

**COMMUNITY PDG
24 MARCH 2020**

CONTAMINATED LAND COST RECOVERY POLICY

Cabinet Member(s): Cllr Dennis Knowles (Community Well Being)
Responsible Officer: Simon Newcombe, Group Manager for Public Health & Regulatory Services

Reason for Report: The Contaminated Land Cost Recovery requires review by virtue of time bar.

RECOMMENDATION: That the PDG recommends to Cabinet that the revised Contaminated Land Cost Recovery Policy (attached in Annex A) be adopted

Financial Implications: 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. The apportionment of remediation costs and exclusion/hardship tests can be complex and having an up to date policy means a consistent decision-making framework is in place if and when required which Defra consider is a best-practice approach.

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 (under Part 2A of the Environmental Protection Act 1990). 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. Nonetheless, formally designating land as contaminated has to pass substantial scientific and legal thresholds and isn't done lightly or frequently as a result. Consequently, whilst we continue to drive remediation of historic land contamination through the planning process, we have had no requirement to designate any land in the district under the Part 2A regime since the policy was last reviewed in 2015. However, triggers leading to investigation of land under the legislation could occur at any time.

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 March 2017 the Council can no longer apply for external funding from the Defra Contaminated Land Capital Projects Programme to cover 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at the time (and had been available for a number of years), it was provided at the discretion of Defra and could be withdrawn or changed in the future, which was clearly the case.

Minor amendments have therefore been made to the policy to reflect the withdrawal of this programme.

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.

Approved by Finance: yes/nø - Group Manager for Financial Services

Budget and Policy Framework

This is a policy regarding cost-recovery arising from undertaking a specific statutory function. The internal budget implications (and potential third-party financial implications) are discussed under Financial Implications above and herein throughout the body of the report and the policy itself. The policy implications are as set out under Legal Implications below and also within the body of the policy itself as determined by the statutory framework.

Approved by Finance: yes/nø - Group Manager for Financial Services

Legal Implications: Under Part 2A of the Environmental Protection Act 1990, the Council has 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, the accompanying statutory guidance and other technical guidance. 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.

Since the previous adoption of this policy in 2015, following the 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.

Approved by Legal: yes/æ – Elizabeth Palmer, Solicitor on behalf of Head of Legal Services

Risk Assessment: Failure to adopt an appropriate Cost Recovery Policy may lead to uncertainty and inconsistency in any cost recovery action taken by the Council and a failure to meet Statutory Guidance/legal requirements. As a consequence, this may also result in a failure to secure appropriate remediation, thereby not protecting the community from harm to health or preventing further pollution to the environment. Furthermore this could lead to a financial loss by the Council and reputational damage.

Approved by Performance/Governance: yes/æ – Group Manager for Performance, Governance and Data Security

Equality Impact Assessment: No equality issues are specifically identified in this report and the policy does not impact in any way on legally protected characteristics. Nonetheless, the policy specifically addresses issues of financial hardship and equitable apportionment of costs in a manner which is consistent with statutory requirements.

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 latest Corporate Plan (2020-24) priority for sustainable communities.

Impact on Climate Change: None directly arising from the report. Indirectly, allowing people to stay in their homes and regenerating existing development has a lower net-carbon footprint than new-build.

1.0 Background and policy changes

1.1 The report presents a revised version of the current Contaminated Land Cost Recovery Policy approved by Cabinet. 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:

- Reformatting the policy in-line with current policy document templates and changing reference to the 'local authority' to 'the Council' where necessary for clarity.
- Minor legislative updates (EU Exit regulations on Environmental Regulations in 2019 and repeal of Housing Act 1996 in England)
- Pending changes to updated Environment Agency Guidance (Land contamination: risk management (LCRM – due to replace current model procedures called CLR11 in 2020)
- Closure of the Defra Contaminated Land Capital Projects Programme in March 2017
- The updated Housing Assistance Policy 2019-22 (availability of Healthy Homes Grants in addition to the on-going Wessex Home Improvement Loan product)

