UNITED KINGDOM AND USA'S LEGISLATIONS TO CLEAN HISTORIC CONTAMINATION

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Abstract

The industrial revolutionaries have left harmful residues on and in the land. Dealing with such contamination, the UK introduces Part 2A of the Environmental Protection Act (EPA) 1990 and the USA has legislated CERCLA 1980. This essay is going to discuss both provisions in cleaning up the contamination in each jurisdiction. We reach into a conclusion that both EPA 1990 and CERCLA 1980 govern the cost of cleaning up historic contamination, provide broad definition for the meaning of liable persons, and recognise the retroactivity principle. We find that there is a bifurcation of polluters classification in UK laws. This bifurcation is absent in US laws.

Keywords: *The UK, the USA, legislation, historic contamination.*

Intisari

Revolusi industri telah menyisakan bahan yang berbahaya baik di atas maupun di bawah permukaan tanah. Untuk mengatasi pencemaran bahan berbahaya tersebut, Inggris telah menerbitkan Bagian 2A EPA 1990 sementara Amerika Serikat telah mengesahkan CERCLA 1980. Tulisan ini mengkaji kedua aturan negara tersebut. Disimpulkan bahwa baik EPA 1990 maupun CERCLA 1980 sama-sama memiliki ketentuan yang mengatur perihal biaya pembersihan kontaminasi historis, mendefinisikan makna 'orang yang bertanggungjawab' secara luas, dan mengakui prinsip retroaktifitas. Hukum Inggris mengklasifikasikan pencemar, namun hukum Amerika Serikat tidak memiliki sistem klasifikasi tersebut.

Kata Kunci: Inggris, Amerika Serikat, peraturan, pencemaran lingkungan masa lalu.

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A. Introduction

The introduction of regulations governing problems resulting from historically contaminated land is relatively recent as such problems are usually well covered and its legal issues especially regarding its liabilities are becoming more complex and controversial.[1] Due to the serious concern about the extent and impacts of historic contamination in the early 1990s, the United Kingdom legislative body has arranged the final version of the legislation by providing a complex system for determining a definition and identification of historically contaminated land, deciding priority action to clean up sites that would be resulting the greatest harms, identifying what works should be taken to solve those harms, allocating and sharing the cost of carrying out the works among 'appropriate person', and bearing the responsibility for such persons to conduct such works where necessary.[2] The same approach to deal with the contamination is also taken by the United States of America by introducing the Comprehensive Environmental Response, Compensation, and Liability Act 1980 (CERCLA).

B. Discussion

1. The Legislation to Clean Up the Historic Contamination in the United Kingdom

Such environmental liability system has been regulated by the Environmental Protection Act 1990 in Part 2A[3] entitled Contaminated Land. Part 2A deals with "identifying land that needs cleaning up, deciding how to clean it up, and determining who is going to do this (or pay for it being done by the regulators)".[4] Therefore, this provision is considered as the main rule that is used in order to determine who must be liable for cleaning up the historical contamination sites in the United Kingdom. Apart from this statute, there is also additionally secondary legislation in the form of the Contaminated Land (England) Regulation 2006 dealing with certain aspects of the contaminated land regime, involving the meaning of 'special sites', public registers and the specific arrangements for remediation notices consisting of content, service, and appeals.[5] Moreover, the most significant parts of the new system are to be bound in Circular 2/2006, Part 2A of the Environmental Protection Act 1990: Contaminated Land setting out the term of the operation of the rest of the legislation and providing a general description of how system works.[6] This also provides specific guidance on evaluating risk, allocating and apportioning liability and correcting approach to the strategic identification of sites.[7]

The meaning of contaminated land is defined by section 78A(2) of the Environmental Protection Act 1990, which provides that:

> Contaminated land is any land which appears to the local authority in whose area it is situated to be in such a condition, by reason of subtances in, on or under the land, that: (a) significant harm is being caused or there is a significant possibility of such harm being caused; or (b) pollution of controlled waters is being, or likely to be, caused; and in determining whether any land appears to be such land, a local authority shall…act in accordance with guidance issued by the Secretary of State…with respect to the manner in which that determination is to be made.

According to Bell and McGillivray its definition is essential to the implementation of Part 2A due to the fact that it is the trigger for all other procedures to happen.[8] In addition, the definition is considered as a reflection of the discrimination between the liability imposed in terms of historical contamination and current contamination.[9] Regarding historical contamination, the distinction between polluters who cause or knowingly permit

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1 S. Bell and D. McGillivray, 2008, *Environmental Law,* 7th Ed, Oxford University Press, New York, p. 554.
2 *Ibid.,* p. 555.
3 Part IIA of the Environmental Protection Act 1990 c.43, this version was in force from August 4, 2006 to present (version 10 of 10).
4 S. Bell and D. McGillivray, 2008, *Op.cit*., p. 555.
5 *Ibid.*
6 *Ibid.*
7 *Ibid.*
8 S. Bell and D. McGillivray, *Loc.cit.*
9 *Ibid.*

the presence of pollutants and polluters who are simply owners or occupiers of land has been clearly distinguished by statutory guidance issued under Part 2A of the Environmental Protection Act 1990.[10] The two classifications of contaminated land are provided to reflect the policy of requiring clean-up only if the contamination resulting inadmissible or intolerant harms to the environment or to human health.[11] The definition of "harm" is provided in section 78(4) which states that "harm" means harm to the health of living organisms or other interference with the ecological systems of which they form part and, in the case of man, includes harm to his property.

