as the preferred means of participation. Some improved method of public participation in rule-making is, however, required as:

> "It is ultimately destructive of the rule of law to allow the distance between law makers and the governed to grow and grow."[78]

The way forward for securing the advantages, whilst avoiding or minimising the dangers, of consultation has often been perceived as widening participation and opening-up rule-making processes to public scrutiny, whilst also formalising the process and requirements of consultation. Informal consultation can easily miss out fringe groups and individuals, or even established groups not known to be interested

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[74] Garner, J.F. "Consultation in Subordinate Legislation", *op cit.*, p. 112. See also Turpin, C. *British Government and the Constitution* 3rd Edition (Butterworths, 1995) p. 329-31.
[75] Such as an aggrieved body contending that there has not been consultation which is "representative of" a particular industry, if that is what is required: Garner, J.F. "Consultation in Subordinate Legislation", *op cit.*, p. 112.
[76] De Smith, Woolf & Jowell *Judicial Review of Administrative Action* 5th Edition (Sweet & Maxwell, 1995) pp. 276-77.
[77] Cane, P. *An Introduction to Administrative Law, op cit.*, p. 194.
[78] Wilson, W. *op cit.*, p. 58.

in the particular policy field, and can serve to confirm the restricted nature of a policy community and its undue influence on the process.[79] One problem arises from the need to ensure that there is a sufficient number of people capable of understanding and participating in the process of rule-making.[80] A further difficulty arises from the need to avoid the approach to consultation often taken under the traditional representative model. Under this, rather than being an organic part of decision-making, policy is formulated and the consultation exercises are largely marketing exercises or viewed as a cause of delay in the normal process of Government.[81] This traditional approach often "adds on" consultative processes to less participatory procedures, with consultation a "hurdle" to be jumped, rather than a positive and influential part of the overall process. Suggestions for improvement of the consultation process often focus mainly upon practical improvements to the existing consultation procedure, such as opening more (or all) areas of rule-making to consultation (or at least imposing consistent and logical consultation requirements); increasing the length of consultation periods; and consulting at an earlier stage and at policy identification and implementation stages, as well as on draft rules (including Bills where possible).[82] Such approaches are not, however, without difficulties themselves. They tend to increase cost and delay, to increase the formality of, or "legalise", rule-making, and there is no clear evidence that they will improve rule quality.[83] Even the idea that the "quality" of rules is a tangible concept[84] is not unproblematic, as it suggests that there is some kind of objective "public interest" which can be pursued as a goal. Whilst this is one view of policy–making, another is that the political process is about reconciling and compromising conflicting group

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[79] Asimow, M., *op cit.,* p. 267.

[80] Hudson-Phillips, K.T., *op cit.,* p.78. Hudson-Phillips suggests that ensuring this is not really the task of the lawyer, but of educators, however, there is no doubt that lawyers can help to contribute to participation by assisting in developing a process and the presentation of proposals which make the rule-making process accessible to the wider populace.

[81] Robinson, D. "Regulatory Evolution in Pollution Control" in: Jewell, T. & Steele, J. *Law in Environmental Decision-Making, op cit.,* p. 54.

[82] See the recommendations of: The Hansard Society Commission on The Legislative Process *Making the Law* (Hansard Society, November 1992) generally and Keeling, E. "Consultation and Tax Legislation: The Lessons from the Development of Proposals for Taxing Currency Fluctuations" [1995] Statute Law Review 109.

[83] Craig, P.P. *Public Law and Democracy in the United Kingdom and the United States of America, op cit.,* p. 128.

interests (which may be more realistic), or is a method of establishing a compromise between conflicting values which are shared by most people but are not absolutes and sometimes in conflict.[85]

5.1.6 Some Ideas from the United States Experience

Commentators have examined the rule-making requirements imposed in the United States and contrasted the formal requirements there with our tendency towards informality and secrecy.[86] The United States Administrative Procedure Act 1946 has formal requirements for public consultation and hearings regarding rule-making by "Agencies" and the courts are very active in ensuring that those requirements are met.[87] These include rights for individuals to be heard in rule-making process (which may themselves be in the form of publishing draft rules and inviting comments, or may be more adversarial, with trial type hearings on proposed rules).[88] Legislation can be initiated in some States by the use of the "Ballot Measure" process, whereby citizens petition for certain proposals to be legislated and a ballot is then held. Although there are the usual dangers of undue influence, citizen participation is encouraged and can have a direct result.[89] The "Hard Look" doctrine in US administrative law also allows judicial review to a greater degree than in the UK, by requiring agencies to provide an adequate basis and explanation for policy choices, rules (and decision-making), as well as to give adequate consideration to the views of

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[84] See: Keeling, E. "Consultation and Tax Legislation: The Lessons from the Development of Proposals for Taxing Currency Fluctuations" *op cit.,* for an example of the suggestion that 'quality' may be 'improved' by consultation.

[85] Cane, P.P. *Administrative Law, op cit.,* p. 360-65. Here some interests may have a greater interest in some factors than others. For example, in the area of sustainable development, most interests may agree with the principle, but where tensions arise, manufacturers may emphasise the economic development aspect, whilst others may emphasise the sustainability aspect.

[86] Although there are moves towards a less secret system of Government, such as the (rather weak) Freedom of Information Bill and European interventions, such as the Environmental Information Directive - see Wilson, W. *Making Environmental Laws Work* (Hart, 1999), p. 30.

[87] See Harlow, C. & Rawlings, R. *op cit.,* p. 205 and Cane, P.P. *Administrative Law, op cit.,* p. 196. Although those procedures apply to 'Agency' rule-making, it may be possible to borrow some of the approach and apply it to other types of rule-making.

[88] Asimow, M., *op cit.,* p. 255.Craig, P.P. *Public Law and Democracy in the United Kingdom and the United States of America, op cit.,* p. 123.

[89] Wilson, W. *op cit.,* pp. 40-42.

interested persons.[90] It has been suggested that the main rôle of the courts there is to protect sectional interests and ensure that all properly interested parties have been listened to[91] and that the lack of the "hard look" approach by courts in the UK results in the governing institutions determining what level of public debate takes place in a particular policy area by judging what they think that they can "get away with".[92] One must take care, however, when looking to transpose or adopt procedures developed within the US constitutional order (and which generally focus on rule-making by agencies, rather than by central government), as the courts there have a tradition of willingness to intervene in political issues, whilst looking to a higher constitutional authority than that of the Executive.[93] Nor is judicial intervention in rule-making processes without criticism in the United States.[94]

5.1.7 Public Participation and Satisfaction with Outcomes

It is not clear why a hearing or other participatory process, is often thought necessary in this country for decision-making, but not for the making of the rules which determine how such decision should be made,[95] however, it seems that wider public participation may not necessarily result in more satisfaction with rules (or decisions). Participation may be of limited value if it does not increase satisfaction with outcomes[96] (although access to the political process may be a good thing in itself so that dissatisfaction with outcomes may not wholly undermine the process, provided that it does not lead to non-participation). Research contrasting satisfaction with decision-making outcomes where there has been little public involvement and where

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[90] See, for example: Lewis, N. & Harden, I. *The Noble Lie* (Hutchinson, 1986), Chapter 9; and Craig, P.P. *Public Law and Democracy in the United Kingdom and the United States of America, op cit.,* p. 182.

[91] Cane, P.P. *Administrative Law, op cit.,* p. 357.

[92] See Lewis, N. "Corporatism and Accountability: The Democratic Dilemma", *op cit.,* p. 96., where the secrecy endemic in British Government is contrasted with open access in the United States, including under the Freedom of Information Act and Government in the Sunshine Act 1977.

[93] Asimow, M., *op cit.,* p. 268. For this reason, it is less likely that the courts in this country would be happy to take a 'hard look' at Parliamentary rule-making.

[94] For a recent example, see Cross, F. "Shattering the Fragile Case for Judicial Review of Rulemaking", Virginia L.R. October 1999 pp. 1243-1334.

[95] Craig, P.P., *Administrative Law, op cit.,* p. 258, although it may be that this results from the traditional focus on the protection of individual rights, which are most directly threatened by decisions and more obliquely by rule-making. The extension of judicial review to rule-making more generally could provide a system not dissimilar to 'Hard Look'.

there have been public hearings suggests that the hearings procedures did not make the outcomes any more publicly acceptable.[97] If there is dissatisfaction with outcomes of consultation during rule-making, there is a danger that this will result in disillusionment and withdrawal from consultation processes by unorganised individuals more than organised interest groups. Organised interest groups may have a more sophisticated approach to participatory exercises, and have the ability to influence rule-makers on a number of levels. They may also be more adept at ensuring that the maximum weight is given to their views. There is, therefore, a danger that increasing the importance of consultation without securing the involvement of wider influences (who may be more easily disillusioned by a lack of "satisfactory" outcomes) will serve only to increase, or at least mask (or even further legitimate), the influence of powerful groups. Public consultation exercises may take place, and allow for legitimacy claims to be made for the rule-making process and the resulting rules, when the only participants in consultation are (already) powerful interests. Whilst limited consultation exercises provide for legitimacy claims in their own right (securing expertise, and limited wider participation), it is important that the participants in them are identified to ensure that these claims do not extend beyond what is justifiable. Even if wider participation in consultation processes is secured, there is the obvious problem of the influence of those processes on the rule-making decisions. There is a world of difference between going through the motions of consultation, and genuinely opening up the rule-making process to wider public involvement. Public consultation can often be little more than sending draft rules to interest groups, collating and summarising replies and looking for amendments to the drafts which are required.[98]

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[96] Cane, P.P. *Administrative Law, op cit.*, p. 198.

[97] See Asimow, M., *op cit.*, although Asimow acknowledges that it may be that the substance of those hearings – controversial road schemes – had overridden any possibility of increasing public acceptance of the decisions in any event and suggests that the informal consultation procedures surrounding rule-making in the UK help to foster the general satisfaction with rule-making found in the UK. The lack of evidence regarding increased satisfaction resulting from US procedures in the United States may also result from external factors, here the difficult relationship between many US citizens and the State and the tendency for rule-making in the UK to be by Government or bodies which are not politically independent of Government, so that there is a close connection with the legitimacy afforded by Parliamentary democracry: see Cane, P.P. *Administrative Law, op cit.*, p. 197-8.

[98] Wilson, W. *op cit.*, p. 46.

5.1.8 Practical Problems in Securing Wider Participation

There are also practical issues of how meaningful wider participation can be made possible. Public involvement in developing rules requires thought about institutional structures and incentives to get people involved: the mere idea that it should be allowed it is insufficient.[99] Increasing procedural rights within the traditional administrative law philosophy may only enhance the rights and influence of certain established interest groups, such as property owners, whilst the cost and complexity of involvement may favour well-organised and well-funded groups and exclude others.[100] Giving wider interests a voice, whilst preventing the powerful from wielding coercive influence, is the central conceptual problem inherent in increasing participatory rights.[101] This may be particularly acute in areas of technical complexity, where differences in access to, and ability to utilise, information may discourage many from becoming involved. This is despite that facts that many seemingly "technical" decisions are actually political choices between technical options; and that social, political and economic factors may play an important rôle in seemingly technical decisions.[102]

Practical methods of facilitating more meaningful consultation have been suggested. These include holding public meetings to explain or discuss proposals,[103] and releasing drafts of rules on the internet, in order to reach a wider community than the usual "professional" interests.[104] Whilst these may broaden the extent to which proposed rules are distributed, they would not necessarily make the proposals

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[99] Juni, R. speaking at the Atlantic Fellows Seminar, University of York, Spring, 1997.
[100] Cane, P.P. *Administrative Law, op cit.*, p. 358-9.
[101] Craig, P.P. *Public Law and Democracy in the United Kingdom and the United States of America, op cit.*, p. 128.
[102] See, for the example, the discussion of standard setting for contaminated land in Chapter Three and Cane, P.P. *Administrative Law, op cit.*, p. 196.
[103] Common in the United States but unheard of in this country: Wilson, W. *op cit.*, p. 46: however, in the Contaminated Land rule-making process, a series of conferences with business and other powerful interests were held by the rule-makers as part of an attempt to stimulate debate between the various interests and 'sell' the policy to them (Interview with Dr Neil Jackson (the DoE administrator responsible for devising *Paying for Our Past* and carrying out the consultation exercise on it, and responsible for departmental policy on contaminated land from then up to the Environment Bill) carried out on 13 May 1999: he refers to them as 'Roadshows').
[104] Wilson, W. *op cit.*, p. 47 and *How to Consult Your Users - An introductory guide* (The Cabinet Office), pp. 66-67, where the limited access to this resource is recognised.

accessible and understandable to a wider audience. Nor would they necessarily encourage a culture of participation.[105] The development of participation is an evolutionary process which is shaped by political culture: the inevitable thrust is towards power sharing and the use of new democratic forms, which may be regarded with suspicion by holders of power.[106]

5.1.9 The Governmental Approach to Participation in Rule-making

The government has acknowledged the need for, and problems in securing, participation in rule-making. Recent guidance has been provided within government for consultation when drawing up regulatory proposals.[107] In it, the Prime Minister identifies "open public debate" as a key issue, which is said to require "consultation at an early stage".[108] The need to avoid corporatist approaches is recognised (with a warning not to restrict consultation only to those likely to be the subject of the proposed regulation but to include consumer and other groups[109]), and suggestions are made (such as the use of statistical sampling techniques and of different consultative methods) to help ensure that the people consulted are representative.[110] However, the different level of influence which major groups have is also evidenced by the suggestion that there should also be meetings and discussions with main interest groups.[111] Practical points suggested in the guidance as means to facilitate meaningful consultation include: establishing clear issues and options; keeping things short; and simple and allowing plenty of time.[112] The guidance attempts to generate a culture of

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[105] The internet is now a valuable source of consultation documents (including the last round of consultation on Contaminated Land statutory Guidance) and this may have improved efficiency and dissemination of information. However, it is highly probable that these improvements have been within and between the existing policy networks, rather than outside them.
[106] O'Riordan, T. *Environmentalism, op cit.*, p. 256.
[107] *The Better Regulation Guide, op cit.* and *How to Consult Your Users - An introductory guide, op cit.* (the latter being concerned with consultation in a variety of contexts, including satisfaction with services, etc.).
[108] *The Better Regulation Guide, op cit.*, p. 1.
[109] *The Better Regulation Guide, op cit.*, p. 9.
[110] *How to Consult Your Users - An introductory guide, op cit.*, p. 2.
[111] *The Better Regulation Guide, op cit.*, p. 10. The reference to, and focus upon, 'users' in *How to Consult Your Users - An introductory guide, op cit.*, also identifies where the priorities lie, although there is encouragement to consult as widely as possible.
[112] *The Better Regulation Guide, op cit.*, p. 9.

participation by suggesting that it should be made easy for the public to respond.[113] A two-stage process of consultation is envisaged. As well as consulting on policy options, this would also include a second stage of formal consultation on specific proposals, even where this was not a statutory requirement.[114] A number of methods of consultation are also suggested, including: pilot schemes; consulting representative groups; focus groups; citizen's panels; and citizen's juries.[115] These methods have varying advantages and disadvantages, such as cost, transparency, applicability to particular issues, the extent to which participants are representative of others and the extent to which detailed information can be extracted. Whilst all of these can be criticised,[116] they do provide alternatives to the usual consultation paper approach and they may encourage and facilitate wider participation and the eliciting of general values within a particular policy area. Methods such as "piloting" may also provide more sophisticated methods of gathering expertise,[117] by highlighting problems with implementation and use of rules before they are finalised. Perhaps the greatest danger with these methods is, however, the extent to which they are truly methods of facilitating participation, rather than "marketing" by the rule-makers.

5.2 The Environmental Context

5.2.1 Participation in Environmental Rule-making

In the environmental context, many interest groups, such as the RSPB, have secured close relationships with the relevant departments, although lacking economic sanctions or a different direct need for their co-operation from the government. The pressure which they have exerted has usually been the threat of public censure through

[113] *How to Consult Your Users - An introductory guide, op cit.*, p. 3.
[114] *The Better Regulation Guide, op cit.*, p. 13, one reason for this being to reduce the risk of legal challenge.
[115] *How to Consult Your Users - An introductory guide, op cit.*, Part 2. The main difference between 'panels' and 'juries' being the numbers involved (hundreds, and a dozen or so) and the depth in which they (correspondingly) are able to investigate and consider issues.
[116] For example, will a Citizen's Jury of twelve or so people be truly representative?
[117] See, for example: Peysner, J. "Focus Groups and Analogue Vignettes: Modelling and Piloting in Civil Procedural Reform" [1999] Civil Justice Quarterly 113.

the media and delay[118] (sometimes supported by litigation or direct action), these being the methods of inflicting a political "cost" on government,[119] and so generating a need for their co-operation. As disillusionment with political parties has grown, there has been some diversification of political activism and participation, so that involvement in such groups has increased,[120] although this does not necessarily mean that they provide effective or satisfactory means of participation. These groups are becoming more influential at national and local levels[121] and the "resurgence" of environmental concern has resulted in an influence in policy areas which has come from outside the established policy communities.[122] Utilising a variety of means to exert influence in the formative stages of rule-making has required: access to senior civil servants and Ministers; lobbying; support in Parliament; and using the media. In fact, government has been an active agent, rather than passive recipient of pressure from environmental interest groups. This has extended to funding or establishing them,[123] as well as establishing procedures for consulting with them. Constant exertion of pressure by environmental groups has been a key feature of the 1990's. Technical knowledge has been acquired so that they can compete on equal terms with "commercial" interests and become regularly included in the consultation process.[124] This may suggest that their objectives are accepted to some degree, but also that there is a desire by the Government to manage and control these pressures.[125] In order to "secure the ear" of Government, environmental groups must gain sufficient public recognition and may have to appear "politically respectable", which may mean "playing the game": potentially posing a moral dilemma for members who believe in more radical action.[126] Gaining and maintaining insider "consultative" status may require moderation of views, and so some groups have preferred to consult on a more

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[118] Lowe, P. & Goyder, J. *Environmental Groups in Politics* (George Allen & Unwin, 1983), p. 60.
[119] Turpin, C. *British Government and the Constitution* 3rd Edition (Butterworths, 1995) p. 466.
[120] A 'green' society is generally recognised as being more participatory than that existing at present: Pepper, D. *Environmentalism, op cit.,* p. 17.
[121] Foley, M. *The Politics of the British Constitution (*Manchester University Press, 1999), p. 80.
[122] Maloney, W.A. & Richardson, J.J. *The Politics of Water* (Edinburgh University Press, 1995), p. 159: so-called 'sporadic interventionists'. For example, surfers have made sporadic interventions into water policy in recent years (p. 161).
[123] See, for example, Gunningham, N. & Grabosky, P. *Smart Regulation: Designing Environmental Policy* (Clarendon, 1998) pp. 101-104.
[124] Maloney, W.A. & Richardson, J.J. *The Politics of Water op cit.,* p. 168.
[125] Lowe, P. & Goyder, J. *Environmental Groups in Politics op cit.,* p. 62.

independent basis, rather than securing positions on advisory committees, etc.[127] The precise extent to which the views of environmental interest groups are valued, or to which consultation amounts to mere "tokenism", depends upon the department in question. This contrasts with some interests (such as the Confederation of British Industry and the National Farmers' Union) which have a close relationship with government "across the board". [128] This may identify the distinction between corporatist and pluralist groups, and could provide the source for comparative weakness in those groups with opposing views.[129] A great difficulty in investigating the rule-making process is in distinguishing effective from ineffective participation: a large number of consultees can mask the fact that the important influences come from a small number of powerful participants.[130] Thus the majority of "participants" may only be included in order to give the process a false impression of wider legitimacy. Although environmental interest groups have exerted a high degree of influence in certain areas (and this has, at times, resulted in the adoption of environmental interest groups own proposals for legislation), there is a suggestion that they have more success in lobbying MPs and Peers than in influencing Whitehall.[131] A variety of systems have been used to secure and increase influence (which include media management and even direct action[132] where considered appropriate[133]) as a result of the moderate success in exerting direct influence on government. One advantage which environmental interest groups do have is their relative wealth and expertise when seeking to compete with other interests in the consultation process.

For less well organised and funded groups (and individuals) access to and use of environmental information can be difficult, which undermines attempts to generate a

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[126] O'Riordan, T. *Environmentalism op cit.*, p. 255.
[127] Lowe, P. & Goyder, J. *Environmental Groups in Politics op cit.*, p. 66.
[128] Lowe, P. & Goyder, J. *Environmental Groups in Politics op cit.*, p. 64.
[129] Lowe, P. & Goyder, J. *Environmental Groups in Politics op cit.*, p. 85.
[130] Maloney, W.A. & Richardson, J.J. *The Politics of Water op cit.*, p. 170.
[131] Lowe, P. & Goyder, J. *Environmental Groups in Politics op cit.*, p. 68.
[132] Foley, M. *The Politics of the British Constitution op cit.*, p. 81.
[133] Although, the "inside channel" of influence has generally been seen as more likely to be effective than the "outside channel": Jordan, G. & Maloney, W.A. *The Protest Business? Mobilising campaign groups* (Manchester University Press, 1997), p. 180.

culture of public participation.[134] Getting hold of the relevant information can be difficult and making sense of it can be even more onerous.[135] The environmental context presents inequalities in access to information (and expertise) and economic power, one element of which is the imbalance in ability even to identify the impacts of environmental problems, which are being identified as increasingly diffuse and far-reaching.[136] Although this may, in part, reflect the scientific complexity of many issues, there is a danger that procedures such as risk assessments are allowed to present what are really political choices as a having some kind of unanswerable scientific authority[137] and, accordingly, as not being amenable to public participation. The problem is that asking the public its views on such issues may elicit different responses from every respondent; and the law and technical issues in some areas may be so complex as to discourage sensible public participation.[138] Wide participation in rule-making can make it more difficult, as it may focus on the polycentric nature of issues,[139] drawing in wider concerns and making the process unmanageable. In the environmental context, this is one of the core problems of consultation. As we have seen, the characteristics of environmental problems are: that everyone is affected by them (to some degree at least),[140] including non-human interests; and that their physical nature results in the interests of future generations also being at issue. Thus the difficulties in terms of time, expense and practicality of conducting consultation exercises[141] are exacerbated in the environmental context. Not only is the pool of

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[134] See, Rowan-Robinson, J., et al "Public Access to Environmental Information: A Means to What End?" [1996] JEL 20.
[135] Wilson, W. *op cit.*, p. 43.
[136] Steele, J. "Tort Law and Environmental Risk" in: Jewell, T. & Steele, J. *Law in Environmental Decision-Making, op cit.*, p. 118.
[137] Wilson, W. *op cit.*, p. 64.
[138] Wilson, W. *op cit.*, p. 65.
[139] See: Craig, P.P. *Public Law and Democracy in the United Kingdom and the United States of America* (Clarendon, 1990), p. 132, where participation in decisions is suggested to highlight polycentricity - the same being likely to result from participation in rule-making.
[140] This is primarily through the exhausting or degradation of environmental 'capital', common to all of us, though the particular impact may be felt in a much stronger and direct fashion by those closest to it. A less direct (and certainly less ecocentric) way in which the wider population may be affected by environmental issues is their potential drain on the public purse, though this is certainly not an effect which is unique to environmental issues.
[141] David Blunkett, speaking on the Today Programme, Radio 4, March 30, 1999, stated that his Department had received over 25,000 responses to consultation on Performance Related Pay for Teachers. An obvious practical issue here is how to deal with such a volume of material in a meaningful way and, although the strength of feeling amongst respondents on this issue and, indeed, the specific nature of it, may have contributed to such a high response rate, this does highlight the

interests widened, but it also includes interests which cannot be directly consulted. One way of addressing this problem could be to increase the influence of "experts" and for us to rely on their guarding such interests, though this seems to increase the dangers of inappropriate influence and capture of the rule-making "agenda". Another, however, is to broaden the range of participants as far as possible in the hope that this will somehow provide for their protection. The Royal Commission on Environmental Pollution found that public consultation could provide both a method of establishing peoples' values regarding environmental issues and (without coercing) educate the public so that those values may reflect a deeper understanding of the issues involved.[142]

5.2.2 Securing Wider Participation in Environmental Rule-making

Having highlighted the need to consult widely in the environmental rule-making area in particular, the question is then how to achieve this. The use of surveys, consultation exercises and public inquiries were commended by the Royal Commission (at as early a stage as possible), however, more effective methods for articulating values (whilst exposing them to informed reflection and debate) were suggested, such as the use of focus groups and citizen's juries.[143] These suggestions were made in the context of both standard setting and decision-making but their application seems more problematic where standards, or other rules, are to be made at national level.[144] The chance of keeping issues manageable and participation representative seems more realistic at the local level where, at its most basic, less people are likely to be (or at least be perceived to be, or desire to be) involved.[145] True participation or even

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problem of what to do when a consultation exercise is successful in terms of response rate. This is one of the reasons why a more corporatist approach may be preferable for some rule-makers.

[142] R.C.E.P. 21st Report, *op cit.,* Chapter 7.

[143] R.C.E.P. 21st Report, *op cit.,* pp. 102-7.

[144] The R.C.E.P. Report recognises that no method for determining values will provide a guaranteed solution, that the methods used will have to fit the issues involved and that what should be aimed for is eliciting general principles, rather than points of detail.

[145] The examples given of articulating values in the R.C.E.P. Report are at the local level.: See Appendix F.

representation appears a huge task where national rules are being made.[146] However, these difficulties do not mean that these techniques cannot at least help rule-makers keep a "finger on the pulse" of public values at national level.[147] To the extent that public values underpin rules, therefore, wider public participation seems a more appropriate, and achievable, part of the rule-making process, particularly where value judgements (such as those underlying risk considerations[148]), rather than technical decisions, are involved.[149]

5.3 Consultation and Contaminated Land Policy Development

5.3.1 The Approach to Consultation in Contaminated Land Rule-making

Public consultation has been a significant feature of contaminated land policy development. As well as consultation on wider issues and legislative proposals which were intended to have an impact on contaminated land,[150] specific measures to deal with contaminated land have been widely consulted on, as described in Figure 5.1 below:

[146] For this reason, devolution does, and could further, assist with participation and representation in rule-making, simply by reducing the size of 'constituencies'. Reduction on regional lines may also help provide greater homgeneity of cultural and other values.
[147] Which may have helped to avoid the conflict generated between the Government and its advisors and the general public over issues such as Genetically Modified Organisms.
[148] For example, defining/identifying contaminated land and determining remediation requirements.
[149] Robinson, D. "Regulatory Evolution in Pollution Control" in: Jewell, T. & Steele, J. *Law in Environmental Decision-Making, op cit.*, p. 55.
[150] Such as consultation by the DoE on section 61 of the Environmental Protection Act 1990 (relating to closed landfill sites) (1992), see *Paying for Our Past, op cit.*, para 4G.9.

Public Consultation Exercises	Other Consultation
Prior to the Environment Bill[151]	
	Prior consultation with local authorities and "specialist" bodies[152]
Public Registers of Land Which May Be Contaminated: A Consultation Paper[153]	
Environmental Protection Act 1990: section 143 Registers[154]	
	Consultation during Review[155]
Paying for Our Past	
Environment Bill and After	
	Consultation with certain bodies on drafts of Bill[156]
	Working Draft Statutory Guidance[157]
Statutory Guidance – *Consultation Draft*[158]	
	Statutory Guidance – *Revised Draft for Round Table Discussion*[159]
Statutory Guidance – *Latest Draft*[160]	

Figure 5.1

[151] Views on s.143 will have been sought as part of the usual consultation which takes place during the passage of legislation.
[152] Referred to in *Public Registers of Land Which May Be Contaminated: A Consultation Paper* (DoE/Welsh Office, May 1991), para 2.12.
[153] (DoE/Welsh Office, May 1991).
[154] (DoE/Welsh Office, May 1992).
[155] Referred to in *Paying for Our Past, op cit.*, para 1.12.
[156] Referred to in Hansard - see Chapter Four.
[157] The final Working Draft being issued on a restricted basis on June 24, 1996 (earlier drafts also having been consulted on to some extent, including with ten 'small businesses' in order to assess impact on that group specifically). After first 'Working' Draft was devised, a 'Round Table' of 22 organisations was held to discuss this, prior to wider circulation.
[158] (DoE/WO, September 1996).
[159] (DETR/WO, October 23, 1998), which the Government has suggested was actually a 'public' consultation exercise (see DETR News Release 1999 No. 981 introducing the latest Consultation Paper in October 1999 and para 7 of the Draft Circular).
[160] Issued for consultation on October 8, 1999.

The consultation exercises which led to withdrawal of legislation designed to address problems of insufficient market information[161] have been mentioned in earlier chapters.[162] The first consultation paper on s.143[163] focused on the types of potentially contaminative uses to be included on registers, although consultees were specifically invited also to comment on issues of blight and public alarm.[164] Thus the scope of the consultation exercise was limited, asking how the details of a policy approach already enshrined as legal rules should de determined. It was also clear from the document that prior consultation had taken place with local authorities and "specialist" bodies.[165] Following a negative response to the proposals generally, a further round of public consultation on revised register proposals[166] was followed by their abandonment and a review of contaminated land policy generally. This review was carried out in an "... open way welcoming written contributions, meeting interested individuals and organisations and explaining the issues and considerations ..."[167] and so involved a number of consultation processes. One interesting feature of these first two exercises is that their limited focus did not prevent much wider criticism leading to a complete policy re-think: the criticism revealed wider problems and concerns which undermined the government's limited policy objective of providing information through registers; or suggested that the disbenefits of introducing the proposals outweighed the benefits (at least in their then current form).[168] The consultation paper resulting from the policy review - *Paying for Our Past* - took a completely different approach from that in the earlier consultation papers in that it did not explicitly present specific proposals, but presented a summary of the current law and policy and asked a series of questions regarding suggested approaches to dealing with contaminated land and as to the level of satisfaction with present arrangements (with

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[161] Through the proposed requirement to maintain registers of contaminated land under s.143 Environmental Protection Act 1990.
[162] Chapters One and Three.
[163] *Public Registers of Land Which May Be Contaminated: A Consultation Paper* (DoE/Welsh Office, May 1991).
[164] *Ibid.*, para 4.5.
[165] *Ibid.*, para 2.12.
[166] *Environmental Protection Act 1990: section 143 Registers* (DoE/Welsh Office, May 1992).
[167] *Paying for Our Past, op cit.*, para 1.12.
[168] For a discussion of the s.143 consultation exercises and responses by local authorities (as well as a more limited discussion of *Paying for Our Past*) see Walton, W. "Bad land and bad law: the rôle of local authorities in the formulation of new legislation and guidance for contaminated land in the United Kingdom" [1997] Environment and Planning C: Government and Policy 229.

the government's preliminary view on these also being provided). The questions raised by *Paying for Our Past* are summarised below in Figure 5.2:

Paying for Our Past: Questions (Summarised):

Issue A	What should the objectives be within the policy?
(1)	Are the priorities set out in the paper appropriate?
Issue B	How should the statutory framework meet the objectives?
(2)	Should there be greater consistency in regulators' powers?
(3)	Should regulators increase understanding by the market of what they do?
(4)(a)	Should regulators continue to be able to pursue one or more persons?
(b)	Should there be liability limits for lenders, home-owners, etc. and, if so, who should pay instead?
(5)	[Mines exemption]
Issue C	What relationship should the statutory framework have with the Common Law?
(6)	Should there be a minimum change to the Common law?
Issue D	Should there be any extension of strict liability?
(7)	Is the strict v. fault based liability balance presently appropriate?
(8)(a)	Should there be changes to the availability of: a "State of the Art" defence?
(b)	Defence of unforeseeability?
(c)	Defence of regulatory compliance?
Issue E	Who should pay for putting right environmental damage?
(9)(a)	Is liability transfer to others consistent with the "polluter pays" principle?
(b)	Should avoidance be made as difficult as possible?

(10)(a)	Should there not be (mandatory) funds or insurance to meet liabilities?
(b)	Should voluntary funds be encouraged?
Issue F	How should markets be provided with information?
(11)	Is it for Government Departments. local authorities and professionals to identify/advise on best practice for information flow on contaminated land, especially through improvements to the conveyancing process?
(12)	Should the Department of the Environment continue with its priorities for Risk Guidance research?
(13)	Should the principle of caveat emptor be maintained?
Issue G	What other rôles should public sector bodies have?
(14)	Should re-use of "Brown" land be encouraged by the appropriate agencies?
(15)	Should the Environment Agency provide a framework of Guidance for dealing with contaminated land?

Figure 5.2

It is apparent from the above summary that *Paying for Our Past* included a mix of very wide questions (such as whether there should be minimum change to the common law) and fairly specific ones (such as whether liability transfer is consistent with the "polluter pays" principle). The questions also included a mix of general questions (asking about general approaches to issues, such as liability transfer and the "polluter pays" principle) and specific questions (asking about concrete proposals, such as whether to have a defence of regulatory compliance). It is also clear that the questions did not present issues in a value-free manner and many questions were "leading" in the extreme,[169] providing solid indications of the government's own view of those issues.

[169] See, for example, the full version of Question (6) which reads: "Do you consider that, subject to any further consideration of the House of Lords judgment in the Cambridge case, there should be the minimum of change to private, Common law, undertaken only where it causes tensions or

The policy paper *Paying for Our Past* was not, however, developed by the rule-makers in isolation, and the development process itself involved consultation with selected groups prior to and during its drafting, although their influence appears to have been limited:

> "There were contacts before publication. The substance of those "private" discussions did affect what the review group put into *Paying for Our Past*. But the views I got were never taken at face value. I've gone on about privately challenging people and, frankly, playing them off against each other in public sometimes. That was to ensure that these people weren't dictating to us. We were making sure we understood their positions, but the Quid Pro Quo for us listening to them was that they had to listen to me or to justify themselves to others with conflicting interests.."[170]

It seems that the groups involved in these early discussions comprised the "core policy community" for the department(s) concerned with the issue, and that their involvement came about through the normal system whereby rule-makers seek expertise and general opinions from within their closer network:

> "You have the announcements. As those show, formally, the review was entirely internal to government through the usual inter-departmental arrangements, without 'outsiders' as such. But individual departments have their normal 'client group' and could consult them. We had through Judith Denner and the DoE Research Programme a considerable network of contacts in environmental consultancy and environmental engineering, in the notionally polluting industries, and with people like British Gas who were experts in de-polluting and de-contamination and were happily lending government that expertise. When the review came

uncertainties, and not undertaken solely to keep Common law liability in line with regulatory obligations?" (original emphasis).

[170] Interview with Dr Neil Jackson.

up, therefore they were available as the beginnings of our own network of contacts."[171]

Following *Paying for Our Past*, there was the usual informal consultation and lobbying which takes place during the preparation, and passage, of a Bill.[172] As a result of the requirements of the resulting Environment Act, the statutory guidance providing much of the detail for the rule-system has also been consulted on. Although the Act only requires that the Secretary of State consult with the Environment Agencies and such other bodies or persons as " ... he may consider appropriate to consult ...",[173] there have been at least four formal, or semi-formal, consultation exercises on the guidance (with two also seeking views on draft Regulations[174]). A number of drafts of the *Working Draft Statutory Guidance* were consulted on informally, with the final version being the subject of semi-formal consultation. Following the formal exercise regarding Statutory Guidance, a further draft was released to selected members of the policy community only (a much more restricted group than those who had responded to the formal paper) and this was then the subject of a "round table" discussion with the Department of the Environment Transport and the Regions.[175] A further round of formal consultation then followed on a further draft of the Statutory Guidance, which the Secretary of State was "minded to issue". The contaminated land rule-making process has, therefore, been subject to an almost continuous process of consultation, but with differing types of consultation, with differing objectives:

"There were different processes at different stages of the development of the policy, and I think it can be typified, though I am not sure I've got the sequence right. From consultation where you are actually trying to find out information, just information gathering, from the world outside the

[171] Interview with Dr Neil Jackson.
[172] An example of the influence which can be exerted here is provided in Chapter Seven: the decision as to appeal bodies.
[173] S.78YA(1) Environment Act 1995.
[174] Those carried out in Autumn 1996 and October to December 1999.
[175] The secrecy surrounding this exercise was the source of some complaint amongst the policy community and seemed unnecessary in light of the minor changes which the draft made to the Consultation Draft Guidance.

Department, through to consultation where you are asking people what they thought should be done, so that was different; a "what's the problem?" sort of issue. Then: "what can be done?" Then more detailed elements about what can be done, like what's feasible, technically feasible, what people are prepared to live with, what's the minimum that can be done, those sort of things, and then how you do that. So there was consultation about how can this whole thing be done, did it require legislation, did it require a change to any of the legislation, could it be done in a very simple way or did it need draconian powers and things. And then after all those different stages, some of which overlapped of course, there's the selling, which isn't exactly consultation, the selling of the whole policy once it had been determined, although it is actually rather difficult to say that it had ever been determined because it was sort of evolving, even all the way through Parliament, as you can see. But at each stage, and as time went on there was much more of the selling and much less of the finding out what people would agree with, you got to that stage where the consultation was more of a process of selling it to people who you needed on board, like the CBI and others."[176]

A further objective in carrying out consultation was to legitimise the rule-making process and the resulting rules, primarily by involving all those considered to have an interest. One aspect of this was the creation of a feeling of confidence amongst consultees. Furthermore, one important result of public consultation, which provided further legitimacy for the rule-making process, was perceived to be the opening up of the political debate to some degree of wider public scrutiny, or at least the putting of some positions taken on contaminated land issues into the public domain:

"... This whole process was to get people like Small and Medium-sized Enterprises to have confidence that they would be listened to - not unchallenged; not uncritically, - but that their point of view was

[176] Interview with anonymous Departmental source.

understood in Government … And getting people to understand that I saw the whole issue in those terms was important. I've got words down here about legitimisation; that is legitimising both the process, and through the process, the product, (the new regime) was part of the task of consultation … First, let's say it's legitimisation. That included what I mentioned earlier as 'playing the sides off against each other'. That's not strictly right. It involved getting people not only to look at the motes in their own eyes, but also to accept that when they wanted out from under [a contamination problem with land they owned] they would be passing it on to somebody else. So the legitimisation included getting people to face up to where they, in getting out from under, couldn't just dump it on someone else, maybe on the taxpayer … The other major part (probably the pre-'*Paying for Our Past*' phase), was, as much as anything, about generating confidence. For whatever reason, good or bad, real or imaginary, the Section 143 consultative process had generated a crisis in confidence in brownfield sites … so legitimisation and confidence-building were both major parts of the consultation process, writ large. That shows in the particular terms of *Paying for Our Past*. If you look at it, it had three legs: the factual; the issues; but also preliminary conclusions. We could have gone for an entirely open-ended consultation, and that looks, on the one hand, more open-minded. But that could have led to some people rushing off and saying 'you're about to do something' which we had had no intention of doing. Hence we put it in the form of preliminary conclusions which gave people a clear idea of the way we were thinking of going. It gave them something to respond to. So they were given the facts, the questions, but they were also given draft answers against which to respond; and that was a confidence-building measure. It was also an insurance against bias. You've talked to me about "private" consultations. And I know that the academic commentators talk about some people having 'privileged access' to the rule-making process. Well, the best antidote to that is to show where

the rule-makers have got to, and then everybody has got something to kick against ... A consultation exercise in this sort of area which did not, at the very least, give Friends of the Earth and RSPB or whoever a proper chance to participate, for their views to be properly considered, would have been a failure. So we had to make sure that all views were able to be brought in, and that included those of the enforcing authorities ... The basics remain common [between public and private consultation], but the formal public consultation probably is where the legitimisation occurs, both of the process and then the product - the environmental rules; the legislation; the subordinate legislation and so on. [One hopes that those] are accepted by the people who've got to live with them, whether it's a question of making them work, or of living with the consequences."[177]

With regard to the influence of the consultation processes, it seems that the weight afforded to responses by consultees may vary according to the nature of the particular consultee:

"In the very early policy stage, I suspect that some of the responses [to the big general consultation exercises] might have set the tenor for the whole thing, it might have ... re-enforced this idea that we weren't going to do anything dramatic, different, wild, exciting, we were just going to stick with the 1870's system, but update it"[178]

"Yes, there are some responses you would turn to immediately, but you read them all. I learned a salutory lesson about that on an earlier occasion. Under a policy responsibility of mine, a letter came in from a Local Authority Borough Solicitor for draft reply. I read it, to be frank, over my lunch, because I reckoned that I would get through three pages

[177] Interview with Dr Neil Jackson.

[178] Interview with anonymous Departmental source. The reference to "the 1870's system" is to the Statutory Nuisance regime, which dates from the late nineteenth century and is now found in Part III of the Environmental Protection Act 1990.

easily enough … and it was quite clear that what he said was wrong. But it stopped my lunch! Because, although he had got it wrong, he'd perceived quite rightly that, without knowing it, we'd got it wrong but not in the way that he understood … So you look at all responses. One does so for what they tell you. Yes there was something of a head count [as the usual practice says, even confidential responses will be included in any published numerical analysis] … There was also a structured assimilation process amongst my team and me to make sure we took on board what we were told. If we hadn't done so, there was going to be the Parliamentary process. These players were all experienced enough to get amendments down that would attack what was proposed …"[179]

However, access to the informal processes and direct access to Parliament would not lead powerful consultees to neglect the public exercises:

"I think you get it both, I think you know the big players would do it direct at a political level, but would also not miss their opportunity to whack in the same comment, in reply to [the public exercises]."[180]

The method of identifying consultees who were to be provided with the consultation paper without having to ask for it, was the "usual" system of circulating amongst core representative bodies (and other powerful interets):

"In this case (as in all other consultation exercises I'd been engaged with up until that date) we put together a list to whom it was sent direct. We aimed to include all organisations, like the representative bodies for major industries, that appeared to us to have an interest affected by the withdrawn regulations, or who had already taken part in the resulting debate. Sometimes it would be a surprising one. In the

[179] Interview with Dr Neil Jackson. The implication here is that the threat of powerful interests exerting their political influence through the Parliamentary process enhanced their (already substantial) influence during consultation as well.
[180] Interview with anonymous Departmental source.

environment field for example, I find the Royal Society of Protection to Birds a very expert and informed lobbyist, not just an advocate for their point of view. Probably a lot of people got it who didn't quite expect it, or didn't want it. I should think we erred on the side of excess. So it was the usual way of getting round the usual suspects."[181]

5.3.2 Contaminated Land Consultation and the Stages of the Rule-making Process

We saw in Chapter One that the Rule-making Process could be broken down into a number of stages,[182] as follows:

Stage 1: Ignition Stage – problem needing attention identified
Stage 2: Problem assessed to determine the type of action needed
Stage 3: Assessment and political pressure leads to policy proposals, inc. rules
Stage 4: Legal basis for action provided (if necessary)
Stage 5: Implementation and decision-making
Stage 6: Political and legal challenges to implementation

What is striking about the contaminated land rule-making process as a whole, is not only the number of occasions on which the views of consultees were sought, but also the various stages of the rule-making process[183] at which they were sought. Views were sought at stage 2, where (following the identification of a problem) the problem is assessed objectively to determine what kind of action is required (if any).[184] Stages 2 & 3, formulation of policy proposals (including rules), were the stages at which the *Paying for Our Past* exercise was carried out and the provision of the legal basis for action (stage 4) was the focus of a number of consultative processes.[185] Perhaps more unusually, the implementation stage (5) appears to have also involved wider

[181] Interview with Dr Neil Jackson.
[182] See Chapter One, Section 1.2.2.
[183] See Figure 1.1 in Chapter One.
[184] An example being the consultation with certain groups during the review of contaminated land policy.
[185] Those during the passage of the Environmental Protection Bill and the Environment Bill.

participation[186] and the nature of the rule structures (leaving points of detail and principle to secondary or tertiary legislation) allowed the detailed implementation to form the basis of challenge (stage 6) to the rules themselves and the policy underlying them.[187] Whereas it is more usually implementation over a period of time and experience of the rules and policy in practice (together with changes in perceptions of public policy) which results in political and legal challenge to implementation, the extended gestation of rules to deal with contaminated land issues[188] has allowed a sustained (primarily political) challenge to them. This lengthy development process, coupled with multi-layered rule-systems, provides a number of points in the rule-making process at which such challenge can be made.[189] Indeed, the experience of contaminated land rule-making suggests that stages 1 to 6 of the rule-making process can be completed without full implementation[190] and the process continues straight through to a further stage 2 (assessing the problem to determine the type of action needed), then through the remaining stages.[191] Furthermore, an interesting feature is that the demands of the policy community have lead to a particular rule-type and structure being developed[192] which in turn provides an increased opportunity for input by that policy community.

Having considered in Chapter Four the rules which have been developed as a result of the contaminated land rule-making process, part of the analysis of responses to *Paying for Our Past* will identify the preferences expressed by consultees and the form of this expression.[193] Whilst analysis of publicly expressed preferences is valuable, one interesting aspect of rule-makers seeking preferences (or "demands") from individuals within interest groups through the "private" consultation exercises is that discussions on this level may facilitate more open discussions and communication of positions

[186] On what information to include on the s.143 Registers.
[187] The withdrawal of the s.143 system following consultation on it.
[188] Resulting, in part at least, from the use of framework legislation and more complex rule-systems to provide detail.
[189] Which is reflected by the abandonment of one rule-system and the extremely lengthy time scale for the formulation and implementation of another.
[190] Although this may mean that stage 5 is not completed.
[191] In this sense, the Contaminated Land rules are currently between stage 4 and 5, for the third time, having 'refused' first and second time round.
[192] See Chapter Four.
[193] See Chapter Six.

than if consultation takes place solely on a group, or other public, basis without the prior informal debate:

> "... there were certain issues, like with the insurers, where it was absolutely necessary to consult with them just to see what their real concerns were, not what you thought. And interestingly that's where things like [XXXX] Bank were important because if you could get a major player from any of the groups to sort of break away, and discuss things directly, honestly and possibly even off the record, you discovered that what they were saying as a group wasn't really what they were prepared to accept individually."[194]

There may be a number of objectives in conducting a public consultation exercise and so the scope of the exercise and the presentation of the issues may depend upon those objectives. Before moving on to consider what the objectives of consultation may have been and evaluating how the exercise may, or may not, have contributed to meeting those objectives,[195] the way in which each of the Contaminated Land Rule-making issues were addressed in the *Paying for Our Past* consultation paper will be briefly examined.

5.4 Contaminated Land Rule-making Issues and *Paying for Our Past*

This section provides analysis of how the framework of Contaminated Rule-making Issues developed in Chapters One, Two and Three were approached by the rule-makers in *Paying for Our Past*. It comprises analysis of both the background material presented in the paper and the questions explicitly asked of respondents.

[194] Interview with anonymous Departmental source.
[195] In Chapters Six & Seven.

5.4.1 Issue 1(a) The Rôles of Central and Local Government and Other Bodies

The primary concern of the rule-makers appeared to be the number of regulators which caused uncertainty and confusion, which was often exacerbated by overlapping responsiblities.[196] The value of local knowledge held by local authorities was recognised,[197] however, the regulatory system was intended to be simplified and provided with greater certainty by the development of a single Environment Agency[198] which was to have a central rôle.[199] Although the Environment Agency was to provide expertise at a national level and have responsibility for the most difficult environmental problems,[200] initial responsibility for issues affecting solely land was to continue to reside with the local authorities.[201] It was implicit in the questions for respondents ("the Questions") that "regulators" would have a high degree of involvement[202] and the respondents were explicitly asked whether it was appropriate for the Department of the Environment to have a rôle regarding the provision of information and development of risk assessment guidance.[203] One aim of the planning authorities and development agencies was questioned (that of encouraging the re-use of "Brown" land)[204] and the issue as to whether the Environment Agency should be given general responsibility for contaminated land guidance was the subject of the final question.[205] However, the Questions raised these issues in a very controlled fashion: they included an assumption that the basic framework of regulation was correct and really sought confirmation that some marginal changes were appropriate. A good example is Question (3):

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[196] *Paying for Our Past op cit.*, paras 3.2.3.5.
[197] *Ibid.*, paras 4B.7-4B.8, though flexibility at local level is is also demanded in order to provide local autonomy.
[198] *Ibid.*, para 3.4
[199] *Ibid.*, para 4G.8.
[200] *Ibid,* para 3.4.
[201] *Ibid.*, para 4G.2.
[202] See Questions (2), (3), (4), (9) and (14).
[203] See Questions (11) and (12).
[204] In Question (14).
[205] See Question (15).

> "Should regulators make greater efforts to help to increase understanding in markets of what they do, especially about protecting the unowned environment?"

The underlying assumption was that the system of regulation which the regulators and others operated within was broadly correct. It seems implicit that the real issue was one of communication and presentation, rather than substantive amendment of the regulatory system. Thus, although this consultation paper appears to provide the greatest scope for respondents to comment,[206] the framework of the Questions in fact gave them very little room for creative thinking.[207] The actual responses to the consultation paper are analysed in the next chapter. It is worth noting here, however, that questions drafted in terms designed to elicit binary (yes/no) responses do not by their very nature tend to invite a variety of views as to the proper rôles of the government, regulatory agencies, the courts and the market, particularly when posed in the context of a clearly identifiable regulatory framework. Even within such a constrained approach, however, the document failed to consider vital issues, such as funding for the various regulatory agencies.[208]

5.4.2 Issue 1(b) The Need for a New Rule-system

Paying for Our Past identified problems with existing rule-systems in a very broad sense by mentioning some problems with regulation, whilst confirming that regulation was still required.[209] One of the five objectives for arrangements for dealing with contaminated land was to minimise financial and regulatory burdens.[210] Such an objective may lead to a number of approaches being taken in order to further it, the

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[206] For example, in comparison with one which asks the question "which land uses should we include on our Registers of contaminated land".
[207] Although there was, of course, nothing to prevent wider points being made in addition to, or instead of, simply responding to the questions as put.
[208] As regulators, rather than as remediators of contaminated land (in respect of which some comments are made, such as the levels of take-up of Supplementary Credit Approvals by local authorities: *Paying for Our Past, op cit.*, para 2.16). Addressing questions of funding may also have been difficult due to the precise form of the new Environment Agency not being identified at that time.
[209] *Paying for Our Past, op cit.*, para 2.3.
[210] *Ibid.*, para 4A.5.

two extremes being: a "comprehensively rational" approach, where every possible method of securing policy objectives is considered in order to establish whether there is a "win-win" system so that the other aims are furthered and "burdens" are reduced as well (which requires some creative or lateral thinking); or an incremental approach may be taken, with the existing systems and general approaches being set as boundaries beyond which new policy measures may not pass.[211] The approach taken in *Paying for Our Past* was clearly towards the latter end of the spectrum,[212] with the existing statutory and common law provisions being set out,[213] possible defences being identified[214] and points made regarding the funding of the burden.[215] The sense of incrementalism is enhanced by discussion of the s.143 registers[216] and of the s.61 provisions;[217] the clear impression being that what was needed was an improvement and consolidation of these proposals. The desire to avoid any increase in "burdens" is also reflected in the explicit suggestion that the (then) current levels of expenditure could well be sufficient to address the problem, provided that this was well targeted.[218] With regard to the Questions posed, there was no clear suggestion that any new rule-system was envisaged, or thought necessary. The one Question (Question (6)) that touched upon the possible need for a change in the rule system was itself framed as an invitation to agree with the proposition that minimum change was required:

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[211] For consideration of the 'incremental' and 'comprehensively rational' approaches, see Chapter Two, where the main problems of comprehensive rationality were identified as time and expense.

[212] A harsh view of the whole process of contaminated land rule development could be that it combined the time and (to a lesser extent) expense of comprehensive rationality with the restricted consideration of options of incrementalism. Although policy approaches did include attempts to introduce registers and the introduction of new planning guidance as well as the new regime, and the resistance of the policy community to proposals was a significant factor in devising measures, there is no doubt that the policy of not increasing regulatory 'burdens' was the major constraint on policy implementation. Where more radical or creative proposals were mentioned in Questions, these were in a leading form, suggesting that they were not appropriate – see, for example, the way that the issue of Funds was dealt with in Q. 10. This approach limits policy options to existing regulatory techniques (mainly of the 'command-and-control variety) and may miss opportunities to develop or utilise other techniques (see, for example, Jewell, T. & Steele, J. *Law in Environmental Decision-making, op cit* and Gunningham, N., *et al Smart Regulation: Designing Environmental Policy, op cit*). Such an approach may frustrate objectives of working with the market and not increasing regulatory burdens, at least in the sense of the number and complexity of rules, and possibly reflects a rather simplistic view of not increasing 'burdens'.

[213] *Paying for Our Past op cit.*, paras 4B1-14 and 4C1-8..

[214] *Ibid.*, para 4D.1-13.

[215] *Ibid.*, para 4E.1-19.

[216] *Ibid.*, paras 4F.1-3, together with mention of the availability of information from private sector sources.

[217] *Ibid.*, paras 4G.9 & 11.

[218] *Ibid.*, para 2.14.

> "Do you consider that, subject to any further consideration of the House of Lords judgment in the Cambridge case, there should be the minimum of change to private, Common law, undertaken only where it causes tensions or uncertainties, and not undertaken solely to keep Common law liability in line with regulatory obligations?"

This hardly suggests that contributions were being welcomed on a broad range of possible policy approaches. In fairness, a policy-maker may also be criticised for lacking sufficient structure in a consultation paper. The use of more open questions than this would, however, seem a requirement for any process which seeks to identify the views of the policy community, particularly on an issue for which there was no record of successful rule-making.

The underlying assumption in the consultation document was, therefore, that minor modification of the Statutory Nuisance regime provided the way forward for dealing with contaminated land issues; and that what was required was clarification in areas of uncertainty (for example, as regards the rôles of the various regulators) rather than any significant changes. Such an assumption could, of course, have been challenged by respondents, but the focus on Statutory Nuisance was not made explicitly and so it may not have been clear to all of them that this was the intended approach.[219] The great attraction of clarifying the (existing) Statutory Nuisance regime as it applied to contaminated land was that this fitted in with (or at least could be presented as fitting with) the constraining general policy of not increasing regulatory burdens. The great failing of not making this intention known was that respondents were not directly asked about the conceptual and practical problems with using this system.

[219] Although the provisions under Part III of the Environmental Protection Act 1990 are considered in a number of places in the document (see, for example, para 2.24), there is no indication in the preliminary conclusions, or elsewhere, that this is to form the basis of any new rule-system. If this was to provide the basis for new measures, then one question which really had to be asked was what the problems with the existing system were. Giving a clearer indication of this may have prompted practical and conceptual advice as to how to implement the policy objectives within it.

5.4.3 Issue 1(c) Levels of Certainty and Flexibility

Issues of certainty, flexibility and (to a lesser extent) fairness are at the heart of the consultation paper. Existing uncertainties affecting the contaminated land market were identified,[220] and areas/aspects of uncertainty were considered in detail (such as issues concerning regulators' powers;[221] costs recovery;[222] the need for it to encourage voluntary action;[223] the use of guidance to address problems of uncertainty;[224] and the need to avoid unnecessary differences between common and statute law[225]). Whilst enhancing certainty was the priority (and the consolidation of various powers within a single Environment Agency was expected to help provide some certainty),[226] the complementary need for flexibility through providing discretionary powers was also considered.[227] The need for some flexibility to allow local knowledge and priorities to be taken into account was suggested,[228] but so was the need to enhance certainty by adapting common approaches to, and standards for, site investigation and appraisal.[229] The Paper emphasised the fact that regulators may negotiate with regulatees, and alluded to the way in which such negotiation could provide flexibility, even in the context of strict rules.[230]

As we have seen, consideration of certainty and flexibility may implicitly include elements of fairness: if sufficient certainty for anticipating the consequences of actions is not provided this may be perceived as "unfair", whilst a certain, but rigid and inflexible system may be similarly viewed. The consultation paper also considered fairness issues explicitly, suggesting: that sharing liability may be fairer on individuals;[231] that it was possible for liability for certain individuals to exceed what

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[220] *Paying for Our Past op cit.*, paras 1.6-7.
[221] *Ibid.*, paras 3.11-16.
[222] *Ibid.*, paras 3.17-19.
[223] *Ibid.*, para 4B.14.
[224] *Ibid.*, para 4F.10.
[225] *Ibid.*, para 4C.7.
[226] *Ibid.*, para 4B.6.
[227] *Ibid.*, para 3.8.
[228] *Ibid.*, para 4B.7.
[229] *Ibid.*, para 4B.8.
[230] *Ibid.*, para 2.37.
[231] *Ibid.*, para 4B.17.

might be considered their true responsibility (generally in professional capacities);[232] that there may be a need to limit liability to that relating to present uses of land;[233] that there was a possibility of general defences (such as unforeseeability of damage and regulatory compliance) being used to impart some additional fairness;[234] and that the consequences of the operation of the *caveat emptor* rule were often unfair.[235]
These concerns were reflected in many of the Questions for respondents which related to: the need for greater consistency in regulators' powers;[236] providing greater certainty to the market through explanation of regulators' rôles;[237] the fairness of pursuing multiple parties and of providing limitations for certain parties;[238] avoiding unnecessary uncertainty between common and statute law;[239] the availability of certain defences;[240] and the provision of guidance.[241] One impressive feature of the Questions and (particularly) the main text of the document, is the clear appreciation and articulation of the need for certainty, flexibility and fairness and the tensions which these conflicting needs may produce. This led on to limited suggestions as to how to reconcile the conflicting needs: by providing discretionary powers, but within a framework of guidance.

5.4.4 Issue 1(d) Whether Issues are Polycentric or Justiciable

The breadth of the issues covered in the consultation paper and in the Questions indicates that contaminated land issues were, and were perceived as, polycentric.[242] The importance of contaminated land in planning was stated explicitly[243] and so was

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[232] *Ibid.*, paras 4B.19-20, although the success of professionals, such as administrative receivers and trustees, in limiting their liability may also reflect their access to and influence upon Government and the rule-making process.
[233] *Ibid.*, para 4B.21.
[234] *Ibid.*, paras 4D.10-13.
[235] *Ibid.*, paras 4F.8-10.
[236] Question (2).
[237] Question (3).
[238] Question (4).
[239] Question (6).
[240] Question (8).
[241] Question (15).
[242] See, for example, Questions (11) – (14), dealing with aspects of conveyancing, the *caveat emptor* rule and the planning authorities and development agencies.
[243] *Paying for Our Past, op cit.*, para 4F.13.

the importance of the rôles of the planning and development bodies.[244] However, as an incremental approach was taken, without consideration of a significant new rule-system, there was no discussion of the justiciability of issues.[245] Possible reasons for this are; that using existing measures and structures includes an assumption that existing decision-making structures are appropriate; that if (conversely) the measures have not yet been finalised in any detail, questions of justiciability will not be clearly apparent at that stage; and that the nature of questions of justiciability is such that they are unlikely to be considered in a consultation paper.

5.4.5 Issue 2(a) Implementation of the Environmental Principles

The issues arising from implementing the environmental principles were acknowledged in the first paragraph of the consultation paper[246] and the principle of sustainable development was outlined within it.[247] The "polluter pays" principle was stated to be "central" to any regulatory regime[248] and its application to contaminated land issues was considered in some detail.[249] These principles, together with that of proportionality, were also dealt with explicitly or implicitly in a number of places.[250] A number of Questions addressed aspects of implementation of the "polluter pays" principle[251] with one (Question (9)) asking directly whether one aspect of proposed liability would be consistent with it.[252] Sustainable development and proportionality considerations were presented as part of the priorities for policy in Question (1) and sustainable development was, of course, at the heart of the use/re-use of contaminated land presented in Question (14). All of this might lead one to assume that environmental issues and the implementation of the environmental principles was an integral part of contaminated land policy as presented in the consultation paper and

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[244] *Ibid.*, paras 4G.4-7.
[245] In contrast to the close attention given to how existing arrangements may be better co-ordinated.
[246] Para 1.1 recognising the problems of tackling damage to the environment without endangering the economic growth required to fund works (sustainable development) and the problems of allocating costs when contamination took place long ago or the polluter is unavailable (the "polluter pays" principle).
[247] *Paying for Our Past, op cit.*, para 2.2.
[248] *Ibid.*, para 4E.1.
[249] *Ibid.*, paras 4E.2-19.
[250] See, for example, paras 4A.1-5 and 4B.16.
[251] See Questions (4) & (7)-(8).

considered by the policy-makers. But on a closer examination, the importance of environmental concerns appears largely confined to identifying and scoping the issues to be addressed. Vital though this process was, the way in which the issues were addressed was then dominated by other concerns:[253] primarily the operation of the property market. Consideration of the "polluter pays" principle took place in the context of establishing a viable pattern of liability in the property market, with possible defences and limitations shaped with that in mind. Having established that the "polluter pays" principle was "central", the paper then discussed its application in the (admittedly difficult) area of contaminated land, without any consideration of what the principle was seeking to achieve. In considering how to address contaminated land, the emphasis was on identifying "real" risks[254] and limiting regulatory requirements to situations where voluntary action has not been taken, and sites have been identified as "priorities" (within a context of protecting economic growth). In this sense, the "foundational policy"[255] aspect of sustainable development seems to have been the major influence of the environmental principles. In the contaminated land context, the policy was being developed in the Paper with the objective of environmental protection subordinated to a determination to operate within the bounds of, and without prejudice to, the property market.

