

**POLICY FOR WAIVING OR REDUCING THE COSTS OF REMEDIATION UNDER  
PART 2A OF THE ENVIRONMENTAL PROTECTION ACT FOR CLASS B  
PERSONS WHO ARE OWNER/OCCUPIERS OF RESIDENTIAL DWELLINGS**

**1. Summary of policy**

This policy relates to the contaminated land regime set out under Part 2A of the Environmental Protection Act 1990<sup>1</sup> (Part 2A) and accompanying guidance from the Secretary of State<sup>2</sup> (the Statutory Guidance). It introduced a duty for all local authorities to identify and inspect potentially contaminated land and to require remediation of land. However, there is a limit on the things that can be achieved through remediation. The essential limit is what is regarded by the authority as being "reasonable", having regard to the cost which is likely to be involved and the seriousness of the harm. In determining the standards of remediation and reasonableness of measures to be taken, the local authority is required to have regard to the statutory guidance. The local authority has the power to secure remediation of land where there are unacceptable risks to human health or the wider environment. The policy specifically sets out the principal considerations the local authority will have regard to, when seeking to recover remediation costs of contaminated land from the owners of that land.

When remediation is secured and an *appropriate person*<sup>3</sup> has been identified the statutory guidance states that in general the local authority should "*seek to recover in full*" its "*reasonable costs*". However the local authority is also required not to cause hardship and take account of other specific considerations in the statutory guidance.

This policy seeks to promote fairness, transparency and consistency in helping to decide financial responsibility for remediation of contaminated land and avoid hardship which this decision may cause. It also seeks to comply with the primary legislation of Part 2A and the requirements of the statutory guidance to avoid causing hardship. This does not automatically mean that the local authority will waive its costs. However, in any case where an owner or occupier of a site is covered by this policy the local authority will consider the following principles:

- **Fairness to national and local tax payers:** waiving a significant proportion of costs where a site has been contaminated by a former nationalised industry that cannot now be held liable.
- **The value of the land:** the amount to be recovered will be capped in relation to the value of the land.
- **The level of Knowledge:** a person might reasonably be expected to have at the time of they purchased the land.

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<sup>1</sup> Introduced by s57 of the Environment Act 1995

<sup>2</sup> Department of Environment Food and Rural Affairs (defra) Circular on Contaminated Land 01/2006

<sup>3</sup> As defined under s78F of the Environmental Protection Act (Part 2A)

- **Income:** the local authority will have due regard to the income and out goings necessary to have an adequate family life based on the broad principles of the housing renewal grant regulations (HRG)<sup>4</sup>.

## **2. Introduction**

Under Part 2A, the appropriate person to pay for remediation is determined with reference to the primary legislation and the statutory guidance. In the first instance, the person that caused or knowingly permitted a pollutant to be in, on or under the land will be the appropriate person (described as a Class A person). If such a person cannot be found, the owner or occupiers of the land may be the appropriate persons (described as Class B persons)<sup>5</sup>.

This policy describes the local authority's approach to the recovery of costs from Class B owner/occupiers of residential dwellings and the associated gardens. Owners of other types of property such as commercial premises are excluded from this policy.

## **3. General approach**

The local authority will follow the requirements of the primary legislation, act in accordance with the statutory guidance on the exclusion and apportionment of liabilities for remediation and have regard to the statutory guidance on remediation and cost recovery decisions. In particular it will follow the principles set out in Chapter E of the statutory guidance, supplemented by the specific policy set out below.

In practice the effect of the principles and this specific policy is that the local authority will take a sequential approach to the consideration of waiving or reducing its costs as follows:

- i. Waive a significant proportion of class B person's costs where the contamination arose from a former nationalised industry and the privatisation process has not transferred liabilities for contamination to a legal successor.
- ii. Waive all costs from recipients of an income related means tested benefit other than Tax credits.<sup>6 7</sup>

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<sup>4</sup> Housing Renewal Grant regulations (HRG) 1996 Statutory instrument No 2890

<sup>5</sup> See Paragraph D.5 of Annex 3 of the Statutory Guidance.

<sup>6</sup> Paragraph E13 of Annex 3 of the Statutory Guidance only allows the local authority to recover more costs through a charging notice in accordance with section 78P where the land owner caused or knowingly permitted the contamination. This mechanism is not available for class B persons.

<sup>7</sup> Council tax will generally be considered as the benchmark assessment criteria and any significantly more generous benefits may be excluded from the process.

- iii. Consider the degree to which costs should be capped in relation to land values
- iv. Consider the degree to which the costs should be further capped in relation to the likely level of ignorance that might be expected at the time that the land was purchased.
- v. Consider the specific hardship which this recovery might impose;
  - a. First in relation to the capital interest in the land, and
  - b. Second in relation to the other capital, income and outgoings of the Class B person.