2. The Identification of Historic Contamination in the United Kingdom

Before addressing who must be responsible for cleaning up historic contamination land, it is compulsory for the local authority to identify its site as the first stage. As discussed above, Part 2A of the Environmental Protection Act governs how to identify historical contamination in order to conclude that the harm of the contamination is significant. Section 78B (1) Part 2A of the Environmental Protection Act 1990 requires every local authority shall cause its area to be inspected from time to time for the purpose (a) of identifying contaminated land and (b) of enabling the authority to decide whether any such land is land which required to be designated as special site." The inspection must be conducted based on reasonable grounds approach. Annex 3, chapter B.17A of Circular 1/2006 provides that:

> Under section 78B(1) (as modified), the trigger for a local authority to cause land to be inspected for the purposes of identifying whether the land is contaminated land is where it considers that there are reasonable grounds for believing that land may be contaminated. It will have such reasonable grounds where it has knowledge of relevant information relating to: (a) a former historical land use, past practice, past work activity or radiological emergency, capable of causing lasting exposure giving rise to the radiation doses set out in paragraph A.41; or (b) levels of contamination present on the land arising from a past practice, past work activity or radiological emergency, capable of causing lasting exposure giving rise to the radiation doses set out in paragraph A.41.

Cicular 1/2006, Annex 3, ch.B.9 (a) regulates that in terms of identifying contaminated land, the local authority has power to determine the cumulative impact of two or more separate sites when assessing whether or not there is a considerable harm or pollution of controlled waters. In accordance with section B.17B in B.17A of Circular 1/2006, in conducting the identification, local authorities must refer to the appropriate and authoritative information. Therefore, the authorities might rely on information provided by a number of sources, including the owners or occupiers but it would be a problem concerning who might have conducted a voluntary investigation on their own land.[12] In case of pollution of controlled waters is being caused or the contamination is endangering a nature conservation site, the local authority must consult the Environment Agency and Natural England, respectively, and local authority must consider any of their comments before determining whether the land should be identified as contaminated land.[13]

3. Special Sites

After identifying the contaminated land, local authorities must consider whether the site classified as one of the 'special sites' that are regulated directly by the Environment Agency.[14] In determining whether the sites are special sites, it depended on the seriousness of the harm or water pollution that would be, or being, caused and the

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[10] D.Woolley, "Contaminated Land - The Real World", *Journal of Planning and Environment Law*, Vol. 5, 2002, p. 7.
[11] S. Bell and D. McGillivray, *Loc.cit.*
[12] S. Bell and D. McGillivray, 2008, *Op.cit*., p. 558.
[13] *Ibid.*
[14] *Ibid.*

Agency might get help from expertises who are suitably qualified experienced practitioners to deal with the sites.[15] If the authority considers that the land should be designated as a special site, section 78C (1)-(3) bears the authority to notify the Environment Agency, the owner or occupier, and any person who might be liable for paying the costs of remediation. Section 78Q (3) provides the Agency the powers to hold inspection or enter the sites, and in the subsection (4) stating that:

> If it appears to the appropriate Agency that a special site is no longer land which is required to be designated as such a site, the appropriate Agency may give notice— (a) to the Secretary of State, and (b) to the local authority in whose area the site is situated, terminating the designation of the land in question as a special site as from such date as may be specified in the notice.

It confers power to the Agency to terminate the designation of a special site if it appears to the Agency that it is no longer suitable for designation, even though the land will continue to 'remain contaminated' as identified by the local authority.[16]

4. Notification and Consultation

Section 78B (3) bears a responsibility to the local authority to notify the land that has been identified as contaminated land to the Environmental Agency and all owners, occupiers, people that according to the authority to be responsible for paying the clean up costs.[17] In practice, many such people will already know about the potential designation because of supplying information as part of the identification process.[18] The notification enables the Agency to determine whether the site should be designated as a special site and whether it is necessary for site-specific guidance on the level or nature of the clean-up work.[19] The next step is regulated by section 78H (1), which states that:

> Before serving a remediation notice, the enforcing authority shall reasonably endeavour to consult—(a) the person on whom the notice is to be served, (b) the owner of any land to which the notice relates, (c) any person who appears to that authority to be in occupation of the whole or any part of the land, and (d) any person of such other description as may be prescribed, concerning what is to be done by way of remediation.

