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CABINET – 5 JULY 2010 PORTFOLIO: EMPLOYMENT, HEALTH AND WELLBEING

CONTAMINATED LAND AT ELING WHARF

1. INTRODUCTION

1.1 Eling Wharf covers an area of approximately 15 hectares and currently provides a range of industrial and warehouse units as well as open storage for containers. The site is accessed from the High Street, Totton and is bounded to the west by housing along Eling Lane and to the south by The Anchor Public House and an area of foreshore giving access to the Eling Channel to the east.

A plan of the site is included as Appendix 1 with the industrial site outlined in red and the foreshore in blue.

1.2 The main industrial site is owned by Burt Boulton Holdings Ltd (BBH) with the units leased to individual companies. BBH also own the land above the high water mark (HWM) on the foreshore which is currently leased to the Totton and Eling Totton Council. In normal circumstances the foreshore has a high amenity value and is used for mooring boats and accessing the adjacent tidal estuary. The land below HWM is owned by Crown Estates.

1.3 In late 2005 this Council and the Environment Agency (EA) received a report from a member of the public regarding the appearance of a yellow substance and odorous oily discharges on the foreshore. Samples of the material were subsequently analysed by the EA and found to contain very high levels of arsenic, lead, mercury, hydrocarbons and polycyclic aromatic hydrocarbons.

1.4 Following discussions with the Health Protection Agency, the contaminants were considered to pose a risk to human health and in early 2006 the decision was taken to erect fencing to prevent public access to the foreshore and the site has remained cordoned off ever since.

1.5 The purpose of this report is to advise Members of the current position following extensive investigations into the source and extent of the contamination and to recommend a way forward to secure appropriate remediation, whilst discharging the Council's statutory duties which are further explained below.

2. CONTAMINATED LAND REGIME

2.1 Part 2A of the Environmental Protection Act 1990

2.1.1 Part 2A of the Environmental Protection Act 1990 came into force in England in 2000. Its main aim is to help address the problem of historical contamination of land and provide an improved system for the identification and remediation of land where contamination is causing unacceptable risks to people's health or the wider environment. In addition to the requirements contained in the primary legislation, operation of the regime is also subject to regulations and statutory guidance.

2.1.2 The local authority is the regulator for the purposes of the Act and is under a legal duty to inspect the land in its area for the purpose of:

(a) Identifying contaminated land; and

(b) Enabling the Authority to decide whether any such land is to be designated as a special site (in such cases the enforcement responsibilities pass from the Council to the Environment Agency).

2.1.3 The Act defines contaminated land as:

Any land which appears to the local authority 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 the significant possibility of such harm being caused, or

(b) pollution of controlled waters is being caused, or is likely to be caused.

2.1.4 Harm is further defined as:

Harm to the health of living organisms or other interference with ecological systems of which they form part, and in the case of man, includes harm to his property.

In the case of human health significant harm means death, disease, serious injury, genetic mutation, birth defects or the impairment of reproductive functions.

2.1.5 In performing these duties the Local Authority has to act in accordance with Statutory Guidance issued by the Secretary of State. If, following detailed technical and scientific assessment of all available evidence, contaminated land is identified, the Council must notify interested persons of that fact i.e land owner, occupier of the land, Environment Agency and 'appropriate persons' (persons with a responsibility for the remediation).

2.1.6 It is an extremely complex piece of legislation with the definition of contaminated land based on the principles of risk assessment, where there is a contaminant (a source), a receptor (human beings, controlled waters, ecological systems, property etc) and, most importantly, a pathway between the two. A pollutant linkage is therefore the relationship between these three components and a significant pollutant linkage (SPL) is one which forms the basis for a determination that a piece of land is contaminated

2.1.7 Having identified that land is contaminated, remediation is then focused on breaking that pollutant linkage and returning land to a condition where it no longer poses an unacceptable risk to human health and the environment based on the current use of the land.

2.1.8 The duties placed on the Council are therefore clearly defined and it has sole responsibility for determining whether any land is contaminated, although in reaching that decision it can rely on information or advice from the Environment Agency or environmental consultants. Once

determined as contaminated land, the enforcing authority (which in the case of designated special sites becomes the Environment Agency) then has a further duty to serve a Remediation Notice, unless a voluntary remediation statement has been agreed with the regulator in the period following determination and prior to the service of the Notice (a minimum period of 3 months has to be allowed between determination and the issuing of a Remediation Notice).

2.1.9 The responsibility for the remediation of contaminated land rests in the first instance with the person(s) who caused or knowingly permitted the presence of the substance in, on or under the land and if that person(s) cannot be found then the clean up defaults to the owner or occupier of the land.

2.1.10 A written record of the determination must be made and recorded on the public register along with details of any subsequent actions leading to the remediation of that land, including final verification that it has been cleaned up to a standard that meets with the approval of the regulator. It is therefore a very transparent process with access to information readily available to the public.

2.1.11 The process leading to determination of land as contaminated and subsequent designation as a special site can be summarised in the flow chart below (responsibilities of LA indicated in italics and those of the EA in bold):

Detailed Inspection of Site

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One (or more) SPL's identified following scientific and technical assessment

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Physical extent of land to be determined decided

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LA determines land as contaminated

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LA notifies interested persons of decision to determine

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LA designates land as Special Site (if certain criteria are satisfied)

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LA notifies relevant persons of special site designation

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Enforcement responsibilities to secure remediation now pass from LA to the Environment Agency

2.2 Planning and Development Control

2.2.1 It is recognised that Government policy encourages the voluntary remediation of contaminated land and that this often occurs through the planning system where land is suitable for or scheduled for re-development. However, Stephen Tromans, QC and author of the definitive work on the contaminated land regime makes the point that:

"The [planning] authority should however bear in mind that whilst planning powers may be able to secure remediation in the event that development goes forward, the fact that planning permission will be implemented is not a foregone conclusion…..Local planning authorities may need to resist the temptation to elide the two regimes which have different purposes. Planning law is concerned with ensuring that the risks consequent on developing and changing the use of contaminated land are properly identified and addressed. Part IIA is concerned with ensuring that unacceptable risks arising from the land in its current use are removed and allocating and apportioning the liability for the costs of doing so. To try to deal with complex liability issues in the context of a planning application or s106 agreement risks going beyond the proper bounds of land use planning. It may also result in an adverse costs award against the defendant….

2.2.2 The importance of the Eling Wharf site and its redevelopment potential are well recognised and throughout Environmental Health have liaised closely with Planning colleagues about the contamination issues. Whilst BBH have development aspirations for this site and are actively preparing their Master Plan in discussions with Planning, it is unlikely to result in a planning application until at least 2011.

2.2.3 The contamination at Eling Wharf is a material consideration in any planning decision and it is of critical importance that whatever uses are proposed the site is remediated of contamination to an end state appropriate to that type of development. No new development could be considered through the planning system unless the Council is confident that this can be achieved. Therefore, before any decisions can be made on any redevelopment proposals an in depth investigation which fully characterises the site would be required. This in turn would inform the remediation options appraisal with the required level of remediation being dependant on the proposed end use. The outcome of any planning application cannot therefore be prejudged, nor can it be certain whether, and within what timescale, any planning permission would be implemented. It is therefore not considered appropriate to wait and address the current contamination issues through the planning system.

2.2.4 It is important to stress that remediation under Part 2A focuses on breaking the pollutant linkage between the source and the receptor based on the **current use** of the site, whereas under planning it is the **proposed end use** for which permission is sought that dictates the standard of remediation to be achieved. As such the remediation requirements under the two regimes can differ significantly.

3. BACKGROUND TO CURRENT SITUATION

3.1 This site has a long history of industrial use stretching back to the late nineteenth century which has included a tar distillery, timber yard and treatment plant, naphthalene oxidation plant, a bitumen roadstone coating plant and a chemical fertiliser plant. As the characteristics of the contaminants present on the foreshore (heavy metals, hydrocarbons, etc) were broadly representative of the type of substances associated with the former uses on the main Eling Wharf industrial site, it was considered that this was a possible source of the contamination and, following receipt of the initial complaint in late 2005, early dialogue ensued with the landowner, BBH.

3.2 This Council originally sought funding from Defra through their Contaminated Land Capital Programme to undertake a site investigation into the extent and possible source of the contamination on the foreshore. This funding was not pursued as BBH agreed to undertake a site investigation which focussed on the foreshore. The subsequent report produced in February 2007[3] by their consultants, Environ, concluded that the contamination was discrete with no apparent pollutant pathway linking the main industrial site with the materials on the foreshore. This led to BBH's assertion that the contaminants had been dumped on the foreshore at some time in the past by persons unknown. Whilst they were willing to carry out remediation of the land above the high water mark in their capacity as owner of this land, and to this end produced a Remediation Strategy for its clean up in May 2007, they were not, at that time, prepared to accept liability for remediation of the land below high water mark which was owned by Crown Estates.

