

Mid Devon District Council

Contaminated Land Cost Recovery Policy

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Target audience:

Management Team, Cabinet Member for Managing the Environment, Members of the Public affected by historic land contamination

...March, 2015

Version Control Sheet

Title: Contaminated Land Cost Recovery Policy

Purpose: The purpose of this policy is to ensure a consistent and transparent approach when seeking to recover costs for remediation of Contaminated Land determined under Part 2A of the Environmental Protection Act 1990.

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Management Team

Cabinet Member

Managing the Environment Policy Development Group

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1. Introduction and scope

- 1.1 The costs of cleaning up contaminated land are not automatically covered by the public purse. The government's policy is that the polluter (all persons who put the contamination there in the first place) should pay for any contamination they have caused by bearing the financial costs of cleaning it up.
- 1.2 Once a site has been legally determined as Contaminated Land, the local authority has a duty to compile a list of **ALL** potential liable parties; this is to include anyone who has owned, occupied or operated on the site and may result in quite a long list. A series of tests is applied to each party (known as exclusion tests) to determine who, if anyone, is the liable party.
- 1.3 The enforcing authority (usually the local authority) will serve a remediation notice on the polluter to ensure the works are carried out. The remediation notice is a legal document so therefore open to appeal in the courts. Appealing a remediation notice will undoubtedly slow the remediation works.
- 1.4 The legislation (Environmental Protection Act 1990 Part 2A section 78F) states, however that there are three parties that may become the potential recipients of a remediation notice, only one of which is the polluter. A conflict with the 'polluter pays' principle therefore exists. Potential liable parties are:
 - The person(s) who **caused** or **knowingly permitted** the contaminating substances to be in, on or under the land in question (known collectively as the 'polluter' and referred to in the legislation as the Class A person)
 - The **owner** for the time being of the contaminated land (Class B person)
 - The **occupier** for the time being of the contaminated land (Class B person)
- 1.5 The most obvious person who should be the recipient of the remediation notice is the original polluter of the site (Class A person). If there is more than one polluter of a site, where for example the site has had a long history of different contaminative uses then the enforcing authority has to decide how much each (Class A) person should pay towards remediation works.
- 1.6 Although the primary responsibility for the cost of the remediation rests with the person who caused or knowingly permitted the contamination if they cannot be found after reasonable inquiry by the regulator, responsibility falls upon the current owners and occupiers of the land (Class B persons). The Council will in all cases do its best to ensure a fair and equitable solution can be found should liability fall upon the current owner/occupier.
- 1.7 Class B parties are only liable for remediation of contamination within the boundaries of their property and cannot be held liable for any pollution of controlled waters (underlying groundwater or surface water features including rivers, lakes and streams).
- 1.8 Responsibility for cleaning up Contaminated Land will only fall on the local authority when no liable parties can be found for the site in question; so termed Orphan sites (this is only the case when the local authority is not regarded as a potential Class A or B party). Should this be the case, the local authority can no longer apply to central government for ring-fenced financial assistance in covering its costs following closure of the Defra Contaminated Land Capital Grants Programme in April 2014.

- 1.9 If a remediation notice is served and not complied with or the Authority chooses not to serve a remediation notice, the Authority will bear the costs of the clean-up themselves (where external funding cannot be found) and seek to recover those costs from the appropriate persons.
- 1.10 Financial circumstances have no bearing on the identification of the appropriate person, the application of the exclusion tests, apportionment or attribution of liability between liable groups involved in shared actions, although it may entitle the appropriate person to a reduction or release of liability under the hardship provisions when the Council are making cost recovery decisions.
- 1.11 Before attempting to recover any costs from an appropriate person, the Council will take into account any hardship that full recovery of costs will cause and adhere to all applicable statutory guidance. Hardship is given no specific meaning under the Contaminated Land regulations, and so carries its *normal* meaning: 'hardness of fate or circumstance, severe suffering or privation'.
- 1.12 It is not the purpose of this policy to set out when and how land may be determined as contaminated (if at all). That is a matter of for the Part 2A legislation and accompanying statutory guidance and the Councils Contaminated Land inspection strategy. The purpose of this policy is to ensure a consistent and transparent approach when seeking to recover costs for remediation of Contaminated Land where it is formally determined (see Section 2).
- 1.13 At the time of producing this policy, following the recent withdrawal of Defra grant funding (see 1.8), the Council has ceased proactively investigating potential historic contaminated land (i.e. land developed prior to the introduction of planning controls in 1990 and/or the introduction of the Environmental Damage Regulations in March 2009). However, the Council may become aware of land that is potentially contaminated through historic activities that may pose a risk to public health or the environment and therefore under the statutory duties set out within the Part 2A legislation be required to investigate. Part 2A also remains an important driver for land remediation under the Planning regime and on a voluntary basis.
- 1.14 Planning controls already secure the remediation of over 90 per cent of contaminated sites in England. This is reflected within Mid Devon whereby land remediation is successfully secured as necessary through the planning process in consultation with the Council's Environmental Health team. This policy does not affect this.