5.4.6 Issue 2(b) The Rôle of Scientific Standards

With the way forward for contaminated land policy viewed as implying a need to reduce uncertainties, it was no surprise that the need for scientific standards featured quite strongly in the paper. Regulation was presented as slow to incorporate evolving scientific standards and these were thought to be better applied through a market-based approach.[256] The objective of acting on unacceptable risks[257] requires the development of scientific standards in order that reasonably objective determinations as to risk can be made. Improvements in the provision of standards were demanded by

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[252] The issue of owner liability being presented in a characteristically leading fashion.
[253] One area of environmental policy which does arise is the issue of remediation standards, discussed below.
[254] Without really addressing how these 'risks' are shaped and perceived.
[255] See Chapter One.
[256] *Paying for Our Past, op cit.*, para 2.3.

the policy community[258] and guidance on approaches to risks (including standard setting) was seen as a continuing priority.[259] This was also perceived as an important factor in aiding the effective operation of the market.[260] One area of uncertainty with regard to policy was whether research on standards should be the responsibility of the Department of the Environment or of the Environment Agency.[261] The need for standards was implicit within the risk-based approach proposed in the objectives in Question (1); was explicitly raised as a priority in Question (12); and the question of which body was the appropriate provider of guidance (including standards) was raised in Question (15).[262] Thus the issue of providing scientific/technical standards was presented as complimentary to providing regulatory certainty,[263] so that there would be a "two-pronged" attack on market uncertainties. Two interesting features are (i) that the question as to who should be the provider of standards was raised but with very little information provided as to how these standards were to be set; and (ii) that the standards themselves were implicitly presented as being value free, with no explicit acknowledgement of the non-scientific influences, such as economic and social factors,[264] which are very important factors in setting them.

5.4.7 Issue 2(c) Dealing with the Physical Nature of Environmental Issues

The physical nature of the issues being addressed is obvious,[265] and the physical actions required to address them were explicitly dealt with.[266] Wider physical damage to the un-owned environment was mentioned[267] in the paper and was specifically

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[257] *Ibid.*, para 4A.5.
[258] *Ibid.*, para 4B.8.
[259] *Ibid.*, para 4F.11-12.
[260] *Ibid.*, para 4F.16.
[261] *Ibid.*, para 4G.8 & 10.
[262] The precise extent of such 'guidance' being unclear. The main area of doubt would seem to have been whether this would include detailed guidance on matters such as enforcement, or even liability, as well as technical standards and methodologies.
[263] Through consolidating and clarifying powers and duties.
[264] See Chapter Three. Although it was stated that there should be wide consultation on such guidance (para 4G.10), this appears to have been with the view of educating the market at least as much as providing for participation.
[265] With the title "*Paying for Our Past*" recognising the nature of the problem and the introduction discussing the physical legacy of past actions.
[266] See, for example, paras 2.23 & 2.33-34: where the failure of the common law to ensure that damages are used to carry out remedial works was discussed and developed in para 4C.4.
[267] *Paying for Our Past, op cit.*, para 3.16.

mentioned as an area where regulators should provide the market with more information about their activities.[268] The future impact of physical damage was also mentioned, where changes in use may lead to further remedial works being required.[269] This might have prompted consideration of the issue of remediation standards[270] and the need for "Completion Certificates".[271] In fact, however, only the former of these was considered in the paper and Questions, and the latter issue, which is a vital one once the future implications of physical harm are recognised, has been a contentious issue throughout the following rule-making process.[272] One important reason why this matter was not raised (and which would have had major implications regarding certainty for the market), will have been its implications for public funds, with the State in one form or other effectively underwriting remedial works carried out to an approved standard. The reluctance to deal with this issue here[273] may have reflected the limitations of prevailing scientific standards so that the State was (and still may be) unwilling to assume responsibility for this area of uncertainty. In this way, a hierarchy of policies becomes apparent, with market certainty a significant policy objective, but the protection of the State resources a superior one.[274]

5.4.8 Issue 3(a) Clarification of Policy Objectives

Overall policy aims were set out early in the paper,[275] which can be summarised as "Sustainable development, preventing new contamination where possible and remedying it where practicable, working within the operation of the market, taking a "suitable for use approach", aiming to re-use 'brown' land, with action being proportional and prioritised". A further, key, objective was to avoid damaging the confidence of the property market in contaminated land.[276] These policy objectives were, however, subject to overriding policy imperatives that burdens should not be

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[268] In Question (3).
[269] *Ibid.*, para 4B.21.
[270] Discussed below.
[271] See Chapter Four.
[272] *Ibid.*
[273] Which the analysis in Chapter Six will suggest should have been apparent to the policy-makers.
[274] This hierarchy is reflected elsewhere, such as with the policy of not increasing 'burdens' being superior to, and an overriding constraint, in relation to other policy objectives.
[275] See paras 2.1-7.
[276] *Paying for Our Past, op cit.*, para 4A.4.

increased and the public purse should not be exposed. The objectives were re-stated with the additional objective of minimising burdens and respondents specifically asked their views on them in Question (1). Again, the question could be lauded for presenting clear objectives and criticised for being rather leading. The major problem seems to be that these broad objectives were not really developed in any clear way, so that they were ultimately lacking in substance or definition and rather meaningless. The Questions which followed focus on very specific areas, such as the *caveat emptor* rule and whether particular defences should be provided but this was something of a quantum leap from having "proportional and prioritised action". There was little attempt really to consider how these objectives could be furthered by a rule-system or whether the existing system could really be utilised to give effect to them. Again, the problem of the "burdens" constraint arose, with few options realistically open for implementing or expanding upon the identified policy. A further difficulty faced by the policy-makers was that objectives such as taking a "proportional" approach were not really amenable to clarification in a consultation document as they were reliant upon case-by-case consideration. Perhaps the best that could be achieved was to present the overall approach but also to provide a clear indication of the proposed rule-making structure.

5.4.9 Issue 3(b) Re-use of Brownfield Land/Relieving Pressure on Greenfield Sites

This was, of course, a key aspect of the proposed policy[277] and would make a major contribution to sustainable development. The way to achieve this was viewed as providing market confidence (through certainty) regarding the liabilities which might result from dealing in contaminated land.[278] Question (14) then suggested those who might play a part in securing this objective, whilst also raising the question whether the objective was indeed appropriate.[279]

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[277] See the discussion of Policy Objectives, above.
[278] *Paying for Our Past op cit.*, para 1.2.
[279] The analysis of responses in Chapter Six will identify that this was perhaps the least contentious policy objective.

5.4.10 Issue 3(c) Identification of Sites/Dissemination of Information - Registers

Over four years on from the identification of contaminated land as an issue requiring attention, and the identification of a lack of information as to the extent of the problem,[280] no national survey of land contamination had been undertaken and so estimates as to its extent varied widely.[281] The consultation paper briefly discussed the nature and scale of the problem[282] and the history of the registers legislation.[283] These were no longer considered necessary as the private sector was considered able to meet some of these needs.[284] Although some local authorities may have collated information which it may have been possible to request under the Environmental Information Regulations 1992,[285] market distortions resulting from inadequate information were identified as requiring action,[286] together with the problems of the operation of the *caveat emptor* principle in this context.[287] The Paper canvassed possible alternatives for providing and disseminating information. These included the provision of Land Quality Statements to accompany planning applications and which would be made public,[288] and the introduction of a duty of disclosure of information relevant to land contamination in transactions involving domestic and small or medium sized commercial vendors.[289] Overall, it was clear from *Paying for Our Past* that the balance had shifted in the provision of information from the public sector (through local authorities) to the private sector (through commercial surveys and information dissemination and through adjustments to the conveyancing process). This was followed through by Questions (11) and (13) which stated that it should be for government, local authorities and professional practitioners to identify and advise on best practice for information dissemination, particularly through the conveyancing

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[280]House of Commons Environment Committee; First Report *Contaminated Land*; Session 1989-90 170-I, *op cit.*

[281] For some of the reasons for such variations, see Chapter Three.

[282] *Paying for Our Past, op cit.*, paras 2.8-12.

[283] *Ibid.*, paras 4F.1-3.

[284] *Ibid.*, para 4F.4.

[285] SI 1992 No. 3240 (as amended) See para 4F.5.

[286] *Paying for Our Past, op cit.*, para 4F.6.

[287] *Ibid.*, 4F.7-9, though the element of certainty which it provided was also recognised: para 4F.10.

[288] Suggested by the Royal Institute of Chartered Surveyors: para 4F.14-15.

[289] *Ibid.*, para 4F.19, although the element of fairness (as well as market effectiveness) which this suggestion sought to provide would seem to have been better served if the nature of the purchaser was the determining factor, rather than the vendor.

process, and that there should be no change to the principle of *caveat emptor*. The question then invited respondents to concur with these opinions.

5.4.11 Issue 3(d) Who Pays and For What?

This issue was dealt with fairly comprehensively, although the theoretical basis for determining and apportioning liability tended towards relatively intangible concepts such as "fairness", rather than considering the complex issues underlying concepts such as the "polluter pays" principle.[290] This identified the funding of remedial works as a crucial aspect of any proposals and this is not surprising as it is an area where environmental policy came up against well established policies and principles relating to private property. Where the potential for eroding private property rights and imposing liability relative to the use of property was apparent, the need to compromise and include limitations and exceptions from liability was perceived.

(i) Joint & Several Liability

This issue was outlined in the text of *Paying for Our Past*[291] and forms part of Question (4), although the phrase "Should regulators continue to be able to pursue one or more persons?... " was somewhat opaque and contradicted, in part, the outline of the current position in the text.[292] The implication of the form in which the question was posed was that no changes were intended to the pattern of liability and that any change would be to reduce the overall burden only (complying with the "regulatory burdens" policy).

(ii) "Innocent" Owner Liability and Other Exemptions

This area is one which directly intruded upon property rights and the justifications for it were generally based upon effectiveness rather than equity. It also produced a

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[290] As to these points, see the discussions of Issues 1(c) and 2(a), above
[291] *Ibid.*, para 2.43-45.
[292] Which identified that different statutory provisions had different positions as to joint and several liability.

conflict between two of the "higher" policies of not increasing regulatory burdens and not increasing public expenditure. There is much discussion of the position in the text of the paper[293] which highlighted the potential liability of those indirectly involved with land transactions and the effect of any limitations on the public purse, and which identified the politically difficult position in relation to homeowners. Again, the relationship with the "polluter pays" principle was identified.[294] The end result was an assumption that all property owners should be responsible for the state of their land, subject to some possible limitations, together with a reiteration of the fact that the funds for remedial works must come from somewhere (Questions (4) & (9)). Thus in this one aspect of the conflict between the need to avoid imposing regulatory "burdens" on the one hand, and the need to protect the public purse on the other, it seems that protecting State resources was the more important policy.

(iii) "Deep Pockets"/Lender Liability

This issue was central to any market-based system for land remediation. The text of *Paying for Our Past* recognised the dangers of excessive lender liability for development funding and, in line with the "minimisation of regulatory burdens" policy, suggested that liability should remain as it was.[295] The Questions include consideration of the need to have limitations on liability for lenders.[296]

(iv) "Orphan Sites"/Funds

It was recognised in *Paying for Our Past* that "orphan sites" were a potential problem, despite the broad nature of the suggested liability structure. Perhaps more importantly, it was also recognised that the public sector may have to take responsibility in such circumstances (in order to avoid risks to health or unacceptable environmental damage).[297] Thus, this was one area where it was recognised at an early stage that the conflict between contaminated land policy and the "higher" policy of avoiding public

[293] See, for example, paras 3.20-23, 4B.19-20 & 25 and 4E.3-12.
[294] *Ibid.*, paras 4E.3-4.
[295] *Ibid.*, paras 4B.18-24.
[296] Question (4).

expenditure could not be easily resolved.[298] This may be reflected in the fact that the Questions did not explicitly raise the issue of "orphan sites" at all.[299] As it was not completely clear at the time of the consultation paper that the Government would view future contamination as being prevented by command and control regulation,[300] there was some discussion of insurance as the way of spreading risk in a general sense.[301] Other forms of advance funding were mentioned in the text; bonds, levies and sectoral funds, although advance funding in this way was considered to be acceptable on a voluntary basis only[302] (as with insurance). Having discounted mandatory funds in the text, the Questions then invited agreement with the view that liabilities should be met as they fall due, rather than in advance through funds or insurance, but that voluntary arrangements for sharing liabilities should be encouraged.[303] The sense that one gets from the reading the document is that in the area of "funds", a major concern was to avoid any suggestion that a new regime along the lines of "Superfund" was being considered, as the perceived problems of its operation had resulted in aversity to such an approach amongst many members of the policy community.

(v) Strict or Fault Liability

The potential impact of changing the pattern of liabilities on the ability of the private sector to fund remedial works was considered in the paper.[304] Some advantages of strict, as opposed to fault-based, liability for environmental damage were set out - certainty, efficiency and effectiveness[305] - and the international movement towards strict liability was acknowledged.[306] The potential impact of this upon industrial

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[297] *Paying for Our Past, op cit.*, para 4E.6.
[298] Indeed, the analysis in Chapter Four suggests that this has still not been satisfactorily resolved.
[299] It is arguable that the Questions pertaining to 'funds' indirectly address the 'orphan sites' issue.
[300] So that the new regime would deal with historic contamination, primarily at least.
[301] *Paying for Our Past, op cit.*, paras 4E.15-17 & 19. It was anticipated that increased certainty resulting from the changes to contaminated land measures would assist in developing a market for environmental liability insurance relating to future activities.
[302] *Ibid.*, paras 4E14, 18 & 19.
[303] Questions (10) (a) & (b).
[304] *Paying for Our Past, op cit.*, para 2.14.
[305] *Ibid.*, para 4D.1.
[306] *Ibid.*, para 4D.2.

investment was raised[307] and the ability of defences to mitigate the harshness of strict (and other) liability considered.[308] The conclusion reached was that the prevailing mix of liability provided a reasonable balance between the interests of the regulators in: seeking remediation; protecting the environment; and providing redress for plaintiffs; the interests of industry; and (perhaps most importantly) the public purse.[309] With regard to defences, the Paper suggested that: there was a stronger argument for these in relation to historic contamination; that it might be reasonable to include "unforeseeability" as a defence;[310] but that it could be less reasonable to include regulatory compliance as a defence.[311] These conclusions were then presented in Question (8) by asking whether there should be any change to the availability of those defences and that of "State of the Art", in relation to historic pollution only.[312]

(vi) When Should The Public Pay

We have already noted the importance of the general policy of protecting the public purse and, although it was not considered as an independent issue in *Paying for Our Past*, it was clearly of paramount concern in all of the areas which were considered. This pervasive influence indicates that it was ranked above most others in the hierarchy of objectives and helped to shape the approach taken to other issues, such as liability for "innocent owners".

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[307] *Ibid.*, para 4D.3.
[308] *Ibid.*, paras 4D.4-8.
[309] *Ibid.*, paras 4D.7-9.
[310] *Ibid.*, para 4D.10.
[311] *Ibid.*, para 4D.11. Interestingly, the 'regulatory burdens' policy was used to justify this view; the suggestion being that such a defence would lead to overly defensive regulation in the future, thus frustrating the policy.
[312] Question (8) presents those issues in a relatively neutral manner, although it does assume a level of knowledge about the defences and their availability in the common law and regulatory contexts which may not reflect the information provided in the document itself.

5.4.12 Issue 3(e) Historic Contamination:

(i) Retrospective/Retroactive Liability

The approach taken in the review of contaminated land policy, being constrained by the broader policy objective of not increasing regulatory burdens (and taking an incrementalist view of this constraint), would suggest that new legal or other rules should not have resulted in retrospective liability, but should simply have clarified existing obligations. Thus liability may appear to be retroactive, in that the consequences of past actions may only become apparent after a long period of time but it should not be retrospective in the sense of making actions unlawful which were lawful at the time that they were carried out. The consultation paper identified this distinction[313] but did not consider the issue further.[314] Questions relating to changes to strict and fault-based liability, and to the availability of defences in relation to historic contamination may have appeared to imply the possibility of retrospective changes but the general tenor of the document was that the overall pattern and level of liability should not change significantly.[315]

(ii) Dealing with the Past and Future Differently

Issues concerning the availability of defences in cases of historical contamination on the one hand, and for the future on the other, were considered, and presented in the Questions for respondents, as quite distinct. Indeed changes were only presented as a possibility in relation to historic pollution.[316] For new pollution, one of the five key policy objectives set out was to prevent or minimise this and to make the "polluter"

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[313] *Paying for Our Past, op cit.*, paras 2.46-7.

[314] This may have been wise as the question of whether the resulting legislation did amount to a retrospective change in the pattern of liabilities was the subject of conflicting Counsel's Opinions, see Chapter Four.

[315] Although some retrospective changes would be inevitable unless changes were only considered so far as they would be 'downwards only' which would defeat the purpose of the whole review. The overall package of liabilities would, therefore, appear to be the key question and the need to protect the public purse where polluters were no longer available by imposing liability on landowners again seems to identify that policy objective as superior to others, even where its pursuit would result in retrospective liability (increasing the regulatory burden).

[316] Question (8).

pay for that which did occur.[317] Problems of trying to identify the state of knowledge or reasonableness of particular actions at particular times in the past were recognised,[318] and the possibility of an historic date from which general awareness of risks would allow more onerous liability to be imposed was mentioned.[319] This could be viewed as a further attempt to impart an element of fairness into a system of liability which includes some retrospective elements

5.4.13 Issue 3(f) Remediation Levels: Multifunctionality or Suitable for Use

Perhaps the clearest policy decision in the paper was that remediation was to be on the basis of "suitable for use", with any more thorough works being on a purely voluntary basis,[320] the rationale being that this was the most effective use of resources.[321] This technical standard for action was one of the five key objectives whose appropriateness was put to respondents in Question (1).

5.4.14 Issue 3(g) Blight

The problem of avoiding blight was identified as a key concern.[322] In the main, it was dealt with as an underlying, rather than specific, concern (most clearly in relation to the provision of information about contamination). For example, one of the few specific mentions of blight problems[323] was in relation to the possible blighting effect of the system of Land Quality Statements proposed by the Royal Institute of Chartered Surveyors.[324] Having rejected the s.143 system following consultation which suggested that the information may have been misleading or blighting,[325] the

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[317] *Paying for Our Past, op cit.,* para 4A.5.
[317] *Ibid.,* para 4D.8, though not put as a Question
[318] *Ibid.,* para 4D.10.
[319] *Ibid.,* para 4D.8, though not put as a Question for respondents.
[320] *Ibid.,* paras 2.4-5.
[321] *Ibid.,* para 2.12.
[322] *Ibid.,* para 1.1.
[323] A further mention is made in relation to the use of Development Agencies' rôles and use of grant funding where there are contamination issues in derelict land areas, to prevent the contamination element having a wider blighting effect: *Ibid.,* para 4G.6.
[324] *Ibid.,* para 4F.14.
[325] *Ibid.,* para 4F.3.

way forward was seen as improving the way in which the market was provided with information and the way in which it handled it.

5.4.15 Issue 3(h) Providing Incentives for Remediation

As the general approach to remediating sites was to be through the market, which would often involve development, it was conceivable that the planning system could provides incentives in one form or another. However, the issue of providing incentives directly was dealt with in *Paying for Our Past* only within the limited context of derelict land,[326] with no mention of central or local funding in any other situation. Fiscal incentives to develop contaminated sites were not considered, nor were disincentives to greenfield development which could direct investment towards contaminated sites.[327] The result of this was that the objective of recycling land was commended to respondents[328] without any indication as to how this might be furthered, other than by imposing liability or through the planning system in some unspecified manner.

5.4.16 Issue 3(i) Use of a Market-Led Approach

The market philosophy dominated the whole consultation paper,[329] with regulation being viewed as a method of correcting failures in the operation of the market and improving its efficiency and effectiveness. There was a perceived need for any measures to "... work with the grain of the market ..."[330] and the five key policy objectives suggested to respondents included the need to encourage the development of an efficient market in contaminated land..[331] This approach is not surprising considering the political climate in which policy-makers were operating at the time of the consultation paper, and there seems no reason to believe that a very similar approach would not be taken under our present Government.

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[326] See the previous section. There is also a mention of public expenditure in the form of Supplementary Credit Approvals (para 2.16), however, this is not linked to any incentive-based policy.
[327] For example, through a green field development tax.
[328] In the form of Question (14).
[329] See, for example, *Paying for Our Past, op cit.*, para 2.3.
[330] *Ibid.*, paras 4A.1 and 2.3.

5.4.17 Issue 3(j) Interaction/Overlap with Other Controls (inc. planning & common law)

The existing and potential overlap between contaminated land policy and planning[332] and the common law was recognised and considered in the consultation paper. The relationship with existing areas of regulation was also considered,[333] and it was acknowledged that s.61 of the Environmental Protection Act 1990 required review.[334] Recognition of the wider context of the planning system and the influences upon it was indicated by the way that the consultation paper commented that the planning system could help with contamination issues but left concrete proposals to the (then forthcoming) Planning Policy Guidance Note 23.[335] The matter was, correspondingly, omitted from the Questions for respondents.[336] The policy-makers did feel competent to consider changes to the common law. As well as highlighting some of the problems with using the common law and suggesting that it provided a method whereby the regulatory burden could be passed on to others,[337] they considered possible changes to it,[338] and concluded that there should be minimum change.[339] The discussion of the relationship between the common law and regulation is one of the less satisfactory themes of the consultation paper, particularly as it is rather confusing. It is not clear, for example, when discussing changes to existing defences, whether the Paper's suggestions related to the common law, regulation, or both. It is also unclear how the common law was to be "changed", and the wider implications of using statute specifically to amend the common law were not dealt with in any depth.[340]

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[331] *Ibid.*, paras 4A.5 and Question (1).
[332] See *Paying for Our Past, op cit.*, paras 2.26-7, 4F.13-20 and 4G.4-5 and paras 2.28-34, 2.38-9, 3.24-6 and 4C.1-8, respectively.
[333] See, for example, *ibid.*, paras 3.9, 12-14 & 18.
[334] *Ibid.*, para 4G.10.
[335] *Ibid.*, para 4F.20.
[336] Other than suggesting that planning authorities should aim for the re-use of contaminated land: Question (14).
[337] See *Ibid.*, paras 2.32-4 & 38-42.
[338] *Ibid.*, paras 4C.1-8 & 4D.1-13.
[339] Question (6), due to the common law and regulation serving different purposes.

5.4.18 Issue 4(a) Legitimising the Rules, Through Public Participation or Other Means

Of course, the paper itself formed part of the process of legitimation of the resulting rules and the history of the development of contaminated land policy was set out in it, indicating the influence of consultation processes.[341] Further wide consultation was considered a requirement for guidance to be developed by the Environment Agency, though the precise scope of such guidance was not indicated (the implication being that it would be technical in nature). Other than this, no specific requirements of the rule-making process were anticipated.

5.4.19 Issue 4(b) EC and International Developments

The potential influence of international developments was identified as an area of uncertainty in contaminated land policy.[342] The fact that the review was being conducted without the resolution of questions as to the future of the EC Green Paper on Remedying Environmental Damage, suggested that the Government felt that it was "safe" to review the national position in isolation,[343] the only substantive reference to international action being the noting of a movement towards strict liability.[344]

5.4.20 Issue 5(a) Selection of Rule-types and of Qualities of Rules

A wide mix of rule-types were anticipated as playing a part in meeting contaminated land issues, though a narrower range was mentioned in relation to regulatory action itself. Planning policy, the common law, technical standards and statutory measures, including discretionary powers to provide a "... balance between flexibility and

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[340] It being one thing to introduce, change or clarify a system of regulation but another to use statute to change the operation of the common law in a particular area - the resulting legislation including the former, but having no effect upon the common law.
[341] *Paying for Our Past, op cit.*, paras 1.4-14.
[342] *Ibid.*, para 1.7.
[343] This may also have reflected the view that subsidiarity should negate the movement for EC-wide action: *ibid.*, paras 1.9-10.
[344] *Ibid.*, para 4D.2.

rigidity ...",[345] were all mentioned. How rules and rule-types may assist with meeting objectives was considered in the context of their contribution to certainty and flexibility, with the possible scope for greater consistency in statutory provisions "... either in the form of the provisions or in the procedures they prescribe ...".[346] Thus, as well as the concerns underlying the "new" rule-type used in the new regime, the uses of rule-types to meet those concerns were in the mind of the policy-maker at the consultation stage.

5.4.21 Issue 5(b) Desired Features of the Rule-system - simplicity, intelligibility, etc.

As well as certainty, flexibility and fairness, we have already noted that the wider policy objectives (not exposing the public purse, working within the market system and not increasing regulatory burdens) were seen as paramount. As these objectives included the efficient working of the market, simplicity and intelligibility of the resulting rules would appear to have been desirable, although they were not articulated.

5.4.22 Issue 6(a) Identifying Appropriate Decision-makers

As noted above, the review had taken place during a period when the formation of a single Environment Agency was being considered and the rôle of that agency was not yet clearly established. The consultation paper identified the main regulators with responsibility for land contamination issues[347] and considered criticisms that the number of regulators, combined with overlapping responsibilities, had resulted in uncertainty as to who would act and when.[348] Simplification and the gathering of expertise was expected to result from the single Environment Agency,[349] although Borough and District Councils were to retain a "... major rôle ...".[350] The additional

[345] *Ibid.*, para 3.8.
[346] *Ibid.*, para 3.11.
[347] *Ibid.*, paras 2.24-5.
[348] *Ibid.*, paras 3.2-3.
[349] *Ibid.*, para 3.4.
[350] *Ibid.*, para 3.5.

certainty which a single Environment Agency would provide was seen as providing an opportunity for discretionary powers to be used which perhaps could not be the case with multiple agencies.[351] As the formation of a single agency was not then certain, the basic allocation of decision-making was, in default, to have been on the basis of environmental media with local authorities retaining responsibility for land alone and the National Rivers Association for the water environment.[352] Local authorities would also continue to be relevant decision-makers in their capacity as local planning authorities,[353] as would the development agencies in the field of reclaiming derelict land.[354] The proposed Environment Agency would also take on some of the responsibilities of the DoE: providing technical guidance, advice and research.[355] The reduction in number of decision-makers was one method of achieving the greater consistency in regulator's powers thought desirable in Question (2) (or was, at least, one method of securing greater consistency in the exercise of those powers). Other than this, the Questions for respondents did not ask whom the appropriate decision-makers should be, the only reference being in relation to planning/development (Question (14)) and the provision of technical guidance (Question (15)). Thus the approach to the allocation of decision-making functions was, again, an incremental one with the only significant change resulting from the wider policy decision to establish a single Environment Agency.

5.4.23 Issue 6(b) Other Participants in the Decision-making Process

The clear implication of the consultation paper was that the making of decisions was a matter for regulators and regulatees. The only area where private individuals (as third parties) were considered to have a part to play was in relation to the common law, which allowed an aggrieved person to "... seek redress for damage or loss to his private interests ...".[356] This limitation of involvement by private individuals to situations in which private property was affected was to be supplemented by

[351] *Ibid.*, para 4B.5.
[352] *Ibid.*, para 4G.2.
[353] *Ibid.*, para 4G.5.
[354] *Ibid.*, paras 4G.6-7.
[355] *Ibid.*, para 4G.8 & 10.
[356] *Ibid.*, para 2.28 (emphasis added).

regulators' powers, which were *inter alia* "... intended to protect the public interest in the environment, in particular in relation to unowned aspects where private individuals may not be able to act."[357] Thus the traditional view of the State as the guardian of the public interest generally, and the environment specifically, was to be retained, despite the fact that the Paper referred to government policy to enhance the rôle of the individual in protecting and enhancing the environment, and to a desire to facilitate the exercise of rights and the assumption of responsibilities by individuals where appropriate.[358] The involvement of individuals was not considered at all (except in respect of the use of common law rights), and methods of involving them in the wider decision-making process were ignored. These could have included: facilitating the collection, assessment and dissemination of information by individuals; including rights of appeal by third party individuals; providing for consultation with individuals regarding local decision-making; or even extending standing rights in private law or public law in order to allow individuals, or interest groups, to bring proceedings against "polluters" or to challenge decisions. Whether such measures would have been practicable or politically acceptable is unknown. Nonetheless, one of the most glaring omissions in the consultation paper is this failure to consider participation by the general public. The assumption seems to have been that this would be facilitated solely through the usual political channels (i.e. representation, rather than participation).

5.4.24 Issue 6(c) Identifying Appropriate Appeal/Review Bodies

Paying for Our Past considered review of decision-making by simply stating that judicial review may be possible in respect of regulators' actions or (possibly) inactions.[359] The implications of consolidating regulatory powers within a single Environment Agency were not considered in terms of its effects upon accountability.[360] It seems, therefore, that the questions of review and accountability were not considered to be important at this stage of rule development, that existing

[357] *Ibid.*, para 4B.4.
[358] *Ibid.*, para 4G.1.
[359] *Ibid.*, paras 2.35-6 and 3.7.

methods would be used without change, and/or that the issue was not appropriate for comment by respondents.

5.4.25 Issue 6(d) Prevention of Avoidance Practices

The Paper recognised the increased difficulties of tracking liability over a long period of time which could result from complex systems of corporate ownership and the existence of contractual relationships,[361] with the resulting suggestion that evasion through corporate and contractual devices should be "... as difficult as possible ...".[362] Although respondents were invited to agree with this objective, no indication was provided as to how this might be implemented in practice and views on this were not specifically sought. A particular point of uncertainty here was whether the focus was the deliberate use of such devices in the future to avoid potential liability and/or the frustrating effect of such devices used for "legitimate" reasons in the past.

5.5 Conclusions

5.5.1 General Conclusions

From the discussion in the first part of this chapter, it seems that two main rationales for consulting during rule-making can be identified: Expertise and Participation. The first of these is fairly straightforward and would provide obvious benefits for rule-makers and the "consumers" of rules, in the form of higher "quality" rules. The latter is more complex and it seems possible to break it down further. The participation of a wide range of interests and individuals is clearly a strong element in providing legitimacy. The increased efficiency in rule implementation which may result from securing the co-operation of organised interests in the rule-making process may provide additional elements of legitimacy. Here the "marketing" aspect of consultation may support that legitimacy claim. The dangers which may result from

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[360] Again, this may have been considered a matter for the wider policy issue of having such an agency generally.
[361] *Ibid.*, para 4E.8.
[362] *Ibid.*, para 4E.10 and Question (9).

this type of participation are those of undue influence by powerful groups and the exclusion, or under-representation, of the unorganised general public.

The models of participation in rule-making that we have identified ("public interest", "pluralism" and "corporatism") suggest that the nature and number of responses may indicate which model is the most evident in a consultation exercise,[363] as the more that these display a desire to further sectional or self-interest, the less likely that they will support an "altruistic" public interest process and the more that they represent a struggle between competing interests. A tendency towards self-interest should also weaken the expertise rationale, as the consultee's assistance will then be provided on a subjective, self-serving basis.[364] Although it is very difficult to establish which interests are actually influential (and so to establish the extent to which corporatism exists), identifiable success in shaping policy by a limited number of powerful groups, particularly where contrary to the expressed desires of the majority of others, may provide some evidence of such a system.

Preliminary conclusions which can be made as to improving the system of consultation in rule-making are: formalising and imposing rational and consistent requirements; making the systems more open and accountable; and broadening the scope of interests consulted, together with encouraging a culture of participation.

In the environmental context, consultation is made more problematic by two main factors: scientific uncertainty and complexity, which has sometimes been used as an excuse to restrict consultation (the scientific "mystification" of the issues) but which does present real problems of access to the debate for the general public; and the extremely wide effects of environmental issues, coupled with the effects on non-human actors and upon future generations, which provides the need for wider consultation, regarding values at the very least. Thus there is need to consult widely, but this need makes consultation more difficult and participation by non-experts is discouraged by the technical complexity of the subject matter.

5.5.2 Benchmarks for Evaluating Consultation Exercises

If we were developing a consultation exercise in the field of environmental rule-making, there would be many factors which we would want to take into account and objectives which we would hope to meet. In analysing and evaluating the consultative elements of a rule-making process which has nearly completed, a great asset in supporting and framing any quantitative analysis[365] is the establishment of "benchmarks" as guides to apply the data to theory. In this context, a number of issues can be identified which lend themselves to such an approach and which are used for the collection and analysis of data in the next chapter.

A crucial aspect of a consultation process (which has also been identified as one of the great omissions in policy-making in this country[366]) is openness and accountability in participation. One method of providing an element of this is for responses to be made public, so that the debate is open to public scrutiny. Two problems arise here: the fact that there may be genuine considerations of commercial, or other, confidentiality which counter requirements of openness; and (less satisfactorily) the fact that public consultation exercises are only one part of the rule-making process through which opinions can be provided and influence exerted. With regard to the latter point, there may be multiple "layers" or processes of influence and so the formal response to a consultation exercise may only be a version of opinions presented for public consumption. Although hearings in the rule-making procedure, along the lines of agency rule-making in the United States may be impracticable or unacceptable here, the extent to which Government requires open and formal consultation to provide the main or only method of exerting influence and presenting views is a matter of political will. Whatever process is devised, it can be circumvented if rule-makers wish to, or are forced to, accept alternative and secret channels of influence. We must be realistic and accept that opinions will always be expressed in many ways, however, the

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[364] Although the 'expertise' provided may be as to what the rule 'consumers' and the present relationship between them will accept.
[365] Which also helps when considering qualitative analysis.
[366] Lewis, N., "Corporatism and Accountability: The Democratic Dilemma", quoted above.

openness and accountability in consultative processes does seem to provide a necessary, though not sufficient, precondition for the legitimacy of a rule-making process and the extent to which this is found within it may provide one "benchmark" for evaluating it.

A second benchmark seems to be the extent to which the purposes for consultation are facilitated: these being expertise and public participation. We have seen how the environmental context increases the need for wide consultation and also provides barriers to it. It does not seem necessary for both of the purposes to be furthered at the same time and so consultation seeking expert opinion and public opinion could conceivably take place at different times and in different forms, provided that these are consistent and do not provide an opportunity for undue influence by some interests over others. For experts, the test would appear to be whether the exercise gives them an opportunity to provide detailed advice on clear proposals, the objective being to avoid technical errors and difficulties in implementation (although this does not mean that expert advice at an early stage will not be valuable). We could usually expect that experts are likely to have the knowledge and resources to be aware of the issues under examination, in the sense of both awareness that the exercise is being undertaken and understanding the material required to make an effective response. For the general public, there are greater problems of accessibility for weak and unorganised interests, again both in the sense of awareness of the process and ability to make a meaningful response. For this group in particular, it would seem that exercises should contain material which is: understandable; simple; short; and available and publicised. It would seem that the purpose of consultation would be furthered by the summarising of longer material and of proposals, with clear options being presented where relevant. Whilst both experts and the general public could benefit from these approaches (and from a broad range of options being presented where possible) it would seem that the general public would also benefit from an indication as to how their view, or "values", are relevant to particular issues, making it clear that those matters are not solely for experts. Whilst it may assist both groups, a mixture of consultative methods may, again, provide particular help in furthering the aim of engaging the general public. A combination of practical measures to improve access to, awareness of and

participation in, the consultative aspects of the rule-making process and the political will to take on board the views of all consultees (so far as appropriate and reasonable) may help in developing the culture of participation which is a further requirement of effective consultation. The extent to which consultation with all parties is meaningful and secret negotiations and discussions which undermine the open and accountable process is probably a matter which can only be left to the rule-makers, however, the positive benefits which can accrue from enhancing the legitimacy and broadening the scope of consultation in rule-making need to be appreciated.

These "benchmarks" provide the focus for some of the analysis in the next chapter, where data has been collected which helps test the extent to which they are met.

Chapter Six: Empirical Analysis of Contaminated Land Consultation

6.1 Aims

The aims of this section are: first, to identify those who participated in the public consultation exercises regarding contaminated land, to consider some aspects of how they responded, and to consider how this may be relevant to the rationales for consultation discussed in the preceding chapter; and secondly, to identify and analyse how different groups of respondents responded to the issues raised in the Questions set out in the consultation paper *Paying for Our Past*[1], and to consider whether and how they discussed the "Contaminated Land Rule-making Issues" identified in the earlier sections of this Study. The purpose is two-fold: identifying the policy community involved in public consultation on contaminated land; and identifying the way in which sections of that community have approached particular issues, which may assist in identifying patterns of shared cultural perception. The analysis forms part of the basis for the conclusions in the final chapter.

6.2 Methodology

The methodology adopted for this work is a combination of quantitative and qualitative research. Some aspects have a more quantitative approach, where the nature of the information available made such an approach both possible and desirable; whilst other aspects have some element of empiricism but are supplemented by qualitative material[2] as the available data could not justify a purely empirical approach.

6.2.1 Data Collection

The raw data used for analysis in this chapter comprises: (i) lists of respondents to the public consultation exercises carried out in relation to contaminated land; (ii) hard

[1] *Op cit.*
[2] In the form of selected quotes from consultation responses which provide examples of the point raised in the analysis.

copies of the full responses[3] made to the consultation paper *Paying for Our Past*; and (iii) hard copies of the responses made to the consultation drafts of Statutory Guidance and Regulations (to be made under Part IIA of the Environment Act 1990).[4] All of this material, save for the lists of invitees and attendees of the "Round Table" discussion,[5] was made available to the author for photocopying by the Department of the Environment, Transport and the Regions, Contaminated Land and Liabilities Division during January 1998.[6]

6.2.2 Data Analysis

The assembled data was processed in a number of ways:

For analysis of total numbers of respondents and respondent categories, each list of respondents was initially used for a simple calculation of the number of respondents to each exercise. For a breakdown of this simple calculation, ten categories of respondents were selected. The purpose of breaking down respondents into categories was to facilitate a further level of analysis of responses by considering whether their substance reflected differing cultural perspectives. This approach also facilitated identification of those who actually responded to the consultation exercises, so that the numbers and proportion of lawyers and other groups responding may, for example, be considered. Accordingly, the categories devised seek to identify groups where there may be some commonality of interest (such as commercial interest, as in the case of the business categories) and/or approach (as in the case of lawyers and consultants). The categories devised are as follows:

[3] Other than those responses which respondents wished to remain confidential.
[4] I.e. responses to the Statutory Guidance and other material consulted on in Autumn 1996.
[5] Which was provided through a contact in a national law firm.
[6] And the Author is extremely grateful for the kind and generous assistance provided by the personnel in that Division.

1. **Local Authorities** – comprising all local authorities and representative groups made up of members from such authorities;
2. **Business** – comprising all private and public companies, involved in manufacturing and other industry (not falling within other categories), together with their representative groups;
3. **Consultants** – comprising all members of engineering and other consultant professions (not falling within other categories), together with their representative groups;
4. **Finance/Insurance** – comprising all organisations involved in the insurance and finance industry (including accountants), together with their representative groups;
5. **Lawyers** – comprising all practising solicitors and barristers, together with their representative groups;
6. **Government Organisations** – comprising all Departments and agencies of central government, together with Quasi-Autonomous Governmental Organisations (not having a primarily regulatory function);
7. **Regulators** – comprising all governmental bodies having primarily regulatory functions (not being local authorities);
8. **Property Industry** – those businesses and individuals directly involved in the property industry (which are not professional consultants);[7]
9. **NGOs** – comprising community, environmental and other representative groups sharing a common interest (and not being directly connected to government); and
10. **Others** – comprising any other respondents (primarily private individuals and educational institutions).

Of course, any division of respondents into categories of this kind is open to some degree of criticism and the dividing lines between groups is not always clear.[8] Even with groups where the dividing line is clear,[9] the identification of categories to form

[7] Whilst the Housing Corporation was considered to be sufficiently closely connected to Government to be logged as a 'Government Organisation', individual Housing Associations were felt to be more closely related to the property industry and so were included in this category, though they might easily have been considered NGOs or even 'Quasi-Local Authorities'.
[8] For example, whether the business of a respondent has sufficient direct connection with property to take it out of the general Business category and into the Property Industry category.
[9] For example, a respondent is either qualified (and practising as) a solicitor or barrister, or is not.

the basis of some analysis is open to criticism on the grounds that the respondent's occupation or business may not be relevant to the response which is made.[10] However, the purpose of the categorisation was to identify distinguishable sectors of the contaminated land policy community, in order to consider how that policy community was made up and whether there was some correlation between the sector and the substantive response made to consultation. Thus, the categorisation seeks to use a breakdown which is not dissimilar to that considered in the discussion of "cultural perspectives" in Chapter One. The main difference is that there are more categories, which allows consideration of whether there are differing views amongst different classes of the business community, such as the Insurance and Finance group possibly being more risk averse than other, more entrepreneurial, members.

Having identified the total number of separate responses and allocated them to respondent categories, each response was read and summarised: the summary noting answers to the fifteen Questions[11] posed by the Consultation Paper and any points which were relevant to the Contaminated Land Rule-making Issues. These summaries were then used to draw up tables identifying the responses made to each Question and references made regarding the Rule-making Issues, the basis for the latter being where the Issue was addressed, either by responding to, or independently of, a Question. One immediate difficulty with this approach was that respondents often made their response without reference to the Questions, although the text which they submitted identified their views on the issues raised.[12] For that reason (and the fact that the Rule-making Issues were not put to the respondents at all) there was a significant element of judgement in analysing responses and interpreting how Questions were "answered" and whether Issues were addressed in the written material. This was a particular factor in the Issue analysis as the connection between the material and the issue would often be less direct than with the Questions. Although this might introduce an element of subjectivity into the analysis, the aim is to present broad trends, rather than objective

[10] For example, there may be more significant factors than employment by a local authority which colour the response made by a council officer, albeit on behalf of the council. The degree to which such responses reflect the views of the council as a body, or the individual officer, does seem to have varied between responses (and is sometimes reflected by the (lack of a) procedure for ratification of the response by others, such as council committees).

[11] But ignoring Q. 5 which relates to abandoned mines and has been excluded from the scope of this Study.

[12] Whilst many respondents related all of their points to the Questions posed, many made points in addition to, or instead of, some or all of the Questions.

quantitative statistics (the trends identified statistically being supported by extracts from the documentary material). In terms of sampling validity, the methodology allows 96% of responses to be analysed,[13] so that as far as response rate is relevant,[14] it is a positive factor.

Whilst the nature of the Questions for Respondents is such that a simple, binary Yes/No analysis is appropriate, for the Contaminated Land Rule-making Issues, groups for answers were devised following the summarising of responses (which identified how such groups should be constructed). As will be evident from the analysis, some of these Issues were not sufficiently mentioned in responses for any statistically relevant data to be produced.[15]

An additional method for analysis of responses was the categorisation of responses as "detailed" or "brief" and as "comprehensive" or "restricted". The aim of these approaches was to provide indicators of whether responses reflected an "expert" or more "generalist" knowledge and approach. The basis for this is that the more detail provided in a response is likely to reflect detailed knowledge and so expertise. Less detail might reflect less expertise but will more probably also identify that detailed knowledge was not being communicated to the rule-maker even if held by the respondent.[16] Of course, length is not necessarily a guide to expertise and a concise opinion may be better informed than a verbose one. However, simple "yes" or "no" answers to complex questions and regarding detailed material are unlikely to indicate expert knowledge. For the two main consultation exercises, the methods of categorising responses as "detailed" or "brief", and as "comprehensive" or "restricted", were:

[13] The remaining 4% being confidential - see the Table below.

[14] See Fink, A. *The Survey Handbook* (Sage, 1995), p.35 *et seq.* for a discussion of survey reliability and validity, including the relevance of response rate.

[15] See the Tables and analysis below.

[16] Although, of course, a long response does not necessarily provide useful material for the rule-maker, or such information in an easily accessible form.

Paying for Our Past – Whether the majority of the response was more than a simple "Yes/No" to the Question (in substance, rather than form), and whether every section of the Questions was responded to, or certain sections only[17]

Draft Statutory Guidance – Whether more than one detailed point was made which related to the text of the document, and whether every chapter was responded to (or selected chapters only)[18]

Although the need to make judgments regarding classification arises in this context as well that for substantive responses to Issues and Questions, the same factors countering this problem are present.

6.2.3 Interviews

In order to supplement the analysis of documentary data and to address the wider themes of this Study, interviews were arranged with two key participants in the rule-making process. The first of these was the Departmental administrator who had been responsible for devising the consultation paper *Paying for Our Past* and for carrying out the consultation exercise.[19] Having attempted to arrange an interview with those currently involved in devising the contaminated land rules, the Department advised that changes in personnel meant that it would be more appropriate and more useful for the interview to be with this person, who had since retired from the Civil Service. It was clear that this approach would be the better one as his involvement was more directly relevant to the focus of the Study and because he was in a position to offer more time for the interview, both in terms of preparation and the interview itself. For the other interview, the intention was to interview current or former members of the Legal Team within the Department advising on the development of the consultation paper and the subsequent rule development process. The Department advised that it would be inappropriate for such an interview to take place, as the issues involved "on-

[17] The Questions being divided under seven headings (Issues A to G), some reflecting differing areas of expertise, such as Issue C being concerned with changes to the common law and Issue F being primarily concerned with information dissemination.
[18] The Draft Guidance comprising five chapters, some reflecting differing areas of expertise, such as Chapter Three providing Guidance on remediation requirements and Chapter Four providing it on liability apportionment and exclusion.
[19] Dr Neil Jackson, for whose kind assistance and hospitality the Author is extremely grateful.

going matters of policy and law". The Author was fortunate, however, in having made contact quite independently with a DETR lawyer who had been involved in the consultation and other rule-making processes who was willing to undertake an interview, though this had to be strictly non-attributable (for obvious reasons). For both interviewees, an interview outline was prepared which sought to draw out information regarding the issues considered in the Study. In view of the characteristics of the interviewees, the structure of the two interviews and the questions asked differed in some respects. One had a more legal focus than the other and included specific questions regarding the structure of the new legal regime, as well seeking information on the rôle of the lawyer in consultation and other aspects of the rule-making process. The most sensitive aspect of these interviews was how to deal with the confidential source. It was agreed that s/he would remain anonymous and that any material which was to be used (either in this Thesis or elsewhere) would be sent to the interviewee, not only to check for accuracy (which was the case with the administrator), but also to ensure that the anonymous source was happy for the material be used and that it did not reveal his/her identity. Thus the informed consent of the interviewee was secured both prospectively and retrospectively in the more sensitive case and, in particular, with regard to the use of unattributed quotations.

6.4 Total Respondents to Contaminated Land Consultation Exercises

The first task undertaken in analysis of responses to the Contaminated Land consultation exercises was to identify the total number of responses made to each of the public exercises (see Figure 6.1).

Total Responses to Public Exercises	
s.143(1)	319
s.143(2)	433
Paying for Our Past	349[20]
Draft Guidance	304
Draft Regulations, etc.	70

Figure 6.1

From these figures we can see that there was a fairly consistent level of participation in public consultation exercises throughout the period of rule development. The only response rate outside the range of 3-400 was that for the Draft Regulations, Compliance Cost Assessment and Regulatory Impact Assessment, which was carried out at the same time as consultation on the Draft Statutory Guidance.[21] There are a number of reasons why this particular figure is so low comparatively (primarily relating to it being part of a "joint" exercise, with many respondents preferring to concentrate on the Draft Guidance). The low figure can, therefore, probably be ignored.

Numbers of respondents peaked with the second consultation exercise on s.143 Registers and then dropped for the later exercises. When considering how satisfactory these levels of response are, an important issue is the context in which this took place: if the rationale for the consultation was wider public participation, there seems to be an unsatisfactory level as 3-400 responses gathered in an unstructured manner are unlikely to be representative; if the rationale was to gather expertise, then whether or not these levels were satisfactory depends in part upon the identity of the respondents.

[20] One response was submitted jointly by a law firm and the National Federation of Housing Associations and so the total figure could be increased, however, the response was single one and, in view of it being drafted by the law firm, was categorised as by a 'lawyer'. In addition, two separate responses were made by one 'consultant', which were amalgamated and logged as a single response for the purposes of this Study.

[21] See Chapter Five.

6.5 Respondent Breakdown for s.143 Exercises

The next level of analysis was to identify the composition of the respondents to various consultation exercises. The first of these were the exercises seeking responses to issues raised by the S.143 Registers proposals (see Figures 6.2 below).

	s.143 (1)		s.143 (2)	
Local Authorities	211	66%	181	42%
Business (General)	49	15%	83	19%
Consultants	21	6%	52	12%
Finance/Insurance	3	1%	13	3%
Lawyers	10	3%	27	6%
Government Organisations	5	2%	25	6%
Regulators	0	-	3	1%
Property Industry	6	2%	28	6%
NGOs	5	2%	6	2%
Others	9	3%	15	3%
Total	319	100%	433	100 %

Figure 6.2

This breakdown of respondents identifies Local Authorities as the largest respondent category.[22] This is not surprising for at least two reasons: first, they had primary responsibility for implementing the proposals (being required to collect information for, and the maintain, the Registers); and secondly, they were a "fixed set" of respondents which rule-makers would find easy to identify as interested parties and provide the consultation material to.[23] The most interesting feature of the breakdown is that it indicates how local authority responses dropped slightly between the two

[22] For a discussion of some aspects of the substantive responses made by this category, see Walton, W. "Bad Lands and bad Law: the rôle of local authorities in the formulation of new legislation and new guidance for contaminated land in the United Kingdom", *op cit.*

[23] For the later exercises in particular, there are additional reasons why local authorities would be consultees, such as their potential liability both as polluters and as landowners (as well as, again, having primary responsibility for implementation).

exercises, but the number of other respondents more than doubled. It was this increase which gave the second s.143 exercise the highest total of respondents. The level of opposition to the Registers proposals, or concern over their use without further measures, has already been noted[24] and so it is highly likely that concern about "blight" and other issues (generated in part by the first s.143 consultation exercise) "sensitised" non-local authority respondents and generated the response levels in the second exercise. However, it was not only "business" categories [25]which drastically increased in numbers of responses, but lawyers and other consultants[26] and, perhaps more surprisingly, Government organisations[27] as well.

6.6 Respondent Breakdown for Later Exercises

The breakdown of respondents to the s.143 exercises was followed by a breakdown of the respondents to the later exercises[28] (Figure 6.3 below).

[24] See Chapter Three.
[25] Business almost doubling and Insurance/Banking & Property Industry more than quadrupling.
[26] Each more than doubling.
[27] Increasing five-fold.
[28] *Paying for Our Past, op cit.*, the 1996 Draft Statutory Guidance, *op cit.*, and the 1996 Draft Regulations etc., *op cit.*

	Pf	OP	Draft	Guid	Draft	Regs
Local Authorities	149	43%	172	57%	36	51%
Business (General)	54	15%	36	12%	13	18%
Consultants	46	13%	25	8%	6	9%
Finance/Insurance	20	6%	16	5%	3	4%
Lawyers	19	5%	18	6%	2	3%
Government Organisations	21	6%	12	4%	6	9%
Regulators	3	1%	4	1%	2	3%
Property Industry	16	5%	6	2%	0	0%
NGOs	13	4%	9	3%	2	3%
Others	8	2%	6	2%	0	0%
Total	349	100 %	304	100%	70	100 %

Figure 6.3

As with the analysis of the earlier exercises, there appears to have been a fairly consistent involvement, in terms of respondent categories, between the two main later exercises. Apart from Local Authorities and (other) Regulators, every category reduced its response rate numerically (though in the case of Lawyers, this was only by one response). The number of Government Organisations responding reduced by nearly half. Although there is no clear evidence of why this should be, it may well be that some of these organisations were being "filtered out" of the public consultation community as they had been originally consulted for expertise in areas relevant to "mapping",[29] which was no longer relevant.

The reasons for the decrease in responses by other areas, particularly the business categories are even less apparent. It might be thought that this could be explained by a shift from fairly broad "value-based" issues being considered in *Paying for Our Past*, such as determining who should be required to pay for remedial works where

[29] For example, a hand written note made by the Department of the Environment on the response to consultation on Draft Statutory Guidance by the Royal Commission on Historical Manuscripts (n. 34) asks why they were consulted and a second note explains that this was probably due to being left on the

unacceptably contaminated land is identified, to more "technical" issues, such as risk assessment methodologies in determining remediation requirements, in the Draft Guidance. However, the latter did include value-based issues, or policy matters, such as who should fund remediation of "orphan sites" and the allocation of liability where more than one "appropriate person" could be found,[30] it is likely that the business expertise of these categories would be as valuable to the rule-maker as many other kinds and if a move to technical expertise was the reason for this reduction in participation, we would probably anticipate a greater involvement by experts as a correlative. In fact, there was quite the reverse, with the number of Lawyers reducing slightly but the number of other consultants nearly halving between *Paying for Our Past* and the Draft Statutory Guidance.[31] This is particularly surprising[32] as, not only were the consultation issues becoming more "technical" in nature, but publicity and anticipation of the new legal regime had generated a huge number of conferences and publications whereby consultants of various kinds[33] professed expertise in this area.[34] The reduction in responses from this category alone accounts for nearly half of the total reduction in responses between the two exercises. Whilst the same factors apply to the "Lawyers" category, the number of responses there reduced by only one. Although there may be a number of factors which influenced this disproportionately decreased participation by Consultants, it does have implications for the theoretical basis for consultation as it undermines the expertise rationale by demonstrating a reduced involvement by a large group of technical experts where the process was, seemingly, moving to a more technical basis.

This undermining of the expertise rationale is particularly important as there can be no serious claim to wider public participation in view of the number of respondents to the two main consultation exercises. The "Others" category (with total respondents of eight for *Paying for Our Past* and six for the Draft Statutory Guidance) has been

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'list' following its inclusion for the registers consultation. It is likely that the Ordnance Survey was consulted on *Paying for Our Past* but not on the Draft Statutory Guidance for similar reasons.

[30] See the discussion in Chapter Four.

[31] The reduction in responses by 'Consultants' reducing by 46%, whilst the response rate overall dropped by only 13%.

[32] Although consultation 'fatigue' could explain changes such as these 'across the board', this does not explain reductions by categories which are 'out of line' with the general trend, i.e. why changes in certain categories were disproportionate.

[33] Such as environmental scientists and engineers of various kinds.

further broken down in order to identify the number of private individuals within the category totals. Responses by private individuals numbered five for *Paying for Our Past* and four for the Draft Statutory Guidance. However, even this tiny proportion of less than 2% is exaggerated with regard to public participation as some were made by practising or retired "experts" who, although sometimes responding on the basis of their personal views, had professional experience and expertise.[35] One interesting feature of the presentation of the consultation exercises by the government was that the impression was given that a significant number of individuals had been involved, the Press Release[36] announcing the publication of the *Framework for Contaminated Land* stating on a number of occasions that 349 "individuals and organisations" had responded to *Paying for Our Past*, and this method of "presentation" continued with the press release announcing consultation on "minded to" guidance in October 1999, where the amendments to earlier drafts were said to have been made following input "... from over 500 individuals, local authorities and businesses and from the House of Commons Environment Committee."[37] The remaining members of the Others category are also interesting. They comprise Higher Education Institutions and, again, one would anticipate that such institutions would hold a significant amount of expert knowledge in legal and other fields. Whilst accepting that some of this expertise may have been utilised through a more direct route than public consultation[38] and that contributions may have been made to other responses,[39] this does seem a low number, particularly when the only response to either exercise made specifically by a law school was connected to, though not directly a part of, this Study. A further interesting feature of some responses which may be termed as "self-interest" responses, was that at least one academic institution was responding in a way which seemed to view the consultation process as, in part, providing an opportunity for

[34] Further evidence of the increased number of 'professionals' involved in contaminated land issues is provided by the 'Situations Vacant' section of ENDS Monthly.
[35] See, for example, Response No. 130 to *Paying for Our Past.*
[36] Department of the Environment News Release No. 654, November 24, 1994, which does not seem to reflect the imbalance between these categories of respondents and seems to suggest the opposite.
[37] DETR News Release 981, October 8, 1999.
[38] For example, the research carried out on remediation standards and risk assessment methodologies by Nottingham Trent University's Centre for Research into the Built Environment.
[39] For example, as members of associations such as the United Kingdom Environmental Law Association.

marketing its expertise to the Department, suggesting as its main point that increased research funding was required.[40]

6.7 Private/Restricted Consultation

The only aspect of this type of consultation for which statistical data has been available is the Round Table Discussion on Revised Draft Statutory Guidance.[41] Figure 6.4 below sets out the consultees who were invited to the meeting and those who actually attended. It also identifies the number of consultees who were legally qualified, whether representing legal consultees or those from other categories.

[40] See response No. 119 to *Paying for Our Past*, although it could be argued that this simply reflected that respondent's area of expertise and identified an issue which required attention.
[41] See Chapter Five. There being no (or very limited) public information available regarding ad-hoc discussions between rule-makers and other parties, etc.

	Invited		Attended	
	Number	Legal Reps	Number	Legal Reps
Local Authorities	2	-	-	-
Business (General)	4	-	3	-
Consultants	5	1	5	1
Finance/Insurance	4	1	4	1
Lawyers	4	4	5	5
Government Organisations	3	-	3	1
Regulators	2	-	-	-
Property Industry	6	1	7	1
NGOs	7	1	4	1
Others	-	-	-	-
Total	38	8	31	10[42]
DETR			6	2
Scottish Office			1	-
Total			7	2

Figure 6.4

The most immediately striking aspect is the representation by Local Authorities: having been the dominant group responding to public consultation exercises, they were proportionately the joint lowest group in terms of those invited and in terms of attendance (none attending). It may be that their views were elicted by other, more informal means. There is, however, no immediately apparent reason why this should be the case for that category more than any other. The other striking feature is the dominance of the legal profession amongst consultees, both the high number of Lawyer groups invited and the high proportion of legal representation amongst other categories. Also significant was the high proportion of Property Industry consultees and NGOs (the latter in terms of those invited more than those actually attending), in

comparison with their proportionate response to public consultation exercises. These statistics support the theory that the subject matter of consultation was, or at least was perceived as being, more technical than the issues considered in *Paying for Our Past* and, in particular, supports the view that there was a strong legal element to that technicality.[43] The expertise rationale for consultation was, therefore, again dominant, with any general public participation being provided only through local authorities (which, in the event, did not materialise) or through NGOs, which could only be in the form of representative involvement and at some distance.[44] Whilst the complexity of the *Draft Statutory Guidance* originated (at least in part) within Government itself,[45] this (actual and anticipated) degree of involvement by lawyers may provide one reason why the Guidance is so detailed and complex on many matters, perhaps reflecting some of the cultural perspectives of that category, with added definitions and provisions seeking to provide certainty as to exactly what the "guidance" means in many places.

6.8 Response Detail and Scope

Having identified the level of detail and breadth of responses (as set out in the methodology above), the results are set out in Figures 6.5 and 6.6.

	Paying for Our Past	Draft Statutory Guidance
Confidential	4%	1%
No Comment	7%	3%
Brief	8%	44%
Detailed	81%	52%

Figure 6.5

[42] The fact that more Lawyers attended the meeting than were invited is explained in part by certain other categories of invitees sending lawyers instead of, or in addition to, their own personnel. Why they felt the need for legal representation of this kind is not entirely clear.

[43] Although one of the problems identified with the rule-system comprising the new legal regime was that matters of policy and general values (such as who should pay for Orphan Sites) have been left to this 'technical' material.

[44] Whilst an organisation such as the R.S.P.B. (for example) can justifiably claim that its membership is both large and purely voluntary, it is unclear precisely how many members are even aware of, let alone actively support, that organisation's policy on the detail of contaminated land issues and membership of that organisation does not preclude the support of contrasting views, or even membership of other organisations with very different views.

[45] The earlier 'Working' drafts being complex.