The section is about consultation with the notified parties.[20] However, in case of there is an imminent danger of serious harm or pollution of controlled water, the authority could ignore such duty (s.78G (4) and 78H (4)).[21]

5. Remediation Standards

In terms of cleaning up historical contamination, there are two clean-up levels which most commonly adopted; the level of the use to which the land is put and the level of clean-up that is required to put the land to such a use without any of the risks associated with the original contamination.[22] On the one side, "the so-called 'multifunctional' approach requires land to be cleaned up to a level so that it is fit for any possible use, including ecological use; on the other side, the 'suitable for use' standard is assessed against the current use or during the determination of any permission that is required for a future use".[23] The land is cleaned up before the development commenced to a standard that is appropriate for the future use because this approach ensures that the action is suitable and dose not have to consider possible unknown future harms.[24]

The standards that support the legal frame work dealing with the clean-up historically contaminated land need to be interpreted in the

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15 *Ibid.*
16 S. Bell and D. McGillivray, 2008, *Op.cit.,* p. 558-559.
17 *Ibid.*
18 *Ibid.*
19 *Ibid.*
20 S. Bell and D. McGillivray, 2008, *Loc.cit.*
21 *Ibid.,* p. 559.
22 *Ibid*.
23 *Ibid*.
24 *Ibid.*

broader context of the extensive effects that such contamination has upon sustainable development.[25] For example, the questions of policy, science, and economics that are closely linked to distinguishing interpretations of sustainable development should be involved in identifying the suitable level for clean-up standards for contaminated land.[26] Even though the 'suitable for use' approach is applied to solve historical contamination, there is an exception in terms of contamination has been caused as a result of activities that are covered by an extant statutory authorization or licence.[27]

6. The Allocation of Liability

In order to deal with historic contamination, the legislation has now adopted a 'polluter pays' principle to bear the remediation cost on those responsible for the problem.[28] Lawrence and Lee state that "legislative moves in this direction have been slow in coming. Notions of registers of potentially contaminated land suggested in the EPA 1990 were abandoned, but, given the pressing need to deal with historic pollution, the Environment Act 1995 which repealed this provision introduced a far more strict and wide-ranging approach to the problem".[29] Therefore, by its change in the EPA 1995 that came into force in 2000, the appropriate person should undertake the remediation.[30] The effect of Part 2A on solving such contamination is harsh because in imposing liability for historic contamination it applies both strict and retroactive.[31]

Pursuant to Section 33 (1) EPA 1990 the original polluter has to pay for clean up measures because of depositing controlled waste, or knowingly causing or knowingly permit controlled waste to be deposited in or on land; treating, keeping or dispossing of controlled waste, or knowingly causing or knowingly permit controlled waste to be treated, kept or disposed of in or on any land or by means of any mobile plant and reat, keeping or dispossing of controlled waste in a manner likely to cause pollution of the environment or harm to human health. However, the Section also exclude someone from being held liable for the contamination if a waste management licence authorising the deposit is in force and the deposit is in accordance with the licence and under and in accordance with a waste management licence.

Pursuant to the polluter pays principle regarding the definition of the appropriate person as regulated by subsection 78F (2), the appropriate person is defined as the person or any of the persons, who caused or knowingly permitted the substances, or any of the substances, that have been the cause of the contamination to be in or under the land. Subsection 78F (3) restricts the liability of the appropriate person to remediation works that one referable to substances which the polluter caused or knowingly permitted to be present in, on or under the contaminated land in question.[32] It is clear that the underlying principle bears the responsibility to clean up the contamination only to the polluter, but there is the fact that in terms of the Agency or Authority has the difficulty in finding the polluter because of a change of their identity, a possibility arising from mergers and takeovers, whether public or private.[33] Moreover, Nield also mentions further worry that might arise from imposing the liability in relation to subsection 78F (5) and (6) of the EPA which provide that "where following a reasonable enquiry, it is impossible to identify the person responsible for the pollution the owner or occupier

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25 *Ibid.*
26 *Ibid.*
27 *Ibid.*
28 D. Lawrence and R. Lee, "Permitting Uncertainity: Owners, Occupiers and Responsibility for Remediation", *Modern Law Review*, Vol. 66, No. 261, 2003, p. 261.
29 *Ibid*., p. 261.
30 D.Woolley, 2002, *Op.cit*., p.6.
31 D. Lawrence and R. Lee, 2003, *Op.cit.*, p.261.
32 Sarah Nield, "The Polluter Pays: But Who is a Polluter Who Can Pay?", *CONVPL*, Vol. 6, 2008, p. 539.
33 *Ibid*.

for the time being of the contaminated land in question is appropriate person".[34] The definition of the appropriate person in this principle seems to have a wide meaning that would include a person who brought potentially polluting substances onto land, regardless whether or not a person is able to control the substances polluted.[35] Nevertheless, the point is such contamination now threatens serious harm or water pollution, and it becomes the duty of the Environmental Agency and a local authority to demand that the site be cleaned up.[36] Such threat would be a justification to impose the strict nature of the regime, and the polluter pays principle dictates that the original polluter should bear responsibility for the pollution rather than the current owner or occupier.[37] However, there is the fact that the stringent form of liability is not imposed on the person who caused the substances contaminating the land but it is imposed on the person who knowingly permitted the substances to be present in such land.[38]

According to the statutory guidance on the implementation of Part 2A EPA 1990, Circular 1/2006, paragraph 37 of Annex 1, it regulates that:

> Under the provisions concerning liabilities, responsibility for paying for remediation will, where feasible, follow the 'polluter pays' principle. In the first instance, any persons who caused or knowingly permitted the contaminating substances to be in, on or under the land will be appropriate persons(s) to undertake the remediation and meet its costs. However, it is not possible to find any such person, responsibility will pass to the current owner or occupier of the land.

