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Draft Contaminated Land Statutory Guidance

Presented to Parliament pursuant to section 78YA of the Environmental Protection Act 1990 as amended by Section 57 of the Environment Act 1995

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Applicable Parliamentary Procedure

This statutory guidance is issued in accordance section 78YA of the Environmental Protection Act 1990, which states:

Section 78YA

(1) Any power of the Secretary of State to issue guidance under this Part shall only be exercisable after consultation with the appropriate Agency and such other bodies or persons as he may consider it appropriate to consult in relation to the guidance in question.

(2) A draft of any guidance proposed to be issued under section 78A(2) or (5), 78B(2) or 78F(6) or (7) above shall be laid before each House of Parliament and the guidance shall not be issued until after the period of 40 days beginning with the day on which the draft was so laid or, if the draft is laid on different days, the later of the two days.

(3) If, within the period mentioned in subsection (2) above, either House resolves that the guidance, the draft of which was laid before it, should not be issued, the Secretary of State shall not issue that guidance.

(4) In reckoning any period of 40 days for the purposes of subsection (2) or (3) above, no account shall be taken of any time during which Parliament is dissolved or prorogued or during which both Houses are adjourned for more than four days.

(5) The Secretary of State shall arrange for any guidance issued by him under this Part to be published in such a manner as he considers

Introduction

1. This statutory guidance ("this Guidance") is issued by the Secretary of State for Environment, Food and Rural Affairs in accordance with section 78YA of the Environmental Protection Act 1990 ("the 1990 Act"). Section 57 of the Environment Act 1995 created Part 2A of the Environmental Protection Act 1990 ("Part 2A") which establishes a legal framework for dealing with contaminated land in England. This Guidance applies only in England.

2. This Guidance is intended to explain how local authorities should implement the regime, including how they should go about deciding whether land is contaminated land in the legal sense of the term. It also elaborates on the remediation provisions of Part 2A, such as the goals of remediation, and how regulators should ensure that remediation requirements are reasonable. This Guidance also explains specific aspects of the Part 2A liability arrangements, and the process by which the enforcing authority may recover the costs of remediation from liable parties in certain circumstances.

3. This Guidance is legally binding on enforcing authorities, and relevant sections of Part 2A which form the basis of this Guidance are mentioned in specific Sections of this Guidance below. This Guidance has been subject to Parliamentary scrutiny under the negative resolution parliamentary procedure, in accordance with section 78YA of the 1990 Act. The Environment Agency and other relevant bodies in the land contamination sector have been consulted in relation to this Guidance, as required by section 78YA(1) of the 1990 Act, and a full public consultation was held between December 2010 and March 2011. This Guidance should be read in accordance with Part 2A.

4. This Guidance replaces the previous statutory guidance which was published as Annex 3 of Defra Circular 01/2006, and was issued in accordance with section 78YA of the 1990 Act. The previous statutory guidance, as it relates to non-radioactive contaminated land, and the Circular of which it was a part are obsolete from the date on which this Guidance is issued.

Radioactive contamination of land

5. This Guidance does not apply to radioactive contamination of land. Radioactive contaminated land is covered by separate statutory guidance. In the event that land is affected by both radioactive and non-radioactive contaminants both sets of statutory guidance will apply, and the enforcing authority should decide what is a reasonable course of action having due regard for the relevant primary legislation and advice from the Environment Agency.

Terminology

6. Most of the specific terms used in this Guidance are defined within the text. Some general aspects of terminology are:

- "contaminated land" is used to mean land which meets the Part 2A definition of contaminated land. Other terms, such as "land affected by contamination" or "land contamination", are used to describe the much broader categories of land where contaminants are present but usually not at a sufficient level of risk to be contaminated land.
- "Part 2A" means Part 2A of the Environmental Protection Act 1990 (as amended).
- The terms "contaminant", "pollutant" and "substance" as used in this Guidance have the same meaning – i.e. they all mean a substance relevant to the Part 2A regime which is in, on or under the land and which has the potential to cause significant harm to a relevant receptor, or to cause significant pollution of controlled waters. This Guidance mainly uses the term "contaminant" and associated terms such as "contaminant linkage". However it recognises that some non-statutory technical guidance relevant to land contamination uses alternative terms such as "pollutant", "substance" and associated terms in effect to mean the same thing.
- "unacceptable risk" means a risk of such a nature that it would give grounds for land to be considered contaminated land under Part 2A.

Section 1: Objectives of the Part 2A regime

1.1 This Guidance should be read and applied with Part 2A and the following points in mind.

1.2 England has a considerable legacy of historical land contamination involving a very wide range of substances. On all land there are background levels of substances, including substances that are naturally present as a result of our varied and complex geology and substances resulting from diffuse human pollution. On some land there are greater concentrations of contaminants, often associated with industrial use and waste disposal. In a minority of cases there may be sufficient risk to health or the environment for such land to be considered contaminated land.

1.3 Part 2A provides a means of dealing with unacceptable risks posed by land contamination to human health and the environment, and enforcing authorities should seek to find and deal with such land. Under Part 2A the starting point should be that land is not contaminated land unless there is reason to consider otherwise. Only land where unacceptable risks are clearly identified, after a risk assessment has been undertaken in accordance with this Guidance, should be considered as meeting the Part 2A definition of contaminated land.

1.4 The overarching objectives of the Government's policy on contaminated land and the Part 2A regime are:

(a) To identify and remove unacceptable risks to human health and the environment.

(b) To seek to ensure that contaminated land is made suitable for its current use.

(c) To ensure that the burdens faced by individuals, companies and society as a whole are proportionate, manageable and compatible with the principles of sustainable development.

1.5 Enforcing authorities should seek to use Part 2A only where no appropriate alternative solution exists. The Part 2A regime is one of several ways in which land contamination can be addressed. For example, land contamination can be addressed when land is developed (or redeveloped) under the planning system, during the building control process, or where action is taken independently by landowners. Other legislative regimes may also provide a means of dealing with land contamination issues, such as building regulations; the regimes for waste, water, and environmental permitting; and the Environmental Damage (Prevention and Remediation) Regulations 2009.

1.6 Under Part 2A , the enforcing authority may need to decide whether and how to act in situations where such decisions are not straightforward, and where there may be unavoidable uncertainty underlying some of the facts of each case. In so doing, the authority should use its judgement to strike a reasonable balance between: (a) dealing with risks raised by contaminants in land and the benefits of remediating land to remove or reduce those risks; and (b) the potential impacts of regulatory intervention including financial costs to whoever will pay for remediation (including the taxpayer where relevant), health and environmental impacts of taking action, property blight, and burdens on affected people. The authority should take a precautionary approach to the risks raised by contamination, whilst avoiding a disproportionate approach given the circumstances of each case. The aim should be to consider the various benefits and costs of taking action, with a view to ensuring that the regime produces net benefits, taking account of local circumstances.

Section 2: Local authority inspection duties

2.1 Part 2A requires that local authorities cause their areas to be inspected with a view to identifying contaminated land, and to do this in accordance with this Guidance. Relevant sections of the Act include:

(a) Section 78B(1): Every local authority shall cause its area to be inspected from time to time for the purpose – (a) of identifying contaminated land; and (b) of enabling the authority to decide whether any such land is land which is required to be designated as a special site.

(b) Section 78B(2): In performing [these] functions .... a local authority shall act in accordance with any guidance issued for the purpose by the Secretary of State.

2.2 This Guidance recognises that there are two broad types of “inspection” likely to be carried out by local authorities: (a) strategic inspection, for example collecting information to make a broad assessment of land within an authority’s area and then identifying priority land for more detailed consideration; and (b) carrying out the detailed inspection of particular land to

obtain information on ground conditions and carrying out the risk assessments which support decisions under the Part 2A regime relevant to that land. This Guidance refers to the former as “strategic inspection” and the latter as “detailed inspection”.

Strategic inspection

2.3 The local authority should take a strategic approach to carrying out its inspection duty under section 78B(1). This approach should be rational, ordered and efficient, and it should reflect local circumstances. Strategic approaches may vary between local authorities.

2.4 The local authority should set out its approach as a written strategy, which it should formally adopt and publish to a timescale to be set by the authority. Strategies produced in accordance with previous versions of this Guidance should be updated or replaced to reflect this Guidance. The authority may choose to have a separate strategy document and/or to include its strategy as part of a wider document.

2.5 The local authority should keep its written strategy under periodic review to ensure it remains up to date. It is for the authority to decide when its strategy should be reviewed, although as good practice it should aim to review its strategy at least every five years.

2.6 The local authority should include in its strategy:

(a) Its aims, objectives and priorities, taking into account the characteristics of its area.

(b) A description of relevant aspects of its area.

(c) Its approach to strategic inspection of its area or parts of it.

(d) Its approach to the prioritisation of detailed inspection and remediation activity.

(e) How its approach under Part 2A fits with its broader approach to dealing with land contamination. For example, its broader approach may include using the planning system to ensure land is made suitable for use when it is redeveloped; and/or encouraging polluters/owners of land affected by contamination to deal with problems without the need for Part 2A to be used directly; and/or encouraging problematic land to be dealt with as part of wider regeneration work.

(f) Broadly, how the authority will seek to minimise unnecessary burdens on the taxpayer, businesses and individuals; for example by encouraging voluntary action to deal with land contamination issues as far as it considers reasonable and practicable.

Prioritisation of detailed inspection activity

2.7 When the local authority is carrying out detailed inspection of land in accordance with Part 2A, it should seek to give priority to particular areas of land that it considers most likely to pose the greatest risk to human health or the environment.

2.8 In some cases the process of strategic inspection, including prioritisation of detailed inspection activities, may give rise to property blight issues. The local authority should seek to minimise or reduce such potential blight as far as it considers reasonable. The authority should also be open to moves by the land owner (or some other interested party) to help resolve the status of the land themselves. For example, the authority may decide that the land is, or is not, contaminated land on the basis of information provided by the land owner or other interested party, provided the authority is satisfied with the robustness of the information.

Detailed inspection of particular areas of land

2.9 If the local authority identifies land where it considers there is a reasonable possibility that a significant contaminant linkage (as defined in paragraphs 3.8 and 3.9) exists, it should inspect the land to obtain sufficient information to decide whether it is contaminated land, having regard to section 3 of this Guidance. The timing of such inspection should be subject to the authority's approach to prioritisation of detailed inspection.

2.10 The authority should consult the landowner before inspecting the land unless there is a particular reason why this is not possible, for example because it has not been possible to identify or locate the landowner. Where the owner refuses access, or the landowner cannot be found, the authority should consider using statutory powers of entry.

2.11 If the local authority intends to carry out an inspection using statutory powers of entry under section 108 of the Environment Act 1995 it should first be satisfied that there is a reasonable possibility that a significant contaminant linkage may exist on the land. The authority should not use statutory powers of entry to undertake intrusive investigations, including the taking of sub-surface samples, if:

(a) it has already been provided with appropriate, detailed information on the condition of the land (e.g. by the Environment Agency or some other person such as the owner of the land) which provides sufficient information for the authority to decide whether or not the land is contaminated land; or

(b) a relevant person (e.g. the owner of the land, or a person who may be liable for the contamination) offers to provide such information within a reasonable and specified time, and then provides such information within that time.

2.12 The local authority should carry out any intrusive investigation in accordance with appropriate good practice technical procedures for such investigations.

2.13 If at any stage the local authority considers, on the basis of information obtained from inspection activities, that there is no longer a reasonable possibility that a significant contaminant linkage exists on the land, the authority should not carry out any further inspection in relation to that linkage.

2.14 If the local authority identifies land which it considers (if the land were to be determined as contaminated land) would be likely to meet one or more of the descriptions of a special site set out in the Contaminated Land (England) Regulations 2006, it should consult the Environment Agency and, subject to the Agency's advice and agreement, arrange for the Agency to carry out any intrusive inspection of the land on behalf of the authority. If the Agency is to carry out such an inspection, the authority should where necessary authorise a person nominated by the Agency to exercise the powers of entry conferred by section 108 of the Environment Act 1995.

2.15 Where the Environment Agency carries out an inspection on behalf of a local authority, the authority's regulatory functions under section 78B and 78C of the 1990 Act (including the inspection duty and the decision as to whether land is contaminated land) and the need to comply with the related provisions of this Guidance remain the sole responsibility of the authority. The Agency should advise the authority of its findings in order to enable the authority to carry out these functions. The Agency should carry out any intrusive investigations in accordance with appropriate good practice technical procedures for such investigations.

Section 3: Risk assessment

3.1 Part 2A takes a risk based approach to defining contaminated land. For the purposes of this Guidance, "risk" means the combination of: (a) the likelihood that harm, or pollution of water, will occur as a result of contaminants in, on or under the land; and (b) the scale and seriousness of such harm or pollution if it did occur.

3.2 All soils contain substances that could be harmful to human or environmental receptors, although in the very large majority of cases the level of risk is likely to be very low. In conducting risk assessment under the Part 2A regime, the local authority should aim to focus on land which might pose an unacceptable risk.

3.3 Local authorities should have regard to good practice guidance on risk assessment and they should ensure they undertake risk assessment in a way which delivers the results needed to make robust decisions in line with Part 2A and this Guidance.

3.4 Risk assessments should be based on information which is: (a) scientifically-based; (b) authoritative; (c) relevant to the assessment of risks arising from the presence of

contaminants in soil; and (d) appropriate to inform regulatory decisions in accordance with Part 2A and this Guidance.

Current use

3.5 Under Part 2A, risks should be considered only in relation to the current use of the land. For the purposes of this Guidance, the "current use" means:

(a) The use which is being made of the land currently.

(b) Reasonably likely future uses of the land that would not require a new or amended grant of planning permission.

(c) Any temporary use to which the land is put, or is likely to be put, from time to time within the bounds of current planning permission.

(d) Likely informal use of the land, for example children playing on the land, whether authorised by the owners or occupiers, or not.

(e) In the case of agricultural land, the current agricultural use should not be taken to extend beyond the growing or rearing of the crops or animals which are habitually grown or reared on the land.

3.6 In assessing risks the local authority should disregard any receptors which are not likely to be present given the current use of the land or other land which might be affected. In considering the timescale over which a risk should be assessed the authority should take into account any evidence that the current use of the land will cease in the relevant foreseeable future (e.g. within the period of exposure assumed for relevant receptors in a contaminant linkage).

3.7 When considering risks in relation to any future use or development which falls within the description of a "current use", the local authority should assume that the future use or development would be carried out in accordance with any existing planning permission. In particular, the authority should assume:

(a) That any remediation which is the subject of a condition attached to that planning permission, or is the subject of any planning obligation, will be carried out in accordance with that permission or obligation.

(b) Where a planning permission has been given subject to conditions which require steps to be taken to prevent problems which might be caused by contamination, and those steps are to be approved by the local planning authority, that the local planning authority will ensure that those steps include adequate remediation.

Contaminant linkages

3.8 Under Part 2A, for a relevant risk to exist there needs to be one or more contaminant-pathway-receptor linkage – "contaminant linkage" – by which a relevant receptor might be affected by the contaminants in question. In other words, for a risk to exist there must be contaminants present in, on or under the land in a form and quantity that poses a hazard,

and one or more pathway by which they might significantly harm people, the environment, or property; or significantly pollute controlled waters. For the purposes of this Guidance:

(a) A “contaminant” is a substance which is in, on or under the land and which has the potential to cause significant harm to a relevant receptor, or to cause significant pollution of controlled waters.

(b) A “receptor” is something that could be adversely affected by a contaminant, for example a person, an organism, an ecosystem, property, or controlled waters. The various types of receptors that are relevant under the Part 2A regime are explained in later sections.

(c) A “pathway” is a route by which a receptor is or might be affected by a contaminant.

3.9 The term “contaminant linkage” means the relationship between a contaminant, a pathway and a receptor. All three elements of a contaminant linkage must exist in relation to particular land before the land can be considered potentially to be contaminated land under Part2A, including evidence of the actual presence of contaminants. The term “significant contaminant linkage”, as used in this Guidance, means a contaminant linkage which gives rise to a level of risk sufficient to justify a piece of land being determined as contaminated land. The term “significant contaminant” means the contaminant which forms part of a significant contaminant linkage.

3.10 In some cases the local authority may encounter land where risks are presented by groups of substances which are likely to behave in the same manner, or a substantially very similar manner, in relation to the risks they may present (e.g. as may be the case with organic substances found in oils). For the purposes of identifying and assessing contaminant linkages and taking regulatory decisions in relation to such linkages, the local authority may treat such groups of contaminants as being in effect a single contaminant and multiple contaminant linkages as being in effect a single contaminant linkage. The authority should only do this if there is a scientifically robust reason for doing so, and it should state clearly why this approach has been taken in relevant documentation (including the risk summary discussed later in this Section) if the land is later determined as contaminated land.

