

Dear

ATISN 18757

Thank you for your request which I received on 13 July 2023. You asked for information across five areas of work this included:

- a. Correspondence between the Independent Environmental Protection Advisor for Wales (IEPAW) and the Law Commission;
- b. Correspondence between Natural Resources Wales and the IEPAW;
- c. Correspondence from Welsh Government Officials to the IEPAW regarding a series of questions presented by the IEPAW;
- d. Information as to why Ty Llwyd quarry is not contaminated land despite an ongoing Environmental Protection Act Part 2a process presently being undertaken;
- e. An opinion regarding a statement by Welsh Ministers.

Our response

The information requested for Parts A and B of your request; the Welsh Government does not hold information of this description. You may wish to address your requests to the IEPAW or the Law Commission directly.

The IEPAW can be contacted at:

Interim Environmental Protection Assessor
PO Box 123
Cardiff
CF12 3AB

E-mail: IEPAW@gov.wales

And the Law Commission can be contacted at:

The Law Commission
1st Floor, Tower,
52 Queen Anne's Gate,
London
SW1H 9AG

E-mail: Enquiries@lawcommission.gov.uk

The information you requested in relation to Part C of your request is enclosed.

I have decided that some of the information is exempt from disclosure under sections 40(2) of the Freedom of Information Act and is therefore withheld. The reasons for applying this exemption are set out in full at Annex A to this letter.

The information you requested in relation to Parts D and E of your request is not held by Welsh Government. Under Part IIA of the Environmental Protection Act 1990 the decision as to whether a site should be determined as 'contaminated land' lies with the Local

Authority. Any decision on a sites existing status would be based on the available evidence at the time any assessment is undertaken. This does not preclude any future assessment or review of a site's status under the legislation when, for example, new evidence becomes available.

Next steps

If you are dissatisfied with the Welsh Government's handling of your request, you can ask for an internal review within 40 working days of the date of this response. Requests for an internal review should be addressed to the Welsh Government's Freedom of Information Officer at:

Information Rights Unit,
Welsh Government,
Cathays Park,
Cardiff,
CF10 3NQ

or Email: Freedom.ofinformation@gov.wales

Please remember to quote the ATISN reference number above.

You also have the right to complain to the Information Commissioner. The Information Commissioner can be contacted at: Information Commissioner's Office,
Wycliffe House,
Water Lane,
Wilmslow,
Cheshire,
SK9 5AF.

However, please note that the Commissioner will not normally investigate a complaint until it has been through our own internal review process.

Yours sincerely,

Annex A

Application of exemptions/exceptions

The Freedom of Information Act/Environmental Information Regulations provide a right for anyone to ask a public authority to make requested information available to the wider public. As the release of requested information is to the world, not just the requester, public authorities need to consider the effects of making the information freely available to everybody. Any personal interest the requester has for accessing the information cannot override those wider considerations.

I have decided to withhold the following information:

- Personal information of correspondents in the attached correspondence – Section 40(2) – Personal information

This Annex sets out the reasons for the engagement of section and 40(2) of the Freedom of Information Act.

Section 40(2) – Personal Data

Section 40(2) together with the conditions in section 40(3)(a)(i) or 40(3)(b) provides an absolute exemption if disclosure of the personal data would breach any of the data protection principles.

‘Personal data’ is defined in sections 3(2) and (3) of the Data Protection Act 2018 (‘the DPA 2018’) and means any information relating to an identified or identifiable living individual. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.

We have concluded that, in this instance, the information requested contains third party personal data.

Under Section 40(2) of the FOIA, personal data is exempt from release if disclosure would breach one of the data protection principles set out in Article 5 of the GDPR. We consider the principle being most relevant in this instance as being the first. This states that personal data must be:

“processed lawfully, fairly and in a transparent manner in relation to the data subject”

The lawful basis that is most relevant in relation to a request for information under the FOIA is Article 6(1)(f). This states:

“processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child”.

In considering the application of Article 6(1)(f) in the context of a request for information under FOIA it is necessary to consider the following three-part test:-

- **The Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;

- **The Necessity test:** Whether disclosure of the information/confirmation or denial that it is held is necessary to meet the legitimate interest in question;
- **The Balancing test:** Whether the above interests override the interests, fundamental rights and freedoms of the data subject.

Our consideration of these tests is set out below:

1. Legitimate interests

The personal data is the name and details of correspondents in the correspondence captured by this request. There is a legitimate interest in understanding the context of communications, and from which and to which organisations the correspondence was addressed.