3.3 By the Autumn of 2007 an impasse had occurred as the Crown, through their Solicitors, were not willing to engage in voluntary remediation of their land below HWM unless it could be clearly demonstrated that the person who 'caused or knowingly permitted' the contamination could not be found.

3.4 Given this Authority's firm belief that the foreshore was linked with the main industrial site and that any remediation of the former was likely to be re-contaminated if it were treated in isolation from the latter, consideration was then given as to what further evidence was required to clearly demonstrate that on the 'balance of probability' the contaminants on the foreshore had emanated from the main industrial site.

3.5 A position statement prepared by this Council's contaminated land consultants, WPA Consultants Ltd, then followed in December 2007 which, following further engagement with the Health Protection Agency, highlighted the need for further investigation of both the foreshore **and** the main site.

3.6 In May 2008 a meeting was held with the EA in their capacity as advisers to Defra for funding under their Capital Programme for Contaminated Land investigations. As a result of these discussions a letter was sent by this Council to the EA formally requesting that they consider the industrial site and the foreshore as a potential special site. This request was made as one of the former uses on the site was regulated by the EA through the Integrated Pollution Control regime and as such fell within the criteria for special site consideration. Their letter of agreement to undertake an inspection of Eling Wharf (including the foreshore) on behalf of the Council was received in June 2008 and BBH was subsequently advised of this decision.

3.7 The EA appointed consultants, URS, and the first stage of the process was for them to carry out a Part 2A compliant data review of all available reports/investigations and produce a conceptual site model (indicating potential sources of contamination, receptors and pollutant linkages) together with a site investigation design. This report was produced in October 2008.

3.8 In line with EA protocol, BBH were involved in discussions and volunteered to undertake the intrusive site investigation of the main site and foreshore at their expense. To this end Environ prepared a Part 2A compliant investigation strategy which finally met with the EA/NFDC approval in December 2008. The main aims of this investigation were to:

- Characterise the source areas on the main site (both in extent and degree/type of contamination);
- Understand the ground water regime as the expected principal control on contaminant migration and;
- Assess the impact on the identified receptors – groundwater, the adjacent tidal surface water and the estuarine sediments.

The site investigation was subsequently undertaken in February/March 2009, resulting in Environ's report of their findings being produced in April 2009. Again this concluded that there was no pollutant linkage between the main site and the foreshore. Additionally, Environ's interpretation of the data concluded that the contamination on the main site appeared to be contained and not impacting the adjacent surface water courses and associated receptors and as such did not meet the definition of contaminated land under Part 2A of the Act.

3.9 This report was reviewed by URS and WPA, the contaminated land consultant's acting on behalf of the EA and NFDC respectively, and areas of concern were identified. As a result URS put forward a proposal for additional monitoring which was accepted by the EA and further monitoring was undertaken by URS in September 2009. The report of the findings from the additional monitoring was produced by URS on 1st December 2009, details of which are discussed below.

4. TECHNICAL AND SCIENTIFIC ASSESSMENT OF INFORMATION

4.1 As previously mentioned in paragraph 2.1.3 land is defined as contaminated if, by reason of substances in, on or under the land:

(a) significant harm is being caused, or

(b) there is a significant possibility of significant harm being caused, or

(c) pollution of controlled waters is occurring, or

(d) pollution of controlled waters is likely to occur

In reaching its decision on whether the statutory criteria in respect of contaminated land are satisfied the Council is now in possession of the following information.

4.2 Pollution of Controlled Waters

4.2.1 Given the data that had already been obtained about the contaminants on the foreshore and their human health implications, the main aim of the EA led investigation in 2009 was to gain a better understanding of the ground water regime and the potential for migration of contaminants
from the main site (land delineated in red on plan in Appendix 1) and to assess the impact that potential contaminative historical activities at Eling Wharf were having or were likely to have on controlled waters. The ultimate aim of the assessment was then to conclude whether or not the site met the statutory definition of contaminated land and whether it could also be classified as a special site.

4.2.2 In view of the current industrial use of the land (as opposed to a more sensitive residential end use) and the fact that much of the site is hard surfaced, thereby minimising the potential for site workers to come into direct contact with any contaminants (other than via possible migration of vapours), harm to human health was not considered to be the primary focus of the investigation on the main industrial site. In this respect the main site differs from the foreshore where harm to human health is the more significant issue given the presence of surface/near surface contaminants on the beach.

4.2.3 The outcome of the special site investigation undertaken by the EA on behalf of this Council is contained in the report prepared by the environmental consultants, URS, dated the 1st December 2009. It concludes that significant pollutant linkages have been confirmed in respect of controlled waters in that:

- contaminant *sources* present on the main site (identified as total petroleum hydrocarbons, polycyclic aromatic hydrocarbons, BTEX, phenolic compounds, metals, volatile organic compounds and organochlorine pesticide compounds) have been identified as either causing or being likely to cause pollution of

- controlled water *receptors* (identified as shallow ground water within the river terrace deposits or tidal surface waters adjacent to the site, especially the Eling Channel and the River Test), via

- the following *pathways*, namely the migration of free and dissolved phase contamination from shallow soil/made ground to shallow ground water and lateral migration of contaminated shallow groundwater to adjacent surface waters such as the River Test and Eling Channel.

The revised conceptual site model illustrating the above pollutant
linkage components is shown in the figure contained in Appendix 2.

The report concludes that:

"Pollution of controlled waters has been confirmed as actually occurring or being likely to occur. A total of 86 significant pollutant linkages have been identified for controlled waters, divided between the shallow groundwater receptor and adjacent surface water receptor(s). The

presence of Significant Pollutant Linkages associated with the pollution of controlled waters/likely pollution of controlled waters provides a robust technical justification for the determination of the Eling Wharf site as contaminated land, as defined by Part 2A of the Environmental Protection Act 1990."

Of particular note, is the confirmation of the existence of a pathway between the main site and the foreshore in that pollution of controlled waters for surface water receptors has been confirmed for the southern groundwater flow pathway to the Eling foreshore. Discharge of TPH, poly-aromatic hydrocarbons, copper and zinc to the Eling Channel has been confirmed by direct measurement of the Eling foreshore spring samples. Trace contaminant concentrations, especially arsenic and hexavalent chromium, correspond with concentrations measured within parts of the southern groundwater flow pathway. This pathway also has implication for human health, although not in the same magnitude as the solid contaminants present on the foreshore, discussed below in section 4.3.

4.2.4 Following production of the above URS report the EA advised in a letter to this Council dated the 3rd December 2009 that, on completion of the detailed inspection of the Eling Wharf Site undertaken in compliance with the statutory guidance, and following review of all information, they were of the opinion that:

" there is sufficient evidence to demonstrate that pollutant linkages exist and that they are significant".

The letter went on to list 86 significant pollutant linkages relating to pollution of controlled waters before concluding that:

"It is therefore our opinion that significant pollutant linkages are present at the site and as such they should form the basis of a contaminated land determination.

In addition, as an area of the site was previously regulated by the Environment Agency under the Integrated Pollution and Control Regulations, it is considered that the site would meet the Special Site criteria, if determined as contaminated land. As such designation as Special Site is recommended to New Forest District Council……"

4.2.5 Consultants (Environ) acting for the landowner, BBH, challenged the findings of the URS report, as a result of which URS issued a review of Environ's work, dated 22nd April 2010. Of the 86 significant pollutant linkages originally identified, URS have accepted the challenge by Environ in respect of 12 of them, leaving a total of 74 significant
pollutant linkages (listed in the table in Appendix 3) identified in respect of the pollution or likely pollution of controlled waters. URS conclude that:

"Pollution of controlled waters is being caused or is likely to be caused. Inclusion of the controlled waters SPL's identified on the attached tables
(refers to those listed in Appendix 3) in the Schedule of Determination is therefore appropriate under the current statutory test and guidance."

4.2.6 Reference to the table of Controlled Waters SPL's in Appendix 3 clearly shows the identified source, pathway, receptor relationship which forms the basis for any contaminated land determination. Any subsequent determination would therefore relate to a specific area of land which would cover all the identified significant pollutant linkages with justification for the inclusion of each SPL detailed in the Record of Determination i.e a determination is not required for each identified SPL.

