

MANAGING THE ENVIRONMENT PDG 10 March 2015

Contaminated Land Cost Recovery Policy

Cabinet Member: Cllr Neil Davey
Responsible Officer Public Health and Professional Services Manager

Reason for report: To approve the attached revised Contaminated Land Cost Recovery Policy.

RECOMMENDATION: That Members note the content of the report and recommend to Cabinet the adoption of the updated policy.

Relationship to Corporate Plan: Having an adopted, transparent policy for cost recovery for contaminated land remediation will help secure the remediation of such land and is consistent with the Managing the Environment and Community Well Being corporate priorities.

Financial Implications and Risk Assessment: The objective of the policy is to formalise the approach taken to the recovery of costs and to ensure that the approach is transparent and consistent.

There may be significant financial implications for Mid Devon District Council arising from its statutory duty to investigate and secure the remediation of contaminated land. These will vary considerably on a case by case basis depending on the nature of the required remediation and the financial status of the liable persons.

The proposed revised policy in itself will not give rise to any additional expenditure. However, in the event of the Council needing to undertake a substantial remediation project it is very unlikely that costs can be met from existing budgets. Furthermore, from April 2014 the Council can no longer apply for external funding from the Defra Contaminated Land Capital Projects Programme to cover up its capital costs. In adopting the original version of this Policy it was highlighted that whilst this programme was available at the time (and had been available for a number of years), it was provided at the discretion of Defra and may be withdrawn or changed in the future, which was clearly the case.

The suggested approach should facilitate a more efficient and robust method for the recovery of remediation costs.

Failure to adopt an appropriate Cost Recovery Policy may lead to uncertainty and inconsistency in any cost recovery action taken by the Council and may result in financial loss.

Legal Implications: Under Part 2A of the Environmental Protection Act 1990, the Council have a statutory duty to identify and remediate land where contamination is causing unacceptable risks to human health or the wider environment.

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 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.

At the time of producing this revised policy, following the recent withdrawal of Defra grant funding (see above), 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.

In undertaking cost recovery decisions the Council must have regard to any hardship which the recovery might cause to the appropriate person. In doing so, the Council must have regard to the Statutory Guidance for Part 2A (Defra, April 2012). Specific guidance on cost recovery and hardship is given in Section 8 of the Guidance as duplicated in Appendix II of the revised policy.

1.0 Background

1.1 The report presents a revised version of the current Contaminated Land Cost Recovery Policy approved by the Community Well Being PDG in June 2009 and subsequently adopted by Cabinet and Council. It was recommended that the policy was reviewed every 5-years and revised where necessary. A review has been undertaken and the policy does not require substantial revision therefore is largely unchanged from the previous version. Minor changes have however been made to reflect the following:

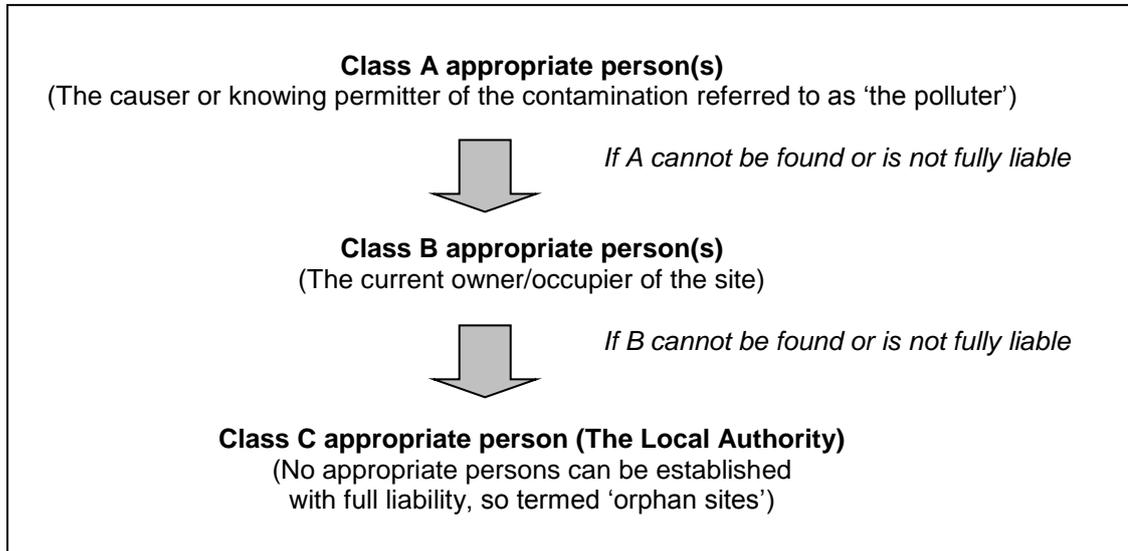
- Changes to over-arching legislative references brought in by amendment regulations in 2012
- Updated Defra Statutory Guidance (April 2012)
- Closure of the Defra Contaminated Land Capital Projects Programme in April 2014
- Removal of availability of Housing Repair Grants (replaced by loans issued in partnership with Wessex Home Improvement Loans)

