Discussion Paper

Does Northern Ireland need a Contaminated Land regime?

This discussion paper challenges the need to introduce a Contaminated Land regulatory regime in Northern Ireland. It considers the currently proposed regime to be inappropriate for the region and one that will result in unnecessary significant costs on the public purse. It considers the effective use and application of existing legislation to be a more cost-effective solution to the region's contaminated sites.

In 2011, The Northern Ireland Audit Office identified a potential gap in legislation governing contaminated land in the region. In 2012, the Public Accounts Committee asked the Department of the Environment and local authorities, to report on the environmental and financial impact of this legislative gap and, in September 2020, the Department of Agriculture Environment and Rural Affairs (DAERA) published its report[1].

This DAERA report concludes that a regulatory gap does exist, and that it could be impacting on the health of those living on contaminated sites, could be impacting surface and ground waters; and could be restricting the productive re-use of contaminated sites. To plug this gap, the report's authors call upon the NI Executive to commence Part III of the 23-year old Waste and Contaminated Land (Northern Ireland) Order 1997 (WCLO) and to provide appropriate levels of funding to local authorities so that they can inspect their respective areas, produce a public register of contaminated sites and then commence the process of enforcing the Polluter Pays Principle to remediate the contamination.

This paper presents matters for discussion that arise from a review of the DAERA report's findings.

Part III of the WCLO mirrors Part 2A (or IIA) of the Environmental Protection Act 1990 for England Wales[2] and Scotland[3]. Most practitioners agree that the Part 2A legislation has failed to deliver the wholesale remediation of contaminated sites in these jurisdictions[4].

The legislation aims to underpin the Polluter Pays Principle, forcing the original contaminator of land to remediate those sites that present a significant possibility of causing significant harm (SPOSH). In theory, once SPOSH has been established to be present, a local authority can serve notice on the original polluter, requiring mitigation of the risk. In reality, local authorities in England, Wales and Scotland have found that proving SPOSH has been exceedingly difficult, and enforcement procedures have been characterised by long-running and expensive legal challenges[5], often resulting in the public purse picking up not just the legal bill but also the remediation costs[6,7]. In practice, under Part 2A, the polluter rarely pays.

With regard to cost: In 2016, England's Environment Agency reported on the first 13 years of progress with Part2A (from 2000 to 2013)[8]. This report found that councils had spent at least £32 million of public money on inspections and a further £52 million on remediation. Over the same period, in Wales, c.£4 million had been spent on inspections and c.£6 million on remediation[9], and over the first 8 years of Scotland's Part IIA, £60 million of public funding was made available to local authorities[10]. Since the onset of public sector austerity-related budget reductions and the withdrawal of DEFRA grant funding in 2013, GB local authorities have all but ceased their duties under this regime[11].

To put potential costs into an NI context, Part III has the potential to cost the public purse somewhere in the region of £490 million in today's money. This figure is based on work undertaken in 2006 when the Department commissioned a consultancy to estimate the costs of fully implementing Part III[12]. Their report found that eleven councils would require £53 million to

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undertake their inspection strategies alone and that they would require a further £276 million for remedial works (a total inflation-adjusted cost of £490 million).

The findings in the DAERA report are based on an invitation-only NIEA facilitated workshop attended by academics and local authority officers and was held in July 2016, barely one month after the BREXIT referendum when the political, legal and economic worlds looked very different to what we are experiencing today.

The DAERA report fails to acknowledge that the majority of contaminated land in NI is owned by public bodies. For decades, local authorities ran their own unlicensed landfills and some still own major former gasworks sites. In addition, the NI Executive took complete ownership of, and absolved the MOD of, any liability bounce back for the contamination it caused on any of the former military sites they returned to the Executive. The author suggests that these bodies have a corporate and social responsibility to remediate these sites, and that introducing a legislative obligation that pitches one public body against another is counterproductive and unnecessarily bureaucratic.

The DAERA report identifies that, in the absence of Part III, the region could fall foul of a European derived Regulation relating to mercury[13]. It argues that if NI fails to produce a register of sites contaminated with mercury the region would potentially be exposed to EU infringement proceedings. Since NI's industrial heritage has not required the large-scale storage or use of mercury, the likelihood of there being such polluted sites is minimal. Any derived list would be very short, and the likelihood of being exposed to fines from Brussels for failing to create such a list is extremely low. In our current world, this driver for Part III is no longer relevant.

The workshop considered how Part III would facilitate the management of 30 sites. Although anonymised in the report, these sites are easily identifiable with the vast majority clearly failing the strict legal hurdles required to prove SPOSH that would then justify a local authority serving a remedial notice. One such site is a well-known completely cleared site in the centre of Belfast. Supporting information reviewed during the Planning process has determined that there is no unacceptable risk to groundwaters or the neighbouring river but that soils are heavily contaminated with immobile heavy metals. This, the report concludes, would make the site determinable as contaminated land, and that Part III notices would even help to accelerate its redevelopment. As the site has been devoid of an occupier or user for the past 20 years, it is hard to imagine how SPOSH could be applied to this site. It is even harder to understand how the local authority could legitimately apply Part III action to encourage the productive re-use of this site.

Many of the anonymised sites presented have been failed by existing legislation. Examples include permitted industrial processes that have failed to provide pre- and post-operation land condition reports, Planning approved developments that have failed to meet pre-commencement or pre-occupation conditions, licensed waste facilities that have failed to provide waste closure reports, and illegal waste dumps. The WCLO is very clear: Part III cannot be used for illegal waste deposits, nor was it ever intended to be used to facilitate action where existing legislation had failed or had not been properly enforced by the relevant regulatory body. As with the rest of the UK, the vast majority of NI's contaminated sites are remediated during the Planning process. Failure to ensure that sites are fit for use post-development is not because of the lack of Part III, it has everything to do with the failings in the application of existing legislation.

Another key presented argument is that the Planning regime prevents action being taken to mitigate an off-site source of contamination that is having a documented impact on a site being progressed through the Planning process. Several of the anonymised sites present this scenario, but at no point does the report explain why, when a regulatory body has documented evidence

of pollution it failed to use its powers under the Water Order (1999), the Groundwater Regulations (Northern Ireland) 2009[14] or the Clean Neighbourhoods and Environment Act (Northern Ireland) 2011[15,16]. The report's only justification is that it is difficult to take action under these pieces of legislation, which leads to the assumption that Part III would be more straight-forward to apply – something which is evidently not the case, judging from the experience of Part 2A in the rest of the UK.

In conclusion, the Northern Ireland Audit Office considers there to be a worrying gap in legislation governing contaminated land in NI. Based on the evidence presented in the DAERA report, one could surmise that there is a more worrying gap in the effective application of existing legislation, and a collective misunderstanding of what Part III is designed for and is able to deliver. In an age of climate emergency and biodiversity crisis, dwindling public resources could be better spent on the focused application of existing legislation rather than attempting to cut and paste other jurisdictions' failed legislation into a NI context. The very absence of a contaminated land regime in NI actually presents an ideal opportunity to devise a more inclusive Executive supported strategy that delivers tangible, cost-effective and NI-centric contaminated land solutions.

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