	Paying for Our Past	Draft Statutory Guidance
Confidential	4%	1%
No Comment	7%	3%
Comprehensive	58%	15%
Restricted	31%	81%

Figure 6.6

Whilst there are some obvious limitations to the use which can be made of these findings,[46] they do illustrate a trend which is confirmed by a reading of the responses (as well as by the length of responses[47]): fewer of the responses to the Draft Statutory Guidance were detailed than was the case with those to *Paying for Our Past.* Some clues as to why this should be so, when the increased technicality of the subject matter would suggest that expertise was a more important aspect than in the earlier exercise, are provided in some responses by the largest category of respondents – Local Authorities. One factor is mentioned by many respondents in this category: the lack of resources which were available to respond to the consultation exercise. Many Local Authorities complained that they did not have the resources available to implement the incoming regime,[48] and at least one then stated that resource allocation priorities prevented the provision of a detailed response to the consultation exercise.[49] Thus the main respondent category had a dis-incentive to provide detail reflecting its expertise as to the subject matter of the consultation (the drain on scarce resources) so that whilst the number of Local Authority responses increased (against the general trend of reducing for most other categories) this did not necessarily involve a corresponding increase in detailed, expert information. Lack of resources was not a factor generally

[46] The unavoidable differences in methods for categorisation between the two consultation exercises, for example.

[47] Responses to *Paying for Our Past* fill five lever arch files, whilst those to the Draft Statutory Guidance (which are only around 10% fewer) fill only three.

[48] See, for example, Response Nos. 10, 11 and 12.

[49] See Response No. 23. The complaints as to lack of resources generally, and the specific linking here of that issue with ability to respond in detail, suggests that others may not have responded (or responded in detail) for this reason.

mentioned by other categories of respondents, though it may have been influential for some of them.[50]

When one looks at the other indicator of expertise (the degree of specialisation, rather than comprehensiveness), however, the figure might suggest that there was an increased element of expertise in the sense of "specialisation" with the later exercise, as there were fewer responses which responded to all aspects of the exercise. However, this may actually reflect the breadth given to respondents by the material comprising the exercise, with *Paying for Our Past* actually providing an opportunity for views to be expressed on a range of subjects, irrespective of expert knowledge, whereas the Draft Statutory Guidance provided detailed text in a number of technical areas which may have limited the scope for "blustering". In that sense, technical knowledge may have been more of a requirement for "gaining access" to the consultation process in the second exercise. Of course this undermines to some extent the findings that greater expertise was provided in the first exercise as the "detail" may actually have been "waffle". However, there is no doubt that, whatever the level of expertise of those providing it, there were fewer detailed points made in response to the second exercise and more responses which said little or simply made a few general points, and this factor is also the most likely explanation for the drop in generalist responses – it being very difficult for a response to be both brief and comprehensive. A further important factor here may have been that it is easier to respond to 15 Questions (seeking simple "Yes/No" responses)[51] than to comment on all areas of a detailed text, without being prompted in the same fashion.[52] Therefore, the presentation of material may be at least as important as the material which is being consulted upon. The implication of all of this is that, for whatever reason, the expertise rationale for consulting did not increase in terms of responses when it did increase in terms of the material consulted upon and this accords with the major reduction in the Consultants respondent category over the same period.

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[50] Less tangibly (and without being able to identify specific extracts from the responses in support), there is also a feeling of disillusionment with the consultation process which one gets from reading some of the Local Authority responses; a sense of fatigue after participating in many public and other consultation exercises and (possibly) a sense of cynicism as to which respondents were being listened to by the rule-makers.
[51] As in *Paying for Our Past, op cit.*
[52] As with the consultation on the Statutory Guidance, etc.

6.9 *Paying for Our Past*: Responses to Questions (Totals and by Respondent Category)

6.9.1 "Popularity" of Questions

The number of identifiable responses to the 15 Questions shows that the order of "popularity" was as follows:

1.	Q. 2	69%	11.	Q. 6	46%
2.	Q. 1	68%	12.	Q. 10(a)	44%
3.	Q. 14	64%	13.	Q. 7	43%
4.	Q. 13	62%	14.	Q. 8(b)	39%
5.	Q. 15	61%	15.	Q. 8(c)	38%
6.	Q. 12	60%	16.=	Q. 4(a)	37%
7. =	Q. 11	56%	16.=	Q. 8(a)	37%
7. =	Q. 9(a)	56%	18.	Q. 9(b)	34%
9.	Q. 3	52%	19.	Q. 4(b)(i)	27%
10.	Q. 10(b)	47%	20.	Q. 4(b)(ii)	25%

Figure 6.7

In view of the idiosyncratic way in which many issues were presented through the Questions and the flaws in the Questions,[53] the response rate is likely to reflect the clarity of the question at least as much as the strength of feeling that the issues raised by it generated: the key point being that responses had to be "identifiable" in order to be logged and with many responses it was difficult to identify what the views of the respondent actually were.[54]

The sections below present the statistical findings of the research, present some comment on them, and then briefly consider how the preferences expressed by respondents relate to the eventual outcomes (in terms of the new legal regime). The detail of these outcomes was discussed in depth in Chapter Four and so the discussion

[53] Identified in Chapter Five.
[54] Reflecting the nature of the Question and/or the quality of the response generally.

of their relationship with the statistical findings is limited to quite basic and broad evaluations.

6.9.2 Analysis of Responses to Questions

Q.1 Are the priorities set out in the paper appropriate?

	Yes		No	
Local Authorities	107	96%	4	4%
Business	34	100%	-	0%
Consultants	38	97%	1	3%
Finance/Insurance	9	100%	-	0%
Lawyers	13	93%	1	7%
Govt Orgs	9	90%	1	10%
Regulators	3	100%	-	0%
Property Industry	10	100%	-	0%
NGOs	3	75%	1	25%
Others	5	100%	-	0%
Totals	231	97%	8	3%
Total Responding	239	68%		

Figure 6.8

The near unanimity of view on this Question probably reflects the nature of the Question: asking whether there was broad agreement with certain policy objectives - many of which were not contentious, or even banal.[55] Although not revealed by the raw data (which reflects broad agreement with the objectives overall), one policy objective was, in fact, the source of a number of objections: the minimising of financial and regulatory burdens. The use of "Suitable for Use" as the standard for remediation also drew some adverse comment,[56] however, the phrasing of the Question meant that it was still possible to state that there was broad agreement amongst the vast majority of respondents, despite two of the five objectives actually being quite contentious. The only clear outcome in the resulting rules which relates to the objectives referred to in the question is the Suitable for Use policy. [57]

[55] For example, acting only on contamination posing 'unacceptable' risks.
[56] See the findings in relation to Issue 3(f), below.
[57] Which is considered in relation to Issue 3(f), below.

Q.2 Should there be greater consistency in regulators' powers?

	Yes		No	
Local Authorities	100	88%	13	12%
Business	37	97%	1	3%
Consultants	34	100%	-	0%
Finance/Insurance	8	100%	-	0%
Lawyers	15	100%	-	0%
Govt Orgs	11	100%	-	0%
Regulators	3	100%	-	0%
Property Industry	11	100%	-	0%
NGOs	5	100%	-	0%
Others	3	100%	-	0%
Totals	227	94%	14	6%
Total Responding	241	69%		

Figure 6.9

Again the very high degree of agreement on this Question reflects its non-contentious nature, but also reflects the desire for greater certainty regarding contaminated land issues, with the number of regulators and differing regulations being identified as a source of confusion and unnecessary duplication.

Broadly speaking, it could be said that the outcome matched the preferences expressed by respondents, in that it involved the introduction of a new rule-system which, in part at least, sought to "clarify" the powers available to regulators and to provide consistency in their use.

Q.3 Should regulators increase understanding by the market of what they do?

	Yes		No	
Local Authorities	73	96%	3	4%
Business	27	100%	-	0%
Consultants	33	100%	-	0%
Finance/Insurance	8	100%	-	0%
Lawyers	13	93%	1	7%
Govt Orgs	6	100%	-	0%
Regulators	3	100%	-	0%
Property Industry	9	100%	-	0%
NGOs	4	100%	-	0%
Others	2	100%	-	0%
Totals	178	98%	4	2%
Total Responding	182	52%		

Figure 6.10

Q.4 (a)Should regulators continue to be able to pursue one or more persons?

	Yes		No	
Local Authorities	72	100%	-	0%
Business	11	100%	-	0%
Consultants	18	95%	1	5%
Finance/Insurance	3	100%	-	0%
Lawyers	9	100%	-	0%
Govt Orgs	2	100%	-	0%
Regulators	2	100%	-	0%
Property Industry	6	100%	-	0%
NGOs	1	100%	-	0%
Others	3	100%	-	0%
Totals	127	99%	1	1%
Totals Responding	128	37%		

Figure 6.11

Both Question 3. and 4(a) continued the pattern of near-unanimity from respondents, reflecting the nature of their content. With Question 4(a), this is perhaps more surprising as pursuing "one or more persons" is not particularly clear as to its meaning. This may explain the low response rate and actually be founded upon a large number of answers which simply stated "yes" or otherwise indicated agreement without identifying exactly what the respondent thought. This is probably the least

reliable of Questions for analysis (as the lack of clarity in a number of responses resulted in difficulties with interpreting exactly what was meant). Thus the presentation of issues as questions demanding "yes/no" responses may exaggerate the degree of agreement amongst respondents.

In terms of outcomes, the general, aspirational nature of Question 3 means that it is difficult to identify any related outcome. However, with Question 4 (a) there does seem to be a clearly identifiable outcome in that joint liability is one of the starting points for liability in the new legal regime, although there are a number of mitigating elements.

Q.4 (b)(i) Should there be liability limits for lenders, etc. and, if so, who should pay instead?

	Yes		No	
Local Authorities	13	48%	14	52%
Business	19	100%	-	0%
Consultants	9	69%	4	31%
Finance/Insurance	11	100%	-	0%
Lawyers	12	86%	2	14%
Govt Orgs	3	100%	-	0%
Regulators	2	67%	1	33%
Property Industry	6	86%	1	14%
NGOs	1	50%	1	50%
Others	-		-	
Totals	72	76%	23	24%
Total Responding	95	27%		

Figure 6.12

This was the first Question to elicit polarised responses. Whilst the numbers limit the statistical relevance of the findings, there is a clear divergence of view between the "business" categories[58] on the one hand and Local Authorities on the other, with Lawyers and other Consultants somewhere in between. This is probably not surprising as we might anticipate that differing cultural perspectives might provide a more immediate concern regarding the provision of finance and the impact of lender liability on business funding on the part of some classes of respondents, and less immediate concern amongst others.

The liability limitation outcome is one of the most complex aspects of the new regime, with the definition of "appropriate persons", the existence and nature of the "exclusionary tests" and some of the provisions regarding costs recovery all providing for limitation of liability for certain groups to some extent. This complexity of outcome perhaps reflects that there was some difference of opinion within respondent categories, as well as (to a greater extent) between categories.

Q.4 (b)(ii) Should there be liability limits for home-owners and, if so, who should pay instead?

	Yes		No	
Local Authorities	40	91%	4	9%
Business	6	100%	-	0%
Consultants	13	86%	1	14%
Finance/Insurance	3	100%	-	0%
Lawyers	8	100%	-	0%
Govt Orgs	4	100%	-	0%
Regulators	1	100%	-	0%
Property Industry	5	100%	-	0%
NGOs	1	100%	-	0%
Others	1	100%	-	0%
Totals	82	94%	5	6%
Total Responding	87	25%		

Figure 6.13

Following the divergence of views on the issue of lender liability, we then find a return to consensus regarding the issue of home-owner liability. Again, this is probably not very surprising as the "harder line" taken by many Local Authorities with regard to lenders was unlikely to be carried on to an issue which would directly and immediately impact upon their own constituents.

An interesting feature when comparing responses with outcomes in the new regime is that the limitations on home-owner liability are not really any clearer, or more significant, than those relating to other groups. The main impact is in the provisions regarding costs recovery, which could be viewed as leaving enforcing authorities to deal with this difficult issue, and exposing the local, rather than central, public purse

[58] Comprising Business, Finance/Insurance and Property Industry.

in most cases. Thus the greater degree of consensus on this point did not appear to have any significant effect in terms of outcomes.[59]

Q.6 Should there be a minimum change to the Common law?

	Yes		No	
Local Authorities	42	75%	14	25%
Business	24	92%	2	8%
Consultants	26	93%	2	7%
Finance/Insurance	6	67%	3	33%
Lawyers	13	81%	3	19%
Govt Orgs	5	100%	-	0%
Regulators	3	100%	-	0%
Property Industry	6	67%	3	33%
NGOs	4	80%	1	20%
Others	1	50%	1	50%
Totals	130	82%	29	18%
Total Responding	159	46%		

Figure 6.14

The level of consensus reduced with this Question. It did, however, draw reasonably consistent responses, with no statistically relevant responses (by category) going against the general approach of the majority favouring the view (set out in an extremely leading manner) of the policy-makers. What is perhaps interesting, is that Lawyers, who might be expected to have a deeper knowledge of the subject matter than most, responded almost exactly in line with the average across all categories, and so the leading nature of the Question may not have been all that influential.

In terms of outcome, the basic result was no change, reflecting the views of the majority of respondents.

[59] Which possibly reinforces the fact that there is a 'hierarchy' of policies, with protection of the public

Q.7 Is the strict v. fault-based liability balance presently appropriate?

	Yes		No	
Local Authorities	25	42%	34	58%
Business	22	92%	2	8%
Consultants	18	72%	7	28%
Finance/Insurance	7	88%	1	12%
Lawyers	9	64%	5	36%
Govt Orgs	5	100%	-	0%
Regulators	2	67%	1	33%
Property Industry	4	57%	3	43%
NGOs	1	25%	3	75%
Others	-		-	
Totals	93	62%	56	38%
Total Responding	149	43%		

Figure 6.15

The issue of strict or fault-based liability polarised views to a similar extent to that with Question 4(b)(i). The response "no" was to the issue of whether there should be a change in the pattern of strict and fault based liability: within this response, the majority of respondents wanted more strict liability and the minority wanted less. Although the division was not quite as clear as with the earlier Question, there is a pattern of "business" respondents being much more in favour of not increasing strict liability than Local Authorities (and NGOs). This would suggest that there is some sharing of cultural perspectives amongst categories, as the divisions which arise when issues are contentious have a clear pattern to them, although there was a greater degree of dissent with the views of the policy-maker overall with this Question. Whilst the eventual outcome in the new regime is probably arguable, on balance there was no significant change in the pattern of strict and fault based liability.

purse being at, or near, the top, at least at the time of rule formulation in this area.

Q.8 (a)Should there be changes to the availability of: a "State of the Art" defence?

	Yes		No	
Local Authorities	17	35%	31	65%
Business	22	85%	4	15%
Consultants	16	70%	7	30%
Finance/Insurance	5	83%	1	17%
Lawyers	7	88%	1	12%
Govt Orgs	4	100%	-	0%
Regulators	-	0%	1	100%
Property Industry	5	71%	2	29%
NGOs	1	50%	1	50%
Others	1	33%	2	67%
Totals	78	61%	50	39%
Total Responding	128	37%		

Figure 6.16

Q.8 (b) Should the re be any changes to the defence of unforeseeability?

	Yes		No	
Local Authorities	18	34%	35	66%
Business	-	0%	28	100%
Consultants	3	12%	22	88%
Finance/Insurance	-	0%	6	100%
Lawyers	-	0%	11	100%
Govt Orgs	-	0%	2	100%
Regulators	-	0%	1	100%
Property Industry	1	17%	5	83%
NGOs	1	50%	1	50%
Others	2	67%	1	33%
Totals	25	18%	112	82%
Total Responding	137	39%		

Figure 6.17

Q.8 (c) Should there be any changes to the defence of regulatory compliance?

	Yes		No	
Local Authorities	7	14%	44	86%
Business	22	81%	5	19%
Consultants	5	42%	7	58%
Finance/Insurance	2	67%	1	33%
Lawyers	2	18%	9	82%
Govt Orgs	1	25%	3	75%
Regulators	-	0%	1	100%
Property Industry	2	29%	5	71%
NGOs	1	50%	1	50%
Others	1	33%	2	67%
Totals	53	40%	78	60%
Total Responding	131	38%		

Figure 6.18

With these three Questions we see a return to polarisation of some views, with Local Authorities going against (and overturning by weight of numbers) an otherwise general trend of support for a regulatory compliance defence. An interesting feature of some responses was that they indicated a misunderstanding of the issues by favouring an "unforeseeability" defence, whilst rejecting a "state of the art" defence (and the text making it clear that the basis for this was not that there should be a more general defence rather than the more limited one, the state of the art defence being rejected as inappropriate irrespective of the position as to the foreseeability position). A further interesting feature of the responses is that Lawyers were in broad agreement with business groups regarding the state of the art defence and the foreseeability defence, but were in agreement with Local Authorities and went clearly against the preferences of business groups with the issue of having a regulatory compliance defence. The way in which the issues were presented, by reference to "historic pollution" only, resulted in this being another rather difficult area in which to identify clear responses as respondents also brought in the question of present and future activities. It is also interesting (to some extent) that the Property Industry category did not always respond in the same way as Business, the responses to Question 8(c) being the clearest example in that the Property Industry was against the regulatory compliance defence, whilst Business was heavily in favour. The low numbers of responses do, however, limit any statistical relevance which this might have.

The rather complicated way in which the issues were presented in the Questions and the suspicion that this may have confused some respondents means that, despite the outcomes being easily identifiable (none of the matters constitutes a defence under the new regime, though some might be relevant factors in exercising discretion as to costs recovery), how this fits in with the responses is difficult to determine (particularly as unforeseeability is not uniformly applicable in all areas of the common and regulatory law). Overall, looking at the new regime as an administrative law regime, it would be fair to say that there has not been any significant change in the availability of defences in relation to the patterns which one would generally expect to find in this area of law, and so the only issue where the outcome was out of line with the responses given was the desire of the majority of respondents for the introduction of a "state of the art" defence, which was not in fact provided in the resulting rules.

Q.9 (a)Is liability transfer to others consistent with the "Polluter Pays" Principle?

	Yes		*No*	
Local Authorities	81	86%	13	14%
Business	18	67%	9	33%
Consultants	29	97%	1	3%
Finance/Insurance	4	50%	4	50%
Lawyers	10	77%	3	23%
Govt Orgs	6	86%	1	14%
Regulators	2	67%	1	33%
Property Industry	4	50%	4	50%
NGOs	2	67%	1	33%
Others	2	67%	1	33%
Totals	158	81%	38	19%
Total Responding	196	56%		

Figure 6.19

Although there was a fair degree of agreement on the question of whether transfer of liability to others was consistent with the "polluter pays" principle, there is some suggestion of differing cultural perspectives as the Business categories were less keen on this suggestion than the others (although this could simply reflect self-interest).

The overall majority of responses does accord with the resulting outcome.

Q.9 (b) Should avoidance be made as difficult as possible?

	Yes		No	
Local Authorities	56	98%	1	2%
Business	13	93%	1	7%
Consultants	20	100%	-	0%
Finance/Insurance	4	100%	-	0%
Lawyers	5	83%	1	17%
Govt Orgs	6	86%	1	14%
Regulators	3	100%	-	0%
Property Industry	5	83%	1	17%
NGOs	-		-	
Others	3	100%	-	0%
Totals	116	96%	5	4%
Total Responding	120	34%		

Figure 6.20

The near unanimity on the question of whether avoidance should be prevented reflects the banality of the Question: the real issues being how to decide what was "avoidance" and how to prevent it. Bearing in mind the problematic nature of identifying clear responses to some Questions, it is still interesting that so few Lawyers gave an identifiable response to a Question which would seem so closely related to their area of expertise.

The anti-avoidance outcomes in the resulting rules are complex but limited[60] and do not reflect the certainty and unanimity with which preferences were expressed. Although this probably identifies the difficulties in seeking to prevent avoidance, it also reflects the resistance in some quarters to measures which would impact upon corporate structures and other devices which were not specifically established in order to facilitate avoidance, but which may have had that result. This is a good example of how the desire for certainty can conflict with other desirable outcomes.

[60] Mainly through the use of the concept 'causing and knowingly permitting' in the Act and the 'related companies' provisions in the draft Statutory Guidance. See Chapter Four.

Q.10 (a) Should there not be (mandatory) funds or insurance to meet liabilities?

	Yes		No	
Local Authorities	32	47%	36	53%
Business	21	95%	1	5%
Consultants	17	74%	6	26%
Finance/Insurance	3	60%	2	40%
Lawyers	9	69%	4	31%
Govt Orgs	3	75%	1	25%
Regulators	1	100%	-	0%
Property Industry	8	80%	2	20%
NGOs	2	67%	1	33%
Others	-	0%	3	100%
Totals	96	63%	56	37%
Total Responding	152	44%		

Figure 6.21

The issue of whether to have mandatory funds for remediation works seems to have highlighted some differing cultural perspectives, with Local Authorities being less opposed to the idea than other categories and Business the most unanimous in its opposition. A likely reason for these differing views is that Business and some other categories may see themselves as potentially bearing an unfair (or at least greater) share of the remediation costs burden through a fund or funds, whilst Local Authorities expressed fears that they would be the ultimate funders of works where liability could not be clearly identified or enforced. Thus they had an incentive to favour funds and so what is, perhaps, most interesting is that they were not more clearly in favour of them.

Q.10 (b) Should voluntary funds be encouraged?

	Yes		No	
Local Authorities	54	69%	24	31%
Business	11	50%	11	50%
Consultants	18	78%	5	22%
Finance/Insurance	4	57%	3	43%
Lawyers	8	80%	2	20%
Govt Orgs	7	88%	1	12%
Regulators	1	100%	-	0%
Property Industry	4	50%	4	50%
NGOs	2	50%	2	50%
Others	1	50%	1	50%
Totals	110	67%	53	33%
Total Responding	163	47%		

Figure 6.22

The majority of respondents answering "no" to this Question thought that funds should be mandatory, whilst some thought that there should not be any funds (including voluntary ones). Opposition to the use of mandatory funds (in response to Question 10(a) was not sustained where they were to be voluntary only (particularly as some "No's" wanted funds as well), however, the Business categories remained less keen than the others.

The clear outcome in the new regime is that there are to be no mandatory funds (in line with the views of the majority of respondents) and no apparent support, or incentives, for voluntary schemes (contrary to the views of the majority of respondents). It would appear that the favoured method of spreading the risk was through encouraging and preparing a foundation for insurance.[61]

[61] Though there are severe limitations on the usefulness of such an approach, particularly in relation to historic pollution: see Chapter Three.

Q.11 Is it for government departments, local authorities and professionals to identify/advise on best practice for information flow on contaminated land, especially through improvements to the conveyancing process?

	Yes		No	
Local Authorities	46	46%	53	54%
Business	12	52%	11	48%
Consultants	20	69%	9	31%
Finance/Insurance	3	60%	2	40%
Lawyers	4	33%	8	67%
Govt Orgs	5	63%	3	37%
Regulators	2	67%	1	33%
Property Industry	5	50%	5	50%
NGOs	3	60%	2	40%
Others	1	100%	-	0%
Totals	101	52%	94	48%
Total Responding	195	56%		

Figure 6.23

The majority of "no" responses to this Question indicated a preference for some kind of register, whilst some expressed a desire for Land Quality Statements (instead, or as well as, registers[62]). Views were fairly evenly divided in all categories, with Lawyers (and to a lesser extent Local Authorities) the only categories going against the general trend.

Although there are provisions for information dissemination through Registers in the new regime, these relate to the serving of remediation notices and carrying out of works, etc., rather than dissemination of information as to land identified as "contaminated", without further action having been taken, and the proposed system of more general registers[63] is to be repealed.

[62] See Issue 3(c), below.
[63] On the statute book as s.143 of the Environmental Protection Act 1990.

Q.12 Should the Department of the Environment continue with its priorities for Risk Guidance research?

	Yes		No	
Local Authorities	99	100%	-	0%
Business	29	100%	-	0%
Consultants	34	100%	-	0%
Finance/Insurance	8	100%	-	0%
Lawyers	13	100%	-	0%
Govt Orgs	8	100%	-	0%
Regulators	3	100%	-	0%
Property Industry	9	100%	-	0%
NGOs	5	100%	-	0%
Others	2	100%	-	0%
Totals	210	100%	0	0%
Total Responding	210	60%		

Figure 6.24

"Yes" responses here indicated the view that there was the need for technical guidance. The figures speak for themselves and reflect a frequently expressed strong desire for technical guidance.

The outcome has been an attempt to develop technical/scientific standards, though this has been far from complete and the risk-based approach taken probably identifies what is a more realistic approach (and provides less certainty through recognising the complex factors to be considered) than the implicit suggestion that such standards would provide "the answer" to contaminated land problems.[64]

[64] For further comment, see Issues 2(b) and 5(a), below.

Q.13 Should the principle of *caveat emptor* be maintained?

	Yes		No	
Local Authorities	23	22%	80	78%
Business	16	50%	16	50%
Consultants	10	29%	24	71%
Finance/Insurance	2	29%	5	71%
Lawyers	6	40%	9	60%
Govt Orgs	4	50%	4	50%
Regulators	1	100%	-	0%
Property Industry	4	44%	5	56%
NGOs	1	33%	2	67%
Others	-	0%	3	100%
Totals	67	31%	148	69%
Total Responding	215	62%		

Figure 6.25

Within the "no" responses there were suggestions that registers, Land Quality Statements and/or a duty to disclose information of some kind were required. The general pattern of cultural perspectives was followed to some extent, with Local Authorities most in favour of a change to the principle of *caveat emptor*, Business the least keen and others (generally) somewhere in between. We can also note that more than twice as many Lawyers responded to this Question (within their sphere of expertise) as responded to the issue of avoidance,[65] although this may also reflect the clarity of Questions[66] and answers.

Perhaps the clearest outcome has resulted here: no change whatsoever, although the limited registers provisions may have some impact.

[65] See Q.9(b), above.

Q.14 Should re-use of "Brown" land be encouraged by the appropriate agencies?

	Yes		No	
Local Authorities	109	100%	-	0%
Business	28	97%	1	3%
Consultants	35	100%	-	0%
Finance/Insurance	6	86%	1	14%
Lawyers	15	100%	-	0%
Govt Orgs	8	100%	-	0%
Regulators	3	100%	-	0%
Property Industry	11	100%	-	0%
NGOs	4	100%	-	0%
Others	2	100%	-	0%
Totals	221	0%	2	1%
Total Responding	223	64%		

Figure 6.26

Again, the responses to this Question could not be much clearer, reflecting its un-contentious nature. The policy objective of re-using brownfield land has continued to be one of the foundational principles of the new regime.

Q.15 Should the Environment Agency provide a framework of Guidance for dealing with contaminated land?

	Yes		No	
Local Authorities	86	88%	12	12%
Business	26	87%	4	13%
Consultants	29	88%	4	12%
Finance/Insurance	8	100%	-	0%
Lawyers	11	85%	2	15%
Govt Orgs	9	100%	-	0%
Regulators	3	100%	-	0%
Property Industry	10	100%	-	0%
NGOs	6	100%	-	0%
Others	4	100%	-	0%
Totals	192	90%	22	10%
Total Responding	214	61%		

Figure 6.27

[66] For example, raising more than one issue in a single Question.

Responses were fairly unanimous in favour of the suggestion that the (then proposed) Environment Agency provide guidance, with the Local Authorities in agreement with other categories. It may be that respondents had in mind different types of guidance,[67] with some viewing this as a method of restricting the discretion of enforcement agencies (particularly Local Authorities) and others seeing it as fulfilling more of a technical advice and support rôle. The nature of the Question was such that it was open to a number of differing ideas as to how it would actually be realised.

Although guidance has formed a very significant part of the new regime, it has been provided, in the main, by central government, with the Environment Agency providing more of a technical support function. Of course, this may have been what the respondents actually envisaged at the time of consultation as the structure, and indeed existence of, a new regime was not clear, and it is eminently possible that matters such as "exclusion" and "apportionment" would not have been considered appropriate matters for the Environment Agency if this had been put to respondents.

6.10 Further Analysis

A further aspect of the analysis of responses to *Paying for Our Past* was the identification of the number, and proportion of the total number of respondents, who wished their responses to be confidential and not made available to the public (see Figure 6.28 below).

[67] See Issue 5(a), below.

Confidential		**% of Total**
Local Authorities	4	26%
Business	7	46%
Consultants	1	7%
Finance/Insurance	1	7%
Lawyers	-	
Govt Orgs	-	
Regulators	-	
Property Industry	1	7%
NGOs	1	7%
Others	-	
Total	15	100%
Total of Responses	15	4%

Figure 6.28

The proportion of confidential responses was very low. This suggests that the public consultation exercise was truly "public" in that sense (although other, private discussions did, of course, take place), and it may have been that to respond to the public exercise but request that the information provided remain confidential would suggest that the respondent had something to "hide", or that the information had commercial implications.[68] What is rather unsatisfactory is that four Local Authorities responded confidentially. Whilst there may have information which was sensitive and could have financial or other legal implications, it does seem unsatisfactory for a public body to respond to a public consultation exercise, using public funds to formulate its response and responding on the basis of a political mandate from the local electorate, making a conscious decision to refuse to make that response available to the providers of the funds and mandate. If it was thought necessary to provide the policy-makers with material which was sensitive, there appears to be no reason why that could not be supplied separately from the main response.

[68] Although some confidentiality may have been claimed due to fears as to revealing contaminated property publicly, respondents may have been aware that to identify themselves as having an interest in contaminated land issues, but not prepared to discuss these publicly, may have caused problems in itself.

No Substantive Comment		**% of Total**
Local Authorities	7	23%
Business	4	13%
Consultants	2	7%
Finance/Insurance	2	7%
Lawyers	1	3%
Govt Orgs	7	23%
Regulators	-	-
Property Industry	2	7%
NGOs	3	10%
Others	2	7%
Total	30	100%
Total of Responses	30	9%

Figure 6.29

These respondents generally made no response but indicated that they been provided with the consultation paper, or only raised issues which were not directly relevant to the Questions or Rule-making Issues. The high proportion of Government Organisations relative to their overall number of responses identifies how they may make up a significant proportion of the consultees who are routinely included in the circulation of an consultation paper in a given policy area.

6.11 Contaminated Land Rule-making Issues - Responses to *Paying for Our Past*

With the Contaminated Land Rule-making Issues, references to these were logged only where there was some reasonably clear/specific relationship between the text of the response and the relevant issue. For this reason, there are some differences between the data collected relating to the issues and that presented in relation to the Questions raised by the Consultation Paper, where the Issue and the Question are similar.[69]

Issue 1(a) - The Rôles of Central and Local Government and Other Bodies[70]

	Central Govt	Other	LAs[71]	Env Agency[72]
Local Authorities	10	1	47	43
Business	1	-	2	12
Consultants	2	-	3	10
Finance/Insurance	-	-	-	2
Lawyers	1	-	3	9
Govt Orgs	1	-	1	3
Regulators	1	-	-	-
Property Industry	-	1	1	7
NGOs	-	-	-	2
Others	-	-	-	2
Total	16	2	57	90

Figure 6.30

These figures reflect the general views expressed as to which bodies should be involved in contaminated land regulation. This could be in the rôles of regulators, providers of guidance for regulators and other direct rôles.[73] The results show that there was a significant level of support for the (proposed) Environment Agency to be involved, with some support for Local Authorities having a rôle instead, or as well.[74] The only significantly differing perspective was that of Local Authorities which had a much higher level of support for their own rôles, whilst still supporting the

[69] For example, with Issue 6(d), only responses identifying or making some reference to, methods of preventing avoidance were logged, whereas with Question 9(b) a simple 'Yes' was included.
[70] Respondents making reference to bodies that should have a role.
[71] Local authorities.
[72] The (proposed at the time of consultation on *Paying for Our Past*) Environment Agency.
[73] But does not include wider rôles, such as providers or disseminators of information (other than through new systems such as registers).

involvement of the Environment Agency.[75] Although the argument that local authorities needed to be involved and to have flexibility to meet local needs was also recognised by some from other sectors,[76] other respondents favoured decision-making by the Environment Agency regarding "major" sites at least, as well as a role for the Agency in providing technical guidance, with some seeing the new agency as something of a "saviour".[77] The rôle of central government was generally perceived as that of a provider of regulations and guidance, rather than that of individual decision-maker.

The outcome in the new regime was the involvement of all of these bodies, within a hierarchy which had central government at the top, the local authorities as the main enforcing agencies and the Environment Agency dealing with more serious "Special" sites. Thus the outcome generally accords with the majority of views expressed, although there has been a greater degree of involvement for local authorities than that suggested by as appropriate by most other categories (which wanted the Environment Agency to have many of these responsibilities).

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[74] Typical comments including: "Land contamination ... remains largely a local problem best dealt with directly at local level by the Local Authority." (Response No. 31 (Mid Suffolk District Council)).
[75] Generally through provision of guidance and/or funds.
[76] "... flexibility must rest at local authority to interpret those guidelines as befits the local need." (Response No. 20 (the Retail Motor Industry Federation)).
[77] "It is believed that the establishment of an environment agency would help to bring consistency and clarity to the law relating to environmental liability and that is something which must be welcomed by all those working within the field." (Response No. 72 (Norwich Union)).

Issue 1(b) – Whether There Was a Need for a New Rule-system

	Yes	No
Local Authorities	42	-
Business	7	5
Consultants	8	-
Finance/Insurance	3	-
Lawyers	9	-
Govt Orgs	2	1
Regulators	-	-
Property Industry	2	1
NGOs	3	-
Others	1	2
Total	77	9

Figure 6.31

Whilst the total figures identify an overwhelming majority of preferences in favour of new rules of some kind,[78] the opinion of the Business and Property Industry categories (whilst of limited statistical relevance) was much more evenly divided, the general rationale for the view against new rules being that this simply added bureaucracy which would stifle industry.[79]

The outcome has been a (complex) new system of rules, but one which has been presented as merely clarification of existing liabilities.[80]

[78] Analysis of the types of rules preferred (which also includes the wider issue of technical standards) is provided below in relation to Issue 5(a).
[79] An example of Business in favour of legislation being the Association of British Chambers of Commerce: "It is, therefore, imperative that the Government follows the lead of the Lords and clarifies the position about environmental liability in legislation" (Response No. 172).
[80] See Chapter Four.

Issue 1(c) - Levels of Certainty and Flexibility

	Certainty[81]	Flexibility[82]	Fairness[83]
Local Authorities	98	31	52
Business	32	12	25
Consultants	30	9	23
Finance/Insurance	13	5	8
Lawyers	17	8	11
Govt Orgs	11	5	8
Regulators	3	-	3
Property Industry	11	2	6
NGOs	2	-	-
Others	3	-	1
Total	220	72	137

Figure 6.32

It is apparent from the total figures that many respondents expressed a desire for more than one quality in rules or other provisions to address contaminated land issues.[84] The most striking aspect of the results by respondent category is that there was an almost universal approach, with the most often preferred quality being Certainty, the next Fairness and the last Flexibility. The interrelationship between flexibility and fairness was discussed in earlier Chapters.[85] It appears, however, that the balance between these qualities was thought less significant than Certainty, the latter being the primary concern of every category of respondents. This desire for certainty[86] was often the reasoning behind the acceptance by Business and other groups of the need for further, or at least clarification of, legislation.[87] Further certainty was (variously)

[81] Respondents referring to a need for certainty in any measures.
[82] Respondents referring to a need for flexibility in any measures.
[83] Respondents referring to a need for fairness in any measures.
[84] For example, many respondents indicated desires for both certainty and flexibility, or for certainty, flexibility and fairness.
[85] Chapters Two, Three and Four.
[86] See, for example: Response No. 241 (Linklaters & Paines) "A further aspect that should perhaps be regarded as a priority is that there should be a high degree of certainty. Several clients have expressed the view that an onerous liability of which they were aware is preferable to an unknown contingent liability."; and "Business - and the environment - need a clear framework so that they know what the rules are and can be kept to them" (Response No. 24, University of Dundee), although others saw some advantages in having uncertainty: "On the other hand, at present, there is considerable uncertainty amongst owners, developers and others as to their exact responsibilities and just what the regulators powers are. This uncertainty may have the doubtful advantage of making these people more careful in case they fall foul of more than one section of law. Greater consistency could therefore lead to their pushing the law as far as it will go and thus be a two-edged sword." (Response No. 50, the Landscape Institute).
[87] See, for example, Response No. 172 (quoted above) and Response No. 336 (the American Chamber of Commerce (UK)).

considered to be possible through: new rules[88] (and standards in particular[89]); consistency in approach to rules by regulatory agencies; and institutional changes.[90] However, a large number of respondents communicated a desire for greater certainty, but only whilst retaining flexibility,[91] and one even qualified its desire for further certainty by the condition that this produced more "fairness" (which was not defined any further).[92]

Although the outcome in the new regime is difficult to characterise, there does seem to be an attempt to provide some balance between these (often conflicting) qualities of rules: most notably through the use of "mandatory guidance" and the mass of detailed rules which seem to attempt to be both certain and fair.

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[88] See Issue 1(a), above.
[89] See Issue 2(a), below.
[90] See, for example: Response No. 101 (Beverley Borough Council) "Greater consistency in regulatory powers through a proposed Environment Agency should recognise the value of discretion in allowing the regulator to operate flexibly but within a framework of minimal acceptable standards."; and Response No. 148 (the United Kingdom Environmental Law Association) "The formation of a unified Environment Agency should help to ensure a more consistent approach" and "We believe that consistency could also be greatly assisted if appeals against the decisions of regulators were heard by a single, independent Environment Appeals Tribunal".
[91] For example, Response No. 9, St. Paul's Developments: "Greater consistency is always a help. But we are not strong supporters of absolute standards for remediation. Different sites have different conditions impacting upon the level (and implications) of on-site contamination. These differences should always be taken into account when determining the methodology of remediation."; Response No. 51 (Crawley Borough Council): "... Local Authorities have specific local knowledge and local circumstances may lead to some Councils coming to different judgements on how to exercise their powers when dealing with otherwise similar situations."; and Response No. 58 (Winchester City council) "However, a balance must be struck between consistency using rigid guidance and the need for flexibility which can often be required when dealing with such problems."
[92] "Response No. 206 (Richards, Moorehead and Laing Ltd) (responding to the question whether there should be greater consistency in regulators' powers) "Yes, providing that such consistency leads to a fairer regulatory system."

Issue 1(d) - Whether Issues are Polycentric or Justiciable

	Yes[93]	No (planning)[94]	No (other)[95]
Local Authorities	-	10	16
Business	2	1	6
Consultants	-	6	8
Finance/Insurance	1	-	-
Lawyers	1	4	3
Govt Orgs	-	1	4
Regulators	-	-	1
Property Industry	-	1	-
NGOs	-	1	2
Others	-	-	-
Total	4	24	40

Figure 6.33

These results clearly indicate that contaminated land issues have a significantly polycentric "pull", as the vast majority of those indicating a view in their responses felt that they could not be dealt with wholly in isolation from planning and other issues.[96] Further support for this view can be found in the responses regarding Issues 3(h) and (to a lesser extent) 3(j) below.

These overlapping areas are referred to in the "Statutory Guidance" and are viewed as the methods by which future contamination will be prevented. Within the new regime itself, planning and wider economic/environmental factors will remain relevant, for example, through decisions as to costs recovery and the possible use of enabling development to generate remediation funds.

[93] Suggestion that contaminated land could be dealt with in isolation from other issues.
[94] Reference the fact that other issues were drawn in when seeking to deal with contaminated, through town and country planning considerations.
[95] Reference the fact that other issues were drawn in when seeking to deal with contaminated, through other considerations (mainly pollution control).
[96] See, for example: Response No. 166 (Bexley London Borough) "Clear guidance to planning authorities will be necessary to so as to ensure the appropriate relationship between the actions taken under town planning powers and other legislation."; Response No. 202 (Portsmouth City Council) "The difference between Planning and Environmental Health powers does present a problem which should be resolved by clearer guidance to local planning authorities."; Response No. 210 (the Town and Country Planning Association) "The Town and Country Planning Association ... would wish to emphasise the important rôle which planning and the development process can play in finding effective solutions to the problems which are largely a legacy of our industrial past."; and Response No. 47 (the Insolvency Lawyers' Association) "In particular, the relationship between Land Use Planning, pollution and contamination needs to be examined and clarified, particularly in the light of recent case law."

Issue 2(a) - Implementation of the Environmental Principles

	P P P[97]	P P[98]	S D[99]	Proportion[100]
Local Authorities	31	6	18	-
Business	17	2	2	-
Consultants	12	-	5	-
Finance/Insurance	8	1	-	-
Lawyers	10	-	3	-
Govt Orgs	6	2	2	-
Regulators	-	-	1	-
Property Industry	7	-	-	-
NGOs	4	2	2	-
Others	3	-	1	-
Total	98	13	34	0

Figure 6.34

These figures provide only very basic data as they refer only to references being made to one of the Environmental Principles, but do not identify the nature of such references. The large number of references to the "polluter pays" principle may suggest that this "principle" is a flexible concept, as much as identifying that it was a central concern, with it being used as the basis for arguments both for and against imposing certain types of liability.[101] Similarly, the majority of references to the

[97] Respondents referring to the "polluter pays" principle.
[98] Respondents referring to the precautionary principle.
[99] Respondents referring to sustainable development.
[100] Respondents referring to proportionality.
[101] Amongst the numerous examples are: Response No. 14 (Barnet London Borough) "If the principle is that the polluter should pay there is no case for limiting the financial exposure of certain types of owner"; Response No. 27 (the Association of London Authorities) "In general we support the view that polluters should pay ... However, we consider that this principle is difficult to apply to contaminated land ... The owners or developers of the land are not normally those who caused the pollution in the first place. Therefore it is questionable whether they should be the ones to pay for the consequences of clearing up the damage."; Response No. 32 (Buckinghamshire County Council) "Whilst [the first of the five objectives referred to in Q.1] is consistent with the concept of the 'polluter pays principle' (PPP) which forms the basis of European environmental protection policy, it is unclear whether 'new pollution' refers to new contamination resulting from the spread of pollution from previous deposits, or pollution directly as a result of new deposits."; Response No. 60 (Theodore Goddard) "The principle that the polluter pays should not imply that he pays for doing something which was not reasonably considered polluting at the time at which he did it."; Response No. 82 (Kemsley, Whiteley & Ferris) "As a general principle the polluter should pay. The owner should be latched into this liability, especially if he is in any sense or form connected with the person causing the problem."; Response No. 91 (Eversheds Hepworth & Chadwick) "An allocation of funds by the Treasury on a general basis is the only appropriate source of funding. Levies on particular products or processes along the lines of the 'Superfund' in the USA have a specious appeal in terms of 'polluter pays', and internalising the cost of external impacts but will unacceptably penalise businesses which honour the highest environmental practices in such sectors..."; and Response No. 128 (the Country Landowners Association) "The CLA's view is that the overriding principle must be that the polluter should pay. The polluter must be clearly defined to mean the person actually responsible for the contamination. It is totally inconsistent

precautionary principle[102] and sustainable development[103] were made in the context of supporting the principle and suggesting that a particular policy was, or was not, in accordance with it.

Whether the outcomes in the new regime include furtherence of the Environmental Principles is a matter for debate: the principles being capable of differing interpretations.[104] Overall, it would appear that the weakest claim could be made in relation to the precautionary principle and the strongest with regard to proportionality,[105] most clearly through requirements as to the carrying out of cost/benefit calculations. This may reflect the self-interest of many respondents (and/or of their clients) and economic self-interest appears to regularly appear as a "concrete" aspect of "cultural" perception.

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with that principle to include a landowner in a situation where he is not responsible for the pollution simply because he happens to own the land in question."

[102] See, for example, Response No. 239 (the National Council of Building Material Producers) "With regard to action on existing contamination, the current wording that action should be taken on 'suspected risks' to health or the environment is highly precautionary and could possibly lead to landowners undertaking costly clean-up programmes on the basis of groundless suspicions."; and Response No. 233 (Cumbria County Council) "The environmental, health and safety etc costs of not undertaking sufficient remedial works should be evaluated and properly taken into account. The 'precautionary principle' should apply."

[103] Where responses: identified the internal conflict within the principle (for example, Response No. 274); identified the problem as being a result of a past failure to develop sustainably (Response No. 215); suggested that certain policies (such as Suitable for Use) were not in accordance with the principle (for example, Responses 210 & 323); and suggested that either insufficient, or too much, weight was given to the 'development' aspect of the principle (Responses 212 & 272 and 282 & 304, respectively).

[104] See the discussions in Chapters One to Four..

[105] Which really acts as a counterbalance to the other principles, and was not mentioned by any of the respondents, although this was often behind some of the differences in views as to implementation of the principles.

Issue 2(b) - The Rôle of Scientific Standards[106]

	Yes	No
Local Authorities	86	-
Business	31	-
Consultants	29	1
Finance/Insurance	9	-
Lawyers	15	-
Govt Orgs	9	-
Regulators	3	-
Property Industry	10	-
NGOs	3	-
Others	3	-
Total	198	1

Figure 6.35

These results confirm the responses made to Question 12. Again, they identify the almost universally perceived need for scientific standards, however, the way in which those standards should be established was rarely mentioned and the difficulties in establishing them rarely recognised. [107]

The outcome in the new regime has been the requirement of the use of suitable scientific standards, etc., but without government actually providing them in many cases. Technical standards have been developed separately from the new legal regime, and are far from complete and comprehensive.[108]

[106] Whether scientific standards were a priority.

[107] One of the rare examples being: Response No. 34 (the British Geological Survey) "Standards are the subject of current research but are going to be very difficult to establish at politically and economically acceptable levels." And another being Response No. 252 (see Issue 5(a), below).

Issue 2(c) - Dealing with the Physical Nature of Environmental Issues

	Referred to
Local Authorities	6
Business	2
Consultants	5
Finance/Insurance	1
Lawyers	6
Govt Orgs	2
Regulators	-
Property Industry	4
NGOs	-
Others	-
Total	25

Figure 6.36

These totals relate to the (sometimes oblique) references made to the physical nature of contaminated land issues, the most common being in the form of suggesting the use of "Completion Certificates".[109] Although the total number is low, other ways in which the physical nature was recognised more indirectly (such as standards for physical remediation) have been identified in Chapters Four and Five.

The outcomes have acknowledged the physical nature of the contaminated land issues by requiring physical remediation to be carried out, with financial penalties only secondary to this. However the Completion Certificates issue has not yet been dealt with satisfactorily.[110]

Issue 3(a) - Clarification of Policy Objectives

Whether there was broad agreement with contaminated land policy objectives was so closely mirrored by Question 1 that it is not repeated here.

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[108] See the discussion in Chapter Four.

[109] See the discussion in Chapter Four. Examples of respondents favouring such certificates include Nos. 91, 124, 150 and 325.

[110] The position being that enforcing authorities 'may wish to consider' providing written confirmation that they are currently happy with the remediation carried out (but providing no guarantee that further

Issue 3(b) - Re-use of Brownfield Land/Relieving Pressure on Greenfield Sites

The issue of how to provide for re-use of brownfield sites and relieve pressure on greenfield land is dealt with as part of Issue 3(h) (below).

The outcome seems to be a set of rules which, whilst not directly addressing how to pursue these issues, should help to further the general policy.

Issue 3(c) - Identification of Sites/Dissemination of Information - Registers

	Reg - Yes[111]	Reg - No[112]	LQS[113]	Other[114]
Local Authorities	52	1	11	9
Business	3	1	7	1
Consultants	10	-	10	1
Finance/Insurance	3	-	1	-
Lawyers	3	-	7	-
Govt Orgs	2	-	2	-
Regulators	-	-	-	1
Property Industry	4	-	-	1
NGOs	2	-	-	1
Others	-	-	-	-
Total	79	2	38	14

Figure 6.37

This is probably one of the most interesting findings as it identified the use of Registers as the most often preferred method of disseminating information. The number of responses expressly rejecting (or confirming rejection of) the use of Registers is extremely low.[115] Therefore, it may be that the use of Registers was not objectionable to the respondent policy community, provided that the wider issues of liability were addressed as well, or that the specific concerns expressed during the s.143 consultation exercises were addressed. There are some differences of views

works will not be required): see the *Description of the New Regime* in the Draft Circular, *op cit.*, para 15.6.

[111] Referred to the need for registers of some kind.

[112] Stated that registers should not be introduced.

[113] Suggested that Land Quality Statements should be required (see the discussion of Issue 3© in Chapter Five).

[114] Referred to the need for some other system of information dissemination.

[115] Although this could be because the question of whether Registers should be used was not directly raised, there is a discussion of their use in the Consultation Paper.

between the respondent categories, with Local Authorities being most in favour,[116] together with Property Industry, and others favouring Land Quality Statements (such as Business and Lawyers).[117]

The outcome has been the use of some Registers - see Question 11 (above).

Issue 3(d) (i) - Joint & Several Liability[118]

	Yes	No
Local Authorities	2	2
Business	-	2
Consultants	-	3
Finance/Insurance	-	5
Lawyers	-	1
Govt Orgs	-	-
Regulators	-	-
Property Industry	-	-
NGOs	1	-
Others	-	-
Total	3	13

Figure 6.38

The issue of whether joint and several liability should be imposed was not directly raised and the difficulties of identifying views in the context of complex issues regarding, and views upon, types of liability mean that all that can really be said is that the general trend was against this type of liability.[119]

The outcome has been the use of joint and several liability, but with some limitations and mitigation of some of its effects.

[116] For example, Respondent No. 32 (Buckinghamshire County Council) "It is important that contaminated sites are identified. This could be achieved by reintroducing the concept of a register. Inclusion on the register should be governed by stricter rules, and there should be a facility for amending or removing an entry once the site had been restored."
[117] See, for example, Respondent Nos. 117, 123, 169 194 and 259.
[118] Views as to whether there should be joint and several liability.
[119] See, for example, Respondent No. 154 (the Association of British Insurers) "A joint and several liability regime would create problems for insurers as they would find it extremely difficult to operate under a liability regime in which persons only partly responsible for pollution could be held financially responsible for the actions of other polluters."

Issue 3(d)(ii) - "Innocent" Owner Liability[120]

	Yes	No
Local Authorities	3	39
Business	1	17
Consultants	-	18
Finance/Insurance	-	6
Lawyers	-	9
Govt Orgs	-	4
Regulators	-	3
Property Industry	-	6
NGOs	-	-
Others	-	1
Total	4	103

Figure 6.39

The results on the issue of whether "innocent" owners should pay for cleaning up contaminated land are much more clear cut, with a significant number of respondents indicating clear preferences and the vast majority of those being opposed to this,[121] although there was not the same level of agreement as to precisely what amounted to "innocence".[122]

The outcome here is quite interesting as the resulting rules are the opposite of the clear views expressed, including all landowners as "Class B" appropriate persons, even where not responsible for causing or "knowingly permitting" the presence of substances. Again, there are some limitations and mitigating measures, however, the general policy is to make "innocent" owners liable as a fall back where polluters cannot be made to pay.

[120] Views expressed as to whether liability should be imposed on "innocent" landowners.
[121] For example, Response No. 296 (Richards, Moorehead and Laing Ltd) "Care has to be taken to protect the innocent homeowner or other landowner as an unfair system will have political consequences."
[122] With some suggestions of owners having to have taken all reasonable steps to discover any contamination as a requirement for such a defence.

Issue 3(d)(iii) - "Deep Pockets"/Lender Liability

Whether there should be lender liability or other liability for "Deep Pockets" was so closely mirrored by Question 4 (b)(i) that it is not repeated here. [123]

The extent of "Deep Pockets" liability remains to be seen, being dependent, in part, upon the interpretation of "knowingly permitting", however, the exclusionary tests establish that there are to be limitations and the general policy is not to particularly target lenders, etc.

Issue 3(d)(iv) - "Orphan Sites"/Funds

Whether "Orphan Sites" should be dealt with by using funds was so closely mirrored by Question 10 that it is not dealt with separately here.[124]

The outcome has been clear in that funds are not to be used to fund remediation of Orphan Sites, but the outcome regarding responsibility for their clean up generally is less clear and is one of the more unsatisfactory aspects of the new regime.

Issue 3(d)(v) - Strict or Fault Liability

Whether there should be more strict or fault-based liability was so closely mirrored by Question 7 that it is not dealt with separately here.

The outcome has been the imposition (or clarification) of generally strict liability, which is contrary to many of the views expressed by respondents.

[123] For examples of respondents: against lender liability, see Nos. 9, 21, 29 and 80; in favour of lender liability, see Nos. 14, 18 and 61; and in favour of lender liability but limited in some way (such as to the value of the loan made), see Nos. 19, 70 and 83.
[124] For examples of respondents in favour of: no funds, see Nos. 50, 87 and 100; voluntary funds only, see Nos. 121 and 122; and mandatory industry or other funds, see Nos. 19, 54 and 94.

Issue 3(d)(vi) - When Should The Public Pay

The issue of when the public should pay for remediation works is such a wide one that it could not be dealt with in the same manner as other issues. A rough guide as to general views can be found in the responses to Questions 4. & 10, where the general trend was to view remediation works as ultimately either a cost for the polluter (widely defined so as to include landowners and lenders) or a social cost to be borne by the general public.

Issue 3(e) - Historic contamination: Retrospective/Retroactive Liability

Dealing with the Past and Future Differently

	Retro Liability	**Retro Liability**	**Past & Future Separately**	
	Yes	**No**	**Yes**	**No**
Local Authorities	6	13	33	1
Business	1	16	15	-
Consultants	1	8	8	-
Finance/Insurance	1	5	7	-
Lawyers	1	4	6	-
Govt Orgs	-	3	2	-
Regulators	-	-	1	-
Property Industry	-	4	3	-
NGOs	1	-	4	-
Others	1	1	2	-
Total	12	54	81	1

Figure 6.40

A clear picture has been provided of respondents' views as to the imposition of retrospective/retroactive liability and whether historic and future contamination should be dealt with differently. Although Local Authorities were more often in favour of taking a "hard line" than other categories of respondents, there was otherwise a near unanimous opposition to retrospective/active liability and desire to treat the past and future contamination of land differently.[125]

[125] See, for example, Respondent No. 54 (Great Yarmouth Borough Council) "Historical contamination must be tackled by a common fund."; Respondent No. 113 (Bath City Council) "Strict liability should not be imposed retrospectively for historic pollution."; on a pragmatic more than principled basis, Respondent No. 47 (the Insolvency Lawyers' Association) "Regulators should be able to pursue more than one person at least for historic pollution or contamination on a qualified 'polluter pays' basis if the current owner cannot deal with the problem. We suspect that in terms of problems of identification and

Contrary to these views, the outcomes have not dealt with the past and future differently (the assumption being that control mechanisms will prevent future contamination, but the new regime being applicable if they fail) and retrospective/active liability has been imposed.

Issue 3(f) - Remediation levels: Multifunctionality or Suitable for Use

	Suitable for Use	**Higher than SFU**[126]
Local Authorities	6	21
Business	3	-
Consultants	1	7
Finance/Insurance	-	-
Lawyers	4	2
Govt Orgs	1	-
Regulators	-	-
Property Industry	4	-
NGOs	-	3
Others	-	-
Total	19	33

Figure 6.41

The results as to the standard of remediation which should be required are interesting for a number of reasons: First, the issue was directly raised in the Consultation Paper and forms one of the policy objectives on which respondents are directly questioned[127] (so that the issue was put to respondents, together with explanatory material and an expression of the rule-maker's view on the matter); secondly, the majority of respondents making explicit to this issue preferred a level higher than that of "Suitable for Use", contrary to the rule-maker's preference; thirdly, there were significant differences of view between respondent categories (Local Authorities, Consultants and NGOs generally preferring higher standards[128] and Business,

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indeed lack or waste of resource there is little point in seeking to recover for pollution or contamination occasioned more than (say) 15 years previously."; and Respondent No. 29 (Blackpool Borough Council) "With historical contamination, and historical perceptives (sic) upon the environment, it does appear unreasonable to be liable for what was unforeseeable ... More pertinent is that henceforth industry should regard any land contamination as entirely foreseeable and therefore avoidable. Therefore quite separate control and compensation regimes are required for past and future contamination."

[126] Expressed the view that remediation standards should be higher than Suitable for Use, though not necessarily that they should be multifunctional.

[127] See *Paying for Our Past, op cit.,* paras 2.4-12, 4A.5 and Q.1.

[128] See, for example, Response No. 127 (Congleton Borough Council) "The Council consider that the 'suitable for use' principle has swung too far in the direction of economic considerations and that, if sustainable development is to be realised, this must be the minimum response only ... and

Property Industry and Lawyers generally preferring Suitable for Use[129]); and fourthly, (in terms of outcome) the rule-maker continued with the Suitable for Use approach in the resulting rules. Of course, it could be that there was a "silent majority" in favour and communicating this through a simple agreement with the "bundle" of policy objectives, which illustrates how the views of the policy community may be "muddied" by the presentation of issues as "packages".

Issue 3(g) - Blight

	Concerned[130]	**Not Concerned**
Local Authorities	10	2
Business	5	-
Consultants	-	-
Finance/Insurance	-	-
Lawyers	-	-
Govt Orgs	-	-
Regulators	-	-
Property Industry	1	-
NGOs	-	-
Others	-	-
Total	16	2

Figure 6.42

A surprisingly small number of respondents noted continuing concerns about blight, perhaps because the issue was not directly raised. Many of those which did raise concerns based these on a lack of certainty,[131] and so it may be that the issue was communicated mainly through the general demands for more certainty identified in Issue 1(c) (above). Some of those who specifically stated that blight was no longer a

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contaminated land should be improved more in line with the multifunctionality approach."; Response No. 42 (Wigan Metropolitan Borough Council) "the 'suitable for use' approach may not take account of changing knowledge, perception or tolerance of harmful effects - a 'precautionary approach' might be more appropriate."; and Response No. 134 (the National Association of Waste Regulation Officers) "The 'suitable for use' approach is too remote and does nothing to address the many areas of contamination that exist in urban areas."

[129] See, for example, Response No. 325 (the City of London Law Society) "The Sub-Committee supports the Consultation Paper's proposal that clean-up requirements should be based on a 'fitness for use' standard ...".

[130] Respondents indicating that they considered Blight to be a continuing concern

[131] See, for example, Response No. 135 (the Joint Countryside Advisory Service) "It has been suggested that the existence of ... Registers would lead to blighting of land identified upon them ... To some extent this has occurred due to concern over the content of S143 Registers, but it has also occurred due to the lack of clear guidance on identification, treatment and liabilities arising from contaminated land. The best solution would thus be for clear guidance to be provided so that a uniform approach to contaminated land can be taken, working from a sound information base." (original emphasis).

(or such a) concern sometimes considered that blighting effects were an existing physical fact and that this could be overcome through provision of information[132] (in contrast with those who thought that provision of information through Registers would result in further blight[133]).

There has been no direct outcome regarding blight, but the avoidance of unnecessary blight would appear to be one policy aim if the new regime.

Issue 3(h) - Providing Incentives for Remediation[134]

	Green Field[135]	Central[136]	Enabling Dev[137]	Other/Need	No
Local Authorities	6	21	1	15	-
Business	2	5	3	1	-
Consultants	6	9	4	8	-
Finance/Insurance	-	3	-	2	-
Lawyers	-	7	3	2	-
Govt Orgs	2	2	2	-	-
Regulators	-	-	-	-	-
Property Industry	-	2	1	2	-
NGOs	-	1	-	2	-
Others	-	-	-	-	1
Total	16	50	14	32	1

Figure 6.43

The issue of whether/how to provide incentives for remediation works elicited a significant number of comments and a broad range of suggested methods. It is perhaps not surprising that Local Authorities favoured central funds more than other respondent categories, with their having one eye on the impact on their own resources.[138] These results confirm that the polycentric "pull" of contaminated land

[132] See, for example, Response No. 335 (West Midlands Planning and Transportation Sub-Committee) "Contamination is a blight in itself which will only be tackled in a meaningful way if all parties to the property and development process approach the problem from a well-informed position rather than from ignorance."
[133] See, for example, Response No. 155.
[134] Respondents referring to the need for incentives to clean up land (or not), and the form of such incentives (excluding regulatory and other liability mechanisms).
[135] A Greenfield Development Tax.
[136] Grants, or other forms of Central Government funding.
[137] Use of the Planning system for generation of funds through development projects.
[138] See, amongst the many examples, Response Nos. 54, 70, 157 and 175.

issues may be increased by a perceived desirability of bringing wider considerations into play such as the Planning system and wider fiscal and economic policies.[139]

The outcome regarding incentives has been to provide some in the wider context, but not to provide any within the new regime itself.