3.11 In considering contaminant linkages, the local authority should consider whether:

(a) The existence of several different potential pathways linking one or more potential contaminants to a particular receptor, or to a particular class of receptors, may result in a significant contaminant linkage.

(b) There is more than one significant contaminant linkage on any land. If there are, the authority should consider whether or not each should be dealt with separately, since different people may be responsible for the remediation of individual contaminant linkages.

The process of risk assessment

3.12 The process of risk assessment involves understanding the risks presented by land, and the associated uncertainties. In practice, this understanding is usually developed and communicated in the form of a “conceptual model”. The understanding of the risks is developed through a staged approach to risk assessment, often involving a preliminary risk

assessment informed by desk-based study; a site visit and walkover; a generic quantitative risk assessment; and various stages of more detailed quantitative risk assessment . The process should normally continue until it is possible for the local authority to decide: (a) that there is insufficient evidence that the land might be contaminated land to justify further inspection and assessment; and/or (b) whether or not the land is contaminated land.

3.13 For land to proceed to the next stage of risk assessment there should be evidence that an unacceptable risk could reasonably exist. If the authority considers there is little reason to consider that the land might pose an unacceptable risk, inspection activities should stop at that point. In such cases the authority should have regard to paragraphs 5.2 – 5.4 of this Guidance.

3.14 It may become apparent during the course of detailed inspection of land that the assumptions that led to the prioritisation of the land prove to be incorrect, and that the risks posed by the land are lower than expected. In such cases the authority should consider whether (and if so how) to proceed with its inspection, having regard to the need to prioritise inspection activities in accordance with Section 2. There may be good reason to continue until a decision can be taken on whether or not the land is contaminated land. However, as soon as it becomes clear to the authority that the land is unlikely to be contaminated land, it should bring its inspection and risk assessment to an end, and redirect its efforts to the inspection of other land in line with its approach to prioritisation.

3.15 As a general rule, inspections should be conducted as quickly, and with as little disruption, as reasonably possible whilst ensuring that a sufficiently robust assessment is carried out. The local authority should seek to avoid or minimise the impacts of long inspections on affected persons, in particular significant disruption and stress to directly affected members of the public in the case of inspections involving residential land.

3.16 The local authority should seek to ensure that its risk assessment is relevant to the land in question, and that it is based on risks that are reasonably likely to exist. In the course of risk assessment the authority may consider possible exposure scenarios or situations which are very unlikely to occur. However, regulatory decisions should be based on what is reasonably likely, not what is hypothetically possible.

3.17 In undertaking risk assessments, local authorities should ensure that the time and resource put into assessment is sufficient to provide a robust basis for regulatory decisions. In some cases, there may be a need for detailed and lengthy assessments, particularly in complex cases where regulatory decisions are not straightforward. However, in other cases a less detailed and shorter assessment may be appropriate. For example, if it becomes evident early in risk assessment that there is clearly a high or low risk (to the extent that the decision on whether or not land is contaminated land is straightforward) the authority should normally take the decision on the basis of this evidence alone.

Using external expertise during risk assessment

3.18 Developing an understanding of risks in complex cases may raise issues which are beyond the expertise of any one person, and may require the involvement of others to conduct a robust risk assessment. There may be little need to consult others in cases where

risks are clearly high or low or where the authority has sufficient internal expertise, but in more complex cases the authority may consider it necessary to bring in external expertise.

3.19 The question of who to consult depends largely on the circumstances of the land, and the expertise and gaps in expertise of the person doing the assessment. When choosing specialist consultants, local authorities should strive as far as possible to ensure that they are appropriately qualified and competent to undertake the work. Authorities, or consultants working on their behalf, may also consider seeking advice from other relevant experienced practitioners.

3.20 External experts may advise the local authority on regulatory decisions under the Part 2A regime, but the decisions themselves remain the sole responsibility of the local authority.

"Normal" presence of contaminants

3.21 The Part 2A regime was introduced to help identify and deal with land which poses unacceptable levels of risk. It is not intended to apply to land with levels of contaminants in soil that are commonplace and widespread throughout England or parts of it, and for which in the very large majority of cases there is no reason to consider that there is an unacceptable risk.

3.22 Normal levels of contaminants in soil should not be considered to cause land to qualify as contaminated land, unless there is a particular reason to consider otherwise. Therefore, if it is established that land is at or close to normal levels of particular contaminants, it should usually not be considered further in relation to the Part 2A regime and the local authority should have regard to paragraphs 5.2 to 5.4 of this Guidance.

3.23 For the purpose of this Guidance, "normal" levels of contaminants in soil may result from:

(a) The natural presence of contaminants (e.g. caused by soil formation processes and underlying geology) at levels that might reasonably be considered typical in a given area and have not been shown to pose an unacceptable risk to health or the environment.

(b) The presence of contaminants caused by low level diffuse pollution, and common human activity other than specific industrial processes. For example, this would include diffuse pollution caused by historic use of leaded petrol and the presence of benzo(a)pyrene from vehicle exhausts, and the spreading of domestic ash in gardens at levels that might reasonably be considered typical.

3.24 In deciding whether land has normal levels of contaminants, the local authority should consider whether contamination is within the bounds of what might be considered typical or widespread: (a) locally, if there is sufficient information to make a reasonable consideration of what is normal within a local area; and/or (b) regionally or nationally in broadly similar circumstances, having due regard to similarity in terms of land use and other relevant factors such as soil type, hydrogeology, and the form of the contaminants.

3.25 The local authority should decide that normal levels of contaminants exist in relation to land where: (a) those levels are not significantly different to those likely to be typical or widespread within the authority's area, or in other similar areas; and/or (b) those levels are common or usual in similar land use situations across England or parts of it; and (c) there is no specific reason to consider that those levels of contaminants are likely to pose an unacceptable risk.

3.26 It is possible that specific pieces of land at or slightly above normal levels of contamination with regard to specific substances may pose sufficient risk to be contaminated land, and that remediation of such land may bring significant net benefits. However, such cases are likely to be very unusual and the authority should take particular care to explain why the decision has been taken, and to ensure that it is supported by robust scientifically-based evidence.

Use of generic assessment criteria and other technical tools

3.27 It is common practice in contaminated land risk assessment to use "generic assessment criteria" (GACs) as screening tools in generic quantitative human health risk assessment to help assessors decide when land can be excluded from the need for further inspection and assessment, or when further work may be warranted.

3.28 Local authorities may use GACs and other technical tools to inform certain decisions under the Part 2A regime, provided: (i) they understand how they were derived and how they can be used appropriately; (ii) they have been produced in an objective, scientifically robust and expert manner by reputable organisations; and (iii) they are only used in a manner that is in accordance with Part 2A and this Guidance.

3.29 GACs[1] relating to human health risk assessment represent cautious estimates of levels of contaminants in soil at which there is considered to be no risk to health or, at most, a minimal risk to health. With regard to such GACs:

(a) They may be used to indicate when land is very unlikely to pose a significant possibility of significant harm to human health. This is on the basis that they are designed to estimate levels of contamination at which risks are likely to be negligible or minimal and far from posing a significant possibility of significant harm to human health.

(b) They should not be used as direct indicators of whether a significant possibility of significant harm to human health may exist. Also, the local authority should not view the degree by which GACs are exceeded (in itself) as being particularly relevant to this consideration, given that the degree of risk posed by land would normally depend on many factors other than simply the amount of contaminants in soil.[2]

[1] Paragraph 3.27 refers specifically to the Soil Guideline Values produced by the Environment Agency, and other published GACs produced on similar basis by LQM/Chartered Institute of Environmental Health and the Environmental Industries Commission using the Agency's Contaminated Land Exposure Assessment methodology as existed when this Guidance came into force.

[2] The level of risk raised by land contamination will depend on more than simply the amount of contaminants in the soil. For example, it will also depend on what form the contaminants take, where they are in the soil, the efficiency of the pathway by

(c) They should not be seen as screening levels which describe the boundary between Categories 3 and 4 in terms of Section 4 (i.e. the two Categories in which land would not be contaminated land on grounds of risks to human health). In the very large majority of cases, these SGVs/GACs describe levels of contamination from which risks should be considered to be comfortably within Category 4.[3]

(d) They should not be viewed as indicators of levels of contamination above which detailed risk assessment would automatically be required under Part 2A.

(e) They should not be used as generic remediation targets under the Part 2A regime. Nor should they be used in this way under the planning system, for example in relation to ensuring that land affected by contamination does not meet the Part 2A definition of contaminated land after it has been developed.

3.30 New technical tools and advice may be developed and used in accordance with paragraph 3.28 above to help regulators and others apply and conform to this Guidance. This may be undertaken by government bodies, regulators or other organisations in the land contamination sector. Tools might be developed to help assessors apply the Category 1-4 approach (as described in Section 4 of this Guidance) in relation to specific substances or situations. For example, this might include the development of generic screening levels to help assessors decide when land might be assumed to be in Category 4; or tools to help describe how estimates of risk and/or bodily uptake of a contaminant might indicate that land should be placed within certain Categories.

Recognising and dealing with uncertainty

3.31 All risk assessments of potentially contaminated land will involve uncertainty, for example due to scientific uncertainty over the effects of substances, and the assumptions that lie behind predicting what might happen in the future. When building an understanding of the risks relating to land, the local authority should recognise that uncertainty exists. The authority should seek to minimise uncertainty as far as it considers to be relevant, reasonable and practical; and it should recognise remaining uncertainty, which is likely to exist in almost all cases. It should be aware of the assumptions and estimates that underlie the risk assessment, and the effect of these on its conclusions.

3.32 The uncertainty underlying risk assessments means there is unlikely to be any single "correct" conclusion on precisely what is the level of risk is posed by land, and it is possible that different suitably qualified people could come to different conclusions when presented with the same information. It is for the local authority to use its judgement to form a reasonable view of what it considers the risks to be on the basis of a robust assessment of available evidence in line with this Guidance.

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which receptors may be exposed, the sensitivity of receptors, the likely degree and duration of exposure, the dose-response relationship, etc. These factors will vary from case to case, sometimes very substantially.

[3] The question of how comfortably land at the SGV/GAC levels would fall into Category 4 depends on the specific GAC in question and the site circumstances, given that different GACs have different levels of precaution built into them and that risks will depend on many factors other than merely the amount of contaminants in soil. In some cases it may be that GAC levels can be exceeded by a substantial degree (sometimes by orders of magnitude) and the land might still fall within Category 4, but in other cases there may be a considerably smaller margin and in some cases it may be that GAC levels are exceeded by only a few times and land would fall outside of Category 4.

Risk summaries

3.33 Once the local authority has completed its detailed inspection and assessment of particular land it should be satisfied it has sufficient understanding of the risks to take relevant regulatory decisions.

3.34 The local authority should produce a risk summary for any land where, on the basis of its risk assessment, the authority considers it is likely that the land in question may be determined as contaminated land. The risk summary should explain the authority's understanding of the risks and other factors the authority considers to be relevant. The authority should seek to ensure that the risk summary is understandable to the layperson, including the owners of the land and members of the public who may be affected by the decision. The authority should not proceed to formal determination of land as contaminated land unless a risk summary has been prepared.

3.35 Risk summaries should as a minimum include:

(a) A summary of the authority's understanding of the risks, including a description of: the contaminants involved; the identified contaminant linkage(s), or a summary of such linkages; the potential impact(s); the estimated possibility that the impact(s) may occur; and the timescale over which the risk may become manifest.

(b) A description of the authority's understanding of the uncertainties behind its assessment.

(c) A description of the risks in context, for example by setting the risk in local or national context, or describing the risk from land contamination relative to other risks that receptors might be expected to be exposed to in any case. This need not involve a detailed comparison of relative risks, but the authority should aim to explain the risks in a way which is understandable and relevant to the layperson.

(d) A description of the authority's initial views on possible remediation. This need not be a detailed appraisal, but it should include a description of broadly what remediation might entail; how long it might take; likely effects of remediation works on local people and businesses; how much difference it might be expected to make to the risks posed by the land; and the authority's initial assessment of whether remediation would be likely to produce a net benefit, having regard to the broad objectives of the regime set out in Section 1. In the case of land which (if it were determined as contaminated land) would be likely to be a special site, the authority should seek the views of the Environment Agency, and take any views provided into account in producing this description.

3.36 Local authorities are not required to produce risk summaries:

(a) For land which will not be determined as contaminated land (e.g. land that would be in Categories 3 and 4 in terms of Section 4 of this Guidance). In such cases the authority should have regard to paragraphs 5.2 – 5.4 of this Guidance.

(b) For land which has been prioritised for detailed inspection (in accordance with Section 2 of this Guidance) but which has not yet been subject to risk assessment in accordance with Section 3 above.

(c) For land determined as contaminated land before this Guidance came into force.

Section 4: The definition of "contaminated land"

4.1 Part 2A of the 1990 Act defines "contaminated land", and provides for the Secretary of State to issue guidance (i.e. this Guidance) to on how local authorities should determine which land is contaminated land and which is not.

4.2 Relevant sections of the Act include:

- Section 78A(2): "contaminated land" is any land which appears to the local authority in whose area it is situated to be in such a condition, by reason of substances in, on or under the land that – (a) significant harm is being caused or there is a significant possibility of such harm being caused; or (b) significant pollution of controlled waters is being caused, or there is a significant possibility of such pollution being caused;....

- Section 78A(4): "Harm" means harm to the health of living organisms or other interference with the ecological systems of which they form part and, in the case of man, includes harm to his property.

- Section 78A(5): The questions – (a) what harm or pollution of controlled waters is to be regarded as "significant", (b) whether the possibility of significant harm or of significant pollution of controlled waters being caused is "significant", shall be determined in accordance with guidance issued for the purpose by the Secretary of State in accordance with section 78YA below.

- Section 78A(6): Without prejudice to the guidance that may be issued under subsection (5) above, guidance under paragraph (a) of that subsection may make provision for different degrees of importance to be assigned to, or for the disregard of, – (a) different descriptions of living organisms or ecological systems or of poisonous, noxious or polluting matter or solid waste matter; (b) different descriptions of places or controlled waters, or different degrees of pollution; or (c) different descriptions of harm to health or property, or other interference; and guidance under paragraph (b) of that subsection may make provision for different degrees of possibility to be regarded as "significant" (or as not being "significant") in relation to different descriptions of significant harm or of significant pollution.

Section 4.1: Significant harm to human health

4.3 The paragraphs below set out categories of harm that should be considered to be significant harm to human health. In all cases the harm should be directly attributable to the effects of contaminants in, on or under the land on the body(ies) of the person(s) concerned.

4.4 Conditions for determining that land is contaminated land on the basis that significant harm is being caused would exist where: (a) the local authority has carried out an appropriate,

scientific and technical assessment of all the relevant and available evidence; and (b) on the basis of that assessment, the authority is satisfied on the balance of probabilities that significant harm is being caused (i.e. that it is more likely than not that such harm is being caused) by a significant contaminant(s).

4.5 The following health effects should always be considered to constitute significant harm to human health: death; life threatening diseases (e.g. cancers); other diseases likely to have serious impacts on health; serious injury[4]; birth defects; and impairment of reproductive functions.

4.6 Other health effects may be considered by the local authority to constitute significant harm. For example, a wide range of conditions may or may not constitute significant harm (alone or in combination) including: physical injury; gastrointestinal disturbances; respiratory tract effects; cardio-vascular effects; central nervous system effects; skin ailments; effects on organs such as the liver or kidneys; or a wide range of other health impacts. In deciding whether or not a particular form of harm is significant harm, the local authority should consider the seriousness of the harm in question: including the impact on the health, and quality of life, of any person suffering the harm; and the scale of the harm. The authority should only conclude that harm is significant if it considers that treating the land as contaminated land would be in accordance with the broad objectives of the regime as described in Section 1.

4.7 If the local authority decides that harm is occurring but it is not significant harm, it should consider whether such harm might be relevant to consideration of whether or not the land poses a significant possibility of significant harm (see sub-section 4.2 below). For example, this might be the case if there is evidence that the harm may be a precursor to, or indicative or symptomatic of, a more serious form of harm, or that repeated episodes of minor harm (e.g. repeated skin ailments) might lead to more serious harm in the longer term.

4.8 In cases where the local authority considers that: (i) significant harm may be being caused, or is likely to have been caused in the past; and (ii) there is a significant possibility that it may happen again; the authority may choose to consider whether to determine the land on grounds of significant possibility of significant harm (as an alternative to consideration that significant harm is being caused).

Section 4.2 Significant possibility of significant harm to human health

4.9 In deciding whether or not a significant possibility of significant harm to human health exists, the local authority should first understand the possibility of significant harm from the relevant

[4] Physical injury in relation to significant harm would include injury caused by chemical and biochemical properties of substances, such as injury resulting from explosive or asphyxiating properties of gases. It would not extend to injury caused by only physical properties of substances, such as injury caused by falling onto sharp or hard objects made of relevant substances.

contaminant linkage(s) and the levels of uncertainty attached to that understanding, before it goes on to decide whether or not the possibility of significant harm is significant.

