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Your ref: APP/CL/15/03
Date: 5 April 2017

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PART 2A OF THE ENVIRONMENTAL PROTECTION ACT 1990: APPEAL AGAINST A REMEDIATION NOTICE SERVED BY WALSALL MBC IN RESPECT OF LAND AT STONEGATE HOUSING ESTATE, WILLENHALL, WEST MIDLANDS

I am directed by the Secretary of State for the Environment, Food and Rural Affairs ("the Secretary of State") to say that consideration has been given to the report of the Inspector, Mr I Jenkins BSc CEng MICE MCIWEM, who held a public local inquiry on 8-11 December and 15-18 December 2015 into an appeal made under s. 78L(1) of the Environmental Protection Act 1990 ("the Act") by Jim 2 Ltd ("Jim 2") against the remediation notice issued by Walsall Metropolitan Borough Council ("Walsall") for the land known as Stonegate Housing Estate, Willenhall, West Midlands.

The remediation notice was served pursuant to s.78E(1) of the Act on 17 March 2015 in relation to the land which Walsall identified as being contaminated land under s.78B(1) of the Act on 27 March 2012.

Inspector's recommendation and summary of the decision

The Secretary of State has given careful consideration to the Inspector's report ("IR") and has determined, in line with the Inspector's recommendations contained at IR 9, that:

- In relation to ground of appeal (a), the appeal be allowed and the Remediation Notice quashed.

The IR included analysis on the remaining grounds of appeal in case the Secretary of State reached a different conclusion on ground of appeal (a). As she has upheld the appeal on ground (a), which is determinative of the Appeal, the Remediation Notice will be quashed. However, for completeness and in order to assist the parties in understanding the approach to be taken in relation to the relevant guidance and legislation, the Secretary of State will set out her conclusions on the remaining grounds of challenge. The Secretary of State considered that:

- In relation to grounds of appeal (c), (d) and (e) the appeal would have been dismissed;
- In relation to grounds of appeal (m) and (n) the appeal would have been allowed and the Remediation Notice quashed.

Procedural matters

The Secretary of State notes that Jim 2 confirmed in its opening statement that it no longer wished to pursue its appeal under Ground (d) in respect of other parties it had cited as possible appropriate persons, namely leaseholders, Triton Investments and Shenstone Properties Ltd (IR 8.5.4.2).

The Secretary of State also notes that Jim 2 accepts that it would not be in Walsall's interests for it to seek to have E Fletcher Ltd ("Fletcher") restored to the Companies Register (IR 4.4.24) in order that a proper assessment can be made of its ability to meet its financial liability as an appropriate person.

Matters arising since the close of the inquiry

The Secretary of State has noted the representations made after the close of the Inquiry by Jim 2 on 8 January 2016 and 22 March 2016; and on 5 February by Walsall. The Secretary of State does not consider that the Contaminated Land Expert Panel case study submitted as evidence during the Inquiry has any material effect on the appeal decision or the decision with regard to costs. The Secretary of State also notes that neither party has asked for the case study issue to be considered within the appeal process.

Policy and statutory considerations

The legislative framework for this appeal is set out in Part 2A of the Act and the Contaminated Land (England) Regulations 2006 ("the Regulations"). Section 78L(2)(b) of the Act confirms that on appeal the Secretary of State may confirm the Remediation Notice (with or without modification) or quash it.

Under s.78A(2) of the Act, the Secretary of State has made statutory guidance on the manner in which the determination of whether land is contaminated was to be made by local authorities. Two versions of that guidance are relevant to this appeal. The first came into force in September 2006 (the "2006 Guidance"). That was replaced by a revised version, the "2012 Guidance", which came into force in April 2012.

In addition to the statutory guidance, the Secretary of State published guidance in July 2008 entitled 'Guidance on the Legal Definition of Contaminated Land' (the "2008 Guidance").

Regulation 7(1) of the Regulations sets out the grounds on which an appeal against a remediation notice may be made. Jim 2 has appealed on the following of those grounds:

- Ground (a) i) and ii) – that, in determining whether any land to which the notice relates appears to be contaminated land, the local authority – i) failed to act in accordance with guidance issued by the Secretary of State under 78A(2), (5) or (6); or ii) whether by reason of such a failure or otherwise, unreasonably identified all or any of the land to which the notice relates as contaminated land.