Issue 3(i) - Use of a Market-led Approach

References to the suitability of market-based approaches were so few as to be of very little significance.[140]

Although it appears that the philosophy of the new regime is to support and use the market as much as possible, it is interesting that the rule-system, on its face, operates independently of it.[141]

Issue 3(j) - Interaction/Overlap with Other Controls[142]

	Planning	**Common Law**	**Other**
Local Authorities	17	3	2
Business	5	1	-
Consultants	8	-	-
Finance/Insurance	-	-	-
Lawyers	4	1	1
Govt Orgs	3	-	-
Regulators	1	-	-
Property Industry	1	-	1
NGOs	-	-	-
Others	-	-	-
Total	39	5	4

Figure 6.44

[139] For examples of suggestions for a Greenfield Development Tax, see Response Nos. 134 and 151. For an example of the suggested use of Enabling Development, see Response No. 136.
[140] For examples of responses suggesting that use of the market was not appropriate, or inappropriate on its own, see Response No. 211 (Friends of the Earth), where it was submitted that the policy had to be more environment-driven, and Response No. 170 (Woodspring District Council), where it was submitted that such an approach may lead to inappropriate development.
[141] For a discussion of how the new regime supports the market, for example by upholding private contractual agreements as to liability where possible, see Chapter Four.
[142] Respondents referring tom the overlap or interaction with other legal controls.

With clear mentions of the overlap or relevance of other areas of law, the clearest connection was made with Planning.[143] Whilst a number of references were made to pollution and other issues,[144] it is perhaps surprising that the clear references to other areas were so few.

The outcome has been a complex and sometimes poorly defined relationship with some areas of law,[145] which has been one of the sources of criticism of the new regime.

Issue 4(a) - Legitimisation and Involvement in the Rule-making Process[146]

	Cons - Yes[147]	Cons - No[148]	Env Agency	LAS	Central Govt	Others
Local Authorities	7	1	56	9	9	4
Business	6	-	20	1	2	2
Consultants	3	-	18	1	5	-
Finance/Insurance	3	-	3	-	1	1
Lawyers	2	-	11	2	2	-
Govt Orgs	3	-	6	-	-	1
Regulators	1	-	3	1	-	1
Property Industry	1	-	6	-	1	1
NGOs	-	-	3	-	-	-
Others	-	-	2	-	-	-
Total	26	1	128	14	20	10

Figure 6.45

With regard to the rule-making process, views were quite consistent with virtually all those expressing a preference in favour of further consultation and of the Environment Agency being involved,[149] (though with some dissent as to the need for, or efficacy

[143] See, for example, Response Nos. 3, 46, 58 and 173 (planning) & 9, 44, and 94 (common law and development agencies).
[144] See Issue 1(d), above.
[145] Particularly the overlap with water pollution powers under s.161 of the Water Resources Act 1991: see the discussion in Chapter Four.
[146] Views expressed as to whether consultation was desirable and the bodies which should be involved in further rule-making processes.
[147] Indicated that further consultation was required.
[148] Indicated that further consultation was not required.
[149] See, for example (responding to Q.15), Response No. 154 (the Association of British Insurers) "We agree that such guidance would need to be drawn up only after wide consultation with interested parties."; Response No. 228 (South Buckinghamshire District Council) "Yes, subject to consultation with Local Authorities."; and Response No. 239 (the National Council of Building Material Producers) "Yes, the Environment Agency should be given a general responsibility for establishing a framework of guidance for dealing with contaminated land in consultation with industry." (original emphasis).

of, consultation[150]). There were also fairly consistent (although much less relevant statistically) views as to the involvement of other organisations.

The outcomes have been high levels of consultation in most stages of rule-making,[151] but with a greater involvement of Central Government and more limited rôle for the Environment Agency than the responses would suggest were desired by the policy community.

Issue 4(b) - EC and International Developments

Reference to European Community and International developments were not sufficiently numerous or clear to provide any meaningful statistics. However, a number of respondents did make some reference, such as preferring action at EU level, either to provide consistency across Europe generally, or in order to avoid national action resulting in British industry being disadvantaged competitively.[152]

Not surprisingly, there have been no direct outcomes in the resultant rule-making regarding this issue.

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[150]See Response No. 41 (Luton Borough Council) "With reference to the preliminary conclusions set out in para 4G.10: it would be totally unacceptable if the provision of such guidance has to wait for the establishment of the Environment Agency and then a further prolonged period of *wide consultation*". (original emphasis). This also identifies one of the fears communicated by some respondents of involving the then proposed Environment Agency in rule-making: that it might cause delay.

[151] See Chapter Five.

[152] See, for example, Response No. 43 (Cheshire County Council) "All developments in Britain will need to pay due regard to European developments so as to ensure a consistent Europe wide approach (if civil liability for environmental damage operated differently in Member states (sic), some industries will be required to pay the costs of damage they cause whilst industries in other Member states will avoid these costs)."

Issue 5(a) - Selection of Rule-types and of Qualities of Rules[153]

	Guidance	Standards	Legis/Regulation	Other
Local Authorities	50	69	27	1
Business	12	26	6	1
Consultants	12	29	5	2
Finance/Insurance	4	9	4	-
Lawyers	9	15	9	1
Govt Orgs	6	8	1	-
Regulators	1	3	-	-
Property Industry	2	7	2	-
NGOs	1	3	3	-
Others	1	1	1	-
Total	98	170	58	5

Figure 6.46

Surprisingly consistent views were expressed with regard to the types of rules which ought to be used. It might be anticipated that standards were the most favoured rule-types,[154] however, a large number of respondents were in favour of the use of other (legal) rule-types, mainly in addition to the production of standards.[155] Although there was strong support for Legislation and/or Regulation, there was more support for the use of Guidance[156] - presumably due to the ability to provide some degree of certainty whilst retaining flexibility, although the use of rule terminology by respondents was sometimes confusing: it being used in relation to both technical guidance to work with/instead of standards[157] and to provide consistency amongst regulators.[158] There

[153] Respondents indicating the need for one or more rule-types. Views as to the desired qualities of rules are not presented in the table. References are made in the text and relevant statistics are found in Issue 1 (c) above.

[154] Though, as noted in Issue 1(b) above, there were some warnings about placing too much reliance on the production of standards: see also Response No. 252 (WS Atkins Environment) "Helpful though they may appear to be, and notwithstanding the apparent clamour from industry, the creation of a set of 'clean-up standards' is a false hope in this context (ie contaminated land) where it is not practicable to follow the pattern of other environmental sectors where air pollution emission standards or noise emission levels, for example, are 'standardised'."

[155] See Issue 1(b), above.

[156] For example, Response No. 36 (Malvern Hills District Council) "Guidance for dealing with contaminated land is certainly needed."

[157] For example, Response No. 34 (British Geological Survey) "Setting guidelines rather than standards when improving land suitable for use is preferable when the scientific basis for supporting standards is so open to debate and argument."

[158] For example, Response No. 41 (Luton Borough Council) "There is clearly a need for some harmonisation within the various regimes governing regulatory action. There is also an urgent need however to address the concerns expressed by the CBI (para 4B.8) about the need for further guidance for the regulators to avoid the vastly different standards of approach currently being applied within the UK."

was also some confusion over what guidance would actually provide, in terms of flexibility or certainty.[159]

The outcomes have been in the form of all of the types of rules suggested as desirable by respondents, but with the focus on legal rules (of various kinds) and technical standards more peripheral, later and less comprehensive, and (perhaps most interestingly) developed without public participation of any kind.

Issue 5(b) - Desired Features of Rule-system - simplicity, intelligibility, etc

Responses to the issue of the qualities which rules should have were not sufficiently distinguishable from the responses to Issue 1(c) for them to provide any meaningful statistics. A general point was that there was a particular desire expressed for simplicity, as one aspect of demands for certainty in rules.[160]

The most easily identifiable outcome which is relevant here is that the new rule-system has been criticised as overly complex, rather than lauded for its simplicity - though this must be judged in the context of the qualities desired in relation to Issue 1(c).

[159] See, for example, Response No. 58 (Winchester City Council) "However, a balance must be struck between consistency using rigid guidance and the need for flexibility which can often be required when dealing with such problems." and Response No. 197 (FMW Environmental Ltd) "Such guidance can be advisory rather than having legal force but could place (sic) a valuable part in defining professional obligations." & Response No. 325 (the City of London Law Society) "Because of varying local conditions, it is suggested that such guidance should remain only as guidance so as to allow room for local discretion but the issue of guidance would help to achieve a level of consistency nationwide." - the latter views being more representative of the general understanding by respondents.

[160] And one stimulus for this desire was a perception that experiences in some other jurisdictions had been of complex and wasteful rule-systems: see, for example, Response No. 252 (WS Atkins Environment) "... we must avoid creating a complex legal framework where the US experience might be repeated."

Issue 6(a) - Identifying Appropriate Decision-makers[161]

	Environment Agency	LAS	Other
Local Authorities	22	54	3
Business	13	2	-
Consultants	8	4	1
Finance/Insurance	1	-	1
Lawyers	6	3	-
Govt Orgs	-	-	-
Regulators	1	1	-
Property Industry	2	-	-
NGOs	1	-	-
Others	2	-	-
Total	56	64	5

Figure 6.47

When we come to the appropriate bodies to take individual decisions, there is a high degree of divergence in opinions, with Local Authorities clearly out of step with the views of other respondent categories.[162] The Environment Agency was the favoured decision-maker for all other categories.[163]

The outcome has been the allocation of most decisions to local authorities, with more significant sites falling for decision by the Environment Agency. Thus the rôles of these bodies have significantly differed from the desires expressed by the majority of respondents who were not themselves local authorities.

[161] Respondents indicating a view as to the appropriate decision-making body for contaminated land issues.
[162] See Issue1(a), above.
[163] See Issue 1(a), above.

Issue 6(b) - Determining Other Participants in the Decision-making Process[164]

	More Public Involvement	Less Public Involvement
Local Authorities	1	
Business	-	3
Consultants	1	-
Finance/Insurance	1	-
Lawyers	2	-
Govt Orgs	-	-
Regulators	-	-
Property Industry	-	-
NGOs	3	-
Others	-	-
Total	8	3

Figure 6.48

These figures are so low that they are of little real value, however, they do have one interesting feature in that the Business category was the only one which expressed a desire to have less public involvement in decision-making.[165]

The outcome has been a very limited rôle for wider participants, though with some room to include them where this is considered desirable.

[164] Respondents indicating a view as to whether there should be more or les public participation in contaminated land decision-making.

[165] See, for example, Respondent No. 21 (British Gas) "The unowned environment must be relevant to this but is obviously different if only because private interest may not be involved (sic). It is not necessarily desirable to create surrogates by way of giving locus standi to environmental and other such bodies."

Issue 6(c) - Identifying Appropriate Appeal/Review Bodies[166]

	Local Democracy	Other	Courts
Local Authorities	4	1	-
Business	-	1	1
Consultants	-	-	-
Finance/Insurance	-	-	1
Lawyers	-	1	1
Govt Orgs	-	-	-
Regulators	-	-	-
Property Industry	-	1	-
NGOs	-	-	-
Others	-	-	-
Total	4	4	3

Figure 6.49

Again, the results regarding the issue of accountability for decision-makers are of little value due to the low number of references by respondents.[167]

Outcomes have included some local democracy by having local authorities as the main decision-makers, with further representative accountability through Central Government and "technical" accountability through the courts.

[166] Respondents indicating a view as to the methods, or bodies, through which decision-makers should be made accountable.

[167] As well as local democracy, other methods of providing accountability/review included: an Environmental Tribunal (Respondent No. 148); Ministerial appeals and judicial review (Respondent No. 117); and accountability through having local authority representatives on the board of the Environment Agency (Respondent No. 157).

Issue 6(d) - Prevention of Avoidance Practices[168]

	Director Liability/Lifting Corporate Veil	Other "Yes"	No
Local Authorities	6	9	1
Business	1	4	1
Consultants	1	4	-
Finance/Insurance	1	-	-
Lawyers	-	7[169]	1
Govt Orgs	-	-	1
Regulators	-	1	-
Property Industry	1	1	1
NGOs			
Others			
Total	10	26	5

Figure 6.50

These results do not reveal much about prevention of avoidance, other than confirming the results from Question 9 (b) that the vast majority of those responding to the issue thought that prevention was desirable, and identifying some of the more popular ideas – which were quite varied. As well as imposing rigid liability on company officers and shareholders[170] (the latter through ignoring the limited liability of companies), other suggestions included making lender and other liability "fair",[171] using remediation funds,[172] providing regulators with simple (and draconian) cost recovery powers,[173] and limiting "hardship" defences.[174]

Outcomes have included some attempts to deal with avoidance through the flexibility of the "knowingly permit" concept and specific provisions which deal with some methods of avoidance through group company structuring included in the exclusionary tests.

[168] Respondents indicating a view as to whether, and how, avoidance practices could be prevented or deterred.
[169] One respondent suggesting that whilst desirable, this would probably be impossible.
[170] For example, Respondent Nos. 16, 77 and 254.
[171] Respondent No. 117.
[172] Respondent No. 106.
[173] For example, Respondent Nos. 36 and 262.
[174] For example, Respondent Nos. 159 and 313.

Chapter Seven: Conclusions

7.1 A Summary of the Study

This Study has attempted to establish that the nature of environmental issues is such that they present particular challenges to rule-makers. The rule-makers have used particular tools in (a) rule formulation (consultation) and (b) the resulting rules (mandatory guidance) as two means of seeking to meet these challenges. These tools have, however, had limited success. The reasons for this include some which are specific to the environmental and contaminated land contexts, as well more general reasons.

7.2 The Importance of the Study

This Study is important for a number of reasons. It makes an original contribution to knowledge through providing a critical review of the literature on rules and rule-making in the context of environmental law and through the original material generated and critically analysed. This original material comprises the two lengthy and detailed interviews conducted with key rule-makers (from legal and administrative backgrounds respectively) involved in the development of the Contaminated Land regime combined with detailed contextual analysis of two highly important and extensive consultation exercises. The Study shows how complex rules were developed, over a long period of time, and in difficult circumstances and, critically, it establishes the impact which various consultation processes may have had on the development of the rules.

7.3 Findings

The empirical analysis in Chapter Six provided a number of findings. The number and nature of respondents to the various public consultation exercises on contaminated land remained fairly constant. The involvement of private individuals, as opposed to interest groups of various kinds, was negligible, despite the issues raised including a

number of "value" questions, as well as "technical" matters. The nature of many questions asked in *Paying for Our Past*[1] was such that there was agreement from the vast majority of respondents with many of them. There were, however, a number of issues which polarised opinion, and which lead to some differences of opinion along "respondent category" lines.[2] Analysis of the respondents views as to the Contaminated Land Rule-making Issues found consistency of view between respondent categories in some areas,[3] but less in others.[4] Whilst the resulting rules reflected the preferences expressed by the majority of respondents in many areas, there are instances where the rules directly conflict with the clear preferences of nearly all responses, most notably the imposition of liability upon "innocent" landowners in some circumstances.

The key findings in the Study overall are that: mandatory guidance was used to meet particularly acute problems with achieving an acceptable balance between certainty and flexibility, with limited success; certain powerful interests have enjoyed greater access to the rule-making process and appear to have had quite significant influence upon it; the rule-makers have been constrained by a number of other factors in developing the Contaminated Land rules; and that they have had a number of reasons for consulting publicly and privately. These key findings are elaborated further below. They lead to final conclusions on consultation, examining how the environmental context provides an enhanced *need* for public participation, but also makes effective public participation *more difficult*. It seems that the greatest need for further research is in devising new methods for public participation which can either facilitate greater *and more equal* participation, or to open up the rule-making process to greater public understanding and scrutiny.

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[1] *Op Cit.*
[2] For example, Q.4(b)(i) Limits on liability for lenders and others.
[3] For example, with Issue 1 (c).
[4] For example, with Issue 6(a).

7.3.1 The Use of Mandatory Guidance

The rationale for developing the concept of substantive "mandatory guidance" has been considered in Chapters Two and Four. It seems that the rule-makers saw this device as a means to avoid an overly complex system of rules, which would otherwise inevitably result from the nature of the issues being dealt with:

> "It was realised at an early stage that ... fundamentally you could not legislate for everything in relation to the remediation of contaminated land because it would be phenomenally prescriptive and enormously complicated (and it wouldn't look anything like Statutory Nuisance) and it just would not be feasible to produce that level of detail, you would end up with something as unwieldy and burdensome as Super Fund or CERCLA with lots and lots of sub-rules and exception to sub-rules ... One of the things that the technical people made clear to us was that every remediation is unique unless you had something which was very broad brush which said, you know, everything should be remediated to this level, then this level, and so on. If you were to reduce it into legally enforceable rules in the tradition of statutory rules it would be phenomenally complicated. And that was just for one aspect of it let alone for the allocations and attributions of liability. So it was realised relatively early on that this was not going suit itself to that style. That's when we realised that there would be three or even four categories of rules, including: binding guidance, less than binding guidance, and directions ... And the classic sort of style is the primary legislation, secondary legislation, then you have guidance (which everybody knows it is a material consideration and we have to have regard to it). And it was realised that what was needed was literally something in between those two. That was sufficiently flexible but was practicably the equivalent to regulation making powers, but not as cumbersome or as restricted as the procedure for regulation making powers, and also could be more generally phrased and yet could be considered to be more binding than

just normal guidance. So I think it was simply the realisation as we were working on the instructions that there needed to be that level of flexibility combined with more prescription than normal … the idea was that it was going to be much more within the control of the Department, and easy to work on and then issue, and less of a burden on plugging through Parliament."[5]

However, the limited success of the rule-type in practice is also accepted:

"But in fact I think that's probably proved to be illusory, partly also because it's tied up with the development of the subordinate legislation anyway. In other areas you would have the subordinate legislation and then issue the guidance, but here it's all had to be tied much more together. So I think the benefits they saw of speed and ease of doing it, haven't necessarily come about. But the benefit for the outside world, I think, is that it's an easier concept to grapple with, and it does make allowances for the fact that you're covering in a much more general way a whole sort of range of issues, which you couldn't do in regulations, other than by producing huge tomes of complex regulation, which even then wouldn't deal with the situation."[6]

We have considered the usefulness, and otherwise, of using mandatory guidance at length in earlier chapters. There is little to add here, save for a reminder that its purpose is to provide both certainty and flexibility (to provide "fairness" regarding allocation of liability and to allow local conditions and factors to be taken into account[7]). The analysis in Chapter Six established that this was demanded by all of the groups responding to *Paying for Our Past*, but has also provided one of the main constituent parts of an extremely complex system. A clue as to why the rule-system is so complex may be found in what appears on its face to be a remarkable philosophy expounded by some of the rule-makers in the draft Regulatory Impact Assessment,

[5] Interview with anonymous Departmental source.
[6] Interview with anonymous Departmental source.

when outlining the (rejected) approach of having "maximum requirements" for land remediation:

> "The guidance on liability (exclusion and apportionment, and on cost recovery), would be **less complex and hence less equitable**, in order to make it easier for enforcing authorities to issue remediation notices."[8]

This view is reinforced by the explanation for the complexity of the procedure for determining liability where the Government states that:

> "These steps may appear complex, but they are needed to fulfil the aims of the legislation in implementing the "polluter pays" principle while trying to avoid making APPROPRIATE PERSONS bear more that their fair share of the cost."[9]

Whilst it is obviously correct that the complexity of the "exclusionary tests" and many other provisions in the Statutory Guidance are intended to provide fairness in the application of the new legal regime, such a direct correlation between complexity and fairness does seem extraordinary, and the concept of "fairness" is not one which rule-makers are always happy or competent to address, at least without guidance from politicians:

> "Fairness"? I'm going to say neither 'yes' or 'no' to it, because fairness is in the eye of the beholder. I've mentioned the way the CBI felt it was unfair on the big businesses that Government should bring in hardship as a fairness consideration only for SMEs. Now was that fair or unfair? For whatever reason, and you're talking to me as a former Official, it is for Ministers to judge certain matters, and one of those is

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[7] Both of which could be seen as 'individuation' of decisions made under the rules.
[8] *The Contaminated Land Regulations and Statutory Guidance: Draft Regulatory Impact Assessment* (1999, DETR) (contained in the Draft Circular), Annex C (emphasis added).
[9] *Description of the New Regime, op cit.*, para 9.23.

acceptability. I was educated early in my policy Civil Service career that "acceptable" is a word for Ministers to use, and "fairness" is a matter for Ministers to decide."[10]

An opinion often expressed as to why the new regime is so complex is that it simply reflects the complexity of the issues being addressed:

> "(I have to answer that on a different basis – as an informed outsider only. I left DoE before the Environment Bill was placed before Parliament. I had no involvement at all in the drafting of the statutory guidance and was not a party to the consultation on it. From the perspective of someone with responsibility for the earlier stages of the process and with a detailed understanding of the issues involved, however, I think that complexity in the resulting rules was inescapable). This is a complex area. In Venn diagram terms, we are here at an overlap between property law, liability law (including *caveat emptor* and contracts), and scientific uncertainty. These involve judgmental matters and interpretations. Remember that 'suitable for use' is the policy touchstone, including the words 'an acceptable risk'. Which takes us into an area involving risk, not certainty. There isn't a simple answer ... You can't get away with having a simple matrix for a complex situation ... But I wouldn't be surprised if a period of experience enabled people to take quite a lot of the complexity out of the formal guidance, articulating it in practice material instead."[11]

Exactly why it is impossible to have a relatively simple approach (at least relative to the regime which has been developed) to dealing with a complex matter is not entirely clear, but it does seem that trying to accommodate a range of interests (some of which are very powerful), whilst trying not to expose the public purse, was a significant

[10] Interview with Dr Neil Jackson.
[11] Interview with Dr Neil Jackson.

factor[12] (particularly where historic liability was being settled, rather than future activities being compromised).

7.3.2 Other Methods of Addressing the Fears of the Regulatees

At the end of Chapter Four, it was suggested that the use of mandatory guidance was one way of alleviating concerns where those governed by the rules might not be happy with discretionary decision-making by the selected decision-maker. This could result from differing cultural perspectives of matters (such as risk) and differing values, regarding matters such as the balance between economic development and the need for ecological protection. In Chapter Six, the analysis of responses to the Questions raised by the consultation paper and of the approach taken to the Contaminated Land Rule-making Issues suggested that there were significant differences in values and perceptions between various respondent groups, particularly between Local Authorities and groups such Business. These differences are important as they indicate a split between the "regulated" and the primary decision-makers (indeed, the differing rôles and, therefore, concerns, are probably a major cause of these differing outlooks). In such a context, the rule-type may be used to provide some comfort for the regulated. But the nature of the rules is only one way of providing such "comfort": another is the nature of the decision-maker. One of the interesting features of the consultation responses was the level of support for, and faith in, the soon to be created Environment Agency (at least outside the Local Authority category). For a number of reasons (including local knowledge, local accountability, political expediency, and resources) Local Authorities remained the primary regulators, and there was some wider support for this. However, what was not proposed, or introduced, was a specialist appeals body in order to provide additional consistency and expertise at the appeals level, which could filter down to primary decision-making. There have been suggestions that some kind of specialist "Environmental Court", or "Tribunal" should be introduced in order to address some of the problems which result from the polycentricity of environmental decision-making, and, in particular, to deal with the

[12] The Statutory Guidance had become "increasingly detailed" as the rule-makers sought "to take account of representations made by various interest groups." *House of Commons (2), op cit.,* para 14.

complex scientific issues which arise.[13] These calls have become a little more muted since the Planning Inspectorate has taken over responsibility for many administrative appeals in the environmental context,[14] however, there is still some opinion in favour of an Environmental Division of the High Court.[15] Although it is beyond the scope of this Study to consider the use of such a body, this does illustrate that there are alternative, or complimentary, methods of balancing flexibility with certainty. Such a body (or bodies) might also alleviate some of the concerns expressed regarding the use of magistrates' courts as appellate bodies adding to, rather than reducing uncertainty in decision-making.[16]

7.3.3 Regulatee's Influence Upon Appellate Structures

A further important aspect of the Issue of identifying appropriate appellate bodies,[17] and one which sheds some quite interesting light upon the breadth of issues consulted upon, is the way in which the rule-makers established the appellate structures.[18] One might think that the decision as to the appeal body which was to have decisions allocated to it might be one which was a matter for Government alone, being a (quasi-) constitutional matter, and so one on which consultation was unlikely.[19] What was originally intended was that the magistrates' court would hear all appeals (as it did regarding Statutory Nuisances, where Local Authorities were the only regulators), from decisions made by both Local Authorities and the Environment Agency.

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[13] See, for example, Carnwath, R. "Environmental Enforcement?: The Need for a Specialist Court" [1992] J.P.E.L. 799; Woolf, H. "Are the Judiciary Environmentally Myopic?" [1992] J.E.L. 1; McAuslan, P. "The Role of Courts and Other Judicial Type Bodies in Environmental Management" *op cit.*; and the research carried out on the need for an environmental tribunal and possible structures for such a tribunal conducted by Malcolm Grant on behalf of the Department of the Environment, Transport and the Regions.

[14] Including the hearing of Special Sites appeals under Part IIA.

[15] See, for example, the suggestion that in the longer term the primary legislation may be amended to direct all appeals to either the Secretary of State or the proposed Environment Division of the High Court:: letter from Michael Meacher, Minister for the Environment, to Mr Andrew Bennett MP, Chair of the House of Commons Select Committee on the Environment, Transport and the Regions, dated December 22, 1997 (emphasis added), and the paper given by Sir Robert Carnwarth (as he then was) at the "Sustaining Environmental Law" conference, Imperial College, London, September 1998.

[16] See the discussion in Chapter Four.

[17] Contaminated Land Rule-making Issue 6 (c).

[18] The Issue not being raised by *Paying for Our Past* and drawing very few unsolicited comments (see the analysis in Chapter Six).

[19] And indeed was not publicly consulted upon regarding Contaminated Land (see Chapter Five).

However, when powerful interests, such as international companies, became aware that decisions by the Environment Agency would be appealed to the magistrates' court, they lobbied very hard for a change, even though this departed from the Statutory Nuisance model.[20] This illustrates how informal participation in rule-making may be highly influential and yet opaque: the change was made before any version of the draft Bill was made public and so, on the face of the public record, no change ever took place (and Parliament was not aware of the change in position).[21] Whilst there may be a number of benefits associated with "private" consultation, this example illustrates one of the unsatisfactory aspects which are considered in Chapter Five. Whilst the outcome in terms of the change made may not be objectionable (in fact it may be the remaining rôle of the magistrates' court which is the more objectionable), the way in which it came about does seem to be: an extremely significant aspect of the new legal regime being amended as a result of private discussions between big business and civil servants.

7.3.4 A "Hierarchy" of Policy Objectives

It seems clear from the approach taken by the rule-makers that a "hierarchy" of policies exists which set the constraints for rule development in a given area.[22] One of the most constraining factors, due to its elevated position within the policy hierarchy, was that there should not be an increase in the regulatory burden on industry. This was considered to be "critical"[23] and the need to maintain the argument that all the new regime amounted was an updating of liability rules which had existed for over a hundred years can be seen throughout the development of the rules.[24] The protection of the central public purse was an absolute policy, so that there was never any question of central government funding remediation works,[25] though this was not such

[20] Interview with anonymous Departmental Source (although this may well have been the most rational appeal body for complex sites in any event).
[21] Interview with anonymous Departmental Source.
[22] See Chapter Five.
[23] Interview with anonymous Departmental Source.
[24] See Chapter Four.
[25] Other than indirectly providing support, such as through grants and through local government funding.

a constraint with regard to local government resources.[26] The physical nature of the contaminated land issue (which is confirmed by the response analysis in Chapter Six) resulted in inevitable conflicts between those who had been in some kind of relationship with the land, over a number of years, and between those persons and government.[27] As the rules reached the implementation stage, where decisions could be foreseen by those potentially affected by them, these conflicts became more focused and a mass of rules were produced. Fundamental principles, such as the Environmental Principles failed to provide any solution at this level of detail due to their fundamentally inchoate, and sometimes conflicting, nature (the anlysis in Chapter Six identifying that all sides were praying them in aid of their causes[28]), and the drawing in of a number of other principles and policies, such as the protection of private property, the *caveat emptor* principle, and policies such as deregulation and protection of the public purse. What is notable in the context of these conflicts is that important ones, such as Orphan Sites, were identifiable as difficult issues right from the beginning of the rule-making process, and yet they have still not been satisfactorily dealt with (despite the number and variety of rules which have been used).

This Study has argued that there are specific aspects of environmental issues which present particular challenges to the rule-makers. At least some of the rule-makers recognise that factors like scientific uncertainty and risk assessment make rule-making particularly difficult,[29] although these problems do arise in a number of areas of rule-making.[30] The contaminated land context has the particular focus of retrospective liability, however, it was argued in Chapters Two and Three that this is really an example of the general contextual problems in "bold relief". The physical nature of

[26] Although the way in which this has been addressed (the 'Orphan Sites' Issue) is one of the less satisfactory aspects of the new regime.
[27] Generally conflicts between property rights, and between property rights and governmental intervention.
[28] For example, many respondents to *Paying for Our Past* argued (sometimes convincingly) that some remediation costs were truly 'social costs', and so should be borne by society generally (see the analysis in Chapter Six). This view met a brick wall in the conflicting and overriding policy to the contrary.
[29] Interview with anonymous Departmental source.
[30] Such as food safety: interview with anonymous Departmental source.

the context and the lack of certainty as to matters such as "risk" combine to make consultation in rule-making very difficult. A number of (often powerful) interests are prompted into taking an interest, which may be due to actual or perceived threats to their property rights (such threats sometimes being retrospective) or due to wider interests (such as protecting the interests of non-human actors), and these participants do not always share the same perspectives or values.[31] So what are the rule-makers striving to achieve when trying to make rules?

7.3.5 Why Rule-makers Consult

In the context of contaminated land, the rule-makers had no particular desire to facilitate general public participation. This is clear from the way in which consultation has been carried out and the nature of the respondents to those exercises.[32] It is also readily accepted by the rule-makers (perhaps for very good reasons):

> "I think that [there were] very few policies, interestingly enough, that the Department got involved in that really justified huge mass consultations of the wider populace … May be they should have tried it with the Poll Tax."[33]

The rule-makers had a number of objectives in carrying out the various consultation exercises, and these sometimes varied according to the nature of the exercise:

> " … to an extent the Civil Service and … generally all Governments believe it is a good thing, so you always do consultation. There are lots of reasons why you do consultation, and I think with contaminated land, probably all of them applied, the … "don't know what to do about this" sort of thing, so you just issue a sort of … very open-ended early consultation paper saying there seems to be a problem, what does

[31] For examples, see the findings in Chapter Six regarding Issues 2(a), 3(f) and 6(b), and Questions 4(b)(i), 7. and 8.
[32] See the critical analysis in Chapter Five and the empirical findings in Chapter Six.
[33] Interview with anonymous Departmental source.

> everybody think. And then you hope that even if you haven't had a bright idea at that point, somebody will come up with a bright idea which you can then develop. So I think that is always there on consultation And then there's the fact that you have to settle the major players in anything, so it is necessary at a later stage, once you are developing your thoughts to consult in a more focused way with certain groups so that you know, first of all what their concerns are in rather more detail than a general consultation, and you can find out more about what they are likely to support or not. And then as a part of all this you get them involved and sort of committed to the thing and then they sort of buy into it and they think it is their idea ..."[34]

It does appear that the main aims were to use consultative processes as: (i) part of a "marketing" process: getting the policy community to accept the general policy and providing them with the means to communicate their views; and (ii) to obtain expert advice on the detailed rules themselves. It is quite significant that an important part of the rule-making process was to hold "roadshows" at which selected members of the policy community would attend, where attempts were made to initiate a general debate, following a presentation by the Government and associated groups. The interesting thing here is that this concerted effort to "sell" the idea of a new system for dealing with contaminated land was initiated and carried on in the face of strong and concerted opposition from many powerful groups, and without particularly strong political support from within Government. This suggests that the model which closely fits what happened in the contaminated land experience was the public interest model, with public administrators identifying the need for some action (the "Ignition Stage" of the Rule-making Process[35]), primarily as a result of the physical nature of the issue and the lack of scientific certainty, then carrying this through the other stages largely through their efforts alone, but with a need for some pluralist, or probably more corporatist, elements, in order to carry through the fundamental policy to detailed rules.

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[34] Interview with anonymous Departmental source.
[35] See Figure 1.1 in Chapter One.

> " ... there was a real attempt made to try to balance the interests of various competing groups, including the Government as one of those competing groups ..."[36]

7.3.6 The Results of Consultation

The conflicting demands for certainty and flexibility (generally to satisfy needs for "fairness"), identified in the empirical analysis provided in Chapter Six, then resulted in the use of an unusual rule-type. Perhaps more importantly, they also lead to a mass of complex rules: partly resulting from the complexity of the issues faced (which are generally polycentric in nature); and partly due to an unsatisfactory association between complex rules and "equity" on the part of some rule-makers. The increasing degree of involvement and influence by Lawyers as the rule development process progressed[37] may have been a further factor here, as rules (together with their drafting and interpretation) are the "tools of the trade" of the legal profession, and Lawyers have been identified as having an interest in seeking "legalisation".[38]

It seems as though consultative processes have been used in the Contaminated Land rule-making process as methods of "risk management": acting as a safety valve for opposition from powerful interests; as a method of delay and to engage with powerful and disparate interests to avoid serious political errors; and as a method of securing expertise to avoid serious technical mistakes, although these processes can themselves present quite serious difficulties for the rule-maker:

> "... we were in a constant period of flux and consultation, so it was actually very difficult at any stage to work out where you were, because you were changing things all along ..."[39]

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[36] Interview with anonymous Departmental source.
[37] See the representatives at the 'Round Table' meeting in December 1998.
[38] As they see problems as arising from ambiguities or gaps in rules (See Chapter Two) and may have their status (and possibly also income) enhanced by rules.

and there are varying opinions as to the overall success of this model of rule-making, even amongst the rule-makers themselves (although there does seem to be more agreement on the value of the process as an idea, though not necessarily in terms of the actual experience of it, and only if divorced from the outcome):

> "I think that it is a failure really, but it isn't in full. I think the success is as a process. I think it was quite successful in that it involved lots and lots of disparate groups and got them to sort of negotiate a settlement, not quite amongst themselves, but around the Department, which might not have happened without that process. I think it's probably not had a good effect within the Department in that, I'm not sure, but I think people generally don't refer to it as a model of decision-making, in that it's not considered to be a resounding success in terms of what happened ... I think it was thought that ... they made a mistake with registers [and decided to] do something simple, along the lines of statutory nuisance and get it out of the way and then move onto something else. And I don't think anybody appreciated early on that this was going to be quite such a horrific process, that would go on for years ..."[40]

A contrasting view being:

> "I think that *Paying for Our Past* was part of an unusual, and unusually effective, exercise, and so a good 'democratic' rule-making process ... I think it was a good process, and there are lessons for others to learn from it, rather than the other way round (after all, as I have described, I applied to it the lessons I had learned from other exercises)."[41]

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[39] Interview with anonymous Departmental source.
[40] Interview with anonymous Departmental source.

7.4 Conclusions on Consultation: Is There a Way Forward?

7.4.1 The Contaminated Land Consultation Experience

Although the experience of Contaminated Land consultation may be an exceptional one, in terms of:

(i) the extent of consultation:

> "I would be tempted to say, although probably those with a wider experience of DoE would contradict me, that it was a rather more extensive and continuing consultation exercise than the Department had been involved in before. I think that is probably true, I cannot think of anything in my experience that was quite the same. It did seem like we were in a constant process of consultation, so that there was never a period when we weren't discussing it with one group or another, or progressing to the next very big stage of consultation.";[42]

(ii) its nature (being more of a limited public debate designed to restore confidence amongst interest groups):

> "This exercise was concerned much more with a debate. As I said earlier, it's very much the same pattern of liabilities and the same players. But the people that were on the receiving end of it had much more confidence in, and understanding [of, the situation]. So it was partly a public education process, partly a confidence-building measure, not a negotiation ... I can speak openly about this because the whole process was so open I think that was, in turn, because of the nature of the difficulties that Section 143 had run into: there was uproar; the issues ran across political Party lines; there were these players; there was a public

[41] Interview with Dr Neil Jackson.
[42] Interview with anonymous Departmental source.

crisis of confidence; and there had to be a public recovery process. Whether it was at the informal level or the formal level it had to be done."[43]

(iii) the degree of involvement by lawyers:

> "... I have never seen anything that involved the lawyers working on an area of policy as much as this ... It partly goes back to the point that it was a perception that it involved quite complicated legal issues."[44]

It provides a valuable case study of how large scale exercises can operate.

7.4.2 Consultation in Other Areas

It appears as though consultation as a method of public participation in rule-making is here to stay.[45] The Labour Government has been accused of governing by "focus group"[46] and of spending vast sums of public money on researching public opinion.[47] A glance at the DETR web-site reveals a number of consultation papers on a wide variety of matters at any one time. The Environment Agency has recently even consulted on how it carries out consultation.[48] The Royal Commission on Environmental Pollution seems to view consultation as a requirement of rule and decision-making in the environmental field,[49] and offers a number of alternative and

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[43] Interview with Dr Neil Jackson.
[44] Interview with anonymous Departmental source.
[45] In fact, there has been criticism that Government is becoming too concerned with consultative exercises: Government by 'Focus Group', though this may relate more to the political expediency of consulting key voters, those who do not have strong allegiance to any particular party, rather than consulting a cross-section of society.
[46] Which has been considered by some to have lead to an 'anti-green' approach by the Government, focus group findings suggesting that voters did not care very much the environment, until the GMO furore ("Costing us the earth, Tony": The Observer, November 14, 1999, pp. 18-19.
[47] The Labour Government is said to have tripled spending on public opinion surveys, including consultation/focus groups, compared to spending by the Conservative Administration. The figure is estimated at £1 million per month (and the DETR is likely to comprise a significant element of this): Liberal Democrat Education Spokesperson speaking on the Radio 5 Live Breakfast Show, October 3, 1999.
[48] Environment Agency Consultation Paper on Public Consultation Processes (September 1999).
[49] See R.C.E.P. 21st, Chapter Seven.

complimentary methods of carrying this out.[50] Some of the methods of utilising expertise and "testing" proposed rules were actually used by the Contaminated Land rule-makers,[51] although there does not appear to have been any general consultation on the key issue of standards for remedial works. One reason for this may be that the rule-makers have viewed technical standards as more complex and difficult issues than other rules:

> "Here we're talking about the key provisions of primary legislation. From statutory nuisance you've quoted the phrase 'prejudicial to health or a nuisance'. Those were terms of art dating from the mid-nineteenth century with particular interpretations in particular circumstances. We felt rightly or wrongly that part of the modernisation was to use language that would be more readily understood amongst the 'clients' for the new legislation. So, yes it's a 'standard' but only in the more esoteric legal sense. Defining numerical standards for contaminated land is much more difficult territory."[52]

7.4.3 The Way Forward for Consultation and Environmental Rule-making

So is there any particular way forward for environmental rule-making, and consultation in particular?

7.4.3.1 Political Will

A key question is whether consultation on contaminated land issues lead to more delay in the rule-making process. Not only have we seen how over ten years after Parliament identified that there was a problem which required action and over four years after appearing on the Statute book, the new rules are only just about to come in

[50] See the discussion in Chapter Five.
[51] A Study into the Effectiveness of the Liability Regime in the Draft Statutory Guidance on Contaminated Land (DoE, March 1997), a pilot study carried out for the DoE by Stanger Science and Environment, with Simmons and Simmons Solicitors.

force, but the Statutory Guidance has been developed for a period of around four years with only very close scrutiny identifying any changes between the 1996 and 1999 drafts (with no significant changes of policy), and virtually no changes of any substance between the 1999 and 2000 drafts. The public interest model identifies possible reasons why the whole thing was not left to quietly wither away, however, it may be that this also identifies the greatest obstacle to effective rule development: a lack of political will. The politicians seem to have taken a fairly neutral stance: not sufficiently opposed to the policy to put a stop to it, yet not sufficiently in favour to push it through:

> "The only slight hesitation I have about all of that is that given that it was under a Conservative Government, it was a slightly different experience because you were doing something which, inherently, I never understood why the Government was doing [it] ... Every now and again it sort of fitted with what they probably wanted to do, but you just got the impression that this was a policy that hadn't taken off really, and somehow if they did stop and think about it, and if actually the people on the outside got to them much more directly, rather than through the Civil Service, they would have said "I'm not so sure about this, I think we made a mistake about this one". And so actually it was quite important for the Civil Service, for various reasons (because everybody likes to develop new policies), to neutralise that direct ... antipathy that could have been fed through to a very high political level."[53]

> "This was a policy that, to an extent, had arrived, albeit reluctantly. [The Government] had been contacted at a political level by heads of industry, captains of industry, and others, who didn't want to be clobbered with liability, everybody knew what they didn't want was American Superfund. Whether they actually understood that or not, they knew that there was this concept and it was dreadful, and they didn't want to do that, so they were sold the idea that, as a

[52] Interview with Dr Neil Jackson.
[53] Interview with anonymous Departmental source.

Conservative Government, all they were doing was modernising Statutory Nuisance and making it work better ..."[54]

This issue of political will also provides an interesting example of how the effectiveness of traditional representative democratic systems can be underestimated. It appears that the time when political influence was most forcefully brought to bear upon the rule-makers and the issue of a new regime for contaminated land suddenly became a political "hot potato" for them was when homeowner constituents who had been worried by media scare mongering regarding blight[55] contacted their MPs. As well as the inherent difficulties of dealing with complex issues and seeking to implement inchoate and often conflicting principles and policy, this lack of clear political will to drive the policy through put additional pressures on the rule-makers to "sell" the policy to the powerful interests. Having said all of this and accepting that the devil is very often in the detail of drafting rules, it still seems to have taken a remarkably long time to finalise something which has been stated on a number of occasions to only reflect (and not increase) existing patterns of liability, and which is designed simply to direct existing levels of expenditure more effectively, rather than increase the current levels of expenditure on remedial works. Indeed, after being questioned on the adequacy of the consultation processes carried out, the (then) Department of the Environment stated (in the context of local authority expenditure) that " ... the 1995 Act did not represent a major innovation".[56]

7.4.3.2 Problems With Public Participation

We established in the earlier parts of this Study that the wider public have been excluded from direct participation in decision-making[57] as well not taking part in the consultation aspects of the rule-making process.[58] This seems to have been on the basis that they did not have sufficient "interest" in the matters to be decided, yet the

[54] Interview with anonymous Departmental source.
[55] Which is still taking place to some extent: see, for example, "There's poison at the bottom of my garden", MacEarlean, N., The Observer 'Cash', November 7, 1999, p.11.
[56] *House of Commons (2)* (Appendix): DoE evidence, para 6.
[57] See, particularly, Chapter Four.
[58] See Chapters Five & Six.

analysis offered in this Study on the nature of environmental issues (including contaminated land) identified that there was a need for wider public participation than may be the case with other issues.[59] It seems that that traditional notions of property rights (here as potential funders of remedial works) have provided the key to access to the rule-making process, and (in the future) the decision-making process, for those outside central and local government. Evidence of the view of the more powerful interests is limited, but indicates a desire to exclude others from decision-making processes at least.[60] The problems of representative participation through central and local government were identified in Chapter Two and through interest groups in Chapter Five. Whether the amendments to consultative proposals suggested by the Royal Commission and elsewhere would facilitate a truly participative system of rule-making, and whether many members of the general public are sufficiently interested (or can have a sufficient interest generated by others) in issues such as dealing with land contamination are open to question, and no opinion is offered here.[61] There are very great problems in devising such a system and in managing the results if one is successful.[62] The "regionalisation" of United Kingdom government through Devolution may help to make such systems more manageable: allowing the break down of rule-making geographically into so that rules can be "localised" and consultation conducted among more limited numbers (as well as on more limited issues in some cases).[63] Cultural perspectives may differ along geographical and many other lines, just as much as between the industry and other categories used in Chapter Six. Localised rules may also allow differing geographical economic conditions to be more satisfactorily addressed. The down side of both a more inclusive consultation system generally and the localising of rules is that this could lead to more complexity.

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[59] Though not necessarily all other issues. For example, health issues could lead to similar problems regarding numbers of consultees (though not the other difficulties resulting from the nature of environmental issues), however, the (rather unsatisfactory) way around this seems to have been to restrict consultation to health professionals and exclude the general public (see Griffiths, J.A.G. & Street, H. *The Principles of Administrative Law, op cit.,* pp.118-129.

[60] See the analysis of consultation responses regarding Issue 6(b) in Chapter Six.

[61] However, it does seem that a large number of individuals do respond to some aspects of rule-making (including quasi-environmental matters). Over 4,000 responses were received from individuals in response to the Scottish Office's consultation paper "*Water and Sewerage Services in Scotland: investing for our future*" (Maloney, W.A. & Richardson, J.J. *The Politics of Water, op cit.,* p. 167).

[62] Some of these are discussed in Chapter Five.

With wider consultation, this could be a result of having to accommodate even more disparate interests and perspectives on issues and, with localisation this could result from having slightly less complex systems of rules, but more systems (which seems to be precisely the problem which was identified in Question 2 of *Paying for Our Past* - inconsistency in regulators' powers).

7.4.3.3 Does Consultation Matter for Environmental Issues?

From identifying the nature of environmental issues it might be concluded that it does not matter whether society is happy about the measures taken to address them. They involve a number of other interests than those of our present society: the inter-generational effect and the effects on non-humans. An eco-centric environmentalist might conclude that all that mattered was the result on the ground; the physical effect, with the nature of the action being above the desires and/or needs of the present society. For them, the acceptance of the policy or detailed rules might be an irrelevance. However, there are a number of reasons why such an approach is flawed, in both practical and philosophical terms. Even if it were truly possible to objectively determine "the public interest" (in the sense of anthropocentric, ecocentric, or inter-generational equity needs) in practical terms, the acceptance of rules is a pre-requisite for their effective implementation.

We explored the need to provide rules with validity in Chapter Two, together with the way in which rules can be avoided, ignored, etc. (or "creatively complied" with) where not accepted by the regulated society - despite attempts to produce more effective rules. The need to gain acceptance of, or reduce resistance to, rules has been one of the catalysts for the development of alternatives to "command-and-control" regulation. Even if we assume that perfect compliance can be provided by appropriately drawn rules, two important issues still remain. First, there is something inherently unacceptable about consciously imposing rules which do not have the general support of society, and elevating other concerns over that fundamental

[63] One example is that the Statutory Guidance etc. consultation in 1999 relates to England, with Wales and Scotland now having devolved powers to make Regulations and develop Statutory Guidance for

constraint. Whilst rule-makers sometimes mis-judge the support for policies and rules, a distinction can be made where deliberately ignoring such support is a system of governance.

The environmental context also provides a particular reason why such an approach is flawed: the lack of scientific certainty and shared perspectives, so that there is a lack of agreement, even amongst "experts", as to what it is that needs to be done and can be elevated above democratic values. Thus we would have not only "Green Fascism", but "Green Fascism" in an intellectual void. Although participation in areas of mass administrative justice may be both impracticable and ineffective,[64] the uncertainties and indeterminacy inherent in sustainable development and its fundamentally political/ethical nature (the economic/technical issue being secondary), with the corresponding need for practical judgements, means that there is more to it than identifying the ecological means to determined ends.[65] The concept requires discussion and consideration by a wide range of actors, rather than being authoritatively "given", and (empirically) there seems to be a positive connection between democratic institutions and ecological protection.[66] Whilst the goal to be reached may be argued to in some sense "override" the wishes of the present human population, the means of reaching the goal and the establishment of realistic and practical measures to assist will have to secure the support of powerful interests, and the involvement of the wider population in establishing these measures can help to both balance those interests and help provide the system with wider values. Thus the environmental context provides the need for greater public debate, not less, and the policy "marketing" conducted by the DETR rule-makers (though overly restrictive as to its "consumers") seems a much more satisfactory method, both pragmatically and

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Contaminated Land (Scotland previously having its own rules, but developed by the Scottish Office).

[64] Craig, P.P. *Public Law and Democracy in the United Kingdom and the United States of America* (Clarendon, 1990), p. 135.

[65] Barry, J. "Sustainability, Political Judgement and Citizenship: Connecting Green Politics and Democracy", in: *Democracy and Green Political; Thought* Ed. Doherty, B. & de Geus, M. (Routledge, 1996), p. 116.

[66] Barry, J. "Sustainability, Political Judgement and Citizenship: Connecting Green Politics and Democracy", in: *Democracy and Green Political; Thought* Ed. Doherty, B. & de Geus, M. (Routledge, 1996), p. 116.

theoretically, although practical problems may result from not consulting more widely, as well as there being theoretical justifications for doing so.

One example of an environmental issue which has a high profile and which further illustrates a number of the points made in relation to contaminated land and consultation is the environmental impact of the use of Genetically Modified Organisms ("GMOs"). The characteristic features of environmental issues are present: physical effects (which may be irreversible); a lack of scientific knowledge on potential effects; and widely divergent cultural perspectives on how to approach the issue (including on the implementation of the Environmental Principles - what is sufficiently precautionary action and whether GMOs contribute, or are contrary, to the pursuit of sustainable development). An obvious problem is how to deal with consultation in area such as this, where one could imagine a huge public response, as well as from organised interests. It seems feasible that transparency and trust in the rule-making process are vital ingredients. This example might also identify the types of problems (such as direct lawful and unlawful action) which can arise if the values of the wider public are not identified and taken on board by rule-makers.

7.4.3.4 Transparency and Accountability: The Way Forward?

The identification by Lewis of the lack of transparency and accountability in the early stages of rule-making:

"Policy-making is the great accountability desert of British public law"[67]

seems the key to finding a way forward for implementing the Environmental Principles and moving through the Environmental Rule-making Process efficiently, effectively and appropriately. The failings of domestic provisions in this area were documented in Chapter Five. We have recently had a Freedom of Information Bill. This will not, however, cover most aspects of policy-making. The arguments against releasing such information include it leading to more defensive administration (such

[67] Lewis, N., "Corporatism and Accountability: The Democratic Dilemma", *op cit.*, p. 95.

as less advice in writing).[68] It could be equally well-argued, however, that release of such information would support administrators and encourage well-documented rule-making, so that they would have publicly available evidence to back up their views and advice.[69] In any event, it seems that perceptions of undue influence by certain interests are as damaging as any such influence which might actually take place. The problem is that we don't know enough about what goes on: the rule-making procedure seems to have a lack of structure, accountability and transparency. Despite documents such as the *Better Regulation Guide*[70] and *How to Consult Your Users - An introductory guide*,[71] the 1999 Statutory Guidance consultation process seems little different from the process in 1996, 1994 before that, and 1991/2 before that, save for availability on the Internet.

The rule-makers seem to have acted nobly and persevered in the face of strong opposition whilst dealing with very difficult issues, but they do seem to have been "muddling through" and repeatedly asking the same people quite similar questions. More availability of general public participation and scrutiny, if nothing else, would remove some doubt (which may exist) as to whether what is going on is appropriate and leave an audit trail so that the process of rule-making, (in the environmental context) can be examined and lessons learned, both positive and negative, from what can be extensive and lengthy processes of rule-making. Even if the wider public are not sufficiently interested in these issues (and remain uninterested despite new efforts to enthuse them), such an approach would still be useful for the rule-makers themselves (as much of the knowledge and experience gained through consultative and other rule-making processes should be transferable within and between Departments), and, at the very least, might remove the need to present consultation exercises publicly as something which they are not.[72] Even greater access to, and transparency of, the rule-making process will not provide for some ideal process as such processes only reflect the wider society in which we live and the power

[68] Rule-making by 'post-it notes'.
[69] Which would be particularly useful when criticised publicly by the press or politicians.
[70] *Op cit.*
[71] *Op cit.*
[72] The mis-leading suggestions as to the identity of respondents contained in Government Press Releases.

structures within it. Despite some openness with the "Round Table" discussion in 1998, there remains the murky area of where open consultation moves to a "smoke-filled room with only the few that 'matter' present",[73] so that the relevance of the statistics provided in Chapter Six becomes even more limited. However, that is no reason to abandon attempts at reform and the residual relevance of these statistics is that they help to identify areas of variance between the resulting rules and the publicly expressed desires of those responding to the rule-makers.

7.5 Final Conclusions

It appears that the use of consultation in the contaminated land rule-making process and the use of "mandatory guidance" in the resulting rules has been driven by the nature of the issues involved. Whilst the rule-makers have had some success in dealing with them (most notably by keeping the process going despite the lack of a strong political will supporting it), these tools have also provided particular problems. This Study has identified the issues which Contaminated Land rule-makers have to deal with, how they have dealt with them, and the areas of greatest concern with the way in which they have been addressed. Whilst the majority of these issues also arise in the environmental context generally,[74] many of them are merely exacerbated by this context and so they apply to rule-making generally, to a greater of lesser extent.[75] It is hoped that the Study is of some use in seeking to improve such processes.

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[73] Maloney, W.A. & Richardson, J.J. *The Politics of Water, op cit.*, p. 170.

[74] For example, with regard to water policy: see Maloney, W.A. & Richardson, J.J., *The Politics of Water, op cit.* where powerful interests ("Core Insiders") were found to exert influence through informal contacts, as well as formal consultation and were found to have more highly 'weighted' opinions

[75] See, for example, the problems of Powerful Interest Groups, Conflicting Values, and Unrepresentative Consultation identified in the work of the Law Commission by Cretney, S. in "The Politics of Law Reform - A View from the Inside" [1985] M.L.R. 493.

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Appendix One: Section 57 of the Environment Act 1995

PART II

CONTAMINATED LAND AND ABANDONED MINES

Contaminated land

57. After section 78 of the Environmental Protection Act 1990 there shall be inserted—

"PART IIA

CONTAMINATED LAND

Preliminary

78A.—(1) The following provisions have effect for the interpretation of this Part.

(2) "Contaminated land" is any land which appears to the local authority in whose area it is situated to be in such a condition, by reason of substances in, on or under the land, that—

(a) significant harm is being caused or there is a significant possibility of such harm being caused; or

(b) pollution of controlled waters is being, or is likely to be, caused;

and, in determining whether any land appears to be such land, a local authority shall, subject to subsection (5) below, act in accordance with guidance issued by the Secretary of State in accordance with section 78YA below with respect to the manner in which that determination is to be made.

(3) A "special site" is any contaminated land—

(a) which has been designated as such a site by virtue of section 78C(7) or 78D(6) below; and

(b) whose designation as such has not been terminated by the appropriate Agency under section 78Q(4) below.

(4) "Harm" means harm to the health of living organisms or other interference with the ecological systems of which they form part and, in the case of man, includes harm to his property.

(5) The questions—

(a) what harm is to be regarded as "significant",

(b) whether the possibility of significant harm being caused is "significant",

(c) whether pollution of controlled waters is being, or is likely to be caused,

shall be determined in accordance with guidance issued for the purpose by the Secretary of State in accordance with section 78YA below.

(6) Without prejudice to the guidance that may be issued under subsection (5) above, guidance under paragraph (a) of that subsection may make provision for different degrees of importance to be assigned to, or for the disregard of,—

(a) different descriptions of living organisms or ecological systems;

(b) different descriptions of places; or

(c) different descriptions of harm to health or property, or other interference;

and guidance under paragraph (b) of that subsection may make provision for different degrees of possibility to be regarded as "significant" (or as not being "significant') in relation to different descriptions of significant harm.

(7) "Remediation" means—

(a) the doing of anything for the purpose of assessing the condition of—

(i) the contaminated land in question;

(ii) any controlled waters affected by that land; or

(iii) any land adjoining or adjacent to that land;

(b) the doing of any works, the carrying out of any operations or the taking of any steps in relation to any such land or waters for the purpose—

(i) of preventing or minimising, or remedying or mitigating the effects of, any significant harm, or any pollution of con-

trolled waters, by reason of which the contaminated land is such land; or

(ii) of restoring the land or waters to their former state; or

(c) the making of subsequent inspections from time to time for the purpose of keeping under review the condition of the land or waters;

and cognate expressions shall be construed accordingly.

(8) Controlled waters are "affected by" contaminated land if (and only if) it appears to the enforcing authority that the contaminated land in question is, for the purposes of subsection (2) above, in such a condition, by reason of substances in, on or under the land, that pollution of those waters is being, or is likely to be caused.

(9) The following expressions have the meaning respectively assigned to them—

"the appropriate Agency" means—

(a) in relation to England and Wales, the Environment Agency;

(b) in relation to Scotland, the Scottish Environment Protection Agency;

"appropriate person" means any person who is an appropriate person, determined in accordance with section 78F below, to bear responsibility for any thing which is to be done by way of remediation in any particular case;

"charging notice" has the meaning given by section 78P(3)(b) below;

"controlled waters"—

(a) in relation to England and Wales, has the same meaning as in Part III of the Water Resources Act 1991; and

(b) in relation to Scotland, has the same meaning as in section 30A of the Control of Pollution Act 1974;

"creditor" has the same meaning as in the Conveyancing and Feudal Reform (Scotland) Act 1970;

"enforcing authority" means—

(a) in relation to a special site, the appropriate Agency;

(b) in relation to contaminated land other than a special site, the local authority in whose area the land is situated;

"heritable security" has the same meaning as in the Conveyancing and Feudal Reform (Scotland) Act 1970;

"local authority" in relation to England and Wales means—

(a) any unitary authority;

(b) any district council, so far as it is not a unitary authority;

(c) 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;

and in relation to Scotland means a council for an area constituted under section 2 of the Local Government etc. (Scotland) Act 1994;

"notice" means notice in writing;

"notification" means notification in writing;

"owner", in relation to any land in England and Wales, means a person (other than a mortgagee not in possession) who, whether in his own right or as trustee for any other person, is entitled to receive the rack rent of the land, or, where the land is not let at a rack rent, would be so entitled if it were so let;

"owner", in relation to any land in Scotland, means a person (other than a creditor in a heritable security not in possession of the

security subjects) for the time being entitled to receive or who would, if the land were let, be entitled to receive, the rents of the land in connection with which the word is used and includes a trustee, factor, guardian or curator and in the case of public or municipal land includes the persons to whom the management of the land is entrusted;

"pollution of controlled waters" means the entry into controlled waters of any poisonous, noxious or polluting matter or any solid waste matter;

"prescribed" means prescribed by regulations;

"regulations" means regulations made by the Secretary of State;

"remediation declaration" has the meaning given by section 78H(6) below;

"remediation notice" has the meaning given by section 78E(1) below;

"remediation statement" has the meaning given by section 78H(7) below;

"required to be designated as a special site" shall be construed in accordance with section 78C(8) below;

"substance" means any natural or artificial substance, whether in solid or liquid form or in the form of a gas or vapour;

"unitary authority" means—

(a) the council of a county, so far as it is the council of an area for which there are no district councils;

(b) the council of any district comprised in an area for which there is no county council;

(c) the council of a London borough;

(d) the council of a county borough in Wales.

Identification of contaminated land

78B.—(1) Every local authority shall cause its area to be inspected from time to time for the purpose—

(a) of identifying contaminated land; and

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

(2) In performing its functions under subsection (1) above a local authority shall act in accordance with any guidance issued for the purpose by the Secretary of State in accordance with section 78YA below.

(3) If a local authority identifies any contaminated land in its area, it shall give notice of that fact to—

(a) the appropriate Agency;

(b) the owner of the land;

(c) any person who appears to the authority to be in occupation of the whole or any part of the land; and

(d) each person who appears to the authority to be an appropriate person;

and any notice given under this subsection shall state by virtue of which of paragraphs (a) to (d) above it is given.

(4) If, at any time after a local authority has given any person a notice pursuant to subsection (3)(d) above in respect of any land, it appears to the enforcing authority that another person is an appropriate person, the enforcing authority shall give notice to that other person—

(a) of the fact that the local authority has identified the land in question as contaminated land; and

(b) that he appears to the enforcing authority to be an appropriate person.

Identification and designation of special sites

78C.—(1) If at any time it appears to a local authority that any contaminated land in its area might be land which is required to be designated as a special site, the authority—

(a) shall decide whether or not the land is land which is required to be so designated; and

(b) if the authority decides that the land is land which is required to be so designated, shall give notice of that decision to the relevant persons.

(2) For the purposes of this section, "the relevant persons" at any time in the case of any land are the persons who at that time fall within paragraphs (a) to (d) below, that is to say—

(a) the appropriate Agency;

(b) the owner of the land;

(c) any person who appears to the local authority concerned to be in occupation of the whole or any part of the land; and

(d) each person who appears to that authority to be an appropriate person.

(3) Before making a decision under paragraph (a) of subsection (1) above in any particular case, a local authority shall request the advice of the appropriate Agency, and in making its decision shall have regard to any advice given by that Agency in response to the request.

(4) If at any time the appropriate Agency considers that any contaminated land is land which is required to be designated as a special site, that Agency may give notice of that fact to the local authority in whose area the land is situated.