4.3 Human Health Risk Assessment

4.3.1 To date, the investigations undertaken on the main site do not indicate the presence of contaminants at levels that would amount to the significant possibility of significant harm being caused to site users, although as indicated above pollution of controlled waters is an issue. However, it is acknowledged that further assessment of volatile organic compounds is still required. In this respect the two areas of land differ and for the solid contaminants identified on the foreshore (land outlined in blue) a Detailed Quantitative Risk Assessment in respect of Human Health has been undertaken by Dr Simon Cole of the EA, an acknowledged expert on contamination and human health. This report has reviewed all available monitoring data collected from the various intrusive site investigations since the contaminants (arsenic, lead, mercury, naphthalene, polycyclic aromatic hydrocarbons) were first detected in late 2005. The report which was finalised on the 29th April 2010 states:

"It is reasonable to conclude (based on the balance of evidence available) that there is a significant health risk to young children associated with an unacceptable one off acute oral exposure to arsenic in Area 1 (reference to an area of contamination on the foreshore)*. Similarly it is reasonable to conclude that this exposure is consistent with the statutory definition of unacceptable intake.*

The SPL's associated with arsenic, mercury, benzo(a)pyrene highlighted above do meet the statutory definition of SPOSH (significant possibility of significant harm) *and consequently these SPL's can be used by NFDC in its decision on whether the area in question meets the statutory definition of Contaminated Land."*

4.3.2 So in terms of the human health pollutant linkages a young child has been identified as the receptor with soil ingestion as the assumed pathway for acute exposure to the contaminants arsenic and mercury. In terms of chronic exposure to arsenic and benzo(a)pyrene again a young child has again been taken as the receptor with a pathway of soil ingestion and dermal contact.

4.4 Technical and Scientific Conclusion

4.4.1 Based on the above technical and scientific assessments of all available evidence this Council is now in a position to conclude that the land is contaminated within the meaning of Part 2A in that:

- **pollution of controlled waters is occurring or is likely to occur** from contaminative sources on the main industrial site (land outlined in red), and

- **there is the significant possibility of significant harm being caused** to a young child by virtue of the substances in, on or under the land constituting the foreshore (land outlined in blue).

5. BURT BOLTON HOLDINGS LTD POSITION

5.1 Since the discovery of the contaminants on the foreshore in late 2005 and following the initial site investigation by their consultants, Environ, in late 2006, BBH have always disputed the extent of the contamination and in particular have denied any link between the contaminants on the foreshore and the main site. The most recent site investigation carried out by Environ in April 2009 also concluded that the main site did not meet the statutory definition of contaminated land and that the contamination appeared to be contained and was not impacting the adjacent surface water courses and associated receptors. These findings are clearly at odds with those of URS in respect of controlled waters and detailed in section 4.2.

5.2 Whilst BBH has agreed in principle since 2007 to undertake voluntary remediation of the foreshore, until recently they were only prepared to do so to the extent of land in their ownership above the high water mark. Since November 2009, their stance has changed and their current remediation strategy indicates their willingness to undertake voluntary remediation of the whole of the foreshore, including that in the ownership of the Crown Estates below the high water mark, but still on the basis that there is no ongoing contamination migrating from the main site.

5.3 Recent correspondence from BBH has indicated that voluntary remediation of the foreshore could be undertaken imminently with a proposed start date of 5th July 2010. The necessary consents to undertake this work have now been obtained from the EA (Flood Defence Consent) and the Marine Management Organisation but the former is subject to the submission of a detailed land and water based monitoring programme not less than 2 weeks prior to this proposed start date. Work cannot commence until the EA has approved this programme and agreed threshold levels which, if exceeded, will require works to cease.

5.4 Again up until recently, BBH have always indicated that they wish to attend to the remediation of the main site through the planning process. However, since February 2010 a number of letters have been received either from BBH or their consultants, Environ, indicating their commitment to bring forward voluntary remedial actions for the main site in advance of the planning process and to work with this Council and the EA to secure a satisfactory outcome. They have requested that the Council do not proceed to formally determine the land as contaminated. That said, up until 14th June 2010 no detailed proposals relating to the characterisation of the main site or its subsequent remediation had been submitted to either this Council or the EA. The information submitted by BBH, through their Solicitors, Travers Smith, on the 14th June 2010 is further discussed in Section 6.0.

5.5 Members attention is particularly drawn to the contents of the letter dated 17th March 2010 (Appendix 4) from James Roberts of BBH to Annie Righton, Head of Public Health and Community Safety, which sets out the company's concerns if the land is formally determined as contaminated, namely:

"If the site were to be Registered, we believe that the impact on BBH, the current tenants and the local community would be significant:

Bank lending to remediate Registered Land is unobtainable; funds for remediation could only be generated from our tenants' roll on site.

The sale of land to raise cash to finance remediation would not be possible at any sensible price as no developer will risk the blight of Registered Land on their balance sheet when "clean" greenfield land is available. Any sale would reflect this blight and be at a heavily discounted price.

Our tenants' leases would all require qualification. The potential loss of tenants and the impact on jobs will decrease income and the means to pay for remediation and redevelopment.

Limited finance for remediation would delay redevelopment and the provision of new jobs by between 5 and 8 years."

The letter goes on to further explain that:

"In the event of Registration of the site and the consequent significant legal and financial effect this would have on BBH I regret that we would have no option other than to withdraw our offer to bear the full cost of voluntarily remediating the Eling Foreshore. The legal process of Registration would delay dealing with the " significant human health risk" (URS report) while the Council involved the Crown Estate as land owners and Totton and Eling Town Council as tenant of the Foreshore in the clean up process. This would be a time consuming and expensive process adding substantially to the 4 years it has already taken to get this far."

6. CURRENT POSITION/LEGAL ADVICE

6.1 Given the complexities of the situation and the voluntary remediation proposals currently being advanced by BBH, advice has been obtained from specialist Counsel on the Council's legal responsibilities under Part 2A of the Environmental Protection Act, 1990. In particular, the advice has focussed on whether the Council is under a statutory duty to determine the land as contaminated once it is has been so identified (as in this case) or whether it has a discretion not to do so.

6.2 Counsel has concluded that if the land meets the statutory criteria for identification as contaminated land i.e it has been established that contaminants are causing harm (or there is the significant possibility of such harm) or pollution or the likelihood of pollution of controlled waters, (as is clearly indicated by the wealth of technical and scientific evidence referred to in Section 4), there is a duty to determine it. The absence of a duty would negate the express duty on enforcing authorities to clean up contaminated sites (by way of the express duty to serve a Remediation Notice), which is at the heart of the contaminated land regime.

6.3 # Following this advice the Council's position was communicated to BBH in a letter dated 4th May 2010 (Appendix 5). At the time of sending this letter detailed proposals for the voluntary remediation of the foreshore had been received and were in the process of being agreed with this Council, the EA and the Marine Maritime Organisation (MMO). This was not the case for the main site as detailed proposals relating to its further characterisation and remediation had not yet been received by either the EA or this Council. Whilst the letter

indicated that this Council was prepared to defer the decision to determine the foreshore as contaminated land as remedial works were imminent (subject to the production of evidence demonstrating this and other requested information), it made it clear that the decision to determine the main site remained and that a recommendation to this effect would be taken to Cabinet. In reaching this decision, further advice had been obtained from Counsel who confirmed that it would be appropriate to defer a decision to determine the foreshore in view of the imminent plans to undertake remedial works. Furthermore, treating the two areas of land separately would be in accordance with statutory guidance as they are physically distinct areas of land and can be dealt with by distinct, separate remediation actions.

6.4 # This was the position up until the 14th June 2010 at which point a letter (Appendix 6) was received from Travers Smith, Solicitors acting for BBH, detailing the company's voluntary remediation proposals in respect of both the foreshore **and** the main site. This letter was accompanied by a number of documents which included:

- details of the requested information relating to the remediation of the foreshore (remediation strategy, legal agreement with the Crown for BBH to undertake work on their land, Method Statement from Contractor, confirmation of consents from EA and MMO etc)

- information relating to the main site (report detailing the investigations undertaken in recent weeks to further characterise the site, current works of remediation and a proposed remediation strategy, proposals to set up a working party to monitor progress with officers from this Council and the EA in attendance)

- letter from Barton Willmore dated 9th June 2010 (Appendix 7), the company advising BBH on the future redevelopment of the main site.

6.5 It can be seen that mobilisation for the remediation works on the foreshore will start on the 30th June with a proposed start date for the actual work (removal of contaminated material to a licensed waste disposal site and replacement with clean fill) on the 5th July.

