

WEST LINDSEY DISTRICT COUNCIL

LOCAL AUTHORITY CONTAMINATED LAND CONTROL AND DECISION FRAMEWORK

ENVIRONMENTAL PROTECTION ACT 1990 PART IIA

1 PROMOTING AWARENESS OF THE REQUIREMENTS OF THE ACT

- 1.1 The Council will provide advice and information via the Council's Contaminated Land Inspection Strategy.
- 1.2 The Council will provide advice and information either verbally or in writing to any person enquiring about contaminated land within the District.
- 1.3 The Council will carry out inspection of land and identification of land that may be contaminated as detailed in the Contaminated Land Inspection Strategy.

2.0 DETERMINATION

- 2.1 The Council will exercise its power under S78B (1) to inspect and identify whether or not a particular area of land is contaminated land. In doing so it will, if considered appropriate rely on information provided by others, such as the Environment Agency or consultants.
- 2.2 The Council will consult with relevant bodies such as the Environment Agency and English Nature prior to making the determination in order to ensure consistency.
- 2.3 The Council will ensure that any evidence used as part of the subsequent assessment has been collected using reliable and scientifically defensible techniques and methods.
- 2.4 The Council will carry out an appropriate scientific and technical assessment of all relevant and available evidence and in accordance with Statutory Guidance.
- 2.5 In the event that the determination results in the identification of contaminated land, then the Council will prepare a written account of the following in accordance with Statutory Guidance:
 - The particular pollutant linkage(s) on which the determination has been made
 - The area of land to which the determination applies taking into account the distribution of the significant pollutants, the nature of remediation that might be required and the likely identity of those who may be responsible for remediation (if known) at this stage.

- A summary of the evidence on which the determination is based
- A summary of the assessment of evidence
- A summary of the way in which the Council considers the requirements of the relevant parts of Chapters A & B of the Statutory Guidance have been met

3.0 NOTIFYING THE OUTCOME OF DETERMINATION

- 3.1 Once the Council has identified an area of land, which it has determined to be contaminated, it will formally notify the following interested persons in accordance with Section 78B(1-4): the site owner, the apparent occupiers, the apparent appropriate persons responsible for remediation and the Environment Agency.
- 3.2 The Council will reasonably endeavour to carry out this process based on the best information available to it at any particular time. The notification will aim to be clear and transparent and encourage wider discussion and consultation between the Council and the appropriate person(s) on what remediation might be appropriate.

The Council will always reasonably endeavour to identify the Class A person(s) who caused or knowingly permitted the substances to be present on or under the contaminated land in question. However in cases where searching for additional information would not be reasonable having regard to cost, effort and potential significance then the Council will consider that it has made all reasonable enquiries.

- 3.3 The notification will take place in writing and inform the person(s) of the capacity in which they have been formally notified.
- 3.4 The notification will start the minimum three month formal consultation process on what is to be done by way of remediation.
- 3.5 The notification will contain the following information:
- A copy of the Council's written record of the outcome of determination
 - Information on the availability of site investigation reports underpinning the determination
 - An indication of the reason why particular person(s) appear to be appropriate person(s) responsible for remediation
 - The names and addresses of other persons also notified and the capacity in which they have been notified
 - Appropriate person(s) will also receive information on the tests for exclusion from and apportionment of liabilities as set out in Statutory Guidance
 - If relevant that the land is to be designated as a special site

- An invitation to submit further information concerning the condition of the land, the circumstances of the land and the identification of any further individuals or organisations that should be added to the consultation list.
- Details of where to obtain a copy of the relevant legislation and Statutory Guidance
- A request for acknowledgement of receipt of the letter

3.6 In cases where urgent remediation action is needed the Council will also include the following:

- a clearly written summary explaining how the Council has reached its decision
- a statement advising that the Council is not required to wait the minimum statutory period of three months before serving a remediation notice (should this prove necessary)
- a statement advising that the Council wishes to discuss the issues with the consultee and other relevant persons as quickly as possible.

