

Cabinet – 3 February 2010

Council Policy on Contaminated Land Cost Recovery and Hardship

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| Portfolio: | Councillor Mike Flower - Environment |
| Service: | Pollution Control, Engineering and Transportation |
| Wards: | All |
| Key decision: | Yes |
| Forward plan: | No |

1. Summary of report

- 1.1 This report presents a policy relating to the contaminated land regime falling under Part 2A of the Environmental Protection Act 1990 (the regime). The policy sets out the principal considerations the Council will have regard to when seeking to recover its costs associated with remediating contaminated sites under this legislation. It seeks to promote transparency, fairness and consistency in the application of the proposed policy in helping to decide financial responsibility for such works and avoid hardship which this decision might cause.

2. Recommendations

- 2.1 That Cabinet approves the policy on Contaminated Land Cost recovery and Hardship attached (**Appendix A**).
- 2.2 That Cabinet delegates responsibility for making decisions in relation to Part 2A liability to the Executive Director for Neighbourhood Services, in consultation with the Environment Portfolio Holder, on a case by case basis

3. Background information

- 3.1 The Environmental Protection Act 1990, together with the enabling Contaminated Land (England) Regulations 2000, introduced a legal duty on local authorities to search their area for contaminated land and, where discovered, ensure it is remediated. This can include carrying out the works in advance and recovering the costs reasonably incurred.
- 3.2 In carrying out this task, the legislation requires that Councils focus their investigations in areas that present the greatest risk. As a consequence, officers have been looking at land that could potentially contain the highest levels of pollutants together with the potential for people to be exposed to them. This

could clearly lead to residential estates, built on former industrial sites, being the subject of investigation and action.

- 3.3 The regime that was introduced is exceptionally complicated not least because it goes into great detail about how the liability for the remediation of land should be determined.
- 3.4 In determining liabilities, the legislation follows the principle of the “polluter pays”. This means that the cost of remediating a Part 2A site should be the responsibility of the person(s) who contaminated it. Whilst this undoubtedly applies to the companies who polluted sites, it can also apply to companies or persons who were responsible for introducing the circumstances which have led to the exposure to the pollutants in question. For example, a developer who constructed a housing estate on a former industrial site without carrying out proper decontamination.
- 3.5 These “polluters” are called Class A persons and, in the event of more than one being involved, there are several complicated tests in the statutory guidance which need to be applied to determine the proportion of liability for each. Where no Class A persons can be found, for example if companies no longer exist, the responsibility for remediating the site then falls to the owners or occupiers of the land who are termed as Class B persons. This can include private householders.
- 3.6 There is however provision in the legislation for the Council to waive or reduce the costs it recovers from others where the application of costs in full will cause “hardship”. Whilst the legislation does not define what hardship is, the statutory guidance gives an indication of the principles that should be considered. It also suggests that, in the interests of transparency, fairness and consistency, local authorities should produce an associated policy, hence this report.
- 3.7 Applying the provisions of the legislation, it is likely that the Council will become liable for costs associated with this regime for some sites. It is however recognised in the proposed policy that the Council will have regard to a number of factors when balancing the decisions of liability, including the ability of the person to pay, the circumstances around their acquisition of land and the need to protect the public purse. Full details of these considerations are given in the policy.
- 3.8 Where the Council is liable for costs there is, at present, capital support grants available from the Department for Environment, Food and Rural Affairs (DEFRA) and the policy acknowledges that all avenues to secure external support for costs incurred will be pursued.

4. Resource considerations

- 4.1 **Financial:** There is potential for the Council to become liable for significant costs and this will need to be reflected in the Capital Programme. The Policy in question sets out the principles and approach that the Council will adopt in recovering the costs it reasonably incurs in this regime. It also deals with circumstances where the Council may waive or reduce the amount of costs it intends to recover which will carry financial pressure. The principles reflected in

the policy are however those that are contained within the statutory guidance which the authority is legally obliged to have regard to. Nevertheless, the Council will always seek to recover its reasonable costs in full subject to the provisions of the proposed policy.

- 4.2 **Legal:** Part 2A of the Environmental Protection Act 1990 introduces obligations on local authorities to search for and address contaminated land within their areas. Additionally, they have a duty to ensure that land is remediated once it is discovered. The associated regulations and statutory guidance specify how the liability for such remediation should be apportioned. The attached policy reflects the advice given in the statutory guidance.
- 4.3 **Staffing:** The attached policy is associated with existing statutory obligations and does not, in its own right, introduce additional duties.

