

ADVICE NOTE 4 - Environmental Protection Act 1990: Part IIA Apportioning liability for contaminated land

Introduction

Having established land as being "Contaminated Land", the Local Authority must determine who is liable for its remediation, and, where there is more than one person, what proportion each must contribute. The Department for Environment, Food and Rural Affairs (DEFRA) statutory guidance, Circular 01/2006 (DEFRA, 2006) sets out a complicated structure for allocating liability and it will not be possible to provide the full details in this note. For each significant pollutant linkage the Local Authority needs to identify those who are the appropriate persons for any remediation action relating to that pollutant. All those appropriate persons are a "liability group". There are two levels of liability:-

Class A – Persons who caused or knowingly permitted the contamination.

Class B – The current owner or occupier.

Having identified the liability groups, the Local Authority should first have regard to any agreements that may exist on liabilities between parties. If there are no agreements, then regard must be had to the remainder of the guidance to determine whether any persons can be regarded as exempt persons, whether any Class A or B person can be excluded and then, finally, to apportion the costs of remediation between those remaining.

Exempt Persons

A person is "exempt" if:-

- (i) they are a Class B person and the contamination is water pollution;
- (ii) they permit water from an abandoned mine before 31 December 1999 to cause water pollution;
- (iii) contamination which they did not cause, or knowingly permit, has escaped from his land to other land;
- (iv) they are acting in a "relevant capacity", e.g. receivers.

Excluding Polluters

There are six tests applied when considering whether a Class A person should be excluded:-

- (i) Is it a benign activity which has not contributed significantly to the contamination?
- (ii) Have they already paid another member of the liability group to carry out adequate remediation?
- (iii) Have they provided proper information to a purchaser about the contamination on the site?
- (iv) Are they responsible for a contaminative substance which only caused harm or pollution because another substance was later introduced?
- (v) Would there have been a need for remediation were it not for another "appropriate person" causing or permitting the escape of contaminative substances from other land?
- (vi) Have others introduced relevant pathways or receptors so as to create a pollutant linkage?

Excluding Owners and Occupiers

Where there is no Class A person for a significant pollutant linkage, liability switches to Class B persons who (where there is more than one) form a Class B liability group. For the Class B group there is only one test which excludes any Class B member who does not have an interest in the capital value of the land.

Apportioning Liability

Once all appropriate exclusions have taken place, the Local Authority has to apportion liability between the remaining members of that group. For Class A liability groups, the general principle is that liability should be apportioned to reflect the relative responsibility of each of those members for creating or continuing the risk now being caused by the significant pollutant

linkage in question. A number of factors are considered, including the nature of the pollutant, and his/her ability and opportunity to prevent or remove the pollutant. If appropriate information is not available to enable some other apportionment to be made, then liability has to be apportioned in equal shares. Apportionment with Class B liability groups is less complex and based on capital values of land. There are also rules for allocating liability between separate liability groups which depend upon the nature of remediation required. Inevitably, it is not possible to describe the procedure for allocation liability and the tests for exclusion and apportionment in detail. For this, you should refer to the Annex 3 of DEFRA Circular 01/2006 (DEFRA 2006).

Contacts

Local Authorities

Babergh District Council - 01473 822801
contaminated.land@babergh.gov.uk

Forest Heath District Council - 01638 719000
envhealth@forest-heath.gov.uk

Ipswich Borough Council - 01473 432000
pollution@ipswich.gov.uk

Mid-Suffolk District Council - 01449 720711
envcontrol@midsuffolk.gov.uk

St Edmundsbury Borough Council - 01284 763233
env.health@stedsbcc.gov.uk

Suffolk Coastal District Council – 01394 383789
environmental.protection@suffolkcoastal.gov.uk

Waveney District Council – 01502 562111
Environment@waveney.gov.uk

Environment Agency

Central Area & Eastern Area -08708 506506
enquiries@environment-agency.gov.uk

References and Further Reading

A list of reference material and further reading is presented below. Parties involved in site investigation and remediation are encouraged to have regards to their contents and make use of the sources of information during their work. The list is not exhaustive and is current at the time of publishing this document. Further advice is available from the contacts listed above.

- DEFRA (2006). Circular 01/2006. Environmental Protection Act 1990: Part 2A. DEFRA, London. Internet site: www.defra.gov.uk

Disclaimer

This Note is intended to serve as an informative and helpful source of advice. However, readers must note that legislation, guidance and practical methods are inevitably subject to change. This note should therefore be read in conjunction with prevailing legislation and guidance, as amended, whether mentioned here or not. Where legislation and documents are summarised this is for general advice and convenience, and must not be relied upon as a comprehensive or authoritative interpretation. Ultimately it is the responsibility of the person/company involved in the development or assessment of potentially contaminated land to apply up to date working practices to determine the contamination status of a site and the remediation requirements.

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