6.6 # It is evident from the reports recently submitted in respect of the main site that BBH have taken the intention to recommend to Cabinet formal determination of the land as contaminated very seriously. This is demonstrated by the fact that in recent weeks they have undertaken works to further characterise the main site and have actually started remediation by way of removal of free phase product (neat hydrocarbons) and contaminated ground water in the most contaminated areas, in an attempt to remove the source of pollution at this location. It is equally clear from the contents of the letter from James Roberts (Appendix 4) and Barton Willmore (Appendix 7) that they have grave concerns that formal determination of the land as contaminated under Part 2A of the Act would 'significantly prejudice' the redevelopment of the site.

6.7 These moves by BBH are seen as a positive indication of their willingness and commitment to work with this Council and the EA to secure the voluntary remediation of the foreshore and the main site and their proposal to set up a working party to monitor progress is to be welcomed. However, it has to be

stressed that the work to date on the main site has been undertaken without any prior detailed discussion or agreement with this Council or the EA. As such the information submitted needs to be thoroughly assessed for Part 2A compliance before a decision on the appropriateness or otherwise of a formal determination under the Act can be reached.

7. FINANCIAL IMPLICATIONS

7.1 From the legal perspective there is no statutory appeal against determination of land as contaminated and any challenge to this decision could only be by way of judicial review. In the event of the main site proceeding to determination there is a potential cost implication should legal proceedings ensue but provided the Council has acted in accordance with statutory procedure and with statutory guidance there would be no basis for such a challenge.

7.2 As previously mentioned, it is the Council's sole responsibility as regulator to make the decision on the determination but having done so and thereafter designated the land as a special site (EA have already accepted that it meets the special site criteria in view of the former IPC use on the site which they regulated as discussed in paragraph 4.2.2), the future enforcement responsibilities would pass to the Environment Agency.

7.3 If the site is not determined and designated as a special site and remediation occurs voluntarily outside the formal regime then this Council will retain full responsibility as the regulator of contaminated land with the consequent resourcing implications associated with overseeing the work and monitoring progress.

8. ENVIRONMENTAL IMPLICATIONS

8.1 Given the cocktail of contaminants on the foreshore with the ensuing health implications together with the identification of controlled waters issues, the environmental consequences, as indicated in Section 4, are considerable unless the site is remediated to a Part 2A compliant standard (whether by voluntary means or by formal determination under the Act) thereby ensuring that any pollutant linkages are broken.

9. CRIME AND DISORDER

9.1 None

10. PORTFOLIO HOLDER COMMENTS

10.1 I have followed developments on this site from the outset and I am well aware of the complexities and sensitivities of the issues surrounding it and of the investigations that have taken place to more fully understand the extent and nature of the contamination.

10.2 The Eling foreshore is a valuable community asset and as such the imminent plans by BBH to clean it up so that it can once again be open to the public are very welcome. With regards to the main site it is important that this too is remediated at the earliest opportunity so that any controlled water issues are

dealt with and to ensure that there is no further migration of contaminants off site. I would therefore agree that it would be appropriate to defer any decision to determine the main site as contaminated pending the full assessment of the recently submitted information by Council officers and the EA.

11. CONCLUSION

11.1 Contaminated land, as defined by Part 2A of the Environmental Protection Act 1990, has been identified at Eling Wharf in that pollutant linkages (identification of a source, receptor and a pathway) have been established which:

- present the significant possibility of significant harm to a young child by virtue of substances in, on or under the land known as the foreshore
(area of land delineated in blue on Appendix 1) and

- are resulting in, or are likely to result in, pollution of controlled waters by virtue of substances in, on or under the land known as the main site
(area of land delineated in red on Appendix 1)

In concluding that significant pollutant linkages exist all available evidence has been subject to appropriate technical and scientific assessment and the requirements of the Statutory Guidance contained in Defra Circular 01/2006 (Annex 3 Chapter A and :Part 4 of Chapter B) have been taken into account and followed.

11.2 Advice from leading Counsel has confirmed that there is an implied statutory duty on the Council to determine land as contaminated once it has been so identified. However, all the information presented by BBH in recent weeks has been carefully considered in conjunction with Counsel and given that an agreed scheme of remedial works for the foreshore is due to commence on the 5th July 2010 and that notification has now been received that remediation has already commenced on the main site (removal of free phase product and contaminated ground water from the central part of the site), it is considered that it would not be appropriate to proceed to formal determination of the land as contaminated, at this stage. However, it is imperative that the matter be kept under strict review to ensure remediation is commenced and continues expeditiously and to a standard compliant with Part 2A.

11.3 With that in mind, the documentation submitted on the 14th June 2010 by BBH's Solicitor, Travers Smith, detailing the works undertaken in recent weeks to further characterise the main site together with the proposed remediation strategy now needs to be thoroughly assessed by officers of this Council and the EA for Part 2A compliance.

12. RECOMMENDATIONS

It is recommended that:

12.1 In light of the fact that BBH have confirmed that remediation of the foreshore
(land delineated in blue on Appendix 1) will commence on the 5th July 2010, that Cabinet defer any decision to formally determine the foreshore as contaminated land pending a further report back to Members by October 2010 as to the progress of the said works of remediation.

12.2 In light of the fact that BBH have confirmed that remediation of the 'main site' # (land delineated in red on Appendix 1) has commenced, that Cabinet defer any decision to formally determine the main site as contaminated land pending the assessment by this Council and the EA of the documentation submitted on the 14th June, 2010 by BBH, with a view to bringing a further report back to Cabinet by October 2010 detailing the outcome of the assessment and any subsequent discussions with BBH.

12.3 Without prejudice to the outcome of the assessment referred to in 12.2, that officers accept BBH's offer for New Forest District Council to join a Working Party along with the EA to monitor progress and discuss the on-going remediation taking place on the foreshore and the main site.

12.4 That officers report back to Members if they consider that significant progress is not being made, in respect of either the remediation of the foreshore or the main site, whereupon Members will give consideration to formally determining the land as contaminated under Part 2A of the Environmental Protection Act, 1990.

For Further Information Please Contact:

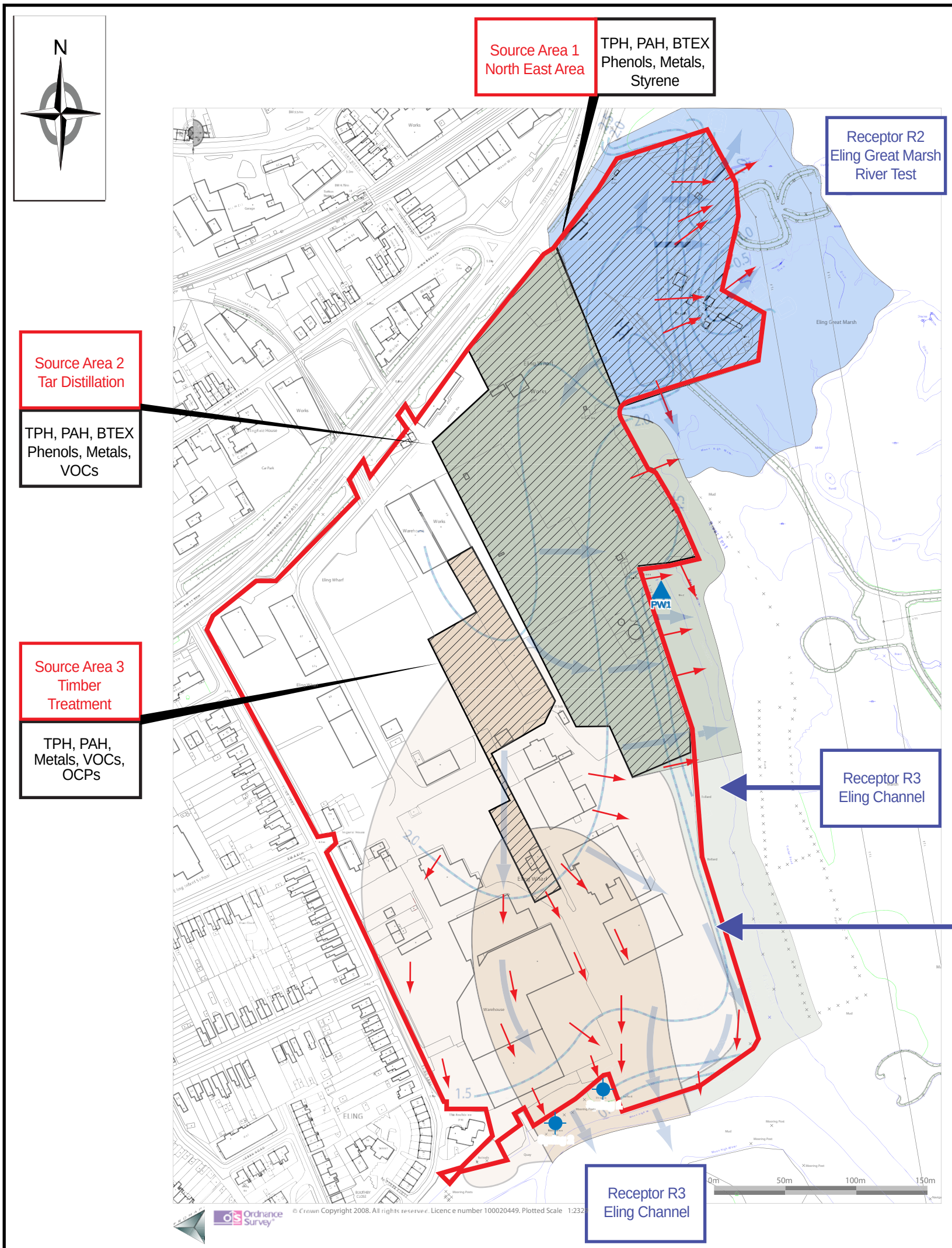
Carole Gallagher
Environmental Health Manager (Env Protection)
Tel: (023) 80285162
E mail carole.gallagher@nfdc.gov.uk

