Senior Investigation Officer
Environmental Standards Scotland
Ìrean Àrainneachdail na h-Alba

ENVIRONMENTAL
Standards Scotland
Ìrean Àrainneachdail na h-Alba

via email

04 July 2023

Dear ,

Case Reference IESS.23.035 - Decision not to investigate

Thank you for submitting representation regarding Aberdeenshire Council's policy of how they apply the contaminated land regime within the Environmental Protection Act 1990 ("the EPA 1990"). I understand you are concerned that the Council's position (that the contaminated land regime does not apply to any new or ongoing sources of contamination) is a misinterpretation of their duties under Part IIA of the EPA 1990.

In review of the matters raised, I have concluded that policy decisions to apply Part IIA of the EPA 1990 only to historical contamination is a reasonable approach. When multiple regimes can be used to address the same environmental issue, then a policy reflecting the promotion of certain regimes ahead of others is not considered, de facto, detrimental to the environment. In terms of environmental outcomes, it is observed that alternate, applicable regimes can carry out similar functions to Part IIA: to prevent or rectify harm from contamination. It is good practice for public bodies to avoid duplication of regulation.

As your representation and previous complaint relating to case IESS.23.012 indicated, there is not any definitive statement within the provisions of Part IIA of the EPA 1990 itself which

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explicitly excludes ongoing activities from the regime. However, looking to statutory guidance and provisions about interactions with other regimes, it is apparent that there is a distinct intent to promote other regimes (which deal with ongoing contamination) ahead of the contaminated land regime.

As other regimes can deliver outcomes of rectifying unacceptable contamination, then the matters raised in the representation are not considered to meet ESS' criteria for investigation. Therefore I have decided the matters raised in your representation should not be taken forward by ESS at this time. Additional details regarding my review into Part IIA of the EPA 1990, which support my conclusion, are given below in four numbered points.

Point #1 - the ubiquity of interpreting Part IIA as relating to historical contamination

The interpretation of Part IIA by various public authorities, e.g. statements of its purpose and intent, support the divide of Part IIA applying to historical rather than ongoing contamination:

- The Scottish Government (SG)'s May 2006 *Environmental Protection Act 1990: Part IIA Contaminated Land Statutory Guidance: Edition 2* (SE/2006/44) ("the 2006 Statutory Guidance"). The introduction specifically states the EPA 1990 *"was introduced to provide an improved system for the identification and remediation of land where historical contamination is causing unacceptable risks to human health or the wider environment."*

- SEPA's overview of Part IIA: *"Part IIA is aimed at addressing the legacy of land which is already chemically contaminated, for example by past industrial, mining and waste disposal activities."*

- The foreword of Statutory Guidance on Part IIA issued by DEFRA to cover England: *"The contaminated land regime under Part 2A of the Environmental Protection Act 1990 is one of the main policy measures used to deal with this legacy"* (the legacy being the industrial history of England).

- Descriptions of the purpose of Part IIA by many Scottish and English local authorities, e.g.:

- Aberdeen City Council: *"The Government's policy for addressing historical land contamination is set out in Part IIA of the Environmental Protection Act 1990."*
- West Dunbartonshire Council: *"In order to tackle a legacy of historical contamination, the contaminated land regime was introduced in Scotland through Part IIA of the Environmental Protection Act 1990"*
- Breckland Council: *"The contaminated land regime in Part 2A was introduced specifically to address the historical legacy of land contamination"*
- Rotherham Council: *"The Council has a duty to inspect land to identify where historical contamination may pose a significant risk to people or the environment"*

Point #2 - The purpose of the 2006 Statutory Guidance

Section 78A(2) of the EPA 1990 relates to the definition of Contaminated Land, and states that a local authority should act in accordance with guidance issued by the Secretary of State in determining whether any land is Contaminated Land. In Scotland, Scottish Ministers have the power to issue this guidance, and their powers to issue guidance also relate to other sections of Part IIA:

- Section 78A(5) – also in relation to the definition of Contaminated Land
- Section 78B(2) – in relation to the identification of Contaminated Land
- Section 8E(5) – in relation to the remediation of Contaminated Land
- Sections 78F(6) and (7) – in relation to exclusion from, and apportionment of, liability for remediation
- Section 78P(2) – in relation to the recovery of the costs of remediation

Page 3 of the 2006 Statutory Guidance states this document sets out guidance issued under the above-listed sections. The Statutory Guidance is therefore legally binding, and has to be considered side by side with the relevant sections of the EPA 1990 in determining local authority duties.

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In your previous complaint relating to case IESS.23.012, you acknowledged the introductory quote from the guidance which says the EPA 1990 was introduced to deal with historical contamination but state in response *“However, that reference is made in the context of the introduction to the statutory guidance and does not provide any assistance in terms of the interpretation of the duties of local authorities in Part IIA of the 1990 Act.”*

Section 78A(2) states the local authority should act in accordance with guidance issued by the Scottish Ministers in determining whether sites are contaminated land. I consider it would be reasonable for a local authority to apply this introductory statement in their policies.

