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# **Policy on the Recovery of Costs Associated with the Remediation of Contaminated Land Sites under The Environmental Protection Act 1990 (as amended)**

**Version:** 1  
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**Owner:** Elizabeth Street Environmental Health Manager

## 1.0 Introduction

- 1.1 It is the aim of this policy to demonstrate the considerations and procedure that will be undertaken by Erewash Borough Council when pursuing the recovery of the costs it has incurred in contaminated land remediation. It is intended to promote transparency, fairness and consistency within the process for recovering remediation costs under Part IIA of the Environmental Protection Act 1990 (as amended by Section 57 of the Environment Act 1995) and comply with the statutory guidance provided by the Secretary of State.
- 1.2 The policy specifies circumstances where the Erewash Borough Council would be prepared to consider waiving or reducing the recovery of remediation costs having given due regard to hardship and other relevant factors.

## 2.0 Background

- 2.1 Erewash Borough Council is an enforcing authority for the purpose of Part IIA of the Environmental Protection Act 1990 has the responsibility to:
- (a) Cause its areas to be inspected in order to identify contaminated land, including intrusive site investigations where required. The legislation requires that the Council produce a Contaminated Land Inspection Strategy detailing how it will undertake this process;
  - (b) Determine whether any particular site is contaminated land;
  - (c) Act as enforcing authority for all contaminated land which is not designated as a "special site" (the Environment Agency will be the enforcing authority for special sites).
- 2.2 The Contaminated Land Regime takes a "suitable for use" approach, ensuring that land is suitable for its current use. No consideration is given to future possible uses as it is expected that this issue will be addressed through the planning process.
- 2.3 If Erewash Borough Council declare a site to be contaminated land it will have four main tasks:
- (a) To establish who should bear responsibility for the remediation of the land (the "**appropriate person**" or persons). Normally this will be the person(s) responsible for the pollution or if they cannot be found the site owners;
  - (b) To decide, after consultation, what remediation is required in any individual case and to ensure that such remediation takes place, either through agreement with the appropriate person, or by serving a remediation notice on the appropriate person if agreement is not possible or, in certain circumstances, through carrying out the work itself;
  - (c) Where a remediation notice is served, or the authority itself carries out the work, to determine who should bear what proportion of the liability for meeting the costs of the work; and
  - (d) To record certain prescribed information about its regulatory actions on a public register.

2.4. In those cases where Erewash Borough Council by virtue of section 78N(3)(a), (c), (e) or (f) of the Environmental Protection Act 1990 does any particular thing by way of remediation, it is entitled, subject to limitations, to recover the reasonable cost it incurred from the appropriate person, or persons, by virtue of Section 79P of the 1990 Act (reproduced in Appendix 1).

2.4 Section 78P of the 1990 Act states that in deciding whether to recover the cost, and, if so, how much of the cost to recover, the Council shall have regard to any hardship which the recovery may cause to the person from whom the cost is recoverable; and to any guidance issued by the Secretary of State for the purposes of this subsection. The Secretary of State's guidance on this matter is given in Part 6 of Chapter E of Appendix 3 to DEFRA Circular 01/2006 (reproduced in Appendix 2).

2.5 Appropriate persons are divided into two classes as follows:

(a) **Class A Persons** - These are persons who have caused or knowingly permitted the pollution in question to be in, on or under the ground. Where a Class A Person exists they are liable for the costs of remedial work. As well as the original polluters they can include persons who had the opportunity to clean up a site but failed to do so. This would include developers and, indeed, the statutory guidance has provisions to exclude from liability original polluters if the site only becomes statutorily contaminated land by virtue of someone introducing new receptors, such as housing, onto that land.

(b) **Class B Persons** - These are persons who own or occupy the contaminated land, but who have not caused or knowingly permitted the significant pollutant to be in, on or under the land and become liable where a Class A person cannot be found. Where a Class A Person does not exist, the Class B Person becomes liable for the costs of remedial work. It should be noted that Class B persons may not be given liability to carry the costs of clean up when the harm that is to be prevented is pollution to controlled waters.

### **3.0 Matters to be considered with regard to applications for the recovery of costs associated with the remediation of contaminated land to be waived or reduced**

#### **3.1 General considerations**

3.1.1 In making any cost recovery decision, Erewash Borough Council will have regard to the following general principles which are based on the statutory guidance:

(a) Erewash Borough 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; and

(b) The "polluter pays" principle, by virtue of which the costs of remediating pollution are to be borne by the polluter. Erewash Borough Council will therefore consider the degree and nature of responsibility of the appropriate

person for the creation, or continued existence, of the circumstances which lead to the land in question being identified as contaminated land.