2. Is disclosure necessary?

Disclosure of the personal data is not necessary for the legitimate interest, where we can provide the context of the request instead. By replacing the names with the context (e.g. WG Official 1 etc.) we are able to maintain the context for which a legitimate interest exists without disclosing personal data, which affects the fundamental rights of the data subjects under data protection legislation.

3. The balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

Because the redaction meets the legitimate interest and so disclosure of the personal data is not necessary, there is no need to further consider the balance of interests, and the information is withheld.

From: REDACTED <REDACTED>
Sent: Tuesday, February 21, 2023 10:52 AM
To: IEPAW <IEPAW@gov.wales>
Cc: REDACTED <REDACTED>; REDACTED <REDACTED>
Subject: RE: Polychlorinated Biphenyl (PCB) Contamination in Wales

Good morning – Apologies for the delay in responding but please see attached our response to the request for information on the Part 2A contaminated land regime and the sites of interest. If you have any queries or require any further information then please come back to me as REDACTED is away this week.

Regards

REDACTED
REDACTED

[Y Gangen Ansawdd Amgylchedd a Rheoleiddio/ Environment Quality and Regulation Branch](#)
[Diogeli'r Amgylchedd / Environmental Protection Division](#)
[Llywodraeth Cymru/ Welsh Government](#)
[Parc Cathays/ Cathays Park](#)
[Caerdydd CF10 3NQ/ Cardiff CF10 3NQ](#)
[E-bost/ E-mail: REDACTED](#)
[Ffon / Tel: REDACTED or REDACTED](#)

From: REDACTED <REDACTED >
Sent: 17 February 2023 15:30
To: IEPAW <IEPAW@gov.wales>
Cc: REDACTED <REDACTED >
Subject: RE: Polychlorinated Biphenyl (PCB) Contamination in Wales

Good afternoon REDACTED

Just a quick message to let you know we've drafted a response to this enquiry although we need to get it signed off at our end. Apologies, I won't be able to return it today but it will be with you early next week.

Have a good weekend
REDACTED

From: REDACTED <REDACTED > **On Behalf Of** IEPAW
Sent: 20 December 2022 11:42
To: REDACTED <REDACTED >
Cc: IEPAW <IEPAW@gov.wales>
Subject: Polychlorinated Biphenyl (PCB) Contamination in Wales

Dear REDACTED

As the Interim Environmental Protection Assessor for Wales (IEPAW) I've received a submission raising concerns about polychlorinated biphenyl (PCB) contamination in Wales.

The submission (redacted copy attached) covers a variety of aspects including:

- allegations of PCB contamination at various sites across Wales

- that some of the most chemically contaminated land in the UK is not classified as contaminated land or as special sites under Part IIA of the Environmental Protection Act 1990
- that statutory guidance undermines the legislation intention by excluding many significant watercourses from being classified as 'receptors'
- issues with receiving data from NRW on this matter

As a result I am considering whether to produce a report on this matter for Welsh Ministers to:

- assess whether the existing legal framework is functioning correctly;
- identify areas where the existing legal protection may not be delivering the intended benefits
- identify potential gaps in existing legislation;
- identify areas where the practical application of the legislation may be impeded; and
- produce draft recommendations for how the law could be improved.

As background for my assessment please let me know the Welsh Government position regarding the above points including any recent developments, announcements or future proposals on the legislative framework effecting PCB's.

If possible please could you send me a response by Friday 17 February. If you'd like to meet to clarify any points just let me know.

With good wishes.

Ar rhan / On behalf of

REDACTED

Asesydd Interim Diogelu'r Amgylchedd Cymru / Interim Environmental Protection Assessor for Wales

E-bost / E-mail: IEPAW@llyw.cymru / IEPAW@gov.wales

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Information for the Interim Environmental Protection Assessor for Wales (IEPAW)

Concerns about polychlorinated biphenyl (PCB) contamination in Wales

1) Regulatory Background - Contaminated Land and Part IIA of the Environmental Protection Act 1990

- a) Part IIA of the [Environmental Protection Act 1990 \(legislation.gov.uk\)](https://www.legislation.gov.uk) (Part IIA hereafter) ensures risks from land contamination to human health, property and the environment are managed appropriately. Under the legislation Local Authorities are the primary regulator and are required to identify contaminated land in their areas and, where necessary, secure remediation.
- b) In certain situations, the Local Authority (LA) can decide that a contaminated site should be considered a 'special site' (usually where sites are impacted by specific contaminants such as radiation, or acid tar), are impacting 'controlled waters' or involve former MOD sites. In these circumstances regulatory responsibility is passed to Natural Resources Wales (NRW).
- c) [Statutory Guidance](#) has been produced to provide assistance for implementing this legislation. This explains key parts of Part IIA and sets legally binding rules on how they should be applied by the regulator. For example, it sets out how LAs should decide whether land meets the definition of "contaminated land" within the legislation.
- d) Part IIA comes into effect when there is no other solution for addressing the risks from contaminated land. For example, if a voluntary agreement to assess and remediate contamination cannot be made with the original polluter or landowner, if they cannot be identified or no longer exist (as it the case with many historical industrial operators). Sometimes contamination within sites is dealt with through redevelopment under the planning regime. This is discussed below.