5. Citizen impact

- 5.1 Under the regime, there is potential for citizens to incur significant liability where they are homeowners on land that has been declared as contaminated. This is unfortunately a consequence of the primary legislation and not a locally driven policy. One of the main aims of the attached document however is to ensure that Walsall Council undertakes this duty in as, transparent, fair, consistent and equitable a manner as possible.

6. Community safety

- 6.1 The Part 2A regime itself deals with the issue of identifying and addressing contaminated land. This process as a whole will have a direct impact on the health and welfare of residents. The attached policy however, only deals with some of the principles of apportioning financial liability and recouping the authority's costs. It does not in its own right have an impact on community safety.

7. Environmental impact

- 7.1 The Part 2A regime itself deals with the issue of identifying and addressing contaminated land. The attached policy only deals with some of the principles of apportioning financial liability and recouping the authority's costs. It does not in its own right have any environmental impact.

8. Performance and risk management issues

- 8.1 **Risk:** There is a risk that, in carrying out its statutory duty, the Council may become liable for substantial costs. The attached policy sets out the principles that will be applied when apportioning liability, including when the Council will waive that and bear costs themselves.

- 8.2 Failure to implement the legislation and remediate land that has been identified as contaminated could equally put the Council at risk of third party challenge, including Ombudsman investigations and Judicial Review.
- 8.3 The policy specifies that the responsibility for making decisions on Part 2A liability rests with the Executive Director for Neighbourhood Services. These decisions shall be made in consultation with the relevant portfolio holder and the reasons for them recorded on a signed decision form.
- 8.4 **Performance management:** Each case will be closely managed on an individual basis, including close liaison with relevant ward members.

9. Equality implications

- 9.1 There are no equality implications associated with this policy.

10. Consultation

- 10 Internal consultees on the draft policy include: Legal, Finance and Communications teams. On approval, the policy will be placed on our web site and made publicly available.

Background papers

Draft Cost Recovery and Hardship Policy (**Appendix A**)

The Environmental Protection Act 1990, Part 2A

The Contaminated Land (England) Regulations 2006 (Statutory instrument 2006 No 1380)

DEFRA circular 01/2006 Statutory Guidance (specifically Chapter E)

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Jamie Morris
Executive Director

22 January 2010



Councillor Michael Flower
Portfolio Holder

24 January 2010

Walsall Metropolitan Borough Council

The Environmental Protection Act 1990 Part IIA

DRAFT Cost Recovery and Hardship Policy

Introduction and Scope

It is the aim of this policy to demonstrate the approach adopted by Walsall Metropolitan Borough Council (the Council) in pursuing recovery of its costs expended in contaminated land remediation activities. It relates only to those activities carried out in accordance with Part 2A of the Environmental Protection Act 1990 (Part 2A). A principal objective of this policy is to promote transparency, fairness and consistency in this activity and to ensure the Council has due regard to the Statutory Guidance.

Section 78P of the above Act provides that:

“(1) Where, by virtue of section 78N(3)(a), (c), (e) or (f) ... the enforcing authority does any particular thing by way of remediation, it shall be entitled, subject to sections 78J(7) and 78K(6)... , to recover the reasonable cost incurred in doing it from the appropriate person or, if there are two or more appropriate persons in relation to the thing in question, from those persons in proportions determined pursuant to section 78F(7)....

“(2) In deciding whether to recover the cost, and, if so, how much of the cost, which it is entitled to recover under subsection (1) above, the enforcing authority shall have regard –

“(a) to any hardship which the recovery may cause to the person from whom the cost is recoverable; and

“(b) to any guidance issued by the Secretary of State for the purposes of this subsection.”

The statutory guidance also points out that these considerations are “crucial in deciding when the enforcing authority is prevented from serving a remediation notice. Under section 78H(5), the enforcing authority may not serve a remediation notice if the authority has the power to carry out remediation itself, by virtue of section 78N. Under that latter section, the authority asks the hypothetical question of whether it would seek to recover all of the reasonable costs it would incur if it carried out the remediation itself. The authority then has the power to carry out that remediation itself if it concludes that, having regard to hardship and the guidance in this chapter it would either not seek to recover its costs, or seek to recover only a part of its costs.”