2. Purpose of this policy

- 2.1 The purpose of this policy is to ensure a consistent and transparent approach when seeking to recover costs for remediation of Contaminated Land determined under Part 2A of the Environmental Protection Act 1990. The following documentation should be read in conjunction to the policy:

- Environmental Protection Act 1990 – Part 2A, sections 78A-78Y
- The Contaminated Land (England) Regulations 2006 (SI 2006 No.1380)
- The Contaminated Land (England) (Amendment) Regulations 2012 (SI 2012 No.263)
- Defra Environmental Protection Act 1990: Contaminated Land Statutory Guidance April 2012
- Environment Agency Contaminated Land Report CLR 11 – Model Procedures for the Management of Land Contamination

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- 2.2 In producing this policy, the Council has been obliged to take particular account of Section 8 of the Statutory Guidance (referenced above) 'Recovery of costs of remediation'. This Section is duplicated in full in Appendix II.

3. Application

- 3.1 This policy will apply in the following instance:

- Where the remediation work has been agreed voluntarily or otherwise as a result of direct implementation of the remediation stages of the Part 2A regime

- 3.2 The flexible nature of this policy is deemed necessary in order for it to be in keeping with the Government's stated objectives for the Contaminated Land Regime, i.e. the encouragement of voluntary remediation and to seeking that the cost burdens faced by individuals, companies and society as a whole are proportionate, manageable and economically sustainable.

4. General Considerations

- 4.1 This document sets out the Council's policy considerations in relation to the recovery of costs incurred during the remediation of contaminated land.

- 4.2 In general terms, the Council will;

- Seek to recover in full its reasonable costs incurred when performing its statutory duties in relation to the remediation of contaminated land.
- Wherever possible, apply the 'polluter pays' principle, whereby the remediation costs are borne by the polluter.
- Where this is not possible, seek all external sources of finance for remediation.
- Have due regard to avoiding hardship that the recovery of costs may cause.
- Aim for an overall result, which is fair and equitable as possible to all who may have to meet the costs of remediation, including national and local taxpayers.

- 4.3 Accordingly, the Council will consider the degree and nature of responsibility of the appropriate person for the creation, or continued existence, of the circumstances that led to the land in question being identified as contaminated land.

- 4.4 The Council will also consider whether it could recover more of its costs by deferring recovery and securing them by a charge on the land in question under section 78P of the Environmental Protection Act 1990. Such deferral may lead to payment from the appropriate person either in instalments (EPA 1990 S78P(12)) or when the land is next sold.

5. Estimating Remediation Costs

- 5.1 The following procedure will be followed by the Council to estimate the remediation costs on a site specific basis. The procedure must be completed before any decisions are made on waiver or reduction in liability on any appropriate person (Class A or B).

5.2 A basic remediation options appraisal will be under taken by the Council based upon the principles set out in the guidance document *CLR11: Model Procedures for the Management of Land Contamination*. The following principles will apply for this policy:

- Identification of a minimum of 3 feasible remediation options for each pollutant linkage.
- Carrying out an evaluation of a minimum of 2 feasible remediation options for each pollutant linkage sufficient to obtain a budget estimate of the cost of remediation.
- Selection of 1 remediation option for each pollutant linkage proposed for implementation on the site and the production of a remediation method statement to refine costs and finalise a budget estimate.
- The involvement of an independent environmental consultant to propose and estimate remediation costs.
- In the event of disagreements between the Council and the Class A or B appropriate person (on the proviso that the policy has been followed appropriately) the Council is not obliged to expend any more resources on the estimation of remediation costs.

6. Information for Making Decisions

6.1 The Council will expect that anyone who is seeking a waiver or reduction in the recovery of remediation costs will need to present any financial or related information required to support their request within a reasonable time period.

6.2 The Council will also seek to obtain such information as is reasonable, having regard to:

- How the information may be obtained
- The cost, for all the parties involved, of obtaining the information; and
- The potential significance of the information for any decision

6.3 The appropriate person will be informed of any cost recovery decisions taken, explaining the reasons for those decisions. There shall be no appeal mechanism against the decision unless it can be demonstrated that:

- Information supplied for an assessment was erroneous; or
- The circumstances of the appropriate person have substantially changed between the time of the selection of the remediation methodology/costs and the completion of works in a way that require an assessment to be repeated

7. Threat of Business Closure or Insolvency

7.1 In the case of a small or medium-sized enterprise¹ which is the appropriate person, or which is run by the appropriate person, the Council will consider:

¹A small or medium sized enterprise is considered to be an independent enterprise with fewer than 250 employees, and either an annual turnover not exceeding £40 million, or an annual balance sheet total not exceeding £27 million.

- Whether recovery of the full cost attributable to that person would mean that the enterprise is likely to become insolvent and thus cease to exist; and if so, the cost to the local community of such a closure
- Where the cost of remediation would force an enterprise to become bankrupt, the Authority will consider waiving or reducing its costs recovery to the extent needed to avoid making the enterprise insolvent.

