

Environmental Protection Act 1990 Part IIA

Cost Recovery Policy

Introduction:

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 IIA of the Environmental Protection Act 1990.

The costs of cleaning up contaminated land are not automatically covered by the public purse; the government's policy is that the polluter should pay for any contamination they have caused by bearing the financial costs of cleaning it up.

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 or appropriate persons as they are termed in the legislation; this is to include anyone who has owned, occupied or operated on the site. A series of tests is applied to each party (known as exclusion tests) to determine who, if anyone, is classed as an appropriate person.

The enforcing authority (usually the local authority) will serve a remediation notice on the appropriate persons to ensure the clean up of the land takes place.

The Environmental Protection Act 1990 section 78F states, however that there are three parties that may be deemed to be appropriate persons:

- 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)

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 local authority has to decide how much each (Class A) person should pay towards remediation works.

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, 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.

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 apply to central government for financial assistance in covering its reasonable costs.

If a remediation notice is served and not complied with or the Council chooses not to serve a remediation notice, the Council 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.

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 is making cost recovery decisions.

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'.

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 (Statutory instrument 2006 No.1380)
- DEFRA circular 01/2006
- Housing Renewal Grants Regulations 1996 (Statutory Instrument 1996 No.2890 as amended)

1. General aims of the policy:

This document sets out the Council's aims in relation to the recovery of costs incurred during the remediation of Contaminated Land.

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 costs of remediating pollution are borne by the polluter.
- Where this is not possible, seek all sources of finance (external to the Council) for remediation.
- Have due regard to the avoidance of hardship which 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 within Bath and North East Somerset Council.

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.

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 will lead to payment from the appropriate person either in installments (EPA 1990 578P(12)) or when the land is next sold.

Conditions relating to business premises:

2. Threat of Business Closure or Insolvency:

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

- 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 Council will consider waiving or reducing its costs recovery to the extent needed to avoid making the enterprise insolvent.

The Council will not 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.

In balancing the need to approach applicants compassionately while ensuring that Council taxpayers' interests are protected, when waiving immediate recovery and costs the Council will seek to recover its costs in due course by deferring recovery and securing by a charge on the land in question under section 78P of the Environmental Protection Act 1990. Such deferral will lead to payment from the appropriate person either in instalments (EPA 1990 578P(12)) or when the land is next sold.

Each case will be considered on its own merits having regard to the above criteria and the final decision will be confirmed by an Officer Panel.

3. Trusts:

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 Council will 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.

However, the Council 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.

4. Charities:

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 Council 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.

5. Registered Social Landlords (RSLs)

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

- 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), and
- 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.

Conditions relating to Class A and Class B Persons:

6. Class A Persons:

Subject to Section 7 below, the Council will not waive or reduce its cost recovery where a Class A person caused or knowingly permitted the presence of the significant pollutants to be in, on or under the land in the cause of carrying on a business. This is especially where they are likely to have earned profits from the activity which created or permitted the presence of those pollutants.

7. Where Other Potentially Appropriate Persons Have Not Been Found:

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 in question, but who cannot now be found for the purposes of treating him as an appropriate person. For example, this may apply where a company has been dissolved.

The Council will consider waiving or reducing its costs recovery from a Class A person if that person demonstrates to the satisfaction of the Council that:

- 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

- If that other person could be found, the Class A person seeking the waiver or reduction of the Council's costs recovery would either:
 - a) Be excluded from liability by virtue of one or more of the exclusion tests set out in DETR Circular 02/2006, or
 - b) 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 DETR Circular 02/2006.

Where an appropriate person is making a case for the Council's costs recovery to be waived or reduced by virtue of the paragraph 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 regard it as sufficient for the appropriate person concerned merely to state that such a person must have existed.

8. Class B Persons:

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. 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.

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.

9. Precautions Taken Before Acquiring a Freehold or Leasehold Interest:

In some cases, the appropriate person may have been reckless as to the possibility that land he has acquired may be contaminated, or he 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.

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

- He 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;
- When he acquired the land, or accepted the grant of assignment of the leasehold, he was 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
- It would be fair and reasonable, taking into account the interests of national and local tax payers, that he will not bear the whole cost of remediation.

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.

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 will lead to payment from the appropriate person either in installments (EPA 1990 578P(12)) or when the land is next sold.

10. Owner-Occupiers of Dwellings:

For Class B person owners and occupiers, the Council will consider waiving or reducing its costs recovery where that person satisfies the Council that, at the time the person purchased the dwelling, he did not know, and could not reasonably have been expected to have known, that the land was adversely affected by presence of a pollutant.

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 his income, capital and outgoings.

Inherited property will be treated as though the property was purchased.

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 the paragraph above will be applied only to the dwelling and its curtilage.

Any application for financial assistance from an appropriate person who is an owner occupier, will be considered by having regard to the eligibility criteria contained within Housing Renewal Grants Regulations 1996.

In addition, the Council will have regard to the current market value of the property (when remediated) and family income and assets.

In balancing the need to approach applicants compassionately while ensuring that Council taxpayers' interests are protected, when waiving immediate recovery and costs the Council will seek to recover its costs in due course by deferring recovery and securing by a charge on the land in question under section 78P of the Environmental Protection Act 1990. Such deferral will lead to payment from the appropriate person either in instalments (EPA 1990 578P(12)) or when the land is next sold.

Each case will be considered on its own merits having regard to the above criteria and the final decision will be confirmed by an Officer Panel.

11. Means testing of applicants:

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 that used for applications for Housing Renovation Grant (HRG). These grants are assessed on a means-tested basis, as presently set out in the Housing Renewal Grants Regulations 1996 (SI 1996/2890, as amended). The HRG 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. For this purpose, any upper limits for grants payable under HRG will be ignored.

12. Applications for costs of remediation to be waived or reduced:

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

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.

All hardship applications shall be made in writing to Bath and North East Somerset Council and signed by the applicant.

The Council may, having regard to the applicant's circumstances, approve an application being made in a format other than writing. Such approval will be given in writing and will prescribe alternative formats available.

The appropriate person will be informed of any cost recovery decisions taken, explaining the reasons for those decisions.

In the event of an applicant being dissatisfied with the outcome of an application for hardship they may appeal, in writing or other agreed format, to Bath and North East Somerset Council against the decision.

Appeals regarding the outcome of an application shall be determined by an alternative Officer Panel.