Possibility of significant harm to human health

4.10 In assessing the possibility of significant harm to human health from the land and associated issues, the local authority should act in accordance with the advice on risk assessment in Section 3 and the guidance in this section.

4.11 The term "possibility of significant harm" as it applies to human health, for the purposes of this guidance, means the risk posed by one or more relevant contaminant linkage(s) relating to the land. It comprises:

(a) The estimated likelihood that significant harm might occur to an identified receptor, taking account of the current use of the land in question.

(b) The estimated impact if the significant harm did occur – i.e. the nature of the harm, the seriousness of the harm to any person who might suffer it, and (where relevant) the extent of the harm in terms of how many people might suffer it.

4.12 In estimating the likelihood that a specific form of significant harm might occur the local authority should, among other things, consider:

(a) The estimated probability that the significant harm might occur: (i) if the land continues to be used as it is currently being used; and (ii) where relevant, if the land were to be used in a different way (or ways) in the future having regard to the guidance on "current use" in Section 3.

(b) The strength of evidence underlying the risk estimate. It should also consider the key assumptions on which the estimate of likelihood is based, and the level of uncertainty underlying the estimate.

4.13 In some cases the local authority's assessment of possibility of significant harm may be based, solely or partially, on a possible risk that may exist if circumstances were to change in the future within the bounds of the current use of the land. For example, an assessment may be based on a possible risk if a more sensitive receptor were to move onto the land at some point in the future. In such cases the authority should ensure that the possibility of the future circumstance occurring is taken into account in estimating the overall possibility of significant harm.

4.14 The local authority should estimate the timescale over which the significant harm might become manifest, to the extent that this is possible and practicable (and recognising that often it may only be possible and practicable to give a broad indication of the estimated timescale).

4.15 Having completed its estimation of the possibility of significant harm, the local authority should produce a risk summary in accordance with Section 3.

Deciding whether a possibility of significant harm is significant (human health)

4.16 The decision on whether the possibility of significant harm being caused is significant is a regulatory decision to be taken by the relevant local authority. In deciding whether the possibility of significant harm being caused is significant, the authority is deciding whether the possibility of significant harm posed by contamination in, on or under the land is sufficiently high that regulatory action should be taken to reduce it, with all that would entail. In taking such decisions, the local authority should take account of the broad aims of the regime set out in Section 1 of this Guidance.

4.17 In deciding whether or not land is contaminated land on grounds of significant possibility of significant harm to human health, the local authority should use the categorisations described in paragraphs 4.19 – 4.30 below. Categories 1 and 2 would encompass land which is capable of being determined as contaminated land on grounds of significant possibility of significant harm to human health. Categories 3 and 4 would encompass land which is not capable of being determined on such grounds.

4.18 In considering whether a significant possibility of significant harm exists, the local authority should consider the number of people who might be exposed to the risk in question and/or the number of people it estimates would be likely to suffer harm. In some cases, the authority may decide that this is not a particularly relevant consideration: it is quite possible that land could be determined as contaminated land on the basis of a significant possibility of significant harm to an individual or a small number of people. However in other cases the authority may consider that the number of people affected is an important consideration, for example if the number of people at risk substantially alters the authority's view of the likelihood of significant harm or the scale and seriousness of such harm if it did occur.

Category 1: Human Health

4.19 The local authority should assume that a significant possibility of significant harm exists in any case where it considers there is an unacceptably high probability, supported by robust science-based evidence, that significant harm would occur if no action is taken to stop it. For the purposes of this Guidance, these are referred to as "Category 1: Human Health" cases. Land should be deemed to be a Category 1: Human Health case where:

(a) the authority is aware that similar land or situations are known, or are strongly suspected on the basis of robust evidence, to have caused such harm before in the United Kingdom or elsewhere; or

(b) the authority is aware that similar degrees of exposure (via any medium) to the contaminant(s) in question are known, or strongly suspected on the basis of robust evidence, to have caused such harm before in the United Kingdom or elsewhere;

(c) the authority considers that significant harm may already have been caused by contaminants in, on or under the land, and that there is an unacceptable risk that it might continue or occur again if no action is taken. Among other things, the authority may decide to determine the land on these grounds if it considers that it is likely that significant harm is being caused, but it considers either: (i) that there is insufficient evidence to be sure of meeting the "balance of probability" test for demonstrating that significant harm is being caused; or (ii) that the time needed to demonstrate such a level of probability would cause unreasonable delay, cost, or disruption and stress to affected people particularly in cases involving residential properties.

Category 4: Human Health

4.20 The local authority should not assume that land poses a significant possibility of significant harm if it considers that there is no risk or that the level of risk posed is low. For the purposes of this Guidance, such land is referred to as a "Category 4: Human Health" case. The authority may decide that the land is a Category 4: Human Health case as soon as it considers it has evidence to this effect, and this may happen at any stage during risk assessment including the early stages.

4.21 The local authority should consider that the following types of land should be placed into Category 4: Human Health:

(a) Land where no relevant contaminant linkage has been established.

(b) Land where there are only normal levels of contaminants in soil, as explained in Section 3 of this Guidance.

(c) Land that has been excluded from the need for further inspection and assessment because contaminant levels do not exceed relevant generic assessment criteria in accordance with Section 3 of this Guidance, or relevant technical tools or advice that may be developed in accordance with paragraph 3.30 of this Guidance.

(d) Land where estimated levels of exposure to contaminants in soil are likely to form only a small proportion of what a receptor might be exposed to anyway through other sources of environmental exposure (e.g. in relation to average estimated national levels of exposure to substances commonly found in the environment, to which receptors are likely to be exposed in the normal course of their lives).

4.22 The local authority may consider that land other than the types described in paragraph 4.21 should be placed into Category 4: Human Health if following a detailed quantitative risk assessment it is satisfied that the level of risk posed is sufficiently low.

4.23 Local authorities may decide that particular land apparently matching the descriptions of paragraph 4.21 (b) or (d) immediately above poses sufficient risk to human health to fall into

Categories other than Category 4. However, such cases are likely to be very unusual and the authority should take particular care to explain why the decision has been taken, and to ensure that it is supported by robust evidence.

Categories 2 and 3: Human Health

4.24 For land that cannot be placed into Categories 1 or 4, the local authority should decide whether the land should be placed into either: (a) Category 2: Human Health, in which case the land would be capable of being determined as contaminated land on grounds of significant possibility of significant harm to human health; or (b) Category 3: Human Health, in which case the land would not be capable of being determined on such grounds.

4.25 The local authority should consider this decision in the context of the broad objectives of the regime and of the Government's policy as set out in Section 1. It should also be mindful of the fact that the decision is a positive legal test, meaning that the starting assumption should be that land does not pose a significant possibility of significant harm unless there is reason to consider otherwise. The authority should then, in accordance with paragraphs 4.26 to 4.29 below, decide which of the following two categories the land falls into:

(a) Category 2: Human Health. Land should be placed into Category 2 if the authority concludes, on the basis that there is a strong case for considering that the risks from the land are of sufficient concern that the land poses a significant possibility of significant harm, with all that this might involve and having regard to Section 1. Category 2 may include land where there is little or no direct evidence that similar land, situations or levels of exposure have caused harm before, but nonetheless the authority considers on the basis of the available evidence, including expert opinion, that there is a strong case for taking action under Part 2A on a precautionary basis.

(b) Category 3: Human Health. Land should be placed into Category 3 if the authority concludes that the strong case described in 4.25(a) does not exist, and therefore the legal test for significant possibility of significant harm is not met. Category 3 may include land where the risks are not low, but nonetheless the authority considers that regulatory intervention under Part 2A is not warranted. This recognises that placing land in Category 3 would not stop others, such as the owner or occupier of the land, from taking action to reduce risks outside of the Part 2A regime if they choose. The authority should consider making available the results of its inspection and risk assessment to the owners/occupiers of Category 3 land.

4.26 In making its decision on whether land falls into Category 2 or Category 3, the local authority should first consider its assessment of the possibility of significant harm to human health, including the estimated likelihood of such harm, the estimated impact if it did occur, the timescale over which it might occur, and the levels of certainty attached to these estimates. If the authority considers, on the basis of this consideration alone, that the strong case described in paragraph 4.25(a) does or does not exist, the authority should make its

decision on whether the land falls into Category 2 or Category 3 on this basis regardless of the other factors discussed in paragraph 4.27.

4.27 If the authority considers that it cannot make a decision in line with paragraph 4.26, it should consider other factors which it considers are relevant to achieving the objectives set out in Section 1. This should include consideration of:

(a) The likely direct and indirect health benefits and impacts of regulatory intervention. This would include benefits of reducing or removing the risk posed by contamination. It would also include any risks from contaminants being mobilised during remediation (which would in any case have to be considered under other relevant legislation); and any indirect impacts such as stress related health effects that may be experienced by affected people, particularly local residents. If it is not clear to the authority that the health benefits of remediation would outweigh the health impacts, the authority should presume the land falls into Category 3 unless there is strong reason to consider otherwise.

(b) The authority's initial estimate of what remediation would involve; how long it would take; what benefit it would be likely to bring; whether the benefits would outweigh the financial and economic costs; and any impacts on local society or the environment from taking action that the authority considers to be relevant.

4.28 In making its consideration in regard to paragraph 4.27(a) and (b), the local authority is not required to make a detailed assessment. For example, the consideration should not necessarily involve quantification of the impacts, particularly if the authority considers it is not possible or reasonable to do so, and the authority is not expected to produce a detailed cost-benefit or sustainability analysis. Rather it is expected to make a broad consideration of factors it considers relevant to achieving the aims of Section 1.

4.29 If, having taken the above factors into account, the local authority still cannot decide whether or not a significant possibility of significant harm exists, it should conclude that the legal test has not been met and the land should be placed in Category 3.

Section 4.3: Significant harm and significant possibility of such harm (non-human receptors)

4.30 In considering non-human receptors, the local authority should only regard receptors described in Tables 1 and 2 as being relevant for the purposes of Part 2A (e.g. harm to an ecological system outside the description in Table 1 should not be considered to be significant harm). Similarly, in considering whether significant harm is being caused or there is a significant possibility of such harm, the authority should only regard the forms of harm described in Tables 1 and 2 as being relevant.

4.31 Tables 1 and 2 below give guidance on how the local authority should go about deciding whether or not: (i) significant harm is being caused; or (ii) there is a significant possibility of such harm; to non-human receptors. In making such decisions the authority should have close regard to Section 1 and should only consider determining land as contaminated land if it is satisfied it would be in accordance with the broad aims set out in Section 1.

4.32 In Tables 1 and 2, references to "relevant information" mean information which is: (a) scientifically-based; (b) authoritative; (c) relevant to the assessment of risks arising from the presence of contaminants in soil; and (d) appropriate to inform the determination of whether any land is contaminated land.

4.33 In considering "ecological system effects" described in Table 1, the local authority should consult Natural England and have regard to its comments before deciding whether or not to make a determination.

Table 1: Ecological system effects

Relevant types of receptor	Significant harm	Significant possibility of significant harm
Any ecological system, or living organism forming part of such a system, within a location which is: • a site of special scientific interest (under section 28 of the Wildlife and Countryside Act 1981) • a national nature reserve (under s.35 of the 1981 Act) • a marine nature reserve (under s.36 of the 1981 Act) • an area of special protection for birds (under s.3 of the 1981 Act) • a "European site" within the meaning of regulation 8 of the Conservation of Habitats	The following types of harm should be considered to be significant harm: • harm which results in an irreversible adverse change, or in some other substantial adverse change, in the functioning of the ecological system within any substantial part of that location; or • harm which significantly affects any species of special interest within that location and	Conditions would exist for considering that a significant possibility of significant harm exists to a relevant ecological receptor where the local authority considers that: • significant harm of that description is more likely than not to result from the contaminant linkage in question; or • there is a reasonable possibility of significant harm of that description being caused, and if that harm were to occur, it would

Relevant types of receptor	Significant harm	Significant possibility of significant harm
and Species Regulations 2010 • any habitat or site afforded policy protection under paragraph 6 of Planning Policy Statement (PPS 9) on nature conservation (i.e. candidate Special Areas of Conservation, potential Special Protection Areas and listed Ramsar sites); or • any nature reserve established under section 21 of the National Parks and Access to the Countryside Act 1949.	which endangers the long-term maintenance of the population of that species at that location. In the case of European sites, harm should also be considered to be significant harm if it endangers the favourable conservation status of natural habitats at such locations or species typically found there. In deciding what constitutes such harm, the local authority should have regard to the advice of Natural England and to the requirements of the Conservation of Habitats and Species Regulations 2010	result in such a degree of damage to features of special interest at the location in question that they would be beyond any practicable possibility of restoration. Any assessment made for these purposes should take into account relevant information for that type of contaminant linkage, particularly in relation to the ecotoxicological effects of the contaminant.

Table 2: Property effects

Relevant types of receptor	Significant harm	Significant possibility of significant harm
Property in the form of: • crops, including timber; • produce grown domestically, or on allotments, for consumption; • livestock; • other owned or domesticated animals; • wild animals which are the subject of shooting or fishing rights.	For crops, a substantial diminution in yield or other substantial loss in their value resulting from death, disease or other physical damage. For domestic pets, death, serious disease or serious physical damage. For other property in this category, a substantial loss in its value resulting from death, disease or other serious physical damage. The local authority should regard a substantial loss in value as occurring only when a substantial proportion of the animals or crops are dead or otherwise no longer fit for their intended purpose. Food should be regarded as being no longer fit for purpose when it fails to comply with the provisions of the Food Safety Act 1990. Where a diminution in yield or loss in value is caused by a contaminant linkage, a 20% diminution or loss should be regarded as a benchmark for what constitutes a substantial diminution or loss. In this Chapter, this description of significant harm is referred to as an "animal or crop effect".	Conditions would exist for considering that a significant possibility of significant harm exists to the relevant types of receptor where the local authority considers that significant harm is more likely than not to result from the contaminant linkage in question, taking into account relevant information for that type of contaminant linkage, particularly in relation to the ecotoxicological effects of the contaminant.
Property in the form of buildings. For this purpose, "building" means any structure or erection, and any part of a building including any part below ground level, but does not include plant or	Structural failure, substantial damage or substantial interference with any right of occupation. The local authority should regard substantial damage or substantial interference as occurring when any part of the building ceases to be capable of being used for the purpose for which it is or was intended. In the case of a scheduled Ancient	Conditions would exist for considering that a significant possibility of significant harm exists to the relevant types of receptor where the local authority considers that significant harm is more likely than not to result from the contaminant linkage in question during

machinery comprised in a building, or buried services such as sewers, water pipes or electricity cables.	Monument, substantial damage should also be regarded as occurring when the damage significantly impairs the historic, architectural, traditional, artistic or archaeological interest by reason of which the monument was scheduled. In this Chapter, this description of significant harm is referred to as a "building effect".	the expected economic life of the building (or in the case of a scheduled Ancient Monument the foreseeable future), taking into account relevant information for that type of contaminant linkage.

Section 4.4: Significant pollution of controlled waters and significant possibility of such pollution

4.34 This sub-section gives Guidance on how the local authority should go about deciding whether significant pollution of controlled waters is being caused, or whether there is a significant possibility of such pollution being caused. This sub-section deals with controlled waters as a receptor in contaminant linkages, and not as a pathway.

4.35 In establishing whether significant pollution of controlled waters is being caused, or whether there is a significant possibility of such pollution being caused, the local authority should have regard for any technical guidance issued by the Environment Agency to support this Guidance. If the authority considers it likely that land might be contaminated land on such grounds, it should consult the Agency and have strong regard to the Agency's advice.

Pollution of controlled waters

4.36 Under section 78A(9) of Part 2A the term "pollution of controlled waters" means the entry into controlled waters of any poisonous, noxious or polluting matter or any solid waste matter. The term "controlled waters" in relation to England has the same meaning as in Part 3 of the Water Resources Act 1991, except that "ground waters" does not include waters contained in underground strata but above the saturation zone.

4.37 Given that the Part 2A regime seeks to identify and deal with significant pollution (rather than lesser levels of pollution), the local authority should seek to focus on pollution which: (i) may be harmful to human health or the quality of aquatic ecosystems or terrestrial ecosystems directly depending on aquatic ecosystems; (ii) which may result in damage to material property; or (iii) which may impair or interfere with amenities and other legitimate uses of the environment.

Significant pollution of controlled waters

4.38 The following types of pollution should be considered to constitute significant pollution of controlled waters:

(a) Pollution equivalent to "environmental damage" to surface water or groundwater as defined by The Environmental Damage (Prevention and Remediation) Regulations 2009, but which cannot be dealt with under those Regulations.