2) Designating Sites 'Contaminated Land'

'that some of the most chemically contaminated land in the UK is not classified as contaminated land or as special sites under Part IIA of the Environmental Protection Act 1990'

- a) Part IIA requires Local Authorities to inspect their areas to identify contaminated land or to determine whether a site should be considered a 'special site'. LAs are required to produce an inspection strategy within which all potentially contaminated sites within their area are identified, categorised and prioritised for inspection.
- b) Prioritisation is based on a preliminary risk assessment approach. This will include –
 - identifying a potential source of contamination e.g. a former land use such as a chemical works;
 - establishing if there are receptors on or near the site (and the level of sensitivity of those receptors e.g. an dwelling would be high risk, a carpark low risk); and
 - whether pathways could potentially exist between source and receptors (e.g. contaminated soil in the dwellings garden). This is the '**source – pathway – receptor**' (SPR) relationship and is a fundamental consideration when

establishing if a site should be determined as 'contaminated land' as defined by the legislation.

- c) If the SPR relationship exists, further assessment may be required to establish if contamination is causing '**significant harm**' or '**has significant possibility of significant harm**'. Likewise, whether the site is causing '**significant pollution to water**' or there is a '**significant possibility of significant pollution to waters**'. At this point the LA (or NRW if it's a Special Site) will undertake detailed site investigations and human health risk assessments (usually by employing contractors) to look at potential exposure to contaminants and whether levels could be above thresholds constituting significant harm or the potential for significant harm. Only if this is established (through a detailed risk assessment process), can a site meet the statutory definition of 'contaminated land'. Following determination there is a legal requirement for the LA or NRW to secure remediation to an extent that those risks are mitigated sufficiently.
- d) The presence of contamination (or suspected presence of contamination) on its own does not necessarily warrant a site being determined as 'contaminated' and thus require intervention. If the preliminary assessment finds no evidence of a 'SPR' relationship, LAs will often not progress to a more detailed site investigation and risk assessment.
- e) If there is evidence, the detailed risk assessment may then find that any exposure to the contaminant is not at a level which presents either 'significant harm' or the significant possibility of significant harm. On this basis the site will not be determined as contaminated land (nor need to be remediated). The risk level of the site is then revised following the assessment and would not be subject to further regulatory intervention (unless conditions change in the future, for example more sensitive receptors are "added" to the site).
- f) The remediation of contaminated land is often an expensive and protracted process. It usually involves either removing contaminated material to another site for treatment/disposal or require on-site treatment. The exact nature of the remediation will be dependent on the contamination involved. The most common intervention is to "break" the contaminant pathways (for example by capping with a clean or inert substance) or other mechanical and chemical treatment processes followed by a verification exercise to ascertain risks have been reduced to an acceptable level. Determining a site as 'contaminated land' can also cause 'blight' to property potentially lowering its value or saleability.

3) Contaminated Land – Statutory Guidance

'that statutory guidance undermines the legislation intention by excluding many significant watercourses from being classified as 'receptors''

- a) Given the technical and complex nature of dealing with contaminated sites and understanding their potential impact to human health and the wider environment statutory guidance was produced to support the process. The guidance provides a more detailed explanation around the requirements within Part IIA allowing LAs and NRW to implement the regime more effectively.
- b) As with human health the presence (or suspected presence) of contamination within a water body is not on its own sufficient to determine as contaminated land. There are

a number of factors which need to be proven by the regulatory body to establish if controlled waters are impacted. Surface and groundwaters is consider as controlled waters in the statutory guidance if they;

- Affect a supply which is used for human consumption.
 - Cause a water body to fail its Environmental Quality Standard (which contain various pollution threshold levels for water bodies).
 - Cause pollution that could be considered ‘environmental damage” to surface water or groundwater as defined by The Environmental Damage (Prevention and Remediation) Regulations 2009, (but is not captured by these Regulations).
 - Pollutes groundwater causing a significant and sustained upward trend in concentration of contaminants (as defined in Article 2(3) of the Groundwater Daughter Directive (2006/118/EC)8.
- c) In addition to these requirements the statutory guidance allows LAs to take a broader approach to determining land as ‘contaminated’ if there is pollution to water which falls outside the four areas defined above. This includes if there are significant concentrations of hazardous or non-hazardous substances present or significant concentrations, or priority substances or other specific polluting substances in surface water at an appropriate risk-based compliance point.
- d) Therefore, a contaminant entering a waterbody at low concentrations (and assuming none of the conditions above are met) may not result in determination.

