

# Review of LSD10: Contaminated Land

## 1. Introduction

- 1.1 This paper will review the Aberdeenshire Local Development Plan SG LSD10: Contaminated Land and assess whether any changes are required in light of amendments to national/regional policy and changes in the local context. It will also assess whether the guidance forms a sound basis for making planning decisions on contaminated land in Aberdeenshire.
- 1.2 SG LSD9: Contaminated Land aims to reduce the number of contaminated sites in Aberdeenshire by bringing such sites back into use, whilst ensuring public health and safety is not compromised.

## 2. Background

### 2.1 National context

2.2 A statutory regime for remediating contaminated land came into force in Scotland on July 14 2000. Legislative provision for the new regime was made in the Environment Act 1995 through a new Part IIA of the Environmental Protection Act 1990. Under Part IIA the primary regulatory role for dealing with contaminated land rests with Scottish Local Authorities, who are required to identify all contaminated land in their area, establish responsibilities for the remediation of the land and ensure that this takes place. This excludes 'special sites', which are the responsibility of SEPA.

2.3 Part IIA of the Act adopts a risk-based approach to contaminated land, defining it as land, which, through confirmed or suspected substances in, on or under the land:

- *“Significant harm is being caused or there is a significant possibility of such harm being caused*
- *Pollution of the water environment is being or is likely to be caused”.*

Contaminated land therefore does not necessarily include all land where contaminants are present.

2.4 Part IIA recognises that the risks posed by contamination will vary depending upon the use of the land. In light of this, Part IIA adopts a 'suitable for use' principle to ensure remediation requirements are site specific and proportionate. Remediation is only required to prevent unacceptable risks to human health or the environment in relation to the permitted or allocated use of the land.

2.5 Part IIA also uses the 'polluter pays' principle to establish liability for remediation work. In the first instance the person who causes the contamination will be liable. If this person cannot be identified, liability passes to the current owner/occupier of the land.

2.6 Part IIA refers directly to the role of planning when it states that:

*“ensuring that land is made suitable for any new use, as planning permission is given for that new use..... is the role of the town and country planning and building control regimes”.*

2.7 In addition, Part IIA provides a basis for LSD10 by stating that *“Planning authorities are responsible for preparing structure and local plans which set out*

*the policy framework for dealing with issues such as the development of contaminated land”.*

- 2.8 The Environmental Protection Act: Part IIA Contaminated Land Statutory Guidance (2006) aligned the contaminated land regime and the relevant provisions of the Water Environment and Water Services Act 2003 (the 2003 Act).
- 2.9 Scottish Planning Policy (2010) does not provide policy on contaminated land directly. However, SPP’s preference for the redevelopment of brownfield sites over development on greenfield land broadly supports the aim of LSD10 to “*bring contaminated land back into use*”. While it is accepted that brownfield land may not always meet Part IIA’s risk based definition of contaminated land, brownfield land will include a significant proportion of contaminated land. Therefore SPP, indirectly, requires the redevelopment of contaminated land. LSD10 can also be seen to align with SPP’s requirement for development plans to contribute to sustainable development, as it enables environmental improvement.
- 2.10 Planning Advice Note 33 “*Development of Contaminated Land*” directly supports the need for a specific policy on contaminated land (LSD10) by stating that “*Planning authorities have a positive role to play in tackling the legacy of contaminated land by developing appropriate development plan policies for the remediation and redevelopment of contaminated land*”. The approach advised by PAN33 aligns with Part IIA legislation by adopting its definition of contaminated land, along with the ‘risk based’ approach and ‘suitable for use’ and ‘polluter pays’ principles. Overall PAN33 requires planning authorities to ensure that their policies, procedures and decisions are consistent with Part IIA legislation.
- 2.11 Planning Advice Note (PAN) 51 *Planning, Environmental Protection and Regulation* also reflects the key requirements of Part IIA. Importantly, it aligns planning advice with The Environmental Protection Act: Part IIA Contaminated Land Statutory Guidance (2006), in terms of the specific need to consider potential contamination risks that may impact upon water and the wider environment.
- 2.12 National Planning Framework 2 broadly reinforces the need for LSD10 when it states that “*The statutory regime for cleaning up contaminated land provides for local authorities to identify sites and bring about their remediation*”.

### 2.13 Strategic/regional context

- 2.14 While the Proposed Aberdeen City and Shire Strategic Development Plan (SDP) does not mention contaminated land directly, it reflects SPP when stating that “*Opportunities for redeveloping brownfield sites....need to be a clear priority*”. As with SPP, this indirectly supports the provision of LSD10.

### 2.15 Local Context

- 2.16 The Aberdeenshire Council: Contaminated Land Strategy (2011), which details how potentially contaminated land is identified and how and when remedial works are secured, identified planning policy and development management as important ways in which to secure remediation.
- 2.17 Aberdeenshire does not have a legacy of heavy industry, with the most significant contamination associated with former landfills (200 sites) and gasworks (30 sites). Other sites such as fuel storage depots, military establishments and ad hoc industrial land are currently under investigation.

