

# South Lakeland District Council Cost Recovery and Hardship Policy

(associated with the remediation of Contaminated Land under Part IIA of the Environmental Protection Act 1990)

## 1. Introduction

This policy sets out the South Lakeland District Council position in regards to the possibility of waiving or reducing, the recovery of the costs of remediation, in respect of land determined as contaminated under Part IIA of the Environmental Protection Act 1990. It is recognised that there is likely to be a wide variety of situations associated with land contamination (including its history, ownership, and liability for its remediation); and that regard should be paid to the circumstances of each individual case.

The legislation places a duty on the Council to inspect and identify contaminated land within its District. When land has been determined to be contaminated, and voluntary remediation cannot be secured within a reasonable time, the Council has a duty to serve a remediation notice on each person who is an appropriate person (that is, the person or persons who bear responsibility for anything which is to be done by way of remediation in any particular case); specifying what they are to do by way of remediation. Before serving a remediation notice the Contaminated Land Statutory Guidance, 2012, requires the Council to adopt a formal Cost Recovery and Hardship Policy. This Policy provides a framework for the Council to apply when recovering costs for remediation.

The remediation notice details the requirements needed to remediate land, or otherwise manage the contamination, and sets out details of the contaminant(s) and those responsible for remediation. Those person(s) responsible for the pollution or an activity that has resulted in the determination of contaminated land, being liable for the cost of remediation. There are two main categories of persons that bear responsibility: Class A being persons who caused or knowingly permitted the relevant contaminated substance to be in, on, or under the land; and Class B persons being the current owners and occupiers when no person falling into Class A can be found. There are circumstances where a person may be both a Class A and a Class B person.

The Council will seek to promote fairness, transparency and the need to prevent hardship when making a decision with regards to determining financial responsibility for remediation of contaminated land.

## 2. Statutory Context

2.1 Part IIA of the Environmental Protection Act 1990 (the Act) gives the Council a number of duties and powers in the identification of Contaminated Land. These are:

- A duty to require remediation of land that has been determined as Contaminated Land (section.78E).
- The power to determine who should bear responsibility for liabilities (section.78F).
- A duty to consult with those who may be responsible for remediation (for at least three months), prior to serving a remediation notice. This is not required when it appears there is imminent danger of serious harm or pollution (section.78H).
- The power to carry out remediation (section.78N).
- The power to recover costs of remediation (section.78P).

2.2 Reference to 'Statutory Guidance' in this policy means the following two documents:

- Environmental Protection Act 1990: Part IIA. Contaminated Land Statutory Guidance, Department for Environment, Food and Rural Affairs, April 2012.
- Environmental Protection Act 1990: Part IIA. Contaminated Land - Radioactive Contaminated Land Statutory Guidance, Department of Energy and Climate Change, April 2012.

2.3 Section 78P of the 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."*

2.4 Subsection 78H(5) provides 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..."*

2.5 Section 78N(3) provides that the enforcing authority has the power to carry out remediation in the following cases:-

- "(a) where the enforcing authority considers it necessary to do anything itself by way of remediation for the purpose of preventing the occurrence of any serious harm, or serious pollution of controlled waters, of which there is imminent danger;*
- (b) where an appropriate person has entered into a written agreement with the enforcing authority for that authority to do, at the cost of that person, that which he would otherwise be required to do under this Part by way of remediation;*
- (c) where a person on whom the enforcing authority serves a remediation notice fails to comply with any of the requirements of the notice;*
- (d) where the enforcing authority is precluded by section 78J or 78K from including something by way of remediation in a remediation notice;*
- (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;*
- (f) where no person has, after reasonable inquiry, been found who is an appropriate person in relation to any particular thing."*

2.6 These powers and duties are clarified in the Contaminated Land Statutory Guidance, 2012, which provides details on the administration of the Environmental Protection Act, 1990: Part IIA. Section 8 of this Guidance provides direction to the Council on the extent to which it should seek to recover the costs of remediation.