7.2 The Authority will not normally waive or reduce its costs recovery where:

- It is clear that an enterprise has deliberately arranged matters so as to avoid responsibility for the costs of remediation
- It appears that the enterprise would be likely to become insolvent whether or not recovery of the full cost takes place; or
- It appears that the enterprise could be kept in, or returned to, business even if it does become insolvent under its current ownership.

8. Trusts

8.1 Where the appropriate persons include persons acting as trustees, the Council will assume that such trustees will exercise all powers which they have, or may reasonably obtain, to make funds available from the trust, or from borrowing that can be made on behalf of the trust, for the purpose of paying for the remediation. The Authority will, nevertheless, consider waiving or reducing its costs recovery to the extent that the costs of remediation to be recovered from the trustees would otherwise exceed the amount that can be made available from the trust to cover these costs.

8.2 The Authority will not waive or reduce its costs recovery:

- Where it is clear that the trust was formed for the purpose of avoiding paying the costs of remediation; or
- To the extent that trustees have personally benefited, or will personally benefit from the trust.

9. Charities

9.1 The Council will consider the extent to which any recovery of costs from a charity would jeopardise that charity's ability to continue to provide a benefit or amenity, which is in the public interest. Where this is the case, the Authority will consider waiving or reducing its costs recovery to the extent needed to avoid such a consequence. This approach applies equally to charitable trusts and to charitable companies.

10. Registered Social Landlords (RSLs)

10.1 The Council will consider waiving or reducing its costs for recovery if:

10.2 The appropriate person is body eligible for registration as a social housing landlord under section 2 of the Housing Act 1996 (for example, a housing association);

- 10.2 Its liability relates to land used for social housing, and full recovery would lead to financial difficulties for the appropriate person, such that the provision or upkeep of the social housing would be jeopardised.
- 10.3 The extent of the waiver or reduction will normally be sufficient to avoid any financial difficulties.

11. Specific Considerations Applying to Class A Persons

- 11.1 The Council will not normally waive or reduce its cost recovery where it was in the course of carrying on a business that the Class A person who caused or knowingly permitted the presence of the significant pollutants. This is because the appropriate person is likely to have earned profits from the activity, which created or permitted the presence of those pollutants.

12. Where Other Potentially Appropriate Persons Have Not Been Found.

- 12.1 In some cases where a Class A person has been found, it may be possible to identify another person who caused or knowingly permitted the presence of the significant pollutant linkage in question, but who cannot now be found for the purposes of treating them as an appropriate person. For example, this may apply where a company has been dissolved.
- 12.2 The Authority will consider waiving or reducing its costs recovery from a Class A person if that person demonstrates to the satisfaction of the Council that:
- (a) Another identified person, who cannot now be found, also caused or knowingly permitted the significant pollutant to be in, on or under the land: and
 - (b) If that other person could be found, the Class A person seeking the waiver or reduction of the Authority's costs recovery would either:
 - (i) Be excluded from liability by virtue of one or more of the exclusion tests set out in the Statutory Guidance (Defra, April 2012), or
 - (ii) The proportion of the cost of remediation of which the appropriate person has to bear would have been significantly less, by virtue of the guidance on apportionment set out in Statutory Guidance (Defra, April 2012).
- 12.3 Where an appropriate person is making a case for the Authority's costs recovery to be waived or reduced by virtue of paragraph 12.2 above, The Council will expect that person to provide evidence that a particular person, who cannot now be found, caused or knowingly permitted the significant pollutant to be in, on or under the land. The Council will not normally regard it as sufficient for the appropriate person concerned merely to state that such a person must have existed.

13. Specific Considerations Applying to Class B Persons

- 13.1 In some cases the cost of remediation may exceed the value of the land in its current use after the required remediation has been carried out. In such circumstances, the Council will consider waiving or reducing its costs recovery from a Class B person if that person demonstrates to the Council that the cost of remediation is likely to exceed the value of the land including any property. 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 contamination.