4.0 **DECIDING WHO PAYS**

4.1 The Council will decide as part of its preparation of a remediation notice, who has responsibility for meeting the cost of remediation in accordance with S78A (9), S78F and Statutory Guidance.

4.2 In cases where there are two or more liable persons to bear responsibility for remediation, then the Council will act in accordance with guidance issued by the Secretary of State in deciding whether any of them should be excluded from liability and how liabilities should be apportioned between remaining persons. By this stage the Council will have provided all identified appropriate persons information on the tests as detailed in 3.5 above.

4.3 The Council will follow the same procedure for determining liabilities where it has powers to carry out the necessary works itself under S78N (3). This will be done in order that the Council can establish whether and from whom it can recover its reasonable costs of carrying out the work.

4.4 If members of the identified liability group benefit from exemptions detailed in the Act then the site will be identified as an orphan site and the Council will be responsible for remediation of orphan linkages.

4.5 The tests of exclusion and apportionment of liability as detailed in 4.2 above will be applied in all cases except as detailed in 4.6 below.

4.6 Subject to implications for public expenditure the Council may allocate liability between members of a liability group on the basis of an agreement between the parties. Any agreement will be required in writing and will provide the Council with a clear basis for division of responsibilities.

- The Council will not accept any agreement, which is challenged by a member of the party.

- The Council will disregard any agreement in cases where the party liable would benefit from hardship provisions or other limitations on cost recovery under S78P & S78X (3&4).

4.7 Throughout the process of applying the tests the Council will at all time reasonably endeavour to consult with those who may be affected by the tests.

5.0 IDENTIFICATION OF APPROPRIATE REMEDIATION

5.1 In deciding what is to be done by way of remediation either voluntarily or through enforcement action, the Council will determine the standard of remediation in accordance with S78E and taking into account the “best practicable technique” as set out in the statutory guidance. The Council will also take into account the costs in relation to the seriousness of the risk.

5.2 In carrying out this process of consultation the Council will encourage voluntary remediation rather than service of a remediation notice.

5.3 In assessing remediation schemes voluntary or otherwise the Council may choose to consult with appropriate bodies, including the use of specialist consultants.

5.4 If during this process, voluntary remediation is offered, the Council will require the person(s) to submit a written remediation statement and associated timetable in accordance with S78H (7&8).

5.5 When assessing the appropriateness of a remediation statement, the Council will have regard to 5.1 above and whether or not the person intends and can practicably carry out the proposed remediation.

5.6 If the Council does not receive a remediation statement for publication within a reasonable time period, that being no less than the formal consultation period of three months, then it may choose to prepare and publish the statement itself. In these circumstances the Council will advise the person in writing of its intentions, advising that the Council may recover reasonable costs from the person(s) in doing so. The letter will aim to encourage further dialogue with a view to the remediation statement being published by the responsible person.

6.0 REMEDIATION NOTICES

6.1 Prior to serving a remediation notice in accordance with S78E the Council will have ensured the following:

- No other regime is more applicable to dealing with the determined area of contamination
- The use of Part 11A is appropriate
- All reasonable assistance and advice has been given to the appropriate person(s) in order to encourage voluntary action

- In cases where the Council has power to carry out remediation actions itself, it will ensure that it is not precluded from serving a remediation notice requiring anyone else to carry out that remediation action
- The proposed recipient of the notice has been advised of the details of what he is being required to do and the time in which he must do it
- Aim to resolve as many disagreements as possible

6.2 The Council will not serve a remediation notice when it is satisfied that either:

- The appropriate person responsible for remediation or some other person plans or undertakes during the consultation process to carry out particular remediation actions on a voluntary basis and by publication of a remediation statement.
- Remediation with an equivalent effect is taking place as a result of action under other powers.
- If the Council considers that a remediation action is not reasonable or contrary to Statutory Guidance
- If the notice would not be effective in dealing with imminent danger of serious harm or serious water pollution
- The Council decides to carry out the work itself but does not seek to recover all of its costs
- The Council has entered into a written agreement with the appropriate person to carry out the work on their behalf
- When no appropriate person has been found after reasonable enquiry

6.3 Except in circumstances as detailed in 6.4 below The Council will observe the specified three month period between the identification of the contaminated land in question and the service of a remediation notice. The three month period will start when the formal notification as detailed in 3.1 to 3.4 is given.