In general, this will mean that Erewash Borough Council will seek to recover in full its reasonable costs. However, Erewash Borough Council will waive or reduce the recovery of costs to the extent that the authority considers appropriate and reasonable, either:

- (a) To avoid any hardship which the recovery may cause to the appropriate person; or
- (b) To reflect one or more of the specific considerations set out below.

3.1.2 When deciding how much of its costs it should recover in any case, Erewash Borough Council will consider whether it could recover more of its costs by deferring recovery and securing them by a charge on the land in question under section 78P of the Environmental Protection Act 1990 with a view to recovering its costs either in instalments or when the land is next sold. There are limitations determining whether a charge on the land can be applied under section 78P such that it can only occur if the appropriate person is a Class A person and still owns the land.

## 3.2 Considerations Applying both to Class A and Class B Persons

### 3.2.1 Commercial Enterprises

3.2.1.1 In the case of a small or medium-sized enterprise (as defined in the European Commission's Community Guidelines on State Aid for Small and Medium-Sized Enterprises, published in the Official Journal of the European Communities) which is the appropriate person, or which is run by the appropriate person, in deciding an application for Erewash Borough Council to waive or reduce the costs of remedial work 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.

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

3.2.1.3 However, Erewash Borough Council will **not** waive or reduce its costs recovery where:

- (a) It is clear 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 it does become insolvent under its current ownership.

### 3.2.2 **Trusts**

3.2.2.1 Where the appropriate persons include persons acting as trustees, Erewash Borough 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. Erewash Borough Council 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.

3.2.2.2 However, as exceptions to the approach set out in the preceding paragraph, Erewash Borough Council will not waive or reduce its costs recovery:

- (a) Where it is clear 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.

### 3.2.3 **Charities**

3.2.3.1 Since charities are intended to operate for the benefit of the community, Erewash Borough 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, Erewash Borough Council 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.

### 3.2.4 **Social Housing Landlords**

3.2.4.1 Erewash Borough Council will consider waiving or reducing its costs recovery if:

- (a) The appropriate person is a body registered 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 financial difficulties for the appropriate person, such that the provision or upkeep of the social housing would be jeopardised.

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

### 3.3 **Specific considerations applying to Class A Persons**

3.3.1 Subject to paragraph 3.3.2 below, there will be a bias towards Erewash Borough Council **not** being willing to reducing its costs recovery where a Class A person caused or knowingly permitted the significant pollutant to be in, on or under the land in the course of carrying on a business especially where they are likely to

have earned profits from the activity which created or permitted the presence of those pollutants.

3.3.2 Erewash Borough Council will consider waiving or reducing its costs recovery from a Class A person if that person demonstrates to its satisfaction 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 Part 5 of Chapter D of Annex 3 to Defra 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 Part 6 of Chapter D of Annex 3 to Defra Circular 01/2006.

3.3.3 Where an appropriate person is making a case for the recovery of Erewash Borough Council's costs to be waived or reduced by virtue of paragraph 3.3.2 above, Erewash Borough 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. Erewash Borough Council will not regard it as sufficient for the appropriate person concerned merely to state that such a person must have existed.

#### 3.4 **Specific Considerations Applying to Class B Persons.**

##### 3.4.1 **Land Owners other than Owner-Occupiers of Dwellings**

3.4.1.1 Erewash Borough Council will consider waiving or reducing its costs recovery from a Class B person if that person demonstrates to the satisfaction of the Council 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.

3.4.1.2 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 work would result in an increase in the value of any other land from which the Class B person would benefit.

3.4.1.3 Erewash Borough Council will consider reducing its costs recovery where a Class B person who is the owner of the land demonstrates to its satisfaction that:

- (a) They took such steps prior to acquiring the freehold, or accepting the grant or assignment of a leasehold, as would have been reasonable at that time to establish the presence of any pollutants;

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

3.4.1.4 In making the above consideration, Erewash Borough 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).

3.4.1.5 In considering what might reasonably be expected by way of knowledge that might be obtained the Council will have regard to the state of knowledge on the issue of contaminated land at the time the purchase was made. This too will be looked upon with regard to the nature of the transaction but for commercial land transactions it will be assumed as a starting point in the considerations that any transactions concluding after the start of 2002 will be assumed to have been carried out in a regime in which there is an expectation that the purchaser will make extensive enquiries regarding contamination issues before concluding a purchase.

#### 3.4.2 **Owner-occupiers of Dwellings**

3.4.2.1 Where a Class B person owns and occupies a dwelling on the contaminated land in question Erewash Borough Council shall have particular regard to the Secretary of State's guidance (under section 78) to take into account hardship when deciding whether to reclaim. In judging the extent of a waiver or reduction in costs recovery from an owner-occupier of a dwelling, Erewash Borough Council will apply a "means test" based on the methodology used for applications for housing renovation grant (HRG), as suggested by the Secretary of State's guidance (see appendix 2).

