

NORTH LINCOLNSHIRE COUNCIL

**HIGHWAYS AND NEIGHBOURHOODS
CABINET MEMBER**

POLICY ON COST RECOVERY FOR CONTAMINATED LAND

1. OBJECT AND KEY POINTS IN THIS REPORT

- 1.1 To approve the 2014 policy statement on cost recovery for contaminated land.
- 1.2 The 2014 policy takes account of new contaminated land statutory guidance published in April 2012 by Defra.

2. BACKGROUND INFORMATION

- 2.1 Cabinet identified the need for a cost recovery policy on 29 December 2004. A policy on cost recovery was subsequently produced. Cabinet approved the policy on 18 July 2005.
- 2.2 The policy sets out the general approach towards deciding whether or not to recover costs.
- 2.3 The 2005 policy reflected the requirements of Part 2A of the Environmental Protection Act 1990 and the approved statutory guidance on cost recovery (02/2000). The 2005 policy aims to obtain a result that is fair and equitable to all who may have to meet the costs of clean up. This includes national and local taxpayers. The policy applies the “polluter pays principle”. The council also seeks to recover any reasonable costs.
- 2.4 Defra published revised guidance in April 2012. We now need to update the council’s 2005 policy in line with this updated guidance.
- 2.5 The draft 2014 policy is attached at Appendix 1. The draft policy reflects the new guidance.
- 2.6 The new guidance does not require that councils follow the means tested framework set out in the Housing Renewal Grants Regulations 1996 when considering cost recovery from an owner occupier of a dwelling. It also does not require commercial enterprises, trusts, charities or social housing landlords to have demonstrated in writing that they have looked for different types of funding such as grants or tax relief.

3. OPTIONS FOR CONSIDERATION

- 3.1 To approve the revised 2014 policy.

4. ANALYSIS OF OPTIONS

4.1 Approval of the 2014 policy statement will ensure that the council complies with current legislation. This requires that the council should consider hardship and guidance issued by the Secretary of State when deciding whether to recover reasonable costs.

4.2 Not approving the revised policy statement is likely to result in a cost recovery decision that is not fair and equitable to those who may have to meet the costs of clean up, including local and national taxpayers. The council would not comply with the new guidance and the requirements of section 78P(2) of the Environmental Protection Act 1990 Part 2A.

5. RESOURCE IMPLICATIONS (FINANCIAL, STAFFING, PROPERTY, IT)

5.1 Financial

5.1.1 In carrying out its statutory duties, the council will be required to decide whether or not it should seek to recover costs of remediation. The new policy will help the council to make those decisions in a fair and equitable way.

5.2 There are no further resource implications to consider.

6. OUTCOMES OF INTEGRATED IMPACT ASSESSMENT (IF APPLICABLE)

6.1 Officers have completed an Integrated Impact Assessment. There are no significant issues to highlight.

7. OUTCOMES OF CONSULTATION

7.1 The proposed policy complies with guidance issued by Defra.

8. RECOMMENDATIONS

8.1 That the Cabinet Member approves the revised policy on cost recovery for contaminated land.

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Background Papers used in the preparation of this report – Contaminated Land Statutory Guidance April 2012 (Defra).

APPENDIX 1



Draft Policy on the Recovery of Costs Associated with the Remediation of Contaminated Land

CONTENTS

Definition of terms

Introduction

Cost Recovery Decisions

Information Required for Making Cost Recovery Decisions

Cost Recovery Policies

Appendix 1 Specific considerations applying both to Class A and Class B persons

Appendix 2 Specific Considerations Applying to Class A Persons

Appendix 3 Specific Considerations Applying to Class B Persons

Definition of Terms

Unless otherwise stated, any word, term or phrase given a specific meaning in Part IIA of the Environmental Protection Act 1990, or in the statutory guidance has the same meaning in this policy.

Any reference to “Part 2A” means “Part 2A of the Environmental Protection Act 1990”.

Any reference to a “section” in primary legislation means a section of the Environmental Protection Act 1990 and any subsequent textural amendments or extent information, unless it is specifically stated otherwise.

“Appropriate person” is any person determined in accordance with section 78F who should bear the responsibility for anything, which is to be done by way of remediation in any particular case.

“Class A person” is an appropriate person by virtue of section 78F(2) owing to their having caused or knowingly permitted the pollutant to be in, on or under the contaminated land.