Background Papers:

Published documents
Exempt information

APPENDIX 1


A36
Totton
A35
High Street
School Road
Elling Lane
Downs Park Avenue



Key

- Spring Location
- PW Sample Location
- Current Site Plan
- 1.5 Inferred Groundwater Elevation
- Inferred Groundwater Flow Direction
- Site Boundary

SOURCES & PATHWAYS

Source Area 1
NE Area of Site
Pathway P2-1

Source Area 2
Tar Distillation Works
Pathway P2-2
Pathway P2-3

Source Area 3
Timber Treatment Works
Pathway P2
Pathway P2

Pathway 1 to Groundwater : All Source Areas
Contaminant Migration Pathway

Title:	REVISED CONCEPTUAL SITE MODEL		
Location:	ELING WHARF		
Client:	ENVIRONMENT AGENCY		
URS	App'd: KN	Drawn: LCH	Date: NOV 2009
	Status: FINAL		Ref: RK/CDF/LCH/BRIS
	Scale: AS SHOWN		Job No: 49319753
	Drg. Size: A3		**FIGURE 11**

Controlled Waters SPLs Identified at Eling Wharf

APPENDIX 3

Groundwater SPLs

Linkage ID	Source	Pathway	Receptor	Comments
1	TPH	Migration from soils to shallow groundwater	Groundwater	
	Ali C8 – C10	Migration from soils to shallow groundwater	Groundwater	POCW is being caused
	Ali C10 – C12	Migration from soils to shallow groundwater	Groundwater	POCW is being caused
	Ali C12 – C16	Migration from soils to shallow groundwater	Groundwater	POCW is being caused
	Ali C16 – C21	Migration from soils to shallow groundwater	Groundwater	POCW is being caused
	Ali C21 – C35	Migration from soils to shallow groundwater	Groundwater	POCW is being caused
	Aro C8 – C10	Migration from soils to shallow groundwater	Groundwater	POCW is being caused
	Aro C10 – C12	Migration from soils to shallow groundwater	Groundwater	POCW is being caused
	Aro C12 – C16	Migration from soils to shallow groundwater	Groundwater	POCW is being caused
	Aro C16 – C21	Migration from soils to shallow groundwater	Groundwater	POCW is being caused
	Aro C21 – C35	Migration from soils to shallow groundwater	Groundwater	POCW is being caused
2	1-Methylnaphthalene	Migration from soils to shallow groundwater	Groundwater	**POCW is likely to be caused**
3	2-Methylnaphthalene	Migration from soils to shallow groundwater	Groundwater	**POCW is likely to be caused**
4	Acenaphthylene	Migration from soils to shallow groundwater	Groundwater	POCW is being caused
5	Benzo (a) anthracene	Migration from soils to shallow groundwater	Groundwater	POCW is being caused
6	Benzo (a) pyrene	Migration from soils to shallow groundwater	Groundwater	POCW is being caused
7	Chrysene	Migration from soils to shallow groundwater	Groundwater	POCW is being caused
8	Dibenzo (a,h) anthracene	Migration from soils to shallow groundwater	Groundwater	POCW is being caused
9	Fluoranthene	Migration from soils to shallow groundwater	Groundwater	POCW is being caused
10	Naphthalene	Migration from soils to shallow groundwater	Groundwater	POCW is being caused
11	Phenanthrene	Migration from soils to shallow groundwater	Groundwater	POCW is being caused
12	Benzene	Migration from soils to shallow groundwater	Groundwater	POCW is being caused
13	Toluene	Migration from soils to shallow groundwater	Groundwater	POCW is being caused

14	Ethylbenzene	Migration from soils to shallow groundwater	Groundwater	POCW is being caused
15	Xylene	Migration from soils to shallow groundwater	Groundwater	POCW is being caused
16	Phenol	Migration from soils to shallow groundwater	Groundwater	POCW is being caused
17	Cresols	Migration from soils to shallow groundwater	Groundwater	**POCW is likely to be caused)**
18	Dimethylphenols	Migration from soils to shallow groundwater	Groundwater	**POCW is likely to be caused**
20	Biphenyl	Migration from soils to shallow groundwater	Groundwater	**POCW Likely to be caused**
21	Aluminium	Migration from soils to shallow groundwater	Groundwater	**POCW Likely to be caused**
22	Arsenic	Migration from soils to shallow groundwater	Groundwater	POCW is being caused
23	Cadmium	Migration from soils to shallow groundwater	Groundwater	**POCW is being caused**
24	Chromium	Migration from soils to shallow groundwater	Groundwater	**POCW is being caused**
25	Hexavalent Chromium	Migration from soils to shallow groundwater	Groundwater	**POCW Likely to be caused**
27	Copper	Migration from soils to shallow groundwater	Groundwater	POCW is being caused
28	Iron	Migration from soils to shallow groundwater	Groundwater	**POCW Likely to be caused**
31	Manganese	Migration from soils to shallow groundwater	Groundwater	**POCW Likely to be caused**
32	Mercury	Migration from soils to shallow groundwater	Groundwater	POCW is being caused
33	Nickel	Migration from soils to shallow groundwater	Groundwater	POCW is being caused
35	Selenium	Migration from soils to shallow groundwater	Groundwater	POCW is being caused
36	Zinc	Migration from soils to shallow groundwater	Groundwater	POCW is being caused
37	1,2,4-Trimethylbenzene	Migration from soils to shallow groundwater	Groundwater	POCW is being caused
38	cis 1,2-Dichloroethene	Migration from soils to shallow groundwater	Groundwater	POCW is being caused
39	iso-Propylenbenzene	Migration from soils to shallow groundwater	Groundwater	POCW is being caused
41	Styrene	Migration from soils to shallow groundwater	Groundwater	POCW is being caused
42	Trichloroethene	Migration from soils to shallow groundwater	Groundwater	POCW is being caused
43	Dieldrin	Migration from soils to shallow groundwater	Groundwater	POCW is being caused

Surface Water SPLs

Linkage ID	Source	Pathway	Receptor	Comments
44	TPH	Lateral migration of groundwater to surface waters	Surface Waters	POCW is being caused
45	1-Methylnaphthalene	Lateral migration of groundwater to surface waters	Surface Waters	POCW is being caused (PW1, Spring 2)
46	2-Methylnaphthalene	Lateral migration of groundwater to surface waters	Surface Waters	**POCW is likely to be caused – present in groundwater**
47	Acenaphthylene	Lateral migration of groundwater to surface waters	Surface Waters	**POCW is likely to be caused – present in groundwater**
48	Benzo (a) anthracene	Lateral migration of groundwater to surface waters	Surface Waters	POCW is being caused (PW1)
49	Benzo (a) pyrene	Lateral migration of groundwater to surface waters	Surface Waters	POCW is being caused (PW1)
50	Chrysene	Lateral migration of groundwater to surface waters	Surface Waters	POCW is being caused (PW1)
51	Dibenzo (a,h) anthracene	Lateral migration of groundwater to surface waters	Surface Waters	**POCW is likely to be caused – present in groundwater**
52	Fluoranthene	Lateral migration of groundwater to surface waters	Surface Waters	POCW is being caused (PW1, Spring 2)
53	Naphthalene	Lateral migration of groundwater to surface waters	Surface Waters	POCW is being caused
54	Phenanthrene	Lateral migration of groundwater to surface waters	Surface Waters	POCW is being caused (PW1, Spring 2)
55	Benzene	Lateral migration of groundwater to surface waters	Surface Waters	POCW is being caused
56	Toluene	Lateral migration of groundwater to surface waters	Surface Waters	POCW is being caused
57	Ethylbenzene	Lateral migration of groundwater to surface waters	Surface Waters	POCW is being caused
58	Xylene	Lateral migration of groundwater to surface waters	Surface Waters	POCW is being caused
59	Phenol	Lateral migration of groundwater to surface waters	Surface Waters	POCW is being caused

