



Executive
26 July 2010

**Report from the Director of
Environment and Culture**

Ward affected:
Stonebridge

**Further soil condition investigations at St Raphael's and
Brentfield Estate**

1.0 Summary

- 1.1 Benzo-a-pyrene levels that may pose a significant possibility of significant harm have been identified in three areas, two areas of St Raphael's Estate and one in Brentfield estate.
- 1.2 Safe determination values of 17ppm (parts per million) have been derived after seeking expert help from Institute of Occupational Medicine.
- 1.3 Further soil sampling of 138 properties has been undertaken (four samples from each property) in May/June 2010 in order to finally identify the exact number of properties which exceed the 17 ppm determination value.
- 1.4 Once the affected properties are identified we would need to remove 0.6m of the soil and replace with clean soil, re-turf and re-fence the gardens.
- 1.5 It is imperative that we apply to Environment Agency for remediation assessments works (consisting of structural, utilities and ecological surveys) funding in July 2010. The results of these surveys are required prior to applying for remediation treatment funding. If the application is successful, the provision will be made by The Environment Agency in September/October 2010.
- 1.6 We intend to apply for remediation treatment (removal and replacement of contaminated soil) funding when the next window opens in November 2010. The Environment Agency anticipates that £10 million allocation (recently reduced from 17.5 million) will continue to be provided by central government but cannot confirm this until after the Comprehensive Spending review in October 2010.

2.0 Recommendations

- 2.1 Members note the findings of the soil investigation at St Raphael's and Brentfield Estates
- 2.2 Agree the approach to risk management and the threshold levels of 17 ppm for benzo-a-pyrene.
- 2.3 Agree that officers should carry out such further investigations as are necessary in order to ascertain exactly how many properties are affected by the above threshold levels.
- 2.4 Members note the options for remediating and agree soil replacement for the affected properties.
- 2.5 Members agree to waive the costs of basic remediation of privately owned properties.
- 2.6 Members note the financial risks associated with remediation, the intention to seek grant funding from Environment Agency and request a further report when the outcome is known.

3.0 Detail

- 3.1 The Council has a statutory duty to inspect land in the Borough and identify potentially polluted land which could pose a risk to human health. Several sites have been identified as a priority requiring further investigation to determine risk to health.
- 3.2 A soil investigation was undertaken to look for contamination associated with the historic sewage works in October 2008 at St Raphael's and Brentfield estates. The area investigated 1200 households.
- 3.3 Benzo-a-pyrene was found in 4 areas covering 506 households. Benzo-a-pyrene is typically associated with coal products, tar and creosote, which were available for normal domestic use but now have been identified as being harmful to health.
- 3.4 In October 2009 further soil sampling and analysis was undertaken to define the areas of contamination.

The guideline level and risk

- 3.5 Under the Part II (A) of the Environmental Protection Act 1990, the Council needs to ensure that there **is** a problem and confirm there is a significant possibility of significant harm.
- 3.6 There are no set safe guideline levels of benzo-a pyrene for remediation of polluted land. Environmental Health sought expert help from the Institute of Occupational Medicine toxicologists to identify a level above which there would be significant possibility of significant harm. They recommended a guideline level of 17 parts per million (PPM).

3.7 Using this as a guide we determined that levels above 17 ppm represented a significant possibility of significant harm and remediation action would have to be undertaken. Therefore, following the approval of this report we will be determining all properties at or above 17ppm of benzo-a-pyrene. Other authorities who have determined sites at similar levels are South Oxfordshire and Gloucester.

The current situation

3.8 The soil investigation undertaken in October 2009 has identified 138 properties where levels of benzo-a-pyrene are of concern. Appendix 1 illustrates the 3 clusters of concern, 2 in the St Raphael's estate built in the 1960's and one in the Brentfield estate built in the 1930's.

3.9 The findings are based on a single sample per property which is not sufficient to undertake remediation or to make informed decisions.

3.10 In January 2010, a further bid for £55,000 was made to DEFRA for undertaking 4 samples from each of the 138 properties identified. In April, DEFRA and the Environment Agency approved our bid for further sampling based on 17 ppm level of significant possibility of significant harm.

3.11 In March 2010, Brent Housing Partnership and the Council's Communications Team were informed of our findings to date.

3.12 Throughout our investigations we have kept the residents as well as the Steering group (made up of ward councillors and resident representatives) informed of progress and findings.

3.13 In May 2010, officers from Environmental Health, and the Tenant and Leaseholder Engagement officer visited every single householder to inform them of our next phase of investigation. There are 108 BHP and 30 private leasehold properties.

3.14 The sampling of individual gardens started on 24th May 2010. The additional sampling will provide an average baseline level of benzo-a-pyrene for every property and give the final number of properties that would require remediation.

The Council's liability

3.15 Under Part II (A) of the Environmental Protection Act, in the first instance, it is the responsibility of the polluter to pay for the cost of remediation. The polluter is referred to as Class A person(s).

3.16 We cannot be certain as to how benzo-a-pyrene came to be in the soil. There are two main possibilities
(i) they were caused by the sewage farm previously operated by Willesden Urban District Council or
(ii) they were caused by contractors who built the houses and brought contaminated soil on to the land.