It can be seen that such appropriate persons who have caused or knowingly permitted the presence of the substances to be in, on or under the land are known as 'Class A appropriate persons'.[39] However, if Class A person could not be found or identified, it the present owners or occupiers are known as 'Class B appropriate persons' will be responsible for the pollution.[40] It is clear that Class A person is responsible for cleaning up only to the extent referable to such substances which he has caused or knowingly permitted to be present, and it might be that there are more than one Class A appropriate persons despite the fact that in most cases there will be only one a Class A appropriate person.[41] Similarly, Garbett states that if there is more than one person known as Class A appropriate persons, they are classified as a Class A Liability Group, and in case of a Class A person could not be found, a Class B person who will be current owner or occupier must be responsible for the contamination.[42] Woolley explains that the definition of appropriate person has two implications in terms of dealing with the contamination "first, that the person who knowingly permits contamination must have had some ability to prevent its occurrence, and secondly, that he should have been to do so at the time when the contamination took place."[43] Consequently, based on Part 2A, a landowner granting a licence that whether or not he gives authorisation to prevent the disposal of contaminating substances in, on or under the land, and then he permits the contamination to take place either knowingly or without taking reasonable steps to find out what is going on is claimed as knowingly, hence, he could be liable for a Class A appropriate person.[44]

The authorities hold a Class B person liable for cleanup; this is based on Section 78L, Class B

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34 *Ibid*., p. 539-540.
35 S. Bell and D. McGillivray, 2008, *Op.cit*., p. 563.
36 D. Lawrence and R. Lee, 2003, *Op.cit.,* p. 262.
37 *Ibid*.
38 *Ibid*.
39 S. Bell and D. McGillivray, *Op.cit.,* p. 563.
40 D. Lawrence and R. Lee, *Op.cit.*, p. 262.
41 D. Woolley, 2002, *Op.cit.*, p. 6.
42 J. Garbett, 2005, *Op.cit.,* p. 123.
43 D.Woolley, 2002, *Op.cit*., p. 7.
44 *Ibid*., p. 8.

person cannot take recourse in *vis-à-vis* Class A person in terms of compensation. What the Class B person can do is appealing against a remediation notice. It is expalianed more detailed in Circular 1/2006, Annex 2 that provides that any person who receives a remediation notice has twenty-one days within which he can appeal against the notice and the grounds for any such appeal are prescribed in regulation 7 of the Contaminated Land Regulations. If an appeal is made, the remediation notice is suspended until final determination or abandonment of the appeal. If any appeal is made against a remediation notice, the authority must enter prescribed particulars of the appeal, and the decision reached on the appeal, on its register (section 78R(1)(b) and regulation 13 of the Contaminated Land Regulations). In addition, based on Circular 1/2006, Annex 4 paragraph (41) (d) it rules that if someone else is also an appropriate person for a remediation action; section 78F is relevant; under this ground, the appellant must claim either to have found someone else who has caused or knowingly permitted the pollution or that someone else is also an owner or occupier of all or part of the land.

In regards with the liability limit of a Class B person, it is regulated in the Circular 1/2006, Annex 3, Paragraph D94, which provides that the enforcing authority is apportioning responsibility amongst some or all of the members of a Class B liability member. The authority should refer to the capital values of the interests in the land in question, which include those of any buildings or structures on the land. The liability limit of the class is based on:

(a) Where different members of the liability group own or occupy different areas of land, each such member should bear responsibility in the proportion that the capital value of his area of land bears to the aggregate of the capital values of all the areas of land; and
(b) Where different members of the liability group have an interest in the same area of land, each such member should bear responsibility in the proportion which the capital value of his interest bears to the aggregate of the capital values of all those interests; and
(c) Where both the ownership or occupation of different areas of land and the holding of different interests come into the question, the overall liability should first be apportioned between the different areas of land and then between the interests within each of those areas of land, in each case in accordance with the last two sub-paragraphs

If the cleanup cost is higher than the market price of the contaminated land, Circular 1/2006, Annex 3, paragraph E.39 states that:

> The enforcing authority should consider waiving or reducing its costs recovery from a Class B person if that person demonstrates to the satisfaction of the authority that the costs of remediation are likely to exceed the value of the land. In this context, the "value" should be taken to be the value that the remediated land would have on the open market, at the time the cost recovery decision is made, disregarding any possible blight arising from the contamination.

Paragraph E.40 of Annex 3 Circular 1/2006 rules that the extent of the waiver or reduction in costs recovery should be enough to ensure that the remediation cost paid by the Class B person does not exceed the price of the land. Nevertheless, the enforcing authority should find to recover more of its costs to the extent that the remediation would be increase in the price of any other land from which the Class B person would benefit.