- Ground (c) – that the enforcing authority unreasonably determined the appellant to be the appropriate person who is to bear responsibility for any thing required by the notice to be done by way of remediation.

- Ground (d) – that the enforcing authority unreasonably failed to determine that some person in addition to the appellant is an appropriate person in relation to any thing required by the notice to be done by way of remediation.

- Ground (e) – that, in respect of any thing required by the notice to be done by way of remediation, the enforcing authority failed to act in accordance with guidance issued by the Secretary of State under section 78F(6).

- Ground (n) – that the enforcing authority in considering for the purposes of section 78N(3)(e) whether it would seek to recover all or a portion of the cost incurred by it in doing some particular thing by way of remediation – (i) failed to have regard to any hardship which the recovery may cause to the person from whom the cost is recoverable or to any guidance issued by the Secretary of State for the purposes of section 78P(2); or (ii) whether by reason of such a failure or otherwise, unreasonably determined that it would decide to seek to recover all of the cost.

- Ground (m) – that the enforcing authority itself has power, in a case falling within section 78N(3)(e), to do what is appropriate by way of remediation.

- Ground (b) – that, in determining a requirement of the notice, the enforcing authority – (i) failed to have regard to guidance issued by the Secretary of State under section 78E(5); or (ii) whether by reason of such a failure otherwise, unreasonably required the appellant to do any thing by way of remediation.

- Ground (p) – that a period specified in the notice within which the appellant is required to do anything is not reasonably sufficient for the purpose.

Main issues – grounds of appeal

Ground (a) – 'that, in determining whether any land to which the notice relates appears to be contaminated land, the local authority – (i) failed to act in accordance with guidance issued by the Secretary of State under section 78A(2), (5) or (6); or (ii) whether by reason of such a failure or otherwise, unreasonably identified all or any land to which the notice relates as contaminated land.'

Statutory Guidance

The Secretary of State agrees with the Inspector at IR 8.3.5.1 that it was the 2006 Guidance, rather than the 2012 Guidance, that Walsall were required to act in accordance with under the Act and that the issuing of the 2012 Guidance did not give rise to a legal obligation on Walsall to review the determination it had already made. The Secretary of State also agrees with the Inspector at IR 8.3.5.2 that as the 2012 Guidance had not been ratified at the time of determination, limited weight should be given to it as a material consideration in that determination. Further, the Secretary of State agrees that it was not unreasonable for Walsall to proceed to issue its determination without delay, given the statutory obligation under 78B of the Act on regulators to give notice of the identification of contaminated land.

The Secretary of State confirms that the Inspector's approach to the various pieces of statutory and non-statutory guidance is correct; and considers that the two step approach to applying the definition of contaminated land asserted by the Inspector at IR 8.3.5.4, based on the 2006 Guidance, is the appropriate test. That is: 1) to determine whether there is a pollutant linkage between a contaminant, a pathway and a receptor and 2) whether that pollutant linkage exists in respect of a piece of land and whether it presents a significant possibility of significant harm (SPOSH) being caused to the receptor. This should be determined by scientific and technical assessment undertaken according to relevant, appropriate, authoritative and scientifically based guidance on such risk assessments, taking into account whether or not there are suitable and sufficient risk management arrangements in place to prevent such harm.

Potential pollutant linkage and possibility of significant harm

The Secretary of State agrees with the Inspector's reasoning at IR 8.3.6 that there is a clear case for the existence of a pollutant linkage with a possibility of significant harm, based on the potential presence of Benzo(a)pyrene in the ground. The Secretary of State notes that there was no dispute between the parties on this point.

Use of Guideline Values

The Secretary of State agrees with the Inspector that the approach taken by Walsall set out at IR 8.3.7 to derive Site Specific Assessment Criteria ("SSAC") resulted in an authoritative and scientifically based guideline value.