- 13.2 In general, the extent of the waiver or reduction in costs recovery will be sufficient to ensure that the costs of remediation borne by the Class B person do not exceed the value of the land. However, the Council will seek to recover more of its costs to the extent that the remediation would result in an increase in the value of any other land from which the Class B person would benefit.
- 13.3 In determining the value of the land the Council will formally request that the Class B person provides an independent property valuation completed by an appropriately accredited professional. If there is any doubt or disagreement regarding a valuation that has been provided then the Council retains the right, at its own expense, to obtain a separate independent valuation of the property concerned from the District Valuer or other organisation.
- 13.4 For Class B person owners and occupiers, the council will consider waiving or reducing its costs recovery where that person satisfies the Authority that, at the time the person purchased the dwelling, they did not know, and could not reasonably have been expected to have known, that the land was adversely affected by presence of a pollutant.
- 13.5 Any such waiver or reduction will be to the extent needed to ensure that the Class B person in question bears no more of the cost of remediation than it appears reasonable to impose, having regard to their income, capital and outgoings.
- 13.6 Inherited property will be treated as though the property was purchased.
- 13.7 In accordance with the contaminated land legislation (Part 2A) a Class B person will not be liable for any remediation costs in respect of pollution of controlled waters.
- 13.8 Where the contaminated land in question extends beyond the dwelling and its curtilage, and is owned or occupied by the same appropriate person, the approach described in paragraph 13.1 above will be applied to each dwelling and its curtilage independently.
- 13.9 In judging the extent of a waiver or reduction in costs recovery from an owner-occupier of a dwelling, the council will apply an approach similar to used for applications for home improvement loans. These loans are assessed on a means-tested basis, as presently set out in the Councils current partnership arrangement with Wessex Home Improvement Loans (WHIL). The WHIL test determines how much a person will contribute towards the cost of necessary renovation work for which they are responsible, taking into account income, capital and outgoings, including allowances for those with particular special needs.
- 13.10 In the event that the means test indicates that the Class B person is not eligible for any cost reduction the Class B person will be liable for all of the costs of the remediation work unless section 13.12 of this policy applies. Section 16 of this Policy addresses the scenarios that may arise in this event.
- 13.11 In the event that the Means Test indicates that the Class B person is eligible for a reduction of the costs of remediation, the Council will only be able to recover the proportion, as indicated by the Means Test, of the costs incurred in carrying out the remediation work allowing for any waiver or reduction in the event that section 13.12 of

this policy applies. Section 17 of this Policy addresses the scenarios that may arise in this event.

13.12 The council may also consider a waiver or reduction in costs that a Class B person may be liable for in the following circumstances:

- It can be demonstrated that the Council has acted unreasonably in any grant of planning permission, tenancy agreement or building control approval in that it failed to take into account direct evidence provided to the Council of actual or potential significant contamination and/or failed to take all reasonable steps to establish a potential contamination constraint in accordance with its statutory duties (as they applied at the time the permission, agreement or approval was granted).
- In *exceptional* circumstances a Class B person may be eligible for a loan (housing repair assistance) if the contamination present is sufficient for it be categorised as a Class 1 hazard in accordance with current Housing Health and Safety Rating System (HHSRS published by DCLG May 2006). If this is the case then the Council will consider reducing the amount of liability to a maximum extent of the upper limit of a loan payable under the Councils loan scheme available at the time (currently the Council operate a loan scheme in partnership with not-for-profit organisation Wessex Home Improvement Loans, WHIL)

14. Precautions Taken Before Acquiring a Freehold or Leasehold Interest

14.1 In some cases, the appropriate person may have been reckless as to the possibility that land they have acquired may be contaminated, or they may have decided to take a risk that the land was not contaminated. Conversely, precautions may have been taken to ensure that he did not acquire land which is contaminated.

14.2 The Authority will consider reducing its cost recovery where a Class B person who is the owner of the land demonstrates to the satisfaction of the Authority that:

- (a) They took such steps prior to acquiring the freehold, or accepting the grant of assignment of a leasehold, as would have been reasonable at that time to establish the presence of any pollutants;
- (b) When they acquired the land, or accepted the grant of assignment of the leasehold, they were unaware of the presence of the significant pollutant now identified and could not reasonably have been expected to have been aware of its presence; and
- (c) It would be fair and reasonable, taking into account the interests of national and local tax payers, that they will not bear the whole cost of remediation.

14.3 The Council will bear in mind that the safeguards which might reasonably be expected to be taken will be different in different types of transaction. For example, acquisition of recreational land as compared with commercial land transactions, and as between buyers of different types e.g. private individuals as compared with major commercial undertakings.

14.4 Any acquisition of land made by a Class B person prior to the coming into force of Part 2A of the Environmental Protection 1990 (1 April 2000 except radioactive contamination for which the Part 2A was extended to include from 4 August 2006) will not be required to be accompanied by evidence of reasonable precautions. This is because prior to the introduction of the legislation it can reasonably be argued that the purchaser could not have aware of their potential liabilities and also enquires made to

the Council would not have been made in same manner as enquires made after the legislation came into force.

15. Environmental Insurance

- 15.1 A range of commercial and homeowner environmental insurance policies have been available in the UK for a number of years. These include Environmental Liability Policies, Property Transfer Policies, First-Party Liability Policies, Homeowner Environmental Insurance Policies and other related insurance products.
- 15.2 A valid environmental insurance policy if held by a Class A or B appropriate person often provides protection against risk of liability under the contaminated land legislation (Part 2A). Such policies, especially for domestic properties, normally only cover pre-existing contamination unknown at the time the property/land was purchased. In this context this may include Part 2A sites where there was no evidence of significant contamination at the time of the property transfer. Some commercial policies do cover pre-existing contamination known to the insurer and insured when the policy is taken out.
- 15.3 In the event of any liability residing with an appropriate person the Council will enquire if a valid environmental insurance policy is held and the scope of cover it provides. If cover provided by the policy protects the insured against all or part of any liability under Part 2A the Council will take this into account when making any cost-recovery decisions.