#### **4. Decisions in general**

Paragraphs E.10 to E.13 of the statutory guidance will apply.

Within that, the local authority will:

- Seek to recover in full its reasonable costs incurred when performing its statutory duties in relation to the remediation of contaminated land, in particular:
  - Wherever possible, by applying the polluter pays principle, whereby the costs of remediating pollution are borne by the polluter. To this end the local authority will ensure that it has collected information on the site history, including ownership and use, reviewed that information to establish whether it has sufficient evidence to identify a Class A person, and considered carefully whether that Class A person still exists and can therefore be found for the purposes of Part 2A.
  - Where a Class A person cannot be found, seek to recover any costs from a Class B person that it is fair and reasonable to do, having regard to the hardship which the recovery of costs may cause and taking into account the considerations set out in Chapter E of the statutory guidance.
  - Seek external funding for any costs that the local authority itself will have to bear having applied these principles.
  - In all cases, the local authority will endeavour to keep the costs of remediation to a minimum consistent with achieving the required standard of remediation under Part 2A. Costs will include the reasonable costs of the local authority in planning and supervising the work.

- Aim for an overall result that is fair and equitable as possible to all who may have to meet the costs of remediation, including national and local taxpayers. Thus where a former nationalised industry has caused the contamination, but the legal process of transferring assets to the private sector has not transferred liabilities for contamination to a legal successor, the local authority shall waive [30%] of the costs and the local Authority will apply to the defra capital grant programme to recover these funds.

The local authority notes that it does not have the power under s78P to secure the costs by a charge on the land where the appropriate person is not a Class A person. It is not therefore possible to consider whether it can recover more of its costs from Class B persons in this way (i.e. it cannot take advantage of less hardship resulting from deferred payment). However, the local authority will still consider whether as part of the agreement to carry out remediation on behalf of a Class B person it may secure what costs it does consider to be reasonable by placing a charge on the land, hence enabling it to offer residents access to lower cost capital as a “voluntary” alternative other than would apply for a commercial loan.

## **5. Information for making decisions and the decision making process**

Paragraphs E.14 to E.16 of the statutory guidance will apply.

Within that, the local authority will:

- Endeavour to provide an accurate estimate of the overall cost of the works particularly estimates for;
  - the costs of main remediation contract;
  - project overheads such as ancillary professional fees and local authority costs to be incurred supervising the project;
  - any ancillary costs associated with implementation.
- Obtain openly available and general information on land and property values to support its preliminary decision on the maximum level of cost it could aim to recover.
- Invite owners and occupiers to provide any more specific information on the value of their particular land, or their other circumstances, including mortgage, income and any entitlement to an income related means tested benefit, to enable the authority to confirm or change its preliminary decision.
- Invite owners and occupiers to provide sufficient information to support any claim for compensation to which the owner might be eligible under s78G (and relevant regulations<sup>8</sup>) and which still may be paid by MVDC.

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<sup>8</sup> Regulation 6 and Schedule 2 of the Contaminated Land (England) Regulations 2006 (SI 2006 No 1380)

- Invite owners and occupiers whether they wish to make a personal submission in support of any submitted information.
- Make decisions on recovery of costs on the basis of information available to it at the time, but reserve the right to revisit this cost recovery within 10 years if it becomes aware that false information has been provided by the owner/occupier or their circumstances have significantly changed. It will also consider relevant criminal proceedings where false information has been knowingly provided by the person benefitting from that information.

The decision as to cost apportionment will be made by the Council's Executive based on information submitted and any personal submission. There is no appeal to this decision.

## **6. Costs in relation to land values**

Paragraphs E.38 to E.40 will apply.

Within that, the local authority will cap the value of the contribution to be made in accordance with two factors:

- i. **The overall value of the property:** this should be based on an existing framework. The Council considers the most robust method is to use the valuation points provided by Her Majesties Revenue and Custom Service in assessing stamp duty land tax (SDLT).
- ii. **The level of knowledge considered reasonable at the time:** which may also have an impact on the market value

The local authority would particularly take account of the following:

- **Lower Value Properties:** Where the capital value of the property (dwelling and curtilage) is such that it would attract the three lowest bands of stamp duty land tax (SDLT) the local authority will apply a cap to the maximum payment in accordance with the level of knowledge that would be expected to be available at the time of purchase as detailed in Section 7 below.
- **Higher Value Properties:** Where the capital value of the property (dwelling and curtilage) is such that it would attract a higher band of SDLT than the lowest three bands, the local Authority will increase the capital cap in section 7 below by [25%] rounded down to the nearest percentage point.
- If practicable, and as long as the residual value of the remaining property does not also increase after remediation the local Authority will use the value of only the land requiring remediation as a cap on the total cost it will recover from an owner. For example this would require the owner to demonstrate<sup>9</sup> that the garden plot can be successfully separated from the value of the

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<sup>9</sup> For example by obtaining an independent valuation by an appropriately accredited professional.

property and that both pieces of land would continue to have a viable use in keeping with the character of the immediate area.