2.7 Section 8 of the Statutory Guidance gives further information on the treatment of persons or bodies which may be subject to cost recovery by the Council.

2.8 This policy details the manner in which South Lakeland District Council will exercise the power in section 78P of the Act, with respect to persons found by them to bear a liability for remediation. In particular it details the manner in which it deals with issues of hardship.

## 3. Cost Recovery Decisions

3.1 When making any decisions on cost recovery, the Council should have regard to the following general principles:

- Aim for an overall result which is just, fair, and as equitable as possible to all who have to bear the financial burden of remediation, including national and local taxpayers.
- The Council should seek to recover all of its reasonable costs without causing any undue hardship which recovery may cause to the appropriate person(s).
- Wherever possible, apply the "polluter pays" principle, whereby the costs of remediating pollution are borne by the polluter.

All of the above issues will be considered alongside issues of hardship.

3.2 Overall the Council should consider the degree and nature of responsibility for the creation, or continued existence, of the circumstances that led to the land in question being identified as Contaminated Land attributable to the appropriate person(s).

3.3 In accordance with section 78F of Part IIA of the Environmental Protection Act 1990, an appropriate person is one who is determined to bear responsibility for anything which is to be done by way of remediation in any particular case. A Class A appropriate person is defined as someone who caused or knowingly permitted the presence of the substance (deemed to be contaminated land) in, on or under the land. A Class B appropriate person is defined as someone who owns or occupies the land in circumstances where no person falling within Class A can be found with respect to a particular remediation action.

3.4 When deciding how much of the Council's costs should be recovered, consideration can be given to whether greater costs can be recovered by deferring recovery and securing them by a charge on the land in question under section 78P of the Environmental Protection Act 1990. Such deferral may lead to payment from the appropriate person either in instalments (see section 78P(12)), or when the land is next sold.

## 4. Information for Making Decisions

4.1 When making decisions on cost recovery, the Council should consider all relevant information provided by appropriate person(s). In addition the Council must also seek to obtain such information as is reasonable, having regard to:

- accessibility of the information
- the cost, for any of the parties involved, of obtaining the information

- the likely significance of the information for any decision.

4.2 Any appropriate person(s) who is seeking a waiver or reduction in the recovery of remediation costs are required to submit to the Council any relevant information to support this request within 28 days. In the event that an appropriate person cannot achieve that timescale they should contact the Council setting out the reasons in writing why they cannot achieve this, and the Council will consider if it is reasonable to extend the timescale for the provision of information.

## 5. Criteria against which hardship will be assessed

5.1 There is no definition within the Statutory Guidance therefore in terms of this policy “hardship” is defined using its ordinary meaning, namely to cause severe suffering or privation. In deciding if a person would suffer hardship, the Council will apply the test of whether or not the hypothetical reasonable person would view a person to be in hardship.

Where the cost of remediation attributable to an appropriate person would cause serious difficulties to that person then the Council will consider waiving or reducing the amount of costs it would seek to recover.

## Considerations Applying both to Class A & Class B Appropriate Persons

## 6. Commercial Enterprises

6.1 Subject to the considerations detailed in this policy the Council will apply the same parity of 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.

## 7. Threat of Business Closure or Insolvency

7.1 In the case of a small or medium-sized enterprise being, or being operated / controlled by, the appropriate person, the Council will consider:

- whether recovery of the full cost attributable to that person would mean that the enterprise is likely to become insolvent and thus cease to exist; and
- if so, the potential cost to the local economy of such a closure.

For these purposes, 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 subsequent definition from time to time. Under the 2003 definition this would cover any such enterprise with fewer than 250 employees, and either an annual turnover of no more than €50 million, or an annual balance sheet total of no more than €43 million.

7.2 Where the cost of closure appears to be greater than the costs of remediation that the Council would have to bear themselves, the Authority is able to waive or reduce its costs recovery to the extent needed to avoid making the enterprise insolvent.