16. Policy in the Event of Insufficient Means being Proved (Class B Persons)

- 16.1 There are two possible scenarios:
- (a) The Class B person is proved to have insufficient equity and no means to pay for any proportion of the remediation works. In this situation hardship has been proven and all costs will be waived. The Council will then be liable for the relevant remediation costs as the Class C appropriate person
 - (b) The Class B person has sufficient equity but has no other means to pay for all of the remediation works. In this situation hardship has not be fully established but a reduction in liability can be considered. The Council can approve a loan, repayable at the Bank of England base interest rate, to cover the all or part of cost of the necessary work that the Class B person cannot afford at the time of the assessment. The Council will require that the grant be registered as a legal charge against the property. This will remain a legal charge on the property until the Class B person decides to repay the loan or the property is sold and the debt is repaid.

17. Policy in the Event of Sufficient Means being Proved (Class B Persons)

- 17.1 The Class B person will be responsible for all of the costs of the remediation. There are two options available to them:
- (a) The Class B person reaches an agreement, in writing, with the Council to arrange, organise and directly commission the necessary remediation works. In this circumstance the Class B person will be required to repay all of the Council's reasonably incurred costs in completing the necessary remediation work together. This is subject to there being sufficient resources available within the Council's capital works or other relevant budget or with the assistance of any available central government funding.

- (b) Alternatively, the Class B person may take responsibility for arranging, commissioning and paying for the remediation works directly. In such a situation the role of the Council is to review the work undertaken and ensure it is satisfied that the works have been undertaken to an appropriate standard. This will be done in the same manner as the review of remediation work undertaken by the Council as part of a conditional planning permission.

18. Responsibility for Final Decisions regarding Cost-recovery

- 18.1 The responsibility for making final decisions in respect of cost recovery on a case by case basis shall be held by the Public Health & Professional Services Manager in consultation with the Head of Service and the Cabinet Member for Managing the Environment.

19. Policy Review

- 19.1 The Council should monitor the application of this policy in order to assess its impact and effectiveness with regard to its duties under contaminated land legislation and in its fulfilment of the Council's objectives.
- 19.2 Accordingly, this Policy should be reviewed from time to time in order to reflect its performance and take account of any changes to legislation, guidance, case law, best-practice and Council objectives etc. In any event, the policy should be formally reviewed every 5 years as a minimum.

Appendix I – Potential Scenarios and Outcomes

The following presents six scenarios describing how the liability would be determined and apportioned. They are fictional, simplified and for illustrative purposes only.

Scenario 1

A residential site built in the 1970s has been determined Contaminated Land due to unacceptable concentrations of arsenic in the garden soils. Prior to the site being residential it was a saw mill and that timber treatment may have been carried out for a short period during this occupation using arsenic based chemicals to prolong the life of wood. No information was provided (or other evidence available) at the time planning permission was granted that indicated timber treatment had been carried out. The site was therefore NOT investigated for arsenic contamination prior being redeveloped for housing. The developer no longer exists in any legal capacity but the company operating the timber works does. Investigations have not found the site to have any other previous uses and the concentrations of arsenic are significantly above average arsenic concentrations compared with 'background' local soils.

Potential Outcome

The timber treatment works (or more specifically its legal entity) should be classed as the Class A appropriate person as they are the original polluter of the site. They would be the recipient of the remediation notice and be required to conduct remediation to the appropriate standard.

Note: Should the developer of the houses still be in existence than liability may be divided between them and the operator of the Timber treatment works. The developer increased the sensitivity of the site without undertaking any contamination assessment and so may be seen as a 'knowing permitter' (Class A appropriate person) and therefore potentially liable.

If the Class A person can demonstrate that it can be excluded from liability by one or more of exclusion tests available under the legislation then liability may fall to the current residential property owners (Class B persons). The policy on cost-recovery will apply with particular attention on assessing hardship.

Scenario 2

A site is determined Contaminated Land due to presence of oils in the soils. The site is derelict but if left the contamination has the potential to move onto adjoining residential properties. The owner and operator of the site cannot be established.

Potential Outcome

Investigations have not been able to determine a Class A appropriate (polluter) or a Class B appropriate person (current owner/occupier). The site is regarded as an orphan site and the liability for ensuring contamination is cleaned up to prevent it moving offsite falls to the local authority. No remediation notice will be served (the local authority cannot serve a notice upon itself - instead a remediation statement will be issued outlining what the necessary works will entail).

Scenario 3

A site has been determined Contaminated Land. No Class A (polluter) can be established. The current occupier of the site rents the site from its owner. Neither the owner nor the occupier of the site undertakes any activity that would have caused the contamination of the site.

Potential Outcome

Class B liability would be considered to be the owner of the property and the policy on cost-recovery will apply with particular attention of assessing hardship. The renter would not be considered to have any liability in this case.

Scenario 4

A site has been determined as Contaminated Land. A Class A appropriate person (polluter) has been established. A valuation of the polluting company's assets estimates it to be worth £1.2million. An options appraisal has indicated that remediation works are likely to cost £2million.