(5) Where notice under subsection (4) above is given to a local authority, the authority shall decide whether the land in question—

(a) is land which is required to be designated as a special site, or

(b) is not land which is required to be so designated,

and shall give notice of that decision to the relevant persons.

(6) Where a local authority makes a decision falling within subsection (1)(b) or (5)(a) above, the decision shall, subject to section 78D below, take effect on the day after whichever of the following events first occurs, that is to say—

(a) the expiration of the period of twenty-one days beginning with the day on which the notice required by virtue of subsection (1)(b) or, as the case may be, (5)(a) above is given to the appropriate Agency; or

(b) if the appropriate Agency gives notification to the local authority in question that it agrees with the decision, the giving of that notification;

and where a decision takes effect by virtue of this subsection, the local authority shall give notice of that fact to the relevant persons.

(7) Where a decision that any land is land which is required to be designated as a special site takes effect in accordance with subsection (6) above, the notice given under subsection (1)(b) or, as the case may be, (5)(a) above shall have effect, as from the time when the decision takes effect, as the designation of that land as such a site.

(8) For the purposes of this Part, land is required to be designated as a special site if, and only if, it is land of a description prescribed for the purposes of this subsection.

(9) Regulations under subsection (8) above may make different provision for different cases or circumstances or different areas or localities and may, in particular, describe land by reference to the area or locality in which it is situated.

(10) Without prejudice to the generality of his power to prescribe any description of land for the purposes of subsection (8) above, the Sec-

retary of State, in deciding whether to prescribe a particular description of contaminated land for those purposes, may, in particular, have regard to—

(a) whether land of the description in question appears to him to be land which is likely to be in such a condition, by reason of substances in, on or under the land that—

(i) serious harm would or might be caused, or

(ii) serious pollution of controlled waters would be, or would be likely to be, caused; or

(b) whether the appropriate Agency is likely to have expertise in dealing with the kind of significant harm, or pollution of controlled waters, by reason of which land of the description in question is contaminated land.

Referral of special site decisions to the Secretary of State

78D.—(1) In any case where—

(a) a local authority gives notice of a decision to the appropriate Agency pursuant to subsection (1)(b) or (5)(b) of section 78C above, but

(b) before the expiration of the period of twenty-one days beginning with the day on which that notice is so given, that Agency gives the local authority notice that it disagrees with the decision, together with a statement of its reasons for disagreeing,

the authority shall refer the decision to the Secretary of State and shall send to him a statement of its reasons for reaching the decision.

(2) Where the appropriate Agency gives notice to a local authority under paragraph (b) of subsection (1) above, it shall also send to the Secretary of State a copy of the notice and of the statement given under that paragraph.

(3) Where a local authority refers a decision to the Secretary of State under subsection (1) above, it shall give notice of that fact to the relevant persons.

(4) Where a decision of a local authority is referred to the Secretary of State under subsection (1) above, he—

(a) may confirm or reverse the decision with respect to the whole or any part of the land to which it relates; and

(b) shall give notice of his decision on the referral—

(i) to the relevant persons; and

(ii) to the local authority.

(5) Where a decision of a local authority is referred to the Secretary of State under subsection (1) above, the decision shall not take effect until the day after that on which the Secretary of State gives the notice required by subsection (4) above to the persons there mentioned and shall then take effect as confirmed or reversed by him.

(6) Where a decision which takes effect in accordance with subsection (5) above is to the effect that at least some land is land which is required to be designated as a special site, the notice given under subsection (4)(b) above shall have effect, as from the time when the decision takes effect, as the designation of that land as such a site.

(7) In this section "the relevant persons" has the same meaning as in section 78C above.

Duty of enforcing authority to require remediation of contaminated land etc.

78E.—(1) In any case where—

(a) any land has been designated as a special site by virtue of section 78C(7) or 78D(6) above, or

(b) a local authority has identified any contaminated land (other than a special site) in its area,

the enforcing authority shall, in accordance with such procedure as may be prescribed and subject to the following provisions of this Part, serve on each person who is an appropriate person a notice (in this Part referred to as a "remediation notice") specifying what that person is to do by way of remediation and the periods within which he is required to do each of the things so specified.

(2) Different remediation notices requiring the doing of different things by way of remediation may be served on different persons in consequence of the presence of different substances in, on or under any land or waters.

(3) Where two or more persons are appropriate persons in relation to any particular thing which is to be done by way of remediation, the remediation notice served on each of them shall state the proportion, determined under section 78F(7) below, of the cost of doing that thing which each of them respectively is liable to bear.

(4) The only things by way of remediation which the enforcing authority may do, or require to be done, under or by virtue of this Part are things which it considers reasonable, having regard to—

(a) the cost which is likely to be involved; and
(b) the seriousness of the harm, or pollution of controlled waters, in question.

(5) In determining for any purpose of this Part—

(a) what is to be done (whether by an appropriate person, the enforcing authority or any other person) by way of remediation in any particular case,
(b) the standard to which any land is, or waters are, to be remediated pursuant to the notice, or
(c) what is, or is not, to be regarded as reasonable for the purposes of subsection (4) above,

the enforcing authority shall have regard to any guidance issued for the purpose by the Secretary of State.

(6) Regulations may make provision for or in connection with—

(a) the form or content of remediation notices; or
(b) any steps of a procedural nature which are to be taken in connection with, or in consequence of, the service of a remediation notice.

Determination of the appropriate person to bear responsibility for remediation

78F.—(1) This section has effect for the purpose of determining who is the appropriate person to bear responsibility for any particular thing which the enforcing authority determines is to be done by way of remediation in any particular case.

(2) Subject to the following provisions of this section, any person, or any of the persons, who caused or knowingly permitted the substances, or any of the substances, by reason of which the contaminated land in question is such land to be in, on or under that land is an appropriate person.

(3) A person shall only be an appropriate person by virtue of subsection (2) above in relation to things which are to be done by way of remediation which are to any extent referable to substances which he caused or knowingly permitted to be present in, on or under the contaminated land in question.

(4) If no person has, after reasonable inquiry, been found who is by virtue of subsection (2) above an appropriate person to bear responsibility for the things which are to be done by way of remediation, the owner or occupier for the time being of the contaminated land in question is an appropriate person.

(5) If, in consequence of subsection (3) above, there are things which are to be done by way of remediation in relation to which no person has, after reasonable inquiry, been found who is an appropriate person by virtue of subsection (2) above, the owner or occupier for the time being of the contaminated land in question is an appropriate person in relation to those things.

(6) Where two or more persons would, apart from this subsection, be appropriate persons in relation to any particular thing which is to be done by way of remediation, the enforcing authority shall determine in accordance with guidance issued for the purpose by the Secretary of State whether any, and if so which, of them is to be treated as not being an appropriate person in relation to that thing.

(7) Where two or more persons are appropriate persons in relation to any particular thing which is to be done by way of remediation, they shall be liable to bear the cost of doing that thing in proportions determined by the enforcing authority in accordance with guidance issued for the purpose by the Secretary of State.

(8) Any guidance issued for the purposes of subsection (6) or (7) above shall be issued in accordance with section 78YA below.

(9) A person who has caused or knowingly permitted any substance ("substance A") to be in, on or under any land shall also be taken for the purposes of this section to have caused or knowingly permitted there to be in, on or under that land any substance which is there as a result of a chemical reaction or biological process affecting substance A.

(10) A thing which is to be done by way of remediation may be regarded for the purposes of this Part as referable to the presence of any substance notwithstanding that the thing in question would not have to be done—

(a) in consequence only of the presence of that substance in any quantity; or

(b) in consequence only of the quantity of that substance which any particular person caused, or knowingly permitted to be present.

Grant of, and compensation for, rights of entry etc.

78G.—(1) A remediation notice may require an appropriate person to do things by way of remediation, notwithstanding that he is not entitled to do those things.

(2) Any person whose consent is required before any thing required by a remediation notice may be done shall grant, or join in granting, such rights in relation to any of the relevant land or waters as will enable the appropriate person to comply with any requirements imposed by the remediation notice.

(3) Before serving a remediation notice, the enforcing authority shall reasonably endeavour to consult every person who appears to the authority—

(a) to be the owner or occupier of any of the relevant land or waters, and

(b) to be a person who might be required by subsection (2) above to grant, or join in granting, any rights,

concerning the rights which that person may be so required to grant.

(4) Subsection (3) above shall not preclude the service of a remediation notice in any case where it appears to the enforcing authority that the contaminated land in question is in such a condition, by reason of substances in, on or under the land, that there is imminent danger of serious harm, or serious pollution of controlled waters, being caused.

(5) A person who grants, or joins in granting, any rights pursuant to subsection (2) above shall be entitled on making an application within such period as may be prescribed and in such manner as may be pre-

scribed to such person as may be prescribed, to be paid by the appropriate person compensation of such amount as may be determined in such manner as may be prescribed.

(6) Without prejudice to the generality of the regulations that may be made by virtue of subsection (5) above, regulations by virtue of that subsection may make such provision in relation to compensation under this section as may be made by regulations by virtue of subsection (4) of section 35A above in relation to compensation under that section.

(7) In this section, "relevant land or waters" means—

(a) the contaminated land in question;

(b) any controlled waters affected by that land; or

(c) any land adjoining or adjacent to that land or those waters.

Restrictions and prohibitions on serving remediation notices

78H.—(1) Before serving a remediation notice, the enforcing authority shall reasonably endeavour to consult—

(a) the person on whom the notice is to be served,

(b) the owner of any land to which the notice relates,

(c) any person who appears to that authority to be in occupation of the whole or any part of the land, and

(d) any person of such other description as may be prescribed,

concerning what is to be done by way of remediation.

(2) Regulations may make provision for, or in connection with, steps to be taken for the purposes of subsection (1) above.

(3) No remediation notice shall be served on any person by reference to any contaminated land during any of the following periods, that is to say—

(a) the period—

(i) beginning with the identification of the contaminated land in question pursuant to section 78B(1) above, and

(ii) ending with the expiration of the period of three months beginning with the day on which the notice required by subsection (3)(d) or, as the case may be, (4) of section 78B above is given to that person in respect of that land;

(b) if a decision falling within paragraph (b) of section 78C(1) above is made in relation to the contaminated land in question, the period beginning with the making of the decision and ending with the expiration of the period of three months beginning with—

(i) in a case where the decision is not referred to the Secretary of State under section 78D above, the day on which the notice required by section 78C(6) above is given, or

(ii) in a case where the decision is referred to the Secretary of State under section 78D above, the day on which he gives the notice required by subsection (4)(b) of that section;

(c) if the appropriate Agency gives a notice under subsection (4) of section 78C above to a local authority in relation to the contaminated land in question, the period beginning with the day on which that notice is given and ending with the expiration of the period of three months beginning with—

(i) in a case where notice is given under subsection (6) of that section, the day on which that notice is given;

(ii) in a case where the authority makes a decision falling within subsection (5)(b) of that section and the appropriate Agency fails to give notice under paragraph (b) of section 78D (1) above, the day following the expiration of the period of twenty-one days mentioned in that paragraph; or

(iii) in a case where the authority makes a decision falling within section 78C(5)(b) above which is referred to the Sec-

retary of State under section 78D above, the day on which the Secretary of State gives the notice required by subsection (4)(b) of that section.

(4) Neither subsection (1) nor subsection (3) above shall preclude the service of a remediation notice in any case where it appears to the enforcing authority that the land in question is in such a condition, by reason of substances in, on or under the land, that there is imminent danger of serious harm, or serious pollution of controlled waters, being caused.

(5) The enforcing authority shall not serve a remediation notice on a person if and so long as any one or more of the following conditions is for the time being satisfied in the particular case, that is to say—

(a) the authority is satisfied, in consequence of section 78E(4) and (5) above, that there is nothing by way of remediation which could be specified in a remediation notice served on that person;

(b) the authority is satisfied that appropriate things are being, or will be, done by way of remediation without the service of a remediation notice on that person;

(c) it appears to the authority that the person on whom the notice would be served is the authority itself; or

(d) the authority is satisfied that the powers conferred on it by section 78N below to do what is appropriate by way of remediation are exercisable.

(6) Where the enforcing authority is precluded by virtue of section 78E(4) or (5) above from specifying in a remediation notice any particular thing by way of remediation which it would otherwise have specified in such a notice, the authority shall prepare and publish a document (in this Part referred to as a "remediation declaration") which shall record—

(a) the reasons why the authority would have specified that thing; and

(b) the grounds on which the authority is satisfied that it is precluded from specifying that thing in such a notice.

(7) In any case where the enforcing authority is precluded, by virtue of paragraph (b), (c) or (d) of subsection (5) above, from serving a remediation notice, the responsible person shall prepare and publish a document (in this Part referred to as a "remediation statement") which shall record—

(a) the things which are being, have been, or are expected to be, done by way of remediation in the particular case;

(b) the name and address of the person who is doing, has done, or is expected to do, each of those things; and

(c) the periods within which each of those things is being, or is expected to be, done.

(8) For the purposes of subsection (7) above, the "responsible person" is—

(a) in a case where the condition in paragraph (b) of subsection (5) above is satisfied, the person who is doing or has done, or who the enforcing authority is satisfied will do, the things there mentioned; or

(b) in a case where the condition in paragraph (c) or (d) of that subsection is satisfied, the enforcing authority.

(9) If a person who is required by virtue of subsection (8)(a) above to prepare and publish a remediation statement fails to do so within a reasonable time after the date on which a remediation notice specifying the things there mentioned could, apart from subsection (5) above, have been served, the enforcing authority may itself prepare and publish the

statement and may recover its reasonable costs of doing so from that person.

(10) Where the enforcing authority has been precluded by virtue only of subsection (5) above from serving a remediation notice on an appropriate person but—

(a) none of the conditions in that subsection is for the time being satisfied in the particular case, and

(b) the authority is not precluded by any other provision of this Part from serving a remediation notice on that appropriate person,

the authority shall serve a remediation notice on that person; and any such notice may be so served without any further endeavours by the authority to consult persons pursuant to subsection (1) above, if and to the extent that that person has been consulted pursuant to that subsection concerning the things which will be specified in the notice.

Restrictions on liability relating to the pollution of controlled waters

78J.—(1) This section applies where any land is contaminated land by virtue of paragraph (b) of subsection (2) of section 78A above (whether or not the land is also contaminated land by virtue of paragraph (a) of that subsection).

(2) Where this section applies, no remediation notice given in consequence of the land in question being contaminated land shall require a person who is an appropriate person by virtue of section 78F(4) or (5) above to do anything by way of remediation to that or any other land, or any waters, which he could not have been required to do by such a notice had paragraph (b) of section 78A(2) above (and all other references to pollution of controlled waters) been omitted from this Part.

(3) If, in a case where this section applies, a person permits, has permitted, or might permit, water from an abandoned mine or part of a mine—

(a) to enter any controlled waters, or

(b) to reach a place from which it is or, as the case may be, was likely, in the opinion of the enforcing authority, to enter such waters,

no remediation notice shall require him in consequence to do anything by way of remediation (whether to the contaminated land in question or to any other land or waters) which he could not have been required to do by such a notice had paragraph (b) of section 78A(2) above (and all other references to pollution of controlled waters) been omitted from this Part.

(4) Subsection (3) above shall not apply to the owner or former operator of any mine or part of a mine if the mine or part in question became abandoned after 31st December 1999.

(5) In determining for the purposes of subsection (4) above whether a mine or part of a mine became abandoned before, on or after 31st December 1999 in a case where the mine or part has become abandoned on two or more occasions, of which—

(a) at least one falls on or before that date, and

(b) at least one falls after that date,

the mine or part shall be regarded as becoming abandoned after that date (but without prejudice to the operation of subsection (3) above in relation to that mine or part at, or in relation to, any time before the first of those occasions which falls after that date).

(6) Where, immediately before a part of a mine becomes abandoned, that part is the only part of the mine not falling to be regarded as abandoned for the time being, the abandonment of that part shall not be regarded for the purposes of subsection (4) or (5) above as constituting the abandonment of the mine, but only of that part of it.

(7) Nothing in subsection (2) or (3) above prevents the enforcing authority from doing anything by way of remediation under section 78N below which it could have done apart from that subsection, but the authority shall not be entitled under section 78P below to recover from any person any part of the cost incurred by the authority in doing by way of remediation anything which it is precluded by subsection (2) or (3) above from requiring that person to do.

(8) In this section "mine" has the same meaning as in the Mines and Quarries Act 1954.

Liability in respect of contaminating substances which escape to other land

78K.—(1) A person who has caused or knowingly permitted any substances to be in, on or under any land shall also be taken for the purposes of this Part to have caused or, as the case may be, knowingly permitted those substances to be in, on or under any other land to which they appear to have escaped.

(2) Subsections (3) and (4) below apply in any case where it appears that any substances are or have been in, on or under any land (in this section referred to as "land A") as a result of their escape, whether directly or indirectly, from other land in, on or under which a person caused or knowingly permitted them to be.

(3) Where this subsection applies, no remediation notice shall require a person—

(a) who is the owner or occupier of land A, and

(b) who has not caused or knowingly permitted the substances in question to be in, on or under that land,

to do anything by way of remediation to any land or waters (other than land or waters of which he is the owner or occupier) in consequence of land A appearing to be in such a condition, by reason of the presence of those substances in, on or under it, that significant harm is being caused, or there is a significant possibility of such harm being caused, or that pollution of controlled waters is being, or is likely to be caused.

(4) Where this subsection applies, no remediation notice shall require a person—

(a) who is the owner or occupier of land A, and

(b) who has not caused or knowingly permitted the substances in question to be in, on or under that land,

to do anything by way of remediation in consequence of any further land in, on or under which those substances or any of them appear to be or to have been present as a result of their escape from land A ("land B") appearing to be in such a condition, by reason of the presence of those substances in, on or under it, that significant harm is being caused, or there is a significant possibility of such harm being caused, or that pollution of controlled waters is being, or is likely to be caused, unless he is also the owner or occupier of land B.

(5) In any case where—

(a) a person ("person A") has caused or knowingly permitted any substances to be in, on, or under any land,

(b) another person ("person B") who has not caused or knowingly permitted those substances to be in, on or under that land becomes the owner or occupier of that land, and

(c) the substances, or any of the substances, mentioned in paragraph (a) above appear to have escaped to other land,

no remediation notice shall require person B to do anything by way of remediation to that other land in consequence of the apparent acts or omissions of person A, except to the extent that person B caused or knowingly permitted the escape.

(6) Nothing in subsection (3), (4) or (5) above prevents the enforcing authority from doing anything by way of remediation under section 78N below which it could have done apart from that subsection, but the authority shall not be entitled under section 78P below to recover from any person any part of the cost incurred by the authority in doing by way of remediation anything which it is precluded by subsection (3), (4) or (5) above from requiring that person to do.

(7) In this section, "appear" means appear to the enforcing authority, and cognate expressions shall be construed accordingly.

Appeals against remediation notices

78L.—(1) A person on whom a remediation notice is served may, within the period of twenty-one days beginning with the day on which the notice is served, appeal against the notice—

(a) if it was served by a local authority, to a magistrates' court or, in Scotland, to the sheriff by way of summary application; or

(b) if it was served by the appropriate Agency, to the Secretary of State;

and in the following provisions of this section "the appellate authority" means the magistrates' court, the sheriff or the Secretary of State, as the case may be.

(2) On any appeal under subsection (1) above the appellate authority—

(a) shall quash the notice, if it is satisfied that there is a material defect in the notice; but

(b) subject to that, may confirm the remediation notice, with or without modification, or quash it.

(3) Where an appellate authority confirms a remediation notice, with or without modification, it may extend the period specified in the notice for doing what the notice requires to be done.

(4) Regulations may make provision with respect to—

(a) the grounds on which appeals under subsection (1) above may be made;

(b) the cases in which, grounds on which, court or tribunal to which, or person at whose instance, an appeal against a decision of a magistrates' court or sheriff court in pursuance of an appeal under subsection (1) above shall lie; or

(c) the procedure on an appeal under subsection (1) above or on an appeal by virtue of paragraph (b) above.

(5) Regulations under subsection (4) above may (among other things)—

(a) include provisions comparable to those in section 290 of the Public Health Act 1936 (appeals against notices requiring the execution of works);

(b) prescribe the cases in which a remediation notice is, or is not, to be suspended until the appeal is decided, or until some other stage in the proceedings;

(c) prescribe the cases in which the decision on an appeal may in some respects be less favourable to the appellant than the remediation notice against which he is appealing;

(d) prescribe the cases in which the appellant may claim that a remediation notice should have been served on some other person and prescribe the procedure to be followed in those cases;

(e) make provision as respects—

(i) the particulars to be included in the notice of appeal;

(ii) the persons on whom notice of appeal is to be served and the particulars, if any, which are to accompany the notice; and

(iii) the abandonment of an appeal;

(f) make different provision for different cases or classes of case.

(6) This section, so far as relating to appeals to the Secretary of State, is subject to section 114 of the Environment Act 1995 (delegation or reference of appeals etc).

Offences of not complying with a remediation notice

78M.—(1) If a person on whom an enforcing authority serves a remediation notice fails, without reasonable excuse, to comply with any of the requirements of the notice, he shall be guilty of an offence.

(2) Where the remediation notice in question is one which was required by section 78E(3) above to state, in relation to the requirement which has not been complied with, the proportion of the cost involved which the person charged with the offence is liable to bear, it shall be a defence for that person to prove that the only reason why he has not complied with the requirement is that one or more of the other persons who are liable to bear a proportion of that cost refused, or was not able, to comply with the requirement.

(3) Except in a case falling within subsection (4) below, a person who commits an offence under subsection (1) above shall be liable, on summary conviction, to a fine not exceeding level 5 on the standard scale and to a further fine of an amount equal to one-tenth of level S on the standard scale for each day on which the failure continues after conviction of the offence and before the enforcing authority has begun to exercise its powers by virtue of section 78N(3)(c) below.

(4) A person who commits an offence under subsection (1) above in a case where the contaminated land to which the remediation notice relates is industrial, trade or business premises shall be liable on summary conviction to a fine not exceeding £20,000 or such greater sum as the Secretary of State may from time to time by order substitute and to a further fine of an amount equal to one-tenth of that sum for each day on which the failure continues after conviction of the offence and before the enforcing authority has begun to exercise its powers by virtue of section 78N(3)(c) below.

(5) If the enforcing authority is of the opinion that proceedings for an offence under this section would afford an ineffectual remedy against a person who has failed to comply with any of the requirements of a remediation notice which that authority has served on him, that authority may take proceedings in the High Court or, in Scotland, in any court of competent jurisdiction, for the purpose of securing compliance with the remediation notice.

(6) In this section, "industrial, trade or business premises" means premises used for any industrial, trade or business purposes or premises not so used on which matter is burnt in connection with any industrial, trade or business process, and premises are used for industrial purposes where they are used for the purposes of any treatment or process as well as where they are used for the purpose of manufacturing.

(7) No order shall be made under subsection (4) above unless a draft of the order has been laid before, and approved by a resolution of, each House of Parliament.

Powers of the enforcing authority to carry out remediation

78N.—(1) Where this section applies, the enforcing authority shall itself have power, in a case falling within paragraph (a) or (b) of section 78E(1) above, to do what is appropriate by way of remediation to the relevant land or waters.

(2) Subsection (1) above shall not confer power on the enforcing authority to do anything by way of remediation if the authority would, in the particular case, be precluded by section 78YB below from serving a remediation notice requiring that thing to be done.

(3) This section applies in each of the following cases, that is to say—

(a) where the enforcing authority considers it necessary to do anything itself by way of remediation for the purpose of preventing the occurrence of any serious harm, or serious pollution of controlled waters, of which there is imminent danger;

(b) where an appropriate person has entered into a written agreement with the enforcing authority for that authority to do, at the cost of that person, that which he would otherwise be required to do under this Part by way of remediation;

(c) where a person on whom the enforcing authority serves a remediation notice fails to comply with any of the requirements of the notice;

(d) where the enforcing authority is precluded by section 78J or 78K above from including something by way of remediation in a remediation notice;

(e) where the enforcing authority considers that, were it to do some particular thing by way of remediation, it would decide, by virtue of subsection (2) of section 78P below or any guidance issued under that subsection,—

(i) not to seek to recover under subsection (1) of that section any of the reasonable cost incurred by it in doing that thing; or

(ii) to seek so to recover only a portion of that cost;

(f) where no person has, after reasonable inquiry, been found who is an appropriate person in relation to any particular thing.

(4) Subject to section 78E(4) and (5) above, for the purposes of this section, the things which it is appropriate for the enforcing authority to do by way of remediation are—

(a) in a case falling within paragraph (a) of subsection (3) above, anything by way of remediation which the enforcing authority considers necessary for the purpose mentioned in that paragraph;

(b) in a case falling within paragraph (b) of that subsection, anything specified in, or determined under, the agreement mentioned in that paragraph;

(c) in a case falling within paragraph (c) of that subsection, anything which the person mentioned in that paragraph was required to do by virtue of the remediation notice;

(d) in a case falling within paragraph (d) of that subsection, anything by way of remediation which the enforcing authority is precluded by section 78J or 78K above from including in a remediation notice;

(e) in a case falling within paragraph (e) or (f) of that subsection, the particular thing mentioned in the paragraph in question.

(5) In this section "the relevant land or waters" means—

(a) the contaminated land in question;

(b) any controlled waters affected by that land; or

(c) any land adjoining or adjacent to that land or those waters.

Recovery of, and security for, the cost of remediation by the enforcing authority

78P.—(1) Where, by virtue of section 78N(3)(a), (c), (e) or (f) above, the enforcing authority does any particular thing by way of remediation, it shall be entitled, subject to sections 78J(7) and 78K(6) above, to recover the reasonable cost incurred in doing it from the appropriate person or, if there are two or more appropriate persons in relation to the thing in question, from those persons in proportions determined pursuant to section 78F(7) above.

(2) In deciding whether to recover the cost, and, if so, how much of the cost, which it is entitled to recover under subsection (1) above, the enforcing authority shall have regard—

(a) to any hardship which the recovery may cause to the person from whom the cost is recoverable; and

(b) to any guidance issued by the Secretary of State for the purposes of this subsection.

(3) Subsection (4) below shall apply in any case where—

(a) any cost is recoverable under subsection (1) above from a person—

(i) who is the owner of any premises which consist of or include the contaminated land in question; and

(ii) who caused or knowingly permitted the substances, or any of the substances, by reason of which the land is contaminated land to be in, on or under the land; and

(b) the enforcing authority serves a notice under this subsection (in this Part referred to as a "charging notice") on that person.

(4) Where this subsection applies—

(a) the cost shall carry interest, at such reasonable rate as the enforcing authority may determine, from the date of service of the notice until the whole amount is paid; and

(b) subject to the following provisions of this section, the cost and accrued interest shall be a charge on the premises mentioned in subsection (3)(a)(i) above.

(5) A charging notice shall—

(a) specify the amount of the cost which the enforcing authority claims is recoverable;

(b) state the effect of subsection (4) above and the rate of interest determined by the authority under that subsection; and

(c) state the effect of subsections (7) and (8) below.

(6) On the date on which an enforcing authority serves a charging notice on a person, the authority shall also serve a copy of the notice on every other person who, to the knowledge of the authority, has an interest in the premises capable of being affected by the charge.

(7) Subject to any order under subsection (9)(b) or (c) below, the amount of any cost specified in a charging notice and the accrued interest shall be a charge on the premises—

(a) as from the end of the period of twenty-one days beginning with the service of the charging notice, or

(b) where an appeal is brought under subsection (8) below, as from the final determination or (as the case may be) the withdrawal, of the appeal,

until the cost and interest are recovered.

(8) A person served with a charging notice or a copy of a charging notice may appeal against the notice to a county court within the period of twenty-one days beginning with the date of service.

(9) On an appeal under subsection (8) above, the court may—

(a) confirm the notice without modification;

(b) order that the notice is to have effect with the substitution of a different amount for the amount originally specified in it; or

(c) order that the notice is to be of no effect.

(10) Regulations may make provision with respect to—

(a) the grounds on which appeals under this section may be made; or

(b) the procedure on any such appeal.

(11) An enforcing authority shall, for the purpose of enforcing a charge under this section, have all the same powers and remedies under the Law of Property Act 1925, and otherwise, as if it were a mortgagee

by deed having powers of sale and lease, of accepting surrenders of leases and of appointing a receiver.

(12) Where any cost is a charge on premises under this section, the enforcing authority may by order declare the cost to be payable with interest by instalments within the specified period until the whole amount is paid.

(13) In subsection (12) above—

"interest" means interest at the rate determined by the enforcing authority under subsection (4) above; and

"the specified period" means such period of thirty years or less from the date of service of the charging notice as is specified in the order.

(14) Subsections (3) to (13) above do not extend to Scotland.

Special sites

78Q.—(1) If, in a case where a local authority has served a remediation notice, the contaminated land in question becomes a special site, the appropriate Agency may adopt the remediation notice and, if it does so,—

(a) it shall give notice of its decision to adopt the remediation notice to the appropriate person and to the local authority;

(b) the remediation notice shall have effect, as from the time at which the appropriate Agency decides to adopt it, as a remediation notice given by that Agency; and

(c) the validity of the remediation notice shall not be affected by—

(i) the contaminated land having become a special site;

(ii) the adoption of the remediation notice by the appropriate Agency; or

(iii) anything in paragraph (b) above.

(2) Where a local authority has, by virtue of section 78N above, begun to do any thing, or any series of things, by way of remediation—

(a) the authority may continue doing that thing, or that series of things, by virtue of that section, notwithstanding that the contaminated land in question becomes a special site; and

(b) section 78P above shall apply in relation to the reasonable cost incurred by the authority in doing that thing or those things as if that authority were the enforcing authority.

(3) If and so long as any land is a special site, the appropriate Agency may from time to time inspect that land for the purpose of keeping its condition under review.

(4) If it appears to the appropriate Agency that a special site is no longer land which is required to be designated as such a site, the appropriate Agency may give notice—

(a) to the Secretary of State, and

(b) to the local authority in whose area the site is situated,

terminating the designation of the land in question as a special site as from such date as may be specified in the notice.

(5) A notice under subsection (4) above shall not prevent the land, or any of the land, to which the notice relates being designated as a special site on a subsequent occasion.

(6) In exercising its functions under subsection (3) or (4) above, the appropriate Agency shall act in accordance with any guidance given for the purpose by the Secretary of State.

Registers

78R.—(1) Every enforcing authority shall maintain a register containing prescribed particulars of or relating to—

(a) remediation notices served by that authority;

(b) appeals against any such remediation notices;
(c) remediation statements or remediation declarations prepared and published under section 78H above;
(d) in relation to an enforcing authority in England and Wales, appeals against charging notices served by that authority;
(e) notices under subsection (1)(b) or (5)(a) of section 78C above which have effect by virtue of subsection (7) of that section as the designation of any land as a special site;
(f) notices under subsection (4)(b) of section 78D above which have effect by virtue of subsection (6) of that section as the designation of any land as a special site;
(g) notices given by or to the enforcing authority under section 78Q (4) above terminating the designation of any land as a special site;
(h) notifications given to that authority by persons—
(i) on whom a remediation notice has been served, or
(ii) who are or were required by virtue of section 78H(8)(a) above to prepare and publish a remediation statement,
of what they claim has been done by them by way of remediation;
(j) notifications given to that authority by owners or occupiers of land—
(i) in respect of which a remediation notice has been served, or
(ii) in respect of which a remediation statement has been prepared and published,
of what they claim has been done on the land in question by way of remediation;
(k) convictions for such offences under section 78M above as may be prescribed;
(l) such other matters relating to contaminated land as may be prescribed;

but that duty is subject to sections 78S and 78T below.

(2) The form of, and the descriptions of information to be contained in, notifications for the purposes of subsection (1)(h) or (j) above may be prescribed by the Secretary of State.

(3) No entry made in a register by virtue of subsection (1)(h) or (j) above constitutes a representation by the body maintaining the register or, in a case where the entry is made by virtue of subsection (6) below, the authority which sent the copy of the particulars in question pursuant to subsection (4) or (5) below—
(a) that what is stated in the entry to have been done has in fact been done; or
(b) as to the manner in which it has been done.

(4) Where any particulars are entered on a register maintained under this section by the appropriate Agency, the appropriate Agency shall send a copy of those particulars to the local authority in whose area is situated the land to which the particulars relate.

(5) In any case where—
(a) any land is treated by virtue of section 78X(2) below as situated in the area of a local authority other than the local authority in whose area it is in fact situated, and
(b) any particulars relating to that land are entered on the register maintained under this section by the local authority in whose area the land is so treated as situated,

that authority shall send a copy of those particulars to the local authority in whose area the land is in fact situated.

(6) Where a local authority receives a copy of any particulars sent to it pursuant to subsection (4) or (5) above, it shall enter those particulars on the register maintained by it under this section.

(7) Where information of any description is excluded by virtue of section 78T below from any register maintained under this section, a statement shall be entered in the register indicating the existence of information of that description.

(8) It shall be the duty of each enforcing authority—

(a) to secure that the registers maintained by it under this section are available, at all reasonable times, for inspection by the public free of charge; and

(b) to afford to members of the public facilities for obtaining copies of entries, on payment of reasonable charges;

and, for the purposes of this subsection, places may be prescribed by the Secretary of State at which any such registers or facilities as are mentioned in paragraph (a) or (b) above are to be available or afforded to the public in pursuance of the paragraph in question.

(9) Registers under this section may be kept in any form.

Exclusion from registers of information affecting national security

78S.—(1) No information shall be included in a register maintained under section 78R above if and so long as, in the opinion of the Secretary of State, the inclusion in the register of that information, or information of that description, would be contrary to the interests of national security.

(2) The Secretary of State may, for the purpose of securing the exclusion from registers of information to which subsection (1) above applies, give to enforcing authorities directions—

(a) specifying information, or descriptions of information, to be excluded from their registers; or

(b) specifying descriptions of information to be referred to the Secretary of State for his determination;

and no information referred to the Secretary of State in pursuance of paragraph (b) above shall be included in any such register until the Secretary of State determines that it should be so included.

(3) The enforcing authority shall notify the Secretary of State of any information which it excludes from the register in pursuance of directions under subsection (2) above.

(4) A person may, as respects any information which appears to him to be information to which subsection (1) above may apply, give a notice to the Secretary of State specifying the information and indicating its apparent nature; and, if he does so—

(a) he shall notify the enforcing authority that he has done so; and

(b) no information so notified to the Secretary of State shall be included in any such register until the Secretary of State has determined that it should be so included.

Exclusion from registers of certain confidential information

78T.—(1) No information relating to the affairs of any individual or business shall be included in a register maintained under section 78R above, without the consent of that individual or the person for the time being carrying on that business, if and so long as the information—

(a) is, in relation to him, commercially confidential; and

(b) is not required to be included in the register in pursuance of directions under subsection (7) below;

but information is not commercially confidential for the purposes of this section unless it is determined under this section to be so by the enforcing authority or, on appeal, by the Secretary of State.

(2) Where it appears to an enforcing authority that any information which has been obtained by the authority under or by virtue of any provision of this Part might be commercially confidential, the authority shall—

(a) give to the person to whom or whose business it relates notice that that information is required to be included in the register unless excluded under this section; and

(b) give him a reasonable opportunity—

(i) of objecting to the inclusion of the information on the ground that it is commercially confidential; and

(ii) of making representations to the authority for the purpose of justifying any such objection;

and, if any representations are made, the enforcing authority shall, having taken the representations into account, determine whether the information is or is not commercially confidential.

(3) Where, under subsection (2) above, an authority determines that information is not commercially confidential—

(a) the information shall not be entered in the register until the end of the period of twenty-one days beginning with the date on which the determination is notified to the person concerned;

(b) that person may appeal to the Secretary of State against the decision;

and, where an appeal is brought in respect of any information, the information shall not be entered in the register until the end of the period of seven days following the day on which the appeal is finally determined or withdrawn.

(4) An appeal under subsection (3) above shall, if either party to the appeal so requests or the Secretary of State so decides, take or continue in the form of a hearing (which must be held in private).

(5) Subsection (10) of section 15 above shall apply in relation to an appeal under subsection (3) above as it applies in relation to an appeal under that section.

(6) Subsection (3) above is subject to section 114 of the Environment Act 1995 (delegation or reference of appeals etc.).

(7) The Secretary of State may give to the enforcing authorities directions as to specified information, or descriptions of information, which the public interest requires to be included in registers maintained under section 78R above notwithstanding that the information may be commercially confidential.

(8) Information excluded from a register shall be treated as ceasing to be commercially confidential for the purposes of this section at the expiry of the period of four years beginning with the date of the determination by virtue of which it was excluded; but the person who furnished it may apply to the authority for the information to remain excluded from the register on the ground that it is still commercially confidential and the authority shall determine whether or not that is the case.

(9) Subsections (3) to (6) above shall apply in relation to a determination under subsection (8) above as they apply in relation to a determination under subsection (2) above.

(10) Information is, for the purposes of any determination under this section, commercially confidential, in relation to any individual or person, if its being contained in the register would prejudice to an unreasonable degree the commercial interests of that individual or person.

(11) For the purposes of subsection (10) above, there shall be disregarded any prejudice to the commercial interests of any individual or person so far as relating only to the value of the contaminated land in question or otherwise to the ownership or occupation of that land.

Reports by the appropriate Agency on the state of contaminated land

78U.—(1) The appropriate Agency shall—

(a) from time to time, or

(b) if the Secretary of State at any time so requests,

prepare and publish a report on the state of contaminated land in England and Wales or in Scotland, as the case may be.

(2) A local authority shall, at the written request of the appropriate Agency, furnish the appropriate Agency with such information to which this subsection applies as the appropriate Agency may require for the purpose of enabling it to perform its functions under subsection (1) above.

(3) The information to which subsection (2) above applies is such information as the local authority may have, or may reasonably be expected to obtain, with respect to the condition of contaminated land in its area, being information which the authority has acquired or may acquire in the exercise of its functions under this Part.

Site-specific guidance by the appropriate Agency concerning contaminated land

78V.—(1) The appropriate Agency may issue guidance to any local authority with respect to the exercise or performance of the authority's powers or duties under this Part in relation to any particular contaminated land; and in exercising or performing those powers or duties in relation to that land the authority shall have regard to any such guidance so issued.

(2) If and to the extent that any guidance issued under subsection (1) above to a local authority is inconsistent with any guidance issued under this Part by the Secretary of State, the local authority shall disregard the guidance under that subsection.

(3) A local authority shall, at the written request of the appropriate Agency, furnish the appropriate Agency with such information to which this subsection applies as the appropriate Agency may require for the purpose of enabling it to issue guidance for the purposes of subsection (1) above.

(4) The information to which subsection (3) above applies is such information as the local authority may have, or may reasonably be expected to obtain, with respect to any contaminated land in its area, being information which the authority has acquired, or may acquire, in the exercise of its functions under this Part.

The appropriate Agency to have regard to guidance given by the Secretary of State

78W.—(1) The Secretary of State may issue guidance to the appropriate Agency with respect to the exercise or performance of that Agency's powers or duties under this Part; and in exercising or performing those powers or duties the appropriate Agency shall have regard to any such guidance so issued.

(2) The duty imposed on the appropriate Agency by subsection (1) above is without prejudice to any duty imposed by any other provision of this Part on that Agency to act in accordance with guidance issued by the Secretary of State.

Supplementary provisions

78X.—(1) Where it appears to a local authority that two or more different sites, when considered together, are in such a condition, by reason of substances in, on or under the land, that—

(a) significant harm is being caused or there is a significant possibility of such harm being caused, or

(b) pollution of controlled waters is being, or is likely to be, caused,

this Part shall apply in relation to each of those sites, whether or not the condition of the land at any of them, when considered alone, appears to the authority to be such that significant harm is being caused, or there is

a significant possibility of such harm being caused, or that pollution of controlled waters is being or is likely to be caused.

(2) Where it appears to a local authority that any land outside, but adjoining or adjacent to, its area is in such a condition, by reason of substances in, on or under the land, that significant harm is being caused, or there is a significant possibility of such harm being caused, or that pollution of controlled waters is being, or is likely to be, caused within its area—

(a) the authority may, in exercising its functions under this Part, treat that land as if it were land situated within its area; and

(b) except in this subsection, any reference—

(i) to land within the area of a local authority, or

(ii) to the local authority in whose area any land is situated,

shall be construed accordingly;

but this subsection is without prejudice to the functions of the local authority in whose area the land is in fact situated.

(3) A person acting in a relevant capacity—

(a) shall not thereby be personally liable, under this Part, to bear the whole or any part of the cost of doing any thing by way of remediation, unless that thing is to any extent referable to substances whose presence in, on or under the contaminated land in question is a result of any act done or omission made by him which it was unreasonable for a person acting in that capacity to do or make; and

(b) shall not thereby be guilty of an offence under or by virtue of section 78M above unless the requirement which has not been complied with is a requirement to do some particular thing for which he is personally liable to bear the whole or any part of the cost.

(4) In subsection (3) above, "person acting in a relevant capacity" means—

(a) a person acting as an insolvency practitioner, within the meaning of section 388 of the Insolvency Act 1986 (including that section as it applies in relation to an insolvent partnership by virtue of any order made under section 421 of that Act);

(b) the official receiver acting in a capacity in which he would be regarded as acting as an insolvency practitioner within the meaning of section 388 of the Insolvency Act 1986 if subsection (5) of that section were disregarded;

(c) the official receiver acting as receiver or manager;

(d) a person acting as a special manager under section 177 or 370 of the Insolvency Act 1986;

(e) the Accountant in Bankruptcy acting as permanent or interim trustee in a sequestration (within the meaning of the Bankruptcy (Scotland) Act 1985);

(f) a person acting as a receiver or receiver and manager—

(i) under or by virtue of any enactment; or

(ii) by virtue of his appointment as such by an order of a court or by any other instrument.

(5) Regulations may make different provision for different cases or circumstances.

Application to the Isles of Scilly

78Y.—(1) Subject to the provisions of any order under this section, this Part shall not apply in relation to the Isles of Scilly.

(2) The Secretary of State may, after consultation with the Council of the Isles of Scilly, by order provide for the application of any provisions of this Part to the Isles of Scilly; and any such order may provide for the

application of those provisions to those Isles with such modifications as may be specified in the order.

(3) An order under this section may—

(a) make different provision for different cases, including different provision in relation to different persons, circumstances or localities; and

(b) contain such supplemental, consequential and transitional provision as the Secretary of State considers appropriate, including provision saving provision repealed by or under any enactment.

Supplementary provisions with respect to guidance by the Secretary of State

78YA.—(1) Any power of the Secretary of State to issue guidance under this Part shall only be exercisable after consultation with the appropriate Agency and such other bodies or persons as he may consider it appropriate to consult in relation to the guidance in question.

(2) A draft of any guidance proposed to be issued under section 78A (2) or (5), 78B(2) or 78F(6) or (7) above shall be laid before each House of Parliament and the guidance shall not be issued until after the period of 40 days beginning with the day on which the draft was so laid or, if the draft is laid on different days, the later of the two days.

(3) If, within the period mentioned in subsection (2) above, either House resolves that the guidance, the draft of which was laid before it, should not be issued, the Secretary of State shall not issue that guidance.

(4) In reckoning any period of 40 days for the purposes of subsection (2) or (3) above, no account shall be taken of any time during which Parliament is dissolved or prorogued or during which both Houses are adjourned for more than four days.

(5) The Secretary of State shall arrange for any guidance issued by him under this Part to be published in such manner as he considers appropriate.

Interaction of this Part with other enactments

78YB.—(1) A remediation notice shall not be served if and to the extent that it appears to the enforcing authority that the powers of the appropriate Agency under section 27 above may be exercised in relation to—

(a) the significant harm (if any), and

(b) the pollution of controlled waters (if any),

by reason of which the contaminated land in question is such land.

(2) Nothing in this Part shall apply in relation to any land in respect of which there is for the time being in force a site licence under Part II above, except to the extent that any significant harm, or pollution of controlled waters, by reason of which that land would otherwise fall to be regarded as contaminated land is attributable to causes other than—

(a) breach of the conditions of the licence; or

(b) the carrying on, in accordance with the conditions of the licence, of any activity authorised by the licence.

(3) If, in a case falling within subsection (1) or (7) of section 59 above, the land in question is contaminated land, or becomes such land by reason of the deposit of the controlled waste in question, a remediation notice shall not be served in respect of that land by reason of that waste or any consequences of its deposit, if and to the extent that it appears to the enforcing authority that the powers of a waste regulation authority or waste collection authority under that section may be exercised in relation to that waste or the consequences of its deposit.

(4) No remediation notice shall require a person to do anything the effect of which would be to impede or prevent the making of a discharge in pursuance of a consent given under Chapter II of Part III of the Water

Resources Act 1991 (pollution offences) or, in relation to Scotland, in pursuance of a consent given under Part II of the Control of Pollution Act 1974.

This Part and radioactivity

78YC. Except as provided by regulations, nothing in this Part applies in relation to harm, or pollution of controlled waters, so far as attributable, to any radioactivity possessed by any substance; but regulations may—

(a) provide for prescribed provisions of this Part to have effect with such modifications as the Secretary of State considers appropriate for the purpose of dealing with harm, or pollution of controlled waters, so far as attributable to any radioactivity possessed by any substances; or

(b) make such modifications of the Radioactive Substances Act 1993 or any other Act as the Secretary of State considers appropriate."

Appendix Two: Contaminated Land (Draft) Statutory Guidance

ANNEX 3 - [Draft] Statutory Guidance

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CHAPTER A - Statutory Guidance on the Definition of Contaminated Land

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PART 1 – Scope of the Chapter

A.1 The statutory guidance in this Chapter is issued under section 78A(2), (5) and (6) of Part IIA of the Environmental Protection Act 1990 and provides guidance on applying the definition of contaminated land.

A.2 "Contaminated land" is defined at section 78A(2) as:

"any land which appears to the local authority in whose area it is situated to be in such a condition, by reason of substances in, on or under the land, that -

"(a) significant harm is being caused or there is a significant possibility of such harm being caused; or

"(b) pollution of controlled waters is being, or is likely to be caused; ..."

A.3 Section 78A(5) further provides that:

"the questions -

"(a) what harm is to be regarded as "significant"

"(b) whether the possibility of significant harm being caused is "significant"

"(c) whether pollution of controlled waters is being, or is likely to be caused,

"shall be determined in accordance with guidance issued .... by the Secretary of State".

A.4 In determining these questions the local authority is therefore required to act in accordance with the guidance contained in this Chapter.

A.5 As well as defining contaminated land, section 78A(2) further provides that:

> " ..... in determining whether any land appears to be such land, a local authority shall .... act in accordance with guidance issued by the Secretary of State .... with respect to the manner in which that determination is to be made"

A.6 Guidance on the manner in which that determination is to be made is set out in Part 3 of the statutory guidance in Chapter B.

PART 2 – Definitions of Terms and General Material

A.7 Unless otherwise stated, any word, term or phrase given a specific meaning in Part IIA of the Environmental Protection Act 1990 has the same meaning for the purposes of the guidance in this Chapter.

A.8 Any reference to "Part IIA" means "Part IIA of the Environmental Protection Act 1990". Any reference to a "section" in primary legislation means a section of the Environmental Protection Act 1990, unless it is specifically stated otherwise.

Risk Assessment

A.9 The definition of contaminated land is based upon the principles of risk assessment. For the purposes of this guidance, "risk" is defined as the combination of:

(a) the probability, or frequency, of occurrence of a defined hazard (for example, exposure to a property of a substance with the potential to cause harm); and

(b) the magnitude (including the seriousness) of the consequences.

A.10 The guidance below follows established approaches to risk assessment, including the concept of contaminant-pathway-receptor. (In the technical literature, this is sometimes referred to as source-pathway-target.)

A.11 There are two steps in applying the definition of contaminated land. The first step is for the local authority to satisfy itself that a "contaminant", a "pathway" (or pathways), and a "receptor" have been identified with respect to that land. These three concepts are defined for the purposes of this Chapter in paragraphs A.12 to A.14 below.

A.12 A contaminant is a substance which is in, on or under the land and which has the potential to cause harm or to cause pollution of controlled waters.

A.13 A receptor is either:

(a) a living organism, a group of living organisms, an ecological system or a piece of property which

(i) is in a category listed in Table A (see below) as a type of receptor, and

(ii) is being, or could be, harmed, by a contaminant; or

(b) controlled waters which are being, or could be, polluted by a contaminant.

A.14 A pathway is one or more routes or means by, or through, which a receptor:

(a) is being exposed to, or affected by, a contaminant, or

(b) could be so exposed or affected.

A.15 It is possible for a pathway to be identified for this purpose on the basis of a reasonable assessment of the general scientific knowledge about the nature of a particular contaminant and of the circumstances of the land in question. Direct observation of the pathway is not necessary.

A.16 The identification of each of these three elements is linked to the identification of the others. A pathway can only be identified if it is capable of exposing an identified receptor to an identified contaminant. That particular contaminant should likewise be capable of harming or, in the case of controlled waters, be capable of polluting that particular receptor.

A.17 In this Chapter, a "pollutant linkage" means the relationship between a contaminant, a pathway and a receptor, and a "pollutant" means the contaminant in a pollutant linkage. Unless all three elements of a pollutant linkage are identified in respect of a piece of land, that land should not be identified as contaminated land. There may be more than one pollutant linkage on any given piece of land.

A.18 For the purposes of determining whether a pollutant linkage exists (and for describing any such linkage), the local authority may treat two or more substances as being a single substance, in any case where:

(a) the substances are compounds of the same element, or have similar molecular structures; and

(b) it is the presence of that element, or the particular type of molecular structures, that determines the effect that the substances may have on the receptor which forms part of the pollutant linkage.

A.19 The second step in applying the definition of contaminated land is for the local authority to satisfy itself that both:

(a) such a pollutant linkage exists in respect of a piece of land; and

(b) that pollutant linkage:

(i) is resulting in significant harm being caused to the receptor in the pollutant linkage,

(ii) presents a significant possibility of significant harm being caused to that receptor,

(iii) is resulting in the pollution of the controlled waters which constitute the receptor, or

(iv) is likely to result in such pollution.

A.20 In this Chapter, 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".

A.21 The guidance in Part 3 below relates to questions about significant harm and the significant possibility of such harm being caused. The guidance in Part 4 below relates to the pollution of controlled waters.

PART 3 – Significant Harm and the Significant Possibility of Significant Harm

A.22 Section 78A(4) defines "harm" as meaning "harm to the health of living organisms or other interference with the ecological systems of which they form part and, in the case of man, includes harm to his property". Section 78A(5) provides that what harm is to be regarded as "significant" and whether the possibility of significant harm being caused is significant shall be determined in accordance with this guidance.

What Harm is to be Regarded as "Significant"

A.23 The local authority should regard as significant only harm which is both:

(a) to a receptor of a type listed in Table A, and

(b) within the description of harm specified for that type of receptor in that Table.

TABLE A – CATEGORIES OF SIGNIFICANT HARM

	Type of Receptor	Description of harm to that type of receptor that is to be regarded as significant harm
1	Human beings	Death, disease, serious injury, genetic mutation, birth defects or the impairment of reproductive functions. For these purposes, disease is to be taken to mean an unhealthy condition of the body or a part of it and can include, for example, cancer, liver dysfunction or extensive skin ailments. Mental dysfunction is included only insofar as it is attributable to the effects of a pollutant on the body of the person concerned. In this Chapter, this description of significant harm is referred to as a "human health effect".
2	Any ecological system, or living organism forming part of such a system, within a location which is: • an area notified as an area of special scientific interest under section 28 of the Wildlife and Countryside Act 1981; • any land declared a national nature reserve under section 35 of that Act; • any area designated as a marine nature reserve under section 36 of that Act; • an Area of Special Protection for Birds, established under section 3 of that Act; • any European Site within the meaning of regulation 10 of the Conservation (Natural Habitats etc) Regulations 1994 (ie Special Areas of Conservation and Special Protection Areas); • any habitat or site afforded policy protection under paragraph 13 of Planning Policy Guidance Note 9 (PPG9) on nature conservation (ie candidate Special Areas of Conservation, potential Special Protection Areas and listed Ramsar sites); or • any nature reserve established under section 21 of the National Parks and Access to the Countryside Act 1949.	Harm which results in an irreversible adverse change, or in some other substantial adverse change, in the functioning of the ecological system within any substantial part of that location. In determining what constitutes such harm, the local authority should have regard to the advice of English Nature and to the requirements of the Conservation (Natural Habitats etc) Regulations 1994. In this Chapter, this description of significant harm is referred to as an "ecological system effect".

	Type of Receptor	Description of harm to that type of receptor that is to be regarded as significant harm
3	Property in the form of: • crops, including timber; • produce grown domestically, or on allotments, for consumption; • livestock; • other owned or domesticated animals; • wild animals which are the subject of shooting or fishing rights.	For crops, a substantial diminution in yield or other substantial loss in their value resulting from death, disease or other physical damage. For domestic pets, death, serious disease or serious physical damage. For other property in this category, a substantial loss in its value resulting from death, disease or other serious physical damage. The local authority should regard a substantial loss in value as occurring only when a substantial proportion of the animals or crops are dead or otherwise no longer fit for their intended purpose. Food should be regarded as being no longer fit for purpose when it fails to comply with the provisions of the Food Safety Act 1990. Where a diminution in yield or loss in value is caused by a pollutant linkage, a 20% diminution or loss should be regarded as a benchmark for what constitutes a substantial diminution or loss. In this Chapter, this description of significant harm is referred to as an "animal or crop effect".
4	Property in the form of buildings. For this purpose, "building" has the meaning given in section 336(1) of the Town and Country Planning Act 1990 (ie it includes "any structure or erection, and any part of a building... but does not include plant or machinery comprised in a building").	Structural failure, substantial damage or substantial interference with any right of occupation. For this purpose, the local authority should regard substantial damage or substantial interference as occurring when any part of the building ceases to be capable of being used for the purpose for which it is or was intended. Additionally, in the case of a scheduled Ancient Monument, substantial damage should be regarded as occurring when the damage significantly impairs the historic, architectural, traditional, artistic or archaeological interest by reason of which the monument was scheduled. In this Chapter, this description of significant harm is referred to as a "building effect".

A.24 The local authority should not regard harm to receptors of any type other than those mentioned in Table A as being significant harm for the purposes of Part IIA. For example, harm to ecological systems outside the descriptions in the second entry in the table should be disregarded. Similarly, the authority should not regard any other description of harm to receptors of the types mentioned in Table A as being significant harm.

A.25 The authority should disregard any receptors which are not likely to be present, given the "current use" of the land or other land which might be affected.

A.26 For the purposes of this guidance, the "current use" means any use which is currently being made, or is likely to be made, of the land. This definition is subject to the following qualifications:

(a) the use must be consistent with any existing planning permission, or be otherwise lawful under town and country planning legislation;

(b) the current use should be taken to include any temporary use, permitted under that legislation, to which the land is, or is likely to be, put from time to time;

(c) the current use includes future uses or developments which do not require a new, or amended, grant of planning permission (but see also paragraph A.35 below);

(d) the current use should, nevertheless, be taken to include any likely informal recreational use of the land, whether authorised by the owners or occupiers or not, (for example, children playing on the land); and

(e) in the case of agricultural land, however, the current agricultural use should not be taken to extend beyond the growing or rearing of the crops or animals which are habitually grown or reared on the land.

Whether the Possibility of Significant Harm Being Caused is Significant

A.27 As stated in paragraph A.9 above, the guidance on determining whether a particular possibility is significant is based on the principles of risk assessment, and in particular on considerations of the magnitude or consequences of the different types of significant harm caused. The term "possibility of significant harm being caused" should be taken as referring to a measure of the probability, or frequency, of the occurrence of circumstances which would lead to significant harm being caused.

A.28 The local authority should take into account the following factors in deciding whether the possibility of significant harm being caused is significant:

(a) the nature and degree of harm;

(b) the susceptibility of the receptors to which the harm might be caused; and

(c) the timescale within which the harm might occur.

A.29 In considering the timescale, the authority should take into account any evidence that the current use of the land (as defined in paragraphs A.25 and A.26 above) will cease in the foreseeable future.

A.30 The local authority should regard as a significant possibility any possibility of significant harm which meets the conditions set out in Table B for the description of significant harm under consideration.

TABLE B - SIGNIFICANT POSSIBILITY OF SIGNIFICANT HARM

	Descriptions Of Significant Harm (As Defined In Table A)	Conditions For There Being A Significant Possibility Of Significant Harm
1	Human health effects arising from • the intake of a contaminant, or • other direct bodily contact with a contaminant.	If the amount of the pollutant in the pollutant linkage in question: • which a human receptor in that linkage might take in, or • to which such a human might otherwise be exposed, as a result of the pathway in that linkage, would represent an unacceptable medical risk, assessed on the basis of relevant information on the toxicological properties of that pollutant. Such an assessment should take into account: • the likely total intake of, or exposure to, the substance or substances which form the pollutant, from all sources including that from the pollutant linkage in question; • the relative contribution of the pollutant linkage in question to the likely aggregate intake of, or exposure to, the relevant substance or substances; and • the duration of intake or exposure resulting from the pollutant linkage in question. Toxicological properties should be taken to include carcinogenic, mutagenic, teratogenic, pathogenic, endocrine-disrupting and other similar properties.
2	All other human health effects (particularly by way of explosion or fire).	If the probability, or frequency, of occurrence of significant harm of that description is unacceptable, assessed on the basis of relevant information concerning: • that type of pollutant linkage, or • that type of significant harm arising from other causes. Such an assessment should take into account the levels of risk which have been judged unacceptable in other similar contexts.
3	All ecological system effects.	If significant harm of that description is more likely than not to result from the pollutant linkage in question, taking into account relevant information for that type of pollutant linkage, particularly in relation to the ecotoxicological effects of the pollutant.
4	All animal and crop effects.	If significant harm of that description is more likely than not to result from the pollutant linkage in question, taking into account relevant information for that type of pollutant linkage, particularly in relation to the ecotoxicological effects of the pollutant.

	Descriptions Of Significant Harm (As Defined In Table A)	Conditions For There Being A Significant Possibility Of Significant Harm
5	All building effects	If significant harm of that description is more likely than not to result from the pollutant linkage in question during the expected economic life of the building (or, in the case of a scheduled Ancient Monument, the foreseeable future), taking into account relevant information for that type of pollutant linkage.

A.31 In Table B, references to "relevant information" mean information which is:

(a) scientifically-based;

(b) authoritative;

(c) relevant to the assessment of risks arising from the presence of contaminants in soil; and

(d) appropriate to the determination of whether any land is contaminated land for the purposes of Part IIA, in that the use of the information is consistent with providing a level of protection of risk in line with the qualitative criteria set out in Tables A and B.

A.32 In making any assessment of what is unacceptable in relation to human health, the local authority should give particular weight to conclusions that significant harm which might be caused by the pollutant linkage which:

(a) would be irreversible or incapable of being treated;

(b) would affect a substantial number of people;

(c) would result from a single incident such as a fire or an explosion; or

(d) would be likely to result from a short-term (that is, less than 24-hour) exposure to the pollutant.

A.33 In addition, the local authority may also determine that there is a significant possibility of significant harm with respect to a non-human receptor in any case where the conditions in the third, fourth and fifth entries in Table B are not met, but where:

(a) the significant harm would result from a single incident such as a fire or explosion;

(b) the ecological system in a high proportion of a relevant habitat or site would be devastated; or

(c) the significant harm would be likely to result from a short-term (that is, less than 24-hour) exposure of the receptor to the pollutant.

A.34 The possibility of significant harm being caused as a result of any change of use of any land to one which is not a current use of that land (as defined in paragraph A.26 above) should not be regarded as a significant possibility for the purposes of this Chapter.

A.35 When considering the possibility of significant harm being caused in relation to any future use or development which falls within the description of a "current use" as a result of paragraph A.26(c) above, the local authority should assume that if the future use is introduced, or the development carried out, this will be done in accordance with any existing planning permission for that use or development. In particular, the local authority should assume:

(a) that any remediation which is the subject of a condition attached to that planning permission, or is the subject of any planning obligation, will be carried out in accordance with that permission or obligation; and

(b) where a planning permission has been given subject to conditions which require steps to be taken to prevent problems which might be caused by contamination, and those steps are to be approved by the local planning authority, that the local planning authority will ensure that those steps include adequate remediation.

PART 4 - The Pollution of Controlled Waters

A.36 Section 78A(9) defines the pollution of controlled waters as:

"the entry into controlled waters of any poisonous, noxious or polluting matter or any solid waste matter".

A.37 Before determining that pollution of controlled waters is being, or is likely to be, caused, the local authority should be satisfied that a substance is continuing to enter controlled waters or is likely to enter controlled waters. For this purpose, the local authority should regard something as being "likely" when they judge it more likely than not to occur.