6.4 When it appears to the Council that there is imminent danger of serious harm or serious pollution of controlled waters being caused and it is satisfied that there is a need for urgent remediation the following requirements may not be applied:

- Prior consultation
- The three month period as specified in 5.3 above

6.5 The Council will follow the statutory requirements for the contents of a remediation notice as set out in sections 78E (1) & (3) of the EPA 1990, and Regulation 4 of the Contaminated Land (England) Regulations 2000. The information will be as follows:

Administrative/Particulars

- Name & address of the person on whom the notice is served
- Location and extent of the contaminated land to which the notice relates
- Date and reference of any notification as detailed in section 2 above
- Whether the person named above is a Class A Person or Class B Person owner or Class B Person Occupier, including the basis on which the Council has established this.

- The name and address of the contaminated land (where known)
- The name & address of any person(s) whose consent is required for access before any particular remediation action can be done

The Problem That Is Being Addressed

- Particulars of the significant harm or pollution of controlled waters
- A list of substances by reason of which the land is contaminated land
- Details of the determination with reference to one or more of :
Significant harm is being caused
There is a significant possibility of significant harm being caused
Pollution of controlled waters is being caused
Pollution of controlled waters is likely to be caused
- Whether the Council considers that there is imminent danger of serious harm or pollution of controlled waters and the basis on which this assessment has been made

What Is To Be Done

- What is to be done by way of remediation and when. The Council will aim to be as clear and concise as possible and will aim to include for each remediation action a clear specification of :
The nature of the action
Its scale or extent
Its particular characteristics or design, including the purpose it should achieve and the standard to which it should be carried out
Any associated quality assurance procedures including verification that the action has been carried out and achieved its purpose
- The basis for the Council's decision showing how the Statutory Guidance issued under s78E (5) has been applied (Chapter C of Annex 3 of DETR Circular 2/200) The Council will aim to include with this a report on the selection and assessment of remediation actions, packages and schemes, identifying the standard of remediation or the purpose which they are trying to achieve, including a reference to any guidance issued by the Environment Agency to which the Council has had regard.

Who Else Is Involved

- Whether anyone else is involved and if so the name and address of each person and the remediation action(s) for which they bear responsibility
- A report on the application of the exclusion tests. This will detail the exclusion from liability of any other person in accordance with Statutory Guidance issued under s78F(6) (Chapter D of Annex 3 of DETR Circular 02/2000) to show how the guidance has been applied
- The proportion (expressed as a percentage) each appropriate person is to bear of the total costs of each remediation action as identified in the notice
- A report detailing the application of the attribution between different liability groups and the apportionment within the group of the costs as set out in the Statutory Guidance Chapter D issued under s78F(7)

Other Regulatory Information

- A warning that failure to comply with the notice, without reasonable excuse may be an offence
- Details of penalties that may be applied on conviction for such an offence
- An explanation that:
- The person on whom the notice is served has a right to appeal under s78L of EPA 1990
- Information on how, within what period and on what grounds appeals may be made
- If an appeal is made the notice is suspended until the final determination or abandonment of the appeal
- The name and address of the Council
- The date of the notice

6.6 The Council will follow the statutory requirements for service of the remediation notice as set out in Regulation 5 of the Contaminated Land (England) Regulations 2000 (SI227/2000) in that:

- Copies of the notice will be served on
- Any person who as owner or occupier has been consulted under section 78G(3) about the granting of rights over the land or waters to the appropriate person(s)
- Any one else who has been consulted under section 78G(3) about the granting of rights over the land or waters to the appropriate person(s)
- Any person who as owner or occupier has been consulted under section 78H(1) about the appropriate remediation
- The Environment Agency
- The recipient will be told in what capacity they are being sent a copy
- Under Regulation 5(2) when urgent remediation action is required (see 3.4 above) and as a consequence the remediation notice is served without consultation, the Council will send copies as soon as is reasonably practicable, to those who would have been consulted if there had not been a need for urgent action.
- Prescribed details of a remediation notice will be placed on the Council's Public Register

6.7 In cases where the Council is satisfied that the remediation action is not reasonable and it is precluded from serving a remediation notice by Section 78E (4&5) then it will prepare and publish a remediation declaration detailing actions that it would have specified for a given site but is prevented from doing so. In such circumstances the Council will notify the appropriate person(s) in writing of its intentions.