Section 78H(5) of the Act states that:

“(5) The enforcing authority shall not serve a remediation notice on a person if and so long as ...

“(d) the authority is satisfied that the powers conferred on it by section 78N below to do what is appropriate by way of remediation are exercisable...”

Section 78N(3) provides that the enforcing authority has the power to carry out remediation:

“(e) where the enforcing authority considers that, were it to do some particular thing by way of remediation, it would decide, by virtue of subsection (2) of section 78P ... or any guidance issued under that subsection, –

“(i) not to seek to recover under subsection (1) of that section any of the reasonable cost incurred by it in doing that thing; or

“(ii) to seek so to recover only a portion of that cost;....”

In summary the council is required to ensure that legally contaminated land is remediated and, where it undertakes the work itself, recover its reasonable costs incurred from those that are deemed liable. If by doing so this would cause “hardship” the council should either waive or reduce the amount of money it seeks to recover. Any non-recovered costs are therefore the responsibility of the council which will have to consider the financial burden this will create.

Whilst the legislation requires the council to have regard to the considerations in this policy it does not automatically mean that the council will waive its costs. It will however provide a record of the factors it has considered in reaching its decision and the reasons for doing so.

Policy

1.0 General Considerations

1.1 It is acknowledged that there is a wide variation in the circumstances around each situation. It is therefore inappropriate to set out detailed rules to accommodate all eventualities. This policy sets out the principles and approaches of Part 2A cost recovery and acknowledges that each individual case will need to be considered on its own merits.

1.2 The Council will aim to achieve a 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.

- 1.3 Where it is identified that others have liability for remediation, the Council will seek to recover its reasonable costs from them in full, subject to the considerations set out in this policy.
- 1.4 In recovering its costs, the Council will follow the principles and guidance set out in the Environmental Protection Act Part 2A and the relevant associated regulations and Statutory Guidance. In general terms, it will seek to enforce the “polluter pays” principal having regard to the degree and nature of responsibility of the appropriate person(s) for the creation, or continued existence of the circumstances which lead to the land in question being identified as contaminated land.
- 1.5 The Council will itself be responsible for any fraction of the costs that are apportioned to itself as an appropriate Person, or which relate to orphan linkages from the process of attribution. For the purpose of clarification an orphan linkage is defined as a significant pollutant linkage for which no appropriate (liable) person can be found, or where those who would otherwise be liable are exempted by one of the relevant statutory provisions.
- 1.6 The Council will have due regard to the avoidance of hardship which the recovery of costs may cause and to this end will consider the principles set out in this policy.
- 1.7 On considering the options for cost recovery against a landowner, the Council may choose to defer recovery and secure them by placing a charge on the land in question. Such deferral may lead to payment from the appropriate person in instalments or when the land is next sold.
- 1.8 Where the Council is liable for costs, it will seek capital support where available.

2.0 Information for Making Decisions

- 2.1 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 his request within a reasonable time period.
- 2.2 The Council will also seek to obtain such information as is reasonable, having regard to:
 - 2.2.1 How the information may be obtained
 - 2.2.2 The cost, for all the parties involved, of obtaining the information; and

2.2.3 The potential significance of the information to the decisions being made.

2.3 The responsibility for making decisions in relation to Part2A liability rests with the Executive Director for Neighbourhood Services. These decisions will be made in consultation with the Environment Portfolio Holder and a signed document will be produced giving the reasons for each decision.

2.4 The Council will inform appropriate persons of any cost recovery decisions taken, explaining the reasons for those decisions.

3.0 Commercial Enterprises

3.1 Subject to the specific guidance elsewhere in this policy, the same approach will be adopted for 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, a partnership or an individual operating as a sole trader.

3.2 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:

(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.

3.2 Where the cost of closure appears to be greater than the costs of remediation which the Council would have to bear themselves, the Council will consider waiving or reducing its costs recovery to the extent needed to avoid making the enterprise insolvent.

3.3 The Council will not normally waive or reduce its costs recovery where:

3.3.1 it is clear that an enterprise has deliberately arranged matters so as to avoid responsibility for the costs of remediation;

3.3.2 it appears that the enterprise would be likely to become insolvent whether or not recovery of the full cost takes place; or

3.3.3 it appears that the enterprise could be kept in, or returned to, business even it does become insolvent under its current ownership.

