

## 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 sets out a complicated structure for allocating liability and it will not be possible to provide 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<sup>st</sup> 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 introduced later?
- 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 the 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 Annex 3 of DEFRA Circular 01/2006.

### Contacts

#### Local Authorities

Aylesbury Vale District Council  
envhealth@aylesburyvaledc.gov.uk  
01296 585605

Chiltern District Council  
sustainable@chiltern.gov.uk  
01494 732060

Milton Keynes Council  
ehept@milton-keynes.gov.uk  
01908 252398

South Bucks District Council  
envhealth@southbucks.gov.uk  
01895 837200

Wycombe District Council  
environmentalhealth@wycombe.gov.uk  
01494 421307

#### Environment Agency

enquiries@environment-agency.gov.uk  
08708 506506

#### Guidance and References

A list of reference material and further reading is presented below. Parties involved in site investigations 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 writing.

- DEFRA (2006). Circular 01/2006 Environmental Protection Act 1990: Part IIA. DEFRA London
- DEFRA and Environment Agency (2004). CLR11: Model Procedures for the Management of Land Contamination. EA Bristol
- OPSI (1995). Environment Act 1995 – Part IIA Contaminated Land. OPSI London

#### Disclaimer

This note is intended to serve as an informative and helpful source of advice. However, readers must not that legislation, guidance and practical methods are inevitably subject to change. This note should therefore be read in conjunction with prevailing legislation and guidance. 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 and to determine the contamination status of a site and the remediation requirements.

#### Acknowledgements

The members of the Buckinghamshire Land Quality Forum would like to thank the members of the Suffolk Environmental Protection Group in giving permission to utilise their guidance notes.

Copyright © 2009 Buckinghamshire Land Quality Forum