7.0 ENFORCING AND FOLLOWING UP REMEDIATION

7.1 In circumstances where remediation is being carried out voluntary basis the Council will ensure that sufficient progress is being made, by carrying out periodic reviews. In considering this the Council will have regard to the following:

- Whether a remediation statement has been published by the responsible person(s)
- Whether key project milestones have been achieved
- Whether remediation is being carried out as specified in the remediation statement
- Whether the circumstances of the land are as anticipated
- Whether it has become apparent that urgent remediation is necessary or that the site should be designated as a Special Site

In considering the above the Council will also have regard to the general principals of the Public Protection Services Enforcement Policy and in particular will consider the following:

- The seriousness of the offence and the consequences of non-compliance
- The reasons why non-compliance occurred
- The previous history and attitude of the person or business concerned
- The cost of taking action weighed against the likely benefit to the community
- The likelihood of a successful action

Prior to making any decision on the type of action required, the Council will ensure that discussions have taken place with the person responsible in an attempt ascertain whether the person responsible has “reasonable excuse” for making insufficient progress. The Council will aim to encourage the person responsible to provide the Council with an assurance that the remediation will be carried out within a reasonable time period.

7.2 If the Council is not satisfied that sufficient progress is being made having taken into account details of 7.1 above, then it will consider the following actions:

- The service of a remediation notice on the appropriate person
- The publishing of a remediation statement on behalf of the responsible persons with a view to recovering costs of carrying out this work under S78H (7&8).
- The power of the Council to carry out works itself under Section 78N(3) with a view to recovering reasonable costs involved

Before taking either of these actions, the Council will ensure that the appropriate person(s) and person(s) responsible have been advised in writing of the Councils intentions.

7.3 In circumstances where the Council has served a remediation notice, the Council will ensure that sufficient progress is being made, by carrying out periodic reviews. In considering this the Council will have regard to the following:

- Whether remediation actions have been carried out by the dates specified in the remediation notice
- Whether remediation is being carried out as specified in the remediation notice
- Whether the circumstances of the land are as anticipated

- Whether it has become apparent that urgent remediation is necessary or that the site should be designated as a Special Site

In considering the above the Council will also have regard to the general principals of the Public Protection Services Enforcement Policy and in particular will consider the following:

- The consequences of non-compliance
- The reasons why non-compliance occurred
- The previous history and attitude of the person or business concerned
- The cost of taking action weighed against the likely benefit to the community
- The likely hood of a successful action

Prior to making any decision on the type of action required, the Council will ensure that discussions have taken place with the person(s) responsible for the remediation actions in an attempt ascertain whether the failure to comply with the remediation notice occurred “without reasonable excuse”. The Council will aim to encourage discussions in order to provide the Council with an assurance that the remediation will be carried out within a reasonable time period with out formal action being necessary.

7.4 If the Council is satisfied that the notice has failed to be complied with “without reasonable excuse” whilst having regard to 6.3 above, then it will consider the following actions:

- Prosecution under the Act (Section 78M(1))
- The power of the Council itself in carrying out the work with a view to recovering reasonable costs. (Section 78N(3))

Before taking either of these actions the Council will ensure it has notified the appropriate person(s) responsible in writing of the Councils intentions.

GLOSSERY OF TERMS

Apportionment: is dividing the costs of remediation between appropriate persons in accordance with statutory guidance.

Appropriate Person: Any person who is found liable to pay for remediation under the terms of EPA 1990 Part 11A.

Attribution: is dividing remediation costs between liability groups

Class A Persons: are those regarded as an appropriate person because they caused or knowingly permitted the substance in question (the pollutant) to be in, on or under the land.