A.38 Land should not be designated as contaminated land where:

(a) a substance is already present in controlled waters;

(b) entry into controlled waters of that substance from land has ceased; and

(c) it is not likely that further entry will take place.

A.39 Substances should be regarded as having entered controlled waters where:

(a) they are dissolved or suspended in those waters; or

(b) if they are immiscible with water, they have direct contact with those waters on or beneath the surface of the water.

A.40 The term "continuing to enter" should be taken to mean any entry additional to any which has already occurred.

CHAPTER B - Statutory Guidance on the Identification of Contaminated Land

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PART 1 - Scope of the Chapter

B.1 The statutory guidance in this Chapter is issued under sections 78A(2) and 78B(2) of Part IIA of the Environmental Protection Act 1990, and provides guidance on the inspection of its area by a local authority and the manner in which an authority is to determine whether any land appears to it to be contaminated land.

B.2 Section 78B(1) provides that:

> "Every local authority shall cause its area to be inspected from time to time for the purpose-
>
> "(a) of identifying contaminated land; and
>
> "(b) of enabling the authority to decide whether any such land is land which is required to be designated as a special site."

B.3 Section 78B(2) further provides that:

> "In performing [these] functions .... a local authority shall act in accordance with any guidance issued for the purpose by the Secretary of State."

B.4 Section 78A(2) also provides that:

" 'Contaminated land' is any land which appears to the local authority in whose area it is situated to be in such a condition, by reason of substances in, on or under the land, that -

"(a) significant harm is being caused or there is a significant possibility of such harm being caused, or

"(b) pollution of controlled waters is being, or is likely to be, caused;

"and, in determining whether any land appears to be such land, a local authority shall, ... act in accordance with guidance issued by the Secretary of State .... with respect to the manner in which that determination is to be made."

B.5 The local authority is therefore required to act in accordance with the statutory guidance contained in this Chapter.

B.6 The questions of what harm is to be regarded as significant, whether the possibility of significant harm being caused is significant, and whether pollution of controlled waters is being or is likely to be caused are to be determined in accordance with guidance contained in Chapter A.

PART 2 - Definitions of Terms

B.7 Unless otherwise stated, any word, term or phrase given a specific meaning in Part IIA of the Environmental Protection Act 1990, or in the guidance at Chapter A, has the same meaning for the purposes of the guidance in this Chapter.

B.8 Any reference to "Part IIA" means "Part IIA of the Environmental Protection Act 1990". Any reference to a "section" in primary legislation means a section of the Environmental Protection Act 1990, unless it is specifically stated otherwise.

PART 3 - The Local Authority's Inspection Duty

Strategic Approach to Inspection

B.9 In carrying out its inspection duty under section 78B(1), the local authority should take a strategic approach to the identification of land which merits detailed individual inspection. This approach should:

(a) be rational, ordered and efficient;

(b) proportionate to the seriousness of any actual or potential risk;

(c) seek to ensure that the most pressing and serious problems are located first;

(d) ensure that resources are concentrated on investigating in areas where the authority is most likely to identify contaminated land; and

(e) ensure that the local authority efficiently identifies requirements for the detailed inspection of particular areas of land.

B.10 In developing this strategic approach the local authority should reflect local circumstances. In particular it should consider:

(a) any available evidence that significant harm or pollution of controlled waters is actually being caused;

(b) the extent to which any receptor (which is either of a type listed in Table A in Chapter A or is controlled waters) is likely to be found in any of the different parts of the authority's area;

(c) the extent to which any of those receptors is likely to be exposed to a contaminant (as defined in Chapter A), for example as a result of the use of the land or of the geological and hydrogeological features of the area;

(d) the extent to which information on land contamination is already available;

(e) the history, scale and nature of industrial or other activities which may have contaminated the land in different parts of its area;

(f) the nature and timing of past redevelopment in different parts of its area;

(g) the extent to which remedial action has already been taken by the authority or others to deal with land-contamination problems or is likely to be taken as part of an impending redevelopment; and

(h) the extent to which other regulatory authorities are likely to be considering the possibility of harm being caused to particular receptors or the likelihood of any pollution of controlled waters being caused in particular parts of the local authority's area.

B.11 In developing its strategic approach, the local authority should consult the Environment Agency and other appropriate public authorities, such as the county council (where one exists), statutory regeneration bodies, English Nature, English Heritage and the Ministry of Agriculture, Fisheries and Food.

B.12 The local authority should set out its approach as a written strategy, which it should formally adopt and publish. This strategy should be published within 15 months of the issue of this guidance. As soon as its strategy is published, the local authority should send a copy to the Environment Agency.

B.13 The local authority should keep its strategy under periodic review.

B.14 The local authority should not await the publication of its strategy before commencing more detailed work investigating particular areas of land, where this appears necessary.

Contents of the Strategy

B.15 Strategies are likely to vary both between local authorities and between different parts of an authority's area, reflecting the different problems associated with land contamination in different areas. The local authority should include in its strategy:

(a) a description of the particular characteristics of its area and how that influences its approach;

(b) the authority's particular aims, objectives and priorities;

(c) appropriate timescales for the inspection of different parts of its area; and

(d) arrangements and procedures for:

(i) considering land for which it may itself have responsibilities by virtue of its current or former ownership or occupation,

(ii) obtaining and evaluating information on actual harm, or pollution of controlled waters,

(iii) identifying receptors, and assessing the possibility or likelihood that they are being, or could be, exposed to or affected by a contaminant,

(iv) obtaining and evaluating existing information on the possible presence of contaminants and their effects,

(v) liaison with, and responding to information from, other statutory bodies, including, in particular, the Environment Agency, English Nature and the Ministry of Agriculture, Fisheries and Food (see paragraphs B.16 and B.17 below),

(vi) liaison with, and responding to information from, the owners or occupiers of land, and other relevant interested parties,

(vii) responding to information or complaints from members of the public, businesses and voluntary organisations,

(viii) planning and reviewing a programme for inspecting particular areas of land,

(ix) carrying out the detailed inspection of particular areas of land,

(x) reviewing and updating assumptions and information previously used to assess the need for detailed inspection of different areas, and managing new information, and

(xi) managing information obtained and held in the course of carrying out its inspection duties.

Information from Other Statutory Bodies

B.16 Other regulatory authorities may be able to provide information relevant to the identification of land as contaminated land, as a result of their various complementary functions. The local authority should seek to make specific arrangements with such other bodies to avoid unnecessary duplication in investigation.

B.17 For example, the Environment Agency has general responsibilities for the protection of the water environment. It monitors the quality of controlled waters and in doing so may discover land which would appropriately be identified as contaminated land by reason of pollution of controlled waters which is being, or is likely to be, caused.

Inspecting Particular Areas of Land

B.18 Applying the strategy will result in the identification of particular areas of land where it is possible that a pollutant linkage exists. Subject to the guidance in paragraphsB.22 to B.25 and B.27 to B.30 below, the local authority should carry out a detailed inspection of any such area to obtain sufficient information for the authority:

(a) to determine, in accordance with the guidance on the manner of determination in Part 4 below, whether that land appears to be contaminated land; and

(b) to decide whether any such land falls within the definition of a special site prescribed in regulations 2 and 3 of the Contaminated Land (England) Regulations 1999, and is therefore required to be designated as a special site.

B.19 To be sufficient for the first of these purposes the information should include, in particular, evidence of the actual presence of a pollutant.

B.20 Detailed inspection may include any or all of the following:

(a) the collation and assessment of documentary information, or other information from other bodies;

(b) a visit to the particular area for the purposes of visual inspection and, in some cases, limited sampling (for example of surface deposits); or

(c) intrusive investigation of the land (for example by exploratory excavations).

B.21 Section 108 of the Environment Act 1995 gives the local authority the power to authorise a person to exercise specific powers of entry. For the purposes of this Chapter, any detailed inspection of land carried out through use of this power by the local authority is referred to as an "inspection using statutory powers of entry".

B.22 Before the local authority carries out an inspection using statutory powers of entry, it should be satisfied, on the basis of any information already obtained:

(a) in all cases, that there is a reasonable possibility that a pollutant linkage (as defined in Chapter A) exists on the land; this implies that not only must the authority be satisfied that there is a reasonable possibility of the presence of a contaminant, a receptor and a pathway, but also that these would together create a pollutant linkage; and

(b) in cases involving an intrusive investigation, that it is further likely that both the contaminant and receptor are actually present.

B.23 The local authority should not carry out any inspection using statutory powers of entry which takes the form of intrusive investigation if:

(a) it has already been provided with detailed information on the condition of the land, whether by the Environment Agency or some other person such as the owner of the land, which provides an appropriate basis upon which the local authority can determine whether the land is contaminated land in accordance with the requirements of the guidance in this Chapter; or

(b) a person offers to provide such information within a reasonable and specified time, and then provides such information within that time.

B.24 The local authority should carry out any intrusive investigation in accordance with appropriate technical procedures for such investigations. It should also ensure that it takes all reasonable precautions to avoid harm or water pollution which might be caused as a result of its investigation.

B.25 If at any stage, the local authority considers, on the basis of information obtained from a detailed inspection, that there is no longer a reasonable possibility that a particular pollutant linkage exists on the land, the authority should not carry out any further detailed inspection for that pollutant linkage.

Land which may be a Special Site

B.26 If land has been determined to be contaminated land and it also falls within one or more of the "special sites" descriptions prescribed in the Contaminated Land (England) Regulations 1999, it is required to be designated as a special site. The Environment Agency then becomes the enforcing authority for that land. It is therefore helpful for the Environment Agency to have a formal role at the inspection stage for any such land.

B.27 Before authorising or carrying out on any land an inspection using statutory powers of entry, the local authority should consider whether, if that land were found to be contaminated land, it would meet any of the descriptions of land prescribed in the Regulations as requiring to be designated a special site.

B.28 If the local authority already has information that this would be the case, the authority should always seek to make arrangements with the Environment Agency for that Agency to carry out the inspection of the land on behalf of the local authority. This might occur, for example, where the prescribed description of land in the Regulations relates to its current or former use, such as land on which a process designated for central control under the Integrated Pollution Control regime has been carried out, or land which is occupied by the Ministry of Defence.

B.29 If the local authority considers that there is a reasonable possibility that a particular pollutant linkage is present, and the presence of a linkage of that kind would require the designation of the land as a special site (were that linkage found to be a significant pollutant linkage), the authority should seek to make arrangements with the Environment Agency for the Agency to carry out the inspection of the land. An example of this kind of pollutant linkage would be the pollution of waters in the circumstances described in regulation 3(b) of the Contaminated Land (England) Regulations 1999.

B.30 Where the Environment Agency is to carry out an inspection on behalf of the local authority, the authority should, where necessary, authorise a person nominated by the Agency to exercise the powers of entry conferred by section 108 of the Environment Act 1995. Before the local authority gives such an authorisation, the Environment Agency should satisfy the local authority that the conditions for the use of the statutory powers of entry set out in paragraphs B.22 to B.25 above are met

PART 4 - Determining whether Land Appears to be Contaminated Land

B.31 The local authority has the sole responsibility for determining whether any land appears to be contaminated land. It cannot delegate this responsibility (except in accordance with section 101 of the Local Government Act 1972), although in discharging it the local authority can choose to rely on information or advice provided by another body such as the Environment Agency. This applies even where the Agency has carried out the inspection of land on behalf of the local authority (see paragraphs B.26 to B.30 above).

Physical Extent of Land

B.32 A determination that land is contaminated land is necessarily made in respect of a specific area of land. In deciding what that area should be, the primary consideration is the extent of the land which is contaminated land. However, there may be situations in which the local authority may consider that separate designations of parts of a larger area of contaminated land may simplify the administration of the consequential actions. In such circumstances, the local authority should do so, taking into account:

(a) the location of significant pollutants in, on or under the land;

(b) the nature of the remediation which might be required; and

(c) the likely identity of those who may be the appropriate persons to bear responsibility for the remediation (where this is reasonably clear at this stage).

B.33 If necessary, the local authority should initially review a wider area, the history of which suggests that contamination problems are likely. It can subsequently refine this down to the precise areas which meet the statutory tests for identification as contaminated land, and use these as the basis for its determination.

B.34 In practice, the land to be covered by a single determination is likely to be the smallest area which is covered by a single remediation action which cannot sensibly be broken down into smaller actions. Subject to this, the land is likely to be the smaller of:

(a) the plots which are separately recorded in the Land Register or are in separate ownership or occupation; and

(b) the area of land in which the presence of significant pollutants has been established.

B.35 The determination should identify the area of contaminated land clearly, including reference to a map or plan at an appropriate scale.

B.36 The local authority should also be prepared to review the decision on the physical extent of the land to be identified in the light of further information.

Making the Determination

B.37 In determining whether any land appears to the local authority to be contaminated land, the authority is required to act in accordance with the guidance on the definition of contaminated land set out in Chapter A. Guidance on the manner in which the local authority should determine whether land appears to it to be contaminated land, by reason of substances in, on or under the land, is set out in paragraphs B.39 to B.51 below.

B.38 There are four possible grounds for the determination, (corresponding to the parts of the definition of contaminated land in section 78A(2)) namely that:

(a) significant harm is being caused (see paragraph B.44 below);

(b) there is a significant possibility of significant harm being caused (see paragraphs B.45 to B.49 below);

(c) pollution of controlled waters is being caused (see paragraph B.50 below); or

(d) pollution of controlled waters is likely to be caused (see paragraph B.51 below).

B.39 In making any determination, the local authority should take all relevant and available evidence into account and carry out an appropriate scientific and technical assessment of that evidence.

B.40 The local authority should identify a particular pollutant linkage or linkages (as defined in Chapter A) as the basis for the determination. All three elements of any pollutant linkage (pollutant, pathway and receptor) should be identified. A linkage which forms a basis for the determination that land is contaminated land is then a "significant pollutant linkage"; and any pollutant which forms part of it is a "significant pollutant".

B.41 The local authority should consider whether:

(a) there is evidence that additive or synergistic effects between potential pollutants, whether between the same substance on different areas of land or between different substances, may result in a significant pollutant linkage;

(b) a combination of several different potential pathways linking one or more potential pollutants to a particular receptor, or to a particular class of receptors, may result in a significant pollutant linkage; and

(c) there is more than one significant pollutant linkage on any land; if there are, each should be considered separately, since different people may be responsible for the remediation.

CONSISTENCY WITH OTHER STATUTORY BODIES

B.42 In making a determination which relates to an "ecological system effect" as defined in Table A of Chapter A, the local authority should adopt an approach consistent with that

adopted by English Nature. To this end, the local authority should consult that authority and have regard to its comments in making its determination.

B.43 In making a determination which relates to pollution of controlled waters the local authority should adopt an approach consistent with that adopted by the Environment Agency in applying relevant statutory provisions. To this end, where the local authority is considering whether pollution of controlled waters is being or is likely to be caused, it should consult the Environment Agency and have regard to its comments before determining whether pollution of controlled waters is being or is likely to be caused.

DETERMINING THAT "SIGNIFICANT HARM IS BEING CAUSED"

B.44 The local authority should determine that land is contaminated land on the basis that significant harm is being caused where:

(a) it has carried out an appropriate scientific and technical assessment of all the relevant and available evidence; and

(b) on the basis of that assessment, it is satisfied on the balance of probabilities that significant harm is being caused.

DETERMINING THAT "THERE IS A SIGNIFICANT POSSIBILITY OF SIGNIFICANT HARM BEING CAUSED"

B.45 The local authority should determine that land is contaminated land on the basis that there is a significant possibility of significant harm being caused (as defined in Chapter A), where:

(a) it has carried out a scientific and technical assessment of the risks arising from the pollutant linkage, according to relevant, appropriate, authoritative and scientifically based guidance on such risk assessments;

(b) that assessment shows that there is a significant possibility of significant harm being caused; and

(c) there are no suitable and sufficient risk management arrangements in place to prevent such harm.

B.46 In following any such guidance on risk assessment, the local authority should be satisfied that it is relevant to the circumstances of the pollutant linkage and land in question, and that any appropriate allowances have been made for particular circumstances.

B.47 To simplify such an assessment of risks, the local authority may use authoritative and scientifically based guideline values for concentrations of the potential pollutants in, on or under the land in pollutant linkages of the type concerned. If it does so, the local authority should be satisfied that:

(a) an adequate scientific and technical assessment of the information on the potential pollutant, using the appropriate, authoritative and scientifically based guideline values, shows that there is a significant possibility of significant harm; and

(b) there are no suitable and sufficient risk management arrangements in place to prevent such harm.

B.48 In using any guideline values, the local authority should be satisfied that:

(a) the guideline values are relevant to the judgement of whether the effects of the pollutant linkage in question constitute a significant possibility of significant harm;

(b) the assumptions underlying the derivation of any numerical values in the guideline values (for example, assumptions regarding soil conditions, the behaviour of potential pollutants, the existence of pathways, the land-use patterns, and the availability of receptors) are relevant to the circumstances of the pollutant linkage in question;

(c) any other conditions relevant to the use of the guideline values have been observed (for example, the number of samples taken or the methods of preparation and analysis of those samples); and

(d) appropriate adjustments have been made to allow for the differences between the circumstances of the land in question and any assumptions or other factors relating to the guideline values.

B.49 The local authority should be prepared to reconsider any determination based on such use of guideline values if it is demonstrated to the authority's satisfaction that under some other more appropriate method of assessing the risks the local authority would not have determined that the land appeared to be contaminated land.

DETERMINING THAT "POLLUTION OF CONTROLLED WATERS IS BEING CAUSED"

B.50 The local authority should determine that land is contaminated land on the basis that pollution of controlled waters is being caused where:

(a) it has carried out an appropriate scientific and technical assessment of all the relevant and available evidence, having regard to any advice provided by the Environment Agency; and

(b) on the basis of that assessment, it is satisfied on the balance of probabilities that both of the following circumstances apply:

(i) a potential pollutant is present in, on or under the land in question, which constitutes poisonous, noxious or polluting matter, or which is solid waste matter, and

(ii) that potential pollutant is entering controlled waters by the pathway identified in the pollutant linkage.

DETERMINING THAT "POLLUTION OF CONTROLLED WATERS IS LIKELY TO BE CAUSED"

B.51 The local authority should determine that land is contaminated land on the basis that pollution of controlled waters is likely to be caused where:

(a) it has carried out an appropriate scientific and technical assessment of all the relevant and available evidence, having regard to any advice provided by the Environment Agency; and

(b) on the basis of that assessment it is satisfied that, on the balance of probabilities, all of the following circumstances apply:

(i) a potential pollutant is present in, on or under the land in question, which constitutes poisonous, noxious or polluting matter, or which is solid waste matter,

(ii) the potential pollutant in question is in such a condition that it is capable of entering controlled waters,

(iii) taking into account the geology and other circumstances of the land in question, there is a pathway (as defined in Chapter A) by which the potential pollutant can enter identified controlled waters,

(iv) that potential pollutant is more likely than not to enter these controlled waters and will remain in a form when it enters the controlled waters that is poisonous, noxious or polluting, or solid waste matter, and

(v) there are no suitable and sufficient risk management arrangements relevant to the pollution linkage in place to prevent such pollution.

Record of the Determination that Land is Contaminated Land

B.52 The local authority should prepare a written record of any determination that particular land is contaminated land. The record should include (by means of a reference to other documents if necessary):

(a) a description of the particular significant pollutant linkage, identifying all three components of pollutant, pathway and receptor;

(b) a summary of the evidence upon which the determination is based;

(c) a summary of the relevant assessment of this evidence; and

(d) a summary of the way in which the authority considers that the requirements of the guidance in this Part and in Chapter A of the guidance have been satisfied.

CHAPTER C - Statutory Guidance on the Remediation of Contaminated Land

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PART 1 - Scope of the Chapter

C.1 The statutory guidance in this Chapter is issued under section 78E(5) of Part IIA of the Environmental Protection Act 1990, and provides guidance on the remediation which may be required for any contaminated land.

C.2 Section 78E provides:

"(4) The only things by way of remediation which the enforcing authority may do, or require to be done, under or by virtue of [Part IIA of the Environmental Protection Act 1990] are things which it considers reasonable, having regard to-

"(a) the cost which is likely to be involved; and

"(b) the seriousness of the harm, or pollution of controlled waters, in question.

"(5) In determining for any purpose of this Part-

"(a) what is to be done (whether by an appropriate person, the enforcing authority, or any other person) by way of remediation in any particular case,

"(b) the standard to which any land is, or waters are, to be remediated pursuant to [a remediation] notice, or

"(c) what is, or is not, to be regarded as reasonable for the purposes of subsection (4) above,

"the enforcing authority shall have regard to any guidance issued for the purpose by the Secretary of State".

C.3 The enforcing authority is therefore required to have regard to this guidance when it is:

(a) determining what remediation action it should specify in a remediation notice as being required to be carried out (section 78E(1));

(b) satisfying itself that appropriate remediation is being, or will be, carried out without the service of a notice (section 78H(5)(b)); or

(c) deciding what remediation action it should carry out itself (section 78N).

C.4 The guidance in this Chapter does not attempt to set out detailed technical procedures or working methods. For information on these matters, the enforcing authority may wish to consult relevant technical documents prepared under the contaminated land research programmes of DETR and the Environment Agency, and by other professional and technical organisations.

PART 2 - Definitions of Terms

C.5 Unless otherwise stated, any word, term or phrase given a specific meaning in Part IIA of the Environmental Protection Act 1990, or in the statutory guidance in Chapters A or B, has the same meaning for the purposes of the guidance in this Chapter.

C.6 "Remediation" is defined in section 78A(7) as meaning:

"(a) the doing of anything for the purpose of assessing the condition of-

"(i) the contaminated land in question;

"(ii) any controlled waters affected by that land; or

"(iii) any land adjoining or adjacent to that land;

"(b) the doing of any works, the carrying out of any operations or the taking of any steps in relation to any such land or waters for the purpose-

"(i) of preventing or minimising, or remedying or mitigating the effects of, any significant harm, or any pollution of controlled waters, by reason of which the contaminated land is such land; or

"(ii) of restoring the land or waters to their former state; or

"(c) the making of subsequent inspections from time to time for the purpose of keeping under review the condition of the land or waters."

C.7 The definition of remediation given in section 78A extends more widely than the common usage of the term, which more normally relates only to the actions defined as "remedial treatment actions" below.

C.8 For the purposes of the guidance in this Chapter, the following definitions apply:

(a) a "remediation action" is any individual thing which is being, or is to be, done by way of remediation;

(b) a "remediation package" is the full set or sequence of remediation actions, within a remediation scheme, which are referable to a particular significant pollutant linkage;

(c) a "remediation scheme" is the complete set or sequence of remediation actions (referable to one or more significant pollutant linkages) to be carried out with respect to the relevant land or waters;

(d) "relevant land or waters" means the contaminated land in question, any controlled waters affected by that land and any land adjoining or adjacent to the contaminated land on which remediation might be required as a consequence of the contaminated land being such land;

(e) an "assessment action" means a remediation action falling within the definition of remediation in section 78A(7)(a) (see paragraph C.6 above);

(f) a "remedial treatment action" means a remediation action falling within the definition in section 78A(7)(b) (see paragraph C.6 above); and

(g) a "monitoring action" means a remediation action falling within the definition in section 78A(7)(c) (see paragraph C.6 above).

C.9 Any reference to "Part IIA" means "Part IIA of the Environmental Protection Act 1990". Any reference to a "section" in primary legislation means a section of the Environmental Protection Act 1990, unless it is specifically stated otherwise.

PART 3 – Securing Remediation

C.10 When the enforcing authority is serving a remediation notice, it will need to specify in that notice any remediation action which is needed in order to achieve remediation of the relevant land or waters to the standard described in Part 4 of this Chapter and which is reasonable for the purposes of section 78E(4) (see Part 5 of this Chapter). Part 6 of this Chapter provides further guidance relevant to the determining the necessary standard of remediation. Part 7 provides guidance on the circumstances in which different types of remediation action may, or may not, be required.

C.11 The enforcing authority should be satisfied that appropriate remediation is being, or will be, carried out without the service of a remediation notice if that remediation would remediate the relevant land or waters to an equivalent, or better, standard than would be achieved by the remediation action or actions that the authority could, at that time, otherwise specify in a remediation notice.

Phased Remediation

C.12 The overall process of remediation on any land or waters may require a phased approach, with different remediation actions being carried out in sequence. For example, the local authority may have obtained sufficient information about the relevant land or waters to enable it to identify the land as falling within the definition of contaminated land, but that information may not be sufficient information for the enforcing authority to be able to specify any particular remedial treatment action as being appropriate. Further assessment actions may be needed in any case of this kind as part of the remediation scheme. In other cases, successive phases of remedial treatment actions may be needed.

C.13 The phasing of remediation is likely to follow a progression from assessment actions, through remedial treatment actions and onto monitoring actions. However, this will not always be the case, and the phasing may omit some stages or revisit others. For example, in some circumstances it may be possible for a remedial treatment action to be carried out without any previous assessment action (because sufficient information is already available). But, conversely, in some instances additional assessment action may be found to be necessary only in the light of information derived during the course of a first phase of a required assessment action or the carrying out of required remedial treatment actions.

C.14 Where it is necessary for the remediation scheme as a whole to be phased, a single remediation notice may not be able to include all of the remediation actions which could eventually be needed. In these circumstances, the enforcing authority should specify in the notice the remediation action or actions which, on the basis of the information available at that time, it considers to be appropriate, taking into account in particular the guidance in Part 7 of this Chapter. In due course, the authority may need to serve further remediation notices which include remediation actions for further phases of the scheme.

C.15 However, before serving any further remediation notice, the enforcing authority must be satisfied that the contaminated land which was originally identified still appears to it to meet the definition in section 78A(2). If, for example, the information obtained as a result of an assessment action reveals that there is not, in fact, a significant possibility of significant harm being caused, nor is there a likelihood of any pollution of controlled waters being caused, then no further assessment, remedial treatment or monitoring action can be required under section 78E(1).

PART 4 - The Standard to which Land or Waters should be Remediated

C.16 The statutory guidance in this Part is issued under section 78E(5)(b) and provides guidance on the standard to which land or waters should be remediated.

The Standard of Remediation

C.17 The Government's intention is that any remediation required under this regime should result in land being "suitable for use". The aim of any remediation should be to ensure that the circumstances of the land are such that, in its current use (as defined in paragraph A.26 of Chapter A) it is no longer contaminated land (as defined in section 78A(2)), and that the effects of any significant harm or pollution of controlled waters which has occurred are

remedied. However, it is always open to the appropriate person to carry out remediation on a broader basis than this, if he considers it in his interests to do so, for example if he wishes to prepare the land for redevelopment.

C.18 The standard to which the relevant land or waters as a whole should be remediated should be established by considering separately each significant pollutant linkage identified on the land in question. For each such linkage, the standard of remediation should be that which would be achieved by the use of a remediation package which forms the best practicable techniques of remediation for:

(a) ensuring that the linkage is no longer a significant pollutant linkage, by doing any one or more of the following:

(i) removing or treating the pollutant;

(ii) breaking or removing the pathway; or

(iii) protecting or removing the receptor; and

(b) remedying the effect of any significant harm or pollution of controlled waters which is resulting, or has already resulted from, the significant pollutant linkage.

C.19 In deciding what represents the best practicable technique for any particular remediation, the enforcing authority should look for the method of achieving the desired results which, in the light of the nature and volume of the significant pollutant concerned and the timescale within which remediation is required:

(a) is reasonable, taking account of the guidance in Part 5; and

(b) represents the best combination of the following qualities:

(i) practicability, both in general and in the particular circumstances of the relevant land or waters;

(ii) effectiveness in achieving the aims set out in paragraph C.18 above; and

(iii) durability in maintaining that effectiveness over the timescale within which the significant harm or pollution of controlled waters may occur.

C.20 Further guidance on how the factors set out in sub-paragraph b) above should be considered is set out in Part 6. The determination of what, in any particular case, represents the best practicable technique of remediation may require a balance to be struck between these factors.

C.21 When considering what would be the best practicable techniques for remediation in any particular case, the enforcing authority should work on the basis of authoritative scientific and technical advice. The authority should consider what comparable techniques have recently been carried out successfully on other land, and also any technological advances and changes in scientific knowledge and understanding.

C.22 Where there is established good practice for the remediation of a particular type of significant pollutant linkage, the authority should assume that this represents the best practicable technique for remediation for a linkage of that type, provided that:

(a) it is satisfied that the use of that means of remediation is appropriate, given the circumstances of the relevant land or waters; and

(b) the remediation actions involved would be reasonable having regard to the cost which is likely to be involved and the seriousness of the harm or pollution of controlled waters in question.

C.23 In some instances, the best practicable techniques of remediation with respect to any significant pollutant linkage may not fully achieve the aim in subparagraph C.18(a), that is to say that if the remediation were to be carried out the pollutant linkage in question would remain a significant pollutant linkage. Where this applies, the standard of remediation with respect to that significant pollutant linkage should be that which, by the use of the best practicable techniques:

(a) comes as close as practicable to achieving the aim in subparagraph C.18(a);

(b) achieves the aim in subparagraph C.18(b); and

(c) puts arrangements in place to remedy the effect of any significant harm or pollution of controlled waters which may be caused in the future as a consequence of the continued existence of the pollutant linkage.

C.24 In addition, the best practicable techniques for remediation with respect to a significant pollutant linkage may, in some circumstances, not fully remedy the effect of past or future significant harm or pollution of controlled waters. Where this is the case the standard of remediation should be that which, by the use of the best practicable techniques, mitigates as far as practicable the significant harm or pollution of controlled waters which has been caused as a consequence of the existence of that linkage, or may be caused in the future as a consequence of its continued existence.

C.25 For any remediation action, package or scheme to represent the best practicable techniques, it should be implemented in accordance with best practice, including any precautions necessary to prevent damage to the environment and any other appropriate quality assurance procedures.

MULTIPLE POLLUTANT LINKAGES

C.26 Where more than one significant pollutant linkage has been identified on the land, it may be possible to achieve the necessary overall standard of remediation for the relevant land or waters as a whole by considering what remediation actions would form part of the appropriate remediation package for each linkage (ie, representing the best practicable techniques of remediation for that linkage) if it were the only such linkage, and then carrying out all of these remediation actions.

C.27 However, the enforcing authority should also consider whether there is an alternative remediation scheme which would, by dealing with the linkages together, be cheaper or otherwise more practicable to implement. If such a scheme can be identified which achieves an equivalent standard of remediation with respect to all of the significant pollutant linkages to which it is referable, the authority should prefer that alternative scheme.

VOLUNTEERED REMEDIATION

C.28 In some cases, the person carrying out remediation may wish to adopt an alternative remediation scheme to that which could be required in a remediation notice. This might

occur, in particular, if the person concerned wished also to prepare the land for redevelopment. The enforcing authority should consider such a remediation scheme as appropriate remediation provided the scheme would achieve at least the same standard of remediation with respect to each of the significant pollutant linkages identified on the land as would be achieved by the remediation scheme which the authority would otherwise specify in a remediation notice.

PART 5 - The Reasonableness of Remediation

C.29 The statutory guidance in this Part is issued under section 78E(5)(c) and provides guidance on the determination by the enforcing authority of what remediation is, or is not, to be regarded as reasonable having regard to the cost which is likely to be involved and the seriousness of the harm or of the pollution of controlled waters to which it relates.

C.30 The enforcing authority should regard a remediation action as being reasonable for the purpose of section 78E(4) if an assessment of the costs likely to be involved and of the resulting benefits shows that those benefits justify incurring those costs. Such an assessment should include the preparation of an estimate of the costs likely to be involved and of a statement of the benefits likely to result. This latter statement need not necessarily attempt to ascribe a financial value to these benefits.

C.31 For these purposes, the enforcing authority should regard the benefits resulting from a remediation action as being the contribution that the action makes, either on its own or in conjunction with other remediation actions, to:

(a) reducing the seriousness of any harm or pollution of controlled waters which might otherwise be caused; or

(b) mitigating the seriousness of any effects of any significant harm or pollution of controlled waters.

C.32 In assessing the reasonableness of any remediation, the enforcing authority should make due allowance for the fact that the timing of expenditure and the realisation of benefits is relevant to the balance of costs and benefits. In particular, the assessment should recognise that:

(a) expenditure which is delayed to a future date will have a lesser impact on the person defraying it than would an equivalent cash sum to be spent immediately;

(b) there may be a gain from achieving benefits earlier but this may also involve extra expenditure; the authority should consider whether the gain justifies the extra costs. This applies, in particular, where natural processes, managed or otherwise, would over time bring about remediation; and

(c) there may be evidence that the same benefits will be achievable in the foreseeable future at a significantly lower cost, for example, through the development of new techniques or as part of a wider scheme of development or redevelopment.

C.33 The identity or financial standing of any person who may be required to pay for any remediation action are not relevant factors in the determination of whether the costs of that action are, or are not, reasonable for the purposes of section 78E(4). (These factors may however be relevant in deciding whether or not the enforcing authority can impose the cost of remediation on that person, either through the service of a remediation notice or through the recovery of costs incurred by the authority; see section 78P and the guidance in Chapter E.)

The Cost of Remediation

C.34 When considering the costs likely to be involved in carrying out any remediation action, the enforcing authority should take into account:

(a) all the initial costs (including tax payable) of carrying out the remediation action, including feasibility studies, design, specification and management, as well as works and operations, and making good afterwards;

(b) any on-going costs of managing and maintaining the remediation action; and

(c) any relevant disruption costs.

C.35 For these purposes, relevant disruption costs mean depreciation in the value of land or other interest, or other loss or damage, which is likely to result from the carrying out of the remediation action in question. The enforcing authority should assess these costs on the following basis:

(a) where the depreciation, loss or damage would be suffered by a person required to grant rights of entry etc. under section 78G(2), the relevant disruption costs should be taken to be the enforcing authority's estimate of the value of any compensation payable to that person under section 78G(5); or

(b) in any other case (for example, where the appropriate person owns the land), the relevant disruption costs should be taken to be the enforcing authority's estimate of the value of any compensation which would have been payable under section 78G(5) if the person suffering the depreciation, loss or damage had been required to grant rights of entry etc. to another person, and would therefore have been entitled to compensation.

C.36 Each of the types of cost set out in paragraph C.34 above should be included even where they would not result in payments to others by the person carrying out the remediation. For example, a company may choose to use its own staff or equipment to carry out the remediation, or the person carrying out the remediation may already own the land in question and would therefore not be entitled to receive compensation under section 78G(5). The evaluation of the cost involved in remediation should not be affected by the identity of the person carrying it out, or internal resources available to that person.

C.37 The enforcing authority should furthermore regard it as a necessary condition of an action being reasonable that:

(a) where two or more significant pollutant linkages have been identified on the land in question, and the remediation action forms part of a wider remediation scheme which is dealing with two or more of those linkages, there is no alternative scheme which would achieve the same purposes for a lower overall cost; and

(b) subject to subparagraph a) above, where the remediation action forms part of a remediation package dealing with any particular significant pollutant linkage, there is no alternative package which would achieve the same standard of remediation at a lower overall cost.

C.38 In addition, for any remediation action to be reasonable there should be no alternative remediation action which would achieve the same purpose, as part of any wider remediation package or scheme, to the same standard for a lower cost (bearing in mind that the purpose of any remediation action may relate to more than one significant pollutant linkage).

The Seriousness of Harm or of Pollution of Controlled Waters

C.39 When evaluating the seriousness of any significant harm, for the purposes of assessing the reasonableness of any remediation, the enforcing authority should consider:

(a) whether the significant harm is already being caused;

(b) the degree of the possibility of the significant harm being caused;

(c) the nature of the significant harm with respect, in particular, to:

(i) the nature and importance of the receptor,

(ii) the extent and type of any effects on that receptor of the significant harm,

(iii) the number of receptors which might be affected, and

(iv) whether the effects would be irreversible; and

(d) the context in which the effects might occur, in particular:

(i) whether the receptor has already been damaged by other means and, if so, whether further effects resulting from the harm would materially affect its condition, and

(ii) the relative risk associated with the harm in the context of wider environmental risks.

C.40 Where the significant harm is an "ecological system effect" as defined in Chapter A, the enforcing authority should take into account any advice received from English Nature.

C.41 In evaluating for this purpose the seriousness of any pollution of controlled waters, the enforcing authority should consider:

(a) whether the pollution of controlled waters is already being caused;

(b) the likelihood of the pollution of controlled waters being caused;

(c) the nature of the pollution of controlled waters involved with respect, in particular, to:

(i) the nature and importance of the controlled waters which might be affected,

(ii) the extent of the effects of the actual or likely pollution on those controlled waters, and

(iii) whether such effects would be irreversible; and

(d) the context in which the effects might occur, in particular:

(i) whether the waters have already been polluted by other means and, if so, whether further effects resulting from the water pollution would materially affect their condition, and

(ii) the relative risk associated with the water pollution in the context of wider environmental risks.

C.42 Where the enforcing authority is the local authority, it should take into account any advice received from the Environment Agency when it is considering the seriousness of any pollution of controlled waters.

C.43 In some instances, it may be possible to express the benefits of addressing the harm or pollution of controlled waters in direct financial terms. For example, removing a risk of explosion which renders a building unsafe for occupation could be considered to create a benefit equivalent to the cost of acquiring a replacement building. Various Government departments have produced technical advice, which the enforcing authority may find useful, on the consideration of non-market impacts of environmental matters.

PART 6 - The Practicability, Effectiveness and Durability of Remediation

C.44 The statutory guidance in this Part is issued under section 78E(5)(b) and is relevant to the guidance given in Part 4 on the standard to which land and waters should be remediated.

General Considerations

C.45 In some instances, there may be little firm information on which to assess particular remediation actions, packages or schemes. For example, a particular technology or technique may not have been subject previously to field-scale pilot testing in circumstances comparable to those to be found on the contaminated land in question. Where this is the case, the enforcing authority should consider the effectiveness and durability which it appears likely that any such action would achieve, and the practicability of its use, on the basis of information which it does have at that time (for example information derived from laboratory or other "treatability" testing).

C.46 If the person who will be carrying out the remediation proposes the use of an innovative approach to remediation, the enforcing authority should be prepared to agree to that approach being used (subject to that person obtaining any other necessary permits or authorisations), notwithstanding the fact that there is little available information on the basis of which the authority can assess its likely effectiveness. If the approach to remediation proves to be ineffective, further remediation actions may be required, for which the person proposing the innovative approach will be liable.

C.47 However, the enforcing authority should not, under the terms of a remediation notice, require any innovative remediation action to be carried out for the purposes of establishing its effectiveness in general, unless either the person carrying out the remediation agrees or there is clear evidence that it is likely that the action would be effective on the relevant land or waters and it would meet all other requirements of the statutory guidance in this Chapter.

The Practicability of Remediation

C.48 The enforcing authority should consider any remediation as being practicable to the extent that it can be carried out in the circumstances of the relevant land or waters. This applies both to the remediation scheme as a whole and the individual remediation actions of which it is comprised.

C.49 In assessing the practicability of any remediation, the enforcing authority should consider, in particular, the following factors:

(a) technical constraints, for example whether

(i) any technologies or other physical resources required (for example power or materials) are commercially available, or could reasonably be made available, on the necessary scale, and

(ii) the separate remediation actions required could be carried out given the other remediation actions to be carried out, and without preventing those other actions from being carried out;

(b) site constraints, for example whether

(i) the location of and access to the relevant land or waters, and the presence of buildings or other structures in, on or under the land, would permit the relevant remediation actions to be carried out in practice, and

(ii) the remediation could be carried out, given the physical or other condition of the relevant land or waters, for example the presence of substances, whether these are part of other pollutant linkages or are not pollutants;

(c) time constraints, for example whether it would be possible to carry out the remediation within the necessary time period given the time needed by the person carrying out the remediation to

(i) obtain any necessary regulatory permits and constraints, and

(ii) design and implement the various remediation actions; and

(d) regulatory constraints, for example whether

(i) the remediation can be carried out within the requirements of statutory controls relating to health and safety (including engineering safety) and pollution control,

(ii) any necessary regulatory permits or consents would reasonably be expected to be forthcoming,

(iii) any conditions attached to such permits or consents would affect the practicability or cost of the remediation, and

(iv) adverse environmental impacts may arise from carrying out the remediation (see paragraphs C.51 to C.57 below).

C.50 The responsibility for obtaining any regulatory permits or consents necessary for the remediation to be carried out rests with the person who will actually be carrying out the remediation, and not with the enforcing authority. However, the authority may in some circumstances have particular duties to contribute to health and safety in the remediation work, under the Construction (Design and Management) Regulations 1994 (S.I. 1994/3140).

ADVERSE ENVIRONMENTAL IMPACTS

C.51 Although the objective of any remediation is to improve the environment, the process of carrying out remediation may, in some circumstances, create adverse environmental impacts. The possibility of such impacts may affect the determination of what remediation package represents the best practicable techniques for remediation.

C.52 Specific pollution control permits or authorisations may be needed for some kinds of remediation processes, for example:

(a) authorisations under Part I of the Environmental Protection Act 1990 (Integrated Pollution Control and Local Authority Air Pollution Control);

(b) site or mobile plant licences under Part II of the Environmental Protection Act 1990 (waste management licensing); or

(c) discharge consents under Part III of the Water Resources Act 1991.

C.53 Permits or authorisations of these kinds may include conditions controlling the manner in which the remediation is to be carried out, intended to prevent or minimise adverse environmental impacts. Where this is the case, the enforcing authority should assume that these conditions provide a suitable level of protection for the environment.

C.54 Where this is not the case, the enforcing authority should consider whether the particular remediation package can be carried out without damaging the environment, and in particular:

(a) without risk to water, air, soil and plants and animals;

(b) without causing a nuisance through noise or odours; and

(c) without adversely affecting the countryside or places of special interest.

C.55 If the enforcing authority considers that there is some risk that the remediation might damage the environment, it should consider whether:

(a) the risk is sufficiently great to mean that the balance of advantage, in terms of improving and protecting the environment, would lie with adopting an alternative approach to remediation, even though such an alternative may not fully achieve the objectives for remediation set out at paragraph C.18 above; or

(b) the risk can be sufficiently reduced by including, as part of the description of what is to be done by way of remediation, particular precautions designed to prevent the occurrence of such damage to the environment (for example, precautions analogous to the conditions attached to a waste management licence).

C.56 In addition, the enforcing authority should consider whether it is likely that the process of remediation might lead to a direct or indirect discharge into groundwater of a substance in either List I or List II of the Schedule to the Groundwater Regulations 1998 (S.I. 1998/1006). (For these purposes, the terms direct discharge, indirect discharge and groundwater have the meanings given to them in the 1998 Regulations.)

C.57 If the enforcing authority considers that such a discharge is likely, it should (where that authority is not the Environment Agency) consult the Environment Agency, and have regard to its advice on whether an alternative remediation package should be adopted or precaution required as to the way that remediation is carried out.

The Effectiveness of Remediation

C.58 The enforcing authority should consider any remediation as being effective to the extent to which the remediation scheme as a whole, and its component remediation packages, would achieve the aims set out in paragraph C.18 above in relation to each of the significant pollutant linkages identified on the relevant land or waters. The enforcing authority should consider also the extent to which each remediation action, or group of actions required for the same particular purpose, would achieve the purpose for which it was required.

C.59 Within this context, the enforcing authority should consider also the time which would pass before the remediation would become effective. In particular, the authority should establish whether the remediation would become effective sufficiently soon to match the particular degree of urgency resulting from the nature of the significant pollutant linkage in question. However, the authority may also need to balance the speed in reaching a given level of effectiveness against higher degrees of effectiveness which may be achievable, but after a longer period of time, by the use of other remediation methods.

C.60 If any remedial treatment action representing the best practicable techniques will not fully achieve the standard set out in paragraph C.18 above, the enforcing authority should consider whether additional monitoring actions should be required.

The Durability of Remediation

C.61 The enforcing authority should consider a remediation scheme as being sufficiently durable to the extent that the scheme as a whole would continue to be effective with respect to the aims in paragraph C.18 above during the time over which the significant pollutant linkage would otherwise continue to exist or recur. Where other action (such as redevelopment) is likely to resolve or control the problem within that time, a shorter period may be appropriate.

The durability of an individual remediation action is a measure of the extent to which it will continue to be effective in meeting the purpose for which it is to be required taking into account normal maintenance and repair.

C.62 Where a remediation scheme cannot reasonably and practicably continue to be effective during the whole of the expected duration of the problem, the enforcing authority should require the remediation to continue to be effective for as long as can reasonably and practicably be achieved. In these circumstances, additional monitoring actions may be required.

C.63 Where a remediation method requires on-going management and maintenance in order to continue to be effective (for example, the maintenance of gas venting or alarm systems), these on-going requirements should be specified in any remediation notice as well as any monitoring actions necessary to keep the effectiveness of the remediation under review.

PART 7 - What is to be Done by Way of Remediation

C.64 The statutory guidance in this Part is issued under section 78E(5)(a) and provides guidance on the determination by the enforcing authority of what is to be done by way of remediation – in particular, on the circumstances in which any action within the three categories of remediation action (that is, assessment, remedial treatment and monitoring actions) should be required.

Assessment Action

C.65 The enforcing authority should require an assessment action to be carried out where this is necessary for the purpose of obtaining information on the condition of the relevant land or waters which is needed:

(a) to characterise in detail a significant pollutant linkage (or more than one such linkage) identified on the relevant land or waters for the purpose of enabling the authority to establish what would need to be achieved by any remedial treatment action;

(b) to enable the establishment of the technical specifications or design of any particular remedial treatment action which the authority reasonably considers it might subsequently require to be carried out; or

(c) where, after remedial treatment actions have been carried out, the land will still be in such a condition that it would still fall to be identified as contaminated land, to evaluate the condition of the relevant land or waters, or the incidence of any significant harm or pollution of controlled waters, for the purpose of supporting future decisions on whether further remediation might then be required (this applies where the remediation action concerned would not otherwise constitute a monitoring action).

C.66 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. For the purposes of this guidance, assessment actions relate solely to land which has already been formally identified as contaminated land, or to other land or waters which might be affected by it. The statutory guidance in Chapters A and B sets out the requirements for the inspection of land and the manner in which a local authority should determine that land appears to it to be contaminated land.

Remedial Treatment Action

C.67 The enforcing authority should require a remedial treatment action to be carried out where it is necessary to achieve the standard of remediation described in Part 4, but for no other purpose. Any such remedial treatment action should include appropriate verification measures. When considering what remedial treatment action may be necessary, the enforcing authority should consider also what complementary assessment or monitoring actions might be needed to evaluate the manner in which the remedial treatment action is implemented or its effectiveness or durability once implemented.

Monitoring Action

C.68 The enforcing authority should require a monitoring action to be carried out where it is for the purpose of providing information on any changes which might occur in the condition of a pollutant, pathway or receptor, where:

(a) the pollutant, pathway or receptor in question was identified previously as part of a significant pollutant linkage; and

(b) the authority will need to consider whether any further remedial treatment action will be required as a consequence of any change that may occur.

C.69 Monitoring action should not be required to achieve any other purpose, such as general monitoring to enable the enforcing authority to identify any new significant pollutant linkages which might become present in the future. This latter activity forms part of the local authority's duty, under section 78B(1), to cause its area to be inspected from time to time for the purpose of identifying any contaminated land.

What Remediation should not be Required

C.70 The enforcing authority should not require any remediation to be carried out for the purpose of achieving any aims other than those set out in paragraphs C.18 to C.24 above, or purposes other than those identified in this Part of this Chapter. In particular, it should not require any remediation to be carried out for the purposes of:

(a) dealing with matters which do not in themselves form part of a significant pollutant linkage, such as substances present in quantities or concentrations at which there is neither a significant possibility of significant harm being caused nor a likelihood of any pollution of controlled waters being caused; or

(b) making the land suitable for any uses other than its current use, as defined in paragraphs A.25 and A.26 in Chapter A.

C.71 It is, however, always open to the owner of the land, or any other person who might be liable for remediation, to carry out on a voluntary basis remediation to meet these wider objectives.

CHAPTER D - Statutory Guidance on Exclusion from, and Apportionment of, Liability for Remediation

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PART 1 - Scope of the Chapter

D.1 The statutory guidance in this Chapter is issued under sections 78F(6) and 78F(7) of the Environmental Protection Act 1990. It provides guidance on circumstances where two or more persons are liable to bear the responsibility for any particular thing by way of remediation. It deals with the questions of who should be excluded from liability, and how

the cost of each remediation action should be apportioned between those who remain liable after any such exclusion.

D.2 Section 78F provides that:

> "(6) Where two or more persons would, apart from this subsection, be appropriate persons in relation to any particular thing which is to be done by way of remediation, the enforcing authority shall determine in accordance with guidance issued for the purpose by the Secretary of State whether any, and if so which, of them is to be treated as not being an appropriate person in relation to that thing.
>
> "(7) Where two or more persons are appropriate persons in relation to any particular thing which is to be done by way of remediation, they shall be liable to bear the cost of doing that thing in proportions determined by the enforcing authority in accordance with guidance issued for the purpose by the Secretary of State".

D.3 The enforcing authority is therefore required to act in accordance with the guidance in this Chapter. Introductory summaries are included to various parts and sections of the guidance: these do not necessarily give the full detail of the guidance; the section concerned should be consulted.

PART 2 – Definitions of Terms

D.4 Unless otherwise stated, any word, term or phrase given a specific meaning in Part IIA of the Environmental Protection Act 1990, or in the statutory guidance in Chapters A or B, has the same meaning for the purpose of the guidance in this Chapter.

D.5 In addition, for the purposes of this Chapter, the following definitions apply:

(a) a person who is an appropriate person by virtue of section 78F(2) (that is, because he has caused or knowingly permitted a pollutant to be in, on or under the land) is described as a "Class A person";

(b) a person who is an appropriate person by virtue of section 78F(4) or (5) (that is, because he is the owner or occupier of the land in circumstances where no Class A person can be found with respect to a particular remediation action) is described as a "Class B person";

(c) collectively, the persons who are appropriate persons with respect to any particular significant pollutant linkage are described as the "liability group" for that linkage; a liability group consisting of one or more Class A persons is described as a "Class A liability group", and a liability group consisting of one or more Class B persons is described as a "Class B liability group";

(d) any determination by the enforcing authority under section 78F(6) (that is, a person is to be treated as not being an appropriate person) is described as an "exclusion";

(e) any determination by the enforcing authority under section 78F(7) (dividing the costs of carrying out any remediation action between two or more appropriate persons) is described as an "apportionment"; the process of apportionment between liability groups is described as "attribution";

(f) a "remediation action" is any individual thing which is being, or is to be, done by way of remediation;

(g) a "remediation package" is all the remediation actions, within a remediation scheme, which are referable to a particular significant pollutant linkage; and

(h) a "remediation scheme" is the complete set or sequence of remediation actions (referable to one or more significant pollutant linkages) to be carried out with respect to the relevant land or waters.

D.6 Any reference to "Part IIA" means "Part IIA of the Environmental Protection Act 1990". Any reference to a "section" in primary legislation means a section of the Environmental Protection Act 1990, unless it is specifically stated otherwise.

PART 3 – The Procedure for Determining Liabilities

D.7 For most sites, the process of determining liabilities will consist simply of identifying either a single person (either an individual or a corporation such as a limited company) who has caused or knowingly permitted the presence of a single significant pollutant, or the owner of the site. The history of other sites may be more complex. A succession of different occupiers or of different industries, or a variety of substances may all have contributed to the problems which have made the land "contaminated land" as defined for the purposes of Part IIA. Numerous separate remediation actions may be required, which may not correlate neatly with those who are to bear responsibility for the costs. The degree of responsibility for the state of the land may vary widely. Determining liability for the costs of each remediation action can be correspondingly complex.

D.8 The statutory guidance in this Part sets out the procedure which the enforcing authority should follow for determining which appropriate persons should bear what responsibility for each remediation action. It refers forward to the other Parts of this Chapter, and describes how they should be applied. Not all stages will be relevant to all cases, particularly where there is only a single significant pollutant linkage, or where a liability group has only one member.

First Stage - Identifying Potential Appropriate Persons and Liability Groups

D.9 As part of the process of determining that the land is "contaminated land" (see Chapters A and B), the enforcing authority will have identified at least one significant pollutant linkage (pollutant, pathway and receptor), resulting from the presence of at least one significant pollutant.

WHERE THERE IS A SINGLE SIGNIFICANT POLLUTANT LINKAGE

D.10 The enforcing authority should identify all of the persons who would be appropriate persons to pay for any remediation action which is referable to the pollutant which forms part of the significant pollutant linkage. These persons constitute the "liability group" for that

significant pollutant linkage. (In this guidance the term "liability group" is used even where there is only a single appropriate person who is a "member" of the liability group.)

D.11 To achieve this, the enforcing authority should make reasonable enquiries to find all those who have caused or knowingly permitted the pollutant in question to be in, on or under the land. Any such persons constitute a "Class A liability group" for the significant pollutant linkage.

D.12 If no such Class A persons can be found for any significant pollutant, the enforcing authority should consider whether the significant pollutant linkage of which it forms part relates solely to the pollution of controlled waters, rather than to any significant harm. If this is the case, there will be no liability group for that significant pollutant linkage, and it should be treated as an "orphan linkage" (see paragraph D.103 below).

D.13 In any other case where no Class A persons can be found for a significant pollutant, the enforcing authority should identify all of the current owners or occupiers of the contaminated land in question. These persons then constitute a "Class B liability group" for the significant pollutant linkage.

D.14 If the enforcing authority cannot find any Class A persons or any Class B persons in respect of a significant pollutant linkage, there will be no liability group for that linkage and it should be treated as an orphan linkage (see paragraph D.103 below).

WHERE THERE ARE TWO OR MORE SIGNIFICANT POLLUTANT LINKAGES

D.15 The enforcing authority should consider each significant pollutant linkage in turn, carrying out the steps set out in paragraphs D.10 to D.14 above, in order to identify the liability group (if one exists) for each of the linkages.

IN ALL CASES

D.16 Having identified one or more liability groups, the enforcing authority should consider whether any of the members of those groups are exempted from liability under the provisions in Part IIA. This could apply where:

(a) a person who would otherwise be a Class A person is exempted from liability arising with respect to water pollution from an abandoned mine (see section 78J(3));

(b) a Class B person is exempted from liability arising from the escape of a pollutant from one piece of land to other land (see section 78K); or

(c) a person is exempted from liability by virtue of his being a person "acting in a relevant capacity" (such as acting as an insolvency practitioner), as defined in section 78X(4).

D.17 If all of the members of any liability group benefit from one or more of these exemptions, the enforcing authority should treat the significant pollutant linkage in question as an orphan linkage (see paragraph D.103 below).

D.18 Persons may be members of more than one liability group. This might apply, for example, if they caused or knowingly permitted the presence of more than one significant pollutant.

D.19 Where the membership of all of the liability groups is the same, there may be opportunities for the enforcing authority to abbreviate the remaining stages of this procedure. However, the tests for exclusion and apportionment may produce different results for different significant pollutant linkages, and so the enforcing authority should exercise caution before trying to simplify the procedure in any case.

Second Stage - Characterising Remediation Actions

D.20 Each remediation action will be carried out to achieve a particular purpose with respect to one or more defined significant pollutant linkages. Where there is a single significant pollutant linkage on the land in question, all the remediation actions will be referable to that linkage, and there is no need to consider how the different actions relate to different linkages. This stage and the third stage of the procedure therefore do not need to be carried out in where there is only a single significant pollutant linkage.

D.21 However, where there are two or more significant pollutant linkages on the land in question, the enforcing authority should establish whether each remediation action is:

(a) referable solely to the significant pollutant in a single significant pollutant linkage (a "single-linkage action"); or

(b) referable to the significant pollutant in more than one significant pollutant linkage (a "shared action").

D.22 Where a remediation action is a shared action, there are two possible relationships between it and the significant pollutant linkages to which it is referable. The enforcing authority should establish whether the shared action is:

(a) a "common action" – that is, an action which addresses together all of the significant pollutant linkages to which it is referable, and which would have been part of the remediation package for each of those linkages if each of them had been addressed separately; or

(b) a "collective action" – that is, an action which addresses together all of the significant pollutant linkages to which it is referable, but which would not have been part of the remediation package for every one of those linkages if each of them had been addressed separately, because:

(i) the action would not have been appropriate in that form for one or more of the linkages (since some different solution would have been more appropriate),

(ii) the action would not have been needed to the same extent for one or more of the linkages (since a less far-reaching version of that type of action would have sufficed), or

(iii) the action represents a more economic way of addressing the linkages together which would not be possible if they were addressed separately.

D.23 A collective action replaces actions that would have been appropriate for the individual significant pollutant linkages if they had been addressed separately, as it achieves the purposes which those other actions would have achieved.

Third Stage - Attributing Responsibility between Liability Groups

D.24 This stage of the procedure does not apply in the simpler cases. Where there is only a single significant pollutant linkage, the liability group for that linkage bears the full cost of carrying out any remediation action. (Where the linkage is an orphan linkage, the enforcing authority has the power to carry out the remediation action itself, at its own cost.)

D.25 Similarly, for any single-linkage action, the liability group for the significant pollutant linkage in question bears the full cost of carrying out that action

D.26 However, the enforcing authority should apply the guidance in Part 9 with respect to each shared action, in order to attribute to each of the different liability groups their share of responsibility for that action.

D.27 After the guidance in Part 9 has been applied to all shared actions, it may be the case that a Class B liability group which has been identified does not have to bear the costs for any remediation actions. Where this is the case, the enforcing authority does not need to apply any of the rest of the guidance in this Chapter to that liability group.

Fourth Stage - Excluding Members of a Liability Group

D.28 The enforcing authority should now consider, for each liability group which has two or more members, whether any of those members should be excluded from liability:

(a) for each Class A liability group with two or more members, the enforcing authority should apply the guidance on exclusion in Part 5; and

(b) for each Class B liability group with two or more members, the enforcing authority should apply the guidance on exclusion in Part 7.

Fifth Stage - Apportioning Liability between Members of a Liability Group

D.29 The enforcing authority should now determine how any costs attributed to each liability group should be apportioned between the members of that group who remain after any exclusions have been made.

D.30 For any liability group which has only a single remaining member, that person bears all of the costs falling to that liability group, that is both the cost of any single-linkage action referable to the significant pollutant linkage in question, and the share of the cost of any shared action attributed to the group as a result of the attribution process set out in Part 9.

D.31 For any liability group which has two or more remaining members, the enforcing authority should apply the relevant guidance on apportionment between those members. Each of the remaining members of the group will then bear the proportion determined under that guidance of the total costs falling to the group, that is both the cost of any single-linkage action referable to the significant pollutant linkage in question, and the share of the cost of

any shared action attributed to the group as a result of the attribution process set out in Part 9. The relevant apportionment guidance is:

(a) for any Class A liability group, the guidance set out in Part 6; and

(b) for any Class B liability group, the guidance set out in Part 8.

PART 4 – General Considerations Relating to the Exclusion, Apportionment and Attribution Procedures

D.32 This Part sets out general guidance about the application of the exclusion, apportionment and attribution procedures set out in the rest of this Chapter. It is accordingly issued under both section 78F(6) and section 78F(7).

D.33 The enforcing authority should ensure that any person who might benefit from an exclusion, apportionment or attribution is aware of the guidance in this Chapter, so that they may make appropriate representations to the enforcing authority.

D.34 The enforcing authority should apply the tests for exclusion (in Parts 5 and 7) with respect to the members of each liability group. If a person, who would otherwise be an appropriate person to bear responsibility for a particular remediation action, has been excluded from the liability groups for all of the significant pollutant linkages to which that action is referable, he should be treated as not being an appropriate person in relation to that remediation action.

Financial Circumstances

D.35 The financial circumstances of those concerned should have no bearing on the application of the procedures for exclusion, apportionment and attribution in this Chapter, except where the circumstances in paragraph D.76 below apply (the financial circumstances of those concerned are taken into account in the separate consideration under section 78P(2) on hardship and cost recovery). In particular, it should be irrelevant in the context of decisions on exclusion and apportionment:

(a) whether those concerned would benefit from any limitation on the recovery of costs under the provisions on hardship and cost recovery in section 78P(2); or

(b) whether those concerned would benefit from any insurance or other means of transferring their responsibilities to another person.

Information and Decisions

D.36 The enforcing authority should make reasonable endeavours to consult those who may be affected by any exclusion, apportionment or attribution. In all cases, however, it

should seek to obtain only such information as it is reasonable to seek, having regard to:

(a) how the information might be obtained;

(b) the cost of obtaining the information for all parties involved; and

(c) the potential significance of the information for any decision.