“Class B person” is an appropriate person by virtue of section 78F(4) or (5) owing to their being the owner or occupier of the land in circumstances where no Class A person can be found with respect to a particular remediation action.

“Contaminated land” has the same meaning as in section 78A(2) in that any land which appears to the local authority to be in such a condition, by reason of substances in, on or under the land, that significant harm is being caused or that there is significant possibility of such harm being caused; or that pollution of controlled waters is being, or is likely to be caused.

“Hardship” is not defined in the Contaminated Land Legislation and therefore carries its ordinary meaning – hardness of fate or circumstance, severe suffering or privation.

“Recovery decision” is used to describe any decision by the Council, for the purposes either of section 78P or of sections 78H and 78N, whether or not to recover from the appropriate person all of the reasonable costs incurred by the authority in carrying out remediation; or whether not to recover those costs or to recover only part of those costs.

“Remediation” is an action carried out to remove or permanently disrupt identified significant contaminant linkages to ensure that they are no longer significant and risks have been reduced to an acceptable level.

“Significant harm” is significant harm to the health of living organisms or other interference with ecological systems of which they form part and, in the case of man includes harm to his property.

“Significant contaminant linkage” is the contaminant-pathway-receptor relationship by which a relevant receptor is being harmed by the contaminant in question and which forms the basis for the land being determined as contaminated land.

“Statutory Guidance” is guidance that must be complied with by the enforcing authority. The statutory guidance is given in Contaminated Land Statutory Guidance dated April 2012 (Defra).

Draft Policy on the Recovery of Costs Associated with the Remediation of Contaminated Land

Policy Statement

Where the council exercises its powers of remediation under Part 2A of the Environmental Protection Act 1990, **it will seek to recover all costs to which it is entitled.**

The council will follow the “polluter pays” principle by virtue of which the costs of remediating pollution are to be borne by the polluter.

The council will aim to ensure that the overall result is just, fair and equitable as possible to all those who have to meet the costs of remediation, including local and national taxpayers.

1 Introduction

- 1.1 In order to promote transparency, fairness and consistency, the council has prepared, adopted and made available this policy statement, which details the approach it intends to follow subject to sections 78J(7) and 78K(6) in seeking reasonable costs from appropriate person(s) associated with remediation of contaminated land carried out under section 78N (3) (a), (b), (c), (e), or (f) of Part 2A of the Environmental Protection Act 1990.
- 1.2 In formulating this policy on the recovery of remediation costs the council has given due regard to the requirements of Part 2A of the Environmental Protection Act 1990 and the Contaminated Land Statutory Guidance (Defra April 2012).
- 1.3 The above statutory guidance is issued under section 78P(2) of the 1990 Act and it provides guidance on the extent to which the council should seek to recover the costs of remediation which it has carried out and which it is entitled to recover.
- 1.4 In deciding whether to recover cost, and if so how much of the cost, which it is entitled to recover the council shall have regard to any hardship which the cost recovery may cause to the person from whom the cost is recoverable and to any guidance issued by the Secretary of State.
- 1.5 This policy will outline the circumstances in which the council may consider waiving or reducing cost recovery having had regard to hardship and the statutory guidance April 2012.

2 Cost Recovery Decisions

- 2.1 If the council is prevented from serving a remediation notice under section 78H(5) and has power to carry out remediation itself under section 78N, it will consider whether or not it would seek to recover all of the reasonable costs it would incur if it carried out the remediation itself. In carrying out this assessment the council will have regard to this hardship policy. If the assessment concludes that having had regard to hardship and the statutory guidance it would either not seek to recover costs or recover only part of those costs the council has powers to carry out remediation itself in circumstances where sections 78H(5)(d) and 78N(3)(e) are relevant.
- 2.2 The statutory guidance sets out considerations to which the council should have regard to when making any cost recovery decision. In view of the wide variation in situations which are likely to arise (e.g. due to variations in the history and ownership of land, and liability for its remediation) the guidance in this section sets out principles and approaches, rather than detailed rules. The enforcing authority should have regard to the circumstances of each individual case.
- 2.3 In making any cost recovery decision the council will have regard to the following general principles
 - (a) The council will aim for an overall result which is as fair and equitable as possible to all who may have to meet the costs of remediation, including national and local taxpayers.
 - (b) The “polluter pays” principle will be applied with a view that, where possible, the costs of remediating pollution should be borne by the polluter. The council will therefore consider the degree and nature of responsibility of the relevant appropriate person(s) for the creation, or continued existence, of the circumstances which lead to the land in question being identified as contaminated land.