Potential Outcome

The company is likely to apply for hardship. The local authority must consider whether serving a remediation notice will cause the company hardship. The local authority may therefore not serve the remediation notice; it will assess the company's ability to pay and apportion those reasonable costs to the company.

Scenario 5

A site has been determined as Contaminated Land; the site has 3 privately owned residential properties. The site has been determined on the basis of arsenic and lead in the garden soils. The site was a lead pipe factory from 1960-1975 and a timber treatment works (using arsenic products) from 1975-1990. The operator of the lead pipe factory no longer exists. The company that built the houses no longer exists. The operator of the timber treatment works still exists.

Property 1 has **lead** and **arsenic** present in the soil

Property 2 has **lead** in the soil

Property 3 has **arsenic** in the soil

Potential Outcome

The liable party responsible for remediating property 1 and 3 would be the operator of the timber treatment works as the original polluter of the site (class A appropriate person). The original polluter for property 2 is no longer in existence and therefore the liability falls upon the current owner/occupier of the property and the policy on cost-recovery will apply with particular attention of assessing hardship.

Scenario 6

A site was been determined Contaminated Land in 2005; the site has 3 privately owned residential properties. The contamination is believed to have moved onto the site from an adjoining industrial site that was in operation between 1975 and 1980; the original polluter of the site (class A appropriate person) cannot be established. The residential properties are Victorian and were built in 1880. All of the properties are single homes and worth £300,000.

Property 1 was bought in 1950 for £35,000, the property is owned outright.
Property 2 was bought in 2006 for £200,000, the property is owned outright.
Property 3 was bought in 2008 for £300,000 with a 100% mortgage.

Potential Outcome

The owner of property 1 would not be considered as a class B appropriate person on the basis that it was not contaminated when they purchased the property. It is likely that the financial costs of remediation will have to be found by the local authority.

The owner of property 2 purchased it after it was determined Contaminated Land; they also have a net equity of £300,000 in the property. They are unlikely to be considered for hardship.

The owner of property 3 has no net equity from their property; hardship may be proven and works funded by the local authority.

Appendix II – Section 8 of Defra EPA 1990 Part 2A Statutory Guidance (Pages 62-67)

Section 8: Recovery of the costs of remediation

- 8.1 The statutory guidance in this Section is issued under section 78P(2) of the 1990 Act. It provides guidance on the extent to which the enforcing authority should seek to recover the costs of remediation which it has carried out and which it is entitled to recover.
- 8.2 The main relevant sections of the 1990 Act are:
- Section 78P(1): "Where, by virtue of section 78N(3)(a), (c), (e) or (f)... the enforcing authority does any particular thing by way of remediation, it shall be entitled, subject to sections 78J(7) and 78K(6)..., to recover the reasonable cost incurred in doing it from the appropriate person or, if there are two or more appropriate persons in relation to the thing in question, from those persons in proportions determined pursuant to section 78F(7)..."
 - Section 78P(2): "In deciding 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 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."
- 8.3 This Section also explains when the enforcing authority is prevented from serving a remediation notice under section 78H(5), under which the authority may not serve a remediation notice if the authority has the power to carry out remediation itself, by virtue of section 78N. Under that latter section, the authority asks the hypothetical question of whether it would seek to recover all of the reasonable costs it would incur if it carried out the remediation itself. The authority then has the power to carry out that remediation itself if it concludes that, having regard to hardship and the guidance in this Chapter, it would either not seek to recover its costs, or seek to recover only a part of its costs. The relevant sections of the 1990 Act are:
- Section 78H(5): "The enforcing authority shall not serve a remediation notice on a person if and so long as... (d) the authority is satisfied that the powers conferred on it by section 78 below to do what is appropriate by way of remediation are exercisable..."
 - Section 78N(3) provides that the enforcing authority has the power to carry out remediation: "(e) where the enforcing authority considers that, were it to do some particular thing by way of remediation, it would decide, by virtue of subsection (2) of section 78P... or any guidance issued under that subsection, – (i) not to seek to recover under subsection (1) of that section any of the reasonable cost incurred by it in doing that thing; or (ii) to seek so to recover only a portion of that cost;..."

Section 8(a): Cost recovery decisions

- 8.4 This Section sets out considerations to which the enforcing authority should have regard when making any cost recovery decision. In view of the wide variation in situations which are likely to arise (e.g. due to variations in the history and ownership of land, and liability for its remediation) the guidance in this section sets out principles and approaches, rather than detailed rules. The enforcing authority should have regard to the circumstances of each individual case.