60	Cresols	Lateral migration of groundwater to surface waters	Surface Waters	POCW is being caused
61	Dimethylphenols	Lateral migration of groundwater to surface waters	Surface Waters	POCW is being caused
63	Biphenyl	Lateral migration of groundwater to surface waters	Surface Waters	POCW is being caused (PW1)
64	Aluminium	Lateral migration of groundwater to surface waters	Surface Waters	. **POCW is likely to be caused – present in groundwater**
65	Arsenic	Lateral migration of groundwater to surface waters	Surface Waters	POCW is being caused
66	Cadmium	Lateral migration of groundwater to surface waters	Surface Waters	**POCW is likely to be caused – present in groundwater**
67	Chromium	Lateral migration of groundwater to surface waters	Surface Waters	POCW is being caused (Spring 1)
68	Hexavalent Chromium	Lateral migration of groundwater to surface waters	Surface Waters	**POCW is likely to be caused – present in groundwater**
70	Copper	Lateral migration of groundwater to surface waters	Surface Waters	POCW is being caused (Spring 1)
71	Iron	Lateral migration of groundwater to surface waters	Surface Waters	POCW is being caused (Spring 1)
74	Manganese	Lateral migration of groundwater to surface waters	Surface Waters	. **POCW is likely to be caused – present in groundwater**
75	Mercury	Lateral migration of groundwater to surface waters	Surface Waters	**POCW is likely to be caused – present in groundwater**
76	Nickel	Lateral migration of groundwater to surface waters	Surface Waters	**POCW is likely to be caused – present in groundwater**
78	Selenium	Lateral migration of groundwater to surface waters	Surface Waters	**POCW is likely to be caused – present in groundwater**
79	Zinc	Lateral migration of groundwater to surface waters	Surface Waters	POCW is being caused (Spring 1)
80	1,2,4-Trimethylbenzene	Lateral migration of groundwater to surface waters	Surface Waters	POCW is being caused
81	cis 1,2-Dichloroethene	Lateral migration of groundwater to surface waters	Surface Waters	POCW is being caused
82	iso-Propylenbenzene	Lateral migration of groundwater to surface waters	Surface Waters	**POCW is likely to be caused – present in groundwater**

84	Styrene	Lateral migration of groundwater to surface waters	Surface Waters	POCW is being caused
85	Trichloroethene	Lateral migration of groundwater to surface waters	Surface Waters	POCW is being caused
86	Dieldrin	Lateral migration of groundwater to surface waters	Surface Waters	**POCW is likely to be caused – present in groundwater**

Please note – although the linkage ID goes to 86 there are only 74 SPL's for controlled waters (follows further review by URS when 12 were removed from the 86 originally identified)

APPENDIX 4

Ms Annie Righton
Head of Public Health and Community Safety
New Forest District Council
Appletree Court
Lyndhurst
Hampshire
SO43 7PA

17th March 2010.

Dear Ms Righton,

Eling Wharf, Totton – Foreshore Remediation and Redevelopment.

John Marshall and Carole Gallagher had a meeting on 2nd March with the Environment Agency to discuss our proposals for the remediation of the Eling Foreshore. I am sorry that they were not able to make better progress at the meeting but we remain determined to deal with all the issues that were raised and satisfy all interested parties concerns so that we can get on with the clean up as soon as possible.

Our objectives continue to be to remediate the Foreshore and deal with all issues relating to the contamination of Controlled Waters on a voluntary basis as soon as permitted.

John gathered from Carole that it was likely there would be a recommendation to Cabinet that the Eling Wharf site should be Registered as a Special Site under the EPA. We understand that the initial decision to Register lies with NFDC. We would however like to point out that even if we did not dispute the findings of the URS report on which you are basing your decision to Register, Registration is not the only option available to you and the Cabinet Members.

As Carole pointed out at the meeting, the law relating to Controlled Waters does not require a test of significance, although common policy and amending regulations that are due to be adopted this summer will bring in this test. Whilst we do not dispute that contamination of Controlled Waters is taking place these waters have been monitored on a regular basis by the Environment Agency as part of a Waste Licence consent granted to one of our subsidiary companies in September 1995. At the EA's request we installed oil control booms some years ago and at no time have we breached the consent limits agreed with the EA. We contend that the contamination of Controlled Waters is therefore a technical breach; it is not causing significant harm and has not been of concern to the EA for the last 15 years.

We fully accept that remediation should take place to eliminate contamination of Controlled Waters. We believe that this can be achieved effectively and more comprehensively as part of the overall redevelopment of the site rather than through Registration. As you are aware it is common practice that where a landowner is willing and able to work with the Local Authority then the land is not normally

Registered, particularly where remediation forms part of a redevelopment proposal. Planning Policy Statement 23 sets this out quite clearly.

We are in discussion with the Council's Planning Department and have appointed Master Planners to prepare a comprehensive development plan for the whole of the Eling Wharf site with reference to the new Local Development Framework Core Strategy. This will produce more employment on the site and better amenities for the local community. We have also worked closely with the Department to improve access to Eling Wharf to reduce noise and congestion affecting residents in the High Street. We fully intend to continue this constructive and mutually beneficial relationship with the Council.

We made an offer to you at our meeting on 8th February at Lyndhurst to appoint a member of SILC, at our expense, to assist you with the independent analysis and implementation of a remediation plan for the Foreshore. We appreciate the complexity and expense of NFDC undertaking this work and would be happy to provide this assistance which I believe would be in both our interests and enable remediation to proceed rapidly.

If the site were to be Registered, we believe that the impact on BBH, the current tenants and the local community would be significant:

> Bank lending to remediate Registered Land is unobtainable; funds for remediation could only be generated from our tenants' rent roll on site.
>
> The sale of land to raise cash to finance remediation would not be possible at any sensible price as no developer will risk the blight of Registered Land on their balance sheet when "clean" greenfield land is available. Any sale would reflect this blight and be at a heavily discounted price.
>
> Out tenants' leases would all require qualification. The potential loss of tenants and the impact on jobs will decrease income and the means to pay for remediation and redevelopment.
>
> Limited finance for remediation would delay redevelopment and the provision of new jobs by between 5 and 8 years.

In the event of Registration of the site and the consequent significant legal and financial effect this would have on BBH I regret that we would have no option other than to withdraw our offer to bear the full cost of voluntarily remediating the Eling Foreshore. The legal process of Registration would delay dealing with the "significant human health risk" (URS report) while the Council involved the Crown Estate as land owners and Totton and Eling Town Council as teneant of the Foreshore in the clean up process. This would be a time consuming and expensive process adding substantially to the 4 years it has already taken to get this far.

Burt Boulton Holdings has been in occupation of Eling Wharf for 150 years. The business has been a large employer locally and is committed to the remediation and redevelopment of the site. Registration, where the land owner is willing and able to deal with the contamination, is extremely uncommon and would seriously delay the

opportunity that now exists to clean up the Foreshore, redevelop the site and provide the jobs and prospects that Totton so badly needs.

I believe that not Registering this site is in all our best interests and that the remediation of Eling Wharf should be dealt with on a voluntary basis as part of an ongoing dialogue between NFDC, the EA and Burt Boulton Holdings.

I do hope you will consider our positive proposals based on cooperation favourably against the more restricted and protracted regulatory route. If however you decide to make a recommendation to Cabinet to Register the site I should be grateful if you would let me know the date of the Cabinet meeting, how we can represent our own views to the Cabinet Members and let me have a list of the names and contact addresses of the Members prior to the meeting.

Yours sincerely

J Roberts
Cc: John Mascall
Chris Elliott

APPENDIX 5

Mr J Roberts
Burt Boulton Holdings Ltd
5 – 6 The Square
Winchester
Hants
SO23 9WE

My Ref:
Your Ref:

4th May 2010

Dear Mr Roberts,

Eling Terminal and Foreshore, Totton

1. I enclose the following, recently published, reports in relation to the contamination at Eling Wharf:

    a. Interpretative Findings from Intrusive Investigations undertaken at a section of the foreshore at Eling Wharf – Detailed Quantitative Risk Assessment for Human Health (Environment Agency April 2010)

    b. Review of Environ Correspondence on Controlled Waters SPL, prepared by URS, dated 22 April 2010.