Site Investigation

AECOM Reports

The Secretary of State agrees with the Inspector's expectation at IR 8.3.8.2 that the Council would appoint appropriately qualified and competent advisors when determining whether the land was contaminated.

Notwithstanding the Inspector's finding at IR 8.3.8.8 that Walsall's findings with regard to soil sampling, sample distribution and soil analysis were reasonable, the Secretary of State agrees with the Inspector's further findings at IR 8.3.8.9-12. That is, that the following factors indicate the weaknesses in AECOM's advice: Mr Smart as Technical Director at AECOM lack of previous experience in investigating former gas works sites, the incorrect use of the term 'Health Criteria Value' to describe the derived SSAC in Walsall's Record of Determination ("RoD)", the misleading depiction of some of the report's findings, and the lack of clarity in the evidence submitted by Walsall in advance of the Inquiry. The Secretary of State therefore supports the Inspector's conclusion at IR 8.3.8.13 that the advice provided to Walsall by their consultants, AECOM, fell short of expert advice and that it would have been reasonable to expect Walsall to recognise this and not repeat mistakes such as the use of incorrect terms, in light of the 2008 guidance.

Zoning of the site

The Secretary of State supports the Inspector's reasoning set out at IR 8.3.8.14-18 and agrees that Walsall's approach to zoning based on information available on historic uses of the site was not unreasonable.

Outliers

Notwithstanding the reasonable expectation of Walsall that, given the heterogeneous nature of the made ground with the determined zones, high next to low sample results are to be expected, and Walsall's adequate regard to historic uses when zoning zones 4 and 7, the Secretary of State agrees with the Inspector's findings set out at IR 8.3.8.21-29 with regard to Walsall's approach to the potential outliers in zone 7. That is, that there is a significant degree of uncertainty as to whether the two high values for zone 7 represent a genuine risk.

Given the significant influence of the two high results in the datasets on the derived statistical mean for the zone, the Secretary of State agrees that it would have been reasonable to explore conditions in the vicinity of WS13 and SMW2 in more detail. At the time, there was relevant guidance available for the treatment of potential outliers in the form of CIEH/CL:AIRE Guidance on *Comparing Soil Contamination Data with a Critical Concentration* ("CIEH Guidance"). This guidance indicates that various outlier tests are available that can be used by assessors to identify anomalous data in a dataset. The Secretary of State notes at IR 8.3.8.23 that statistical analysis was not undertaken for zone 7, although it was provided for other individual zones, and that no explanation was given for its lack. Furthermore, statistical analysis undertaken by Dr Cole on behalf of Walsall for the Inquiry identifies the potential for multiple soil contaminant populations to exist and in particular suggests that the higher concentrations related to a specific soil component that is not present in the samples with the lower concentrations.

The CIEH Guidance also recommends that field records should be re-examined to establish whether observations at the time samples were taken can explain the results and that further sampling may be necessary to verify conditions in the outlier area. The Secretary of State notes at IR 8.3.8.25 that no such records were provided in the case of SMW2.

The Secretary of State agrees with the Inspector's reasoning at IR 8.3.8.26 that Walsall's lack of evidence to verify that the material within WS13 would have been different from the material found within the curtilage of No. 1 Brookthorpe Drive casts doubt over whether WS13 can be considered representative of that area, or the wider zone 7 area; or that any follow up exploration was prohibited by the requirement for the use of heavy equipment.

In conclusion, the Secretary of State agrees with the Inspector at IR 8.3.8.30 that Walsall acted unreasonably in not exploring conditions in the vicinity of WS13 and SMW2 in more detail, the outcome of which had the potential to affect the manner in which the determined zone 7 was zoned, the outcome of the risk assessment for that zone and the determination based upon it.

Topsoil as a separate soil population in the assessment and the adequacy of shallow soil sampling

The Secretary of State agrees with the Inspector as found at IR 8.3.8.31-2 that it would be unreasonable to assume that an un-mixed layer of topsoil would remain in place over time; and that sample results from the top one metre of ground indicated that there is no discernible variation in the concentration of B(a)P with depth. It was therefore not unreasonable for Walsall to regard these sample results as representative of those soils to which human receptors would be most likely to be exposed. On this basis, the Secretary of State agrees that Walsall was not unreasonable in not treating topsoil as a separate soil population.