(b) Inputs resulting in deterioration of the quality of water abstracted, or intended to be used in the future, for human consumption such that additional treatment would be required to enable that use.

(c) A breach of a statutory surface water Environment Quality Standard, either directly or via a groundwater pathway.

(d) Input of a substance into groundwater resulting in a significant and sustained upward trend in concentration of contaminants (as defined in Article 2(3) of the Groundwater Daughter Directive (2006/118/EC)[5]).

4.39 In some circumstances, the local authority may consider that the following types of pollution may constitute significant pollution: (a) significant concentrations[6] of hazardous substances or non-hazardous pollutants in groundwater; or (b) significant concentrations of priority hazardous substances, priority substances or other specific polluting substances in surface water; at an appropriate, risk based compliance point[7]. The local authority should only conclude that pollution is significant if it considers that treating the land as contaminated land would be in accordance with the broad objectives of the regime as described in Section 1. This would normally mean that the authority should conclude that less serious forms of pollution are not significant. In such cases the authority should consult the Environment Agency.

4.40 The following types of circumstance should not be considered to be contaminated land on water pollution grounds:

(a) The fact that substances are merely entering water and none of the conditions for considering that significant pollution is being caused set out in paragraphs 4.38 and 4.39 above are being met.

(b) The fact that land is causing a discharge that is not discernible at a location immediately downstream or down-gradient of the land (when compared to upstream or up-gradient concentrations).

(c) Substances entering water in compliance with a discharge authorised under the Environmental Permitting Regulations.

[5] Relating to paragraph 4.41(d), Article 2(3) says, "significant and sustained upward trend means any statistically and environmentally significant increase of concentration of a pollutant, group of pollutants, or indicator of pollution in groundwater for which trend reversal is identified as being necessary in accordance with Article 5."

[6] significant concentrations must be determined on a site and substance specific basis

[7] Appropriate compliance points must be determined on a site and substance specific basis

Significant pollution of controlled waters is being caused

4.41 In deciding whether significant pollution of controlled waters is being caused, the local authority should consider that this test is only met where it is satisfied that the substances in question are continuing to enter controlled waters; or that they have already entered the waters and are likely to do so again in such a manner that past and likely future entry in effect constitutes ongoing pollution. For these purposes, the local authority should:

(a) Regard substances as having entered controlled waters where they are dissolved or suspended in those waters, or (if they are immiscible with water) they have direct contact with those waters on or beneath the surface of the water.

(b) Take the term "continuing to enter" to mean any measurable entry of the substance(s) into controlled waters additional to any which has already occurred.

(c) Take the term "likely to do so again" to mean more likely than not to occur again.

4.42 Land should not be determined as contaminated land on grounds that significant pollution of controlled waters is being caused where: (a) the relevant substance(s) are already present in controlled waters; (b) entry into controlled waters of the substance(s) from land has ceased; and (c) it is not likely that further entry will take place.

Significant Possibility of Significant Pollution of Controlled Waters

4.43 In deciding whether or not a significant possibility of significant pollution of controlled waters exists, the local authority should first understand the possibility of significant pollution of controlled waters posed by the land, and the levels of certainty/uncertainty attached to that understanding, before it goes on to decide whether or not that possibility is significant. The term "possibility of significant pollution of controlled waters" means the estimated likelihood that significant pollution of controlled waters might occur. In assessing the possibility of significant pollution of controlled waters from land, the local authority should act in accordance with the advice on risk assessment in Section 3 and the guidance in this sub-section.

4.44 In deciding whether the possibility of significant pollution of controlled waters is significant the local authority should bear in mind that Part 2A makes the decision a positive legal test. In other words, for particular land to meet the test the authority needs reasonably to believe that there is a significant possibility of such pollution, rather than to demonstrate that there is not.

4.45 Before making its decision on whether a given possibility of significant pollution of controlled waters is significant, the local authority should consider:

(a) The estimated likelihood that the potential significant pollution of controlled waters would become manifest; the strength of evidence underlying the estimate; and the level of uncertainty underlying the estimate.

(b) The estimated impact of the potential significant pollution if it did occur. This should include consideration of whether the pollution would be likely to cause a breach of European water legislation, or make a major contribution to such a breach.

(c) The estimated timescale over which the significant pollution might become manifest.

(d) The authority's initial estimate of whether remediation is feasible, and if so what it would involve and the extent to which it might provide a solution to the problem; how long it would take; what benefit it would be likely to bring; and whether the benefits would outweigh the costs and any impacts on local society or the environment from taking action.

4.46 The local authority should consider these factors in the context of the broad objectives of the regime as set out in Section 1. It should also consider how the factors interrelate (e.g. likelihood relative to impact). The authority should then decide which of the following categories the land falls into. Categories 1 and 2 would comprise cases where the authority considers that a significant possibility of significant pollution of controlled waters exists. Categories 3 and 4 would comprise cases where the authority considers that a significant possibility of such pollution does not exist.

(a) Category 1 (Water): This covers land where the authority considers that there is a strong and compelling case for considering that a significant possibility of significant pollution of controlled waters exists. In particular this would include cases where there is robust science-based evidence for considering that it is likely that high impact pollution (such as the pollution described in paragraph 4.38) would occur if nothing were done to stop it.

(b) Category 2 (Water): This covers land where: (i) the authority considers that the strength of evidence to put the land into Category 1 does not exist; but (ii) nonetheless, on the basis of the available scientific evidence and expert opinion, the authority considers that the risks posed by the land are of sufficient concern that the land should be considered to pose a significant possibility of significant pollution of controlled waters on a precautionary basis, with all that this might involve (e.g. likely remediation requirements, and the benefits, costs and other impacts of regulatory intervention). Among other things, this category might include land where there is a relatively low likelihood that the most serious types of significant pollution might occur.

(c) Category 3 (Water): This covers land where the authority concludes that the risks are such that (whilst the authority and others might prefer they did not exist) the tests set out in Categories 1 and 2 above are not met, and therefore regulatory intervention under Part 2A is not warranted. This category should include land where the authority considers that it is very

unlikely that serious pollution would occur; or where there is a low likelihood that less serious types of significant pollution might occur.

(d) Category 4 (Water): This covers land where the authority concludes that there is no risk, or that the level of risk posed is low. In particular, the authority should consider that this is the case where: (a) no contaminant linkage has been established in which controlled waters are the receptor in the linkage; or (b) the possibility only relates to types of pollution described in paragraph 4.40 above (i.e. types of pollution that should not be considered to be significant pollution); or (c) the possibility of water pollution similar to that which might be caused by "background" contamination as explained in Section 3.

Section 5: Determination of contaminated land

5.1 Section 78A(2) of the 1990 Act says that in determining whether any land appears to be contaminated land, a local authority shall, *"...act in accordance with guidance issued by the Secretary of State...with respect to the manner in which that determination is to be made."* This section provides such Guidance.

Deciding that land is not contaminated land

5.2 In implementing the Part 2A regime, the local authority is likely to inspect land that it then considers is not contaminated land. For example, this will be the case where the authority has ceased its inspection and assessment of land on grounds that there is little or no evidence to suggest that it is contaminated land. In such cases, the authority should issue a written statement to that effect (rather than coming to no formal conclusion) to minimise unwarranted blight. The statement should make clear that on the basis of its assessment, the authority has concluded that the land does not meet the definition of contaminated land under Part 2A. The authority may choose to qualify its statement (e.g. given that its Part 2A risk assessment may only be relevant to the current use of the land).

5.3 Paragraph 5.2 recognises that the nature of soil contamination means it is never possible to know the exact contamination status of any land with absolute certainty, and that scientific understanding of risks may evolve over time. However, such a lack of certainty should not stop the authority from deciding that land is not contaminated land. The starting assumption of Part 2A is that land is not contaminated land unless there is reason to consider otherwise.

5.4 The local authority should keep a record of its reasons for deciding that land is not contaminated land. The authority should inform the owners of the land of its conclusion and give them a copy of the written statement referred to in paragraph 5.2. The authority should also consider informing other interested parties (for example occupiers of the land and owners and occupiers of neighbouring land) and whether to publish the statement. The

statement should be issued within a timescale that the authority considers to be a reasonable, having regard to the need to minimise unwarranted burdens to persons likely to be directly affected, in particular the landowner, and occupiers or users of the land where relevant.

Determining that land is contaminated land

5.5 The local authority has the sole responsibility for determining whether any land appears to be contaminated land. It cannot delegate this responsibility (except in accordance with section 101 of the Local Government Act 1972). However, in making such decisions the authority may rely on information or advice provided by another body such as the Environment Agency, or a suitably qualified experienced practitioner appointed for that purpose.

5.6 There are four possible grounds for the determination of land as contaminated land (with regard to non-radioactive contamination):

(a) Significant harm is being caused to a human, or relevant non-human, receptor.

(b) There is a significant possibility of significant harm being caused to a human, or relevant non-human, receptor.

(c) Significant pollution of controlled waters is being caused.

(d) There is a significant possibility of significant pollution of controlled waters being caused.

5.7 Before making any determination, the local authority should have identified one or more significant contaminant linkage(s), and carried out a robust, appropriate, scientific and technical assessment of all the relevant and available evidence. If the authority considers that conditions for considering land to be contaminated land do not exist it should not decide that the land is contaminated land.

5.8 In the case of any land which, following determination as contaminated land, would be likely to meet one or more of the descriptions of a “Special Site” set out in the Contaminated Land Regulations 2006, the local authority should consult the Environment Agency before deciding whether or not to determine the land, providing the Agency with a draft record of the determination that the authority is required to prepare in accordance with paragraphs 5.17 – 5.19 below. The authority should take the Agency’s views into full consideration and it should strive to ensure it has the Agency’s agreement to its decision (although the decision is for the authority to make subject to the provisions of Part 2A).

Physical extent of land to be determined

5.9 It is for the local authority to decide the physical extent of land that should be determined. The authority should strive to ensure that there are grounds to consider that all the land in

question can reasonably be considered to be contaminated land. In practice, often it is likely that contamination will not be uniformly spread across land, and it may not be clear precisely where the boundaries of the contamination lie. In such cases the authority should use its judgement on the extent of land it might reasonably consider to be contaminated land.

5.10 The local authority should review its decision on the physical extent of the land to be determined (or that has been determined) if at a later date it becomes aware of relevant further information. For example this may be the case if, during remediation, it becomes clear that the extent of contamination is significantly greater or less than was thought when the determination was made.

Sub-division of land for the purposes of determination

5.11 The local authority may sub-divide the relevant land for the purposes of determination by issuing separate determinations for smaller areas of land which form part of a larger area of contaminated land. In deciding whether (and if so how) to do this, the authority should take into account: (i) the nature of the contamination; (ii) the degree of risk posed, and whether this varies across the land; (iii) the nature of the remediation which might be required; (iv) the ownership of the land; and (v) the likely identity of those who may bear responsibility for the remediation.

Making determinations in urgent cases

5.12 If the local authority considers there is an urgent need to determine particular land, it should make the determination in a timescale it considers appropriate to the urgency of the situation.

Informing interested parties

5.13 Before making a determination, the local authority should inform the owners and occupiers of the land and any other person who appears to the authority to be liable to pay for remediation of its intention to determine the land (to the extent that the authority is aware of these parties at the time) unless the authority considers there is an overriding reason for not doing so. The authority should also consider:

(a) Whether to give such persons time to make representations (for example to seek clarification of the grounds for determination, or to propose a solution that might avoid the need for formal determination) taking into account: the broad aims of regime; the urgency of the situation; any need to avoid unwarranted delay; and any other factor the authority considers to be appropriate.

(b) Whether to inform other interested parties as it considers necessary, for example owners and occupiers of neighbouring land.

5.14 If the local authority determines land as contaminated land, it shall give notice of that fact to (a) the Environment Agency; (b) the owner of the land; (c) any person who appears to the authority to be in occupation of the whole or any part of the land; and (d) each person who appears to the authority to be an appropriate person; in accordance with section 78B(3) of Part 2A. In respect of point (d) this Guidance recognises that in some cases the authority may not have identified the appropriate person(s) at the time the determination is made, in which case the requirement to give notice to such persons would not apply.

Postponing determination

5.15 The local authority may postpone determination of contaminated land if the land owner or some other person undertakes to deal with the problem without determination, and the authority is satisfied that the remediation will happen to an appropriate standard and timescale. If the authority chooses to do this, any agreement it enters into should not affect its ability to determine the land in future (e.g. if the person fails to carry out the remediation as agreed).

5.16 The local authority may postpone determination of contaminated land if a significant contaminant linkage would only exist if the circumstances of the land were to change in the future within the bounds of the current use of the land as described in paragraph 3.5 of this Guidance (e.g. if a more sensitive receptor were to move onto the land or a temporarily interrupted pathway were to be reactivated). If the authority chooses to do this, it should keep the status of the land under review and take reasonable measures to ensure that the postponement does not create conditions under which significant risks could go unaddressed in future. Alternatively the authority may decide to determine the land but postpone remediation.

Record of the determination of contaminated land

5.17 The local authority should prepare a written record of any determination that land is contaminated land. The record should clearly and accurately identify the location, boundaries and area of the land in question, making appropriate reference to Ordnance Survey grid references and/or Global Positioning coordinates. The record should be made publicly available by means to be decided by the authority.

5.18 The record should explain why the determination has been made, including:

(a) The risk summary required by Section 3 of this Guidance, and where not already covered in the risk summary: (i) a relevant conceptual model comprising text, plans, cross sections, photographs and tables as necessary in the interests of making the description understandable to the layperson; and (ii) a summary of the relevant assessment of this evidence.

(b) A summary of why the authority considers that the requirements of relevant sections of this Guidance have been satisfied

5.19 The local authority should seek to ensure (as far as reasonable) that all aspects of the record of determination are understandable to non-specialists, including affected members of the public.

Reconsideration, revocation and variation of determinations

5.20 The local authority should reconsider any determination that land is contaminated land if it becomes aware of further information which it considers significantly alters the basis for its original decision. In such cases the authority should decide whether to retain, vary or revoke the determination.

5.21 The local authority should reconsider any determination of contaminated land if remediation action has been taken which, in the view of the authority, stops the land being contaminated land. In such cases the authority should issue a statement to this effect, having regard to paragraphs 5.2 to 5.4 above.

5.22 If the local authority varies or revokes a determination, or issues a statement in accordance with paragraph 5.21, it should record its reasons for doing so alongside the initial record of determination in a way that ensures the changed status of the land is made clear. If the reconsideration results in relevant documentation, such as a revised determination notice or a statement in accordance with paragraph 5.21, copies of this documentation should also be recorded. The authority should ensure that interested parties are informed of the decisions and the reasons for it, including the owner of the land; any person who appears to the authority to be in occupation of the whole or any part of the land; any person who was previously identified by the authority to be an appropriate person; and the Environment Agency.

Section 6: Remediation of Contaminated Land

6.1Once land has been determined as contaminated land, the enforcing authority must consider how it should be remediated and, where appropriate, it must issue a remediation notice to require such remediation. The enforcing authority for the purposes of remediation may be the local authority which determined the land, or the Environment Agency, which takes on responsibility once land has been determined if the land is deemed to be a "special site". The rules on what land is to be regarded as special sites, and various rules on the issuing of remediation notices, are set out in the Contaminated Land (England) Regulations 2006.

6.2Relevant provisions of Part 2A include:

- Section 78A(7): Defines "remediation" as: "(a) the doing of anything for the purpose of assessing the condition of – (i) the contaminated land in question; or (ii) any controlled waters affected by that land; or (iii) any land adjoining or adjacent to that land; (b) the doing of any works, the carrying out of any operations or the taking of any steps in relation to any such land for the purpose – (i) of preventing or minimising, or remedying or mitigating the effects of, any significant harm (or significant pollution of controlled waters), by reason of which the contaminated land is such land; or (ii) of restoring the land or waters to their former state; or (c) the making of subsequent

inspections from time to time for the purpose of keeping under review the condition of the land or waters."

- Section 78E(1): "In any case where [the local authority has identified contaminated land]...the enforcing authority shall... serve on each person who is an appropriate person a..."remediation notice"...specifying what that person is to do by way of remediation and the periods within which he is required to do each of the things so specified."
- Section 78E(4): "The only things by way of remediation which the enforcing authority may do, or require to be done, under or by virtue of [Part 2A] are things which it considers reasonable, having regard to – (a) the cost which is likely to be involved; and (b) the seriousness of the harm, or pollution of controlled waters, in question."
- Section 78E(5): "In determining for any purpose of this Part – (a) what is to be done (whether by an appropriate person, the enforcing authority, or any other person) by way of remediation in any particular case, (b) the standard to which any land is, or waters are, to be remediated pursuant to [a remediation] notice, or (c) what is, or is not, to be regarded as reasonable for the purposes of subsection (4) above, the enforcing authority shall have regard to any guidance issued for the purpose by the Secretary of State."