1.2 Part 2A (Section 78) of the Environmental Protection Act 1990 (as inserted by Section 57 of the Environment Act 1995) introduced a duty for all local authorities to identify and remediate land where contamination is causing unacceptable risks to human health or the wider environment. Local authorities are the primary regulator and only they can determine if land is formally contaminated under the legislation.

- 1.3 The main purpose of Part 2A is to deal with the legacy of land contamination arising from the long history of industrial, military and waste disposal activities in the UK. Contamination can also occur as result of the geology of the area, or through agricultural use. In applying its duties under Part 2A local authorities safeguard public health and the wider environment.
- 1.4 The aim is to take a proportionate approach and identify sites where there is most significant land contamination. Thereafter, local authorities have to evaluate whether or not there is a connection between the contamination or pollution in the ground and whether, by a variety of different routes or pathways, the pollutants could come into contact with various different receptors including humans and ground water. Under Part 2A contaminated land is legally defined where there is this source, pathway and receptor connection and that the degree of contamination is such that it could cause a significant possibility of significant harm to human health, harm to property or significant pollution of designated eco-systems and controlled waters (e.g. groundwater, rivers and lakes). It is the responsibility of local authorities to ensure that unacceptable risks are remediated or mitigated to the extent that the land is no longer capable of meeting the legal definition of contaminated land.
- 1.5 The local authority can secure remediation in two ways, by voluntary negotiation or by serving a Determination Notice and using its legal powers to 'clean-up' a site.
- 1.6 In common with other environmental legislation, Part 2A utilises the 'polluter pays' principle to ensure those responsible for polluting are liable for the financial costs of remediation.
- 1.7 The 'polluter pays' principle does not however fit particularly well in the case of the Part 2A legislation. This is because, for example:
- the original contamination may have occurred many years ago and the responsible companies may have ceased to exist, or responsible persons be dead or untraceable
 - the pollution may have migrated from one site to another
 - it may be inappropriate to expect the present occupiers to be aware of past occurrences when they purchased their houses
- 1.8 There is a highly complex series of scientific and legal tests that need to be fulfilled before the 'polluter' can be pursued and liability to pay for remediation established. The outcome of the investigations may identify more than one person who would meet the definition of polluter or it might identify none. For the purposes of the legislation the polluter is the person who caused or knowingly permitted the contamination to occur and this group is known as the Class A appropriate person. Where no party fits this description liability falls upon the current owner/occupier of the site (this group is known as the Class B appropriate person). In cases where no appropriate person can be established and/or where the appropriate persons are not liable for part or all

of remediation costs, the local authority (Class C appropriate person) becomes the appropriate person and is responsible for remediating the site. Figure 1 illustrates the hierarchy for liability:

Figure 1: Contaminated Land Liability under Part 2A EPA 1990



- 1.9 When all appropriate persons have been identified and the liability for remediation has been apportioned, then legal tests are carried out on any Class A or B persons to see if any should be excluded from all or part of their liability. These tests include hardship. When these tests have been completed no appropriate persons may be left fully liable. All or part of the liability that remains will fall to the local authority as the Class C person. There are no exclusion tests for the local authority.
- 1.10 There is no specific definition of 'hardship' within Part 2A and it therefore carries its ordinary meaning; hardness of fate or circumstance, severe suffering. How hardship is proposed to be specifically interpreted and applied in this context within Mid Devon is detailed in the attached proposed Cost Recovery Policy.
- 1.11 Class A and C person(s) are potentially liable for all land that is contaminated and for all impacts to all receptors (i.e. human-health, property, designated eco-systems and controlled waters). Class B persons are only potentially liable for the specific area of land they own/occupy and are excluded from liability for impacts to controlled waters.
- 1.12 Where a determination notice has been served and the local authority is left with all or part of the liability to remediate contaminated land (as the Class C person) then it can no longer apply for monies under the Defra Contaminated Land Capital Projects Programme. Therefore the Council is potentially liable for the full costs of remediation