Summary on Walsall's approach to risk assessment

The Secretary of State agrees with the Inspector's conclusion at IR 8.3.8.33 that Walsall did not carry 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. On that basis, Walsall failed to follow the two-step approach of the 2006 Guidance.

Significant Possibility of Significant Harm

The Secretary of State accepts that toxicological risk assessment cannot answer the policy question about what is acceptable or unacceptable. The correct approach to determine whether there is a SPOSH in respect of piece of land is asserted by the Inspector at IR 8.3.5.6-7 and set out in paragraph 23 of the 2008 Guidance. That is, 1) the completion of a science-based risk assessment which takes account of toxicological information and site specific local circumstances and 2) a judgement taken by the local authority on whether there is a SPOSH based on scientific risk assessment, and due account of the purposes of Part 2A. The Secretary of State also acknowledges the Inspector's assertion at IR 8.3.9.2

that if an SGV is exceeded, the assessor will usually need to conduct a detailed qualitative risk assessment (DQRA) to discover whether there is a SPOSH.

There is no dispute that regulators are afforded considerable discretion when making a judgement on whether contamination poses a significant level of risk. However, the Secretary of State agrees with the Inspector that there were a number of shortcomings in relation to the approach taken by Walsall in its determination.

The Secretary of State notes the Inspector's reasoning at IR 8.3.9.6 that the AECOM reports that informed the determination include a chapter on human health risk assessment that drew conclusions in relation to B(a)P simply on the basis of the degree to which the SSAC was exceeded. For her part, the Secretary of State notes from IR 8.3.9.6-8 that Walsall indicated that exceedance of the SSAC was used as a starting point and that it was not the only factor considered to determine the existence of SPOSH. Other factors included the extent to which the SSAC, rather than the SGV, was exceeded - in some cases up to 2 orders of magnitude, and the depth below the surface from which samples were obtained. Walsall's RoD also indicates that account was taken of the likelihood of occupiers or users of the land being exposed to contamination, referencing the extent of surface cover/landscaping and the potential for disturbance of soils. However, the RoD does not make clear to what extent Walsall's judgement was informed by consideration of unacceptable intake or direct bodily contact, which is a requirement under the 2006 Statutory Guidance. The Secretary of State notes the Inspector's assertion at IR 8.3.9.9 that there is no evidence to show that a toxicological assessment was actually undertaken and that Dr Cole has acknowledged in his written evidence that Walsall did not do so.

On this basis, the Secretary of State agrees with the Inspector's conclusion at IR 8.3.9.9 that Walsall's approach departed significantly from the 2006 guidance such that it can be regarded as non-compliant with the Guidance as a whole and therefore unreasonable.

In addition to this conclusion, the Secretary of State agrees with the Inspector's finding at IR 8.3.9.9 that the exposure and toxicological review undertaken by Dr Cole for the purposes of the Inquiry is not relevant to the question as to whether Walsall acted in accordance with the statutory guidance when making its determination in 2012.

Overall conclusion on ground (a)

The Secretary of State agrees with the Inspector's conclusions on Walsall's approach to the determination of the land as contaminated set out at IR 8.3.9.11 as follows. It was the 2006 Guidance that Walsall was required to act in accordance with at the time the determination was made. However, in making that determination, Walsall failed to act in accordance with 78A(2) of the Act, the 2006 Guidance and in accordance with the CIEH guidance.

The Secretary of State therefore finds that Walsall did not undertake a risk assessment based on sound science, which would allow it to conclude that the entirety of zones 4 and 7 represented a SPOSH, and that Walsall unreasonably identified the land to which the notice relates as contaminated land.

The Secretary of State's Discretion

Section 78L(2)(b) of the Act confirms that the Secretary of State has a discretion to quash, modify or confirm the Remediation Notice. Walsall has suggested that, in light of the later evidence gathered from the site by Walsall for the Inquiry, the Secretary of State could exercise that discretion to allow the Remediation Notice to stand. The Secretary of State agrees with the Inspector at IR 8.3.10.1 that, in order not to delay remediation of the land unduly and to the detriment of the residents, it is appropriate that she considers whether to exercise her discretion.