D.37 The statutory guidance in this Chapter should be applied in the light of the circumstances as they appear to the enforcing authority on the basis of the evidence available to it at that time. The enforcing authority's judgements should be made on the basis of the balance of probabilities. The enforcing authority should take into account the information that it has acquired in the light of the guidance in the previous paragraph, but the burden of providing the authority with any further information needed to establish an exclusion or to influence an apportionment or attribution should rest on any person seeking such a benefit. The enforcing authority should consider any relevant information which has been provided by those potentially liable under these provisions. Where any such person provides such information, any other person who may be affected by an exclusion, apportionment or attribution based on that information should be given a reasonable opportunity to comment on that information before the determination is made.

Agreements on Liabilities

D.38 In any case where:

(a) two or more persons are responsible for all or part of the costs of a remediation action;

(b) they agree, or have agreed, the basis on which they wish to divide that responsibility; and

(c) a copy of the agreement, and confirmation in writing that all parties to the agreement are content for the agreement to be applied, are provided to the enforcing authority;

the enforcing authority should generally make such determinations on exclusion, apportionment and attribution as are needed to give effect to this agreement, and should not apply the remainder of this guidance for exclusion, apportionment or attribution between the parties to the agreement. However, the enforcing authority should apply the guidance to determine any exclusions, apportionments or attributions between any or all of those parties and any other appropriate persons who are not parties to the agreement.

D.39 However, where giving effect to such an agreement would increase the share of the costs theoretically to be borne by a person who would benefit from a limitation on recovery of remediation costs under the provision on hardship in section 78P(2)(a) or under the guidance on cost recovery issued under section 78P(2)(b), the enforcing authority should disregard the agreement.

PART 5 – Exclusion of Members of a Class A Liability Group

D.40 The guidance in this Part is issued under section 78F(6) and sets out the tests for determining whether to exclude from liability a person who would otherwise be a Class A person (that is, a person who has been identified as responsible for remediation costs by reason of his having "caused or knowingly permitted" the presence of a significant pollutant). The tests are intended to establish whether, in relation to other members of the liability group, it is fair that he should bear any part of that responsibility.

D.41 The exclusion tests in this Part are subject to the following overriding guidance:

(a) the exclusions that the enforcing authority should make are solely in respect of the significant pollutant linkage giving rise to the liability of the liability group in question; an exclusion in respect of one significant pollutant linkage has no necessary implication in respect to any other such linkage, and a person who has been excluded with respect to one linkage may still be liable to meet all or part of the cost of carrying out a remediation action by reason of his membership of another liability group;

(b) the tests should be applied in the sequence in which they are set out; and

(c) if the result of applying a test would be to exclude all of the members of the liability group who remain after any exclusions resulting from previous tests, that further test should not be applied, and consequently the related exclusions should not be made.

D.42 The effect of any exclusion made under Test 1, or Tests 4 to 6 below should be to remove completely any liability that would otherwise have fallen on the person benefiting from the exclusion. Where the enforcing authority makes any exclusion under one of these tests, it should therefore apply any subsequent exclusion tests, and make any apportionment within the liability group, in the same way as it would have done if the excluded person had never been a member of the liability group.

D.43 The effect of any exclusion made under Test 2 ("Payments Made for Remediation") or Test 3 ("Sold with Information"), on the other hand, is intended to be that the person who received the payment or bought the land, as the case may be, (the "payee or buyer") should bear the liability of the person excluded (the "payer or seller") in addition to any liability which he is to bear in respect of his own actions or omissions. To achieve this, the enforcing authority should:

(a) complete the application of the other exclusion tests and then apportion liability between the members of the liability group, as if the payer or seller were not excluded as a result of Test 2 or Test 3; and

(b) then apportion any liability of the payer or seller, calculated on this hypothetical basis, to the payee or buyer, in addition to the liability (if any) that the payee or buyer has in respect of his own actions or omissions; this should be done even if the payee or buyer would otherwise have been excluded from the liability group by one of the other exclusion tests.

Related Companies

D.44 Before applying any of the exclusion tests, the enforcing authority should establish whether two or more of the members of the liability group are, or were at the "relevant date", "related companies".

D.45 Where this is the case, for the purposes of applying the exclusion tests and making any exclusions, the enforcing authority should treat the related companies as if they were a single person.

D.46 For these purposes, the terms "relevant date" and "related companies" have the following meanings:

(a) the "relevant date" is that on which the enforcing authority first served on anyone a notice under section 78B(3) identifying the land as contaminated land; and

(b) "related companies" are those which are members of a group of companies consisting of a "holding company" and its "subsidiaries", where these terms have the same meaning as in section 736 of the Companies Act 1985.

The Exclusion Tests for Class A Persons

TEST 1 – "EXCLUDED ACTIVITIES"

D.47 The purpose of this test is to exclude those who have been identified as having caused or knowingly permitted the land to be contaminated land solely by reason of having carried out certain activities. The activities are ones which, in the Government's view, carry such limited responsibility, if any, that exclusion would be justified even where the activity is held to amount to "causing or knowingly permitting" under Part IIA. It does not imply that the carrying out of such activities necessarily amounts to "causing or knowingly permitting".

D.48 In applying this test with respect to any appropriate person, the enforcing authority should consider whether the person in question is a member of a liability group solely by reason of one or more of the following activities (not including any associated activity outside these descriptions):

(a) providing financial assistance to another person, in the form of any one or more of the following:

(i) making a grant,

(ii) making a loan or providing any other form of credit, including leasing arrangements and instalment credit,

(iii) guaranteeing the performance of a person's obligations,

(iv) indemnifying a person in respect of any loss, liability or damage,

(v) investing in the undertaking of a body corporate by acquiring share capital or loan capital of that body without thereby acquiring such control as a "holding company" has over a "subsidiary" as defined for the purposes of section 736 of the Companies Act 1985, or

(vi) providing a person with any other financial benefit (including the remission in whole or in part of any financial liability or obligation);

(b) withholding financial assistance of any of the forms identified in sub-paragraph (a) above;

(c) underwriting an insurance policy under which another person was insured in respect of any occurrence, condition or omission by reason of which that other person has been held to have caused or knowingly permitted the significant pollutant to be in, on or under the land in question; (for the purposes of this sub-paragraph, underwriting an insurance policy is to be taken to include imposing any conditions on the insured, for example relating to the manner in which he carries out the insured activity);

(d) carrying out any action for the purpose of deciding whether or not to underwrite any such insurance policy; (for the purposes of this sub-paragraph, such action does not include carrying out any intrusive investigation in respect of the land in question for the purpose of the underwriting where the carrying out of that investigation is itself a cause of the existence, nature or continuance of the significant pollutant linkage in question);

(e) consigning, as waste, to another person the substance which is now a significant pollutant, under a contract under which that other person knowingly took over responsibility for its proper disposal or other management on a site not under the control of the person seeking to be excluded from liability;

(f) creating at any time a tenancy over the land in question in favour of another person who has subsequently caused or knowingly permitted the presence of the significant pollutant linkage in question (whether or not the tenant can now be found);

(g) as owner of the land in question, licensing at any time its occupation by another person who has subsequently caused or knowingly permitted the presence of the significant pollutant in question (whether or not the licensee can now be found); this test does not apply in a case where the person granting the licence operated the land as a site for the disposal or storage of waste at the time of the grant of the licence;

(h) issuing any statutory permission, licence or consent required for any action or omission by reason of which some other person appears to the enforcing authority to have caused or knowingly permitted the presence of the significant pollutant in question; this test does not apply in the case of statutory undertakers granting permission for their contractors to carry out works;

(i) providing legal, financial, engineering, scientific or technical advice to (or design, contract management or works management services for) another person (the "client"):

(i) in relation to an action or omission (or a series of actions and/or omissions) by reason of which the client has been held to have caused or knowingly permitted the presence of the significant pollutant,

(ii) for the purpose of assessing the condition of the land, for example whether it might be contaminated, or

(iii) for the purpose of establishing what might be done to the land by way of remediation;

(j) carrying out any intrusive investigation in respect of the land in question in the course of preparing advice, or providing services, in the circumstances set out in the preceding sub-paragraph, except where the investigation is itself a cause of the existence, nature or continuance of the significant pollutant linkage in question; or

(k) performing any contract by providing a service (whether the contract is a contract of service (employment), or a contract for services) or by supplying goods, where the contract is made with another person who is also a member of the liability group in question; for the purposes of this sub-paragraph and paragraph D.49 below, the person providing the service or supplying the goods is referred to as the "contractor" and the other party as the "employer"; this sub-paragraph applies to subcontracts where either the ultimate employer or an intermediate contractor is a member of the liability group; this sub-paragraph does not apply where:

(i) the activity under the contract is of a kind referred to in a previous sub-paragraph of this paragraph,

(ii) the action or omission by the contractor by virtue of which he has been identified as an appropriate person was not in accordance with the terms of the contract, or

(iii) the circumstances in paragraph D.49 below apply.

D.49 The circumstances referred to in paragraph D.48(k)(iii) are:

(a) the employer is a body corporate;

(b) the contractor was a director, manager, secretary or other similar officer of the body corporate, or a person purporting to act in any such capacity, at the time when the contract was performed; and

(c) the action or omissions by virtue of which the employer has been identified as an appropriate person were carried out or made with the consent or connivance of the contractor, or were attributable to any neglect on his part.

D.50 If any of the circumstances in paragraph D.48 above apply, the enforcing authority should exclude the person in question.

TEST 2 – "PAYMENTS MADE FOR REMEDIATION"

D.51 The purpose of this test is to exclude from liability those who have already, in effect, met their responsibilities by making certain kinds of payment to some other member of the liability group, which would have been sufficient to pay for adequate remediation.

D.52 In applying this test, the enforcing authority should consider whether all the following circumstances exist:

(a) one of the members of the liability group has made a payment to another member of that liability group for the purpose of carrying out particular remediation on the land in question; only payments of the kinds set out in paragraph D.53 below are to be taken into account;

(b) that payment would have been sufficient at the date when it was made to pay for the remediation in question;

(c) if the remediation for which the payment was intended had been carried out effectively, the land in question would not now be in such a condition that it has been identified as contaminated land by reason of the significant pollutant linkage in question; and

(d) the remediation in question was not carried out or was not carried out effectively.

D.53 Payments of the following kinds alone should be taken into account:

(a) a payment made voluntarily, or to meet a contractual obligation, in response to a claim for the cost of the particular remediation;

(b) a payment made in the course of a civil legal action, or arbitration, mediation or dispute resolution procedure, covering the cost of the particular remediation, whether paid as part of an out-of-court settlement, or paid under the terms of a court order; or

(c) a payment as part of a contract (including a group of interlinked contracts) for the transfer of ownership of the land in question which is either specifically provided for in the contract to meet the cost of carrying out the particular remediation or which consists of a reduction in the contract price explicitly stated in the contract to be for that purpose.

D.54 For the purposes of this test, payments include consideration of any form.

D.55 However, no payment should be taken into account where the person making the payment retained any control after the date of the payment over the condition of the land in question (that is, over whether or not the substances by reason of which the land is regarded as contaminated land were permitted to be in, on or under the land). For this purpose, neither of the following should be regarded as retaining control over the condition of the land:

(a) holding contractual rights to ensure the proper carrying out of the remediation for which the payment was made; nor

(b) holding an interest or right of any of the following kinds:

(i) easements for the benefit of other land, where the contaminated land in question is the servient tenement, and statutory rights of an equivalent nature,

(ii) rights of statutory undertakers to carry out works or install equipment,

(iii) reversions upon expiry or termination of a long lease, or

(iv) the benefit of restrictive covenants or equivalent statutory agreements.

D.56 If all of the circumstances set out in paragraph D.52 above apply, the enforcing authority should exclude the person who made the payment in respect of the remediation action in question. (See paragraph D.43 above for guidance on how this exclusion should be made.)

TEST 3 – "SOLD WITH INFORMATION"

D.57 The purpose of this test is to exclude from liability those who, although they have caused or knowingly permitted the presence of a significant pollutant in, on or under some land, have disposed of that land in circumstances where it is reasonable that another member of the liability group, who has acquired the land from them, should bear the liability for remediation of the land.

D.58 In applying this test, the enforcing authority should consider whether all the following circumstances exist:

(a) one of the members of the liability group (the "seller") has sold the land in question to a person who is also a member of the liability group (the "buyer");

(b) the sale took place at arms' length (that is, on terms which could be expected in a sale on the open market between a willing seller and a willing buyer);

(c) before the sale became binding, the buyer had information that would reasonably allow that particular person to be aware of the presence on the land of the pollutant identified in the significant pollutant linkage in question, and the broad measure of that presence; and the seller did nothing material to misrepresent the implications of that presence; and

(d) after the date of the sale, the seller did not retain any interest in the land in question or any rights to occupy or use that land.

D.59 In determining whether these circumstances exist:

(a) a sale of land should be regarded as being either the transfer of the freehold or the grant or assignment of a long lease; for this purpose, a "long lease" means a lease (or sub-lease) granted for a period of more than 21 years under which the lessee satisfies the definition of "owner" set out in section 78A(9);

(b) the question of whether persons are members of a liability group should be decided on the circumstances as they exist at the time of the determination (and not as they might have been at the time of the sale of the land);

(c) where the sale of the land is a part of a group of transactions or a wider agreement (such as the sale of a company or business), a sale of land arms' length should be taken to include any case where the person seeking to be excluded can show that the net effect of the group of transactions or the agreement as a whole was a sale at arms' length;

(d) in transactions since the beginning of 1990 where the buyer is a large commercial organisation or public body, permission from the seller for the buyer to carry out his own investigations of the condition of the land should normally be taken as sufficient indication that the buyer had the information referred to in paragraph D.58(c) above; and

(e) for the purposes of paragraph D.58(d) above, the following rights should be disregarded in deciding whether the seller has retained an interest in the contaminated land in question or rights to occupy or use it:

(i) easements for the benefit of other land, where the contaminated land in question is the servient tenement, and statutory rights of an equivalent nature,

(ii) rights of statutory undertakers to carry out works or install equipment,

(iii) reversions upon expiry or termination of a long lease, and

(iv) the benefit of restrictive covenants or equivalent statutory agreements.

D.60 If all of the circumstances in paragraph D.58 above apply, the enforcing authority should exclude the seller. (See paragraph D.43 above for guidance on how this exclusion should be made.)

D.61 This test does not imply that the receipt by the buyer of the information referred to in paragraph D.58(c) above necessarily means that the buyer has "caused or knowingly permitted" the presence of the significant pollutant in, on or under the land.

TEST 4 – "CHANGES TO SUBSTANCES"

D.62 The purpose of this test is to exclude from liability those who are members of a liability group solely because they caused or knowingly permitted the presence in, on or under the land of a substance which has only led to the creation of a significant pollutant linkage because of its interaction with another substance which was later introduced to the land by another person.

D.63 In applying this test, the enforcing authority should consider whether all the following circumstances exist:

(a) the substance forming part of the significant pollutant linkage in question is present, or has become a significant pollutant, only as the result of a chemical reaction, biological process or other change (the "intervening change") involving:

(i) both a substance (the "earlier substance") which would not have formed part of the significant pollutant linkage if the intervening change had not occurred, and

(ii) one or more other substances (the "later substances");

(b) the intervening change would not have occurred in the absence of the later substances;

(c) a person (the "first person") is a member of the liability group because he caused or knowingly permitted the presence in, on or under the land of the earlier substance, but he did not cause or knowingly permit the presence of any of the later substances;

(d) one or more other persons are members of the liability group because they caused or knowingly permitted the later substances to be in, on or under the land;

(e) before the date when the later substances started to be introduced in, on or under the land, the first person:

(i) could not reasonably have foreseen that the later substances would be introduced onto the land,

(ii) could not reasonably have foreseen that, if they were, the intervening change would be likely to happen, or

(iii) took what, at that date, were reasonable precautions to prevent the introduction of the later substances or the occurrence of the intervening change, even though those precautions have, in the event, proved to be inadequate; and

(f) after that date, the first person did not:

(i) cause or knowingly permit any more of the earlier substance to be in, on or under the land in question,

(ii) do anything which has contributed to the conditions that brought about the intervening change, or

(iii) fail to do something which he could reasonably have been expected to do to prevent the intervening change happening.

D.64 If all of the circumstances in paragraph D.63 aboveD.63 above apply, the enforcing authority should exclude the first person (or persons, if more than one member of the liability group meets this description).

TEST 5 – "ESCAPED SUBSTANCES"

D.65 The purpose of this test is to exclude from liability those who would otherwise be liable for the remediation of contaminated land which has become contaminated as a result of the escape of substances from other land, where it can be shown that another member of the liability group was actually responsible for that escape.

D.66 In applying this test, the enforcing authority should consider whether all the following circumstances exist:

(a) a significant pollutant is present in, on or under the contaminated land in question wholly or partly as a result of its escape from other land;

(b) a member of the liability group for the significant pollutant linkage of which that pollutant forms part:

(i) caused or knowingly permitted the pollutant to be present in, on or under that other land (that is, he is a member, of that liability group by reason of section 78K(1)), and

(ii) is a member of that liability group solely for that reason; and

(c) one or more other members of that liability group caused or knowingly permitted the significant pollutant to escape from that other land and its escape would not have happened but for their actions or omissions.

D.67 If all of the circumstances in paragraph D.66 above apply, the enforcing authority should exclude any person meeting the description in paragraph D.66(b) above.

TEST 6 – "INTRODUCTION OF PATHWAYS OR RECEPTORS"

D.68 The purpose of this test is to exclude from liability those who would otherwise be liable solely because of the subsequent introduction by others of the relevant pathways or receptors (as defined in Chapter A) in the significant pollutant linkage.

D.69 In applying this test, the enforcing authority should consider whether all the following circumstances exist:

(a) one or more members of the liability group have carried out a relevant action, and/or made a relevant omission ("the later actions"), either

(i) as part of the series of actions and/or omissions which amount to their having caused or knowingly permitted the presence of the pollutant in a significant pollutant linkage, or

(ii) in addition to that series of actions and/or omissions;

(b) the effect of the later actions has been to introduce the pathway or the receptor which form part of the significant pollutant linkage in question;

(c) if those later actions had not been carried out or made, the significant pollutant linkage would either not have existed, or would not have been a significant pollutant linkage, because of the absence of a pathway or of a receptor; and

(d) a person is a member of the liability group in question solely by reason of his carrying out other actions or making other omissions ("the earlier actions") which were completed before any of the later actions were carried out or made.

D.70 For the purpose of this test:

(a) a "relevant action" means:

(i) the carrying out at any time of building, engineering, mining or other operations in, on, over or under the land in question, and/or

(ii) the making of any material change in the use of the land in question for which a specific application for planning permission was required to be made (as opposed to permission being granted, or deemed to be granted, by general legislation or by virtue of a development order, the adoption of a simplified planning zone or the designation of an enterprise zone) at the time when the change in use was made; and

(b) a "relevant omission" means:

(i) in the course of a relevant action, failing to take a step which would have ensured that a significant pollutant linkage was not brought into existence as a result of that action, and/or

(ii) unreasonably failing to maintain or operate a system installed for the purpose of reducing or managing the risk associated with the presence on the land in question of the significant pollutant in the significant pollutant linkage in question.

D.71 This test applies only with respect to developments on, or changes in the use of, the contaminated land itself; it does not apply where the relevant acts or omissions take place on other land, even if they have the effect of introducing pathways or receptors.

D.72 If all of the circumstances in paragraph D.69 above apply, the enforcing authority should exclude any person meeting the description at paragraph D.69(d) above.

PART 6 – Apportionment Between Members of any Single Class A Liability Group

D.73 The statutory guidance in this Part is issued under section 78F(7) and sets out the principles on which liability should be apportioned within each Class A liability group as it stands after any members have been excluded from liability with respect to the relevant significant pollutant linkage as a result of the application of the exclusion tests in Part 5.

D.74 The history and circumstances of different areas of contaminated land, and the nature of the responsibility of each of the members of any Class A liability group for a significant pollutant linkage, are likely to vary greatly. It is therefore not possible to prescribe detailed rules for the apportionment of liability between those members which would be fair and appropriate in all cases.

General Principles

D.75 In apportioning costs between the members of a Class A liability group who remain after any exclusions have been made, the enforcing authority should follow the general principle that liability should be apportioned to reflect the relative responsibility of each of those members for creating or continuing the risk now being caused by the significant pollutant linkage in question. (For these purposes, "risk" has the same meaning as that given in Chapter A.) In applying this principle, the enforcing authority should follow, where appropriate, the specific approaches set out in paragraphs D.77 to D.86 below.

D.76 If appropriate information is not available to enable the enforcing authority to make such an assessment of relative responsibility (and, following the guidance at paragraph D.36 above, such information cannot reasonably be obtained) the authority should apportion liability in equal shares among the remaining members of the liability group for any significant pollutant linkage, subject to the specific guidance in paragraph D.85 below.

Specific Approaches

PARTIAL APPLICABILITY OF AN EXCLUSION TEST

D.77 If, for any member of the liability group, the circumstances set out in any of the exclusion tests in Part 5 above apply to some extent, but not sufficiently to mean that the an exclusion should be made, the enforcing authority should assess that person's degree of responsibility as being reduced to the extent which is appropriate in the light of all the circumstances and the purpose of the test in question. For example, in considering Test 2, a payment may have been made which was sufficient to pay for only half of the necessary remediation at that time – the authority could therefore reduce the payer's responsibility by half.

THE ENTRY OF A SUBSTANCE VS. ITS CONTINUED PRESENCE

D.78 In assessing the relative responsibility of a person who has caused or knowingly permitted the entry of a significant pollutant into, onto or under land (the "first person") and another person who has knowingly permitted the continued presence of that same pollutant in, on or under that land (the "second person"), the enforcing authority should consider the extent to which the second person had the means and a reasonable opportunity to deal with the presence of the pollutant in question or to reduce the seriousness of the implications of that presence. The authority should then assess the relative responsibilities on the following basis:

(a) if the second person had the necessary means and opportunity, he should bear the same responsibility as the first person;

(b) if the second person did not have the means and opportunity, his responsibility relative to that of the first person should be substantially reduced; and

(c) if the second person had some, but insufficient, means or opportunity, his responsibility relative to that of the first person should be reduced to an appropriate extent.

PERSONS WHO HAVE CAUSED OR KNOWINGLY PERMITTED THE ENTRY OF A SIGNIFICANT POLLUTANT

D.79 Where the enforcing authority is determining the relative responsibilities of members of the liability group who have caused or knowingly permit the entry of the significant pollutant into, onto or under the land, it should follow the approach set out in paragraphs D.80 to D.83 below.

D.80 If the nature of the remediation action points clearly to different members of the liability group being responsible for particular circumstances at which the action is aimed, the enforcing authority should apportion responsibility in accordance with that indication. In particular, where different persons were in control of different areas of the land in question, and there is no interrelationship between those areas, the enforcing authority should regard the persons in control of the different areas as being separately responsible for the events which make necessary the remediation actions or parts of actions referable to those areas of land.

D.81 If the circumstances in paragraph D.80 above do not apply, but the quantity of the significant pollutant present is a major influence on the cost of remediation, the enforcing authority should regard the relative amounts of that pollutant which are referable to the different persons as an appropriate basis for apportioning responsibility.

D.82 If it is deciding the relative quantities of pollutant which are referable to different persons, the enforcing authority should consider first whether there is direct evidence of the relative quantities referable to each person. If there is such evidence, it should be used. In the absence of direct evidence, the enforcing authority should see whether an appropriate surrogate measure is available. Such surrogate measures can include:

(a) the relative periods during which the different persons carried out broadly equivalent operations on the land;

(b) the relative scale of such operations carried out on the land by the different persons (a measure of such scale may be the quantities of a product that were produced);

(c) the relative areas of land on which different persons carried out their operations; and

(d) combinations of the foregoing measures.

D.83 In cases where the circumstances in neither paragraph D.80 nor D.81 above apply, the enforcing authority should consider the nature of the activities carried out by the appropriate persons concerned from which the significant pollutant arose. Where these activities were broadly equivalent, the enforcing authority should apportion responsibility in proportion to the periods of time over which the different persons were in control of those activities. It would be appropriate to adjust this apportionment to reflect circumstances where the persons concerned carried out activities which were not broadly equivalent, for example where they were on a different scale.

PERSONS WHO HAVE KNOWINGLY PERMITTED THE CONTINUED PRESENCE OF A POLLUTANT

D.84 Where the enforcing authority is determining the relative responsibilities of members of the liability group who have knowingly permitted the continued presence, over a period of time, of a significant pollutant in, on or under land, it should apportion that responsibility in proportion to:

(a) the length of time during which each person controlled the land;

(b) the area of land which each person controlled;

(c) the extent to which each person had the means and a reasonable opportunity to deal with the presence of the pollutant in question or to reduce the seriousness of the implications of that presence; or

(d) a combination of the foregoing factors.

COMPANIES AND OFFICERS

D.85 If, following the application of the exclusion tests (and in particular the specific guidance at paragraphs D.48(k)(iii) and D.49 above) both a company and one or more of its relevant officers remain as members of the liability group, the enforcing authority should apportion liability on the following bases:

(a) the enforcing authority should treat the company and its relevant officers as a single unit for the purposes of:

(i) applying the general principle in paragraph D.75 above (ie it should consider the responsibilities of the company and its relevant officers as a whole, in comparison with the responsibilities of other members of the liability group), and

(ii) making any apportionment required by paragraph D.76 above; and

(b) having determined the share of liability falling to the company and its relevant officers together, the enforcing authority should apportion responsibility between the company and its relevant officers on a basis which takes into account the degree of personal responsibility of those officers, and the relative levels of resources which may be available to them and to the company to meet the liability.

D.86 For the purposes of paragraph D.85 above, the "relevant officers" of a company are any director, manager, secretary or other similar officer of the company, or any other person purporting to act in any such capacity.

PART 7 – Exclusion of Members of a Class B Liability Group

D.87 The guidance in this Part is issued under section 78F(6) and sets out the test which should be applied in determining whether to exclude from liability a person who would otherwise be a Class B person (that is, a person liable to meet remediation costs solely by reason of ownership or occupation of the land in question). The purpose of the test is to exclude from liability those who do not have an interest in the capital value of the land in question.

D.88 The test applies where two or more persons have been identified as Class B persons for a significant pollutant linkage.

D.89 In such circumstances, the enforcing authority should exclude any Class B person who either:

(a) occupies the land under a licence, or other agreement, of a kind which has no marketable value or which he is not legally able to assign or transfer to another person (for these purposes the actual marketable value, or the fact that a particular licence or agreement may not actually attract a buyer in the market, are irrelevant); or

(b) is liable to pay a rent which is equivalent to the rack rent for such of the land in question as he occupies and holds no beneficial interest in that land other than any tenancy to which such rent relates; where the rent is subject to periodic review, the rent should be considered to be equivalent to the rack rent if, at the latest review, it was set at the full market rent at that date.

D.90 However, the test should not be applied, and consequently no exclusion should be made, if it would result in the exclusion of all of the members of the liability group.

PART 8 – Apportionment between the Members of a Single Class B Liability Group

D.91 The statutory guidance in this Part is issued under section 78F(7) and sets out the principles on which liability should be apportioned within each Class B liability group as it stands after any members have been excluded from liability with respect to the relevant significant pollutant linkage as a result of the application of the exclusion test in Part 7.

D.92 Where the whole or part of a remediation action for which a Class B liability group is responsible clearly relates to a particular area within the land to which the significant

pollutant linkage as a whole relates, liability for the whole, or the relevant part, of that action should be apportioned amongst those members of the liability group who own or occupy that particular area of land.

D.93 Where those circumstances do not apply, the enforcing authority should apportion liability for the remediation actions necessary for the significant pollutant linkage in question amongst all of the members of the liability group.

D.94 Where the enforcing authority is apportioning liability amongst some or all of the members of a Class B liability group, it should do so in proportion to the capital values of the interests in the land in question, which include those of any buildings or structures on the land:

(a) where different members of the liability group own or occupy different areas of land, each such member should bear responsibility in the proportion that the capital value of his area of land bears to the aggregate of the capital values of all the areas of land; and

(b) where different members of the liability group have an interest in the same area of land, each such member should bear responsibility in the proportion which the capital value of his interest bears to the aggregate of the capital values of all those interests; and

(c) where both the ownership or occupation of different areas of land and the holding of different interests come into the question, the overall liability should first be apportioned between the different areas of land and then between the interests within each of those areas of land, in each case in accordance with the last two sub-paragraphs.

D.95 The capital value used for these purposes should be that estimated by the enforcing authority, on the basis of the available information, disregarding the existence of any contamination. The value should be estimated in relation to the date immediately before the enforcing authority first served a notice under section 78B(3) in relation to that land. Where the land in question is reasonably uniform in nature and amenity and is divided among a number of owner-occupiers, it can be an acceptable approximation of this basis of apportionment to make the apportionment on the basis of the area occupied by each.

D.96 Where part of the land in question is land for which no owner or occupier can be found, the enforcing authority should deduct the share of costs attributable to that land on the basis of the respective capital values of that land and the other land in question before making a determination of liability.

D.97 If appropriate information is not available to enable the enforcing authority to make an assessment of relative capital values (and, following the guidance at paragraph D.36 above, such information cannot reasonably be obtained), the enforcing authority should apportion liability in equal shares among all the members of the liability group.

PART 9 – Attribution of Responsibility between Liability Groups

D.98 The statutory guidance in this Part is issued under section 78F(7) and applies where one remediation action is referable to two or more significant pollutant linkages (that is, it is a "shared action"). This can occur either where both linkages require the same action (that is, it is a "common action") or where a particular action is part of the best combined remediation scheme for two or more linkages (that is, it is a "collective action"). This Part provides statutory guidance on the attribution of responsibility for the costs of any shared action between the liability groups for the linkages to which it is referable.

Attributing Responsibility for the Cost of Shared Actions between Liability Groups

D.99 The enforcing authority should attribute responsibility for the costs of any common action among the liability groups for the significant pollutant linkages to which it is referable on the following basis:

(a) if there is a single Class A liability group, then the full cost of carrying out the common action should be attributed to that group, and no cost should be attributed to any Class B liability);

(b) if there are two or more Class A liability groups, then an equal share of the cost of carrying out the common action should be attributed to each of those groups, and no cost should be attributed to any Class B liability group); and

(c) if there is no Class A liability group and there are two or more Class B liability groups, then the enforcing authority should treat those liability groups as if they formed a single liability group, attributing the cost of carrying out the common action to that combined group, and applying the guidance on exclusion and apportionment set out in Parts 7 and 8 of this Chapter as between all of the members of that combined group.

D.100 The enforcing authority should attribute responsibility for the cost of any collective action among the liability groups for the significant pollutant linkages to which it is referable on the same basis as for the costs of a common action, except that where the costs fall to be divided among several Class A liability groups, instead of being divided equally, they should be attributed on the following basis:

(a) having estimated the costs of the collective action, the enforcing authority should also estimate the hypothetical cost for each of the liability groups of carrying out the actions which are subsumed by the collective action and which would be necessary if the significant pollutant linkage for which that liability group is responsible were to be addressed separately; these estimates are the "hypothetical estimates" of each of the liability groups;

(b) the enforcing authority should then attribute responsibility for the cost of the collective action between the liability groups in the proportions which the hypothetical estimates of each liability group bear to the aggregate of the hypothetical estimates of all the groups.

CONFIRMING THE ATTRIBUTION OF RESPONSIBILITY

D.101 If any appropriate person demonstrates to the satisfaction of the enforcing authority that the result of an attribution made on the basis set out in paragraphs D.99 and D.100 above would have the effect of the liability group of which he is a member having to bear a liability which is so disproportionate (taking into account the overall relative responsibilities of the persons or groups concerned for the condition of the land) as to make the attribution of responsibility between all the liability groups concerned unjust when considered as a whole, the enforcing authority should reconsider the attribution. In doing so, the enforcing authority should consult the other appropriate persons concerned.

D.102 If the enforcing authority then agrees that the original attribution would be unjust it should adjust the attribution between the liability groups so that it is just and fair in the light of all the circumstances. An adjustment under this paragraph should be necessary only in very exceptional cases.

Orphan Linkages

D.103 As explained above at paragraphs D.12, D.14 and D.17 above, an orphan linkage may arise either where no Class A or Class B persons can be found, or where those who would otherwise be liable are exempted by one of the relevant statutory provisions. Where there is a remediation action which is referable to an orphan linkage, the enforcing authority should adopt the following approach:

(a) for any single-linkage action, the enforcing authority should itself bear the cost of carrying out that action;

(b) for any shared action which is also referable to a single significant pollutant linkage for which there is a Class A liability group, the enforcing authority should attribute all of the cost of carrying out that action to that Class A liability group;

(c) for any shared action which is also referable to two or more significant pollutant linkages for which there are Class A liability groups, the enforcing authority should attribute the costs of carrying out that action between those liability groups in the same way as it would do if the orphan linkage did not exist;

(d) for any common action which is also referable to a significant pollutant linkage for which there is a Class B liability group (and not to any other significant pollutant linkage for which there is a Class A liability group), the enforcing authority should attribute all of the cost of carrying out that action to the Class B liability group; and

(e) for any collective action which is also referable to a significant pollutant linkage for which there is a Class B liability group (and not to any other significant pollutant linkage for which there is a Class A liability group), the enforcing authority should estimate the hypothetical cost of the action which would be needed to remediate separately the effects of the linkage for which that group is liable. The enforcing authority should then attribute the costs of carrying out the collective action between itself and the Class B liability group so that the expected liability of that group does not exceed that hypothetical cost.

CHAPTER E - Statutory Guidance on the Recovery of the Costs of Remediation

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PART 1 – Scope of the Chapter

E.1 The statutory guidance in this Chapter is issued under section 78P(2) of the Environmental Protection Act 1990. It provides guidance on the extent to which the enforcing authority should seek to recover the costs of remediation which it has carried out and which it is entitled to recover.

E.2 Section 78P provides that:

> "(1) Where, by virtue of section 78N(3)(a), (c), (e) or (f) ... the enforcing authority does any particular thing by way of remediation, it shall be entitled, subject to sections 78J(7) and 78K(6) ... to recover the reasonable cost incurred in doing it from the appropriate person or, if there are two or more appropriate persons in relation to the thing in question, from those persons in proportions determined pursuant to section 78F(7) ...
>
> "(2) In deciding whether to recover the cost, and, if so, how much of the cost, which it is entitled to recover under subsection (1) above, the enforcing authority shall have regard –

"(a) to any hardship which the recovery may cause to the person from whom the cost is recoverable; and

"(b) to any guidance issued by the Secretary of State for the purposes of this subsection."

E.3 The guidance in this Chapter is also crucial in deciding when the enforcing authority is prevented from serving a remediation notice. Under section 78H(5), the enforcing authority may not serve a remediation notice if the authority has the power to carry out remediation itself, by virtue of section 78N. Under that latter section, the authority asks the hypothetical question of whether it would seek to recover all of the reasonable costs it would incur if it carried out the remediation itself. The authority then has the power to carry out that remediation itself if it concludes that, having regard to hardship and the guidance in this chapter, it would either not seek to recover its costs, or seek to recover only a part of its costs.

E.4 Section 78H(5) provides that:

"(5) The enforcing authority shall not serve a remediation notice on a person if and so long as ...

"(d) the authority is satisfied that the powers conferred on it by section 78N below to do what is appropriate by way of remediation are exercisable..."

E.5 Section 78N(3) provides that the enforcing authority has the power to carry out remediation:

"(e) where the enforcing authority considers that, were it to do some particular thing by way of remediation, it would decide, by virtue of subsection (2) of section 78P ... or any guidance issued under that subsection, -

"(i) not to seek to recover under subsection (1) of that section any of the reasonable cost incurred by it in doing that thing; or

"(ii) to seek so to recover only a portion of that cost;...."

E.6 The enforcing authority is required to have regard to the statutory guidance in this Chapter.

PART 2 – Definition of Terms

E.7 Unless otherwise stated, any word, term or phrase given a specific meaning in Part IIA of the Environmental Protection Act 1990, or in the statutory guidance in Chapters A, B, C, or D has the same meaning for the purpose of the guidance in this Chapter.

E.8 In addition, for the purposes of the statutory guidance in this Chapter, the term "cost recovery decision" is used to describe any decision by the enforcing authority, for the purposes either of section 78P or of sections 78H and 78N, whether:

(a) to recover from the appropriate person all of the reasonable costs incurred by the authority in carrying out remediation; or

(b) not to recover those costs or to recover only part of those costs (described below as "waiving or reducing its costs recover").

E.9 Any reference to "Part IIA" means "Part IIA of the Environmental Protection Act 1990". Any reference to a "section" in primary legislation means a section of the Environmental Protection Act 1990, unless it is specifically stated otherwise.

PART 3 – Cost Recovery Decisions

Cost Recovery Decisions in General

E.10 The statutory guidance in this Part sets out considerations to which the enforcing authority should have regard when making any cost recovery decision. In view of the wide variation in situations which are likely to arise, including the history and ownership of land, and liability for its remediation, the statutory guidance in this Chapter sets out principles and approaches, rather than detailed rules. The enforcing authority will need to have regard to the circumstances of each individual case.

E.11 In making any cost recovery decision, the enforcing authority should have regard to the following general principles:

(a) the authority should aim for an overall result which is as fair and equitable as possible to all who may have to meet the costs of remediation, including national and local taxpayers; and

(b) the "polluter pays" principle, by virtue of which the costs of remediating pollution are to be borne by the polluter; the authority should therefore consider the degree and nature of responsibility of the appropriate person for the creation, or continued existence, of the circumstances which lead to the land in question being identified as contaminated land

E.12 In general, this will mean that the enforcing authority should seek to recover in full its reasonable costs. However, the authority should waive or reduce the recovery of costs to the extent that the authority considers this appropriate and reasonable, either:

(a) to avoid any hardship which the recovery may cause to the appropriate person; or

(b) to reflect one or more of the specific considerations set out in the statutory guidance in Parts 4, 5 and 6 below.

E.13 When deciding how much of its costs it should recover in any case, the enforcing authority should consider whether it could recover more of its costs by deferring recovery and securing them by a charge on the land in question under section 78P. Such deferral may lead to payment from the appropriate person either in instalments (see section 78P(12)) or when the land is next sold.

Information for Making Decisions

E.14 In general, the enforcing authority should expect anyone who is seeking a waiver or reduction in the recovery of remediation costs to present any information needed to support his request.

E.15 In making any cost recovery decision, the authority should always consider any relevant information provided by the appropriate person. The authority should also seek to obtain such information as is reasonable, having regard to:

(a) how the information might be obtained;

(b) the cost, for all the parties involved, of obtaining the information; and

(c) the potential significance of the information for any decision.

E.16 The enforcing authority should, in all cases, inform the appropriate person of any cost recovery decisions taken, explaining the reasons for those decisions.

Cost Recovery Policies

E.17 In order to promote transparency, fairness and consistency, an enforcing authority which is a local authority may wish to prepare, adopt and make available as appropriate a policy statement about the general approach it intends to follow in making cost recovery decisions. This would outline circumstances in which it would waive or reduce cost recovery (and thereby, by inference, not serve a remediation notice because it has the powers to carry out the remediation itself), having had regard to hardship and the statutory guidance in this Chapter.

E.18 Where the Environment Agency, is making a cost recovery decision with respect to a special site falling within the area of a local authority which has adopted such a policy statement, the Agency should take account of that statement.

PART 4 – Considerations Applying both to Class A & Class B Persons

E.19 The statutory guidance in this Part sets out considerations to which the enforcing authority should have regard when making any cost recovery decisions, irrespective of whether the appropriate person is a Class A person of a Class B person (as defined in Chapter D). They apply in addition to the general issue of the "hardship" which the cost recovery may cause to the appropriate person.

Commercial Enterprises

E.20 Subject to the specific guidance elsewhere in this Chapter, the enforcing authority should adopt the same approach to all types of commercial or industrial enterprises which are identified as appropriate persons. This applies whether the appropriate person is a public

corporation, a limited company (whether public or private), a partnership (whether limited or not) or an individual operating as a sole trader.

THREAT OF BUSINESS CLOSURE OR INSOLVENCY

E.21 In the case of a small or medium-sized enterprise which is the appropriate person, or which is run by the appropriate person, the enforcing authority should consider whether recovery of the full cost attributable to that person would mean that the enterprise is likely to become insolvent and thus cease to exist. Where the cost to the local economy of such a closure might be greater than the costs of remediation which the authority would have to bear themselves, the authority should consider waiving or reducing its costs recovery to the extent needed to avoid making the enterprise insolvent. However, the authority should not waive or reduce its costs recovery where it is clear that an enterprise has deliberately arranged matters so as to avoid responsibility for the costs of remediation.

E.22 For these purposes, a "small or medium-sized enterprise" is as defined in the European Commission's Community Guidelines on State Aid for Small and Medium-Sized Enterprises, published in the Official Journal of the European Communities (the reference number for the present version of the guidelines is OJ C213 1996 item 4). This can be summarised as an independent enterprise with fewer than 250 employees, and either an annual turnover not exceeding €40 million, or an annual balance sheet total not exceeding €27 million.

E.23 Where the enforcing authority is a local authority, it may wish to take account in any such cost recovery decisions of any policies it may have for assisting enterprise or promoting economic development (for example, for granting financial or other assistance under section 33 of the Local Government and Housing Act 1989, including any strategy which it has published under section 35 of that Act concerning the use of such powers).

E.24 Where the Environment Agency is the enforcing authority, it should seek to be consistent with the local authority in whose area the contaminated land in question is situated. The Environment Agency should therefore consult the local authority, and should take that authority's views into consideration in making its own cost recovery decision.

Trusts

E.25 Where the appropriate persons include persons acting as trustees, the enforcing authority should assume that such trustees will exercise all the powers which they have, or may reasonably obtain, to make funds available from the trust, or from borrowing that can be made on behalf of the trust, for the purpose of paying for remediation. The authority should, nevertheless, consider waiving or reducing its costs recovery to the extent that the costs of remediation to be recovered from the trustees would otherwise exceed the amount that can be made available from the trust to cover those costs.

E.26 However, as exceptions to the approach set out in the preceding paragraph, the authority should not waive or reduce its costs recovery:

(a) where it is clear that the trust was formed for the purpose of avoiding paying the costs of remediation; or

(b) to the extent that trustees have personally benefited, or will personally benefit, from the trust.

Charities

E.27 Since charities are intended to operate for the benefit of the community, the enforcing authority should consider the extent to which any recovery of costs from a charity would jeopardise that charity's ability to continue to provide a benefit or amenity which is in the public interest. Where this is the case, the authority should consider waiving or reducing its costs recovery to the extent needed to avoid such a consequence. This approach applies equally to charitable trusts and to charitable companies.

Social Housing Landlords

E.28 The enforcing authority should consider waiving or reducing its costs recovery if:

(a) the appropriate person is a body eligible for registration as a social housing landlord under section 2 of the Housing Act 1996 (for example, a housing association);

(b) its liability relates to land used for social housing; and

(c) full recovery would lead to financial difficulties for the appropriate person, such that the provision or upkeep of the social housing would be jeopardised.

E.29 The extent of the waiver or reduction should be sufficient to avoid any such financial difficulties.

PART 5 – Specific Considerations Applying to Class A Persons

E.30 The statutory guidance in this Part sets out specific considerations to which the enforcing authority should have regard in cost recovery decisions where the appropriate person is a Class A person, as defined in Chapter D (that is, a person who has caused or knowingly permitted the significant pollutant to be in, on or under the contaminated land).

E.31 In applying the approach in this Part, the enforcing authority should be less willing to waive or reduce its costs recovery where it was in the course of carrying on a business that the Class A person caused or knowingly permitted the presence of the significant pollutants, than where he was not carrying on a business. This is because in the former case he is likely to have earned profits from the activity which created or permitted the presence of those pollutants.

Where Other Potentially Appropriate Persons have not been Found

E.32 In some cases where a Class A person has been found, it may be possible to identify another person who caused or knowingly permitted the presence of the significant pollutant in question, but who cannot now be found for the purposes of treating him as an appropriate person. For example, this might apply where a company has been dissolved.

E.33 The authority should consider waiving or reducing its costs recovery from a Class A person if that person demonstrates to the satisfaction of the enforcing authority that:

(a) another identified person, who cannot now be found, also caused or knowingly permitted the significant pollutant to be in, on or under the land; and

(b) if that other person could be found, the Class A person seeking the waiver or reduction of the authority's costs recovery would either:

(i) be excluded from liability by virtue of one or more of the exclusion tests set out in Part 5 of Chapter D, or

(ii) the proportion of the cost of remediation which the appropriate person has to bear would have been significantly less, by virtue of the guidance on apportionment set out in Part 6 of Chapter D.

E.34 Where an appropriate person is making a case for the authority's costs recovery to be waived or reduced by virtue of paragraph E.33 above, the enforcing authority should expect that person to provide evidence that a particular person, who cannot now be found, caused or knowingly permitted the significant pollutant to be in, on or under the land. The enforcing authority should not regard it as sufficient for the appropriate person concerned merely to state that such a person must have existed.

PART 6 – Specific Considerations Applying to Class B Persons

E.35 The statutory guidance in this Part sets out specific considerations relating to cost recovery decisions where the appropriate person is a Class B person, as defined in Chapter D (that is, a person who is liable by virtue or their ownership or occupation of the contaminated land, but who has not caused or knowingly permitted the significant pollutant to be in, on or under the land).

Costs in Relation to Land Values

E.36 In some cases, the costs of remediation may exceed the value of the land in its current use (as defined in Chapter A) after the required remediation has been carried out.

E.37 The enforcing authority should consider waiving or reducing its costs recovery from a Class B person if that person demonstrates to the satisfaction of the authority that the costs of remediation are likely to exceed the value of the land. In this context, the "value" should be taken to be the value that the remediated land would have on the open market disregarding any possible blight arising from the contamination

E.38 In general, the extent of the waiver or reduction in costs recovery should be sufficient to ensure that the costs of remediation borne by the Class B person do not exceed the value of the land. The enforcing authority should, however, take into account:

(a) the price paid by the appropriate person for the land; if the appropriate person paid a reduced price for the land to reflect its condition, the authority should be less willing to waive or reduce its costs recovery;

(b) any increase, as a result of the remediation, in the value of any other land in the same ownership or occupation; and

(c) any support from public funds which the appropriate person has received towards the costs of acquiring or developing the land.

Precautions Taken before Acquiring a Freehold or a Leasehold Interest

E.39 In some cases, the appropriate person may have been reckless as to the possibility that land he has acquired may be contaminated, or he may have decided to take a risk that the land was not contaminated. On the other hand, he may have taken precautions to ensure that he did not acquire land which is contaminated.

E.40 The authority should consider reducing its costs recovery where a Class B person who is the owner of the land demonstrates to the satisfaction of the authority that:

(a) he took such steps prior to acquiring the freehold, or accepting the grant of assignment of a leasehold, as would have been reasonable at that time to establish the presence of any pollutants;

(b) when he acquired the land, or accepted the grant of assignment of the leasehold, he was nonetheless unaware of the presence of the significant pollutant now identified and could not reasonably have been expected to have been aware of their presence; and

(c) it would be fair and reasonable, taking into account the interests of national and local taxpayers, that he should not bear the whole cost of remediation.

E.41 The enforcing authority should bear in mind that the safeguards which might reasonably be expected to be taken will be different in different types of transaction (for example, acquisition of recreational land as compared with commercial land transactions) and as between buyers of different types (for example, private individuals as compared with major commercial undertakings).

Owner-occupiers of Dwellings

E.42 Where a Class B person owns and occupies a dwelling on the contaminated land in question, the enforcing authority should consider waiving or reducing its costs recovery where that person satisfies the authority that, at the time he person purchased the dwelling, he did not know, and could not reasonably have been expected to have known, that the land was adversely affected by presence of a pollutant.

E.43 Any such waiver or reduction should be to the extent needed to ensure that the Class B person in question bears no more of the cost of remediation than it appears reasonable to impose, having regard to his income, capital and outgoings. Where the appropriate person has inherited the dwelling or received it as a gift, the approach in paragraph E.42 above should be applied with respect to the time at which he received the property.

E.44 Where the contaminated land in question extends beyond the dwelling and its curtilage, and is owned or occupied by the same appropriate person, the approach in paragraph E.42 above should be applied only to the dwelling and its curtilage.

THE HOUSING RENEWAL GRANT ANALOGY

E.45 In judging the extent of a waiver or reduction in costs recovery from an owner-occupier of a dwelling, an enforcing authority which is a local authority may wish to apply an approach analogous to that used for applications for housing renovation grant (HRG). These grants are assessed on a means-tested basis, as presently set out in the Housing Renewal Grants Regulations 1996 (SI 1996/2890, as amended). The HRG test determines how much a person should contribute towards the cost of necessary renovation work for which they are responsible, taking into account income, capital and outgoings, including allowances for those with particular special needs.

E.46 The HRG approach can be applied as if the appropriate person were applying for HRG and the authority had decided that the case was appropriate for grant assessment. Using this analogy, the authority would conclude that costs recovery should be waived or reduced to the extent that the appropriate person contributes no more than if the work were house renovations for which HRG was being sought.

E.47 Where the Environment Agency is the enforcing authority, it should seek to be consistent with the local authority in whose area the contaminated land in question is situated. The Environment Agency should therefore consult the local authority, and should take that authority's views into consideration in making its own cost recovery decision.

Appendix Three: "Paying for Our Past"

PAYING FOR OUR PAST

The arrangements for controlling contaminated land and meeting the costs of remedying the damage to the environment

A consultation paper from the Department of the Environment
and
the Welsh Office

March 1994

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PAYING FOR OUR PAST

The arrangements for controlling contaminated land and meeting the costs of remedying the damage to the environment

Proposals for consultation

This paper is part of the review of contaminated land and liabilities in England and Wales being carried out by Government departments. Views sent to the Department of the Environment or the Welsh Office in response to the paper will be taken into account by the Review Committee.

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EXECUTIVE SUMMARY

Paying For Our Past has been issued as part of a review set up by the Government in March 1993. The review covers the arrangements for controlling contaminated land in England and Wales and meeting the costs of remedying the damage to the environment.

The paper is intended to gather the informed and structured views of interested parties on the key issues thrown up by the review process. Those views will then be taken into account by the Review Committee in preparing its recommendations to Ministers.

Sections I and II of the paper set the scene in terms of policy towards contamination and the current legal and regulatory framework.

Section III discusses the criticisms or problems identified by contributors to the review or by the Review Committee about how to apportion the burden of putting contamination right while striking balances between the interests of polluters, owners, the public sector, or the community at large.

Section IV sets out the key issues for resolution. Each part reviews the main considerations bearing on an issue, discusses aspects which might be changed, and presents preliminary conclusions about whether or not to make changes or to clarify the current arrangements. The issues are:

Issue A - What should the objectives be within the policy?

Issue B - How should the statutory framework meet the objectives?

Issue C - What relationship should the statutory framework have with the Common Law?

Issue D - Should there be any extension of strict liability?

Issue E - Who should pay for putting right environmental damage?

Issue F - How should markets be provided with information? and

Issue G - What other roles should public sector bodies have?

Finally, sections V and VI bring together the questions about the issues to which respondents are invited to reply and say where responses should be sent.

SECTION I - BACKGROUND

The problem of contaminated land and liabilities

1.1 Contaminated land is an unwanted legacy of Britain's long industrial history. It poses difficult problems: how best to tackle the resulting damage to the environment without endangering the economic growth which will fund the work; how to ensure that the work is done on an orderly basis without blighting large areas of land capable of worthwhile use; and how to allocate the costs of the work when the damage was done long ago or the polluter has gone away or lacks the assets to clean up behind him.

1.2 The supply of land is essentially finite. A crowded island like Great Britain cannot afford to waste its land. If the problems associated with contamination are substantially unresolved, then market confidence and investment in "brownfield" sites affected by it could fall. Ministers are concerned that such sites should be recycled into new uses and the pressures thereby reduced for greenfield sites to be converted to urban, industrial or commercial uses.

1.3 In order to find ways of resolving the problems, the Secretaries of State for the Environment and for Wales set up a Review of the arrangements for controlling contaminated land in England and Wales and of the related liabilities ("the Review"). *Paying for our Past* has been issued as part of the Review, and is intended to carry forward the debate about the problems and possible responses to them.

The Review.

1.4 The Secretaries of State announced the Review in March 1993 after considering the responses to a joint Department of the Environment ("DoE") and Welsh Office ("WO") consultation paper on proposals for local authorities to keep registers of land subject to potentially contaminative uses. Their decisions to set up the Review and to withdraw the register proposals were announced in a Written Answer to a Parliamentary Question - copy at Annex A.

1.5 The Secretary of State for Scotland announced at the same time a parallel but separate review to be carried out in Scotland by the Scottish Office Environment Department ("SOED") reflecting the different legal and institutional framework there.

1.6 The responses to the DoE/WO register proposals showed that there were **uncertainties which were affecting markets in contaminated or potentially contaminated land** which were damaging the prospects for achieving Ministers' objectives of dealing with contaminated land which posed actual threats to health and the environment and of keeping or bringing such land into beneficial use. The uncertainties included:

- which public authority might be responsible for regulating a problem or site, and what its powers and duties were;

- how great the latent costs of contamination might be, under statute or private law;

- who might have to meet all or part of those costs, and under what circumstances;

- what happens when the problems (or the costs of dealing with them) have to be faced years or decades after the contamination took place; and

- whether there would be changes to the UK arrangements in response to international developments in the field of liability for damage to the environment.

1.7 There was particular uncertainty about the potential influence of three **international developments relating to liability for environmental damage.** The first was the experience of lenders, insurers and other businesses of meeting liabilities under the US "*Comprehensive Environmental Response, Compensation and Liability Act 1980*" ("US Superfund"). Secondly, the Council of Europe was completing its "*Convention on Civil Liability for Damage resulting from activities dangerous to the environment*" (known after it opened for signature in June 1993 as "the Lugano Convention"). Thirdly, the Commission of the European Communities was drafting its "*Green Paper On Remedying Environmental Damage*" (issued in May 1993; "the EC Green Paper").

The developing context for the Review

1.8 In February 1993, Ministers received the report of the Financial Sector Working Group of the Advisory Committee on Business and the Environment ("the ACBE report"), which included the **views of the financial sector, industrialists and others on the implications of the international developments relating to liability for environmental damage.**

1.9 In June, Ministers announced that <u>the UK would not sign the Lugano Convention</u>. In October, the Government sent to the EC Commission its <u>formal, written response to the EC Green Paper</u> ("the UK Response"), arguing that, in accordance with the principle of subsidiarity, it saw no case for general Community legislation on civil liability for environmental damage. The House of Lords Select Committee on the European Communities has also considered the Green Paper and issued a report in December 1993 ("the House of Lords Report") recommending that it would be prudent for the Community to adopt a "framework" directive requiring a programme of remediation of past pollution.

1.10 The Green Paper is the subject of continuing debate to which the UK is contributing. In the meantime, this paper reflects the views set out in the UK Response.

Purpose of *Paying For Our Past*

1.11 Ministers directed officials from the DoE, WO and other Government departments ("the Review Committee") to address the uncertainties identified in the consultations on the register proposals and to make recommendations for resolving them.

1.12 The March announcement made it clear that the Review would be open to contributions from interested parties. The Review Committee has accordingly carried out the Review in an open way, welcoming written contributions, meeting interested individuals and organisations, and explaining the issues and considerations.

1.13 The Committee is grateful for the many such representations it received. It has considered those alongside other relevant material, notably from the consultations over the proposed registers, the ACBE Report, the EC Green Paper, the UK Response to it and responses by other UK and European bodies, and the related debates.

1.14 Ministers agreed that the Review Committee should nonetheless formally seek the structured views of interested parties on the key issues before drawing up its recommendations. To that end, DoE/WO have prepared this consultation paper - ***Paying for our Past***. It incorporates in section IV **preliminary conclusions** on the key issues. It also poses in section V a related set of questions intended to help respondents to present their views.

SECTION II - THE CURRENT POSITION

(1) Overall policy aims

2.1 Land is, with air and water, one of the three environmental media. UK **policy towards land contamination fits within an overall environmental policy**, summed up in paragraph 1.24 of "*This Common Inheritance: Britain's Environmental Strategy*" ("the 1990 White Paper"). That stated:

> "Action on the environment has to be proportionate to the costs involved and to the ability of those affected to pay them. So it is particularly important for Governments to adopt the most cost-effective instruments for controlling pollution and tackling environmental problems. And we need to ensure that we have a sensible order of priorities, acting first to tackle problems that could cause most damage to human life or health and could do most damage to the environment now or in the future."

2.2 The aim therefore is to control actions which may cause damage so as to prevent or to minimise the risk of harm to human health and the environment and, where damage has already occurred, to encourage remediation where practicable and to discourage any further damage. This is consistent with the **principle of sustainable development**, defined in the Brundtland Report as:

> "Development that meets the needs of the present without compromising the ability of future generations to meet their own needs."

2.3 The Government considers that, to achieve those goals, regulation has always been required and is still required. But regulation has its shortcomings, which can include monitoring costs, the time taken to respond to scientific and technical advance, pitching controls at the right level, and insufficient flexibility. The Government is looking for ways to control pollution which avoid some of those problems by **working better with the grain of the market:**

> "These new approaches have been described loosely as the market-based approach to the environment, since they involve integrating economic and environmental concerns and applying market economics more broadly." (1990 White Paper, paragraph 1.29).

2.4 The Government's policy towards tackling the UK's burden of land contamination is that the works, if any, required to be undertaken for any contaminated site should deal with any <u>unacceptable risks to health or the environment</u>, taking into account its <u>actual or intended use</u>. That "**suitable for use approach**" does not preclude an owner, occupier or developer from undertaking earlier or more thorough action if he wishes to do

so. Nor does it preclude a regulatory body from requiring very thorough remedial works where the circumstances justify it.

2.5 In line with that policy and with Ministers' concerns about recycling "brownfield" land (see paragraph 1.2 above), **the aims of the "suitable for use" approach are:**

- to deal with actual or perceived threats to health, safety or the environment;

- where practicable, to keep or to bring back such land into beneficial use; and so

- to minimise avoidable pressures on greenfield sites.

2.6 The **resources for remedying the contamination** will all, however, have to be drawn - sooner or later, and one way or another - from the wealth created by the UK economy. As such, remedial work will have to compete with many other such calls. If disproportionate or unnecessarily early steps to treat land have to be taken, this may positively jeopardise wealth creation, by imposing excessive burdens on industry and commerce. It is necessary, therefore, to guard against over-specifying the degree of restoration, by considering the costs and benefits of particular schemes, and by balancing the need for economic growth and environmental protection.

The scope for change

2.7 The Review, including the consultative process, is therefore concerned with finding ways to improve the current approach to dealing with land contamination, taking into account the costs and other burdens it imposes on different people or organisations. **Recommendations for change**, if any, are likely to relate to the balance of objectives within the policy or to the legal and administrative frameworks for executing it.

(2) The nature and scale of the problem

2.8 A 1988 Survey of Contaminated Land in Wales undertaken on behalf of WO identified 746 potentially contaminated sites with an estimated area of 4,080 hectares.

2.9 There has been no equivalent survey in England. Estimates of **the amount of contaminated land** in England needing investigation or treatment on the basis that it might present an actual risk of harm to health or the environment vary widely depending on each author's particular assumptions.

2.10 The number of sites might, for example, be as many as the 100,000 sites mentioned in the Friends of the Earth ("FoE") 1993 booklet "*Buyer Beware: A guide to finding out about contaminated land*". The area might be as much as the 200,000 hectares suggested in the Confederation of British Industry ("CBI") paper "*Firm Foundations: CBI proposals for environmental liability and contaminated land*" ("the CBI Report"). But higher or lower

estimates can result from different assumptions about the contaminative potential of each use, the risks that contamination might pose for health or the environment, or the extent of contamination of each site.

2.11 The costs of investigation and, where appropriate, remedial work depend on the nature of the pollutants, the nature and environmental setting of each site, and the intended standard of treatment. On one set of assumptions, the CBI considers that the costs could be up to around £20 billion.

2.12 Costs would be substantially greater if, rather than adopt our "suitable for use" approach, land had to be restored to close to its pristine state or if the UK adopted the multi-functionality approach (of improvement to a standard suitable for any possible use) as applied in, for example, the US or the Netherlands.

Resources

2.13 The contamination on most sites can be safely left until an opportunity such as redevelopment arises to tackle it economically. In the light of experience, DoE consider that the **overall expenditure** on investigation or remedial work can be spread over many years, even decades. Of the 746 sites identified in Wales, for example, less than 6% were regarded as representing a potentially significant hazard.