3.4.2.2 In such a case the HRG approach will be applied as if the appropriate person were applying for HRG and the Council had decided that the case was appropriate for grant assessment. Using this analogy, Erewash Borough Council would conclude that costs recovery should be waived or reduced to the extent that the appropriate person contributes no more than if the work were house renovations for which HRG was being sought. For this purpose, any upper limits for grants payable under HRG will be ignored.

3.4.2.3. Where a Class B person owns and occupies a dwelling on the contaminated land in question, Erewash Borough Council will also consider waiving or reducing its costs recovery where that person satisfies the Council 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 presence of a pollutant.

- 3.4.2.4 In considering what might reasonably be expected by way of knowledge that might be obtained the Council will have regard to the state of knowledge on the issue of contaminated land at the time the purchase was made. For transactions relating to owner occupation it will be assumed as a starting point in the considerations that any transactions concluding after the start of 2002 will be have been carried out in a regime in which there is an expectation that the purchaser will make extensive enquiries regarding contamination issues before concluding a purchase.
- 3.4.2.5 Any such waiver or reduction shall 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. Where the appropriate person has inherited the dwelling or received it as a gift, the approach in paragraph 3.4.2.1 above should be applied with respect to the time at which they received the property.
- 3.4.2.6 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 3.4.2.3 above shall be applied only to the dwelling and its curtilage.

#### **4.0 Applications for the recovery of costs associated with the remediation of contaminated land to be waived or reduced.**

- 4.1 Subject to paragraph 4.2 below, all applications for the recovery of costs associated with the remediation of contaminated land to be waived or reduced shall be made in writing to Erewash Borough Council and signed by the applicant.
- 4.2 Erewash Borough Council may, having regard to the applicant's circumstances, agree that an application for the recovery of costs associated with the remediation of contaminated land to be waived or reduced may be made in a format other than writing. Such an agreement shall be in writing and shall specify the application formats that are acceptable.
- 4.3 It shall be the responsibility of the applicant to supply any information required by Erewash Borough Council to process their application for a waiver or reduction in the recovery of remediation costs
- 4.4 In making any cost recovery decision, Erewash Borough Council will always consider any relevant information provided by the appropriate person and other sources. Erewash Borough Council will seek to obtain such information as is reasonable, having regard to:
- (a) How the information might be obtained;
  - (b) The cost, for all the parties involved, of obtaining the information, and
  - (c) The potential significance of the information for any decision.
- 4.5 Applications for the recovery of costs associated with the remediation of contaminated land to be waived or reduced shall be determined jointly by the Director for Places and Environment and the Director for Resources.



**5.0 Appeals regarding the outcome of an application for the recovery of costs associated with the remediation of contaminated land to be waived or reduced.**

5.1 In the event of an applicant being dissatisfied with the outcome of an application for the recovery of costs associated with the remediation of contaminated land to be waived or reduced they may appeal to Erewash Borough Council against the decision.

5.2 Subject to paragraph 5.3 below, all appeals regarding the outcome of an application for the recovery of costs associated with the remediation of contaminated land to be waived or reduced shall be made in writing to Erewash Borough Council and signed by the applicant.

5.3 Erewash Borough Council may, having regard to the applicant's circumstances, approve an appeal regarding the outcome of an application for the recovery of costs associated with the remediation of contaminated land to be waived or reduced being made in a format other than writing. Such an approval will be in writing and will specify the application formats that are acceptable.

5.4 Appeals regarding the outcome of an application for the recovery of costs associated with the remediation of contaminated land to be waived or reduced shall be determined by the Council Executive.

## Appendix 1

### Section 78P of the Environmental Protection Act 1990 (as amended by the Environment Act 1995)

- 78P.**—(1) Where, by virtue of section 78N(3)(a), (c), (e) or (f) above, the enforcing authority does any particular thing by way of remediation, it shall be entitled, subject to sections 78J(7) and 78K(6) above, 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) above.
- (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.
- (3) Subsection (4) below shall apply in any case where—
- (a) any cost is recoverable under subsection (1) above from a person— (i) who is the owner of any premises which consist of or include the contaminated land in question; and (ii) who caused or knowingly permitted the substances, or any of the substances, by reason of which the land is contaminated land to be in, on or under the land; and
  - (b) the enforcing authority serves a notice under this subsection (in this Part referred to as a "charging notice" ) on that person.
- (4) Where this subsection applies—
- (a) the cost shall carry interest, at such reasonable rate as the enforcing authority may determine, from the date of service of the notice until the whole amount is paid; and
  - (b) subject to the following provisions of this section, the cost and accrued interest shall be a charge on the premises mentioned in subsection (3)(a)(i) above.
- (5) A charging notice shall—
- (a) specify the amount of the cost which the enforcing authority claims is recoverable;
  - (b) state the effect of subsection (4) above and the rate of interest determined by the authority under that subsection; and
  - (c) state the effect of subsections (7) and (8) below.
- (6) On the date on which an enforcing authority serves a charging notice on a person, the authority shall also serve a copy of the notice on every other person who, to the knowledge of the authority, has an interest in the premises capable of being affected by the charge.