The Secretary of State notes at IR 8.3.10.8 that Walsall commissioned Dr Pease, an expert in contaminated land, to carry out an additional risk assessment. This assessment was carried out in light of the four category test introduced under the 2012 Statutory Guidance and the technical guidance published on the methodology to be used for the derivation of category four screening levels. The Secretary of State also notes that Walsall did not take forward the recommendations made by Dr Pease, despite her expertise (IR 8.3.10.9).

The Secretary of State also notes that Walsall undertook a review of its determination in light of the 2012 Guidance (IR 8.3.10.10); and that Dr Cole undertook an exposure and toxicological review in his original proof of evidence (IR 8.3.10.11) as well as an appraisal of the factors set out in paragraph 4.27 (IR 8.3.10.15) of the 2012 Statutory Guidance based on the remediation solution proposed by Walsall of excavation and replacement of soil.

As has been found under Ground (a), a substantive factor contributing to the unreasonableness of Walsall's determination of the land as contaminated is the inclusion in datasets of the two potential outlier values in zone 7. The further assessments undertaken by Walsall when reviewing its determination in light of the 2012 Guidance included these two potential outlier values without further analysis. The Secretary of State notes that this leads the Inspector to conclude at IR 8.3.10.10 that Walsall's findings in respect of its review under the 2012 Guidance cannot be regarded as made on a robust basis and may only be afforded little weight.

On this basis, the Secretary of State agrees with the Inspector's findings at IR 8.3.11.2 that the further assessments undertaken by Walsall do not amount to the robust assessment required by guidance to support a determination of contaminated land. The Secretary of State considers that it would therefore be inappropriate for her to exercise her discretion to allow the Remediation Notice to stand.

Final conclusion

The Secretary of State is satisfied that with regards to the above the Inspector has taken due account of policy concerns and applied the law correctly to reach the conclusion that the Remediation Notice should be quashed.

The remaining grounds of appeal

As the Secretary of State has decided to uphold ground (a) of the appeal, the Remediation Notice will be quashed. The remainder of the grounds are not now determinative of the

appeal. As the Inspector has made a decision on each of the remaining grounds in the event that the Secretary of State decided that the determination of the land is reasonable, the Secretary of State's findings in respect of the remaining grounds are set out here to assist the parties in understanding the approach to be taken to the relevant guidance and legislation.

Ground (c) – that the enforcing authority unreasonably determined the appellant to be the Appropriate Person who is to bear responsibility for any thing required by the notice to be done by way of remediation.

The Secretary of State agrees with the Inspector's judgement at IR 8.4.3 that in the context of 'caused or knowingly permitting a substance' in this case, it relates to B(a)P and not to general contamination.

Caused

The Secretary of State supports the Inspector's findings at IR 8.4.4.9 that although preparation of zones 4 and 7 for development would be likely to have involved some infilling and movement of material, it cannot reasonably be said that such operations would have led to an increased level of contamination within those same zones.

The Secretary of State therefore agrees with the Inspector's conclusion at IR 8.4.4.10 that it is unlikely that Jim 2 caused or exacerbated contamination by B(a)P within zones 4 and 7, and Walsall's finding to the contrary was unreasonable.

Knowingly Permitted

The Secretary of State notes the Inspector's comment at IR 8.4.5.1 that the act of 'knowingly permitting' requires knowledge of a substance, the power to remove that substance, the opportunity to exercise that power and a failure to do so.

The Secretary of State agrees with the Inspector's findings at IR 8.4.5.2-8 that Jim 2 can be regarded as having knowledge of the presence of B(a)P and that it had sufficient opportunity to remediate the area (including the area later developed by Fletcher had they chosen to do so). The Secretary of State therefore agrees with the Inspector's conclusion at IR 8.4.5.9 that Jim 2 knowingly permitted B(a)P to be on the land and that Walsall's finding to that effect was reasonable.