- 1.13 Under its current inspection strategy, the Council have identified more than 930 sites that have the potential to meet the Part 2A definition of contaminated land. These sites have been risk assessed and placed in five categories A – E, with A having the highest risk of significant contamination and E the lowest. These categories inform the priority of which sites are investigated under the Part 2A legislation with those sites in A or B in particular most likely to give rise to significant harm to human health. Currently approximately 8% of all sites have been investigated and remediated where required. To date, the vast majority of these sites have been ‘voluntarily’ remediated through the development control regime rather than via regulatory intervention using Part 2A and this situation is unlikely to change.
- 1.14 In January 2010, under Part 2A the Council formally determined one high-risk former timber treatment site in Yeoford (redeveloped for housing in the 1970-80s). Cost-recovery for the remediation of the land affected, comprising the curtilage of part or all of four properties in total, was subsequently secured in accordance with the Contaminated Land Cost Recovery Policy. Without that policy in place then the recovery of costs would have been made significantly more difficult and open to challenge.
- 1.15 Despite development control being the main driver in achieving the remediation of land contamination, the Council has previously been able to commence active intrusive investigations of sites under Part 2A following the completion of identification and risk assessment work. Focus was on sites in either category A or B where redevelopment of the land concerned was unlikely in the near future but where there is current residential occupation or use (e.g. housing or allotments).
- 1.16 Following the withdrawal of Defra capital funding (see above) the Council is no longer pro-actively targeting potential sites. The legal duty to investigate land in our district remains and land may come to our attention at any time as result of other triggers e.g. change of ownership and environmental liability queries or a health event arising from a change of use. As a consequence the Council may still have to formally determine land as contaminated under Part 2A in the future and must therefore have in place an adequate Contaminated Land Cost Recovery Policy.

2.0 Policy development and principles

- 2.1 This attached policy has been drawn up against the background given above and is based upon the relevant sections of the primary legislation (Part 2A) and updated statutory guidance (Defra April 2012). In developing this policy, the Council have also consulted external officers and policies other local authorities who have determined land as contaminated under Part 2A (e.g. South Oxfordshire DC, Mendip DC, Lewes DC, North Hertfordshire DC, LB Camden).

- 2.2 Internal consultation on this policy was previously carried out with the respective heads or chief officers of the legal, finance, private sector housing and development control services.
- 2.3 Should the Council have need to implement the policy it must continue to have regard the primary legislation and statutory guidance (as may be updated) in addition to any relevant case law.
- 2.4 It is important however, that the Council recognises there is a wide variation in the circumstances associated with land contamination and its approach is to apply nationally published guidance in terms of *principles* and *approaches* rather than rigid rules. The policy defines how the Council will apply these principles and approaches in a manner that is as transparent, consistent, fair and equitable as is possible and in particular seeks to minimise the financial burden on Class B persons and the taxpayer. Overall, where possible the costs of remediating contaminated land are to be borne by the original polluter (Class A person).
- 2.5 The policy contains a mechanism to conduct an assessment of hardship which includes ‘means testing’ in order to establish an appropriate persons ability to pay for remediation works and therefore their level of liability. Information gathered in respect of this decision making process will be treated in confidence and in full accordance with the Data Protection Act 1998. Information received will only be used for the sole purpose of cost recovery decisions and in making judgements regarding the ability to pay in each individual case.
- 2.6 Overall, the policy will act as a guide for the decision making process in respect of the recovery of costs.

3.0 Decision sought

- 3.1 The recommendation of the adoption of the Contaminated Land Cost Recovery Policy provided with this report, to guide future decisions regarding the remediation of contaminated land in the district.

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Background papers:

Defra Environmental Protection Act 1990: Contaminated Land Statutory Guidance April 2012

Environmental Protection Act 1990 (Part 2A – sections 78A-78Y)

Local Authority Guidance on the Application of Part 2A, EPA 1990

Contaminated Land Report (CLR) 11: Model Procedures for the Management of and Contamination

Circulation of the report: Management Team, Cabinet member