6.3The enforcing authority should have regard to this Guidance when it is: (a) deciding what remediation action it should specify in a remediation notice as being required to be carried out; (b) satisfying itself that appropriate remediation is being, or will be, carried out without the service of a notice; or (c) deciding what remediation action it should carry out itself.

6.4The guidance in this Section does not attempt to set out detailed technical procedures or working methods. In considering such matters, the enforcing authority may consult relevant technical documents (e.g. produced by the Environment Agency or other professional and technical organisations). It may also act on the advice of a suitably qualified experienced practioner.

Section 6(a): Remediation techniques

6.5The broad aim of remediation should be: (a) to remove identified significant contaminant linkages, or permanently to disrupt them to ensure they are no longer significant and that risks are reduced to below an unacceptable level; and/or (b) to take reasonable measures to remedy harm or pollution that has been caused by a significant contaminant linkage.

6.6Remediation may involve a range of treatment, assessment and monitoring actions, sometimes with different remediation actions being used in combination or sequentially to secure the overall remediation of the land.

6.7In cases where the aim of remediation is to remove or permanently disrupt significant contaminant linkages, remediation treatment should involve demonstrable disruption or removal of the significant contaminant linkage(s) that led to land being determined as

contaminated land, in order to reduce or remove unacceptable risks to receptors. This might involve one or more of the following:

(a) Reducing or treating the contaminant part of the linkage (e.g. by physically removing contaminants or contaminated soil or water, or by treating the soil or water to reduce levels of contaminants, or by altering the chemical or physical form of the contaminants).

(b) Breaking, removing or disrupting the pathway parts of the linkage (e.g. a pathway could be disrupted by removing or reducing the chance that receptors might be exposed to contaminants, for example by installing gas membranes in a property, or by sealing land with a material such as clay or concrete).

(c) Protecting or removing the receptor. For example, by changing the land use or restricting access to land it may be possible to reduce risks to below an unacceptable level.

6.8Assessment or monitoring actions may also be required as part of remediation. For example, assessment actions may be needed to characterise the nature of significant contaminant linkage(s) to help the authority decide what remediation should involve. Assessment may also be needed whilst other remediation actions are being carried out, or after other actions have been carried out (e.g. to assess the effectiveness of the other measures, or to inform the need for possible further remediation actions). Monitoring actions may be needed after remediation has taken place (e.g. to check whether remedial action has been successful, or whether there is a need for further assessment or action).

6.9Assessment and monitoring action should not be required for any purpose other than the remediation of the land in relation to the reason why it was determined as contaminated land.

Phased Remediation

6.10Remediation may require a phased approach, with different remediation actions being carried out in sequence or in parallel.

6.11In some cases, it may not be possible or reasonable for a single remediation notice to specify all the remediation actions which might eventually be needed. In such cases, the enforcing authority should specify in the notice the remediation action(s) which it considers to be appropriate at the time, and further remediation notices may need to be issued later regarding further phases of action.

6.12If a phased approach is taken to remediation, before serving any further remediation notice, the enforcing authority should be satisfied that previous action has not already achieved the remediation of the land (i.e. to a standard to which remediation can reasonably be required, having regard to the advice below), and that further action is still necessary to achieve the remediation of the land in question.

Remediation of multiple significant contaminant linkages

6.13Where more than one significant contaminant linkage has been identified on the land, the enforcing authority should consider whether reasonable actions for addressing each linkage individually would result in the optimum approach for achieving the overall remediation of the land. If a more integrated approach would be more practicable and more cost effective whilst still delivering the same (or a better) overall standard of remediation the enforcing authority should generally favour this approach. However, in cases where more than one party has been found responsible for linkages, the enforcing authority should not impose an approach which is more costly for any responsible party than addressing the linkages separately.

Section 6(b): Securing remediation without a remediation notice

6.14Before serving a remediation notice, the enforcing authority should consider section 78H(5)(a) – (d) of Part 2A. The authority should not serve a remediation notice if it is satisfied that appropriate measures are being taken by way of remediation without the serving of a remediation notice. The authority should assume that appropriate measures are being taken if: (a) it is satisfied that steps are being taken that are likely to achieve a standard of remediation equal to, or better than, what the authority would otherwise have specified in a remediation notice; and (b) the authority is satisfied that the timescale in which remediation is planned to take place is appropriate.

6.15The enforcing authority should actively consider the merits and likelihood of achieving remediation without recourse to a remediation notice before issuing a remediation notice.

Section 6(c): Standard of remediation

6.16Part 2A states that the enforcing authority may only require (or undertake itself in cases where direct enforcing authority intervention is deemed necessary) actions in a remediation notice which are reasonable with regard to the cost and the seriousness of the pollution or harm. This requirement is in addition to the broader responsibility on the enforcing authority, as a public regulator, to act in a reasonable manner.

6.17In cases where the aim of remediation is to remove or permanently to disrupt significant contaminant linkages, the enforcing authority should aim to ensure that remediation achieves a standard sufficient to ensure the land no longer poses sufficient risk to qualify as contaminated land. In using powers under Part 2A, the authority should not require a higher standard of remediation. The appropriate person or some other person might choose to carry out remediation to a higher standard (e.g. to increase the value or utility of the land, or to prepare it for redevelopment) but it should not be required by the authority.

6.18Where the authority considers that it is not practicable or reasonable to remediate land to a degree where it stops being contaminated land, the authority should consider whether it would be reasonable to require remediation to a lesser standard. The broad aim should be to manage or remediate the land in such a way that risks are minimised as far as is

reasonably practicable.

6.19In cases where the purpose of remediation is to remedy harm or pollution that has already been caused, the enforcing authority should decide what is a suitable standard of remediation having regard to the guidance on reasonableness below. In some cases it may be reasonable to require land or waters to be restored to their former state. In other cases it may not be practicable and/or reasonable to do this. In such cases the authority should consider whether it would be reasonable to require remediation to a lesser standard.

Section 6(d): Reasonableness of remediation

6.20The enforcing authority may only require remediation action in a remediation notice if it is satisfied that those actions are reasonable. In deciding what is reasonable, the authority must consider various factors, having particular regard to: (a) the practicability, effectiveness and durability of remediation; (b) the health and environmental impacts of the chosen remedial options; (c) the financial cost which is likely to be involved; and (d) the benefits of remediation with regard to the seriousness of the harm or pollution of controlled waters in question.

6.21The paragraphs below explain how the enforcing authority should consider these factors in reaching a judgement on what is reasonable. The enforcing authority should regard a remediation action as being reasonable if it is satisfied that the benefits of remediation are likely to outweigh the costs of remediation

6.22In some cases, it might be that there is more than one potential approach to remediation that would be reasonable. In such cases the authority should choose what it considers to be the “best practicable technique” having regard to the factors above. Unless there are strong grounds to consider otherwise, the best practicable technique in such circumstances is likely to be the technique that achieves the required standard of remediation to the appropriate timescale, whilst imposing the least cost on the persons who will pay for the remediation.

Practicability, effectiveness and durability of remediation

6.23The enforcing authority should ensure that any requirement it makes in regard to remediation is practicable and effective – i.e. it should be possible, within reasonable limits, for the person to undertake the required actions, and the actions should be effective in addressing the problem at hand. This applies both to the remediation scheme as a whole and the individual remediation actions of which it is comprised.

6.24In assessing the practicability of any remediation, the authority should consider, in particular: (i) technical constraints, such as whether the technical capacity and resources needed to undertake the work exist, and could reasonably be made available; (ii) site constraints, such as access to the relevant land or waters, the presence of buildings or other structures in, on or under the land; (iii) time constraints, such as whether it would be possible to carry out the remediation within the required time period; and (iv) regulatory constraints, such as whether the remediation can be carried out within relevant statutory or similar controls.

6.25The enforcing authority should consider the durability of remediation. In some cases it will be reasonable to require (or otherwise ensure) a permanent solution to the problem. In other cases this may not be possible or reasonable, in which case the authority should consider how to ensure a reasonable standard of durability. The aim should be to ensure (as far as practical and reasonable) that the scheme as a whole would continue to be effective during the time over which the significant contaminant linkage would continue to exist or recur.

6.26In considering durability, the enforcing authority should consider whether it is likely that some other future action (such as redevelopment) will resolve or control the problem. If the authority feels that such action is likely to occur within a reasonable timescale, the authority may consider whether it would be appropriate to require remediation of limited durability, pending a more durable solution later.

6.27Where a remediation scheme cannot reasonably and practicably continue to be effective during the whole of the expected duration of the problem, the enforcing authority should require the remediation to be effective for as long as can reasonably and practicably be achieved. In such circumstances, additional monitoring actions may be required.

6.28Where a remediation method requires on-going management and maintenance in order to continue to be effective (for example, the maintenance of gas venting or alarm systems), these on-going requirements should be specified in any remediation notice (or similar remediation agreement if remediation is being taken forward without such a notice) as well as any monitoring actions necessary to keep the effectiveness of the remediation under review.

Financial cost of remediation

6.29In considering the costs likely to be involved in carrying out any remediation action, the enforcing authority should take into account the direct financial costs likely to be caused by remediation. This would include:

(a) The cost of preparing for remediation to take place (e.g. feasibility studies, design of remedial actions, management costs, and the cost of relevant assessment actions).

(b) The cost of undertaking the remediation actions and making good afterwards, including any tax payable.

(c) The cost of managing the land after the main remediation action has taken place (e.g. on-going requirements to manage or maintain the remediation action, and the cost of any monitoring or assessment action).

(d) Relevant disruption costs (e.g. depreciation in the value of land or other interests, or other loss or damage, which is likely to result from the carrying out of the remediation action in question).

(e) The above costs relative to any estimated increase in the financial value and utility of the land as a result of remediation, and whether such increase in value and utility would accrue to the person(s) bearing the cost of remediation.

6.30 The identity or financial standing of any person who may be required to pay for a remediation action are not relevant to the consideration of whether the costs of a remediation action are reasonable (although they may be relevant in deciding whether the cost of remediation can be imposed on such persons).

Benefits of remediation

6.31 In considering the benefits of remediation, the enforcing authority should consider: (a) the seriousness of any harm or pollution of controlled waters and the various factors that led the land to be determined (e.g. the scale of harm or pollution that might already be occurring; or the likelihood of potential future harm or pollution and the likely impact if it were to occur); (b) the context in which the effects are occurring or might occur; and (c) any estimated increase in the financial value and utility of the land as a result of remediation, and who would benefit from such an increase. In considering such benefits it is for the authority to decide whether or not to describe such benefits (whether direct or indirect) in terms of monetary value or whether to make a qualitative consideration.

6.32 Where the significant harm is an "ecological system effect" (as defined in Table 1 in Section 4) the enforcing authority should take into account any advice received from Natural England. Where the enforcing authority is the local authority, it should take into account any advice received from the Environment Agency when it is considering the significance of any pollution of controlled waters and the benefits of any remediation.

Health and environmental impacts of remediation

6.33 In considering the costs of remediation and the seriousness of harm or pollution, the enforcing authority should also consider other costs and impacts that may, directly or indirectly, result from remediation. This should include consideration of: (a) potential health impacts of remediation; and (b) environmental impacts of remediation. In considering such impacts it is for the authority to decide whether or not to describe such costs in terms of monetary value or whether to make a qualitative consideration.

6.34 The enforcing authority's consideration of potential health impacts of remediation should include: (a) direct health effects (e.g. resulting from contaminants being mobilised during remediation, and worker safety); and (b) indirect health effects such as stress related effects that may be experienced by affected people, particularly local residents. In making this

consideration the authority should also be mindful of the health benefits of remediation and the potential health impacts of not remediating the land.

6.35With regard to environmental impacts of remediation, the enforcing authority should consider whether remediation can be carried out without disproportionate damage to the environment, and in particular: (a) without significant risk to water, air, soil and plants and animals; (b) without causing a nuisance through noise or odours; (c) without adversely affecting the countryside or places of special interest; and (d) without adversely affecting a building of special architectural or historic interest.

6.36The enforcing authority should strive to minimise impacts of remediation on health and the environment (and comply with any relevant regimes that might require this, for example the health and safety, planning and environmental permitting regimes). If the authority considers that health or environmental impacts of a particular remediation approach are likely to outweigh the likely benefits of dealing with the risk posed by the contamination, it should consider whether an alternative approach to remediation is preferable, even if it may deliver a lower standard of remediation than other techniques.

Section 6(e): Revision of remediation notices

6.37The enforcing authority should consider revising a remediation notice if it considers it is reasonable to do so. In particular this would apply to cases where new information comes to light which calls into question the reasonableness of an existing remediation notice. For example, this might be the case where information that comes to light during remediation shows that some remediation actions are no longer necessary, or that additional or alternative actions are necessary.

6.38If the enforcing authority has issued a remediation notice but the person concerned later proposes an alternative remediation scheme, the authority should consider whether to amend or revoke the remediation notice. It is for the authority to decide the degree of consideration it gives to such a proposal. If the authority decides to do this, it should be satisfied that the standard of remediation and the timescale in which it would take place are in line with the guidance in this chapter.

Section 6(f): Verification

6.39Any remedial treatment action should include appropriate verification measures. In arranging for such measures, the enforcing authority should ensure that the person responsible for verification is a suitably qualified experienced practioner.

Section 7: Liability

7.1The main provisions for the establishment of liability are set out in Part 2A, and the enforcing authority (and anyone else interested in liability) should refer directly to Part 2A. This section (as with all of this Guidance) should be read in conjunction with the 1990 Act.

7.2The statutory guidance in this section relates in particular to circumstances where two or more persons are liable to bear the responsibility for any particular thing by way of remediation. It deals with the questions of who should be excluded from liability, and how the cost of each remediation action should be apportioned between those who remain liable after any such exclusion. It is issued under section 78F(6) and (7) of the 1990 Act, which provides that:

- Section 78F(6): Where two or more persons would, apart from this subsection, be appropriate persons in relation to any particular thing which is to be done by way of remediation, the enforcing authority shall determine in accordance with guidance issued for the purpose by the Secretary of State whether any, and if so which, of them is to be treated as not being an appropriate person in relation to that thing.
- Section 78F(7): Where two or more persons are appropriate persons in relation to any particular thing which is to be done by way of remediation, they shall be liable to bear the cost of doing that thing in proportions determined by the enforcing authority in accordance with guidance issued for the purpose by the Secretary of State.

7.3In summary, this section sets out a process involving:

(a) **Initial identification of liable persons**: The authority makes an initial identification of persons who may be responsible for paying for remediation actions. In doing this, each significant contaminant linkage is treated separately (unless it is reasonable to treat more than one linkage together because the same parties are liable). The authority first looks for persons who caused or knowingly permitted each linkage in terms of section 78F(2) of Part 2A (who this Guidance refers to as “Class A” persons). If no Class A persons can be found, the authority usually seeks to identify the owners or occupiers of the land in terms of section 78F(4) of Part 2A (who this Guidance refers to as “Class B” persons), although this step does not apply to linkages that relate solely to the pollution of controlled waters. The persons responsible for each linkage make up a “liability group” for that linkage. Liability groups may consist of one or more persons, and this Guidance sometimes uses the terms “Class A liability group” or a “Class B liability group” to reflect the nature of persons in the group.

(b) **Orphan linkages**: If no Class A or Class B persons can be found liable for a linkage, that linkage becomes known as an “orphan linkage” for which there are separate procedures set out at the end of this Section.

(c) **Remediation actions**: The authority decides what remediation actions relate to which linkages. This Guidance uses the term "remediation action" to mean any individual thing which is being, or is to be, done by way of remediation. A "remediation package" is all the remediation actions which relate to a particular linkage. A "remediation scheme" is the complete set of remediation actions (relating to one or more linkages) to be carried out with respect to the relevant land or waters.

(d) **Attribution of liability to liability groups**: The authority attributes responsibility between liability groups. This Guidance uses the term "attribution" to mean the process of apportionment between liability groups.

(e) **Exclusions**: The authority considers (with regard to any liability group with two or more members) whether members of the group should be excluded, in accordance with the rules for exclusion set out in Section 7(c) with regard to Class A persons, and Section 7(e) with regard to Class B persons. This Guidance uses the term "exclusion" to mean any decision by the enforcing authority that a person is to be treated as not being an appropriate person in accordance with section 78F(6) of Part 2A.

(f) **Apportioning liability between members of liability groups**: The authority decides how apportion liability between the members of each liability group who remain after any exclusions have been made. This Guidance uses the term "apportionment" to mean a decision by the authority dividing the costs of carrying out any remediation action between two or more appropriate persons in accordance with section 78F(7) of Part 2A.