Ground (d) – that the enforcing authority unreasonably failed to determine that some person in addition to the appellant is an Appropriate Person in relation to any thing required by the notice to be done by way of remediation

Ground (e) – that, and in respect of any thing required by the notice to be done by way of remediation, the enforcing authority failed to act in accordance with guidance issued by the Secretary of State under section 78F(6)

The Council

The Secretary of State agrees with the Inspector's findings at IR 8.5.2-7 on both grounds (d) and (e) that Walsall was not unreasonable to exclude itself from the liability group through the application of Exclusion Test 6, the purpose of which is to exclude from liability those who would otherwise be liable solely because of the introduction by others of the relevant pathways or receptors in the contaminant linkage that led to the determination and that it acted in accordance with the Statutory Guidance in this respect when formulating the Remediation Notice.

The gas companies

The Secretary of State agrees with the Inspector's findings at IR 8.5.3.2 that the West Midlands Gas Board and its predecessor, the Willenhall Gas Company, notwithstanding the fact that they are no longer in existence, would also be excluded from liability by reason of Test 6.

E Fletcher Ltd

The Secretary of State agrees with the Inspector at IR 8.5.4.1 that this company can be considered as a 'knowing permitter' for the same reasons given in relation to Jim 2 because it was responsible for introducing the receptors. However, the company was dissolved following notice by Walsall that it was regarded as a potential appropriate person and can no longer be found

Ground (n) – that the enforcing authority in considering for the purposes of section 78N(3)(e) whether it would seek to recover all or a portion of the cost incurred by it in doing some particular thing by way of remediation – failed to have regard to any hardship which the recovery may cause to the person from whom the cost is recoverable or to any guidance issued by the Secretary of State for the purposes of section 78P(2); or (ii) whether by reason of such a failure or otherwise, unreasonably determined that it would decide to seek to recover all of the cost.

Hardship

The Secretary of State supports the Inspector's findings at IR 8.6.4.3 and agrees with the Inspector that Walsall have acted reasonably and in accordance with the Statutory Guidance, and have not failed to have regard to the matter of hardship.

Apportionment

The Secretary of State acknowledges that under paragraph 8.25 of the 2012 Statutory Guidance consideration should be given to waiving or reducing costs recovery on the basis that a) another person who caused or knowingly permitted the contamination has been identified but cannot now be found; and (b) if that other person cannot be found, the proportion of the cost to the appropriate person seeking the waiver or reduction would

have been significantly less. The Secretary of State agrees with the Inspector at IR 8.6.5.2-3 that both criteria (a) and (b) have been met in respect of Fletcher and that it follows that Walsall should consider waiving or reducing its costs recovery from Jim 2.

The Secretary of State notes that Walsall are required only to 'consider' waiving or reducing costs and that they should be less willing to waive those costs if Jim 2 profited financially from the activity which led to the land being determined to be contaminated land (IR 8.6.5.9). It is also noted that under paragraph 8.5 of the 2012 Guidance Walsall 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.

The Secretary of State also notes the Inspector's conclusions at IR 8.6.5.8 that in respect of the Fletcher land Jim 2 did not complete the significant contaminant linkage and that the Council warning, when it sold the land, was not a clear indication that the land may be contaminated.

After taking account of those considerations, the Secretary of State agrees with the Inspector's conclusion at IR 8.6.5.10 that Jim 2's overall liability amounts to 84%. This is calculated on the basis that Jim 2 is liable for 100% of the land it developed (60% of the area/houses it built across the two zones) and 60% liable for the remaining 40% of the houses E Fletcher built in those zones. The Secretary of State acknowledges that Jim 2 indicated its support for this approach in closing (IR 8.6.5.7).

Ground (m) – that the enforcing authority itself has power, in a case falling within section 78N(3)(e), to do what is appropriate by way of remediation

The Secretary of State acknowledges that under s.78N(3)(e) of the Act the enforcing authority, where it decides not to seek to recover all or only a proportion of costs from an appropriate person or persons, shall itself have the power to do what is appropriate by way of remediation.

As the Secretary of State agrees with the Inspector that Jim 2 is not liable for 100% of the costs of remediation, the Secretary of State supports the Inspector's findings at IR 8.7.1 that it follows that Walsall have the power to carry out remediation and to then recover the reasonable costs incurred from Jim 2 through the mechanism of a charging notice.