- (7) Subject to any order under subsection (9)(b) or (c) below, the amount of any cost specified in a charging notice and the accrued interest shall be a charge on the premises—
- (a) as from the end of the period of twenty-one days beginning with the service of the charging notice, or
  - (b) where an appeal is brought under subsection (8) below, as from the final determination or (as the case may be) the withdrawal, of the appeal, until the cost and interest are recovered.
- (8) A person served with a charging notice or a copy of a charging notice may appeal against the notice to a county court within the period of twenty-one days beginning with the date of service.
- (9) On an appeal under subsection (8) above, the court may—
- (a) confirm the notice without modification;
  - (b) order that the notice is to have effect with the substitution of a different amount for the amount originally specified in it; or
  - (c) order that the notice is to be of no effect.
- (10) Regulations may make provision with respect to—
- (a) the grounds on which appeals under this section may be made; or
  - (b) the procedure on any such appeal.
- (11) An enforcing authority shall, for the purpose of enforcing a charge under this section, have all the same powers and remedies under the [1925 c. 20.] Law of Property Act 1925, and otherwise, as if it were a mortgagee by deed having powers of sale and lease, of accepting surrenders of leases and of appointing a receiver.
- (12) Where any cost is a charge on premises under this section, the enforcing authority may by order declare the cost to be payable with interest by instalments within the specified period until the whole amount is paid.
- (13) In subsection (12) above—  
"interest" means interest at the rate determined by the enforcing authority under subsection (4) above; and  
"the specified period" means such period of thirty years or less from the date of service of the charging notice as is specified in the order.
- (14) Subsections (3) to (13) above do not extend to Scotland.

## **Appendix 2**

### **Part 6 of Chapter E of Appendix 3 to DEFRA Circular 01/2006**

#### **Part 6 – Specific Considerations Applying to Class B Persons**

E.37 The statutory guidance in this Part sets out specific considerations relating to cost recovery decisions where the appropriate person is a Class B person, as defined in Chapter D (that is, a person who is liable by virtue of their ownership or occupation of the contaminated land, but who has not caused or knowingly permitted the significant pollutant to be in, on or under the land).

#### **Costs in Relation to Land Values**

E.38 In some cases, the costs of remediation may exceed the value of the land in its current use (as defined in Chapter A) after the required remediation has been carried out.

E.39 The enforcing authority should 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” should 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.

E.40 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 enforcing authority should 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.

#### **Precautions Taken before Acquiring a Freehold or a Leasehold Interest**

E.41 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.

E.42 The authority 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:

- (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.

E.43 The enforcing authority should 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).

### **Owner-occupiers of Dwellings**

E.44 Where a Class B person owns and occupies a dwelling on the contaminated land in question, the enforcing authority should 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 presence of a pollutant.

E.45 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. Where the appropriate person has inherited the dwelling or received it as a gift, the approach in paragraph E.44 above should be applied with respect to the time at which he received the property.

E.46 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 E.44 above should be applied only to the dwelling and its curtilage.

### **The Housing Renewal Grant Analogy**

E.47 In judging the extent of a waiver or reduction in costs recovery from an owner-occupier of a dwelling, an enforcing authority which is a local authority may wish to apply an approach analogous 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.

E.48 The HRG approach can be applied as if the appropriate person were applying for HRG and the authority had decided that the case was appropriate for grant assessment. Using this analogy, the authority would conclude that costs recovery should be waived or reduced to the extent that the appropriate person contributes no more than if the work were house renovations for which HRG was being sought. For this purpose, any upper limits for grants payable under HRG should be ignored.

## **Appendix 3**

### **CONSULTATION ON DRAFT STRATEGY AND DRAFT COST RECOVERY POLICY**

A consultation exercise on the draft contaminated land inspection and assessment strategy and the draft policy on the recovery of costs associated with the remediation of contaminated land sites was undertaken from 29 June 2009 to 29 July 2009.

Consultation consisted of:

- i) A press release;
- ii) Posting copies of both draft documents on the website;
- iii) A mail-out to commercial, regulatory and other groups;
- iv) Displaying copies of the draft documents in public libraries with pre-paid envelopes and feedback forms.

There have been no responses which asked for the draft documents to be amended.