4) Complementary Regulatory Regimes

- a) The planning system in Wales provides a complimentary, long-standing legislative and policy framework. It recognises the need to prevent activities which may contaminate land and provides a key role to play in safeguarding future developments from the legacy of land contamination caused by past land uses. Where land contamination issues arise, the planning authority will require evidence of a detailed investigation, risk assessment and remediation by condition of planning consent to enable beneficial use of land, often prior to occupation.
- b) The onus remains with the developer to ensure the development of the site will remove any unacceptable risks. The planning authority in making development management decisions will need to ensure land does not meet the legal definition of contaminated land under Part IIA and is suitable for its proposed use. The current version of Planning Policy Wales (PPW) supports this principle and sets out the requirement for the planning system to follow a de-risking approach to land contamination.
- c) Environmental permitting of industry also aims to safeguard the environment from the impacts of industrial operations. Where there is a potential risk to land, operators will be required to establish the baseline condition of that land when applying for an industrial environmental permit. Upon application to surrender the permit at the end of the lifetime of the site, the operator must then undertake an assessment against this baseline condition. If this assessment reveals that contamination has occurred during the lifetime of the site, the operator is required to return the land to its baseline condition. This process essentially protects land from being impacted by current day industrial activities offering a level of protection that historical industrial sites did not benefit from leaving legacy contamination issues and the associated environmental and human health impacts.

5) Polychlorinated biphenyl (PCB) contamination in Wales *'allegations of PCB contamination at various sites across Wales'*

Background

- a) PCB's are a group of organic chemical compounds with a range of properties and associated past uses. They are well known environmental pollutants also considered hazardous to health. In addition to their toxicity they are characterised as being relatively stable and persistent when released into the environment meaning they break down very slowly and therefore bioaccumulate within food chains.
- b) PCBs were manufactured at several locations across the UK (including one in Newport) during the 1960/70's in addition to being imported from abroad. They had a wide variety of uses including within plasticisers and plastics, lubricating and hydraulic oils, as well as within large electrical components such as transformers and capacitors.
- c) Human / environmental exposure to these compounds has declined since their manufacture and use ceased in the UK (production of PCBs ceased in the UK during 1977). The main potential pollution pathway remaining are emissions from historical disposal sites and their ongoing low-level presence within the environment given their persistent nature. There are a number of known former landfill sites in the UK that were used to dispose of PCB waste from the manufacturing process, a number of these are located in Wales and are discussed further below.
- d) As was typical at the time many of these disposal sites were poorly regulated and were not engineered to modern day landfill standards - which aim to contain waste and protect against off-site pollution impacts.

6) Summary of Relevant Sites

Eastman (formerly Monsanto, Solutia) Chemical Manufacturing Facility, Newport

- a) The Eastman site (formerly Solutia / Monsanto) in Newport is one of several locations within the UK which manufactured PCB's in the past as well as other chemicals. Current chemical manufacturing operations at the site are regulated through a number of environmental permits issued by NRW to control various discharges from existing manufacturing processes.
- b) As part of the NRW permit for the site there is a requirement to monitor PCB levels within effluent (even though it is no longer manufactured at the site) due to small amounts entering site drainage systems from diffuse historical sources which have escaped into the ground within the large industrial complex during the past. The site operator has reduced these legacy PCB discharges to site drainage from around 35kg per annum (1995) to approximately 500 grams per annum (2006). Discharge levels of PCBs have stayed broadly the same since.

Former Brofiscin Quarry Landfill, Groesfaen, RCT.

- c) Brofiscin is a former limestone quarry that received waste from a large number of industrial operators including Monsanto, BP, ICI and others during the 1970's. The site became subject to regulatory actions following a number of 'off-site' pollution incidents several decades ago namely those involving pollution entering an adjacent stream that crossed agricultural land and livestock pastures in the decades following its closure as a landfill site.

- d) In 2005 the site was determined as 'contaminated land' under Part IIA due to impact to controlled waters and subsequently became a 'Special Site' - with regulatory responsibility moving from the LA (RCT) to NRW. Between 2005 and 2011 RCT then NRW undertook an investigation and risk assessment of the site to enable remediation works. Remediation was completed during 2011, at a cost of around £1.2M with some of the costs being covered by voluntary payments from a number of organisations that had used the site for waste disposal in the past, including Monsanto, Veolia and BP. The site is therefore currently considered remediated.