Section 7(a): Procedure for determining liabilities

7.4For some land, the process of determining liabilities will consist simply of identifying either a single person (either an individual or a corporation such as a limited company) who has caused or knowingly permitted the presence of a single significant contaminant, or the owner of the land. The history of other land may be more complex. A succession of different occupiers or of different industries, or a variety of substances may all have contributed to the problems which have made the land "contaminated land" as defined for the purposes of Part 2A. Numerous separate remediation actions may be required, which may not correlate neatly with those who are to bear responsibility for the costs. The degree of responsibility for the state of the land may vary widely. Determining liability for the costs of each remediation action can be correspondingly complex.

Step 1: Identifying potential appropriate persons and liability groups

7.5As part of the process of determining that the land is "contaminated land" (see Chapters A and B), the enforcing authority will have identified at least one significant contaminant

linkage (contaminant, pathway and receptor), resulting from the presence of at least one contaminant.

7.6Where there is a single significant contaminant linkage:

(a) The enforcing authority should identify all persons who would be appropriate persons to pay for any remediation action relevant to the contaminant which forms part of the significant contaminant linkage. These persons constitute the "liability group" for that significant contaminant linkage.

(b) To achieve this, the enforcing authority should make reasonable enquiries to find all those who have caused or knowingly permitted the contaminant in question to be in, on or under the land. Any such persons constitute a "Class A liability group" for the significant contaminant linkage.

(c) If no such Class A persons can be found for any significant contaminant, the enforcing authority should consider whether the significant contaminant linkage of which it forms part relates solely to the significant pollution of controlled waters (rather than to any significant harm to human or relevant environmental receptors). If this is the case, there will be no liability group for that significant contaminant linkage, and it should be treated as an "orphan linkage" (see paragraphs 7.92 – 7.98 below).

(d) In any other case where no Class A persons can be found for a significant contaminant, the enforcing authority should identify all of the current owners or occupiers of the contaminated land in question. These persons then constitute a "Class B liability group" for the significant contaminant linkage.

(e) If the enforcing authority cannot find any Class A persons or any Class B persons in respect of a significant contaminant linkage, there will be no liability group for that linkage and it should be treated as an "orphan linkage" (see paragraphs 7.92 – 7.98 below).

7.7Where there are two or more significant contaminant linkages, the enforcing authority should consider each significant contaminant linkage in turn, carrying out the steps set out in paragraph 7.6 above, to identify the liability group (if one exists) for each of the linkages.

7.8Having identified one or more liability groups, the enforcing authority should consider whether any of the members of those groups are exempted from liability under the provisions in Part 2A. This could apply where:

(a) A person who would otherwise be a Class A person is exempted from liability arising with respect to water pollution from an abandoned mine (see section 78J(3) of Part 2A).

(b) A Class B person is exempted from liability arising from the escape of a contaminant from one piece of land to other land (see section 78K of Part 2A).

(c) A person is exempted from liability by virtue of his being a person "acting in a relevant capacity" (such as acting as an insolvency practitioner) as defined in section 78X(4) o f Part 2A.

7.9If all of the members of any liability group benefit from one or more of these exemptions, the enforcing authority should treat the significant contaminant linkage in question as an orphan linkage (see paragraphs 7.92 – 7.98 below).

7.10Persons may be members of more than one liability group (e.g. if they caused or knowingly permitted the presence of more than one significant contaminant).

7.11Where the membership of all of the liability groups is the same, there may be opportunities for the enforcing authority to abbreviate the remaining stages of this procedure. However, the tests for exclusion and apportionment may produce different results for different significant contaminant linkages, and so the enforcing authority should exercise caution before trying to simplify the procedure in any case.

Step 2: Characterising remediation actions

7.12Each remediation action will be carried out to achieve a particular purpose with respect to one or more defined significant contaminant linkages. Where there is a single significant contaminant linkage on the land in question, all the remediation actions will be referable to that linkage, and there is no need to consider how the different actions relate to different linkages. This step and Step 3 of the procedure therefore do not need to be carried out in where there is only a single significant contaminant linkage. However, where there are two or more significant contaminant linkages on the land in question, the enforcing authority should establish whether each remediation action is: (a) referable solely to the significant contaminant in a single significant contaminant linkage (a “single-linkage action”); or (b) referable to the significant contaminant in more than one significant contaminant linkage (a “shared action”).

7.13Where a remediation action is a shared action, there are two possible relationships between it and the significant contaminant linkages to which it is referable. The enforcing authority should establish whether the shared action is:

(a) a “common action” – i.e. an action which addresses together all of the significant contaminant linkages to which it is referable, and which would have been part of the remediation package for each of those linkages if each of them had been addressed separately.

(b) a “collective action” – i.e. an action which addresses together all of the significant contaminant linkages to which it is referable, but which would not have been part of the remediation package for every one of those linkages if each of them had been addressed separately, because: (i) the action would not have been appropriate in that form for one or more of the linkages (since some different solution would have been more appropriate); (ii) the action would not have been needed to the same extent for one or more of the linkages (since a less far-reaching version of that type of action

would have sufficed); or (iii) the action represents a more economic way of addressing the linkages together which would not be possible if they were addressed separately.

7.14A collective action replaces actions that would have been appropriate for the individual significant contaminant linkages if they had been addressed separately, as it achieves the purposes which those other actions would have achieved.

Step 3: Attributing responsibility between liability groups

7.15This stage of the procedure does not apply in simpler cases. Where there is only a single significant contaminant linkage, the liability group for that linkage bears the full cost of carrying out any remediation action. Where the linkage is an orphan linkage, the enforcing authority has the power to carry out the remediation action itself, at its own cost.

7.16Similarly, for any single-linkage action, the liability group (i.e. the group that remains after the exclusions in paragraph 7.8 have been applied) for the significant contaminant linkage in question bears the full cost of carrying out that action.

7.17However, the enforcing authority should apply the guidance in Section 7(g) below with respect to each shared action, in order to attribute to each of the different liability groups their share of responsibility for that action.

7.18After the guidance in Section 7(g) has been applied to all shared actions, it may be the case that a Class B liability group which has been identified does not have to bear the costs for any remediation actions. Where this is the case, the enforcing authority does not need to apply any of the rest of the guidance in this Chapter to that liability group.

Step 4: Excluding members of a liability group

7.19The enforcing authority should now consider, for each liability group which has two or more members, whether any of those members should be excluded from liability: (a) for each Class A liability group with two or more members, the enforcing authority should apply the guidance on exclusion in Section 7(c); and (b) for each Class B liability group with two or more members, the enforcing authority should apply the guidance on exclusion in Section 7(e).

Step 5: Apportioning liability between members of a liability group

7.20The enforcing authority should now determine how any costs attributed to each liability group should be apportioned between the members of that group who remain after any exclusions have been made.

7.21For any liability group (after the exclusions in paragraph 7.8 have been applied) which has only a single remaining member, that person bears all of the costs falling to that liability group (i.e. both the cost of any single-linkage action referable to the significant contaminant linkage in question; and the share of the cost of any shared action attributed to the group as a result of the attribution process set out in Section 7(g)).

7.22For any liability group which has two or more remaining members, the enforcing authority should apply the relevant guidance on apportionment between those members. Each of the remaining members of the group will then bear the proportion determined under that guidance of the total costs falling to the group, that is both the cost of any single-linkage action referable to the significant contaminant linkage in question, and the share of the cost of any shared action attributed to the group as a result of the attribution process set out in Part 9. The relevant apportionment guidance is: (a) for any Class A liability group, the guidance set out in Section 7(d); and (b) for any Class B liability group, the guidance set out in Section 7(f).

Section 7(b): General considerations relating to exclusion, apportionment and attribution procedures

7.23This sub-section sets out general guidance about the application of the exclusion, apportionment and attribution procedures set out in the rest of this Chapter. It is issued under both section 78F(6) and section 78F(7).

7.24The enforcing authority should ensure that any person who might benefit from an exclusion, apportionment or attribution is aware of the guidance in this Chapter, so that they may make appropriate representations to the enforcing authority.

7.25The enforcing authority should apply the tests for exclusion (in Section 7(c) and (e)) with respect to the members of each liability group. If a person, who would otherwise be an appropriate person to bear responsibility for a particular remediation action, has been excluded from the liability groups for all of the significant contaminant linkages to which that action is referable, he should be treated as not being an appropriate person in relation to that remediation action.

Financial circumstances

7.26The financial circumstances of those concerned should have no bearing on the application of the procedures for exclusion, apportionment and attribution in this Chapter, except where the circumstances in paragraph 7.74 below apply (the financial circumstances of those concerned are taken into account in the separate consideration under section 78P(2) on hardship and cost recovery). In particular, it should be irrelevant in the context of decisions on exclusion and apportionment: (a) whether those concerned would benefit from any limitation on the recovery of costs under the provisions on hardship and cost recovery in

section 78P(2); or (b) whether those concerned would benefit from any insurance or other means of transferring their responsibilities to another person.

Information and Decisions

7.27The enforcing authority should make reasonable endeavours to consult those who may be affected by any exclusion, apportionment or attribution. In all cases, however, it should seek to obtain only such information as it is reasonable to seek, having regard to: (a) how the information might be obtained; (b) the cost of obtaining the information for all parties involved; and (c) the potential significance of the information for any decision.

7.28The statutory guidance in this Section should be applied in the light of the circumstances as they appear to the enforcing authority on the basis of the evidence available to it at that time. Where the enforcing authority is presented with conflicting evidence, it should make decisions with regard to the balance of probabilities. The enforcing authority should take into account the information that it has acquired in the light of the guidance in the previous paragraph, but the burden of providing the authority with any further information needed to establish an exclusion or to influence an apportionment or attribution should rest on any person seeking such a benefit. The enforcing authority should consider any relevant information which has been provided by those potentially liable under these provisions. Where any such person provides such information, any other person who may be affected by an exclusion, apportionment or attribution based on that information should be given a reasonable opportunity to comment on that information before the determination is made.

Agreements on Liabilities

7.29In any case where:

(a) two or more persons are appropriate persons and thus responsible for all or part of the costs of a remediation action;

(b) they agree, or have agreed, the basis on which they wish to divide that responsibility; and

(c) a copy of the agreement is provided to the enforcing authority and none of the parties to the agreement informs the authority that it challenges the application of the agreement;

the enforcing authority should generally make such determinations on exclusion, apportionment and attribution as are needed to give effect to this agreement, and should not apply the remainder of this guidance for exclusion, apportionment or attribution between the parties to the agreement. However, the enforcing authority should apply the guidance to determine any exclusions, apportionments or attributions between any or all of those parties and any other appropriate persons who are not parties to the agreement.

7.30However, where giving effect to such an agreement would increase the share of the costs theoretically to be borne by a person who would benefit from a limitation on recovery of remediation costs under the provision on hardship in section 78P(2)(a) or under the guidance on cost recovery issued under section 78P(2)(b), the enforcing authority should disregard the agreement.

Section 7(c): Exclusion of Members of a Class A Liability Group

7.31This sub-section of the Guidance sets out the tests for determining whether to exclude from liability a person who would otherwise be a Class A person. The tests are intended to establish whether, in relation to other members of the liability group, it is fair that relevant persons should bear any part of that responsibility.

7.32The exclusion tests below are subject to the following overriding guidance:

(a) the exclusions that the enforcing authority should make are solely in respect of the significant contaminant linkage giving rise to the liability of the liability group in question; an exclusion in respect of one significant contaminant linkage has no necessary implication in respect to any other such linkage, and a person who has been excluded with respect to one linkage may still be liable to meet all or part of the cost of carrying out a remediation action by reason of his membership of another liability group;

(b) the tests should be applied in the sequence in which they are set out; and

(c) if the result of applying a test would be to exclude all of the members of the liability group who remain after any exclusions resulting from previous tests, that further test should not be applied, and consequently the related exclusions should not be made.

7.33The effect of any exclusion made under Test 1, or Tests 4 to 6 below should be to remove completely any liability that would otherwise have fallen on the person benefiting from the exclusion. Where the enforcing authority makes any exclusion under one of these tests, it should therefore apply any subsequent exclusion tests, and make any apportionment within the liability group, in the same way as it would have done if the excluded person had never been a member of the liability group.

7.34The effect of any exclusion made under Test 2 (Payments made for remediation) or Test 3 (Sold with information), on the other hand, is intended to be that the person who received the payment or bought the land, as the case may be, (the “payee or buyer”) should bear the liability of the person excluded (the “payer or seller”) in addition to any liability which the person is to bear in respect of their own actions or omissions. To achieve this, the enforcing authority should:

(a) complete the application of the other exclusion tests and then apportion liability between the members of the liability group, as if the payer or seller were not excluded as a result of Test 2 or Test 3; and

(b) then apportion any liability of the payer or seller, calculated on this hypothetical basis, to the payee or buyer, in addition to the liability (if any) that the payee or buyer has in respect of his own actions or omissions; this should be done even if the payee or buyer would otherwise have been excluded from the liability group by one of the other exclusion tests.

Related Companies

7.35Before applying any of the exclusion tests, the enforcing authority should establish whether two or more of the members of the liability group are "related companies".

7.36Where the question to be considered in any exclusion test concerns the relationship between, or the relative positions of, two or more related companies, the enforcing authority should not apply the test so as to exclude any of the related companies. For example, in Test 3 (Sold with information), if the "seller" and the "buyer" are related companies, the "seller" would not be excluded by virtue of that Test.

7.37For these purposes, "related companies" are those which are, or were at the "relevant date", members of a group of companies consisting of a "holding company" and its "subsidiaries". The "relevant date" is that on which the enforcing authority first served on anyone a notice under section 78B(3) identifying the land as contaminated land, and the terms "holding company" and "subsidiaries" have the same meaning as in Section 1159 of the Companies Act 2006.

Exclusion tests for Class A persons

Test 1: Excluded activities

7.38The purpose of Test 1 is to exclude persons who have been identified as members of a Class A liability group solely on grounds of having carried out certain activities. The activities are ones which, in the Government's view, carry such limited responsibility (if any) that exclusion would be justified even where the activity is held to amount to "causing or knowingly permitting" under Part 2A. This is not intended to imply that the carrying out of such activities necessarily amounts to "causing or knowingly permitting".

7.39In applying Test 1, the enforcing authority should exclude any appropriate person who is a member of a liability group solely by reason of one or more of the activities listed in (a) to (k) below.

(a) Providing (or withholding) financial assistance to another person (whether or not that other person is a member of the liability group), in the form of any one or more of the following: (i) making a grant; (ii) making a loan or providing any other form of credit, including instalment credit, leasing arrangements and mortgages; (iii) guaranteeing the performance of a person's obligations; (iv) indemnifying a person in respect of any loss, liability or damage; (v) investing in

the undertaking of a body corporate by acquiring share capital or loan capital of that body without thereby acquiring such control as a "holding company" has over a "subsidiary" as defined in section 736 of the Companies Act 1985; or (iv) providing a person with any other financial benefit (including the remission in whole or in part of any financial liability or obligation).

(b) Underwriting an insurance policy under which another person was insured in respect of any occurrence, condition or omission by reason of which that other person has been held to have caused or knowingly permitted the significant contaminant to be in, on or under the land in question. For the purposes of this sub-paragraph: (i) underwriting an insurance policy is to be taken to include imposing any conditions on the person insured, for example relating to the manner in which he carries out the insured activity; and (ii) it is irrelevant whether or not the insured person can now be found.

(c) As a provider of financial assistance or as an underwriter, carrying out any action for the purpose of deciding whether or not to provide such financial assistance or underwrite such an insurance policy as is mentioned above. This sub-paragraph does not apply to the carrying out of any intrusive investigation in respect of the land in question for the purpose of making that decision where: (i) the carrying out of that investigation is itself a cause of the existence, nature or continuance of the significant contaminant linkage in question; and (ii) the person who applied for the financial assistance or insurance is not a member of the liability group.

(d) Consigning, as waste, to another person the substance which is now a significant contaminant, under a contract under which that other person knowingly took over responsibility for its proper disposal or other management on land not under the control of the person seeking to be excluded from liability. For the purpose of this sub-paragraph, it is irrelevant whether or not the person to whom the waste was consigned can now be found.

(e) Creating at any time a tenancy over the land in question in favour of another person who has subsequently caused or knowingly permitted the presence of the significant contaminant linkage in question (whether or not the tenant can now be found).

(f) As owner of the land in question, licensing at any time its occupation by another person who has subsequently caused or knowingly permitted the presence of the significant contaminant in question (whether or not the licensee can now be found). This test does not apply in a case where the person granting the licence operated the land as a site for the disposal or storage of waste at the time of the grant of the licence.

(g) Issuing any statutory permission, licence or consent required for any action or omission by reason of which some other person appears to the enforcing authority to have caused or knowingly permitted the presence of the significant contaminant in question (whether or not that other person can now be found). This test does not apply in the case of statutory undertakers granting permission for their contractors to carry out works.

(h) Taking, or not taking, any statutory enforcement action: (i) with respect to the land, or (ii) against some other person who appears to the enforcing authority

to have caused or knowingly permitted the presence of the significant contaminant in question, whether or not that other person can now be found.