- 3.4 For these purposes, a “small or medium-sized enterprise” is as defined in the European Commission's Community Guidelines on State Aid for Small and Medium-Sized Enterprises, summarised as an independent enterprise with fewer than 250 employees, and either an annual turnover not exceeding €50 million, or an annual balance sheet total not exceeding €43 million.

4.0 Trusts

- 4.1 Where the appropriate persons include persons acting as trustees, the enforcing authority should 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 authority will, nevertheless, 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 those costs.
- 4.2 However, as exceptions to the approach set out in the preceding paragraph, the authority will not waive or reduce its costs recovery:
- 4.2.1 where it is clear that the trust was formed for the purpose of avoiding paying the costs of remediation; or
 - 4.2.2 to the extent that trustees have personally benefited, or will personally benefit, from the trust.

5.0 Charities

- 5.1 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 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 authority 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.

6.0 Registered Social Landlords

- 6.1 The Council will consider waiving or reducing its costs recovery if:
- 6.1.1 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);
 - 6.1.2 its liability relates to land used for social housing; and

6.1.3 full recovery would lead to financial difficulties for the appropriate person, such that the provision or upkeep of the social housing would be jeopardised.

6.2 The extent of the waiver or reduction should be sufficient to avoid any such financial difficulties.

7.0 Specific Considerations Applying to Class A Persons

7.1 The Council will not normally waive or reduce its cost recovery where it was in the course of carrying on a business that the Class A person caused or knowingly permitted the presence of the significant pollutants, than where he was not carrying on a business. This is because, in the former case, he is likely to have earned profits from the activity which created or permitted the presence of those pollutants.

7.2 Where Other Potentially Appropriate Persons have not been Found

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

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

- (a) 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
- (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 DETR Circular 01/2006, 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 guidance on apportionment set out in DETR Circular 01/2006.

7.2.3 Where an appropriate person is making a case for the authority's costs recovery to be waived or reduced by virtue of

paragraph 7.2.2 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 enforcing authority should not regard it as sufficient for the appropriate person concerned merely to state that such a person must have existed.

8.0 Specific Considerations Applying to Class B Persons

8.1 Costs in Relation to Land Values

8.1.1 In some cases, the costs of remediation may exceed the value of the land in its current use after the required remediation has been carried out. In these circumstances, the Council will consider waiving or reducing its costs recovery from a Class B person if that person demonstrates to the satisfaction of the authority that the costs of remediation are likely to exceed the value of the land. In this context, the “value” shall 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.

8.1.2 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.

8.2 Precautions Taken before Acquiring a Freehold or a Leasehold Interest

8.2.1 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. On the other hand, he may have taken precautions to ensure that he did not acquire land which is contaminated.

8.2.2 The authority shall consider reducing its costs recovery where a Class B person who is the owner of the land demonstrates to the satisfaction of the authority that:

- (a) 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;
- (b) when he acquired the land, or accepted the grant of assignment of the leasehold, he was nonetheless unaware of the presence of the significant pollutant now identified and could not reasonably have been expected to have been aware of their presence; and
- (c) it would be fair and reasonable, taking into account the interests of national and local taxpayers, that he should not bear the whole cost of remediation.

8.3.3 The Council acknowledges 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).

8.4 Owner-occupiers of Dwellings

- 8.4.1 Where a Class B person owns and occupies a dwelling on the contaminated land in question, the Council shall consider waiving or reducing its costs recovery where that person satisfies the authority 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 the presence of a pollutant.
- 8.4.2 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 his income, capital and outgoings.
- 8.4.3 Where the appropriate person has inherited the dwelling or received it as a gift, the approach in paragraphs 8.4.1 and 8.4.2 shall be applied with respect to the time at which he received the property.
- 8.4.4 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 paragraphs 8.4.1 and 8.4.2 above should be applied only to the dwelling and its curtilage.
- 8.4.5 In judging the extent of a waiver or reduction in costs recovery from an owner-occupier of a dwelling, the Council may wish to

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 (S.I. 1996/2890, as amended). The HRG test determines how much a person should 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 should be ignored.