- 8.5 In making any cost recovery decision, the enforcing authority should have regard to the following general principles:
- (a) The authority should aim for an overall result which is as fair and equitable as possible to all who may have to meet the costs of remediation, including national and local taxpayers.
 - (b) The “polluter pays” principle should be applied with a view that, where possible, the costs of remediating pollution should be borne by the polluter. The authority should therefore consider the degree and nature of responsibility of the relevant appropriate person(s) for the creation, or continued existence, of the circumstances which lead to the land in question being identified as contaminated land.
- 8.6 In general the enforcing authority should seek to recover all of its reasonable costs. However, the authority should waive or reduce the recovery of costs to the extent that it considers this appropriate and reasonable, either: (i) to avoid any undue hardship which the recovery may cause to the appropriate person; or (ii) to reflect one or more of the specific considerations set out in the statutory guidance in sub-sections 8(b), 8(c) and 8(d) below. In making such decisions, the authority should bear in mind that recovery is not necessarily an “all or nothing” matter (i.e. where reasonable, appropriate persons can be made to pay part of the authority’s costs even if they cannot reasonably be made to pay all of the costs).
- 8.7 In deciding how much of its costs it should recover, the enforcing authority should consider whether it could recover more of the costs by deferring recovery and securing them by a charge on the land in question under section 78P. Such deferral may lead to payment from the appropriate person either in instalments (see section 78P(12)) or when the land is next sold.

Information for making decisions

- 8.8 In general, the enforcing authority should expect anyone who is seeking a waiver or reduction in the recovery of remediation costs to present any information needed to support such a request.
- 8.9 In making any cost recovery decision, the enforcing authority should consider any relevant information provided by the appropriate person(s). The authority should also seek to obtain such information as is reasonable, having regard to: (i) accessibility of the information; (ii) the cost, for any of the parties involved, of obtaining the information; and (iii) the likely significance of the information for any decision.
- 8.10 The enforcing authority should, in all cases, inform the appropriate person of any cost recovery decisions taken, explaining the reasons for those decisions.

Cost recovery policies

- 8.11 The enforcing authority may choose to adopt and make available a policy statement about the general approach it intends to take in making cost recovery decisions.

Section 8(b): Considerations Applying both to Class A & Class B Persons

8.12 Paragraphs 8.13 – 8.22 below set out considerations to which the enforcing authority should have regard when making any cost recovery decisions, irrespective of whether the appropriate person is a Class A person or a Class B person. They apply in addition to the general issue of the "hardship" which the cost recovery may cause to the appropriate person.

Commercial Enterprises

8.13 Subject to the specific circumstances set out below, the enforcing authority should adopt the same approach to all types of commercial or industrial enterprises which are identified as appropriate persons. This applies whether the appropriate person is a public corporation, a limited company (whether public or private), a partnership (whether limited or not) or an individual operating as a sole trader.

Threat of business closure or insolvency

8.14 In cases where a small or medium-sized enterprise is the appropriate person, or is run by the appropriate person, the enforcing authority should consider: (i) whether recovery of the full cost attributable to that person would mean that the enterprise is likely to become insolvent and thus cease to exist; and (ii) if so, the cost to the local economy of such a closure.

8.15 Where the cost of that closure to the local economy appears to be greater than the costs of remediation which the enforcing authority would have to bear itself, the authority should consider waiving or reducing its costs recovery to the extent needed to avoid making the enterprise insolvent.

8.16 However, the enforcing authority should not waive or reduce its costs recovery where: (a) it is satisfied that an enterprise has deliberately arranged matters so as to avoid responsibility for the costs of remediation; (b) it appears that the enterprise would be likely to become insolvent whether or not recovery of the full cost takes place; or (c) it appears that the enterprise could be kept in, or returned to, business even if it does become insolvent under its current ownership.

8.17 For these purposes, a "small or medium-sized enterprise" should be taken to mean an independent enterprise which matches the definition of a "micro, small and medium-sized enterprise" as established by the European Commission Recommendation of 6 May 2003, and any updates of that definition as may happen in future. (Under the 2003 definition this would cover any such enterprise with fewer than 250 employees, and either an annual turnover less than or equal to €50 million, or an annual balance sheet total less than or equal to €43 million).

8.18 Local authorities may wish to take account in cost recovery decisions of any relevant policy on assisting enterprise or promoting economic development. In cases where the Environment Agency is the enforcing authority, it should seek to be consistent with the policy of the local authority in whose area the contaminated land is situated (if such a policy exists). The Agency should consult the local authority and take its views into consideration in making its own cost recovery decisions.

Trusts

- 8.19 Where the appropriate persons include persons acting as trustees, the enforcing authority should assume that such trustees will exercise all the powers which they have, or may reasonably obtain, to make funds available from the trust, or from borrowing that can be made on behalf of the trust, for the purpose of paying for remediation. The authority should, nevertheless, consider waiving or reducing its costs recovery to the extent that the costs of remediation to be recovered from the trustees would otherwise exceed the amount that can be made available from the trust to cover those costs.
- 8.20 However, the enforcing authority should not waive or reduce its costs recovery: (a) where it is satisfied that the trust was formed for the purpose of avoiding paying the costs of remediation; or (b) to the extent that trustees have personally benefited, or will personally benefit, from the trust.

Charities

- 8.21 Since charities are intended to operate for the benefit of the community, the enforcing authority should consider the extent to which any recovery of costs from a charity would detrimentally impact that charity's activities. Where this is the case, the authority should consider waiving or reducing its costs recovery to the extent needed to avoid such a consequence. This approach applies equally to charitable trusts and to charitable companies.