- Note that this “garden cap” cannot apply in the case where the remediation results in significant harm no longer occurring (or otherwise reduces its effect) on the remaining land owned by the Class B person - for example where remediation relating to landfill gas removes an unacceptable risk to the occupiers of the house.

### **7. Owner-occupiers of dwellings “*knowledge of contamination*”**

Paragraphs E.41 to E.48 with paragraphs E44-E46 being considered a specific case relating to Class B persons who are also owners and occupiers.

As detailed in Section 4 all cost recovery caps for land contaminated by a former Nationalised industry will be applied after a [30%] waiver has been applied to the costs of the work in each property. The local Authority will apply to the defra capital grant programme to make up this short fall thus meeting its obligation to be fair to local and national tax payers.

The local authority will apply the following caps modified in accordance with the land value adjustments in section 6 above:

- Consider that, unless they have information to the contrary, where the current owner purchased the property before 1991<sup>10</sup>, they could not be expected to be aware of the presence of the significant pollutant now identified. **In these cases the authority will consider it reasonable to cap its recovery of costs to [5%] of the capital value of the property (dwelling and curtilage), before specific hardship is considered.**
- Consider that after 1991, unless they have information to the contrary, where the owner purchased the property he should normally have been made aware of the potential presence of pollutants in general, but that this may not have resulted in a reduction in the purchase price to reflect any remediation required. **In these cases the authority will consider it reasonable to cap its recovery of costs to [7.5%] of the capital value of the property (dwelling and curtilage), before specific hardship is considered.**
- Consider that from April 2000<sup>11</sup> to April 2012 where the owner purchased the property he could have reasonably been made aware of the potential presence of pollutants and the price paid can be taken to reflect that knowledge to some degree. **In these cases the authority will consider it reasonable to cap its recovery of costs to [15%] of the capital value of**

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<sup>10</sup>The date of government consultation on the introduction of the proposed s143 registers of land contamination.

<sup>11</sup> The date of implementation of Part 2A.

**the property (dwelling and curtilage), before specific hardship is considered.**

- Consider that from April 2012 where the owner purchased the property he should have been made aware of the potential presence of pollutants and the price paid can be taken to reflect that knowledge to some degree. **In these cases the authority will consider it reasonable to cap its recovery of costs to [20%] of the capital value of the property (dwelling and curtilage), before specific hardship is considered.**
- **In all cases, if the local authority has reasonable grounds for considering that a particular owner/occupier did know that the land was adversely affected by the presence of a pollutant then it will consider it reasonable to recover 100% of its costs as a maximum, before hardship is considered.**

**8 *In relation to E.45 –49 consideration of income, capital and outgoings***

The local authority will apply a staged approach based on information provided by the Class B person:

- Waive all remediation costs where information has been provided by the Class B person that they are in receipt of a means tested income related benefit (except Tax Credits)
- Identify available capital in accordance with Department of Work and Pensions (DWP) guidance manual which identifies a capital payment as a payment which is:
  - i. Made without being tied to a period
  - ii. Made without being tied to any past payment and
  - iii. Not intended to form part of a series of payments
- Class B persons shall be required to release capital to contribute to capped remediation costs in accordance with DWP and housing benefit guidance and capital will be protected in accordance with this guidance.
- Where available capital is insufficient to meet the capped remediation costs, the local authority will recover only as much of the remaining costs as would be fundable by a notional loan secured against the equity in the property held by the Class B person which a typical person with his income would be able to repay over a maximum of 10 years.

- In calculating this, the local authority will use the methodology described in the Housing Renewal Grant regulations (HRG) 1996 Statutory instrument No 2890 to determine the following:
  - The weekly applicable amount the government dictates the household can live on and;
  - The total disposable income available to the household.

The Local authority will then calculate an annual available income (AAI) for the household by taking the total disposable income from the HRG formula and subtracting the following elements:

- a supplementary living allowance of [10%] followed by
- the cost of any mortgage calculated at the higher interest rate of either the published 7 year public works loan board or the residents current interest rate;
- any other loans or hire purchase agreements

The adjusted AAI for a household will then be considered as the principal amount the Council expects to recover over a maximum period of 10 years in at least annual instalments (each being calculated as the adjusted AAI divided by the number of years for recovery). Unless the person agrees to a charge on the property in which case the principal can be recovered over a longer period.