- 2.4 The council will seek to recover all of its reasonable costs, however the council will waive or reduce costs where it is considered appropriate or reasonable in that it either (i) to avoid any undue hardship which the recovery may cause to the appropriate person; or (ii) to reflect one or more of the specific considerations set out in the statutory guidance which are set out in Appendix 1, 2 and 3.
- 2.5 In making these decisions the council will consider whether or not the appropriate person(s) can be made to pay part or all of the reasonable costs involved
- 2.6 When deciding how much of its costs it should recover, the council will consider whether it could recover more of the costs by deferring recovery and securing them by a charge on the land in question under section 78P. Such deferral may lead to payment from the appropriate person either in instalments (see section 78P(12)) or when the land is next sold.
- 2.7 Where the Environment Agency is responsible authority for Special Sites under section 78Q the council will seek to ensure that this policy on the recovery of costs associated with the remediation of contaminated land is taken into account.

3 Information Required for Making Cost Recovery Decisions

- 3.1 The council will only consider making a waiver or reduction in the recovery of remediation costs if the person seeking the waiver or reduction presents the written information needed to support the request.
- 3.2 In making any cost recovery decision, the council will consider any relevant written information provided by the appropriate person(s). The council may seek to obtain such information as is reasonable, having regard to:
 - (i) accessibility of the information;
 - (ii) (ii) the cost, for any of the parties involved, of obtaining the information; and
 - (iii) (iii) the likely significance of the information for any decision.
- 3.3 The council will in all cases, inform the appropriate person in writing of any cost recovery decisions taken, explaining the reasons for those decisions.

4 Cost recovery Considerations for Class A and Class B Appropriate Person(s)

- 4.1 Appendix 1 sets out specific considerations to which the council will have regard in cost recovery decisions where irrespective of whether the appropriate person is defined as Class A or Class B person.
- 4.2 Appendix 2 sets out specific considerations for Class A persons only and Appendix 3 sets out specific considerations for Class B persons only.

Appendix 1

Specific Considerations Applying to Class A and Class B Persons

This part of Appendix 1 sets out specific considerations to which the council will have regard in cost recovery decisions irrespective of whether the appropriate person is a Class A or a Class B person. The council will apply these specific considerations in addition to the general issue of “hardship” which the cost recovery may cause to the appropriate person.

1 Commercial Enterprises

1.1 Subject to the specific circumstances set out below, the council will adopt the same approach to all types of commercial or industrial enterprises which are identified as appropriate persons. This applies whether the appropriate person is a public corporation, a limited company (whether public or private), a partnership (whether limited or not) or an individual operating as a sole trader.

2 Threat of Business Closure or Insolvency

2.1 In cases where a small or medium-sized enterprise is the appropriate person, or is run by the appropriate person, the council will consider:

- (a) 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
- (b) if so, the cost to the local economy of such a closure.

2.2 Where the cost of that closure to the local economy appears to be greater than the costs of remediation which the council would have to bear itself, the council will consider waiving or reducing its costs recovery to the extent needed to avoid making the enterprise insolvent.

2.3 However, the council will not waive or reduce its costs recovery where:

- (a) it is satisfied that an enterprise has deliberately arranged matters so as to avoid responsibility for the costs of remediation;
- (b) it appears that the enterprise would be likely to become insolvent whether or not recovery of the full cost takes place; or
- (c) it appears that the enterprise could be kept in, or returned to, business even if it does become insolvent under its current ownership.

- 2.4 For the purposes described above, a “small or medium-sized enterprise” should be taken to mean an independent enterprise which matches the definition of a “micro, small and medium-sized enterprise” as established by the European Commission Recommendation of 6 May 2003, and any updates of that definition as may happen in future. (Under the 2003 definition this would cover any such enterprise with fewer than 250 employees, and either an annual turnover less than or equal to €50 million, or an annual balance sheet total less than or equal to €43 million).
- 2.5 The council will take account in cost recovery decisions of any relevant policy on assisting enterprise or promoting economic development.