## **3. Policy Approach**

- 3.1 The current policy permits development on land that is contaminated, or suspected of contamination where the necessary site investigations and

assessments are undertaken to identify any actual or possible significant risk and effective remedial action is taken to ensure the site is made suitable for the new use, in scale with the nature of the proposal.

- 3.2 LSD10 aligns with PAN33 and fulfils Part IIA legislation for development plans to “*set out the policy framework for dealing with issues such as the development of contaminated land*”.
- 3.3 The opening line of the policy and criterion 1 accords with the PAN33 definition of contaminated land by covering land that is either confirmed or suspected of contamination. Criterion 1 is also in line with the Part IIA requirement for local authorities to identify contaminated land in their area using a risk based approach.
- 3.4 Criterion 1, by requiring potential pollution of the water environment to be considered, aligns with The Environmental Protection Act: Part IIA Contaminated Land Statutory Guidance (2006).
- 3.5 Criterion 2 fulfils the PAN33 requirement for contaminated sites to be suitable for the intended use and proportionate to the scale of the development.
- 3.6 Paragraphs 1 and 3 of the justification text align with SPP’s requirement for planning authorities to “*adopt a proactive approach and encourage the redevelopment of brownfield land*”.

#### **4. Drivers of change**

- 4.1 The Radioactive Contaminated Land (Scotland) Regulations 2007 made provision for radioactive contaminated land within the regime. While SEPA are identified as the lead authority, SEPA’s Planning Guidance on Land subject to Contamination Issues (2012) states that “*we need to ensure...there (is) a general (development plan) policy on land contamination which also covers radioactive contaminated land and special sites*”. Given that there is no legacy or current radioactive land use in Aberdeenshire there is no need for LSD10 to cover this issue. However, Aberdeenshire does have a ‘Special Site’ at Pelikan Hardcopy Scotland, Turriff, and therefore LSD10 should make reference to ‘Special Sites’.
- 4.2 The Environmental Protection Act: Part IIA Contaminated Land Statutory Guidance (2006) prevents disproportionate regulation being applied to contaminated land through trivial amounts of pollution to the water environment. In light of this there is a need to further define the use of ‘pollution of the water environment’ in criterion 1.
- 4.3 PAN33 states that “*Where there are high remediation costs they may be more easily borne by a new high value use*”. This suggests that significant remediation costs could, potentially, take precedence over existing LDP allocations. For example, where unsuspected levels of contamination are discovered on a site and the land value is not sufficient to address these, higher value land uses, could be considered to provide the financial means to remove the risk posed by the contamination. However, robust justification would be required to permit this and prove that the remediation costs were prohibitive. These higher value uses would require to be considered as proposals in a future development plan to ensure appropriate considerations of the implications of the development on other allocated sites and maintain a plan led system
- 4.4 PAN33 recommends that early dialogue take place between developers, the planning service and relevant consultees in order to identify the likely state of

contamination and the most appropriate means of remediation. In light of this, there is a need for the justification text to highlight the need for early dialogue.

## **5. Recommendations**

5.1 On the basis of this information the following recommendations are made.

- In criterion 1, replace 'pollution of the water environment' with 'significant pollution of the water environment'.
- In paragraph 4 of the justification text there is a need to highlight that local authorities have a duty to ensure the remediation of contaminated land. Therefore update the first sentence with 'statutory duty to identify and inspect potentially contaminated sites within their area and ensure their remediation'.
- In paragraph 4 of the justification text, include the following after the first sentence "While Sepa has responsibility for 'Special Sites', this policy can be used to secure their remediation".
- In paragraph 5 of the justification text add the following, 'early dialogue between developers, the planning service and relevant consultees is recommended in order to identify the likely state of contamination, the most appropriate means of remediation and associated costs'.
- Text should be added to the reasigned justification to promote application to the next LDP for land use to be upgraded in value where site remediation costs are unexpectedly high.

## **6. Summary of main points**

6.1 Current national legislation and planning policy/advice supports the need for a specific LDP policy on contaminated land. In general LSD10 provides a sound basis for assessing development proposals on contaminated land. However, there is a need to further define what constitutes pollution of the water environment, to reference 'special sites', highlight the need for early dialogue between stakeholders and provide a mechanism for the consideration of an upgraded in value when remediation costs are unexpectedly high.

## **References**

- Aberdeen City and Shire *Proposed Strategic Development Plan* (2013)
- Aberdeenshire Council (2012) *Aberdeenshire Local Development Plan 2012*
- Scottish Government (2010) *Scottish Planning Policy*
- Scottish Government (2009) *National Planning Framework for Scotland 2*
- Planning Advice Note 33 (2000) *Contaminated Land*
- Planning Advice Note 51 (2006) *Planning and Environmental Protection and Regulation*
- Sepa (2012) *Planning Guidance on Land subject to Contamination Issues*
- The Environmental Protection Act: Part IIA Contaminated Land Statutory Guidance (2006)