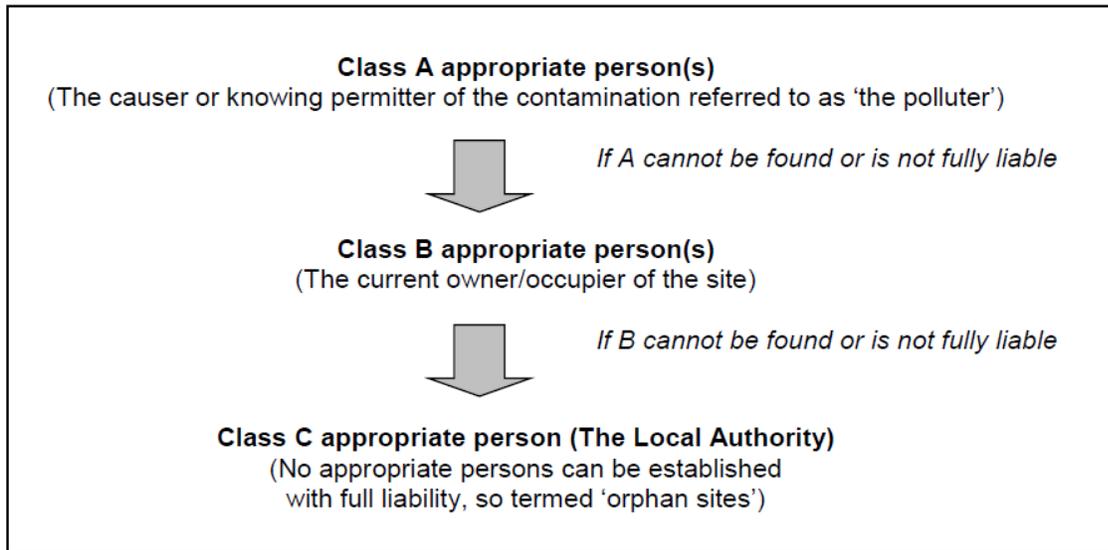
2.0 **Statutory duty – the Part 2A Contaminated Land regime**

- 2.1 Part 2A (Section 78) of the Environmental Protection Act 1990 (as inserted by Section 57 of the Environment Act 1995) came into force in 2000 and 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.
- 2.2 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 a 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.
- 2.3 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.

- 2.4 The Council 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.
- 2.5 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.
- 2.6 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
- 2.7 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.
- 2.8 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).
- 2.9 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



- 2.10 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 local authorities.
- 2.11 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.
- 2.12 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 ecosystems 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.
- 2.13 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.

- 2.14 Under its previous inspection strategy, the Council had identified more than 930 historic 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 with greatest weighting given to potential for significant harm to human health. Currently approximately 12% of all sites have been investigated and remediated where required. To date, the vast majority of these sites have been ‘voluntarily’ remediated through redevelopment and the planning process rather than via regulatory intervention using Part 2A and this situation is unlikely to change.
- 2.15 In 2010, under Part 2A the Council formally determined one high-risk former timber treatment site in Yeoford (redeveloped for housing in the 1970-80s) following an assessment of all category A sites in the area. 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 the policy in place then the recovery of costs would have been made significantly more difficult and open to challenge.
- 2.16 Despite redevelopment 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 other sensitive use (e.g. housing or allotments).
- 2.17 Following the withdrawal of Defra capital funding (see above) the Council is no longer able to pro-actively target 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 and we will continue to rely on surveillance and notification by Public Health England to alert us to potential issues. 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.

3.0 Policy principles

- 3.1 The 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 statutory guidance (Defra April 2012). In developing this policy originally, 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). We have also been able to identify a small number of new policies adopted by other authorities since the last review but identified no major policy differences.

- 3.2 Should the Council have need to implement the policy it must continue to have regard to the primary legislation and statutory guidance (as may be updated) in addition to any relevant case law.
- 3.3 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).
- 3.4 The policy contains a mechanism to conduct an assessment of hardship which includes 'means testing' in order to establish an appropriate person's 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 data protection legislation. Information received will only be used for the purpose of cost recovery decisions and in making judgements regarding the ability to pay in each individual case.
- 3.5 Overall, the policy will act as a guide for the decision making process in respect of the recovery of costs.

4.0 **Recommendation**

- 4.1 That the PDG recommends to Cabinet that the revised Contaminated Land Cost Recovery Policy (as attached in Annex A) be adopted

Contact for more Information: Simon Newcombe (Group Manager for Public Health & Regulatory Services) 01884 244615 or snewcombe@middevon.gov.uk.

Circulation of the Report:

Cabinet Member for Community Wellbeing (Cllr Dennis Knowles)
Members of the Community Policy Development Group
All Leadership Team
All Group Managers

List of Background Papers:

1. Environmental Protection Act 1990 – Part 2A, sections 78A-78YC
2. The Contaminated Land (England) Regulations 2006 (Statutory instrument 2006 No.1380)
3. Defra Circular 01/2006
4. Defra Environmental Protection Act 1990: Part 2A Contaminated Land Statutory Guidance (2012)
5. Environment Agency Contaminated Land Report CLR 11 – Model Procedures for the Management of Land Contamination and Land contamination: risk management (LCRM – due to replace CLR11 in 2020)
6. Environment Agency Managing and reducing land contamination: guiding principles (GPLC 2016)
7. Mid Devon District Council Housing Assistance Policy (current version 2019-22)

Annex A – Contaminated Land Cost Recovery Policy 2020.