Point #3 – Interaction with other regimes

While there does not appear to be any provision in Part IIA itself which would confine the duties of local authorities to historical contamination only, there are provisions which indicate when alternate regimes would take precedence over Part IIA to rectify unacceptable contamination impacts. These provisions were included to avoid duplication of regulation, and could be interpreted as establishing the historical / on-going contamination divide in practice.

Where pollution issues relate to activities falling under other certain other regimes (e.g. CAR regulations or in relation to the deposit of controlled waste), those regimes generally apply instead of Part IIA. The basis of this is Section 78YB of Part IIA, *Interaction of this Part with other enactments*. In review of this, the following salient points are noted:

- A remediation notice shall not be served is if the contamination is the result of an activity to which the CAR regulations apply, and either a) the activity is authorised, b) SEPA intends to serve notice, or c) SEPA is intending to mitigate the harm.
- Part IIA does not apply where the contamination relates to the final disposal by deposit in or on land of controlled waste, and enforcement action may be taken in relation to that activity.

However, Section 78Y is worded in such a way that may infer Part IIA, and the need to intervene with e.g. remediation notices, may still apply in instances of Contaminated Land where SEPA or other authorities are not able to take action under their respective powers.

This legal duty would still exist in cases where the contaminated land regime is the last resort, and I consider this should overrule a broad policy in this scenario. However, the policy overall promotes more effective approach to dealing with land contamination under more suitable regimes in the first instance; this is therefore considered a reasonable approach.

We do not have any evidence that there is a widespread failure of public authorities to apply the regimes promoted ahead of the contaminated land regime. In the previous lead shot case (IESS.23.012), SEPA demonstrated to ESS that they reviewed the specific shooting range under the CAR regime, and decided not to intervene due to the lead concentrations in the water samples at the time falling under drinking water standards, indicating low risk to the private water supply. In order to deem the policies of not applying Part IIA to historical contamination as ineffective, it would have to be demonstrated that the promoted regimes are systemically ineffective in protecting the environment and humans from contamination.

Local Authority duties concerning the identification of contaminated land are given in Section 78B(2) of the EPA 1990. The legally-binding 2006 Statutory Guidance gives Local Authorities advice on how to interpret their inspection duties, so as to take cognisance of when other regimes would apply. Chapter B of Annex 3 of the 2006 Statutory Guidance states: *"The local authority should consider in their contaminated land inspection strategy 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 the water environment being caused in particular parts of the local authority's area."*

DEFRA's Statutory Guidance on Part IIA takes further the concept of promoting other regimes ahead of Part IIA, stating: *"Enforcing authorities should seek to use Part 2A only where no appropriate alternative solution exists. The Part 2A regime is one of several ways in which land contamination can be addressed. For example, land contamination can be addressed when land is developed (or redeveloped) under the planning system, during the building control process, or where action is taken independently by landowners. Other legislative regimes may also provide a means of dealing with land contamination issues, such as building regulations; the regimes for waste, water, and environmental permitting; and the Environmental Damage (Prevention and Remediation) Regulations 2009"*

In my view, the promotion of regimes controlling ongoing contamination ahead of the Part IIA is, at high level, aligned with two of the guiding principles on the environment, namely: environmental damage should as a priority be rectified at source, and the principle that the polluter should pay.

Point #4 - the legal definition of contaminated land being onerous to prove

The presence of contamination in soil or water may pose a risk to human health or the environment, but this depends on the concentrations and the sensitivity of the receptors. The presence of contamination does not define “Contaminated Land.” Contaminated Land is only designated after “significant harm” or “significant pollution” is proven as occurring, or it has been established there is a “significant possibility” of these occurring.

“Significant harm”, significant pollution of the water environment”, and “significant possibility” have definitions in the 2006 Statutory Guidance which set a high bar of proof in cognisance of data, probabilities, and site setting. This can require a considerable effort and cost by Local Authorities to demonstrate that significant possibility of significant harm/pollution exists, to force remediation of contamination. In contrast, enforcement under regimes promoted over Part IIA can be pursued more effectively and economically – e.g. breaches of permit conditions can lead to enforcement actions without needing to demonstrate significant harm.

Conclusion

Following the points above, I consider there is not sufficient evidence that Aberdeenshire Council’s policy (shared by many other public authorities) is a substantial issue as similar protection from contamination can be achieved under other regimes. Because of this, the environmental impacts of the policy are not deemed to be significant, and therefore I consider that the matter does not meet ESS’ criteria for investigation.

If you have any questions or queries please do not hesitate to contact me at the above e-mail address.

Yours sincerely,

Senior Investigation Officer

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