Class B Persons: are those regarded as an appropriate person because no Class A person has been found and they are the owner or occupier of the land.

Contaminated Land: The definition of contaminated land as defined in the EPA 1990 Part 11A that being “any land which appears to the local authority in whose area it is situated to be in such a condition, by reason of substances in, on or under the land, that

- Significant harm is being caused or there is a significant possibility of such harm being caused; or
- Pollution of controlled waters is being, or is likely to be caused”.

Controlled Waters: All natural inland and near coastal waters including groundwater are “Controlled waters”, therefore all ponds, lakes, rivers, streams, estuaries, and coastlines are controlled waters. Pollution of controlled waters means the addition of any “poisonous, noxious or polluting matter or any solid waste matter”.

Determination: is the formal process in the statutory guidance by which the Local Authority decides whether or not a particular area of land is contaminated land.

Exclusion: means the decision to remove an appropriate person from a liability group as a result of the application of an exclusion test as detailed in the statutory guidance (paragraphs D47-D72 and D87-D90).

Exemption: means the statutory preclusion of liability for persons benefiting from sections 78J, 78K or 78X(3) of the EPA 1990.

Liability Group: means all the appropriate persons for a particular significant pollutant linkage in accordance with statutory guidance (paragraphs D10-D14).

Notification: is the formal process by which the Local Authority informs the site owner, the apparent occupiers, the apparent appropriate persons responsible for remediation and the Environment Agency that a particular area of land is contaminated land within the meaning of EPA 1990 Part 11A.

Orphan Site: a site which the Local Authority has not been able to find after reasonable enquiry an appropriate person in such cases the Local Authority takes responsibility for remediation.

Pollutant Linkage: A circumstance where it is possible that a contaminant (source) may contact a receptor (via a particular pathway)

Remediation: Remediation is an action carried out to reduce the risk of significant harm or water pollution. It entails breaking or removing significant pollutant linkages, by treating the source (contaminant); blocking the pathway or protecting or removing the receptor.

Remediation Declaration: A document prepared and published by the enforcing authority, detailing remediation actions that it would have specified for a given site but is prevented from doing so by Section 78E (4&5). This section says that the authority must only specify remediation that is reasonable, given the seriousness of the harm or water pollution, and the cost of the works that would have to be carried out.

Remediation Notice: A notice specifying what an appropriate person has to do by way of remediation and when he is to do each of the specified actions by. These actions can also consist of “assessment actions” and “monitoring actions”.

Remediation Statement: A statement prepared and published by the responsible person detailing the remediation actions that have been carried out (or are planned)

Responsible Person: The person responsible for carrying out the remediation. Not necessarily the same as the appropriate person.

Significant Harm: Significant harm includes:

- Death, disease, serious injury, genetic mutation, birth defects, or the impairment of reproductive functions in humans
- Irreversible adverse change, or threat to endangered species, affecting an ecosystem in a protected area(eg site of special scientific interest)
- Death, serious disease or serious physical damage to pets, livestock, game animals or fish
- A substantial loss (20%) in yield or value of crops, timber or produce
- Structural failure, substantial damage or substantial interference with the right to occupation of any building

Significant Pollutant Linkage: A pollutant linkage where the amount of contaminant (source) that may be able to contact the receptor is likely to be sufficient to result in significant harm or pollution of controlled waters.

Significant Possibility of Significant Harm: In determining whether there is significant possibility of significant harm, the local authority will use a risk assessment approach, considering both the severity and the likelihood of the possible harmful effect. This will involve establishing:

- The nature and degree of harm predicted

- The susceptibility of the receptors to which harm might be caused
- The timescale in which the harm might occur

Special Site: S special site is a contaminated land site that is regulated by the Environment Agency instead of the Local Authority. The definition of a special site is given in Section 78C (7) and 78D (6) of the Environmental Protection Act 1990.

Examples of special sites are:

- Sites that could be contaminating drinking water resources
- Nuclear sites
- MoD land (with some exceptions such as off base housing)

Statutory Guidance: Guidance that must be complied with by the enforcing authority. The statutory guidance is given in DETR Circular 02/2000.