2. The reports contain the following material conclusions:

    Risk to Human Health

    "It is reasonable to conclude (based on the balance of evidence available) that there is a significant health risk to young children associated with an unacceptable one off acute oral exposure to arsenic in Area 1. Similarly it is reasonable to conclude that this exposure is consistent [with] the statutory definition of unacceptable intake.

    Because the elevated concentrations of lead and mercury co-exist with the elevated arsenic a similarly detailed evaluation of risk associated with acute exposure to these two substances is not necessary as mitigation of arsenic would reasonably be expected to mitigate the health risk associated with the co-exposure to lead and mercury". (page 24 of the Detailed Quantitative Risk Assessment for Human Health)

    and further recommends on page 38 that:

the SPLs associated with arsenic, mercury and benzo(a)pyrene highlighted above do meet the statutory definition of SPOSH and consequently these SPLs can be used by NFDC in its decision on whether the area in question meets the statutory definition of Contaminated Land.

Pollution of controlled waters

"Pollution of controlled waters is being caused or is likely to be caused. Inclusion of the controlled waters SPLs identified on the attached tables in the Schedule of Determination is therefore appropriate under the current statutory test and statutory guidance" (page 8 of URS letter dated 22nd April 2010).

The table referred to in the quote above lists the 86 significant pollutant linkages originally identified by URS. Of the 86 SPLs, Environ accept 33 of them. Of the remaining SPLs challenged by Environ, URS have rejected the challenge in relation to 41 of them but accepted the challenge in relation to the remaining 12, leaving a total of 74 SPL's identified in respect of controlled waters.

3. As you are aware, the contamination at Eling Wharf is due to be considered at the meeting of the Cabinet of the Council on 2 June 2010, including the issue of whether to determine the land as contaminated under the contaminated land regime. The Cabinet papers need to be published by 24 May.

4. The Council is in receipt of your letter dated 17 March 2010 and your letter (13 April 2010) to John Mascall. The letters refer in turn to various other documents which the Council has also reviewed. The Council has given due and careful consideration to the points raised in your correspondence and has taken legal advice on the matter.

5. The question the Council is required to ask itself under the contaminated land regime is whether the statutory criteria for contaminated land are satisfied, not whether it is appropriate or expedient to determine the land as contaminated. If the land in question meets the statutory criteria for identification, then there is a duty to identify it.

6. As regards the main site, there is clear evidence that it is contaminated within the definition of 'contaminated land' under the contaminated land regime. Whilst I am aware that Environ have tabled proposals for the further assessment of the main site, a full site characterisation is considered necessary in order to further inform any remediation option appraisal. The timetable for any remediation is therefore uncertain and unlikely to happen imminently. However, in your e-mail dated 27 April 2010 you indicated that the company hopes to start the remediation of the foreshore during May and that, with a prompt decision to start, the contractor should be able to complete the clean-up by 31 May 2010. The Council is aware that there have been discussions with the Environment Agency about the proposed measures in respect of controlled waters and that the outcome of these discussions now needs to be detailed in a revised foreshore remediation strategy, for final approval. In addition the revised document will need to contain the outcome of discussions between Environ and New Forest District Council which are due to take place on the 5th May 2010 regarding the human health aspects of the remediation proposals.

7. In view of these recent developments in terms of the proposal to remediate the foreshore, the Council is prepared to consider the foreshore and the main site separately in terms of identification of the land as contaminated They are physically distinct areas of land and can be dealt with by distinct, separate remediation actions.

8. If BBH is able to present appropriate evidence, to show that effective remediation of the foreshore will have commenced by the end of May, as indicated in your e-mail of 27 April, then that will be taken into account by the Cabinet, and the recommendation to Cabinet will be that the decision on determination of the foreshore be deferred until the work is complete and has been validated. Appropriate evidence in this context would include a contract for execution of the works (including start date); any relevant consents for the work to be undertaken and confirmation from Environ that the works have commenced or will commence on a specific date, and a projected completion date. The Council would also like to see details of how, during the works, the

site will be secured so as to prevent access by members of the public to disturbed contaminants and the prevention of dissemination of such contaminants, for example as dust. The material will need to be provided in sufficient time for it to be considered by officers and to go into the Cabinet papers. To achieve this, the Council will need the appropriate evidence by 17th May at the latest. If it is not forthcoming by that date, then it will not be possible to include the information in the papers to Cabinet or to reflect it in the recommendations made to Members.

9. If the decision is taken to defer a decision on determination on the basis of such evidence of commencement of the remediation works, the recommendation will be that the matter come back to Cabinet following completion of the remediation works, and that if evidence is provided that the works have been properly and effectively undertaken to the satisfaction of the Environment Agency and this Council as regulator for contaminated land, then a formal decision not to determine the Foreshore as contaminated can be taken. The Council of course reserves its position in the event that the remediation works are not commenced or completed within the imminent timeframe which you propose.

10. I should point out that irrespective of the position on the Foreshore, there will be a recommendation to Cabinet to proceed to determine the Main Site as contaminated, given the evidence of contamination and the uncertain nature and timetable for any remediation of the site. The representations in your letters of 17 March and 13 April will be drawn to the attention of the Cabinet.

Yours sincerely

Annie Righton
Head of Public Health and Community Safety
Tel: 023 80 285123
e-mail: annie.righton@nfdc.gov.uk

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EMAIL: romola.parish@traverssmith.com

14 June 2010

Dear Mr Mascall,

Burt Boulton Holdings Limited: Eling Wharf and Foreshore, Totton
Remediation of Contaminated Land.

We act for Burt Boulton Holdings Ltd ("BBH") in respect of the above matter. We refer to Annie Righton's letter of 4 May 2010 (the "Letter") setting out a number of requests in respect of information and other documentation relating to remediation works at Eling Wharf and the Foreshore.

Attached to this letter are the documents that were requested in the Letter in respect of the Foreshore to be submitted by 14th June 2010 for consideration at Cabinet on 5 July 2010. We have also provided documents that we consider would address the uncertainties that are referred to in the Letter with respect to the Main Site.

1. FORESHORE (PARAGRAPH 8 OF THE LETTER)

1.1 Licence from the Crown (signed copy attached) which should give the assurance that you require that the Crown has no objection to the works being carried out. We note that it is stated in the Letter that you would be prepared to defer registration of the Foreshore on receipt of this document.

1.2 Revised Foreshore Remediation Strategy taking into account discussions with the Environment Agency and yourselves as referred to in item 6 of the Letter. Following a further meeting on 25 May 2010 a separate letter has also been issued confirming additional actions (see attached letter from Environ dated 7 June 2010). This has been agreed by all parties.

1.3 The Letter refers to requirements for evidence for starting of the works, for example, a copy contract for the remediation works on the Foreshore including start date. We cannot provide this until the Foreshore Remediation Strategy has been approved by NFDC. However we attach a copy of a letter of intent signed 17 March 2010 from Soilfix, an appropriate contractor for these works.

1.4 You have also requested details of how the Foreshore is to be secured to as to prevent public access during the works and dissemination of such contaminants. The remediation contractor's method statement is included as an annex to Environ's remediation strategy. This shows how the works will be secured and also confirms signage to be used during the works. BBH has also spoken with Totton & Eling Town Council and they are amenable to closing the slipway and fencing off the entire site.

1.5 You have requested confirmation from Environ that the works have begun or will begin on a specified date and a projected completion date. Mobilisation for the foreshore remediation work will start on 30 June and actual remediation will start on 5 July. These dates have been agreed with the EA and NFDC (see Environ's letter dated 7th June 2010). On 11th June a pre-start health and safety meeting was held and on the 17th June the pre-start validation sampling is to be undertaken (as specified by the foreshore remediation strategy).

1.6 A Flood Defence Consent Licence (reference LD/2010/046) has been granted by the Environment Agency and a licence in respect of the works has also been granted by the Marine Management Organisation in respect of any works undertaken to the foreshore (see attached).

2. MAIN SITE (PARAGRAPH 6 OF THE LETTER)

Full Site Characterisation

2.1 It is stated in the Letter that a Full Site Characterisation ("FSC") of the Main Site is necessary. This is attached along with a Remediation Strategy for the Main Site ("RS") which sets out proposals for the remediation of the contamination on the Main Site in two stages:

i) works required to address the Part IIA contamination on the site: and
ii) on-going monitoring and further remediation that could be undertaken in the event of redevelopment.