7.3 The Authority will not normally waive or reduce its costs recovery where:

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

## 8. Trusts

8.1 Where the appropriate person(s) includes any person acting as trustees, the Council will assume that such trustees will exercise all of their necessary powers, or powers that they may reasonably be able to obtain, to make funds available from either the trust or from borrowing that can be made on behalf of it, for the purpose of paying for the 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.

8.2 The Authority will not usually waive or reduce its costs recovery:

- where it is satisfied that the trust was formed for the purpose of avoiding paying the costs of remediation; or
- where the trustee(s) has personally benefited under the trust. In such circumstances they will be treated as an individual.

## 9. Charities

9.1 The Council will consider the extent to which any recovery of costs from a charity would detrimentally impact that charity's activities. Where this would jeopardise the charity's ability to deliver its charitable purposes, 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.

## 10. Social Housing Landlords

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

- the appropriate person is a body eligible for registration as a social housing landlord under section 2 of the Housing Act 1996 (for example, a housing association);
- its liability relates to land used for social housing; and
- 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. The extent of the waiver or reduction will normally be sufficient to avoid any such financial difficulties.

## Specific Considerations Applying to Class A Persons

### 11. General

11.1 The Council will consider if the Class A person caused or knowingly permitted the contamination in the course of carrying on a business, and whether or not that person is likely to have financially benefited from the activity in question. If that person did financially benefit, the Council will generally be unlikely to waive or reduce the cost recovery than if no such financial benefit were made.

### 12. Where Other Potentially Appropriate Persons have not been found

- 12.1 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 him as an appropriate person. For example, this might apply where a company has been dissolved.
- 12.2 The Authority will consider waiving or reducing its costs recovery from a Class A person if that person demonstrates to the satisfaction of the Council that:
- another identified person, who cannot now be found, also caused or knowingly permitted the significant contaminant to be in, on, or under the land; and
  - if that other person could be found, the Class A person seeking the waiver or reduction of the Authority's costs recovery would either:



- be excluded from liability by virtue of one or more of the exclusion tests set out in Section 7 of the Statutory Guidance, or
  - 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 Section 7 of the Statutory Guidance.
14. Where an appropriate person makes a request that the Council's cost recovery be waived or reduced by virtue of this section, the Council will require that person to provide 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 normally regard it as sufficient for the appropriate person concerned merely to state that such a person must have existed.

## Specific Considerations Applying to Class B Persons

### 13. General

- 13.1 Where a Class A person cannot be found or for any other reason costs cannot be recovered from a Class A person, financial responsibility transfers to the Class B person, because of their present ownership or occupation of land.

### 14. Costs relative to land values

- 14.1 In some cases, the costs of remediation may exceed the value of the land in its current use (as defined in Section 3 of the Statutory Guidance) after the required remediation has been carried out. In such circumstances, the Council will consider waiving or reducing its costs recovery from a Class B person if that person demonstrates to the satisfaction of the Authority 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. A minimum of two valuations will be required, and to be independently verified by an expert appointed by the Council, with costs of verification to be recovered by the Council.
- 14.2 In general, the extent of the waiver or reduction in cost recovery will be sufficient to ensure that the costs of remediation borne by the Class B person do not exceed the value of the land after remediation has taken place. However, if the remediation would result in an increase in the value of any other land from which the Class B person would benefit, this will be taken into account when deciding the extent to which it should seek to recover its costs.



## 15. Precautions Taken before Acquiring a Freehold or a Leasehold Interest

- 15.1 In some cases, the appropriate person may have been unaware that the land in question was, or might be, contaminated when they acquired it, or they may have decided to take a risk that the land was not contaminated. Conversely, precautions may have been taken to ensure that the person did not acquire land which is contaminated.
- 15.2 The Council will 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:
- the person took such steps prior to acquiring the freehold or the leasehold interest in the land, as would have been reasonable at that time to establish the presence of any contaminants;
  - when the person acquired the land, or accepted the grant of assignment of the leasehold, the person was 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
  - it would be fair and reasonable, taking into account the interests of national and local taxpayers, that the person will not bear the whole cost of remediation.
- 15.3 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 e.g. private individuals as compared with major commercial undertakings.