2.14 The **private sector** is thought to undertake about half of the current expenditure on dealing with contamination, estimated at over £500 million/year. **There is no evidence that expenditure at broadly that level would not, if well targeted, be of the right order to address the problem.** Moves which increased that expenditure or brought forward a large proportion of the burden of liabilities discussed above would have significant effects on private sector firms' finances. That could damage their ability to finance their activities, including remedial work.

2.15 **Public authorities incur expenditure** on regulating activities which might cause land contamination, on regulating remedial work, or on undertaking remedial work themselves. They may also provide funds - for example, Derelict Land Grant ("DLG") - to carry out works including remediation. It is not meaningful to separate out from authorities' general work on controlling and preventing pollution a sum for preventing land contamination. It is part and parcel of all their regulatory work and of preventing or minimising emissions to all three media.

2.16 It is, however, possible to isolate certain **sums spent wholly or substantially on remedying contamination** once it has occurred. Local authorities in England made use of almost £10 million in 1992/93 by way of Supplementary Credit Approvals ("SCAs") for investigations or for remedial work. A proportion of the £116 million total provided in 1992/93 for DLG was for remedying contamination on derelict sites. A further smaller sum was spent in England through City Grant.

2.17 In Wales, **the Welsh Development Agency** ("WDA") is tackling many of the worst contaminated sites through its land reclamation programme. WDA spent £31 million on reclamation in 1992/93 to reclaim more than 400 hectares of land, of which 73 hectares comprised hazardous and contaminated land.

2.18 Figures are not readily available on the amounts **local authorities spend from their own resources** in their wider roles - on investigating or controlling statutory nuisance cases involving contamination; on contributions to SCA cases or on similar cases without SCA support; as partners in development and regeneration projects; or in their ordinary course of business as landowners and landlords.

2.19 Allowing for those "own resources", it is probable that **public expenditure on remedying contamination** in 1992/93 exceeded £250 million.

(3) The framework for action

2.20 **The general framework for dealing with contamination or its consequences** comprises:

- the statutory arrangements; and
- the Common Law.

The statutory arrangements

2.21 The main powers and duties ("functions") of public authorities ("the regulators") with respect to contaminated land will be found in **statute law.** Much of the legislation has been recently reviewed, amended or re-enacted, particularly in the Environmental Protection Act 1990 ("the 1990 Act") and the Water Resources Act 1991 ("the 1991 Act").

2.22 There are powers to take **preventive measures**, including powers to control processes, backed up by criminal law sanctions against breaches of controls.

2.23 The legislation also, in certain circumstances, imposes obligations on persons or organisations to **put right environmental damage** or to pay the regulators' costs of doing so. It gives the regulators certain enforcement powers. Such requirements to restore, or to pay for the restoration of, environmental damage are called "regulatory obligations" in this paper in order to distinguish them from liabilities or requirements to make compensation payments arising under private, Common Law.

2.24 **The main regulators**, their responsibilities which relate to land contamination, and their particular powers to enforce regulatory obligations are as follows.

- Borough and district councils are responsible for "statutory nuisances" which can include land contamination;

they have powers in sections 79 to 81 of the 1990 Act; they are also waste collection authorities ("WCAs"), responsible for illegally dumped "controlled wastes", and have powers under section 59 of that Act.

- The National Rivers Authority ("NRA") has responsibilities for "controlled waters" and has powers under section 161 of the 1991 Act.

- Waste Regulation Authorities ("WRAs", mainly county councils) are responsible for "controlled wastes" and have powers under section 59 of the 1990 Act; they would also have powers under section 61 of that Act if it were in force. and

- Her Majesty's Inspectorate of Pollution ("HMIP") is responsible for integrated pollution control ("IPC") of certain prescribed industrial processes, requiring the application of the Best Available Techniques Not Entailing Excessive Cost ("BATNEEC"), and has powers under section 27 of the 1990 Act.

2.25 This list is not exhaustive; it concentrates on the key regulators and on their responsibilities and powers in relation to remedying damage which have been the main subjects of comment during the Review. The regulators carry out these functions in the context of their wider responsibilities and their other powers and duties.

2.26 **Land use planning** powers can apply to identifying and remedying contamination or adapting proposed uses or developments in ways that minimise the hazards, while keeping or bringing land, where practicable, into beneficial use. They should, however, complement, not duplicate the regulatory arrangements.

2.27 **Local planning authorities** can include in development plans their policies for the reclamation and possible use of contaminated land, and site-specific proposals where there is actual or suspected contamination. Depending on the nature of the problems, applicants for planning permission for such sites can be required to include in their applications information from investigations carried out to identify remedial measures to deal with any hazards; and authorities can impose and enforce conditions on permissions requiring the execution of such measures.

Common law and contamination

2.28 Statutory arrangements operate alongside the long-established system of **private, Common Law.** That allows an aggrieved person or body ("the plaintiff") to seek redress for damage or loss to his private interests caused by the actions or failures of another ("the defendant"). The plaintiff must show that he or she has some cause of action; this might be that he has suffered nuisance or as a result of the defendant's negligence. Others may be "joined" in the action, that is

brought in and, potentially, made to share in the costs and in any settlement.

2.29 It is hard to generalise about **the way the Common Law works in the environmental context**; that will depend on the facts of each case, including rights and obligations under property and contract law.

2.30 The House of Lords made an important judgment in this area in December 1993 in the case of Cambridge Water Company v Eastern Counties Leather ("the Cambridge case"). The water company sued the leather company for damages in respect of spillages of solvents at the tannery which had contaminated ground waters supplying a borehole. The House of Lords ruled that the leather company was not liable since that damage was not reasonably foreseeable at the time of the spillages.

2.31 The Review Committee is considering the implications of the Cambridge case. It is nonetheless possible to identify a number of **points of interaction between statute law and the Common Law.**

2.32 A plaintiff who faces a regulatory obligation may be able to use the Common Law to try to pass some or all of the burden to others who he can show shared the responsibility. In some cases a regulator may have been involved at some stage in the events before or after the polluting action(s). The regulator's actions or decisions would be of evidential weight only. In particular, the existence of an authorisation or licence granted by a regulator does not normally insulate a person against liability.

2.33 The outcome of a successful case will vary with the circumstances; it might be an injunction to stop the defendant(s) from causing the loss to the plaintiff or it might be an award of damages. It is for the court to decide the measure of damages, which might well take some account of the cost of remedial work. Many cases end in an out-of-court settlement by agreement. But it is for the successful plaintiff to decide what to do with any money received; there is no presumption or guarantee that any money received will be spent on restoring environmental damage.

2.34 Although the Common Law can deal with some aspects of contamination-related issues, **its purpose and effect** are not always the same as those of the statutory arrangements. An award of damages in a Common Law action addresses private interests and does not necessarily address the issue of damage to the environment with which the regulators are concerned.

Judicial review

2.35 Regulators' exercise of their powers is subject to judicial review by the courts. That allows persons or bodies who have sufficient "standing" in law to seek a hearing to challenge the regulators' decisions.

2.36 Such challenges may relate to decisions to adopt a particular course of action, or not to do so, if there appears to be any defect in the decision-making process, for example a failure to consult or to use powers properly.

(4) Enforcing obligations or establishing liability

2.37 Regulators often proceed by negotiation, with formal action taken only as a fall-back; and that action is tested in the Courts only if a person affected by it challenges the action, or the regulator seeks a court order to enforce the action. Similarly, civil actions can be settled out-of-court at any stage.

Proving responsibility

2.38 At Common Law, plaintiffs would generally have to establish some link or **causation** between actual or potential damage and the acts or omissions of the defendant. In practice this can be almost as difficult a burden for the plaintiff to discharge as establishing fault.

2.39 Some European countries have sought to mitigate the burden on the plaintiff, for example, by prescribing industries which are presumed to cause particular types of pollution. In the US Superfund legislation, proof of participation in the activity causing damage can result in being joined in litigation to recover costs of clean-up.

2.40 Statutory provisions in England and Wales vary widely. There is not necessarily the same link between the acts or omissions of a person and actual or potential damage. Some provisions reverse the burden of proof and leave it, for example, to a land owner to prove that he did not make a deposit or "knowingly cause or knowingly permit" it.

2.41 The EC Green Paper discusses, amongst other issues, whether environmental liability should be **strict or fault-based.** It is not always necessary for a regulator or plaintiff to prove fault on someone's part. Indeed, many of the relevant statutory provisions are in this sense strict. Under Common Law there is a mixture of strict liability and fault-based liability. In practice, the distinction between strict and fault-based liability is usually blurred by the existence of further defences against liability.

2.42 A regulator may, in some circumstances, be able to enforce a regulatory obligation only where the person or body involved has breached **a regulatory authorisation, consent or direction.** This applies, for example, to section 27 of the 1990 Act in relation to a process authorised under IPC where action can take place only after commission of a criminal offence under section 23(1)(a) or (c) of that Act.

Shared responsibility

2.43 **Obligations and liabilities can fall on a number of persons.** If liability is shared out so that each is responsible for only the proportion of the total burden that he has contributed, it is "joint". "Joint and several" liability, for example under US Superfund legislation, renders any potentially responsible person liable for the whole amount of the damage caused by an activity in which they have participated.

2.44 The ACBE Report notes (paragraph 53) that, "so far as civil damages [in the UK] are concerned, joint and several liability has always existed and this has not caused any real difficulties."

2.45 Under statute law, the position varies: for example, under section 61(8) of the 1990 Act the burden of meeting the costs of remedial works falls upon "the owner for the time being"; under section 81(4) of that Act the burden may be apportioned between persons by the court on a "fair and reasonable" basis; but, under section 59(8)(b), it may all fall to "any person who deposited or knowingly caused or knowingly permitted the deposit of any of the waste". In any event, a person may be able to use the Common Law to share or shed the burden imposed by statute - see paragraph 2.31 above.

Latent damage and unexpected responsibility

2.46 It is of the nature of land pollution that **its effects are often delayed.** Polluting events can pass unnoticed at the time, can give rise to contamination which occurs or is revealed long afterwards, or can have consequences which can only be shown at a later date to have caused actual damage. In such circumstances regulatory obligations or civil liability can appear to the defendant to be retroactive.

2.47 If, during the time between the initial act and the detection of damage, the law has changed to tighten environmental or operational standards, the question arises of whether or not that change applies retrospectively to penalise an action which was lawful or acceptable at the time.

SECTION III - MAKING A CASE FOR CHANGE

Critique of the current arrangements

3.1 The representations to the Review Committee have helped it to identify a number of areas where the regulatory regime or the Common Law have given rise to uncertainties about, or discontent with the patterns of, environmental liabilities arising from the past. This section sets out the basis of some of the criticisms or uncertainties as a prelude to considering whether changes might be made to meet them.

"Too many regulators"

3.2 There has been criticism about **the number of regulators** who might be involved in any one case. In some cases, that leaves some people unsure which regulator might be responsible for dealing with a particular problem. It is not just a question of which regulator can act, but which others may also get involved, perhaps to provide advice or information.

3.3 Part of the problem may be attributable to **overlapping responsibilities.** For example: WRAs and Borough and District councils have concurrent powers under section 59 of the 1990 Act over illegally dumped controlled wastes - see paragraph 2.23 above. Or, depending on the circumstances, a "deposit" might be: a statutory nuisance, and so the responsibility of a borough or district council; a controlled waste, and so the responsibility of a WRA; and a matter causing water pollution, and so the responsibility of the NRA.

3.4 The Government has announced that, subject to the approval of Parliament, it will set up an **Environment Agency for England and Wales** combining the functions of HMIP, NRA and WRAs. That will simplify the regulatory system, concentrating in one national authority responsibility for, and expertise in, the most difficult environmental problems.

3.5 **Borough and district councils** will retain a major role and will be responsible for identifying and dealing with local pollution, though there will need to be some adjustment to the relationship between them and the Agency. Further simplifications in the numbers and tiers of local authorities have already been proposed for some areas under the current Local Government Review.

Under what circumstances will the regulators act?

3.6 There appears to be uncertainty about **when regulators will act.** That may arise in part because the regulators have a mixture of duties under which they are required to act, and powers under which the law allows them some discretion to decide whether to act in the particular circumstances of each case.

3.7 Whether a duty or a power is involved, the regulator must operate within the terms of the governing legislation. An authority that fails to do so lays itself open to challenge under judicial review (see paragraphs 2.34 and 2.35 above). It is, therefore, possible that a regulator will be required to act or to cease action in the light not of its own decision but of the terms of the court's judgment.

3.8 There is always a tension between allowing regulators the discretion to respond in the appropriate way to particular circumstances and creating certainty by removing that discretion. There has to be a balance between flexibility and rigidity.

3.9 There may be uncertainty because of **differences of procedure before different regulators can exercise their powers to enforce regulatory obligations.** For example, the NRA may act under section 161 of the 1991 Act where "it appears to the Authority that any poisonous, noxious or polluting matter or any solid matter is likely to enter, or to be or to have been present in, any controlled waters." On the other hand, when dealing with a statutory nuisance, borough and district councils have first to serve abatement notices requiring others to act on the nuisances; they can take action themselves only when a notice has not been complied with. The powers of HMIP and WRAs also vary.

How will the regulators act?

3.10 The regulators have differing responsibilities (see paragraph 2.23 above); for the NRA, WRAs and HMIP those are quite specific; but borough and district councils have very general responsibilities within their areas for statutory nuisances.

3.11 The statutory provisions governing the actions the regulators may take are accordingly differently drafted. It is open to question, however, whether there are **differences of detail** beyond those required, for example, to relate the NRA's interest in land contamination specifically to the actual or likely pollution of controlled waters. There may be scope for greater consistency, either in the form of the provisions or in the procedures they prescribe.

3.12 Borough and district councils' powers under sections 79 to 81 of the 1990 Act to deal with "deposits or accumulations which are prejudicial to health or a nuisance" were drawn from public health legislation going back to 1936. That legislation was first directed at the protection of public health rather than at the prevention or remediation of pollution or the protection of the environment *per se*.

3.13 The other 1990 Act provisions, although they had antecedents in earlier pollution control legislation, set out a modern legal framework which makes specific mention of: "the environment"; "pollution of the environment"; and, as section 1(4) of that Act puts it: "harm to the health of living organisms or other interference with the ecological systems of which they form part, and, in the case of man, includes offences caused to any of his senses or harm to his property".

3.14 The NRA's powers in the 1991 Act are close in concept to section 1 of the 1990 Act though different in detail, reflecting their origin in the slightly earlier Water Act 1989, itself drawing on the Control of Pollution Act 1974.

3.15 Regulators may act only within the terms of their respective powers. The differences in those statutory provisions, reflecting different responsibilities or different legislative histories, mean that **the regulators may well fulfil different roles in respect of the same or similar cases.** They may have to act together in complex cases, or assist each other or operators by providing help and advice.

3.16 In some cases, the obligations which they are empowered to enforce may go beyond the remedying of damage to owned property and extend to **the unowned environment.** That may involve action which is difficult to carry out to put right damage which is hard to value - for example where fauna, flora or whole ecosystems have been damaged. In such circumstances, the amount of any potential liability will be a very uncertain quantity.

What costs can a regulator recover?

3.17 Where a regulator itself takes action, **it may normally recover its costs.** In principle, a regulator would expect to recover its costs to the full extent permitted by the relevant statutory provision. It should not, of course, incur and so recover costs other than for actions within the scope of its powers. However, as explained in the preceding paragraphs, that scope varies from regulator to regulator which may, in turn, give rise to uncertainty about the resulting costs.

3.18 Besides the uncertainty about the overall financial implications, there are doubts because the regulators' **cost-recovery powers are not worded consistently.** Most refer to "costs"; but section 81(4) of the 1990 Act refers to "expenses". All have wording which, in effect, confines recovery to sums reasonably incurred by the regulator. Section 61(8) of the 1990 Act alone, however, refers explicitly to recovery of "the cost or part of the cost"; and section 61(10) alone requires that a WRA should consider "hardship" in deciding whether and if so how much to recover of its costs.

3.19 There has therefore been criticism that **the amount of any recovery may apparently vary in similar circumstances** - depending not only on the scope of the works that the different regulators may undertake, but also on the detail of each regulator's powers or duties in determining the proportion it will try to recover. There is particular uncertainty about the amount and incidence of costs for remedying damage to the unowned environment, especially given the difference between statutory nuisance powers and the others.

Who will have to pay to put damage right?

3.20 The regulators can, depending on circumstances and on the wording of the relevant statute, **enforce obligations on owners, occupiers or persons.** The provisions vary as to whether they apply to persons who caused or knowingly caused or knowingly permitted the actual or likely problem. None of the statutes tries to define "polluter" for this purpose.

3.21 Particular criticism has been directed at the phrase "the **owner for the time being**" in section 61 of the 1990 Act as an open-ended catch-all term; a similar, long-established term is, however, employed in section 81(4) of the 1990 Act.

3.22 At this point, it is necessary to refer to **Common Law remedies.** Where such a remedy is available, the cost of meeting a regulatory burden may be transmitted to others in whole or in part from the person bearing it. But the question of compensation for private loss or damage is separate from obligations enforced by regulators.

3.23 In short, one range of people could face regulatory obligations in relation to past contamination while the Common Law could bring in other liabilities or a further group of people.

The case for change

3.24 This section of the paper has emphasised the differences between the relevant provisions and possible uncertainties about their application or effect. But statutes should not always impose rigid requirements which are uniform across all circumstances or across all regulators regardless of their responsibilities. And the private, Common Law, should continue to interact with the statutory system to enable individuals and bodies to protect their own interests.

3.25 Both statute and Common Law have evolved over many years and decades to cope with changing problems and changing contexts. There must a be risk that any change made as a result of this review could adversely affect an arrangement still needed in other circumstances.

3.26 Differences or uncertainties do not therefore, in themselves, create a prima facie case for making changes. They are factors which should be taken into account in considering whether to make changes, if any, to the framework. So, too, should the effectiveness of the arrangements in terms of getting the contamination put right in an orderly, fair and appropriate fashion, within a market-centred approach, and with the necessary minima of regulation and of burdens on the public purse. But changes to the existing arrangements would have to be clearly justified on their merits.

SECTION IV - THE KEY ISSUES

Resolving the arguments

4.1 The Review Committee has identified seven key issues arising from the concerns about the existing arrangements discussed in the previous sections of this paper. These are set out as follows:

Issue A - What should the objectives be within the policy?

Issue B - How should the statutory framework meet the objectives?

Issue C - What relationship should the statutory framework have with the Common Law?

Issue D - Should there be any extension of strict liability?

Issue E - Who should pay for putting right environmental damage?

Issue F - How should markets be provided with information? and

Issue G - What other roles should public sector bodies have?

4.2 Each part of this section reviews the main considerations bearing on an issue, discusses aspects which might be changed, and presents preliminary conclusions about whether or not to make changes or to clarify the arrangements.

Issue A - What should the objectives be within the policy?

4A.1 The **broad aims of the Government's policy** are elaborated in paragraphs 2.1 to 2.6 above. They are: to prevent or minimise further land contamination; and, where practicable, to remedy it where it has occurred. These constitute a sustainable approach to the problems of land contamination, recognising that land is not only a resource which must be secured for the future, but that it also supports or has an impact on other aspects of the environment such as habitats, flora and fauna and water resources. However, this policy must also work with the grain of the market. That points to a need to specify more clearly the policy's objectives.

4A.2 Paragraphs 2.8 to 2.18 above relate the estimated scale of the problem to the resources being applied to it and note that these could lead to significant burdens on both private and public finances. That means that **priorities for action** will have to be set which balance the need to deal with our burden of past pollution against the resource costs of doing so.

4A.3 Land is a major factor in **economic activity.** The actual or potential costs of remedying contamination or paying compensation for damage can affect many decisions including:

- whether to buy or sell a site and on what terms, including its price and warranties, if any, offered by the vendor to protect the buyer from subsequent claims;

- whether to develop or redevelop a site for a particular use;

- what type of activity should be carried out on that land;

- what it is worth as security for advances or as collateral for businesses' operating capital - a special concern for small and medium-size enterprises ("SMEs") and their lenders; and

- whether, when and on what terms to bring the liability into a business's Annual Report and Accounts.

4A.4 Policy must take into account what view owners, developers, lenders and others take of the financial risks they might face in connection with contamination. To do otherwise would run **the risk of increasing uncertainty, damaging confidence and reducing the amount of remedial work undertaken voluntarily by owners and occupiers** to keep or bring contaminated land into use. That would, in turn, increase pressure on greenfield sites and could lead to increased regulatory activity and public expenditure.

Preliminary conclusion:

4A.5 The objectives of the arrangements for dealing with contaminated land could be:

- *to prevent or minimise new pollution where practicable and to place the onus on the polluter to remedy or to render harmless any pollution which does occur;*

- *to act on existing contamination which poses unacceptable, actual or suspected risks to health or the environment;*

- *to improve sites in line with the "suitable for use" approach as and when hazards are tackled, the private sector decides to develop land, or public authorities prepare land to promote development;*

- *to encourage development of, and an efficient market in, land which has been subject to potential or actual contamination or where such contamination has been tackled; and*

- *to minimise financial and regulatory burdens.*

<u>Issue B - How should the statutory framework meet the objectives?</u>

4B.1 The regulatory framework of key statutes and principal regulators is described in paragraphs 2.19 to 2.27 above.

4B.2 The statutory provisions serve **three key purposes:**

- to prevent or minimise new contamination;
- to require its clean-up where it has happened; and
- where that cannot be achieved by other means, to enable the regulators to take direct action and to recover their reasonable costs in appropriate circumstances.

4B.3 The statutory pollution control powers enable regulators **to prevent or minimise future contamination** in four broad ways:

(a) by controlling polluting activities through licences, authorisations or consents so that polluting incidents are made less likely;

(b) through the deterrent effect of the threat of prosecution and criminal sanctions;

(c) through the deterrent effect of the threat of the cost of regulatory obligations; and

(d) through providing advice and information about the causes of contamination, the risks it poses for health, and the environment, and ways of avoiding them.

4B.4 The provisions for requiring remedial work and, in some circumstances, carrying it out and recovering the costs come into play **once contamination has happened.** They are intended to ensure restoration and to place the associated burden on the person or organisation responsible for the damage. Regulators' powers are also intended to protect the public interest in the environment, in particular in relation to unowned aspects where private individuals may not be able to act.

4B.5 There are some **uncertainties about the effect of the legal provisions for regulatory obligations.** As discussed in paragraphs 3.1 to 3.19 above, however, the roots of such uncertainty vary:

- some provisions are powers not duties;
- powers leave the regulators room to exercise discretion;
- some, but not all, of the relevant statutory provisions prescribe the remedial action which may be taken by the regulator;
- some, allow for action on the unowned as well as the owned environment.

4B.6 Discretion allows a regulator to operate flexibly; differences in the statutory provisions can quite properly reflect specialised responsibilities; and the problems of overlap or multiplicity of regulators should be reduced by developments such as the proposed Environment Agency.

4B.7 Borough and district councils, in particular, have specific local knowledge and understanding of their areas and this may lead to different authorities setting different priorities. Within the scope of their powers, and taking note of any DOE/WO guidance, councils may, therefore, come to different judgements on how to exercise their regulatory and planning powers when dealing with otherwise similar circumstances.

4B.8 Nonetheless the CBI report argues for action to overcome the lack of a "generally accepted method for identifying, evaluating and remedying environmental damage" (paragraph 89) and to improve the "network of standards to which land should be cleared up which is already developing piecemeal in the UK" (paragraph 95).

4B.9 Any **deterrent effects of regulatory obligations** on the behaviour of a potential polluter will depend on their awareness of the risk of pollution and their estimate of the likelihood that he will have to meet the costs of restoration. That awareness will owe something to the educational activities of the regulators.

4B.10 But **the private sector** is also responding: the Chemical Industries Association provides advice and information about contamination for its members; the CBI intends to promote awareness among its members; and some firms undertake environmental audit and monitoring either for themselves or at the behest of their lenders or insurers.

4B.11 A number of UK lenders have endorsed the approach to the environment and to the management of risks to it set out in "*Banking and the Environment: Statement by Banks on Environment and Sustainable Development*"; United Nations Environment Programme, Geneva, May 1992.

Preliminary conclusions

4B.12 There is a continuing need for a regulatory framework to prevent or minimise new pollution, and to require action in respect of existing pollution. Regulators must also continue to be able to take action themselves where that cannot be achieved by other means and to recover costs.

4B.13 The various regimes governing regulatory action, however, vary to an extent that may not be fully justified by the different circumstances they are addressing. There should be some harmonisation on the basis of the provisions in the 1990 Act.

B.14 Voluntary action is usually preferable to formal enforcement action, and regulators should do more to encourage it. They should be ready to offer help and advice, and should seek to provide a consistent framework whereby markets know what is required of them. The creation of the Environment Agency (see Issue G) will help in this respect.

Joint obligations, responsibility and individual resources

4B.15 Paragraph 2.31 above shows how the Common Law may enable a person to share the burden of a regulatory obligation. Obligations may be borne jointly by different persons from those identified by statute (see paragraphs 3.20 to 3.23 above).

4B.16 Issue E considers more specifically the question of who should pay. For the moment, however, it is enough to recognise that **responsibility is often shared** for the decisions and actions giving rise to many individual polluting events, let alone for the gradual and cumulative pollution which often causes contamination of land. There is a need for regulatory obligations to be able to match the shared responsibility for pollution.

4B.17 Although arrangements for **enforcing joint burdens** or for the **transmission of burdens** through Common Law actions may appear uncertain, they have two advantages. The redistribution of a burden may be fairer on the individual parties involved, and its wider transmission reduces the risk that the scope for restoration will be limited where one person or organisation lacks the necessary resources.

4B.18 In the light of US experience, there are concerns, set out by the CBI, ACBE and bankers among others, that it might be **the "deepest pocket"** that pays. That is, of all the bodies involved in a case, the one with the largest available resources has to foot the whole bill, irrespective of the degree of responsibility. That party is then free to try to share the burden through action under private law. That approach, which rests on the "joint and several" liability provisions of US regulatory law, has deterred or restricted the provision of finance in the US for the treatment of contaminated sites or for potentially contaminative activities.

4B.19 Some commentators have pointed out areas - for example **lenders, receivers, trustees, or developers** - where people or bodies can, in the ordinary course of affairs, acquire burdens apparently exceeding their responsibility. They have argued that the individual exposure of such parties to burdens or liabilities should be limited so that they do not face costs which are open-ended or are simply disproportionate to their involvement in the scheme, trust, site or operation.

4B.20 There are cases where, for example, receivers have refused, or been unable to obtain the necessary warranties, to act in order to wind-up a business with a contaminated site. It is also argued that, where a borrower defaults on a loan secured on a contaminated property, British banks are at a disadvantage compared with European competitors. In the UK they risk, when taking possession of the property, acquiring liabilities beyond the value of the advance; in Europe, however, ownership is vested in the court, and only the advance and related sums are at risk.

4B.21 Problems may arise where contamination is treated to ensure that the land is suitable for a particular use. However, at a later date, the use of the land may change or further remediation

may become necessary or opportune. A developer who carried out the initial, worthwhile work would consider it unfair if he were made liable for the costs of the further work. Fear of such further liability could inhibit current remedial work.

Preliminary conclusion:

4B.23 People or organisations should normally be held liable for any responsibility under statute which they might have, even if indirect, for contamination. Accordingly, regulators should - in so far as appropriate - be able to pursue lenders, financial institutions, etc for recovery of costs in cleaning up contamination.

4B.24 The extent of liability should not, however, be determined by availability of resources. It would be inequitable and damage markets if regulators were able to pursue the financial sector to an extent disproportionate to their responsibility or ahead of others who had more direct responsibility.

4B.25 Under Issue E below there are proposals about regulators acting first against polluters and owners. Additionally, some people have argued for measures to limit the obligations which regulators can enforce where people or bodies would end up with exposure substantially greater than their loan or other commitment or responsibility. But any limitations to liability should be practical, and not open to abuse; and they would have to be weighed against the effects on public finances.

The special case of abandoned mines

4B.26 There are unique exemptions under the 1991 Act from criminal liability or regulatory obligations in respect of water escaping from abandoned mines which contaminates controlled waters. The justification for these special exemptions should be reassessed in the light of the emerging conclusions of the Review.

Issue C - What relationship should the statutory framework have with the Common Law?

4C.1 The Common Law, as it relates to contamination, is described in paragraphs 2.27 to 2.33 above, and certain features of it which bear on the issues are set out in that section. It is noted that the implications of the recent judgment of the House of Lords in the Cambridge case are still being considered.

4C.2 The Common Law enables a plaintiff to seek damages for, or to prevent the occurrence of, damage to his property or person. In a given case, it may well affect a different set of people or bodies from those subject to regulatory action.

4C.3 The Common Law may enable a plaintiff bearing the burden of a regulatory obligation to recover some or all of the costs from any defendant he can show should share the responsibility; in that way, it may make the regulatory regime operate more fairly and enlarge the resource base for funding the obligation.

4C.4 Remedies available under Common Law may include injunctions to prevent or abate a polluting activity and, where damage has occurred, orders for restitution. The award of damages may have no effect in preventing pollution or securing physical restoration of the environment: however, the reasonable costs of such restoration may be taken into account by the courts in determining the amount of damages.

4C.5 As with regulatory obligations:

- the deterrent effect on potential polluters depends on their perception of the risk of incurring a liability;

- liability may arise from pollution which occurred much earlier (subject, however, to time limits on how long after the discovery of an adverse effect a private case can be started); and

- the amount of damages payable is uncertain, though it does not include sums in respect of the unowned environment, only in respect of rights owned in it.

Preliminary conclusions

4C.6 It seems important that the Common Law should retain provision for individuals to join others in any action or to share burdens with others and for the Courts to determine the extent of each individual's exposure.

4C.7 Common Law has its own proper functions and so should not be used to duplicate functions which can better be achieved through regulation. It can, however, make markets work more efficiently, and to that extent take some of the burden off regulation. Because Common Law concerns private interests, it may well be acceptable that it apportions liabilities in a way that does not precisely match the effects of regulatory powers. However, if the differences become too great, this can create tensions and so uncertainties for private parties, and disrupt the efficient working of the market.

4C.8 While, therefore, a cautious approach should be adopted towards any statutory changes to Common Law, its amendment should not be ruled out. Some possible changes are discussed below under Issue D.

Issue D - Should there be any extension of strict liability?

Strict and fault-based liability

4D.1 Some obligations or liabilities are strict but others require the regulator or plaintiff to establish some degree of fault (see paragraph 2.40 above). It is argued that **strict liability is more appropriate for cases of environmental damage**, because, compared with a fault-based approach, it may be relatively:

- certain (as the regulator or plaintiff no longer has to overcome the additional burden of proving fault on the part of the potentially liable parties) and so has a greater deterrent effect on potential polluters;

- efficient (since legal costs are thereby limited and there is more chance of establishing a legal obligation to pay); and

- effective (since it is also more reliable in generating clean-up funds or in forcing potential polluters to take preventive action or to seek insurance or other cover for their risks).

4D.2 Some pressure for **wider application of strict liability** has come from international developments. It is an aspect of the Lugano Convention. The EC Green Paper says that it is " ... a recent legislative ... trend for certain activities dangerous to the environment ...".

4D.3 On the other hand, some commentators, including ACBE and the property industry, have suggested that any extension of the application of strict liability would be a major disincentive to investment in processes which can be polluting, in developing contaminated land, in carrying out remedial work or in trading in actually, potentially or formerly contaminated land.

4D.4 There are provisions for liability in English Law which are strict and others which are fault-based; in practice, either is usually combined with a range of defences against liability. One effect of such defences is often to temper or to blur the distinction between the two.

Defences

4D.5 Commentators have argued for a range of **defences against responsibility for environmental damage**, including the following:

- the action which gave rise to the contamination was not negligent;

- the action was acceptable at the time;

- the action conformed to the prevailing state of best knowledge and practice at the time (often known as a "State of the Art" defence);

- the action, if judged by a court now, ought to be tested against what a court would have thought of it at the time the event occurred;

- no-one could reasonably have foreseen the consequences of the action at the time (see the House of Lords ruling in the Cambridge case);

- no-one could possibly have foreseen the consequences of the action at the time (a rather sterner test favoured by the House of Lords Select Committee on the European Communities in 1990 when considering EC proposals for civil liability for damage caused by waste);

- the action was in compliance with regulatory authorisations; or

- the action took place too long ago (that is, time limits on legal actions should be based on the occurrence of the polluting event rather than, as at present, on the subsequent discovery of its effects).

4D.6 It is argued that such defences would be fairer to the operator or defendant and likely, by reducing some of the uncertainties, to improve the working of markets in contaminated land (see paragraph 4A.4 above); they could also reduce concerns about being penalised for unforeseeable consequences or having to meet unforeseen obligations or liabilities (see paragraphs 2.45 to 2.46 above).

4D.7 But their general effect would be to leave more plaintiffs without redress or regulators with no-one against whom to take action, and to transfer, not to remove, the potential burden of remediation or compensation. In practice, they might leave more damage untreated or transfer to taxpayers a substantial part of the estimated costs of remedying damage (see paragraph 2.18 above).

4D.8 Some commentators have argued for more onerous liability for the consequences of events from about, say, 1993 because the current debate has changed attitudes towards pollution and has led to generally increased awareness of the risks. They suggest that it would therefore not be unreasonable, now and for the future, to expect operators to take more care and to regard ignorance of environmental hazards as unjustifiable.

Preliminary conclusions:

4D.9 The practical distinction between strict and fault-based liability is often one of emphasis rather than total polarity. It seems, subject to further analysis of the judgment in the Cambridge case, that the current mix of strict and fault-based approaches strikes a reasonable balance. A strong case would be needed for the introduction of any defence that would weaken the ability of regulators to secure remediation, or which would pass costs to the taxpayer.

4D.10 There may be a stronger case for defences which relate to past contamination, especially in the distant past; the most deserving of further examination would, subject to consideration of the ruling in the Cambridge case, appear to be the "no-one could reasonably have foreseen" and "what a court would have thought at the time" approaches. Both would, however, present problems in trying to reconstruct what level of ignorance of hazards on the part of operators would have been justified at the time or what view a previous court might have taken.

4D.11 It would be a major innovation to give more than evidential weight in Common Law cases to compliance with regulatory consents and so effectively exclude from private liability the effects of actions that were at the time subject to such consents. It would appear to reduce plaintiffs' scope for seeking redress.

4D.12 As regards regulatory obligations, consents have not generally been drawn up on the basis that they would remove from the operators of processes responsibility for the consequences of their actions, including damage to the environment. For past pollution the effects of a regulatory compliance defence would be to shift the burden of remediation from the polluter or owner of land to the public sector. For future pollution, the general effect on the terms of consents or on required standards of treatment could well be to encourage regulators to be excessively cautious, to the general detriment of industry and against the grain of the Government's deregulation initiative. There would be a stronger case, however, for a polluter to have a defence where it took an action at the express request of a regulator.

4D.13 There are already time limits in the Common Law related to the appearance of damage rather than to the polluting event. Given the often concealed nature of contamination and the latent effects, especially where chemical changes in the ground or the movement of contaminants is involved, it would seem that any event-related time limit would have to be very long to strike a fair balance between operators' and regulators' or plaintiffs' interest.

Issue E - Who should pay for putting right environmental damage?

4E.1 The **polluter pays principle** ("PPP") must be central to any regulatory regime. Commentators such as ACBE, the CBI and bankers go further and argue that the PPP alone should apply. In their view, where no-one can be found against whom a case can be proved or where such a person lacks the necessary resources, the burden should become a "social cost".

4E.2 Some degree of **certainty** is required both for regulators and business alike as to who may be subject to an obligation and under what circumstances. Regulators should generally aim first

at the polluter and should not be able to spread their net unduly widely.

4E.3 It is, on the other hand, a principle of long standing that **the owner of a property is responsible for its condition** and for its effects on other properties. Much past pollution will:

- have been caused by the owner or occupier of a site as the person who carried out the polluting action; or
- be the owner's responsibility, subject to any arrangements he may have made when either
  - buying it; or
  - leasing or otherwise admitting the occupier to it.

4E.4 It does not, therefore, necessarily follow from the PPP that obligatory remediation should always and only be enforced on the actual polluter. For past pollution, the polluter may be no longer known, or may have gone bankrupt. Equally, the liabilities created by the pollution might or should have been taken into account in subsequent sales of property to new owners.

4E.5 It would follow that, depending on the circumstances, the primary target for a regulator seeking to enforce an obligation in respect of past pollution could be the owner or occupier of the site. It would be administratively economical, and the Common Law would provide that person with the chance of sharing the burden if he could establish the liability of others.

4E.6 There may be particular problems with so-called "orphan sites" where the polluter cannot be identified or neither he nor any other responsible person has the resources required to stop pollution from contamination. If so, it may be necessary, in order to avoid risks to health or unacceptable environmental damage, for the public sector to take responsibility.

Preliminary conclusion:

> *4E.7 It need not be inconsistent with the PPP to provide for the enforcement of regulatory obligations on others, especially the owner. The regulator should be able to seek to enforce obligations on the person responsible for the pollution or on anyone to whom the polluter has transferred the burden of meeting the obligations however that transfer took place.*

4E.8 But, where responsibility has been shared or transferred, regulators should not be delayed or defeated by the need to disentangle a complex web of corporate or contractual relationships. Nor should they be inhibited from taking urgent action simply because of the need to investigate the history of a particular contamination episode or the relevant legal relations or by first ensuring that they will be able to recover their costs. Any other approach would perpetuate the risks to health or the environment.

4E.9 In any event, where contaminated land has been dealt with at public expense and its value thereby enhanced, the land owner should not make an uncovenanted gain.

Preliminary conclusion:

> *4E.10 It should be as difficult as possible to evade responsibility through corporate or contractual devices. Regulators should retain the freedom to act quickly on appropriate cases even where liability is unclear. They should be the first to benefit by way of recovered costs from any value added to the land.*

4E.11 There are cases where **individual householders** face actual or potential obligations which could exceed the value of the property or, conversely, so frighten would-be buyers as to render the property worthless.

Preliminary conclusion:

> *4E.12 There may be a case for extending to all applicable statutes provisions whereby financial hardship can be taken into account - see paragraph 3.18 above. This might, in particular, assist private householders who have unwittingly bought property with major contamination problems.*

Funding the burdens

4E.13 Lastly, an important part is to be played by the private sector in providing a financial framework in which funds are available to clean up contamination and avoid blighting effects.

4E.14 This raises the question of whether liable persons or a broader field of people and bodies should be required to make some form of **advance payment**, whether by way of insurance premia, bonds, or levies to provide a fund. The fund approach is aired in the EC Green paper which reviews areas, such as orphan sites, where a fund should meet the costs. The US Superfund in the narrow sense is a form of advance funding of remedial works from a variety of sources including taxation and industry levies; expenditure recovered from liable parties is returned to the fund.

4E.15 One way for the private sector to build up capacity to meet uncertain, future expenditure is **insurance.** The costs of meeting responsibilities for contamination and remediation can sometimes be laid off through the market in environmental impairment liability ("EIL") insurance.

4E.16 **The EIL market** is in transition. There is a general move, following the issuing in 1991 by the Association of British Insurers ("ABI") of a new standard exclusion clause, to eliminate cover from general policies; in response to US experience, the market is developing specialised EIL policies.

4E.17 **Compulsory insurance** has been mooted for future activities which could cause contamination. Insurers are hostile to this, partly because of the difficulty of identifying for certain when contamination occurred - before or after a policy was taken out. There is also a risk that the availability of insurance would come to determine what activities could be carried out rather than an efficient insurance market developing to provide cover for activities which are carried out. Insurers do not wish to become "environmental policemen".

4E.18 Some companies are **carrying the liabilities themselves** on- or off-balance sheets. Others seek to share the risks through insurance or through sectoral funds, which are supported by the special expertise from within the industry to deal with a given class of problems and under the control of the participating companies. In Denmark, for example, the major petrochemical companies have discussed with the Government setting up a voluntary fund to cover liabilities in respect of contamination at petrol-filling stations, including those of independent operators.

Preliminary conclusion:

> *4E.19 The outcome of this Review is intended to make it more likely that the insurance market will be ready to insure businesses against contamination and, in doing so, will encourage risk assessment and preventative measures. There should be scope for individual sectors to build their own, voluntary funding arrangements to spread liabilities, whether for existing or future damage, in ways which keep the extent of liability and the control of the funds within their own spheres of accountability and responsibility. The case for compulsory general EIL insurance has yet to be made, and there would seem to be little point in imposing a requirement which, in relation to historic pollution, no-one seems likely to underwrite.*

Issue F: How should markets be provided with information?

The withdrawal of section 143 registers

4F.1 When announcing the Review in March 1993, Ministers also said that they were withdrawing proposals in relation to section 143 of the 1990 Act for local authorities to keep registers of land subject to potentially contaminative uses ("section 143 registers").

4F.2 The section 143 registers would have brought together the readily available information each authority was able to assemble about the past or present use of sites in their area for one or more of the prescribed uses. The registers would have been open to the public.

4F.3 But responses to the consultation exercise suggested that the information could have been misleading or blighting in too many instances. It could have been only as complete as the

sources available to the authority allowed. It would not, moreover, have been on its own conclusive about whether a site was contaminated, let alone by what substances or to what degree. And no entry, once validated, could have been deleted even if the site was in fact uncontaminated or any actual problems had been wholly or substantially remedied.

Information and land transactions

4F.4 The **private sector** has shown itself capable of fulfilling some of the intended purposes of s143 registers. It is now possible to buy some of the relevant services - to examine old maps and other sources to identify any potential for contamination; and to undertake environmental appraisals and surveys of sites. The advertised price of compiling information about possible contamination is typically £250/site; but the costs of physical sampling and chemical analysis can readily exceed £2000 for a small site. Professional advisers undertaking valuations or searches preparatory to conveyances are increasingly using those or other means of finding out about and evaluating problems.

4F.5 Some **local authorities** have compiled databases which collate material which would have been required under section 143. Public authorities have had a duty since 31 December 1992 under the **Environmental Information Regulations** to disclose environmental information which can include information relevant to contamination.

4F.6 Even so, there are three linked **problems in the way the market handles information** about land which is or may be contaminated:

- If information about actual or potential contamination is not taken into account, then the price is arguably too high and the purchaser may face a loss of equity.

- If the information indicates only a possible problem, a transaction may be aborted even where there is no contamination.

- The cost of obtaining information about the mere possibility of contamination can more than double the cost of a domestic conveyance or exceed the interest charge on a loan to a small or medium-sized enterprise ("SME"). It may therefore be uneconomic to collect information for the domestic housing and SME markets, to the extent that any suspect site might be blighted.

Caveat emptor and market failure

4F.7 Some commentators argue that the principle of **caveat emptor**, which applies to land transactions, is an additional obstacle to the ready flow of information. Sellers appear to have an incentive to limit disclosure to avoid having to accept a lower

price. Buyers faced with uncertain information and the possible costs of investigations to resolve their doubts may withdraw.

4F.8 It is argued that caveat emptor can operate particularly unfairly if the parties to the relevant transaction could not possibly have been informed at the time about a contamination problem. That can happen, for example, where either the contamination is revealed long after the polluting event (which may have passed unnoticed at the time) or where the plaintiff or the regulator is able to establish only at a later date that the consequences were damaging. Under such circumstances an "innocent owner" may find he has a liability without having had any opportunity to obtain an off-setting reduction in the price or a vendor's warranty. (Neither vendor nor purchaser is likely to be able to "insure the past" and so share the risk.)

4F.9 Some argue that this is so unfair and such a disincentive to the marketing and use of potentially contaminated land that, when dealing with environmental liabilities in land transactions, sellers should be put under a duty to disclose information without being asked for it. An extension to that approach of increasing the vendor's responsibility for volunteering information would be to provide for an implied warranty in the contract of sale to the effect that the land was not known by him, after his taking reasonable steps to establish the position, to be contaminated or likely to be contaminated.

4F.10 On the other hand, that approach would dissipate the current clear transfer of responsibility to each successive buyer which takes place at completion. Moreover, there are other forms of latent defect, notably subsidence, which can be just as hard to handle under the current arrangements. In any case, some legal commentators already advise their clients that they would be better off in the marketplace if they compiled the information for voluntary disclosure to buyers in order to pre-empt any concern.

Research and Guidance

4F.11 DOE has in place a programme of research intended to consolidate existing knowledge, to advance understanding of risks from contamination, and to provide guidance on how best to assess and set priorities for those risks. It is aimed towards areas where markets are failing to solve information difficulties for themselves.

4F.12 The main priorities for the programme are: guidance on the information needed to assess risks; procedures for categorising and assessing risks; and evaluation and selection of remedial methods. The programme also includes projects on risk communication, factors affecting value and saleability of property which may be contaminated, and best practice in investigating and treating contaminated land. Expenditure on the programme in 1993/94 is £1.5M.

Linkage to the planning system

4F.13 Contamination is relevant to **planning** (see paragraphs 2.25 and 2.26 above). DoE and WO advised LAs in 1987 (Circular DOE 21/87; WO 22/87) that it is "a material consideration" and should be considered in preparing plans and deciding planning applications. Where the circumstances of a site justify it, applicants can be required to undertake surveys or to take remedial action to bring the site to a state which is suitable for the proposed use as a condition of being granted planning permission.

4F.14 In its response to the section 143 proposals, the Royal Institution of Chartered Surveyors ("RICS"), supported by other bodies, proposed that all or some selected planning applications should be accompanied by a Land Quality Statement ("LQS"). The LQS would remain on the planning register and so be available as a source of information, especially to regulators and would-be purchasers.

4F.15 The coverage of the country by LQSs would, of course, depend on where planning applications were made and on the way in which authorities exercised any discretion in requiring them. Many sites would not be covered for many years. There would be a risk of blighting sites where an LQS was required and registered.

Preliminary conclusions:

4F.16 Markets are effective when owners, purchasers and vendors alike are well informed and when there is as little scope as possible for misunderstanding the position. DoE intends to continue its research programme to prepare and publish reports and guidance for the use of public authorities and private bodies and advisers to enable them to decide for themselves the appropriate action, if any, in the circumstances.

4F.17 It appears that implementing section 143 of the 1990 Act may not be necessary to ensure an efficient market in land and to ensure that contamination is put right.

4F.18 It would clearly be in the interests of all concerned if the conveyancing process was as economic, efficient and effective as possible in assembling information about contamination for relevant transactions. DoE has taken that up in the first instance with the Law Society and the Local Authority Associations. DoE will also continue to discuss the LQS proposal with RICS.

4F.19 In reviewing the vendor's duties of disclosure of any knowledge of actual or potential contamination, especially from causes well in the past, it seems necessary to distinguish the major commercial transactions from those involving domestic and SME vendors. For the former, it would seem in practice to add little if anything to the existing balance of incentives to make disclosures; the current arrangements place a responsibility and incentive

on each participant to play a full role in the identification of contamination and in the consideration of necessary remedial action; that is too valuable to lose without good cause. But the particular difficulties in ensuring the generation and transmission of such information in the domestic and SME markets may shift the balance of advantage there.

4F.20 The role of the planning system in encouraging the investigation, reporting, assessment and remediation of land as part of the process of ensuring its beneficial use or re-use will continue. This will be re-stated in the forthcoming Planning Policy Guidance Note ("PPG") on "Planning and Pollution". The resulting information flows will continue whatever the outcome of the discussions with RICS about the LQS proposal.

Issue G - What other roles should public sector bodies have?

Environmental regulation and the citizen

4G.1 The Government set out in "*This Common Inheritance: The Second Year Report*" (Cm 2068, London HMSO, 1992) many measures to enhance the role of the individual in protecting and enhancing the environment. This paper is concerned with relationships between individuals, private bodies and public regulators. Under both deregulation and the Citizen's Charter, Ministers are concerned to see that, where appropriate, individuals can and do exercise rights and take on responsibilities. This part looks at the roles of the regulators not already covered.

4G.2 The principal regulator of the water environment will continue to be the NRA and, if Parliament confers the necessary powers, the proposed Environment Agency. People will look to them for action and information on contamination affecting the water environment. But the initial responsibility for issues affecting land alone will continue to rest with local authorities. They also have the relevant planning powers in most areas. There will be consultation between the regulators.

Land markets

4G.3 Under the general approach outlined in this paper, land values of contaminated sites might sometimes be negative. Where the owner of the land does not have other funds to clean up the contamination, or to provide some form of warranty, this may result in the land remaining unusable.

4G.4 Some commentators have suggested, however, that land use planning decisions which restrict the availability of greenfield sites could help increase demand for, and the value of, "brownfield" sites including those with contamination problems. That, in turn, could generate the funds to pay for the works needed to bring the land into beneficial use.

Preliminary conclusion:

4G.5 The forthcoming PPG will remind local planning authorities of the place of contamination issues in their work on development plans and in taking decisions on planning applications. Individual authorities will then determine the priority given to this in their particular circumstances and its effects in their particular area.

Overcoming blight and dereliction

4G.6 English Partnerships ("E3P") in England and the Welsh Development Agency ("WDA") in Wales have important roles in respect of contamination where it is a component of dereliction. They will be able to help prevent this having a more general blighting effect by using their powers to secure the reclamation and development or to reclaim land. E3P will be able to make use of the grant arrangements which will replace Derelict Land Grant ("DLG") and City Grant. WDA will continue to use DLG to tackle dereliction including contamination.

Preliminary conclusion:

4G.7 E3P and the WDA will have a proper role to play in cases where lack of action over contamination of a particular site has hindered the development of a wider area. However, the funds available will always be finite and priorities will be set in the light of E3P's and WDA's wider objectives.

The Environment Agency

4G.8 The **Environment Agency** will also have a central role. It will be the successor to many of the powers currently exercised by HMIP, the NRA and WRAs, including those to require remedial works or to undertake them and to recover costs. The Agency might also take over from DoE tasks in the general field of advice, guidance and research on handling the risks from contaminated land which sit readily with its proposed core functions.

4G.9 DoE's 1992 Consultation Paper on **section 61** of the 1990 Act (which relates to closed landfill sites and has yet to be implemented) proposed that the responsibilities of WRAs should be split so as:

- to make borough and district councils responsible for identifying closed landfill sites alongside their existing duties under statutory nuisance;

- to make them responsible for the initial assessment of sites and for monitoring low risk sites in accordance with a protocol agreed with the Agency;

- to make the Agency responsible for supervising the councils' discharge of their responsibilities and, where

necessary, make it responsible for monitoring high risk sites; and

- to make the councils responsible for any necessary remedial work in accordance with a protocol agreed with the Agency.

Preliminary conclusions:

4G.10 The Environment Agency could be given a general responsibility, building on work already undertaken in DOE, to establish a framework of guidance within which remediation of contaminated land could be addressed by itself and other regulators. This might include guidance on the extent and associated risks of types of contamination in various contexts and hence relative priorities, and on approaches to treatment. Such guidance would need to be drawn up following wide consultation and would be designed to improve understanding of risks, to assist the private sector in ensuring that land is treated to appropriate standards.

4G.11 The existing proposals for the future of section 61 will need to be reviewed in the light of the general recommendations from this Review and of the other emerging institutional changes. It should not be brought into force until the necessary amendments have been made and responsibilities have been transferred.

SECTION V - QUESTIONS FOR RESPONDENTS

5.1 The following questions are set out here for the convenience of respondents. It will greatly help the task of collating and doing justice to responses if respondents relate what they wish to say to specific questions wherever they can.

Issue A

(1) Do you consider that the priorities proposed for the policy in paragraph 4A.5 above are appropriate?

Issue B

(2) Should there be greater consistency in regulators' powers?

(3) Should regulators make greater efforts to help to increase understanding in markets of what they do, especially about protecting the unowned environment?

(4) Should regulators continue to be able to pursue one or more persons? To what extent, if any, should there be provision for limiting the financial exposure of some persons or bodies such as trustees, receivers, lenders or home-owners; and, if so, who should pay instead?

(5) What, if anything, should be done about the exemptions in respect of abandoned mines?

Issue C

(6) Do you consider that, subject to any further consideration of the House of Lords judgment in the Cambridge case, there should be the minimum of change to private, Common Law, undertaken only where it causes tensions or uncertainties, and not undertaken solely to keep Common Law liability in line with regulatory obligations?

Issue D

(7) Do you consider that the current mixture of strict and fault-based approaches strikes broadly correct balances in regulatory and Common Law between the public interest and the interests of plaintiffs on one side and those of liable persons on the other?

(8) Do you consider that there should be any changes, in statute law or Common Law, in the availability of the following defences in relation to historic pollution:

- *(a) a "State of the Art" defence;*

- *(b) the unforeseeability of damage; or*

- *(c) regulatory compliance?*

Issue E

(9) Do you consider that it need not be inconsistent with the PPP to provide for the enforcement of regulatory obligations on others, especially the owner, to whom the polluter has transferred the burden of meeting the obligations however that transfer took place; and that it should be as difficult as possible to evade responsibility through corporate or contractual devices.

(10) Do you consider that:

- *(a) liabilities for contaminated land should generally be met as they fall due or arise rather than in advance through contributions to funds or insurance; but*

- *(b) industry sectors should be encouraged to set up voluntary arrangements for sharing or funding existing or future liabilities for contamination?*

Issue F

(11) Do you consider that it is for DoE/WO, professional practitioners and local authorities to identify and to advise on the best practices on the flow of information about actual or potential contamination, especially through improvements to the conveyancing process?

(12) Should DoE continue with its current priorities for research and the development of guidance on the identification and assessment of risks?

(13) Do you consider that there should be no change in the application of the principle of caveat emptor in land transactions as regards environmental liabilities?

Issue G

(14) Should the planning authorities, English Partnerships and the Welsh Development Agency, in consultation with the pollution control regulators, aim for the use or re-use of contaminated land, where practicable and subject to dealing with any threats of harm to health or the environment?

(15) Should the Environment Agency be given a general responsibility to establish a framework of guidance for dealing with contaminated land?

SECTION VI - RESPONDING TO PAYING FOR OUR PAST

Where to send responses

6.1 Anyone who wishes to let DoE know their views should write to:

Paul Watkinson
Contaminated Land and Liabilities Division
Department of the Environment
Room A310
Romney House
43 Marsham Street
LONDON SW1P 3PY

6.2 Respondents are requested to send or to copy any comments relating specifically to Wales to:

R J Gibbs
Environment Division 3
Welsh Office
Cathays Park
CARDIFF CF1 3NQ

Closing date

6.3 Comments should be submitted not later than **3 May 1994**.

Number of copies

6.4 Please send **two** separate copies of your response.

Confidentiality

6.5 Those commenting should also indicate:

- whether they propose to publish their comments or to make them available to the media; and

- whether they agree that the Department may make their comments available to Parliament and open to public inspection by placing copies in the Department's library.

6.6 If the answer to both questions is "no", comments will be treated as being in confidence to the Government, but may be counted in any numerical survey which does not identify individual responses.

Consultations in Scotland

6.7 A separate consultation paper is being issued in Scotland by the Scottish Office Environment Department in connection with the separate review in Scotland - see paragraph 1.5 above. Copies may be obtained from:

Lawrie Anderson
Air & General Environment Protection Division
Scottish Office Environment Department
Room 205
83 Princes Street
EDINBURGH EH2 2ER

Additional copies

6.8 Further copies of this paper are available from the Department of the Environment (tel: 071 276 8469) or from Julie Owen at the Welsh Office (tel: 0222 825 546), at the addresses given above.

Copyright

6.9 Copyright is vested in the Crown. *Paying For Our Past* cannot be copied or reproduced for any commercial purposes. You may, however, if you wish, take whole or part copies to enable colleagues or departments within your organisation to contribute to your response.

Department of the Environment
Welsh Office

March 1994

Annex A

ANNOUNCEMENT OF THE REVIEW AND ITS TERMS OF REFERENCE

Written Answers, 24 March 1993

Contaminated Land

Mr Hawksley: To ask the Secretary of State for the Environment when Her Majesty's Government expect to reach a decision on their consultative proposals for local authorities in England and Wales to set up statutory registers of contaminated uses of land under section 143 of the Environmental Protection Act 1990; and if he will make a statement.

Mr Howard: My right hon. Friend the Secretary of State for Wales and I have received a large number of comments on the consultative proposals we issued last July. I am placing in the Library a list of respondents.

Although there is widespread agreement that the problem of contamination of land is a serious one that needs to be addressed, there has also been substantial criticism of the proposals for the registers on three main grounds:

that since the proposed registers would be based on the criterion of use or former use by a limited range of potentially contaminating activities it would include a large number of sites that are not actually contaminated, while missing other sites that are actually contaminated by other former uses not on the prescribed list;

that since the register would record past potentially contaminative uses of land there would be no way of removing such sites from the register even if any contamination had been satisfactorily dealt with;

that when sites are identified as actually contaminated it remains unclear in some cases what action should be taken, what remediation measures should be carried out and by whom, which regulatory authorities should be involved, and, where the liability for the cost of remediation should fall.

We have given very careful consideration to all comments received. The Government remain determined to ensure that land contamination does not give rise to unacceptable risks to health and safety, to ground water and to the environment generally, and also to ensure that vacant urban and industrial land can be put back into good use wherever practicable. The responses to our consultation paper showed that the proposed registers would have made this objective more difficult by reducing confidence in the value of sites placed on the register, thereby exacerbating blight without giving any clear indication on how such sites could be brought back into good condition and confidence restored.

We are therefore today withdrawing our proposals for establishing registers of contaminative uses of land, and announcing a new wide-ranging review of the problems in this area. The review will be conducted by and interdepartmental group of officials under the chairmanship of my Department and will seek contributions from interested parties. Its terms of reference will be as follows:

> To review the powers and duties of public authorities which relate to the identification, assessment and appropriate treatment or control of land that could cause pollution of the environment or harm human health, having regard to the need to minimise the costs which existing and new regulatory burdens place on the private sector; to consider the mechanisms for recovering authorities' costs in controlling or remedying pollution of such land sufficient to ensure its safety for health and the environment, and its return to beneficial use where practicable; to consider the applications of these for the role of the Environment Agency; to report initially on any statutory changes needed in the short term and on the scope of any longer-term studies that should be put in hand; and to undertake and report of those studies.

Meanwhile, local authorities will still have their long-standing statutory powers to find and deal with actual pollution which is a source of danger and to decide planning issues about contamination. They will therefore continue to keep information about land for those purposes and to give informed answers to queries. The Government will continue to provide technical guidance to assist authorities in their tasks.

Annex B

BIBLIOGRAPHY AND GLOSSARY OF ABBREVIATIONS

Bibliography

1990 White Paper - This Common Inheritance: Britain's Environmental Strategy (Cmnd 1200, London, HMSO, September 1990)

1990 Act - Environmental Protection Act 1990 (c43, HMSO)

1991 Act - Water Resources Act 1991 (c57, HMSO)

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EC Green Paper - Green Paper on Remedying Environmental Damage (European Commission, Com(93)47, 14 May 1993)

House of Lords Report - House of Lords, Select Committee on the European Communities, Remedying Environment Damage (Session 1993-94, 3rd Report, HL Paper 10, London, HMSO, December 1993)

Lugano Treaty - Convention on Civil Liability for damage resulting from activities dangerous to the environment (Council of Europe, European Treaty Series 150, Lugano, 21 June 1993)

UK Response - Response of the UK Government to the EC Green Paper (Department of the Environment, London, 8 October 1993)

Glossary of abbreviations

ABI	Association of British Insurers
BATNEEC	Best Available Techniques Not Entailing Excessive Cost
Cambridge case	Cambridge Water Company v Eastern Counties Leather plc, judgment given by the House of Lords on 8 December 1993
CBI	Confederation of British Industry
DLG	Derelict Land Grant
DoE	Department of the Environment
E3P	English Partnerships
EIL	Environmental Impairment Liability Insurance
FoE	Friends of the Earth
HMIP	Her Majesty's Inspectorate of Pollution
IPC	Integrated Pollution Control
LQS	Land Quality Statement
NRA	National Rivers Authority
PPG	Planning Policy Guidance
PPP	Polluter Pays Principle
RICS	Royal Institution of Chartered Surveyors
SCAs	Supplementary Credit Approvals
Section 143 registers	Proposed registers under section 143 of the 1990 Act of land subject to contaminative uses; proposals were withdrawn on 24 March 1993
SMEs	Small and Medium-Sized Enterprises
SOED	Scottish Office Environment Department
US Superfund	US scheme under the Comprehensive Environmental Response, Compensation and Liability Act 1980
WCAs	Waste Collection Authorities
WDA	Welsh Development Agency
WO	Welsh Office
WRAs	Waste Regulation Authorities