- 3.17 If (i) above applies then Willesden Urban District Council no longer exists and therefore can not be an 'appropriate person'. Brent did not inherit the liabilities of Willesden District Council and therefore can not be the Class A person responsible for the remediation.
- If (ii) applies then the contractors are clearly appropriate persons but so far Environmental Health have been unable to trace them. This is still the situation and therefore they cannot be pursued to carry out the remediation.
- 3.18 In the absence of any class A person being liable (as is the case here), then the liability falls on class B persons i.e. current owners/occupiers. This is clearly the Council in respect of the land which it still owns.
- 3.19 30 properties are privately owned. Ordinarily therefore, the Council would serve remediation notices on the private owners.
- 3.20 However under the Act before serving remediation notices on the private owners, the Council has to consider whether it should waive the whole or part of the costs to which the private owner would normally be liable.
- 3.21 In considering whether to waive some or all of the costs, section 78P(2) of the Act applies. Under that subsection the Council has to consider 'any hardship which the recovery may cause to the person from whom the cost is recoverable' and the statutory guidance. Accordingly therefore the Council has discretion over and above the guidance as to what constitutes 'hardship'. However, even just applying the statutory guidance, a strong case can be made to not recover the cost from private owners in this case. Under the guidance, the Council needs to apply the general principle of aiming for an overall result which is fair and equitable and also have regard to the extent to which the appropriate persons are responsible for the existence of the pollution.
- 3.22 One factor to be taken into account is whether the owner made reasonable enquiries as to whether any pollutants were present and could not reasonably have been expected to know that they were. Where an owner/occupier satisfies the Council that it did not know and could not reasonably have been expected to know that the land was polluted at the time of his purchase this is a factor to be taken into account.
- 3.23 Furthermore, hardship is defined quite widely and includes 'hardness of fate or circumstance'. This would support the Council in waiving recovery from private owners, since it further supports the argument that it would be unfair to seek to make them liable when they had no reason to suspect that there was any issue. This is further strengthened by the fact that these houses were originally constructed and sold by the Council. It is therefore probably fair to say that any private landowner would have been entitled to assume that any issue as to pollution would have been picked up by the Council.
- 3.24. Taking all these points into account, it is considered that the appropriate action in this case is not to pursue private landowners for the cost of remediation of their properties.

- 3.25. In these circumstances, the Council would not serve any remediation notices but would just proceed with a 'remediation statement' under section 78H(7), and subsequently undertake the remediation itself.
- 3.26 The results from the investigation should be available in July 2010. The determination of individual properties will be undertaken as soon as the validated results are received in order to apply for Environment Agency funding for remediation. The next window for applying for this funding is in July 2010.
- 3.27 There are two main options for remediation, either removal of contaminated material (0.6m deep) and replacing with 'clean' top soil, or hard landscaping all the gardens. The cost of removal and replacement is approximately £1 million and hard landscaping £ 0.9 million. The recommended option for remediation is replacement with 'clean' top soil, in order to discharge the Council's liabilities and achieve a permanent solution.
- 3.28 There are 2 stages to the remediation process. Stage 1 is the remediation assessment (detailed structural, ecological and utilities surveys) and Stage 2 is remediation treatment (removal and replacement of contaminated soil). The application for the remediation treatment can not be undertaken until the remediation assessment is undertaken.

4.0 Financial Implications

- 4.1 Once the average levels of benzo-a-pyrene are known for each of the 138 properties from the investigation in May 2010, then properties with levels above 17 ppm will have to be determined as contaminated by issuing a 'remediation statement' for Council owned properties and determinations for privately owned properties.
- 4.2 Once the properties are determined, then remediation must be undertaken. The estimated cost is likely to exceed £1m depending on how the waste is classified. However, the Environment Agency can provide funding for such work through the Contaminated Land Grant. An original allocation of £17.5m was available, but this was reduced to £10m as part of the Government's grant reductions on 10th June. Bids cannot be made until the remediation statement is issued and the determinations made.
- 4.3 The window for the applications has just opened and will close on 12th August 2010. We will be applying for funding for the remediation assessment. If granted, this funding must be spent by March 2011.
- 4.4 We intend to apply for remediation treatment funding when the next window opens in November 2010.
- 4.5 We have contacted the Environment Agency for further clarification regarding funding. They anticipate that £10 million allocation will continue to be provided by central government. However, they cannot confirm this until after the Comprehensive Spending Review in October 2010.

4.6 If the Council is not allocated grant funding to cover all or part of the costs, no provision exists to fund the work. A further report will be submitted to members when the outcome of funding is known.

5.0 Legal Implications

5.1 The actions proposed in this report are in line with discharging our legal obligations under Part II (A) of the Environmental Protection Act 1990.

5.2 The approach to the investigation is in line with Brent's Contaminated Land Inspection Strategy published in 2002. The detailed legal implications are set out in the body of the report.

6.0 Diversity Implications

6.1 None as every household affected will be contacted.

Background Papers

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