## 16. Payment of the Council's costs

- 16.1 In each case where the Council has used public funds to remediate land in its area, a decision will be taken by the Council - taking account of all circumstances pertaining to the matter - whether to recover any or all of the funds expended on a property in order to make it suitable for use.
- 16.2 The Council will also consider how payment to the Council should be made. This could, for example, take the form of payment of the full amount within a fixed period, by instalments or by attaching a charge to the property so that it is recovered when the property is sold. In the latter case, 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.

## 17. Hardship Panel

The Council's Hardship Panel will consider the cost recovery associated with remediation of contaminated land.

17.1 The Hardship Panel will consist of:

- Principal Environmental Protection Officer (Chair)
- Financial Services Manager
- Legal Officer

Ordinarily the Panel meeting will be a face to face process, but an appropriate person can provide written evidence in lieu of attendance. Attendees must provide any written evidence at least 5 working days prior to the hearing.

Any representations made by Ward members to the Panel should be in writing. The Panel can receive technical support and advice from the Environmental Protection Team.

17.2 A report will be provided for the Hardship Panel by Public Protection (similar format to a Licensing Committee report). The Panel will agree on the information required in order to assess the hardship of the responsible person(s). The Panel before making a decision will have regard to:

- the guidance in this Policy and the Revised Statutory Guidance(April 2012)
- the report of the officer in the Environmental Protection Team
- any representations from the persons concerns
- any reports of experts
- any representation from the relevant Ward member

Below is a non-exhaustive list of examples of information the Council may ask for:

- The value of the land on the open market [(the Council would expect at least two valuations to be obtained from estate agents/surveyors)];
- The value of the land disregarding the fact that it has been identified as contaminated by the Council;
- The amount of debt secured on the land, a recent mortgage statement will be required;
- Whether the land is held for investment ;
- Whether the land is held for business or purely residential purposes;
- Where the land is owned by a company the profit and loss accounts and balance sheets for a period of [3/5 years];

- Where the land is used for business purposes, details of the income generated through the use of the land and the costs involved;
- Where the land is owned by an individual, details of the persons other assets/savings;
- Where the land is owned by an individual, details of the person's debts and income;
- Where the land is owned and occupied by an individual, details of the persons incomings and outgoings;
- Where the land is owned by a company, details of any insurance policies in place which cover the costs of the remediation of land;
- The amount of capital available to the person, and whether there is sufficient capital to meet the cost;
- The personal needs of the individual - health and age of the individual and the existence of dependents;
- The assets of the person, and the ability of the person to raise finance against the assets
- Whether the person is running a business on the land (i.e. gaining an income from the use of it by another person or carrying out a business activity on the land);
- Where the person owns the contaminated land, whether the remediation is likely to increase the value of the land by more than the cost of the remediation such that the person should be able to borrow against the land to raise the necessary finance;
- The amount the person paid for the land and whether when they bought the land the price reflected the state of contamination; or
- Any other relevant information which is applicable to the person and which may indicate that hardship would be caused.

17.3 In each case, the Hardship Panel will make a decision as to what it considers is fair and reasonable in the circumstances. It will inform the appropriate person(s) of any cost recovery decisions taken, and explain the reasons for those decisions. The Hardship Panel will aim to make decisions within 3 weeks of being presented with all the relevant information. The decision of the Panel will be sent to the persons concerned within 1 week of the decision being made.

17.4 If the person is aggrieved by the decision of the Panel, the person concerned may appeal that decision by informing the Council in writing within 21 days of the date of the decision document.

An Appeals Panel will review evidence presented at the original Hardship Panel, the deliberations of that Hardship Panel, and any new representations. They will consider the appeal and confirm, vary or quash the original decision.

As well as presenting any original information the appellant is entitled to present relevant new information to the Panel.

The Appeals Hardship Panel will consist of:

- Chief Finance Officer
  - Public Protection Manager (Chair)
  - Solicitor to the Council
-