2.2 There are a number of options for remediation at different areas of the Main Site, in particular at Zone 6 and Zone 2 (Figures B and C of the attached RS). You will see from these figures that work is already underway on site at these Zones by way of ongoing voluntary remediation as referred to in the DEFRA Circular 01/2006 (the "Circular") at Annex 2 paragraphs 8.2 to 8.8.

2.3 The attached RS is an updated version of the remediation options appraisal first submitted to you on 5 March 2010 but for which we have not yet had formal sign-off from you. It addresses all the additional issues raised in your letter of 4 May 2010 and the URS comments dated 22 April 2010.

There is a "Non Technical Summary" included that may be helpful to non-specialists.

Evidence of Current Works

2.4 We have also provided you with additional evidence of current remediation works. You will see from the implementation timescale in the RS (Table 9.2) that certain works are already underway or have been completed on the site. The additional information on the current works is provided for clarification as to the nature of the works being undertaken. Briefly, these works comprise:

- Pumping of free phase product ('neat' hydrocarbons) and contaminated groundwater in the most contaminated areas, thus removing the source of pollution at this location.
- An engineering feasibility study has been commissioned to determine the most appropriate technique for sealing the pollution at the head of the creek – options include new sheet piled walls, damming the creek and repairs to existing sheet piling.
- Excavation of the main contamination hotspot and assessment of underground structures that may be contributing to the contamination has started.
- Within the excavation a permanent large diameter sump has been installed and is being used to enhance removal of contamination from the ground (including free phase product and contaminated groundwater).
- Remediation trials are being undertaken on the soil from the hotspot excavation. This is important for determining the most efficient and sustainable method for dealing with contaminated soil excavated from the site.
- An additional boom has been installed in the creek close to the discharge of contamination. This is an ongoing measure undertaken to control the pollution ahead of the main remediation works.
- A monitoring action has been undertaken in respect of less contaminated areas of the site and this is an appropriate action under Part 2A of the EPA, 1990.
- A drainage survey has also been carried out to assess potential contaminant migration pathways associated with the site's drainage.

Working Party to monitor progress

2.5 Our client has suggested that a working party could be set up to monitor progress and discuss the on-going phases of the RMS, agreeing the appropriate options at each stage, having regard to the guidance in the Circular with respect to voluntary remediation works (Annex 2 paragraphs 8.2 to 8.8) and technical and financial circumstances (section 10 of Annex 2) and the relative merits of alternative options. We understand that you considered that this would be a sensible approach to adopt.

Contract for Works and timetable

2.6 Soilfix are undertaking the works on the Main Site on an on-going basis on terms agreed with Environ. The proposed timetable for current and future works is set out in the RS.

Letter from Barton Willmore on impact of registration

2.7 We attach a letter from Barton Willmore who advise BBH on the future redevelopment of the Main Site in accordance with your emerging new development plans. Barton Willmore has considerable experience of development of contaminated land and, from this experience, consider that registration of the Main Site could be detrimental to the prospects of the future of the Main Site. We note the comments on paragraph 5 of the Letter but ask that this information be considered in the preparation of your report to the Cabinet.

3. SUBMISSION

We note that you consider that it would be appropriate to defer registration of the Foreshore on production of the required evidence and confirmation of imminent works. We trust the documentation provided will enable you to defer any decision to register.

We submit that the FSC and the RS for the Main Site are appropriate to address the immediate and longer term remediation requirements of the site in accordance with the Circular. We have provided evidence that work has already been implemented on the Main Site and which comprises voluntary remediation works in accordance with the Circular. We have proposed a mechanism of a "working party", which could facilitate regular meetings to enable you to monitor progress and agree options in the ongoing remediation works. The RS also contains a timetable for implementation of the works, which has already been implemented by the commencement of the works on the Main Site.

We submit that the information attached to this letter both addresses your requests for information and your certainty as to the nature and timescales for remediation works on the Main Site (paragraph 10 of the Letter).

On the basis that you were advised, in respect of the Foreshore, that it would be vexatious to register in circumstances where works were about to start, we suggest that, as the Main Site is currently in similar circumstances to the Foreshore in that works are identified and on-going, it might appear inconsistent and vexatious to register the Main Site at this time and would ask that the decision to register the Main Site should also be deferred.

Yours sincerely

Romola Parish

Dr. Romola Parish
Solicitor
Environment and Planning

WE CERTIFY THIS TO BE
A TRUE COPY OF THE
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J Mascall
Executive Director
New Forest District Council
Appletree Court
Beaulieu Road
Lyndhurst
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Our Ref. 18228/A3/PR/JMD

9th June 2010

Dear Mr Mascall

ELING WHARF, TOTTON

Burt Boulton Holdings Ltd (BBH) is intending to regenerate land at Eling Wharf and carry out environmental improvements as part of a comprehensive mixed use redevelopment of the site. Barton Willmore has been appointed as part of a Consultant team to achieve the successful decontamination and environmental improvements to enable the comprehensive regeneration of the site.

The Eling Wharf site is allocated for employment uses, together with some residential development, within the adopted Local Plan. However, at the time the Local Plan was prepared no technical studies were undertaken to demonstrate that the current allocation is viable and deliverable. BBH has agreed to work with NFDC to prepare a Development Brief for the site which, informed by a series of technical studies, will provide a proposal for the redevelopment of the site that is both economically viable and deliverable and will inform the ongoing production of the LDF.

BBH has appointed a large and experienced professional team and committed substantial funds to deliver positive economic and physical benefits to Totton through the development of Eling Wharf.

The professional team is providing advice on the following issues:

- Decontamination – Environ;
- Planning – Barton Willmore;
- Urban Design – Barton Willmore;
- Transportation – Clarke Bond;
- Drainage and Flood Risk – Clarke Bond;
- Ecology – Waterman Group;
- Townscape and Visual Impact – Barton Willmore;
- Heritage and Archaeology – Waterman Group;
- Utilities – Clarke Bond; and
- Commercial Advice – King Sturge.

BBH and their team are in close liaison with New Forest DC Planning Officers, and the requisite technical studies on the above matters are currently being undertaken, which will advise on the decontamination of the site and form the evidence base to the production of a Development Brief within the agreed timeframe. The Development Brief will establish a framework for the redevelopment of the site, establishing broad parameters

for the types and mix of uses, quantum of development, access arrangements, management of flood risk and design and development principles. The intention is that the Development Brief will feed into the LDF and will have status equivalent to that of SPD, forming the basis against which future planning decisions will be determined.

The key elements of the proposals that the Development Brief will seek to achieve are broadly:

- Decontaminate site;
- Raise the Quay wall in order to avoid future flooding of site;
- Create an improved access from A35; and
- Redevelop site with up to 150 homes, Care Home, Medical Centre and Employment uses.

Work to date has involved extensive consultation with the Environment Agency, Natural England, Officers at NFDC and HCC and other agencies.

As proposals advance, a process of stakeholder consultation will be undertaken to inform the production of the Development Brief. Stakeholders that will be invited to take part include Totton Town Council, relevant NFDC Officers, Members and relevant agencies. The stakeholder consultation process will be followed by Public Consultation. Sustainability Appraisal, including Strategic Environmental Assessment, will be undertaken in respect of the Development Brief before its submission to Members and Officers of NFDC for consideration as part of the LDF.

The process that is currently underway provides a strategy that will aid the production of the NFDC LDF by dealing with the future of the site in a comprehensive manner, based on a robust evidence base, in a timescale agreed with NFDC.

Registration of the site as contaminated land will have the effect of decreasing land values, discouraging investment in the site and precluding higher value uses from locating on site. This in turn is likely to significantly prejudice the redevelopment of the site and prevent the environmental, employment and amenity improvements that its redevelopment would deliver.

Decontamination works are underway on site, as set out within the Non-Technical Summary from Environ. BBH, the owners of the site, are committed to decontaminating the site. Work on the creation of a policy framework to guide the comprehensive redevelopment and environmental improvements to the site are also progressing apace. The objectives of BBH are identical to those of NFDC, the EA and other agencies, and registration at this stage is potentially counterproductive.

We appreciate the responsibilities of NFDC with regards to securing the decontamination works in particular and we would request that Registration is deferred to allow a working party of the combined experts to continue with the collaborative approach that has been adopted on the foreshore, as this is the best and quickest way to achieve the decontamination of the main site. The working party would be chaired by a senior executive from NFDC to ensure the Council remain in control of the process and can review the effectiveness and progress being made by all parties thereby discharging their responsibility.

Yours sincerely

IAN MELLOR
Partner