The basic and fundamental freedom to own property in the UK limit the liability of the current owner to clean up in the amount of maximum the market price of the contaminated land. Under the EPA 1990 regime, it is possible that the owner would be given the recovery cost. The legal basis is ruled in Annex 3, paragraph E.42 (b)(c) of the Circular 1/2006 which provides that the authority should consider decreasing its costs recovery

where a Class B person who is the owner of the land demonstrates to the satisfaction of the authority that:

(a) When he acquired the land, or accepted the grant of assignment of the leasehold, he was nonetheless unaware of the presence of the significant pollutant now identified and could not reasonably have been expected to have been aware of their presence; and
(b) It would be fair and reasonable, taking into account the interests of national and local taxpayers, that he should not bear the whole cost of remediation

As discussed above, in terms of there is no a Class A appropriate person, a Class B appropriate person could be liable for cleaning up the contamination. However, in *R. (National Grid Gas Plc (formerly Transco)) v Environment Agency*,[45] the House of Lords held that the liability to clean up the contamination could not be imposed on Class B appropriate persons because they are not actual polluters. This decision quashed the decision of the first instance. At first instance Judge Forbes agreed with the facts presented by the Environment Agency. Judge Forbes held that,

> The phrase 'appropriate person' should be interpreted purposively to include not only the original undertaking which had put the contamination on the land, but also an entity comprised of a succession of corporate bodies that had been continuously involved in the relevant activities and in respect of which there are statutory transfer provisions to ensure legal continuity, such as the Gas Industry, and liabilities to which the predecessor undertaking was subject to immediately before the date of transfer could indeed include contingent liability under legislation not in force at time, or even contemplated.[46]

It is important case because this is the first case requiring the House of Lords to consider the scope of the statutory wording of appropriate person under Part 2A of the EPA 1990.[47] The case concerned on 9 actual polluters of the Bawtry site, first two private companies, namely the Bawtry and District Gas Co (B and DGC) and the South Yorkshire and Derbyshire Gas Co (SY and DGC).[48] The B and DGC had bought the site in about 1912 and built the gas works, which started operating in about 1915, and in 1931 the B, and DGC and the joined company continued producing gas at the site.[49] Because of implementation of the Gas Act 1948 regulating nationalisation of the gas industry, the site was owned and controlled by the East Midlands Gas Boards (EMGB), and after the nationalisation, gas production at the site was ceased before it was sold to Kenton Homes Ltd.[50] In 1966 when he the houses had not been developed on the site, subsequently, the site was transferred to Kenneth Jackson Ltd that company applied for and achieved planning licence to develop houses on the site.[51] The Environmental Agency concluded that although National Gas had never owned the former Bawtry site, it was responsible to clean up the land due to the fact that National Gas was relevant to be claimed as appropriate person based on purposive interpretation of the Part 2A of the EPA 1990.[52] Consequently, the appropriate person should consist of not only the EMGB and its predecessor as potential polluters, but also its statutory successor, National Gas.[53]

Having regard to hardship that remediation might cause, subsection 78P (2) of the EPA 1990 provides that:

> In including whether to recover the cost, and, if so, how much of the cost, which it is entitled to recover under subsection (1) above, the enforcing authority shall have regard (a) to any

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45 Regina (National Grid Gas plc (formerly Transco)) v Environment Agency [2007] UKHL 30.
46 J. Garbett, 2005, *Op.cit*., p. 123.
47 *Ibid.*, p. 122.
48 Regina (National Grid Gas plc (formerly Transco)) v Environment Agency, 2007, *Op.cit*., p. 1783.
49 *Ibid*.
50 *Ibid.*
51 *Ibid.*
52 J. Garbett, 2005, *Op.cit*., p. 123.
53 *Ibid*., p. 123.

> hardship which the recovery may cause to the person from whom the cost is recoverable; and (b) to any guidance issued by the Secretary of State for the purposes of this subsection.

In *Regina* (*National Grid Gas plc (formerly Transco)) v Environment Agency*) 2007, the Agency had a discretion that did not pursue any of the current owners or occupiers of the 11 houses to clean up the contamination on their respective properties.[54] Although the Agency's decision to pursue National Gas only connected with one site in Bawtry, this decision was significant because the principle established would be adduced to deal with hundreds of other former gas works sites in England and Wales, which were never owned by National Gas.[55] Hence, the purpose of the proceeding between Environmental Agency and National Gas is to make clear on this essential legal principle.[56] The House of Lords concluded that the application of National Gas to quash the Agency's decision that National Gas was an appropriate person was admissible.[57] The House of Lords unanimously dismissed the Agency's reasons for deciding that National Gas was liable for the contamination by concluding that,

> the emphasis in Part 2A […] is on the actual polluter, the person who…'caused or knowingly permitted'[…]. National Gas did not cause or knowingly permit any substances to be in, on or under the land, that was done by EMGB or its predecessors many years before National Gas came into existence.[58]

Similarly, Lord Hoffman held that there is nothing in the EPA 1990 providing that appropriate person shall be considered to include some other person or which defines who that other person should be, hence, Lord Hoffman clearly stated that National Gas is not an appropriate person based on the definition of the legislation.[59] Moreover, the Lords also concluded that the Agency's suggested construction caused nonsense of the transferring provisions in the Gas Acts that plainly restrict the assets and liabilities to those existing immediately before the transfer date.[60]

It can be seen that between the first instance court and the House of the Lords have different points of view on interpreting Part 2A of the EPA 1990 concerning who must be held liable for cleaning up the historic contamination on the site that have ever been owned by more than one landowners. Nevertheless, it seems that implementation of Part 2A is only imposed on original polluters, or appropriate persons mentioned in the legislation in terms of cleaning up historic contamination only refers to original polluters and not referring to Class B appropriate persons which are known as current owners or occupiers of the contaminated site. In fact, according to Part 2A of the EPA 1990, Class B appropriate persons are also subjected to be held liable for cleaning up historic contamination when it is impossible to trace Class A appropriate persons or original polluters. It can be seen from the *Regina (National Grid Gas plc (formerly Transco)) v Environment Agency)*, the Environment Agency did not pursue the current owners or occupiers of the contaminated site because of the consideration of any hardship, which the recovery may cause, to the current owners or occupiers.