3 Trusts

- 3.1 Where the appropriate persons include persons acting as trustees, the council will assume that such trustees will exercise all the 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 remediation. The council may consider waiving or reducing its cost 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 those costs.
- 3.2 The council **will not** waive or reduce its costs recovery:
- (a) where it is satisfied that the trust was formed for the purpose of avoiding paying the costs of remediation; or
 - (b) to the extent that trustees have personally benefited, or will personally benefit, from the trust.

4 Charities

- 4.1 Since charities are intended to operate for the benefit of the community, the council will consider the extent to which any recovery of costs from a charity would detrimentally impact that charity's activities. Where this is the case, the authority should 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 Social Housing Landlords

- 5.1 The council will consider waiving or reducing its costs recovery if:
- (a) 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);
 - (b) its liability relates to land used for social housing; and
 - (c) full recovery would lead to significant financial difficulties for the appropriate person, such that the provision or upkeep of the social housing would be jeopardised significantly.
- 5.2 The extent of the waiver or reduction will be sufficient to avoid any such financial difficulties.

Appendix 2

Specific Considerations Applying to Class A Persons

Appendix 2 sets out specific considerations to which the council will have regard in cost recovery decisions where the appropriate person is a Class A person.

In applying the approach in this part, the council will be less willing to waive or reduce its cost recovery where a Class A person has profited financially from the activity which led to the land being determined to be contaminated land.

1 Where other potentially appropriate persons have not been found

- 1.1 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 contaminant in question, but who cannot now be found for the purposes of treating that person as an appropriate person (as might be the case if a company has been dissolved). In such cases, the council will consider waiving or reducing its costs recovery from a Class A person if that person demonstrates that:
 - (a) another identified person, who cannot now be found, also caused or knowingly permitted the significant contaminant to be in, on or under the land; and
 - (b) if that other person could be found, the Class A person seeking the waiver or reduction of the authority's costs recovery would either:
 - (i) be excluded from liability by virtue of one or more of the exclusion tests set out in the Section 7 of this Guidance; or
 - (ii) the proportion of the cost of remediation which the appropriate person has to bear would have been significantly less, by virtue of the statutory guidance (April 2012) on apportionment as set out in Section 7.
- 1.2 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 in these circumstances expect that person to provide written evidence that a particular person, who cannot now be found, caused or knowingly permitted the significant contaminant 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.

Appendix 3

Specific Considerations Applying to Class B Persons

Appendix 3 sets out specific considerations to which the council will have regard in cost recovery decisions where the appropriate person is a Class B person.

1 Costs in Relation to Land Values

- 1.1 In some cases, the costs of remediation may exceed the likely value of the land in its current use (as defined in Section 3.5 to 3.7 of the statutory guidance (April 2012)) after the required remediation has been carried out. In such cases, the council will consider waiving or reducing its costs recovery from a Class B person if that person demonstrates that the costs of remediation are likely to exceed the value of the land. In this context, the “value” will 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 the contamination.
- 1.2 In general, the extent of the waiver or reduction in costs recovery should 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.

2 Precautions taken before acquiring a freehold or a leasehold interest

- 2.1 In some cases, the Class B person may have been unaware that the land in question may be contaminated land when they acquired it. Alternatively, the person may have taken a risk that the land was not contaminated, or they may have taken some precautions to reduce the risk of acquiring land which is contaminated.
- 2.2 The council will consider reducing its costs recovery where a Class B person who is the owner of the land demonstrates that:
 - (a) the person 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 contaminants;
 - (b) when the person acquired the land (or accepted the grant of assignment of the leasehold) they were nonetheless unaware of the presence of the significant contaminant now identified, and could not reasonably have been expected to have been aware of its presence; and
 - (c) the authority considers it would be reasonable, taking into account the interests of national and local taxpayers, that the person should not bear the whole cost of remediation.

- 2.3 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 (for example, private individuals as compared with major commercial undertakings).

3 Owner-occupiers of Dwellings

- 3.1 Where a Class B person owns and occupies a dwelling on the contaminated land in question, the council will consider waiving or reducing its costs recovery if the person satisfies the council that, at the time the person purchased the dwelling, the person did not know, and could not reasonably have been expected to have known, that the land was adversely affected by presence of the contaminant(s) in question. Any such waiver or reduction should 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 the person's income, capital and outgoings. Where the person has inherited the dwelling or received it as a gift, the authority should consider the situation at the time when the person received the property.
- 3.2 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 in paragraph 3.1 will be applied only to the dwelling and its curtilage.