(i) Providing legal, financial, engineering, scientific or technical advice to (or design, contract management or works management services for) another person (the "client"), whether or not that other person can now be found: (i) in relation to an action or omission (or a series of actions and/or omissions) by reason of which the client has been held to have caused or knowingly permitted the presence of the significant contaminant; (ii) for the purpose of assessing the condition of the land, for example whether it might be contaminated; or (iii) for the purpose of establishing what might be done to the land by way of remediation.

(j) As a person providing advice or services as described in sub-paragraph (i) above carrying out any intrusive investigation in respect of the land in question, except where: (i) the investigation is itself a cause of the existence, nature or continuance of the significant contaminant linkage in question; and (ii) the client is not a member of the liability group.

(k) Performing any contract by providing a service (whether the contract is a contract of service (employment), or a contract for services) or by supplying goods, where the contract is made with another person who is also a member of the liability group in question. For the purposes of this sub-paragraph the person providing the service or supplying the goods is referred to as the "contractor" and the other party as the "employer". This sub-paragraph applies to subcontracts where either the ultimate employer or an intermediate contractor is a member of the liability group. This sub-paragraph does not apply where: (i) the activity under the contract is of a kind referred to in a previous sub-paragraph of this paragraph; (ii) the action or omission by the contractor by virtue of which he has been identified as an appropriate person was not in accordance with the terms of the contract; or (iii) where:

- the employer is a body corporate;
- the contractor was a director, manager, secretary or other similar officer of the body corporate, or a person purporting to act in any such capacity, at the time when the contract was performed; and
- the action or omissions by virtue of which the employer has been identified as an appropriate person were carried out or made with the consent or connivance of the contractor, or were attributable to any neglect on his part.

Test 2: Payments for remediation

7.40The purpose of this test is to exclude from liability those who have already, in effect, met their responsibilities by making certain kinds of payment to some other member of the liability group, which would have been sufficient to pay for adequate remediation.

7.41In applying this test, the enforcing authority should consider whether all the following circumstances exist: (a) one of the members of the liability group has made a payment to

another member of that liability group for the purpose of carrying out particular remediation on the land in question; only payments of the kinds set out in paragraph 7.42 immediately below are to be taken into account; (b) that payment would have been sufficient at the date when it was made to pay for the remediation in question; (c) if the remediation for which the payment was intended had been carried out effectively, the land in question would not now be in such a condition that it has been identified as contaminated land by reason of the significant contaminant linkage in question; and (d) the remediation in question was not carried out or was not carried out effectively.

7.42Payments of the following kinds alone should be taken into account: (a) a payment made voluntarily, or to meet a contractual obligation, in response to a claim for the cost of the particular remediation; (b) a payment made in the course of a civil legal action, or arbitration, mediation or dispute resolution procedure, covering the cost of the particular remediation, whether paid as part of an out-of-court settlement, or paid under the terms of a court order; or (c) a payment as part of a contract (including a group of interlinked contracts) for the transfer of ownership of the land in question which is either specifically provided for in the contract to meet the cost of carrying out the particular remediation or which consists of a reduction in the contract price explicitly stated in the contract to be for that purpose.

7.43For the purposes of this test, payments include consideration of any form.

7.44However, no payment should be taken into account where the person making the payment retained any control after the date of the payment over the condition of the land in question (that is, over whether or not the substances by reason of which the land is regarded as contaminated land were permitted to be in, on or under the land). For this purpose, neither of the following should be regarded as retaining control over the condition of the land: (a) holding contractual rights to ensure the proper carrying out of the remediation for which the payment was made; nor (b) holding an interest or right of any of the following kinds: (i) easements for the benefit of other land, where the contaminated land in question is the servient tenement, and statutory rights of an equivalent nature; (ii) rights of statutory undertakers to carry out works or install equipment; (iii) reversions upon expiry or termination of a long lease; or (iv) the benefit of restrictive covenants or equivalent statutory agreements.

7.45If all of the circumstances set out in paragraph 7.41 above apply, the enforcing authority should exclude the person who made the payment in respect of the remediation action in question. (See paragraph 7.34 above for guidance on how this exclusion should be made.)

Test 3: Sold with information

7.46The purpose of this test is to exclude from liability those who, although they have caused or knowingly permitted the presence of a significant contaminant in, on or under some land, have disposed of that land in circumstances where it is reasonable that another

member of the liability group, who has acquired the land from them, should bear the liability for remediation of the land.

7.47In applying this test, the enforcing authority should consider whether all the following circumstances exist:

(a) one of the members of the liability group (the “seller”) has sold the land in question to a person who is also a member of the liability group (the “buyer”);

(b) the sale took place at arms’ length (that is, on terms which could be expected in a sale on the open market between a willing seller and a willing buyer);

(c) before the sale became binding, the buyer had information that would reasonably allow that particular person to be aware of the presence on the land of the contaminant identified in the significant contaminant linkage in question, and the broad measure of that presence; and the seller did nothing material to misrepresent the implications of that presence; and

(d) after the date of the sale, the seller did not retain any interest in the land in question or any rights to occupy or use that land.

7.48In determining whether these circumstances exist:

(a) a sale of land should be regarded as being either the transfer of the freehold or the grant or assignment of a long lease; for this purpose, a “long lease” means a lease (or sub-lease) granted for a period of more than 21 years under which the lessee satisfies the definition of “owner” set out in section 78A(9);

(b) the question of whether persons are members of a liability group should be decided on the circumstances as they exist at the time of the determination (and not as they might have been at the time of the sale of the land);

(c) where there is a group of transactions or a wider agreement (such as the sale of a company or business) including a sale of land, that sale of land should be taken to have been at arms' length where the person seeking to be excluded can show that the net effect of the group of transactions or the agreement as a whole was a sale at arms' length;

(d) in transactions since the beginning of 1990 where the buyer is a large commercial organisation or public body, permission from the seller for the buyer to carry out his own investigations of the condition of the land should normally be taken as sufficient indication that the buyer had the information referred to in paragraph 7.47(c) above; and

(e) for the purposes of paragraph 7.47(d) above, the following rights should be disregarded in deciding whether the seller has retained an interest in the contaminated land in question or rights to occupy or use it: (i) easements for the benefit of other land, where the contaminated land in question is the servient tenement, and statutory rights of an equivalent nature, (ii) rights of statutory undertakers to carry out works or install equipment, (iii) reversions upon expiry or termination of a long lease, and (iv) the benefit of restrictive covenants or equivalent statutory agreements.

7.49If all of the circumstances in paragraph 7.47 above apply, the enforcing authority should exclude the seller. (See paragraph 7.34 above for guidance on how this exclusion should be made.)

7.50This test does not imply that the receipt by the buyer of the information referred to in paragraph 7.47(c) above necessarily means that the buyer has "caused or knowingly permitted" the presence of the significant contaminant in, on or under the land.

Test 4: Changes to substances

7.51The purpose of this test is to exclude from liability those who are members of a liability group solely because they caused or knowingly permitted the presence in, on or under the land of a substance which has only led to the creation of a significant contaminant linkage because of its interaction with another substance which was later introduced to the land by another person.

7.52In applying this test, the enforcing authority should consider whether all the following circumstances exist:

(a) The substance forming part of the significant contaminant linkage in question is present, or has become a significant contaminant, only as the result of a chemical reaction, biological process, radioactive decay or other change (the "intervening change") involving: (i) both a substance (the "earlier substance") which would not have formed part of the significant contaminant linkage if the intervening change had not occurred; and (ii) one or more other substances (the "later substances").

(b) The intervening change would not have occurred in the absence of the later substances;

(c) A person (the "first person") is a member of the liability group because he/she caused or knowingly permitted the presence in, on or under the land of the earlier substance, but he/she did not cause or knowingly permit the presence of any of the later substances.

(d) One or more other persons are members of the liability group because they caused or knowingly permitted the later substances to be in, on or under the land.

(e) Before the date when the later substances started to be introduced in, on or under the land, the first person: (i) could not reasonably have foreseen that the later substances would be introduced onto the land; (ii) could not reasonably have foreseen that, if they were, the intervening change would be likely to happen; or (iii) took what, at that date, were reasonable precautions to prevent the introduction of the later substances or the occurrence of the intervening change, even though those precautions have, in the event, proved to be inadequate.

(f) After that date, the first person did not: (i) cause or knowingly permit any more of the earlier substance to be in, on or under the land in question; (ii) do anything which has contributed to the conditions that brought about the intervening change; or (iii) fail to do something which he could reasonably have been expected to do to prevent the intervening change happening.

7.53If all of the circumstances in paragraph 7.52 above apply, the enforcing authority should exclude the first person (or persons, if more than one member of the liability group meets this description).

Test 5: Escaped substances

7.54The purpose of this test is to exclude from liability those who would otherwise be liable for the remediation of contaminated land which has become contaminated as a result of the escape of substances from other land, where it can be shown that another member of the liability group was actually responsible for that escape.

7.55In applying this test, the enforcing authority should consider whether all the following circumstances exist:

(a) a significant contaminant is present in, on or under the contaminated land in question wholly or partly as a result of its escape from other land;

(b) a member of the liability group for the significant contaminant linkage of which that contaminant forms part: (i) caused or knowingly permitted the contaminant to be present in, on or under that other land (that is, the person is a member of that liability group by reason of section 78K(1)), and (ii) is a member of that liability group solely for that reason; and

(c) one or more other members of that liability group caused or knowingly permitted the significant contaminant to escape from that other land and its escape would not have happened but for their actions or omissions.

7.56 If all of the circumstances in paragraph 7.55 above apply, the enforcing authority should exclude any person meeting the description in paragraph 7.55(b) above.

Test 6: Introduction of pathways or receptors

7.57 The purpose of this test is to exclude from liability those who would otherwise be liable solely because of the subsequent introduction by others of the relevant pathways or receptors (as defined in Section 3) in the significant contaminant linkage.

7.58 In applying this test, the enforcing authority should consider whether all the following circumstances exist:

(a) One or more members of the liability group have carried out a relevant action, and/or made a relevant omission ("the later actions"), either: (i) as part of the series of actions and/or omissions which amount to their having caused or knowingly permitted the presence of the contaminant in a significant contaminant linkage; or (ii) in addition to that series of actions and/or omissions.

(b) The effect of the later actions has been to introduce the pathway or the receptor which form part of the significant contaminant linkage in question.

(c) If those later actions had not been carried out or made, the significant contaminant linkage would either not have existed, or would not have been a significant contaminant linkage, because of the absence of a pathway or of a receptor.

(d) A person is a member of the liability group in question solely by reason of having carried out other actions or making other omissions ("the earlier actions") which were completed before any of the later actions were carried out or made.

7.59 For the purpose of this test:

(a) A “relevant action” means: (i) the carrying out at any time of building, engineering, mining or other operations in, on, over or under the land in question; and/or (ii) the making of any material change in the use of the land in question for which a specific application for planning permission was required to be made (as opposed to permission being granted, or deemed to be granted, by general legislation or by virtue of a development order, the adoption of a simplified planning zone or the designation of an enterprise zone) at the time when the change in use was made.

(b) A “relevant omission” means: (i) in the course of a relevant action, failing to take a step which would have ensured that a significant contaminant linkage was not brought into existence as a result of that action, and/or (ii) unreasonably failing to maintain or operate a system installed for the purpose of reducing or managing the risk associated with the presence on the land in question of the significant contaminant in the significant contaminant linkage in question.

7.60This test applies only with respect to developments on, or changes in the use of, the contaminated land itself. It does not apply where the relevant acts or omissions take place on other land, even if they have the effect of introducing pathways or receptors.

7.61If all of the circumstances in paragraph 7.58 above apply, the enforcing authority should exclude any person meeting the description at paragraph 7.58(d) above.

Section 7(d): Apportionment between members of a single Class A liability group

7.62The statutory guidance in this Part is issued under section 78F(7) and sets out the principles on which liability should be apportioned within each Class A liability group as it stands after any members have been excluded from liability with respect to the relevant significant contaminant linkage as a result of the application of the exclusion tests in Section 7(c).

7.63The history and circumstances of different areas of contaminated land, and the nature of the responsibility of each of the members of any Class A liability group for a significant contaminant linkage, are likely to vary greatly. It is therefore not possible to prescribe detailed rules for the apportionment of liability between those members which would be fair and appropriate in all cases.

General Principles

7.64In apportioning costs between the members of a Class A liability group who remain after any exclusions have been made, the enforcing authority should follow the general principle 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 contaminant linkage in question. In applying this principle, the enforcing authority should follow, where appropriate, the specific approaches set out in paragraphs 7.66-7.75 below.

7.65If appropriate information is not available to enable the enforcing authority to make such an assessment of relative responsibility (and, following the guidance at paragraph 7.27 above, such information cannot reasonably be obtained) the authority should apportion liability in equal shares among the remaining members of the liability group for any significant contaminant linkage, subject to the specific guidance in paragraph 7.74 below.

Specific Approaches

Partial applicability of an exclusion test

7.66If, for any member of the liability group, the circumstances set out in any of the exclusion tests in Section 7(c) above apply to some extent, but not sufficiently to mean that the an exclusion should be made, the enforcing authority should assess that person's degree of responsibility as being reduced to the extent which is appropriate in the light of all the circumstances and the purpose of the test in question. For example, in considering Test 2, a payment may have been made which was sufficient to pay for only half of the necessary remediation at that time – the authority could therefore reduce the payer's responsibility by half.

Entry of a substance vs. its continued presence

7.67In assessing the relative responsibility of a person who has caused or knowingly permitted the entry of a significant contaminant into, onto or under land (the "first person") and another person who has knowingly permitted the continued presence of that same contaminant in, on or under that land (the "second person"), the enforcing authority should consider the extent to which the second person had the means and a reasonable opportunity to deal with the presence of the contaminant in question or to reduce the seriousness of the implications of that presence. The authority should then assess the relative responsibilities on the following basis: (a) if the second person had the necessary means and opportunity, they should bear the same responsibility as the first person; (b) if the second person did not have the means and opportunity, their responsibility relative to that of the first person should be substantially reduced; and (c) if the second person had some, but insufficient, means or opportunity, their responsibility relative to that of the first person should be reduced to an appropriate extent.

Persons who have caused or knowingly permitted the entry of a significant contaminant

7.68Where the enforcing authority is determining the relative responsibilities of members of the liability group who have caused or knowingly permitted the entry of the significant

contaminant into, onto or under the land, it should follow the approach set out in paragraphs 7.69 to 7.72 below.

7.69If the nature of the remediation action points clearly to different members of the liability group being responsible for particular circumstances at which the action is aimed, the enforcing authority should apportion responsibility in accordance with that indication. In particular, where different persons were in control of different areas of the land in question, and there is no interrelationship between those areas, the enforcing authority should regard the persons in control of the different areas as being separately responsible for the events which make necessary the remediation actions or parts of actions referable to those areas of land.

7.70If the circumstances in paragraph 7.69 above do not apply, but the quantity of the significant contaminant present is a major influence on the cost of remediation, the enforcing authority should regard the relative amounts of that contaminant which are referable to the different persons as an appropriate basis for apportioning responsibility.

7.71If it is deciding the relative quantities of contaminant which are referable to different persons, the enforcing authority should consider first whether there is direct evidence of the relative quantities referable to each person. If there is such evidence, it should be used. In the absence of direct evidence, the enforcing authority should see whether an appropriate surrogate measure is available. Such surrogate measures can include: (a) the relative periods during which the different persons carried out broadly equivalent operations on the land; (b) the relative scale of such operations carried out on the land by the different persons (a measure of such scale may be the quantities of a product that were produced); (c) the relative areas of land on which different persons carried out their operations; and (d) combinations of the foregoing measures.

7.72In cases where the circumstances in neither paragraph 7.69 nor 7.70 above apply, the enforcing authority should consider the nature of the activities carried out by the appropriate persons concerned from which the significant contaminant arose. Where these activities were broadly equivalent, the enforcing authority should apportion responsibility in proportion to the periods of time over which the different persons were in control of those activities. It would be appropriate to adjust this apportionment to reflect circumstances where the persons concerned carried out activities which were not broadly equivalent, for example where they were on a different scale.

Persons who have knowingly permitted the continued presence of a contaminant

7.73Where the enforcing authority is determining the relative responsibilities of members of the liability group who have knowingly permitted the continued presence, over a period of time, of a significant contaminant in, on or under land, it should apportion that responsibility in proportion to: (a) the length of time during which each person controlled the land; (b) the area of land which each person controlled; (c) the extent to which each person had the

means and a reasonable opportunity to deal with the presence of the contaminant in question or to reduce the seriousness of the implications of that presence; or (d) a combination of the foregoing factors.