Shelbourn states that it is not easy to interpret the position concerning liability for gradual or historic contamination, and it seems to be a degree of ambivalence covering the question of whether the polluter pays principle should apply, and also different approaches seem to have been applied in different cases.[61] In *Cambridge Water Company v Eastern Counties Leather*,[62] the case concerned with the damage caused by historic activities on the site where it was used to make leather by using organ chlorines and other chemical substances as solvents for degreasing. The contamination resulted from

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54 Regina (National Grid Gas plc (formerly Transco)) v Environment Agency, 2007, *Op.cit*., p. 1785.
55 J. Garbett, 2005, *Op.cit*., p. 123.
56 *Ibid*.
57 Regina (National Grid Gas plc (formerly Transco)) v Environment Agency, 2007, *Op.cit*., p. 1787.
58 J. Garbett, 2005, *Op.cit*., p. 124.
59 *Ibid*.
60 *Ibid*.
61 C. Shelbourn, "Historic Pollution-Does the Polluter Pay?", *JPL*, 1994, p. 705.
62 Cambridge Water Company v Eastern Counties Leather, [1994] 2 WLR 53.

the spillage of solvent at tannery during unloading operations, and although the practice, which led to, the spillage stopped in 1976, the solvents have proved to be persistent, and Cambridge Water Company (CWC) has already removed over 5000 litres of the solvent from contaminated aquifer.[63] The position of Cambridge Water Company is less favourable because the House of Lords concluded that the Eastern Counties Leather (ECL) was not liable for the contamination.[64] The House of Lords held that the polluter pays principle would not be imposed on this case because the damage suffered by the CWC was not foreseeable; the Lords considered that at that time the solvents would evaporate away without contaminating the land and underlying groundwater.[65] It seems that there is no liability for historic contamination because the actual polluter could not reasonably foresee the future contamination.[66]

7. The Legislation to Clean Up the Historic Contamination in the United States of America

The liability system concerning who must be liable for cleaning up historic contamination resulted from hazardous substances in the United States of America is regulated in the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[67] The issue of leaking landfill and Superfund are famous for the American public, and the retroactive strict liability of the CERCLA has become a usual feature of the American legal landscape.[68] Superfund is a fund provided to finance clean up of the sites where liable parties are unknown, insolvent or disbanded.[69] The fund is collected from taxation of the chemical and petroleum industries beneffitting from polluting products.[70]

In order to modify the application of common law liability regulations to the remediation of contaminated sites, CERCLA created the Superfund aiming at funding emergency government in removing the hazardous waste substances.[71] The Superfund authorises the United States EPA:

> [w]henever (A) any hazardous substance is released or there is a substantial threat of such a release into the environment, or (B) there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare.[72]

Such urgent response capability is normally restricted to a maximum of $2 million total in fund and twelve months total in response time per site, but there is exception in terms of immediate risks to public health or welfare or the environment exist that would not otherwise be remedied on a timely basis.[73] The restrictions imposed by the Fund also do not apply for financing orphan sites where no solvent liable persons could be identified.[74] Moreover, in terms of urgent removal actions, the EPA might initiate remedial operations for permanent site clean up funded by Superfund and recover later under the liability regulations.[75]

It has purposes, especially after being amended by the Superfund Amendment and Reauthorization Act (SARA) of 1986.[76] The changes are "(1) to

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63 *Ibid*.
64 C. Shelbourn, 1994, *Op.cit*., p. 705.
65 *Ibid*., p. 706.
66 Anonymous, "No Liability for Historic Pollution", *PLB,* Vol. 14 Number 7, 1994, p. 53.
67 Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. 96-510, 94 Stat. 2767. (generally codified at 42 U.S.C. §§ 9601-9657) .
68 E. James, "An American Werewolf in London: Applying the Lesson of Superfund to Great Britain", Vol. 19, 1994, p. 350.
69 B. Virjee, " Stimulating the Future of Superfund: Why the American Recovery and Reinvestment Act Calls for A Reinstatement of the Superfund Tax to Polluted Sites in Urban Environments", *Sustainable Development Law and Policy Journal*, Vol.11 (1), 2010-2011, p. 27.
70 *Ibid*.
71 E. James, 1994, *Op.cit.*, p. 388.
72 42 U.S.C. § 9604 (a)(1).
73 E. James, 1994, *Loc.cit.*
74 *Ibid.*, p. 388.
75 *Ibid*.
76 Superfund Amendment and Reauthorization Act (SARA) of 1986, Pub. L. 99-499, 100 Stat.1613 (Oct. 17, 1986).