Former Maendy Quarry Waste Disposal Site, Upper Church Village, RCT

- e) The former Maendy Quarry was also suspected of receiving industrial waste including PCB waste when it was operational landfill. Unlike Brofiscin this site is regulated by NRW through an Environmental Permit as part of its restoration scheme following closure as a waste management site. The most recent permit issued in 2018 allows the site operators (now Veolia Waste) to 'discharge to water' from the site via surface drainage. The operator was required to introduce a 'passive surface treatment system' to treat low levels of potential effluent leaving the site (predominantly caused by surface run off after rain) as a requirement of the permit following its closure, in addition to periodic sampling and analysis of effluent. The completion of the introduction of a treatment system is currently being overseen by NRW's environmental permitting team. Sampling and analysis of effluent leaving the site which joins a small stream was undertaken by Veolia during 2021 did not identify elevated levels of PCBs.
- f) As the primary regulator of the site (under Part IIA) RCT has not identified the site as a 'priority site for inspection' within their contaminated land inspection strategy. This is due to them being unable to establish preliminary evidence to identify a potential 'source-pathway-receptor' relationship exists at the site which would require further inspection. This is likely to be due to its isolated location with no onsite or adjacent receptors, and the absence of evidence suggesting significant levels of pollution is migrating beyond site boundaries.

Former Ty Llwyd Quarry and Landfill, Ynysddu, Caerphilly

- g) Ty Llwyd was an historically a stone quarry and from 1969 and 1972 was used for the disposal of industrial waste. When the tip was closed it was covered with shale and stone dust and overlain with topsoil and seed. In 1990 Caerphilly Council Borough Council (CCBC) took ownership of the site. An interim cap was installed over the site and a shallow, concrete lined ditch was constructed along the top boundary to divert surface water run-off. From 2006 CCBC installed groundwater monitoring points and started monitoring the site. The monitoring results were shared with NRW (Environment Agency Wales at that time) for review on approximately an annual basis.
- h) In 2012 CCBC assessed the site in line with its duties under Part IIA with respect to pollution of controlled waters. The assessment concluded that Ty Llwyd should not be determined as contaminated land with regards to controlled waters. NRW (Environment Agency Wales at the time) subsequently agreed with the conclusions at the time.
- i) Occasionally, following prolonged periods of heavy rainfall there are leachate outbreaks on site. To manage the visual impact and public concern regarding these outbreaks, CCBC and their consultant Arcadis have implemented a

voluntarily scheme of works to divert outbreaks through a cascade, slowing down the flow and volatilising potential contamination before it soaks back into the ground. Drainage culverts on site have also been improved to maintain separation of the leachate from surface water courses to protect the environment. It was acknowledged at the time that further improvement works were required to cope with more frequent high rainfall events.

- j) NRW attended the site to carry out an investigation and take samples after the most recent leachate breakout. The investigation and assessment is currently ongoing. In light of the current issues at the site Caerphilly Council are reviewing the site under its Part IIA responsibilities to see if it will be determined as 'contaminated land'.

Other Sites

- k) There are a small number of other former waste disposal sites which are suspected of receiving chemical waste (potentially including PCBs) within Wales and England. In Wales this includes the former Glebelands Landfill site in Newport, a second site in the Borough of Caerphilly (which has subsequently been remediated and redeveloped) and another in the Wrexham area in addition to others where the information is more anecdotal.
- l) Historically the Welsh Government has supported LAs and NRW in dealing with sites under the Part IIA regime via a Contaminated Land Capital Fund Programme. This originally ran from 2005 to 2011 and was briefly reinstated during the 2017/18 financial year. The funding invited all LAs in Wales and NRW to submit applications to either inspect or remediate sites they considered a priority based on the potential risks they posed. Brofiscin Quarry and the Glebelands (Newport) have both benefited from this fund to facilitate investigation and assessment. Both sites were subsequently remediated.

7) Natural Resources Wales

'issues with receiving data from NRW on this matter'

- a) NRW provide technical support to the Contaminated Land Policy team in relation to land contamination matters, in particular those that concern controlled waters. They provide an active supporting role to Local Authorities with contaminated land issues and also contribute to the Welsh Contaminated Land Working Group and the Welsh Governments Contaminated Land Advisory Group. The policy team occasionally request input from NRW (sometimes from multiple teams) when responding to Senedd questions or correspondence relating to contaminated land. They have always provided a comprehensive supporting role when approached for input by Welsh Government officials including the provision of data.