Companies and officers

7.74If, following the application of the exclusion tests (and in particular the specific guidance at paragraph 7.39(k)(iii)) both a company and one or more of its relevant officers remain as members of the liability group, the enforcing authority should apportion liability on the following bases:

(a) the enforcing authority should treat the company and its relevant officers as a single unit for the purposes of: (i) applying the general principle in paragraph 7.64 above (i.e. it should consider the responsibilities of the company and its relevant officers as a whole, in comparison with the responsibilities of other members of the liability group), and (ii) making any apportionment required by paragraph 7.65 above; and

(b) having determined the share of liability falling to the company and its relevant officers together, the enforcing authority should apportion responsibility between the company and its relevant officers on a basis which takes into account the degree of personal responsibility of those officers, and the relative levels of resources which may be available to them and to the company to meet the liability.

7.75For the purposes of paragraph 7.74 immediately above, the “relevant officers” of a company are any director, manager, secretary or other similar officer of the company, or any other person purporting to act in any such capacity.

Section 7(e): Exclusion of members of a Class B liability group

7.76The guidance in this sub-section is issued under section 78F(6) and sets out the test which should be applied in determining whether to exclude from liability a person who would otherwise be a Class B person (that is, a person liable to meet remediation costs solely by reason of ownership or occupation of the land in question). The purpose of the test is to exclude from liability those who do not have an interest in the capital value of the land in question.

7.77The test applies where two or more persons have been identified as Class B persons for a significant contaminant linkage.

7.78In such circumstances, the enforcing authority should exclude any Class B person who either:

(a) occupies the land under a licence, or other agreement, of a kind which has no marketable value or which he is not legally able to assign or transfer to another person

(for these purposes the actual marketable value, or the fact that a particular licence or agreement may not actually attract a buyer in the market, are irrelevant); or

(b) is liable to pay a rent which is equivalent to the rack rent for such of the land in question as he occupies and holds no beneficial interest in that land other than any tenancy to which such rent relates; where the rent is subject to periodic review, the rent should be considered to be equivalent to the rack rent if, at the latest review, it was set at the full market rent at that date.

7.79However, the test should not be applied, and consequently no exclusion should be made, if it would result in the exclusion of all of the members of the liability group.

Section 7(f): Apportionment Between the Members of a Single Class B Liability Group

7.80The statutory guidance in this Part is issued under section 78F(7) and sets out the principles on which liability should be apportioned within each Class B liability group as it stands after any members have been excluded from liability with respect to the relevant significant contaminant linkage as a result of the application of the exclusion test in Section 7(e) above.

7.81Where the whole or part of a remediation action for which a Class B liability group is responsible clearly relates to a particular area within the land to which the significant contaminant linkage as a whole relates, liability for the whole, or the relevant part, of that action should be apportioned amongst those members of the liability group who own or occupy that particular area of land.

7.82Where those circumstances do not apply, the enforcing authority should apportion liability for the remediation actions necessary for the significant contaminant linkage in question amongst all of the members of the liability group.

7.83Where the enforcing authority is apportioning liability amongst some or all of the members of a Class B liability group, it should do so in proportion to the capital values of the interests in the land in question, which include those of any buildings or structures on the land:

(a) where different members of the liability group own or occupy different areas of land, each such member should bear responsibility in the proportion that the capital value of their area of land bears to the aggregate of the capital values of all the areas of land; and

(b) where different members of the liability group have an interest in the same area of land, each such member should bear responsibility in the proportion which the capital value of their interest bears to the aggregate of the capital values of all those interests; and

(c) where both the ownership or occupation of different areas of land and the holding of different interests come into the question, the overall liability should first be apportioned between the different areas of land and then between the interests within each of those areas of land, in each case in accordance with the last two sub-paragraphs.

7.84 The capital value used for these purposes should be that estimated by the enforcing authority, on the basis of the available information, disregarding the existence of any contamination. The value should be estimated in relation to the date immediately before the enforcing authority first served a notice under section 78B(3) in relation to that land. Where the land in question is reasonably uniform in nature and amenity and is divided among a number of owner-occupiers, it can be an acceptable approximation of this basis of apportionment to make the apportionment on the basis of the area occupied by each.

7.85 Where part of the land in question is land for which no owner or occupier can be found, the enforcing authority should deduct the share of costs attributable to that land on the basis of the respective capital values of that land and the other land in question before making a determination of liability.

7.86 If appropriate information is not available to enable the enforcing authority to make an assessment of relative capital values (and, following the guidance at paragraph 7.27 above, such information cannot reasonably be obtained), the enforcing authority should apportion liability in equal shares among all the members of the liability group.

Section 7(g): Attribution of responsibility between liability groups

7.87 The statutory guidance in this sub-section is issued under section 78F(7) and applies where one remediation action is referable to two or more significant contaminant linkages (i.e. it is a “shared action”). This can occur either where both linkages require the same action (that is, it is a “common action”) or where a particular action is part of the best combined remediation scheme for two or more linkages (that is, it is a “collective action”). This Part provides statutory guidance on the attribution of responsibility for the costs of any shared action between the liability groups for the linkages to which it is referable.

Attributing Responsibility for the Cost of Shared Actions between Liability Groups

7.88 The enforcing authority should attribute responsibility for the costs of any common action among the liability groups for the significant contaminant linkages to which it is referable on the following basis:

(a) If there is a single Class A liability group, then the full cost of carrying out the common action should be attributed to that group, and no cost should be attributed to any Class B liability group).

(b) If there are two or more Class A liability groups, then an equal share of the cost of carrying out the common action should be attributed to each of those groups, and no cost should be attributed to any Class B liability group).

(c) If there is no Class A liability group and there are two or more Class B liability groups, then the enforcing authority should treat those liability groups as if they formed a single liability group, attributing the cost of carrying out the common action to that combined group, and applying the guidance on exclusion and apportionment set out in sub-sections 7(e) and 7(f) above as between all of the members of that combined group.

7.89 The enforcing authority should attribute responsibility for the cost of any collective action among the liability groups for the significant contaminant linkages to which it is referable on the same basis as for the costs of a common action, except that where the costs fall to be divided among several Class A liability groups, instead of being divided equally, they should be attributed on the following basis:

(a) Having estimated the costs of the collective action, the enforcing authority should also estimate the hypothetical cost for each of the liability groups of carrying out the actions which are subsumed by the collective action and which would be necessary if the significant contaminant linkage for which that liability group is responsible were to be addressed separately; these estimates are the "hypothetical estimates" of each of the liability groups.

(b) The enforcing authority should then attribute responsibility for the cost of the collective action between the liability groups in the proportions which the hypothetical estimates of each liability group bear to the aggregate of the hypothetical estimates of all the groups.

Confirming the attribution of responsibility

7.90 If any appropriate person demonstrates, before the service of a remediation notice, to the satisfaction of the enforcing authority that the result of an attribution made on the basis set out in paragraphs 7.88 and 7.89 above would have the effect of the liability group of which they are a member having to bear a liability which is so disproportionate (taking into account the overall relative responsibilities of the persons or groups concerned for the condition of the land) as to make the attribution of responsibility between all the liability groups concerned unjust when considered as a whole, the enforcing authority should reconsider the attribution. In doing so, the enforcing authority should consult the other appropriate persons concerned.

7.91 If the enforcing authority then agrees that the original attribution would be unjust it should adjust the attribution between the liability groups so that it is just and fair in the light of all the circumstances. An adjustment under this paragraph should be necessary only in very exceptional cases.

Orphan Linkages

7.92As explained above (e.g. in paragraphs 7.6 and 7.9), an “orphan linkage” may arise where: (a) the significant contaminant linkage relates solely to the significant pollution of controlled waters (and not to significant harm) and no Class A person can be found; (b) no Class A or Class B persons can be found; or (c) those who would otherwise be liable are exempted by one of the relevant statutory provisions (i.e. sections 78J(3), 78K or 78X(3)).

7.93In any case where only one significant contaminant linkage has been identified, and that is an orphan linkage, the enforcing authority should itself bear the cost of any remediation which is carried out.

7.94In more complicated cases, there may be two or more significant contaminant linkages, of which some are orphan linkages. Where this applies, the enforcing authority will need to consider each remediation action separately.

7.95For any remediation action which is referable to an orphan linkage, and is not referable to any other linkage for which there is a liability group, the enforcing authority should itself bear the cost of carrying out that action.

7.96For any shared action which is referable to an orphan linkage and also to a single significant contaminant linkage for which there is a Class A liability group, the enforcing authority should attribute all of the cost of carrying out that action to that Class A liability group.

7.97For any shared action which is referable to an orphan linkage and also to two or more significant contaminant linkages for which there are Class A liability groups, the enforcing authority should attribute the costs of carrying out that action between those liability groups in the same way as it would do if the orphan linkage did not exist.

7.98For any shared action which is referable to an orphan linkage and also to a significant contaminant linkage for which there is a Class B liability group (and not to any significant contaminant linkage for which there is a Class A liability group) the enforcing authority should adopt the following approach:

(a) where the remediation action is a common action the enforcing authority should attribute all of the cost of carrying out that action to the Class B liability group; and

(b) where the remediation action is a collective action, the enforcing authority should estimate the hypothetical cost of the action which would be needed to remediate separately the effects of the linkage for which that group is liable. The enforcing authority should then attribute the costs of carrying out the collective action between

itself and the Class B liability group so that the expected liability of that group does not exceed that hypothetical cost.

Section 8: The Recovery of the Costs of Remediation

8.1 The statutory guidance in this section is issued under section 78P(2) of the 1990 Act. It provides guidance on the extent to which the enforcing authority should seek to recover the costs of remediation which it has carried out and which it is entitled to recover.

8.2 The main relevant sections of the 1990 Act are:

- Section 78P(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)…."
- Section 78P(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."

8.3 This section also explains when the enforcing authority is prevented from serving a remediation notice under section 78H(5), under which the 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. The relevant sections of the 1990 Act are:

- Section 78H(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 78 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;...."

Section 8(a): Cost Recovery Decisions

8.4 This Section sets out considerations to which the enforcing authority should have regard when making any cost recovery decision. In view of the wide variation in situations which are likely to arise (e.g. due to variations in the history and ownership of land, and liability for its remediation) the guidance in this section sets out principles and approaches, rather than detailed rules. The enforcing authority should have regard to the circumstances of each individual case.

8.5 In making any cost recovery decision, the enforcing authority should have regard to the following general principles:

(a) The authority should 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.

(b) The "polluter pays" principle should be applied with a view that, where possible, the costs of remediating pollution should be borne by the polluter. The authority should therefore consider the degree and nature of responsibility of the relevant appropriate person(s) for the creation, or continued existence, of the circumstances which lead to the land in question being identified as contaminated land.

8.6 In general the enforcing authority should seek to recover all of its reasonable costs. However, the authority should waive or reduce the recovery of costs to the extent that it considers this appropriate and reasonable, either: (i) to avoid any undue hardship which the recovery may cause to the appropriate person; or (ii) to reflect one or more of the specific considerations set out in the statutory guidance in subsections 8(b), 8(c) and 8(d) below. In making such decisions, the authority should bear in mind that recovery is not necessarily an "all or nothing" matter (i.e. where reasonable, appropriate persons can be made to pay part of the authority's costs even if they cannot reasonably be made to pay all of the costs).

8.7 In deciding how much of its costs it should recover, the enforcing authority should consider whether it could recover more of the costs by deferring recovery and securing them by a charge on the land in question under section 78P. Such deferral may lead to payment from the appropriate person either in instalments (see section 78P(12)) or when the land is next sold.

Information for Making Decisions

8.8 In general, the enforcing authority should expect anyone who is seeking a waiver or reduction in the recovery of remediation costs to present any information needed to support such a request.

8.9 In making any cost recovery decision, the enforcing authority should consider any relevant information provided by the appropriate person(s). The authority should also seek to obtain such information as is reasonable, having regard to: (i) accessibility of the information; (ii) the cost, for any of the parties involved, of obtaining the information; and (iii) the likely significance of the information for any decision.

8.10 The enforcing authority should, in all cases, inform the appropriate person of any cost recovery decisions taken, explaining the reasons for those decisions.

Cost Recovery Policies

8.11 The enforcing authority may choose to adopt and make available a policy statement about the general approach it intends to take in making cost recovery decisions.

Section 8(b): Considerations Applying both to Class A & Class B Persons

8.12 Paragraphs 8.13 – 8.22 below set out considerations to which the enforcing authority should have regard when making any cost recovery decisions, irrespective of whether the appropriate person is a Class A person or a Class B person. They apply in addition to the general issue of the "hardship" which the cost recovery may cause to the appropriate person.

Commercial Enterprises

8.13 Subject to the specific circumstances set out below, the enforcing authority should adopt the same 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.

Threat of business closure or insolvency

8.14 In cases where a small or medium-sized enterprise is the appropriate person, or is run by the appropriate person, the enforcing authority should consider: (i) 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 (ii) if so, the cost to the local economy of such a closure.

8.15 Where the cost of that closure to the local economy appears to be greater than the costs of remediation which the enforcing authority would have to bear itself, the authority should consider waiving or reducing its costs recovery to the extent needed to avoid making the enterprise insolvent.

8.16 However, the enforcing authority should not waive or reduce its costs recovery where: (a) it is satisfied 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.

8.17 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 updates of that definition as may happen in future. (Under the 2003 definition this would cover any such enterprise with fewer than 250 employees, and either an annual turnover less than or equal to €50 million, or an annual balance sheet total less than or equal to €43 million).

8.18 Local authorities may wish to take account in cost recovery decisions of any relevant policy on assisting enterprise or promoting economic development. In cases where the Environment Agency is the enforcing authority, it should seek to be consistent with the policy of the local authority in whose area the contaminated land is situated (if such a policy exists). The Agency should consult the local authority and take its views into consideration in making its own cost recovery decisions.

Trusts

8.19 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 should, nevertheless, consider waiving or reducing your 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.

8.20 However, the enforcing authority should not waive or reduce its costs recovery: (a) where it is satisfied 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.

Charities

8.21 Since charities are intended to operate for the benefit of the community, the enforcing authority should consider the extent to which any recovery of costs from a charity would detrimentally impact that charity's activities. Where this is the case, the authority should consider waiving or reducing its costs recovery to the extent needed to avoid such a

Social Housing Landlords

8.22 The enforcing authority should consider waiving or reducing its costs recovery if: (a) 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); (b) its liability relates to land used for social housing; and (c) 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 should be sufficient to avoid any such financial difficulties.

Section 8(c): Specific Considerations Applying to Class A Persons

8.23 This sub-section sets out specific considerations to which the enforcing authority should have regard in cost recovery decisions where the appropriate person is a Class A person.

8.24 In applying the approach in this sub-section, the enforcing authority should consider whether or not the Class A person is likely to have profited financially from the activity which led to the land being determined to be contaminated land (e.g. as might be the case if the contamination resulted from a business activity). If the person did profit, the authority should generally be less willing to waive or reduce costs recovery than if no such profits were made.

Where other potentially appropriate persons have not been found

8.25 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 that person as an appropriate person (as might be the case if a company has been dissolved). In such cases, the enforcing authority should consider waiving or reducing its costs recovery from a Class A person if that person demonstrates that:

(a) 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

(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 the Section 7 of this Guidance; 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 Section 7.

8.26 Where an appropriate person is making a case for the enforcing authority's costs recovery to be waived or reduced by virtue of paragraph 8.25 above, that person should provide evidence to the authority 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 authority should not regard it as sufficient for the appropriate person concerned merely to state that such a person must have existed.

Section 8(d): Specific Considerations Applying to Class B Persons

8.27 This sub-section sets out specific considerations relating to cost recovery decisions where the appropriate person is a Class B person.

Costs in Relation to Land Values

8.28 In some cases, the costs of remediation may exceed the likely value of the land in its current use (as defined in Section 3 of this Guidance) after the required remediation has been carried out. In such cases, the enforcing authority should consider waiving or reducing its costs recovery from a Class B person if that person demonstrates 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.

8.29 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

8.30 In some cases, the Class B person may have been unaware that the land in question may be contaminated land when they acquired it. Alternatively, the person may have taken a risk that the land was not contaminated, or they may have taken some precautions to reduce the risk of acquiring land which is contaminated.

8.31 The enforcing authority should consider reducing its costs recovery where a Class B person who is the owner of the land demonstrates that:

(a) the person 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 contaminants;

(b) when the person acquired the land (or accepted the grant of assignment of the leasehold) they were 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

(c) the authority considers it would be reasonable, taking into account the interests of national and local taxpayers, that the person should not bear the whole cost of remediation.

8.32 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

8.33 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 if the person satisfies the authority that, at the time the person purchased the dwelling, the person did not know, and could not reasonably have been expected to have known, that the land was adversely affected by presence of the contaminant(s) in question. 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 the person's income, capital and outgoings. Where the person has inherited the dwelling or received it as a gift, the authority should consider the situation at the time when the person received the property.

8.34 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 8.33 above should be applied only to the dwelling and its curtilage.