provide for clean up if a hazardous substance is released into environment or if such a released is threatened, and (2) to hold responsible parties liable for these clean up".[77] According to Lyons, the process of forcing responsible parties, either initially or subsequently, to pay the clean up cost of hazardous sites became a considerable impediment to the main CERCLA's purpose of eliminating the immediate and long-term threats to human health and the environment caused by the nation's worst hazardous waste sites.[78] It resulted from the government should have to spend substantial transaction costs, mainly fees paid to lawyers and to scientific consultants in order to force responsibility parties to clean up the site.[79] It is a natural consequence of the option chosen and the method selected by Congress to remove the primarily financial duty of cleaning up the worst hazardous waste sites from the public treasury to private parties who caused the existence of such waste.[80] By using section 106 or section 107 of CERCLA, EPA can force liable parties to undertake clean up activities or pay for the response activities conducted by EPA.[81] Such sections are functioned as a major funding mechanism for National Priorities List (NPL) site response actions by removing clean up and other costs away from the Fund to private parties, and even though liability under such sections have been characterised in terms of tort or unjust enrichment theory, it is best viewed as the consequence of a conscious funding option made by Congress.[82]

Under CERCLA, waste generators, transporters, and owners or operators of waste disposal sites would be liable for remediation costs and damages to natural resources due to the release of hazardous substances.[83] By placing the responsibility for potentially responsible parties (PRPs), it means that the harm resulted from their waste is divisible renders, hence, it practically makes not possible for responsible parties to not joining with the liability because it is not possible to measure the amount of environmental harm caused by each party.[84] The purpose of Congress to give broad definition to the term of liable persons under CERCLA is to anticipate situations where liability would primarily serve remediation, rather than deterrence, purposes, and such definition repeatedly points to past behaviour with no reference to a restricting time frame.[85] Consequently, by implementing retroactivity principle under CERCLA, liability could come from actions taken before the passage of the law that, at the time, did not result in liability.[86]

In terms of the liability limit of potential responsible party (PRP) in the US (it is called a Class B Person in the UK), similar to the UK that there is no exact maximum limit cost, a PRP can be held responsible for all response costs that are the costs recoverable under CERCLA, the costs of remedial actions and damages for loss of natural resources even though its actions may have been legal at the time they occurred.[87] In addition, a PRP may be held liable for all response costs although its total contribution of hazardous wastes to the site may be relatively small.[88] It can be seen that the act held the present owner or operator of the side despite the fact that there is no hazardous substances have been disposed since occupation or the operation of the site.[89] Nevertheless, unlike the regulation in the UK regarding that it is not permissible for a Class B person to sue the Class A person for ask-

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77 J. Lyons, "Deep Pockets and CERCLA: Should Superfund be Abolished", *Stan Environmental Law Journal*, Vol. 6, 1987, p. 271.
78 *Ibid*., pp. 271-272.
79 *Ibid*.
80 *Ibid*.
81 *Ibid.*, p. 280.
82 *Ibid*.
83 E. James, 1994, *Op.cit.*, p. 384.
84 *Ibid.*, p. 385.
85 *Ibid*.
86 *Ibid*.
87 M.E.S. Raivel, "CERCLA Liability as a Pollution Prevention Strategy", *Maryland Journal of Contemporary Legal Issues,* Vol. 4. Issue I**,** 1993. p. 36.
88 *Ibid.*
89 *Ibid*., p. 137.

ing the compensation for remediation cost, under CERCLA of the US, it is permissible for a PRP to recoup their cost later from the polluter who contaminated the site.[90] Some argue that this option is not very effective due to the fact that there are more and more businesses are preferring to file for bankruptcy rather than incurring cleanup payment and try to regain them later.[91]

The basic and fundamental freedom to own property in the US does not limit the liability of the current owner to clean up in the amount of maximum the market price of the contaminated land although under Superfund regime it is possible that the owner would be given the remediation cost from the fund. However, the liability would have deterred the purchase of any property potentially subject to CERCLA.[92] In the wake of the fear to purchase property, the US Congress had an idea to remove the liability by changing the regulation and in 2002 President Bush signed the Brownfields Revitalization and Environmental Restoration Act of 2001 ("BRERA") into law.[93] The law amended CERCLA to free a certain class of property owners from being held liable because of purchasing the property.[94]

One of the cases in this matter is *Crofton Ventures v G&H Partnership*.[95] Crofton claimed that under CERCLA 42 U.S.C. § 9601, G&H Partnership as a former owner and operator of the site that was transferred to Crofton are liable for recovering the costs that had been spent by Crofton on removing a part from the hazardous substance in the site that according to Crofton, the defendant disposed the hazardous substances.[96] Crofton's claim is based on 42 U.S.C. § 9613 (f), which authorizes a suit in contribution against any other person who is liable or potentially liable under section 9607 (a) for response costs.[97] Section 9607(a) governing the scope of liability, provides that in relation to a facility "from which there is a release, or threatened release which causes the incurrence of response costs, of a hazardous substance", there are four classes of persons are liable for the response costs, two of them are (1) the owner and operator of a vessel or a facility, and (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of.[98] Consequently, based on such subsection (a)(1) imposing liability on current owners and operators of a contaminated site, it makes Crofton liable for cleaning up the site, and in accordance with subsection (a)(2) imposing liability on any past owners or operators, the defendants are also liable for clean up costs if at the time they owned or operated the facility there were disposal of hazardous substances.[99] It is regardless whether or not the past owners or operators were the cause of the disposal or, indeed, even had knowledge of it.[100] Both the District and Circuit Court did not agree with the claim brought by Crofton that the defendants are liable for the contamination in the facility. The District Court concluded that due to the fact that the defendant was not able to provide sufficient evidence, and the buried drums containing hazardous substances did not leak before Crofton began developing the facility in 1995, the defendants were not liable under § 9607 (a)(2).[101] Crofton contended that the decision was erroneous because it required Crofton to prove that the defendants dumped their hazardous wastes on the site at the time when