Social housing landlords

- 8.22 The enforcing authority should consider waiving or reducing its costs recovery if: (a) the appropriate person is a body eligible for registration as a social housing landlord under section 2 of the Housing Act 1996 (for example, a housing association); (b) its liability relates to land used for social housing; and (c) full recovery would lead to significant financial difficulties for the appropriate person, such that the provision or upkeep of the social housing would be jeopardised significantly. The extent of the waiver or reduction should be sufficient to avoid any such financial difficulties.

Section 8(c): Specific considerations applying to Class A persons

- 8.23 This sub-section sets out specific considerations to which the enforcing authority should have regard in cost recovery decisions where the appropriate person is a Class A person.
- 8.24 In applying the approach in this sub-section, the enforcing authority should consider whether or not the Class A person is likely to have profited financially from the activity which led to the land being determined to be contaminated land (e.g. as might be the case if the contamination resulted from a business activity). If the person did profit, the authority should generally be less willing to waive or reduce costs recovery than if no such profits were made.

Where other potentially appropriate persons have not been found

8.25 In some cases where a Class A person has been found, it may be possible to identify another person who caused or knowingly permitted the presence of the significant contaminant in question, but who cannot now be found for the purposes of treating that person as an appropriate person (as might be the case if a company has been dissolved). In such cases, the enforcing authority should consider waiving or reducing its costs recovery from a Class A person if that person demonstrates that:

- (a) another identified person, who cannot now be found, also caused or knowingly permitted the significant contaminant to be in, on or under the land; and
- (b) if that other person could be found, the Class A person seeking the waiver or reduction of the authority's costs recovery would either: (i) be excluded from liability by virtue of one or more of the exclusion tests set out in the Section 7 of this Guidance; or (ii) the proportion of the cost of remediation which the appropriate person has to bear would have been significantly less, by virtue of the guidance on apportionment set out in Section 7.

8.26 Where an appropriate person is making a case for the enforcing authority's costs recovery to be waived or reduced by virtue of paragraph 8.25 above, that person should provide evidence to the authority that a particular person, who cannot now be found, caused or knowingly permitted the significant contaminant to be in, on or under the land. The authority should not regard it as sufficient for the appropriate person concerned merely to state that such a person must have existed.

Section 8(d): Specific considerations applying to Class B persons

8.27 This sub-section sets out specific considerations relating to cost recovery decisions where the appropriate person is a Class B person.

Costs in Relation to Land Values

8.28 In some cases, the costs of remediation may exceed the likely value of the land in its current use (as defined in Section 3 of this Guidance) after the required remediation has been carried out. In such cases, the enforcing authority should consider waiving or reducing its costs recovery from a Class B person if that person demonstrates 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.

8.29 In general, the extent of the waiver or reduction in costs recovery should be sufficient to ensure that the costs of remediation borne by the Class B person do not exceed the value of the land. However, the enforcing authority should seek to recover more of its costs to the extent that the remediation would result in an increase in the value of any other land from which the Class B person would benefit.

Precautions taken before acquiring a freehold or a leasehold interest

- 8.30 In some cases, the Class B person may have been unaware that the land in question may be contaminated land when they acquired it. Alternatively, the person may have taken a risk that the land was not contaminated, or they may have taken some precautions to reduce the risk of acquiring land which is contaminated.
- 8.31 The enforcing authority should consider reducing its costs recovery where a Class B person who is the owner of the land demonstrates that:
- (a) the person took such steps (prior to acquiring the freehold or accepting the grant of assignment of a leasehold) as would have been reasonable at that time to establish the presence of any contaminants;
 - (b) when the person acquired the land (or accepted the grant of assignment of the leasehold) they were nonetheless unaware of the presence of the significant contaminant now identified, and could not reasonably have been expected to have been aware of its presence; and
 - (c) the authority considers it would be reasonable, taking into account the interests of national and local taxpayers, that the person should not bear the whole cost of remediation.
- 8.32 The enforcing authority should bear in mind that the safeguards which might reasonably be expected to be taken will be different in different types of transaction (for example, acquisition of recreational land as compared with commercial land transactions) and as between buyers of different types (for example, private individuals as compared with major commercial undertakings).

Owner-occupiers of dwellings

- 8.33 Where a Class B person owns and occupies a dwelling on the contaminated land in question, the enforcing authority should consider waiving or reducing its costs recovery if the person satisfies the authority that, at the time the person purchased the dwelling, the person did not know, and could not reasonably have been expected to have known, that the land was adversely affected by presence of the contaminant(s) in question. Any such waiver or reduction should be to the extent needed to ensure that the Class B person in question bears no more of the cost of remediation than it appears reasonable to impose, having regard to the person's income, capital and outgoings. Where the person has inherited the dwelling or received it as a gift, the authority should consider the situation at the time when the person received the property.
- 8.34 Where the contaminated land in question extends beyond the dwelling and its curtilage, and is owned or occupied by the same appropriate person, the approach in paragraph 8.33 above should be applied only to the dwelling and its curtilage.