Ground (b) – that in determining a requirement of the notice the enforcing authority (i) failed to have regard to guidance issued by the Secretary of State under Section 78E(5); or (ii) whether by reason of such a failure otherwise, unreasonably required Jim 2 to do any thing by way of remediation

Ground (p) – that a period specified in the notice within which the appellant is required to do anything is not reasonably sufficient for the purpose.

The Secretary of State agrees with the findings of the Inspector at IR 8.8.1-8.8.5 that overall the remediation requirements set out by Walsall in the Remediation Notice for the purposes of breaking the significant contaminant linkage are reasonable.

Formal decision on appeal

Accordingly, for the reasons given above, the Secretary of State has found in favour of Jim 2 in respect of Ground (a) and considers that, notwithstanding the additional work undertaken by Walsall for the purposes of the Inquiry, the Remediation Notice should be quashed.

Formal decision on costs application

The Secretary of State notes at 2.1.2 of the Inspector's Report on Costs (IRC) that before the close of the Inquiry, Jim 2 made two applications for costs in writing against Walsall, pursuant to s.250 of the Local Government Act 1972, as applied by Schedule 20, s.5(1) of the Environment Act 1995. These being:

- A partial award in respect of Walsall's procedural conduct in respect of data and;

- A full award relating to Walsall's continuation and conduct of the appeal in light of Walsall's unreasonable determination of the land and/or determining the appellant to be the Appropriate Person to bear responsibility for the costs of remediation.

The Secretary of State notes at IRC 6.1.1 that both parties are in agreement that the costs section of the Planning Practice Guidance (PPG) that applies to planning appeals is applicable here by analogy and that it confirms that parties in appeals normally meet their own expenses. The Secretary of State agrees that it is appropriate to apply the PPG to this appeal. The PPG shows that all parties are expected to behave reasonably to support an efficient and timely process, for example in providing all of the required evidence and ensuring timetables are met.

Partial award

The Secretary of State notes that Walsall has accepted that errors in data have been made and that they acknowledge that the complex nature of the data surrounding the determination led to these errors. The Secretary of State agrees that this of itself does not amount to unreasonable behaviour.

The Secretary of State does however agree with the Inspector at IRC 6.2.6 that it was reasonable that Jim 2 spent time trying to understand the data on which Walsall's case was built and that this would have been made more difficult by the late submission of the data and the confusion over what data had been used. The confusion over which datasets had been relied on led to Jim 2 incurring unnecessary costs.

On this basis, the Secretary of State agrees with the Inspector's conclusion at IRC 6.2.8 that a partial award of costs to the appellant is justified on the basis that Walsall failed to make clear in a timely manner the datasets it used, both in support of its determination and

in its proof of evidence, and that this amounts to unreasonable behaviour. The costs should be limited to those costs incurred by Jim 2 due to time spent by its team in the lead up to the Inquiry in trying to understand Walsall's conclusions without clarification from Walsall on the datasets they used.

Full award

The Secretary of State agrees with the Inspector's conclusions at IRC 6.3.9 that Walsall's continued defence of the appeal does not amount to unreasonable behaviour, based on Walsall's demonstration, through its consistent response to evidence put forward by Jim 2, that evidence was not ignored and their submissions in respect of further work undertaken for the Inquiry. The Secretary of State also notes that the appeal was successfully defended by Walsall on some of the grounds and that the very small number of appeals under this statutory framework leaves a degree of uncertainty as to the correct approach.

On this basis, the Secretary of State agrees with the PI's conclusion at IRC 6.3.11 that Walsall's continuation and conduct of the appeal did not amount to the type of behaviour that would merit a full award of costs, notwithstanding and without prejudice to conclusions regarding Walsall's unreasonable determination of the land and that the Remediation Notice should be quashed.

Final matters

A copy of this letter has been sent to those listed in the Annex attached to this letter in accordance with Regulation 10(2) of the Contaminated Land (England) Regulations 2006.

Yours sincerely

M. Read

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Land Use

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