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90 *Ibid*. p.143
91 *Ibid*. p.149
92 G. W. Kettles, "Bad Policy: CERCLA's Amended Liability for New Purchasers", *UCLA J. Envtl. L. & Pol'y*. Vol. 21(1), 2002-2003, p. 2
93 *Ibid.*
94 *Ibid.*
95 *Crofton Ventures Limited Partnership v G&H Partnership*, 258 F.2d 292 (4th Circuit Court of Appeals, 2001).
96 *Crofton Ventures Limited Partnership v G&H Partnership.*
97 *Ibid.*
98 *Crofton Ventures Limited Partnership v G&H Partnership*.
99 *Ibid.*
100 *Ibid.*
101 *Ibid.*

they were owners or operators.[102] Nevertheless, the Circuit Judge affirmed the decision of the District Court by concluding that, "Crofton failed to prove by a preponderance of the evidence that contaminated drums were placed on the site during the time the defendants were responsible".[103] As discussed above, it is clear that the United States legislation concerning clean up costs of historic contamination as regulated under CERCLA is imposed not only on the owner and the operator of a facility, but also any person who at the time of disposal of any hazardous substance owned and operated any facilities at which such substances were disposed of.

8. The Responsibility of Past Polluters for Cleaning Up Contamination Sites

As discussed above, both legislation in the United Kingdom and the United States bear the cost of cleaning up contamination sites for past polluters. However, I disagree that if past polluters should bear the responsibility for recovering historically contaminated sites. Firstly, the Environmental Agency or the local authority would find it difficult to impose such regulation on past polluters to clean up the historically contaminated sites resulted from their past activities because the Agency or the authority or the plaintiff must firstly bring the action to claim the polluter liabilities through the courts. It is the fact that the litigation often takes long time to arrive at the final decision because before arriving at the final decision the Judges have to contemplate all facts presented by both plaintiffs and defendants. It is also common phenomena that if there is a party, which is not, satisfied with the First Instance Court's decision would appeal the decision to the higher court; hence, they would appeal the case to the Court of Appeal in order to get more satisfied decision. It is no doubt that the court proceedings from the beginning to the last would spend long time in terms of imposing the legislation to the past polluters.

Moreover, because of the proceedings take long time in reaching the final and executed decision, the Agency has to spend a lot of money on paying lawyer and environmental law consultant fees. For the complicated environmental case, it is usually takes longer time than simple one. The longer time spend on the proceeding, it would make the Agency has to spend much more money on paying the lawyer and the consultant or environmental expert. Therefore, in terms of requiring the past polluter to clean up the contaminated site, it might be costly if there are many obstacles in the proceeding. Furthermore, I agree with James statement "the combination of retroactive and joint and several liabilities produce a deep pocket effect that encourages further pollution".[104] It is clear that in the United States legislation regulated under CERCLA, both the current and the past polluter would have the same degree of liability in order to clean up the contaminated site. Therefore, it is not possible to separate each liability because according to Congress it is impossible to measure the amount of pollutant or contaminant caused by each polluter. This phenomena result in the government would find it difficult to reduce the pollution because the potential polluters would not be afraid to contaminate the environment. They consider that if they pollute the environment, it is possible to share the costs of cleaning up contamination with other people.

C. Conclusion

In conclusion, both Part 2A of the EPA 1990 and CERCLA govern the cost of cleaning up historic contamination and provide broad definition for the meaning of liable persons. Moreover, both provisions also recognise the retroactivity principle that is useful to compel the past polluter to clean up the historically contaminated site. Unlike the

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[102] *Ibid.*
[103] *Ibid.*
[104] E. James, *Op.cit.,* p. 386.

United Kingdom's legislation, the United States' legislation under CERCLA does not recognise a Class A and a Class B appropriate person. In the United Kingdom's legislation under Part 2A of the EPA 1990, it discriminates between a Class A and a Class B appropriate person. A Class B appropriate person or a current owner or occupier is only liable for cleaning up the historically contaminated site if the Environmental Agency is not able to find a Class A appropriate person or original polluter. It seems that a Class B appropriate person has a lesser degree of liability in the United Kingdom's legislation. However, in the United States both of the parties mentioned above have the same degree of liability in recovering the historic contamination site. In my view, the government efforts to bear the responsibility for the orphan contaminated sites would be fair because the government issues the licence of industrial activities. However, it seems not fair to tax innocent taxpayers to in order compensate the unknown polluters' wrongdoing on the site. As well as, it is not fair to hold a current owner of the site liable for clean up it when the owner is not contaminating the site.

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